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LAW 503 Employment Law

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CONDENSED ANNETATED NOTES (CAN)

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Table of Contents

CHAPTER 1: THE NATURE OF EMPLOYMENT 3
The "Employee" 7
Therrien v True North Properties 10
Dependent Contractors 12
CHAPTER 2: THE EMPLOYMENT CONTRACT 13
Amending Employment Contracts 16
Hobbs v TDI Canada Inc 17
Globex Foreign Exchange Corp v Kelcher 19
Wronko v Western Inventory Services Ltd 21
CHAPTER 3: TERMINATION OF THE EMPLOYMENT RELATIONSHIP 23
Reasonable Notice 25
Common Law Reasonable Notice Period 30
Bardal v The Globe & Mail Ltd 30
Minott v O'Shanter Development Co 32
Radwan v Arteif Furniture Manufacturing Inc 33
Resignation 36
Kieran v Ingram Micro Inc 38
Frustration 39
Wightman Estate v 2774046 Canada Inc 40
Expiry of Fixed Term Contracts 42
Termination for Just Cause 43
Basket 1: Culpable Misconduct 44
McKinley v BC Tel 45
Dowling v Ontario (Workplace Safety and Insurance Board) 47
Poliquin v Devon Canada Corp 50
Whitehouse v Royal Bank of Canada 52
Sexual Harassment and Just Cause 55
Hodgins v St John Council for Alberta 57
Social Media Use and Just Cause 60
Basket 2: Poor Performance 62
Milsom v Corporate Computers Inc 62
Henson v Champion Feed Services 64
Basket 3: Termination for Non-Culpable Misconduct 66
Whitford v Agrium Inc 66
Constructive Dismissal 69

Wilkinson v T Eaton Co ... 71
Potter v New Brunswick Legal Aid Service Commission ... 72
Alguire v Cash Canada Group Ltd ... 76
Temporary Layoffs ... 77
Otto v Hamilton & Olsen Surveys ... 80
Pathak v Jannock Steel Fabricating Co ... 81
CHAPTER 4: DAMAGES ... 82
Entitlement and Quantification ... 82
Sylvester v British Columbia ... 83
IBM Canada Limited v Waterman ... 85
Noble v Principal Consultants Ltd ... 88
Bonuses and Vacation Pay ... 90
Matthews v Ocean Nutrition Canada ... 91
Duty to Mitigate ... 94
Christianson v North Hill News Inc ... 95
Evans v Teamsters Local Union No 31 ... 98
Magnan v Brandt Tractor Ltd ... 100
Russo v Kerr Brothers ... 101
Giza v Sechelt School Bus Service Ltd ... 104
Contractually Fixed Termination Notices ... 105
Boutcher v Clearwater Seafoods Ltd Partnership ... 105
Bowes v Goss Power Products Ltd ... 107
Extraordinary Damages ... 109
Keays v Honda Canada Inc ... 109
Merrill Lynch Canada v Soost ... 112
CHAPTER 5: TORTS IN THE WORKPLACE & SETTLEMENT AGREEMENTS ... 114
Torts in the Workplace ... 114
Elgert v Home Hardware Stores ... 114
Piresferreira v Ayotte ... 117
Settlement Agreements ... 118
Blackmore v Cablenet ... 119
CHAPTER 6: EMPLOYEE DUTIES, FIDUCIARY EMPLOYEES & RESTRICTIVE COVENANTS ... 120
Anderson, Smith & Kelly Custom Brokers Ltd v World Wide Customs Brokers ... 121
Torcana Valve Services v Anderson ... 123
BC Dominion Securities Inc v Merrill Lynch Canada Inc ... 124
Restrictive Covenants ... 126

Jones v Klassen 126
JG Collins Insurance Agencies Ltd v Elsley Estate 128
CHAPTER 7: HUMAN RIGHTS IN THE WORKPLACE 131
Meiorin Grievance 132
Brewer v Fraser Milner Casgrain LLP 135
CHAPTER 8: *EMPLOYMENT STANDARDS CODE* 138
Employment Standards Office Provisions 140

CHAPTER 1: THE NATURE OF EMPLOYMENT

Human labour was one of the first areas of law that statutes were created for in the western world since it was vital to society and the economy.

- Originally, "employment law" was called "master and servant law"

Masters (ie, employers) were strong lobbyers and pressured governments to pass laws in their interest.

- The Black Plague decimated the workforce in the 14th century, which allows servants (ie, employees) to demand better work since there would be no one else to replace them.
- In the 16th century, the *Statute of Artificers, 1563* was passed. Among other things, this statute put maximum caps on certain rights (wages, hours worked)
    - The animating idea was for the implementation of state-controlled conditions of labour (wages and training) which could be enforced through the court system and executed using court sanctioned punishments
    - However, at first they were more in favour of the masters; wages and work hours were all in their interest and it was basically a feudal contract to enforce masters dominance over workers
        - This exertion of control was seen as the best for efficiency and creating an obedient and productive society to decrease crime and abuse
- The general idea was that workers were tools to harness the employer's work via punitive control, using a paternalistic notion that without threat of sanction, there will not be a healthy civil body of workers.
    - Fun fact but "articling" for lawyers is a remnant of this term and the difficulty of articling is vestigial of this way of thinking

In the 19th century, master and servant law was imported into Canadian law. Alberta passed the *Master and Servant Act* in 1942 and the *Factory Act* in 1917

- The *Master and Servant Act* was later revamped and renamed the *Employment Standards Code,* which will be the main statute of this course.
- *Factory Act* was the first notion that workers should be protected in statute rather than threatened.

Employment Standards Code, RSA 2000, c E-9
PREAMBLE RECOGNIZING that a mutually effective relationship between employees and employers is critical to the capacity of Albertans to prosper in the competitive world-wide market economy of which Alberta is a part;

> ACKNOWLEDGING that it is fitting that the worth and dignity of all Albertans be recognized by the Legislature of Alberta through legislation that encourages fair and equitable resolution of matters arising over terms and conditions of employment;
>
> REALIZING that the employee-employer relationship is based on a common interest in the success of the employing organization, best recognized through open and honest communication between affected parties;
>
> RECOGNIZING that employees and employers are best able to manage their affairs when statutory rights and responsibilities are clearly established and understood; and
>
> RECOGNIZING that legislation is an appropriate means of establishing minimum standards for terms and conditions of employment;
>
> HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

The Preamble of the *Code* really reflects the paradigm shift.

- Things like "minimum standards" is the opposite of putting caps on workers rights
- Things like "common interest" puts a more equal relationship between employers/employees
  - Signals that a profitable workplace turns on what a worker needs just as much as what the employer needs
- Things like "mutual" suggests mutualism between both parties are key to a prosperous economy
  - Opposite of the idea that prosperity came from the master's rule and dedication to it
- Things like "worth and dignity" is the most fundamental change
  - Previously employment was almost dehumanized. But humans are not chattel, so to recognize their worth and enshrine it.
    - To accomplish this, minimum protections can be exercised through enforcement
  - Also a general notion that employment is central to a lot of people's lives and key to their place in society and with their families and this should be honoured not dominated

Purpose of Employment Law:

Historically	Modern
- Master centric - Worker control & obedience - Strict entry requirement into guilds - Maximizing productivity	- Address power imbalances - Impose mandatory minimum standards - Fairness of both employer/employee - Anti-Discrimination - Protect worth and dignity of workers - Fair and equitable resolution of disputes

The modern approach is much more regulation on something that is, in essence, private contract. –

- Freedom of contract is very guarded at common law
  - Absent inebriation, coercion or duress, the contract you signed is enforceable and the courts will honour that
- Why is employment law so regulated then?
  - There is an implicit power imbalance – workers cannot bargain for interests in the same way most contracting parties can
  - The government feels it fair to step in and protect workers from abuse of the imbalance
    - The big corporation shouldn't be able to hire the best lawyers to get what they need at the expense of someone who just wants to put food on their table

    - Labour is part of the free market economy, so shouldn't we just let people negotiate their own contracts?
        - No, humans are not a commodity
        - Employees won't argue for different contract terms because they need a job
    - A 23-hour work day, chained to economy outcomes may sound ideal for generating wealth, but maybe the economy is more complex than that
        - What about the health, turnover and productivity of workers?
        - Humans are not widgets, so we need to regulate these things more than a free market model that deals with pure goods
- The balance that needs to be struck between recognizing workers protections and freedom of contract is often at the core of employment cases.

What are the sources of employment law? Is it provincial or federal?
- In reality, both levels of government regulate employment law

There is no enumerated "employment" category in sections 91 or 92, but can be inferred through everything else
- Section 91 (Federal):
    - unemployment insurance, postal Service, Militia, Military and Naval Service, and Defence, Salaries and Allowances of Civil and other officers of the Government of Canada, Beacons, buoys, lighthouses, Navigation and Shipping, Quarantine and the establishment or marine hospitals, Sea Coast and Fisheries, Ferries between provinces, Banking, provincial projects that go between provinces or benefit of multiple provinces
- Section 92:
    - 92(13): Property and Civil Rights
        - *Parsons* found that employment is under s92(13) since employment is just about contracts, which are a civil right

The General Framework for assessing who controls what:
- Presumption: Provinces regulate employment as a private contract (civil right) within the province (under s 92(13)
    - This means you look to the Alberta *Code* rather than federal
- Exceptions: The federal government will regulate an employment relationship where it has either (both codified under section 4 of the *Canada Labour Code*):
    - Direct Jurisdiction: employee is directly related by a work, undertaking or business within the legislative authority of Parliament
        - Generally met when employed by a federal undertaking or doing work that fall directly under one of the enumerated heads of power in s 91 (5, 7, 8, 9…)
            - Things like banks, aviation, interprovincial travel, military, postal service
            - You don't actually have to be doing the work of the federal undertaking, as long as you work for one (ie, don't have to be the train conductor, if you are IT, HR or a construction worker for Canada Post, it is in the federal realm)
    - Derivative Jurisdiction: employee is employed by an employer whose business is
        - (i) predominantly for *and*
        - (ii) integrally related to, and operationally necessary for the business and performance of a federal undertaking
            - This means it won't be a federally regulated employer, but if the work done "fits" under the federal heads of power

        - The nature of the work must operationally be essential to the core activities of a federal undertaking or an industry under the federal power
            - Look at substantial or predominant activities of the employees and their connection not the federal business.
    - *Tessier v Quebec (Commission des lesions professionelles),* 2012 SCC 23 is the leading case on federal employment jurisdiction.

Examples:

- Stevedores (crane operators for rail cars/shipping boats that put crates on and off ships)
    - They don't do the shipping, but the work related to a federal undertaking
    - Any cross border transport would be federal (CN or CP)
        - Company (i) does 100% of its work for CN (predominantly) and (ii) it is integral to interprovincial transport, so it would be federal
- Mail Delivery
    - Say 100% of mail is transported to a Canada Post hub in Edmonton and then a private company delivers it to households.
    - It would still be federal since it is (i) predominantly a federal undertaking (postal service) and (ii) they are literally doing the job of the mail delivery, so it is essential
- Contractors who pave runway at Pearson airport
    - Airports and their employees are federally regulated authorities
    - But the Courts found that pavers are provincial since paving is not a federal authority
    - 100% of the project is in federal authority, but not all their tasks are
        - Just because you contract with a federal authority does not mean it is federally regulated
        - Tomorrow that company could go pave a residential street in Toronto, so the work is not functionally necessary for the running of Pearson, it is just a subcontractor agreement.
            - This gets hairy and to a slippery slope argument – every time you are contracted by a federal company, of course you are doing integral work to a federal undertaking
- Empress Hotel in Victoria
    - Empress used to be hired by CN for the railway workers that lived there. This is interprovincial transport, so all the hotels are part and parcel of the federal regulation.
    - Are hotel staff federal?
        - It would make sense to include them as such so it is not a patchwork of federally and provincially regulated employees (administrative nightmare)
        - The quality and quanity of the hotel workers jobs are *not* interprovincial transport, even if CN employes the hotel workers. They are hospitality workers, so it is indirect
            - As an employer, this means that you can have both federally and provincially regulated employees since your business won't wholly be federal or provincial

The other two ways employment can be federally regulated are more ancillary:

- 91(2a) is unemployment insurance
- POGG
    - Only in emergency times like the *War Measures Act* and the *Anti Inflation Reference* (took employment contracts as federal to control inflation)

In reality, though this is complex, 98% of employment is provincial. It is very rare to be federal.

<u>The "Employee"</u>

Why does it matter to be classified as an "employee"? The moment a worker is classified as an "employee" under common law or statute, there are a lot of protections afforded to them that are not afforded to non-employees:

- Common law benefits (if employed for an indefinite duration):
    - The right to receive reasonable notice of termination
        - This means that if an employer decides to terminate your employment contract they can do so at will, but they are required to give you advance warning that the contract will be ending. How long depends on multiple factors
            - The aim of this is to give the employee income as they attempt to find a new job
    - The right to *pay* for reasonable notice period in lieu of reasonable notice
        - Instead of giving you notice that your termination is incoming, employers will often just give the employee the wages they would have made in that notice period and let them go immediately.
- Benefits under the *Employment Standards Code*:
    - Vacation time and pay (ss 34, 34,1, 34,2), Minimum wage (s 8.1), Overtime pay (ss 21-22), Statutory holiday pay (ss 25-29)
    - Various forms of permissive leave:
        - Maternity and paternal leave (ss 45, 50)
        - Compassionate care leave (s 53.9)
        - Death, disappearance or illness of child leave (ss 53.95, 53.96)
    - Minimum amounts of notice or pay in lieu of notice for termination (ss 55, 56)
- Other Statutory Benefits:
    - Protections under the *Occupational Health and Safety Act*
    - Protections under the *Human Rights Act*
    - Benefits under the *Workers Compensation Act*
    - These are all dependent on the statute in question
        - They have different rules on who is considered an "employee", so an "employee" under the *HRA* may not be an "employee" under the *OHSA.*

As an employee, you get extensive protection. As an employer, you know what level you are held to when providing your workers with employment.

- On the flipside, as an independent contractor (*not* an "employee"), you are now aware of the rights that you are giving up

Since every statute is different, you need to look at each statute in question to determine if your client is covered by the statute.

Employment Standards Code, RSA 2000, c E-9
Section 1 (1) In this Act, (k) "employee" means an individual employed to do work who receives or is entitled to wages and includes a former employee, but does not include an individual who is a member of a class of individuals excluded by the regulations

(l) “employer” means a person who employs an employee and includes a former employer

Workers' Compensation Act, RSA 2000, c W-15
Section 1 (1) In this Act, (z) “worker” means a person who enters into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes (i) a learner, (ii) a person whose application to the Board under section 15 is approved, and (iii) any other person who, under this Act or under any direction or order of the Board, is deemed to be a worker, but does not include a person who ordinarily resides outside Canada and is employed by an employer who is based outside Canada and carries on business in Alberta on a temporary basis

Occupational Health and Safety Act, SA 2017, c O-2.1
Section 1 (1) In this Act, (bbb) “worker” means a person engaged in an occupation, including a person who performs or supplies services for no monetary compensation for an organization or employer and, for greater certainty, includes a self-employed person, but does not include (i) a student in learning activities conducted by or within an educational institution for which no compensation is paid to the student, or (ii) except for the purpose of section 5(a) and (b), the following persons engaged in a farming and ranching operation specified in the regulations or the OHS code: (A) a person to whom no wages, as defined in the *Employment Standards Code*, are paid for the performance of farming or ranching work; (B) a person referred to in clause (hh)(i)(B)(I) to (IV) to whom wages, as defined in the *Employment Standards Code*, are paid for the performance of farming or ranching work

The *Code* applies to “employees”, whereas the *OHS Act* and *WC Act* apply to “workers”, which is broader

- *OHS Act* covers workers in “occupations”, with “occupations” also broadly defined in the Act
    - This covers all employees as per the *Code* but also all people in business pursuit
    - Even if you are not an employee under the *Code*, you could be beneficiary of OHS rights

Why is there a difference between these statutes?

- The *Code* is very monetary in nature, whereas *OHS Act, WC Act, HR Act* are more about protecting basic human rights and dignity
    - Just because you are a worker that is not entitled to overtime does not mean you should be entitled to work in an unsafe work environment
        - The Legislature is just recognizing this implicit difference. Just because there is a particular contractual relationship does not mean basic safety can be ignored.

So, always start with the statutory definitions. Nevertheless, the *Code* definitions of "employer" and "employee" are not all that helpful.

- But one key thing, is that the employer definition in the *Code* includes former employees. The point of this inclusion is to prevent an employer from terminating an employee just to avoid the statutory responsibilities.
- Other than that, the tests for who is an employee is very fluid, multi factorial and turn on the facts of the case. The definitions are also positive and negative:
    - Positive: Are you achieving the standards of an employee
    - Negative: Do you lack hallmarks of an independent contract

Various tests have developed at common law to determine whether an individual is an "employee":

1. Control Test
    a. Historic and most simplistic
    b. Employee is subject to control and direction of employer for the manner of the work done, how work is to be done and when it must be done
    c. Employer has power over employee's hiring, renumeration, firing and method of doing work
        i. Basically, an employee is someone where the principal exerts complete control or supervision over them
    d. Supervisory control isn't really a desirable benchmark these days
        i. Previously, an apprentice would learn almost completely from the supervisor
        ii. Whereas today, you are hired more for the specialized knowledge you have (like law or medicine) where supervision is not needed
    e. *Therrien* (see below)
2. Enterprise Test
    a. Four factors to consider:
        i. Control
        ii. Exclusivity
            1. Kind of a manifestation of "control"
            2. Usually employees only work for one employer, whereas contractors work for as many as they want
                a. Not applicable for engineer who works as bartender on the side
        iii. Ownership of Tools
            1. Generally, employers do not own the tools needed to do their work, as they are often supplied by the employer.
                a. Whereas contractors often do own their own tools
        iv. Chance of Profit/Risk of Loss
            1. Typically, independent contractors are paid by the profits they make. They invest in themselves, buy equipment and set rates
                a. They have overhead, there is chance of profit and risk of loss
            2. Whereas employees are regularly renumerated (wages are stable)
                a. Economy more immediately affects contractors since consumers will not pay directly
                b. A contractor whose cost goes up with renumeration will suffer more at the beginning that an employee
    b. Also considered the "four-fold test" or "who's business is it test"
    c. The point of this test: who owns the business?
        i. Do you own the business and get the income as profit, or do you work for it?
        ii. Is your salary completely contingent on individual jobs?
            1. Boils down to control and economic dependence

        iii. *Montreal v Montreal Locomotive,* [1947] 1 DLR 161
3. Integration Test
    a. Employee is employed as part of the business and their work is integral to the business
        i. Non-employees services are usually accessory on an "as needed" basis
    b. This is also a little hairy… what work is integral?
        i. *Ontario Ltd v Sagaz Industries Canada Inc,* 2001 SCC 59
4. Multi-Factorial Approach
    a. Look at all factors:
        i. Organizational Integration, Control, Worker chance or profit/risk of loss (evidence of entrepreneurship), Ability to subcontract tasks, Ownership of Tools, Exclusivity of Relationship, Freedom to vary fees, reject tasks, move
    b. Balance factors, weigh them to the unique situation or the worker to say, do the scales tip to employee or contractor more?
    c. Ability to subcontract is somewhat new. It is a manifestation of control – generally employees can't delegate their work (that is why they were hired) but contractors rely on delegating work to others
    d. *Alberta Permit Pro v Booth,* 2008 ABQB 562
5. Purposive Approach
    a. If the purpose of employment law is to protect vulnerable workers, definition of employees ought to be broad
        i. If the whole point is to ensure employer competitiveness in the world economy, then a narrow definition of employees may better serve this purpose.
        ii. Or if the point is for tort liability, then maybe we care more about the control thing. Since vicarious liability depends on control, the control over the employee is tantamount
    b. Basically, maybe the classification changes depending on the context and purpose we are working with. Simply think, should this person be awarded statutory protections for the work they are performing?
        i. Advocating for an approach that is more purpose or philosophical in nature
        ii. Someone should be classified as an employee for the purpose that employee definition exists

The various tests used by scholars and courts prove that there is no one, conclusive, universally-applicable test that can be formulaically applied to determine if someone is an employee

- If you act for an employer, you want to favour the factors that are indicia for employment
    - There are usually good arguments on either side.
    - The things that litigated are the ones which are unclear

Employees vs Independent Contractors

Employees are often defined based on the absence of characteristics of independent contracting

Therrien v True North Properties, 2007 ABQB 312 (aff'd at 2009 ABCA 44)

Facts:

Therrien (plaintiff) has been a CPA since 1972. He sold his partnership interest to work for a client, the Gagnon Companies, in January 2000. As part of the departure, Therrien negotiated for high wages and benefits. He also requested to practice through his professional corporation rather than the company for tax reasons (he was nearing retirement).

- The Gagnon Companies had financial difficulties and laid off many employees. The defendants informed Therrien they no longer needed a full-time employee, and he could work on an "as needed" basis starting later.
    - Therrien took this as a constructive dismissal and brought action.
        - The Defendants argue Therrien didn't have an employment contract such that he was an independent contractor that provided accounting services

Issue:
Was Therrien an independent contractor, or an employee in an 'employer-employee' relationship?

Rule:
The employer-employee relationship is a pre-requisite to any wrongful dismissal claims.
Tests for 'employee' vs independent contractor

1. Control Test: Is alleged employee subject to control and direction of the employer in the work being done, how it is done, and how the employee must do so?
    a. 4 factors: control, ownership of tools, chance or risk, risk of loss
2. Organization Test: is individuals work an integral part of the business operation?
    a. 4 factors: power of selection of employees, payment/renumeration, right to control the method of doing work, right to discharge

Analysis:
While the defendants consider Therrien's position as an independent contractor, other independent contractors of the company worked on an on-call basis and as needed, which is dramatically different from Therrien's position which was full time and had a regular salary.

- Therrien and Gagnon discussed the contract and Gagnon had the control and direction of Therrien's work and the timelines of it.
- Therrien had no authority to hire/fire Gagnon Company members or delegate work
- Therrien worked solely for Gagnon and relied on it as his sole income
    - It is clear the relationship, by whatever test, is one of employment
- The defendants argument that Therrien being paid through his professional corporation indicates contractor does not stand. The payment was for tax reasons. He did not have financial independence, nor independence on how his work was done.

<u>Dismissal</u>
Employer-employee relationships cement an obligation of reasonable notice.

- The termination does not need to be unequivocal. Any time an employer unilaterally makes a fundamental change to the employment contract, the employee can consider themselves constructively dismissed.
    - Significant reduction of wages can constitute a constructive dismissal
- The downgrading of hours to part time is a constructive dismissal and a reasonable person in Therrien's position would have felt this

Conclusion:
True employee

Hold, Order:
Action allowed

This case used various different factors rather than an explicit "test". Various factors heavily pointed to him being an employee of Gagnon:

- Only worked for Gagnon, Regular pay and hours, Contract negotiations when joining Gagnon

As a more practical reality, because Therrien was induced to leave his stable job (this is quite common in this field), the court was more in favour finding him as an employee rather than a contractor.

- Courts often lean this way when there is such an inducement

Nonetheless, the argument that by working through his professional corporation favoured him being an independent contractor was strong.

- He was getting financial benefits that most "employees" do not get

- He was having his cake and eating it too
    - To get the administrative benefits and protections of being an employee, but want the monetary benefits of the professional corporation that employees do not get is trying to take all benefits and avoid all risks
- There was also evidence he was doing small tasks for other employers. In terms of exclusivity, there is no gray area, are you exclusively Gagnon employee or not?
    - You either work for one corporation or you do not – what difference does it make if some of the projects are small?

If this case was approached from a purposive approach, is Mr. Therrien terribly vulnerable?
- He negotiated lots of vacation, high wages and ability to subcontract and to be paid through his professional corporation and the tax benefits that came from it
- He is a successful professional person with high sophistication and knew exactly what he contracted for and the risks he avoided for the benefits he got
    - Is this really the kind of worker that employment law wants to protect?
        - This is not a legal argument per se, but judges are human too
        - Lawyers are free to play to the emotions of humans to see it their way
    - Another hurdle in Therrien's favour is the standard of review being very deferential. Trial judges findings of fact will likely be respected at the appeal level, so if arguing a purely purposive approach it would be an uphill battle.
        - Contractor vs employee distinction is very fact specific so

<u>Dependent Contractors</u>
To complicate matters further, Alberta common law recognizes two types of contractors: dependent and independent.
- Dependent are stuck in the middle between an "employee" and a pure independent contractor
    - They have their own tools and exert control over who they work for
        - This would technically satisfy the enterprise test
    - But, they generally have a long standing and almost exclusive relationship with one principal
        - Economically dependent like an employee, but independent in the work
    - Duration and permanency both considered
    - Degree of exclusivity: is it one employer or more?
    - Degree of reliance: what is the relation?

Even if someone is a "dependent contractor", they are not "employee" under the *Code*. So what do dependent contractors get that independent contractors don't?
- They *likely* (yet to be litigated) get common law rights of reasonable notice, subject to contrary provisions in the contract (contract either says reasonable notice is not awarded or provides for another method of termination)

Practically, this shifts to a three-stage analysis:
1. Are they an employee or a contractor?
    a. If contractor, go to Step 2
    b. If employee, all *Code* protections are extended
2. If contractor, are they independent or dependent?
    a. Look to exclusivity factors
    b. If independent, no *Code* protections extended and few common law benefits conferred

3. If dependent, did the employer-dependent contractor contract negate termination/reasonable notice protections?
    a. If there is no contract, the dependent contractor argues for common law right of reasonable notice
    b. If the contract has a provision that reasonable notice is not awarded or provides for another method of termination, the dependent contractor gets no common law protection

One major item is omitted from determination of what an employee is: the employment contract.

- Of course, the terms of the employment contract are relevant, but they are not determinative
    - That would be form over function
    - Any form could say it is an employment contract, but it may not be one in substance
    - If, in function, the contract isn't one of employment, the words don't amount to much
- There is also a power imbalance when it comes to employment contracts. The power rests in who can say it is an employment contract
    - They will be relevant, but don't hang your hang on employment contract provisions.

CHAPTER 2: THE EMPLOYMENT CONTRACT

The employment contract is crucially important as they may impact virtually every statutory or common law protection that employees are given. Contracts are often written, but they can be implied (either by law or statute).

- Just because there is no four-corner contract does not mean there isn't a contract
    - Employment is grounded in mutual agreement between employer and employee, without which it would be forced labour (ie, slavery)
    - This means there is *always* an employment contract in place.

Employment contracts are really not treated any differently than other contracts, though courts are more willing to be generous to the employee because of an implied power imbalance between the parties to an employment contract

- This means offer, acceptance and consideration all apply
    - Consideration in this case is the employer paying and the employee working

The terms of the contract are the meat and potatoes.

- Written Terms
    - Is it just the four corners signed on the first day of employment?
    - Or is it more referential than that, including policies, code of conduct, safety protocols…?
        - Some will be incorporated as reference by inference
    - Even if there isn't anything referentially incorporated, you should always ask if there is anything more
    - Entire Agreement Clause: Clause that says the entire agreement is that on the page(s) and there are not other formal agreement terms to the contract
- Oral Terms
    - These are more common with unsophisticated employers
    - Oral terms are no less binding than written ones, but proving them is harder since employers will often deny claimed terms being said
- Implied Terms
    - Terms like this would be things like estoppel or acquiescence
    - If the parties agree to a change in conduct of continue it, that is an implied term
        - Becomes difficult to refute it

- Many terms are implied by both statute and common law.
    - However, employment contracts can contract out of common law duties with explicit intention to do so in the contract
    - So, common law terms may exist, but you can contract out of them
        - Good faith duty exists, but employers can circumscribe the duty by setting bounds as to what it looks like.
- Common law implied terms:
    - Duties of the Employer
        - Exercise obligations in good faith, and terminate in a manner that exhibits good faith
        - Provide requisite notice of termination
    - Duties of the Employee
        - Exercise obligations in good faith and with fidelity to the employer
        - Maintain confidences and trade secrets of the employer
        - Provide requisite notice to quit

There are *Code* terms that will apply if the contract is silent on them:

- Section 3: Protections and standards laid out in the *Code* are a floor, not a ceiling.
    - Section 3(1)(b): Parties are free and able to contract more than the standards therein without making it contrary to the *Code*
        - Typically, contracts contrary to the *Code* are unenforceable, but because s 3 is a minimum, contracts that exceed these standards are still given force of law
    - Section 3(1)(a): Nothing in the *Code* derogates an entities' access to take action for common law remedies
        - This means that both employers and employees can start common law actions to enforce common law rights even if the *Code* already sets standards around those parameters
        - Since the *Code* is a minimum, it is likely that the common law would afford much greater protection than the *Code* codifies.
            - So, if the *Code* standards are met but the common law ones are not, an employee can still bring action and seek remedies for the loss of common law privileges
    - However, Section 3 must be read in conjunction with Section 4
- Section 4: Parties are free to contract for more than the ceiling, but you cannot contract for less
    - If the contract provides for protections less than the *Code* sets out, it is unenforceable as being contrary to public policy

Employment Standards Code, RSA 2000, c E-9
Section 3 (1) Nothing in this Act affects (a) any civil remedy of an employee or an employer; (b) an agreement, a right at common law or a custom that (i) provides to an employee earnings, leaves of the types described in Divisions 7 to 7.6 or other benefits that are at least equal to those under this Act, or (ii) imposes on an employer an obligation or duty greater than that under this Act.

(2) If under an agreement an employee is to receive greater earnings or leaves of the types described in Divisions 7 to 7.6 than those for which this Act provides, the employer must give those greater benefits.

Section 4
An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void.

Sections 3 and 4 together allow for both statutory and common law protections for the benefit of the employee. They are not mutually exclusive.

- Say an employer gave 3 weeks notice to an employee:
    - If the *Code* says 2 weeks advanced notice is required, but common law says 8 weeks notice is required:
        - The employee is entitled to seek remedy through the courts under common law, but not the *Code,* for those 5 weeks
            - Section 3(1)(a)
    - If the contract said 4 weeks notice is required:
        - The employee cannot only bring action, since contracts can contract out of common law duties
            - Section 3(1)(b)
    - If the contract said 1 week notice is required:
        - The employee can bring action since the contract *cannot* contract out of statutory duties.
        - The employment contract in this case would be null and void
            - Section 4

Employment Contracts usually have some basic terms consistent across all agreements:

- Set out the parties
- Preamble to set out that the relationship is employee or contractor
- Job responsibilities and expectations
- Renumeration entitlements
- Termination requirements
- Workplace policies and conduct the employee is bound to
- Confidentiality clauses (can't take things when you leave)

Practical Tips for drafting Employment Agreements:

- For employees:
    - Get everything in writing (makes potential litigation so much easier)
    - Entire agreement clauses
    - Know your rights on termination
    - Health and benefits packages
- For employers:
    - Consider oral representations and separate communications becoming part of the agreement
    - Entire agreement clause
        - Good for both sides to know there aren't a million other deals on the go
    - Amending contracts have rules
        - Provide a term for the method of varying contracts during employment
    - Establish termination requirements

Amending Employment Contracts

Since employment contracts are bound by contract law, are there any differences when it comes to amending contracts? Consideration will still be needed for every amendment of the original contract

There are two ways that an employer cannot unilaterally amend the terms of an existing employment agreement. They cannot, in a way that adversely impacts the employee:

1. Offer an amendment and say "Sign this or resign"
    a. Basically saying that this restrictive covenant is coming into force and if the employee does not sign it then they will be terminated
    b. An employee agreeing to continue an employment relationship by accepting the amendments will not serve as valid consideration
        i. Without that consideration, the amendment is not enforceable
        ii. Continuing the job is past consideration, which is not consideration at all
            1. But from a more human perspective, this doesn't allow an employer to just steamroll over employees by changing everything
    c. Slatter in *Globex* dissent doesn't think this principle should be used too strongly
        i. Employers are entitled to terminate an employment contract at any time (so long as the right process is followed). Not everyone has tenure with unlimited job security
        ii. So, if your job is always on the line, but the employer foregoes their right to terminate the employee if they sign, isn't that consideration? Remember that forbearance of a legal right is valid consideration
2. Employers cannot just give reasonable notice that the amendment is coming into effect at the end of the notice period
    a. Employers can terminate a contract with adequate notice, but they cannot do this for an amendment.
    b. Again, Slatter takes issue with this
        i. Isn't termination just the most extreme amendment?

In terms of an amendment that is adverse to an employee, what can an employer do?

1. Terminate the entire employment contract on sufficient requisite notice and on expiry of notice period, re-offer employment on the proposed new terms
    a. This isn't technically amending a contract, it is terminating an old contract and brining on a brand new one with the desired changes
    b. Basically allows them to chose the amendment or be terminated
2. Support the amendments with fresh consideration.
    a. Peppercorn principle: it is not the value of the consideration, merely that something fresh was given
    b. In practice, this is what most employment lawyers advise and it is quite common
    c. So, when introducing an amendment, institute it with other things like bonuses, pay increases or vacation increases.
        i. When you take something out, give something new
    d. The "sign or resign" prohibition has a wrinkle. If fresh consideration is a promise of continued employment, the employer must provide "something more". Two options:
        i. The promise of continued employment must be accompanied by a tacit or express promise that the employer will forbear the right to terminate for a reasonable period of time after the employee agrees to the amendment

1. This must be mutually understood by the employee as conferring some additional kernel of job security
2. This period of job immunity after the change comes into force is consideration since it was not something that the employee had before
3. This is not practically advisable; what constitutes a reasonable time period after the amendment is put into force?
    a. Simply too fraught to suggest doing this

ii. There must be proof of forbearance of a pre-existing, clear intention to terminate an employee that is reversed upon agreement to the amendment
    1. If the employer can demonstrate they had a presently informed intention to terminate the person, which they gave up in exchange for signing the amendment, it is considered fresh
    2. The employer had to decide to terminate the employee irrespective of the amendment and they saved their job by signing the agreement
    3. This is pretty tricky as it is self serving evidence and needs a lot of cross examination to uncover it
    4. This is also not advisable unless there is extensive HR records of how the employee was going to be terminated.

Hobbs v TDI Canada Inc, (2004) OJ No 4876 (CA)

Facts:

Hobbs (appellant) was a salesperson with Urban Outdoor Transit ("Urban") from 1994 to 1999. Their largest client was the Toronto Transit Commission ("TTC"). However, Urban lost a bid for a renewal of a TTC contract, which was awarded to TDI Canada ("TDI", respondent) instead.

- Urban then laid off several employees but retained Hobbs

TDI approached Hobbs for a position with them, and Hobbs met with Gottlieb and Cummings to arrange a transfer from Urban to TDI after Hobbs learned of their commission rates. He stated he would only leave his current job if he was provided a written offer, which they supplied but the offer did not include the higher commission rates that Hobbs and Cummings discussed.

- Cummings assured Hobbs the rates were in a separate document
    - Hobbs then signed this offer and resigned from Urban

Hobbs secured substantial business for TDI before his first commission advance. Cummings later gave Hobbs a non-negotiable Solicitors Agreement that was needed in order to be paid.

- The Agreement confirmed the commission rates as previously discussed but also stipulated that the rates could be changed at the sole discretion of TDI Management
    - It also included that commission would not be paid until the accrued commission paid the full annual draw.
- After asking multiple times with Cummings, Hobbs became uneasy that he would not receive his commission payments. He suspected that TDI poached all Urban workers for their expertise and intended to terminate them later on

Hobbs took another job at Alliantis and resigned 5 months into working with TDI. By this time, he had accrued roughly $76,000 in commission but had not received it from TDI

- TDI, as per the Solicitor's Agreement paid Hobbs only $24,000 which was his draw

Hobbs brought action to acquire the unpaid commission by claiming that the Solicitor's Agreement was an unenforceable amendment and sued on his original contract

Procedural History:

The trial judge dismissed Hobbs' claim since the commission was dictated by the Agreement

Issue:

Did the employer fairly disclose to the employee the terms of the new employment?

Rule:

Francis v CIBC: the law does not permit employers to permit employers to present employees with amended terms of employment and threaten to fire them if they do not agree, and then rely on the continued employment as consideration to new terms.

Analysis:

Amendment

The trial judge concluded that the Solicitors Agreement and employment offer constituted one contract in two installments. However, TDI did not present the initial offer as introductory part of the Solicitors Agreement

- The offer made no comment as to signing another document to engage in employment

The Agreement also cannot be viewed as a second half to one contract since it had provisions that were inconsistent with the original arrangement

- The Agreement thus negated fundamental terms that had been negotiated. It also was only presented after employment had commenced.
  - As all the terms were orally discussed when the offer was signed, the Solicitor's Agreement was not needed to complete the already valid contract
- As such, the Solicitor's Agreement was not part of the employment contract under which TDI hired Hobbs. It thus constituted an amendment of the employment contract

Consideration

Hobbs' refusal to sign the Solicitor Agreement would have resulted in his termination. But, *Francis v CIBC* would find this is not allowed

- Consideration to support an amended agreement is especially important in the employment context since there is an inherent inequality in bargaining power. Once an employee is hired and receiving pay, they become more vulnerable to bargaining. It is the laws job to protect them.

Hobbs received no consideration for the Solicitor's Agreement since it provided him with no additional security in his employment than he had under the initial offer.

- In sum, the Solicitor's Agreement cannot be relied on by TDI to avoid paying Hobbs his entitled commission rates.

Damages

The agreed commission rates as discussed between the parties are what Hobbs is entitled to, since the Solicitor's Agreement (which restricted payment) cannot be relied on. This amount would be the remaining $52,778.

Conclusion:

Agreement is not enforceable

Hold, Order:

Appeal allowed

Ratio:

A "sign or resign" amendment to a contract is not enforceable without additional consideration beyond continued employment.

The court literally opened this case with "Accepting an offer of employment is an important life decision that most people take carefully". This is very telling of the judicial disposition and describes the tendency of courts to favour the employee over the employer in employment law litigation.

- TDI tried to argue this was an amendment the employer *could* do: forbearance of a right to terminate him which they were otherwise entitled to do.
  - Forbearance of a right is consideration
- Hobbs tried to argue that this was an amendment the employer could *not* do: a promise of continued employment he was already entitled to
  - Past consideration is not consideration

- The ONCA adopted Hobbs' argument as this was a "Sign or Resign" situation, without "more" consideration than the promise to continued employment:
    - No evidence that TDI wanted or intended to terminate Hobbs' before presenting him with the Solicitor's Agreement
    - No express agreement to forbear right to dismiss after Solicitors Agreement signed
- Fact that TDI poached all of Urban's workers with the intention to use them and then terminate them wasn't the legal reason that Hobbs won but it definitely did not help TDI's argument

Practically speaking, most contract amendments are not that drastic, they are minor changes that aren't worth litigating over. This also creates a lot of uncertainty in this area of law since there are a lot of unanswered questions

- Technically, you could have a large change and a minor kernel of consideration to make it enforceable. Since these cases are rarely litigated, courts haven't had the chance to consider largescale changes
    - But is also works to give the employers pause to consider if they actually want to propose the change and if the consideration they are contemplating giving would be sufficient in court.

Globex Foreign Exchange Corp v Kelcher, 2011 ABCA 240

Facts:

MacLean, Kelcher and Oliverio (respondents) were employees at Globex Foreign Exchange Corp ("Globex", appellant), a foreign currency exchange company

- MacLean accepted restrictions to his employment contract (a non-competition clause) as a term of the initial employment, and was then wrongfully dismissed
- Kelcher and Oliverio were already employed and then accepted the same clauses, but received no benefits for accepting them
    - Kelcher was told he either had to sign the agreement or he would be terminated
    - After Globex asked them to agree to further onerous restrictions, the two left the employment.

All three left to Axiom Foreign Exchange and set up a foreign currency exchange practice. Though they took nothing from Globex, they remembered various clients and thus prepared "Do Not Call" lists to respect the non-solicitation covenants, though some of them were eventually contacted.

- The respondents called these clients when the clause expired.

Globex brought action by alleging a loss of clients causing them to reduce profit margins

Procedural History:

The Alberta Court of Queen's Bench dismissed the action and Globex appealed.

Issue:

Was there proper consideration to the employment contract amendment to render it enforceable?

Rule:

Maguire v Northland Drug: forbearance to dismiss is insufficient consideration; there must be a mutual understanding when the covenant is entered into that there will be such forbearance

Analysis:

<u>Kelcher and Oliverio</u>

Globex's president considered Kelcher's continued employment as consideration, though did admit they received no benefit for signing them

- However, employers are already required to continue the employment until there are grounds for dismissal or reasonable notice of termination.
- Absent any further guarantees, continued employment alone does not provide consideration for a new covenant extracted from an employee during employment.

- There was no guarantee of continued employment in Kelcher's case, and thus no consideration arose from either of the two amendments.
  - They did not receive anything more than that which they were already entitled
  - They cannot be enforceable and Kelcher/Oliverio are not bound to them

Conclusion:
No proper consideration; amendments not enforceable

Hold, Order:
Appeal dismissed

Ratio:
Restrictive covenants presented in a sign or resign manner without tacit or express agreement to forbear right to terminate for a reasonable time is not consideration.
- Onus is on employer to establish these

Dissent (Slatter):
When an employee is offered employment on the condition that a non-competition covenant will be required, the consideration is found in the employment itself (for Maclean)
- Where non-competition clauses are given during the employment, it gets more complicated.
  - For Oliverio, where there were two agreements but the original non-competition agreement had adequate consideration, this would still prevail if the second did not
  - Many terms of an employment contract are implied, so there is nothing to prevent the implication of a "tacit agreement" where either side can seek variations of the agreement from time to time.

Since *Hobbs* is an Ontario case, this was the Alberta version. The majority adopts the *Hobbs* reasoning and rule for amendments. There are two cases when amending an existing contract is enforceable:
1. Employer had clear, pre-existing intention to terminate before the amendment and agreed to forbear termination in exchange for the amendment
2. Employer tacitly or expressly agrees to forbear right to terminate for a reasonable period after the amendment and the employee mutually understands this as additional job immunity
   a. Employer has the onus or proving both of these

Basically, confirming everything we knew from *Hobbs*. However, Slatter in dissent is where things get interesting:
1. Why is consideration being used? This is a practical issue that should be addressed practically
   a. Why can't employment contracts be varied/amended upon provision of reasonable notice of those amendments.
   b. Contracts can be terminated (which is just the most drastic form of variation) upon reasonable notice anyway
2. Consideration should only be used in the contract formation context
   a. Consideration isn't all that apt when considering amendments of ongoing concerns
   b. These are business realities – in an indefinite commercial relationship, of course there are changes. Some good, some bad
   c. We are talking about adjustments that accord with legitimate commercial expectations, so it is unreasonable to make employers undergo this formalistic kernel or consideration commitments.
      i. Fundamentally different types of promises that should be treated differently
3. Consideration is being used arbitrarily to come to the aid of vulnerable employees
   a. When we just want to protect employees and use arbitrary outcomes to get there, the results become illogical and impractical
   b. If we really are worried about abuse of power, then address it with the proper tools

c. Yes there was an inequality in bargaining relationships, but the employees had a lot of leverage in this case
    i. Could Globex offer a $10 Starbucks gift card under the peppercorn principle?
        1. Practically speaking it may have made in enforceable, but is this the way to go about all of this?
4. Using sufficient consideration for amendments actually produces mixed results
    a. It is a mistake to lump employment contracts with commercial ones
    b. In this case, the employees signed the amendment, understood why, thought they were bound to it and then breached the clause a year later
        i. The respondents knew this and breached it anyway – consideration shouldn't be used as an escape hatch it wasn't intended to be used as

So according to Slatter, notice should be used to implement amendments. You can terminate the whole contract at will with notice anyway (which is the most severe amendment). Amendments may be adverse, but termination is obviously worse. If you don't like the amendment, use the notice period to go and find another job.

While Slatter's dissent is compelling, the ONCA firmly put his arguments to rest in *Wronko*:

Wronko v Western Inventory Services Ltd, 2008 ONCA 327

Facts:

Wronko (appellant) was employed at Western Inventory Services ("Western", respondent) for 17 years in which time he had obtained the positions of Vice President of National Accounts and Marketing.

- When he obtained these positions, he signed a new employment contract in 2000 with President Ford that had a termination provision of 2 years salary as notice

Western then obtained a new President, Mr. Davoren who gave Wronko a new employment contract to sign. Mr. Davoren was unaware of the original 2000 contract.

- The major difference in the contracts was it decreased the notice/pay to 30 weeks
    - Wronko did not sign this new contract and brought up the provision with Mr. Davoren, who stated the 2-year provision was a "mistake"
    - Wronko was told the new provision was required for continued employment.

Wronko again did not sign the new contract and met with Davoren, who accused him of personal conflicts of interest with the previous President and that the new provision was non negotiable.

- 2 years after the new agreement was provided, Wronko received an email that the new contract was now in force since 2 years had lapsed, and if Wronko did not sign it then he would not be employed.
    - He thus responded that he considered his employment terminated

Wronko then brought a wrongful dismissal claim against Western and claimed breach of contract

Procedural History:

Trial Court found Western could unilaterally amend the contract with notice and dismissed the claim

Issue:

Did Western have the right to unilaterally amend the termination provision in their employment contract with Wronko? Does the end of Wronko's employment constitute a termination?

Rule:

Farber v Royal Trust Co: A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer

Analysis:

Was Wronko terminated?

Western's clear intention to terminate Wronko was expressed in Davoren's email response to Wronko refusing the new provision, stating there would be no job for him without signature.

- A reasonable person would have regarded this as a termination, particularly when considering Wronko's ardent opposition to the new provision
  - As such, it was not Wronko but Western who terminated the employment

What consequences follow from the termination?

An employee who is forced with a new contract/amended terms has three options:

1. Accept the variation expressly or impliedly through acquiescence
2. Refuse to accept and if the employer persists with the variation, the employee can treat this as breach of contract and sue for damages (constructive dismissal)
3. Refuse to accept and if the employer persists with the variation, the employee can refuse the terms and continue his employment if the employer permits it and the employee makes it clear he does not accept the new terms and is thus entitled to insist on the original terms.

The trial judge erred to consider the case as the second, when in reality it was the third. Wronko's response to the new change brought it outside the realm of constructive dismissal.

- When Western gave notice of the intention to enforce the new contract from 2 years prior, that was a repudiation of the contract. Wronko's response was unequivocal that he did not accept the new provision
- Western, knowing of Wronko's opposition, could advise Wronko that refusal would lead to termination and re-employment of the new terms, or accept there would be no new agreement and Wronko could continue working on the original terms.
  - By failing to chose the former, Western acquiesced to Wronko's position to continue working on the original terms.
  - As such, Wronko's termination was under the original agreement and he was entitled to the two years termination pay
  - Since Western gave no notice, this was a wrongful dismissal that triggers the termination pay

Damages

Since Wronko was earning $143,000, the total potential damages is $286,000. However, he earned $218,205 in the two year period between the new contract and its enforcement, so the wrongful dismissal claim would be worth $67,795

Conclusion:

No right to unilaterally amend and this was thus a wrongful termination.

Hold, Order:

Appeal allowed

Ratio:

To enforce an amendment to an employment contract, employers can wait the notice period, terminate the employee and offer the new amendment. The "amendment" is just a whole new contract

The Court rejected the notion that notice was sufficient to enforce the amendment as Slatter suggested. If notice is all that is needed, why shouldn't the new provisions come into force at the end of it?

- ONCA states that Western could have done this, *if* they expressly states that Wronko would be fired in two years time and just before the end date, offered him a brand new contract with the amendments.
- Or, they could have presented Wronko with some sort of fresh consideration

Say an employer wants to unilaterally decrease RRSP contributions by 10%, this is adverse, albeit a small change. Say it was accompanied by a small bonus (as consideration), the employee has three options:

1. Accept it
    (a) This is what usually happens – is a small change worth it to leave a paying job and sue?
2. Protest it and see what the employer does
    (a) Employer can terminate on notice or just toss out the amendments
3. Protest it, resign and consider it a wrongful termination or constructive dismissal and be awarded all damages
    (a) This is a risk since you resign and don't get notice
    (b) Will the legal costs outweigh the damages you may be awarded?
        i. Even if it's a slam dunk win, it may not be economical for them to pursue

In *Rosas v Toca,* 2018 BCCA 191, the BCCA basically adopts Slatter's dissent. This isn't an employment case but a contracts one, but it could signal a change coming in employment law

- They say that in a commercial contract setting, if you have amendments in the middle of the relationship, you don't need consideration to be enforceable so long as there is no duress, it is voluntary and there is a meeting of the minds.
    - This aligns with commercial reality – parties cannot resile from things they agreed to simply because they weren't awarded a $10 gift card
    - Slatter may have won out with general contracts, but does this mean that *Globex, Hobbs* are bad law?
        - No, they are treated differently than general contracts
        - For now, employment lawyers will still advise that consideration is needed until *Globex* is overturned

CHAPTER 3: TERMINATION OF THE EMPLOYMENT RELATIONSHIP

Generally speaking, both the employer and the employee may elect to end the employment relationship, even for employment of indefinite duration.

- Terminating the employment is not a breach of contract on it's own.
    - If it were, there would be forced tenure on the part of the employer, or forced labour for on the part of the employee

This means that the right to end the employment relationship goes both ways. Employees can leave the relationship as much as employers can end it. This also means it is never wrong to be dismissed

- It is only wrong to be dismissed *in the wrong way*

While an employer can end the employment relationship at will, there are various limitations to this right when the employer does not have just cause for termination. Employers cannot terminate if:

1. Employee is on a protected leave of absence under the *Code*
2. Discriminatory grounds under the *Alberta Human Rights Act* are the reason for termination
3. The contract is fixed term
4. Reasonable notice in advance of termination is not provided
    a. This is the big one
    b. An employer must either provide the employee with sufficient working notice that their employment contract will end, or pay in lieu thereof (pay for that working notice period)
    c. The notice period is calculated under:
        i. Common law, or
        ii. A valid and enforceable contractual provision for termination notice
            1. The clause cannot violate *Code* minimums and be an enforceable term under contract law

Protected Leaves of Absence

Protected leaves of absence are all delineated under the *Code*. However, they change *constantly*, particularly with changes of government, but even within the same government sitting. This makes learning them somewhat futile. Practically speaking, an employment lawyer will have to check the *Code* every time when advising a client.

- The important part is to know that these protected grounds a) exist and b) act as a limitation on the employer's right to terminate.
- If you are eligible for a protected leave of absence under the *Code* (this is very clear in the *Code* if you are eligible or not), you are entitled to the length therein (changes for every type of leave)
    - There are a lot of technical rules under the *Code* to qualify and extensive regulation on the matter
- This means, an employer cannot terminate or lay off an employee while on a job protected leave unless the employer suspends or discontinues the business.
    - If the business starts up again with 52 weeks of leave ending, the employer must reinstate the employee.
- It used to be the law that an employee could be terminated as long as the reason for termination was not that they were on the leave
    - In any case, terminating an employee on leave is fraught and very risky since it could easily turn into a human rights ground (like maternity leave)
    - As such, it is never advisable to terminate an employee on a protected leave

It is important to note that just because a certain leave is protected, that does not mean the person will get paid during that period. The *Code* guarantees that the job will be there when they return, but it does not stipulate that they will get paid during it.

- If they get paid during the protected leave, it would all be on the contract and the employer-employee agreement
- Usually the employer will have some paid leave benefits and other government subsidies exist for more extreme cases, but it is not mandated in the *Code*

Why are protected grounds protected?

- When someone is chronically absent from work, that is generally grounds for just cause
- Protected leaves are like excused absences with a defence to just cause
    - It is also just humane and reflects the difficulties of human life that cannot be easily covered in a contract

Some examples as of February 2023 of protected leaves of absence:

Type of Leave	Protected Length (no termination allowed)
Maternity Leave	16 weeks
Parental	62 weeks
Long term Illness or Injury	16 weeks
Compassionate Care Leave	27 weeks
Disappearance of a Child	52 weeks
Death of a Child	104 weeks
Critical Illness of a Child	36 weeks
Personal and Family Responsibility	5 days
Bereavement	3 days
Domestic Violence	10 days
Citizenship Ceremony	0.5 days

Human Rights Act Discrimination

This is covered later in the course, but the gist is that if you are a protected ground under the *Alberta Human Rights Act*, you cannot be refused employment, or terminated because you are part of that group as per s 7:

Alberta Human Rights Act, RSA 2000, c A-25.5
Section 7 (1) No employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) 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. (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.

Fixed Term Contracts

Will also be covering this later in the term, but the quick and dirty is that when you have a fixed term, the reasonable notice under the 4th limitation does not apply. Employer either have to:

- Let the term expire, or
- Pay out the remainder of the term for immediate cessation of work

The big limitation is the fourth: reasonable notice

Reasonable Notice

When the first three limitations do not apply, and there is no just cause for termination (more to come), the presumption is that reasonable notice is required to be given to the employer to end employment.

- This presumption is a common law rule. The courts found that the right to reasonable notice is an implied term to all employment contracts – written or not and whether it is explicitly mentioned in the contract or not
    - An employer has the right to terminate an employee without just cause, as long as the employer provides reasonable notice to the employee prior to the effective date of termination
    - If employers fail to provide adequate notice prior to terminating an employee, the employee can sue the employer for breach of the implied term to provide sufficient notice prior to termination

There are many reasons for the courts finding this implied duty:

- Functionally: gives the employee time to find another job, since finding a job takes a lot of time
- Practically: the importance of work to human life is front and central
    - A lot of our self worth comes from our work, so whenever that relationship ends, that is fundamentally upsetting
    - This implied term is a way of cushioning the blow with a psychological and emotional aspect to it

        - Allows time to get over the termination and transition to the next employment

There are two ways to provide reasonable notice in practice:

1. Working Notice (required by common law)
    a. Employee is given notice that their employment ends in X weeks/months and they may continue to work up until that termination date
    b. Employer will say to the employee "in X time/at X date, your employment contract will end and you will no longer be employed". Then the employee is expected to work until that date (hence *working* notice)
        i. The contract is still in force during this time
        ii. Both employer and employee are still bound to all terms of the contract which means the employee gets paid
2. Pay in Lieu of Notice
    a. Employee is paid for the period of their reasonable notice period and dismissed immediately
    b. Why would an employer do this if they don't get the labour for it?
        i. A disgruntled employee probably won't be majorly productive or the best employee after finding out they have been terminated
        ii. It can be acrimonious, but some employees would continue working perfectly normal depending on how the termination went down
    c. Technically, paying in lieu is still a breach of the common law duty, which only requires working notice
        i. So paying in lieu is simply pre-paying damages breaching the duty to give working notice
        ii. Remember that this implied term is an implied *contractual* term.
        iii. Damages for breach of contractual terms are the money awarded had the contract been performed without breach
            1. In this case, the damages would simply be paying out the rest of that implied term
            2. An employee could technically get pay in lieu and still sue for breaching the implied term, they would just get no damages since they were already remedied by the employer

But can't the common law be contracted out of? Wouldn't this duty be hollow if there is a termination provision saying there is no reasonable notice requirement? Yes, the common law duty can be contracted out of, but this is where the *Code* comes in. The *Code* codifies certain protections that cannot be contracted out of, including minimum reasonable notice periods.

- Section 55: absent just cause, after the first 90 days' probationary period of employment the employer must terminate with working notice or pay in lieu or a combination thereof
- Section 56 provides the minimum notice periods an employer must provide to an employee to terminate them based solely on length of service
    - Less than 2 years: 1 week notice
    - Less than 4 years: 2 weeks notice
    - Less than 6 years: 4 weeks notice
    - Less than 8 years: 5 weeks notice
    - Less than 10 years: 6 weeks notice
    - More than 10 years: 8 weeks notice
    - By contrast, common law reasonable notice depends on other factors (more to come)
        - The notice periods under the *Code* are very short
        - Common law notice periods are months and often years

- Section 57: calculation of pay in lieu of notice of reasonable notice
  - Pay at least equal to wages the employee would have earned had they worked regular hours during the applicable termination notice period
- BUT, recall sections 3 and 4: nothing in the *Code* affects any civil remedy or common law and any agreement that attempts to derogate from the *Code* is void and against public policy
  - This means that the short notice periods in the *Code* are only a floor. It codifies the right, but there is often much more reasonable notice available at common law.
    - So if the employer only gives the employee the *Code* notice amount, the employee is still entitled to bring action for their common law reasonable notice period which is often much longer (and thus worth it to undertake legal action)
    - This is actually common, most employers will just look to the *Code* and only give that amount. If they call the Employment Standards Office, they can only tell them about the *Code* minimum
      - But the common law determination of reasonable notice is contextual and therefore they cannot advise employers on what common law notice is needed.

Employment Standards Code, RSA 2000, c E-9
Section 54 For the purposes of determining the correct termination notice to be given by an employer or employee or termination pay to be given by an employer, when an employee has been employed by the same employer more than once, the periods of employment with that employer are considered to be one period of employment if not more than 90 days has elapsed between the periods of employment. Section 55 (1) An employer may terminate the employment of an employee only by giving the employee (a) a termination notice under section 56, (b) termination pay under section 57(1), or (c) a combination of termination notice and termination pay under section 57(2). (2) Termination notice is not required (a) if the employment of the employee is terminated for just cause, (b) when an employee has been employed by the employer for 90 days or less, (c) when the employee is employed for a definite term or task for a period not exceeding 12 months on completion of which the employment terminates, (d) when the employee is laid off after refusing an offer by the employer of reasonable alternative work, (e) if the employee refuses work made available through a seniority system, (f) if the employee is not provided with work by the employer by reason of a strike or lockout occurring at the employee's place of employment, (g) when the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested to work by the employer, (h) if the contract of employment is or has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer, (i) if the employee is employed on a seasonal basis and on the completion of the season the employee's employment is terminated, or (j) when employment ends in the circumstances described in sections 62 to 64.

Section 56
To terminate employment an employer must give an employee written termination notice of at least
(a) one week, if the employee has been employed by the employer for more than 90 days but less than 2 years,
(b) 2 weeks, if the employee has been employed by the employer for 2 years or more but less than 4 years,
(c) 4 weeks, if the employee has been employed by the employer for 4 years or more but less than 6 years,
(d) 5 weeks, if the employee has been employed by the employer for 6 years or more but less than 8 years,
(e) 6 weeks, if the employee has been employed by the employer for 8 years or more but less than 10 years, or
(f) 8 weeks, if the employee has been employed by the employer for 10 years or more.

Section 57
(1) Instead of giving a termination notice, an employer may pay an employee termination pay of an amount at least equal to the wages the employee would have earned if the employee had worked the regular hours of work for the applicable termination notice period.

(2) An employer may give an employee a combination of termination pay and termination notice, in which case the termination pay must be at least equal to the wages the employee would have earned for the applicable termination notice period that is not covered by the notice.

(3) If the wages of an employee vary from one pay period to another, the employee's termination pay must be determined by calculating the average of the employee's wages during the previous 13 weeks in which the employee worked preceding the date of termination of employment.

Again, common law is subject to contracting. So, the employer can contract for more or less than the common law amount.

- When an employment contact is silent about the length of an employee's notice period prior to termination, the *Code* applies and the employer must give at least the statutory minimum periods of notice thereunder
- This means that while the employer can contract out of the common law duty, they *cannot* contract out of the statutory notice period.
    - This facilitates contracting when negotiating since the employer knows they cannot go below the minimum of the *Code*
- Common law only provides for working notice
- *Code* provides for both working notice *and* pay in lieu (or any combination thereof)
    - So only paying in lieu of notice is not offside the *Code* even if it technically is offside the common law
        - Kind of a distinction without a difference since the pay in lieu of notice is pre-emptive damages for the breach of working notice
- The hallmark of the contract is having a termination notice provision if the employer ever wants to bring the contract to an end, at will, without just cause
    - It is prudent to fix an employee's notice period entitlement or pay in lieu thereof on termination in an employment arrangement
    - Certainty and predictability: employee knows exactly what is going to happen

  - Even if an employer doesn't give the common law period, it often isn't worth it for the employee to bring action as any payout would be exhausted by legal fees
  - Termination provisions can thus be a net good as it is beneficial for both parties

<u>Tips for Drafting Termination provisions</u>

Where a clause sets out a lawful period of notice (ie, at least the *Code* minimum), that is effective to rebut the presumption of reasonable notice at common law

- The contract must clearly and unambiguously specify a period or amount of notice or pay in lieu thereof that the employee will be entitled to on termination without cause to oust the common law reasonable notice regime and restrict notice obligations to that contractually stipulated amount.
- This must express the mutual intention to contract out of the common law calculation of reasonable notice
- Usually something like "Should the employer wish to terminate an employee at will without cause, the following notice periods apply"
  - This avoids the magic 8 ball common law notice period calculation by the courts
- They must also be in line with the *Code* so you can't just give one day notice and think it's fine
  - There should be a sliding scale of notice in the contracts based on years of service to be based on the *Code* provisions which increase based on years of service
  - There should also be a mitigation clause that says clarifies that if the person finds alternative work sooner, they will get a lump sum that is a percentage of their wage
    - "Employer is prepared to offer salary continuance for 12 months beginning on January 1. If employee finds new employment by March 1 then salary continuance will cease but employer will pay lump sum of 75% of remaining 10 months of salary continuance; if employee finds employment by May 1, then employer will pay 50% of remaining 8 months of salary continuance; if employee finds employment by July 1, then employer will pay lump sum of 25% of remaining 6 months of salary continuance"
- It is actually more difficult than it sounds to ensure that the termination provision is effectively drafted to ensure that the employer only has to pay the *Code* minimum notice period
  - Most employers will only want to pay the *Code* notice because it is so much lower
  - In *Kosowan v Concept Electric,* the employer used the following provision:
    - The company reserves the right to terminate your employment at any time. Should you be terminated for reasons other than cause then you will be entitled to advance notice or severance pay thereof in accordance with the *Employment Standards Act of Alberta*
  - Sounds pretty clear right?
  - The ABCA said the provision was not clear enough to limit the employer's notice obligations to the *Code* minimums.
    - The *Code* still allows the common law notice to stand as per ss 3 and 4. So when the provision just says "as per the *Code*", that doesn't tell us very much since that would include the statutory minimums and the common law notice periods.
    - You need to *expressly* provide the notice period is consistent with the *Code* provisions on notice as amended and cite s 56
      - "The employer shall have the right to terminate your employment without cause, upon providing you with the minimum notice or pay in lieu of notice as set out in Sections 56 and 57 of the *Employment Standards Code* (Alberta), as revised from time to time, plus an additional two (2) weeks'.

- The payments to be made or notice to be given under this Agreement by (") will be accepted by you in complete satisfaction of all obligations for severance and/or termination pay to which you might otherwise be entitled at law or in equity. This provision will continue to be in effect regardless of the duration of your employment and despite any changes that might occur to your compensation, job function, responsibilities or title, so long as you continue to hold a position with (") or its related companies."

Common Law Reasonable Notice Period

While the *Code* sets up clear, predictable notice periods, the common law is not clear at all. The analysis is long and depends on various factors.

- Step 1: Look at the contract
  - Is there a provision that tells us how much to give?
  - Is it in line with the *Code*?
  - Was there undue influence, unconscionability or duress to negate the contract provisions?
    - Unless there is some reason that the contract is unenforceable, the contract provision should apply
    - You don't need to do a common law analysis if the contract says it all
- Step 2: Look to the *Code*
  - The *Code* only gives you a minimum, but at very least they have to be followed
  - But if the employer only gives the *Code* minimum, they risk the employee bringing action for the notice they were entitled to get at common law
- Step 3: Look to the common law
  - There is one landmark case on this front: *Bardal*

Bardal v The Globe & Mail Ltd, [1960] OJ No 149 (ONHCJ)

Facts:

Bardal (plaintiff) was an assistant advertising manager in Winnipeg. He was approached by the Globe & Mail (defendant) to offer him becoming assistant advertising manager of that company.

- During the conversations, Bardal stressed on the Globe Company that it was important the employment was permanent given that he was aging.

Bardal then accepted the offer for a salary of $6,500/year, starting in October 1942.

- In 1954, Bardal was appointed advertising manager, and in 1955 he was appointed director of advertising and a member of the Board of Directors of The Globe & Mail Ltd.

In April 1959, the defendant president (Mr. Dalgleish) asked for Bardal's resignation. In compensation, he would get 6 months salary. The reason was the company was losing money and Mr. Dagleish wanted to get someone to improve the advertising department.

- Bardal did not agree with the accusations of incompetency and refused to resign.
  - Mr. Dalgleish gave him a letter to confirm his termination and a cheque for his salary.

Bardal made arrangements for other employment and found another job not long thereafter. Bardal brought action for wrongful dismissal. The Globe and Mail claimed he withdrew from employment rather than was terminated and if he was, it was reasonable given Bardal's performance.

Issue:

Was Bardal wrongfully dismissed and if so, was he subject to reasonable notice?

Rule:

Carter v Bells & Sons: In the case of master and servant there is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement

Analysis:

Bardal was appointed to the Board of Directors which demonstrates both the permanency of his employment as well as his importance to the enterprise. It is settled law that reasonable notice for termination is required, but what is considered "reasonable notices" is undecided. It must derive from the circumstances of the contract

- The obligation is to give reasonable notice and keep the employee in employment, but if dismissed without reasonable notice, the employee is entitled to damages that flow from breaching this contractual obligation.

There is no formula for what reasonable notice exists. It is contextual to each case, considering various factors:

a. character of employment
b. length of service
c. age
d. availability of similar employment (considering experience and qualifications).

Bardal had a lifetime of experience with two large newspapers with few comparable offices in Canada. Any new employment will be of different character given the seniority he had

- One year notice would have been reasonable.

Damages

Given that one year notice was not granted, damages are to be calculated. Bardal was making $17,750/year at the Globe & Mail. He received $15,000 with his new employment and is therefore entitled to $3,254,15 for the loss of salary while searching for new employment, and $2,245.20 for the difference in salary of his new employment.

- Had he been employed for another year his pension would have been moved up; had he been given the appropriate notice would have got him there
- He lost the Christmas bonus, participation in profit sharing, loss of director's fees
  - He is not entitled to any of this since the Christmas bonus was purely voluntary, the profit sharing was not on contract and not obligatory and his appointment to the Board was at the will of shareholders.

Conclusion:

Not adequate notice given. Entitled to damages for different of salary

Hold, Order:

Action allowed.

Ratio:

Reasonable notice is contextual depending on factors of employment, the employee and the employment contract.

This case may be old, but it is still the leading authority for assessing the common law reasonable notice period. The Court confirms there is an implied term on employers in indefinite contracts of employment that they must provide reasonable notice of termination absent just cause.

- Length of that notice is a fact specific, highly contextual exercise. There is no catalogue, chart or formula for determination
- Each employee would be assessed holistically and on the facts
- We call the factors to be analysed, "The Bardal Factors":
  - Character of Employment
  - Length of Service
  - Age of Employee at dismissal
  - Availability of similar, comparable employment considering the employees qualifications
- This is an art, not a science, so there is no formula. Just live with the uncertainty it brings
  - You present these factors and the judge spits out a number

The one thing that unites all the factors is that they all relate to how difficult it will be for the employee to find new work

- Character of employment
  - He was in a managerial position and in charge of crucial parts of the business
  - It was permanent/indefinite and intended to be long term
- Length of Service
  - Worked for 17 years
  - He was also induced to leave his old company, which the courts will always add to the analysis to bump up the notice period
- Age
  - 63 years old, nearing retirement which would be difficult to be hired
- Availability of similar work
  - He was very specialized, since the role was made specifically for him, so odds are low
- All things considering, one year (12 months) notice would be reasonable

It is important to note that the issue is not that he lost his job, since that is always the employers right to do. It is that he lost his job without notice that is the issue.

Minott v O'Shanter Development Co, [1999] OJ No 5 (CA)

Facts:

Minott (plaintiff, respondent), worked in the maintenance department of O'Shanter Development Company Ltd ("ODC", defendant, appellant) for 11 years. He was considered a great worker.

- He had a minor dispute with a supervisor and took days off without permission. For not showing up, Minott was suspended and then fired.

Minott applied for unemployment insurance benefits. The Board found his misconduct disqualified him from receiving these benefits.

- Minott then brought action against O'Shanter for wrongful dismissal

Procedural History:

Trial judge concluded Minott was wrongfully dismissed and awarded damages for 13 months salary

Issue:

Does a long-term employee's refusal to work give an employer cause for dismissal?

Analysis:

Wilfully missing a day's work might justify dismissal, but not in this case. Minott had a long record of being a good employee. There was confusion as to when his suspension ended which may explain why he did not show up. He was also not given any warning his job was in jeopardy after the suspension.

- "the decision to terminate employment, particularly one of a long-standing employee, is not one which should be taken lightly"
- Even if he wilfully skipped work, this does not warrant dismissal

Conclusion:

No cause – trial judge did not err.

Issue:

Should courts calculate the reasonable notice if dismissed without cause?

Analysis:

Without just cause, Minott was entitled to reasonable notice, or the equivalent salary for the dismissal. Since O'Shanter did not do this, the damages must be calculated. Determining the reasonable notice period involves balancing relevant factors and the answer will be in a range of reasonable outcomes. The trial judge's decision is often awarded deference.

- Trial judge awarded 13 months reasonable notice and salary. While on the high end, this still falls in the reasonable range and the award should not be interfered with.

The trial judge did err in relying on *Cronk* and the principle that clerical workers are entitled to less notice than senior managers since this decision was overturned.

- It was also an error to rely on a "rule of thumb" where an employee is entitled to one month's notice for every year worked.
- While this uses predictability, consistency and certainty, it is best to weigh and blend the *Bardal* factors to reach the calculation
  - Rule of Thumb overemphasizes "length of service" and undermines flexibility

Yet it is reasonable. O'Shanter argues 12 months is a maximum, but this is also not accurate. It is an arbitrary ceiling. 13 months is reasonable since:
- Minott was 43 when terminated with little education
- Few jobs were available due to the recession

Conclusion:
Damages reasonable; Rule of Thumb not warranted

Hold, Order:
Appeal dismissed

Ratio:
Since reasonable notice is a contextual analysis, deference is to be given to the trial judge's finding.
- Rule of Thumb should not be used and neither should 'managerial vs clerical' distinction

The ONCA reaffirms here that this is an art, not a science. This means that deference has to be given to the trial judges determination and should only be overturned if way off. They even say that this is on the high end, indicating they would have given lower, but since it was reasonable, they didn't interfere. However, the ONCA did reject a couple things about the trial judge's decision:

1. Wrong to say that someone who is a manager is entitled to more notice that a clerical employee
   a. Someone lower ranking would likely have lower notice anyway, but this would be reflected in the Bardal analysis
      i. But immediately taking off notice because of the clericall position is not in support of the contextual analysis
   b. Your experience and position is considered
      i. There are simply more janitors than CEOs out there
      ii. The function of notice is to give adequate time to find a new job, so clerical employees often end up with lower notice periods by the analysis
         1. But it is *not* just because their work is clerical
2. Wrong to use a "Rule of Thumb"
   a. There is common thinking that for every year of service, the employee is entitled to one month's notice. This is the Rule of Thumb
   b. There is an appeal to this, it is easy to apply, predictable and a market solution
      i. Predictability is a valid goal of law in any case
   c. But certainly should not sacrifice fairness at the alter of justice
      i. It's more beneficial to respond to unique circumstances than a hard & fast rule
      ii. It can be predictable with enough case law
   d. The Rule of Thumb is still often used today, but more flexibly
      i. It is often a starting point that can go up and down from there depending on the Bardal factors
      ii. But technically, you should not use it! The court literally says here that it is an error to use it

Radwan v Arteif Furniture Manufacturing Inc, 2002 ABQB 742

Facts:

Mr. Radwan (plaintiff) worked for the City of Edmonton as a labourer and then became a punch press operator for Superior Steel Desk, then transferred to Wescab Industries Ltd in 1975. He was told he was working for the same company but not told why he was transferred.

- Wescab was purchased by EIF Sales in 1985, who was put into bankruptcy with Campbell Saunders in 1995 as the trustee.

Arteif Furniture Manufacturing ("Arteif", defendant) purchased the assets for the property. Since there were no major changes to the operation, Radwan considers this a purchase of "going concern".

- Radwan was on short term disability from two surgeries, prompted by workplace injuries at EIF. He returned to work in 1996 to the same position, same pay and same supervisor, though Arteif had purchased the business from EIF.

Due to shortage of work, Radwan was temporarily laid off various times. Under the *Employment Standards Code*, a lay off becomes a termination after 60 days and the employer is obligated to pay notice as required by the Code, dependent on the length of employment.

- Arteif then paid Radwan $960.00, which was 2 weeks pay on the basis that he was employed at Arteif for less than 4 years due to the EIF-Arteif transition.
    - Radwan brought action claiming he was entitled to 25-year termination notice

Issue:
What length of service should be attributed to Radwan for pay in lieu of termination notice?

Rule:
Section 5 of the *Employer Standards Code*
For the purposes of this Act, the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a receiver or receiver-manager

Analysis:
Radwan denies any documentation of a new application was ever produced. He also did not contact Arteif to determine if he might be able to return to work. The BCCA in *Sorel v Tomenson Saunders Whitehead* concluded that credit for years of past service may be given if a subsequent employer brought a business as "going concern". As such, it must be determined whether Arteif purchased from EIF the business, or merely the assets

- The trustee deposes it was as "going concern". The business carried on essentially the same from EIF to Arteif and some (though not all) of the EIF employees were offered their jobs
- Arteif argues they only purchased the assets and that it did not have access to employee information or how long Radwan had even worked there.
    - How was Arteif to offer some, but not all, employees their jobs without a list?

There is the truth that relationships are ended by bankruptcy, but notwithstanding this, Arteif may be the successor. In Alberta, whether or not a transfer was "asset sale" or "going concern" is only used in successor employee relationships. Under s5 of the *Code*, the employment is continuous and on the facts, Arteif purchased a "going concern" business. Arteif began operating the business after the Trustee sold it, and there was no significant changes to the nature of the business.

- In essence, there was continuity of the business

As per *Sorel*, when an employer has purchased the going concern, there is an implied term in the employment contract between the purchaser and the employees that, if they are kept on, the years of past service count to salaries, bonuses and notice of termination.

- This can be negated by express mention in a contract, but without, it is presumed.
- There is no evidence Arteif explicitly mentioned this matter and thus failed to negate the implied term that the new employer would give credit for previous service of the old employer

Given precedent of broad and generous interpretation, and consistent with s 5 of the Code, Radwan's employment should be considered continuous

- As such, Radwan is entitled under the Code to termination pay applicable to a person employed for 25 years

What reasonable notice?

As per *Bardal,* what is reasonable notice will depend on the circumstances of the case. Radwan was almost 63 years old and with 25 years experience.

- Reasonable notice for Radwan would be 20 months.

Conclusion:

Employment was continuous – entitled to 20 months

Hold, Order:

Action allowed

Ratio:

When an employer has purchased the going concern, there is an implied term in the employment contract between the purchaser and the employees that, if they are kept on, the years of past service count to salaries, bonuses and notice of termination.

The argument was that since the company changed hands many times, that each one of those was a new employment, so his notice period was only the employment after the last change of hands

- This is notwithstanding that his job remained largely unchanged between each change

The court gives a number of important takeaways:

1. There is an implied term in employment contracts that retained employees through acquisition of as going concern that past years of service for predecessor employers will be credited against the new employer unless expressly negated in a new contract with the new employer
    a. The contract must be explicit to negate it
    b. Sounds a little harsh, but that is a point of negotiation
    c. Seller can terminate all employees, provide them all with notice they are entitled to, and the buyer would come in, rehired them all and then say their year of service starts at 0
        i. This is usually contemplated in the sale and practically happens a lot
        ii. If it doesn't happen, common law would favour the employees
    d. This is enshrined in s5 of the *Code*
2. Purchasing a business as "going concern" means you are buying a turnkey operation – you buy the business and run it by substantially continuing it how it was running prior to the acquisition
    a. Contrasted with an asset sale where you buy the assets and the actual business operation is gone or fundamentally changed
3. Employment deemed continuous when the employer's business is transferred or continued through a bankruptcy, just as if it was a going concern
    a. There is no principled difference between bankruptcy and going concern
    b. Bankruptcy is read in to the list of circumstances where years of prior service of continued employees credited against successor employees under s5 of the *Code*

They also discuss the clerical vs managerial facts

- Radwan didn't work his way up, he stayed in the same labour job for 25 years. But that is not determinative in setting the notice period
- The Bardal factors are the ones we go to and the clerical nature of his work would put too much stock into an arbitrary distinction
- Bardals:
    - 25 years experience
    - 63 years old at termination – close to retirement age
    - Manufacturing job
    - Not skilled, minimal education and limited English skills
    - Workplace injuries lead to lower health
    - End conclusion: very unlikely to find new employment, so high notice period. 20 months

As a more practical note, technically there is no limit to the reasonable notice period. But courts have never really gone above 24 months, so that is a practical cap lawyers use, but certainly not a legal cap

Resignation

Just like employers have to give reasonable notice when terminating an employee, employees also have a duty to give reasonable notice in advance of their intended date of quitting or resignation from employment.

- This is implied at common law and enshrined in the *Code*
- Section 58 sets out the minimum requirements employees must satisfy in order to effectively resign
  - Must be in writing of the intention to resign
  - If employment was between 3 months and 2 years, 1 week notice is required
  - If employment was more than 2 years, 2 weeks notice is required

Employment Standards Code, RSA 2000, c E-9
Section 58 (1) Except as otherwise provided in subsection (2), to terminate employment an employee must give the employer a written termination notice of at least (a) one week, if the employee has been employed by the employer for more than 90 days but less than 2 years, or (b) 2 weeks, if the employee has been employed by the employer for 2 years or more. (2) Subsection (1) does not apply when (i) there is an established custom or practice in any industry respecting the termination of employment that is contrary in whole or in part to subsection (1), (ii) an employee terminates employment because the employee's personal health or safety would be in danger if the employee continued to be employed by the employer, (iii) the contract of employment is or has become impossible for the employee to perform by reason of unforeseeable or unpreventable causes beyond the control of the employee, (iv) the employee has been employed by the employer for 90 days or less, (v) the employee is temporarily laid off, (vi) the employee is laid off after refusing an offer by the employer of reasonable alternative work, (vii) the employee is not provided with work by the employer by reason of a strike or lockout occurring at the employee's place of employment, (viii) the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested to work by the employer, or (ix) an employee terminates the employment because of a reduction in wage rate, overtime rate, vacation pay, general holiday pay or termination pay. Section 59 (1) If an employee gives a termination notice that is less than the notice that the employer would have been required to give and the employer wishes to expedite the termination, the employer must pay the wages that the employee would have earned if the employee had worked regular hours for the remainder of the termination notice period that has been given by the employee. (2) If an employee gives a termination notice that is equal to or more than the notice that the employer would have been required to give and the employer wishes to expedite the

termination, the employer must pay the wages that the employee would have earned if the employee had worked regular hours for the remainder of the termination notice period that would have been required to be given by the employer.

Like the employer reasonable notice period, the reasonable notice period for the employee at common law is calculated by the judge, so most employees will just do the statutory minimum

- Calculating is almost the same, using the *Bardal* factors. But the length is always *far* less than employer notice
  - It is essentially the time that it would reasonably take to replace the employee
  - At most it would be a couple weeks

Employers can sue for, or insist on, longer notice period from key employees, especially those to whom they are particularly valuable.

- There is very little case law on this. An employer is not likely to sue the employee for a couple weeks analysis since it just wouldn't be worth it
- What would they be suing for? What would the damages be?
  - It isn't a breach of contract to quit, so when an employee quits without notice, the damages are not losses suffered because they left, or the costs to hire someone else
  - It is the losses because the employee didn't give notice, not the losses because they left
- Say your head IT person leaves, and they knew the entire system, without notice. Without them, you are vulnerable to malware and don't have any passwords
  - The damages would be the costs of emergency consultants to come in and transfer admin systems and lockdown the old one
  - You aren't claiming because they left, you are claiming because they left quickly and you need to hastily clean up the mess
    - Had they given notice, the mess wouldn't exist
    - It is a subtle difference but could have large differences on the damages
      - Most resignations without notice would likely not have any compensable damages, and if there are they are unlikely to be more than legal fees to get them since they are often much shorter than employer notices
  - An employer won't get revenues for the costs the employee would have accumulated for the company by leaving (the billables a lawyer could have received in the reasonable notice period wouldn't be compensable)

Section 59 deals with expediting a resignation. This is needed because during the notice period, the contract is still in tact and the employee is not considered terminated until the notice period ends

- But, if you are an employer and an employee tells you they are leaving in 6 months, you probably won't want them to stick around
  - But they have to be careful on how they expedite the process since the contract is still operational in this period
- Section 59(1): if the employee gives notice of resignation that is less than what the employer would have to give and the employer wants them to leave before the notice period is up, the employer has to pay out the remainder of the notice period the employee provided
  - If the employee gives 2 months resignation notice, but at common law they would have had to have given 3 months, the employer would still only need to pay out 2 months
- Section 59(2): if the employee gives more notice that is equal to or greater than what the employee would have had to give them and the employer wants them to leave before the end of this period, they have to pay the salary for the period the employer would have had to give in order to terminate them
  - The employer then becomes the terminating party

- The ABCA in *Smith v Hostess* interpreted s 59(2)
    - Smith was an employee and gave 6 months resignation notice
    - Hostess read s 59(2) and found that they would terminate them with reasonable notice
        - But they only gave the statutory minimum (8 weeks) so the ABCA said they were entitled to pay them the full common law notice period
    - This means that section 59(2) is not limited to the *Code* minimums of notice for termination and does not preclude common law notice entitlements.
- Section 59(2) protects employees. We don't want to disincentivize employees from giving advanced notice. For a lot of industries, notice is not a courtesy but crucial, especially for key employees.
    - The employer would want extra time to find a new key employee and ensure the handover is smooth.
    - So this protects and incentivizes employees to give advanced notice
    - If the employer still doesn't want them to finish, they have to pay them out

Kieran v Ingram Micro Inc, [2004] OJ No 3118 (CA)

Facts:
Kieran (plaintiff, appellant) was hired as Vice President of Purchasing with Ingram Canada (defendant, respondent) in 1989 and moved into Senior VP of Purchasing thereafter. The President resigned and Kieran was contemplated as his replacement with Mr. Schofield, the Senior VP of Sales.
- Kieran let the Worldwide President know that he would like to be moved to Ingram Worldwide if Schofield was chosen on the basis that Schofield is not a good leader
    - Ingram said they would try to accommodate this

Kieran was in a verbal altercation with another employee so Schofield was selected as President.
- After Schofield was appointed, Kieran again requested a new position with Ingram.
- However, after Schofield was announced as President, Kieran told Ingram he was committed to staying and working with Schofield, at which time he was told he may not have any job with the company at all.

Kieran was then given a job option "in light of [his] decision not to remain an employee" though the job was a significant cut in pay and bonus. His "resignation" was confirmed.
- He got another job in Australia which ended after 9 months, but received more compensation than he would have earned with Ingram

Kieran then brought action for wrongful dismissal

Procedural History:
The trial judge dismissed Kieran's claim as his actions amounted to a resignation.

Issue:
Were Kieran's actions a resignation?

Rule:
Resignation from employment must be clear and unequivocal. To be so, the resignation objectively must reflect an intention to resign or conduct that evidences such an intention

Analysis:
Kieran's conduct and it's implications are fact-driven. The issue becomes whether Ingram was legally allowed to treat Kieran's statements as clearly and unequivocally amounting to resignation. Kieran did not plainly state that if Schofield was chosen then he would leave, but that he would require an international transfer; Ingram even tried to do so but there was no indication to Kieran it would be successful. Because previous employees had done so, and Kieran knew he was highly valued, he assumed he would be able to be transferred
- However, Ingram encouraged him to believe that a suitable position would be found.

- Kieran's statements cannot be said to be a clear and unequivocal resignation, nor would a reasonable person think so

With respect to his notice, though he was in a senior position, he was relatively young and there was availability in the field. The trial judge's estimate that 9 months is adequate notice is reasonable.

- However, because Kieran received a more beneficial renumeration for his Australia position, more than he would have made had he stayed at Ingram, he is not entitled to any supplemental damages.

Conclusion:
Wrongfully terminated but no other damages

Hold, Order:
Appeal dismissed

Ratio:
Resignation from employment must be clear and unequivocal. To be so, the resignation objectively must reflect an intention to resign or conduct that evidences such an intention

This case analysed what actually must be done or said to effectuate a resignation. It isn't always as clear cut as "I quit". Often, an employer will not know whether to consider something a resignation or not

- The resignation must be clear and unequivocal statements or conduct
  - They will be assessed on a case-by-case basis considering all surrounding circumstances, but it is an objective standard
  - Test: Would a reasonable person, viewing the matter objectively, have understood the employee to have unequivocally resigned?
- This is not subjective because that would allow the employee to turn around and say "well I didn't really mean it"
  - In this case, the ONCA said he didn't make unequivocal statements he was quitting
  - He didn't say "if Schofield wins I will quit", he just wanted to be transferred
    - This is very different than a resignation, particularly because he had just had a contentious presidential run with Schofield
  - He overestimated his value at the company and their ability to find him an alternative post, but this was bolstered by Ingram leading him to believe there would be an alternative position or they were endeavouring to find him one

Frustration

Frustration is often very difficult to ascertain. A contract is considered frustrated when:

1. There has been a radical change in circumstances
2. Through no fault of either party
3. That renders further performance of the contractual obligations impossible or something fundamentally different than what was initially contemplated

When an employment contract is frustrated, it has come to an end and there is no need for either party to give notice of its termination. The contract simply ends on the day of frustration and parties are removed from all further obligations

- Because of this, frustration is often a defence for the employer to a wrongful termination suit

Practically, frustration ending contracts is usually quite neutral as both parties view the employment relationship at an end

- Following a neutral agreement, there is usually a courtesy letter sent out that says "your employment has been frustrated, your end date is X"

- The most common frustration is when an employee has a permanent or long-term disabling illness that prevents them from working a long time
  - This naturally comes at an intersection with human rights
  - When an employee has a long term disability, it is protected under the *Code*. The employee cannot be fired because of that, so the employer will have to accommodate up to undue hardship.
  - Frustration arises where this duty to accommodate has been exhausted or further accommodation is impossible

Wightman Estate v 2774046 Canada Inc, [2006] BCJ No 2164 (CA)

Facts:
Wightman (plaintiff) began working for the Employer (defendant) in 1975 under an employment contract of indefinite term. He was senior project manager. He had a series of health problems that interrupted his employment
- He had a kidney transplant in 1984 followed by arthritis and gout
- He took short term disability leave between 1996 and 1997; immediately afterwards he was diagnosed with severe coronary artery disease
  - His body rejected the kidney transplant in 2000 and he was unable to work such that he took sick leave in 2002

He was beneficiary of the employees benefits plan provided by the employer. He received disability benefits equal to 2/3 of his salary. His employer was bought by another in 2003, with about 1/3 of the force not being hired back. Wightman, who was on leave, was one not hired back
- However, he continued to receive long-term disability benefits until he died or turned 65 as per the benefit package.

The employer terminated him without pay or notice claiming that the contract was frustrated by serious, lengthy sickness that prevented Wightman from working.
- Mr. Wightman died of heart attack following surgical implantation of a heart pacemaker. His widow and executor (appellant) brought action against his employers (respondent).

Issue:
When does frustration apply to end an employment contract of a totally disabled employee who is unable to work for the remainder of their life?
Can the LTD benefits in the contract never be frustrated in the event of long term illness which is the reason the LTD was expressly contemplated?

Rule:
Employer must prove that Wightman's incapacity was of such nature, or would continue for such a period, that further performance of obligations in the future would be impossible from the employment contract

Analysis:
Whether incapacity due to sickness brings an end to the contract is determined by various factors (*Marshall*):
- Terms of the contract
- How long the employment would last without sickness
- Nature of employment
- Nature of illness and prospects of recovery
  - More complicated the incapacity and the more likely it is to persist, the more likely the relationship is destroyed.
  - Likely to remain for so long that it was impossible to further perform obligations, or they would be radically different, under the contract
- Period of past employment

Frustration can apply to employment contracts where an employee is unable to work because of a disabling illness. Whether the parties foresaw the event is irrelevant. The contract

becomes whether the contract is broad enough to apply to changed circumstances or if the change was such that the new circumstances would be radically different. If the parties provide that the contract will apply in new circumstances, it won't be frustrated.

- The employment contract provided for long term benefits until he ceased to be disabled. This does not mean the contract would continue indefinitely despite his disability. In fact, it envisaged his employment may be terminated.
- The policy provides for a continuation of benefits even after the employment ends if brought by sickness
  - The contract is silent as to the conditions on which the sickness would end the employment, so the phrase "if your employment ends because of sickness" implies the contract was not enduring through the treatment
  - So, the contract provided for the situation where his disability would be such that, at common law, it would have ended the employment contract via frustration
    - Benefits were not dependent on the employment contract continuing

Sickness will not frustrate the contract where it appears likely the employee will return. The appellant argued the doctrine of frustration is null under the *Employment Standards Code* to avoid discrimination. This cannot be true since an employers duty to accommodate will often be fulfilled through a new contract of employment.

Conclusion:

Employees sickness frustrated the contract

Hold, Order:

Appeal dismissed

Ratio:

Whether disabling illness frustrates considers many factors: terms of the contract, how long the employment would last without sickness, nature of employment, nature of illness and prospects of recover, period of past employment

- These are not cumulative, exhaustive or determinative

This case is cited as the one that defines frustration:

- A contract may be brought to an end by operation of law and the parties discharged from further performance if, without fault of either party, the circumstances in which it was expected to be performed have changed so radically that performance would be impossible or at least something fundamentally different than was initially contemplated
- Frustration can apply to employment contracts where an employee is unable to work because of a disabling illness, even if it also provides for LTD benefits that cover permanent disabilities

The essential question becomes whether the disability frustrated the contract

- Whether the employee's capacity, looked at before the dismissal, was of such a nature or appeared likely to continue for such a period that further performance of the employee's obligations in the future would either be impossible or a thing radically different from what was agreed upon
- Has the disability prevented performance of essential functions of employee's job for a period of time that is sufficient to say that, in a practical or business sense, the object of employment has been frustrated

Wightman argued that because the long term disability plans were offered, it was contemplated by both parties as consideration and he would be provided with in the event he needed them

- So how could it be that the circumstance happening (getting a long term disability) would frustrate that bargain?
  - This would not frustrate the contract but just execute it in the event of LTD
- The court rejects this argument as it is too simplistic.
  - His disability being foreseeable was not determinative

- The radical change is not invalidated because it was foreseeable, it deals with the consequence of the illness happening, foreseeable or not
  - Whether the parties contemplated it is not relevant
  - Even if they anticipated it, and it happens, did they contemplate the relationship surviving forever, no matter how serious?
- The proper question is whether, in the circumstances of his disabling illness, the employment contract is fraught enough to continue despite it.
  - Did we anticipate the contract to survive the disability > Did we anticipate the delivery?
    - The latter would be unworkable
  - Sadly this is kind of vague, so that's why the factors are brought in:
    - terms of the contract
      - The LTD benefits weigh in favour of employer
      - But not determinative
    - how long the employment would last without sickness
      - More finite the job is, the more easily it is frustrated
    - nature of employment
      - key employees would frustrate more easily compared to more replaceable employees
    - nature of illness and prospects of recover
      - Short term departures are less likely to frustrate
    - period of past employment
      - Goes to intention of parties to have long term relationship
- The contract did provide LTD benefits and they foresaw the possibility of disabling illness
  - However, that is only one provision, and the contract needs to be read as a whole
- Contract also provided that benefits would continue even if underlying employment contract did not and expressly provided for the situation in which benefits would continue even if employment ends due to the sickness

In terms of the policy, it expressly contemplated the employment period ending and benefits continuing

- If the policy itself contemplates the employment ending, then Wightman's argument is completely flipped
- It expressly contemplates the contract ending because of sickness
  - He did receive benefits until his death, he didn't receive termination notice but he got the benefits that the contract provided.
- There are other externalities to this to
  - If we accept Wightman's argument, then employers will be unwilling to provide LTD benefits
  - If the contract says that providing LTD benefits can never frustrate the contract, employers just won't give them to avoid paying reasonable notice

<u>Expiry of Fixed Term Contracts</u>

Fixed term contracts are employment contracts where the employee knows the end date from the very start of employment. On expiration date, employment comes to an end. Since the employee is aware of this end date, they effectively have notice and the chance to find new employment. This means that fixed term contract employees are not entitled to reasonable notice

- Most employers will give courtesy notice for fixed term contract but it is not mandated

When will a contract be considered a "fixed term" contract? *Alguire v Cash Canada* is the leading authority

- The contract must contain "unequivocal and explicit" language of fixed term (ie, the end date).
    - This means the contract *must* be a written contract
    - An unwritten contract will never be a fixed term, and the presumption is that it is permanent
- Any doubt or ambiguity as to a term of a contract is resolved in favour of the employee and against the employer
- Must fine mutual intention of the parties from objective words of the contract, giving meaning to whole contract and to surrounding circumstances, without giving undue weight to certain provisions in isolation.
    - This is because we are resiling common law employee rights, so if we want to resile from those rights, it must be very explicit

Termination

A fixed term contract will automatically end on the expiration date or at the end of the stipulated term. There is no need to provide notice of its termination.

- If the employer wants to terminate before the end of the fixed term, they may be on the hook for the remaining balance of the term
    - This means that the employee needs to pay them out for the remainder of the term
    - This makes sense since the parties agreed and contemplated the end date of the relationship, so it would be a breach of the contract to not work until that date
        - Damages would have been what they would have earned had the contract not been breached
        - So, without just cause, you prepay damages until the end of term, but no reasonable notice is needed on top of that
- If the employee continues to work beyond the expiry of the fixed term, and the employer acquiesces to the continued work, the nature of the employment may be implied to have changed to an indefinite contract which is terminable only on provision of reasonable notice.
    - The fixed term thus turns in to an employment contract of unlimited duration with no written contract
    - The years of service for when they were on fixed term would likely count as years of service when calculating reasonable notice
        - So, it is important for employers to keep track of fixed term contracts
            - If you fail to keep track of their end dates, the employees nature of employment can change in very material ways

Termination for Just Cause

Termination for Just Cause is a very separate way to end the employment relationship. Termination for Just Cause is also called "Summary Dismissal"

Summary Dismissal: Employee breached the contract by acting in a way that broke down the employment relationship, violated an essential condition of employment, breached the faith inherent in the work relationship or was fundamentally inconsistent or incompatible with continued employment

For a termination to be cause rather than another form of termination is a big deal since there are various consequences:

- Employee can be terminated without notice and there are no further obligations on the employers' part
- No entitlement of working notice or pay in lieu thereof under section 55(2) of the *Code*
- No entitlement to unemployment insurance under section 30 of the *Employment Insurance Act*

- Likely no reference from the dismissing employer for future job applications

Because of the heavy consequences of termination, it is a high bar to meet, legally speaking

The types of summary dismissal fit neatly into three broad categories, but the courts and case law do not separate them this way. So, their division is based solely out of convenience. They engage different analytical factors since the tests are so contextual.

1. Culpable Misconduct
    a. Simply an employee exhibiting flagrantly bad behaviour
    b. Violates Code of Conduct, evinces inappropriateness or is bad for business
    c. Most of it is "you know it when you see it" bad
2. Incompetence
    a. Just not fulfilling job responsibilities
3. Non-culpable Misconduct or "Innocent Absenteeism"
    a. On the surface, the employee is misbehaving but for circumstances outside their control
        i. Maybe alcoholism or something
        ii. Some outside factors that merits additional considerations beyond just cause

Again, these are not real baskets, and they are also not watertight. Technically they all have the same legal tests, but their approaches will differ.

Since the bar to just cause is very high, there are multiple practical tips for employers:

1. Keep Detailed Employee Records
    a. Document misconduct, complaints, disciplinary steps
    b. Anything relied on to justify just cause will require contemporaneous documentation
2. Conduct Investigations
    a. Anytime a complaint or report of misconduct surfaces, this should be investigated
    b. Have a written policy about investigations (when they occur and the progress to follow) and then follow them
    c. Also part of administrative law when it comes to procedural fairness
    d. On a balance of probabilities, a misconduct would be greatly bolstered by a record of good investigations
3. Written Workplace Policies
    a. Have a written code of conduct or workplace policies incorporated (directly or by reference) into an employment contract
    b. They should be in writing, well publicized and accessible, and brought to the employee's attention
        i. More important if you have very specific rules for that workplace or are a bit more intuitive

<u>Basket 1: Culpable Misconduct</u>

There are very typical categories of misconduct for which an employee may be terminated for cause:

- Conflict of interest (taking secret benefits or kickbacks as a result of employment)
- Fraud or dishonesty
- Sexual Harassment
- Breach of duty of fidelity
- Willful disobedience
- Intoxication
    - Mindful that alcoholism is recognized mental disability that needs to be accommodated

Even if these categories are simple, the tests are still contextual and fact specific

- The categories are also not closed. Fluid and broad

There is also the "you-know-it-when-you-see-it" misconduct. These are conducts which don't violate one of the above categories but is so obviously bad it validates just cause.

- Reveals character flaws in an employee that eviscerate the trust inherent and necessary in an employment relationship
- Incompatible with the employee's job responsibilities and trust reposed in them
- Makes continuation of the relationship impossible

McKinley v BC Tel, 2001 SCC 38

Facts:

McKinley (plaintiff, appellant) is a CPA who was employed by BC Tel (defendant, respondent). He earned various promotions, going from Controller, Treasurer and Assistant Secretary

- He began experiencing hypertension, initially treated with medication and time off
    - The condition worsened and his physician suggested he take a leave of absence, which he followed

McKinley's superior, Mansfield, raised the issue of his termination. McKinley requested to return to work but at a lower workload. Mansfield said BC Tel would try to find such a job.

- Alternative employment was never offered since two other positions were filled by other employees

Mansfield terminated McKinley's job while still on leave. By that time McKinley had worked for 17 years and was 48 years old.

- A severance offer was given but rejected.

McKinley brought action for wrongful dismissal without just cause and without reasonable notice

- At trial, the respondent uncovered that Dr. Graff had suggested a medication that would have allowed McKinley to return to work without any health risks. The respondent argued just cause existed for the dishonesty of McKinley about his condition

Procedural History:

The BC Supreme Court allowed the action and awarded over $200,000 in damages

- The BC Court of Appeal allowed the appeal and ordered a new trial

Issue:

Does any dishonesty warrant an employee's termination or if the context of such dishonesty is to be considered?

Rule:

Just Cause requires:

- Appellant's conduct was dishonest in fact and
- Dishonesty was of a degree incompatible with the employment relationship

Analysis:

It is true that simple dishonesty has been found to be valid cause. However, the case law of these circumstances were with an overarching, serious misconduct. Most were cases where the employee intentionally devised to extract some financial gain to which they were not entitled at the employer's expense.

- It is a bridge too far to say that all dishonesty, less egregious than the case law, would warrant termination for cause.

Context must be considered when contemplating whether the dishonesty warranted termination for cause.

- If the dishonesty violates an essential condition of the employment contract, it could be for cause
- This means the contextual test could be strict; cases of serious fraud, misrepresentation or theft would establish just cause

For less serious cases, the nature and circumstances of the misconduct must be considered.

- Absent those considerations, it would be impossible to determine if the dishonesty was severely fraudulent to warrant termination without notice.
- Other sanctions for lesser misconduct are still available to the employer, like docking pay or suspension.
  - The underlying idea is one of proportionality; the severity of the misconduct and the sanction imposed must be balanced.
- A hardline rule would create arbitrary outcomes: some employers would fire for the theft of a pencil, some would not
- Given employment realities (unequal bargaining powers, self-worth), an absolute, unqualified rule of dishonesty warranting termination without notice is unjust to employees

A trial judge must instruct the jury a two-part test for termination for cause in cases of a dishonest employee:

1. Whether the evidence established the employee's deceitful conduct, and (fact)
2. Whether the nature and degree of the dishonesty warranted dismissal (fact)

In the case at hand, the jury had sufficient evidence to answer both questions of this test

- It is clear Dr. Graff believed he could have returned to work, but McKinley did not put the information forward as fully as he might have
- While this could have raised doubts to the jurors, was it sufficient that it would lead them to unequivocally believe the dishonesty justified termination without cause?
  - Telephone conversations indicate that had McKinley knew the only option to continue employment was to take the medication, he would have done so
  - The doctor said the best is to do a lesser job, but if this is not available then beta blocker medication can be used as a last resort
    - This does not mean McKinley should have taken them, and not doing so would not justify termination
- While there was not full disclosure, it was not required of him. So, the dishonesty was not incompatible with his employment relationship and the jury, acting judicially, could (and did) reasonably find that termination was not warranted

Conclusion:

For dishonesty to warrant termination for cause, context must be considered

Hold, Order:

Appeal allowed

Ratio:

Trial judge must instruct the jury a two part test for termination for cause with a dishonest employee:

1. Whether the evidence established the employee's deceitful conduct, and (fact)
2. Whether the nature and degree of the dishonesty warranted dismissal (fact)

This is the leading case in Canada on the test/framework for determining when employee misconduct gives rise to an employer's right to terminate for cause. Before this case, any instance of dishonesty could give rise to just cause termination. But this Brightline rule became unworkable – if you stole a pencil does that justify termination? This is the crux of this case.

- The SCC said that the overarching question is whether the conduct justifies a cause for just cause termination by breaking down the relationship, violating essential terms, breaching trust or acted in a way fundamentally inconsistent with the employee's obligations
  - The strict "any dishonesty is just cause" is rejected

Answering this question requires the employer to satisfy a two part test:

1. Prove that dishonest conduct occurred (in fact)
2. Satisfy the court that the nature of the dishonest conduct is sufficiently serious to justify a dismissal as a proportional consequence

a. Contextual: fact and circumstance specific of the employment relationship
    i. Length of service, responsibilities, employer goals, business impacts
b. Proportionality: does the consequence "fit" the misconduct

All three baskets described earlier use this test, but the contextual/proportionate analysis will be more dependent on the type of misconduct in question, so that is why it is useful to separate them

BC Tel raised a host of defences, including offering termination pay, finding him an alternate position, frustration and just cause at the last minute.

- In this case, the dishonesty was self serving, since his doctor said beta blockers could be used, but the best is to take a lesser work load. It was far more ambiguous than BC Tel made it seem
    - McKinley wasn't deliberately or intentionally trying to deceive BC Tel, it was him indicating what he thought the medical advice was
    - Honest miscommunication doesn't amount to dishonesty that undermined the employment relationship
- Also, important that BC Tel didn't discover the doctors recommendations until after they terminated McKinley
    - Case law says that this could still justify just case
    - After Acquired Cause: findings of fact after termination that would justify termination with cause
        - As long as the thing you rely on to terminate an employee happened, fair game
        - Even if the employer did not know of it when they fired him
            - Happens a lot – IT will run a scan after termination that gives a minefield of misconduct that the employer can rely on
- The case law that BC Tel used to justify dishonesty justifying termination wasn't even supporting the Brightline rule: the cases that justified termination were all just naturally egregious, and the ones that weren't that bad weren't found to be just cause
    - There was an implicit proportionality assessment in those cases too

Dowling v Ontario (Workplace Safety and Insurance Board), [2004] OJ 4812 (ONCA)

Facts:

Dowling (plaintiff) worked for the Workplace Safety and Insurance Board ("WSIB", defendant) for 25 years. He was Manager of Small Business Services in the Ottawa office. Dowling met Ms. Lazar through the job and the two became close friends. Ms. Lazar's clients were reclassified and received credits, supervised by Dowling.

- Ms. Lazar offered Dowling a deal on computers for his sons, which Dowling accepted. Dowling then learned the computers came from one of Ms. Lazar's clients before receiving the computers.
    - He then approved a refund to the company for $16,086,50

Lazar and Dowling made an agreement whereby Lazar would pay Dowling $1,000 and Dowling would reclassify her clients for credits/refunds.

- The next year, Dowling was asked to meet with two investigators of the Board about the transaction. Afterwards he met with Ms. Lazar and agreed to characterize the cheque as a loan. He then typed up a fraudulent loan receipt and backdated it, and she signed it while also making a Christmas card dated from two years ago

He again met with investigators where he told them the fictitious story he and Ms. Lazar made. The WSIB did not believe him and said they believed he and Ms. Lazar had a "money for her clients reclassification" deal. They dismissed him without notice, stating that Dowling was obtaining a monetary benefit by using his position against the Board.

- Mr. Dowling brought action against WSIB, claiming he was wrongfully terminated.

Procedural History:
The trial judge allowed the action and awarded Dowling with $603,750.42

Issue:
Did WSIB have just cause for terminating Mr. Dowling such that no notice was required?

Rule:

WSIB Code of Conduct

[Board] employees must retain their impartiality in the conduct of business and must not accept any direct or indirect gift, honorarium or other benefit from any staff member, job applicant, client, supplier, external individual or organization which could be construed in any way as influencing or rewarding a business decision or action.

Analysis:

The core determination if misconduct was sufficient for termination for just cause was, as per *McKinley*, if the misconduct is incompatible with fundamental terms of the employment relationship. If it strikes at the heart of the employment relationship, just cause is present.

This requires:

1. Determining the nature and extend=t of the misconduct
2. Considering the surrounding circumstances and
    a. Employer and employee circumstances are to be considered
3. Deciding whether dismissal is warranted (if it is a proportional response).
    a. Is the misconduct reconcilable with sustaining the employment relationship

The trial judge erred by only considering whether Dowling's conflict of interest justified the Board's decision to dismiss him.

- The question was not if Dowling used his position to obtain a direct monetary benefit, but rather if the misconduct, in the context, was sufficiently serious that a breakdown in the employment relationship arose.

A full consideration of the context of the misconduct must be given before it can be determined whether dismissal is warranted. The trial judge only considered the $1000 acceptance

- He did not consider that the purchase was discounted, from a Board registered employer or that it constituted a conflict of interest.
- He did not consider the prevarication in the interview nor the repeated contact with Ms. Lazar during the investigation, or the fake documents
    - These should have been considered in the full consideration of the context
- This fundamentally did not consider the nature and function of the Board
    - Without the full contractual analysis, it is impossible to determine whether the termination was justified without cause.

<u>Nature and Extent of the Misconduct</u>

First misconduct was purchasing the discounted computers from an employer registered with the Board, particularly since he supervised their account.

- This is counter to Code of Conduct that prohibits direct/indirect benefits from clients
    - He was fully aware they were coming from a client

Second misconduct was accepting $1,000 from Ms. Lazar. This was given because of the help he provided to her clients.

- This is counter to the Code of Conduct to avoid conflicts of interest and inconsistency with personal and Board interests.
- The memo subject line literally said "Kickback"

Third misconduct was when he questioned in the interview about receipt of money and computers.

- When asked if he received $1,000, he did not disclose that he received $1,000

Fourth misconduct was his contact with Ms. Lazar and concocting the false and misleading story and false loan documents.

- This was dishonest and meant to mislead the Board

Fifth misconduct was lying to the Board in the second interview.

Surrounding Circumstances

He was 50 years old, employed for 25 and months away from retirement. He was a manager with authority and administered substantial public funds

- He was obliged to act in the bounds of the Code of Conduct

WSIB is a statutory body in charge of public insurance schemes and entrusted Dowling (had no immediate supervisor). They were entitled to expect honesty and integrity

Proportionality

1. Did the dishonesty violate an essential term of the employment contract?
2. Did it breach bad faith inherent to the work relationship?
3. Was it fundamentally inconsistent with Dowling's obligations to the Board?

Any of the three measures are satisfied enough to let the Board dismiss Dowling. His actions cannot be reconciled with his obligations and were not mere errors of judgement but intentional, dishonest acts.

- He accepted moneys related to the discharge of his responsibilities.
- He lied and prepared fake documents in face of investigation
  - Not consistent with integrity and impartiality in discharge of his duties
- He breached both Code of Conduct and Conflict of Interest policy
  - Avoiding conflict of interest is a fundamental term of the contract
    - His actions thus repudiated the contract by acting incompatibly with the obligations that he owed thereunder

Considering the level of misconduct with the authority entrusted on him, the dismissal was a proportionate response as the employment relationship was destroyed

Conclusion:

Actions justified termination for cause

Hold, Order:

Appeal allowed

Ratio:

McKinley approach to just cause applies to all alleged elements of misconduct, not just dishonesty

This is a strange case since it seems so clear McKinley was in the wrong. But it is still important since the ONCA really goes hard in describing the context, rather than the pure facts of the case.

- He lied through his teeth multiple times. He tried to argue he was teaching Lazar and that is why she paid him $1000, he lied about it and then went to Lazar to also get her to lie and he even created a fake document.
  - Even when he got caught he dug his heels in and still lied. He furthered the dishonesty
- It wasn't just one incident (as the trial judge looked at), it was a course of misconduct
- His behaviour was the precise thing that makes him incapable of continuing his employment relationship, particularly since it was a public role.

The ONCA breaks the *McKinley* test into three parts, but it just rewords the original test

1. Consider the nature and extent of the misconduct
   a. Did the employer prove the misconduct relied on?
   b. Employers are allowed to use evidence of misconduct post termination even if it was only discovered after ("after acquired cause")
2. Consider the surrounding circumstances around the misconduct
   a. Employee: age, history, seniority, role, responsibilities, expectations

    b. Employer: type of business, relevant policies, employee's fit in organization and how their behaviours affects the rest, degree of tryst reposed in them
3. Determine if dismissal is the proportional consequence for the misconduct
    a. What was the effect of the misconduct on the employer, particularly in light of the employee's responsibilities?
    b. Was it sufficiently serious to warrant termination?

Poliquin v Devon Canada Corp, 2009 ABCA 216

Facts:
Poliquin (plaintiff) was employed in a supervisory role at Devon Canada Corp ("Devon", defendant) for 26 years. He managed oil and gas properties and was responsible for supervising 25 employees. Throughout his employment, Poliquin was required to read and adhere to Devon's Code of Conduct.

- In his employment, Poliquin accepted free landscaping services on his personal residence from Devon's suppliers on a "friendship and business associate basis"
- He also used Devon's equipment to transmit pornographic and racist material.
    - One of the landscapers said he felt pressured to supply landscaping because of Poliquin's position at Devon
    - Poliquin solicited and received the services and he was not billed

The Code of Conduct provisions he breached include:

- Conflicts of Interest for the free landscaping services from a supplier
- Information Systems Usage Policy for the pornographic transmission
- Harassment Violence Prevention Policy for racist emails while at work

Devon terminated his employment upon knowledge of the above events. Poliquin brought action for wrongful dismissal.

Issue:
Was Poliquin wrongfully terminated without just cause?

Rule:
McKinley/Dowling proportionality test for summary dismissal:

1. Consider nature and extend of misconduct
2. Consider surrounding context around misconduct
3. Consider if termination was a proportionate response to the misconduct

Analysis:
Several categories of misconduct – including conflict of interest and dishonesty – have been traditionally recognized as constituting cause for an employees termination without notice.

- Soliciting services from a supplier falls as a "benefit" which is a conflict of interest
    - Summary dismissal, on the circumstances, is an option for the employer
- While *McKinley* found that dishonesty may or may not be grounds for dismissal, it can if the dishonesty:
    - Violated essential condition of employment contract
    - Breached faith inherent to the work relationship
    - Fundamentally/directly inconsistent with employees obligation to employer
- It is incontrovertible that Poliquin's actions were severe.
    - Employees are expected to provide loyal service, the degree raises with more responsibility granted to the employee
        - Since he was a senior supervisor, he had lots of authority
        - He was under obligation to not act to create conflicts of interest as per the Code of Conduct (avoid indirect or direct solicitation of gifts)
            - This solicitation alone justifies termination for cause
    - Using the computer system for pornographic, obscene or racist materials in emails to anyone is a violation against the Code of Conduct

- Employers have the right to set ethical standards around their workplace standards and Poliquin had no reasonable expectation of privacy for his work computer
- The reputational costs in the wider community and the poisoning of workplace morale justify his termination for cause without notice
  - Employers are not obliged to tolerate such misuse
- His breaches satisfy any of the three measures from *McKinley*
  - He is a mature employee who would reasonably be expected to show sound judgement, none of which was shown here
  - The absence of complaints about his conduct is irrelevant
  - The Code of Conduct is also zero tolerance
  - Whatever the culture of the industry is no justification of deplorable action – that is not Devon's responsibility

Obiter: The proportionality test was used even where an employer, through a written employment contract or code of conduct agreed to by the employee, has expressly prohibited certain conduct and reserved unto itself the right to terminate the employee summarily for breach of that prohibition.

- Whether or not it should be used is a question for another day

Conclusion:
Just cause exhibited.

Hold, Order:
Action dismissed

Ratio:
Supervisors owe a heightened duty of honesty or responsibility for business's success, corporations' reputation to lead by example. Consider supervisory rules in contextual analysis.

This conduct was able to be quickly accepted as just cause because it clearly violated the Code of Ethics of all employers. This is all the more reason to have a clear Code of Ethics as an employer that can be easily pointed to. However, the Court goes beyond this in their analysis.

- While the personal benefit he gained from a business customer was obvious conflict of interest that pits personal benefit against benefit of the company and fit in multiple causes of summary dismissal, other conduct don't necessarily git into any
  - The emails and search history are more of a "you know it when you see it" justification
- Employees are expected to have a duty of loyalty and honesty; this duty increases as employees become more senior and take on more managerial roles.
  - The higher you are and the more leadership role you have, the more is expected of you
  - On the flipside, the higher you are the harder you fall
  - This is considered part of the contextual analysis of characterising he wrong
- Self dealing and conflicts of interest, beyond the breach of Code of Ethics, is very egregious and undermines the employment relationship
  - Any confidence the employer has in the employee is suddenly gone
    - Doesn't matter if the employee doesn't see it as that bad, any taking is problematic since the customer will expect things of the business, not necessarily just the employee who gave the benefit.
    - Kickbacks themselves are, in and of itself, incompatible with employment
- Employers have the right to set ethical, professional and operational standards for their workplace and are integral to a good governance regime
  - Poliquin did an excellent job delineating these expectations
- Employers have good reasons to have solid expectations around workplace technology usage

- They are equally justified in controlling and monitoring improper use of technology
- Abuse of technology has a lot of effects:
  - Poisoned workplace for those who do not want to see the hateful emails
  - Impacts work ethics and is a distraction in general
  - If you let this trash in your emails and do not punish it, it can lead to other distracting behaviour
- The improper use of the computer were bad for several reasons
  - The emails were not innocuous
  - The focus is not on how many emails were sent (there were only 2) or that he just forwarded them, need to look at the larger context
    - As supervisor, he needed to set corporate image and culture
    - He had a duty to stop dissemination of offensive content and to enforce Devon's Code
      - His participation encouraged, or at least condoned bad conduct
      - Devon's email is now lumped into pejorative emails
    - One email would not exculpatory compared to a thousand
  - Devon can presume harm flowed from the pollution of the workplace content – don't need actual complaints to prove it
    - Poliquin argued that no one had an issue with the emails, but the fact that they were sent shows the toxicity in and of themselves.
    - It also makes sense that no one came forward to rat out their boss

- Cumulative wrongs are more egregious than a single wrong as they evince a pattern of misconduct and an underlying deficiency of some quality or value needed to fulfill the core of the employer's job
  - This is another factor when considered the proportionality of termination on misconduct

Given his conduct, just cause was absolutely justified. Poliquin did try to argue that the oil and gas industry is just like that; everyone does it so why should Poliquin be punished for industry standards?

- The Court was not sympathetic to this at all. Even if it was commonplace, it was Devon's prerogative to set their own workplaces rules
  - If Devon wanted to be the cleanest employer in the oilfield, they could do so. If Poliquin didn't want to abide, he can go to another employer
  - It also is not the responsibility of Devon to address the systemic issues in the oilfield and should not compromise expectations of their employees because of it

As sound as this decision is, there is one unsettled area of law addressed in the decision:

- If an employer's Code of Conduct expressly lists the violation that will give right to terminate for cause, and the employee violates that clause and is subsequently dismissed, does a court have to go through the whole proportionality analysis to see if the employer had just cause if the employee sues for wrongful dismissal?

Whitehouse v Royal Bank of Canada, 2006 ABQB 372

Facts:

Whitehouse (plaintiff) was a vice president and investment advisor with RBC in Calgary for 16 years. Throughout his career, he became very successful and was nationally ranked. He managed over $125 million in client funds and made over $500,000/year in commission alone.

- In 2004, when he was 49, he went out after work downtown and brought a sex worker back to the RBC office after hours and brought her into a high security, key access only area of the office.

- After refusing to pay for her services, he left her in the lobby of the office with access to all client documents at reception.
- The next day, she returned to the office demanding payment and made a big scene.
  - The event spread like wildfire in the investment banking community

RBC swiftly investigated the incident and it culminated in an in-person interview with Whitehouse. At first, he denied the events.
- When RBC showed video surveillance of the events, he admitted
- He was subsequently terminated and he brought action for wrongful termination.

Issue:
Is termination justified when the acts where outside workplace hours and not a neat category of misconduct from case law?

Rule:
McKinley/Dowling proportionality test for summary dismissal:
1. Consider nature and extend of misconduct
2. Consider surrounding context around misconduct; did it in fact occur?
3. Consider if termination was a proportionate response to the misconduct

Analysis:
Simply because the category is not one of misconduct in existing case law does not mean that the conduct cannot justify termination. A full *McKinley* analysis is still needed. Whether or not the conduct being off duty impacts the termination will come up in the contextual approach.
1. Examination of Nature of Employment Relationship
   a. Whitehouse was a very senior employee. He was well aware that maintaining and garnering business requires a good reputation of integrity that is reflected in a track record, including respecting client confidentiality
      i. Professional reputation is critical in a workplace like this.
   b. As a senior employee, he had a responsibility to lead by example
   c. Code of Conduct acknowledges the importance of integrity, law-abiding behaviour and respecting client privacy
      i. It also provided for the examination of employer conduct.
2. Examination of Employee conduct
   a. His actions exhibited a disdain for the employer: Whitehouse deliberately chose to bring the worker to the work office and leave her with access to confidential information.
   b. This was a serious lack of judgement
   c. The argument brought forward by Whitehouse that this did not occur in the course of work or in workplace hours also needs to be contextualized
      i. There is a sufficient nexus between the workplace and his responsibilities with the misconduct
      ii. He brought her to an area of key-card access they only he and few other executives had access to
      iii. It happened in the workplace and had extreme threats to the workplace, the employees and the business of clients
      iv. He also allowed the reception to have to deal with the angry sex worker the next day when she returned
3. Examination on proportionality of termination
   a. It would be extreme arrogance to not punish action like this since it shows a contempt for the business, it's reputation and the impacts on other coworkers but mostly for client privacy and confidentiality
      i. The repercussion from large clients losing trust in RBC could cost millions of dollars
   b. Tolerating Whitehouse's conduct would have done irreparable harm to RBC's workplace environment, as well as it's business activities with clients.

c. Clients trust financial institutions implicitly, and this trust is completely eroded in one foul swoop
d. His actions are incompatible with the trust needed for his position and industry
e. Termination was justified as a proportionate response to his conduct
f. This may not fit into a category already recognized at common law, but it certainly had largescale effects on his workplace and it is axiomatic that his actions were incompatible with continued employment, categorical or not

Conclusion:
Just cause easily established

Hold, Order:
Action dismissed

Ratio:
Termination for conduct off-duty can be justified for cause if there is a sufficient nexus between the workplace and their responsibilities.

This is another pretty clear example of conduct that is justified for just cause because "you know it when you see it". Bringing a sex worker and exposing her to confidential information (worth literal millions of dollars) doesn't really fit into any category of conduct that justifies termination. That does not mean it has to be accepted in the workplace and termination was not allowed

- Off duty conduct is also fair game – just because he was not working at the time of the incident does not mean he cannot be terminated for it
- Whether or not the off-duty conduct was sufficient to justify termination depends on a contextual analysis on if there was a nexus between the workplace responsibilities and the impugned conduct, but off duty conduct will never be precluded from termination for the sole reason that it was off duty.
  - This is common at office Christmas parties

The impacts of his off-duty conduct had huge implications. This being a professional field, all other investment banking companies knew of this. RBC's competitive position in the industry was massively compromised.

- Clients with very large sums of money in RBC would be completely justified in withdrawing from RBC after finding out that their private pecuniary information (worth huge sums of money) was compromised
- The RBC client base, the RBC reputation and the entire RBC workplace would be compromised
  - Other employees with RBC had to deal with this event – clients with other advisors would have to deal with concerned clients.
  - The receptionist had to deal directly with the sex worker the next day
- He tried to argue that he had made a lot of money for RBC so his termination was a large loss for them and a lesser penalty that allows him to continue work should have been taken
  - The court was not sympathetic to this argument at all, saying that such logic would set a dangerous precedent that high-earning employees can get away with more unacceptable conduct simply because they make a lot of money

In the end, there were ample reasons to justify termination for this conduct through a *McKinley* analysis, regardless if this fit into an established pattern of misconduct.

When there are cases like this, where it is not a category of misconduct, it is even more important for employers to contemplate many things when terminating for just cause

- Are there detailed records about the misconduct, complaints and disciplinary steps?
- Was the incident properly investigated?
  - There should be a written policy about investigations (when they occur, what process should occur) and they should be followed

- Is there a written code of conduct or workplace policy incorporated into the employment contract?

Having clear policies set objective standard, give a plan to follow and form separate and additional evidence for discipline. It has become very important for employers to have clear policies on sexual harassment and social media use.

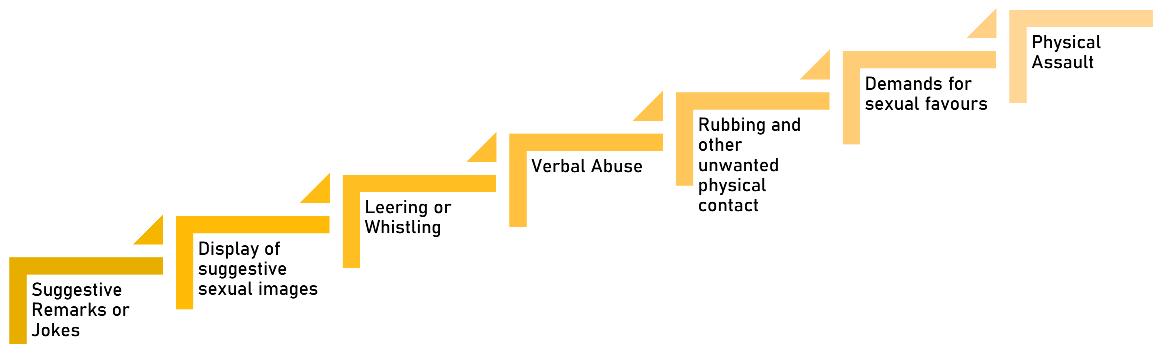
Sexual Harassment and Just Cause

Termination for sexual harassment requires heightened investigatory procedures so that termination is not for a single, unfounded claim. Without an investigation, the employers position is quite precipitous

Sexual Harassment is not defined under an accepted universal definition. Most courts will point to the definition in *Janzen v Platy Enterprises Ltd*:

- "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment"
    - *Unwelcome* is very important as it puts what would constitute harassment on the complainant – if they do not want it is unwelcome
- It is often comes from a position of power over a subordinate and is demeaning on the victim and is detrimental for their sense of dignity
    - Consequently, it is treated very harshly
- *Calgary (City) v Canadian Union of Public Employees* (2019 ABCA 388) took a broader definition:
    - "unwanted, often coercive, humiliating or offensive sexual or gender-based discrimination, whether physical or verbal, directed by one or more person (the perpetrator(s)) towards a targeted person(s), that is in violation of the targeted person(s') human rights, occupational health and safety protections, common law entitlements and/or other applicable statutory rights."
        - Expands to gender based. Not just workplace but human rights as well

Sexual Harassment is a lot of things. The more serious the sexual harassment, the more likely cause will be found



Sexual harassment in the workplace is obviously not new, but increased awareness and response to it is. There used to be a thinking that the complainants not avoiding situations or taking steps to address the sexual harassment meant it wasn't actually grounded. Or that if it wasn't immediately reported it did not happen.

- This thinking is now rejected. When it was reported or what steps the complainant took are not germane in a finding of sexual harassment
- There is also increased awareness around issues like mental health, harassment and bullying that are reflected in statutes like the *Occupational Health and Safety Act*

As a result, employers now feel the need to

- Take steps to prevent and eradicate sexual harassment in workplaces
- Encourage employees to come forward and report incidents
- Take appropriate and meaningful actions and respond to it

Workplace policies on sexual harassment should:

- Provide for a clear definition of Sexual Harassment
    - Set standards for the entire workplace
- Apply to all work settings, including outside the office
    - A conference would likely have the sufficient nexus, as would a workplace office party
    - Even a random event open to anyone but where much of the office attends would have a sufficient nexus for the employer to prevent sexual harassment
- Not prevent employees from seeking external remedies
    - Cannot say you can only complain to HR
    - Reports to police, human rights complaints and other civil remedies (including against the employer) should be allowed
- Identify a process
    - How to make a complaint and to do, informal vs formal resolutions, how evidence is collected, how final determinations will be made and who makes it
- Explains safeguards
    - A lot of complainants want their complaints to be confidential
    - Employers can try their best, but the perpetrator is required to know the claim and have a chance to respond in honour of procedural justice, so this must be explained and reassure the complainant that the investigation will be confidential and only the people that need to know will know
    - Prohibition on retaliation: no one will lose their job for filing a complaint and the employer has to take steps to assure that
- Outline employment consequences and possible penalties, but avoid zero tolerance language
    - Don't promise specific outcomes and use a more flexible approach

What case law has been established as just cause termination for sexual harassment?

- *Bannister v General Motors of Canada Ltd*
    - Supervisor tried to kiss one student, directed sexual innuendos at her, told explicitly sexual stories in her presence
    - Four additional complainants came forward in the investigation process, and he was terminated
    - Trial judge said it wasn't sexual harassment and if it was the employer had a duty to stop it so the fault is on them
    - ONCA: trial judge trivialized the conduct and his conduct violated his manager position
        - Summer students especially are vulnerable as they are young and wanting to perform well
        - Argument that the workplace is just like that wasn't taken well – courts cannot control that but any inappropriate comments can't just be tolerated because the workplace is mostly male
- *Van Woerkens v Marriott Hotels of Canada*
    - Christmas party in a ballroom that some parties moved to a hotel room afterwards
    - Heavy drinking and lewd dancing lead occurred and a supervisor sexually assaulted a subordinate employee
        - Cause was easily established
- *Calgary (City) v Canadian Union of Public Employees, Local 37*

- Respondent inappropriately touched an employee's breast and was dismissed
- Arbitrator found it as sexual harassment, but she did not object and so while it was impulsive, it did not contribute to a toxic work environment
- ABCA did not accept this at all
  - Takeaway: A victims reaction to the harassment has no implication on a finding of sexual harassment.
    - There is little room for "he was a good employee" or "it wasn't that bad"

Hodgins v St John Council for Alberta, 2007 ABQB 275

Facts:
Hodgins (plaintiff) was recruited by the St John Council for Alberta ("SJC", defendant) to manage the Calgary branch. The CEO, Mr. Hook asked Hodgins if he could move up to become second in command of the Alberta operation. He was considered an important asset to the organization. At a Christmas party, Hodgins received 4 complaints of sexual harassment that would lead to his termination without notice:
- one complainant heard Hodgins state a "clothes off" comment about his female driver
- she had her hair commented on various times by Hodgins as he touched her shoulder
- she was with her husband when Hodgins put are arm around her and told her to "ditch her husband" and come with him
- as she was preparing to bowl, her husband made a comment about her butt which Hodgins repeated

Her complaint was only brought to correct the behaviour and stated that she did not want Hodgins fired. The CEO met with Hodgins about the complaint and Hodgins said he didn't say some of the remarks in the complaint. The CEO informed him that he was done working effective immediately.

Issue:
Was the conduct of Mr. Hodgins sufficient to warrant dismissal for cause, without notice?

Rule:
Janzen definition of sexual harassment: unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job related consequences for the victims of the harassment

Analysis:
<u>Did Hodgins' actions amount to sexual harassment?</u>
The definition in *Janzen* must focus on the perception of the complainant. At common law, for an employer to use sexual harassment to justify dismissal with cause, they would have to establish on the balance of probabilities that the words underlying the allegation were spoken or occurred and it was reasonable to conclude that the complainant was offended by the words or conduct and they could reasonable detrimentally affect the work environment or lead to adverse job related consequences for the victim.
- Must balance needs of the employer and the employee in a contextual analysis

The complaints:
- Clothes off complaint
  - The receiver of this line was not offended and the joke appeared innocuous. The complainant said she found it inappropriate, and a comment directed about someone else can still found a legitimate claim for harassment, but this does not appear to detrimentally affect the work environment.
- Hair complaint
  - Unwanted touching and compliments could reasonably be seen as offensive. Physical contact between employees are fraught with danger
  - Since the touching occurred multiple times, this created discomfort and can reasonably detract from the workplace and thus constituted harassment.
- Ditch Your Husband complaint

- While Hodgins may not have intended offence, offence was reasonably taken
- Bowling complaint
  - It doesn't matter that the complainant's husband made the comment first, the comment was embarrassing, and the reaction of the plaintiff was predictable and had an obvious impact on the workplace
    - Lack of guilty intent goes only to the seriousness of the incident not to there being harassment at all

Does the harassment warrant justify dismissal?

Analysis of the severity of the harassment must be contextual and if termination was justified. The *McKinley* proportionality is equally applicable

- Sexual harassment is serious enough to prompt termination for an otherwise perfect employee.

There is a sliding scale between innocuous act and sexual violence

- Where it is on the spectrum depends on circumstances and how the acts were performed. Hodgins' behaviour, on the facts, leans more to the lower end of the spectrum. But, lesser conduct can still justify summary dismissal if it irreconcilably undermines the employment relationship.
- The policy was strict here, and Hodgins' was informed on it
- The conduct did not prevent the operation of their jobs and consideration must be given to the fact that the victim did not want Hodgins' fired, but to simply have the behaviour corrected
- There is no evidence to prior harassment and was serious about his job

On the facts, the employer did not prove that the actions irreconcilably undermined the employment relationship and his summary dismissal was thus not justified.

- He was entitled to 12 months notice as a manager in a highly specialized industry

Conclusion:

No just cause established

Hold, Order:

Motion allowed

Ratio:

Sexual Harassment follows the *McKinley* analysis and a contextual approach; lesser conduct can still justify summary dismissal if it irreconcilably undermines the employment relationship.

- Sexual harassment can be enough to prompt termination for an otherwise good employee

How should a sexual harassment investigation occur?

- Receive and acknowledge the complaint
- Conduct an initial assessment
- Stabilize the immediate situation (interim mesures)
  - It may be impossible to have both parties in the office concurrently, so the perpetrator is often sent home on paid administrative leave pending the results of the investigation
    - The employer has to ensure that this is not punitive until the investigation ends
- Appoint an investigator
- Develop clear terms of reference
  - Is the investigator only finding facts? Or are they making a conclusion?
- Develop a realistic timetable
  - Timetable would be great snice everyone would want this the next day, but for it to be accurate it may take time. So, it is best to keep both parties up to date on proceedings
- Notify the respondent:

- Identify complaint and allegations, cite relevant policies, name the investigator, indicate an opportunity for the respondent to seek support, advice and representation, discuss confidentiality and explain interim measures
- Investigator to meet with the complainant
  - Provide an overview of the process, role, offer opportunity for questions
  - Discuss the complaints and ask if other people should be investigated
- Investigator to meet with the respondent
  - Request a written response to allegations
- Analysis, findings and conclusions
  - Is there sufficient evidence to determine what happened?
    - Often, the evidence is inconclusive (he said, she said stories are hard as they often come down to a credibility assessment)
  - Does what happened constitute sexual harassment?
    - Sometimes this will be a decision of the employer
    - Whatever the conclusion, it is on the employer to decide what punishment to do
      - Damages, compensation
      - Validation of complaint
      - Restoring sense of safety to workplace
      - Discipline for respondent
      - Monitor behaviour of respondent
      - Apology by respondent
      - Sensitivity training for the respondent

Why does sexual harassment justify discipline?

- Interferes with proper operation of business, exposes employer to liability. reveals bad character and insolence and insubordination

But what level of discipline? When is it just cause?

- *Tse v Trow Consulting*: all sexual harassment is "serious and deserving of censure" but "milder forms of less serious instances may not justify dismissal"
- *Hodgins*: in assessing seriousness of an instance of sexual harassment, it is necessary to develop a context. There is a continuum of seriousness from an innocuous joke to forced sexual acts or sexual violence.
  - The comments may be bad, but in the surrounding context, if they are not that severe, the punishment will be less. Context must be considered
- Other factors: abuse of power, previous warnings, frequency, presence/application of policy

Complainants have no say in whatever punishment is chose. But, they have human rights avenues to pursue if they feel it is appropriate

- They could resign and claim constructive dismissal but is risky

Sexual Harassment jurisprudence can be unreliable

- Sexual harassment with a physical element is a form of sexual assault and constitutes "sexual harassment in its most serious form"
- Must consider changes in social norms and be cautious about applying older case law on degree of discipline that is appropriate
- Older case law is likely out of step with modern society's view of acceptable conduct, should not be relied upon to determine an appropriate disciplinary response
- Significant emphasis on employers obligation to maintain a safe work environment by all employees.

<u>Social Media Use and Just Cause</u>
Social Media is obviously a growing area of concern for employers giving it's rising relevance in society. There are various risks involved with social media:

- Damage to employer's legitimate business interests, reputation and workplace relationships
    - Employees who post content that is critical of the employer
    - Employer posts context that damages the employer's interests or impairs the employee's ability to perform their job.
        - Posting racist or discriminatory content may reflect poorly on employer or jeopardize employee's ability to perform functions of the job as they relate to interactions with people of different ethnic backgrounds
- Loss of confidential information
- Loss or productivity due to use of social media while at work

There are good reasons to regulate employees' use of social media, but must be balanced against the employees' legitimate interests:

- Privacy interests
    - Inherent right to privacy but also statutory privacy legislation
- Right to freedom of expression (for public employees)
    - If employees' social media may be considered what they do in their own free time, an employer should not infringe on that
        - This is true, but there comes a point where if it paralyzes the employers reputation or if the employer is involved, that could lead to discipline

Whitehouse showed that off duty content ought not to be of concern to the employer unless there is a real and material connection between the off duty conduct and the workplace

- When does conduct on social media amount to just cause?
- *Re Millhaven Fibres* gave us various factors to consider when assessing appropriateness of punishment through off duty conduct
    - Harms employer's reptation or product
    - Renders employee unable to satisfactorily perform duties
    - Leads to refusal, reluctance or inability of others to work with an employee
    - Makes it difficult for employer to carry out function of managing its works and directing its workforce
- Other important factors
    - Nature of comments; are they hateful, threatening, or racist overtones?
    - Number and frequency
    - Deliberate or merely impulsive
    - Motivated by malice towards employer or co-workers
    - Impact in the workplace generally, and specific impacts on any persons to whom posting referred
    - Disparaged employer, its customers, its management or employees
    - Identified employer and could reasonably have affected employer's reputation or business interests

Case Law

- *EV Logistics v Retail Wholesale Union*
    - Employee had a blog that posted various racists posts with connections to Nazis

- Employer found it and the employee apologized, took the posts down and replaced it with an apology
  - No posts directly referencing his workplace
  - Serious reputations risk to employer because anyone with a computer has access and entry, which obviously includes customers, suppliers, the public, employees and potential employees
    - "while the employer is not the custodian of the grievor's character or personal conduct his conduct may be a disciplinary concern… if it adversely impacts on the legitimate business interests of the employer"
  - Nonetheless, the arbitrator found his termination not justified
    - Said he was young, demonstrated remorse, had no previous record, had depression. So, while the posts were wrong, he didn't deserve termination
    - He was nonetheless worthy of punishment: 4 months suspension would be good
- *Wasaya Airways LP v Air Line Pilots Association*
  - Pilot with Wasaya (an airline that largely serviced First Nation communities) posted a note about being up north that was offensive to First Nation heritage
  - Arbitrator also found the termination was not justified
    - Looked hard into the context: pilot was born in the community, had a First Nation wife and live in the community
    - While the posts were offensive, it wasn't meant as offensive
    - Other employees posting similar content were not disciplined, which is a big no no for arbitration since all employees are to be treated the same
- *Kim v International Triathlon Union*
  - Employee was a senior communications manager
  - They were terminated after ITU received formal complaints that they made derogatory and defamatory comments on social media about ITU
  - ITU claimed it formed an irreparable breach of trust and terminated her.
  - However, ITU did not supply any written or verbal warnings, no explanation that the behaviour was unacceptable or that her job was in jeopardy
  - So the termination was also not justified
- *Canada Post Corp v Canadian Union of Postal Workers*
  - Postal clerk with 31 years service posted many derogatory and mocking statements about supervisors and employers on Facebook
  - Some were very hostile, calling her superintendent a hag, crazy bitch, Devil, evil and an idiot as well as making a voodoo doll of her superintendent
  - In this case, termination was justified since it was destructive of workplace relations
    - They mocked to the point of bullying and she was reckless in how she posted.
    - Contentious and vulgar comments went well beyond legitimate concerns of the workplace.
  - What employees write in their Facebook postings, blogs, and emails, if publicly disseminated and destructive of workplace relationships, can result in discipline

A common theme in these cases is that termination for social media use is often not justified because the employer didn't follow an adequate procedure; they didn't give warnings, inform the employee that their job was in jeopardy, etc.

Employers have significant and valid interest in addressing sexual harassment in workplace and employees' use of social media. Finding of sexual harassment against employees may give employer just cause to terminate, but may also not

- Most significant factor is seriousness of sexual harassment, but other factors important as well

  - Consider the social climate and whether termination may still be the "best" option even if just cause unlikely to be made out
- Employee's use of social media may also give just cause to terminate
  - Off duty factors are key to determination

As is becoming apparent, very clear definitions of misconduct and workplace policies are a huge help to employers when terminating an employee for cause. Most employers will want one broad policy statement, but it is best to break it down because cause is so contextual and we don't want ambiguity
- Having transparency is also a great help to say: here is the rulebook so you know what to do and can find more clarity (a lot of people won't come forward if they don't think it'll go anywhere)
- Having clear expectations and clear consequences laid out is absolutely critical for terminating for just cause

Workplace policies:
- Define misconduct and the scope (to whom does it apply and when)
- Identify the process for making a complaint (anonymous reporting systems)
- Identify the process upon receipt of a complaint
- Explain safeguards during the complaint process
  - Confidentiality, procedural fairness, prohibition on retaliation, right to make complaints in other venues
- Clearly identify potential consequences for finding of misconduct/violation of policy.

Basket 2: Poor Performance

The whole theme of poor performance is "progressive discipline"; it serves as the pillar of just cause (unless you have such an obvious cause like in *Whitehouse*)

If you have a poor performance record, the employer can look and say, do these instances constitute poor performance and I have done all I can to adjust?
- Technically, progressive discipline is needed for all 3 buckets
- But it is just integrated into the *McKinley* analysis
  - We haven't discussed it yet since most of the cases were a 1 strike you're out situation
  - Context and proportionality are always considered, but progressive discipline is very important

Milsom v Corporate Computers Inc, 2003 ABQB 296

Facts:

Milsom (plaintiff) became employed as a salesperson at Corporate Computers (defendant) without a written contract of employment or workplace policies but earned 100% commission to service small business accounts.
- Throughout his 6 years with Milsom, his performance was at best average, though usually poor. He had numerous complaints from customers

The principal of Corporate Computers, Mr. Fletcher tried to change Milsom's pay to a base salary, which Milsom opposed
- Corporate Computers then gave Milsom a termination notice, citing the economic hardships were eliminating 100% commission employees. Milsom was given his 6 weeks notice. Milsom let before those 6 weeks were up

During severance negotiations, Corporate Computers asked him to sign a waiver of his legal rights to sue, which Milsom refused.

- Corporate Computers then looked through his emails and found a bunch of personal emails on his work computer, suggesting "time theft" and poor performance
- Milsom brought action for wrongful dismissal.

Issue:
Was Corporate Computer's response to Milsom's poor performance appropriate to combat a wrongful dismissal claim?

Analysis:
Corporate Computers argues that they gave good notice, and in the alternative, that they had "just cause" for terminating Milsom. The just cause approach relied on two arguments:
- Time theft: by using the computer for personal matters, Milsom was not doing the job he was hired to do
- Poor performance: there were customer complaints and a history of poor sales performance.

Milsom argued he had a right to privacy for his emails on Corporate Computer's computer.
- This cannot be true, when an employer supplies a work phone or computer, employees do not have a reasonable expectation of privacy in their computers or the technology they use at work.
  - These belong to the employer, so of course the employer can search them

Nonetheless, Corporate Computers cannot rely on just cause for poor performance since Milsom was never given the opportunity of remediating his performance. A single instance of poor performance can not ground termination
- Poor performance need to rise to the level of (i) habitual pattern of neglect, (ii) utter and continued incompetence, (iii) conduct incompatible with duties and prejudicial to employer's business, or (iv) willful disobedience, which is not corrected or improved through progressive discipline.
- When faced with poorly performing employees, or employees guilty of misconduct, employers have a duty to institute programs of progressive discipline
  - As such, it cannot be claimed that Milsom's poor performance gave rise to just cause because there was never a system to address it

Conclusion:
Poor performance insufficient to justify just cause.

Hold, Order:
Action allowed

Ratio:
Poor performance will not lead to just cause without the employee having an opportunity to remediate the poor performance through progressive discipline.

The three big takeaways from this case are:

1. Employees have no reasonable expectation of privacy in their computers and technology they use at work that belong to their employers
   a. However, employers who have good workplace technology policies to modify these expectations
   b. These policies should be implemented clearly so employees have clarity on what is expected of them
2. Poor performance which has not been given the opportunity of being remediated does not arise to just cause for dismissal.
   a. The court gives 4 types of "poor performance", but all need the opportunity of remediation to justify just cause:
      i. habitual pattern of neglect,
      ii. utter and continued incompetence,

        iii. conduct incompatible with duties and prejudicial to employer's business, or
        iv. willful disobedience
    b. The automatic response to poor performance cannot be termination. Such an approach is consistent with the *McKinley* logic where the punishment has to fit the crime
    c. This is a human contract, and to err is human, so it is not compatible to have poor performance and justified cause
        i. Tolerance is required.
    d. When faced with a poorly performing employee, progressive discipline is needed. The court finds this means three things:
        i. Clearly communicate that the employee's performance is not up to the employer's standards.
        ii. Clearly communicate that continuation will lead to elevation of consequences and if this continues, the employer will not tolerate it
        iii. Give a reasonable opportunity for the employee to improve their performance
    e. Escalating discipline can look different: verbal warnings, written warnings, docking of pay, suspension
        i. These don't have to be latter rungs, but it has to be continued notice if and when conduct continues.
3. "Near Cause" is dead in the water
    a. There used to be thinking that where an employer *almost* has cause, employers would argue that they should have a break in damages
    b. Both the Supreme Court and ABCA don't go for that – if the employer does not have cause, even if they almost did, termination was not wrongful without notice
        i. It is an all or nothing situation

Since no progressive discipline was given, the court finds Corporate Computers did not have cause

- Step 1 from *McKinley:* prove the misconduct
    - Time Theft
        - There was insufficient evidence to this.
        - Even if he sent personal emails, he didn't have a schedule so he worked his own hours so he may not have been sending them on work time
            - Without knowing when those emails were sent, relative to work time, how can this have an impact on his performance?
        - There was no workplace policy against this either
    - Poor Performance
        - Evidence of customer complaints is established, but Milsom was underperforming for 6 years, without ever having been told his work was not up to par, he had no performance reviews for feedback, no goals he wasn't hitting
            - His understanding was likely that his performance was fine
            - Can't say this was the straw that broke
            - If you want to terminate for poor performance, progressive discipline is necessary

Henson v Champion Feed Services, 2005 ABQB 215

Facts:
Henson (plaintiff) was employed by Champion Feed Services ("CFS", defendant) as a shift foreman. CFS is a livestock feed producer that supplies to farmers across Alberta. Different livestock are extremely sensitive to the type of feed they get, so CFS was held to a high standard on it's products. As shift foreman, Henson's responsibility was supervision of feed production and quality control.

- Over his 7 years of service, Henson steadily increased in performance, earned bonuses each year, gained additional certifications and training and received a promotion
- Despite this, Henson had 5 verbal warnings and one written warning about various incidents relating to his carelessness.

CFS preferred "non punitive counselling" when it came to dealing with poor performance.

- Henson was never told he must improve or that his job was in jeopardy and was never disciplined

There was an incident with feed contamination which CFS claimed Henson tried to cover up. CFS terminated Henson.

- Henson brought action for wrongful dismissal.

Issue:

Was poor performance grounded in the context of Henson's employment?

Rule:

Milsom: for poor performance to justify just cause, there must be an attempt at remediation of progressive discipline.

Analysis:

CFS claimed that the numerous mix-ups by Henson cumulatively indicated that his performance was incompatible for the job he was hired to do (quality control)

- However, cumulative misconduct or poor performance cannot ground just cause without having employed progressive discipline.
- Clear warnings, reasonable opportunity for the employee to improve and a clear escalation of discipline with failure to improve are needed
  - However, the discipline must actually be implemented in the event of continued under performance
- The purpose of progressive discipline is such that, at then end of the process, the employee knows their job is on the line and could be terminated without improvements
  - This is not possible where warnings aren't met with punishment. The employee would have no idea their conduct was even bad

Despite the well intentioned non punitive counselling approach by CFS, this created a system incompatible with using poor performance as just cause

- It is not fair to have a non punitive approach and turn around and use just cause as punishing them
- The feed mix-up that led to his dismissal was never preceded by the employer telling him that another mix-up would lead to his termination.

Conclusion:

No just cause

Hold, Order:

Action allowed.

Ratio:

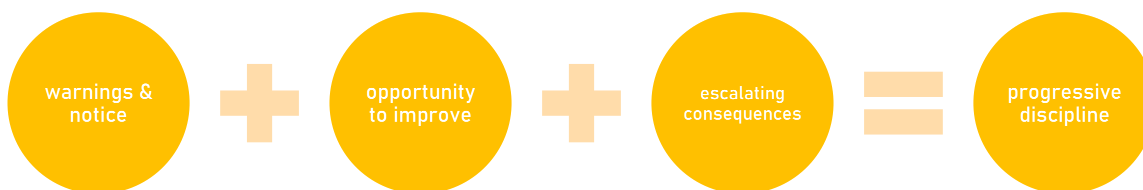
Cumulative misconduct will not amount to just cause without evidence of progressive discipline

To use the final mix-up and the accumulation of past poor performance was insufficient without having used progressive discipline between incidents of poor performance.

- In the name of progressive discipline, the discipline must actually be implemented before just cause can be used; if warnings are used without consequence then the employee will be unaware of their precarious work position.
  - The employee should look back and say "I had 7 strikes, I had this coming"
- Basically, it should be clear on the penultimate warning that another would lead to termination.
  - Such an approach is akin to reasonable notice – it almost gives notice that the job is on the line.

- It is also similar to estoppel or acquiescence – if the employer tolerates all trivial poor performance incidents, they may not be entitled to rely on cumulative effects that warrant termination
- In essence, Henson was lulled into a false sense of security about his job performance
    - Warnings aren't enough to satisfy the purpose of progressive discipline
- The courts say that there is a corrective purpose to progressive discipline: not everyone who is progressively disciplined will be terminated
    - The goal is for the employee to improve to the point that further discipline is not needed and become a better employee. This benefits both employer and employee
        - So, there is merit to progressive discipline.
        - Employees who are not doing a good job are entitled to be told that and progressive discipline is the way this is handled.

Henson and *Milsom* both have consequences or externalities of progressive discipline being implemented prior to acquiring just cause for terminating a poor performing employee
- This is incentive for employers to clearly communicate their expectations and the standards to which they are held but also the consequences that will flow if this is not met
- However, some mistakes may be so bad that the employer may just have to terminate with notice rather than put up with progressive discipline, since either would take the same amount of time anyway
    - The employee will never get a second chance, but employers are entitled to expect things of their employees
        - A mistake could have a lethal contamination of the feed
    - This makes policies also very important. A policy should never say "3 strikes and you're out" because it is so ambiguous that it could be unenforceable: what is a strike?
- Champion basically had three options.
    - Terminate for cause (risky)
    - Terminate with reasonable notice
    - Instruct them clearly to implement progressive discipline



<u>Basket 3: Termination for Non-Culpable Misconduct</u>
This basket is a lot more delicate to approach since it has a lot of intersections with human rights law. Non-culpable misconduct arises when continued employment is not possible, but through fault of neither party. The most common example of Non-Culpable Misconduct is disability.
- It is similar to frustration

Whitford v Agrium Inc, 2006 ABQB 726 Facts: Whitford (plaintiff) worked at Agrium Inc (defendant) for 22.5 years starting in 1981. He got this job immediately after high school and this was thus basically his first job. He eventually moved into a Supervisor position.

- In 2000, he faced personal difficulties including divorce and family deaths and was treated for depression. He resorted to alcohol and requested his supervisors for time off, though his job performance had not been impacted until them.

He called his supervisor about checking into a facility, to which his supervisor was supporting as they wanted Whitford back. Agrium formulated a plan to accommodate as he returned to work. He always called his supervisor to inform them of his progress and absences.

- From Fall 2002 to April 2003, Whitford frequently contacted his supervisor with a doctors note saying he needed to extend his leave. His supervisor always approved but requested he return back.
- In April 2003, Agrium's HR Manager told him that his attendance was "dismal" and that extended absence could be cause for termination. Agrium was willing to accommodate him with a modified basis
  - He was admitted to hospital and did not contact work.

They had conversations for a return to work but continued doctors advice against it eventually led Agrium to terminate Whitford for cause. The decision to terminate was done 4 days prior

- The reason was a weeks worth of absences (all others had been approved)

Whitford brought action for wrongful dismissal

Issue:

Did Agrium have just cause to terminate him for his failure to return to modified duties in April?

Rule:

Cie miniere test: 1) was the employee's ability to fulfil his workplace duties impaired by the alcohol problem and 2) was any improvement likely in the foreseeable future.

Analysis:

Agrium relies on Whitford's absenteeism and alcoholism as grounds for termination. In *Cie-miniere,* the Court recognized alcoholism as an illness and therefore innocent, cause. Cumulative effects cannot be used as just cause without clear and effective warnings. Employer's attempts to accommodate should also be considered

- In April 2003, Agrium made it clear that they were switching from counselling to accommodation as they wanted a return to work plan
  - At their deadline, and without hearing from Whitford, Agrium followed through on their discipline and terminated him.
  - Since all other absences were counselled by Agrium, this was only one week of unexcused absence that counted in his termination.

Whitford had no previous history of absenteeism and his absences were approved as leave. However, after months of leave, he took a cavalier approach to his employment.

- Dr. McManus states that Whitford needed to attend AA and miss work, though Whitford had been absent for weeks to purportedly attend the same program
- However, Whitford had always been transparent about his condition and, absent the last week of employment, sought approval for absence
  - Only one warning was ever given to Whitford; warnings are necessary when alcoholism causes absenteeism. One warning is usually not sufficient to get the employee to improve

The employer is relying on the cumulative effects of Whitford's absences, but he was given leave and vacation for the sickness and was never told a "return-to-work" plan was needed to avoid termination. The *Cie miniere* test can be merged with the *McKinley* analysis

1. Alcoholism caused inability to fulfil workplace duties
   a. Must consider entire context of the employment relationship
   b. Whitford was not given sufficiently clear/detailed warnings about misconduct and was mislead about approvals granting leave nor of the return to work plan he had to prepare to return to work.

Cause not established. Damages would be of 14 months but since Whitford did not mitigate his damages, 12 months damages is awarded

Conclusion:
Cause not established

Hold, Order:
Action allowed

Ratio:
For an employee to be terminated for cause due to non-culpable misconduct, the misconduct must be such that the employee can no longer fulfill their workplace duties and the chance of improvement sufficient to resume work is low. But progressive discipline is still required.

The approach that the court takes in this case is effectively still applying the same as *McKinley*, whether termination is proportional but with more specific contextual considerations. To do so, the court blows up the second prong of the test to a contextualized approach for innocent absenteeism (so it applies to all cases, not just alcoholism). In essence, the court asks two questions when they are contextualizing the wrong to justify termination

1. Prove Misconduct
2. Contextualize the wrong to show if serious enough for termination
    a. Is the employee's ability to fulfill his workplace duties impaired by alcoholism?
        i. Contextual analysis from *McKinley* – employee and employer circumstances
        ii. Has progressive discipline been implemented?
            1. Does the employee know that repeated conduct will be met with discipline rather than tolerance
        iii. Has the employer met the obligations to accommodate the employee's disability up to a point of undue hardship (human rights considered (more to come))?
    b. Is improvement in the employee's condition likely in the foreseeable future.

Blowing up the second question into two questions is just assessing if absenteeism is incompatible with continuation of employment.

- It is still necessary to examine progressive discipline to answer if the employee can still fulfill job responsibilities.
    - Progressive discipline is part and parcel of the first question.

The first question: Whether the employee's ability to fulfill his workplace duties are impaired by alcoholism, which considers:

- Contextual analysis from *McKinley* – employee and employer circumstances
- Has progressive discipline been implemented? Even if the poor performance or absenteeism is not culpable, these employees still deserve an opportunity to improve.
    - Does the employee know that repeated conduct will be met with discipline rather than tolerance?
    - What will progressive discipline look like for alcoholics rather than an employee like *Henson*?
        - Probably longer timeline and more assistance (offering lower stakes positions) and lingering accommodation
- Has the employer met the obligations to accommodate the employee's disability up to a point of undue hardship (human rights considered (more to come))?
- Other things to consider for innocent absenteeism or deficiencies:
    - Employer must define level of job performance required for that person and establish the standard was communicated to the employee
    - Employer must show that it gave reasonable supervision and instruction to the employee and afforded them a reasonable opportunity to meet the standard

- Employer must establish an inability on part of the employee to meet the standard to an extent that renders her incapable of performing the job
    - Employer must establish that efforts were made to find alternate employment within the company for the employee and to accommodate the issues
    - Employer must disclose that reasonable warnings were given to the employee that failure to meet the standard would result in dismissal

The second question: Whether improvement in employee's condition is likely in the foreseeable future?

- A surgery with full recovery expected is very different than an addiction
- That is the point of the second question: technically someone who has surgery would satisfy the first branch of the test but it would not justify their termination
- This engages the employer's knowledge at the time of termination about the employee's condition and the probability of improvement given that information
- Post-termination evidence about the employee's condition will only be admissible if it helps to shed light on the reasonableness of the dismissal at the time it was implemented
    - Must relate to employer's just reasons for termination, cannot add to bolster employer's knowledge at the time
- This branch is pretty vague since it all depends on what the employer knew

As they relate to the facts of this case (below is only the second branch of the *McKinley* test since the misconduct alleged (absenteeism) is obviously established):

1. Did Whitford's alcoholism impair his ability to fulfill workplace duties?
    a. Contextual factors:
        i. 22 year employee and absences were all excused except the final week
    b. He was always honest about his illness, kept Agrium informed and sought approval for absences
    c. No intentional misconduct – his alcoholism prevented him from working
    d. Progressive discipline
        i. Agrium expected him to provide a return to work plan. However, they did so unreasonably abruptly and only gave one warning that his continued absenteeism would result in discipline.
            1. This was not met with enough time to improve
        ii. It was understandably confusing/surprising to Whitford that suddenly his employer was no longer supporting/excusing his absences but disciplining them
        iii. Agrium did the right thing, doing progressive discipline. However, they did not implement it properly.
        iv. Past absences couldn't have been used as justification because 1) they were before progressive discipline and 2) they were all excused.
            1. The termination was an inadequate implementation of the policy
2. Agrium's attempt to use pose termination evidence that his condition did not improve to bolster their justification was deemed irrelevant

<u>Constructive Dismissal</u>

"constructive dismissal" is actually a legal fiction, but in essence, it arises when an employer did not intend to dismiss an employee, but they changed their practice so much that it repudiates the contract and amounts to a termination.

- You have gone so far in conduct that it amounts to a repudiation.

Constructive Dismissal: repudiation of the employment contract by an employer, giving rise to the employee's right to treat the contract as wrongfully terminated and sue for damages.

- The modern definition, as laid out in *Potter* (see below):
    - "Employer unilaterally breached the contract by substantially altering an essential term of the contract in the eyes of a reasonable person or the employer's course of conduct generally evinces an intention to no longer be bound by the employment contract in the eyes of a reasonable person"
- This means there are two ways an employer can constructively dismiss an employee:
    - Unilaterally altering the contract in a way that substantially changes the contract
        - Requires a demonstration of breach of contract
    - Conducting itself that evinces an intention to no longer be bound by the contract
        - Pretty loose term; when an employer acts aloof or cowardly and thereby demonstrates that they don't intend to continue the employment relationship
            - Subtle, but different than finding a breach of contract

If you are an employee facing a constructive dismissal, this is the most vulnerable you can be in because it is not explicit. You have three options:

1. Accept the change and continue working
    a. This was very common during COVID where pay was rolled back and almost all cases were constructive dismissals, but the employee often wanted to stay employed since no where else was hiring
    b. Even if it is a slam dunk case of constructive dismissal, you may not want to do it
2. Refuse the change and risk the consequences
    a. You can negotiate and say "this is a constructive dismissal and I want to insist on my original contract, and I have the right to do so."
    b. This is allowed, but the employer can just terminate you with notice if they don't like it
3. Resign, treat the change as constructive dismissal and sue for wrongful termination
    a. This is what usually ends up in litigation
    b. Quitting without notice, no pay cushion, incur legal fees and if you lose then all you did is lose a lot of money

There are a lot of similarities between amendments and constructive dismissal.

- Amendments can be added with fresh consideration. It is not a constructive dismissal because it may not be a "substantial alteration of an essential term". Minor changes are often on the amendment side of things.
    - Contract ending changes can never be supported by consideration and constitute constructive dismissal
- But amendments can flirt the line, so employers need to be very careful when it comes to this
- Amendments and constructive dismissals are two very different tools, used in two contexts by an employee
    - Usually amendments are introduced, downstream the employer tries to enforce it but the employee refuses because there was no consideration.
        - So amendments are more of a defence to change
    - On the other hand, constructive dismissal is more of a sword; it is a cause of action that attracts damages.

The big issues to constructive dismissal can all be found by breaking down the definition

1. What actions constitute a "fundamental and substantial" change?
2. What is "unilateral" action?

3. When can employers make changes to employment contracts that are bona fide necessitated by economic conditions and the financial realities of their business.

Wilkinson v T Eaton Co, [1992] AJ No 328 (ABQB)

Facts:
Wilkinson (plaintiff) was a receptionist who had worked at Eaton (defendant) for 43 years and was 65 years of age at the date of this action. She was a clerk typist and office administrator. Her job was overwhelmingly administrative, but there were odd emergencies in which she had to work on the department floor store.

- In the 1990s, Eaton was struggling financially so corporate made the decision that clerks could no longer be full time. They offered Wilkinson part time receptionist hours and to be on the store floor to hit full time hours.
- As she was advanced in age, she did not want to work on the floor, so she accepted a pay and hour cut to be a part time receptionist.
    - This request was denied and she was reassigned to a manager who already had a receptionist.
    - They asked Wilkinson to work on the floor and offered to pay her more than her receptionist wages

Wilkinson did not accept the request, resigned and brought action for constructive dismissal.

Issue:
Was changing Wilkinson's job responsibilities from a full term clerical assistant to a full time sales associate a constructive dismissal, entitling her to damages?

Rule:
Constructive dismissal is not a formal breach, and thus the employee has the burden of proof to prove there was a breach of the employment contract.

Analysis:
Wilkinson argued that she was hired as a clerical assistant 43 years ago, and so taking away this job amounted to a constructive dismissal.
Eaton argued that sales was part of her job description and the move was just corporate restructuring.

- In any case, it was also a promotion since they offered her more than her other wage, so it cannot amount to a termination.

Constructive dismissal occurs when the employer has:

i. Unilaterally breached the employment agreement, and
ii. That amounted to a change/alteration to an essential term of a serious or substantial degree and nature.

The common law implies a term in employment contract that employers will not made unilateral changes to the job duties and status of the employee.

- When employers do so, that constitutes a breach of contract.

<u>Unilateral Breach of employment agreement</u>
Wilkinson's job was administrative, at a desk, managing calendars, answering phones.

- This is fundamentally different than sales, which are on their feet doing inventory
- Eaton argued Wilkinson was a "general employee" since she sometimes filled in on the floor.
    - However, she did so rarely and it was outside her regular functions. On the balance of probabilities, her job description was only as clerical assistant.

This being her job description, the next step is to determine if Eatons breached that term?

- The action of Eatons changed her job from 0% on her feet to 100%. This was a unilateral breach by Eatons.

<u>Alteration of an essential term to a substantial degree</u>

Wilkinson being asked to perform a task she was not hired to do and one she had no skill set for is a substantial change. Eaton rebutted this on two arguments:

- This was not a demotion since she was offered higher pay
  - While this is true and admirable of Eatons, the point of constructive dismissal is not what is most beneficial for the employee, but what is a breach of the employment contract.
    - The point of contract law is that it sets out parties obligations
  - It does not matter if it is better or worse, it just matters than it changes
- Eatons was making such changes to try and keep all employees employed
  - Eatons is requesting some credit for being a good employer and trying to continue all employment relationships
  - However to accept this logic is a slippery slope; being in hard times does not mean it is not a dismissal
    - Laudable, perhaps, but this is not a defence in law
    - Employers have obligations to their employees and they do not disappear because times are tough.

Conclusion:
Constructive dismissal established.

Hold, Order:
Action allowed; 18 months notice awarded

Ratio:
Unilateral changes to nature and type of work the employee does (changes to job description) will constitute a breach of an essential term of the contract and if it is substantial enough, it can constitute a constructive dismissal.

Because the common law implies a term in all employment contracts that does not allow employers to make unilateral changes to the job duties (and doing so is a breach), written contracts get a little more complicated for constructive dismissal.

- If there is no written contract, an employee's job description and responsibilities are determined based on what a reasonable bystander would have implied at the start of the employment relationship. The burden is on the employee to establish this.
  - This is objective.
- In essence, this ensures that all employees job responsibilities are considered a key or essential term of the employment contract.

This case only goes over the first type of constructive dismissal, where there is a unilateral breach. The other branch is explained (along with this one) in *Potter.* The first branch of constructive dismissal can thus be broken into two parts: The employer has:

(a) Unilaterally breached the employment agreement and
(b) That amounted to a change/alteration to an essential term of a serious or substantial degree and nature

Potter v New Brunswick Legal Aid Service Commission, 2015 SCC 10

Facts:
Potter (plaintiff) was nominated to be Executive Director, and appointed by the Lieutenant Governor of New Brunswick, of the Legal Aid Service (defendant) as per the *Legal Aid Act.*

- He was hired onto a 7-year fixed contract. He had worked for 4 years of the contract when he required medical leave. Prior to the leave, both parties were negotiating an exit strategy and early termination of his contract and his termination package

- The Board became frustrated that no agreement had been reached. They decided to suspend him without severance by January 11, though never told this to Potter.

On January 11 (a week before his medical leave ended), no severance package was agreed upon so the Board told Potter to not return to work "until further direction" with pay and asked the Legislature to remove him from office (unknown to Potter)

- After two months without further direction, Potter brings action for constructive dismissal

Procedural History:

New Brunswick Queen's Bench found the Board had the ability to place him on admin suspension

- New Brunswick Court of Appeal dismissed the appeal

Issue:

When does an indefinite administrative suspension with pay constitute a constructive dismissal?

Rule:

Constructive dismissal requires a (i) unilateral change that (ii) alters a fundamental term of the employment contract.

Analysis:?

Constructive dismissal does not require a formal termination; rather it is a legal construct in which the law deems the employee terminated by the employer's repudiation.

- It is merely a contractual doctrine of repudiation applied to employment contracts. The employer, by a single act or a culmination of conduct or series of acts, evinces an intention to no longer be bound by the contract, entitling the employee to treat the relationship as at an end.

How the employer does so can vary. But all constructive dismissal cases can be boiled down to two types.

1. Employer has unilaterally breached the contract in a way that substantially altered an essential term of the contract
2. Employer evinced a clear intention to no longer be bound by the relationship.

Either branch will satisfy a constructive dismissal. Under either branch the employee bears the onus of proving he/she was constructively dismissed

- The onus will shift to the employer to establish authority and justification for administrative suspension if that is the alleged basis of constructive dismissal

Potter argued the first branch.

1. Unilateral Breach
    a. Potter argued the Board's placement of him on an indefinite administrative suspension with pay is a unilateral breach of the contract (unauthorized under the contract)
    b. The Board had no express authority to administratively suspend Potter
        i. As a statutory position, no provision allowed the Board to do so
    c. The Board had no implied authority to administratively suspend Potter
        i. Employers do not have to supply continuous work to employees, so employers are generally authorized to impose suspensions
        ii. There are two exceptions to this: (1) employees on commission or (2) employees whose reputation and continued employment is based on doing the work.
        iii. Administrative suspensions are otherwise allowed as long as they are imposed in good faith. If not, it is outside the realm of their authority
        iv. Potter fits into a third category: he is employed by statute.
        v. Employers of statutory delegates whose mandates are laid out by the legislature have no authority to administratively suspend that employee
        vi. Since the Board thus did not have authority, it was a unilateral breach

vii. However, even if the Board had the authority, it was imposed in bad faith as there was no legitimate reason for the suspension.

2. Substantially Altered an Essential Term
    a. Potter argued the breach was sufficiently serious as it substantially altered an essential term of his employment contract (the ability to work)
    b. A reasonable person in Potter's shows would have felt that the essential terms of the contract was substantially modified.
        i. He was completely denied the ability to perform any job responsibilities
    c. An administrative suspension is always a substantial alteration because 100% of what an employee does is withheld – the whole point of the contract is revoked (even temporarily)

Having established that the Board's actions amounted to constructive dismissal, Potter is entitled to payment for the remainder of his fixed term contract

Conclusion:

Constructive dismissal established

Hold, Order:

Appeal allowed

Ratio:

Two branches of constructive dismissal (either will be sufficient to ground claim):

1. Employer unilaterally amended contract that altered an essential term of the agreement
2. Employer evinces general intention to no longer be bound by the employment contract

Administrative suspensions are implicitly authorized unless the contract says otherwise or one of the two exceptions apply. But this is infused with a duty of good faith or reasonable justification

This case was actually straightforward in essence, but the judgement was a mess. It came to a well respected decision, but a complicated way to get there. This was the first constructive dismissal case the SCC had heard in over 2 decades, so they did a very thorough analysis.

First thing the court did, is they established that two branches exist for constructive dismissal. Either branch would be sufficient to ground the claim. The employee bears the onus to establish either, whereas employers will have the tactical burden to rebut it. Potter only argued the first branch, but the SCC took the opportunity to elaborate on the second branch.

First Branch – Unilateral Change

The test for the first branch of constructive dismissal:

- The employee must prove on a balance of probabilities that the employee's unilateral act breached the contract and that breach substantially changed the essential terms of the contract in the eyes of an objective person

There are two distinct steps to meeting this:

1. Identify an express or implied term of the contract that was unilaterally breached by the employer (If it is authorized, it cannot be a breach)
2. Prove the breach amounted to a substantial alteration of an essential term of the contract so as to be sufficiently serious to constitute constructive dismissal
    a. What would a reasonable person infer from the situation?

Second Branch – Intention of Release

The test for the second branch of constructive dismissal:

- Where the conduct of the employer, viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.
    - Example: pattern of conduct or series of actions whereby the employer makes continued employment intolerable.
    - “they clearly just want me gone but aren’t saying it”
    - This is like a cowardly breakup where the employer acts as if they don’t want to be involved with the employee anymore but won’t do anything about it
- Unlike the first branch of constructive dismissal, does not require an examination of the terms of the contract or identification of breach of a specific term.
    - There doesn’t need to be a core breach of the contract. It is less about the contract and more a holistic about the alleged relationship being intolerable.
- This is necessarily retrospective – it requires the analysis of cumulative effects on past conduct and whether that is reasonably perceived to amount to an intention to no longer be bound by the contract

In the context of an administrative leave, the first branch was argued:

1. Identify an express or implied term of the contract that was unilaterally breached by the employer (If it is authorized, it cannot be a breach)
    a. Is there express authority?
        i. No express authority in the *Legal Aid Act* or the employment contract
    b. Is there implied authority?
        i. Administrative suspensions are the withholding of work due to some bona fide or legitimate business reason, but not as discipline (usually lack of work)
        ii. At common law, employers are not obligated to supply continuous work to employees – this means employers have implicit authority to impose administrative suspensions. But, this is subject to three exceptions:
            1. Employees on Commission
                a. Withholding means they literally have no income
            2. Employees whose reputation depends on them doing their work
                a. Only example the SCC gives is an actor/actress; if they don’t do their work it is incompatible with what they do
            3. Employees whose positions are statutorily mandated
                a. Board cannot mandate if the legislature did not give them the authority
                b. This exception did not exist before this case, but Potter successfully added it
            4. The list of exceptions is not closed
        iii. However, the presumed authority (subject to the three exceptions) is not unlimited. Employers can only impose the suspension if:
            1. It is done in good faith and
            2. It is reasonably justified in the circumstances. Factors to consider:
                a. What is the reason?
                    i. Cannot be disciplinary
                b. Was it in good faith?
                    i. Was it communicated properly to the employee?
                c. Was it with pay
                    i. If it is without pay, it is disciplinary and not admin
                d. Was there revocation of rights compared to other employees?
                    i. If there is, it is disciplinary

e. What were the reasons?
    i. If times are tough, that is extrinsic and justified
    ii. If it is because of a specific employee, that is intrinsic and not justified.

iv. If it is not imposed with the two requirements of good faith and justification, the employer loses its authority to impose the administrative suspension

v. In sum, when checking for authority:
    1. First check the contract. Is authority to administratively suspend granted?
    2. Second, does the situation fall into one of the three exceptions?
    3. Third, was it imposed in good faith and reasonably justified?
    4. If the contract does not prohibit it, if the exceptions don't apply, and it was not imposed in bad faith, then the employer is implicitly authorized to impose administrative suspension
        a. Even if it was a substantial change, if it is authorized then it is not a constructive dismissal.

c. NB: while the onus is on the employee to establish constructive dismissal, the SCC in *Potter* does state that the employer has a tactical burden to rebut it

2. Prove the breach amounted to a substantial alteration of an essential term of the contract so as to be sufficiently serious to constitute constructive dismissal
    a. This was the easy part. Obviously an administrative suspension removes the ability to do any work, which is the essence of an employment contract
        i. Of course, it is a substantial alteration of an essential term

Alguire v Cash Canada Group Ltd, 2005 ABCA 387

Facts:

Alguire (plaintiff) was president of Cash Canada (defendant) under a series of fixed term contracts. With only a few months left on his 2002 contract, Alguire was told to finish out the rest of his contract at home and he would be paid his salary until the end of the term

- He was not, however, paid any bonus for that year. He typically made a substantial amount in bonuses

Alguire brought action for wrongful dismissal.

Issue:

Can a fixed term contract be constructively dismissed if they are put on a suspension for the rest of their term and stripped of all responsibilities?

Rule:

Wilkinson: Constructive dismissal requires a (i) unilateral change that (ii) substantially alters a fundamental term of the employment contract.

Analysis:

A unilateral change to a fundamental term of an employment contract can amount to a repudiation of that contract. This is true, regardless of the term (fixed or indefinite)

- Alguire was stripped of work responsibilities before the end of his term. This is a substantial alteration of his contract.

Cash Canada cannot argue that since fixed term contracts are not entitled to reasonable notice, they are allowed to be suspended without it constituting a constructive dismissal.

- This would entitle him to damages equal to salary of his fixed term contract

Conclusion:

Constructive dismissal

Hold, Order:

Appeal dismissed.

Ratio:
Fixed term contract employees can be constructively dismissed by being put on administrative suspension, in which case they are entitled to be paid out the remainder of their term.

This case confirmed that indefinite term contracts are not treated any differently than fixed term in respect to the imposition of a fixed term contract.

- Be careful with this case, it was before *Potter* so there would be a larger and more robust analysis if decided today, even if the outcome likely would not have changed.

Summary of Constructive Dismissal:

1. Employer unilaterally breached the contract that substantially altered fundamental term of the employment contract (*Potter v New Brunswick Legal Aid*)
    a. Two steps (*Wilkinson*):
    b. Identify an express or implied term of the contract that was unilaterally breached by the employer (If it is authorized, it cannot be a breach)
        i. For administrative suspension, employers are generally permitted to impose unless:
            1. Express prohibition in the contract
            2. Categorical exception applies
                a. Commission based employee
                b. Reputation is based on doing work
                c. Statutorily mandated position
            3. Suspension in bad faith are not reasonably justified
                a. Reason, Good faith, With or without pay, What reasons?
        ii. Irrelevant if fixed term or indefinite (*Alguire*)
    c. Prove the breach amounted to a substantial alteration of an essential term of the contract so as to be sufficiently serious to constitute constructive dismissal
        i. Unilateral change to nature and type of what an employee does is a breach of an essential term (*Wilkinson*)
2. Employer evinced an intention to no longer be bound by the contract (*Ocean Nutrition*)

<u>Temporary Layoffs</u>

Temporary Layoffs are similar, if not the same, as administrative suspensions, but they are without pay

- They are pretty standard and common: just told "go home, you won't get paid and we will call you when he have work for you"
- Is that constructive dismissal at common law?
    - Yes, unless they are authorized by the contract, it is a substantial alteration of the employment agreement because work is withheld.
        - Same analysis as administrative suspension
- If someone comes to you with a notice of temporary lay off:
    - Step 1: Get the employment contract
        - In industries where layoffs are common, the contract will often have a clause allowing temporary layoffs without constituting a constructive dismissal
            - This is explicit authorization
    - Step 2: Check if they implied authorization
        - Is the employment agreement one of the exceptions in *Potter*?
        - Is the withholding of work reasonably justified? Imposed in good faith?

        - Employers were always say they were authorized, employees will say they weren't. This is where the litigation comes from
        - In light of *Potter,* temporary layoffs will be hard to justify because they are without pay

However, sections 62 and 63 expressly authorize employers to perform temporary lay offs in narrow circumstances (there will be no termination consequences)

- The circumstances are in the *Regulations* but there are consequences if employers don't follow the rules.
- Section 62: Employer can temporarily lay off an employee with written notice for a total of no more than 90 days in a 120-day period
    - A copy of the *Code* and *Regulations* must be included in the notice
    - Called the 90-in-120 rule: you can only lay off someone for 90 days of a 120 day period
        - An employer can lay someone off for 90 consecutive days and they would have to bring them back on the 91st day.
            - The employer would have to wait until the 120th day (30 days later) to lay them off again
        - It can also be layered, so lay them off for 20 days, bring them back for 1 and then lay them off for another 20. As long as it does not exceed 90/120 days
- Section 63: if the employee is temporarily laid off for longer than the 90 days total in a 120-day period, they are deemed terminated and employer owes a termination pay
    - If the section 62 90-in-120 rule is not followed, the *Code* protection ceases and the employee is considered terminated
    - In this case, the employer has to pay them out as normal

Recall that section 3 of the *Code* says common law rights still exist. So a lot of employers will fall prey to this and only follow the statute.

- Just because you follow the *Code* does not mean it wasn't a constructive dismissal under common law
- But if the contract allows it, there is implicit authority under *Potter* or the employee acquiesces to the layoff, then it will be allowed.
    - In a lot of industries where layoffs are common (oilfield, construction, restaurants), that is just the way it is.
    - If every time you are laid off, you quit and look for a similar job (where the exact same thing will happen) and suing for constructive dismissal, that is a heap of litigation fees
        - If it's industry standard, most people just accept it.
        - If they acquiesce, it is likely too late to oppose anyways.
        - Constructive dismissal claims need to be brought early

COVID messed up the 90-in-120 day rule since everyone was laid off. In response, s 63.1 was added

- If unrelated to COVID:
    - Pre March 17: only allowed 60 days in 120
    - March – June 2020: allowed 120 consecutive days and no limitation period
        - No cap, so you could be laid off for 119 days, be brought back for the 120th and then laid off for 119 more.
        - It could technically have been a constructive dismissal, but no one would bring that action forward given the pandemic
    - June 2020 – present: 90-in-120 rule
        - This could be amended back to the pre-COVID 60-in-120 rule soon
- If related to COVID (business was related to COVID)

- 180 consecutive days without a cap
- This is still in force, but could be scrapped soon

Farm and Construction companies have a ton of *Regulations* specifically for them since the nature of their work deals with layoffs so frequently.

Employment Standards Code, RSA 2000, c E-9
Section 62 (1) An employer who wishes to maintain an employment relationship without terminating the employment of an employee may temporarily lay off the employee only by giving the employee a written layoff notice. (3) The layoff notice must (a) state that it is a temporary layoff notice, (b) state the date that the layoff is to commence, (c) include a copy of this section and sections 63 and 64, and (d) include any other information provided for in the regulations. Section 63 (1) The employment of an employee who is laid off for one or more periods exceeding, in total, 90 days within a 120-day period terminates, and termination pay is payable, unless (a) the layoff the employer, by agreement with the employee, (i) pays the employee wages or an amount instead of wages, or (ii) makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan or similar plan, or (iii) there is a collective agreement binding the employer and employee containing recall rights for employees following layoff. (2) When payments under subsection (1)(a) cease or recall rights under subsection (1)(b) expire, the employment of the employee terminates and termination pay is payable. (3) For the purposes of determining the amount of termination pay payable under subsections (1) and (2), the amount is to be calculated as if section 57(1) applies. (4) Subsections (1) and (2) do not apply if different provisions for termination after temporary layoff are agreed to under a collective agreement.

<u>Renumeration Packages</u>

Changes to compensation is a huge area of litigation for constructive dismissal. Renumeration packages are the bundle of terms you receive when you start an employment. But it is more that salary, it is everything of value that you get from an employer for doing your job.

- Salary or wage
- Insurance benefits (disability, life, AD&D, medical/dental)
- Extra vacation days (beyond the *Code* minimum)
- Stock options
- RRSP contribution matching programs
- Pensions
- Bonuses

- Car allowances & gas cards
- Allowances for work related equipment
- Phone allowances
- Parking

The biggest elements in a renumeration package often relate to constructive dismissal: what you do, when you do it and how you get paid.

Otto v Hamilton & Olsen Surveys, [1993] AJ No 646 (ABCA)

Facts:
Otto (plaintiff) was employed with Hamilton & Olsen Surveys (defendant). Hamilton was in hard times financially in the last two years, so they had to reduce operating costs.
- Hamilton compared it's renumeration package to competitors in the industry and review showed that they were far and away the most generous employer for compensation
    - The company decided it could cut costs to these packages while the company recovered.

The employer cut all employees packages to 1) suspend matching of contributions to employee RRSP plans and 2) reduce pay vacation entitlement from 6 weeks to 4. Salaries went untouched
- The changes amounted to a reduction of the total value of the renumeration packages of about 6.5 – 8%

Otto resigned and claimed he was constructively dismissed.

Issue:
Do the changes in the compensation package amount to a constructive dismissal?

Analysis:
The broader question of this appeal asks when can economic hardship ever be a justification for an employer's unilateral change to an employee's contract?
- Given the context of Hamilton & Olsen, this was an allowable and periodic adjustment to collateral benefits within the overall compensation package.
    - Compensation packages are already and traditionally dependent on the current financial status and fortune of the employer.
    - So, they can be altered periodically without being a constructive dismissal

Reductions to ancillary or collateral parts of a compensation package are common and justified responses to economic pressures and not repudiatory breaches
- The closer the reductions come to the more integral parts of compensation packages (base salary or wage and particularly those tied with the economic wellbeing of the company), the more likely they are to be a constructive dismissal.
- There is a clear distinction between a unilateral change to an ancillary part of compensation packages that is justifiably tied to an employer's financial fortune and performance and a change to the core or base salary component of compensation packages.

The extent of the changes were also quite low, less than 10%. So this would not be classified as a "substantial alteration" to ground a constructive dismissal claim.
- Reasonable person would not have considered this a message that they were fired.

Conclusion:
Not constructive dismissal

Hold, Order:
Motion dismissed

Ratio:
Ancillary benefits that are tied to the economic health of the company can periodically be adjusted without it amounting to a constructive dismissal.

It is perhaps logical that small adjustments to ancillary benefits are just the way that employment goes sometimes. Since these are tied to the economic position of the employer, it makes sense they can fluctuate. When you think back to the root of constructive dismissals, would such a reduction really indicate to a reasonable employee that they are followed? Perhaps the opposite since they are trying to keep everyone employed.

This finding makes logical sense, but it also has some problematic elements to it.

- Some aspects of a package may be more integral to someone's life than another employee. What if they had a medical condition and were dependent on medical benefits?
- The argument is Hamilton saying "I am not the big bad employer, I was trying to keep everyone working" and is similar to the *Wilkinson* case (perhaps Hamilton's lawyers just argued it better)
- What constitutes the core of an employment package may be subjective
    - Salary is usually the bulk of a compensation package, but what if it is not?
    - The best way to evaluate how large a change is, is the total % change which means accounting would be more adequate to answer this
    - Something less than 10% would be hard to argue in court in light of *Otto*

Pathak v Jannock Steel Fabricating Co, [1999] AJ No 19 (ABCA)

Facts:

Pathak (plaintiff) was employed at Jannock Steel Fabricating ("Jannock", defendant) as a manager of an Agri plant. He was given additional responsibilities in 1987 but his salary remained the same, but he was entitled to a "RONA bonus" in exchange for the promotion

- In 1992, the RONA bonus was made available to all employees, so Pathak was no longer distinguished him from subordinate employees.
    - Pathak was upset at this extension since the RONA bonus was used as consideration for him to take on additional responsibilities. So he negotiated with Jannock something called a "Custom Fab bonus" to reflect his distinct and additional responsibilities as manager.

Later that year, Pathak asked to manage another plant in addition to Agri. This promotion increased his salary as well as maintaining both the RONA bonus and Custom Fab bonus

- The next year, managing both proved to be too much work so Pathak was removed as manager for the second plant and his Custom Fab bonus was removed.

Pathak resigned for the removal of the Custom Fab bonus and sued for constructive dismissal.

Issue:

Was the removal of the Custom fab bonus tantamount to a constructive dismissal?

Rule:

Wilkinson: Constructive dismissal requires a (i) unilateral change that (ii) substantially alters a fundamental term of the employment contract.

Analysis:

Pathak alleges that the removal of the Custom fab bonus was unilateral and cut to the core of his employment as manager.

- It is true that the Custom fab bonus was specifically negotiated and a separate term of Pathak's contract to reflect his increased responsibilities as manager.
    - It was not compensation for his responsibilities of the second plant
- The bonus was intended to distinguish Pathak as manger of Agri plant after the RONA bonus was made a universal part of all employees compensation
- It was a separate and discrete obligation, not just one factor in his compensation. It was an important term of his contract and the consideration he received for his managerial responsibilities at Agri

- Denying him that asset is thus a substantial alteration of an essential term of Pathak's employment contract
- A reasonable person in his shoes would feel that an essential part of their contract had been substantially altered (in fact, wholly deprived)

Conclusion:
Constructive dismissal

Hold, Order:
Action allowed

Ratio:
Deprivation of a renumeration package element can be constructive dismissal can amount to a substantial change if specifically important to an employee in consideration (ie, if it is consideration)

Pathak must have done a very good job arguing how imperative that Custom fab bonus was imperative to his employment and the deprivation was a substantial alteration.

- Constructive dismissal is one of those things that if you change a single fact, you have to go back to the drawing board.
- But it always comes down to 1) was there a breach and 2) was it substantial enough.

CHAPTER 4: DAMAGES

Entitlement and Quantification

Damages are not really addressed much in law school, but damages are the day to day of employment lawyers. The basic principles of damages when it comes to employment law are:

- Entitlement to Damages: damages crystallize at the time of the breach (ie, the time of wrongful termination) but is forward thinking through the notice period
  - This is a case where employment and contract law diverge, since contract law deals with "but for" and what happens after the breach is informative
  - But for employment law, at the time of termination, what the employment is entitled to is the damages they get with post termination events being irrelevant.
    - This gets difficult since some hearings happen years into the future
  - Remember that termination does not technically occur until the reasonable notice period is over – whether or not reasonable notice was given
    - If you were fired on January 1 but your reasonable notice would extend to August 1, your termination date is August 1, and your wrongful termination date would be January 1
- Quantification of Damages: based on the compensatory principle of contract damages: place the employee in the position they ought to be in had the employment contract been properly performed (ie, what would they have received had they been properly terminated with notice)
  - The *Code* sets a lot of the nitty gritty out, but the common law complicates it.
  - Termination packages often serve as the pay in lieu of notice
- What effect do post termination events have on entitlement or quantification of damages? What are the collateral benefits and when are they deductible from wrongful termination damages?

Hypothetical: Susie participated in her monthly workplace lottery pool for 6 years. Every month, each participating employee contributes the same nominal amount to a pool and lottery tickets are purchased therefrom, but they have never won.

- Susie was wrongfully terminated, and a week later the team won the lottery
- She sues for wrongful dismissal claiming her salary for the notice period but also what would have been her share of the lottery pool as damages from her employer

- Her argument: had the contract been performed, she would have been given working notice, been at work the week they won the lottery and collected it

This argument cannot hold under employment law damage principles: they crystallize on the date of breach, which was a week prior to the lottery win. No one could have predicted they would have wont the lottery, but it did not occur at the time of the breach so it cannot form part of damages.

Sylvester v British Columbia, [1997] 2 SCR 315

Facts:

Sylvester (plaintiff, respondent) was employed by the provincial government (defendant, appellant) in the Ministry of Advanced Education. His contract was oral. He became ill and was on short term disability and received benefits equivalent to 75% of his salary plus an injury plan, the STIIP.

- The STIIP was eligible for 7 months in the case of inability to work from illness
  - The STIIP was funded completely by the employer

Less than two months into his leave, Sylvester was terminated due to reorganization.

- In his termination letter, Sylvester was offered 12.5 months notice but without any STIIP benefits for those 12.5 months: they would pay him the remaining 25% to top up his 75% salary replacement under the disability insurance policy

Sylvester brought action for wrongful dismissal and claimed 24 months notice, including STIIP benefits

Procedural History:

The BC Supreme Court found Sylvester was entitled to 15 months with STIIP deducted

- BC Court of Appeal allowed the appeal and increased notice to 20 months *with* STIIP

Issue:

If a wrongfully terminated employee could not have worked and earned a salary during the notice period due to being on disability leave, does that effect their entitlement to, or quantification of, their notice period damages?

Rule:

An employee who is wrongfully dismissed without reasonably notice of termination is entitled to damages for breach of contract, in the amount of the salary the employee would have earned had the employee worked during the notice period, less any amounts credited to mitigation.

Analysis:

Arguments claiming WCB and UI benefits being deductible are distinguishable as they are statutory, whereas disability benefits are contractual in nature. This means that the question of deductibility depends on the terms of the contract and thus the intention of the parties.

- In this case, STIIP is not a distinct contract, but an integral part of the original contract
- The contract did not provide for Sylvester to receive disability benefits *and* damages for wrongful dismissal for 2 reasons:
  1. STIIP was intended to substitute for the respondents salary and was reduced by other income received by the employee
  2. Receiving both is not supported by the employment contract – damages are based on the employee working during the notice period notwithstanding the fact that the employee may have been prevented from earning them
     a. The fact that an employee could not have worked during the notice period is irrelevant to the assessment of damages; an employee dismissed while working and one who was receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had they worked in the notice period.

b. The claim to damages and contractual right to disability benefits are based on assumptions that are incompatible with the employment contract entitlement to and quantification of damages is not affected or reduced by post-termination events related to the employee's actual ability to work.
    i. Disability payments are only payable because they could *not* work
c. This suggests that the parties did not intend for a wrongfully terminated employee to receive both

The BCCA claim that since, in the contract, both provisions operated simultaneously is in error since each provision is based on the contrary assumptions about the ability to work

- This is reinforced by the idea that had the employer provided adequate notice and did not breach the contract, Sylvester would not have received both benefits and salary in the notice period anyway

Parties *can* agree in the contract that employees are to receive both disability benefits and damages for wrongful dismissal, and this intention can also be inferred.

- But without intention of this, an employee dismissed while received disability benefits and an employee dismissed while working are treated equally
- If the benefits were paid in addition to the damages for wrongful dismissal, the employee collecting disability benefits would receive more than the employee dismissed while working. This would deter employees from establishing disability benefits which is obviously undesirable.
    - Deducting disability benefits ensures all affected employees receive equal damages.

Conclusion:
Disability payments should be deducted

Hold, Order:
Appeal allowed

Ratio:
Disability payments can be awarded supplementally with damages for wrongful dismissal if the contract or intentions provide for it. Absent such intention, they are to be deducted.

The BCCA used a "two contract theory" where the employment agreement goes over salary, but the disability insurance was a second contract. They conclude on this that the employee should have got compensated under both.

- This is rejected by the SCC – the employment and insurance contracts are the same.
- The disability payments were part of his employment agreement

Disability benefits collected during the notice period are deducted from the notice period damages the employer owes Sylvester

- These benefits are non-contributory of the employee – they are wholly employer funded and a benefit of employment
    - Sylvester did not pay at all (some packages are half-employer half-employee paid)

Terms of disability insurance contracts clearly demonstrate that the benefits are intended to be a substitute or replacement of salary (an indemnity for salary loss when an employee is unable to work)

- There is no circumstance in which an employee would be eligible to earn both salary and disability benefits simultaneously

Inconsistent with employment contract and wrongful termination damages to allow the employee to collect both disability benefits and salary during the notice period

- Courts don't like double dipping/windfalls.

- The package specifically said they got 75% of their salary – it does not say you get X amount no matter how much you work (like a private insurance would)

Whether or not an employee is on disability at termination, they are entitled to that reasonable notice period. Doesn't this go counter to crystallization, since on crystallization they wouldn't receive it anyway?

- There are policy considerations – he worked for years for that period and that should not be negated because the employer decided to terminate the employee during a disability absence.
    - Policy considerations always come down to unfair treatment of employees

Subject to contrary wording in the contract, employer-funded disability during the notice period are deductible from wrongful termination payments. This is due to various factors (any could change the analysis)

- Nature of benefits (non-contributory, indemnity for salary loss)
- Intention of parties to the contract (disability benefits premised on inability to work whereas wrongful termination premised on working; they cannot both be awarded)
- Policy considerations (employees terminated while working would only get one benefit, but one terminated on disability would get both)

Important that this presumption can be contracted out of – if the employment agreement allows to double dip, the employee would be entitled to both

IBM Canada Limited v Waterman, 2013 SCC 70

Facts:

Waterman (plaintiff, respondent) was employed at IBM Canada Ltd ("IBM", defendant, appellant) for 42 years and was receiving the Pension Plan as a contribution as a percentage of his salary that vested over time. Waterman was thus contributing to his own retirement savings fund that guaranteed specific benefits to him once the retirement vested.

- At age 71, the employee can start collecting both his pension benefits and salary. Before that age, both cannot be collected.
    - Once the pension fully vested, can retire and collect the pension

IBM effectively told Waterman that he had to start retiring. At the time of his termination, Waterman was entitled to a full pension under his plan and the termination did not influence the amount of his benefits.

- He was told on termination that he would be treated as a retiree and must receive his monthly pension payments
    - However, he had not reached the age of 71 and thus cannot receive both pension and employment income from IBM simultaneously

Waterman brought action for wrongful dismissal

Procedural History:

Supreme Court of BC found the appropriate notice was 20 months with pension not deducted.

- The British Columbia Court of Appeal dismissed the appeal

Issue:

Does receipt of pension benefits reduce damages to an employee for wrongful dismissal?

Rule:

Sylvester: Absent contract intentions that indicate benefits are meant to be supplementary, they are to be deducted

Analysis:

1. Collateral Benefit Problem?
    a. This problem arises from the strict application of compensatory damages principle. If an employee, placed in the position they would be in had the contract

been performed, they would have earned salary only during notice period and not drawn on pension, so pension should be deducted from notice period damages.

   b. In this case
      i. Waterman was wrongfully terminated
      ii. The pension pay is collateral to damages payable by employer for wrongful termination that does ameliorate some of the loss
      iii. Receipt of pension on top of salary during the notice period would be excess compensation
         1. At age 65, he was not eligible to receive both pension and salary. If pension benefits are not deducted from notice damages, he is effectively getting both pension and salary
         2. There is sufficient connection between the receipt of pension and wrongful termination
            a. Although the pension entitlement is not contingent on wrongful termination, the only reason Waterman collected pension was because he was terminated.
            b. Had IBM not breached the contract he would have only received his salary during the period and not his pension
            c. "but for" the breach Waterman wouldn't have started to collect his pension.
         i. So, the collateral benefit problem exists
2. Exceptions to the Compensatory Principle
   a. Compensation principle: the plaintiff should recover the actual economic loss but not more
      i. The collateral benefit problems asks if we should depart from the compensation principle; the compensation principle should not be strictly or inflexibly applied in a way that is divorced of other considerations.
   b. There are two well established exceptions to the compensatory principle:
      i. Charitable Gifts
      ii. Private Insurance
         1. If it relates to payments from the plaintiff's private insurance, it will not be deductible
         2. Whether this extends to disability, employment insurance and pensions payable on retirement is generally a "yes"
         3. In *Sylvester,* the exception was *not* applied because the benefits were intended to be an indemnity for the loss that resulted from the breach and the plaintiff had not contributed.
         4. The retirement pension benefits thus fall to the exception

Waterman's employment contract is silent on whether benefits should be deducted from wrongful dismissal damages. This means we have to discern the parties' intentions in light of the express terms of the employment contract.

<u>Application to this case</u>

- The retirement pension support not deducting the benefits from wrongful dismissal damages – it is not an indemnity for wage loss, but rather a form of retirement savings
- The employer did make the contributions, but the employee earned the benefits through years of service
   - As such, the compensation principle shall not be applied in this case and the pension should not be deducted from the damages for wrongful dismissal
- The pension benefits purpose "is to provide periodic pension payments to eligible employees after retirement and until death in respect of their service as employees"
   - This means the plan is just a savings vehicle where the employees earns a retirement entitlement over time, determined by service and salary level

- Vested means it is an enforceable statutory right to the accrued value of the benefit even if terminated early.
  - Having read the contract, would the parties have intended to use the pension entitlements to subsidize their wrongful dismissal? Clearly no

While Waterman was between ages 65 and 71, he qualified for full pension but could not receive both employment income and pension benefits. But the intentions of the parties in the contract do not support the conclusion that the pension should be deducted.

- Once the employee turned 71, they would be entitled to both
  - In *Sylvester*, it was impossible to receive both benefits as the disability was deducted from the salary
  - Equal treatment is important – if deduction was allowed, an employee who is eligible to receive their pension before aged 71 could be forced to retire and draw on pension benefits through wrongful dismissal
    - But an employee not entitled to their benefits and an employee over the age of 71 receives both
    - This would be unequal for Waterman and deductibility would be an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper.

Conclusion:
No deductions for pension

Hold, Order:
Appeal dismissed

Ratio:
Private insurance exception to compensatory principle as a solution to collateral benefits problem; requires contextual analysis on nature of benefit, policy considerations.

IBM argues that the pension benefits should be deducted using *Sylvester*

- Putting Waterman in the position he would have been had the contract been performed, means giving salary and benefits he would have earned during his working notice period
  - If he gets pension on top of notice salary, he is being overcompensated and put into a better position
- Waterman argues the pension benefits should not be deducted
  - Pension benefits are distinguishable from disability benefits - *Sylvester*
  - Private insurance exception to deduction of collateral benefit applies – he was paying into the fund, whereas Sylvester was not

A certain understanding of pension plans is needed for a case like this.

- Defined benefit pension plans ("DBPP")
  - Get benefits regularly from retirement until death based on a pre-determined formula
  - Essentially drawing on an unlimited fund; you get defined benefits for life and are not drawing against a finite fund
- Defined contribution pension plans ("DCPP")
  - There is a fixed finite sum amount of savings from which employee draws in retirement
  - The pension fund is drawn down throughout retirement so the employee has to manage how much they are drawing and ensure the amount in the fund is sufficient to last until death; early drawing from pension does matter because you are drawing down a fixed amount and it will have to last longer

Collateral Benefit Problems: If an employee, placed in the position they would be in had the contract been performed, would have earned salary only during notice period and not drawn on pension, so pension should be deducted from notice period damages. When does this problem arise?

1. Employee is wrongfully terminated
2. Employee receives excess benefits from a source other than employer damages that ameliorates the loss suffered by the employee as a result of the employer's breach
    a. Collateral benefit must be excess recovery for the loss
    b. Receipt of the collateral benefit must be sufficiently connected to the employers breach, meaning
        i. The employee would not have received the benefit but for the breach, or
        ii. The benefit is an indemnity for the sort of loss resulting from the breach.

Under the strict compensatory principle, wronged parties should be adequately compensated for their wrongful treatment, but not more. There are two exceptions: charitable gifts and private insurance.

- In this case, the pension plan was a private insurance: Waterman's salary was deducted and the deduction went to the private insurance. Unlike *Sylvester,* Waterman paid for this benefit

When does the collateral benefit fall within the "private insurance" exception to the compensatory damages principle so that it is not deducted from an employers damages? There are several factors to consider, and a full analysis is required every time:

1. There is no single marker or categorical list for when private insurance is excepted or not
2. It does not matter whether collateral benefit and cause of action/damages for wrongful termination arise under the same contract
    a. There could be one contract for employment and one for benefits
3. Nature of the Benefit
    a. Indemnity vs non-indemnity benefit for the type of loss suffered as a result of the employer's breach (ie, is it a wage replacement)
    b. Contributory vs non contributory
    c. General rule: benefit not deducted if non-indemnity and contributory
4. Policy Considerations
    a. Equal treatment of employees
    b. Possibility of incentives for socially desirable conduct
    c. Need for certainty with clear and predictable rules

The dissent argues that this pension is a DBPP (gold standard one), not a DCPP. Drawing on his pension earlier than planned was not depleting a limited fund.

- If the pension was deducted, nothing was being taken from Waterman because he was entitled to the formulaic benefits until his death
- Under words of the pension plan, he was not eligible for both salary and pension until age 71
    - Principles of *Sylvester* directly apply: the contract terms make collection of both at the same time inconsistent with Waterman's situation
        - Pension promised on retirement and not working
        - Wrongful termination damages premised on working

Noble v Principal Consultants Ltd (Trustee of), 2000 ABCA 133

Facts:

Noble (appellant) was employed with Principal Consultants ("Principal", respondent) for over 18 years as Senior VP of finance for the Prairie region. He was terminated without cause or notice.

- Principal then filed for bankruptcy and KMPG became trustee in bankruptcy

Noble brought action for wrongful dismissal without notice. KMPG argued that bankruptcy limits quantum of damages because upon bankruptcy, Noble would not have been employed anyway. They thus argued that the notice should be reduced to 2 months, whereas Noble argued 18 months

Procedural History:
The trial court dismissed the application and found bankruptcy limits the damages given

Issue:
Does bankruptcy of an employer affect the quantum of damages for a wrongfully terminated employee?

Rule:
The quantum of damages is awarded on the day of the breach with limited exceptions

Analysis:
Quantification considers various factors, including parties' intentions and events subsequent to the contract. Quantum of notice is to be determined at the date of breach and is unaffected by subsequent events.

The trial judge erred by deciding that the bankruptcy reduced the notice period as time Noble would have been employed with Principal had reduced. He also erred by deciding that, upon bankruptcy, Noble's status changed from person unlawfully terminated to one terminated by bankruptcy.

- Since his termination was by dismissal, which is a breach of contract, he was entitled to damages on that date.
- This requires looking at the employment contract had it been performed but does not shift the position of the employee unlawfully dismissed to one given working notice.

Even if bankruptcy was an event that affected actual damages, Principal's bankruptcy did not only reduce damages suffered by Noble, but exacerbated them

Conclusion:
Bankruptcy has no impact on damages

Hold, Order:
Appeal allowed

Ratio:
Bankruptcy will not reduce notice period or damages for wrongful termination.

Principal argued that to put Noble in the position he would have been had the contract been performed would be to give him the notice period between his wrongful termination and bankruptcy; if not Noble would be in a better position than he would have had the working notice been provided since, if he was working, he would have been out of luck on bankruptcy anyways. Employees who worked up until the last date would have gotten less money than Noble.

- Noble countered this saying entitlement to damages crystallizes on the date of breach, irrespective of post-termination events
- Otherwise, Principal allowed to erase their breach and "pretend" they gave working notice and respected contract

The court here confirms the crystallization approach argued by Noble. To consider the bankruptcy considers post termination events which is not proper. Entitlement to damages and calculation of the notice period are assessed at the date of breach, and therefore not affected by post-termination events. They cannot be erased by the post-termination bankruptcy

- Interestingly, the court does leave the door open for quantification of damages being affected by post termination events: if the post-termination event (ie, bankruptcy) has an effect on the loss suffered by the employee from the termination.

    - For example, if the employee had mental health costs from the termination, this can be considered even if it is after the breach

Trial judge was wrong to 1) consider the post-termination bankruptcy as an event that reduced the notice period entitlement (contrary to *Sylvester*) and 2) transformed Noble from a wrongfully terminated employee to one terminated with proper notice and then by bankruptcy.

The majority argued the bonus should be included in damages, but the dissent did not.

- Dissent says post termination events don't affect entitlement but can influence quantification; clearly the company was struggling at the termination so bonus should not be included where a) it is entirely determined by performance of the company and b) the performance would not have been earned – even if he stayed on, Noble wouldn't have made bonuses
- Majority says the contract being performed properly would have entitled Noble to bonuses, so they should be included
    - This bonus argument was all amended in *Matthews* (more to come) so it is likely not helpful anymore.

<u>Bonuses and Vacation Pay</u>

Recall the *Alguire v Cash Canada* case where Alguire, as President of Cash Canada was terminated a few months prior to the end of his fixed term contract. The court found he was entitled to payment of salary for the remainder of the term in the contract, but not to reasonable notice payments because it was a fixed term contract. This was all settled at the ABQB and not appealed

- The case was appealed to the ABCA for the issue of whether Alguire was entitled to performance bonuses as part of his damages for the remainder of his contract term

The ABCA decided that the bonus was an "integral" part of his compensation. The bonus was triggered by the company achieving 110% pre-tax income of the prior year (ie, a 10% increase from the year before) so it was not discretionary and purely based on company performance.

- Since Alguire was the President, company performance was indicative of his performance
- In September of the year he was terminated, Alguire's financial forecast suggested Cash Canada was on track to hit the 10% increase and he was terminated in November
    - In the period between October and December, accounting changes meant the revenue was steadily declining and the company would actually not hit the 10% increase so no employee got the bonus

Is the Court restricted to considering known information about the company's financial performance at the time of the breach to determine Alguire's bonus entitlement?

- Both parties argued the crystallization method for assessment of damages:
    - Alguire argued the September report suggested that he would get the bonus and *Noble* found that post termination evidence cannot impact employee damages
    - Cash Canada argued the evidence between September and November suggested it was clear the company would not hit the threshold so that was what crystallized
        - Changes that decreased profits were implemented with Alguire's input
- ABQB: entitlement to bonus as damages depends on information known at the time of breach
    - Cannot use post termination facts or realities of the employers business
    - The writing was on the wall the termination would not be earned, so no damages for it
- ABCA: Dismissed the appeal (bonuses not included) but found that courts are not prohibited from looking at post termination evidence when quantifying damages except for bankruptcy.
    - The *Noble* rule does not apply when damages are related to a formula, the result of which will only be known in the future.
    - So, if there is a performance bonus (whether discretionary or formula based), consider:

1. It is an integral component of compensation
    a. Generally satisfied when habitually awarded and essential part of pay
2. It would have been earned by the employee during what ought to have been their notice period, considering relevant post termination evidence
    a. Look at evidence in existence *at* termination and how did it get affected *after* termination
    b. Most likely is when there is a formula for a bonus already in existence at termination so it could be used after. If no formula existed before termination, it cannot be used at trial

Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26

Facts:
Matthews (plaintiff) was employed by Ocean Nutrition (defendant) from January 1997 to June 2011. He was a valued and specialized chemist with Ocean Nutrition and oversaw large scale manufacturing of omega 3 fish oil products for sale.
- He was largely considered by his employer as a key employee and an integral part of senior management. This was reflected when he received numerous promotions over his employment.

In 2007, a new COO (Mr. Emond) was appointed and became Matthews' supervisor. The same year Ocean Nutrition instituted a "long term incentive plan" (LTIP) where 2% of value generated that was in excess of $100 million (a "realization event") would be distributed to senior employees. Senior executives were invited to sign the LTIP contract, which Matthews did.
- Condition 2.03: the LTIP shall not be given when an employee "ceases to be an employee" regardless if by resignation or termination
- Condition 2.05: only awardable on the realization event and not part of compensation or employee's severance calculation

From the start of Mr. Emond's tenure, he undertook a "four-year campaign, characterized by lies and dishonesty to push Mr. Matthews out of operation"
- This led Matthews to resign in June 2011 and he immediately found new work

In July 2012, Ocean Nutrition was sold to Royal DSM for $540 million which constituted a "realization event" under the LTIP but Ocean Nutrition refused to pay Matthews the LTIP ($1 million)
- Matthews brought action for constructive dismissal and sought damages for the LTIP

Procedural History:
The Nova Scotia Supreme Court found constructive dismissal and bonus was 1) integral and 2) would have been received but for the termination, so it was awarded.
- The Nova Scotia Court of Appeal allowed the appeal by virtue that he resigned so was excluded from the LTIP in Condition 2.03 so only awarded notice damages.

Issue:
Did the interactions between Ocean Nutrition through Mr. Emond towards Matthews constitute a constructive dismissal? (NSSC only)

Rule:

Potter: constructive dismissal can occur where:
1. Employer has unilaterally breached the contract in a way that substantially altered an essential term of the contract, or
2. Employer evinced a clear intention to no longer be bound by the relationship.

Analysis:

Under either branch of the test, it is clear Matthews was constructively dismissed
1. A reasonable person in Matthews' position would have felt the essential terms of his contract substantially changed by the unilateral withdrawal of nearly all his responsibilities

    a. Emond withdrew Matthews' authorities and asked direct reporting not needed for a supervisor
2. A reasonable person in Matthews' position would find that Ocean Nutrition created an intolerable work environment and no longer intended to be bound by the employment relationship
    a. He was continuously undermined for 4 years with ample evidence of a hostile work environment.

Matthews was a highly specialized employee and very senior in the company given that he was offered the LTIP. As such, 15 months notice would be appropriate.

Conclusion:

Constructive dismissal established; 15 months notice in damages.

Issue:

Should the LTIP bonus be quantified as part of Matthews' entitlement to wrongful dismissal? (SCC)

Rule:

Alguire: bonuses can be included in damages where 1) integral to employees compensation and 2) it would have been earned in notice period

Analysis:

Having established that Matthews was constructively dismissed and he was entitled to 15 months notice, he would have received the LTIP bonus had he been given that notice. There are clear distinctions between employer duties, and they should not be conflated when arguing for wrongful dismissal or damages thereof. Duties include:

- Provide reasonable notice of termination
- Terminate in a good faith manner
- Perform the employment contract honestly

The purpose of damages for wrongful termination without notice asks what would the employee have earned during the reasonable notice period to put the employee in the position they would have been had they worked until the end of the notice period. Whether bonuses or incentive payments are to be included in those damages involve a two step approach:

1. But for the termination, would the employee have earned the bonus during what ought to have been their reasonable notice period? If yes, prima facia entitlement to common law damages for the bonus
    a. Had Matthews worked in the 15 month period, he would have received the LTIP
    b. It cannot be argued the LTIP was not integral as it was worth over $1 million
    c. In any case, the integrity of the bonus is irrelevant whether the bonus is vested or not – the bigger consideration is that they would have received it
2. Do the terms of the contract unambiguously take away or limit the employee's common law entitlement in this respect? Were the terms sufficiently brought to the attention of the employee?
    a. The LTIP is a unilateral contract that had no negotiation, so the exclusion clauses need to be strictly construed
    b. "full time" or "active" wording is not sufficient – Matthews would have been full time and active had Ocean Nutrition not fired him.
    c. "with or without cause" in Condition 2.03 removes a right and should thus not cover constructive or wrongful dismissal
    d. So, the LTIP did not unambiguously remove Matthews common law entitlement to the LTIP.
    e. At the time of termination, the formula for the LTIP existed so it can be considered post termination (*Alguire*)

Conclusion:

Bonus included in award

Hold, Order:

Appeal allowed; $1.07 million in damages awarded.

Ratio:
For a bonus to be awarded in damages:

1. Would employee have earned the bonus if proper working notice was given
2. Do the terms of the plan unambiguously limit entitlement to bonus as a result of employer's breach

Companies actually bully employees out of positions all the time – they don't want to pay for termination notice so they just make the employee's life miserable so they leave. It could have been argued that Matthews acquiesced to the changes over 4 years and thus could not argue constructive dismissal, but it could be countered that the bullying got progressively worse over 4 years such that each new bullying event was a new constructive dismissal.

- Matthews argued that 1) Ocean Nutrition breached the duty of good faith from *Bhasin*, 2) Condition 2.03 wasn't clear nor unambiguous, 3) Ocean Nutrition should be estopped because it was their bad faith that triggered 2.03 exclusion
- Ocean Nutrition argued the bonus wasn't integral to his compensation and a mere incentive. The LTIP was to preclude any non-active workers from receiving the bonus, which Matthews was at the time of LTIP being awarded

This case caused quite the shake up in the employment law world. Most employer lawyers would have considered Conditions 2.05 and 2.03 sufficient to preclude bonuses from being awarded before this case.

- The LTIP in this case was quite sophisticated and was used as consideration (this is common when a new CXO comes in to get management to stay)
- Conditions 2.03 and 2.05 were very wise inclusions by Ocean Nutrition since they would disentitle employees to any compensation (though it may breach the *Code*)
- The SCC found the exclusion was not clear enough to unambiguously limit the right to the LTIP since it would not cover employees who are wrongfully terminated or terminated without notice
  - This case basically confirmed that in the case of wrongful dismissal, termination does *not* occur on the date of wrongful termination, it occurs when the reasonable notice period expires.
  - In such an event, Matthews would have been employed under the notice period when the LTIP was awarded and qualified for the LTIP since he would have been an "active employee" had Ocean Nutrition not breached the employment contract.
    - As such, the LTIP contract did not unambiguously remove his right to the LTIP
- This means that exclusion clauses *can* be used to limit awarding the bonus in wrongful termination damages, but they need to be carefully worded to cover the exact circumstances that are anticipated, but they also must comply with minimum standards in legislation and specifically brought to employees attention when signing the contract.
  - Precise wording needs to specifically reference and remove "common law damages entitlement"

The SCC really wanted to go into bad faith, but it was not plead so they couldn't award damages for it. It could have lead to substantial punitive damages because of Mr. Emond's bad faith. But their comments in *obiter* were essentially a red flag to all employers that bad faith could attract hefty damages.

When it comes to vacation pay, reasonable notice is also an important factor. In *Deputat v Edmonton School District*, Deputat was an engineering technician employed by EPSB to oversee school technical systems. There was a written policy that required employees to take vacation and not accrue more than 30 vacation days a year.

- He was given 12 months working notice, which he elected to work during but did not sign a release saying he could not sue for the remaining notice he didn't work (oopsie of the employer)
- He sued for wrongful dismissal arguing
    - There was insufficient notice
    - Should have been forced to take paid holidays during the notice period but been paid his working notice and holiday accruals consecutively
        - Essentially he wanted to be paid out for the vacation pay as well
- The court rejected he should have been paid out for his vacation – employers duty is to give notice of termination, not pay in lieu. When working notice is given, the contract has not been breached and is still in full force. Employees can be disciplined, forced to take vacation.
    - There is no termination at law until the end of the period
    - There is nothing wrong with the employer forcing employee to take paid holidays during that time and it is not fair for the employer to pay working notice and holiday pay

However, since this case section 61.1(2) of the *Code* was added that states employers cannot force employees to take vacation pay during the notice period
- But this is just talking about the *Code* minimum notice periods. For the rest of the common law notice period, employers can force employees to take vacation pay

Employment Standards Code, RSA 2000, c E-9
Section 61.1 (2) Unless an employer has, prior to the giving of a termination notice, provided the employee with notice to take annual vacation in accordance with section 38, the employer must not require the employee to take the vacation during the termination notice period.

A lawyer could have told Deputat that he had two options:
- He could quit and sue for wrongful termination on the basis of insufficient notice
- He can take the notice "under protest" where he expressly tells the employer he will work the notice period but is doing so as mitigation of damages for wrongful dismissal and is not acquiescing to the length of notice given or waiving his right to sue for more notice under *Bardal*
    - Technically, he could also work the 12 month period and then sue for the additional 6 months he claimed, but this runs the risk for acquiescence argument.

Duty to Mitigate

The Duty to Mitigate is an adjustment to damages, so this is considered after damages are found to be entitle and then quantified. The Duty is on the employee, even if they are wronged but the employer has to establish whether or not the employee mitigated or not. The Duty is an obligation on employees to attempt to find alternative, comparable work to the job that they were just terminated from.
- This is something that employment lawyers should tell all terminated employees immediately because if the employee does not mitigate, they could lose damages.
- It is not a duty to find a new job, but a duty to look for a new job. But whether the employee finds a new job is the biggest determination when settling

Mitigation is a manifestation of an "efficient breach". All plaintiffs have obligations to mitigation (in torts, contract, whatever area of civil law) but it is most germane in employment contexts. The employer has the onus of proof from wrongful dismissal by establishing two things:
1. The employee failed to use reasonable efforts to find alternate employment

2. Had the employee done so, they likely would have found alternate employment earlier

The Duty to Mitigate often brings in common issues:
- What does it practically oblige an employee to do upon termination?
- What are its limits?
- What are the relevant burdens in establishing the duty to mitigate?
- What is the effect of a failure to mitigate?

On a practical note, it's a pretty low bar. Usually an employer applying to 5 jobs without an interview will satisfy the duty. But it is important for employees to record their progress of job applications.
- When an employee finds comparable, alternative work, the employer does not have to continue paying notice.
- If the notice period is 12 months, but the employee finds work after 6 months, the employer only needs to pay 6 months notice pay

Christianson v North Hill News Inc., [1993] AJ No 672 (ABCA)

Facts:

Christianson (appellant, plaintiff) was employed at North Hill News Inc ("NHN", respondent, defendant) for 17 years as assistant manager and supervisor after working her way up from a type-setter. She had only ever been described as an exemplary employee without complaint.
- She suggested to upper management ways to improve efficiency of NHN which lead to her being replaced by a younger employee and her employment terminated.
- Her skills were so tailored to North Hill News that finding new employment was difficult.
    - She undertook additional training post termination to revamp her resume

Christianson brought action for wrongful termination.

Procedural History:

Alberta Court of Queen's Bench found her termination wrongful and awarded 6 months notice of damages. They found her mitigation reduced this amount to 2 months.

Issue:

Does the plaintiff's mitigation efforts decrease the period of notice in damages?

Analysis:

The trial judge's determination of the notice period is a fact-finding mission and their decision must be respected within reasonable limits. However, he mistakenly included dealing with availability of similar employment and her duty to mitigate as part of the reasonable notice determination. Including failure to mitigation, in effect, doubly penalizes the plaintiff.
- Her notice period is more appropriately 12 months.

One principle that is respected in employment law is the defence of the duty to mitigate.
- But this is limited – courts will not expect that someone faced with breach of contract to take steps which are risky. The plaintiff need only make decisions of a reasonable person rather than the perfect decision
    - The plaintiff need not mitigate by taking a significant demotion or going back to the employer that fired them
- The respondent argued that her evidence was an insufficient attempt to seek work and contended her intention was to live off unemployment insurance

The plaintiff had all her training at NHN and the system was unique to them, with all other printers having more modern technology. After returning to a Technical Institute to educate on the new system, she easily found a new job.
- Whether this was the best mitigating step cannot be determined, but it was a reasonable decision at the time. Courts should not second guess.

She had inadequate opportunities to employ herself, such as a part time employment or those with vastly different systems. As such, they do not detract her mitigation.

- There was no evidence any similar jobs were available, let alone common
  - Even less evidence that other actions would have found her a job sooner
  - No mitigation damages should be deducted from the 12 month notice

Mitigation Expenses

When an employee is fired without notice, any effort to find new employment likely brings costs which requires some damage costs.

- She cannot be in a worse damages position by failing to mitigate than she would have been for mitigating successfully.
  - A reasonable person fired without notice will likely incur more expenses because of the urgency of the termination and need to find new employment

The plaintiff incurred roughly $700 in expenses. Such decisions are by all parties considered reasonable. The only issue is whether termination with notice would necessitate those expenses. It is hard to see it would. As such, the sum is awarded

Conclusion:

No decrease from mitigation

Hold, Order:

Appeal allowed

Ratio:

Mitigation should not be considered in the *Bardal* analysis; it comes after notice period is determined

- Duty does not have to be perfect, only reasonable; do not have to take low paying job

This is the foundational case for the obligation to mitigate. It was conceded that she was wrongfully terminated so the decision rests on mitigation. The trial judge found that she was entitled to 6 months notice (which is on the low end given her tenure) but reduced it to 2 months finding that she did not mitigate properly as she revamped her resume.

- Trial judge found that had she mitigated she would have found a job within two months
- The ABCA found that the trial judge considered the failure to mitigate as part of the *Bardal* analysis which was wrong. Trial court found that:
  - Availability of similar employment was plentiful, so they decreased her notice period
  - Since there was lots of opportunity, she didn't mitigate properly by not finding a job
    - So they decreased her notice period again
  - ABCA: even if it was a failure to mitigate, it should not have been considered in the *Bardal* analysis because that cuts the notice damages twice.

Ultimately the ABCA found that there was no failure of the duty at all and established the framework for a duty to mitigate analysis

- Onus is on employer to establish employee failed to mitigate its losses from termination
- Tactical burden on employee to produce evidence rebutting this allegation
  - Any gaps in evidence will favour the employee
- Decisions of employee with respect to mitigation efforts will not use hindsight
  - Mitigation efforts do not need to be perfect but reasonable
  - Efforts she took may or may not have helped, but if they were reasonable, that's enough
- Of particular importance: employees do *not* have to take a job that is not comparable to their old job just to satisfy the duty
  - An engineer does not have to take a job at McDonalds just to prove they mitigated

- If an employee finds a comparable job that is 90% of their old salary, they can bring action for the employer to pay the remaining 10% for the remainder of the notice period (though legal fees would likely be more than this)
  - If an employee finds a non comparable job of 50% of their old salary, they could argue that this was not required of mitigation and sue for the full 100% still
- Do not have to take jobs that are fundamentally different, require different skills or qualifications, significant demotions, feelings of humiliation, relocation or return to the dismissing employer (though this one has exceptions)

- North Hill News was decently persuasive, despite losing
  - She undertook 6 months retraining rather than looking for new work
  - She rejected a job offer for part time work using different equipment
  - She delayed responding to competitor company who approached her after termination
  - She failed to apply for other positions with publishers who provided job training
  - She failed to respond to job postings in the industry
- All were good arguments, but kind of dealt the same way: the mitigation does not need to be perfect but reasonable and inferior jobs need not be taken in the name of the Duty.
- A lot of consideration was given to how her knowledge was so specific to North Hill that it was not unreasonable for her to seek outside training
  - Usually corporations will send a termination letter and lay out what expenses they will cover as part of their termination (retraining, resume training…)
    - This shows good faith on the employer and makes them look good in court
    - They will often also include a reference letter
    - Decreases hostility, explains to new employers that the decision was financial (not about employee incompetence) and works to duty to mitigate
- In essence, this case really highlights how courts will favour employees by granting a very broad consideration of how they performed the duty

When considering costs of mitigation (the $700 training): only expenses that flow from mitigation necessitated by lack of notice is recoverable, not costs that flow from the termination itself.

- This makes sense, but is pretty tricky in application; how do you distinguish expenses incurred to find alternative work incurred by lack of reasonable notice vs expenses that would have been incurred even if given at termination date… she would have done training either way

This brings in a lot of practical advice:

- For employers
  - Duty to Mitigate is a standard defence to wrongful termination but do not rely on it
  - Explore employee's mitigation efforts through questioning
  - Amass evidence of available and suitable alternate jobs in the notice period
- For employees
  - Be mindful of tactical burden of proving adequate mitigation efforts
  - Keep a diary of search efforts, job postings responded to and results
  - Consider retraining or recruiters for mitigation (keep records of costs incurred)

Again from the *Deputat v Edmonton School District* case, the employer argued that Deputat failed to mitigate because he did not make reasonable efforts to find alternate employment during the 12 months of working notice he received (he only started looking 8 months into the notice period)

- Does an employee who is given working notice still have a duty to mitigate during that working notice period?
  - ABCA: Yes, employees have to do so

- Additionally, if a new job is secured while still at the old job, the employee has to take the new job to satisfy the duty since the new job is presumably for indefinite duration but the old job will expire in X amount of time
  - The employee wouldn't get the remaining notice since they properly mitigated
- Notice is given for the very purpose of allowing the employee to find a new job and cushion the blow of losing the job
  - This is practically only available to employees who are given insufficient notice and who want to sue for more
- Even if the breach had not yet occurred, the duty to mitigate starts before the date of termination – the duty starts on the day of wrongful termination
  - How can there been a duty when the breach has not occurred? Nothing has crystallized so how can the damages be influenced?
- Deputat didn't start looking for new employment for 8 months after being given his notice, so he failed to mitigate

Evans v Teamsters Local Union No 31, 2008 SCC 20

Facts:

Evans (plaintiff, appellant) was employed as a business agent at Teamsters for over 23 years in Whitehorse as the only employee in that office. During a union election for president, Evans supported the incumbent president who eventually lost. He was then dismissed by the new president

- The new president, Hennessy asked his counsel McGrady about terminating 6 employees, including Evans

Hennessy sent Evans his termination letter. Evans' attorney wrote Hennessy stating that Evans was entitled to 24 months notice pay, or 12 months continued work and 12 months notice pay

- The union continued to pay Evans his salary and benefits during negotiations (5 months)

Local's counsel concluded negotiations and requested Evans return to work for the 24 months notice period. If he did not, he would be terminated for cause

- Evans' counsel considered this an acceptance of Evans demand. He stated Evans would only return to work if Local withdrew the notice of termination, which the union was not prepared to do, so Evans never returned to work

Evans then sought action for wrongful dismissal without notice. Local's stated Evans failed to mitigate loss by declining to return to work

Procedural History:

Trial court found returning to work was not reasonable. Court of Appeal allowed the appeal.

Issue:

Was Evans obligated to return to work for an employer that just terminated him to mitigate damages?

Analysis (Bastarache J):

In some cases, mitigation will require the employee to return to work of the old employer if temporary. This is consistent with damages being to compensate lack of notice, not to penalize for the termination itself.

- Employers who provide working notice are not required to pay out simply because the contract will be terminated
- Terminating in 12 months is effectively the same as terminating immediately and offering 12 months continued employment: the employee knows duration is finite.

It is fair to assume that an employee can be expected to mitigate damages by returning to work for the dismissing employer. This presumption only operates where returning to the workplace is reasonable.

- Where the employer offers re-employment for the rest of the notice period, the analysis is whether a reasonable person would accept such an offer:

- Where pay is the same, working conditions are not substantially different , work is not demeaning, personal relationships are not acrimonious
- Other things to consider: nature of employment, whether the employee has commenced litigation or if re-employment was offered while the employee was still working or whether after they had left

The evaluation is objective (reasonable person accept the offer) but contextual considerations elements including stigma, loss of dignity, nature of working conditions are to be considered

- Absent these elements, it is a failure of the duty to leave before notice period ends.

Application to the Facts

The union had the onus to prove returning to work was reasonable, which the trial judge found was not established. Since this is mixed fact and law, it is only subject to appellate intervention with palpable and overriding error

- The Court of Appeal overturned the decision because Evans agreed to return to work subject to certain conditions.
- The fact that an employee may be willing to return to work if certain terms are met does not, however, automatically lead to the conclusion that the employment relationship has not been severely harmed. Indeed, just because a wrongfully dismissed employee is willing to return to work notwithstanding a damaged relationship does not mean that the law ought to require him to do so

The trial judge found no acrimony between Evans and Hennessy or any other employee. Evans confirmed the work environment had not charged 5 months after the letter was sent.

- The unions offer was in good faith and a true opportunity and fulfilled Evans requested 24-month period

Conclusion:

Not returning to work was a failure of Evans to mitigate

Hold, Order:

Appeal dismissed

Ratio:

If a reasonable person would accept the offer of continued employment for the notice period (or part thereof) and would not be embarrassed, humiliated or faced with an atmosphere of hostility, the employes is required to continue working to satisfy the duty to mitigate.

SCC states that there is no principled reason to distinguish duty to mitigate by returning to a dismissing employer in cases of constructive dismissal vs cases of wrongful dismissal without notice or cause.

- In reality, constructive dismissal cases are risky since if they tell the employer they feel constructively dismissed that breaks the trust between employer and employee
  - The employer can thus argue the employee had the chance to stay at the job but didn't
  - This means mitigation comes out in virtually every constructive dismissal case
- But, the SCC says it can come out in wrongful termination cases as well

Since damages for wrongful dismissal are for failure to give notice, rather than the termination itself, the employee will be required to stay at the job during the notice period in order to satisfy the duty to mitigate – they employer should not have to pay out simply because the contract will end in accordance with contract and employment law.

- Continued employment during notice period is treated the same as immediate termination with a re-offer to come back for the notice period
- But there is a human element – it is only required by the duty to continue working/accept re-employment if it is reasonable to do so
- Factors to consider for reasonableness:
  - Terms or re-employment being the same and working conditions largely unchanged

- Continued work is not demeaning, hostile, humiliating or with stigma, loss of dignity
- Personal relationships not acrimonious
- Nature of termination, history and nature of employment
- Has employee commenced litigation? Was offer made while employee was still working?
- Whether employee expressed willingness to return (but this is not determinative)

- These indicate whether the work relationship would be tenable to allow return reasonably
  - The factors indicated little bad blood between Evans and Teamster; subjective feelings were given little credence since there was little objective reason to it

The SCC states how this framework would naturally find employees terminated for change in position (rather than performance) will be required to mitigate by returning to the employee more than employees who are terminated for other reasons.

- This is not necessarily because it is constructive, but because the termination of the original contract is not personal rather than being terminated for individual reasons
- This kind of mitigation requires "a situation of mutual understanding and respect, and a situation where neither he employer nor the employee is likely to put the other's interests in jeopardy

Abella in dissent put up a good argument as to why the exchanges between counsel made it hard that after 5 months Evans could return with notice

- She would distinguish constructive dismissal and wrongful termination since there are just realistically different attitudes in either – more emphasis on employees subjective feelings
- Creates a slippery slope where employees have to return to employers that just punted them

Magnan v Brandt Tractor Ltd, 2008 ABCA 345

Facts:

Magnan (plaintiff) was employed at Brandt Tractor ("Brandt" defendant) for 38 years. Brandt had a mandatory retirement policy at 65 years of age.

- Magnan discussed with Brandt his retirement and was told that on his 65th birthday (in November) he could work until the years end.

Magnan made it clear he did not respect Brandt's retirement policy and confirmed that, while he would respect the policy, he was not resigning.

- Brandt had hired a replacement for Magnan and Magnan then had to train the new hire
- At the office Christmas party, Magnan was thanked for his service and given a gift

Magnan's attorney then wrote to Brandt saying Magnan did not want to retire, and that the policy was contrary to Alberta human rights law. Brandt responded saying that Magnan could return to work in the new year, which he did.

- Brandt then expressed disappointment that Magnan misrepresented his feelings and allowed a new employee to be hired and accepted a retirement gift and then returning.

Magnan then informed Brandt he would not return and brought action for wrongful dismissal

Procedural History:

Alberta Court of Queens Bench found Magnan constructively dismissed and awarded Magnan three months notice on the fact that Magnan intended to retire March 31.

Issue:

Was Magnan's failure to return to work in January a failure to mitigate?

Rule:

Evans: Employees are obligated to return to work during the notice period to satisfy their duty to mitigate so long as doing so would not be humiliating or demeaning

Analysis:

The trial judge found it unreasonable to return to work to Brandt and there is no palpable and overriding error in this. It is also rejected that Magnan voluntarily removed himself from the work force

- He was only removed because of Brandt's actions, which were a violation of human rights and thus would be demeaning, degrading and an affront to personal dignity to return
- He had publicly accepted a retirement gift and said goodbye
- Brandt's communications had clear hostility in them and alleged Magnan was dishonest
- There was no evidence that other opportunities existed even if he stayed in the Edmonton area.

Conclusion:
No failure to mitigate

Hold, Order:
Appeal allowed; 7 additional months notice granted.

Ratio:
Contextual factors like a forced retirement and hostile interactions can make return unreasonable.

This case put to bed Abella's fear in *Evans* – the duty to mitigate would turn into a duty to return to an employer that just dismissed them. Courts are willing to listen to her warning and find the dismissed employee is not always obliged to return to the dismissing employee to fulfill their duty to mitigate

- Will also give credence to the subjective fears and feelings of the dismissed employee in considering reasonableness of a return to work
- In essence, this case confirmed *Evans* logic but with the benefit of hindsight of Abella's fears and properly addressed them to expand out understanding of this duty to mitigate.
- The issues of dishonesty and breach of trust that were implied by Brandt are real killers to their claim – when issues like trust and dishonesty are accepted, it is almost always unreasonable for the employee to return to that employment.

Russo v Kerr Brothers, 2011 ONSC 6053

Facts:
Kerr Brothers (defendant) is a manufacturer of candy products. Russo (plaintiff) was an employee at Kerr Brothers for 37 years and is the only full-time employee of the company. At the time of termination, he was 53 years old. After starting as a shipping clerk, he maintained the position of warehouse manager since 1977.

- He was paid bi-monthly for a salary of $85,000 and an annual lump sum of $30,000 and had the option to participate in Kerr Brother's pension plan

Kerr Brothers acquired Mr. Zakaria to help with Kerr Brothers financial difficulties.

- He found that renumeration packages were far in excess of the normal market. He asked all employees to take a 10% reduction in compensation and dissolved the pension plan

Zakaria then discussed and reduced Russo's salary to $60,000 with no bonus. Russo retained counsel who wrote to Kerr Brothers. While counsel discussed, Russo continued working and received the reduced pay. Russo did not consent and protested to the unilateral alteration of terms.

- Russo then brought action for constructive dismissal

Issue:
Was Russo's continuation of work for Kerr Brothers acquiescence of new terms, or mitigating losses?

Rule:
Evans: Employees are obligated to return to work during the notice period to satisfy their duty to mitigate so long as doing so would not be humiliating or demeaning

Analysis:

The action is for constructive dismissal where Russo accepts the alteration of terms as a repudiation but remained in his employment as a means of mitigating damages but did not consent to the change. The rejection was communicated by Russo's counsel

- Kerr Brothers could not have taken it any other way, that Russo considered himself constructively dismissed and the contract ended at that point.
- When Russo stayed working, the employer had no basis to consider the employee was now working under the new employment contract

It is true that employees have to make a choice when there is a constructive dismissal, the employer must also make a decision.

- Upon learning that the plaintiff does not accept the new terms, the employer can tell the plaintiff to leave the workplace or kept the old terms
  - Kerr Brothers did neither of these. It allowed the plaintiff to remain in the workplace knowing that Russo considered himself constructively dismissed and didn't accept the new terms.
    - The plaintiff was merely mitigating his loss

The plaintiff is entitled to stay employed at the workplace after being constructively dismissed, but they can only do so during the period of reasonable notice.

- If he stays after that period, he must be considered to have acquiesced to the new terms and is now under that new employment contract.
- He is thus entitled to all damages of his entire notice period

Bardal factors

- 53 years old, future employment difficult renumeration unlikely to be found elsewhere. A lengthy period is appropriate – 22 months is acceptable.

Hold, Order:

Motion allowed

Ratio:

The plaintiff is entitled to stay employed at the workplace after being constructively dismissed, but they can only do so during the period of reasonable notice. Staying after this period will acquiesce to the new contract

Employers have a duty upon learning an employee considers themselves constructively dismissed: must keep old terms or terminate the employee. Neither allows employee to mitigate

Russo alleged that the 10% cut to his wage was a unilateral breach of a substantial term and thus a constructive dismissal

- Practically speaking, this was a little risky. 10% cuts are a rule of thumb to be acceptable with 12-14% as a yellow zone and 15% as not acceptable. But the pension in this case was a big deal
  - So the cuts were quite large and gave no notice (employers should always give lots of notice). This was able to show it was a constructive dismissal
  - He expressly protested the change, as evidenced by his lawyers letter, which literally stated Russo considered this a constructive dismissal.
- Russo argued his *Bardals* entitled him to 28 months since it is unlikely or impossible to find new employment after this termination. Russo was "uniquely vulnerable" after being employed with Kerr his whole life with no education or other training.
  - Reasonable notice don't have a legal cap, though courts usually bring it down so it very rarely will ever exceed 24 months
- Kerr Brothers concedes that the termination was a constructive dismissal, but argues that Russo condoned the new changes to the contract since he had reasonable period to decide whether to leave employment or not after wages were reduced. Kerr argued he could either 1) accept the change or 2) resign and claim constructive dismissal

    - This assertion is not the law
- Constructive dismissal is a repudiation of the contract, which must be clearly accepted by the innocent party in bring the contract to an end. This will be considered the end of the contract. Employees must clearly communicate they reject the change and treat it as repudiation
    - Recently Alberta courts have asserted that if you are a sophisticated party facing a constructive dismissal, non-consent to the change needs to be raised quickly. Courts are avoiding time limits but they are making clear that lollygagging could lead to acquiescence
- The actions of Russo made his intentions clear: it is unreasonable for Kerr Brothers to have interpreted in any different than Russo considering himself constructively dismissed and accepted the new terms temporarily as a means of mitigating losses from the dismissal
    - Had his lawyers not send the very clear rejection, this may not have been true

The court said that both the employee and employer have choices to make when faced with a constructive dismissal
- Employee has a choice:
    - Accept modified terms of employment and continue working for employer
    - Object to new terms, treat themselves as constructively dismissed, resign and sue
    - Object to new terms, treat themselves as constructively dismissed at point of change but continue working under the terms as part of duty to mitigate ("work under protest")
        - The Court adds here there is a limitation to Option 3: continuing work under new terms past the notice period may constitute acquiescence of the new terms
- Employer has a choice too upon learning that employee is working under protest:
    - Terminate immediately
    - Continue employing the employee under the old terms and at the end of the notice period, offer them the new contract (*Wronko*)
    - Do nothing
        - This is what Kerr did, but this just let Russo mitigate his damages and reduce their damages liability
- This addition is good because it puts risk on the employer.
    - If Kerr said "thanks for the letter, get out" then Russo would have to mitigate but it wouldn't have to worry about staying at the employment since trust was broken

The *MacKenzie v 1785863 Ontario Ltd,* 2018 ONSC 3442 case is a new line of authority out of Ontario but is helpful for Alberta.
- When a wrongfully dismissed employee takes up employment during what would have been her reasonable notice period that is an inferior position and/or reduced salary, income generated is not deductible from the wrongful termination damages as mitigation for the income loss
- Because mitigation does not require you to take lesser work, they will not be deducted from the notice pay for wrongful dismissal
    - If they were deducted, it would be incentive to take lesser jobs

In *Brake v PJ-M2R* (PJ-M2R is McDonalds idk why it is different in the style of cause), Ms. Brake was put on a Performance Improvement Plan and was basically told if she didn't do better that she would be demoted or fired for cause. The Court found this a constructive dismissal given it's inferiority and embarrassing demotion.
- She did not have to take the new role as mitigation (*Evans*) so there was no deductions from the wrongful dismissal damages

Giza v Sechelt School Bus Service Ltd, 2012 BCCA 18

Facts:
Giza (appellant) was a bus driver with Sechelt School Bus Service ("Sechelt", respondent). After discussing a bump in his wage, Mr. Gould and Giza had disagreements about a change in bus routes, which Giza voiced to school officials.
- Mr. Gould found this inappropriate so left a termination notice on his bus driver's seat that gave him his 5 weeks statutory notice.
  - On the day he was terminated, he never returned to work and brought action for wrongful dismissal

Procedural History:
BC Supreme Court found 5 weeks notice was inadequate but Giza breached the contract by failing to work after notice was given

Issue:
Did the respondent repudiate the contract by failing to return to work during the notice period?
Analysis:
The trial judge was correct to find that the note period was inadequate. However, the trial judge erred by saying that failing to work during the notice period, the appellant lost his entitlement to reasonable notice or damages in lieu thereof.
- Giza was not constructively dismissed and was the first to repudiate the contract by not returning to work for the notice period
  - However, this does not deprive him of his rights to damage for inadequate notice
  - The moment he was given unreasonable notice, his damages crystallized
    - His repudiation cannot take away from that

Giza is entitled to 5 months notice considering his advanced age.
Conclusion:
Repudiation yes but still entitled to damages.
Hold, Order:
Appeal allowed; appellant awarded costs

Ratio:
Where an employer wrongfully terminates an employee with inadequate notice, the damages crystallize on that date. It is a repudiation of the contract to not work the remainder of the period given by the employer, but that would not eliminate damages in lieu of reasonable notice.

Cases like this are a cautionary tale in not just calling Employment Standards and asking how much notice should be given, because they will only tell you the statutory minimums. They can not and will not tell you what common law notice you get.

The trial court agreed that the 5 weeks was unreasonable, but didn't find it either a constructive dismissal or a wrongful termination, it was just a straight up breach of contract. However, they found that Giza was not entitled to see the contract at an end and had to work the notice period – he repudiated it by not doing this. This is obviously not the law
- The BCCA said working notice brings the contract to an end when the notice period is over.
- Where working notice is insufficient, that is a breach of contract but is not a repudiation
  - It is when the employee refuses to work during the working notice period (whether it is adequate length or not) that is the repudiation but that will *not* disentitle an employee from seeking payment for the full notice period they are entitled to

        - The contract still exists and not going in is a repudiation even if the breach had already occurred (and thus the damages crystallized)
    - But the court will likely deduce the working notice period given from damages as mitigation the employee should have taken.
    - So while Giza was entitled to 6 months notice, 5 weeks statutory notice was deducted since that was given and he ought to have accepted it as mitigation.

Contractually Fixed Termination Notices

Having established the parameters around which duty to mitigate is shaped for employment law, the question inevitably goes to if contractually fixed termination notices are subject to mitigation.

- Fixing termination notice is very common in employment contracts: these provisions will state clearly how much reasonable notice is required on termination
    - Just a way of contracting out of common law duty of reasonable notice

Boutcher v Clearwater Seafoods Ltd Partnership, 2010 NSCA 12

Facts:

Boutcher (plaintiff) and Knickle captained a scallop vessel for Clearwater Seafoods (defendant). Boutcher was 59 at trial, and had been fishing with Clearwater since he was 15.

- The two did not have a written employment contract

December 4, 1996: VP Mr. Matthews gave the two captains termination notice of 18 months as a part of re-organizing their fleet for efficiency purposes in December 1996

- April 28, 1998: Captain Pittman assured the two they would be employed beyond that period but told them they could only continue on if they signed a Multi Trip Agreement ("MTA")
    - The terms had the same compensation and benefits as they were making but had a termination clause where either party was entitled to 30 days notice or payment of a fixed sum ($25,000) on termination
        - Both captains signed the agreement.

January 2003: Clearwater modernized their fleet and presented the captains a Single Trip Agreement ("STA") that was effectively the same as the MTA except that it did not have medical benefits and no termination provisions with an entire agreement clause. These intended to be signed after each departure from port.

- Again, the captains signed a STA each time they departed for sea

January 2005: Clearwater completed modernizing their fleet and terminated Boutcher since his ship was phased out. They offered him another captain position.

- After inquiring about the position with his lawyer, Boutcher rejected the position as a significant pay decrease from his previous job.
- Boutcher then brought action for wrongful dismissal.

Procedural History:

The Nova Scotia Supreme Court ruled both captains were wrongfully dismissed and entitled to 16 months notice. However, Boutcher's failure to accept the other position did not satisfy his duty to mitigate and disentitled him from damages.

Issue:

Is an employee under a duty to mitigate wrongful termination losses when the right to termination pay is established or fixed in the employment contract?

Analysis:

Notice of Termination

Both captains argue that the assurances from Captain Pittman diluted the clear and unequivocal notice of termination.

- This cannot be true. Matthews delivered two explicit notices of termination and Pittman's comments were more subject to "new arrangements".
- It was clear their vessels were changing but the option of re-hire as stated in the termination notice did not negate the clear notice of termination
- The conclusion of the trial judge that just shy of 17 months notice was sufficient has no overriding error.

Findings of Trial Judge (accepted on appeal):

- Original contract was properly terminated effective April 30, 1998 with reasonable notice supplied on December 1996
  - All years of service are effectively wiped out
- MTA was enforceable, properly supported by consideration
- MTA was wrongfully terminated pursuant to it's own termination clause (neither 30 days nor $25,000 was given)
  - So, $25,000 is owed to each captain
- STA is void for want of consideration
  - Invalid attempt to vary terms of MTA without fresh consideration
  - STA is void and unenforceable – all of its terms are useless
- January 2003 onwards, captains worked under unwritten contract that were wrongfully terminated without reasonable notice in December 2005
  - So, common law damages for lack of reasonable notice, equivalent to 3 months' salary based on years of service from 2003 onwards, are owed

Mitigation

Clearwater argues that their payment of $25,000 is eliminated by the captains securing mitigation income.

- The MTA was not intended to be subject to or reduced by mitigation and the $25,000 is fixed by the contract. It is independent of any future earnings

Clearwater also argues that Boutcher failed to mitigate by not taking the alternative work offered from Clearwater on termination.

- In *Evans,* it was found that an employee who fails to re-employ themselves from a former employer will be unreasonable. But this is subject to if the re-employment would have hostility, embarrassment or humiliation
- The new position had substantially less pay and different obligations, so he could not have reasonably been expected to accept it

The duty to mitigate must be exercised in the reasonable notice period. The career choices after the expiry of reasonable notice don't impact the damages.

- The new position would not be available until after a 3 month reasonable notice period had lapsed; even if he took the offer it would not have mitigated his loss of income in the relevant 3 month period.
- For this termination, Boutcher was entitled to 3 months notice.

Conclusion:

No failure to mitigate

Hold, Order:

Appeal allowed

Ratio:

Where a termination provision contemplates a flat sum supplied on termination, mitigation is not required nor relevant absent explicit wording that requires it

In this case, it is easiest to break the employment down into various contracts

- 1970s – April 1998: Unwritten contract
  - Property terminated by giving notice in December 1996

- May 1998 – January 2003: MTA Agreement
    - The MTA was properly presented and signed as a fresh contract of employment effective May 1, 1998 and was a proper *Wronko* style termination:
        - Employer wanted to change terms of the contract so brought existing contract to an end with proper working notice and then offered new employment on new terms on the old contracts expiry
    - This ended on January 2003 with (attempted) transition from MTA to STA.
        - $25,000 or 30 days notice should have been given
        - The transition not being properly implemented voids the STA – it is useless
    - The termination provision in this case is the big takeaway
        - Because all it said was that $25,000/30 days was given on termination, there is no contemplation of mitigation happens. It is a simple "if A happens, you get B"
        - Since they were terminated from the MTA, they should have got $25,000 or 30 days – mitigation is completely irrelevant
        - If contract said "on termination you will get either $25,000 or 30 days working notice *subject to mitigation*", then mitigation would have to be considered
            - This means that termination provisions, absent explicit or implied mention of mitigation, are not to be influenced by mitigation measures
- January 2003 – January 2005
    - Since the STA was not enforceable, the two are under an unwritten contract
    - Without a termination provision in the contract, they were entitled to common law reasonable notice as usual
    - There was no failure to mitigate by Boutcher for not taking the other position because it was such a substantial pay cut and a different job (*Evans*)
        - Even if it was, the new job started beyond the notice period so it would have and no impact on the end result
        - Duty to mitigate is only needed during the reasonable notice period, so if they get offered a job after that period, it has no impact

Example of a termination provision that contemplates mitigation:

> "Employer is prepared to offer salary continuance for 12 months beginning on January 1. If employee finds new employment by March 1 then salary continuance will cease but employer will pay lump sum of 75% of remaining 10 months of salary continuance; if employee finds employment by May 1, then employer will pay 50% of remaining 8 months of salary continuance; if employee finds employment by July 1, then employer will pay lump sum of 25% of remaining 6 months of salary continuance."

Problem is, it is a little ambiguous and it necessitates the employer babying the employee or invites the employee to lie and say they haven't found a job

Bowes v Goss Power Products Ltd, 2012 ONCA 425

Facts:

Bowes (plaintiff, appellant) was VP with Goss Power Products ("Goss", defendant, respondent). The contract included a termination provision that says working notice is a sliding scale depending on years of service, but makes no mention of mitigation.

- Bowes was terminated without cause or notice, so was owed 6 months salary. The letter stated he was required to find employment in that period and inform Goss when secured.

Bowes found employment within 2 weeks of the same salary and Goss stopped paying after 3 weeks (the statutory minimum). Bowes brought action to determine if he was entitled to the 6 months from the employment agreement.

Procedural History:
Applications judge implied a duty to mitigation in the contract and dismissed the application.

Issue:
Does the duty to mitigate extend when there is a fixed term of notice/pay in lieu and the employment contract is silent with respect to mitigation?

Rule:
Boutcher: where a termination provision provides a lump sum to be supplied in cases of termination it is independent of mitigation

Analysis:
Wrongfully dismissed employees are entitled to damages for an employer's breach of duty to provide reasonable notice in advance of termination. Those damages are calculated at common law but can be contracted out of via prescribing a fixed notice period or pay in lieu thereof that the employee is entitled to instead.

- Doing so provides finality on termination and avoids uncertainty and risks of litigating over common law computation of damages.

An employment agreement that has a fixed notice period/pay in lieu should be treated as fixing liquidated damages. As such, no duty to mitigate damages can arise.

- The application judge erred by treating this fixed term as indistinguishable from common law reasonable notice since the parties specifically contracted out of it
    - Contracting out of common law reasonable notice also removes the duty to mitigate. Clear wording is needed for the duty to continue applying

The respondent argues that to find otherwise would allow the appellant to get a windfall. But a contract is a contact, and it is expected to be honoured.

- It would be more unfair for the employer to promise fixed payout and then inform the employee it won't be paid out because of mitigation.

Given the employment contract in question, it is clear that the parties did not intend that mitigation would come into play in the termination.

Conclusion:
Payout still required

Hold, Order:
Appeal allowed

Ratio:
Where parties agree to a fixed notice period in the contract, the duty to mitigate is not implied but must be included explicitly.

The applications judge found that where there is a fixed termination pay entitlement, that entitlement is presumed to be subject to mitigation; it is subject to mitigation unless stated otherwise. Since Bowes mitigated within the reasonable notice period, he was not entitled to further termination pay beyond the statutory minimum of 3 weeks notice.

- The ONCA completely reversed this and said the parties intended to designate a fixed sum owed upon termination, irrespective of mitigation, to provide certainty and closure at termination
- The lack of mention in the provision is consistent with this because subjecting the provision to mitigation would undo the certainty and predictability gained in the clause
    - Bowes' successful mitigation should thus be of no influence on the lump sum
- Similarly, though not discussed in this case, statutory minimum notices are never subject to mitigation

As a practical point on this, when drafting termination provisions with fixed notice or pay in lieu entitlements, ensure they encompass and are not in addition to statutory minimum notice periods and they cover the issue of whether mitigation applies for greater certainty

Extraordinary Damages

What are the employer's duties when actually executing a termination? When is an employer liable for aggravated or punitive damages that go beyond reasonable notice damages in the context of wrongful dismissal cases?

- The two main types of damages that are used in a more punishment oriented way for bad behaviour are aggravated damages and punitive damages.

Wallace v United Grain Growers was a 1997 case that dealt with punitive damages. It isn't good law anymore, but lawyers still try to use the pieces as much as they can

- Wallace was entitled to 15 months notice paid out. But the SCC found that the employer breached their duty of good faith and fair dealing in how they terminated Wallace, so they awarded a 9 month "bump" to his 15 months (24 months total)
  - This is known as a "Wallace bump" and is a form of aggravated damages
- Common law imposes good faith as an obligation that does not need to be contracted in and has to be exercised in the conduct and manner of terminating an employee (especially without cause) but it does *not* mean you have a good faith or legitimate reason to terminate someone.
  - Good faith in termination means employers must be candid, reasonable and honest and avoid being untruthful, misleading or unduly unsensitive when terminating an employee
  - It is a duty that attaches to the conduct of the employer in the course of termination, not to the reasons for terminating
    - In *Wallace*, they compensated a breach of good faith in the process of termination by adding more time onto the pay in lieu of reasonable notice
    - Courts started to apply it routinely. All that had to be done is establish some undue hardship, dishonesty or "bad faith" and add time on the notice period
      - This is no longer good law and has been amended
      - Just because you were treated bad does not mean it will take you longer to find a job
      - Provincial courts started to deviate from this rule as best they could such that the SCC had to address it again in *Honda Keays*

Keays v Honda Canada Inc, 2008 SCC 39

Facts:

Keays (plaintiff, respondent) started working at Honda Canada Inc ("Honda", defendant, appellant) on the assembly line in 1986. 11 years later, he was diagnosed with chronic fatigue syndrome ("CFS") so he took leave and began receiving insurance from an independent insurance provider.

- Insurance was discontinued in 1998 when Keays was found able to return to work full time

Keays continued to be absent from work and was placed in the Honda Disability Program

- Keays missed more work than his physician thought reasonable, so Honda believed the absences were not medically explained.
- Honda hired Dr. Affoo to evaluate Keays and Dr. Brennan to assess how his disability could be accommodated.
  - Keays decided to retain counsel out of fear he would be terminated. They sent Honda a letter with concerns, which Honda never responded to

In March 2000, Keays met with his supervisor who said they were no longer accommodating his existing doctor notes and asked Keays to be assessed by Dr. Brennan.

- Honda gave him a letter summarizing their hopes he would cooperate and meet with Dr. Brennan, as well as maintained their commitment to supporting his return to work.
  - However, they noted that if things didn't improve, they may have to terminate him

- Keays remained unwilling to meet with Dr. Brennan and was terminated.

Keays brought action for wrongful dismissal.

Procedural History:
The Ontario Superior Court of Justice found that Keays was allowed to resist meeting with Dr. Brennan and that Keays was entitled to 15 months working notice.

- Honda displayed bad faith and extended the notice to 24 months and was awarded $500,000 in punitive damages for Honda's discrimination against his medical conditions

Ontario Court of Appeal found the dismissal was a disproportionate response to his insubordination and agreed with the notice period and *Wallace* bump but reduced punitive damages to $100,000.

Issue:
What form and quantum of aggravated damages did Honda's actions attract?

Rule:
Wallace: Employees are under an unwritten duty to act in good faith in the manner of terminating employees. If there is a breach in this duty, additional damages to the reasonable notice can be added

Analysis:

General Damages

Keays was one of the first employees hired by Honda and he spent his entire working life there. He had no formal education and had an incapacitating illness

- Re-employment was unlikely so 15 months notice is reasonable

Aggravated and Punitive Damages

The trial judge increased 15 to 24 months based on Honda's "egregious conduct" that was "planned and deliberate and formed a protracted corporate conspiracy" of which there is simply no evidence. *Wallace* Award analysis:

- Letter sent to Keys from Honda:
  - The entire letter was one where Honda recognized that Keays had a disability and it had to be dealt with
  - Honda has every right to asses accommodations and ask if it is reasonable
    - They weren't asking him to be treated by another doctor, just assessed by another doctor. This it the employers right
- "Hardball"
  - Keays asserts Dr. Brennan had made up his mind about Keays before he met with him, but no evidence supports this
  - He noted that CFS is controversial and many doctors do not see it as a "stand alone" diagnosis, but this does not indicate he was playing "hardball"
    - Even if he did, Honda cannot be faulted for believing expert advice
- Reprisal
  - The decision to stop accepting Keays' doctor notes was not a reprisal for Keays' seeking legal counsel
  - Supervisors had met to discuss Keays before he obtained counsel
- Mental Health
  - It may be true that Keays' mental health declined after the termination, but it was not proved that this was because of the manner of termination as opposed to the mere fact that he was terminated.
    - Just being terminated will never give rise to aggravated damages

There is no bad faith exercised, so no *Wallace* bump is justified, nor are punitive damages.

New Framework for Damages

Compensatory damages for a breach of contractual duty ought to compensate for the actual losses stemming from that breach
- Damages cannot be increased from the circumstances around the dismissal and an employee's hurt feelings

Damages for breach of the duty to terminate in a good faith manner ought to be based on the mental anguish caused by the bad faith manner of termination
- Distress from dismissal is always a possibility, so the anguish must be beyond this
- *Wallace* is inappropriate since, distress should not be used to extend the notice period as these are fixed depending on the *Bardal* factors; conflating damages from failing to give reasonable notice and failure to act in a good faith manner is not proper since these are two very different breaches
  - Instead, damages for breach of duty to terminate in good faith should be awarded as a type of aggravated or punitive damages as they compensate for nonpecuniary damages
  - To bump the reasonable notice and then attach punitive damages (as the lower courts did) would be granting a windfall to the employee
- Such cases could be: attacking their reputation, misrepresentation for the reason of dismissal, or dismissal to deprive of a pension plan

Punitive Damages

While breach of good faith can act as an independent cause of action, punitive damages are only to be given in the most exceptional cases. They are to be based on actions during termination that are independent, actionable wrongs
- They are to be "harsh, vindictive, reprehensible and malicious" in nature

Honda's conduct to Keays must be contemplated:
- It is true that Keays valued his job and depending on it for disability payments, but this does not justify punitive damages.
  - It is wrong to blame Honda for Keays' losing benefits
- Honda was unaware of the true nature of Keays' illness because Keays would not facilitate an exchange of information about it
- It is not egregious for Honda to not deal with Keays' counsel
  - It was harsh, but not justification for punitive damages

Conclusion:

Only appropriate damages were those for failing to give reasonable notice

Hold, Order:

Appeal allowed; punitive damages and conduct in dismissal set aside

Ratio:

A breach of good faith can award punitive or aggravated damages, but they cannot be added to the damages for failure to give reasonable notice.

With this separation of general damages from aggravated and punitive damages, the SCC made it harder for courts to just bump the notice period damages because they need to establish enough breach of good faith or malicious conduct to ground a new head of damages.

- Otherwise courts could double punish a big corporation like Honda by bumping the general damages and then tacking on punitive damages as well
  - Even in this case Honda ended up paying 15 months notice only compared to the trial judge awarding them 24 months notice (15 months general + 9 months aggravated) and half a million dollars punitive

Now damages can be considered as 3 very distinct types of damages

1. General Damages

a. Awarded for breach of substantive employment contract provisions and often paid as pay in lieu reasonable notice subject to the duty to mitigate

2. Aggravated Damages
    a. Breaches of *how* the employer terminated the employee (as opposed to the mere fact that the employer terminated the employee) can attract aggravated damages
    b. If there was a breach of the duty to terminate in good faith in a way that causes mental distress, that can create aggravated damages
        i. But it must go beyond the normal hurt of being terminated
        ii. This is the one time that courts will be more callous with an employee
    c. To secure aggravated "*Honda* damages" for an employer's bad faith manner in termination, an employee must prove:
        i. There was bad faith or unfairness in the manner of termination of an employee, and
        ii. They suffered mental distress or anguish as a result of this misconduct during the course of termination that is separate or in addition to the typical distress occasioned by the decision not terminate itself.
    d. The obligation on the employer is to ensure the termination is done in a good faith manner, not to ensure the employee has no mental health consequences from the termination (though mental health evidence from a psychologist is very helpful)
    e. This has made it a lot harder to prove aggravated damages are justified. They are more rarely awarded because of this
        i. There is no longer a ceiling or cap on the quantum without connection to reasonable notice period
3. Punitive Damages
    a. Awardable based on the actions of termination that are independent, actionable wrongs
    b. They are a rare award, reserved for the most egregious misconduct deserving of punishment
    c. "reprehensible, malicious, high-handed, marked departure" are the common descriptors
    d. They are to be added to compensatory damage awards for the purposes of retribution, deterrence and denunciation
        i. This is how they differ from aggravated damages, which are awarded to compensate the mental anguish of the employee
        ii. Aggravated is because the way termination was implemented made mental distress worse vs punitive is because the actions themselves were bad
    e. These must still be proportionate when looking at the global damage award. They are not mean to be compensatory – they are meant to punish reprehensible conduct

Since this case, aggravated and punitive damages are claimed in almost every employment law claim, but they rarely get awarded. There is even risks to pleading it knowing it may not get awarded.

- The SCC in this case reiterated that these damages are for more serious bad faith conduct. If the employer did not act badly, the costs can be turned back on the plaintiff for vexatiously alleging a serious claim like bad faith – accusing an employer of doing something very bad is not justified for mere lack to provide reasonable notice

Merrill Lynch Canada v Soost, 2010 ABCA 251

Facts:

Soost (respondent) was a high-performing investment advisor at Merrill Lynch (appellant). He was induced to leave his job with RBC at age 45 upon assurance of job security until retirement (provided his performance was adequate).

- Three years into the job, he was dismissed without notice since Merrill Lynch believed they had "half a dozen" reasons to dismiss for cause
- Immediately after his termination, letters were sent to his customers advising them that he had left but gave no reasons as to why he left.

Soost found a new employer within 3 weeks, but of lesser status and his income dropped drastically.

Procedural History:
ABQB found Merrill Lynch had no just cause and awarded Soost a year's pay in lieu and an additional $1,600,000 in damages for damage to his reputation

Issue:
Are courts permitted to award damages for the stigma and loss of business that dismissal brings?

Rule:
Two compensatory damages are awarded for "wrongful" terminations:
- Damages for breach of duty to provide reasonable notice of termination (*Bardal*)
- Damages for breach of duty of good faith and fair dealing in manner of termination (*Honda Keays*)

Analysis:
<u>General Damages</u>
Honda damages are only for compensating loss and are not punitive. If the proper damage was for loss of job, then the argument that Soost made substantially less under the new employer may ground damages. But this is not the law
- Employees of indefinite duration have no right to keep their job
- Decision to terminate is only "wrongful" if there is no cause to terminate, no reasonable notice of termination, of if it's for a protected human rights ground.

The trial judge found that the facts that Merrill Lynch thought amounted to just cause did indeed happen, but they did not amount to just cause. So, Soost was wrongfully terminated without cause.
- The trial judge's assessment that he was entitled to 12 months reasonable notice is awarded deference and won't be disturbed.

<u>Aggravated Damages</u>
Soost adduced various grounds to support his claim for *Honda* damages.
1. It was misleading for Merrill Lynch to fire Soost for cause when cause didn't exist
    a. A good faith or honesty belief in possessing grounds for just case bars *Honda* damages; the employer did not lie it just turned out what they believed was insufficient for just cause.
2. The manner of termination was unduly insensitive and harmful to his reputation in the eyes of his clients and future clients
    a. Stigma and economic losses are inevitable results of termination and there cannot be compensation for the normal prejudicial effects of losing one's job
        i. A termination ending in stigma does not ground undue sensitivity or bad faith in the manner of termination without more
3. Merrill Lynch was guilty of "extremely unfair competition" by setting up the dismissal so to sequester his clients.
    a. The client lists belonged to the employer, not the employee
    b. Once an employer and employee part ways, they are free to compete for clients as long as there was no confidential information or restrictive covenant.
    c. This does not give rise to damages and cannot itself be "undue unfairness"
    d. Soost was entitled to call clients and tell them what happened but did not do so

The test for aggravated damages is simply not made out.

Conclusion:
Detriment was from dismissal, not notice. No right to damages

Hold, Order:
Appeal allowed; $1.6M set aside

Ratio:
Stigma and economic losses are inevitable results of termination and there cannot be compensation for the normal prejudicial effects of losing one's job

This case is a nice illustration of the *Honda Keays* logic because Soost tried to bring a novel claim for $1.6 million in economic losses for a) lost compensation over the reasonable notice period, b) lost value of his book of business and c) mental anguish caused by the manner of termination

- He claimed the reasonable notice damages didn't adequately compensate for his actual losses arising from the wrongful termination
- Terminating for cause which did not actually exist stigmatized him in the investment community such that he lost clients and had to find inferior work
- While this is a compelling argument, this is where the court draws a line between someone being terminated (general damages) and the way they are terminated (aggravated damages)
  - There is a natural loss of pecuniary interest and a blow to stigma when you are fired, particularly in industries where clients are vital
  - This isn't something the court can compensate for by tacking on aggravated damages; a system like that would be unworkable since every employee who was terminated would claim that

The finding that Soost was entitled to 12 months is quite high for only 3 years of service, but since he was swayed away from his previous job this is likely the reason. Courts tend to be very generous when people are swayed away from their safe job (which is common in investment jobs)

The concepts of "good faith" are evolving in contract law with *Bhasin,* and *Wastech* recently found the duty of good faith exercised contractual discretion as implied in every contract. Employment law always allowed you to terminate who you want, but if they terminate one person over it could now be argued as a human rights issue or other damages.

- Similarly, the SCC *really* wanted to go into bad faith in *Matthews* because that was a pretty perfect example of a toxic work environment than lead to a wrongful termination

CHAPTER 5: TORTS IN THE WORKPLACE & SETTLEMENT AGREEMENTS

Torts in the Workplace

Elgert v Home Hardware Stores, 2011 ABCA 112

Facts:
Home Hardware (defendant, appellant) employed Elgert (plaintiff, respondent) and Ms. Bernier was manager. Elgert had worked at Home Hardware for 17 years when he was terminated without notice.

- Elgert was a supervisor and superior to Bernier. He had received various complaints about her performance and, in particular, her romance with a co-worker
- Elgert thus moved Bernier to a new location and Bernier became upset, and said she would "get even" with Elgert.

Bernier then informed her father, VP of Home Hardware that Elgert "belly bumped" her, pushed her on a bed and laid on top of her.

- Her father raised the issue of sexual harassment and an investigation was commenced
  - Elgert was suspended from employment without being given particulars

- The supervisor told Elgert's son, who also worked at the location that his father was suspended for sexual harassment and he was 100% sure he had done it

Elgert obtained counsel and the investigator (who was a friend of Bernier) refused to meet with them. Home Hardware sent Elgert a termination letter citing sexual harassment and insubordination

- Elgert brought action for wrongful dismissal and defamation

Procedural History:

At trial, jury found respondent was terminated without cause and awarded 24 months notice.

- An additional $300,000 was given in punitive damages, $200,000 in aggravated damages and $60,000 in defamation damages

Issue:

Do punitive and aggravated damages get put to the jury?

Analysis:

To determine if there is sufficient evidence for a trial judge to leave aggravated/punitive damages to the jury, it must be examined as a whole. If there is sufficient evidence to come to the conclusion that the manner of dismissal was done unfairly or in bad faith (aggravated) or harsh, reprehensible conduct (punitive) it should be put to the jury

Aggravated Damages

Aggravated damages are compensatory in nature and only awarded for the manner of dismissal, not the fact of dismissal, and grounded in bad faith conduct. Some proof of damages in order to ground one of these claims. As per *Honda Keays,* two parts: 1) bad faith and 2) mental anguish resulting from the bad faith manner of termination.

1. Bad faith:
   a. There is ample evidence on the record to support a finding of bad faith, misleading, unduly insensitive and egregious misconduct on Home Hardware's part in the course of Elgert's investigation and termination
      i. Bad faith: conflict of interest, failure to conduct an impartial interview
      ii. Unfairness: denied particulars and the right to respond, inexperienced investigator
      iii. Undue sensitivity: stigmatizing allegations without any chance to respond, told his son he was guilty of harassment.
2. Evidence of Mental Anguish
   a. There is no evidence as to any mental anguish experienced by Mr. Elgert as a result of the proceedings.
   b. It would be a logical conclusion that the hostile series of events would have some mental anguish, but this jump cannot be made without proof to it
   c. Without evidence of mental anguish, aggravated damages cannot be awarded.

Put aside the Aggravated Damages

Punitive Damages

Punitive damages are punitive in nature and only awarded for the poor conduct of the employer in the dismissal. Since these are between the court and the employer, no proof of damages is needed.

- As established above, there is ample evidence of bad faith
- The very process and humiliating events that transpired were unduly insensitive to Elgert and his son, and were egregious for an employer
- No part of the investigation was done appropriately with the outcome decided before even speaking with Elgert. For a highly stigmatizing and serious allegation like sexual harassment, more sensitivity was required and none was exhibited
  - There was malicious behaviour to support punitive damages.

- The trial judge did not err to put this to the jury, but the quantum was simply too high
- The punitive damages should be reduced from $300,000 to $70,000 to serve a proper deterrence function.

An employer cannot be faulted for honestly believing a sexual harassment claim, nor should they be punished for a clumsy investigation.

- Employers should be able to terminate without punitive and aggravated damages being levied
  - However, how the employer reacts is subject to judicial scrutiny
  - Their responsibilities do not justify providing an inept investigation
  - There was sufficient evidence in this case to leave the matter to the jury

Conclusion:

Evidence was sufficient to ground punitive damages but not aggravated

Hold, Order:

Appeal allowed – Aggravated Damages set aside, Punitive Damages reduced to $75,000

Ratio:

Duty of good faith in the manner of termination applies to all employer's conduct in coming to the decision to terminate, not just the manner in which termination notice is given

The ABCA does a good job of delineating aggravated and punitive damages in this case and how aggravated need proof of mental distress of the employee from the manner in which termination occurred, but punitive just looks at the conduct itself, independent of the termination.

The court also delineates what is a breach of the duty of good faith and what is not.

- Not a Breach of duty of Good Faith:
  - Having an honest belief in the grounds for a just cause termination and ultimately being wrong about possessing just cause at trial (*Soost*)
  - Honestly but clumsily investigating misconduct complaints prior to termination
- Breach of duty of Good Faith:
  - Terminating for cause where the grounds for cause are fabricated or where the employer does not honestly believe in the alleged grounds
  - Carrying out an inept, unfair biased or malicious investigation into misconduct on which termination is then based (*Elgert*)
- Key Takeaways:
  - Employers cannot lie to employees about the reason they are being terminated
    - Better to say something vague than something untrue
      - Claim "inappropriate workplace relations" rather than "sexual harassment" because, legally speaking, claiming sexual harassment is a legal untruth without an investigation being done
    - However, when terminating for cause, employers must be specific
      - Best practice when terminating for cause is to lay out the reasons while being careful that those reasons are only demonstrable in a legal proceeding.
  - It does not demand perfection for conducting investigations – will vary by case/context

They also discuss how punitive damages can be more of a sniff test (offence to the common sense of decency) but must be awarded proportionality, with 6 dimensions:

- Blameworthiness of defendant's conduct
- Degree of vulnerability of the plaintiff

- Harm directed specifically at the plaintiff
- Need for deterrence
- Other penalties likely imposed for same misconduct
- Advantage wrongfully gained by the defendant

Piresferreira v Ayotte, 2010 ONCA 384

Facts:
Piresferreira (plaintiff) worked for 10 years as an account manager at Bell. Her supervisor was Mr. Ayotte (defendant). Her performance was slipping and HR put her on a performance improvement plan ("PIP"). Piresferreira and Ayotte had a disagreement and he shoved her out of frustration.

- She took a few days off work and when she returned to work Ayotte told her she was being put on a PIP.
- Piresferreira filed a complaint with HR about the shove and HR asked her to attend a meeting with Richard to discuss the complaint and the PIP
    - She refused and cited mental distress for going on sick leave

Piresferreira never returned to work and sued for constructive dismissal, *Honda* damages for the bad faith manner of termination and damages for battery, negligent infliction of mental distress and intentional infliction of mental distress

Procedural History:
At trial, Bell was liable for constructive dismissal of 12 months notice, $45,000 in *Honda* damages and Ayotte and Bell were jointly and severally liable for the torts, totalling $500,000

Issue:
Do the alleged torts apply to the workplace setting jointly and severally for Ayotte and Bell?

Analysis:

Tort of Negligent Infliction of Mental Suffering

The trial judge erred by basing a freestanding duty of care on a contractual duty to maintain a safe and harassment free work environment – no concurrent tort and contract liability unless the tort is independent and stand alone from the contract.

- This tort is already rolled into the *Honda* damages; mental suffering and mental anguish are similar to both be in aggravated damages; it would be a windfall to do both
- The *Anns* test is not met to find a novel duty of care on employers to create a safe and harassment free work environment and avoid negligent infliction of mental suffering throughout the employment relationship in this respect
    - There is a relationship of sufficient proximity and it was foreseeable
    - But the policy reasons to negate finding a duty in this case are made out as it would be too broad and alter the employment relationship
    - Already covered by the framework of employment law in *Honda* damages or constructive dismissal

This finding must be reversed

Tort of Intentional Infliction of Mental Suffering

First prong for this tort: is there "flagrant and outrageous conduct"?

- PIP was legitimate and reasonable in the circumstances of poor performance.
    - It was the timing that was insensitive and upsetting, but it does not rise to the level of being flagrant and outrageous

Second prong: was conduct calculated to produce harm?

- Ayotte acted with reckless disregard for the shove and the PIP, but he did not know they were the kind of damage to case the kind of harm suffered

- Piresferreira was able to demonstrate she had PTSD but she was unable to demonstrate that Ayotte or Bell knew this would happen
  - The reckless disregard would otherwise be negligence but that is already rolled into *Honda Keays*

This finding must also be put aside.

Battery

Bell conceded that this was battery, so this cannot be set aside as the elements were easily established. However, with only one tort of three remaining, the compensatory award of $500,000 simply cannot be awarded.

- The trial judge assessed the damages of the three torts holistically.
- Now with only one tort remaining, it is just to reduce damages to $15,000

Conclusion:

Torts available but greatly reduced

Hold, Order:

Set aside two torts, reduce tort of battery to $15,000

Ratio:

The tort of Negligent Infliction of Mental Suffering duty of care does not extend to workplace.

The ONCA agreed with the trial judge on constructive dismissal made and the notice period and the *Honda* damages for an improper investigation (it is inappropriate investigation to have both perpetrator and complainant in the same room for the interview).

- A common theme in bad faith is improper investigation…

As for the torts, the courts give a very cautious note:

- Tort of Negligence of Mental Suffering
  - This would actually satisfy the *Anns* test with sufficient proximity and foreseeability, but the public policy reasons to not have it are big since it is already contemplated in *Honda* damages
  - This case was basically a warning to not plead this tort in the employment context
- Tort of Intentional Infliction of Mental Suffering
  - The intentionality is something that will always be a hurdle for this tort
  - Even if the employee can prove that harm occurred, it is a lot more difficult to prove the perpetrator knew or intended it would happen

What could Bell have done differently?

- This is a pleadings problem
  - Could have argued that it was not vicariously liable
    - Courts may not have accepted this since they usually try and make the one with bigger pockets pay so the employee gets full compensation
- Could have avoided constructive dismissal had they dealt with the situation properly
  - Suspend Ayotte while they investigate the workplace violence
  - *Definitely* do not have him on the investigation meeting
    - Piresferreira very unlikely to give her side of the story with him there exercising the power imbalance
  - Should have given her more time when she said she needed it.

Settlement Agreements

The terms of release and how they are rolled out are incredibly important.

- Employment lawyers always advice clients on 1) how to do a termination and 2) how to do a proper release

Farmer v Foxridge

- Farmer terminated without notice or cause and was asked on the spot to calculate his own backpay and severance pay
- Foxridge told him that he could accept a higher level of commission instead of his statutory notice pay entitlements. Farmer accepted the commission since it was higher but then sued for the period notice but Foxridge said he was precluded from doing so because of their settlement
- Accord and Satisfaction:
    - Accord is the agreement to discharge an existing obligation
    - Satisfaction is the consideration exchange to support that agreement
    - *Any* settlement agreement will need accord and satisfaction to be released from additional contractual agreements.
        - In this case, neither was given; Farmer was given no time to consider and was under economic distress. No negotiation arose and he was not prepared as to his rights

Blackmore v Cablenet, [1994] AJ No 938 (QB)

Facts:

Blackmore (plaintiff) was employed for nearly three years on an entirely commission based salary as a direct sales agent for Cablenet (defendant), a cable company in Lethbridge. Blackmore was so successful he made 4x more than Cablenet expected.

- He was eventually terminated since Cablenet could not afford his commissions, but they told him it was because they ceased to use sales agents

He had no written contract, but was given a settlement offer letter

- The latter allowed 5.25 weeks of salary in lieu of notice, in exchange for the agreement constituting "full satisfaction of claims arising out of this termination"

Blackmore did not expect the termination and became depressed and acquired an adjustment disorder. He was accustomed to a high income such that his family began suffering

- The Labour Standards Board erroneously told him he was not entitled to termination pay
- He was not offered an alternative position with Cablenet so he signed the settlement

Blackmore eventually sued for wrongful dismissal and *Honda* damages.

Issue:

Is Blackmore precluded from further damages as a result of signing the settlement agreement?

Analysis:

Argument 1: Settlement Agreement did not cover claimed damages and was ambiguous

The language of the settlement was clear and unambiguous and covered the damages claimed, so it cannot fail on this ground

Argument 2: Settlement Agreement not enforceable as an unconscionable bargain

Test for unconscionability:

1. Existence in inequality of bargaining power between contracting parties
    a. Blackmore was unable to bargain at all and was vulnerable without legal advice and in distress
2. Stronger party unconscientiously uses its position of power to achieve an advantage
    a. Cablenet withheld entitlements they had no right to withhold to increase their leverage and increase stress on Blackmore
3. Agreement is unfair as sufficiently diverging from community standards of commercial morality to warrant negation
    a. This awarded the statutory minimum notice which was far lower than common law damages

Conclusion: Settlement void for unconscionability Hold, Order: 4 months pay in lieu of notice awarded.

Typically the test for unconscionability in contracts is very hard to establish, but since it is employment law, favour is given to employees a lot, particularly in the settlement process because they are in such a vulnerable position.

So what can lawyers do to make settlement agreements more iron clad (no employment lawyer will ever say an agreement *will* be ok because courts can always find unconscionability

1. If there is a written contract and it spells out what is owed on termination and an employer is simply complying with that term, there is no need for a settlement agreement/release and no fresh consideration to support I anyways
2. Employers should give employees a reasonable period of time after termination to consider the proffered settlement and release agreement
    a. Employers are often scared the employee will sue them in this time, but it is an obligation for them to assess the release after calming down
        i. Offers often state that the employee has been given enough time and a clause that if they sign right away, then they are considered to not want more time
3. Employers should encourage employees to seek independent legal advice about the offered settlement and release agreement and give them a meaningful opportunity to do so before their deadline for signing
4. Employers should not withhold outstanding compensation or entitlements that are automatically owing (*Code* minimums, accumulated vacation pay, backpay…) unless and until the employee signs the proffered release
5. If an agreement can be reached, get it in writing
    a. Common to shake hands and part ways and then when the employer gets sued they cannot prove a settlement was reached
6. Employees/employers should receive accounting advice about how settlement payments should be treated tax-wise (speak to an accountant)

CHAPTER 6: EMPLOYEE DUTIES, FIDUCIARY EMPLOYEES & RESTRICTIVE COVENANTS

This is the first time we look at what employees have to do in the employment world – most of this course is based on what the employer has to do

The only statutory duty that is the *Code* is the duty to provide reasonable notice or resignation. This duty applies to all employees.

- Employees have to give 1-2 weeks notice before resigning

Employment Standards Code, RSA 2000, c E-9
Section 58 (1) Except as otherwise provided in subsection (2), to terminate employment an employee must give the employer a written termination notice of at least (a) one week, if the employee has been employed by the employer for more than 90 days but less than 2 years, or (b) 2 weeks, if the employee has been employed by the employer for 2 years or more.

Common law also recognizes some duties:

- A duty of good faith and fidelity that applies to all employees
    - The duty to not compete with the employer during the course of employment
    - The duty not to take, use or disclose confidential information of the employer during and after the employment relationship
- A duty to not disparage or defame one's employer.
- A duty for key employees as fiduciaries of their employer and owe a heightened duty of loyalty

Anderson, Smith & Kelly Custom Brokers Ltd v World Wide Customs Brokers, 1996 ABCA 169

Facts:

Kelly (defendant) is a customers broker licensed to practice since 1972 and started working at Anderson et al (plaintiff) in 1980. In 1985, Kelly became a director and minority shareholder of, manager of the Edmonton office and his last name was added to the company name

- In August 1989, Kelly resigned without notice and immediately began working for Anderson's competitor – World Wide Customs (defendant)
- Within 3 weeks of departing, Kelly was calling clients of Anderson's to solicit their business and 21 clients left Anderson for World Wide

Anderson then sued Kelly for breach of fiduciary duty to them and World Wide for knowing assistance or inducing that breach.

Issue:

Did Kelly breach a fiduciary duty he had to Anderson by soliciting clients to World Wide?

Rule:

Frame v Smith: Test for fiduciary relationship

1. Fiduciary has scope to exercise some discretion or power
2. Fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests
3. Beneficiary is particularly vulnerable to, or at the mercy of, the fiduciary

Analysis:

There are certain categories of relationships that are recognized at law as gibing rise to fiduciary obligations (corporate officers and directors to corporations; trustees to beneficiaries; agents to principles; key employees to their employer)

- Determining who is a key employee with fiduciary responsibilities requires putting function and substance over their title
- Kelly is clearly a fiduciary of Anderson:
    - By virtue of the *Business Corporation Act,* as an officer and director
    - Manager in charge of all day to day operations; one of three employees at the office but the only face of sales
    - Unique power and discretion to affect economic interests of the company

Fiduciaries owe a duty to not actively and directly solicit former employer's clients for a reasonable period after resignation.

- This does not mean employees cannot generally announce their departure to clients, but doing so must be cautious to not cross line into solicitation
- This also does not mean that the employee is not free to compete more generally by working for a competitor or starting a competing business in the same industry
    - This also does not attach to regular employees.

This duty is also limited temporally as it is unfair to say they are precluded from ever competing with their former employer in an industry they are established in

- The reasonable period of time must be sufficient to allow the employer to recover from the destabilizing effect of losing a key employee

- This will necessarily vary based on the position of the employee and the degree of vulnerability

In the case at bar, Kelly breached his duty to not solicit Anderson's former clients when he started calling clients to solicit them to World Wide within 2-3 weeks of leaving. Given the context and Kelly's position, a reasonable non-solicitation period would have been one year

- Clients were loyal to Kelly personally, not to the company (high vulnerability)
- Would take longer for Anderson to solidify their client relationships to prevent them from leaving .

<u>Damages</u>

The lost profits from the clients that left with Kelly during the 12 month non-solicitation period

- It is naïve to assume all business transferred over, but it is also naïve to assume that some customers would have stayed even if Kelly didn't solicit them
- As such, a 20-25% contingency should be apply to discount from the total 12 month gross revenue that Anderson would have realized had Kelly not left (using historical profit margins)

Conclusion:

Breach of fiduciary duty

Hold, Order:

Action allowed

Ratio:

Key employees who owe a fiduciary duty to their former employer have a duty to not solicit former clients to their new business for a reasonable time after leaving their old employer

While there is a test for who a fiduciary is, there is some words that are automatic indicators of fiduciary: things like owner, shareholder, agents, executives. But title is not determinative, it depends on the substance of the employees role: ownership, power over key decisions, face of the company.

- They are those that the employer is particularly vulnerable if lost

This finding that fiduciary duties have a heightened obligation of loyalty to their employer is sound but it is also confined. Fiduciaries are allowed to leave and work for competitors, they just cannot actively solicit them away from their old employer for a reasonable period before, during or after departure.

- They are allowed to contact old clients to informed them they have moved but must be very careful with what they say to not solicit them
- The "reasonable period" is also a bit of mess to calculate, but rarely exceeds one year. But since it is context dependent, it could
  - The more vulnerable the employer, the longer this period will be.
  - This is actually pretty crazy, that could be a full year that the common law prohibits a key employee from contacting old clients and soliciting their business

Importantly, this duty does *not* attach to regular employees. Regular employees can leave whenever they want without issue with the exception of the duty to not disclose confidential information of the employer.

Damages for these cases are also a mess. They are usually measured by the profits lost by the employer from the number of clients lost to the departing fiduciary employee during the period of time that the duty subsisted

- But courts will discount this because many clients would leave regardless. The amount discounted doesn't seem to follow any consistent rules.

This case held both Kelly and World Wide jointly liable. In cases like this, the old employee and the new employer are almost always co-defendants so the old employer can compel financial transactions of the new employer and to increase likelihood of payout. Often the new employer does not even know of the solicitation, they just assumed they were getting a good profit.

Torcana Valve Services v Anderson, 2007 ABQB 356

Facts:
Anderson (defendant) was employed by Torcana Valve Services ("Torcana" plaintiff). Torcana was in the business of producing and selling industrial valves. Anderson didn't have an official title but was responsible for sales and overseeing the production shop as well as maintaining supplier relations.

- He received a 10% share in net profits.

Unbeknownst to Torcana, Anderson began making plans to leave Torcana and start his own competitor business just 1.5 years after starting with Torcana.

- Anderson approached the shop lead to leave Torcana and join his business
- Anderson then gave his resignation without notice and immediately began setting up operations for his new company and contacting Torcana clients
    - He told clients that Torcana was going out of business and incited them to move to his business.

Torcana brought action for breaching his fiduciary duty.

Issue:
Did Anderson breach a fiduciary duty he owed Torcana by soliciting clients and employees away to his new business?

Rule:
Kelly: key employees who owe a fiduciary duty must not solicit former clients away from their former employer for a reasonable period of time after changing employers in the same industry.

Analysis:

Was Anderson a fiduciary?

His lack of job title and short tenure are factors, but not determinative. In substance, he was not a mere salesman, he was Torcana's rainmaker and it's face. He was the sole point of contact for both customers and suppliers and managed scheduling and hiring/firing

- Importantly, he was privy to financial information that most employees are not so he knew of Torcana's vulnerabilities.

Did Anderson breach his fiduciary duty?

Anderson actively broke many duties he held to Torcana

- Took client information belonging to Torcana on his personal laptop
- Defamed Torcana by telling clients Torcana was going under
- Did not give reasonable notice (should have given 4 weeks)
- Directly solicited Torcana clients and employees to leave before and after departure
- A reasonable time, given the amount of knowledge Anderson had would have been 6 months to not solicit clients.

What damages apply?

Anderson's gained revenue in the first 6 months of his new business can be discounted by 33% contingency for business Anderson would have obtained regardless and a 30% profit margin.

Conclusion:
Fiduciary obligation breached

Hold, Order:
Action allowed.

Ratio:
It is a breach of fiduciary to solicit employees away from a former employer.
Damages can be calculated based of new employers gains or old employers losses

The ABCA goes over, in lots of detail, the rules governing departure of *all* employees:

1. Employees are free to compete against former employer immediately upon leaving
2. Employees have to act in fidelity to their employer while employed with them.
3. Employees are free to plan for departure while still employed as long as planning occurs on their own time and are still faithfully fulfilling obligations
4. Employees have a duty to not take or use confidential information (trade secrets or client information) from former employer during or after relationship
5. Employees cannot disparage or defame their employers
6. Employees have to give reasonable notice of resignation
    a. Considers how long it will take to reasonably replace the employee and how critical they were to the business

Additional roles for *key* employees as fiduciaries:

1. Duty not to actively solicit former employer's clients or take ripe business opportunities from their former employer for a reasonable time after termination
2. Duty not to actively solicit or induce former employees to leave the business, but can discuss or communicate plans with other employees

In terms of the common law duty to provide adequate notice of resignation, it does exist as the period it would reasonably take to find and transition a new employee into the position

- It is available to employers to sue employees for not doing this, but they rarely do so since it simply would not be worth the payout
- Most employees give the statutory minimum and the employer won't fight for more
    - This also means we have no case law on it so we wouldn't exactly how to determine the common law notice period anyways

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

Facts:
Delamont (defendant) was a branch manager and investment advisor of the Cranbook office of RBC (plaintiff). He orchestrated a mass exodus of all investment advisors from that office to the Cranbrook office of Merrill Lynch (co-defendant). All advisors, and Delamont, left without notice

- Their departure was planned and they surreptitiously copied confidential client information or RBC and faxed it to Merrill Lynch
- They then immediately began using client information and soliciting RBC's business
    - RBC only retained about 13% of its clients form this event

RBC then brought action against Delamont and Merrill Lynch

Procedural History:
Trial judge found no breach of fiduciary but found tort of conversion, reasonable notice breaches and implied duties of good faith and awarded damages of $1,800,000

- The BC Court of Appeal upheld a punitive damage but reversed most others.

Issue:
Should damages for unfair competition during the notice period be reinstated?

Analysis:

<u>Loss of competition during notice period</u>
Once an employee resigns and leaves the employ of his employer, even if he does not give notice, the relationship is terminated. The duty of fidelity is brought to an end and the employee is free to immediately begin competing even during the notice period
- Fiduciary employees can do this as well

Employee is confined to damages for failure to provide sufficient notice, but not lost for profits or other losses occasioned by the fact of termination
- The trial judge erred in granting the $250,000

<u>Loss of profit for Delamont's failure to retain employees</u>
It is part of the implied duty of good faith in Delamont's employment contract, in his position as branch manager, that he would make reasonable attempts to retain advisors in RBC's employ
- Not only did he not do this, but he did the exact opposite by orchestrating a mass exodus of all advisors, including himself from RBC's employ to a competitor

Damages owing are the lost profits lost over the span of 5 years from the clients who departed with the defecting employees
- The $1.4M should be reinstated against Delamont as severally liable.

Conclusion:
Delamont failure to retain employees warrants damages.

Hold, Order:
Appeal allowed in part.

Ratio:
A branch manager, even if not a fiduciary, has a duty of good faith that covers the duty to retain employees. Failure to do so, or encouraging their departure can award damages over a significant time period.

The trial judge found:
- No advisors, nor Delamont, were fiduciaries
- All advisors committed tort of conversion for stealing confidential information ($265,000)
- All advisors breached duty to provide 2.5 weeks notice ($40,000)
- All advisors breached implied duties of good faith to not compete ($250,000)
- Delamont breached duty of good faith as branch manager by orchestrating exodus ($1.6M)

BCCA:
- Upheld punitive damages for conversion
- Upheld breach of withholding reasonable notice
- Reversed lost profits from competition ($250,000)
- Reversed loss of profits from Delamont ($1,600,000)

While the SCC maintained that the loss of competition damage cannot be imposed because employees are entitled to compete once they resign, the majority found the $1.4M should be reinstated against Delamont (not Merrill Lynch) for not only not retaining employees, but for organizing the mass exodus.
- A lot of this analysis is because the town is small so the exodus had a particularly detrimental impact on RBC as there was no other business to be found
- Employers can have loss of competition clauses in their employment agreements, but this is not imposed by common law
- Abella in dissent argues that the majority created a "quasi-fiduciary" employee that reformulates the extension of a regular employee's duty of good faith.

- She showed little sympathy for RBC since it was a sophisticated party who could bargain for a non-competition clause for Delamont, but they did not

Restrictive Covenants

In response to the various common law and statutory duties imposed on employees, many employers have began infusing restrictive covenants in employment agreements for greater clarity on what is and what is not allowed.

- These are, by definition, contractual with contract principles like drafting, enforceability and also deterrence being important issues
- It is very rare for these clauses to be included for 'regular employees' but reserved instead for 'key employees'
    - It may decrease the ability of employees finding new work, particularly in small centres
    - Regular employees don't have specialized information about a specialized employer, so they shouldn't be constrained to not to compete
    - Courts are also generally hesitant to impose a restraint on trade.

The typical clauses are:

- Confidentiality Clause
    - This is already imposed at common law, so why contractually enforce it?
    - Clarity for a) what confidential information is included and b) how you cannot use it
        - Basically to prevent litigation
- Non-Solicitation Clauses
    - Non-solicitation of either clients and employees
- Non-Competition Clauses
    - Subsequent employment: cannot work in a competitive industry at all
    - Subsequent business: you cannot work in a competitive industry with our clients

Jones v Klassen, 2006 ABQB 41

Facts:

Klassen (defendant) was an employee at Edward Jones (plaintiff), an international investment company since 1998 in St. Albert. He was hired as an investment representative until October 15, 2002.

- Klassen became the "face of Edward Jones" in St. Albert but eventually grew annoyed with the company restrictions and decided to move to Carter Partners Securities, a competitor of Edward Jones A week before resigning from Edward Jones, Klassen printed his client list contact sheet information and took these when he left.

On October 15, 2002, he moved out of his office and faxed his resignation.

- He sent a letter to his clients, from his home address and with his cell phone number, informing them of his move saying that his "personal and professional values and best interests of his clients" were better served at his new employer, a "premium, independent, entirely Canadian owned full service investment firm".

Klassen admitted it was wrong to take the contact list and gave the list to Jones' solicitor through his own. However, he photocopied and kept the copy

- Some of his clients called him and others he contacted himself.
- 37% of his clients transferred to Cartier after he was employed there.
- For the 6 months after the move, almost $3,500,000.00 moved from Jones to Cartier

Issue:

Did the client letter Klassen sent directly or indirectly solicit clients?

Rule:

Investment Representative Employment Agreement between Jones-Klassen
Clause 4: shall keep and preserve all customer records and files during his employment and surrender the same to Edward Jones after his termination or resignation which remained the confidential and trade secret property of his employer

Clause 10: at no time during or after his employment was he permitted to use or take any information acquired during the course of his employment with Edward Jones in a manner adverse to Edward Jones

Clause 11: for a period of six months following termination, he was not permitted to directly or indirectly solicit business to or from any customer of Edward Jones or otherwise induce any said customer of Edward Jones to terminate his/her relationship with Edward Jones

- Included customers of Edward Jones and potential customers he identified while at Edward Jones

Analysis:
Does Klassen have a contractual duty to not solicit Edward Jones' clients?
Klassen had various contractual duties to Jones:

- Surrender client list and contact information upon resignation
  - Admittedly breached
- Refrain from using information acquired while working at Edward Jones
  - Information includes the client lists but not skills acquired on the job
  - Obviously breached – any transfer of account using the information was adverse to Edward Jones' interests
- Not to solicit Jones clients for 6 months following termination and keep the information confidential
  - The letter was not neutral and could have advised Edward Jones of his move and asked them to mail clients on his behalf.
  - He also called some former clients which is a breach of confidentiality
  - Breach of his non-solicitation agreement

It is a general common law duty to not trade confidential information or customer lists. But there was nothing in the contract or common law about competing with a former employer

- He was free to use skills acquired at his new job, but he was not free to use confidential information against them
- He was the "face" of Edward Jones and he was in a one person office.
  - By taking and using the information he did (as well as the photocopies), Klassen breached those duties.
  - That information was crucial property of Edward Jones

Does Klassen have a fiduciary duty to Edwards Jones? If yes, was it breached?
Klassen argued he has no discretion of Edward Jones. He was "the face" of Edward Jones and, with his clients, had discretion to make recommendations for purchases, sales and day-to-day decisions. He was the only one in St. Albert.

- As such, Klassen had a fiduciary duty to Edward Jones.
- Edward Jones was particularly vulnerable to Klassen's discretion
  - He obviously breached his duty to not solicit clients under the agreement, and thus breached his fiduciary duty to not do the same.

If breaches arose, what damages are attracted?
$3,393,101.10 was transferred from Edward Jones to Cartier within 6 months of Klassen's departure which is 37% of the assets in Edward Jones St Albert office.

- Some of this may have occurred in any case, and 10% is a fair estimate of losses regardless of Klassen's breach

- 10% family and friends attrition rate is also reasonable

Conclusion:

Common law and contractual terms breached

Hold, Order:

Action allowed; general damages in $15,000 for improper solicitation and $5,000 in punitive damage for breach of duty to keep confidences.

Ratio:

Employers have no proprietary interest in the skills acquired on the job by an employer, but the employee cannot take things in which the employer does have a proprietary interest (client lists)

The clauses were very standard, though there were some issues with the wording.

- Saying "directly or indirectly" solicit is tricky since indirectly is nebulous. This risks courts finding it unenforceable (though courts are hesitant to do this)
- "Potential customers" is also tricky since there needs to be some certainty in the time period
  - A good covenant will usually say "potential" means for 6 months, otherwise it could mean anyone you have every talked to

Klassen was obviously a fiduciary, but the court did not extend the common law duty of non-solicitation longer than 6 months (as stated in clause 11).

- He already breached clause 11 by his letter as it was a clear invitation for them to move with him
  - He should have done this in a far more neutral fashion
  - He should have given Edward Jones a copy of the letter and asked if it was ok to send

Damages:

1. Start with lost revenue from the 98 clients that moved (could also be from revenue gained by new employer)
2. Apply 20% contingency reduction from market and friends/family attrition that was inevitable even if Klassen had not breached his non-solicitation duties
   a. Courts always invent this percentage without must reason. It is almost always 20-33%
3. Deduct the $7000 transfer fee per client account that Edward Jones received from Cartier for each account that transferred to them (mitigation)
4. Additional $15,000 in general damages in lost commissions for improper solicitation
5. Additional $5,000 in punitive damages for breach of duty to keep confidences to Klassen only

JG Collins Insurance Agencies Ltd v Elsley Estate, [1978] 2 SCR 916

Facts:

In 1956, Collins (plaintiff) purchased Elsley (defendant)'s general insurance business and the two businesses merged with Mr. Elsley managing it

- Restrictive covenants were placed in the sales agreement and interim management agreement that prohibited Elsley Ltd and Mr. Elsley from carrying on business with a general insurance agency in the area for 10 years after the sale.
- A month later a new management agreement was entered into subject to the covenants and prohibited Mr. Elsley from engaging in general insurance business from 5 years after termination of his employment at a price of $1000 for a breach

Elsley was the face of Collins-Elsley for 17 years and the only point of contact with clients

- He then left the company with proper notice and immediately started a general insurance business called "Elsley Ltd" in the same region and took 3 employees with him.
  - He did not solicit Collins-Elsley clients beyond a general ad that indicated he had left.

Procedural History:
Trial judge found Elsley breached the covenants, and the Ontario Court of Appeal agreed and increased damages for all profits earned for the 5-year period

Issue:
Was the non-competition clause in the sales agreement between Collins and Elsley enforceable?

Analysis:
A restrictive covenant that limits trade or competition is only enforceable if it is reasonably necessary between the parties and with regard to the public interests at stake. This requires a highly contextual analysis that looks at the clause and matrix

- For restrictive covenants in employment contracts, there is a presumption of unenforceability for restrictive covenants that restrain competition generally.
  - This presumption can be rebutted where nature of the employment relationship justifies it (based on reasonable necessity)

Test for enforceability of restrictive covenant in employment contract:

1. Onus is on employer seeking to enforce the clause to show it is reasonably necessary to be prima facie enforceable
   a. Employer has proprietary interest entitled to protection
   b. Employer demonstrates the temporal and spatial scope of clause is reasonably necessary to protect the interest
   c. Employer demonstrates the scope of activities restricted is reasonably necessary
      i. Non competition clauses: heightened burden at this stage
2. Onus shifts to employee to show it is contrary to public interest to enforce it.

Application to this Case

1. Covenant is reasonably necessary so prime facie enforceable
   a. Collins had a proprietary interest with trade connections and book of business
   b. Temporal/spatial limits justified since Collins vulnerable to Elsley's expertise
   c. Restraint on competition was reasonably necessary
      i. Non solicitation wouldn't have been effective since Elsley did not solicit – the only way to protect Collins is to take Elsley out of the industry completely
2. No countervailing policy reasons – market was full of insurance agents so taking out oof commission would not hamper competition.

Remedy is set out in the agreement: $1000

Conclusion:
Non-competition clause enforceable and breached.

Hold, Order:
Appeal allowed in part – liability holds but damages reduced to $1000

Ratio:
Restrictive covenants in employment contracts are presumed unenforceable but can be rebutted where the employment relationship justifies it.

Both the trial and the majority of the ONCA found that the restrictive covenant didn't allow Elsley to work in the industry at all in the region, so the damages should be for all his profits, not just the $1000 in the covenant (which was made for the purpose of avoiding contingency calculations)

- The dissent of the ONCA found the clause was unenforceable because it harmed business generally:
  - Overboard an unreasonable restraint of trade
    - Competition is generally good so we don't want employees owned by their employers
  - Unjustified interference with Elsley's liberty

- Went beyond what was necessary to protect Collin's interests

This was the first case that the SCC really goes into enforceability of restrictive covenants in the employment context. They reinforce the highly contextual approach that must be taken. This case is old but still holds true today – every time a non-competition (or non-solicitation agreement) arises in an employment agreement, we presume it is unenforceable. To make it enforceable:

1. Employer has onus to show it is prima facie reasonably justified
    a. Employer has proprietary interest
    b. Temporal and spatial scope are necessary to protect employer
    c. Scope of restrictions are reasonably necessary
2. Employee has onus to show that the clause is contrary to public interest to enforce

A few details from this case:

- Proprietary interests are usually intellectual property or books of business.
- Time is usually restricted in both non-solicitation and non-competition clauses, but space is usually only restricted in non competition clauses (since solicitation is industry specific rather than region specific)
    - The area needs to be very clearly defined
    - Cannot say "Edmonton Metropolitan Area", must say "City limits of Edmonton, Sherwood Park, St. Albert, Leduc…"
- The scope of restrictions being necessary is usually where the covenant will fail
    - Is there true reason to restrict enforceability later on? Often a feel test
    - Non solicitation will have to be insufficient (as it was in *Collins*)

In *Staebler v Allan,* Allan and Kienapple were employed at Staebler as general salesmen in Waterloo

- The restrictive covenant prohibited them from "conducting business" with any clients of Staebler at the date of termination that they had served for two years after termination
- Obviously they breached this and began soliciting clients
- The new employer also have a restrictive covenants that states for 18 months post termination (however it occurred), they could not contact or solicit clients of their company from 12 months preceding termination
- Staeblers covenant:
    - Time: 2 years after termination
    - Place: No geographical bounds
    - Who: No clients Staebler actually served
    - Activity: "conducting of business"
        - Not restricted to industry or competitive business (any business whatsoever)
- Stevenson covenant:
    - Time: 18 months after termination
    - Place: No geographical bounds
    - Who: any actual or prospective client of employer in 12 months before termination
    - Activity: soliciting or contacting for the purpose of selling competitive products
        - Effectively a non-solicitation clause, even if it was called a "non competition"

Staeblers covenant was less enforceable than the Stevenson one since it was pretty vague, though both lacking a territory is not ideal.

Court: non solicitation clauses will generally be sufficient to protect an employer's proprietary interest on departure of a regular employee. If this is the case, non competition clauses will not be enforceable

- Non-competition clauses are generally only enforceable in rare cases and reserved usually for fiduciary employees where there is a high level of vulnerability/dependence on the employer

- Just because a clause could have been drafted more narrowly does not mean it is enforceable
    - A court will not read down a clause to make it enforceable. As soon as it is enforceable, it is thrown out
- Staebler's covenant was far too broad. There is no unique or exceptional vulnerability of Staebler to the two departing employees to justify a non-competition clause of such breadth
- Prohibition of all business with former Staebler clients is way too broad. Prevented them from doing any business with Staebler clients, even if it had nothing to do with the industry.

CHAPTER 7: HUMAN RIGHTS IN THE WORKPLACE

Human Rights is a very specific area of law and deals heavily with administrative law. It is very rare to go to hearings as they usually resolve beforehand. Awards were typically $5,000 - $25,000 but then Courts found this too low so people started just going to courts rather than the Human Rights Tribunal ("HRT"). This forced the HRT to give bigger damages

This is a whole other piece of legislation, it is the *Human Rights Act* ("HRA"), which is completely independent of the *Code.* People in employment law often forget about the HRA

- The HRA is much broader than employment – employment is a small section of it
    - It is all about protecting vulnerable peoples from power imbalances in various contexts, with employment being just one of them
- The enumerated grounds of protection in the HRA are constantly being expanded because they are nimble and flexible.

The Alberta Human Rights Commissioner ("AHRC") administers the HRA, but there is also the Canadian HRC. As soon as an employee is federally regulated, they are under the *Canada Labour Code* and Canada HRC. The Canada HRC is much stricter

- HRC tend to develop a lot as society progresses with one exception: COVID
- Human Rights agencies were quick to draw the law that masks or vaccine choices are not protected grounds, unless it relates to a real disability
    - Family status during COVID was protected: having a child at home means childcare

There is always the idea of freedom of contract that influences employment law with human rights issues. Employers have the right to hire who they want and terminate them at any time.

- But they cannot do so if it is a human rights issue. Human rights is a catch all
- You cannot not hire or fire someone based on gender, race, place or children, sexuality…

Section 7 is the only section in the *HRA* that talks about employment. It states that no one can hire or fire an employee based on protected grounds

- Section 7(3) says that if the hire or fire is for a bona fide occupational requirement ("BFOR"), then the 'discrimination' is permissive.
    - If a movie needs to hire a male actor, it is not discrimination to not hire a female
- Lawyers actually would not be protected under s 7 since partners are independent, though associates would be protected.

Alberta Human Rights Act, RSA 2000, c A-25.5
Section 7 (1) No employer shall (c) refuse to employ or refuse to continue to employ any person, or

(d) 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.

(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.

In the *McCormick v Fasken Martineau DuMoulin,* 2014 SCC 39 case, Fasken had a rule that partners had to give up their partnership ownership at 65 years old unless an exception is granted

- This is pretty standard across Canada
- McCormick brought this claim pre-emptively when he was 64. Fasken said it is nor a workplace relationship that the HRC protects since partners are not technically employees and the firm is not technically a partner.
  - HRC: HR Tribunals don't have jurisdiction since it isn't employment the HRA covers.
  - BCCA: HR Tribunals don't have jurisdiction since it isn't employment the HRA covers.
  - SCC: HR Tribunals don't have jurisdiction since it isn't employment the HRA covers.
    - This isn't something the HRA was meant to protect. There is no inequality or vulnerability
      - Degree of control: McCormick controls how he made money
      - Degree of dependency: low degree, he could do work without Fasken
- Policy rationale: HRC is quasi constitutional (inalienable rights) that are meant to be universal. It is public policy legislation, so it should be applied broadly
  - Usually, if it is unclear whether the HRC covers it, the Commission will try really hard to cover that group to expand the HRA protections
- First question is always: is the person covered?

Is discrimination ever justified? Yes, ability to perform a job safely matters. This is where BFOR steps in.

- There is a line, but courts struggle to find where it is. Safety is imperative so things like alcoholism or other forms of impairment (which are considered 'disabilities' and thus protected grounds) are fundamentally unacceptable in dangerous work environments.
  - When can you pre access test? When can you test (if at all)?
  - When can you restrict someone from doing legal drugs like cannabis?

British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU), [1999] 3 SCR 3

Facts:

Meiorin applied to be a firefighter in BC to fight forest fires. As part of the application process, the British Columbia government required physical testing to ensure the applicants would be able to safely work in a front line work environment. The physical testing was quite strenuous and included things like VO2 max, carrying multiple bodies.

- A coroner of a deceased firefighter even told the government the testing needed to be stricter
- Meiorin did not meet the requirements and was thus not selected. She claimed it was because the requirements were discriminatory against women and the BCGSEU grieved

Issue:
Were the physical testing requirements a human rights violation, or permissible as a BFOR?

Rule:

Section 7 of the *Human Rights Act*

(1) No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

because of the … gender.

Analysis:

Meiorin presented a plethora of expert evidence on women's physiology and the conclusion is that virtually all women would fail to meet these requirements. This may be, but if these are bona fide occupational requirements, it is not a human rights violation. Test for a BFOR:

1. Is the element prima facie discriminatory?
    a. A detrimental effect on a protected ground or detrimental partly because of a protected ground
    b. Requirements don't have to say "won't hire a woman" (detrimental effect) but if requirement is unfavourable to women (detrimental treatment), that is sufficient
    c. It does not have to be proven by evidence, it can be perceived
    d. This is easily satisfied
        i. Systemic discrimination (system structured so it has unequal impacts on people because of a protected ground)
        ii. *Moore v BC* (2012 SCC 61): to demonstrate prima facie discrimination, complainants are required to show that they 1) have a characteristic protected under the *Code,* 2) that they experienced an adverse impact and that 3) the protected characteristic was a factor in the adverse impact
2. Is it a Bona Fide Occupational Requirement?
    a. Employer adopted the standard rationally connected to performance of the job
        i. This is an extremely dangerous environment so physical testing is crucial
    b. Employer adopted the standard in an honest and good faith belief it was necessary to fulfill the legitimate work related purpose
        i. It was adopted from a coroner's report that indicated stricter testing were needed for the work environment
    c. Standard is reasonably necessary to accomplishment of work-related purpose. Must be demonstrated as necessary, impossible to accommodate without imposing undue hardship upon the employer.
        i. The coroner suggested ideals, not minimums. The standard should be set as low as possible while not discriminating groups.
            1. The government could not prove that the ideals were a minimum requirement
        ii. There was no accommodation

Conclusion:

Not BFOR; discrimination based on gender

Hold, Order:
Action allowed.

Ratio:
Test for BFOR:

- Employer adopted the standard rationally connected to performance of the job
- Employer adopted the standard in an honest and good faith belief it was necessary to fulfill the legitimate work related purpose
- Standard is reasonably necessary to accomplishment of work-related purpose

A BFOR is most likely to lose at the third question: if it was necessary and if it was accommodated

- The standard should be set as low as possible
- Accommodation should be attempted up to the point of undue hardship
    - Consider Alternatives
        - All physical aspects of employment necessary for all employees at all times?
        - Temporary alternative work arrangements to allow training or recovery?
        - Factors: prohibitive cost, efficiency, safety and security
        - Factors *not* in play: tradition and past practices (can't say "we have never done this before") or attitudes among workforce (also cannot say "everyone else will me mad if we do this")
    - Accommodation only needs to be to the point where everyone will be safe. This analysis will vary depending on the job
        - A fire fighter will not be allowed to be impaired ever, but a receptionist may have some leeway
    - Costs: even if costs are high, if the employer can afford it and it is a reasonable accommodation below undue hardship, the HRC will ask you to do it
        - But don't have to give in to whatever the employee wants
- The duties for these claims flip flop:
    - Employer has to inquire if they notice an employee struggle and ask if they can support them
    - Employee has duty to disclose a protected ground issue. It doesn't need to be detailed, but enough for the employer to accommodate
    - Employer has to accommodate up to the point of undue hardship
    - Employee has to report on if it was helpful
    - Employer has to constantly re-evaluate and give more if possible
- Often, employers will have to move the employee to a new position and train them to avoid Human Right Complaints. If doing this would fire another employee, that is undue hardship

Creating Lawful Physical Standards for Employment

- Recognize Adverse Impacts of Testing
- Derive Standards from real work requirements and diverse populations of employees
- Derive test and cut scores and keep current as job demands change
- Derive test and cut scores that determine the *minimum* (as opposed to average or preferable) required level of safe and efficient job performance.

In *Hydro Quebec v Syndicat des employees de techniques professionelles,* [2008] 2 SCR 561, the court looked at non-culpable absenteeism and the employers ability to accommodate.

- Employee had numerous physical and mental challenges and missed 960 work days between 1994 and 2001.
- Hydro Quebec accommodated by allowed them to do light duties, a gradual return to work, shifted position and allowed absences.
    - Eventually her absences became too much and she was terminated. A physician told her she would be unlikely to ever work again
- Arbitrator: the employer was ok to dismiss her since the employee could not work
    - No matter the protected ground, you still need to be able to work
    - Her personality disorder poisoned all workplaces and she had to cycle through offices because other employees could not handle her.
        - This is undue hardship
- Quebec Superior Court: the termination was discriminatory on her health but Hydro Quebec accommodated to undue hardship

- Quebec Court of Appeal: past absences cannot be used as justification because only things at termination matter
  - Cannot use the 960 past absences
  - Employer needs to prove impossible to accommodate
- Supreme Court of Canada:
  - Of course past absences can be used and accommodation does not need to be impossible; employer needs to be flexible but not past undue hardship
  - Employer does not have to alter the fundamental tenant of the contract (employee is providing services and gets paid for it)
    - The Union was asking them to amend the contract since the employment is not working, which would be unfair
  - Assessing undue hardship requires you to look backwards at the past absences
  - The employee's absences destroy the company or clearly can't work for the foreseeable future, so it is not discriminatory

When it comes to drug testing, things get very precarious. Substance addiction is a mental disability under the HRA and needs accommodation

Brewer v Fraser Milner Casgrain LLP, [2006] AJ No 625 (QB) rev'd (CA)

Facts:
Brewer (plaintiff) was a law clerk/legal assistant for 17 years at FMC ("Dentons", defendant). She developed a wide range of symptoms similar to asthma but environmentally triggered.
- She never had a formal diagnosis, but Dentons quickly became a scent free zone and gave her a private washroom. Her hours were altered so she wouldn't be in high traffic environments and air cleaners and face masks were implemented.
  - These did not improve ger condition
- Wakeling (Dentons lawyer) asked for more medical info, specifically what can be done for more accommodation. An expert came in to assess the office and gave suggestions but concluded that no steps would totally resolve the issue

Dentons then moved Brewer away from her lawyer and into a closed environment of a newly renovated floor because one suggestion was to put her in a closed space. The conditions were actually worse on the new floor so she had to take short term disability

Procedural History:
HRC said the accommodation by Dentons was sufficient and dismissed the complaint

Issue:
Did Dentons accommodate up until undue hardship?

Rule:
Section 7 of the *Human Rights Act*
(1) No employer shall
(a) refuse to employ or refuse to continue to employ any person, or
because of the … physical disability.

Analysis:
Dentons did not require an updated medical report nor a diagnosis to require them to accommodate. With or without diagnosis, there is a physical disability and employers have to accommodate up to undue hardship
- The accommodation started as very good. They were open to her suggestions, implemented them office wide and gave her special accommodations.
  - They invited an expert in to assess what could be done.

- However, moving her to another floor without a private restroom was not reasonable. Some of the experts suggestions were too onerous, but they could have done more than they did since they started doing more than they did

Conclusion:
Duty to accommodate not met

Hold, Order:
Appeal allowed

Ratio:
The entire accommodation process needs to be appropriate. If it falters after initial acceptable accommodations it will still be a breach of the duty

It was not an issue that Wakeling asked for more medical information and ways to accommodate. But employers can only ask for information that is necessary for accommodation – if a diagnosis is not needed, it cannot be asked for. More questions can be made when accommodation has occurred but more is needed.

- If symptoms don't match up with the accommodation, more questions should be asked
- Human Rights Commissioner
  - The HRC found that Dentons accommodated as best they could and could not implement everything. She was asked to work alone but then complained when she was moved to a new floor. Employees cannot expect perfect accommodation. This is a big takeaway
    - She applied for internal review
- Chief Commissioner
  - Questioned diagnosis and Brewer's cooperation with investigations and determined the accommodation was satisfactory
    - She applied for judicial review

When employers are hiring, they cannot expressly ask about any human rights grounds as they are not allowed to hire or not hire someone for those reasons. But when they are your employee, and you realize there is an issue, the employer has a duty to inquire and ask if there is an issue and if yes, how can they accommodate them

- If the employee says they are fine, the employer is fine since the employee chose not to disclose
- Employees also have a duty to tell the employer if accommodations have helped and if they are improving.
  - Cannot claw back accommodations without discussing if they are working.

<u>Workplace Drug testing</u>

This is a very live issue, particularly with COVID and masking and testing. Employment lawyers were told in the early days of COVID to treat COVID testing like drug testing

Various types of drug testing are practiced: pre-employment, pre access, suspected impairment, post incident, return from treatment, randomized.

- Randomized drug testing is where it is the most unclear. *Communications, Energy and Paper works Union of Canada, Local 30 v Irving Pulp and Paper,* 2013 SCC 34 states that randomized testing is possible where:
  1. there is a safety sensitive work environment and
  2. there was a demonstrated general problem with alcohol or drug use

Stewart v Elk Valley Coal, 2017 SCC 30

- Stewart drove a loader in mines (highly sensitive, first hurdle passed already)
- Elk Valley had a drug policy where employees must disclose dependence and addiction before any drug incident happens
  - If they have one, Elk Valley would accommodate as much as they could
  - But if an incident happens without disclosing, they will be terminated (no "free accident" rule). Stewart signed this policy
- He then crashed the loader and was sent in for drug testing, which tested positive for cocaine
  - He said that he used it recreationally on his days off and didn't know it stayed in your system post use. He then told Elk Valley that he was addicted to cocaine
    - He was terminated.
- Tribunal: Stewart was terminated because he breached company policy, not because of cocaine
- Alberta Queen's Bench and Court of Appeal: Tribunal was right
- Supreme Court:
  - Majority:
    1. Is the ground in question a protected ground?
    2. Was he subject to an adverse impact?
    3. Was the adverse impact because of the protected ground?
       a. No, the termination was because he did not disclose the addiction as required by the Policy. It was not because of just having the addiction.
    - No discrimination
  - Concurring: discriminatory, but it was a BFOR and a high importance of deterrence
    - Accommodation was sufficient
  - Dissent: discriminatory and no BFOR; absence of individualized assessment
    - This thinking that 'blanket policies' are not good enough has been firmly rejected
    - Safety sensitive environments are justified in having a blanket policy

What about pre-employment drug testing?

- This is very common on virtually every oil rig and construction site.
- In *Alberta v Kellog Brown & Root* (2007 ABCA 26), it was argued pre-testing is discriminatory
  - Asks if they are aiming the policy at someone with a disability, or just perceiving someone to have a disability if they are just recreational users and get caught for it
  - Perception is not about someone being an addict, but rather about persons who use drugs as a safety risk in an already dangerous workplace
    - Conditional offers based on testing or conditions of employment
    - If someone fails this condition, they will be terminated
  - This employee tested positive after recreationally using weed and was terminated. He brought action to testify that he was only a recreational user so not addicted
    - This immediately killed his case since recreational use is not a protected ground but addictions are
    - No disability and no perceived disability
      - If KBR perceived him to be an addict and said "we don't hire addicts" that would have been discriminatory, but this was a pre-condition
- Drug testing is prima facie discriminatory if there is a protected ground
  - There was just no protected ground here
  - ABCA: this policy was aimed at safety, not drug use

Lockerbie v Alberta analysed how drug policies work in a hierarchy of corporations.

- Owner of oilfield sites usually will just subcontract another employer to do the construction work. The employees of that middle company need to be tested before coming to a work site, but would it be Syncrude (oil company) or the construction company that is being discriminatory?
    - Syncrude was the one with the policy
    - Lockerbie sued the middle employer for the policy
        - HR Panel: employment in human rights can cover utilization of services, not just traditional employer dynamics. So, Syncrude can be considered Lockerbie's employer.
            - In any case, the policy was for safety and no prima facie discrimination
        - ABQB and ABCA: Found that the employer is the construction company so Syncrude's policy cannot be discriminatory as an employer.
            - A lot of oil and construction companies intervened since now they are all considered employers of subcontracted companies employees

CHAPTER 8: *EMPLOYMENT STANDARDS CODE*

The *Employment Standards Code* is the foundation of employment law's practice. You start with what the *Code* says since these cannot be altered. Then you look to what the common law says

- *Code* actions are not very common since the Employment Standards Office ("ESO") is so helpful that most people deal with it themselves rather than hiring a lawyer
    - It is really only when common law rights are in question do people seek out employment lawyers.
- Remember that the *Code* is a floor not a ceiling
    - *Machtinger*: employer not allowed to contract for lower notice period obligations than required by the *Code* so the termination provision was unenforceable and under full common law notice period obligations instead. Don't get too greedy
    - *Kosowan*: the *Code* notice period obligations are only a minimum and contracting to confine liability to those minimums (and out of common law) requires very specific language and a clear intent
- The *Code* is a rights conferring and remedial statute and Courts generally give it's provisions broad and liberal interpretations that accord with and further it's larger object of protection of employees (*Rizzo's Shoes*)

The ESO is an administrative Tribunal so it also deals a lot with administrative law. Part III of the Code deals with internal administrative proceedings

- Making a complaint to an ESO (section 82)
    - Two types of complaints
        - Complaints about unpaid earnings and
        - Complaints about terminations, suspensions or lay odds in protected grounds
    - Usually people will just call ESO to help interpret the legislation
    - There is a limitation period of 6 months post termination to make a complaint
- Mediation and attempts to achieve settlement/compromise by the ESO (section 83)
    - The ESO will collect employee information about the complaint and then communicate with the employer.
        - Settlement offers are then exchanged
        - Technically these settlements cannot include common law since that is outside the ESOs mandate, but some ESO's will let it to be included so there can be a peaceful resolution
    - ESOs are not lawyers or business owners – they are instructed to act for the employee
    - This makes it hard for the employer since a lot of the cases are pre-decided

- Past Settlement but Pre Decision
  - ESOs can order two things:
    - Issue a direction
      - Not binding, not an order or judgement
      - Them saying "I have reviewed all this, and I am directing you to do X"
    - Issue an order
      - This is final and binding
- First Level Decision Making
  - ESO may do one of three things:
    - Section 85: Dismiss the complaint because:
      - Frivolous, vexatious, unsubstantiated
      - No entitlement to earnings claimed
      - No termination, suspension for enumerated impermissible reasons
    - Section 86: Make an order for unpaid damages (s 87) but with limitation period on claims for unpaid earnings
      - ESO can only order payments of unpaid wages and overtime owed from 6 months before termination
      - ESO can only order payments of vacation and holiday pay that is owed from 2 years before the termination
    - Section 86: If ESO decides there has been a termination, suspension or lay off for an impermissible, enumerated reasons, must refer to the Director
      - Director can give greater penalties, have more legal consequences and have more authority
      - Director can decide if improper termination and have all remedies available to it (including reinstatement which is very awkward so rare)
  - On a referral from an ESO, if the Director believes there has been a termination, suspension or lay off contrary to the *Code,* they may reinstate the employee and/or order the employer pay compensation to the employee (section 89)

Appeals process

1. If an employee wants to appeal from a ESO's decision dismissing their complaint under s 85, they must appeal to the Director under s 88
   a. They must do so within 21 days of the ESO decision
   b. If the Director affirms the dismissal, there is no further right of appeal to an appeal body
2. If either an employee or employer wants to appeal from
   a. An officer or Director's order to pay earnings, and/or
   b. A Director's order for compensation and/or reinstatement for an impermissible termination, suspension or lay-off,
   c. A right to an appeal body lies in s 95
3. Appeals to an Appeal Body (section 95)
   a. Must be made within 21 days of decision from which right of appeal lies
   b. Written notice is needed to Registrar
   c. Relaxed rules of evidence and informal hearing, but procedural fairness still applies
   d. Decision of appeal body must be in writing and communicated to both parties
   e. Used to be Provincial Court judges sitting as ESC umpires, but now the Labour Relations Board of Alberta is designated as the Appeal Body for these
      i. Labour is unionized and different legislation so this is not ideal
      ii. But it is quicker, even if the decision makers aren't as well versed

Employment Standards Code, RSA 2000, c E-9

Section 82

(1) An employee may make a complaint to an officer that

(a) an employer failed to pay earnings to an employee or to provide anything to which an employee is entitled under this Act;

(b) the employment of the employee was suspended or terminated or the employee was laid off

(i) repealed 2017 c9 s52,

(i.1) contrary to section 52.91 of the *Public Health Act*,

(i.2) contrary to section 52, 53.4, 53.91, 53.951, 53.961, 53.971 or 53.985

(ii) for the sole reason that garnishment proceedings are being or might be taken against the employee,

(iii) because the employee gave evidence or may give evidence at any inquiry or in any proceeding or prosecution under this Act,

(iv) because the employee requested or demanded anything to which the employee is entitled under this Act, or

(v) because the employee made or is about to make any statement or disclosure that may be required of the employee under this Act.

(2) A complaint, other than a complaint referred to in subsection (2.1), may be made at any time while the employee is employed by the employer and, if the employee's employment is terminated, at any time up to 6 months after the date on which the employment is terminated.

Section 84

(1) An officer may mediate between an employer and an employee for the purpose of settling or compromising differences between them and in doing so may

(a) receive from an employer, on behalf of an employee, the money agreed on by the parties in settlement of their differences;

(b) pay to an employee money received on the employee's behalf;

(c) do any other things necessary to assist an employer and employee to settle their differences.

(2) If an officer assists or attempts to assist an employer or an employee, or both, to reach a settlement or compromise, the officer is under no liability to either of them in respect of the settlement or compromise.

(3) When an officer pays to an employee money received as a result of a settlement or compromise, the employer is discharged from further liability to the employee with respect to the amount received by the employee.

Section 85

(1) If an officer

(a) determines that the employee making a complaint is not entitled to earnings,

(b) determines that the employment of the employee was not suspended or terminated or that the employee was not laid off in the circumstances or for the reasons described in section 82(1)(b), or

(c) refuses to accept or investigate a complaint,

the officer must, unless the complaint has been withdrawn by the complainant or deemed to have been withdrawn under subsection (1.1), serve the employee with notice of that decision.

(1.1) The Director may deem a complaint to have been withdrawn if an employee refuses or fails to participate in an investigation and reasonable efforts have been made to contact the employee.

(2) The employee may appeal the decision of the officer to the Director under section 88.

Section 86

If an officer, after investigating a complaint of an employee, has reason to believe that

(a) the employment of the employee was suspended or terminated, or
(b) the employee was laid off

in the circumstances or for any of the reasons described in section 82(1)(b), the officer must, unless the matter has been settled, refer the complaint to the Director.

Section 87

(1) If an officer determines that earnings are due to an employee, whether or not a complaint has been made, the officer must, unless the matter has been settled, make an order requiring the employer to pay to the employee, or to pay to the Director on behalf of the employee, earnings to which the employee is entitled and specify the date by which the order must be complied with.

(2) If an officer is unable to determine the amount of earnings to which an employee is entitled for the purpose of making an order because the employer has not made or kept complete and accurate employment records, or has failed to make those records available to the officer for inspection, the officer may determine the amount in any manner that the officer considers appropriate.

(3) The employer or employee may appeal the order of the officer to an appeal body.

Section 88

(1) Within 21 days from the date the employee is served with the notice of a decision under section 85, the employee may appeal to the Director by serving on the Director a written notice of appeal specifying the reasons for it.

(3) On receipt of the notice of appeal, the Director may
(a) review the matter personally, or
(b) refer the matter to another officer.

(4) The Director or the reviewing officer may
(a) make any decision or order that the original officer could have made, or
(b) direct the original officer or another officer to accept or investigate the complaint if the Director or reviewing officer is of the opinion that the refusal to accept the complaint or to investigate it was not justified.

(5) There is no appeal of a decision of the Director or the reviewing officer if the decision is that
(a) the employee is not entitled to earnings, or
(b) the original officer was justified in refusing to accept or investigate the complaint.

(6) The employer or employee may appeal to an appeal body a Director's or reviewing officer's order to pay earnings.

Section 89

(1) This section applies when a complaint that
   (a) the employment of an employee was suspended or terminated, or
   (b) the employee was laid off

   in the circumstances or for the reasons described in section 82(1)(b) is referred to the Director.

(2) If the Director determines that
   (a) the employment of an employee was suspended or terminated, or
   (b) the employee was laid off

   in the circumstances or for any of the reasons described in section 82(1)(b), the Director must, unless the matter has been settled, make an order for reinstatement or compensation or both and specify the date by which the order must be complied with.

Section 95

(1) A person who has a right of appeal to the appeal body may appeal by serving on the Registrar written notice of appeal specifying the reasons for the appeal and providing to the Registrar the fee, if any, and any amount referred to in subsection (3).

(2) A notice of appeal must be served on the Registrar within 21 days after the date of service on the appellant of a copy of, as the case may be,
   (a) a single employer declaration,
   (b) an order under Division 3,
   (c) a notice of administrative penalty,
   (d) a notification of a cancellation referred to in section 23.1(7),
   (e) a collection notice, or
   (f) a certificate under section 112(4)(b).

(3) The following must be received by the date referred to in subsection (2), in a form and manner acceptable to the Registrar:
   (a) any fee payable under the regulations;
   (b) any amount the employer is required to pay under an order under Division 3;
   (c) any amount the employer is required to pay under section 112(4)(b).

(4) When the Registrar considers that there are extenuating circumstances that warrant doing so, the Registrar may
   (a) waive or reduce a fee or other amount required to be paid when the notice of appeal is served,
   (b) extend the time to pay a fee or other amount referred to in clause (a), or
   (c) accept security for the amount payable in another form and amount acceptable to the Registrar.

EC&M Electric Ltd v Alberta (ESO) was a good example of an employee's use of the ESO complaint system as opposed to resorting to a wrongful dismissal lawsuit

- Mr. White was terminated for cause by EC&M so White complained to ESO for not getting termination pay. When ESO investigated, they found the employer's allegations of cause were not substantiated and ordered White be paid 8 weeks' pay which was the minimum under the *Code*
- EC&M appealed to an umpire, who upheld the ESO order

    - It was strategic to use the ESO process as opposed to a wrongful dismissal suit. The net benefit gain may have been greater than a protracted and contentious fight regarding just cause in court.

Wong v Shell

- Wong was terminated for cause and went through the ESO process (investigation, decision, appeals). All were dismissed so he started a court action for wrongful dismissal
- ABPC, ABQB and ABCA all dismissed. Estoppel was raised in the courts since he had used so many judicial resources that it was getting ridiculous
- To raise estoppel:
    1. He argued the same issue,
    2. Against the same employer,
    3. Under the ESO complaint process, under which administrative decision makers rendered a final decision in the matter
        a. A settlement or direction are not final so these won't count
- The choice of forum from the outset is critical: you cannot attempt to vindicate your rights through the Code administrative process and then after exhausting that process and losing at every stage, re-litigate using the Court process.
    - HRC only covers *HRA* complaints
    - ESOs only cover *Code* complaints
    - Court covers either
        - You can withdraw your complaint at either tribunal if you realize you want to pursue court action instead if the tribunal decision was not final (not an order or was a settlement or direction)
    - But, all have a different limitation period as well:
        - ESO complaints: 6 months
        - HRC complaints: 12 months
        - Court actions: 25 months

Danyluk v Ainsworth Technologies Inc

- Danyluk commenced a complaint for $300,000 in unpaid commissions under Ontario's equivalent ESO administrative process
- Before a decision was rendered by the administrative body, she commenced a lawsuit for the same claim of $300,000 in unpaid commissions
- SCC permitted her court action to proceed despite the three criteria of estoppel being met.
    - The SCC said that they owe some deference to the ESO Tribunal, but they are not legal at the end of the day, so the courts should exercise some discretion broadly
- SO, while estoppel is an easy test, it is discretionary and courts may just not enforce estoppel if they don't want to
    - It is possible to argue the same complaint before a Court after exhausting the statutory ESO process but attempting this is risky and likely rarely to be successful.

Gordon v CAM Distributors

- Gordon was a journeyman millwright working with CAM. After resigning his employer would not pay him his accrued overtime so he commenced action for his statutory minimums
- CAM argued that when an employee wants statutory minimums they need to go through the ESO process as the exclusive forum for vindicating those rights.
    - This relied on a since amended s 83 which stated that the ESO is the exclusive jurisdiction for some courses of action
    - ABQB said Gordon was entitled to pick whatever avenue he pleased

- So: ESO is not the exclusive forum for an employee's claim to pure statutory entitlements and ESOs do not have jurisdiction to award common law remedies as their jurisdiction is only the Code. If employee wants common law damages, they need to do so through the court, not ESO.