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LAW 503: Employment Law

Instructors: Karen Scott & Kelli Lemon

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# Introduction

## Labour vs. Employment Law

* Labour law deals with "unionized" or "organized" workers in which a union stands between the employee and the employer.
  + Unions negotiate contracts with employers on behalf of a large number of employees.
  + Unions help even out the bargaining power between an employer and their employees; however, unions deprive employees of the ability to negotiate with their employer directly.
    - A unionized employee cannot bargain directly with or sue their employer—they must do so through their union.
    - Therefore, if a client tries to retain you with respect to an employment matter, the first question should be whether they are part of a union.
* Employment law governs the relationship between employers and employees where there is not a collective agreement.
  + In employment law matters, there is typically a power imbalance between employers and employees; for this reason, statutes have been enacted to level the playing field a bit.
  + Since employment contracts are mostly unwritten, many of the terms of employment relationships are implied by the common law or legislation.
    - Negotiating lengthy agreements covering every aspect of the employment relationship would likely not be worth the transactional costs involved.
    - This allows the terms of employment to change a bit over time, but it can lead to uncertainty.

## Employee vs. Contractor

* Since employment law deals with the rights and obligations of employers and employees, there are legal consequences to how a worker is classified.
  + Everyone who works is a "worker," but not every worker is an "employee."

### Pros and Cons of an Employment Relationship

* There are pros and cons to classifying a worker as a contractor instead of an employee.
  + Pros for the worker:
    - Contractors can deduct eligible expenses against their income on their tax return.
    - Contractors do not have CPP, EI, and income tax deductions taken straight from their paycheque.
    - Contractors enjoy more flexibility than employees.
    - Contractors have the opportunity to profit from their activities.
  + Cons for the worker:
    - Contractors are not given *Employment Standards Code* protections.
    - Contractors do not have any job security.
    - Contractors have to bear losses directly if their business is not profitable.
    - Contractors have to supply their own tools and equipment.
    - Contractors get no employee benefits.
    - A contractor is liable if contractual obligations are not fulfilled.
  + Pros for the employer:
    - Employers do not have to make CPP, EI, and tax deductions.
    - Employers do not have to supply the worker with tools and equipment.
    - Employers may not be liable if the contractors obligations are not fulfilled.
  + Cons for the worker:
    - Employers have less control over the worker and how they do their job.
    - Employers do not get the dedication and loyalty of the worker.

### Tests for an Employment Relationship

* Several tests have been developed to help differentiate between an employee and an independent contractor:
  + Control test (*Hôpital Notre-Dame de l’Espérance*)
    - Holds that the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work.
      * May be less relevant where we are dealing with highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.
    - Relevant to the employer's degree of control is the ability of the worker to subcontract and the employer's power to discipline the employee.
  + Enterprise test
    - Holds that an employer controls the activities of an employee, is in a position to reduce the risk of loss by an employee, and benefits from the activities of the employee.
  + "Organization test" or "integration test" (*Stevenson Jordan and Harrison Ltd v Macdonald*)
    - Holds that the work of an employee is an integral part of the business, whereas a contractor's work, although done for the business, is not integrated into it but is only accessory to it.
    - Emphasizes the importance of looking at whose business is being benefitted by their work.
    - However, this is often of limited help, as the work of a contractor can very easily be integral to the proper functioning of a business.

#### *Weber v Coco Homes Inc*, 2013 ABQB 180

Facts:

* In 2004, Weber began providing services to Coco Homes Ltd ("Coco"), assisting with the sale of residential properties. She was expected to be in one of Coco's show homes during set hours, providing information about the lots, keeping the show home tidy, and filling out sales contracts for buyers. She had control over how to act during show room hours, but Coco monitored Weber's performance, including through weekly meetings and a shopper survey. Weber received commissions from the sale of these homes and remitted taxes to the government herself. Coco provided Weber with an office in the show home, promotional materials, and office supplies, but Weber hired her own assistant. Coco also provided training to Weber on topics pertinent to Coco's business. While she worked in Coco's show home, she also did work as a real estate agent separately. Thus, she would give Coco's customers her contact information when the opportunity presented itself, allowing her to make some extra money. Weber had to get Coco's approval to be away from the show home for extended periods. She did not receive Coco incentives or benefits like stock options, an expense account, group benefits, etc.
* In 2008, Weber was terminated without notice and without cause. Weber claimed that she was owed severance, submitting that she was an employee, or alternatively a dependent contractor, of Coco.

Issues and holding:

1. Is Weber an employee or a contractor? **Contractor**
2. If she's a contractor, was she a dependent contractor or an independent contractor? **Dependent**
3. Is Ms. Weber entitled to severance? **YES**

Analysis:

* There is no one conclusive test for determining whether a person is an employee or an independent contractor, though some relevant factors include (*Sagaz Industries*):
  1. The level of control the employer has over the worker's activities.
  2. Whether the worker provides his or her own equipment.
  3. Whether the worker hires his or her own helpers.
  4. The degree of financial risk taken by the worker.
  5. The degree of responsibility for investment and management held by the worker.
  6. The worker's opportunity for profit in the performance of his or her tasks.
  + These factors constitute a non-exhaustive list. The relative weight of each will depend on the particular facts and circumstances of the case (*Sagaz Industries*).
* A dependent contractor falls into an intermediate category between an employee and an independent contractor.
  + Typically, they are in a long-standing relationship with the other contracting party, often with a degree of exclusivity in the contract.
  + *Belton v Liberty Insurance Co of Canada* identified five factors relevant to determining whether a contractor is a dependent contractor:
    1. Whether or not the agent was limited exclusively to the service of the principal.
    2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where, and how it is sold.
    3. Whether or not the agent has an investment or interest in the "tools" relating to his service.
    4. Whether or not the agent has undertaken any risk or has any expectation of profit associated with the delivery of his service as distinct from a fixed commission.
    5. Whether or not the activity of the agent is part of the business organization of the principal for which he works (i.e., whose business it is).
  1. *Drew Oliphant Professional Corp v Harrison* laid out three factors to consider in determine whether a contractor is independent or dependent:
     1. Duration/permanency of the Relationship
     2. Degree of Reliance/closeness of the Relationship
     3. Degree of exclusivity
* The court may also imply a term requiring reasonable notice to terminate a relationship with a dependent contractor in situations where the governing agreement does not contain express terms governing the required length of notice to terminate such agreement.
  1. The reasonableness of the notice is a question of fact that must be decided with reference to each particular case, having regard to the character of the employment, the length of service, the age of the employee, and the availability of similar employment, and having regard to the experience, training and qualifications of the employee.

Rationale:

* Taking into account all the relevant factors, it appears that Weber was a dependent contractor for Coco.
  + Weber did need permission to be away from the show home for extended periods.
  + Weber had a partially exclusive relationship with Coco, given that she was a real estate agent as well.
  + Weber was subject to Coco's control, as Coco provided the product and the prices to sell it at and made efforts to monitor her performance in the show home. However, Weber did have some independence, as she could choose how to act during show room hours and hired her own assistant.
  + Regarding tools, Coco provided the show home and gave Weber an office, promotional materials, and office supplies.
  + While Weber was paid commission (i.e., she did not have much ability to profit), she had additional opportunities to supplement her income by meeting with Coco's customers who might need a real estate agent.
  + Selling homes, which is what Weber was engaged in, is an integral part of Coco's business.
  + The parties' relationship was not long—4 years.
  + While Weber did earn a substantial proportion of her money with Coco, she was not completely dependent on them, as she was also successful as a realtor.
* She is entitled to severance in the amount of $21,250.
  + She was entitled to two months' notice, and since she made $12,184 per month, damages are awarded in the amount of $25,000 plus GST minus $5000 to account for a failure to mitigate.

## Who is the Employer?

* While it may be clear who your direct boss is or what the name of your company is, in our modern corporate structure, there are often multiple subsidiaries, numbered companies, affiliates, etc. which can make it hard to identify precisely who someone's employer is.

#### *Bagby v Gustavson International Drilling Co Ltd*, [1980] 24 AR 181 (ABCA)

Facts:

* Bagby was employed by a predecessor company of Gustavson International Drilling Co Ltd (GIDC) in 1953. In 1971, Raymond International Inc, through a wholly owned subsidiary, joined Global Marine Exploration Company in purchasing the predecessor of GIDC and operating it as a joint venture. Subsequently, Raymond bought all the shares of Global and continued to operate the business. Raymond and GIDC signed a letter dated March 11, 1975 reflecting Bagby's terms of employment. In June 1977, Raymond entered an agreement with Thompson Industries Ltd for the sale to the latter of all of the assets of GIDC. Thompson Industries offered employment to all employees of GIDC, excepting only Bagby (because of his age). In July 1977, Bagby received notice of termination from Raymond. Raymond refused to give Bagby payment in lieu of notice.

Procedural history:

* The trial judge awarded Bagby judgment against all defendants named in the statement of claim: GIDC, the nominal employer, Raymond, the controlling Company, and Raymond's two wholly owned subsidiaries, Raymond Concrete Pile Company of the Americas and Global Marine Exploration Company, which actually owned the GIDC shares. It was urged that only GIDC had any contractual liability to Bagby, and that the judgment against the other defendants is in error.

Issues and holding:

* What, if any, is Bagby entitled to in terms of damages? **$23,588.12** (*reasons omitted*)
* Against which defendant is the respondent entitled to judgment? **Raymond**

Analysis:

* Determining who a worker might sue for failure to pay in lieu of notice requires us to ask: Who, in substance, is the employer?
  + It would be unfair to allow a holding company to employ a bunch of staff and let other corporate entities profit of them without taking on responsibility for them.
  + A true employer may be the shareholder of the nominal employer or some other entity or person in control of both the nominal employer and its shareholder.

Rationale: (Laycraft JA)

* The evidence suggests that Raymond International was the real employer, through its intermediary GIDC; Raymond was in complete control of GIDC and governed every aspect of Bagby's employment.
  + His salary and bonus was fixed after reference to the executive vice-president of Raymond.
  + Changes to the pension plan were instituted only after Raymond approved.
  + When Mr. Bagby presented the agreement of March 11, 1975, which governed his employment, the document was signed "Gustavson Arctic Drilling Co" and "Raymond International Inc".

Notes:

* The list of factors that we use for determining if someone is an employee can be applied to determine who their employer is.
  + We can look at who controls the employee's work, who stands to profit from the employees activities, who can discipline the employee, who pays for the employee's tools, etc. to determine who, in substance, is the employer, among all the corporate entities involved.
  + It may even be determined that someone has two employers.
* In employment law practice, to try to recover from an employer, do a corporation search, sue all the related entities, and then sort out who is responsible for paying the judgment later.

# When Do Terms Take Effect?

* An employment contract is a contract like any other, and thus requires certainty of terms.
  + However, the vast majority of employment contracts are mostly unwritten.
* Terms are incorporated into employment contracts by:
  1. The intention of the parties, or
     + The intention of the parties may be made apparent by the express terms of the contract.
     + The intention of the parties may be implied on the basis of the presumed intentions of the parties:
       1. Where necessary to give business efficacy to the contract (which is what the parties are presumed to have intended).
       2. Where it meets the officious bystander test as a term that is so obvious that the parties would have agreed to it had it been raised to their attention.
     + The intention of the parties may also be determined with reference to common law principles.
       - e.g., employment is indefinite, and it may be terminated either "for cause" or "on notice."
       - Express terms override implied intentions, but you *cannot* opt out of minimum standards established by legislation.
         * If a contractual term tries to opt out of legislation, the court will ignore it.
  2. Statutes
     + Statutes are used to fill in gaps that tend to exist in employment contracts by setting certain minimum standards (e.g., *Employment Standards Code*, *Canada Labour Code, Occupational Health and Safety Act*, *Alberta Human Rights Act*, *Canadian Human Rights Act*, provincial/federal privacy legislation, etc.).
* When the terms of an employment contract take effect depend on whether the parties have expressly dealt with it in the employment contract.
  + If the parties have signed a contract, but have not specified when it takes effect, the terms crystallize upon signing, at which point the parties cannot alter the employment contract unilaterally.
    - However, the parties may also specify in the contract when the terms take effect.
  + If the parties have not entered into a contract, the terms of employment crystallize *when the employee starts working*.
* After an employment contract takes effect, changing it requires fresh consideration.

#### *Hobbs v TDI Canada Ltd* (2004), 246 DLR (4th) 43 (ONCA)

Facts:

* Hobbs was a salesperson that sold billboard and transit advertising. On December 16, 1999, TDI Canada Ltd made Hobbs an oral offer of employment promising to pay him 6% commission for new business, 5% for renewals, and 2% for sales into the US. Hobbs insisted on having the agreement put into writing. On December 22, TDI gave Hobbs an offer letter, which stated that information about commissions were to be provided to Hobbs in a *separate* document. After Thomas Cummings at TDI ensured Hobbs that they were a trustworthy company, Hobbs signed the offer. Hobbs assumed that the separate document would simply confirm the commission rates he and Cummings agreed to on December 16. Hobbs started working for TDI on January 4, 2000. On January 10, 2000, Cummings gave Hobbs a "Solicitor's Agreement" and said that he had to sign it if he wanted to get paid. He signed the agreement on January 12. The agreement had very onerous terms concerning the payment of commissions, indicating that TDI could change commission rates *unilaterally at any time*. After not receiving commissions for a few months, Hobbs began to fear that he would not be paid them at all. He gave notice to TDI on May 12, 2000 that he would resign at the end of the month.

Issues and holding:

1. Did the Solicitor's Agreement form part of the original contract of employment? **NO**
2. Was consideration given for Hobbs signing the Solicitor's Agreement? **NO**
3. Was the Solicitor's Agreement enforceable on the grounds that TDI relied on it? **NO**

Rationale: (Juriansz JA)

1. The Solicitor's Agreement did not form part of the original contract of employment.
   * TDI did not present its December 16 letter to Hobbs as the introductory part of a more extensive contract of employment that was to follow at a later date.
     + The letter opened: "We are pleased to confirm our offer of employment and your acceptance on the following terms."
     + Nothing in the letter suggested that Hobbs would be required to sign any other document relating to commissions or that such a document would form part of his employment contract with TDI.
   * The Solicitor's Agreement was inconsistent with the commission arrangement that Hobbs and Cummings had already agreed upon.
   * The Solicitor's Agreement was presented to Hobbs after he had already been hired and after he had started working.
     + The prior agreements contained all of the essential terms of the employment contract between TDI and Hobbs. The Solicitor's Agreement was not necessary to complete an already valid contract.
2. No new consideration was given for Hobbs signing the Solicitor's Agreement.
   * An employer cannot just present an employee with an amendment to the employment contract, say "sign or you'll be fired," and expect a binding contractual amendment without at least an implicit promise of reasonable forbearance for some period of time thereafter.
     + However, the trial judge made no finding that TDI, either explicitly or tacitly, promised to forbear from terminating Hobbs if he signed the Solicitor's Agreement.
   * In return for the new promise received by the employer, something must pass to the employee, beyond that to which the employee is entitled under the original contract.
     + Continued employment represents nothing more of value flowing to the employee than under the original contract.
     + The requirement of fresh consideration is especially important in the employment context, where there is generally inequality of bargaining power between employees and employers.
   * If TDI had a prior intention to terminate Hobbs, and it promised to forbear from exercising its right to do so, then there would be good consideration for Hobbs signing the Solicitor's Agreement.
     + e.g., in *Techform Products Ltd*, the employer asked the employee to sign an agreement providing that the employee's inventions were the employer's property. Since the employer intended to fire the employee if he did not sign the agreement (as it was displeased with his performance), the employer's forbearance to dismiss the employer was good consideration for the employee signing the agreement.
   * If TDI had the right to terminate Hobbs on short notice, and it promised to forbear from doing so for a reasonable period, then there would be good consideration for Hobbs signing the Solicitor's Agreement (such forbearance would offer Hobbs greater job security).
     + e.g., in *Maguire*, the employer was entitled to fire its employee on one month's notice. The employer's tacit promise not to immediately terminate the employee constituted good consideration for the employee signing a non-competition bond.
3. TDI argued that it had relied on the Solicitor's Agreement by allowing Hobbs' probationary period to elapse, thereby losing the opportunity to terminate him without notice had he refused to sign the agreement. However, the evidence was that TDI had no desire or intention of dismissing Hobbs. He was its top biller.

Notes:

* If an employee is performing poorly, an employer's forbearance from firing them would be good consideration for an alteration to the employee's employment contract to demote them.
* According to *Smith v Vauxhall*, fresh consideration is *not* required for workplace policies (distinguished from fundamental terms) to bind an employee.
  + Employers must be able to properly manage their workplace through employee conduct policies, and requiring fresh consideration every time a workplace policy is introduced or modified would make employee management unworkable.
  + Fresh consideration is only required when workplace policies purport to change a *fundamental aspect* of the employment terms or relationship (e.g., changes to compensation structure, the imposition of non-compete and non-solicitation covenants).
  + To enforce workplace policies without fresh consideration, the policies must be reasonable, unambiguous, well published, consistently enforced, and the employee must know or ought to have known of the policies contents, including the consequences of breach.

# Termination of the Employment Contract

* + Employment contracts are for an indefinite term, but they can be terminated in six ways:
    1. Termination upon working notice
    2. Termination for just cause
    3. Constructive dismissal
    4. Expiry of a fixed term
    5. Quitting
    6. Frustration

## Termination Upon Working Notice

* Employment is presumed to be for an indefinite term. It is implied that an employer will not terminate the contract unless it has cause to do so or unless it has given the employee "reasonable notice."
  + The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment.
  + So long as reasonable working notice is given, and the dismissal is not discriminatory, an employer can terminate employment for any reason.
  + Parties to an employment contract can agree on what constitutes a reasonable notice period, but they *cannot* go below the statutory minimum.
  + The employer only has to give the larger of the common law notice requirement and the statutory minimum. They do not have to add these requirements together.
  + During the notice period, the employer is obligated to continue to provide the employee with work.
    - If an employer does not want to give the employee working notice of termination, they must pay them in lieu of notice (since the employee is entitled to be put in the position they would have been in had the contract been properly performed).
      * When employers give their employees severance packages, that package represents liquidated damages (i.e., a genuine pre-estimate of the damages that an employee would be entitled to).

#### *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 (Ont HC)

Facts:

* The plaintiff worked in the advertising department of the Winnipeg Tribune. In 1942, he took a job with the Globe Printing Co as an advertising manager. The plaintiff had made it clear to Globe Printing that, at his age, permanency in employment was important In 1955, the Globe Printing was sold to the Globe & Mail Ltd, to which the plaintiff's employment was transferred. That same year, the plaintiff was appointed director of advertising and a member of the Board of Directors of the defendant. In 1959, the plaintiff was called to the office of the president of the defendant. The president asked for his resignation out of a desire to get an advertising manager who could increase revenues. No improper conduct on the part of the plaintiff was suggested. After the plaintiff refused to resign, the defendant terminated his employment without notice. The plaintiff was given a cheque for the balance of his salary owing to the date of dismissal. The plaintiff brought an action for damages for wrongful dismissal.

Issues and holding:

1. Was the plaintiff entitled to reasonable notice of termination? **YES**
2. What should be implied as reasonable notice in the circumstances of the plaintiff's employment? **1 year**

Analysis:

* There is no catalogue as to what is reasonable notice in particular classes of cases; the reasonableness of notice must be determined by reference to the facts of each particular case.
* To determine the period of reasonable notice, the court examines the characteristics of the particular employment relationship relevant to the employee’s prospects of finding a similar position including:
  1. The nature of the employment
     + *Note*: Tends to justify a longer notice period for senior management employees or highly skilled and specialized employees, as there are fewer replacements for these positions. Conversely, a shorter notice period will generally be justified for lower rank or unspecialized employees.
  2. The length of service of the employee
     + *Note*: generally, the longer the duration of employment, the longer the reasonable notice period. The longer an employee has worked for one employer, the more difficult it may be to find an alternate job, either because the employee has narrowed his or her skills by working for one employer or because the employee has been paid more than the job is worth due to long service.
     + *Note*: where an employer is acquired by another business, there is an implied term in the new employment contract that employees will be given credit for years of past service for the purposes of reasonable notice (*Hansen*).
  3. The age of the employee
     + *Note*: generally, a longer notice period will be justified for older long-term employees (45+ years old), who may be at a competitive disadvantage in securing new employment because of their age (*Radwan*).
  4. The availability of similar employment, having regard to the experience, training, and qualifications of the employee.
     + *Note*: a downturn in the economy or in a particular sector may indicate that an employee may have difficulty finding another position and may justify a longer notice period.
  5. Anything else that might impact employee's ability to get a new similar job.

Rationale: (McRuer CJ)

1. In every employment contract, there is implied obligation to give reasonable notice of an intention to terminate the arrangement.
   * An employee who is dismissed without reasonable advance notice of termination is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of the loss.
2. Having regard to the circumstances, one year's notice would have been reasonable.
   * The plaintiff was qualified to manage the advertising department of a large metropolitan newspaper, a position that is not very common.

Notes:

* Some other factors relevant in determining whether a notice period is "reasonable" include:
  + Recruitment from stable prior employment
    - If someone is recruited from stable prior employment and let go shortly thereafter, a longer notice period will generally be given.
  + Guarantees of job security
    - If an employee receives guarantees of job security at the start of employment, and is let go shortly thereafter, more notice will generally be given because the employee may not have taken the job without those erroneous guarantees.
  + Need to relocate
  + Short term employees
    - Shorter term employees tend to more notice per year served because all dismissed employees have to go through the same job hunt.
  + Prior service with the employer
    - If an employee serves with an employer, leaves, and comes back later, and the parties treat these two hires as one period of employment, then the prior service will be considered in calculating the reasonable notice period for termination of the current service.
* Things that are not relevant to the calculation of notice periods include:
  + Economic downturn
    - While economic downturns will affect an employee's ability to get a new job, courts have recognized that longer notice periods should not be required in periods of economic downturn because it would harm businesses and contribute to further unemployment.
  + Employer's financial situation
    - The purpose of notice is to allow the employee to find a new job, and the employer's financial situation is not relevant to the employee's ability to find a new job.
  + "Near cause"
    - If an employer does not have just cause, the existence of "near cause" (e.g., moderately poor behaviour in the workplace) does not provide grounds for reducing the notice period.
* There is no rule of thumb used to calculate notice periods. Every case must be decided on its own facts, and determining notice periods is more of an art than a science.
  + That said, the SCC has said that there is a notional cap of 24 months of notice. It should not take an employer more than 24 months to move on from termination.
* If the employer acts in bad faith in dismissing an employee, the SCC has held that the employee is not entitled to any "bump" in the notice period.
  + Such a bump did exist in the 1990s, but the SCC eliminated it in the early 2000s.

#### *Dowling v Halifax (City)*, [1998] 1 SCR 22

Facts:

* The City dismissed Dowling, an employee of 25 years, alleging he was guilty of dishonesty and corruption.

Procedural history:

* The trial judge found that Dowling’s conduct provided the City with grounds for discipline, but not discharge, as the case for corrupt conduct on his part was not proven. Invoking the principle of "moderated damages," he awarded Dowling six months’ notice. The Court of Appeal held that moderated damages and near cause were good law in Nova Scotia.

Issue and holding:

* Should the lower courts have accepted the principle of "near cause" for dismissal? **NO**

#### Managing Risks

* Strategies to minimize risks to employers include:
  + Negotiating a fixed term contract in which the employee is not entitled to reasonable notice.
  + Including in the employment agreement an express provision indicating how much notice the employee will be entitled to.
  + Taking steps to mitigate the employee's damages to reduce liability (e.g., giving former employees job references, job search assistance, etc.).
  + Craft a severance package providing for salary continuation as opposed to a lump sum payment.
    - In this case, if the employee gets hired at another job, then the former employer can stop paying them.
  + When negotiating a settlement agreement, get the employee to sign a release.

## Termination for Just Cause

* + There are two categories of employee misconduct:
    1. Culpable misconduct (intentional, morally blameworthy)
    2. Non-culpable misconduct (incompetence)

### Culpable Misconduct

* Not all misconduct is "just cause" for termination.
* There are no "employment offences" that will automatically result in termination.
  + While this was not always the case, the analysis today is always *contextual*.
* The onus is always on the employer to prove on a balance of probabilities that the employee engaged in some form of misconduct that was inconsistent with the continued existence of the employment relationship.
* An individual's conduct *outside of working hours* will generally not justify dismissal without notice unless that conduct prejudices the employer's business interests or damages the employer's reputation.
  + An employee's poor off duty conduct may also provide a basis for termination for cause if it renders an employee unable to discharge their employment obligations properly, or if it is sufficiently related to their employment.

#### *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004), 246 DLR (4th) 65 (ONCA)

Facts:

* Dowling was a manager at the Workplace Safety and Insurance Board for about 25 years. Dowling was authorized to make adjustments to employer's accounts and give them refunds. He was governed by the Board's Code of Conduct, which precluded the acceptance of gifts from employers registered with the Board and demanded integrity and trustworthiness. Dowling supervised the accounts of MicroAge and Telephone Booth, who were clients of employer representative Frances Lazar. Lazar and Dowling became good friends. In 1998, Lazar arranged for Dowling to get an employee discount on computers supplied by MicroAge. Later, Dowling approved a refund to MicroAge for over $16,000. In January 1999, Lazar wrote to Dowling to request a rate reclassification for Telephone Booth. Weeks later, he approved the reclassification. In May 1999, Dowling cashed a cheque for $1000 from Lazar with the memo line "Telephone Booth Savings Partial Cheque." When the Board heard allegations against Dowling and investigated, they asked him if he received $100 from Lazar, which he denied. Later, when the Board presented Dowling with the $1000 cheque from Lazar, he maintained that it was for a loan repayment, and presented false supporting documents to that effect that he created with Lazar. He later claimed that the cheque was instead payment for providing emotional support to Lazar and helping her understand Board policies and practices. In November 2000, the Board dismissed Dowling without notice, saying that he used his position to obtain a direct monetary benefit. It was never disputed that the benefits provided to Lazar's clients were justified under the Board's policies.

Procedural history:

* The trial judge held that Dowling was wrongfully dismissed. They were not satisfied that proof had been made out sufficient to establish that Dowling used his position to obtain a direct monetary benefit.

Issue and holding:

* Did the trial judge err in the test applied to determine if dishonesty warrants dismissal? **YES**
* Did Dowling's dishonesty warrant his dismissal? **YES**

Analysis:

* Misconduct may or may not be grounds for dismissal; from *McKinley v BC Tel*, the test for wrongful dismissal where misconduct is alleged is:
  1. Has the whether the employee's misconduct been established on a balance of probabilities?
  2. If yes, does the misconduct involved warrant dismissal? (question of fact)
     1. What is the nature and extent of the misconduct?
        + i.e., Was it deliberate, repeated, and part of a pattern of misconduct? How severe was the real or potential adverse effect of the misconduct?
        + Summary dismissal can be justified after the fact, so long as there was just cause *at the time* of dismissal.
          - e.g., swearing at your boss post-dismissal cannot be used to justify that dismissal.
     2. What are the surrounding circumstances?
        + With respect to the employee, this would include factors such as age, employment (including disciplinary) history, seniority, role, and responsibilities.
          - Misconduct will be treated more seriously when the employee is older and should have known better.
          - Misconduct will be more serious when the employee has a lengthy disciplinary history.
          - The longer the employee is with the employer, the more grace they get.
          - The seriousness of misconduct is positively related to the degree of responsibility attached to the employee's position.

The actions of more senior managers tend to set the tone for the organization.

* + - * + Where an employee lacks supervision, they have a responsibility to provide more faithful service because their mishaps cannot be so easily corrected.
      * In relation to the employer, this would include factors like the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organisation, and the degree of trust reposed in the employee.
        + Misconduct will be more serious where it harms the most valuable aspects of the employer's reputation.

e.g., a financial advisor's misconduct will be more serious if it harms the reputation of their employer for honesty and integrity.

e.g., the misconduct of an employee of a zipline operator will be more serious where is harms the employer's reputation for safety.

e.g., the misconduct of a health care aide in senior's home will be more serious if it takes advantage of the vulnerable residents.

* + - * + If an employee violates rules that have been expressly spelled out in a code of conduct or conveyed to the employee through training, such misconduct will be more serious.
    1. Does the nature and extent of the misconduct warrant dismissal in the circumstances? (i.e., is dismissal a proportionate response?)
       - An employer is justified in dismissing their employee if the misconduct:
         1. Violated an essential condition of the employment contract,
         2. Breached the faith inherent in the work relationship, or
         3. Was fundamentally inconsistent with the employee's obligations to the employer.
    2. This test is highly fact-specific; there is no bright-line rule as to what types of misconduct justify dismissal given that all forms of misconduct fall on a wide spectrum of severity.

Rationale: (Gillese JA)

1. The trial judge erred in the standard applied at trial and in his assessment of Dowling's misconduct.
   * The trial judge addressed the question of whether Dowling used his position to obtain a direct monetary benefit, whereas what he should've been asking was whether Dowling's misconduct was sufficiently serious that it gave rise to a breakdown in the employment relationship.
   * The trial judge did not fully consider the nature and extent of the misconduct.
     + He limited his examination to Dowling's acceptance of $1000 from Lazar. He did not consider his purchase of discounted computers, his lie to his employer about the reason for the $1000 cheque, the preparation of a false document, etc.
   * The trial judge failed to consider the surrounding circumstances, such as the nature and function of the Board.
2. The Board was justified in dismissing Dowling.
   * Regarding the nature and extent of Dowling's misconduct…
     + Without disclosure, Dowling accepted discounted computers from Lazar contrary to the Board's policy of not accepting benefits from Board clients.
     + Even if Dowling did not accept $1000 from Lazar as part of a "secret commission" arrangement and it was, in fact, a gift, it still amounts to misconduct.
       - While he claimed that the money was partly for explaining Board policies and practices to Lazar, but these were his employment responsibilities.
     + Dowling lied about having not received $100 from Lazar, when he really received that and more.
     + Dowling prepared a false and misleading story for the Board, supplemented by false documents, designed to mislead the board.
   * Regarding the surrounding circumstances…
     + Dowling was a manager with power and authority who administered substantial amounts of public funds, and who had an obligation to abide by the Board's Code of Conduct.
     + The Board is a statutory body that reposed trust in Dowling and expected (as the public does) that its employees act with integrity and impartiality, as is evidenced by the Code of Conduct. These expectations were heightened in respect of Dowling, a manager who had significant discretionary power over substantial sums of money.
   * Considering Dowling's misconduct in the surrounding circumstances, it is clear that the misconduct cannot be reconciled with Dowling's employment obligations.
     + The Board could no longer repose trust in Dowling, and the Board's trust is essential to the effective performance of his functions.
       - Dowling's actions were not mere errors in judgment; they were intentional, numerous, dishonest acts committed over a period of time in the face of Dowling's obligations to act with integrity and impartiality.

#### *Poliquin v Devon Canada Corp*, 2009 ABCA 216

Facts:

* Poliquin had supervisory responsibilities at Devon. His duties included issuing contracts for Devon and signing invoices from suppliers. He was dismissed without notice for two reasons. First, he solicited landscaping services from two of Devon's suppliers for which he was not billed, contrary to Devon's Conflicts of Interest Policy. Second, he used Devon's computers to view and transmit pornographic and racist content in violation of Devon's Information Systems Usage Policy and its Harassment and Violence Prevention Policy. There were not any significant disputes with respect to these facts. Poliquin brought an action for damages for wrongful dismissal, and Devon sought to have this action summarily dismissed.

Issue and holding:

* Should Poliquin's wrongful dismissal action have been summarily dismissed? **YES**

Rationale: (Fraser CJA)

* On the uncontroverted evidence, Poliquin's misconduct violated an essential provision of his employment contract and was fundamentally inconsistent with his obligations to Devon, as it demonstrated that Poliquin had exceptionally bad judgment and was unwilling to obey and enforce Devon's Code of Conduct.
  + Devon's Code of Conduct makes it clear that employees are required to avoid behaviour that has the potential to create a conflict between their obligations to Devon and their personal interests.
    - Yet he, as a senior supervisor who issued contracts and signed invoices from suppliers, explicitly solicited landscaping services from Devon suppliers, which were more than nominal in value and which Poliquin knew he did not pay for.
  + Devon's Code of Conduct expressly prohibits employees from using Devon's computer equipment and Internet access to send pornographic, obscene or inappropriate messages or attachments via email to anyone.
    - Yet Poliquin, who had a responsibility as a senior supervisor to ensure a safe, productive, workplace, received and forwarded pornographic and racist communications (even though he had been warned about viewing pornography in the office before!).
      * While Poliquin stated that such conduct was the norm in the oil industry, this does not constrain an employer's rights to set standards for its operations.
      * The fact that no one complained was not determinative, especially since Poliquin was a supervisor who other employees might not want to make complaints about.
    - Devon was entitled to a supervisor who would do his best to ensure a non-sexist and non-racist workplace, as access to pornographic and racist content can poison the work environment, deny equal opportunities to others, damage the company's reputation, and even pose a risk of contracting viruses on company computers.

#### *Whitehouse v RBC Dominion Securities Inc*, 2006 ABQB 372

Facts:

* The plaintiff was a VP and investment advisor with the defendant. On the night of January 20, 2004, the plaintiff (who had been drinking heavily), brought a prostitute into the business premises of the defendant. This was not the first time he did his. The plaintiff paid her $60, while the agreed fee was $200. An argument developed over the payment of the balance, and the services contracted were not performed. The result was that the plaintiff left to go get security, leaving the prostitute behind. She used a telephone in the lobby area to leave a message on another phone in the office, telling it that she was a prostitute that the plaintiff brought into their office. She then left. The next day, she returned to the offices of the defendant, told a receptionist about the situation, and said she was there to collect $1000. When confronted by his superiors, the plaintiff twice denied bringing in a prostitute. Only when his superiors said they had a videotape of their entry to the office did he admit it. The plaintiff was terminated for cause on two grounds: (1) he brought a prostitute into the office and (2) he left her alone in the lobby area and privy to client and corporate documents.

Issues and holding:

* Did the defendant have cause to terminate the plaintiff's employment without notice? **YES**

Analysis:

* The principle of proportionality holds that an effective balance must be struck between the severity of the employee's misconduct and the sanction imposed.
  + Failure to impose a proportional sanction could foster results that are both unreasonable and unjust, especially given that one's employment is fundamental to their identity (*McKinley*).

Rationale: (McMahon J)

* The nature of an investment advisor's duties and the employer's expectations show the high importance of honesty and integrity in the defendant's business.
  + As an investment advisor, the plaintiff's function was to advise clients and manage their money responsibly and profitably. To maintain existing clients and attract new business, the reputations of the plaintiff and the defendant for honesty, integrity, and confidentiality were therefore essential.
  + RBC's Code of Conduct made it clear that employees were to abide by the law, protect clients' information, maintain confidentiality, not mislead, and avoid all actions inside or outside of work that would call their integrity into question.
* The nature and seriousness of the plaintiff's conduct displayed a contempt for his employer's reputation in the business community, a serious lack of judgment, and a disregard for his clients' interests.
  + He had done this sort of thing before with other prostitutes. This was a pattern of misconduct, not an isolated event.
  + He abandoned the prostitute on the premises, thereby giving her access to whatever client or corporate information that was at the reception desk or in the file cabinet behind it.
  + He lied to his employer the following day, and only told the truth when confronted with proof of what actually happened. This misconduct was committed when he was *sober*.
  + His misconduct was compounded by the fact that he was a VP, as the conduct of senior employees can become the acceptable norm for all employees.
  + While the plaintiff claims that he needed help to combat his alcoholism and high risk lifestyle, he never sought help from or through his employer. His answer now that his employer ought to have tolerated his actions and offer assistance fails to place responsibility where it ought to be.
* While there is no evidence of specific damage to the defendant's business or reputation, it can at least be said that perceived tolerance of this kind of conduct would impact the employer's relationship with other employees and could seriously infect the working relationship in the office.

#### *Hodgins v St John Council for Alberta*, 2007 ABQB 275

Facts:

* In 2002, the plaintiff became Director of Operations and Business Development for the defendant. He was an important asset to the organization. In 2003, at a company Christmas party, four complaints of sexual harassment arose, all from the same complainant. First, the complainant heard him say that his chauffeur to the party was the youngest person to have gotten his clothes off in a long time. He later explained that, before going to the party, he had to rush to show before connecting with his ride, and that he was thus explaining why his hair was still wet. Second, the plaintiff remarked several times about how nice a complainant's hair looked, touching it on one occasion. He said he was going around to put everyone at ease and make sure they had a good evening. Third, the plaintiff came up behind the complainant and her husband, put his arms around them, and said to the complainant that she should ditch her husband and take him home. He claimed he said this because he thought he would need a ride home at the end of the party. Fourth, when the complainant was bowling, and her husband said "with an ass like that you can do anything," the plaintiff stood up and repeated it with his hands up. The written complaints were made on January 14, 2004. Accordingly, the plaintiff was dismissed on January 16, 2004.

Issues and holding:

* Did all or any of the comments made by the plaintiff constitute sexual harassment of the complainant? **YES**
* If all or any of the comments made by the plaintiff did constitute sexual harassment, was that harassment serious enough to justify the plaintiff's dismissal without notice? **NO**

Analysis:

* The employer who relies upon sexual harassment as justification for discipline must establish, on a balance of probabilities, that the words or conduct underlying the allegation were spoken or occurred and that it was reasonable to conclude that the complainant was offended by the words or conduct and the words or conduct could reasonably detrimentally affect the work environment of the complaint or would reasonably lead to adverse job related consequences for the victim.
* While sexual harassment is a serious employment offence, it does not necessarily lead to summary dismissal.
  + Whether dismissal for sexual harassment is justified depends upon the defendant establishing, on a balance of probabilities, that the sexual harassment was so serious that it violated or undermined the obligations and faith inherent in the employment relationship (i.e., that the nature and seriousness of the harassment is not reconcilable with continuing the employment relationship).
  + Where the impugned act falls on the spectrum of sexual harassment depends on:
    - The circumstances in which the acts occurred or the words were spoken.
    - The intent of the offender.
      * i.e., Did they intend to make the victim uncomfortable? Did they deliberately flaunt company policy?
    - The reaction of the victim and others who have seen or heard the offending behaviour.
    - The extent to which the alleged harassment impacted the actual work environment.
    - The disciplinary history of the employee.
      * Sometimes, even a minor transgression by a repeat offender may justify dismissal.

Rationale:

* The latter three complaints constituted sexual harassment, albeit relatively minor sexual harassment.
  + The "clothes off" complaint had a sexual innuendo, but this innuendo was tempered by the context of the remark and its explanation.
    - The defendant has not established, on balance, that these words would reasonably be seen as likely to detrimentally affect the work environment or lead to adverse job related consequences for the complainant.
  + Although relatively minor, the plaintiff's repeated comments singling out the complainant created discomfort which would reasonably detract from the work environment.
  + The "ditch your husband" statement constitutes a clear instance of sexual harassment, whatever the plaintiff's intent.
  + The plaintiff's statement while the complainant was bowling was embarrassing. This reaction was reasonable and even predictable. The impact of this comment on the work environment was obvious.
    - The fact that the statement was a joke makes it less serious, but it does not mean it is not sexual harassment.
* The defendant has failed to establish that the established acts of sexual harassment undermined the employment relationship.
  + There is no evidence that the plaintiff deliberately flaunted the defendant's sexual harassment policy.
  + There is no evidence that the workplace environment suffered. While the complainant did try to avoid the plaintiff, but when they did have contact it seems that these events did not prevent them from being able to do their jobs.
  + The plaintiff was not guilty of any prior inappropriate behaviour.

#### *Smith v Vauxhall*, 2017 ABQB 525

Facts:

* Smith worked for the defendant. In the summer/fall of 2003, Smith and AM (Smith's subordinate) entered a romantic relationship. The parties engaged in a long-term pattern of dishonesty aimed at concealing the relationship from the defendant. Smith admitted that, because of this relationship, he gave AM preferential treatment. The relationship ended in 2008, which caused Smith and AM's work relationship to sour. Smith claimed that AM became insubordinate. AM claimed that Smith became controlling, and threatened to fire her several times in angry outbursts even though company policy prohibited treating an employee differently because of an intimate personal relationship. In the spring of 2009, Smith told his supervisor Longman about the mere existence of the relationship, though he minimized and trivialized it. In August 2009, AM advised Longman of the true extent of the relationship, including its more serious aspects and its effect on the workplace. Following an investigation, Smith was summarily dismissed.

Issues and holding:

* Did Smith's conduct constitute grounds for summary dismissal? **YES**
* If yes, was Smith's conduct condoned by the defendant? **NO**

Analysis:

* An employee may only be dismissed with reasonable notice, or pay in lieu of notice, unless the employer has proven just cause for termination, which is a question of fact, on a balance of probabilities.
* Condonation occurs when an employer knows or ought to know about an employee’s misconduct and, despite this knowledge, allows the employee to continue in his position for a considerable period of time.
  + If condonation occurs, the employer cannot then subsequently dismiss the employee based on the misconduct that was already known but ignored.
  + It must be shown that the employer was fully aware of the details, or at least negligent in its failure to inquire further, in order to have truly condoned the misconduct.
  + The dismissed employee bears the onus of establishing that condonation occurred.

Rationale: (Dario J)

* Smith's actions constituted serious misconduct that violated an essential condition of his employment agreement without reasonable excuse.
  + Smith's treatment of AM after their relationship ended constituted personal harassment in violation of company policy.
  + Even though it is uncertain whether the relationship itself was against company policy, Smith's attempts to cover it up constituted intentional dishonesty.
    - An employee’s dishonesty in relation to his conduct under a workplace policy may be grounds for dismissal even where the policy violation does not itself constitute just cause for dismissal.
  + While Smith had no prior verbal or written warnings on his record, he had a role in relaying and enforcing the defendant's workplace policies, supervised employees, and was in a position of trust.
  + While Smith did not receive warnings about his conduct, it is doubtful that discipline short of termination would have been sufficient to restore the defendant's trust in him.
    - Merely transferring Ms. AM to a different position within the office may not have been an option given that Mr. Smith was the division manager.
* While Smith did tell Longman about his relationship to AM in the spring of 2009, Longman could not condone Smith's behaviour because he did not yet know about the true nature of Smith's relationship with AM and its effect on the work environment.

### Non-Culpable Misconduct

#### *Henson v Champion Feed Services Ltd*, 2005 ABQB 215

Facts:

* Champion prepares and sells feed to farmers. Henson was a shift foreman for Champion. Part of his job was to monitor quality control. His employment history was not enviable, with his record featuring numerous procedure violations resulting in five verbal warnings or counselling sessions and one written warning. Despite this, Henson continued to receive promotions, pay increases, and bonuses. Further, these warnings were not accompanied with a clear message regarding how Henson was to improve or what the consequences would be for further contraventions. On August 26, 2002, Henson failed to incorporate a bag of mix into a batch of feed. When the stray bag appeared on August 28, he placed it in a bin with other bags to be mixed into a batch. On August 30, 2002, Henson was terminated with cause for a "buildup of issues," most importantly the incidences of August 2002.

Procedural history:

* The trial judge held that Henson's improper mixing on August 26 and his alleged attempts to cover it up on August 28 each independently constituted grounds for summary dismissal.

Issue and holding:

1. Did the trial judge make a palpable and overriding error in finding that the mixing error and the alleged cover-up incident were each sufficient on their own to justify dismissal? **YES**
2. Did Champion have just cause to dismiss Henson in the absence of a policy of progressive discipline? **NO**

Analysis:

* Given the sense of identity and self-worth individuals often derive from their employment and the power imbalance ingrained in most facets of the employment relationship, it is essential that any sanction imposed be reflective of the severity of the employee's misconduct.
* In *Lowery v Calgary (City)*, the ABCA held that where cumulative cause for dismissal for incompetence is alleged, the employer must prove:
  1. The employee was given express and clear warnings about his performance.
     + i.e., they must be told about the consequences of their failure to meet expectations.
  2. The employee was given a reasonable opportunity to improve his performance after the warning.
  3. Notwithstanding the foregoing, the employee failed to improve his performance.
  4. The cumulative failings would prejudice the proper conduct of the employer's business.
  5. The focus on "progressive discipline" is justified on the grounds that it is unfair to impose discipline without advising the employee about their wrongdoing and allowing them to correct their behaviour.
     + It balances the right of an employer to take preventative action in dismissing an employee with the employee's interest in retaining employment as a key component of their identity.

Rationale: (Greckol J)

* Champion cannot use cumulative misconduct to prove just cause without having employed clear and effective warnings and the progressive discipline approach.
  + Henson was never told that his job was in jeopardy, or what would happen if incidents of poor performance or behaviour occurred again.
  + Henson was lulled into a false sense of security by the inconsistent messages from the employer that laxity would be tolerated and that despite problems in performance, he was performing well enough throughout to receive a promotion, pay raises and bonuses.

Notes:

* Greckol J found that there was no evidence that these incidents were anything other than honest, albeit careless, mistakes. There was no cogent evidence to deduce deceit on the part of Henson.

## Constructive Dismissal

* With constructive dismissal, the employer does not explicitly terminate the employee, but the effect is the same.
  + Acknowledging constructive dismissal is *not* quitting; it merely constitutes acceptance of the repudiation of the contract.

#### *Pathak v Janmock Steel Fabricating*, 1999 ABCA 8

Facts:

* The appellant worked for the respondent company at its Agri plant. He was initially paid a salary and a management incentive bonus based on the return on net assets ("RONA bonus"). When the RONA bonus was extended to everyone, he negotiated for a "custom fab" bonus to receive additionally. In October 1992, the appellant was promoted to be the manager of its Marclin plant. When there was a change in senior management, new management disagreed with this decision. They moved him back to the Agri plant in March 1993. They kept his salary the same but removed his custom fab bonus. The appellant perceived this change as a demotion and brought an action for constructive dismissal.

Procedural history:

* The trial judge dismissed the action on the grounds that there was no fundamental breach of contract.

Issue and holding:

* Did the trial judge err in finding that the employer did not commit a fundamental breach of the employment contract? **YES**

Analysis:

* In *Farber v Royal Trust Co*, the SCC held that where an employer *unilaterally* makes a *substantial* change to a fundamental term of the employee's contract, the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider herself constructively dismissed.
  + For this purpose, the judge must ask whether a reasonable person in the shoes of the employee would have felt that the essential terms of the employment contract were being fundamentally changed.
    - *Note*: for the contract to have been breached, it is not necessary that the employer intended to force the employee to leave their employ or to have been acting in bad faith (*Holm*).

Rationale:

* The appellant was constructively dismissed. A reasonable person in his situation would have felt that the essential terms of the employment contract were being substantially changed.
  + The appellant wished to be placed in a unique position amongst the other employees by being entitled to the custom fab bonus, and the employer agreed to that as a term of the employment contract.
  + The custom fab bonus was in no way connected to the position with the Marclin plant. It was a benefit that he carried with him to his new responsibilities at that plant.
  + The fact findings at trial establish that the custom fab bonus was considered by the appellant to be a most important term of his employment contract.
* The trial judge considered that since the appellant was still being paid the vast majority of his compensation, and since the bonus was removed at the same time as the reduction in responsibilities, there was no fundamental breach of the employment contract.
  + However, the question is whether there has been a fundamental breach of contract, not whether there has been a substantial change to an essential term.

Notes:

* This case shows that there may be constructive dismissal without an absolute refusal by the employer to perform the contractual obligations relating to compensation.

#### *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10

Facts:

* In December 2005, Potter was nominated to be the Executive Director of Legal Aid in NB for a 7-year term. The Commission established the terms of his employment, and he was officially appointed to that office in March 2006. In the spring of 2009, Potter and the Commission began to negotiate a buyout of his contract. In October 2009, Potter's physician advised him to take time off work for medical reasons for one month. This length was subsequently extended, first to January 4, 2010 and second to January 18. On January 5, the Commission decided that if buyout negotiations did not conclude by January 11, it would request that Cabinet revoke Potter's appointment for cause under the *Legal Aid Act*. On January 11, the Commission advised Potter that he was indefinitely suspended with pay. In March 2010, Potter commenced an action for constructive dismissal. The Commission took this as an implied resignation and stopped Potter's salary and benefits.

Issue and holding:

1. Was Potter constructively dismissed? **YES**
2. If no, did bringing an action for constructive dismissal amount to a resignation? **N/A**

Analysis:

* When an employer’s conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or treating it as a repudiation of the contract by the employer and suing for wrongful dismissal.
  + The burden rests on the employee to establish that he or she has been constructively dismissed.
  + Determining whether an employee has been constructively dismissed is a highly fact-driven exercise.
  + If the employee establishes that they have been constructively dismissed, they are entitled to damages in lieu of reasonable notice of termination.
  + There are two tests by which a finding of constructive dismissal can be made:
    1. The first, more common test (from *Farber*) is two-fold:
       1. Has the employer unilaterally breached an express or implied term of the employment contract?
          - If an express or an implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach.
          - To qualify as a breach, the change must be detrimental to the employee.
       2. If yes, would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract were substantially changed?
          - A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.
          - Typically, the change in question involves changes to the employee’s compensation, work assignments, or place of work that are substantial.
    2. Would the employer's conduct, viewed in light of all the circumstances, lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract?
       - Per this test, the employee is not required to point to a specific breach of the contract, but rather whether the course of conduct cumulatively amounts to an actual breach (e.g., where the employer’s treatment of the employee made continued employment intolerable).
* An employer has an obligation to provide work to employees that benefit from the work (e.g., an actress) or earn by commission. However, even when neither category applies, an employer's authority to withhold work is never unfettered.
  + A person’s employment is an essential component of his or her sense of identity and self-worth. The benefits derived from performing work are not limited to monetary and reputational benefits.
  + Therefore, when an employer withholds work, it will breach the employment contract unless it can show that the suspension is reasonable and justified.
    - In determining whether a suspension is reasonable and justified (*Cabiakman*):
      * The action taken must be necessary to protect legitimate business interests.
      * The employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension.
      * The suspension must be imposed for a relatively short period that is or can be fixed.
      * The suspension must, other than in exceptional circumstances that do not apply here, be with pay.

Rationale: (Wagner J)

1. Applying the first test for constructive dismissal, Potter was constructively dismissed by the Commission.
   * The suspension was unauthorized by the employment contract and therefore amounted to a unilateral breach of the employment contract.
     + Legitimate business reasons for the suspension were not shown, as Potter was never given any reasons for his suspension.
     + Potter was replaced during the suspension period, and the suspension was indefinite.
   * It was reasonable for Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract, given that he was suspended indefinitely without reason.
2. Were the court to uphold the trial judge’s decision that Potter was not constructively dismissed, it would then have to determine whether Potter resigned when he commenced his action for constructive dismissal, or was wrongfully terminated by the Board when it cut his salary and benefits.

Notes:

* The court imagined that an employee would likely be found to have resigned in the *majority* of failed constructive dismissal cases, but left open the possibility of arguing that, in suing their employer, an employee did not resign.
  + What we can take from this is that advancing a constructive dismissal claim is risky, because if the employee loses, they will likely be held to have quit and will get nothing.

#### *Kucera v Qulliq Energy Corp*, 2015 NUCA 2

Facts:

* Kucera was an executive assistant to the President of Qulliq, a Crown corporation responsible for the delivery of electrical power in Nunavut. From the beginning, there were difficulties between Kucera and the Director of Human Resources, through the periods of conflict were accompanied by periods where their relationship was supportive and friendly. At one point, Kucera's position was downgraded from a grade G to grade F, though this did not affect her pay. However, her duties changed regarding the collection and distribution of briefing notes for the Minister. Kucera wrote to her employer on August 5, 2010 to express interest in negotiating a termination package while she continued to execute her duties. Qulliq took this as a repudiation of her employment contract and wrote back saying "the critical relationship of trust and confidence which must exist…has been irreparably broken," "[Qulliq] has just cause for your direct dismissal," and "you are terminated."

Procedural history:

* The trial judge found that Kucera had been constructively dismissed and that the August 5 letter was a repudiation of the employment contract, which the employer accepted to bring the employment relationship to an end.

Issue and holding:

* Was Kucera constructively dismissed? **NO**
* Did the August 5 letter repudiate the employment relationship? **YES**

Analysis:

* To find that an employee has been constructively dismissed, the court must find unilateral changes in the employee’s circumstances that substantially altered the essential terms of the employee’s contract of employment to the extent that a reasonable person in the same situation would feel that the terms of their employment had substantially changed.
  + A hostile working environment can form the basis for constructive dismissal if characterized by conflict that goes well beyond interpersonal conflicts, workplace disagreements, or criticism.
    - Conflict will not amount to constructive dismissal if it does not prevent the employee from doing her work.
* For the letter to be a repudiation of the employment contract it must contain a clear and unequivocal intention to terminate the employment relationship, viewed objectively.

Rationale:

* As the trial judge concluded, Qullip did not make unilateral changes that substantially altered the essential terms of the employee's contract.
  + The downgrade from grade G to F did not affect her compensation.
  + The change in Kucera's responsibilities meant that Kucera was spending less time on briefing notes, but it did not eliminate the task from her responsibilities. Even so, an employer must have some flexibility to restructure in response to changes and as circumstances demand.
  + While there was some conflict in the workplace, the relationship between Kucera and the Director of HR was also often supportive and friendly.
* As the trial judge concluded, the August 5 letter evinced a clear intention to terminate the employment relationship, which Qulliq accepted.
  + The letter states that Kucera would continue to work while the parties "negotiated a severance package." At no point does it indicate that Kucera was prepared to remain in her employment.
  + While Qullip's response used language consistent with termination for cause, when read in light of the August 5 letter, it better reflected an acceptance of Kucera’s repudiation.

Dissent: (Berger JA)

* The trial judge erred in considering the August 5 letter as a repudiation.
  + The August 5 letter is bereft of a clear and unequivocal statement of intention to resign or repudiate.
    - Preparation to enter into negotiations for a severance package is not tantamount to resignation or repudiation.
* The trial judge erred in determining that Qulliq's response was an acceptance of a repudiation of the employment contract.
  + Qulliq's response said "[Qulliq] has just cause for your…dismissal." This statement means what it says.
* Thus, the trial judge should have considered whether Qulliq wrongfully terminated Kucera's employment for just cause.

#### *Magnan v Brandt Tractor Ltd*, 2007 ABQB 437

Facts:

* Magnan was employed by Brandt from 1966 to 2004. In his last 11 years of employment, Magnan was a Customer Support Advisor ("CSA"). In July 2004, Magnan discussed retirement with Brandt's president. He was advised that at the end of 2004, he could continue working until year's end before he would be forced to retire. Thus, on November 25, 2004, Brandt hired another CSA. Magnan trained his replacement and said goodbye to his customers, intending to respect Brandt's mandatory retirement policy. Then, on December 15, 2004, Magnan's lawyer sent a letter to Brandt seeking damages for wrongful dismissal. At this point, Brandt found out that it could not force Magnan to retire under Alberta law. On December 23, 2004, Brandt told Magnan that he could return to work in January 2005, but Magnan did not. Magnan then commenced a wrongful dismissal action.

Issue and holding:

* Did Brandt constructively dismiss Magnan? **YES**

Analysis:

* A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end.
  + Acceptance of the repudiation frees the innocent party from further performance and entitles that party to sue for damages immediately, even if the breach that constitutes the repudiation is anticipatory.
  + The employee's decision about whether to accept repudiation must be made within a reasonable time, but he is entitled to a few days, or even a couple of weeks, to think it over.
  + Failure to unequivocally accept the repudiation means that the repudiation has no effect. The contract continues to exist for the benefit of both parties.

Rationale: (Sirrs J)

* Magnan’s duties were unilaterally and fundamentally changed from being the CSA for Brandt in Edmonton, to introducing Romanchuk to and saying goodbye to Brandt’s Edmonton customers. This represented a repudiation of Magnan's employment contract that he accepted through his lawyer's letter on December 15.

## Expiry of a Fixed Term

* While it is an implied term of employment contracts that they are for an indefinite term and can only be terminated for cause or with reasonable notice.
  + However, the parties can contract out of this term by specifying a date on which the employment relationship will end without any obligation for just cause or reasonable notice.
* At the end of a fixed term of employment, the employment relationships simply comes to an end.
  + Neither party has to give notice, and neither is entitled to damages.
* An employer can still terminate the employee for cause before the end of a fixed term of employment.
* An employee can still quit or claim constructive dismissal during the fixed term.
* When an employer terminates an employee without cause before the expiry of a fixed term, the employee is entitled to damages in the amount of what they would have earned until the end of the fixed term.

#### *Alguire v Cash Canada Group Ltd*, 2005 ABCA 387

Facts:

* The appellant is the former president of the respondent company. The parties entered into a series of contracts for a fixed term, the last of which was dated March 25, 2002 and ended on January 31, 2003. However, on November 15, 2002, the respondent told the appellant to finish the rest of his contract at home and stripped him of much of his decision-making authority, though it paid him until January 31, 2003.

Procedural history:

* The trial judge found that the contract in place at the time of termination was a true fixed term employment contract. Thus, he concluded that there was no requirement to provide the appellant with reasonable notice.

Issue and holding:

* Did the trial judge err in holding that the employment contract was for a fixed term? **NO**
* Did the trial judge err in holding that the appellant was not constructively dismissed? **YES**

Analysis:

* A true fixed term employment contract requires unequivocal and explicit language.
  + Any ambiguities will be interpreted strictly against the employer’s interest (*note*: reflects the fact that employers usually draft employment contracts).
* Fixed term employment contracts are not immune from constructive breach by the employer.

Rationale: (Berger JA)

* The trial judge carefully examined the document as a whole and was mindful of the surrounding context and was thus correct in concluding that the language of the contract was unequivocally for a fixed term.
* The appellant's employment contract was fundamentally breached when the respondent sent him home and stripped him of most his authority on November 15, 2002.

Notes:

* Courts have a bias against finding a fixed term contract because it frees an employer from their obligation to give notice and damages for wrongful dismissal.
  + Further, they can prevent an employee from gaining seniority which they would ordinarily be given credit for.

#### *Ceccol v Ontario Gymnastic Federation* (2001), 204 DLR (4th) 688 (ONCA)

Facts:

* Diana Ceccol started working as the Administrative Director of the defendant non-profit ("the Federation") in 1981. Her employment was governed by a series of one-year contracts, the terms of which were similar. Article 1.1 set a term of 12 months for the contract, "unless sooner terminated or extended as hereinafter provided." Article 1.2 provided that each contract was "subject to renewal" if the plaintiff received a positive performance review and the parties could agree on the terms of renewal. In December 1996, the plaintiff was told that her current contract, which was set to expire in June 1997, would not be renewed. The plaintiff brought an action for wrongful dismissal.

Procedural history:

* The trial judge held that the plaintiff was an indefinite-term, not a fixed-term, employee and that she was entitled to reasonable notice.

Issue and holding:

* Did the trial judge err in holding that Ceccol was an indefinite term employee? **NO**

Analysis:

* The consequences for an employee of finding that an employment contract is for a fixed term are serious: the requirement of reasonable notice does not apply when the fixed term expires.
  + Accordingly, the courts require unequivocal and explicit language to establish a fixed-term contract, and will interpret any ambiguities strictly against the employer's interests.
* A court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts.
  + Employers should not be able to evade the traditional protections of employment standards legislation and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is continuous service by the employee for many years coupled with oral representations and conduct on the part of the employer that clearly signal an indefinite relationship.

Rationale: (MacPherson JA)

* The contract did not contain the unequivocal and explicit language necessary to establish a fixed-term contract; it was for an indefinite term, subject to renewal and termination in accordance with other provisions in the contract.
  + While article 1.1 set a term of 12 months, it also specifically contemplates that the contract may operate either shorter or longer than 12 months with the phrase: "unless sooner terminated or extended as hereinafter provided".
  + The words "subject to renewal" in article 1.2 were not self-defining and cast doubt on the defendant's argument that article 1.1 effectively created a clear fixed-term contract.
  + There was a fair amount of language in the contract that contemplated automatic renewal, including the linking of renewals to "acceptable performance reviews," and the requirement that the employee's salary be negotiated by a specified date before the end of the contract (article 4.2).
  + Ceccol's uncontradicted testimony about the initial job interview leading to her first contract was that the parties discussed that her position was a permanent full-time position.
  + Testimony from senior managers of the defendant similarly showed that their contracted employees were treated as full-time employees.

## Quitting

* Quitting is the employee's version of termination "on notice"—the employer does not have to have a good reason to quit.
* An employee is not entitled to damages when they quit, which is why a finding that an employee has quit is significant.
* An employee is generally obligated to give the employer reasonable notice before they quit (see "Damages Against Employees," below).

#### *Scorgie v CCI Industries Ltd*, 2008 ABPC 65

Facts:

* Scorgie worked for CCI as a sales representative in 2002. In the summer of 2006, CCI presented Scorgie with a job description for sales team leader, which featured new responsibilities it wanted Scorgie to take on. The job description featured a significant number of new responsibilities, and it had educational and skills requirements that Scorgie did not have. He thus feared that he would not be cut out for the job, and that learning the skills required for it would be too demanding for his personal life. The job also did not come with a pay increase. Scorgie thus wrote to reject the position on July 27, 2006, though he maintained that he wanted to remain at CCI and did not wish to resign. CCI advised him that there were no other positions available for him if he didn't accept the new position and made September 15, 2006 his last day, which Scorgie reluctantly accepted.

Issue and holding:

1. Did Scorgie voluntarily terminate his employment with CCI? **NO**
2. Did CCI terminate Scorgie's employment without just cause? **YES**

Analysis:

* From *Kiernan v Ingram Micro Co*, the test for resignation is whether a reasonable person, given all the surrounding circumstances, would have understood the employee to have *unequivocally* resigned through words, actions, or both.
  + The onus is on the plaintiff to prove, on a balance of probabilities, that he or she has been dismissed as distinct from having voluntarily resigned.

Rationale: (Haymour J)

1. Given the surrounding circumstances, Scorgie's actions did not evince any intention to resign.
   * No reasonable person reviewing the circumstances and the facts of this case could objectively view or understand Scorgie's actions as anything other than succumbing to the wishes of his employer.
2. No reason was given by CCI for Scorgie's termination other than to say that CCI had accepted Scorgie's resignation.

Notes:

* Since Haymour J found that Scorgie was dismissed without cause, it was unnecessary to consider constructive dismissal. However, Haymour J nevertheless held that the offer of the new position significantly altered the duties and obligations that Scorgie had, thus resulting in constructive dismissal.
* When an employee uses ambiguous words (e.g., "I might have to consider quitting" or "Maybe I should quit"), this will not satisfy the test for quitting.
  + However, an employee does not have to expressly say "I quit" to terminate the employment relationship (e.g., in some cases, an employee could quit by saying "Take this job and shove it!").
  + Sometimes, words and actions may combine to lead a reasonable person to believe that the employee quit (e.g., saying "I'm done" may be ambiguous, but when combined with the employee's actions of clearing their office out, it might evince an intention to quit).
* An employee's purported act of quitting must reflect their intention.
  + Where an employer tells their employee that they will be taken to resign if they do not accept constructive dismissal, the employee's failure to acquiesce will not be considered as evincing an intention to resign.

## Frustration

* An employment contract is frustrated when:
  1. An unforeseen event occurs that was out of the parties' control.
  2. Performance is impossible or radically different than what the parties originally agreed to (*Simpson*).
* Examples of frustration include: the workplace burns down, the employee dies, etc.
  + Things that are *not* examples of frustration include: bankruptcy, closing down, etc.

#### *Simpson v Co-operators* (1994), [1995] 1 WWR 591 (ABQB)

Facts:

* The plaintiff was hired by the Credit Union Federation of Alberta in 1982. Her job involved handling heavy bags of mail and assorted supplies, which resulted in a hernia. Between January 1986 and September 1987, the plaintiff had five surgeries to repair the hernia as well as other surgical procedures. By the end of December 1987, the plaintiff was incapable of performing her job at the Credit Union. As such, she did not return to her job, and neither her nor the Credit Union sought to negotiate her return to work in any capacity. The plaintiff also did not resign her job. As such, she brought an action claiming that she was unlawfully discharged.

Issue and holding:

* Was the plaintiff wrongfully terminated? **NO**

Analysis:

* An employment contract is frustrated when the employee's incapacity (looked at before the purported dismissal) is of such a nature that further performance of his obligations would either be impossible or radically different from that undertaken by him and accepted by the employer.

Rationale: (Waite J)

* For one, the plaintiff failed to demonstrate that she was discharged.
  + The evidence supports the inference that she abandoned her job, and therefore her contract of employment, because of her physical incapacity to return to work.
* Secondly, the plaintiff's physical incapacity to do the job for which she was hired amounts to a frustration of the contract of employment.

Notes:

* This decision pre-dates the enactment of the *Alberta Human Rights Act*; these facts would have resulted in a different outcome if human rights legislation were in force.

# Common Law Damages Related to Dismissal

* + The only remedy that is available for a breach of an employment contract is damages; specific performance is not an option (e.g., a wrongfully dismissed employee cannot demand their job back).
    - This is distinguishable from the labour law context and in federally regulated industries governed by the *Canada Labour Code*, where the presumptive remedy for unionized employees is reinstatement and back pay.
  + Damages for wrongful dismissal are not meant to compensate the aggrieved party for the dismissal; they are meant to compensate the aggrieved employee *for the breach of the implied term that each party will provide reasonable notice of termination*.
    - The aim of damages is to put the employee/employer in the position they would have been in but for the breach of this implied term.

## Damages for Wrongful Dismissal

* + Damages for wrongful dismissal are calculated as follows:
    - Determine the notice period, considering the *Employment Standards Code* minimums, the employment contract, and the common law *Bardal* factors.
    - Determine what the employee would have earned/received if they worked through the notice period.
      * This includes:
        + Salary (i.e., lost wages from the day of breach, including any pay increases that would likely have occurred over the notice period).
        + Health benefits (i.e., the amount of premiums that an employee would pay to replace health coverage lost).
        + Vacation pay (which does not accrue over the notice period).

If the employee is given working notice, the employer can require the employee to use accrued vacation days.

If the employee is being paid in lieu of working notice, they are entitled to the vacation that has been accrued.

* + - * + Pension plans, which includes:

Defined-benefit pensions, where what you get is determined based on a formula.

Defined-benefit pensions are used for public sector employees.

Losses over the notice period are based on actuarial determinations.

Defined-contribution pensions, where what you get is defined based on what you put into the pension fund.

Losses are defined as what the employer would have paid into the pension fund during the notice period.

* + - * + Allowances for cars, technology, education, fitness, etc.

Only that part of the allowances from which the employee would have obtained a personal benefit are included in damages (e.g., the portion of a work vehicle that is not used for work).

* + - * + Special damages (not often awarded)

e.g., in *Radwan*, the judge awarded Radwan fuel costs associated with finding new employment.

* + - * In some cases, employers maintain benefits coverage over the notice period, even where the employee does not receive working notice, in order to avoid having to calculate and pay damages for the loss of those benefits.
  + When there is a sale of business, the question of whether this affects the employer's length of service for the calculation of the notice period depends on what type of sale it is:
    - Share sale: the purchaser purchases the shares of the employer.
      * In this case, the employment relationship continues uninterrupted.
    - Asset sale: the purchaser purchases the assets of the employer.
      * In this case, the employment relationship with the old employer is terminated.
      * However, when there is substantial continuity in the business, and an employee stays on after his employer is sold, it is implied in his employment contract that the purchaser will give the employee credit for past service.
        + This can be negated by an express term to the contrary, in which case the employee could sue their old employer for failing to give reasonable notice.

#### *Jones v Klassen*, 2006 ABQB 41

Analysis: (Acton J)

* + Damages for breach of contract aim to put the plaintiff in the position he or she would have been in had the wrong not been done (i.e., had the wrongdoer adhered to the implied term that each party will provide "reasonable notice" of termination).
    - The assessment of what the plaintiff's position would have been if the defendant had fulfilled its side of the bargain is inherently speculative, but its difficulty does not excuse the wrongdoer from damages.
    - The court is free to draw inferences from the evidence as to what would likely have happened 'but for' the breach.
    - Foreseeability of damages for breach of contract is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

#### *Hansen v Altus Energy Services Partnership*, 2010 ABQB 820

Facts:

* + Hansen is a 50-year-old engineer. He began to work for a predecessor of Altus in 1981. In September 2008, he was promoted to the role of General Engineering Manager, which saw him managing a technical group consisting of 35 staff at Altus's Nisku and Bonnyville facilities. Hansen's base salary was increased to $160,000, he was given a company vehicle, and his annual bonus maximum (based on profitability) was increased to 50% of his annual salary. Hansen also participated in Altus's group Employee Benefit Plan, under which Altus paid 100% of the premiums for health care, vision care, and dental care. Effective June 1, 2009, due to a slow period, Hansen's hours and pay were reduced 20% from $13,333 per month to $10,666 per month. In September 2009, Norm Denoon, VP of Operations, had Hansen take on a position assisting him with overseeing all operations of Altus. No remuneration was specified, but Hansen assumed that his pay would either be increased or remain the same. On October 1, 2009, the staff at Altus, including Hansen, returned to full time work. However, Hansen's remuneration did not increase back up to $13,333 per month. Altus stated that this was because, while Hansen returned to full-time work, he had moved to a new role assisting Mr. Denoon. When Mr. Denoon was terminated in October 2009, Hansen was became uncertain about his role in the company and tried to get answers from upper management. On February 23, 2010, Altus terminated Hansen's employment and paid him a severance.

Issues and holding:

* 1. Is the plaintiff entitled to $11,692 in under-payment of his base salary? **YES**
  2. How much notice is the plaintiff entitled to? **24 months**
  3. Should a contingency be applied to reduce the amount of Altus' damages? **YES**
  4. Should the plaintiff damage's include bonuses? **YES**
  5. If yes, how much is the plaintiff entitled to in lieu of bonuses? **$34,768**
  6. Did Hansen fail to mitigate his damages? **NO** (*reasons omitted)*
  7. Is Hansen entitled to damages for loss of his use of a company vehicle? **YES**
  8. Is Hansen to damages for loss of health, dental, and vision care? **YES**
  9. Is Hansen entitle to damages for vacation pay? **YES**
  10. Is Hansen entitled to damages for loss of the right to exercise stock options? **NO**

Analysis:

* In assessing damages for breach of contract, the employee must be placed in the same position he would have been in if the contract had been performed, assessed as of the date of breach.
* It is an implied term of contracts of employment that an employee is entitled to reasonable notice of termination to provide the employee with time to find alternate employment (see *Bardal*).
  + - There is an implied term in an employment contract that an employee is to receive credit for prior service upon sale of the business (for the purposes of salaries, bonuses, entitlements, and notice), which can only be negated by express terms to the contrary.
* Where judgment is granted prior to the expiry of the notice period (as is the case here), the employee's duty to mitigate continues post-judgement throughout the notice period.
  + - As such, the court has the discretion to apply a deduction for anticipated mitigation based on the possibility that the plaintiff will find a new position prior to the expiry of the notice period.
* Where a bonus scheme has historically become an integral part of an employee's wage structure so as to give rise to a *reasonable expectation of a bonus*, that bonus is a benefit that has a value and should form part of the employee's damages.
  + - The plaintiff does not have to prove that Altus will be profitable in 2010 and 2011 and likely to in fact award bonuses to establish an entitlement to a bonus.
* In calculating the value of a bonus linked to a company's success, discretion must be exercised reasonably, on the basis of objective criteria, allowing for positive and negative contingencies.
  + - Where financial insight or analysis is provided to establish the expected size of future bonuses, the court may rely on past performance in the calculation of bonuses.
* If the primary purpose of providing an employee with an automobile is to assist in the performance of his job functions, no damages should be provided for its loss.
  + - However, if the vehicle is employed for *personal use* as well, then damages should be provided for the loss of the personal benefit that the vehicle provided.
* Fringe benefits which have become part of the wage package of an employee must be taken into account in computing damages for wrongful dismissal.

Rationale: (Goss J)

* + 1. Hansen's base salary of $160,000 per year remained the same in his new role and should have been reinstated to its full-time level of $13,333 per month effective October 1, 2009.
    - Hansen's role advising the VP of Operations on the financial performance and management of *all* of Altus' business was certainly a promotion and not a demotion. Further, at no time was the plaintiff advised that his salary would decrease in this new role.
    1. The plaintiff was entitled to 24 months of working notice.
    - As a 50-year-old with a senior executive position, high level of responsibility, and very long service in one area of industry with specific products, his opportunity for finding like employment is more limited.
      * Further, the evidence is that, to date, Hansen has had very few job opportunities to respond to.
    - While Hansen began to work for a *predecessor* of Altus in 1981, his past service was recognized when that predecessor was purchased. Therefore, the entire period of 29 years must be considered by the court in determining Hansen's notice period.
    1. A contingency of 2 months should be applied, as there is certainly a realistic possibility that Hansen will find alternate employment within the notice period provided.
    - His positive and long track record with the defendants may assist him if and when comparable opportunities arise.
    1. Hansen has a reasonable expectation of a yearly bonus, as he has received a bonus in all but 2 to 4 of his 23 years of employment.
    - Altus provided little evidentiary basis for its claim that bonuses would not be paid for 2010 and 2011 for reasons of slow growth.
    1. In 2007–2009, the plaintiff received an average bonus of 21.73%. Hence, he is entitled to receive a bonus calculated at 21.73% of his annual base salary of $160,000, or $34,768, for 2010.
    - However, Hansen is not entitled to a bonus for 2011. The evidence shows that Altus gave bonuses at the end of the year and did not typically award a percentage of an anticipated bonus to employees who left during the year. Since Hansen's notice period (minus the contingency) would not take him to the end of 2011, he is not entitled to a pro-rated bonus for 2011.
    1. *Discussion of mitigation omitted.*
    2. Altus paid the operating costs of the company vehicle in the amount of $13,215 per year. Since Hansen submitted that 45% of the car's mileage was for personal use, the car represented a personal benefit of $495.60 per month, which the plaintiff is entitled to.
    3. Since dismissal, Hansen has obtained health, dental, and vision coverage costing $248.19 per month with an annual $50 deductible per family. He should be reimbursed for those costs, together with the additional expenses not covered by the new plan that would have been covered under the Altus group plan that have actually been incurred to date.
    4. Hansen was entitled to 8 weeks of paid vacation per year (14.8%). Thus, from January 1, 2010 to February 23, 2010, he would've been entitled to about 5.5 vacation days.
    5. Hansen's stock option agreement is clear and unambiguous as to its intent to terminate an option granted thereunder when an employee ceases to be in active employment.

Notes:

* + The court awarded judgment to the plaintiff in the following amounts:
    - $11,692.00 for unpaid base salary from October 1, 2009 to February 8, 2010.
    - $293,333.26 (13,333.33 per month × 22 months) reflecting his salary over the notice period.
    - $34,768.00 reflecting a bonus for 2010.
    - $10,903.20 reflecting the value of the use of a company vehicle ($495.60 per month × 22 months)
    - Employee Benefit Plan:
      * $5,460.18 in premiums ($248.19 per month × 22 months)
      * $100.00 ($50 annual deductible per family)
      * Expenses not covered by the new plan that would have been covered under the Altus group plan that have actually been incurred to date.
      * Average monthly expenses incurred to date, for the balance of the notice period.
    - $615.36 for an additional vacation day entitlement prior to termination.
  + This judgment was handed down on December 21, 2010.

#### *Radwan v Arteif Furniture Manufacturing*, 2002 ABQB 742

Facts:

* + Radwan (now 63 years old) immigrated to Canada in 1974 with minimal formal education and limited English language skills. He began work with Superior Steel Desk as a punch press operator in 1975. Within three months, he was transferred to Wescab Industries Ltd. He was told that he was working for the same company, but was not told why he was transferred. EIF Sales Ltd purchased Wescab in July 1985. Then, on November 21, 1995, EIF went bankrupt and Arteif Furniture Manufacturing purchased its assets and property. At this time, Radwan was on short term disability and returned to work on March 4, 1996. He returned to the same position, at the same pay, with the same supervisor and the same plant manager as before he left. Arteif terminated Radwan's employment on February 10, 2000, paying him two weeks' pay in lieu of notice on the basis that he had been employed by them for less than four years. It argued that EIF's bankruptcy terminated Radwan's employment in 1995, and that none of his previous employment should be considered in calculating notice.

Issues and holding:

* + 1. What length of service should be attributed to Radwan? **25 years**
    2. Did Arteif purchase a "going concern" in EIF? **YES**
    3. Did Arteif negate the implied term of credit for past employment? **NO**
    4. Did EIF's bankruptcy change this analysis? **NO**
    5. What is the appropriate notice period?  **20 months**
    6. Was Radwan required to mitigate his damages? **NO**

Analysis:

* + Credit for years of past service may be given if a subsequent employer bought a business *as a going concern*.
    - The test for a successor employer for the purposes of employment legislation is essentially one of whether there is substantial continuity of the business (i.e., there was no interruptions, no significant renovations, no significant changes to the nature of the business, no changes to location, no overhaul of staffing, etc.).
  + When an employer has been purchased as a going concern, there is an implied term in the employment contract between the employer and the employees it keeps on that the employees will be given credit for the years of past service with the seller for the purposes of salaries, bonuses, and notice of termination.
    - However, this term could be negated by an express term to the contrary.
      * *Note*: such a term could be supplied by the employer broaching the topic with the employee.
    - Given the ability to contract out of continuity, this term is fair to a purchasing employer while still preventing employees from serving a new employer only to learn later on that they lost the benefits arising from their years of employment pre-takeover.
  + Section 5 of the *Employment Standards Code* deems employment to be continuous despite a sale, lease, transfer or merger or continued operation under a receiver or receiver-manager.
  + A wrongfully dismissed employee has a duty to take all reasonable steps to mitigate his loss and reduce the damages he will suffer.
    - However, the onus is on the employer to assert the plaintiff's failure to mitigate and the employer must show that had the plaintiff taken reasonable steps to mitigate, he would likely have obtained alternative employment.

Rationale: (Lee J)

* 1. Radwan should be given credit for 25 years, representing his service since he began working with Superior Steel Desk in 1974.
     1. There was continuity of the business after Arteif purchased it.
        + After purchase, there was no period in which the business did not operate, no significant renovations, no significant changes to the nature of the business, and no changes to the location of the plant. Many of the same employees remained in the same positions.
     2. There is no evidence that Arteif negated the implied term that a new employer will give the employee credit for previous service with the old employer.
     3. There is no principled basis for differentiating between continued operation by a new employer as a result of a sale, a merger, a lease, a receiver-manager, and continued operation by a new owner as a result of a bankruptcy.
        + The *ESC* is meant to protect employees' interests. Thus , an interpretation of it that extends protection to as many employees as possible is favoured over an interpretation that does not.
  2. Mr. Radwan is almost at retirement age, he had significant language limitations, limited education, a fairly narrow skill set and had suffered some physical disabilities caused by his employment.
  3. While the evidence reveals that Radwan was not very persistent in his post-termination job search, his age, ability, length of service, and work-related injury made it extremely unlikely that he would be able to find other work. Thus, Radwan did not act unreasonably.

#### *Brito v Canac Kitchens*, 2012 ONCA 61

Facts:

* + In July 2003, the appellant terminated Brito's employment (then 55 years old) after 24 years of service as a cabinet and door maker without cause. It paid Brito 32 weeks' salary plus associated benefits for a period of 8 weeks. Under the appellant, the respondent received both short-term and long-term disability benefits. In November 2004, the respondent underwent surgery to remove the cancer in his larynx.
  + The respondent sued the appellant for damages for wrongful dismissal and associated benefits, including disability benefits that he would've been entitled to under the appellant but for his wrongful termination.

Procedural history:

* + The trial judge held that the termination of the Brito's employment was wrongful and that the appropriate notice period was 22 months. He awarded Brito damages for lost employment income for 22 months, STD benefits for 17 weeks, and LTD benefits thereafter, to age 65.
    - The appellant argued that Brito was not entitled to LTD benefits because he did not meet the definition of "totally disabled" under the company disability benefits plan. It also held that Brito failed to mitigate his losses after March 5 by failing to seek new employment.

Issue and holding:

* + Did the trial judge err in finding that Brito was "totally disabled," and that he thus would have been eligible for LTD benefits with the appellant? **NO**
  + Did Brito fail to mitigate his losses after March 5? **NO**

Rationale: (Cronk JA)

* + There was evidence before the trial judge that Brito was totally disabled within the meaning of the Plan, and it was open for him to conclude that.
  + There can be no obligation to mitigate damages by finding alternate employment where the employee is totally incapable of working.

Notes:

* + In this case, the employer was liable for disability benefits that the employee would have been entitled to if he was allowed to work through the notice period.

## Exceptions to the Damages Principles

* Bonuses, stock options, and other forms of "variable pay" can be difficult to assess over the notice period, as they are discretionary and depend on criteria to be met over the notice period.
  + Where a bonus has been obtained, and was simply payable during the notice period, a wrongfully dismissed employee will be entitled to it.
  + Where a bonus is based on a formula, then the employee will be entitled to it if, based on the information available at the time of termination, the employee would have been entitled to it during the notice period.
  + Where a bonus is discretionary, entitlement is a question of the intention of the parties regarding the entitlement to any bonus (*Hansen*).
    - Bonuses that historically became an integral part of the employee's compensation give rise to a reasonable expectation of a bonus, and obligate the employer to pay out the bonus that the employee would have received during the notice period (*Hansen*).
      * The quantum of the bonus amount can be determined by looking at past practice (*Hansen*).

#### *Jivraj v Strategic Maintenance Ltd*, 2014 ABQB 463

Facts:

* On September 28, 2010, Jivraj started working as a director of integration for Strategic Maintenance Ltd ("SML"). He received a base salary of $160,000 and bonuses. Bonuses were payable in three installments, the first paid at the time the bonus was awarded and the second and third on the first and the second anniversaries of the payment of the first installment. The employment contract further provided that:

*…all Bonus payments are conditional upon the Employee remaining in the employment of Strategic at the time any portion of the a Bonus is actually payable to the Employee, and if for whatever reason, the Employee ceases employment with Strategic, regardless of the circumstances, then no further Bonus amounts are payable to the Employee* [emphasis added].

On March 9, 2012, Jivraj was terminated effective immediately. Jivraj claimed, among other things, bonus payments that SML had awarded him but had not yet paid him.

Issues and holding:

* What period of reasonable notice was Jivraj entitled to when his employment was terminated? **6 months** (*reasons omitted*)
* In light of the notice period and the parties' contractual arrangements, does Jivraj's entitlement to damages for wrongful dismissal include any portion of the bonuses which he has not yet been paid? **NO**

Analysis:

* Parties may agree to forfeiture of accrued employment benefits upon termination, provided they do in clear, unambiguous language

Rationale: (Jones J)

* The agreement between Jivraj and SML clearly provides that SML was not required to pay subsequent tranches if, for any reason, Mr. Jivraj was not employed with SML at the time they became payable.

Notes:

* Shows that parties can agree that the bonus is not payable even in the event of a wrongful dismissal.
* It is arguable that this case is not good law after *Ocean Nutrition*, which restricts the ability of parties abridge the employee's common law right to damages.

#### *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26

Facts:

* Matthews is an experienced chemist who occupied several senior management positions with Ocean Nutrition Canada ("ONC") beginning in 1997. Part of Matthews' contract was a long term incentive plan (LTIP), which provided for payment to employees on sale of the company. Clause 2.03 of the plan said:

*ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event* [i.e., sale of the company] *the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.*

In 2007, ONC got a new COO, Daniel Emond. Frictions developed began Emond and Matthews. Emond began a "campaign" to marginalize Matthews from the company, limiting his responsibilities and influence, leaving him in the dark about his future, and lying to him. There was talk of a termination package, but it never came to fruition, as Matthews took a position with another employer in June 2011. About 13 months after Matthew's departure, ONC was sold, which triggered payments to employees who qualified under the LTIP.

* Matthews filed an application against ONC, alleging that it constructively dismissed him, and in doing so, breached its duty of good faith. He asked for damages reflecting his entitlement to reasonable notice (including the incentive bonus) and damages for the employer's dishonesty, including punitive damages.

Procedural history:

* The NSSC concluded that ONC constructively dismissed Matthews and that he was owed a reasonable notice period of 15 months. It thus held that because (1) Matthews would've been an employee during the purchase of ONC if he hadn't been dismissed and (2) the terms of the LTIP did not unambiguously remove his common law right to damages, he was entitled to damages equivalent to what he would have received under the LTIP. The NSSC also rejected Matthews' claim for punitive damages.
* The NSCA agreed that Matthews was constructively dismissed and that the notice period was 15 months, but held that the LTIP was unambiguous, leading to the conclusion that Matthews’ right to recover under the plan ceased the moment he left ONC.

Analysis:

* The remedy for a breach of the implied term to provide reasonable notice is damages representing what the employee would have earned in the period of notice which should have been given.
* Whether payments under incentive bonuses are to be included in these damages is a common and recurring issue, and should be addressed in two steps:
  1. But for the termination, would the employee have been entitled to the bonus during the reasonable notice period?
  2. Is there something in the bonus plan that would specifically and unambiguously *remove the employee's common law entitlement*?
     + *Note*: the bonus plan has to go beyond specifying that an employee has to be employed to receive the bonus; it must make it clear that the reasons why an employee would not be entitled to the bonus plan would include wrongful dismissal (i.e., *dismissal without cause and without notice*).
     + To be enforceable, the clause must have been clearly brought to the employee's attention.

Issue and holding:

* Did the NSCA err in not awarding Matthews the amount of the LTIP as part of his common law damages for breach of the implied term to provide reasonable notice? **YES**

Rationale: (Kasirer J)

* Matthews is entitled to receive damages equal to what he would have received pursuant to the LTIP.
  + Firstly, but for his constructive dismissal, Matthews would have been entitled to the LTIP payment as part of his compensation during his reasonable notice period, as the sale of ONC occurred before expiration of the 15-month reasonable notice period.
    - *Note*: this was not a case in which the award of the bonus was discretionary, in which case Matthews would have to show that the bonus was integral to his compensation. The bonus was payable on the happening of some event, which occurred during the notice period.
  + The LTIP does not unambiguously remove the employee's common law entitlement.
    - Language requiring an employee to be “full-time” or “active” will not suffice to remove an employee’s common law right to damages.
      * After all, had Mr. Matthews been given proper notice, he would have been “full-time” or “actively employed” throughout the reasonable notice period.
    - While clause 2.03 of the LTIP purported to remove an employee's common law right to damages on termination "with or without cause," neither of these options cover the current circumstances. Termination "without cause" does not equate to unlawful termination without notice.
      * Exclusion clauses must clearly cover the exact circumstances which have arisen.
      * Even if the LTIP said "unlawful termination" as well, this too would not unambiguously alter the employee's common law entitlement, as, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as “terminated” until after the reasonable notice period expires.
    - Since the LTIP is a "unilateral contract," in the sense that the parties did not negotiate its terms, it is a principle of contractual interpretation that its clauses limiting liability be strictly construed.

Notes:

* Commenting on the duty of good faith, Kasirer J said that a breach of the duty to exercise good faith in the manner of dismissal is a distinct contractual breach and is independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal.

#### *Alguire v Cash Canada Group Ltd*, 2005 ABCA 387

Facts:

* The appellant is the former president of the respondent company. The parties entered into a series of contracts for a fixed term, the last of which was dated March 25, 2002 and ended on January 31, 2003. However, on November 15, 2002, the respondent told the appellant to finish the rest of his contract at home and stripped him of much of his decision-making authority, though it paid him until January 31, 2003. The appellant's bonus under the March 25, 2002 agreement would have become payable if Cash Canada's pre-tax net income for the fiscal year ending January 31, 2003 exceeded $973,778.

Procedural history:

* The trial judge found that the contract in place at the time of termination was a true fixed term employment contract. Thus, he concluded that there was no requirement to provide the appellant with reasonable notice.

Issue and holding:

* Did the trial judge err in holding that the employment contract was for a fixed term? **NO**
* Did the trial judge err in holding that the appellant was not constructively dismissed? **YES**

Analysis:

* A true fixed term employment contract requires unequivocal and explicit language.
  + Any ambiguities will be interpreted strictly against the employer’s interest.
* Fixed term employment contracts are not immune from constructive breach by the employer.
  + The issue is whether or not there was a change to an essential term of the employment contract regardless of its duration.

Rationale: (Berger JA)

* The trial judge carefully examined the document as a whole and was mindful of the surrounding context and was thus correct in concluding that the language of the contract was unequivocally for a fixed term.
* The appellant's employment contract was fundamentally breached when the respondent sent him home and stripped him of most his authority on November 15, 2002.
  + Therefore, the Appellant is entitled to damages to place him, as far as possible, in the same position he would have been in had the contract been performed.

Notes:

* Fixed term contracts expressly contract out of the reasonable notice paradigm; damages aim to put the employee or employer in the position that they would have been in had the employee worked *to the end of the term*.
  + This could entitle the employee to wages for 4 year or 4 days (depending on how much time is remaining in the fixed term).
  + However, the parties can contract out of this by agreeing to an "early termination" clause freeing an employer/employee from the obligation to put the other party in the position they would have been in had the employee worked to the end of the term.

## Aggravated/Punitive Damages

* It is not a breach of an employment contract to dismiss an employee; damages for breach flow from the failure to give reasonable notice or the failure to be decent in the manner of dismissal.
* The "manner of dismissal" is not limited to the moment of termination; it includes conduct that occurs before and after termination that is connected to the dismissal (*Matthews*).

#### *Honda Canada Inc v Keays*, 2008 SCC 39

Facts:

* Keays started working for Honda in 1986. In 1997, he was diagnosed with chronic fatigue syndrome ("CFS"). He ceased work and received disability insurance benefits. In 1998, the insurance provider determined that Keays could return to work full-time and discontinued his benefits. Keays continued to absent himself, and was placed in Honda's disability program, where absence was allowed with proof it was related to a disability. Concerns were raised about the adequacy of the notes Keays was providing to explain his absences. Honda claimed that they merely repeated what Keays had told his doctor and did not contain any diagnosis or prognosis. Honda arranged for Keays to meet with one of their doctors, Dr. Brennan, but Keays later backed out. In a letter dated March 28, 2000, Honda advised Keays that they would no longer accept that he had a disability and said that if he did not meet with Dr. Brennan, he would be terminated. Keays remained unwilling to meet with him, so Honda terminated his employment on March 29, 2000.

Procedural history:

* The ONSC said that Keays' dismissal was not proportionate to his refusal to meet with Dr. Brennan. It concluded that he was entitled to 15 months' notice based on the *Bardal* factors, but extended the notice period to 24 months to account for "egregious bad faith" displayed by Honda in the manner of Keays' termination (a "*Wallace* bump"). It also awarded Keays $500,000 in punitive damages on the basis of discriminatory conduct by Honda.
* The ONCA dismissed the appeal, holding that fact-laden conclusions were entitled to substantial deference. It also did not find the award of punitive damages unreasonable, but reduced the quantum to $100,000.

Issues and holding:

1. Did the trial judge err in awarding aggravated damages for the manner of dismissal? **YES**
2. Did the trial judge err in awarding punitive damages? **YES**

Analysis:

* Aggravated damages are recoverable for mental distress caused by contractual breach if the parties would have reasonably contemplated that such distress would arise from it.
  + Since employment contracts are always subject to cancellation, there would not ordinarily be contemplation of psychological damage resulting from dismissal.
    - *Damages resulting from the manner of dismissal are available only where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive*, as such conduct is *not* ordinarily in contemplation.
      * e.g., attacking the employee's reputation by declarations made at the time of dismissal.
      * e.g., misrepresentation regarding the reason for the decision.
      * e.g., dismissal meant to deprive the employee of a pension benefit or other right.
      * The normal distress and hurt feelings resulting from dismissal are not compensable.
  + The plaintiff must provide some actual evidence of harm connected to the employer's bad behaviour.
  + Where damages are awarded, *no extension of the notice period is to be used* to determine the proper amount to be paid.
    - If an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the *actual* damages.
  + To get aggravated damages, the plaintiff does not have to prove an independent actionable wrong (i.e., a tort) in addition to the breach of contract.
* Punitive damages should only be awarded in exceptional cases, where the impugned conduct is harsh, vindictive, reprehensible and malicious, such that by any reasonable standard it is deserving of full condemnation and punishment on their own.
  + When assessing punitive damages, courts must focus on the defendant's misconduct, not on the plaintiff's loss (which is the focus of an assessment of aggravated damages).
* Aggravated and punitive damages are not subject to mitigation.
  + *Note*: earnings at a new position do not have anything to do with these damages, so they cannot offset the employer's obligation to pay them.

Rationale: (Bastarache J)

1. There is insufficient evidence to suggest that Honda displayed bad faith in dismissing Keays. *(details omitted)*
2. There is insufficient evidence to suggest that Honda’s conduct was acutely vindictive or reprehensible enough to attract punitive damages. *(details omitted)*

Dissent: (LeBel J)

* The trial judge made no overriding errors in awarding additional damages for manner of dismissal; there was a sufficient basis for the findings of bad faith and discrimination.

Notes:

* Whereas aggravated damages are compensatory, punitive damages are designed to denounce malicious or outrageous conduct.
* The SCC affirmed that Keays was entitled to choose his own doctor. He did not have to use a medical provider supplied by his employer.

#### *Lalonde v Sena Solid Waste Holdings Inc*, 2017 ABQB 374

Facts:

* In 2008, Lalonde started working for Sena full time as a millwright in a small community. On June 13, 2012, Lalonde was called into the office the maintenance manager, who made unsubstantiated allegations about Lalonde putting a life in danger by allowing a contract worker to work without a permit and failing to follow his supervisor's instructions regarding the disposal of scrap metal. Lalonde, surprised by the criticism, tried to explain himself, but was given little opportunity to do so. He was then suspended and escorted off the property in view of his co-workers. He made several more unsuccessful attempts to communicate his side of the story. Suspension was a very stressful time for Lalonde, making him feel depressed, miserable, humiliated, and angry, and damaging his familial relationships. The record shows that Sena was aware of this. On July 24, 2012, Lalonde received a letter terminating his employment for cause. Thereafter, Lalonde had some difficulty finding similar employment, which he believed was the result of his reputation being damaged by Sena's spurious allegations.
* Lalonde filed a statement of claim seeking compensation for wrongful dismissal. In May 2017, on the opening day of the trial, Sena withdrew the allegations of cause.

Issues and holding:

1. What is the appropriate reasonable notice period? **6 months** *(discussion omitted)*
2. Is Lalonde entitled to aggravated damages? **YES**
3. If yes, what is the appropriate quantum of aggravated damages? **$75,000**
4. Is Lalonde entitled to punitive damages? **NO**

Analysis:

* *Aggravated damages* are awarded to compensate a plaintiff for actual damage caused by unfair or bad faith conduct of the employer in the *manner* of dismissal (as opposed to the fact of dismissal).
  + In the course of dismissal, employers ought to be candid, reasonable, honest, and forthright with their employees as opposed to untruthful, misleading, or unduly insensitive.
* *Punitive damages* are awarded to serve the purposes of retribution, deterrence, and denunciation as opposed to compensation, and punitive damages are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment on its own.

Rationale: (Gill J)

1. Sena's actions amount to a breach of the obligation of good faith and fair dealing and support an award of aggravated damages.
   * Sena accused Lalonde of serious safety violations and insubordination, which Sena maintained until shortly before trial in 2017.
     + These allegations implied some form of illegal conduct or dishonesty on the part of Lalonde.
   * Sena made the decision to terminate Lalonde shortly after it suspended him without giving him the opportunity to explain himself.
   * There was evidence, before and after the dismissal, of the effect of Sena's actions on Lalonde.
   * All of this transpired in a small town where it is reasonable to infer that allegations of serious misconduct would spread and harm Lalonde's future job prospects.
2. Taking into account the evidence and the case law, aggravated damages of $75,000 are appropriate.
   * Although the Defendants actions appear not to have been vindictive, they were intentional, unnecessarily prolonged (5 years) and caused Lalonde significant mental distress.
     + Lalonde was publicly humiliated at the time of dismissal and the humiliation continued as rumors concerning the reasons he was dismissed continued to circulate.
   * The cases relied upon by Lalonde to seek $125,000 (*Karmel* and *Boucher*) are inappropriate; in those cases, the actions of the employers were much more prolonged, serious, and arguably vindictive.
     + In this case there was abusive conduct leading up to the dismissal, inappropriate and false reasons for dismissal, and an inadequate and unfair investigation; this is not quite as egregious.
3. While Sena's actions were clearly insensitive, inappropriate, and caused mental distress for Lalonde, they were not malicious.

Notes:

* The court specified that there was nothing wrong with incorrectly alleging cause, even where that allegation results in litigation. The issue was that the employer failed to do so in good faith. They did not have cause, and they knew or ought to have known it.

#### *Holm v Agat Laboratories Ltd*, 2018 ABQB 415

Facts:

* Holm was hired by Agat in October 2013 in a managerial role based in Calgary. His salary was $100,000, and he also received a car allowance of $9,600 per year. In January 2014, Holm's performance was described as either meeting or exceeding expectations. In April 2014, Holm was shuffled around and put in charge of more employees. At that point, Holm moved his wife from BC so she could look for work in Calgary. Then, on September 25, 2014, the owner of Agat advised Holm that he was not liked and that everyone was complaining about him. No one gave Holm an actual example of how his performance was unsatisfactory. The owner told Holm that he was going to remove him from his supervisory role, move him into a smaller office, cut his car allowance, reduce his salary to $80,000, and put him under the charge of someone who used to be Holm's subordinate. Holm refused to agree to this, and considered himself constructively dismissed. On September 25, 2014, two technicians failed to wear proper safety equipment. Although it later acknowledged that the incident was attributable solely to the technicians' own stupidity, Agat sent a letter to Holm on October 6, 2014 blaming him for the incident. At trial, it became apparent that this letter was meant to increase Holm's anxiety and dissuade him from suing for constructive dismissal. The whole situation caused Holm extreme anxiety, which Agat was acutely aware of.

Issues and holding:

1. Was Holm constructively dismissed? **YES**
2. If yes, what is the appropriate notice period for dismissal without cause? **4 months**
3. Did Holm discharge his duty to mitigate? **YES**
4. If Holm was constructively dismissed, is he entitled to aggravated damages? **YES**
5. If yes, what is the appropriate quantum of aggravated damages? **$20,000**
6. If Holm was constructively dismissed, is he entitled to punitive damages? **NO**

Analysis:

* When an employer offers an employee an opportunity to mitigate damages by offering a different position the issue is then whether a reasonable person in the employee’s position would have accepted the offer.
  + An employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation.

Rationale: (Horner J)

1. Any employee in Holm's position would feel as though the essential terms of his employment had been substantially changed.
   * Subordinates would no longer report to him and he would no longer be referred to as a "manager" in the company.
   * His annual salary would be reduced by 20%, a significant reduction.
   * The loss of the car allowance was both a real loss and an embarrassing loss as it would be reasonably viewed by others as a demotion even though, as Agat submitted, Holm was still able to use a work truck for field work.
   * Holm was moved into a smaller office, and office size usually correlates with the importance of one's position.
   * Holm would be reporting to a person who previously reported to him, which would be embarrassing.
2. The appropriate notice period was 4 months.
   * Holm was 43 years old at the time of his dismissal. He was in a management position but was only employed with Agat for about a year.
   * At the same time, Holm had a reasonable expectation of long-term employment.
     + He had never received any negative feedback on his performance, he had moved his wife from BC after his January 2014 review, and he had been moved to a position of greater responsibility with a higher number of people reporting to him, all of which suggested that Holm had a long-term future with Agat.
3. Agat failed to prove that Holm failed to take reasonable steps to mitigate his losses.
   * Holm was out of work for 15 months, and he looked for work every business day for between two to four hours, submitting approximately 200 job applications.
   * While Agat argued that Holm should have accepted the lower position they offered him, it is reasonable that Holm would feel embarrassed in a position under the charge of his former subordinate, especially given that Holm knew that his co-workers found him annoying.
4. The actions of Agat amounted to a breach of the obligation of good faith and fair dealing and support an award of aggravated damages causing Holm mental distress.
   * The insulting comments in the meeting of September 25, together with the obvious demotion were calculated to cause Holm to terminate his employment so that Agat could escape providing pay in lieu of notice. When Holm would not accept the demotion, they cranked up the hardball tactics.
   * Post-termination, Holm sought counselling, filled at least two prescriptions for anti-anxiety medication, and began gambling and drinking in the afternoons, all of which were out of character for Holm.
     + *Note*: the level of evidence required to establish a connection between an employer's actions and an employee's mental distress is not high, as is shown here.
5. Considering the facts of the case, $20,000 in aggravated damages is appropriate.
   * Prior cases are fact-specific, and are of limited assistance.
6. Agat's actions do not support an award of punitive damages; it was not so malicious and outrageous that it is deserving of sanction.

Notes:

* If Holm had already been constructively dismissed prior to the safety incident on September 25, then his actions after his constructive dismissal were not relevant.
* There is wide variation between the aggravated damage award in *Lalonde* and the one in this case, despite the fact that they are not all that different; this shows the difficulty of estimating aggravated damages.
* In *Ocean Nutrition*, in commenting on the Ocean Nutrition's four-year "campaign" of "lies and dishonesty" to force Matthews out, the SCC clarified that the "manner of dismissal" is not limited to the moment of termination. It could encompass the entire four-year course of conduct.
  + Therefore, just because an employer is polite on the date of dismissal does not excuse any prior dishonesty or high-handed conduct.

#### *Ashraf v SNC Lavalin ATP Inc*, 2017 ABCA 95

Facts:

* The *Workers' Compensation Act* bars personal injury claims against employers covered by the WCB. If an employee suffers personal injury in the workplace, they have to make a claim to the WCB.
* The appellant sued his former employer for how he was treated at work, making claims for, *inter alia*, aggravated damages. The respondent sought to strike the appellant's claim for aggravated damages on the basis that that harm needed to be dealt with by WCB.

Issue and holding:

* Are aggravated damages covered by the WCB bar? **NO**

Rationale: (The Court)

* Damages that arise out of breach of contract, including aggravated and punitive damages for bad faith conduct in the manner of dismissal, are not barred by the *Workers' Compensation Act* (even though they notionally deal with personal injury, in a sense).
  + Only independent personal injury/tort claims are barred by the *Workers' Compensation Act*.

## Damages Against Employees

* Employees have an obligation to give reasonable notice under the employment contract as well.
  + Calculating this notice period is a very different exercise than calculating the amount of notice the employer would have to give the employee.
    - It is easier for an employer to replace an employee than it is for an employee to find a new job.
* Absent a contractual provision dealing with notice of termination, the required notice is determined in accordance with statute and the common law.
  + The usual notice requirement at common law is 2 weeks; a month is generally the most notice an employee would have to give where they are in a very specialized role which is hard to replace.
  + The *Employment Standards Code* sets out statutory minimum amount of notice an employee would have to give, though there are exceptions where notice does not have to be given.
    - An employee employed for under 90 days is not required by the *ESC* to give any notice.
    - An employee has to give written notice of at least 1 weeks if they've been employed for more than 90 days but less than 2 years.
    - An employee has to give written notice of at least 2 weeks if they've been employed for 2+ years.
* For an employer to recover damages for a failure to give adequate notice, they must prove that they suffered some kind of loss as a result.

#### *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54

Facts:

* RBC and Merrill Lynch are competitors in the investment brokerage business. They each had offices in Cranbrook, BC. In November 2000, almost all the investment advisors at RBC's Cranbrook office, in a move coordinated by the branch manager, Don Delamont, left RBC for Merrill Lynch. RBC had no advance notice of this. In the weeks leading up to the employees' departure, RBC's client records were secretly copied and transferred to Merrill Lynch. RBC sued Merrill Lynch and its former employees.

Procedural history:

* The trial judge awarded damages in the amount of $40,000 against the investment advisors for failure to give reasonable notice of termination, based on the profits that the employees would have contributed to RBC during the 2.5 week notice period. The Court of Appeal upheld this award.
* The trial judge awarded damages in the amount of $225,000 against the investment advisors for unfair competition because, during the notice period, they remained subject to their contractual duty to not compete with RBC (which they violated). The Court of Appeal found this unjustified, stating that once the investment advisors left RBC, they were no longer under a duty not to compete with it.
* The trial judge awarded punitive damages in the amount of $5,000 against the investment advisors. This was upheld by the Court of Appeal.

Issues and holding:

* Did the trial judge err in awarding damages for unfair competition? **YES**

Analysis:

* An employee has to give reasonable notice that they are quitting; this entitles the employer to damages in the amount that they lost as a result of the failure to give notice.
* An employee who has terminated employment is not prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice and for specific wrongs such as improper use of confidential information.

Rationale: (McLachlin CJ)

* To the extent the trial judge awarded damages on the basis that the employees continued to be a under a general duty not to compete, this award of damages was wrong in law.

Notes:

* In this case, damages for failure to give notice were based on the profits the employees would have contributed to over the notice period.
* It is an implied term of an employment agreement is that an employee will not compete with their employer. But, as this case suggests, the duty disappears as soon as the employment relationship concludes.
  + In *Matthews*, the SCC specified that any losses that flow from the failure to give reasonable notice are compensable on the employee side. Therefore, it is odd that the SCC does not similarly hold that any losses flowing out of the failure of an *employee* to give reasonable notice are recoverable by the employer (i.e., that the SCC does not award damages for breach of a term that the employees would have been subject to had they provided proper notice).

#### *Jones v Klassen*, 2006 ABQB 41

Facts:

* Edward Jones is a "storefront" investment company that has small branch offices (as opposed to office in downtown high-rises) and relies on its investment representatives having strong personal relationships with their clients. In 1998, Edward Jones hired Klassen. At this point, Klassen signed an Investment Representative Employment Agreement which said:

*4. In the event your employment with Edward Jones ends…you will surrender to Edward Jones all of the…property which shall be and remain the property of Edward Jones*

*…*

*10. You shall at no time…use any information acquired by you during the period of this agreement in a manner adverse to the interests of Edward Jones;*

*…*

*11. For a period of six months following termination of this Agreement, you will not…induce any [Edward Jones customer] to terminate his/her relationship with Edward Jones, if you contacted or dealt with such customer during the course of, or by reason of, your employment with Edward Jones or if the identity of such person was learned by you by reason of your employment with Edward Jones…*

* Edward Jones paid for Klassen's training so that he could become registered to sell securities. As such, in 1999, Klassen became an investment representative in St. Albert. He started with no clients and had to develop a client base on his own. Edward Jones trained Klassen in specific techniques to get new clients. In the fall of 2002, Klassen grew dissatisfied with the restrictions that Edward Jones was placing on his work. He thus decided to leave Edward Jones and move to Cartier Partners, a "storefront" brokerage firm that was a direct competitor of Edward Jones. When he left, Klassen took a client list, contact information relating to those clients, and a list of potential clients. While Klassen later purported to return these documents through counsel, it was later revealed that he retained photocopies. On October 15, 2002, he also mailed his former Edward Jones clients a letter advising them of his move and encouraging them to call him if they have questions. During the six months following Klassen's departure, 98 Edward Jones client investment accounts, totalling over $3.3 million in assets, transferred out of Edward Jones to Klassen at his new firm.

Issues and holding:

1. What were Klassen's duties to Edward Jones on the issue of clients and client lists during the course of his employment and at his departure? *(See below)*
2. If Klassen had a contractual duty not to solicit Edward Jones' clients, did he breach that duty? **YES**
3. If Klassen had a common law duty to Edward Jones, did he breach that duty? **YES**
4. If Klassen had a fiduciary duty to Edward Jones, did he breach that duty? **YES**
5. If the court finds any duties and consequential breaches, did Edward Jones suffer damages? **YES**
6. If yes, what is the appropriate quantum of damages? **$13,464**
7. If Klassen is found to have breached his duties to Edward Jones, is this a case where punitive damages should be awarded, and if so, how much? **YES – $5,000**

Analysis:

* An employee may leave his employment and compete against his former employer, taking with him knowledge gained in his former employment, but he may not take or use against his employer any of the employer's trade secrets, confidential information, or customer lists.
* If a former employee was in senior management or a key employee, then they, being in a position of trust, owe a fiduciary duty to their employer, which is an enlarged duty which endures after termination.
  + *Those with fiduciary duties are not entitled to allow their own self-interest to collide and conflict with their fiduciary responsibilities to their employer*.
    - As such, employees with a fiduciary duty to their employer have a duty not to solicit their employer's clients upon departure.
    - While mere employees are not (in the absence of contract) prohibited from soliciting their former employer's clients, the same is not true of employees who are fiduciaries.
  + *Frame v Smith* identified three general characteristics of a fiduciary relationship:
    1. The fiduciary has scope for the exercise of some discretion or power.
    2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
    3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
* Damages for breach of contract aim to put the plaintiff in the position he or she would have been in had the wrong not been done, which requires an assessment of what the plaintiff's position would have been if the defendant had fulfilled its side of the bargain.
  + That assessment is an inherently speculative process, and the court is free to draw inferences from the evidence as to what would likely have happened 'but for' the breach.
  + Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.
* Punitive damages may be ordered against a defendant where there is misconduct that represents a marked departure from ordinary standards of decent behaviour.
  + Generally, punitive damages are awarded only where misconduct would otherwise go unpunished or inadequately deterred and denounced, either by compensatory damages or by other consequences.
  + A court must impose the lowest award of punitive damages that would achieve their purpose.

Rationale: (Acton J)

1. Klassen had contractual, common law, and fiduciary duties to Edward Jones.
   1. Klassen had a contractual duty to:
      1. Surrender the client list and contact sheet information when he resigned,
      2. Not use any information he acquired while employed with Edward Jones in a manner adverse to the company's interests, and
         * "Information" includes customer lists, contact sheets, and prospect contact sheets, but excludes skills Klassen acquired as a result of his employment with Edward Jones.
      3. Not solicit Edward Jones customers for a period of six months following termination of the Agreement.
   2. As an employee, Klassen had a common law duty to Edward Jones to not take or use against Edward Jones any of its trade secrets, confidential information, or customer lists.
   3. Klassen also owed a fiduciary duty to Edward Jones not to allow their own self-interest to collide and conflict with their fiduciary responsibilities to their employer.
      * As the "face" of Edward Jones in St. Albert, Klassen had the power to make recommendations for purchases, sales, and all the day-to-day decisions relating to Edward Jones' clients in his territory.
      * Edward Jones was vulnerable to Klassen's power when one considers the contract Edward Jones had him sign before the company educated him and hired him as one of its investment advisors.
2. Klassen violated paragraphs 4, 10, and 11 of the Investment Representative Employment Agreement.
   1. He violated paragraph 4 by taking the client list and contact sheet information.
   2. He violated paragraph 10 by using the client lists and contact sheet information in a manner that is clearly "adverse to the interests of Edward Jones."
   3. He violated paragraph 11 with the letter of October 15, which was a clear invitation to the letter's recipients to join him at his new firm.
3. In taking and using the information as he did, Klassen breached his duty not to compete unfairly, and not to make use of confidential information against his former employer.
4. By directly soliciting his former clients, Klassen breached his fiduciary duty to Edward Jones.
5. Within the six months of Klassen's departure, 98 Edward Jones clients totalling over $3.3 million in assets were transferred to Klassen at Cartier Partners, at least some of which is likely attributable to Klassen's breaches of duty.
6. The damages with respect to Edward Jones' existing clients at the time of Klassen's departure, given the commission payout rate tendered into evidence, is $13,464.
   1. The account transfers account for about 17% of commissions Edward Jones would have earned in the six months following Klassen's departure had Klassen not breached his duties.
      1. The $3.3 million that followed Klassen to Cartier Partners represents 37% of the total asset base held by Edward Jones in St. Albert. 10% should be deducted to account for the percentage of monies that Edward Jones would have lost in any event upon Klassen's departure. 10% should be deducted to account for the family and friend who would have left with Klassen in any event.
   2. Only damages for the six month period following Klassen's departure are appropriate.'
      1. Edward Jones was able to retain the majority of the clients and actually increase its client base in St. Albert by the end of the six months after the initial six-month non-solicitation period.
   3. Edward Jones has not provided adequate evidence to justify additional damages to compensate it for additional business that Klassen generated out of its former clients.
   4. Edward Jones gained $7,350 in transfer fees for the 98 accounts transferred to Cartier Partners.
7. Not merely taking the client documentation, but photocopying and retaining it while purporting to return it through counsel, is behaviour that must be condemned—accordingly $5,000 in punitive damages is appropriate.

Notes:

* $5,000 in punitive damages were awarded in this case; this is the same as the amount awarded in *Merrill Lynch*.

# Mitigation

* As with all breach of contract damages, damages for wrongful dismissal are subject to the duty to mitigate.
  + Wronged parties have a legal obligation to try to reduce the harm they've suffered.
  + Once dismissed employees find a new source of income during the notice period (subject to some exceptions), damages must be reduced accordingly.
  + Damages are meant to be compensatory; allowing the employee to receive earnings from two jobs at once would put the employee in a *better* position than they would've found themselves in had the contract not been breached, which damages for wrongful dismissal are not meant to do.
* The big questions in this area of the law are:
  1. Does a dismissed employee have to continue working with their employer who wrongfully dismissed them to mitigate their damages?
  2. What else does the employee have to do to meet their duty to mitigate? Who bears the onus?
     + The employer bears the burden of proving that (1) the employee failed to make reasonable efforts to mitigate their losses and (2) there is a causal connection between the lack of effort and the lack of mitigation.
       - The employer cannot simply claim that the employee could have earned replacement income if they just worked harder.
  3. Are all sources of income during the notice period considered "mitigation earnings"?
  4. Are there any exceptions to the duty to mitigate?

#### *Evans v Teamsters Local Union No. 31*, 2008 SCC 20

Facts:

* Evans was employed for 23 years in the respondent union's Whitehorse office. He was dismissed following the election of a new union executive, which he had opposed during the union's election process. The union terminated Evans’ employment and then asked to open negotiations. When the parties could not come to a deal, the union insisted that Evans return to work for 24 months of working notice. Evans indicated that he would return to work if they rescinded his termination and renegotiated the terms of his wife's employment, which the union refused. The union took the position that he had failed to mitigate his damages by refusing to return to work for the notice period.

Procedural history:

* The trial judge found that Evans had been wrongfully dismissed and was entitled to 22 months' notice. He also found that the union had not shown that Evans had failed to mitigate his damages.
* The Court of Appeal set aside the damage award, holding that Evans had not acted reasonably with respect to the job offer made to him by the union, and that this constituted a failure to mitigate his damages.

Issue and holding:

* Was it necessary for Evans to mitigate his damages by returning to work for the union? **YES**

Analysis:

* Where notice is not given, the employer is required to pay damages in lieu of notice, subject to the employee making reasonable efforts to mitigate the damages by seeking a similar alternate source of income.
  + The employer bears the onus of demonstrating both that an employee has failed to mitigate.
  + For the purposes of mitigation, there is no difference between constructive and wrongful dismissal.
  + Damages awarded because of bad faith conduct in the manner of dismissal are exempt from the duty to mitigate, as they (unlike pay in lieu of notice) are not arranged to provide an opportunity for an employee to seek new employment.
* In some circumstances, it will be necessary for a dismissed employee to mitigate their damages by returning to work for the same employer.
  + Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and one who gives notice of termination and offers working notice.
    - i.e., there is little practical difference between, say, giving 12 months of working notice and terminating the contract immediately but offering the employee a new job for 12 months.
    - In either case, the employee has an opportunity to continue working for the employer while they arrange other employment, and it is nonsensical to say that when this ongoing relationship is termed "working notice" it is acceptable but when it is termed "mitigation" it is not.
  + Where an employer offers a dismissed employee a chance to mitigate damages by returning to work for them, *the employee will be required to accept such an opportunity where a reasonable person in the circumstances would do so* (an objective test).
    - This inquiry is informed by such factors as the work atmosphere, stigma and loss of dignity, and the nature and conditions of employment.
    - A reasonable person would be expected to return where the working conditions and salary offered are substantially the same and the personal relationships involved are not acrimonious.
    - An employee should not be obliged to work in an atmosphere of hostility, embarrassment, or humiliation.
      * As a natural consequence of this, individuals whose dismissals were motivated by legitimate business needs (as opposed to, say, concerns about performance) will more often be required to mitigate by returning to their same employer.
      * Litigation between the parties is not an absolute barrier to an obligation to return to work.
  + It may be reasonable for an employee to impose conditions on the return to work, and refuse absent those conditions, where they are intended to militate against the humiliation or hostility associated with returning to work for the employer.

Rationale: (Bastarache J)

* The evidence makes it clear that the relationship between Evans and the union was not seriously damaged and, given that the terms of employment were the same, it was not objectively unreasonable for him to return to work to mitigate his damages.
  + There was no bad faith in the termination and no acrimony between Evans and anybody at the union. There was no basis for any reasonable belief that Evans would no longer have the respect of union leaders and would be unable to perform effectively.
    - Importantly, Evans was prepared to return to work if his termination was rescinded and his wife's employment contract renegotiated.
* The requirement that Evan's wife be given a new employment contract was unreasonable, as it had no relationship to the conditions of any continued employment.
* While Evans did start an action after negotiations fell apart, starting an action does not by itself relieve the employee from the duty to mitigate his or her damages.

#### *Magnan v Brandt Tractor Ltd*, 2008 ABCA 345

Facts:

* Magnan was employed by Brandt from 1966 to 2004. In his last 11 years of employment, Magnan was a Customer Support Advisor ("CSA"). In July 2004, Magnan discussed retirement with Brandt's president. He was advised that at the end of 2004, he could continue working until year's end before he would be forced to retire. Thus, on November 25, 2004, Brandt hired another CSA. Magnan trained his replacement and said goodbye to his customers, intending to respect Brandt's mandatory retirement policy. Then, on December 15, 2004, Magnan's lawyer sent a letter to Brandt seeking damages for wrongful dismissal. At this point, Brandt found out that it could not force Magnan to retire under Alberta law. On December 23, 2004, Brandt told Magnan that he could return to work in January 2005, but Magnan did not. Magnan then commenced a wrongful dismissal action.

Procedural history:

* The trial judge held that Magnan was constructively dismissed on November 26, 2004. He found that Magnan intended to retire on March 31, 2005 anyway, so he awarded Magnan damages equal to three months' wages and benefits. He did not address aggravated damages, but accepted that Brandt's termination of Magnan was based on a mistaken belief. On the issue of mitigation, the trial judge held that it would not be reasonable to expect Magnan to return to work for Brandt because of how annoyed Brandt was with him.

Issues and holding:

1. Did the trial judge err in finding that Magnan intended to retire on March 31, 2005? **YES**
2. Did the trial judge err in failing to award Magnan aggravated damages for manner of dismissal? **NO**
3. Did the trial judge err in finding that Magnan did not have to mitigate his damages by returning to work for Brandt? **YES**

Rationale: (The Court)

1. The issue of when Magnan intended to retire was never plead nor argued, and was not a live issue at trial.
   * It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. When extraneous issues are ruled on, this denies the parties the opportunity to lead evidence on these issues.
2. While Brandt's ignorance of the law is not to be condoned, such ignorance, in the absence of intent, malice, or blatant disregard for Magnan, does not entitle Magnan to aggravated damages.
3. There is no palpable or overriding error in the trial judge's determination that, in the circumstances of Magnan's constructive dismissal, it was not reasonable to expect him to accept Brandt's offer to allow him to return to work.

Notes:

* Magnan was awarded damages in the amount of seven months' wages and benefits, calculated as: 18 months pursuant to the trial judgment LESS 5 months agreed as the working notice given to Magnan LESS 3 months for vacation taken by Magnan as conceded by his counsel LESS 3 months awarded and paid under the trial judgement.

#### *Frederickson v Newtech Dental Laboratory Inc*, 2015 BCCA 357

Facts:

* Frederickson was a dental hygienist at Newtech, a small business that specialized in making crowns. In April 2011, she took a medical leave of absence. She returned to work on July 20, but Ferbey, the owner of Newtech, laid her off without notice due to insufficient work. On September 23, 2011, Newtech directed Frederickson to return to work on September 26. Frederickson commenced an action for damages for wrongful dismissal on October 18. On October 19, 2011, October 25, 2011, November 4, 2011, and April 19, 2021, Ferbey offered to re-employ Frederickson at the same position, salary, and benefits, and to pay her lost wages from July 20 until the date she was invited to return to work, September 26. Frederickson declined all offers, saying that Ferbey's behaviour broke the employment relationship. Frederickson applied for nearly 100 jobs before she got a diploma in bookkeeping and found a position as a bookkeeper in August 2012.

Procedural history:

* The trial judge concluded that there were no barriers to Frederickson accepting the offers of re-employment and therefore found that she failed to mitigate her damages. It thus only awarded damages for the period from July 20 to September 23, the date she was first offered re-employment.

Issue and holding:

* Did the trial judge err in finding that Frederickson failed to mitigate her damages by declining the employer's offer of re-employment? **YES**

Analysis:

* An employee wrongfully terminated without cause is entitled to reasonable notice of dismissal, or, as a remedy, pay in lieu of reasonable notice.
* Where reasonable notice is not given and the employee suffers damages, the employee cannot recover the portion of damages that could have been mitigated.
  + While the burden is on the employee to establish entitlement to damages, the burden is on the employer to prove a failure to mitigate if such is alleged.
* The employee is only required to take the steps in mitigation that a reasonable person would take.
  + An employee will fail to mitigate their losses when they fail to make reasonable efforts to find adequate alternative employment *that was there to be found*.
  + An employee will also fail to mitigate where they fail to accept an offer of re-employment by their former employer, provided that a reasonable person would accept such an opportunity.
    - A reasonable person would be expected to accept an offer of re-employment where the salary offered is the same, the working conditions are not substantially different or the work demeaning, and the personal relationships involved are not acrimonious.
      * An employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation.
      * Whether an employee has commenced litigation is relevant to determining whether it would be reasonable for them to return to work.

Rationale: (Saunders J)

* The trial judge failed to accord significance to the incomplete nature of the offers of re-employment.
  + The September 26 offer did not deal with Frederickson's lost income from July 20, and as such, they did not purport to pay her the compensation she was entitled to under the law.
  + By the time some back pay was offered in October, it was only to September 26, leaving her in the position of accepting less than she was entitled were she to resume employment.
    - If she accepted the offer of re-employment in October, she would have lost about a months' income, or about 8% of her annual salary, which is no small amount.
  + If Frederickson returned to Newtech, she would still have a claim to the back pay she was not extended.
    - It is difficult to expect that Frederickson and Ferbey should be expected to work closely and professionally together in such a small setting while in a legal dispute.
* The trial judge failed to reflect the intangible element of mutual trust, commensurate with the nature of the employment, that flows like a current in the employment relationship.
  + Ms. Fredrickson's trust in her employer is eroded by at least two aspects of Mr. Ferbey’s actions:
    1. His recording on two occasions of private conversations between them, and the subsequent use made of those conversations.
    2. Ferbey’s engagement in conversation with another employee concerning Fredrickson in which he agreed with that employee that Fredrickson would be too embarrassed to return to work.
       - By discussing Fredrickson with another employee, in the situation of a small workplace, he breached the confidence one would expect of the "boss."
  + In considering these actions, it was not unreasonable for Fredrickson to refuse to return to Newtech.

Notes:

* Frederickson was not required to return to work because the offer to do so was not a "make whole" offer and because the mutual trust was gone.

#### *Crook v Duxbury*, 2020 SKCA 43

Facts:

* Duxbury is a CPA who used to work for K & S Windsor Salt. Crook approached her about coming to work for him. Duxbury and Crook signed a 2-year fixed-term employment contract from March 1, 2016 to February 28, 2018 that was subject to automatic renewal unless terminated. The agreement did not include any provision regarding early termination. Duxbury began her employment with Crook in March 2016 but was terminated in January 2017. Within a few months of her termination, Duxbury found employment in Regina.

Procedural history:

* The chambers judge found that Crook dismissed Duxbury without cause. The judge held that damages under a fixed-term employment contract are never subject to mitigation because it would be unfair to permit an employer to opt for certainty by specifying a fixed amount of damages and then allow the employer to later obtain a lower amount at the expense of the employee by raising an issue of mitigation that was not mentioned in the employment agreement. They thus held that Duxbury was entitled to payment from the date of her dismissal to the end of her contract (February 28, 2018). The judge also awarded Duxbury damages to offset the costs she incurred moving to Regina.

Issues and holding:

* Did the judge err in failing to take mitigation into account when calculating Duxbury's damages? **YES**

Analysis:

* When an employment contract stipulates an amount to be paid on termination and does not mention a duty to mitigate, the employer's obligation will not be affected by the employee's mitigation efforts.
  + *Note*: where the employer terminates the employment, and pays an amount specified in the employment contract, they are not in breach, so there are no damages to mitigate.
* There are different approaches to mitigation when an employer terminates a fixed-term employment contract before expiry.
  + The Ontario approach treats fixed-term contracts similar to those with a specific termination provision; it sees a fixed-term contract as contracting out of the reasonable notice paradigm such that early termination creates an obligation to pay remaining compensation for the balance of the term.
    - Therefore, under this approach, there is no duty to mitigate when a fixed-term contract is terminated early absent a contractual provision requiring mitigation.
  + The Alberta, BC, and Saskatchewan approach specifies that *all* employment contracts terminated early, whether fixed-term or indefinite, give rise to a duty to mitigate.
    - However, as stated, there will not be a duty to mitigate where the parties expressly agreed that early termination will give rise to liquidated damages.

Rationale: (Caldwell JA)

* There was no early termination agreement in Duxbury's employment contract; as such, her claim to general damages is properly limited to the damages that flow from the breach of the employment agreement and is quantified by determining her *actual* loss.

#### *Brake v PJ-M2R Restaurant Inc*, 2017 ONCA 402

Facts:

* In 1999, Esther Brake started working for PJ-M2R Restaurant Inc., a McDonald's franchise holding company owned by Perry and Jo-Ann McKenna. In 2004, she was promoted to the position of Restaurant Manager at one McDonalds location. In November 2011, after years of excellent performance reviews, she received her first negative one. She was transferred to a McDonalds location in a Walmart, which was already performing poorly, to improve her performance. In April 2012, Brake's performance was rated at "needs improvement," so she was placed into a progressive discipline program ("GAP"). The program set arbitrary and unfair goals for Brake, which she failed to meet. On August 2, 2012, Mr. McKenna thus told her that she had to accept a demotion to First Assistant (which offered inferior benefits) or she would be taken to resign. Brake refused. For her, accepting this position would mean reporting to younger and less experienced people whom she trained and supervised, which would be humiliating. Brake sued for wrongful dismissal, and PJ-M2R held that she failed to meet requisite standards, so it had just cause to dismiss her.
* Brake had long worked at Sobey's as a cashier, and increased her hours there after her dismissal. She applied for numerous positions a mostly retail stores, but was only able to find work in a cashier position at Home Depot that was substantially inferior to the managerial position she held with PJ-M2R.

Procedural history:

* The trial judge concluded that Brake's difficulties did not amount to serious incompetence, made a finding of constructive dismissal, and set the notice period at 20 months. He did not find any failure to mitigate, arguing (1) that it was unreasonable to expect Brake to accept the First Assistant position and (2) that she made reasonable efforts to obtain replacement income. He declined to deduct Brake's post-termination earnings from her damage award.
  + PJ-M2R appealed, arguing (1) that Brake's refusal to accept the position of First Assistant and (2) that she did not make reasonable efforts to find replacement income. It also argued that the trial judge erred in failing to deduct Brake's post-termination income (including wages and EI benefits) during the notice period from her damages.

Issues and holding:

1. Did the trial judge err by failing to find that Brake's decision to not accept the offer of continued employment as a First Assistant amounted to a failure to mitigate her damages? **NO**
2. Did the trial judge err in finding that Brake did not make reasonable efforts to mitigate her losses? **NO**
3. Did the trial judge err in failing to deduct Brake's EI income from her damage award? **NO**
4. Did the trial judge err in failing to deduct Brake's employment income earned *during the minimum statutory notice period*? **NO**
5. Did the trial judge err in failing to deduct Brake's employment income earned *during the balance of her notice period*? **NO**

Analysis:

* An employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period.
  + The employer bears the burden of proving that some or all of the employee's losses were avoidable or avoided.
* A wrongfully dismissed employee has a duty to take reasonable steps to mitigate their damages.
  + If a wrongfully dismissed employee secures replacement income, her earnings during the notice period are deducted from her damages as mitigation; however, this is subject to some caveats:
    - EI benefits, which wrongfully dismissed employees are entitled to apply for, are not to be deducted from damages awarded for wrongful dismissal.
      * It would be inconsistent to have EI benefits accrue for the benefit of the employer who, by its breach of contract, compelled the employee to resort to his EI benefits.
      * *Note*: plus, when an employee receives damages for wrongful dismissal, the EI Commission will claw back EI payments.
    - Any employment income earned *during the minimum notice period prescribed by legislation* is not deductible as mitigation income.
      * Statutory entitlements are minimum entitlements, and are not linked to any actual loss suffered by the employee, but are payable in any event.
      * Subjecting minimum entitlements to reduction by reason of sums received from other employers removes their character as minimum.
    - Income earned by a plaintiff after a breach of contract is not deductible from damages if the performance in mitigation and that provided under the original contract are not mutually exclusive (i.e., if the mitigation is not essentially a substitute for the original contract).
      * If an employee has committed herself to employment with one employer, but her contract permits for simultaneous employment with another employer, and the first employer terminates her without notice, any income from the second employer that she could have earned while continuing with the first is not deductible from her damages.
      * i.e., income the employee could have earned while also working for the terminating employer is *not* mitigation earnings.
  + If a dismissed employee turns down or fails to make reasonable efforts to secure a reasonably comparable position, the amount they could have earned at such a position (if any) is deducted from their damages based on a failure to mitigate.
    - The question is whether the employee has stood idly or unreasonably by, or has tried without success to obtain other employment.
    - A dismissed employee is entitled to consider their long-term interests, so they will not fail to mitigate merely because they chooses to take some career risks that might not minimize the compensation that their former employer will owe them.
      * i.e., they are not required to accept any job that becomes available; they are entitled to hold out for something that makes sense for them.
    - Where a former employer offers the employee a chance to mitigate damages by accepting a different position with them, the central issue is whether a reasonable person in the employee’s position would have accepted the offer.
      * The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation.
      * The non-tangible elements of the situation, including work atmosphere, stigma and loss of dignity, as well as the tangible elements, such as the nature and conditions of employment, must be considered in determining whether the objective standard has been met.

Rationale: (Gillese JA)

1. PJ-M2R has not demonstrated a palpable and overriding error with the judge's reasoning that it would be unreasonable to have expected Brake to accept the demotion and continue working for PJ-M2R.
   * He noted that the people at PJ-M2R treated her poorly, insulting her personality and abilities.
   * He noted that it was perfectly understandable that Brake would not want to work under a young man who she had trained.
2. PJ-M2R has not demonstrated a palpable and overriding error with the judge's reasoning that Brake made reasonable efforts to mitigate her losses.
   * The fact that Brake did not apply for other restaurant management positions does not mean that she did not make reasonable efforts to mitigate.
3. Brake's EI benefits were not received in mitigation of loss and are not deductible from the damages award.
4. The income Brake earned during her statutory entitlement period is not subject to deduction as mitigation income.
5. Brake had worked a second job with Sobey’s while working full-time for PJ-M2R; her work for Sobey’s and her work for PJ-M2R were not mutually exclusive. Had Brake stayed in PJ-M2R's employ, she could have continued to supplement her income through part-time work at Sobey's.
   * Whether Brake’s Sobey’s income exceeded an amount that could reasonably be considered as “supplementary” was not argued, but it appears that the amounts received from Sobey’s do not rise to such a level that her work at Sobey’s can be seen as a substitute for her work at PJ-M2R.

Concurring: (Feldman JA)

* If a wrongfully dismissed employee can only find a position that is not comparable in either salary or responsibility, she is entitled to turn it down, and if she does, the amount she would have earned is not deducted from her damages.
  + It follows that where a wrongfully dismissed employee is effectively forced to accept a much inferior position because no comparable position is available, the amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay.
* As such, the trial judge was entitled to find that the cashier position Brake was able to secure after her departure from PJ-M2R were so substantially inferior to the managerial position she held with PJ-M2R that the former does not diminish the loss of the latter (because Brake would not have been required to take that job in order to mitigate her damages).

#### *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10

Facts:

* In December 2005, Potter was nominated to be the Executive Director of Legal Aid in NB for a 7-year term. Legal Aid constructively dismissed him in 2010. In its discussion of damages, the NBQB held that Potter would not be able to collect both his salary and pension benefits, and that any amounts received or to be received under his pension would be deducted from the award of damages. This was because, by wrongfully dismissing the plaintiff, the defendant obliged him to claim those benefits. Hence, a denial to deduct pension income from the damage award would leave Potter in a better position than if the breach had not occurred.

Issue and holding:

* Did the trial judge err in holding that any amounts received or to be received under Potter's pension should be deducted from the award of damages? **YES**

Analysis:

* A benefit would be deducted from an award of damages where it is an indemnity for the exact kind of loss that occurred.
* However, as an exception, benefits should not be deducted from damages where the benefit:
  1. Was not an indemnity for the exact type of loss suffered, or
     + Since pensions are earnings saved during employment for use in retirement, they are not an indemnity against job loss; their use is akin to saving money in a bank account.
  2. Is an indemnity for the exact type of loss suffered *but* the employee contributed to payment (the "private insurance exception").
     + When someone purchases insurance to protect them from job loss, they are able to benefit from that insurance *and* from damages because they paid for the double benefit.

Rationale: (Wagner J)

* Potter’s pension benefits should not be deducted from the damages awarded to him as a consequence of his employer’s breach.
  + The benefits were not intended to compensate Mr. Potter in the event of his being wrongfully dismissed; the pension plan was a contributory plan.

#### Practice Tips

* Employees should keep a diary of their job search, networking efforts, why they decided not to apply for or accept a job, why they made a decision such as setting up their own business or retraining.
  + They may also get an expert opinion from a recruiter as to the availability of similar employment and the overall employability of the employee.
* Employers should consider getting an expert opinion from a recruiter as to the availability of similar employment and the overall employability of the employee.
  + They may also consider forwarding job postings that come to your attention to the employee and keep copies for trial.

# Post-Termination Obligations

* + Employers have an interest in ensuring that the viability of their business is protected, even from those whom they have terminated.
  + Employment law provides employers with the tools to safeguard their business, including:
    - Common law restrictions imposed on all employees.
    - Written provisions in the employment contract (i.e., "restrictive covenants").
    - Common law restrictions imposed upon "key" or "fiduciary" employees.

## Fiduciary Obligations

#### *Jetco Heavy Duty Lighting v Fonteyne*, 2018 ABQB 345

Facts:

* In 1990, Sadhu Mohamed started Jetco, which imports and distributes heavy duty vehicle and industrial lighting. In 2000, Fonteyne started working for Jetco as VP of sales and marketing under a verbal employment contract. Essentially, the totality of the sales function in Jetco was left to him. In October 2008, Fonteyne found new work. To get him to stay, Sadhu and Fonteyne made an informal agreement increasing Fonteyne's guaranteed pay and vacation. In December 2009, Fonteyne resigned to take a job as agent for J.W. Speaker Corporation ("JWS") through the vehicle of Copper Creek Marketing Inc. Jetco sued Fonteyne for breach of his fiduciary duties. It also sued his wife (Ms. Fonteyne), JWS, and Cooper Creek for assisting or participating in the breach. It sought disgorgement of profits and punitive damages.

Issues and holding:

1. Was Fonteyne a fiduciary employee of Jetco? **NO**
2. If yes, was the duty breached? **NO**
3. If yes, did any or all of the defendants participate or assist in the breach? **YES**
4. What is the appropriate quantum of damages? *(Reasons omitted)*

Analysis:

* Fiduciary relationships may arise in the employment context and constitute an employee as a fiduciary.
  + To determine fiduciary employee status, the court must look at the content of the employee's role and the nature of that employee’s relationship to the employer.
  + From *Alberta v Elder Advocates of Alberta Society*, the test for determining whether a fiduciary relationship exists is:
    1. A fiduciary has scope for the exercise of discretion or power.
    2. The fiduciary can *unilaterally* exercise that discretion or power so as to affect the beneficiary’s legal or practical interests.
    3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
       - The vulnerability must not arise merely because the employee happens to be a good or valuable employee; the required vulnerability must be based on the employee's ability to exercise discretion or authority over the employer's operations.
    4. The fiduciary has given an undertaking to act in the best interests of the beneficiary.
       - May be implied simply from the employee's participation in his or her employment role, so it is not a crucial step in the test.
  + With respect to sales employees, it is also important not to make a fiduciary finding based entirely on relationships with clients.
    - The focus of the assessment is whether the employee has sufficient control and authority to make business decisions on the employer's behalf; client relationships are only one part of that context.
* The following principles on the nature, scope, and duration of fiduciary duties are drawn from the case law:
  + Competition with the employer after the employment relationship does not constitute a breach of the fiduciary duty unless the fiduciary *actively* solicits the business of specific customers of the employer.
    - The former employer must provide some evidence that the departing employee solicited former clients; a bald assertion is not enough.
    - "Solicitation" refers to actively engaging in some form of communication intended to encourage the former client to make a business change.
      * It is permissible to advertise a new business to the general public.
      * It is permissible for a fiduciary employee to accept business from former clients, so long as that business is not arranged by direct solicitation.
      * It is permissible for a fiduciary employee to make an informal announcement of his impending resignation.
      * A fiduciary employee is *not* permitted to contact clients to invite them to transfer to his new place of employment.
        + e.g., writing a letter to former clients "inviting them to transfer their account to him at [his new employer]" (*Anderson, Smyth & Kelly*).
        + e.g., sending letters to former clients and then following up on those letters “by telling customers where he could be found – at [his new employer]” (*Unified Freight*).
        + e.g., sending letters to former clients opening with “I am pleased to announce that I have left KJA” and including “If I can be of any assistance, please call” (*KJA*).
      * That said, some professionals, like lawyers and dentists, are actually under a duty to inform clients of an impending departure and of the client's right to choose the departing professional (*Evans*).
    - The duty not to solicit the business of specific customers of the employer exists beyond the employee's termination of employment, but does not last indefinitely.
      * The appropriate duration must be determined on a case-by-case basis.
        + The duration is generally the time a former employer requires to contact existing or potential customers with whom the employee had developed a relationship and to undertake other ameliorative measures to counter the departure of the employee.

*Note*: the duration is generally a few months to a year.

* + - * + Typically, the higher the level of trust and confidence reposed in the employee, with a corresponding vulnerability of the employer, the longer the period will be.
        + The duration may be shorter if the employer is one of many companies offering similar services and if the potential customer base is common knowledge.
      * Once the duration lapses, the departing fiduciary employee is in the same position as any other former employee turned competitor – free to contact the clients of his former employer for the purpose of inducing them to follow him.
  + After the employment relationship has terminated, the employee (fiduciary or not) must not improperly use or disclose confidential information learned in the course of employment.
    - An employee is free to use any skill and general knowledge which he acquires during the course of his employment, but cannot use information which is *special or peculiar to his ex-employer*.
      * To determine whether information is confidential enough to attract this protection, the following factors are relevant:
        1. The extent to which the information is known outside the business.
        2. The extent to which it is known by employees and others involved in the business.
        3. Measures taken to guard the secrecy of the information.
        4. The value of the information to the holder of the secret and to its competitors.
        5. The effort or money expended in developing the information.
        6. The ease or difficulty with which the information can be properly acquired or duplicated by others.
        7. Whether the holder and taker of the secret treat the information as secret.
      * The threshold for confidential information is high; it does not extend to all information that a former employer has by virtue of their employment.
      * Information that is public knowledge or is easily obtained through research from public sources or is generally ascertainable would not be considered confidential.
    - The misuse of confidential information is determined by the "springboard" principle: a fiduciary employee is not allowed to use confidential information as a springboard for activities detrimental to the person who made the confidential communication.
      * Employees breach their fiduciary obligations when they take a confidential customer list and use trade secrets of the former employer for use in a competing enterprise.
  + A fiduciary cannot take from their employer a maturing business opportunity that the employer is actively pursuing.
    - This duty persists even after the employee has departed where the departure was prompted by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity.
    - The determination of misappropriation depends on such factors as:
      * The position held by the employee and the amount of knowledge they possessed.
      * The nature of the opportunity, including its ripeness and specificness.
      * The way the employee received the opportunity after changing to his new employer.
      * The time where the alleged breach occurs after termination of the fiduciary's employment.
    - Assessing whether a business opportunity was taken requires consideration of the employee’s involvement while working for the former employer and the way in which the employee received the work after changing to his new employer.
* Equity binds the conscience of both the fiduciary and that of a third party who knowingly assists or participates in the breach.
  + Thus, a key employee cannot avoid the prohibition against soliciting by having someone else do the solicitation for him (*Evans*).
  + A third party must have actual knowledge of the existence of the duty and that what is being done is in breach of that duty; recklessness or wilful blindness suffice to meet the requirement of knowledge.
* Compensation for breach of fiduciary duty and misuse of confidential information has a restitutionary objective.
  + There must be a connection between the amounts claimed and the breach of fiduciary duty; i.e., the profit of the defendants or the loss of the plaintiff must be tied to their wrongful acts.
  + While the employer's loss or employee's gain must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach.
  + There are two approaches to compensation, which the plaintiff can choose between:
    1. Restoring the plaintiff to the position it would have been in if the breached had not occurred.
       - This approach focuses on the employer's loss.
    2. Disgorging the benefits wrongfully gained by the defendant over an appropriate accounting period.
       - To calculate disgorgement, expenses incurred by the wrong-doer to earn the gain should be deducted as the wronged former employer is only entitled to the others’ profits.
       - The “accounting period” recognizes that, at some point, intervention of other events and actors as well as the behaviour of the claimant dissipates the effect of the breach, and thus a “cut-off” is necessary.
         * The determination of the period is a fact-specific inquiry, with relevant factors being:

The level of responsibility of the fiduciaries and those recruited to leave.

The period of service.

The nature and scope of preplanning.

The degree or lack of candour.

The timing in terms of relative vulnerability of the operation.

The steps required to react, particularly given the business significance of personal relationships with clients.

* + - * + Often, the duration of the fiduciary duty is also used as the accounting period.

Rationale: (Mah J)

1. Fonteyne was not a key or fiduciary employee of Jetco that could not unilaterally exercise power or discretion so as to affect Jetco's legal or practical interests so as to make Jetco peculiarly vulnerable.
   * Fonteyne was generally responsible for calling on customers, maintaining and developing sales, taking orders, facilitating delivery, and making recommendations to Sadru. In doing so, the evidence shows that he was and valuable and competent salesperson.
     + While these facts point to Fonteyne as being crucially important to the organization, it does not immediately translate into him being a beneficiary.
   * That said, Sadru maintained control over all aspects of Jetco’s business and made all the important decisions while Fonteyne was there.
     + There was no suggestion that Fonteyne was responsible for the strategic direction of the company; he was just executing the strategies and relationships put in place.
     + All contracts and price adjustments required Sadru's approval; Fonteyne had no signing authority other than when it came to placing orders.
     + While Fonteyne did form the personal relationships formed while at Jetco, they did not imbue him with a particular power or influence that rendered Jetco vulnerable.
       - Indeed, no witness at the trial testified that it was because of a personal relationship with Fonteyne that the witness decided to do business with JWS.
   * While Sadru stated that his relationship with Fonteyne was based on trust, this falls short of creating a fiduciary relationship.
     + Most employers trust their employees to do their work honestly and competently.
   * Fonteyne's title as "vice president of sales and marketing" is not determinative; the law requires that we examine the actual substance of Fonteyne's role, not its name.
2. If Fonteyne was a fiduciary for Jetco, the facts show no breach of his fiduciary duties.
   * The evidence shows that Fonteyne did not engage in any unlawful solicitation contrary to any fiduciary duty he might have had.
     + While Fonteyne did send out a letter announcing his departure from Jetco, providing his new contact information, and inviting communication, there was only a general reference to lighting and no reference to JWS, GE, or any other product line.
       - It is hard to interpret this document as general solicitation for the benefit of JWS.
     + Further, there is insufficient evidence to show that Fonteyne specifically solicited business from Jetco's business segments.
   * There is no evidence that Mr. Fonteyne used confidential information of Jetco, as a "springboard."
     + There is no evidence that Mr. Fonteyne took any confidential information or trade secrets from Jetco in the form of hard copy or digital documentation.
     + Information about Jetco's business strategy was not proprietary or confidential, nor were the identities of the contacts in the distributor and end user organizations.
       - These organizations use many suppliers and the identities of the contact people would be known in the supplier community.
   * Fonteyne did not misappropriate a maturing business opportunity from Jetco.
     + The alleged misappropriation was merely a case of a customer testing and deciding upon a competitor's product.
     + Another alleged misappropriation was not so because the product involved was sufficiently differentiated.
3. Copper Creek and JWS, but not Ms. Fonteyne, participated in the breach of fiduciary duty by Fonteyne.
   * While Ms. Fonteyne was aware in a general sense that her husband was setting up and operating an agency, there is no evidence to suggest that she actively or knowingly assisted or participated in any of Fonteyne's activities.
   * Since Copper Creek was the corporate instrument through which Fonteyne conducted his activities as the local agent for JWS, it is jointly and severally liable for Fonteyne's breach of fiduciary duty.
   * JWS assisted Fonteyne in the alleged breach of his fiduciary duties, and while it may not have had actual knowledge of the existence of any fiduciary duties, it was willfully blind.
     + While JWS knew that Fonteyne was involved in sales, it made no effort to determine or even inquire as to whether Fonteyne was under any restriction due to his then employment with Jetco.
4. *(Reasons regarding quantum of damages omitted)*

Notes:

* Confidential information is information about important aspects of the business of an employer which are not known to the public and which, if disclosed to the public, would harm the competitive position of the employer (*BrettYoung*).
  + This includes technical, economic, financial, and marketing information relating to the business of an employer or former employer (*BrettYoung*).
  + Confidential information includes: client lists, client contact information, client needs and preferences, marketing strategies and future plans, budgets, salaries, and proprietary methods.
  + Confidential information does *not* include:
    - Information available online or in a textbook
    - Standard industry knowledge
    - Information that is otherwise generally known
* A fiduciary employee has sufficient discretion and power to make business decisions such that the employer’s legal or practical interests are vulnerable to the exercise of that power or discretion.
  + The value or competence of the employee does not, by itself, provide the required degree of vulnerability.
  + When assessing whether someone is a fiduciary, consider their title (though not conclusive), level of responsibility, level of discretion, and the extent to which he/she "owns" the relationship with his/her clients (i.e., are they the "face" of the corporation"?).
  + Indicia of fiduciary employees include:
    - Considerable/exclusive responsibility for customer and supplier relations
    - Being the "face and voice" of the company
    - Responsibility for all aspects of the business (day-to-day management)
    - Discretion to vary prices or extend credit
    - The owner had little actual involvement in the running of the company
    - Access to corporate financial statements
    - Interest in company's financial performance.

#### *Evans v The Sports Corporation*, 2013 ABCA 14

Facts:

* The Sports Corporation (TSC) is a sports agency that assists in the management of current and prospective NHL hockey players. In 2000, Evans was invited to join TSC to recruit and manage Czech and Slovak hockey players. The parties negotiated a three-year employment contract, which included the following terms:

*7. Evans acknowledges that he is a key employee…and that in the course of his employment…he has been and will be entrusted with…confidential information and trade secrets…the disclosure of any of which to…competitors or the general public would be highly detrimental to the best interests of the Company…. Accordingly, Evans covenants and agrees…that:*

*…*

1. *he will not, either during…employment…or…24 months thereafter, obtain or attempt to obtain the withdrawal from the Company of any employees of the Company.*
2. *he will not, either during…employment or for a period of 24 months thereafter…call on, solicit, divert or take away or attempt to call on, solicit, divert or take away any client of the Company or any other company to whom Evans provided any services related to the Company's business….*

*…*

1. *…any revenue generated by Evans' activities which contravene paragraphs…(b), (c)…will unjustly enrich Evans…and will thereby create a trust in favour of the Company in relation to the revenue…*

When the first employment agreement expired, the parties entered another one containing the same restrictive covenant. This second agreement was not renewed, and Evans' employment ended in April 2006. Evans then started Evans Sports & Entertainment Inc. He recruited Peter Kadlecek from TSC to come work for him, but Kadlecek returned to TSC after a few months when their relationship soured. Evans also had an understanding that Jaromir Henys, another TSC employee, would follow him to his new company, but this never came to fruition. Further, the majority of the revenues flowing to Evans after he left TSC were from the players originally entrusted to his care by TSC. TSC sued, claiming that Evans breached his contract and his fiduciary obligations to TSC.

Procedural history:

* The trial judge found that Evans breached cl. 7(b) by obtaining the withdrawal of Kadlecek as an employee of TSC, and by attempting to obtain the withdrawal of Henys. He held that cl. 7(c) was a non-solicitation clause and that Evans was a fiduciary. He concluded that Kadlecek and Henys solicited clients on Evans' behalf, and that Evans was aware of this. Being convinced that Evans breached his contractual and fiduciary duties, the trial judge awarded TSC $207,463.47.

Issues and holding:

1. Did the trial judge err in holding that cl. 7(c) was enforceable? **YES**
2. Did the trial judge err in holding that Evans was a fiduciary? **NO**
3. Did the trial judge err in holding that Evans breached cl. 7(b) and his fiduciary obligations? **NO**

Analysis:

* In *Globex Foreign Exchange Corp v Kelcher*, the ABCA held that a restrictive covenant in an employment contract is enforceable only if it is reasonable between the parties and with reference to the public interest.
  + A restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable.
  + If a covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable and it is thus unenforceable.

Rationale: (The Court)

1. The restrictive covenant in cl. 7(c) is ambiguous and its reach undeterminable.
   * The provision could prohibit solicitation of people Evans served while they were clients of TSC or a related company, but it could also be read as prohibiting solicitation of *past* clients of TSC.
     + It is difficult to understand why it would be reasonable to restrain Evans from soliciting past clients which have already left the company.
2. The trial judge did not err in finding Evans a fiduciary in the circumstances of this case.
   * While the Eastern European market was merely a segment of TSC's overall business operations, Evans was entrusted with primary responsibility for its successful operation with little to no supervision.
     + The situation is thus akin to the appropriation of a corporate opportunity; namely, players entrusted to Evans to develop on behalf of TSC were diverted to his own benefit.
   * While Evans was not a director or shareholder of TSC, the status of a fiduciary does not emanate from holding corporate office, but from the responsibilities entrusted to the employee.
3. The judge did not make a palpable and overriding error in concluding that while Evans did not personally solicit TSC's client-hockey players and did not directly ask anyone to do so on his behalf, Kadlecek and Henys pursued players on Evans' behalf and Evans knew of their effort and accepted the benefit thereof.

Notes:

* The court did not subscribe to the view that an employee's dismissal will relieve them of their ongoing fiduciary obligations.

## Restrictive Covenants

* Restrictive covenants are *contractual* (not common law) obligations that aim to prevent an employee from doing something after the employment relationship ends.
  + These terms include non-competition and non-solicitation provisions:
    - Non-solicitation provisions attempt to prohibit an employee from *approaching* the former employer's clients or employees and *inviting* them to do business.
    - Non-competition provisions attempt to restrain the former employee from engaging in stipulated forms of commercial activity.
  + Restrictive covenants are presumptively unenforceable, because of society's interest in free and open competition in providing for the most efficient allocation of resources.
    - Restrictive covenants give rise to a tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade (*Shafron*).
    - e.g., if an employee trains in graphic design, and then they are restrained from employing those services at another position owing to a non-competition clause, this is an inefficient outcome.
  + Restraints against trade will be upheld if they are reasonable in terms of its geographic and temporal scope, and in relation to the commercial action sought to be restrained, and if they are unambiguous and ascertainable and not against the public interest.
    - Geographic scope refers to the area in which the employee is restrained; temporal scope refers to the time during which the employee is restrained.
    - The restraints a covenant places on the employee must be no broader than necessary to protect the employee's legitimate commercial interests.
    - A provision is ambiguous and unascertainable if it is impossible for the employee to know specifically what activity is sought to be restricted.
      * e.g., if a covenant restricts competition with a company and "its subsidiaries," this term may be unenforceable if we are dealing with a low-level employee who does not know who his former employer's subsidiaries are.
  + The remedy for breach of a restrictive covenant is damages to put the employer in the position they would have been in had the employee not breached their obligations (*Shafron*).

#### *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6

Facts:

* Shafron sold his insurance agency business to KRG Insurance Brokers and continued to be employed at the business. In August 1991, Shafron entered into a contract with KRG containing the following non-competition clause:

*12. Shafron agrees that, upon his leaving the employment…he shall not for a period of three (3) years thereafter…carry on, be employed in, or be interested in or permit his name to be used in connection with the business of insurance brokerage which is carried on within the metropolitan City of Vancouver*.

In January 2001, Shafron started working as an insurance salesman in Richmond, BC. KRG commenced an action claiming that Shafron breached the restrictive covenant and his fiduciary obligations, and that he leaked confidential information.

Procedural history:

* The BCSC dismissed the action, claiming that "the metropolitan City of Vancouver" was neither clear nor certain and, in any event, was unreasonable. It also found that Shafron did not owe KRG a fiduciary duty and did not breach any duty relating to confidential information.
* While the BCCA agreed that Shafron did not have a fiduciary duty, it found that the restrictive covenant was enforceable. It used the doctrine of "notional" severance to construe "the metropolitan City of Vancouver" to Vancouver and the municipalities contiguous to it (including Richmond).

Issues and holding:

* Can the doctrine of *severance* be used to render the restrictive covenant reasonable? **NO**
* Can the doctrine of *rectification* be used to render the restrictive covenant reasonable? **NO**

Analysis:

* A restrictive covenant in an employment contract precludes the vendor in the sale of a business from competing with the purchaser and, in an employment contract, the restrictive covenant precludes the employee, upon leaving employment, from competing with the former employer.
* Given the public interest in the maintenance of free and open competition, restrictive covenants are *prima facie* unenforceable unless they are *reasonable* in reference to the interests of the parties and the public interest, in which case the courts will yield to the freedom of the parties to contract.
  + Restrictive covenants found in employment contracts are more rigorously scrutinized than those found in sale agreements.
    - The sale of a business involves a payment to the vendor for the goodwill of the business; if the seller cannot assure the purchaser that he will not appropriate some of that goodwill by competing with him, he may not be able to sell his business.
      * The same consideration does not apply in the employment context, as there is no payment for goodwill upon the employee leaving the employer.
    - Further, there is a generally a power imbalance between employer and employee.
  + The onus is on the party seeking to enforce the restrictive covenant to show that it's reasonable.
  + The reasonableness of a covenant will be determined by its geographic and temporal scope as well as the extent of the activity sought to be prohibited.
  + An ambiguous (capable of multiple meanings) or unascertainable (incapable of understanding) restrictive covenant is *prima facie* unreasonable, as its reasonableness cannot be ascertained.
* The general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable will be *void and unenforceable*; however, in limited circumstances, severance can be applied to the covenant to remove illegal features of a contract so as to render the contract in conformity with the law.
  + The purpose of severance is to give effect to the parties' intentions when they entered the contract as much as possible.
  + There are two types of severance:
    1. *Blue-pencil severance*: consists of removing part of a contractual provision.
       - May be resorted to sparingly and only in cases where the part removed is clearly severable, trivial, and not part of the main purport of the restrictive covenant.
       - Courts will only apply blue-pencil severance to expunge part of a covenant if the obligation that remains is a sensible and reasonable obligation that the parties would unquestionably have agreed to without varying any other terms of the contract or otherwise changing the bargain.
    2. *Notional severance*: involves reading down a contractual provision to make it legal and enforceable.
       - Notional severance has no place in the construction of restrictive covenants in employment contracts, for two reasons:
         1. There is no bright-line test for reasonableness; as such, applying notional severance may just amount to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case, creating uncertainty.
         2. To introduce the doctrine of notional severance to read down an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant and inappropriately increases the risk that the employee will be forced to abide by an unreasonable covenant.
* For a contract to be rectified, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down incorrectly.
  + The power of rectification must be used sparingly; a relaxed approach to it as a substitute for due diligence at the time a document is signed would undermine confidence in the commercial world.
  + To obtain rectification, it is necessary to prove three things:
    1. The existence and content of a prior inconsistent oral agreement.
    2. The party seeking to uphold the terms of the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud.
    3. The precise form in which the written instrument can be made to express the prior intention.
       - Closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not.

Rationale: (Rothstein J)

* Blue-pencil severance is not applicable in this case.
  + There is no evidence that the parties would have "unquestionably" agreed to alter the language of the restrictive covenant (e.g., removing the word "Metropolitan") without varying any other terms of the contract or otherwise changing the bargain.
* Rectification is not applicable in this case.
  + KRG Western has shown no prior oral agreement, let alone the content of one.
    - Rather, it asserted that "something must have gone wrong with the language" of the contract.
  + As such, there was nothing to indicate what the parties intended by the use of the term "Metropolitan" when they entered into the covenant and nothing to indicate that they agreed on an area and then mistakenly wrote down "Metropolitan."

## Injunctions

* **Injunction**: an order that either requires one to do something or that prohibits or restrains a party from doing something.
* **Interlocutory injunction**: an injunction obtained prior to trial (i.e., prior to the plaintiff proving their case).
  + An interlocutory injunction is an extraordinary remedy contrasting two important concepts:
    1. Relief should be available when needed to protect legitimate interests.
    2. A respondent should not be restrained from doing certain things until she has had a chance to defend the action and present her case.

#### *KOS Oilfield Transportation Ltd v Mitchell*, 2010 ABCA 270

Facts:

* KOS Oilfield Transportation is in the business of moving oilfield equipment and rigs for drilling and service companies. The appellants, Bradley, Lees, and Mitchell, are all former employees of KOS. In 2004, they each signed an Employee Confidentiality and Non-Disclosure Agreement with KOS, which also prohibited solicitation. In 2010, Artie Kos incorporated ATK Oilfield Transportation to compete directly with KOS and recruited the appellants. KOS alleged that Bradley and Lees gathered information on the specifications of KOS's fleet of trucks, as is evidenced by emails between them. It also alleged that Mitchell was in contact with one of KOS's substantial customers to solicit his business. KOS sought an interim injunction order.

Procedural history:

* The chambers judge was satisfied that there was a strong *prima facie* case that the appellants were breaching their confidentiality and non-solicitation agreements. She issued a broad and sweeping interim injunction order prohibiting employment with ATK and the disclosure of confidential information and requiring the preservation of documents and the production of the contacts made by the appellants with customers and former customers of KOS.

Issue and holding:

* Which interim injunctions should stand? *(see below)*

Analysis:

* Subject to ongoing duties of confidentiality and, in some instances, contractual and/or fiduciary obligations, a former employee is entitled to compete with his or her former employer.
* An injunction ought not to be broader than necessary.

Rationale: (The Court)

* The injunction against Mitchell must be vacated; KOS failed to demonstrate a strong *prima facie* case that Mitchell was likely to be in breach of whatever duties she might be found to have owed her former employer.
  + There is no basis for an injunction precluding Mitchell from working for KOS.
    - Mitchell did not enter into a non-competition agreement.
    - Even if she was a fiduciary employee, fiduciary obligations merely preclude solicitation for a reasonable period of time; they do not prevent employment with a competing company.
  + While Mitchell did communicate with one of KOS's customers, it does not appear that Mitchell initiated the process or that she otherwise solicited other customers of her former employer.
  + Mitchell's evidence that she had not removed confidential information, nor deleted work-related emails, was uncontradicted.
* The injunction against Bradley and Lees must be vacated with the exception of those parts prohibiting the disclosure of confidential information and requiring documents and confidential information to be preserved.
  + There is no basis for an injunction precluding Bradley and Lees from working for KOS.
    - Bradley and Lees did not enter into a non-competition agreement.
    - Even if they were fiduciary employees, fiduciary obligations merely preclude solicitation for a reasonable period of time; they do not prevent employment with a competing company.
  + There was no evidence that Lees solicited KOS's customers, and Bradley ceased working for KOS in 2006, making it unlikely that he still owed a duty to KOS not to solicit its customers.
  + It is appropriate to maintain the restraint against using or disclosing confidential information given Bradley and Lees' misconduct in surreptitiously collecting confidential information for ATK's benefit.
  + Bradley and Lees' dishonesty supports an inference that documents in their possession may be destroyed if not restrained by court order, thereby justifying the preservation order.
  + However, the part of the order requiring production, and in some cases, the creation of new documents goes too far; it requires that all materials be produced to the plaintiff's solicitors, whether personal or privileged, and regardless of whether they are relevant to the causes of action eventually pleaded.
    - Much if not all of the information sought by KOS can be obtained through the ordinary discovery process.

#### *BrettYoung Seeds Limited Partnerships v Dyck*, 2013 ABQB 319

Facts:

* BrettYoung sells seeds, landscape fabrics, erosion blankets, and other products. Ken and Shaun Dyck were both sales representatives with BrettYoung. In 2011, they signed agreements ("2011 Agreement") containing non-competition and non-solicitation provisions:

*Either party with 6 months notice may terminate this contract…*

*…*

*…the [employee] agrees that for a period of 18 months following any termination of this agreement he will not compete with the Company by selling similar products within the existing territory, he will not solicit Company customers, directly or indirectly, whether on behalf of himself or other parties and he will not hire or attempt to hire any Company employees.*

The agreement commenced on September 1, 2011 and expired on August 31, 2012 unless renewed by the parties. The parties did not renew the 2011 Agreement, and it ended on August 31, 2012. Ken and Shaun Dyck are directors and shareholders in Green Patch, a general contractor, and BrettYoung alleged that the defendants, through Green Patch competed with BrettYoung before September 1, 2012.

* In October 2012, BrettYoung sued Ken Dyck, Shaun Dyck, and Green Patch, on the grounds that they contravened the non-competition and non-solicitation provisions of the 2011 Agreements and breached their duties as fiduciaries. They also sought interlocutory relief preventing them from competing with BrettYoung.

Issues and holding:

* Is BrettYoung entitled to injunctive relief preventing the defendants from competing with BrettYoung? **NO**

Analysis:

* An interlocutory injunction is an order restraining the defendant until trial or other disposition of the action.
* When considering an interlocutory injunction, the court must ask if justice requires it, recognizing that in the ordinary course a remedy should be the product of a voyage through the entire litigation spectrum.
  + The test for an interlocutory injunctive relief requires that three inquiries be made:
    1. A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
       - Generally, the applicant must make out a *prima facie* case (i.e., prove that they *might* succeed at trial), but there are situations where the applicant may need to make out a *strong* case (i.e., prove that they are more likely than not to succeed at trial).
         * This more demanding standard may be appropriate if the determination of the interlocutory injunction is dispositive, in practical terms, of the proceedings.

It would be unfair to grant what is essentially a final order for the benefit of the applicant unless a trial court will probably decide in the applicant's favour.

* + - * + This more demanding standard may also be appropriate if the dispute turns on a simple question of law alone.

There is no reason a court should decline to decide an uncomplicated legal issue when it has before it all the information needed to make an informed decision.

* + - * That said, an applicant seeking the enforcement of a non-competition agreement against a former employee at a pretrial stage must have a *strong* case.
        + The law should be sensitive to the interest of a person whose ability to earn a livelihood may be thwarted by an interlocutory injunction.
    1. It must be determined whether the applicant would suffer irreparable harm if the application were refused.
       - "Irreparable" harm is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
         * Damage to customer relations, productivity, loss of employees, return on investment, damage to credit rating, reputation, and goodwill may qualify as irreparable.
         * *Note*: the focus is on the nature of the harm rather than the magnitude.
       - Delay by the applicant in seeking an interlocutory injunction may serve as evidence that the risk is not significant enough to warrant pre-trial relief.
         * In contrast, a litigant who seek interlocutory relief sends a message that its interests merit immediate protection.
    2. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.
       - Harm is context specific, but may include loss of revenue, additional expenses, diminished return on investment, damage to credit rating, non-productive period for the workforce, loss of trained and valued members of the workforce, tarnishes reputation, inability to recruit new employees, loss of control over decision making and opportunity loss.
  + The initial decision-maker must conduct an extremely limited review of the case on the merits when making its preliminary assessment of the merits.
    - A prolonged examination on the merits is generally not desirable, for three reasons:
      1. Judicial restraint on the part of the chambers court ensures that the trial court will approach the judging task with an open mind unfettered by any prior intervention.
      2. A limited review on the merits reduces the risk that the judgments of the chambers and trial courts will be seen to be inconsistent.
         * An informed observer will appreciate that any differences of opinion may be attributable to the different levels of scrutiny brought to the task.
      3. The material available to a chambers court will be less complete, generally speaking, than is presented to the trial judge.
         * Disclosure has likely been minimal and neither side has had the opportunity to pursue all helpful lines of inquiry.
    - Nevertheless, the chambers court must still carefully digest the factual and legal material presented in support of and in opposition to the application, regardless of the degree of scrutiny it brings to the task.
* The common law opposes promises not to participate in commercial activity on the ground that such a promise deprives the community of the productivity of one of its members and lessens the prosperity of the community as a whole.
  + As such, a non-competition agreement is contrary to the public interest and is invalid and unenforceable unless the party seeking to enforce the promise can establish that:
    1. A non-solicitation provision would not adequately protect the interests of the promisee, and
       - A non-competition clause will be reasonably necessary where the employee obtains such personal knowledge of and influence over the employer's customers as would enable him, if competition were allowed, to take advantage of the employer's trade connection to undermine the business of the employer.
    2. The non-competition restraints are reasonable from the perspective of:
       1. The promisor and the promisee taking into account the time period the restraints are in force, the geographic limits within which the restraints apply, and the activities prohibited by the restraint, and
          - The restraints must be no broader than are necessary to protect the promisee's legitimate commercial interests.
          - Most employers will not be able to enforce a non-competition agreement which is not an integral component of a sale of business agreement.
       2. The public interest.
  + A non-competition agreement which contains a term that is unascertainable (i.e., has no legally defined meaning) or ambiguous (i.e., it supports two or more reasonable interpretations) cannot be assessed and is hence unreasonable.

Rationale: (Wakeling J)

* BrettYoung has not proved a serious issue to be tried; if the court had to decide this case on its merits based on the material before it, the plaintiff would likely not succeed.
  + The non-competition promises do not apply if the 2011 Agreements expire on account of the passage of time, which is what happened here.
    - The non-competition promises applied only if either of the parties terminated the agreement, which neither party did.
  + If the 2011 Agreement did prohibit the Dycks from competing with BrettYoung, this term would be unenforceable; a non-solicitation provision would adequately protect the interests of BrettYoung.
    - If the non-competition promises were enforceable, the plaintiff would have been entitled to injunctive relief, as the defendants admit that they competed with the plaintiff.
  + If the non-solicitation promise was not satisfactory to protect BrettYoung's interests, and a non-competition provision was necessary, the 18-month period is far too long, making the provision unenforceable.
  + The defendants were not fiduciaries of BrettYoung, which had significant control over the Dycks' activities.
    - They had the authority to sell products within a stipulated price range and nothing more.
    - They generally did not have access to proprietary information.
    - While they played an important role, they were not key employees who would be in a position to unfairly compete with the plaintiff as a result of the knowledge and contacts they acquired.
  + Even if the Dycks were fiduciaries, a fiduciary can compete with their former employer provided he does not use the former employer's proprietary information and does not solicit their customers until a reasonable period of time has elapsed following the end of his employment.
    - The evidence fails to show that the Dycks utilized the plaintiff's proprietary information.
    - The period during which the Dycks could not have solicited BrettYoung Seeds' customers would have lasted no more than seven months, expiring on March 31, 2013 (whereas the date of the hearing was April 3, 2013).
* The plaintiff's decision not to seek interlocutory relief until three months passed after it commenced the action undermines its claim that it will suffer irreparable harm if interlocutory injunctive relief is not granted.
* BrettYoung has not established that the prejudice it will suffer exceeds the detriment which will befall the defendants if interlocutory relief is granted.

Notes:

* As noted by Wakeling J, an application for interlocutory injunction relief involves two contradictory principles.
  + The first is that relief should be available when it is needed to protect the interests of the applicant; recognizes that a remedy may have to be issued before a trial to have any value to the applicant.
  + The second recognizes that a respondent should not be directed to do or refrain from doing a specific act until the respondent has had an adequate opportunity to present her case.
* Wakeling J defines a fiduciary employee as an employee who played a key role in his employer's business and would be in a position to unfairly compete with the former employer by exploiting the benefits derived from his or her key role with the former employer until a reasonable period of time has elapsed after the end of his employment.
  + A former fiduciary employee may not, after the end of the employment relationship:
    1. Use the former employer's proprietary information in a manner contrary to the former employer's best interests.
    2. Use the former employer's corporate opportunity unless the former employer has unequivocally decided not to pursue it.
    3. Solicit customers of his or her former employer until a reasonable period of time has elapsed following the end of his employment by the former employer.
    4. Offer employment to employees of his former employer until a reasonable period of time has elapsed following the end of his employment by the former employer.

# Discrimination and the Duty to Accommodate

* Since the vast majority of Alberta employers are provincially-regulated, we will focus on the *Alberta Human Rights Act* rather than the *Canadian Human Rights Act*, which applies to federally-regulated industries.
  + Unlike the Alberta Act, the federal Act prohibits discrimination on the basis of genetic characteristics and conviction for an offence for which a pardon has been granted.
* Only the Alberta Human Rights Commission has jurisdiction to hear and decide discrimination claims in employment; you cannot bring a discrimination claim in the Alberta courts.
  + Similarly, the Canada Human Rights Commission has exclusive jurisdiction to hear and decide discrimination claims for federally-regulated employers.
  + You can bring an application in the AHRC or CHRC alongside a claim for wrongful dismissal in the courts.

#### *Alberta Human Rights Act*, RSA 2000, c A-25.5

**7(1)** No employer shall

1. refuse to employ or refuse to continue to employ any person, or
2. discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

* This is an exception to the general right of an employer to dismiss an employee for whatever reason.

**(2)** Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

**(3)** Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**8(1)** No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

1. that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person, or
2. that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.
   * “Mental disability” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder [s. 44(1)(h)].
   * “Physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness… [s. 44(1)(l)].

**(2)** Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**20(1)** Any person … who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission.

**(2)** A complaint made pursuant to subsection (1) must

…

1. be made within one year after the alleged contravention of the Act occurs.

**32(1)** A human rights tribunal:

1. may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:
   1. to cease the contravention complained of;
   2. to refrain in the future from committing the same or any similar contravention;
   3. to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;
      * The tribunal may even order that an employee be reinstated.
   4. to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;
   5. to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

#### *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3

Facts:

* s. 7(1) of the *Human Rights, Citizenship and Multiculturalism Act* (the predecessor of the *Alberta Human Rights Act*) specifies that “No employer shall ... discriminate against any person with regard to employment” on any of the prohibited grounds. The Act does not contain any definition of “employer.”
* Luka was a long-term employee of Lockerbie & Hole Industrial. Having contracts with Syncrude, Lockerbie transferred Luke to the site of a large construction project that Syncrude was undertaking. Syncrude had a policy that contractors could not bring workers onto the site unless they passed a drug test. When Luka failed the drug test, Lockerbie did not use him on the Syncrude site. Luka made a complaint under s. 7 of the *Human Rights, Citizenship and Multiculturalism Act* (the predecessor of the *Alberta Human Rights Act*).

Procedural history:

* A Human Rights Panel concluded that Syncrude was an "employer" for the purposes of s. 7 of the Act because it controlled the site. The ABQB concluded that the Panel was in error, holding that the term "employer" in the Act was not wide enough to cover the relationship between the owner of an industrial site, and the employees of arm’s length contractors working on the site.

Issue and holding:

* Is Syncrude an "employer" of Luka within the meaning of s. 7 of the Act? **NO**

Analysis:

* A wide interpretation of human rights statutes is needed to satisfy their aims.
  + As such, the term "employment" has been expanded in the context of human rights legislation to include relationships where one person provides services to another, but not within a traditional master–servant relationship and in the absence of a direct contractual link.
* However, merely because the services provided by the complainant will indirectly accrue to the benefit of someone other than the immediate employer does not necessarily mean that the other indirect user of the services is also the employer of the complainant.
* A contextual approach is required to decide whether a particular relationship qualifies as “employment.” A number of factors must be taken into consideration, including:
  + Whether there is another more obvious employer involved.
  + The source of the employee’s remuneration, and where the financial burden falls.
  + Normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips.
  + Who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline.
  + Who has the direct benefit of, or directly utilizes the employee’s services.
  + The extent to which the employee is a part of the employer’s organization, or is a part of an independent organization providing services.
  + The perceptions of the parties as to who was the employer.
  + Whether the arrangement has deliberately been structured to avoid statutory responsibilities.
* Where it is alleged there is more than one co-employer, the following factors are also relevant:
  + The nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer.
  + The independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two.
  + The nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor.
  + The extent to which the co-employer directs the performance of the work.

Rationale:

* Luka's relationship with Syncrude was too remote to justify a finding of employment, even under the expanded meaning given to that term in human rights legislation.
  + Luka had no contractual relationship with Syncrude, he was not functionally a part of its organization, he did not report to it, and Syncrude did not direct his work.
  + His work did not involve extracting oil from oilsands, or operating Syncrude’s plant.
* While Luka may have been treated unfairly, the Act does not prohibit discrimination in all its forms; it prohibits discrimination in certain types of relationships, like "employment" or "providing services to the public," not "access to private property."
  + Luka is not denied rights under the Act, but the burden of protecting them falls on Lockerbie.

#### *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3

Facts:

* Section 13(1) of BC's *Human Rights Code* provides that a person must not refuse to continue to employ a person because of their sex; under subsection (4), this does not apply with respect to a refusal based on a bona fide occupational requirement ("BFOR").
* Ms. Meiorin was hired by the BC Ministry of Forests as a forest firefighter. Her supervisors found that she performed her job well, posing no apparent risk to herself, her colleagues, or the public. In 1991, the Ministry adopted the "Bona Fide Occupational Fitness Tests and Standards for BC Forest Service Wildland Firefighters" ("the Tests") in response to a report recommending that only physically fit employees be assigned as front-line firefighters for safety reasons. After the report was released, the BC government commissioned a team of researchers to identify the essential components of forest firefighting, measure the physiological demands of those components, select fitness tests to measure those demands, and assess the validity of those tests. The researchers' methodology was based on taking the average performance levels of test subjects and converting the data into minimum performance standards. It did not distinguish between male and female test subjects. In 1994, Ms. Meiorin was required to pass the Tests. After four attempts, she failed to meet the aerobic standard. As a result, she was laid off. Her union brought a grievance on her behalf.

Procedural history:

* The labour arbitrator found that Ms. Meiorin established a *prima facie* case of discrimination by showing that the aerobic standard has a disproportionate impact on women. He further found that the government had not shown that it had accommodated Ms. Meiorin to the point of undue hardship. The BC Court of Appeal allowed the government's appeal, commenting that the arbitrator's ruling created "reverse discrimination" by setting lower physical standards for women.

Issues and holding:

1. Does the aerobic standard *prima facie* discriminate against Ms. Meiorin as a woman? **YES**
2. Is the aerobic standard a BFOR? **NO**

Analysis:

* To establish that a standard is *prima facie* discriminatory (under s. 13(1)), the applicant must show that it is either discriminatory on its face (i.e., "direct discrimination") or in effect (i.e., "adverse effect discrimination").
  + While the conventional approach applied different analyses to direct and adverse effect discrimination, a unified approach that does not distinguish between the two is needed.
    1. The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify: few cases can be so neatly characterized.
    2. It is disconcerting that different remedies are available depending on the stream into which a malleable initial inquiry shunts the analysis.
       - It is difficult to justify conferring more or less protection on a claimant and others who share his or her characteristics, depending only on how the discriminatory rule is phrased.
    3. The distinctions between the elements an employer must establish to rebut a *prima facie* case of direct or adverse effect discrimination are difficult to apply in practice.
    4. The conventional analysis may serve to legitimize systemic discrimination.
       - Under the conventional analysis, if a standard is classified as being" neutral" at the threshold stage of the inquiry, its legitimacy is never questioned.
    5. A bifurcated approach may compromise both the broad purposes and the specific terms of the *Human Rights Code*.
       - An interpretation that allows a standard to be questioned only if the discrimination can be characterized as "direct" does not allow human rights statutes to accomplish their purposes as well as they might otherwise.
    6. The focus by the conventional analysis on the mode of discrimination differs in substance from the approach taken to s. 15(1) of the Charter.
* To establish that a *prima facie* discriminatory standard is a bona fide occupational requirement (under s. 13(4)), an employer must prove on a balance of probabilities that:
  1. The employer adopted the standard for a purpose rationally connected to the performance of the job.
     + The initial task is to determine what the impugned standard is generally designed to achieve.
     + Then, the employer must demonstrate a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job.
       - The focus at this first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more *general* purpose.
         * The inquiry is more general than determining whether there is a rational connection between the performance of the job and the *particular* standard that has been selected.
         * Without a legitimate general purpose, there is no need to continue because the standard cannot be a BFOR.
       - Where the general purpose of the standard is to ensure the safe and efficient performance of the job (an essential elements of all occupations) it will likely not be necessary to spend much time at this stage.
  2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.
     + This addresses the subjective element of the test; if the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*, it cannot be a BFOR.
  3. The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show this, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.
     + The standard, if it is to be justified, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.
       - The skills, capabilities, and potential contributions of the individual claimant and others like him or her must be respected as much as possible.
       - The use of "undue" suggests that some hardship will be acceptable; it is only "undue" hardship that satisfies the test.
       - The employee is not entitled to perfect accommodation; the employee must be able to perform some productive work in order to maintain employment.
         * The employer is not obligated to create a new position for the employee and does not have to pay the employee for work that they cannot do.
     + If individual differences may be accommodated without imposing undue hardship on the employer (i.e., if a reasonable alternative exists to burdening members of a group with a given rule), then the standard is not a BFOR.
     + It may often be useful to consider separately:
       1. The procedures, if any, which were adopted to assess theissueof accommodation, and
          - *Note*: i.e., asking what steps can be taken to allow the employee to maintain her employment.
          - It should be asked whether the employer has investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard.
          - The employee has to cooperate with the employer to identify what accommodations will be reasonable in the circumstances.
       2. The substantive content of either a more accommodating standard which was offered or alternatively the employer’s reasons for not offering any such standard.
          - *Note*: i.e., putting into practice those options identified at the procedural stage so that the employee can continue to work.
          - Courts should be sensitive to the various ways in which an individual may perform the job while still accomplishing the employer's legitimate work-related purpose.

Employers, courts, and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

* + - * + Among the factors to be considered when assessing an employer's duty to accommodate are the financial cost of the possible method of accommodation, the interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees.

Such considerations should be applied with common sense and flexibility in the context of the factual situation presented in each case.

* + - * + Some of the questions that may be asked in the course of this analysis include:

If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Rationale: (McLachlin J)

1. Because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard.
   * The fact that Ms. Meiorin was tested individually does not immunize the government's conduct from a finding of discrimination.
2. The BC government has not discharged its burden of proving that the aerobic standard is a BFOR.
   1. The employer did adopt the standard for a purpose rationally connected to the performance of the job.
      * The general purpose of the standard is not disputed; it is to enable the government to identify those employees or applicants who are able to perform the job of a forest firefighter safely and efficiently. There is a rational connection between this general characteristic and the performance of the particularly strenuous tasks expected of a forest firefighter.
   2. The employer adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfillment of a legitimate work-related purpose.
      * All indications are that the government did not intend to discriminate against Ms. Meiorin. To the contrary, one of the reasons the government retained the researchers was that it sought to identify non-discriminatory standards.
   3. The employer has not established that it would experience undue hardship if a different standard were adopted; implementing the aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter.
      * The government did not appropriately address the discriminatory effects of the aerobic standard in a procedural sense.
        + The procedures adopted by the researchers were problematic for two reasons:
          1. The aerobic capacity of the test subjects was ascertained, and that capacity was established as the minimum standard required of every forest firefighter; but merely describing the characteristics of a test subject does not necessarily allow one to identify the standard minimally necessary for the safe and efficient performance of the task.
          2. They failed to distinguish the female and male subjects; therefore, the record fails to answer whether men and women require the same minimum amount of aerobic capacity to perform safely and efficiently the tasks expected of a forest firefighter.
          - The goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently and, if not, to reflect that disparity in the employment qualifications.
        + There is no evidence that the government studied the discriminatory effects of the aerobic standard when the issue was raised by Ms. Meiorin.
      * The government's response that it would experience undue hardship if it had to accommodate Ms. Meiorin is also deficient from a substantive perspective.
        + As the arbitrator noted, the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public.
        + While the government claimed that accommodated Ms. Meiorin would undermine the morale of forest firefighters, this proposition is not supported by the evidence.
          - Even if they were, the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled with the Code.

Notes:

* If the applicant establishes *prima facie* discrimination, the burden shifts to the employer to establish either:
  + That the offending rule is a BFOR,
  + That the employer has accommodated the claimant, or
  + That further accommodation cannot be provided without incurring undue hardship.
* As McLachlin J notes, employers designing workplace standards owe an obligation to be aware of the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards.
* Responding to the Court of Appeal's comments on "reverse discrimination," McLachlin J argued that the essence of equality if to be treated according to one's own merit, capabilities, and circumstances. It requires that differences be accommodated.

#### *Hydro‑Québec v Syndicat des employé‑e‑s de techniques professionnelles et de bureau d’Hydro‑Québec, section locale 2000 (SCFP‑FTQ)*, 2008 SCC 43

Facts:

* The complainant's employment with Hydro-Québec was marked by numerous physical and mental problems. Over the years, the employer adjusted her working conditions in light of her limitations: modification of her workstation, part-time work, assignment to a new position, etc. Nevertheless, her record indicates that she missed 960 days of work between January 1994 and July 2001. In July 2001, she was dismissed on account of her absenteeism, her inability to work on a regular and reasonable basis, and the fact that no improvement in her attendance at work was expected. She filed a grievance, alleging her dismissal was not justified.

Procedural history:

* The labour arbitrator found that the conditions suggested by the Union would constitute undue hardship and dismissed the grievance. The Union applied for judicial review. The Superior Court agreed with the arbitrator. The Union then appealed that decision to the Court of Appeal. The Court of Appeal allowed the appeal on the grounds that it was not impossible to accommodate the complainant's characteristics. It also held that the duty to accommodate had to be assessed as of the time the decision to dismiss the complainant was made.

Issues and holding:

* Did the Court of Appeal err in holding that a BFOR will only be proven where it was *impossible* to accommodate the employee's characteristics? **YES**
* Did the Court of Appeal err in holding that the duty to accommodate has to be assessed as of the time the decision to dismiss the complainant was made? **YES**

Analysis:

* In the employment context, the purpose of human rights legislation is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.

Rationale: (Deschamps J)

1. Under the third step of the test from *BCGEU*, *the employer is not required to prove that it is impossible to integrate an employee* who does not meet a standard; it must only prove undue hardship.
   * The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.
     + The employer must be flexible in applying the standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship.
     + If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties — or even authorize staff transfers — to ensure that the employee can do his or her work, it must do so to accommodate the employee.
   * If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.
     + The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.
2. Undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not from the date of the decision to dismiss.
   * A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation.
   * Where, as here, the employee has been absent due to illness, the employer has accommodated the employee for several years, and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.

Notes:

* When the point of undue hardship is reached, the contract is frustrated, and the employment relationship terminates; as a result no severance is owed.

#### *Cowling v Her Majesty the Queen in Right of Alberta as represented by Alberta Employment and Immigration*, 2012 AHRC 12

Facts:

* In 1999, Ms. Cowling was hired by the Alberta Department of Employment and Immigration as a labour relations officer. She was employed there for 8 consecutive years. The employment agreements consisted of four sequential contracts with a start date and a termination date. The contracts specified that either party cannot terminate the agreement prior to the termination date noted. Prior to the renewal of the fourth contract, Alberta notified Ms. Cowling that her contract would not be renewed past the May 4, 2007 termination date because Alberta planned to restructure the Mediation Services Branch and downgrade the level and responsibilities of the job. Alberta then held a competition for the permanent lower level job, which was essentially identical to the one Ms. Cowling previously held. Ms. Cowling was unsuccessful in getting the new position. In fact, none of the 110 people who applied for the position got it. Ms. Cowling (then 67 years old) filed a discrimination complaint with the Alberta Human Rights Commission on the ground of age, requesting to be reinstated. Alberta claimed that (1) Ms. Cowling was not a good "fit" or the position because it required hands-on mediation skills or potential to be a mediator and (2) that it could replace the position at will to serve its organizational needs.

Issues and holding:

1. Has Ms. Cowling proven *prima facie* discrimination? **YES**
2. Has Alberta shown that the refusal of continued employment was based on a BFOR? **NO**
3. Has Ms. Cowling failed to mitigate her losses? **NO**
4. Is reinstatement an appropriate remedy? **YES**
5. Is Ms. Cowling entitled to lost wages? **YES**
6. Is Ms. Cowling entitled to an award for injury to dignity and self-esteem? **YES**

Analysis:

* The test for discrimination is:
  1. The complainant must, on a balance of probabilities, prove *prima facie* discrimination by showing:
     1. They possess a characteristic protected from discrimination by the *Alberta Human Rights Act*.
     2. Adverse action or impact in the area of employment.
     3. The protected characteristic was a factor in the adverse action or impact.
        + Since discrimination is rarely practiced openly, it is appropriate to draw reasonable inferences based on circumstantial evidence.
  2. If *prima facie* discrimination is established, the respondent must justify the impugned action or provide a credible explanation on all the evidence, on a balance of probabilities.

Rationale: (Shirley Heafey)

1. The complainant has satisfied the three-part test for *prima facie* discrimination.
   1. At all relevant times, Ms. Cowling was an older woman past the historical age of retirement.
   2. The refusal to continue to employ Ms. Cowling satisfies the requirement for adverse impact.
   3. It is reasonable to infer that age was a factor in the denial of Ms. Cowling's continued employment.
      * Ms. Cowling had exemplary qualifications and skills that clearly met the requirements of the position she applied for. She had "fully competent" performance assessments for eight years. She made it clear that she loved the work that she did and received no complaint from her superiors. She was regularly looking for opportunities to improve her work performance, expand her expertise, and had specifically pursued courses to enhance her knowledge about mediation.
      * During the discussion regarding the final one year offer to extend her contract, Ms. Cowling testified that her supervisor told her that Mediation Services intended to redefine her job into a permanent position that would ensure services "over the long term" and that the position would be a "growth position."
2. The evidence does not reveal that Ms. Cowling was not a good "fit" for the position, or that she would not meet the "long term" needs of the branch; this supports the view that the respondent was looking for someone younger than Ms. Cowling who could continue working for the branch for years to come.
   1. The position Ms. Cowling applied for was materially the same position that she previously held.
      * At her previous position, Ms. Cowling regularly received bonuses for fully meeting expectations, and when she asked how she could improve her performance, her supervisor had nothing to offer; it is thus clear that she met the qualifications for the new position.
   2. There is no convincing evidence that mediation skills were a clear requirement for the position.
      * Mediation skills were not in the job description or in an internal "Change Analysis Report."
      * Actual mediation skills were not in demand in the branch; the branch was tasked with managing arbitrators and mediators, but those jobs were outsourced.
   3. Even if one accepts that mediation skills were important for the position, the evidence shows that the respondent did not fairly assess Ms. Cowling's mediation skills.
      * She was denied opportunities to sit in on mediations for learning and furthering her mediation training.
   4. Alberta submitted that Ms. Cowling was too confrontational to be a good mediator based on her behaviour in her 2004 contract negotiations, in her interview, and in the follow-up after the interview.
      * But, in 2004, Ms. Cowling was under a great amount of stress owing to tragic personal circumstances, and she was entitled to negotiate to get the best deal for herself.
      * The questions posed by Ms. Cowling in her interview and her behaviour thereafter were reasonable and appropriate.
3. Ms. Cowling attempted to appropriately mitigate her losses by seeking employment; her experiences did not show lack of effort or diligence in attempting to re-enter the workforce. Rather, her experiences show the challenges faced by mature workers like Ms. Cowling.
   1. Age 67 at the time, Ms. Cowling applied to several government jobs but received not replies. She went to alumni functions and professional functions to circulate her resume but nothing materialized. She tried to revive a consulting company and retain contracts, but she was unsuccessful.
   2. The Government of Alberta conducted a study which showed that mature workers tend to have longer durations of unemployment once they become unemployed.
4. While the traditional inclination would be to deny reinstatement, the facts of this case support that reinstatement is appropriate and the best way, consistent with human rights principles, to satisfactorily place Ms. Cowling in the position she would have been in but for the discrimination.
   1. Despite the fact that Ms. Cowling was hurt by Alberta's actions, she does not seem to harbor any ill will to the extent that it would affect her being employed once again for Alberta.
      * Similarly, Alberta’s witnesses do not seem to harbor any animosity towards Ms. Cowling.
      * The trust essential in employment relationships does not appear to be irrevocably damaged by this litigation.
   2. The evidence indicated that there is currently an opening in the Mediation Services Branch.
   3. Even if there was ill will towards Ms. Cowling in the Mediation Services Branch, the government has a large and varied workforce and there is opportunity for Ms. Cowling to be placed elsewhere.
   4. There were no work performance issues with Ms. Cowling; she always received strong assessments.
   5. Ms. Cowling continues to be unemployed at the time of the hearing.
   6. The Alberta Government has signalled that, with an aging population, mature workers should be retained to improve productivity and economic growth.
5. Ms. Cowling is entitled to lost wages from May 5, 2007 to the present day (April 2012), less 30% to recognize the more tenuous nature of a contract position.
   1. Tribunals have broad discretion to make an order for compensation for any and all wages lost. While foreseeability is not an appropriate device for limiting loss, *there must be a causal link between the discriminatory practice and the loss claimed*.
      * While there is no question that there is a strong causal link between the discriminatory practice and the loss claimed by the complainant, we should take account of the fact that her employment was by way of contract and not permanent employment.
6. Considering all Ms. Cowling was subjected to, an award of $15,000 is appropriate for the significant injury to her dignity and self-esteem.
   1. Ms. Cowling made it clear that the impact of being unemployed and refused employment in the Alberta branch she had successfully worked in for eight years was humiliating and devastating for her.
   2. It is important to acknowledge injuries unrelated to financial loss but that are nonetheless important to recognize because of the immeasurable harm it casts on a complainant emotionally and psychologically.
      * Injury to dignity should be compensated in a manner that will provide real redress to the complainant and encourage respect for the principles set out in the legislation.

Notes:

* Tribunal member Heafey ordered:
  1. The respondent to reinstate the complainant, on a one year contract, either, at the complainant’s choice, to her previous position in Mediation Services, or to a comparable contract position in the Government of Alberta as a labour relations officer or a comparable position at a comparable salary, at the earliest opportunity.
     + After the expiration of the 1-year contract, Alberta can determine the need for Ms. Cowling’s services, though her age cannot be a factor in future decisions not to renew her contract.
  2. Salary compensation representing wages for five years from May 5, 2007, discounted at a rate of 30%.
     + The amount of salary compensation is to be calculated at the rate of the advertised position, subject to normal statutory deductions.
  3. General damages in the amount of $15,000.00.
  4. Interest in accordance with the *Judgment Interest Act*.
  5. Costs on a party/party basis pursuant to the *Alberta Rules of Court*.
* While employers are free to restructure, they cannot, without legal justification, deny continued employment either in whole or in part on the basis of age.
* Damages for injury to dignity are not subject to mitigation.

#### *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162

Facts:

* SMS supplies equipment and equipment service to customers in the construction, mining, and petrochemical industries in Fort McMurray. The Grievor commenced work with SMS in 2010 as a labourer. In 2012, she successfully applied for a first-year welder apprentice position with SMS, working 7 days on and 7 days off with rotating tours of days and nights. After her first night shift tour, the Grievor requested that her shift be changed to straight day shifts. She had two sons with different fathers, and neither father was providing any significant childcare. As she had no extended family in Fort McMurray, she had to rely on third-party childcare for both her children. However, when she worked nights, it was too expensive to pay for childcare both during the nights when she worked and the days while she slept. As a result, she looked after the children herself during the days and got very little sleep. In December 2012, the Union filed a grievance on the Grievor's behalf. SMS denied the grievance, stating that it could not accommodate the Grievor's request. The grievance proceeded to arbitration.

Procedural history:

* The Arbitrator held that "family status" in the *AHRA* includes childcare responsibilities because it is within the scope of the ordinary meaning of the words, in keeping with the jurisprudence, and consistent with the objects of the Act. He held that the Union established a *prima facie* case of discrimination and that SMS's policy was not a BFOR.

Issues and holding:

1. What is the appropriate standard of review? **Reasonableness**
2. Does "family status" include the duties and responsibilities of childcare? **YES**
3. Has the Union established a *prima facie* case of discrimination? **YES**
4. Has the employer established that its rule or policy is a BFOR? **NO**

Analysis:

* A reasonableness standard usually applies where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Adjudicators acting under their enabling statute are presumed to hold expertise in the interpretation of their enabling legislation.
  + On the other hand, the correctness standard of review applies to constitutional questions, questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise, and true questions of jurisdiction.
* Competing approaches have developed in the jurisprudence regarding the test to establish a *prima facie* case of discrimination based on family status:
  1. The *Hoyt* test: a *prima facie* case of discrimination has been established if the complainant has been adversely affected or disadvantaged based upon her family status by an employer rule or policy.
  2. A *prima facie* case of discrimination requires a serious interference with a substantial parental or other family duty or obligation.
     + Some decisions have required employees to prove they have taken all reasonable steps to “self-accommodate” before a *prima facie* case of discrimination may be established.
* The correct test to establish a *prima facie* case of adverse effect discrimination based on family status is the *Moore* test, which requires that it be shown that:
  1. The complainant has a characteristic that is protected from discrimination.
  2. The complainant has experienced an adverse impact.
     + The efforts of the complainant to avoid the adverse impact are not relevant in this determination. Complainants are not required to prove that a workplace rule has a discriminatory impact on them, but that they were unable to avoid that impact.
       - *Note:* affirmed in *United Nurses of Alberta v Alberta Health Services*, 2021 ABCA 194.
  3. The complainant must show that the protected characteristic was a factor in the adverse impact.
     + *Note*: the protected characteristic does not have to be the only factor in the adverse impact; it does not even have to be the main factor.
* An employer may justify the impugned standard by establishing on the balance of probabilities that:
  1. The employer adopted the standard for a purpose rationally connected to the performance of the job.
  2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.
  3. The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
     + Under this step, the efforts of the complainant to self-accommodate are relevant in determining what reasonable accommodation an employer is required to provide, as part of a multi-party search for accommodation.
       - *Note*: self-accommodation refers to the act of helping one's self to overcome adverse employment effects by looking for solutions outside of what the employer can provide (e.g., reaching out to family members for support, investigating other childcare options, etc.).

Rationale: (Ross J)

1. Whether SMS's shift schedule constitutes *prima facie* discrimination based on family status require an appreciation of how human rights principles apply in the unionized labour environment; these issues are within the specialized expertise of the Arbitrator, and in this context are not questions of central importance to the legal system as a whole.
   * Therefore, the applicable standard of review is reasonableness; this court cannot substitute its opinion for that of the Arbitrator provided the Arbitrator's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.
2. The Arbitrator's conclusion on the scope of "family status" is not unreasonable.
   * The definition of "family status" in the *AHRA* ("the status of being related to another person by blood, marriage, or adoption") is not inconsistent with the Arbitrator's conclusion, and the Arbitrator did not misconstrue the jurisprudence or the object of human rights legislation.
   * Even if the standard of review was correctness, judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations.
3. The Arbitrator's decision on the issue of *prima facie* discrimination was reasonable. Even if the standard of review was correctness, the Arbitrator's decision would still stand.
   1. The Grievor, as a single mother of two young children who require childcare, has a characteristic that is protected from discrimination.
   2. The Grievor experiences adverse effects in the form of having to choose between going sleepless or spending additional sums of money for childcare while she sleeps, thereby exacerbating her financial difficulties.
   3. The adverse effects upon the Grievor are directly the result of SMS's rule requiring her to work night shifts and her responsibilities as a single mother to care for her children.
4. SMS's rule is not a BFOR; SMS called no evidence to justify the requirement that all employees work rotating night and day shifts, and no evidence that accommodating the Grievor would cause it undue hardship.

Notes:

* "Family status" refers to the status of being related to another person by blood, marriage, or adoption [*AHRA*, s. 44(1)(f)].
  + e.g., it would prohibit discrimination on the grounds of one's familial relationship with someone disreputable.
  + Most discrimination cases relating to family status cases relate to requests to modify work schedules to accommodate familial responsibilities.
* Part 1 of the Moore test is modified in cases dealing with family status; the claimant has to prove that they have a characteristic that is protected from discrimination in that:
  1. A child or dependent is under his or her care or supervision, and
  2. Their care obligation engages the claimant's legal responsibility for that dependent (as opposed to a personal choice).
     + Family status is about *need*; it is not about what kind of caregiver you'd like to be or what opportunities you'd like to provide your kid.
     + *Note*: e.g., a desire to get off work early to take one's kids to hockey practice would not engage the employee's legal responsibilities.
     + *Note*: e.g., a desire to work three days a week to care for a toddler when childcare is affordable and readily available would not engage the claimant's legal responsibility. It merely reflects a personal preference for who is going to care for the child.

#### *Stewart v Elk Valley Coal Corp*, 2017 SCC 30

Facts:

* Ian Stewart worked in a mine operated by the Elk Valley Coal Corporation. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and employees. Elk Valley thus implemented the Alcohol, Illegal Drugs & Medications Policy ("the Policy"). Employees were expected to disclose any addiction issues. If they did, they were offered treatment. If they did not, and they were involved in an incident and tested positive for drugs, they would be terminated. The aim of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety. Stewart was advised about the details of the Policy and signed a form to that effect. Nevertheless, Stewart did not tell his employer that he had been using cocaine on his days off. One day, his loader was involved in an accident, and he tested positive for drugs. At a meeting regarding the positive drug test, Stewart claimed that he was addicted to cocaine. Nine days later, pursuant to the Policy, Elk Valley terminated Stewart's employment. Stewart argued that his termination constituted discrimination under the *Alberta Human Rights Act* ("the Act"), as addiction is a recognized disability under the Act.

Procedural history:

* The AHRC accepted that Stewart was addicted to drugs and that this addiction was a disability protected under the Act. It also found that Stewart's termination constituted adverse treatment by Elk Valley. However, it held that Stewart's disability "was not a factor in his termination," but rather, that he was terminated for breaching the Policy, which required him to disclose his addiction or dependence before an accident occurred to avoid termination. Therefore, it held that there was no *prima facie* discrimination. In the alternative, the AHRC also held that Policy was a BFOR. Elk Valley adopted the Policy in good faith and for a job-related purpose, believing that “application of the policy was necessary to ensure the deterrent effect of the policy and ultimately safety in the workplace.” Further, it concluded that Elk Valley had accommodated Stewart to the point of undue hardship. It reasoned that if Elk Valley had to impose less serious consequences on Stewart, the deterrent effect of the Policy would be significantly lessened and constitute undue hardship to the company, given Elk Valley's safety responsibilities. It also believed that the opportunity under the Policy to come forward and access treatment without fear of discipline, and the invitation to obtain treatment and apply for re-employment in six months, constituted accommodation.
* The AHRC's decision was affirmed by the ABQB on the grounds that Stewart failed to establish *prima facie* discrimination. However, the ABQB believed that the AHRC erred in finding that the Policy accommodated Stewart because he was not capable of seeking treatment under the Policy by reason of a dependency that he did not know he had.
* The ABCA dismissed the appeal and upheld the AHRC's decision. The majority found no *prima facie* discrimination, arguing that there was not shown to be direct discrimination in the sense of Elk Valley acting upon arbitrary or pre-conceived stereotypes when Stewart was let go.

Issues and holding:

1. What is the standard of review? **Reasonableness**
2. Did the AHRC err in holding that *prima facie* discrimination was not established? **NO**
3. Did the AHRC err in finding that the employer met its burden of establishing undue hardship? **N/A**
   * In light of the court's conclusions on *prima facie* discrimination, it is unnecessary to consider whether Stewart was reasonably accommodated.

Analysis:

* To establish *prima facie* discrimination, the employee must show:
  1. A disability which is protected under the Act.
  2. Adverse treatment with regard to his employment or a term of that employment.
  3. That the disability was a factor in the adverse treatment.
     + Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination.
* To avoid a finding of discrimination, the employer must justify the impugned standard by establishing on a balance of probabilities that:
  1. The employer adopted the standard for a purpose rationally connected to the performance of the job.
  2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.
  3. The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
     + Therefore, the employer has a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.

Rationale: (McLachlin CJ)

1. This case involves the application of settled principles on workplace disability discrimination to a fact situation; as such, reviewing courts should approach the decision of the AHRC with considerable deference.
   * If the decision is within a range of possible, acceptable outcomes which are defensible in respect of the evidence and the law, it is reasonable.
2. Elk Valley conceded the first two elements of the *prima facie* discrimination test are satisfied, and the AHRC's conclusion that addiction was not a factor in Stewart's termination was reasonable.
   * There was evidence capable of supporting the AHRC's conclusion that the reason for the termination was not addiction, but breach of the Policy (i.e., an inability to either stop or disclose drug use).
     + The letter advising Stewart of his termination cited a failure to "comply with the Drug and Alcohol Policy and disclose [his] dependency on drugs or alcohol before breaching the Policy and placing their lives, and the lives of their co-workers at risk."
   * Stewart suggested that his addiction was a factor in his termination because denial was part of the addiction, and prevented him from disclosing his addiction prior to the incident.
     + However, while the AHRC noted that any distinction between termination due to disability and termination due to failure to follow the Policy may appear to be superficial given that the misconduct relied upon may be considered to be a symptom of the addiction, it concluded that the argument did not assist Stewart because he had the capacity to come forward and disclose his drug use; this decision fell within a range of reasonable outcomes.
       - While Mr. Stewart may have been in denial about his addiction, he knew he should not take drugs before working, and he had the ability to decide not to take them as well as the capacity to disclose his drug use to his employer.
   * *Note*: in my view, this conclusion was unreasonable. The majority notes that *the misconduct relied upon may be considered to be a symptom of the addiction*, but still concluded that the addiction was not a factor in his dismissal.

Concurring: (Moldaver and Wagner JJ)

* The AHRC's conclusion that Stewart's drug dependency was not a factor in his termination was unreasonable; therefore, the test for *prima facie* discrimination was met in this case.
  + To prove *prima facie* discrimination, Stewart is not required to show that his termination was caused solely or even primarily by his drug dependency; he must only show that there is a “connection” between the protected ground — his drug dependency — and the adverse effect.
  + While Stewart’s exercise of some control over his drug use merely reduced the extent to which his dependency contributed to his termination, it did not eliminate it as a “factor” in his termination.
    - Stewart’s impaired control over his cocaine use was obviously connected to his termination.
* However, the AHRC reasonably held that the employer met its obligation to accommodate Stewart to the point of undue hardship.
  + The AHRC reasoned that if Elk Valley had to offer the opportunity for individual assessment to Stewart or replace the immediate effect of termination of employment with less serious consequences (such as a suspension), the deterrent effect of the Policy would be significantly lessened.
    - Given Elk Valley’s safety objectives and responsibilities at the coal mine, it was reasonable for the AHRC to find that this reduction in the Policy’s ability to deter other employees from using drugs constituted undue hardship.
  + The employee is not entitled to perfect accommodation, but rather to accommodation that is *reasonable* in the circumstances; the actions of Elk Valley satisfy this standard.
    - Although Stewart was immediately terminated, he was offered the opportunity to apply for employment after six months, provided that he completed a rehabilitation program.
      * Elk Valley even agreed to pay 50% of the cost of the program on certain conditions.
      * There was also evidence that there would have been vacant positions available had Stewart applied for employment after completing the program.

Dissent: (Gascon J)

* Although drug dependence is a protected ground of discrimination in human rights law, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts to objectively assess the merits of their discrimination claims.
* The AHRC's conclusion that the Policy is not *prima facie* discriminatory is unreasonable.
  + The AHRC's conclusions reflected four conceptual errors:
    1. It required Stewart to make prudent choices to avoid discrimination, which amounts to a sort of contributory fault defence in discrimination cases, which:
    2. It limited Stewart's protections to an assurance of formal equality.
    3. It required Stewart to prove that he was treated arbitrarily or stereotypically, importing substantive considerations into the settled and low threshold for *prima facie* discrimination and shifting a justificatory burden from the employer onto the complainant.
    4. It required Stewart to prove a causal relationship between his ground and harm, a higher bar than the mere “factor” threshold repeatedly adopted by the Court.
  + Under the proper test, the evidence before the AHRC could not support its conclusion that Stewart's drug dependence did not contribute to his termination.
    - His residual control over his choices merely diminishes the extent to which his dependence contributed to his harm, it does not eliminate it as a factor.
* With respect to justification, a policy that accommodates employees through mechanisms which are either inaccessible by the employee due to their disability or only applicable to the employee post‑termination cannot justify *prima facie* discrimination.
  + Reasonable accommodation requires that the employer arrange the employee’s workplace or duties to enable the employee to do his or her work, if it can do so without undue hardship.
    - To determine what reasonable alternatives are available, an employer must engage in an individualized analysis of the employee based on the employee’s differences and capabilities.
      * Therefore, any blanket approach to sanctions imposed on employees for disability‑related conduct will struggle to fulfill an employer’s individualized duty to accommodate.
    - Here, Elk Valley forewent individual assessment in the interest of deterrence; this is not appropriate in the human rights context, even in the safety‑sensitive environment of this workplace, and even though that environment motivates strict drug policies.
  + None of the employer’s efforts at accommodation provided Stewart with accessible accommodation during his employment, and those efforts failed to consider his individual circumstances in a dignified manner, so the employer cannot be said to have discharged its duty to accommodate him as an employee up to the point of undue hardship and the AHRC's findings to the contrary were unreasonable.
    - He was purportedly accommodated by the offer of lenient treatment if he voluntarily disclosed his drug dependence, but that accommodation was inaccessible by him because he appeared to have been unaware of his dependence, a symptom of his disability.
    - After termination, he was allegedly accommodated by being given the prospect of reapplying for his position, but accommodation assists employees *in* their sustained employment, not *former* employees who may, or may not, successfully reapply for the position they lost as a result of a prima facie discriminatory termination.

Notes:

* The key factors informing the majority's decision were:
  + The workplace was safety-sensitive.
  + Stewart was able to control his addiction and make decisions about his drug use. The employer's expert stated that he *could* have complied with the policy but chose not to.
    - Although Stewart was addicted, he apparently wasn't addicted enough to be afforded the protection of human rights law.
* This case would have been very different had the employer not had a policy to deter employees from working under the influence of drugs or alcohol.

# Employment Standards Legislation

## *Employment Standards Code*

* The *ESC* governs all employment relationships in the province, with the exception of federally regulated employees and those exempted by the regulations [s. 2(1)].
* The *ESC* sets out minimum benefits to which employees are entitled; parties can contract above these minimums, but any attempt to contract below them is void.
  + Under s. 56, to terminate employment, an employer must give an employee written termination notice of at least:
    - 1 week, if the employee has been employed for more than 90 days but less than 2 years,
    - 2 weeks, if the employee has been employed for 2 to 4 years,
    - 4 weeks, if the employee has been employed for 4 to 6 years,
    - 5 weeks, if the employee has been employed for 6 to 8 years,
    - 6 weeks, if the employee has been employed for 8 to 10 years, or
    - 8 weeks, if the employee has been employed for 10 years or more.
* Under s. 82, an employee may make a complaint to Employment Standards that an employer failed to pay earnings to an employee or to provide anything to which an emplyee is entitled under the *ESC*.
  + A complaint may be brought while the employer is employed by the employer and up to 6 months after termination [s. 82(2)].
  + An ES officer may refuse to accept or investigate a complaint if [s. 83]:
    1. The officer considers the complaint frivolous or vexatious, there is insufficient evidence, or there are other means available to resolve the complaint.
    2. The employee is proceeding with another action in respect of the subject-matter of the complaint before a court, tribunal, or arbitrator.
  + ES officers can order compensation or reinstatement [s. 89(3)].
* Any person who contravenes the *ESC* is guilty of an offence [s. 129], and may be liable for a fine of up to $100,000 (in the case of a corporation) or $50,000 (in the case of an individual) [s. 132].

#### *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986

Facts:

* Ontario's *Employment Standards Act* sets minimum requirements for contracts of employment. Any attempt to contract out of or waive a minimum standard is "null and void," but parties may agree to terms which provide in favour of the employee a higher remuneration of money, a greater right or benefit, or lesser hours of work than the requirements imposed by the Act. In terms of minimum standards, the Act specifies that an employer must give any employee who has been employed for five years or more, but less than ten years, four weeks' notice of termination or pay in lieu thereof.
* The two appellants were employed by HOJ Industries, which was a new and used car dealer. They were hired in 1978 and dismissed in 1985 without cause. The appellant Machtinger's employment contract stated that HOJ Industries could terminate him on giving him 0 weeks' notice. The appellant Lefebvre's contract stated that HOJ could terminate him on giving him 2 weeks' notice. However, HOJ Industries paid the appellants four weeks' pay in lieu of notice in accordance with the Act.

Procedural history:

* The ONSC held that the termination clauses in the two contracts were invalid because they did not comply with the minimum notice period of four weeks required by the Act. It thus required that HOJ Industries pay the appellants in lieu of notice, which for Machtinger was 7 months and for Lefebvre was 7 1/2 months.
* The ONCA held that Machtinger and Lefebvre were limited to the benefits conferred by the Act, which HOJ Industries provided.

Issue and holding:

* If an employment contract stipulates a period of notice less than that required by the *Employment Standards Act*, is an employee who is dismissed without cause entitled to (1) reasonable notice of termination, or (2) the minimum period of notice required by the Act? **(1)**

Rationale: (Iacobucci J)

* If a term is null and void, then it is null and void for all purposes; if the intention of the parties is to make an unlawful contract, no lawful contractual term can be derived from their intention.
  + Moreover, there is no evidence to warrant the conclusion that the parties, had they turned their minds to the subject, would have agreed to substitute for the void contractual term the minimum period of notice required by statute instead of looking to the common law standard of reasonable notice.
* The objective of the Act is to protect the interests of employees (which lack both the bargaining power and the information necessary to achieve more favourable terms) by requiring employers to comply with certain minimum standards; any interpretation of the Act should further this objective.
  + That said, voiding terms that fail to comply with the minimum notice periods for all purposes will give employers an incentive to comply with the Act to avoid the potentially longer notice periods required by the common law, in keeping with the objective of the Act.
    - This protects employees, most of whom are unaware of their legal rights or unwilling or unable to go to the trouble and expense of having them vindicated.

Ratio:

* If an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted.

#### *Holm v AGAT Laboratories Ltd*, 2018 ABCA 23

Facts:

* The *Employment Standards Code* specifies that, to terminate an employee, an employer must give an employee written notice of at least one week if the employee has be employed for more than 3 months but less than two years [s. 56(a)]. Nothing in the Act affects an agreement, a right at common law, or a custom that imposes on an employer an obligation or duty greater than that under the Act [s. 3(1)].
* Holm started working with AGAT in 2013. His employment agreement states that:

*2(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination …* ***This will be in accordance with the provincial legislation for the province of employment****.* [emphasis added]

Procedural history:

* The chambers judge found that the agreement did not contain sufficiently restrictive language to limit the respondent’s claim to the minimum notice requirements set out in the *Code*.

Issue and holding:

* What is the standard of review? **Palpable and overriding error**
* Did the chambers judge make a palpable and overriding error in holding that the notice provision did not limit Holm's notice to the minimum notice requirements set out in the *Code*? **NO**

Analysis:

* The common law presumption of termination only on reasonable notice can be rebutted through clear and unambiguous language in an employment contract specifying a different notice period.

Rationale: (Majority)

1. Contractual interpretation is a question of mixed fact and law; unless there is an extricable question of law, questions of mixed fact and law are reviewed for palpable and overriding error.
2. The wording in the agreement does not clearly restrict the applicable notice period to the statutory minimum set out in the Act.
   * The contractual requirement that notice be “in accordance with the provincial legislation for the province of employment” does not create a ceiling that legally limits the respondent’s notice entitlement only to the statutory minimum notice requirements.
     + This is in contrast to *Roden v Toronto Humane Society*, where the employer was entitled to terminate the employee’s employment “at any other time, without cause, upon providing the Employee with the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation."
   * Remedies allowable at common law under s. 3(1) of the *ESC* would also be "in accordance" with the Act, since the *ESC* only sets minimums.
   * At best, the contractual wording of section 2(2) of the agreement is ambiguous; in employment law, uncertainty ought to be resolved in favour of the employee.
     + Moreover, *contra proferentem* mandates that contractual ambiguities ought to be resolved against the party that drafted the contract.

Concurring: (O'Ferrall JA)

* In this case, a reasonable observer might question why the parties needed a termination clause like the one in this case to merely indicate their intention to be governed by the common law’s notice requirement.
* The requirement of clear and unambiguous language to rebut the presumption of termination only on reasonable notice may require revisiting for situations where it is clear what the parties intended, but where the words chosen do not satisfy judicial canons of construction.
  + Employers (especially small ones) and their employees ought not to be required to wade through mountains of jurisprudence in order to find the magic formula needed to achieve enforceable contract language is what is being questioned here.

Ratio:

* Contractual language providing notice or pay in lieu of notice “will be in accordance” with the Act does not clearly limit the respondent’s claim to the minimum one week notice requirement in the Act.

Notes:

* In *Inayat v Vancouver Career College (Burnaby) Inc*, 2017 ABPC 124, the employment contract said "The Instructor is not entitled to any additional notice or payment in lieu of notice in excess of what is required to be given or paid under the provisions of the *Alberta Employment Standards Code*." The Court found that this language restricted the employee's notice entitlement to the statutory minimums.

## Canada Labour Code

* The *Code* only applies to a federal work, undertaking, or business, which is defined in s. 2 as including:
  1. a work, undertaking or business connected with navigation and shipping, whether inland or maritime,
  2. a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
  3. a line of ships connecting a province with any other province, or extending beyond the limits of a province,
  4. a ferry between any province and any other province or between any province and any country other than Canada,
  5. aerodromes, aircraft, or a line of air transportation,
  6. a radio broadcasting station,
  7. a bank or an authorized foreign bank,
  8. a work or undertaking that, although wholly situated within a province, is declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
  9. a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and
  10. a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act.
* In 1978, Parliament passed amendments to the *Canada Labour Code*, adding a series of provisions in Part III (ss. 240 to 246) under the heading "Unjust Dismissal."
  + The unjust dismissal scheme applies to non-management, non-unionized employees who have completed 12 consecutive months of continuous employment.
    - The scheme does not apply in the case of (1) a shortage of work or (2) discontinuance of a job.
      * The employer bears the burden of proving either of these things.
  + If a dismissed employee believes they were dismissed unjustly, they can file a complaint within 90 days of dismissal [s. 240(2)].
  + On receipt of a complaint, an inspector is required to try to settle the complaint [s. 241(2)].
    - The inspector acts as a screening mechanism to prevent frivolous, vexatious, or unmeritorious claims from proceeding to arbitration.
  + If an inspector cannot resolve the complaint within a reasonable time, they can refer the matter to the Minister, who can appoint an adjudicator to hear the complaint [s. 241(3)].
    - The mandate of the adjudicator is to determine whether dismissal was unjust.
  + If a dismissal is unjust, the adjudicator has broad authority to grant an appropriate remedy, including compensation and reinstatement [s. 242(4)].
  + A complainant can file a compliant under the *Code* and file a wrongful dismissal claim with the courts.

#### *Wilson v Atomic Energy of Canada Inc*, 2016 SCC 19

Facts:

* Wilson was hired by Atomic Energy Canada Limited ("AECL") in 2005 and had a clean disciplinary record. In 2009, he was dismissed. He filed an unjust dismissal claim under s. 240 of the *Code*, believing he was dismissed for complaining about improper AECL procurement practices. In response, AECL sent a letter saying he was "terminated on a non-cause basis and was provided a generous dismissal package that well exceeded the statutory requirements." A labour arbitrator was appointed to hear the complaint.

Procedural history:

* The arbitrator found that the dismissal was unjust because it was without cause, and said that severance payments, no matter how generous, did not change that. The application judge found this decision to be unreasonable. In his view, nothing in the *Code* precluded employers from dismissing non-unionized employees on a without-cause basis so long as minimum notice and compensation is given. The FCA agreed, but reviewed the issue on a standard of correctness.

Issues and holding:

1. What is the appropriate standard of review? **Reasonableness**
2. Was the adjudicator's decision reasonable? **YES**

Rationale: (Abella J)

1. The decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a reasonableness standard.
2. The text, context, and views of arbitrators and labour law scholars confirm that the purpose of Part III was to ensure that non-unionized employees would be protected from being dismissed without just cause.
   * In 1978, the Minister of Labour said that the amendments were meant to give unorganized workers some of the minimum standards which have been won by the organized workers by allowing them to appeal against arbitrary dismissal.
   * Labour law scholars and adjudicators appointed to apply Part III of the *Code* have almost all interpreted the provisions as offering a statutory alternative to the common law of dismissals and align the protections from unjust dismissals for non-unionized employees with those available to unionized ones.
     + After an extensive review of Part III of the *Code* in consultation with academics, organizations, administrators, and practitioners, Prof. Arthurs confirmed that the new *Code* regime was also an efficient and cost-effective alternative to the civil court system available for dismissed employees.
   * The jurisprudence has interpreted protection for "unjust dismissal" as a requirement that employees can only be dismissed for "just cause," which:
     1. Requires employers to implement progressive discipline (i.e., making employees aware of performance issues, working with the employee to rectify them, and imposing a graduated series of sanctions before resorting to dismissal).
     2. Requires employers to give reasonsshowing why the dismissal is justified.
        + This is in direct conflict with the common law scheme, which provides a right to dismiss on reasonable notice *without* cause or reasons.
     3. Carries with it a wide remedial package including reinstatement and equitable relief not only for the duration of the notice period but for *all* losses attributable to the discharge, which is potentially more extensive than what a court might award.
        + If an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under the Unjust Dismissal scheme.
   * The alternative approach of severance pay in lieu falls outside the range of “possible, acceptable outcomes which are defensible in respect of the facts and law.”
     + To infer that Parliament intended to maintain the common law under the *Code* regime creates a situation in which the protections given to employees by statute — reasons, reinstatement, equitable relief — can be superseded by the common law right of employers to dismiss whomever they want for whatever reason so long as they give reasonable notice or pay in lieu. This is not the correct way to understand the relationship between statutes and the common law.

Notes:

* The common law permits dismissal with notice (provided dismissal is not discriminatory); this does *not* apply in federally regulated industries.

# Privacy

* + Privacy in Alberta is governed by multiple different statutes.
    - The *Personal Information Protection and Electronic Documents Act* applies to federally regulated private employers.
    - The *Privacy Act* applies to federal, public employers (e.g., the RCMP).
    - The *Personal Information Protection Act* applies to provincially regulated private employers in Alberta.
    - The *Freedom of Information and Protection of Privacy Act* applies to provincial, public employers (e.g., Alberta Health Services).
    - The *Health Information Act* governs the collection, use, or disclosure of "health information" (registration, diagnostic, treatment, and care information or registration information).
  + The Office of the Information and Privacy Commissioner of Alberta oversees compliance with *PIPA*, *FOIP*, and the *HIA*; the Office of the Privacy Commissioner of Canada oversees compliance with *PIPEDA* and the *Privacy Act*.
  + Takeaways:
    - People do not lose their privacy rights when they become employees.
    - Other employees and members of the public do not lose their privacy rights because people become employees of an organization.
    - Organizations must take reasonable steps to safeguard personal information (including health information) and must ensure that the collection, use and disclosure of personal information (employees, volunteers, clients) is compliant with the relevant statutory authority.
    - Employers who do safeguard information may find themselves in trouble with the relevant privacy commission, and/or liable to those whose privacy has been breached.
    - Employers should be attentive to the language used in in their statements both to their own employees and to the general public, including when an employee or company officer is under investigation, or has left the company, whether voluntarily or otherwise to ensure statements are not false or misleading.

## Collection of Personal Information

#### Alberta Information and Privacy Commissioner, *Report of an Investigation into Collection and Use of Personal Employee Information without Consent*, Investigation No P2005-IR-004 (Alberta: OIPC, 13 May 2005)

Facts:

* RJ Hoffman Holdings Ltd ("Hoffmans") operates oilfield maintenance services in Alberta and Saskatchewan. In 2004, Hoffmans installed video surveillance cameras throughout its locations. It's reasons for doing so were (1) safety/security and loss prevention and (2) employee performance management. There is no audio, zoom, or pan capacity on any of the cameras. They only record when movement is detected. Video is stored for a month and then automatically erased. Th Hoffmans Operations Manager is the only employee with access to the password for the video feed. The complainant was a non-unionized employee of Hoffmans. He alleged that his employer conducted video surveillance in contravention of the *Personal Information Protection Act* ("the Act"), and that, through the use of the cameras, Hoffmans managers had intercepted a private verbal communication between him and another employee that led to him being dismissed.

Issues and holding:

1. Does this collection involve “personal employee information” under the Act? **YES**
   * i.e., does *PIPA* apply? Does the Office of the Privacy Commissioner have jurisdiction?
2. Was the collection reasonably required for the organization’s purposes of establishing, managing or terminating the employment relationship? **YES**
   1. Was the collection reasonably required for the purposes of safety, security, and loss prevention? **YES**
   2. Was the collection reasonably required for the purpose of employee performance management? **NO**
3. Did the organization provide adequate notice that the personal information was going to be collected and the purposes for which the personal information was going to be used?

Analysis:

* "Personal employee information" is defined in s. 1(j) of the Act as "personal information reasonably required by an organization that is collected … for the purposes of establishing, managing or terminating an employment relationship … but does not include personal information about the individual that is unrelated to that relationship."
  + "Personal information" is defined in s. 1(k) as "information about an identifiable individual."
* ss. 15(2) and 18(2) of the Act specify that an organization shall not collect or use personal employee information without their consent unless the collection or use is *reasonable* for the purposes for which it is being collected or used.
  + It is well established that as between employer and employee, the latter’s reasonable expectations of privacy are not set aside simply by entering into the employment relationship; but, an arbitrator must acknowledge the employer’s legitimate business and property interests. What is required, then, is a contextual and reasonable balancing of interests.
  + "Reasonable" is what a reasonable person would consider appropriate in the circumstances; the determination of “reasonableness” can be determined by considering:
    1. Are there legitimate issues that the organization needs to address through surveillance?
    2. Is the surveillance likely to be effective in addressing these issues?
    3. Was the surveillance conducted in a reasonable manner?
       - The threshold for determining the reasonableness of non-surreptitious video surveillance is lower than with surreptitious video surveillance.
* s. 15(2)(c) of the Act says that an organization shall not collect personal information about an individual without their consent unless it has provided the individual with reasonable notification that the information is going to be collected and of the purposes.
  + Employers should explicitly notify employees about the cameras and their purposes, preferably in writing through a written policy with each employee acknowledging the notice in writing, or through a posting in a conspicuous location within the premises.

Rationale:

1. An image captured of an identifiable person on surveillance camera is information about an identifiable individual; such information captured for the purposes of monitoring employee performance and detecting employee theft is related to the management of the employment relationship and is thus "personal employee information."
2. The collection and use of personal employee information though the cameras is reasonably required for safety, security, and loss prevention, but not for the purpose of employee performance management.
   1. The surveillance as conducted is reasonable to address the safety and security issues.
      1. Hoffmans has demonstrated a legitimate concern about theft and property damage, as well as employee safety.
         * Hoffmans described several prior instances of theft of company-owned equipment from the shop area, as well as instances of theft of equipment and clothing belonging to employees.
         * Hoffmans has also described two instances where fires had started in a truck in the shop, causing significant damage.
      2. Hoffmans has demonstrated that the collection and use of information through the video cameras has proven effective in addressing the issues of theft and property damage.
         * Individual Hoffmans employees and Hoffmans’ management said that the incidents of theft from and property damage to the facility have all but stopped.
         * There have been no further fires or other wilful property damage since the installation of the cameras, and no reported theft of employer- or employee-owned property.
         * Management and employees attribute the elimination of theft from the shop and staff areas to the presence of the cameras.
      3. The collection of information through the video cameras was done in a reasonable manner.
         * The loss of privacy caused by the cameras is less pronounced.
           + The cameras are in plain view, and the employees have been aware of their presence.
           + The cameras are only operational in common areas of the shop and office; there are no cameras in any employee rest area where there would be a heightened expectation of privacy.
           + The recorded images are not accessible to anyone other than Hoffmans’ management; the Operations Manager is the only employee who has a password to access the footage.
           + If there is no investigation that requires the footage to be reviewed, it is automatically deleted within 30 days, which is a reasonable time period.
         * In respect of the purposes of deterring theft and property damage, there is no reasonable alternative to the surveillance as conducted.
           + Hoffmans’ drivers arrive at the truck yard to begin their shift at all hours of the day and night. As such, drivers are entering and leaving the truck yard at times when no supervisor and indeed no other employees are on the premises.
   2. The collection and use of personal information through video surveillance is not reasonably required to ensure that employees are fulfilling their work commitments.
      1. Hoffmans did not describe any specific difficulties with worker productivity; there was no evidence presented that the employees were doing anything other than performing their job duties as expected.
      2. Canadian arbitrators have generally condemned the use of surveillance cameras to record the performance and productivity of workers.
         * Constant camera surveillance of an employee’s productivity may be regarded in some circumstances as a diminution of one’s sense of personal dignity or privacy.
         * The possibility that management might at some point witness an employee avoiding work or taking longer breaks than they are entitled to does not justify the constant and invasive supervision of their daily activities.
      3. Hoffmans would have great difficulty establishing that surveillance cameras would be more effective in monitoring employee performance than a well-timed visit from a supervisor.
3. While the cameras were in plain view and the employees likely knew they were there, Hoffmans failed to give adequate notice of the collection of employee information with them in violation of s. 15(2)(c) of the Act.
   1. Hoffmans did not explicitly notify employees about the cameras and their purposes.

Notes:

* The questions for assessing whether the collection of personal information is reasonable are:
  1. Are there legitimate issues that the organization needs to address through surveillance?
  2. Is the surveillance likely to be effective in addressing these issues?
  3. Was the surveillance conducted in a reasonable manner?
  4. Are there reasonable alternatives to the surveillance?
  5. Were the employees given adequate notice of the surveillance?
* In *R v Cole*, 2012 SCC 53, Cole (a high school teacher) was found with nude photos of a grade 10 student on his employer-issued computer during a routine search of a server. The school board had a policy confirming that school-owned technology was not private and could be monitored. But, the school also allowed personal use of teachers' school-issued devices. Cole's computer, photos, and internet files were turned over to the police, and the SCC allowed the evidence to be admitted at Cole’s trial.
  1. But, the SCC confirmed that while workplace policies can diminish an individual's expectation of privacy in their work computer, they do not fully remove the expectation. Thus, the policy allowing for personal use and the intimate nature of the information on the laptop afforded Cole *some* expectation of privacy in the information accessed and stored on the device.

#### *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34

Facts:

* Irving operates a paper mill in Saint John, NB. In 2006, it unilaterally adopted a "Policy on Alcohol and Other Drug Use" under the management rights clause of the collective agreement without any negotiations with the union. The management rights clause read:

*4.01. The Union recognizes and acknowledges that it is the right of the Company to operate and manage its business subject to the terms and provisions of this agreement.*

The policy, 10% of employees in "safety sensitive" positions were to be randomly selected for unannounced breathalyzer testing over the course of a year. A positive test for alcohol (i.e., one showing a BAC greater than 0.04%) attracted significant disciplinary action, including dismissal. Failure to participate in the test was grounds for immediate dismissal. There were only eight documented incidents of alcohol impairment at the workplace over a period from April 1991 to January 2006, and there were no accidents, injuries, or near misses connected to alcohol consumption. The Union filed a grievance challenging only the random alcohol testing aspect of the policy.

Procedural history:

* Weighing the employer's interest in random alcohol testing as a workplace safety measure against the harm to the privacy interests of employees, the arbitration board allowed the grievance and concluded that the random testing policy was unjustified because of the absence of evidence of an existing problem with alcohol use in the workplace. On judicial review, the board's award was set aside as unreasonable because of the dangerousness of the workplace. The New Brunswick Court of Appeal dismissed the appeal.

Issue and holding:

* Did the arbitration board err in holding that implementing a random alcohol testing policy was not a valid exercise of the employer's management rights under the collective agreement? **NO**

Analysis:

* The scope of management’s unilateral rule‑making authority under a collective agreement is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union must be consistent with the collective agreement and *reasonable*.
* Reasonableness in the unilateral exercise of management rights is assessed using a "balancing of interests" proportionality approach; under it, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees’ privacy rights.
  + Assessing the reasonableness of an employer's policy can include looking at such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.
  + Arbitrators have consistently found that when a workplace is dangerous, an employer can test a safety sensitive employee if (1) there is "reasonable cause" to believe that the employee is impaired while on duty, (2) where the employee has been directly involved in a workplace accident or significant incident, or (3) where the employee is returning to work after treatment for substance abuse.
  + Arbitrators have overwhelmingly rejected unilaterally imposed policies of mandatory random testing for employees in a dangerous workplace as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.
    - The dangerousness of a workplace is clearly relevant, but it is not an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences.

Rationale: (Abella J)

* The board reasonably concluded that the benefit to the employer from the random alcohol testing policy in this workplace was not proportional to the harm to employee privacy; the expected safety gains to the employer were uncertain to minimal at best while the impact on employee privacy was much more severe.
  + As the board found, the mill is a dangerous work environment; however, as the board reasonably concluded, the employer did not demonstrate the requisite safety concerns that would justify universal random testing.
    - As the board concluded, eight alcohol‑related incidents at the Irving mill over a 15‑year period did not reflect the requisite problem with workplace alcohol use.
    - While the employer argued that deterrence was a major benefit of random alcohol testing, the board was not satisfied that there was any evidence of a deterrent effect at the mill.
      * In the board's view, the lack of any positive test results in almost two years of random alcohol testing was consistent with the conclusion that there was no workplace alcohol abuse to deter.
    - In no case has an arbitrator concluded that an employer could unilaterally implement random drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem.
  + Moreover, the board accepted that breathalyzer testing significantly affects privacy, involving a loss of liberty and personal autonomy.
    - This conclusion is unassailable; the SCC has long recognized that the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity.

Dissent: (Rothstein and Moldaver JJ)

* In striking down the policy, the board unreasonably departed from an arbitral consensus that has attempted to strike a balance between competing interests in privacy and safety in the workplace.
  + The demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or are unreasonable.
  + The arbitration board, without explanation, departed from the arbitral consensus that an employer must demonstrate evidence of an alcohol problem in the workplaceto justify random alcohol testing.
    - The board elevated the threshold required by Irving to justify its random alcohol testing policy by requiring evidence of a “significant” or “serious” problem at the Irving mill; the correct standard reflected in the arbitral consensus is evidence of “a” problem.
    - The board required that the evidence of alcohol use be causally linked to the accident, injury or near miss history at the plant; but, the arbitral jurisprudence does not suggest that an employer has to wait for a serious incident of loss, damage, injury or death to occur before taking action.
  + The reasonableness of the board’s reasoning is further undermined by its inference that Irving did not regard the risk at the mill as very high based on the fact that only 10% of mill employees in safety‑sensitive positions were tested in any given year.
    - The inference was unreasonable because it failed to recognize that: even low testing percentages can be highly effective; testing a higher percentage of employees to establish the reasonableness of a workplace testing policy would perversely incentivize employers and lead to a greater intrusion into the privacy of employees.

Notes:

* The test to determine if random drug testing will be lawful is:
  1. Is the workplace safety-sensitive?
     + If so, there can be testing upon accident/near miss, reasonable cause, return to work following addictions treatment, or a documented problem of substance abuse in the workplace.
  2. Is the benefit to the employer from the policy proportional to the harm caused to the employee's privacy? In answering this question, courts consider:
     + What is the harm to the employer is attempting to address?
     + What are the risks associated with the workplace, generally, and the position, specifically?
     + Is there evidence of a substance problem?
     + What is the scope of the intrusion (urine/breath vs. blood)?
* As Moldaver and Rothstein JJ note, alcohol tests are usually conducted with a breathalyser, which provides an immediate result in a minimally invasive manner. Drug testing, on the other hand, does not provide an immediate detection of drug impairment, which may affect the determination of whether it is reasonably necessary to ensure safety in the workplace.
* When related to an absence, the employer can request confirmation that the absence is medically-related and when the employee is expected to return to work.
* Related to accommodation, employers may ask for:
  1. The general nature of the disability.
  2. Whether the illness/injury is permanent or temporary.
  3. What restrictions or limitations the employee has.
  4. Whether treatment or medication the employee is taking will affect their ability to do their job in a satisfactory or safe manner.

#### *Phillips v Westcan*, 2020 ABQB 764

Facts:

* Phillips was a truck driver operating in remote parts of Canada. Upon hiring, he had executed a contract specifically agreeing to be randomly tested. He had also participated in orientation and training that demonstrated he understood that he would be randomly tested. Yet, he brought an injunction seeking to prevent his employer from randomly drug/alcohol testing him. He argued that the random testing was contrary to the SCC's pronouncements regarding random testing, as articulated in *Irving* and in human rights jurisprudence.

Issue and holding:

* Is the term of Phillip's employment contract that Westcan would randomly test its employees for drugs and alcohol enforceable? **YES**
  + Consequently, Mr. Phillips is subject to random drug and alcohol testing.

Rationale: (Dunlop J)

* The enforceability of a contractual drug and alcohol testing regime does not turn on the reasonableness of that regime, as it would if random testing were imposed unilaterally.
* An employer and employee are free to agree to conditions of employment, provided those conditions comply with employment standards, human rights and other legislation, and provided those conditions of employment are not otherwise unconscionable.
  + Random drug and alcohol testing is not an unconscionable term in an employment agreement for a driver hauling dangerous goods over long distances, without supervision.

## Disclosure of Information

#### Alberta Information and Privacy Commissioner, *Report of an Investigation Concerning Misuse of the Alberta Electronic Health Record (Netcare)*, Investigation No H2011-IR-004 (Alberta: OIPC, 30 November 2011)

Facts:

* Alberta Netcare is the provincial electronic health record system. On request, Alberta Health and Wellness ("AHW") will provide a report (i.e., a "Netcare audit log") that shows which Netcare custodians have viewed the individual's records. This is mandated by part 56.6(4) of the *Health Information Act* ("HIA").
* Complainant 1 and his ex-spouse ("the Nurse") separated and became involved in divorce proceedings. At a meeting on October 25, 2010, the Nurse's lawyer asked a question about Complainant 1's medical history that made him uneasy. He thus asked AHW for a copy of his Netcare access log the following week. He discovered access to his health records by physicians who were not his care providers. Complainant 2 (Complainant 1's new partner) and Complainant 3 (Complainant 1's mother) also received results showing suspicious accesses to their records. The suspicious accesses were purportedly made by 12 different physicians in the emergency department of a single Covenant Health hospital, and were not related to any health services provided at the facility. The Complainants suspected that the Nurse or the Nurse's new partner ("the Physician") were behind these accesses. The Commissioner opened investigations under the HIA, interviewing the Physician on April 7, 2011. He admitted to having looked at the Complainants' health information using the other physicians' Netcare accounts without their permission or knowledge despite not providing any health services to the Complainants. He just wanted to have some "control" over the divorce and custody battle between Complainant 1 and the Nurse. He stated that he was able to misuse his colleagues' accounts because it is common practice in the emergency department for staff to simply use whoever's Netcare account is currently logged in and available.

Issues and holding:

1. Does the HIA apply to this matter? **YES**
2. Did the affiliate (the Physician) use health information in any manner not in accordance with the affiliate’s duties to the Custodian, in contravention of Part 4, section 28 of the HIA? **YES**
3. Did Covenant Health fail to protect health information in contravention of section 60 of the HIA? **YES**
4. Did the affiliates (the 12 physicians) use health information in any manner not in accordance with the affiliates’ duties to the Custodian (Covenant Health) in contravention of Part 4, section 28 of the HIA? **NO**

Analysis:

* Section 28 of the HIA says that an affiliate of a custodian must not use health information in any manner that is not in accordance with the affiliate’s duties to the custodian.
* Section 60 of the HIA says that a custodian must take reasonable steps to maintain administrative, technical, and physical safeguards that protect against reasonably anticipated unauthorized use, disclosure, or modification of the health information.
  + This means that custodians must take steps to protect health information that a reasonable person, faced with similar circumstances would also take. If a threat to confidentiality is generally well known, it is reasonable to expect a custodian would anticipate it and devise a safeguard to mitigate the threat.
  + With respect to administrative safeguards, users are normally instructed through policy and training to log off from information systems when not using them.
  + Technical safeguards may include unique authentication and audit logs, reinforced by other technology, such as system timeouts or smart cards.

Rationale:

1. The HIA applies to this matter because the information in question is health information in the custody or control of a custodian, Covenant Health.
   * The HIA applies to health information under the control of "custodians," and Covenant Health is a custodian under s. 1(1)(f)(i) of the HIA.
   * The information viewed (i.e., demographic information, lab test results, operative results, progress notes and diagnostic imaging reports) all fall within the definition of "health information" under s. 1(1)(k) of the HIA.
   * Under s. 1(1)(a) of the HIA, an "affiliate" of Covenant Health includes individuals employed by Covenant Health and individuals who perform a service for Covenant Health under a contract or agency relationship.
     + The Physician implicated in this matter provides services to Covenant Health under the Capital Region Medical Staff Bylaws and is thus an "affiliate" of Covenant Health.
   * Under s. 62(2) of the HIA, any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection use or disclosure by the custodian (i.e., Covenant Health).
2. Clearly, viewing the three Complainants’ health information was not in alignment with the Physician’s duties to Covenant Health under s. 28.
   * None of the Complainants sought health services at any Covenant Health facility at the time of the Netcare accesses in question, and there was no other reason authorized under the HIA for the Physician to have viewed the Complainants’ health information.
   * In the interview of April 7, 2011, the Physician admitted that accessing the Complainants’ health information was wrong.
3. Covenant Health failed to take reasonable steps to maintain administrative, technical, and physical safeguards that protect against reasonably anticipated unauthorized use, disclosure, or modification of the Complainant's health information.
   * There is a clear risk in the hospital setting of unauthorized users misusing health information without being held accountable for their actions
     + Emergency departments are busy settings, and health care workers share common computer terminals to access health information. It is thereby reasonably anticipated that a worker may forget or not have time to properly log off the health information system, thereby allowing workers to misuse others’ sessions in information systems.
   * While Covenant Health had established a policy telling users to log out of applications when leaving a computer terminal unattended, its affiliates were not trained and were not following policy.
     + There was no evidence to show the 12 physicians whose Netcare accounts were misused had received any training in how to use Netcare securely.
     + Plus, while four of the physicians were trained in general privacy and security awareness in 2005, these incidents occurred in 2009-2010 and no refresher training had been delivered.
   * While Covenant Health reported technical controls, including unique user login credentials, audit logs, and system timeouts, these controls would not prevent insider abuse of information systems in a busy area like an emergency department.
     + Neither of these controls is particularly useful if users are not trained to log-off when leaving a computer terminal, or commonly share their login sessions.
     + While Covenant Health had a 10-minute screensaver timeout, the screensaver could be deactivated with a shared password, which does nothing to protect against insider misuse or enforce individual accountability.
4. The 12 physicians contravened Covenant Health policy instructing users to log off computer systems when leaving them unattended, but they lacked security training related to Netcare and the commonly accepted practice of sharing Netcare logins in the emergency department.

Notes:

* Employers not only have a responsibility to collect and use personal information responsibly, but also to protect that information from outsiders and other employees.
  + Just because you have *access* to information, does not mean you are entitled to use or disclose that information.
* Recent changes to the *HIA* allow for a fine of up to $200,000 for anyone failing to take reasonable steps to safeguard health information.

## Breach of Privacy

* There are four breach of privacy torts recognized at common law in Canada.
  1. Appropriation, for the defendants’ advantage, of the plaintiff’s name or likeness (*Athans v Canadian Adventure Camps*, 1977 OJ No. 2417);
  2. Intrusion upon seclusion (*Jones v Tsige*, *below*);
  3. Public disclosure of private facts (*Jane Doe v Morgan*, 2018 ONSC 6607);
     + The elements of the tort of public disclosure of private facts are:
       1. The defendant publicized an aspect of the plaintiff's private life.
       2. The plaintiff did not consent to the publication.
       3. The matter publicized or its publication would be highly offensive to a reasonable person.
          - It need not be the matter itself that is highly offensive to a reasonable person: it is enough if the fact of its publication is offensive.
       4. The publication was not of legitimate concern to the public.
  4. Publicly placing a person in a false light (*Yenkovian v Gulian*, *below*).

#### *Jones v Tsige*, 2012 ONCA 32

Facts:

* The appellant Jones discovered that the respondent Tsige, who had formed a common-law relationship with Jones' former husband, had looked at her banking records at least 174 times over the course of four years. Tsige did not distribute or record the information.

Procedural history:

* The judge dismissed Jones' claim for damages on the ground that Ontario does not recognize the tort of breach of privacy. The judge was of the view that it was up to the legislature, not the courts, to create a tort for breach of privacy if public policy demanded it.

Issue and holding:

* Is there a cause of action for intrusion upon seclusion? **YES** (damages of $10,000 to the plaintiff)
  + The court unanimously held that the time had finally come to recognize at common law the tort of intrusion upon seclusion.

Analysis:

* The key features of intrusion upon seclusion are:
  1. Intentionality, including recklessness,
  2. Invasion of private affairs or concerns without lawful justification,
  3. Conduct that would be regarded as highly offensive to a reasonable person.
     + The plaintiff has the burden of proving (a) that she had an expectation of privacy and (b) that the expectation was reasonable.
  4. Distress to the plaintiff.
     + This can be presumed once the other elements are satisfied.
* Damages should be assessed on the basis of:
  + Were the actions of the defendant deliberate and repeated?
  + Was the conduct offensive to a reasonable person?
  + Did the plaintiff suffer public embarrassment or harm to their health, welfare, social, business, or financial position.
  + Has the defendant apologized for their conduct and tried to make amends?
* General damages for intrusion upon seclusion are capped at $20,000.

Rationale:

* The trend in the case law supports a cause of action for breach of privacy.
  + At the very least, the case law and statutory law do not rule out a common law cause of action for invasion of privacy.
* Privacy has long been recognized as an underlying and animating value for various traditional causes of action to protect personal and territorial privacy.
* *Charter* jurisprudence recognizes privacy, including "informational privacy" (which protects information about ourselves and our activities), as a fundamental value in our law.
  + While the *Charter* doesn't apply to private disputes, the SCC has acted on several occasions to develop the common law in a manner consistent with *Charter* values.
* Many legal scholars who have considered the issue of tort law protection of privacy have supported the recognition of a right of action for breach of privacy.
* The pace of technological change has accelerated, giving rise to substantial privacy concerns to which the court must respond.
* The facts of this case cry out for a remedy; Tsige's actions were deliberate, offensive, and had no lawful justification.

#### *Yenovkian v Gulian*, 2019 ONSC 7279

Facts:

* The parents married in 2000. They have two children: a 12-year-old daughter and 9-year-old son. The daughter suffered from a neurological disorder and was autistic. During their marriage, the father, Mr. Yenovkian, was abusive. The marriage ended in September 2019 when Mr. Yenovkian asked for a divorce. On September 11, 2018, the Ontario Court of Justice granted Ms. Gulian temporary sole custody of the children, permitted her to move to the UK with them, and granted Mr. Yenovkian in-person and Skype access.
* Mr. Yenovkian has posted photos and videos online of the children, which he took without their knowledge or consent during both in-person and Skype access. He posted online making allegations that Ms. Gulian and her family "kidnapped" and "drugged" his daughter. He posted images and videos of Ms. Gulian and her parents with written and oral commentary making unfounded accusations of various illegal acts, including kidnapping and child abuse. He posted a petition called "Demand an End to Corruption in Family Law – Investigate the Gulian Family for Kidnapping, Fraud, and Child Abuse,” which has several online supporters. He has made several unsubstantiated accusations of child abuse and kidnapping against Ms. Gulian and her family to various authorities in Canada, the US, and the UK. None of these allegations amounted to anything. Throughout the proceedings, Mr. Yenovkian sent Ms. Gulian very abusive emails.
* Ms. Gulian seeks damages of $150,000 for nuisance, harassment, intentional infliction of mental suffering and invasion of privacy, and $300,000 for punitive damages.

Issue and holding:

* Should the court award Ms. Gulian damages for intentional infliction of mental suffering? **YES**
* Should the court award Ms. Gulian damages for invasion of privacy? **YES**
  + Is Mr. Yenovkian liable for publicly placing the plaintiff in a false light? **YES**
  + Is Mr. Yenovkian liable for public disclosure of private facts? **YSE**

Analysis:

* The test for the tort of intentional infliction of mental suffering, recognized by the ONCA, is: (a) flagrant or outrageous conduct; (b) calculated to produce harm; and (c) resulting in a visible and provable illness.
* This is an appropriate case in which to recognize the tort of publicly placing the plaintiff in a false light.
  + The tort holds people liable for giving publicity to a matter concerning another that places the other before the public in a false light if:
    1. The false light in which the other was placed would be highly offensive to a reasonable person.
       - While the publicity giving rise to this cause of action will often be defamatory, defamation is not required.
    2. The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
  + The value at stake is respect for a person’s privacy right to control the way they present themselves to the world.
  + Damages for publicly placing a plaintiff in a false light should be calculated by considering:
    1. The nature of the false publicity and the circumstances in which it was made.
    2. The nature and position of the victim of the false publicity.
    3. The possible effects of the false publicity statement upon the life of the plaintiff.
    4. The actions and motivations of the defendant.

Rationale: (Kristjanson J)

1. Mr. Yenovkian shall pay Ms. Gulian compensatory damages in the amount of $50,000 for intentional infliction of mental suffering.
   * Mr. Yenovkian’s conduct is intentional, flagrant and outrageous, calculated to produce the harm that it has, and is highly offensive, causing distress and humiliation, without legal justification.
2. Mr. Yenovkian shall pay Ms. Gulian $100,000 for invasion of privacy (false light and public disclosure of private facts).
   * The allegations that Ms. Gulian is a kidnapper, abuses children, and commits various other crimes are egregious, and paint her in a false light that would be highly offensive for a reasonable person.
     + The false publicity is widely disseminated on the internet, as well as through targeted dissemination to church friends and business associates.
     + Ms. Gulian has suffered damage as a mother, as an employee, in the Armenian community, and in her church community. She is peculiarly vulnerable as the spouse of the disseminator of false publicity.
   * Mr. Yenovkian's behaviour has caused a viable and provable illness.
     + The false publicity has had a detrimental effect on Ms. Gulian’s health and welfare, humiliation, caused her fear, and could be expected as well to affect her social standing and position.
     + Ms. Gulian testified that she has sought medical assistance from her family doctor as a result of Mr. Yenovkian’s conduct; she was having nightmares, feeling ill and was undergoing stress.
     + She is concerned that one of the anonymous people on the internet who have expressed support for Mr. Yenovkian on his online petition could track down her family.