

## EMPLOYMENT: FINAL EXAM NOTES

<b>Origins &amp; Constitutional Framework</b> .....	1
Labour vs. Employment + History/purpose/uniqueness of employment standards .....	1
Constitutional overview (federal/provincial regulation; <i>Constitution Act</i> , ss 91, 92) .....	2
Jurisdiction over employment Ks + Spin-offs + Definition of federal work/undertaking/business .....	3
<b>The Nature of Employment: Who is an employee?</b> .....	4
Employee vs. Independent contractor (Definitions + Tests + Purposive interpretation) .....	4
Dependent contractor .....	4
Therrien v True North Properties (Factors in determining whether an individual is an employee) .....	5
<b>The Employment Contract</b> .....	5
Formation + Types + Terms .....	5
Hobbs v TDI (Attempt to vary essential term needs fresh offer/acceptance/consideration) .....	6
Globex Foreign Exchange Corp v Kelcher (Mere continued employment is not valid consideration) .....	7
Wronko v Western Inventory Services Ltd (Can't vary a contract just with notice) .....	7
Policy updates .....	7
<b>Termination: The Right to Terminate</b> .....	8
<i>Reasonable Notice</i> .....	8
How to figure out length of reasonable notice (K + ESC + <i>Bardal</i> factors) .....	9
Minott v O'Shanter Developments Co ( <i>Bardal</i> factors + Issue with 'rule of thumb') .....	10
Radwan v Arteif Furniture Manufacturing (Change of ownership affecting length of service) .....	10
Reasonable notice for termination mentioned in employment contract .....	10
Options for an employee with poor performance .....	11
Sliding scale offer .....	11
<i>Just Cause</i> .....	11
Consequences for employee .....	11
McKinley v BC Tel (Dishonesty + Context/proportionality + After-acquired cause) .....	11
Dowling v ON (Workplace Safety & Insurance Board) (Cumulative misconduct + Proportionality) .....	12
Poliquin v Devon Canada (Supervisors + Cumulative effect + Privacy expectations) .....	13
Milsom v Corporate Computers (Poor performance + Proper warnings) .....	14
Henson v Champion Feed Services (Cumulative misconduct + Poor performing employee) .....	14
Whitehouse v RBC Dominion Securities (After-hours conduct) .....	15
Whitford v Agrium (Alcohol induced absenteeism + Considerations for absenteeism) .....	15
Hodgins v St John Council for Alberta (Sexual harassment) .....	16
<i>Constructive Dismissal</i> .....	17
Was the employee fired? What's owed to an employee? .....	17
Wilkinson v T Eaton Co (What is constructive dismissal?) .....	17
Potter v New Brunswick Legal Aid Services Commission (Test for constructive dismissal) .....	17
<b>Discussion:</b> Constructive dismissal – Where to look + Advice to employee .....	18
Otto v Hamilton & Olsen Surveys Ltd (Reduction in benefits not a fundamental breach) .....	18
Pathak v Jannock Steel Fabricating (Termination of substantial bonus specifically negotiated for) .....	19
Alguire v Cash Canada Group Ltd (ABCA) (Constructive dismissal in fixed term contracts) .....	19
<i>Quitting</i> .....	19
<b>Discussion:</b> Did she quit? Can employer terminate for cause? Damages/advice? .....	19
Kieran v Ingram Micro Inc (Clear language/consequences/notice) .....	20
<i>Frustration</i> .....	19
Wightman Estate v 2774046 Canada (Employment K frustrated by disability) .....	20
<b>Common Law Damages</b> .....	21
<i>Benefits &amp; Bonuses</i> .....	21
Sylvester v British Columbia (Deduction of disability payments + Intention of parties) .....	21
IBM v Waterman (Deduction of pension benefits + Private insurance exception) .....	21
Noble v Principal Consultants Ltd (Crystallization of damages + Implied term of reasonable notice) .....	22
Alguire v Cash Canada Group Ltd (ABQB) (Post-breach events relevant if reasonably expected) .....	23
Deputat v Edmonton School District No 7 (Holiday pay + Breach vs. repudiation) .....	23
<i>Aggravated &amp; Punitive Damages (including Honda Damages)</i> .....	24
Honda Canada Inc v Keays ( <i>Wallace v UGG</i> + Aggravated/punitive damages + Honda damages) .....	24
Bhasin v Hrynew (Good faith in contract law) .....	25
Merrill Lynch Canada Soost ( <i>Honda</i> damages applied – Note the error in law) .....	25
Elgert v Home Hardware Stores (Proportionality analysis for punitive damages) .....	26
<i>Duty to Mitigate</i> .....	27
Christianson v North Hill News Inc (Duty to mitigate + Costs of mitigation) .....	27

Evans v Teamsters Local Union No 31 (Duty to mitigate by returning to same employer) .....	27
Magnan v Brandt Tractor (Forced retirement + Role of intent) .....	28
Boutcher v Clearwater Seafoods (Sufficient notice + Costs of mitigation) .....	28
Russo v Kerr Brothers (Remaining at work to mitigate + Consent to unilateral changes) .....	29
Bowes v Goss Power Products (K provides a fixed notice term) .....	30
Giza v Sechelt School Bus Service (Duties in repudiation vs. breach) .....	30
<i>Torts in the Workplace</i> .....	31
Piresferreira v Ayotte (Employer's duty to shield employees from torts) .....	31
<b>Summary: Types of damages (General/Punitive/Aggravated/Mitigation/Costs)</b> .....	32
<b>Settlement</b> .....	32
Farmer v Foxridge Homes Ltd (Test for settlement + Requirement of a release) .....	32
Blackmore v Cablenet Ltd ( <i>Contra proferentum</i> + Unconscionability) .....	32
Structuring a settlement in a tax-efficient manner .....	33
<b>Confidential Information, Non-Competition &amp; Injunctions</b> .....	33
Employee duties (Contractual + Fiduciary + Statutory) .....	33
<i>Confidential Information &amp; Key Employees</i> .....	34
Anderson, Smyth & Kelly Customs Brokers v World Wide Customs Brokers (Fiduciary duty of key employees not to solicit and 3Ps who know of breach) .....	34
Torcana Valve Services v Anderson (Notice + Expediting Termination + Reasonable non-solicitation period for key employees) .....	35
RBC Dominion Securities v Merrill Lynch (Unfair competition not compensable + Damages/claims) ..	36
Jones v Klassen (Contact letter to former clients) .....	37
<i>Restrictive Covenants: Non-Compete and Non-Solicitation Clauses</i> .....	37
Elsley v JG Collins Insurance Agencies Ltd (Test for enforcing these clauses) .....	37
HL Staebler Co v Allan (Non-compete can't be too broad) .....	38
KRG Insurance Brokers v Shafron (Ambiguous terms – Severance + Rectification) .....	39
<i>Injunctions</i> .....	39
Test for enforceability .....	39
Renfrew Insurance v Cortese (Successful case of an injunction ordered) .....	40
Dreco Energy Services Ltd v Wenzel (How to interpret the test for injunctions) .....	40
Globex Foreign Exchange Corp v Kelcher (RCs with wrongful termination) .....	40
<b>Employment Standards Code</b> .....	41
<i>Statutory Minimums</i> .....	41
Machtiger v HOJ Industries (Statutory interpretation + Breach of statutory minimums) .....	41
Kosowan v Concept Electric Ltd (Code allows for CL remedies if not explicitly barred by K) .....	41
Nutting v Franklin Templeton Investments (Specificity of language) .....	42
Rizzo & Rizzo Shoes Ltd (Re) (Statutory obligations in bankruptcy + Broad interpretation of <i>ESC</i> ) .....	42
<i>Forum: Statutory vs. Common Law Damages</i> .....	43
Smith v Hostess Frito-Lays (Statutory remedies don't prevent CL remedies + Expediting termination) ..	43
EC&M Electric Ltd v Alberta (Employment Standards Office) (Solving disputes through <i>ESC</i> ) .....	43
Wong v Shell Canada (Estoppel) .....	43
Danyluk v Ainsworth Technologies Inc (Discretion in applying estoppel + Fairness) .....	44
Gordon v CAM Distributors Ltd (Selection of forum + Supervisory exemption from overtime) .....	44
Vrana v Procor Ltd (Temporary layoffs – Contradiction between CL and <i>ESC</i> ) .....	45
Kennett v Superior Millwork Ltd (Selling business as a going concern + Going after purchaser) .....	45
<i>Unjust Dismissal (Canada Labour Code) – Wilson v Atomic Energy</i> .....	45
<b>Human Rights in the Workplace</b> .....	47
Limitation on freedom of K + Framework for a potential violation .....	47
<i>Who's Protected by the Human Rights Act?</i> ..	48
McCormick v Fasken Martineau DuMoulin (Need to be an employee) .....	48
<i>Discrimination, BFOR &amp; Duty to Accommodate</i> .....	48
BC (Public Service Employee Relations Commission) v BCGSEU (Test for discrimination) .....	48
Hydro-Quebec v Syndicat des employees de techniques professionnelles (DTA + Absenteeism) .....	50
Vantage Contracting v Marcil (Perceived disability + Compounded discrimination + Remedy) .....	50
<b>Discussion:</b> Just cause? Human rights/DTA? Constructive dismissal? Advice? .....	51
Brewer v Fraser Milner Casgrain (Unclassified condition + Failure to cooperate + Ongoing duty) .....	51
Richards v Canadian National Railway (Can't contract/compensate out of human rights compliance) ..	52
<i>Drug Testing</i> .....	53
Stewart v Elk Valley Coal (Indirect discrimination from a policy rather than an enumerated ground) .....	53
AB (Human Rights & Citizenship Commission) v Kellogg Brown & Root (Terminated b/c policy) .....	54
Lockerbie & Hole Industrial v Alberta (Only employers are bound by duty not to discriminate) .....	54

# Origins & Constitutional Framework

**Labour vs. employment:** Unionized environments vs. relationship between individual employee/employer.

## History: from ‘master and servant’ to ‘employment standards’

- 14<sup>th</sup> century: Arrival of employment law/standards. 1/3 die from plague, so remaining had strong bargaining positions (relative to employers). First legislation was about controlling workers (making sure they’re tied to controls and suppressed wage damages).
- 16<sup>th</sup> century: *Statute of Artificers* addressed hiring/keeping/departing/working/wages of servants. Agreements between masters/servants were “articles of agreement” (employment K). The term is dropped except in the legal world (articling).
- Well into 18<sup>th</sup> century: Features of employment regulation – (a) Employment was a matter of private K/agreement, (b) But state still enforced agreements, (c) By punishing breaches (whipping, imprisonment, forced labour, specific performance).
- How did the punitive regime survive?
  - o 1905: AB becomes a province. Copies *Master and Servant Act* from other provinces (which adopted from England). Employer could enforce fines imposed for misconduct/ absenteeism/disobedience by going to Justice of the Peace to ask for punishment.
    - S 5 (discipline for disobedience at work) lasted until the 1940s
  - o 1940: Separation between labour (recognition of association) and employment law.
  - o 1980: Statute changed (domination implied with master/servant) to Employment Standards.

### **Brito v Canac Kitchens**

19<sup>th</sup> century: Jail for workplace transgressions. Punished for displeasing masters. Legalized discrimination against Chinese workers in BC. Law enforcers favoured employers.

20<sup>th</sup> century: Canadian employers must dismiss with proper notice or pay in lieu thereof. If the latter, they must make the employee whole for the CL period of reasonable notice.

## Purpose of modern employment standard legislation

1. Safety of workers: Avoid injuries/drainage of resources.
2. Clarify expectation of rights/obligations: Avoid litigation.
3. Give protection to employees (their needs; parental/sick/bereavement leaves) and to minorities (preventing arbitrary discrimination).
4. Protect power imbalances: Employee needs employment more than employer needs employee. Employees aren’t typically in a position to dictate terms (employer has unilateral power to determine terms; vulnerability of employees).

Uniqueness of employment Ks: State intervention (minimum standards) in private Ks (human beings’ labour/time, rather than goods exchanged for money)

### **Preamble** (*Employment Standards Code*)

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;

## **Constitutional overview** (EXAM: Federal versus provincial regulation)

**Powers of the Parliament** (*Constitution Act, 1867*) – **FEDERAL**

Legislative Authority of Parliament of Canada

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within

the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. (44)
- 1A. The Public Debt and Property. (45)
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance. (46)
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. (47)

**Exclusive Powers of Provincial Legislatures – PROVINCIAL  
Subjects of exclusive Provincial Legislation**

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. (48)
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes\*:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

**\*Unique – these subparts actually specify classes under federal jurisdiction.**

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

#### Jurisdiction over employment contracts

1. Employment/labour relations are presumptively a provincial matter. Presume employment Ks/relationships are subject to provincial regulation/jurisdiction (s 92(13))
  - o Max hours/min wages not generally set by feds (*Labour Convention*, UKPC 1937)
2. Exception: Presumption rebutted if it's a federally regulated industry (s 91; limited to federal undertakings/business/services) (*Northern Telecom*, SCC 1980)
  - o Employees make less than minimum wage. Provincial wage laws don't apply. Federal gov. regulates core features of employment (wages within this definition) (*Bell Canada*, 1966).
  - o *Tessier* (SCC, 2012): Two ways that the exception operates
    - a) Direct federal jurisdiction (i.e., postal service workers – s 91(5))
      - May still be private companies (not necessarily working for the government)
    - b) Derivative jurisdiction: Employees not directly employed by federally regulated undertaking, but by an entity that is sufficiently integrated/reliant upon/connected to that undertaking.
      - Ex: Canada Post contracts out to local delivery service (90% of business is delivering parcels for Canada Post). These workers are sufficiently reliant on Canada Post. They are derivatively federal jurisdiction.
        - o Once found to be within federal regulation, all employees/services become federally regulated. Now: 100% of local delivery service is federally regulated (so long as the entity is reasonably coherent).

**Spin-off:** A provincially regulated business (hotel) owned by a federally regulated business (railway) doesn't automatically become federally regulated. It depends on how integrated they are.

#### **Definitions** (*Canada Labour Code*, s 2)

**2** In this Act,

**federal work, undertaking or business** means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

- (a) A work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
- (b) A railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
- (c) A line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) A ferry between any province and any other province or between any province and any country other than Canada,
- (e) Aerodromes, aircraft or a line of air transportation,
- (f) A radio broadcasting station,
- (g) A bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,
- (h) A work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
- (i) A work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and
- (j) A work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the *Oceans Act* apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act;

**Reinstatement:** Under the *Canada Labour Code*, there's a provision that allows for reinstatement to the position in the case of unjust dismissal (See *Wilson*). A federally regulated employee, under *Canada Labour Code*, can make a claim for the return of their job in a way that a provincially regulated employee cannot.

# The Nature of Employment: Who is an employee?

## Employees vs. independent contractors

- Why the distinction matters
  - o Employees are entitled to benefits/protection: (1) employment standards acts (minimum standards, notice), (2) labour relations acts (ability to unionize), (3) common law rights (ability to sue for wrongful dismissal) and obligations (restriction on competition)
  - o Employers vicariously liable for employees, not for independent contractors.
  - o Employers must remit taxes on behalf of employee directly to CRA, whereas the independent contract is responsible for their own taxes (they're their own business).
- Why it's now difficult to decipher: Nature of work is changing. No longer going into the office.
  - o *Trends*: (1) self-employment, (2) fee-for-service (Uber), (3) less job security, (4) tech changes/higher degree of independence (working from home).
  - o *How to decipher*: Look to purpose of employees' statutory coverage – protection! Those who are economically dependent (vulnerable) need protection).
- Independent contractor: (1) Pros (flexibility, potential to make more money, ability to get help by subcontracting), (2) Cons (no job security; easily fired).

## Definitions (ESC)

**Employee:** An individual employed to do work who receives or is entitled to wages and includes a former employee (s 1(1)(k)).

- *Babysitter*: Although she may seem to fit this definition, she is an independent contractor. Although there is a K for work (money in exchange for time), this is not synonymous with an employment K.

**Wages:** Includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include (i) overtime pay, vacation pay, general holiday pay and termination pay, (ii) a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency, (iii) expenses or an allowance provided instead of expenses, or (iv) tips or other gratuities (s 1(1)(x)).

Other (possibly) applicable statutes to consult: *Occupational Health and Safety Act, Human Rights Code*

## Various factors to test if someone is an employee or independent contractor

- Control, ownership of tools, risk of loss, chance of profit (*Montreal Locomotive*)
- Control and economic dependence (*Beyond employees and ICs*, Lagille and Davidov)
  - o Look at administrative control (setting conditions for work; shifts, dress code, power to discipline/promote), rather than direct control (telling you what to do).
- Look at total relationship btwn parties (context). No one factor is determinative (*Sagaz*, SCC 2001).
- Organizational integration, employer control of worker activity (hours/location), worker chance of profit or risk of loss, subcontracting of tasks (paying out own revenue for assistance/delegating work), ownership of tools, exclusive employment (allowed to work for someone else) (*AB Permit Pro v Booth*, ABQB 2007)
- Other factors:
  1. Mechanisms of pay; Invoices given to employer? Hourly/salary?
  2. Do you get benefits? How do you pay taxes (i.e., are things deducted from payment like EI)?

**Purposive interpretation:** “Employee” may have a different meaning in different contexts. Look at purpose/context to figure out if individual is an employee in that situation.

- Example: Bee Clean is hired by the University of Alberta for their cleaning service. The cleaners are employees of Bee Clean, but not employees of the University of Alberta.

**Dependent contractor:** A person, whether or not employed under a K of employment, and whether or not furnishing tools/vehicles/equipment/machinery/any other thing owned by the dependent contractor, who performs work/services for another person for compensation/reward on such terms/conditions and the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor. Includes many people within “employee” that wouldn't otherwise be included.

- Look for CONTROL and ECONOMIC DEPENDENCE.

- Look like independent contractor but employees because of reliance on single entity to prove work (still need protection; vulnerability). Treat like employees in AB (*Pennock*, ABCA 2008)
- Ex: Truck drivers, lawyers, accountants, taxi drivers

**Therrien v True North Properties** [Factors in determining whether an individual is an employee]

Facts: Gagnon hires Therrien to provide accounting services for his company. Later changes employment arrangement (as needed, rather than full time). Therrien sues for wrongful dismissal.

Ratio: Many factors to determine if you're an employee. Only employees can sue for wrongful dismissal

Analysis

*Employee or independent contractor?* Employee.

- Must be an employer-employee relationship for wrongful dismissal.
  1. **Control test:** Is the alleged employee subject to control/direction of employer in respect of manner in which his work is to be done, when it will be done and how the employee must do his work? If employer has this power, employee (*Co-op Insurance Assn v Kearney*).
  2. **Whose business is it:** (a) Control, (b) Ownership of tools, (c) Chance of risk and (d) Risk of loss (*Montreal v Montreal Locomotive Works Ltd*).
  3. **Organization test:** Is the individual's work an integral part of the business operation of the employer or only accessory to it? The more integral, the more likely an employee (*Armstrong v Mac's Milk Ltd*).
  4. **Four factors of employment:** (a) Power of selection of employees, (b) Payment of remuneration, (c) Right to control the method of doing work, (d) Right to discharge (*Talbot v Pan Ocean Oil Corp*)
- FT/exclusive worker (reliance). Initial discussion spoke of the job as if it would take him to retirement. Gagnon had control/direction of Therrien (what work to do/when). Gagnon didn't direct certain work (CPA expectations); this applies to professional staff (lawyers/accountants).

*Dismissal?* Constructive dismissal (substantial change to nature of employment). He would become PT and have to look for other work. Any reasonable person in Therrien's place would have felt that the essential terms of the employment K were being substantially change.

If this went to appeal

- Arguments *for* employer: (1) Therrien held himself out as an IC, (2) Therrien did side work (non-exclusive relationship, (3) Therrien didn't receive benefits, (4) Therrien Racing (as his corporation, not as an individual) issued invoices (not paid under the payroll).
- Arguments *against* employer: (1) Therrien gave up secure employment to work for Gagnon (vulnerable; wouldn't leave that to be IC when he has kids), (2) Gagnon controlled employees.

## The Employment Contract

**Formation:** (1) Offer, (2) Acceptance, (3) Consideration (tricky, especially with varying ongoing relationships).

### Types of contracts

- 1) Term contract: Set period of time. If terminated before term ends, employer pays remainder of K.
- 2) Contract of indefinite duration (most common): Employed until termination/resignation. No set duration.
  - o *Two key terms:* (1) We'll keep hiring you and (2) We can fire with reasonable notice.
    - Termination is a breach of the (implied) term of indefinite duration (i.e., ability to sue for damages for what they owe you) if reasonable notice isn't given.

### Terms of the contract

- 1) Written
- 2) Oral
- 3) Implied by law (can be displaced by written terms as long as the terms don't become unconscionable)
  - a. *Employee:* Good faith, honesty, loyalty, protect confidences (can't share confidential information), reasonable notice of resignation.
  - b. *Employer:* Good faith, safe workplace, reasonable notice of termination.

4) Statutory: See sections 3 and 4 of the *ESC* below.

3. **Civil remedies and greater benefits**

(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, maternity and parental leave, reservist leave, compassionate care leave 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, maternity/parental leave, reservist leave or compassionate care leave than those for which this Act provides, the employer must give those greater benefits.

4. **Minimum standards cannot be avoided:** 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.

▪ Can go ABOVE standards, but not BELOW. Term in breach of minimum standards is void.

5) Conduct: Can vary original written contract (i.e., pay more than what K says; will be bound by it)

**Hobbs v TDI Canada** [Attempt to vary essential term requires fresh offer/acceptance/consideration]

Facts: Hobbs leaves steady job for commissioned sales position with TDI. Talked to management about commission rates. Employment K said he'd receive details of rates in separate document. Signed the K (assured TDI was trustworthy). Solicitor's Agreement stated rates (same as discussed) but that they were subject to change at sole discretion of TDI. Hobbs told he wouldn't get commission until all billings closed. He signed the Agreement and continued to work (TDI's argument for why it's binding/one single K). He resigned and received no commission.

Held: TDI can't rely on Solicitor's Agreement to avoid paying Hobbs' commissions owed to him.

Ratio: Amendments to employment contracts (as it is here) require fresh consideration.

Analysis

- Formation of an enforceable contract:
  1. Offer: The written contract and oral conversation (can be binding) were relied upon. The issue was that the Solicitor's Agreement contradicted the oral conversation.
  2. Acceptance: Complete.
  3. Consideration: Promise to work in exchange for the promise to pay.
- Agreement did *not* form part of original employment K. It's an amendment of employment K.
  1. Original letter was an offer of employment (stated that signing would lead to acceptance of employment; no discussion of a requirement to sign another document as part of K).
  2. Solicitor's Agreement was inconsistent with commission arrangement agreed upon.
  3. Solicitor's Agreement was presented to Hobbs after hired/began working
- Hobbs received no consideration for signing the Solicitor's Agreement. **Signing didn't provide extra security to Hobbs** (than under the terms of the original employment contract).
  1. TDI didn't promise to forbear from terminating Hobbs if he signed.
  2. TDI didn't want/intent to end Hobbs' employment prior to signing (wanted clients).
  3. TDI didn't consider that whatever right it had to dismiss would be affected by him signing.
- Employment contracts *can* be varied (i.e., promotions; fresh consideration is being paid more). Here, it's the opposite – the employee is *worse off* with *no fresh consideration*.
- Comparing this case (**mere continuation of employment**) versus *Maguire* (a promise to forbear termination/**mutual understanding of increased job security**)
  - o Mere continuation of employment: Not valid consideration. This was the original consideration. No added benefit, so can't constitute fresh consideration.
  - o Promise to forbear termination: Can constitute valid consideration. Added job security (employers have the right to fire you).
    - **Understanding** is a requirement (*Globex*, para 77). Does employee understand that he/she won't be fired for a reasonable period of time (i.e., that they saved their job by agreeing to the change)?
    - **Genuine evidence of intent to terminate** is a requirement (not present here).

**What does this teach employers?** (1) Put things in employment K at time of offer/acceptance to make it binding (para 48), (2) Provide a raise (would count as consideration).

**Globex Foreign Exchange Corp v Kelcher** [Mere continued employment is not valid consideration for fresh promises by employer since it is something you already possess under the K]

**Facts:** Three employees agree to non-compete clauses *during* their employment but received no new benefits for doing so. They left when the appellant asked them to accept more onerous restrictions.

**Held:** Employees not bound by restrictive covenants/non-compete clauses.

**Ratio:** Continued employment alone is not valid consideration for fresh promises by employers.

**Analysis:** They didn't receive anything for signing (beyond that to which they were already entitled). Nothing was given for signing and they weren't told that they would be kept on if they signed.

- ***K can be varied with consideration if:*** (1) decision to terminate, (2) decision to reverse decision to terminate (by signing the new K), (3) employer won't terminate for reasonable period, (4) mutual understanding of forbearance (intent to terminate and increased job security).

**Wronko v Western Inventory Services Ltd** [You can't vary a contract just with notice; Ontario law]

**Facts:** Employment K said Wronko entitled to 2 years' salary if terminated. New president gives new employment K (reduces termination pay to 30 weeks). Wronko refuses to sign. 2 years later, president told Wronko that the amended provision was in effect (no job if he didn't accept). Wronko understood his employment to be terminated and didn't report to work.

- It's as if the new K was a termination notice (notified of changes in employment 2 years from implementation) without employer having to 'pay out' the 2 years (continued to work).

**Held:** This is a termination. Employer must pay two years' pay pursuant to the existing contract.

**Ratio:** ***A contract can't effectively be varied just by giving notice of this change*** (Ontario law).

**Analysis**

- He was terminated by the new K. A reasonable person would regard the letter as a termination. He did not intend to resign but "we do not have a job for you" was effective termination.
- Options when your employer attempts to unilaterally amend a fundamental term:
  - a) Accept change: Continue to work under the altered terms.
    - If benefit: No real issue about enforceability. If disadvantageous: Look for consideration (agreeing doesn't mean you're bound by term against your interest).
  - b) Reject change: Sue for constructive dismissal.
  - c) Reject terms
    - I. Employer terminates with proper notice/offers re-employment on new terms, or
    - II. Employer permits employee to continue working/allows previous terms to continue. **This is what happened:** Wronko refuses to agree, employer allowed him to continue working according to existing terms of K (employer must have taken to have acquiesced to Wronko's position and to have accepted that the existing K remained in effect). Employer implicitly agreed to be bound by old contract.

**For employee to follow rules:** Give (2 years of) notice of termination with offer to rehire. Spell it out in advance (existing terms end on a certain date + new K comes into effect then). Wronko would have to work for those 2 years (employer is complying with K, so employee must too). Immediately after giving notice, employer will offer a new K. Decision to accept new terms is up to Wronko.

**What does this teach employees?** You don't have to sign variations of your K that you don't agree to. However, the employer can fire you with notice (not for cause; 'not agreeing to a change' is not cause).

**Policy updates:** Are these contractual changes that give rise to legal issues? No.

1. Must be a fundamental change to terms of employment. Minor variations can't be grounds to argue constructive dismissal, as they don't go to the heart of the contractual relationship.

2. Many variations aren't changes to the K (might have built-in flexibility for change).
  - a. Management rights: Implicit power in most employment Ks that the employer can manage its workplace (includes making minor changes to the employment K).
  - b. Policies also contain implied flexibility (that they will be revised from time-to-time).
    - Tips for employer: (1) Offer policies in the employment K to make them binding, (2) Include "Updates of this policy from time-to-time will constitute terms of the employment contract" in the employment K.

## Termination

**Right to terminate:** Employer's right to terminate the employment relationship with due notice is simply the counterpart to employee's right to quit with due notice. Unless otherwise provided, both parties may end the relationship without alleging cause so long as they provide adequate notice (*Dunsmuir v NC*, para 105).

- Subject to limits (below), employer doesn't need a reason to terminate if reasonable notice provided (don't need to give notice at *all* if there's cause; employee breached the K).
- *Problematic?* Undermines job security/not a fair way to treat people (reliance). Protected by labour law, but not employment law because: (1) freedom of K, (2) employer's right to control their workplace, (3) mirror image (if employee can quit, employer should be able to terminate).
- *Term contracts:* No need to provide notice for the end of that term. If you want to terminate before the term ends, the damages will reflect the rest of the time in that term.

### Limits on the right to terminate

1. The employment contract: What does it say about termination?
2. Human Rights Code: Can't discriminate based on enumerated grounds (even if one of many reasons)

#### Discrimination re employment practices (s 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.

3. Employment Standards Code: More limits on the right to terminate

#### Termination of employment prohibited during maternity leave and parental leave (s 52)

- (1) No employer may terminate the employment of, or lay off,
- (a) An employee who has started maternity or parental leave, or
  - (b) An employee because the employee is entitled to maternity or parental leave.
- Note:** This prohibits termination before pregnancy/before maternity leave.
- (2) Subsection (1) does not apply if an employer suspends or discontinues in whole or in part the business, undertaking or other activity in which the employee is employed, but the obligation of employer to reinstate the employee or provide the employee with alternative work in accordance with s 53.1 continues to apply.

**Termination of employment:** No employer may terminate the employment of, or lay off, an employee who has started: reservist leave (s 53.4(1)), compassionate care leave (s 53.91(1)), death or disappearance of child leave (s 53.951(1)), critical illness of child leave (s 53.961(1)), long-term illness and injury leave (s 53.971(1)), domestic violence leave (s 53.981).

## Reasonable Notice

**How to figure out the length of reasonable notice [GO THROUGH ALL THREE]**

1. The employment contract: What does it say about notice?
2. Employment Standards Code: **The minimum.** Employment K/common law can't go below the statutorily mandated minimum standards (**LOOK TO CANADA LABOUR CODE IF FEDERAL JURISDICTION**)

**Calculating length of employment for termination notice purposes (s 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.

**Options for employer to terminate employment (s 55)**

- (1) An employer may terminate the employment of an employee only by giving the employee
  - (a) A termination notice of at least the period of notice required under section 137(1) if that section applies, or in any other case, 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.

**Employer's termination notice (s 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.

Things to notice with section 56

1. Mostly based on duration of employment (the longer you work, the more notice you're entitled to). Doesn't go indefinitely. Disadvantage to people who work longer than 10 years (same minimums).
2. Talking about weeks. These are (small) minimums.

3. Common law: **Provide a range** (20 months if very specialized, down to 2-3 weeks) If K is silent, there's an implied term of every K that you will be provided reasonable notice. Usually goes beyond *ESC*.

**Bardal v Globe & Mail Ltd** [Factors for length of 'reasonable' notice]

Facts: P's employer merged. Employment transferred to purchaser (no new K). President asked for resignation (accused of incompetency). P refused. President served him with notice of resignation. D denied wrongful dismissal (voluntarily withdrawal). In the alternative, D argues that if it was termination, it was justified since P didn't obtain the results which D was reasonably entitled to expect.

Ratio: To determine what constitutes reasonable notice, consider **Bardal factors**\* (para 21).

1. **Character of employment**: Tasks, responsibilities (supervising, setting policies, hiring, firing, signing authority), salary/commission, job title, place in organizational structure.
2. **Length of service**: Under same ownership (*Radwan*). Not always straightforward; are you bringing years of clients/employment? This might lengthen the time.
3. **Age of servant**: The older the employee, the longer the notice period owed.
4. **Availability of similar employment** (having regard experience/training/qualification of servant): Economic conditions. How specialized are your skills? How relevant is your work?
  - o Only job he/she has ever had? Reliance? Vulnerability? Unsure how to find other work?

\* Not an exhaustive list. Look at all relevant considerations.

Mitigation: Damages flowing from failure to provide adequate notice must include mitigation (money earned during period of reasonable notice that he/she doesn't receive). Sets off what employer owes.

- **Mitigate by finding other work. P's loss is calculated by taking the amount he/she would've earned during notice period, and deducting the amount earned or that could have been earned by acting reasonably during that period** (*Red Deer College v Michaels*)
- Look at earnings in totality. Suppose X is entitled to one-year notice but gets nothing. X earns double the amount he earned at previous job in the final 6 months of that year. Fully mitigated.
- Ex: One month working notice. Later determined that reasonable notice was 12 months. \$ earned during 1<sup>st</sup> month and any \$ earned during remaining 11 months reduces damages owed.

Pay in lieu of notice: Fire today (no notice). Pay for the notice term. No damages with which to sue.

**Minott v O'Shanter Development Co.** [Application of *Bardal* factors + Issues with 'rule of thumb']

Fact: 11-year loyal employee took 2 days off without permission because of a minor dispute with his supervisor. Terminated (employer says just cause) and not entitled to benefits).

Ratio: Rejection of the 'rule of thumb' (one month notice per year of work). A case-by-case/flexible approach (using the *Bardal* factors) is a better way to determine reasonable notice.

Analysis

- Problems with the 'rule of thumb': (1) Risk of overemphasizing "length of service" factor at the expense of others and (2) Risk of undermining the flexibility of the *Bardal* test. All factors should be equally in play. (it's an art, not a science).
- Why 13 months is justified: (1) Age (43 years old), (2) Limited education/skills/jobs available

**Radwan v Arteif Furniture Manufacturing** [Change of ownership affecting length of service]

Facts: Employed for 25 years. Change of ownership (with new employer for 4 years when terminated).

Issue: Does a change in ownership break the 'length of service'?

Ratio: Look to see whether the business operated as a **going concern**. If so, the employer would need to negate previous service to rebut that continuity (See *Kennett* – going after purchaser rather than seller?)

Analysis

- Rejects the 12-month cap from *Cronk* (for clerical/low-level employees).
- **Employment Standards Code (s 5)**: For the purposes of this Act [i.e., only applies to statutory minimums], 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 [*implicitly includes bankruptcy*]
  - o Length of service starts on date of hiring.
  - o You can add up all the previous work, but you only get the statutory minimums.
- **Contract law**: Privity of Ks. Alteration to K means new owners not bound by previous terms.
- **Common law**: If business operates as a going concern, entire length of service is recognized.
- **RECONCILING THIS ALL**: In calculating length of service with a change of ownership or bankruptcy in the employer, **did they continue to operate that business as a going concern?**
  - o Determining continuity of business: (1) Continuous employment (no period it didn't operate), (2) No significant renovations, (3) No significant changes to nature of business, (4) No changes to location of plant, (5) Employees remain in same positions
  - o How can employees protect themselves? In the new employment Ks, include an explicit term to negate previous service ("I'm not recognizing your previous service").

**Termination provision in contract**: Reasonable notice determined at the outset.

The EMPLOYER must give \_\_\_ months written notice before terminating the contract of The EMPLOYEE if the EMPLOYEE has completed 3 months of uninterrupted service with the EMPLOYER. The EMPLOYER can terminate the contract of THE EMPLOYEE for cause at any time.

Advantage: Certainty/cost-containment. Employee has an idea of what will transpire, and employee reduces the chances of litigation/lawsuits. Disadvantage: Lack of flexibility

#### Instances where it can be argued that it's not binding

1. Below statutory minimum (found in the *Employment Standards Code*, s 56 – above)
2. Character of employment dramatically changed.
  - o Employee's argument: Although it's the K signed at start of relationship, it changed. Must prove term was specifically attached to job you no longer have, and that when job fundamentally changed, a new K was formed (and new K had no written notice of termination, so CL applies).

#### **What if an employee isn't performing properly? [See *Milson and Henson*]**

If you want to fire:

##### Termination with NOTICE

1. *Employment Standards Code* minimums: Provide cheque for this right away when terminating.
2. **Is there anything that increases these minimums?**
  - a. Employment contract: Say anything about termination? Still binding (change of jobs)?
  - b. Common law reasonable notice (*Bardal* factors): How much will it cost to fire?

**Note: Lawyer must provide a range.** Employer won't give full reasonable notice. That's only what they get if he/she goes to trial. Employee/their lawyer might determine it's not worth suing for the few months.

**Note: Provide a release** with the termination letter. Once signed by the employee, he/she can't sue.

Termination with JUST CAUSE: Does it break down the employment relationship?

If you don't want to fire: (1) Provide warnings (discipline and/or performance reviews) or (2) change job (with consent/offer/acceptance/consideration or constructive dismissal)

**Sliding scale offer:** Employer prepared to offer salary continuance for 12 months beginning on 1 January 2018. If you find employment by 1 March 2018, your salary continuance will cease but the employer will pay you a lump sum of 75% of 10 months of salary; if you find employment by 1 May 2018, the employer will pay you a lump sum of 50% of 8 months of salary; if you find employment by 1 July 2018, the employer will pay you a lump sum of 25% of 6 months of salary.

#### Just Cause (or "Summary Dismissal")

##### **Consequences for employee**

1. Not entitled to termination notice (*Employment Standards Code*, s 55(2)(a)).
  - o It's the employee that breaches/ends the contract (can't sue for damages).
2. Disqualified from receiving benefits if claimant lost employment because of their misconduct (*Employment Insurance Act*, s 30).

**McKinley v BC Tel** [Dishonesty ≠ automatic dismissal; context/proportionality; after-acquired cause]

Facts: P takes medical leave and says his doctor told him he couldn't return to work. Terminated while on leave. P brings wrongful dismissal claim. Three days into trial, employer finds out P's doctor said he might be able to return to work with different medication.

Issue: Is dishonesty, in and of itself, sufficient to warrant an employee's termination, or does the nature and context of the dishonesty need to be considered in assessing whether just cause for dismissal exists?

Ratio: Rejects previous line of cases. Dishonesty is *not* always grounds for dismissal.

Held: Dismissal without cause. Entitled to damages for reasonable notice.

##### Analysis

##### **Context**

###### - **Factors:**

1. Nature of misconduct: Severity (i.e., harassment on a spectrum/not equally weighted).

2. Employee who committed misconduct: Length of service (if loyalty built up, the more you'll let go) + Past record (Unblemished?) + Personal life (Bad day? Reason?)
  3. Nature of job/workplace: Supervisory + Nature of workplace (i.e., swearing at construction site not as serious as swearing in a daycare; regardless of if the act itself was the same)
- Why we look at so many factors: (1) consequences (work is fundamentally important to identity/self-worth), (2) power imbalance (especially in termination; reliant/vulnerable/less prepared).
  - ***Did the employee's dishonesty give rise to a breakdown in the employment relationship? Violate an essential condition of the employment K? Breach the faith inherent to the work relationship? Fundamentally/directly inconsistent with employee's obligations to employer?***
    - o High bar. Not all misconduct will break down the relationship (even if it damages it)

**Proportionality:** What's the proportionate response/sanction to the misconduct? [See next case]

- Spectrum: Termination (high end) to discipline, suspension (with/without pay), docked pay (especially if misconduct caused loss), warning (similar misconduct will result in termination)
- **Here:** Misconduct didn't warrant termination (didn't violate terms of employment K).
  - o Factors: (1) Employee (long-term; trusted), (2) Nature of misconduct (although he lied about medical condition, we don't know negative effects of the drug that could bring him back to work; it's a lack of full disclosure, not lying/deceit).

**After-acquired cause:** Employer initially terminates without cause but later finds out about employee's misconduct (i.e., right before trial, like here). Doesn't matter when the employer finds out. Provided the misconduct took place while the person was still employed, it can be used as grounds for cause.

**Dowling v ON (Workplace Safety & Insurance Board)** [Applies *McKinley*; Cumulative misconduct; Clarifies proportionality]

**Facts:** Dowling (WSIB manager) told by Lazar (CSR under Dowling's supervision) that she can get him cheap computers (from MicroAge, an employer with WSIB). Dowling purchased 2 and then approved a refund to MicroAge/dealt with their file. Lazar gave \$1K to Dowling (to get clients reclassified; split \$ earned). Lazar suggested they characterize \$1K as a loan. Dowling made/backdated a fake loan receipt. WSIB didn't believe scheme and terminated Dowling (used position to obtain monetary benefit).

**Judicial history:** How did Dowling win at trial?

1. Employee: Length of service (25 years) + Progressively given more responsibility (good employee) + Consistent dedication to employer + Close to retirement (could've bridged into it).
2. Misconduct: Doesn't go to heart of relationship. Nothing improper about adjustments + Nothing to demonstrate he abused position by adjusting costs to clients + Small sums of money + No evidence he knowingly participated in fraud (saying it was lower level employee; this is naive).

**Ratio:** Dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship (i.e., sanction imposed for misconduct is proportional).

Analysis

**Context**

1. Nature of misconduct
  - o Repeated/serious lies (not one-time; took cheque, met with her/briefed her, lied about it)
  - o Deliberately mislead investigators (said he didn't get \$100 when he actually got \$1000; job calls for truth/disclosure; not acceptable to lie about such small things)
  - o Knowingly purchased computers from employer he supervises (at a discount rate + without disclosure), contrary to Code of Conduct.
  - o Breach of obligation to avoid conflicts of interests and situations where (actual or perceived) inconsistency exists between personal interests and best interests of Board.
2. Employee: (a) 50 years old, (b) 25 years of service, (c) few months from retirement
3. Nature of job/workplace
  - o Administering public funds (tax payers' money). Integrity/trust is paramount.
  - o Obligation to abide by Code of Conduct and conflict of interest policy (can't accept gifts from employers registered with Board; must act with integrity/trustworthiness).

- Power/authority (power to act without immediate supervision). Heightened expectation to act with integrity/impartiality when it's managers (significant discretionary power).

**Proportionality:** Did dishonesty violate an essential term of employment K? Did it breach faith inherent to work relationship? Was it fundamentally inconsistent with Dowling's obligations to Board?

- Board justified in dismissing on any of the three measures.
- Various acts + degree of trust + public nature of responsibility = Dismissal appropriate
  - Can't be reconciled with obligations: Intentional/numerous/serious dishonesty over a period of time. Conduct incompatible with obligations to act with integrity.
  - Breach of fundamental term of employment K: Avoiding conflicts of interest (in Code of Conduct which says a violation will lead to termination).

**Poliquin v Devon Canada** [Supervisory obligation; Cumulative effect; Privacy expectations]

**Facts:** P terminated after soliciting/receiving free services from employer's suppliers and using work computer to receive/view/send porn/inappropriate/racist emails (contrary to Code of Conduct). P brings action for wrongful dismissal (employer wants summary dismissal; employee wants trial for a better chance of settlement).

**Held:** Summarily dismiss wrongful dismissal action. Don't need a trial to examine facts (i.e., do a context/proportionality assessment) since facts are sufficiently clear.

**Ratio:** Assess the cumulative effect of the impugned conduct to determine if dismissal is appropriate. Supervisors have additional responsibilities that go along with their elevated position/pay. Intensity of workplace obligations increases with supervisory obligations.

#### Analysis

- Certain misconduct (conflict of interest and dishonesty) are recognized as constituting cause for discharge without notice. Taking a secret benefit can be categorized under either.
- **Dishonesty as grounds for dismissal if:**
  1. Violates essential condition of employment contract (including Code of Conduct) and Fundamentally/directly inconsistent with employee's obligations to employer.
    - **Here:** P's solicitation/receipt of services.
    - CoC: Employees must avoid behaviour that creates a conflict between duties/obligations to employer/personal interests (clear expectations for employee).
  2. Breached faith inherent in work relationship. **Here:** Employee expected to be loyal/faithful. Intensity of obligation increases with degree of responsibility.
- **Contextual approach:**
  1. Number of instances/duration of activity: Over course of a year prior to termination.
  2. Extent of employee's involvement: Received (and didn't tell people to stop sending; should've stopped them since he was a supervisor) and forwarded the content.
  3. Nature of role held by employee in the company: Supervisory responsibilities.
  4. Employee's level of seniority: Been there for over 20 years.
  5. Employer's reasonable expectations: Already warned about this misuse (expected to exercise sound judgment).
  6. All other relevant information informing the degree of seriousness of the impugned conduct: No defence to say this conduct is the norm in the industry.
- **Cumulative effect of impugned conduct:** Two wrongs worse than one. Court can consider cumulative effect of employee's record to determine if dismissal is justified (regardless of if misconduct is similar). **Here:** Conduct had a common element (exceptionally bad judgment).
- **Privacy:** May reasonably expect privacy on personal and work computers (at least where personal use is permitted/reasonably expected) (*R v Cole*). This contains personal information.
  - Important for employers to have policies that say (1) how computers can be used when provided by the employer, (2) what misconduct is wrong, (3) what penalties flow from those misconduct and (4) employer's right to examine computers.
  - **Here:** Zero-tolerance. What if it explicitly says termination? Reasonable? Tension between respect for contracts and fairness to employees. Still do proportionality analysis

**Milson v Corporate Computers Inc** [Poor performance doesn't justify dismissal; Proper warnings]  
Facts: Employer tries to change employee's pay (salary versus commission). Employee refused. Fired with 6 weeks' notice. Employer forwards email from *Employment Standards Code* office to employee to say that employer complied with rules, but cut out the section that stated the employee's right to sue.

Ratio: Poor performance will rarely be grounds for just cause dismissal. Instead, there should be disciplinary/rehabilitative action (provide warnings/help to underperforming employees).

#### Analysis

- Personal emails **insufficient distraction** for summary dismissal. Not a breach of core obligation to employer. Not 'time theft'/fraud (use this terminology if you're the employer; 'theft' goes to heart of relationship). It might have decreased performance, but it didn't stop it.
- Poor performance not communicated to employee (to improve/that employment at risk). No **warnings** given (expectations + ways that the employee is not meeting expectations + consequences for failure to do so). Need to give time to improve.
  - o Explicit warnings + Time period passes = Still difficult to find cause. Need something else or poor performance that's prejudicial in poorness (detrimental to employer)
  - o If X amount of sales was written in K, there'd be a better argument for just cause for not meeting that (employee can argue it was an essential term since it was in there).
- Rejection of the idea of **near cause**. If you have cause, you don't get notice. If you don't have cause, you owe full reasonable notice (can't give *less* than reasonable notice).
- Reasonable notice: 34 y/o. 6 years of service. No qualification/education related to employment. Earnings not high. Good health. No restrictive covenant. Employee mitigated damages by finding work after termination. Average last 3 years of work (fair measure of earnings).

**To avoid issue: Fire + provide reasonable notice. Dissuade lawsuit by giving lower end of reasonable notice (because of the poor performance).**

**Henson v Champion Feed Services** [Cumulative misconduct; Options for poor performing employee]  
Facts: Employee wrongfully mixed grain and tried to cover it up.

Held: Termination is a disproportionate consequence for a careless/honest mistake.

Ratio: Need to use progressive discipline to use cumulative misconduct to prove just cause.

#### Analysis

- No progressive discipline/warning of termination. Mixed signals (warnings, but raises/bonuses)
- Dishonesty didn't give rise to breakdown in the relationship. The test: (1) deceitful conduct established on BOP and (2) nature/degree of dishonesty warranted dismissal (*McKinley*).

#### Options for the employer to consider

##### 1) **Terminate with notice**

a) Calculate reasonable notice.

I. Employment contract: If it says nothing, proceed to statutory minimums.

II. Statutory minimums: *Canada Labour Code* since federal jurisdiction (s 92(10)(c)).

III. Common law (*Bardal*): 7 years of work with some supervisory responsibilities.

b) Provide a bit less than ideal reasonable notice [of 6 months, according to the case]

c) Look at options. Continue to work? Pay employee out? Mixed?

##### 2) **Progressive discipline:** Must do this to use cumulative misconduct to prove just cause

**Initially, provide a letter with:** (1) expectations, (2) previous discipline/warnings, (3) reasons why misconduct was serious (and justifies dismissal) and (4) consequences (if continues).

**Issue here:** Employee thinks nothing will happen from warnings since nothing happened from earlier ones. Employer must have *consistent discipline, clear expectations and elevating consequences (i.e., progressive sanctions)*

##### **Steps:**

a) Employee given clear and express warnings about performance (verbal then written);

- b) Employee given reasonable opportunity to improve performance after warning issued;
  - c) Employee failed to improve his/her performance; and
  - d) Cumulative failings would prejudice the proper conduct of the employer's business.
- 3) **Terminate for cause** (*reasonable* cause argument): Strategic approach. There's a weak cause argument, so employee might not sue. Worst case scenario: sued and provide reasonable notice.

**Note:** Employer focused on cover up, rather than actual screw up (so it's more than poor performance).

**Whitehouse v RBC Dominion Securities** [After-hours conduct can still violate an essential term of K]  
**Facts:** Intoxicated employee brings hooker to office one evening and left her there after a disagreement over payment. She had access to client info. He did this before (no warnings). Employee lied to superior (chance to explain). CoC emphasizes following law, confidentiality and integrity. Terminated for cause.

**Held:** Properly dismissed with cause. Reckless disregard for clients' interest and risk to client/corporate confidentiality (significant). There was a pattern of conduct (not an isolated event).

**Ratio:** Employer can terminate for cause where an essential term of the contract is violated.

Analysis

- Misconduct so severe that warnings weren't essential. Although after-hours, *still* connected to workplace (access to client info). Reputation is important to RBC. It became an essential term of K when put in CoC (justified to require strict compliance by those who purport to lead).
- No leniency for alcoholism (like next case). Severity of misconduct still a factor, even if a non-culpable misconduct (flowing from addiction). Employer didn't know about problem.
- **For summary dismissal:** Character must be incompatible with continued employment. There was lack of integrity, deficient judgment, dishonesty, untrustworthiness, careless disregard for client/corporate confidentiality. Perceived tolerance would impact employer's relationships.
- **Contextual analysis:** (1) nature of duties (high level of trust), (2) employer's expectations (Code of Conduct), (3) employment relationship (manages lots of money; reputation matters; **honesty, integrity, confidentiality** essential), (4) nature/seriousness of P's conduct (severe), (5) impact of conduct on business/reputation of employer (client confidence)

**Whitford v Agrium Inc** [Test for alcohol induced absenteeism; Considerations for absenteeism]

**Facts:** Approved time off to treat alcoholism. Told that additional absence may lead to discipline, but also that they would accommodate a back-to-work plan (slow transition). Failed to return. Terminated.

**Held:** Wrongfully terminated.

Analysis

- Diff. from last case: (1) W disclosed problem from outset; (2) W was seeking help for problem.
- He didn't work for 4 months but look at actual misconduct (don't include approved time off).
- Provided a warning letter (more absenteeism may lead to termination) but HR told him he could come back on a modified schedule. Confused. Accommodation turned to progressive discipline, and he didn't understand that he would lose his job.
- **Non-culpable misconduct:** Stems from mental disability, including alcohol addiction. This is a protected ground under s 7 of *Human Rights Act*. A different approach must be taken to absences attached to illnesses (compared to people who are intentional with their misconduct).
- **Post-termination evidence** (vs. after-acquired cause): Not relevant/admissible unless directed to decision made at time of termination. The fact that he wasn't able to get his life back together was irrelevant since, at the time of termination, they expected him to come back to work on a modified/back-to-work plan.
- Vulnerability: Been there for 22.5 years (no issues with absenteeism). Never had other work.

Personal notes

- **Test for alcohol induced absenteeism** (*Cie-miniere Quebec Cartier v Quebec*)
  - 1) Was the employee's ability to fulfill workplace duties impaired by alcohol problem?

- Contextual analysis: Warnings? Opportunity to improve? Failure to improve? Employer's obligation to accommodate disability to the point of undue hardship? Safety at issue (and if so, magnitude of risk and who bears it)?
- 2) Was there any improvement likely in the foreseeable future?
- **Failed to meet the first step:** Not sufficiently warned/given opportunity to improve. He was misled/confused (not told return-to-work plan necessary for continued employment).
- **Considerations for absenteeism:**
  - 1) Must be misconduct of significance.
  - 2) Failure to return promptly after leave of absence? Without advising employer? Took time off despite a direct order not to do so?
  - 3) Whether the employee took time off under false pretenses
  - 4) The prejudice to the employer's interest.
  - 5) Generally, two instances of absenteeism are required, particularly where the employee is of long service and has acted faithfully in all other respects.
  - 6) The conduct must be intentional misconduct, rather than the result of a misunderstanding
  - 7) The conduct must be the fault of the employee.
  - 8) Where warnings are provided, they should specify that the employee will be terminated if his absences continue.
  - 9) Consider whether there is a reasonable defense, such as illness (includes alcoholism).
  - 10) Consider the type of employment.
  - 11) Consider an employee's history of long service without a record of significant absenteeism (can be used as mitigating factor)
  - 12) Onus of proof on employee to establish he received permission to take a leave of absence.

**Hodgins v St John Council for Alberta** [Test for dismissal due to sexual harassment]

Facts: Complainant claims to be sexually harassed. Employee terminated.

Held: Not serious enough to justify terminating without reasonable notice. Failed to prove that the actions/words were irreconcilably undermined the employment relationship.

Ratio: Sexual harassment can lead to termination. Singular event, cumulative effect or failure to respond to discipline are reasons to terminate without cause. Subjectively and objectively (must be reasonable) determine extent/seriousness of misconduct to decide what the proportionate response is.

Analysis

- **Sexual harassment:** Unwelcomed conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of harassment.
  - o Minor (in relation to sexual assault; can have major impact on workplace env't) to major.
  - o Comments/conduct need not be directed towards a specific person for them to take offence so long as you can argue that it produced a poisoned work env't. Intent is irrelevant.
- To use sexual harassment as justification for discipline: (1) Words/conduct underlying allegation occurred, (2) Reasonable for complainant to be offended, (3) Words/conduct reasonably detrimentally affect work environment (or adverse job-related consequences for victim)
  - o Is the nature/seriousness not reconcilable with continuing the employment relationship? (1) Context (continuum of seriousness), (2) Sexual harassment policy, (3) Impact on work env't, (4) How the victim assessed consequences, (5) Discipline history of employee
- **Wallace bump:** To the extent the employer acted in bad faith/was unfair in the manner it conducted the dismissal, employee may be entitled to compensation for the resulting damage.
  - o Employee may be entitled to extra damages. Replaced by "Honda damages" later.
- **Notice:** 12 months. Senior manager + Highly specialized + Length of service + Age + Prospects of securing alternate employment.

*Potential arguments on appeal (legal errors):*

1. Underappreciation of **management role**. Intensity of expectations rise with responsibility (*Poliquin*). Supervisors expected to set workplace standards/follow rules (if not, nobody will).
2. Not enough weight given to **CoC violation** (*McKinley*). Essential/explicit term of K was violated.

### *Commonalities in sexual harassment complaints:*

1. Complainant wishes to remain anonymous: Embarrassed. Worried if complaint doesn't go anywhere (wanting things to stay normal). Worried they'd be seen as a complainer.
2. Inform employers to have a clearly defined Code of Conduct: Processes of what to do when there's a complaint. Who is in charge? What are the channels?
  - How to deal with confidential complaints:
    - Good: More likely to report (incentive to report) and feeling protected/secure.
    - Bad: Difficult for accused to respond to complaint.
      - Solution: Add transparency if complaint turns to discipline (opportunity to respond; not necessarily face-to-face with complainant). Make sure the complainant makes the decision (has the choice to remain confidential).
  - How to deal with retaining outside parties to investigate:
    - Good: Credibility. Objectivity. Expertise/training. Bad: Costly.
      - Solution: Don't say *every* complaint will lead to investigation (bad use of resources). Say it'll result in discipline, but that is *may* lead to a full investigation (keep flexibility; discretion, depending on severity).

## Constructive Dismissal

### Was the employee fired?

- Risk for employee: If wrong (employer did nothing wrong or only altered minor term), they'll be in breach of K (sued/stopped coming to work). No reasonable notice/job/damages/EI.
- Employer's point of view: Build flexibility into K (account for changes in location/salary).

**Owed to employee:** PAY is an essential term of K. WORK is not (i.e., ER doctor). Even if no work, still pay!

### **Wilkinson v T Eaton Co** [What constitutes constructive dismissal?]

Facts: Employer's initial application said she'd be willing to do any work. However, she predominantly worked in clerical (minimal sales work). Management said she had to be full-time in sales.

Held: Employee can consider herself constructively dismissed. Entitled to reasonable notice.

Ratio: A substantial change in duties in the employment contract can lead to a constructive dismissal. Nature of duties was an implied fundamental term of the employment contract.

### Analysis

- Fluidity at beginning, but clerical became an implied term by conduct (length of time + didn't want to do sales).
- Duties/responsibilities between clerical and sales are very different. Moving an employee from one to the other means substantially changing their duties/responsibilities.
  - **Unilateral change to fundamental nature of an employment K (without agreement/acceptance by employee) constitutes rejection by employee (constructive dismissal)**
- Not all changes lead to constructive dismissal: (1) Management rights or (2) Minor term (i.e., reporting structure, offices, slightly change hours).
- **Economic considerations:** *Not* an argument. Financial hardships don't change contractual rights/obligations unless it's explicitly in the employment contract.
- **Notice:** 18 months. Length of term (43 years), character of employment (office type), work record (satisfactory/higher), age (67 years old), availability of similar employment (unlikely)
- **Duty to mitigate:** Failure to mitigate can result in reduction of damages (look for a new job).
  - Complicated in constructive dismissal. Employer can argue employee should've taken alternate job (stay). ***This case says you don't have to stay at old employer to mitigate!***

### **Potter v New Brunswick Legal Aid Services Commission** [Test for constructive dismissal]

Facts: Employee goes on medical leave. Employer sends letter before he was supposed to come back (indefinite leave without pay). Potter quit after 7 weeks of leave and sued for constructive dismissal.

Held: Constructive dismissal. Unauthorized suspension (breach of K). No clear communication/evidence of legitimate business reason. Suspension was indefinite and Potter was replaced.

#### Analysis

- **Constructive dismissal:** When employer's **conduct** evinces an intention no longer to be bound by employment K, employee has choice of accepting that conduct/changes made by employer or treating conduct/changes as a repudiation of K by employer and suing for wrongful dismissal.
- **Constructive dismissal can occur in one of two ways:**
  1. **Substantial breach** test: (a) Employer's *unilateral* change breaches an express/implied term of employment K; and (b) The breach *substantially* alters an essential term of K.
    - Typically: Change to compensation, work assignment or place of work.
  2. **Conduct** demonstrating intention to no longer be bound by the employment K: Employer's treatment of the employee made continued employment intolerable.
    - Considering the cumulative effect of past acts by the employer, the relationship deteriorates over time (if you look at any one in isolation, it would fail the first branch). Has there been a series of acts that, taken together, show that the employer intended to no longer be bound by the employment contract?
    - Ex: Hired at FT. Slowly reduced hours. Eventually is PT.
- Suspension constitutes a constructive dismissal unless: (1) suspension is with pay (if long), (2) suspension is relatively brief in duration, (3) employer has a legitimate and reasonable business purposes for imposing the suspension and (4) employer honestly/candidly/forthrightly communicates the reason for the suspension to the employee (i.e., the duty to act in good faith).
  - **Here:** First branch. No implied power to indefinitely suspend without a rationale (disciplinary purpose). Implied term *not* to suspend this way. Failed to (1) be brief (it was indefinite); (2) have a legitimate business reason; (3) be honest in communications (didn't tell Potter that they were looking to terminate).
- **Onuses:** Employee must prove it was unilateral/substantial. Onus shifts to employer to prove it was reasonable (4 elements to make suspension *not* a constructive dismissal).
- If employee sues and is wrong about the constructive dismissal, employer can claim employee repudiated K (fails to come to work). If they quit, they're owed no damages/reasonable notice. It won't be repudiation if they continue to come to work, despite having initiated the proceedings.
  - **Here:** He was legitimately on leave. Probably not repudiation *just* to sue (didn't address it because he was found to have been constructively dismissed).
- Damages: Salary for the reasonable notice period (just like a typical wrongful termination). He's a term employee, so the employer must pay until the end of the contract.

***Employee can end K at any time for anything (including if employee sues the employer) (with notice/damages in lieu) UNLESS ESC applies (i.e., maternity leave; s 52).***

**In-class discussion:** Advertising designer (at an agency) does ads for Target. Once it closed down, she was given another client. Is this constructive dismissal? What would be owed? Likelihood of success?

- Analysis: (1) Look at employment K (Scope of duties? Termination provisions?), (2) If K is silent, look at *Bardal* factors (Inquire into circumstances of hiring; Did you leave long-term secure employment?), (3) Look at *ESC* (minimum notice; X weeks).
- Consultation with client:
  - Provide range of reasonable notice: *ESC* minimum and range of time from *Bardal* analysis.
  - Advise client to (1) continue to work (if unsuccessful, employer can say she quit) and (2) write letter to employer to remedy the breach (ask for another client).
    - Who should write the letter to the employer? Employee (cheaper and comes off as less adversarial) or lawyer (employer would take it more seriously).

**Otto v Hamilton & Olsen Surveys Ltd** [Reduction in benefits isn't a fundamental breach]

Facts: Reduction in benefits package. Employees resign.

Held: Although imposed unilaterally, the changes do not constitute constructive dismissal.

Ratio: Reduction of compensation must be more than 10% to be considered a fundamental breach.

Analysis: Not an absolute refusal to perform K. It was a period adjustment in compensation. K contained flexibility (bonuses to reflect economic circumstances). Even if breach, not substantial (benefits, not salary). No sign employer didn't want to be bound.

**Pathak v Jannock Steel Fabricating** [Termination of substantial bonus specifically negotiated for]

Facts: Employee specifically negotiates bonus with employer. This is unilaterally taken away.

Held: Reasonable person would treat this as a substantial change amounting to constructive dismissal.

Analysis

- Bonus was substantial and specifically negotiated for a purpose (took on more responsibility).
- *Performance* bonuses are entitled to fluctuate (to reflect performance). However, where opportunity for bonus is removed, this is constructive dismissal.

**Takeaway from Otto/Pathak:** Employers have some flexibility around minor alterations to compensation arrangements, but not where those components constitute essential terms of employment Ks (or not where the magnitude of those alterations have a substantial/material impact on the employee

**Alguire v Cash Canada Group Ltd (ABCA)** [Constructive dismissal in fixed term contracts]

Facts: Employer tells president to complete remainder of K at home (authorities stripped; still paid).

Held: Unilateral change to a fundamental term (duties/position substantially altered). Breach of K.

Ratio: Fixed term employment Ks not immune from constructive breach by employer.

Analysis

- Fixed term employment K doesn't require reasonable notice of termination. However, a unilateral change to a fundamental term can still amount to repudiation (regardless of its term).
- Being paid is irrelevant. The ability to come to work to perform is a fundamental term.

**Why sue when paid your salary? Alguire is after his bonus (not performing duties to trigger bonus).**

## Quitting

**In-class discussion:** Employee works in customer relations and ignores customers. Employer fires her, and she responded saying "You can't fire me, I quit!" Employer treats it as quitting, so she's not owed anything.

Categories of discussion **[EXAM: Organize into categories – 10 marks for each category]**

*Category 1 – Did she legitimately quit?*

- **Answer:** No, she was terminated first (strong case of wrongful termination). There is a possibility that she quit because the lack of clarity in termination ("I am afraid I am going to have to let you go").
- **Signs that she *did* quit:** Clear and unequivocal (*Kieran*).
- **Signs that she *didn't* quit:** (1) Entire context (there would be no quitting if she wasn't terminated; look at first half of quote), (2) Intention of parties (she didn't intend to end employment; *Kieran*).

*Category 2 – Can the employer legitimately terminate for cause?*

- **Answer:** Unlikely to be able to fire for cause.
- **What to inquire about:** (1) K/CoC, (computer use policy; *Poliquin*), (2) Progressive discipline, (3) Impact on her work (Lost customers? Basic unsuitability for job is grounds for termination; *Poliquin*)
  - o **However:** Even if there was a negative impact on her work, poor performance w/o an ability to correct (warnings/progressive discipline) can't be justification for just cause termination (*Milsom*).

*Category 3 – Damages/advice*

- **We think she was wrongfully terminated (can't be fired for cause). What do we need to tell her?**
  - o Reasonable notice: (1) K, (2) ESC (minimums; s 56(a)), (3) CL reasonable notice (*Bardal*)

- Ask if she's found a job: If so, she mitigated damages (no point in suing for the difference)
- Advice:
  - Ask employer to revise record of employment (from quit to terminated; affects EI)
  - Pay in lieu of reasonable notice.
  - This might be just an *ESC* complaint (do it yourself to get the minimum notice).

**Kieran v Ingram Micro Inc** [Clear language/consequences/notice with regard to quitting]

Facts: Kieran and Schofield run for president. Kieran tells president that he won't work with Schofield if he was selected as president (and that he would seek a position at one of Ingram's related companies). President tells Kieran that if Schofield wins, they'll try to find a suitable position for him at a related company. Schofield became president. Kieran wants to stay, but he's told he can't ("in light of [his] decision not to remain an employee of Ingram", he was offered a position elsewhere with less pay).

Ratio: For employer to rely on resignation, there must be clear and unequivocal objective intention to resign (intention can be evidenced via conduct). The resignation can't be contingent upon a future event.

Held: Didn't clearly say he'd leave if Schofield selected (he asks for a transfer; doesn't clearly say he's resigning). Didn't resign. Constructively dismissed when offered a position with lower compensation.

Analysis

- Employee can rescind resignation notice unless and until employer relies on resignation to its detriment. **Here:** N/A since no resignation. Can't accept resignation if employee didn't resign.
- Kieran earned more in salary/severance (provided by new job) than if he stayed, so he fully mitigated his damages. He sued for stock options (\$1M) since they'd expire during his notice period (low price for employees; can sell to public at higher price)
  - Argument (to be put in position he would've been in had K been performed, he needs stock options) fails. Wouldn't have worked during that time if paid in lieu of notice. K ('don't get stock options if terminated') displaces argument (allowed to K out of CL damages).
- **Consequences of quitting:** (1) no reasonable notice, (2) [if breached w/o notice] breach implied (in common law) or express (in K term), (3) not entitled to EI (*Employment Insurance Act*).
- Reasonable notice an employee must give when resigning:
  - Common law: 1-2 weeks' notice.
  - *ESC*: Must give *written notice*. 1 week (employed by employer for more than 90 days but less than 2 years) or 2 weeks (employed by employer for 2 years or more) (s 58(1))
    - See exceptions (waiving requirements for notice) in s 58(2).
    - Ex: Employee gives 2 weeks' notice (no breach of K). Employer asks employee not to keep working (breach of K; terminated without notice). Employee is entitled to be paid for 2 more weeks (or however much notice you gave). Need to be put back in the position you'd be in had the K been performed.

**Frustration**

**Wightman Estate v 2774046 Canada** [Employment contract frustrated by disability]

Facts: Business is sold. Employment K says old employer will pay out employees not kept on (includes Wightman). He was on disability leave when termination (receiving disability payments). Prospects for recovery were uncertain. Employer doesn't give reasonable notice (says the K was already frustrated). Employee died 3.5 months after dismissal. Estate brought action for wrongful dismissal.

Held: Not wrongful dismissal (lengthy disability leave + recovery was uncertain).

Ratio: Clear evidence of continued inability to perform duties can constitute frustration of the K.

Analysis

- Frustration (no longer able to perform K) means K is at an end. Parties released of obligations.
  - Use with caution in employment law, given the stakes to employees (vulnerability; dealing with individuals; consequence means employer doesn't owe pay/notice).
- **Short-term disability coverage (STD) and long-term disability coverage (LTD)**
  - STD: Entitled to X% of income (i.e., 2/3) during period of disability (time limited).

- Some are third-party funded (i.e., insurance company paying benefits).
  - LTD: No longer just disabled from doing your job, but rather, disabled from doing any job. Employer/3P insurer pays lower % of income for longer period of time.
- K can still be frustrated when STD/LTD coverage is in the K. Why? Employment is distinct from the benefits. If K ends because of sickness, benefits continue.
- **Factors to determine if there's been frustration:** (1) K/nature of employment, (2) nature of illness (permanent?), (3) how long it has already been continued, (4) prospects of recovery/return (remote possibility?), (5) length of employment relationship before onset of disability.
  - **Here:** At time of dismissal, disability was likely to continue for such a period that further performance of his obligations in the future would be either impossible or radically different from the employee's obligations under his employment contract.
  - 'Prospects of recovery/return': Has a reasonable period of time (like 21 months, here) passed? If so, K has been frustrated. 5 months is not enough (*Lippa*, 2009). Should be more than one year, and it increases depending on length of service.
  - *Is the sickness so enduring as to defeat the object of the employment contract?*
- It could be that neither party plays a role (i.e., third-party/stranger causes it)

## Common Law Damages

*Main idea: Put the party in the place that he/she would have been in had the contract been performed.*

### Benefits & Bonuses

**Sylvester v British Columbia** [Deduction of disability payments; Look at intention of parties]

Facts: Employee falls ill. Received disability payments (paid by employer) since he was unable to work. Succeeded on a claim of wrongful dismissal. The issue revolves around the damages to be paid.

Held: Disability payments (established by the employer) should be deducted from damages. Parties didn't intend the employee receive both salary and disability payments.

Ratio: Deducting disability benefits ensures all employees receive equal damages (monies they would have earned had they worked during notice period).

#### Analysis

- Whether to deduct depends on intention of parties. Intention to receive salary and disability benefits can't be inferred here: (1) disability were a substitute for salary and (2) simultaneous payment of disability and damages for wrongful dismissal is inconsistent with employment K.
- Damages: Salary he/she would've earned had he/she worked during notice period, less amounts credited to mitigation. He wanted disability payments and reasonable notice.
  - Damages are based on the premise that he would've worked during the notice period. Disability payments are only payable because he couldn't work. Each based on a contrary assumption about the (in)ability of each employee to work.
  - Fundamental difference in assumptions = Parties couldn't intend for you to receive both
- It was self-insured (by employer). If employee paid premiums (to 3P insurer), look at *Waterman* (double recovery possible).

**Issue with this case:** He got the disability payment and the Court 'topped it up' until it reached his full salary he would've earned had he worked. This seems inconsistent with the opposite assumption argument. Perhaps the argument is that the employee on disability leave should receive full salary if terminated? Extra-vulnerability (difficult to find other work + may not be capable of working)?

**IBM v Waterman** [Deduction of pension benefits; Private insurance exception]

Facts: Terminated without cause with 2-months' notice. He starts drawing on his pension. Employment K and pension plan silent on rights/entitlements in the event of termination without cause.

Ratio: Employers may not deduct earned pension benefits from wrongful dismissal damages. They are deferred compensation and are a form of retirement savings.

### Analysis

- Employer tries to rely on *Sylvester* (pay in lieu of reasonable notice and pension are inconsistent since premised on opposite assumptions about working).
- **Types of pensions**
  1. Defined benefit plan: As long as the pension vests (some certain amount of service/contribution), employee is entitled to that amount until death (of employee or company).
  2. Defined contribution plan: Employer and employee contribute. At end of employment, employer disperses to employee (regular basis or lump sum). Limited to amount put in.
- **Private insurance exception:** Payment from private insurance not deductible from damages.
  - o Collateral benefit purchased by employee. Employer can't take advantage of it.
  - o Employee entitled to both the pension (private insurance) and reasonable notice.
    - Earned through years of service (rather than indemnity for lost wages). Pension benefits are akin to property rights (employee has enforceable rights over them).
    - Different from *Sylvester*: Collateral benefit versus indemnity for lost wages.
  - o Look to nature/purpose of the benefit to see if it falls in this exception
    - If closer to indemnity against loss caused by D's breach, probably deduct.
    - Benefit will *not* be deducted if it's not an indemnity for loss caused by the breach and the P has contributed to obtain entitlement to it.
      - Pension isn't about payment for loss of ability to work. It's a property right (deferred income accumulated over course of employment). It's not that you can't work; it's that you chose not to work and you paid into it.
- **Statutory benefit exception:** Employer can't deduct EI from period of reasonable notice.
  - o In reality: Government takes back EI if/when awarded pay in lieu of reasonable notice (won't let you to double collect).
- Policy consideration: Allowing deductions would create an economic incentive for employers to dismiss their pensionable employees before other employees.
- Look at pension plan to see what you can collect. Premised on all kinds of things for double recovery: (1) no mandatory retirement (can work and receive benefits), (2) can find another job while receiving benefits after retirement, (3) if terminated before vested, required to pay out (and still have to pay out even after being vested).

### **Noble v Principal Consultants Ltd** [Effect of subsequent bankruptcy/bonuses on notice/damages]

Facts: Terminated in August. Entitled to 18-months' notice. Employer goes bankrupt in October. Employer thinks notice should be reduced to 2 months (employee wouldn't have worked past October).

Held: Entitled to damages for breach of K equivalent to 18-months' notice (salary/bonuses). Bonuses, as long as part of a compensation package, are part of award for damages in lieu of reasonable notice.

Ratio: Damages are crystalized at moment of breach. Subsequent events to the breach are not relevant in crystalizing your entitlement to damages (*ability* to work is irrelevant to entitlement of damages).

### Analysis

- **Implied term that each party must give reasonable notice** (para 14). No implied term that employer must pay damages in lieu of notice. Employee is entitled to damages b/c employer is liable to employee for breaching implied term that it must give reasonable notice. Employer can't characterize that payment as compliance with an implied term (that it can breach the K so long as it pays) since there's no such implied term. ***Will be overturned by another CA soon.***
  - o **Termination without notice is a breach (implied term). A remedy to this breach is to pay damages in lieu of notice (not following K; pay damages equivalent to notice)**
- **Bonuses:** Part of damages assessment – (1) Would've been earned had employee continued K and (2) Exclusion creates incentive for employers to make majority of salary in form of bonuses.
  - o Employer argues that if the K was performed, there would be no bonuses (bankrupt). This is wrong. Damages crystalize at time of breach.
  - o **Average the bonuses of the past few years**, rather than looking ahead. This also prevents the employee from getting larger bonuses if the economy improved.
- **Practically speaking:** (1) Entitlement to damages not impacted by bankruptcy but ability to

recover is and (2) Post-breach events impact damages where employee mitigates damages.

### ***Significance***

1. When you breach a K and award damages, the injured party is entitled to damages that would place him/her in the position that he/she would be in if the K was performed.
2. Damages for wrongful dismissal are compensating, but also remedying (cushion for job loss)
  - This is why *Bardal* factors can lengthen notice period for long serving employees a bit longer than “this is how long it will take you to find a job”)

**Alguire v Cash Canada Group Ltd (ABQB)** [Post-breach events are relevant if reasonably expected]

Facts: Things look good in Sept. Alguire implements accounting change in Oct (realize they misreported lost income). Constructively dismissed in Nov. Targets not met after. He wants bonuses (rely on *Noble*).

Ratio: Post-breach events relevant if reasonably anticipated at time of breach. Where it is known/clear that a bonus entitlement would be missed at time of breach, it's not as if you're taking subsequent events into consideration – it *is* at the time of the breach.

### Analysis

- Loss was expected at time of breach (accounting changes would lower/correct the income).
- Assess damages at date of breach. Post-breach events relevant since reasonably anticipated at time of breach. Even if not dismissed, he wouldn't have gotten a bonus (income too low).

**Deputat v Edmonton School District No 7** [Deduction of holiday pay; Breach versus repudiation]

Facts: 56 y/o service technician for school boards. 23 years of service. Employer offers lump sum payment of 12 months or working notice of 12 months. He chose working notice (benefits). He wants more notice *and* all benefits (holiday pay he would've earned during 12 months of working notice).

Ratio: Working notice and paid vacation compatible (no double deduction). Not all breaches constitute repudiation (i.e., if a minor term). Duty to mitigate starts on date of breach.

### Analysis

- **Working notice:** *Not* a breach of K (but wrong here because insufficient notice; settled on 18 months but only 12 months given). *Bardals* against employee: (1) availability of other jobs, (2) character of employment (not management)
- **Notice/holiday pay:** Remove/reduce benefits given
  - Employer has no duty to pay extra money if it gives enough notice.
  - Employee lost no holiday rights. For each day of holiday earned, he stayed at home (paid) or got an extra day's pay at end without working
  - Written policy: Banked holidays limited to 30 days (bars implying a term that employee has a right to work every working day and take extra pay instead of any holidays).
    - Why? Gave him notice that there was no breach, so K still applies (grey area).
  - Contract was fully enforced (all rights/duties remain). What about inadequate notice (rather than no notice)?
    - **Breach vs. repudiation:** Repudiation ends K (innocent party released from obligations; no intention to be bound). All repudiations are breaches but not all breaches are repudiation. If just a breach, innocent party still has obligations.
    - **Inadequate notice:** A breach. Doesn't amount to repudiation (minor term). By giving working notice, there was an intention for the K to continue for 12 months (no intention to no longer be bound).
    - **Breach** (not repudiation): Sue for breach (since it accrued before repudiation/failure to work) not entitled to stop mitigating/working (still have obligations).
- **Duty to mitigate:** Only started looking 8 months into 12-month notice period. Only a few job applications. Insufficient/inadequate in Edmonton (many employers). Reduce damages.
  - He argues that he didn't start looking until later because employers wouldn't want to hire him 12 months out. However, the duty to mitigate starts on date of breach. Look for work ASAP and if you find something more permanent, give notice and quit.

- Advice: Start a mitigation notebook and document efforts to look for work right away.

## Aggravated & Punitive Damages (including *Honda* damages)

### **Honda Canada Inc v Keys** [Aggravated and punitive damages; Honda Damages]

Background: *Wallace v United Grain Growers* (SCC, 1997)

- **Facts:** W leaves secure employment for work (goes towards lengthening notice period; *Bardal*). After 14 years of work, employer terminates for cause (with no cause argument). Employer aggressive with termination (don't want to pay him). "Cause" argument causes psychological damages. Sues for wrongful dismissal (argues employer has a duty to terminate in good faith).
- **Analysis**
  - o *Good faith:* Don't need good faith reason to terminate, but you must terminate in manner of good faith (good faith/fair dealing in manner of dismissal).
  - o *Wallace Bump/Damages:* Failure to terminate in a manner of good faith (not honest, reliable or forthright in manner of termination) will lead to compensation through lengthening the notice period. Untruthful, misleading or unduly insensitive?
    - Not automatic. Conduct must be injurious (have to suffer injury because of conduct; humiliation, embarrassment, damage to self-worth).
    - Criticism: Difficult to quantify (humiliation). Difficult to distinguish between suffering because job loss versus suffering because manner of job loss
      - We don't compensate for feeling sad when you lose your job because it isn't a breach of K (since K specifically contemplates termination).
      - Issue: Everyone will claim Wallace Damages.

Facts: Diagnosed with chronic fatigue. When he returned from leave, he was placed in special disability program (absences with doctor note). Employer believed employee was exaggerating and asked him to meet with employer's doctor. He refused to without explanation of purpose and likely outcome. Told that he'd be fired if he didn't meet doctor. Employee refused; was fired. Sued for wrongful termination.

Held: Not entitled to aggravated, nor punitive, damages. Injury wasn't reasonably foreseeable (aggravated). There was neither egregious conduct nor independent actionable wrong (punitive).

Ratio: Honda Damages compensate for a contractual breach, including the implied duty to terminate in a manner of good faith. Don't extend notice period, but rather, look at actual damages flowing.

### Analysis

#### - **Types of damages**

- o *Aggravated damages* – Employer engages in conduct during course of dismissal that's unfair/in bad faith (untruthful, misleading, unduly sensitive).
  - Damages are generally unavailable for actual loss of job or pain/distress suffered as a consequence of being terminated (even without notice) because it's not a naturally foreseeable consequence.
  - However, where parties have contemplated at time of K that a breach in certain circumstances would cause moral distress, the employee is entitled to recover.
  - Here: Dismissal not in bad faith.
- o *Punitive damages (rare)* – (1) malicious/egregious breach of K and (2) independent actionable wrong which merits punishment (discrimination doesn't count; dealt with under *Human Rights Code*)
  - Focus D's conduct and deterring this wrong (not P's loss/to compensate). Award only if there's extremely reprehensible conduct by D and compensation awarded to P isn't enough to achieve deterrent/retributive effect. It's harsh/extreme so the wrongful acts must be so malicious/outrageous that they deserve punishment.
  - Here: No punitive damages. Neither requirement is met
- March 28th letter (para 6): No bad faith in manner of termination (two doctors say he doesn't have a disability; acknowledge condition, but saying they still want to meet with him).
  - o Dissent: Letter is evidence of bad faith. They already gave him reasons. Skepticism (trying to use meeting with a doctor of their choice [affiliation] to say he's not sick).

- Best argument of bad faith: Letter says neither doctor found basis for diagnoses. However, one actually said he couldn't say anything about the illness before he meets with them. Employer is trying to suggest he's not sick.
- What does he sue for?
  1. General damages: Pay in lieu of reasonable notice. 15 months was determined at trial as reasonable, but his illness can impact notice period owed (difficult to find job).
  2. Wallace Damages: Lengthen notice period (9 more months of notice). There must be bad faith in manner of termination (insensitive/unfair/misleading).
    - Insensitive: Saying they don't believe him/his illness.
    - Failed to uphold human rights obligation to accommodate.
  3. Punitive damages: Deterring other employers from doing this. Damages must be large to properly punish Honda (look at nature of misconduct *and* of the company).
- Issue with 'experts': Lack of independence (Honda sought them out; used to minimize Honda's expenses). Majority naïve not to notice this problem.
- New name: **Honda Damages** – A branch of aggravated damages. Compensating for a contractual breach that occurs at termination (just like other forms of contract breaches).
  - Breach of implied term/duty that employers will terminate K in manner of good faith (*Wallace*). Employee can sue for damages flowing from breach.
  - Don't extend notice period. Damages are *actual* damages. Difficulties in calculating (still psychological damages flowing from bad faith manner of termination).
  - Still focus on hurt feelings by manner of breach, not the fact that they were terminated.
  - Considerations: (1) Timing (death in family?), (2) Things said around termination (Discrete about reasons? Or talking poorly about him/her?), (3) Way it's communicated.
  - Supporting the claim of extra suffering: Need evidence (i.e., psychologist report) to **show that the damage flowed from the manner in which he/she is terminated.**
    - Argue that it's so emotionally upsetting/embarrassing to warrant damages.
  - No requirement of reasonability/foreseeability (just need proof of actual damages).
  - Quantum: (1) Treatment costs, (2) Past precedents (and try to compare), (3) Conduct (Outrageous? Hurt?). Probably around \$20K-\$50K.
  - Rare; don't want double recovery for same wrong. Punitive (independent actionable wrong; breach of K; breach of implied term to terminate in good faith) and Honda.

**Bhasin v Hrynew:** Good faith is an organizing principle of Canadian contract law

- Implied term: Honest performance (CL duty to act honestly in performance of K).
- No duty to disclose: You can't lie, but you don't have to disclose everything to employees.
- Court doesn't expand good faith generally to *reasons* for dismissal. For now, it only assists in good faith in *manner* of termination (may be developed in future; will good faith eventually expand to the point where there needs to be good faith for the reasons for dismissal?)

**Merrill Lynch Canada v Soost** [*Honda* damages applied]

Facts: Employee was an investment advisor employed by a national brokerage and investment firm. He was terminated. Employee argues that the employer planned the dismissal unfairly to get his clients.

Held: No compensation for loss of clients. Employer only needs to pay what would have been earned during the notice period.

Ratio: Damages need to be linked to breach (notice period), not just linked to loss of job. An honest, but mistaken, belief in cause bars *Honda* damages for alleging cause.

Analysis

- 8-10 months of reasonable notice. 35 y/o (not that old), recruited from competitor (treat like 7-year employee; add 3 from last), supervisor, top investment advisor (character of employment).
- Not awarded damages for loss of book of business (argued that if he received working notice and didn't have the gap between termination and re-employment, he wouldn't lose it).
  - **Here:** Damages were linked to loss of job, rather than the breach (notice period). It isn't about losing the job period which was in the contemplation of employment K.

- Already compensated for clients (earnings were remuneration for book; don't double compensate).
- Employer did not carry out termination in a manner supposed to deprive employee of clients.
- No *Honda* damages
  - Para 17: Mere sloppy conduct doesn't suffice for extra damages. It takes something akin to intent/malice/blatant disregard for the employee.
    - Wrong. Sets a higher standard than *Honda* (equating *Honda* with punitive).
  - Compensate, don't punish. Look for unfairness/insensitivity in method of termination (not in mere fact of dismissal).
  - Free to compete for clients once they part ways if: (1) no confidential info/relation and (2) no express restrictive covenant. Competition itself can't create *Honda* damages.
  - **Honest belief**, especially with arguable grounds, bars *Honda* damages for alleging cause
    - Allowed to be wrong about cause (not enough to terminate K in bad faith). Can't be *purposefully* wrong about cause.
  - Economic loss from being dismissed does not fall within *Honda* damages.
- Damages excluded when they're too remote (not foreseeable) (*Hadley v Baxendale*).
- Why the employee's argument fails:
  - Argument of delay/structuring dismissal to get clients is contrary to facts.
  - Honest belief of cause to terminate (breach of industry standards + disobediences)
  - Few clients. Lack of assistants to help is not a serious impediment to contacting them.
  - Employer did not contact clients before dismissal.
  - Industry regulations require employer to contact clients.
  - Employer's staff contact clients in a fair way.
  - Clients' impression that he's involved in something improper irrelevant. He was (and employer not responsible for customer assumption not arising from employer's acts).
  - Illegal for him to do anything until employed by a licensed broker.
  - Employee could've contacted clients to explain the circumstances.
  - Clients were disappointed with his work (which is why they didn't follow him).
- Para 9: No such thing as wrongful dismissal (if terminate w/o notice) → Wrong. Not giving notice makes it wrongful dismissal b/c breaching a term (that you'll give notice on termination)

**Elgert v Home Hardware Stores** [Aggravated and punitive damages; Proportionality for punitive]

Facts: Employed for 17 years (48 y/o and supervisor). Kirck (another employee) chosen to investigate rumours surrounding sexual harassment (no experience in investigating). Terminated without notice.

Held: No basis for aggravated damages. Reduce punitive damages.

Analysis

- **Aggravated damages** (compensate): Baseless, unfounded or fabricated allegations of misconduct sufficient to constitute cause are untruthful, misleading and insensitive. However, the mere fact that cause is alleged, but not ultimately proven, doesn't automatically entitle the employee to aggravated damages (if there is a reasonable basis to base its belief)
- **Punitive damages** (punish): Appropriate to conclude *manner of* dismissal was unfair, in bad faith/misleading/unduly sensitive: (1) Kirck had no experience in investigations, (2) terminated before investigation was complete, (3) conflict of interest (dad involved in investigation relating to daughter), (4) issue of motive (daughter mad at Elgert)
  - Punitive damages (directed towards punishment): 6 dimensions of proportionality:
    1. Proportionality to blameworthiness of D's conduct;
    2. Proportionality to degree of vulnerability of P;
    3. Proportionality to (potential) harm directed specifically at P;
    4. Proportionality to the need for deference;
    5. Proportionality, even after taking into account other penalties (both civil and criminal), which have been or are likely to be inflicted on D for the same misconduct;
    6. Proportionality to the advantage wrongfully gained by D from the misconduct.

Discussion: Arguments to appeal (award was massive)

1. Reasonable notice (24 months): (a) Not skilled (character of employment), (b) Not *that* old.
  - Low likelihood of success. Deference to TJ; factual finding; range is an art, not science.
2. Aggravated (*Honda*; \$200,000): (a) No damages flow from breach of term of K (i.e., from manner of termination), (b) No bad faith in manner of termination (don't need a reason, nor to be right; just need to have good faith manner; probably unsuccessful on this point).
  - Lawyer screwed up: Didn't ask about how the manner of termination affected him.
3. Punitive damages (\$300,000): (a) Didn't meet high threshold (not reprehensible/malicious conduct), (b) Quantum (conduct already covered by other kinds of damages, and you can't double compensate, according to *Honda* + deterrence is met by a lower award).
  - Award is wrong (not grounded in precedent).

## Duty to Mitigate

### **Christianson v North Hill News Inc** [Duty to mitigate and costs of mitigation]

Facts: Employed for 17 years. Terminated without cause. Conceded that it was wrongful termination.

Held: No significant failure to mitigate (deduction for failure to mitigate can't be supported).

Ratio: Employee mitigates if he/she takes reasonable steps to secure alternative employment with a similar character (prestige/nature of work; doesn't have to be same job). It's about reasonable, not perfect, decision making (don't weigh in hindsight). For damages to be awarded, expenses must flow from lack of notice, not from loss of job.

#### Analysis

- Don't need to take significant demotion/go back to old employer to mitigate damages.
- Money spent by employee (education to be more competitive) was reasonable. If she was terminated with notice, these expenses wouldn't have been necessary. Education costs included.
  - Is going back to school a failure to mitigate? Depends on circumstances – employment skills no longer of use? Doing it because you need to versus doing it as an excuse.
  - Prof: Not properly proven that it flowed from breach/failure to give notice (vs. flowing from loss of job). More successful examples: employment counselling, resume drafting.
- Awarded disability and life insurance from date of termination to end of notice period. If she was terminated with notice, she would be paid this amount.
- Reasonable notice period low because of character of employment.
- Onus on employer to prove failure to mitigate (show alternative employment *not* applied for/secured by employee with reasonable reasons why).
  - Advise employee to keep diary of steps taken to mitigate.

### **Evans v Teamsters Local Union No 31** [Duty to mitigate by returning to same employer]

Facts: Dismissed after 21 years. Employee responds that he was due 24 months' notice (wants 12 months' working notice plus 12 months' salary in lieu). Union wanted employee to work for the entire 24 months (if not: just cause termination without notice). Employee refused. Wrongfully terminated.

Held: Duty to mitigate may include accepting old employment. Circumstances didn't justify refusal to resume employment (relationship between employee and union/president wasn't seriously damaged). Not objectively unreasonable for employee to return to work to mitigate damages.

Ratio: Mitigation at your old employer is a possibility if there's no barriers to doing so (on the basis of an objective reasonable person standard). Whether a return to work is necessary to mitigate depends on whether a reasonable person would accept the opportunity.

#### Analysis

- Termination without notice may require dismissed employee to mitigate damages by returning to work for same employer.
  - If employer offers chance to mitigate damages by returning to work, **would a reasonable person accept opportunity?** Need to return if reasonable to do so to mitigate damages.

- Not obliged to return to mitigate if hostility/embarrassment/humiliation (i.e., terminated in bad faith). Not present if restructuring/economic cutback (no personal faults).
- **Here:** On an objective standard, it's reasonable to go return during mitigation period.
- Employer must show: (1) Employee failed to make reasonable efforts to find (comparable) work and (2) Work could've been found (similar salary/working conditions + personal relationships involved not acrimonious; look to history/nature of employment and whether litigation started).
- *Honda* damages are **not** subject to mitigation.

**Note:** Advice to employer who wants to get rid of employee with no cause – Terminate with notice.

**Magnan v Brandt Tractor** [Forced retirement; Proof of damages for *Honda*; Role of intent]

**Facts:** M employed for 38 years. Employer had unwritten mandatory retirement policy and told M that he would be retiring in 6 months. M's lawyer said they can't force retirement (violated *Human Rights Code*; age discrimination). Employer says he can return to work, but he had misled them into getting retirement gift and allowing them to hire a replacement. M didn't return.

**Held:** An obligation to return to work is unreasonable, given the bad faith letter/retirement gift.

Analysis

- The company was based in Saskatchewan, but the misconduct occurred at an Alberta branch. Employer argues that they were following Saskatchewan law (which, at the time, allowed for this). However, this is forced retirement (and so, it is termination; owed reasonable notice).
- *Honda* damages: Need proof that manner of termination caused particular damage.
  - **Here:** Violation of his human rights. However, a human rights breach (without more) doesn't warrant the damages. Include only if reasonable basis of damage.
  - Why *Honda* damages not awarded? Lack of intent. Honest mistake about the legal regulations. **Note:** WB can and will be sufficient.
- Mitigation: Unlike Evans (disentitled to damages), no employment opportunities (at his age).

**Boucher v Clearwater Seafoods** [What constitutes sufficient notice; Costs of mitigation]

**Facts:** B and K terminated as sea captains. No written K until 1996 (oral from 1971). K gave two years' notice that their employment would be terminated. After that, they might keep them for contract work. K had a clause stating that either party can terminate with 30 days' notice (failure to do so means employer pays \$25K or employee pays \$5K). B and K receive new single trip Ks in 2003, without a similar provision to the first (regarding termination). There was a clause waiving any claim against employer (present or future). B was told he could captain a vessel on a reduced basis. He rejected this offer. K was on workers compensation when terminated. Employees sue for wrongful dismissal (want the \$25K)

Held

- **First termination** came with reasonable notice (that period of time not included in rest of analysis). First K invalidly terminated (entitled to the \$25K). **Next agreement** was void since it represented a change in employment that was without consideration. 'No liability' clause doesn't operate, so follow common law to determine the reasonable notice. 3 months' notice.
- **Mitigation:** Offer of employment for vessel (reduced basis) can't count as mitigation since that employment fell outside the notice period. No mitigation expenses for purchase of new vessel. Not a mitigation of the 3 months' notice period, but an investment in capital for future earnings.

Analysis

- Sufficient/effective working notice terminates K if specific/unequivocal/clearly communicated.
- Look to objective interpretation of K to discover whether limitation was meant to be applied to the sum paid for termination.
- **Mitigation** only applies to period of reasonable notice. **Opportunities outside notice period are irrelevant.** Employee can recover reasonable mitigation expenses (since employer obtained a benefit from employee successfully mitigating, so employer should finance search; job counseling, relocation, retraining).

### Timeline

- 1969/1971: K and B start working.
- 1987: Clearwater buys earlier employer. Previous service folded in since no contracting out of previous service and it was purchased as a going concern (*Radwan*).
- 1996: Terminated with 16 months working notice (until 1998). Rehired/new K (*Wronko*).
  - o Employees argues that they were told they'd get rehired. Unclear termination (since reasonable notice). Employer responds, saying that the person who said that doesn't have hiring/firing authority. K validly terminated.
- 1998: Multi-trip agreement (MTA) signed.
- 2003: Single-trip agreement (STA) signed. Cancelled MTA w/o notice/payment to end K.
  - o Employer argues they don't owe payment since, even if a breach, it was mitigated by STA (earning more than MTA, so not owed anything) (*Kieran*).
  - o However, it was in the K: whether the payment is subject to mitigation will be found in the contract. K did not stipulate for mitigation. Payment is due.
- Dec 2005: STA is cancelled. K and B fired.
  - o Employer: STA says employees not entitled to anything (can terminate w/o notice)
  - o Issues
    - MTA: K breached/repudiated by employer. K at an end. That's why you get \$25K.
    - STA: No consideration for imposing.
  - o Entitled to notice. Employment ends 2003 (depends if we look at start of MTA or STA).
  - o Mitigation: Refused to return to work.
    - Argument fails. Fired in December. Given 3 months of notice. Told he can work in May. Can't mitigate damages *after* period of reasonable notice.
    - Mitigation expenses (*Christianson*) denied. It didn't flow from the breach, but rather, it's flowed from the loss of the job.

### **Russo v Kerr Brothers** [Remaining at work to mitigate damages; Consent to unilateral changes]

Facts: Employee told that pay would be decreased and bonus program discontinued (still being paid more than competitors). He continued working (same position/duties with the reduced pay) to mitigate.

Held: Constructively dismissed. Owed 22 months of notice.

Ratio: Constructive dismissal is a repudiation via a fundamental unilateral alteration to term/condition. The change is only effective if accepted by the innocent party (with acceptance being communicated).

### Analysis

- Employee is entitled to dispute imposition of new terms/conditions and sue on original terms
- **Constructive dismissal**
  - o **Here:** No consent to alteration. Employer knew he didn't accept changes and allowed him to remain in his position (knowing that he was constructively dismissed).
    - Made it clear that he didn't accept changes (would continue to rely on legality of earlier K). Damages flow from breach of that K (staying not as an acceptance to new terms, but rather, to mitigate damages).
    - Needs to be clarity in the refusal to accept the changes (which Russo does).
  - o Keeps working but sues employer. Employer can: (1) terminate with reasonable notice or (2) let him keep working (done here; getting labour).
  - o Employee can remain under changed terms to mitigate damages, but only for period of reasonable notice. If he stays beyond this, with the consent the employer, there's a new employment K (under changed terms) after the expiry of the reasonable notice period.
- **Reasonable notice:** Notice over 2 years reserved for very senior members of management. He is entitled to a long period (only job + worked for 37 years since he was 16 + left school to work there + age of 53 makes it hard to find other employment, especially at what he earned)
  - o Impacted by sympathetic circumstances (towards employer's economic situation).
    - Although *Bardal* is not a closed list, this additional factor is still questionable (it's still a breach of the contract; it's about the employee, not the employer).

*How to advise Kerr brothers if they want to insist on the change (unilaterally):*

1. Terminate with notice and re-hire on new Ks (*Wronko*). Legal benefits, but practical downsides (continue to pay during notice period; have to calculate notice period for each employee).
2. Signing off isn't enough. Can't unilaterally change w/o fresh consideration (*Hobbs*). Continued employment may amount to consideration if there's a genuine intention to terminate, there's a period that the right to terminate won't be exercised and the employee understands.

*How to advise Kerr brothers if the employees don't agree:*

1. Risk of constructive dismissal (significant enough change). Periodic adjustments might not be constructive dismissal (*Otto*), but won't fly here (not periodic; big drop; extra drop for Russo).
2. If reduced unilaterally, many employees would accept it. A few will argue for constructive dismissal, but employer can argue that they failed to mitigate by continuing to work (*Evans*).

**Bowes v Goss Power Products** [Mitigation where the contract provides a fixed notice term]

Facts: K stipulates fixed term of notice (or pay in lieu) if terminated w/o cause (wrongful termination). Silent with respect to mitigation. Employee terminated without cause. Employer agreed to pay the fixed term of notice but required the employee to seek alternative employment during this period.

Held: Don't need to mitigate if it's a fixed term of notice unless mitigation of fixed payment mentioned.

Analysis

- Scale (vs. one-size-fits-all): Fair/flexible for employers/employees (if you terminate early)
  - o Better than leaving it to CL: (1) **Certainty**, (2) Avoids litigation (for reasonable notice and duty to mitigate).
- CL damages (not statutory minimums) subject to mitigation. Parties can fix notice period in K (if at least statutory minimums), which displaces CL (contract out of CL; no mitigation duties).
  - o Employers must be clear and explicit (in the contract) if they intend to require employee to mitigate what otherwise would be fixed damages.
  - o Mitigation triggered at time of breach. Here, no breach, so duty to mitigate not triggered

**Giza v Sechelt School Bus Service** [Duty to mitigate when repudiation versus breach]

Facts: Employee terminated with 5 weeks' notice. Employee didn't return to work. Employee alleges wrongful termination, whereas the employer asserts that he was terminated with notice.

Ratio: Employee not released of obligation (to work) when employer breaches (w/o repudiation). Employee can sue for inadequate notice (since that right accrued before employee repudiated/stopped working/failed to work during notice period), but that amount will be reduced by a failure to mitigate.

Analysis

- Employee terminated with notice must work during the notice period. Employment K is not terminated until end of notice period. Employee must remain ready and willing to carry out K.
  - o Inadequate notice = breach. Failure to work = repudiation (released of duties).
- Reasonable notice: 61 y/o, 5 years of service, low prospects of other employment. 6 months (reduce to 5 since appellant could have worked/been paid for 5 weeks to mitigate damages).

Discussion

*Advice to company (before delivering him the letter):*

1. Terminate: (a) working notice or (b) terminate and pay in lieu of notice.
  - o Not for cause. Must show violation of essential term that goes to the heart of the relationship (*McKinley*). Need progressive discipline (*Henson*).
2. Determine reasonable notice: (a) contract (silent), (b) statutory minimum (5 weeks), (c) *Bardal* (6 months; need to go to trial to get this number, so offer less).

*Advice to employee (when he gets 5 weeks of working notice):*

1. Continue to work during notice period (mitigation/*Deputat*)
  - o If repudiated: Released from obligations.

- If just a breach: Not required to comply with K, but still have a duty to mitigate.
  - Here: Inadequate notice is a breach, not a repudiation (5 weeks versus 6 months not that different; didn't breach statutory minimum; no intention not to be bound).
2. Received inadequate notice: Sue for the remainder of notice (i.e., to get the 6 months)
  3. *Honda* damages considered: Insensitive way to terminate (left letter on seat of bus).

## Torts in the Workplace

**Piresferreira v Ayotte** [When is there a duty on the employer to shield employee from torts?]

Facts: P's manager, A, contemplated a Performance Improvement Plan for P. A pushed P after disagreement, and immediately implemented a PIP requiring her to report to him on a daily basis and attend bi-weekly meetings. P lodged complaint against A. HR wanted P to review PIP. She refused. HR told her A would have apologize (and described steps taken to punish A). Bell tried to arrange P to return. She refused. Diagnosed with depression/PTSD (disabled from work), stemming from the assault.

Held: Damages for constructive dismissal (pay in lieu of reasonable notice). *Honda* award of \$45K (for bad faith in manner of termination; connected [reaction to] assault to damages via anxiety disorder). Don't double compensate (since no physical harm from actual push), so reduce general damages.

### Analysis

- **Duty on employer with torts [i.e., battery] in the workplace?**
  1. Relationship of **proximity**: Present between employer/employee (even if arising from K)
  2. Reasonable **foreseeability** of damage: Yes, flowing from battery.
  3. **Policy** considerations limiting duty of care: Weighs against establishing a duty to shield an employee from mental suffering (greatly impacts settled jurisprudence AND employment law [i.e., *Honda* damages] already offer a remedy for such harm)
- Infliction of mental suffering
  - Negligently: Doesn't make sense in employment context – (1) *Honda* solves it, (2) forces courts to police whether discipline is reasonable (court interference), (3) if there's going to be a tort created, let the legislature do it
  - Intentional: Need specific intention to produce mental harm. **Here**: Not present (A never intended damage/knew damage was substantially likely to occur).
    1. Flagrant and outrageous conduct (glaring and notoriously false communication).
    2. Actor must desire the kind of consequences to follow or know that the kind of damage is substantially certain to follow. Don't need to know extent of harm.
- Reasonable notice: 12 months. No failure to mitigate (P's condition made her unable to work).
- *Honda* damages for manner of dismissal – (1) Timing of PIP was to ward off complaint, (2) No copy of warning (given to A to) P, (3) Inadequate action taken to ensure a safe workplace for P.
- For constructive dismissal, there needs to be an intention no longer to be bound (individual conduct or cumulative conduct).
  - Essential term substantially breached here: Safety in the workplace.
  - Might've been different if there was proper discipline/taking care of her.
- How to argue that \$45K undercompensates her: loss of future income (pays off less than a year)

*Advice to employer when they come to you with this problem*: (1) Investigate and discipline manager, (2) Disassociate employer with manager (avoiding VL), (3) Deal with person who got pushed (duty to provide safe/healthy workplace; make changes), (4) Consider terminating for cause (look at severity of conduct, past misconduct/progressive discipline, level of responsibility, length of service).

### *Advice to employee*:

- Her failure to return to work may be seen as quitting, but looking at surrounding circumstances, the relationship might have been broken down before she left (so not seen as quitting).
- Violation of an essential term of the contract: To provide a safe workplace. Battery + no proper response. Can allege constructive dismissal. Can sue employer.
  - Reasonable notice of termination. *Honda* damages (manner of termination was bad faith; medical proof). Battery claim.

**Note**: Employee usually pursues *Honda* damages (bad faith). However, it's open to them to sue for individual torts (i.e., defamation, battery).

## Summary: Types of damages and what we need to know

### 1. General damages: Pay in lieu of reasonable notice (inadequate notice, constructive dismissal, etc.)

- Reasonable notice: Employment K. If silent, assess *Bardal*. Consult statutory minimums (guaranteed).
- More information needed: Entire package of what they're paid (salary, bonuses, benefits, stock options, vacation, allowances, pensions, etc.)

### 2. Punitive damages: Pay because of a breach of the duty of good faith (can be the independent actionable wrong)

- Circumstances of termination: Was it reprehensible/outrageous conduct?
- Size of company: What damages are needed to properly punish the employer?

### 3. Aggravated damages

- a) *Honda* damages: Pay because of bad faith in the manner of termination.
  - o Malicious egregious breach + Independent actionable wrong (which merits punishment)
- b) Torts (any independent actionable wrong, ex: defamation)
  - o Can't double collect. If it's linked to the bad faith termination, claim under *Honda* damages. If truly an independent actionable wrong, go under this.
  - o Ex: *Piresferreira*. The battery is separate from the (incorrect) way the company handled it.

### 4. Mitigation damages: Inquire about \$ spent to find another job. Must be tied to lack of notice (*Christianson*).

### 5. Costs: Always!

## Settlement

**Farmer v Foxridge Homes Ltd** [Test for accord and satisfaction, or settlement; Need a release]

Facts: No release signed. No language of settlement/release. Employer says they came to a settlement (employee not entitled to further damages), and the employee says they did not settle.

Issue: Can you sue if there's been an accord and satisfaction (i.e., a full and final settlement) for the (potential) claim of damages?

Held: No release, so no settlement (also no opportunity to consult a lawyer). Can still sue for more.

### Analysis

- **Accord** [agreement to discharge existing obligation] **and satisfaction** [of the consideration required to support it]. AKA a settlement (K to settle disputes; agree not to sue for more).
  - o **Test**: (1) 2 minds agreeing or (2) 1 of the 2 persons acting in a way as to induce other to think the \$ is taken in satisfaction of the claim and to cause him to act upon that view
  - o Onus on D to prove that such an agreement exists.
  - o **Here**: No evidence of language of settlement. Employee's actions insufficient to induce employer to believe the last pay cheque was in full satisfaction of any claims employee may have (must have clearly indicated he's satisfied with amount provided to him).
- Reasonable notice: 56 y/o (close to retirement), worked there for 41 years (last 18 months as a Sales Manager), no availability of similar employment. 12 months.
- Employer took reasonable steps to mitigate damages upon termination.
- Damages: What he would've received during 12-month notice period, subtract monies received as severance pay under *Employment Standards Act* and monies earned during notice period.
- **Advice to employers**: Give employees time to get independent legal advice (**1 week**) and a written document. Instruct them to get legal advice (if unsophisticated). Have them sign it.

**Blackmore v Cablenet Ltd** [*Contra proferentum* and unconscionability]

Facts: Employee told he'd make \$30K/year but made \$125K/year (commission). Terminated because of commission costs. Received termination letter with severance offer (\$15K + 5.25 weeks' notice) and a release. Sought help from the labour board who told him he's lucky to get anything because he's paid commission (incorrect; just have to take average). He signed it. He was later diagnosed with depression.

- Vulnerability (making a lot of \$): (1) Spending habits, (2) Difficulty/impossibility finding similar employment (his education/experience and the economic conditions for that pay).

Held: Unconscionable. No negotiation. Economic pressure (not given back pay, references, nor severance until he signed). Insufficient legal advice. Notice period of 4 months.

Ratio: Employee must be given the opportunity to consult legal advice. A settlement can fail if it's vague (*contra proferentum*; interpret it against writer of agreement) and/or if it's unconscionable.

### Analysis

- Release (evidence of accord) subject to *contra proferentum* (interpret clause in favour of party that didn't write it) if vague or ambiguous.
  - o Argument: Doesn't explicitly bar entitlement to CL damages (just statutory minimums).
  - o Court rejects this argument. It says "includes" statutory minimums, and also says "full satisfaction of all claims arising out of your termination".
- **Unconscionability**: The law will not uphold unconscionable bargains in equity.
  1. Inequality in bargaining power arising out of ignorance/need/distress of weaker party.
    - o Receipt of advice negates inequality. If you get advice and sign an unconscionable K, sue the lawyer.
    - o Termination generally creates inequality, but you usually need more than this.
    - o **Here**: No legal advice (labour board advice adds to vulnerability). Undue financial pressure (employer threatens to retain back pay [entitled to it] if didn't sign).
  2. Stronger party unconscionably used position of power to achieve advantage.
    - o Participation in negotiation often negates unconscionability
    - o **Here**: Employer imposes pressure to sign (withheld pay rightfully earned)
  3. Agreement is substantially unfair to weaker party (or sufficiently divergent from community standards of commercial morality) that it should be set aside.
    - o What would he have been entitled to at CL? *Bardal* factors of age (young) and length of service (short) work against him. However, availability of similar employment (at the same compensation) may be zero

**Note**: Following *Canada Labour Code*. Federally-regulated cable industry; inter-provincial (s 92(10(a))).

**Structure settlement (in tax-efficient manner)**: Employer is obligated (*Income Tax Act*) to reduce payment by tax consequences if structured as salary. Advise employers to structure as other things (legal fees, *Honda*) as much as possible (instead of salary). If employed before 1996, can designate/assign some to pension plan.

## Confidential Information, Non-Competition & Injunctions

**Employee duties** (breaches of which can give rise for damages that the employer can sue for)

Contractual duties (express or implied)

1. Reasonable notice for quitting: Usually implied. Attaches to ALL employees (not just fiduciaries).
2. Good faith and fidelity: Usually implied. Attaches to ALL employees (not just fiduciaries).
  - a. Won't compete directly with employer while employed (duty ends when employment ends).
  - b. Duty of confidentiality: Won't steal/use confidential information gathered during your employment when you depart (at ANY point in the future). Ex: client lists, strategic plans.
3. Non-compete/non-solicitation clauses: Depends on nature of K/position. Needs to be reasonable (is it reasonable to have this for a non-fiduciary?)

Fiduciary duties (exist outside of K terms; if a fiduciary, these duties apply regardless of if it's in their K)

- Extends beyond employment (duty not to directly solicit for a reasonable period of time).
  - o Implications: Non-fiduciary CAN directly solicit. Fiduciary CAN directly solicit after the expiry of the reasonable period of time. **Note**: A finding of a fiduciary is RARE.
- A fiduciary must place the best interests of their employer ahead of their personal interests.
- If terminated (breached the K): Employer can't insist upon ethical obligations of former fiduciaries.

Statutory duties: Minimum notice a departing employee must give. Depends on length of service. K/CL may demand more.

**Termination of employment by an employee** (*Employment Standards Code*, s 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 employee has been employed by 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
  - (a) 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),
  - (b) 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,
  - (c) 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,
  - (d) The employee has been employed by the employer for 90 days or less,
  - (e) The employee is temporarily laid off,
  - (f) The employee is laid off after refusing an offer by the employer of reasonable alternative work,
  - (g) 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,
  - (h) 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
  - (i) An employee terminates the employment because of a reduction in wage rate, overtime rate, vacation pay, general holiday pay or termination pay.

## Confidential Information & Key Employees

**Anderson, Smyth & Kelly Customs Brokers v World Wide Customs Brokers** [Fiduciary duty of key employees not to solicit clients *and* of 3Ps who know of breach]

Facts: Kelly was in charge of Appellant's Edmonton office (name partner). Quits. Starts working for competitor (served same client base) and solicits Appellant's clients. Many left to go to World Wide.

Held: Fiduciary (director/officer *and* key employee). Breached his fiduciary obligations (dependency/vulnerability). World Wide also liable (knew of Kelly's conduct + happy to accept benefits of breach)

Ratio: Directors/officers and key employees have a fiduciary duty to their employer. Direct solicitation of former employer's clients by departed fiduciary is unacceptable (not at liberty to betray trust by soliciting clients for own account/someone else to his indirect benefit).

### Analysis

*Step 1: Are they a fiduciary? Are they a director/officer or key employee?*

- Drawn from the facts (character of employment/substance of position), not necessarily job title.
- Characteristics of relationships with a fiduciary obligation:
  - a) Fiduciary has scope for the exercise of some **discretion or power**.
  - b) Fiduciary can unilaterally exercise power/discretion to affect beneficiary's legal/practical interests.
  - c) Beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the direction or power (**look at the VULNERABILITY created through the POWER**).
- Look for personification of the business (clients associate individual with company; easy to follow). If an employee is the face of the business (like he was here), they are a key employee.

*Step 2: Have they breached their fiduciary duty (not directly soliciting for a reasonable period of time)?*

- Allowed to indirectly solicit (i.e., former client calls you, advertising your service), but may not contact/target them. Why? Freedom for client to choose their own broker.
- Calculation of **reasonable period of time**: How long does it take for the former employer to contact clients and attempt to retain their loyalty (i.e., how long until is no longer vulnerable)?
  - o **Factors:** (1) length of service (longer = more vulnerable), (2) number of fiduciaries (single fiduciary = more vulnerable), (3) relationship between fiduciary and clients (extent of connection), (4) authority/seniority of fiduciary (power = more vulnerable)
    - **See next case for more factors!**
  - o **Spectrum:** 3 months to 2 years. Blanket prohibition (not a client-by-client basis).
  - o **Advice to employee:** Provide range. Advise that the longer they wait to begin soliciting, the lower the risk of being sued (depends on risk tolerance). Suggest that their new employer add an indemnification clause in new K (they'll pay if you're sued).

- Advice to **employer: Ask lawyer to order injunction to prevent direct solicitation.**

### Discussion

- Clients belong to company, not broker. Broker is paid to bring in clients (employer created capacity to serve those clients).
- **All employees** (even fiduciaries) are free to **compete** (taking knowledge gained in former employment). It's the non-solicitation that bars some activities (for fiduciaries ONLY).
- **3P liability:** Equity binds the fiduciary and of a 3P who knowingly assists/participates in the breach of the fiduciary's duty. World Wide liable: Knowingly assisted Kelly in breach.
- **Remedy:** Compensate for profit Appellant lost as a consequence of Kelly's breach of duty (i.e., by the amount the Respondents have been wrongfully enriched)

**Torcana Valve Services v Anderson** [Notice + reasonable period of non-solicitation of key employees]  
Facts: 30 y/o worked for Torcana for 17 months (sales/dealt with suppliers/set prices). Left employment (no notice; took another employee with him; immediately set up competing business). No restrictive covenant/non-compete obligations. Solicited nearly all clients he worked with while at Torcana.

Held: Fiduciary (key employee; control business/customers; access to financial files). Took confidential info (even if not used, still a breach). Lied to clients (said Torcana was going under; defamatory/attempt to inflict economic harm). Should've given more notice. Shouldn't directly solicit clients for 6 months (no competition for one month, during notice). Liable for damages flowing from direct solicitation.

### Analysis

- **Who is a key employee?** Determine functionally. Not by reference to job title. Look at influence, trust and vulnerability. Do they have the ability to direct/guide affairs of business?
  - **Here:** Key employee. Customers thought of him as the business (point of contact; whole sales end). He profited from the business. Power/trust inherent in relationship
  - Arguments *against* finding of a fiduciary: (1) Sales person, (2) No hiring/firing, (3) Only there 17 months (no extensive client relationships). Did *not* personify the business.
  - **Sales person can personify when they're the ONLY sales person (face of company)**
- **What's allowed/required?**
  - Can't exploit position of trust/confidence for personal interests.
  - Must act in principal's interest (don't be in position where personal interests compete)
    - Examples: (1) don't take maturing business opportunity from employer, (2) don't actively solicit customers, (3) don't take/use/disclose confidential info obtained in course of employment, (4) don't actively solicit other employees to quit and enter new business arrangements.
  - Can depart/take people with you, BUT it can't happen during work hours/within work premises. Wouldn't be a breach of fiduciary duty if outside work hours/work premises.
- **How much notice must be given?** Usually 2 weeks. Give 4 for senior/key/fiduciary employees.
  - Factually driven. Can go up to a few months. Figure out how vulnerable the employer is to the departure. Look at nature of work (ex: prof quitting in summer versus March).
  - Doesn't match *Bardal*. This is weeks, not months.
  - Can be sued for the breach of the duty to give adequate notice.
    - Business opportunities lost, cost for short-term replacement, etc.
- **Factors going into reasonable period of non-solicitation:** (1) Fiduciary's level of responsibility (and of employees recruited to leave), (2) Period of service, (3) Nature and scope of pre-planning, (4) Degree (or lack of) candour, (5) Timing (relative vulnerability of operation), (5) Steps required to react (look at business significance of personal relationships with clients)

### Expediting termination of employment after an employee's termination notice (ESC, s 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.

- *Why? It's the employer breaching the K now (employee gave their notice).*
- *Don't get full Bardal factors (i.e., 20 months) if you give notice of 2 months. You get 2 months because that's when the K would've ended.*

**RBC Dominion Securities v Merrill Lynch Canada** [‘Unfair competition’ is *not* compensable; Goes through the different forms of damages that can be claimed against employees breaching their duties]  
Facts: Virtually all RBC investment advisors left for a competitor. Branch manager (Delamont) coordinated the move. Part of his job description was to retain investment advisors for RBC. RBC did not have a non-compete clause in its agreements. Employer sues for 5 years of lost profit.

Ratio: There are various duties that employees have when they depart (for a competitor), but a duty not to compete unfairly is not one of them. Greater duties are placed on fiduciaries, but a finding of a fiduciary should be exceptional.

### Analysis

#### Claims/responses

1. Breach of duty not to compete unfairly: Immediately started working for competitor (shouldn't do this during 2 weeks of notice that should've been given). Sought \$ earned during the 2 weeks
  - o **Doesn't make sense. 2-week period no longer exists (not working for RBC during theoretical period during which notice should've been given). Free to compete with old employer upon termination (damages taken care of by breach of good faith/fidelity and other damages)**
2. General breach of duty of good faith and fidelity (duty of confidentiality)
  - o **Compensable.** Includes punitive damages for egregious conduct (seized confidential info during employment + used for benefit of competitor to detriment of RBC).
3. Branch manager's breach of duty of good faith and fidelity
  - o **Compensable.** Orchestrating the departure was contrary to his duties (to retain employees and serve branch needs). \$1.5M (loss of profits for 5 years).
4. Key employees' breach of fiduciary duty (not to directly solicit for a reasonable period of time).
  - o **Fails.** Sales people are not fiduciaries (not the face of RBC + replaceable). Close relationships with clients irrelevant since not personifying RBC. **Only personify as sales person if you're the only one.** Loyalty attached to RBC, not the individuals.
5. Branch manager's breach of fiduciary duty (not to solicit clients/facilitate departure)
  - o **Fails.** Not a fiduciary. Not a director/officer of RBC (can't influence their economic interest), nor the face of the office. Look at substance of relationship with clients – barely sees them (so can't be the face of it). 70% of the time, he's a normal investment advisor (and during the rest of the time, he supervises).
  - o Generally: Free to lead departure if not on company time (*Torcan*)
6. Breach of duty to give notice
  - o **Compensable.** Includes expenses associated with failure to give notice (replacement costs during the two weeks). \$40K/investment advisor
7. Competitor's inducing breach of K/fiduciary duties. **Compensable.**

#### Dissent

- Implied duty of good faith: Non-fiduciaries only liable for competition during employment/misuse of confidential info. Employees are free to leave employment and compete (benefit of competition to public + need for employees to earn a living).
  - o Majority's finding punished employees for advancing professional interests (unfair).
    - Damages shouldn't flow from him moving (entitled to do that). Look at industry standards (extremely competitive; typical for employees to leave for a competitor).
- Quasi-fiduciary: Majority treat him like a fiduciary (breach of good faith/fidelity) but didn't label him as one.

- Right to compete: The right to search for alternative employment, negotiate with a competitor and speak with co-workers about the intention to leave *must* be implied with this right.
- Courts implied a restrictive covenant when it wasn't in place (employees wouldn't want to work there if a restrictive covenant was in place; it wasn't bargained for).
  - o Majority's finding heightened vulnerability of employees and expanded the duty of good faith beyond precedent.
- Issues with the quantum of damages
  - o Even if there was a breach, damages are disproportionate/exaggerated. 5-year loss doesn't accord with reasonable expectations of parties nor with industry expectations. 5 years is more than any notice period he would've had to give.
  - o Lack of foreseeability (remote). Compensable damages must arise from the breach (*Hadley v Baxendale*). These are punitive damages disguised as damages flowing from the breach.

**Jones v Klassen** [Contact letters to former clients]

Facts: K was an investment advisor with Edward Jones (only employee at that location). K left for a competitor and sent a letter to former clients to tell them about the move (transferring in their best interest + provided contact info). He took client info (including list of prospective clients). No notice.

Ratio: You can contact clients to tell them you're changing employers (and provide contact info so long as it is not direct solicitation). Even though it doesn't need to be checked by the employer, coordinating it with them is the most cautious approach (risky because employer won't advise them to contact you).

Analysis

- **Breach of:**
  1. Explicit restrictive covenant (contractual duty; no direct solicitation for 6 months)
  2. Duty not to directly solicit former clients (common law fiduciary duty)
    - o **Even with the restrictive covenant, you should still prove that he's a fiduciary (backup plan; no guarantee it'll be enforceable).**
    - o He's the face of the location (only person operating in St. Albert, making EJ vulnerable since the clients are loyal to Klassen).
  3. Duty of confidentiality (taking client information; grounded in CL, but also mentioned in K; ensures employee knows of duty)
  4. Duty not to unfairly compete. **This is a legal error** (RBC says so).
- **Damages:** What loss flows from breach(es)? Clients leaving (all breaches lead to the same loss).
  - o Discount by 20% for market attribution and friends/family attrition.
  - o Punitive damages: Misconduct that was a marked departure from ordinary standards of decent behaviour. **Here:** Took/used/reproduced client information.
    - He argued that he returned the documents/paper (but still made copies; ended up getting punitive damages for even making this argument)

**Restrictive Covenants ("RC"): Non-Compete and Non-Solicitation Clauses**

**Elsley v JG Collins Insurance Agencies Ltd** [Test for enforcing non-solicitation/competition clauses]

Facts: Collins buys insurance company owned by Elsley. Part of sale of business is RC (non-compete). Elsley hired as employee and new employment K included RC (non-compete; 5 years post termination/insurance/parts of ON). Elsley quit and started insurance company before termination of employment K RC (after sale of business RC terminates). Clients follow. Elsley says employment K RC unenforceable.

Held: Valid RC in employment K. Injunction. Collins had proprietary interest (evident by purchasing business; cared about clients). Non-compete necessary to protect proprietary interest (non-solicitation not enough since Elsley had an intimate client relationships). No public policy justifying invalidity.

Analysis

- RC in sale of business versus employment
  - o Sale of business: Non-compete is more reasonable. Expectation that the seller won't create a competitor after the sale (would reduce the valid of OG business).
  - o Employment: Inequality in bargaining power. Public interest in employee exploiting his skill/knowledge.

- RC competing interests: (1) public interest in discouraging restrictions on trade and maintaining free/open competition (freedom to K) and (2) courts disinclined to restrict the right to K (especially if sophisticated parties with equal bargaining power)
- **Test for enforcing the RC** [pick the RC apart and go through the test!]
  - Prima facie* unenforceable/unreasonable. Enforceable if reasonable and in the public interest.
    1. Is there a proprietary interest (trying to protect something of value to you)?
      - Ex: Client information, trade connection.
      - **Here:** Connections with client base is the subject of protection.
    2. Is the covenant reasonable as between the parties? (Onus on employer)
      - a) DURATION (Temporal interest) – Is it like being restrained forever?
        - **Here:** 5 years (as long as it gets) justified by nature of business (time needed to reduce vulnerability to Elsley’s connection with clients). Extraordinary case of vulnerability (continued to work for company when ownership changed and used this to continue relationships + face of company since he deals with clients exclusively + length of service with these clients)
      - b) GEOGRAPHY (Spatial interest) – Is it connected to the proprietary interest? Covering too many areas (too broad)? More than is required to protect interest?
        - **Here:** Niagara Falls (and surrounding areas) is narrowing (good for employer)
        - It may not be geographically rooted (ex: Amazon/anything online)
      - c) CONDUCT (Nature of activity) – What are you not allowed to do? Compete, solicit or both? Within that restriction, is it narrow or broad?
        - Non-competes are rarely enforced since it usually can be argued that a non-solicitation would fulfill the purpose/protect the proprietary interest.
        - Non-compete deserves more scrutiny than non-solicitation.
        - **Here:** Non-competition necessary because non-solicitation wouldn’t protect proprietary interest. Clients would’ve followed whether or not he solicited.
    3. Public interest (Onus on employee to show that even though it’s reasonable, it’s contrary to the public policy)
      - Look at effect of the restraint on public. Ex: Fewer services available. Public wants family doctors in small town (won’t want monopoly/even 1 less doctor).
      - **Here:** There are many insurance brokers. No monopoly being created. Nobody will say that one fewer insurance agent is against public interest.

*Advice to Collins today:* Non-compete makes sense, but 5 years is vulnerable of being too long. It might not need to be this long to protect the proprietary interest Can the job be done in 3-4 years? Do you think clients would actually leave after 4 years? **At the high end, make it a MAXIMUM of 3 years!**

**HL Staebler Co v Allan** [Non-compete clause unenforceable for being too broad in nature of activities]

Facts: Two employees quit (unhappy with changes to the management structure) and took up work with a competitor (took former clients). K had a 2-year non-competition clause.

Held: Non-competition clause is unenforceable for being too broad.

Ratio: A non-competition clause is warranted only in exceptional circumstances (and where a non-solicitation clause wouldn’t effectively protect an employer’s interest). Difficult to defend as reasonable.

Analysis

- There is a proprietary interest, but the clause restricts all forms of business (not just insurance business) with its clients. There’s also no geographical limit (i.e., it’s restricted everywhere).
  - **If no restriction on conduct/geography in RC, that means that all conduct/locations are restricted.** Take it for what it is (don’t try to read in what the parties meant).
    - If not: Incentive for employers to include overly broad terms (court would read it down to the point to make it barely legal). Employees would allow it (to avoid litigation), and then the employer got what they want. We don’t want employees’ autonomy to be restricted after employment (only when it’s strictly necessary to).
- Non-solicitation clause would’ve been sufficient to protect the employer’s interest.

## **KRG Insurance Brokers v Shafron** [Ambiguous terms; Severance and rectification]

**Facts:** Ambiguous non-compete clause that prohibits competition within the “Metropolitan City of Vancouver”. Began working in Richmond (part of the region?)

**Held:** Term has no legally defined meaning and is therefore ambiguous/unenforceable. No evidence demonstrating the mutual understanding of the parties at the time they entered the K (as to what geographic area is covered). Court has strong distaste for overbroad covenants.

**Ratio:** Ambiguous RCs are unreasonable, so they’re unenforceable. Severance/rectification can’t be invoked to resolve ambiguity (lack of objective intention). To be enforceable, it must be precise/defined.

### Analysis

- RCs **must be unambiguous** to be reasonable. Reasonableness can’t be determined without establishing the meaning of the RC. If ambiguous, unreasonable/void/unenforceable.
  - o If ambiguous RCs were reasonable/enforceable, employers would be incentivized to make terms broad/ambiguous to unnecessarily restrain employees.
- Two kinds of severance (to give effect to the intention of the parties)
  1. **Notional severance:** Read down a provision to the maximum possible enforceable clause without changing the words (to the point where it makes legal sense and is reasonable between the parties) (ex: City of Vancouver and contiguous communities)
    - N/A to employment K RCs: (a) no bright line test for reasonableness (read down to *what?*), (b) invites employer to impose unreasonable RC with only sanction being that if RC is found unreasonable, court will still enforce it to the extent of what might validly have been agreed to, (c) don’t want courts to incorporate after-the-fact information (might’ve changed their minds from the time of signing).
    - **Here:** Never applicable in RCs in employment Ks.
  2. **Blue-pencil severance:** Remove part of the contractual provision (ex: a typo). In the absence of that part, the provision makes sense (ex: ~~Metropolitan~~ City of Vancouver)
    - Only use where the part being removed is: (a) trivial, (b) clearly severable and (c) not part of the main purport of the restrictive covenant.
    - Only if it’s possible to give effect to the intention of the parties.
    - **Here:** No evidence that parties would’ve unquestionably agreed to remove “Metropolitan” (City of Vancouver, even if legally defined, does not reflect the intention of the parties; uses pencil to substantively alter the provision)
- **Rectification:** Obvious mistake + there was intention/meeting of minds.
  - o Necessary requirements: (1) prior oral agreement exists and is known, (2) party seeking to uphold written agreement knew or ought to have known about lack of correspondence between document and oral agreement (in circumstances amounting to fraud/existence of fraud), (3) precise form of written agreement can be made to express prior intention.
    - Precise form requirement prevents court from speculating about parties’ unexpressed intentions or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not.
  - o **Here:** No indication that parties agreed on something and then mistakenly included something else in the written K. Rectification can’t be invoked to rewrite the bargain.

## Injunctions

### Test for enforceability

- 1) A serious issue to be tried. A *prima facie* enforceable covenant.
- 2) Irreparable harm (that can’t be remedied by money; i.e., stolen clients) to party seeking injunction if injunction not ordered. May not need to demonstrate if there’s a clear breach of a clear covenant.
- 3) Weigh the fairness through a balance of convenience. Inconvenience for employee (if enforced; finding new employment) versus inconvenience for employer (if not enforced; the irreparable harm)
  - o *Employer tactic:* Take an undertaking that if you’re wrong about the injunction (and K is in fact enforceable), you’ll pay damages to the employee to repair the damages they suffered.

**Renfrew Insurance v Cortese** [Successful case of an injunction ordered]

Facts: Employees agree to 6-month non-compete and 18-month non-solicitation (of customers and employees) clauses after receiving independent legal advice. Received shares in exchange for promises. Started working for competitor (employees/customers followed; no clear evidence of solicitation).

Held: RC/agreements enforceable. Employer entitled to interlocutory injunction.

Analysis

- Consideration given (shares in exchange for promises). It was reasonable (after considering the market/circumstances; received independent legal advice; there was no pressure to sign since employment wasn't in jeopardy if they didn't sign).
- Test:
  - o *Prima facie* case: (1) Worked for competitor, (2) Customers and employees moved.
  - o Irreparable harm: Clear breach of a clear covenant.
  - o Balance of convenience favours P (even though both parties have been inconvenienced).

**Dreco Energy Services Ltd v Wenzel** [How to interpret the test for an interlocutory injunction]

Facts: Wenzel (inventor) sold his business but stayed on. Sale of business K and employment K both have strict no compete clauses. Wenzel resigned and set up a competing business a few blocks away.

Analysis

- Serious question to be tried/strong *prima facie* case. A very strong defence might negate this.
- Irreparable harm: Look at K (provision documenting agreement that a breach would produce irreparable harm?) and substantial evidence. Harm difficult to compute in \$ is traditionally recognized as irreparable harm (ex: goodwill).
- Balance of (in)convenience: If injunction enforced versus if not enforced.
- **Severance provision in RC:** If any particular portion of the K are found to be unenforceable, the rest of the K should still be enforced (the void provisions are to be severed). Good idea!
  - o **Here:** Non-compete and non-solicitation clause. Non-compete found to be unreasonable. This doesn't affect the non-solicitation (may still stand).

**Globex Foreign Exchange Corp v Kelcher** [Restrictive covenants with wrongful termination]

Facts: Employees accept restrictions as part of their employment. One dismissed when he refuses to accept more restrictions, and the other two leave when they're asked to accept more. They made a customer list (from memory) and used it after they believed their non-solicitation period was up.

Ratio: When an employer wrongfully terminates an employee (a breach of the K), that employee is released from the RC which would've otherwise been valid (RC can't be enforced). RCs also can't be enforced when overly broad (*all* dealings with former customers; not restricted to relevant conduct).

Analysis

- Employee's vulnerability (power imbalance + termination) exacerbated with RCs
- Employer argues that even though he's fired, RC should be upheld since employment K says RC survives (regardless of how termination occurs).
  - o Good for employer (who wants it to apply even if the employer breaches the K) to include this. Even if not enforceable/sustainable, it may dissuade litigation.
  - o Why this argument fails: (1) Employee will have difficulty mitigating, (2) employers could hire/fire employees having the benefit of the RC, (3) employees would lose consideration owed to them for agreement of the RC.
- Repudiation (termination without cause and/or pay in lieu of notice) releases an innocent party from their obligations (not bound by K, which includes the RC).
  - o Advice to employer trying to terminate *and* enforce RC: Give notice.
- Issue of overbreadth: Non-solicitation of *any* conduct goes further than is reasonably necessary to protect the employer's legitimate interests. Overbreadth renders the RC unenforceable.
- Legal error in para 25: "Liable for improper use of the employer's confidential information during the notice period" – True, but duty isn't limited to notice period (it's ongoing).

### *Dissent*

- 'Pay in lieu of notice' is not a breach of the K (*Soost*), so he's still bound by the K/RC.
- Breach versus repudiation: We've overemphasized 'failure to give notice' as a repudiation (giving the employee the ability to be released from ongoing obligations)
  - o Minor breach: Employers can dismiss. Only a breach if insufficient notice is given.
  - o We don't let employees walk away from obligations under K when fired (using confidential info), so we shouldn't release them here. A breach of one aspect (notice) doesn't release an employee of all obligations.

*Wrongfully terminated fiduciary*: No longer bound by fiduciary duties. If employer terminates, that's a breach of the K which releases fiduciary duties not to solicit for a reasonable period of time.

## Employment Standards Code

### Why state intervention?

- 1) Minimum standards are necessary because of the inherent bargaining imbalance/vulnerability.
- 2) *ESC* provides a more accessible/affordable/clear forum than the common law. It provides extra protection for extremely vulnerable employees (short-term, young, no money). Avoids litigation/costs by creating an administrative entity. Risk: Insufficient legal information/training (*Blackmore*).

### Statutory Minimums

**Machtiger v HOJ Industries** [Statutory interpretation; Breach of minimum statutory periods]

Facts: Employment Ks say the employer can terminate with less notice than the statutory minimums.

Ratio: Where an employment K fails to comply with statutory minimums, those provisions become null and void. The employee can only be dismissed without cause if he/she is given (CL) reasonable notice.

#### Analysis

- CL presumption of reasonable notice is rebuttable if the employment K clearly specifies some other period of notice (if not below the statutory minimums)
- The first thing to do is consider the purpose of the *ESC*: It is a remedial piece of legislation designed to enforce protection. We should give it a large/liberal interpretation.
  - o Work is fundamental to an individual's identity. The manner of termination is equally important (para 30).
- They're trying to contract out (since below statutory minimums), which isn't allowed (s 4)
- Employer's argument: Although the K is void, the remedies should be restricted to statutory minimums since the parties intended the lowest amount possible. We should give employees the lowest legal amount under the *ESC* since that was the intention of the parties.
  - o **Held**: (1) Can't extract anything (including intentions) from a void K, (2) No disincentive to create illegal Ks if statutory minimums were the only consequence
- Failure to comply with statutory minimums = Void K = CL notice periods operate (imply a term that the employee is entitled to reasonable notice).

**Advice for employers** (para 35): You can still give bad notice periods by converting the floor into the ceiling. Explicitly state that entitlements are limited by the *ESC*. If you say, 'if we fire you, we owe you 3 weeks' because, even if legal now, it becomes illegal as some point (then you'd have to follow CL).

**Kosowan v Concept Electric Ltd** [Code allows for civil/CL remedies if not explicitly barred by K]

Facts: Employment K says if terminated for anything other than cause, employee is entitled to pay "in accordance with the *ESC*". Terminated without cause and paid statutory minimums. Wants to get more.

Held: Clause doesn't confine compensation to statutory minimums. The board language leaves open the ability to pursue an action for civil remedy (*ESC*, s 3), which is technically in accordance with the Code.

#### Analysis

- Acting in accordance with the Code means you act in accordance with the entire Code, which includes s 3 (doesn't restrict an employee from pursuing CL damages).

- Interpret *ESC/s 3* in a liberal way (given the purpose of *ESC*). ‘In accordance’ is not limiting.
  - o *Contra proferentum*: Interpret ambiguity against the drafter/employer.

**Drafting note:** Explicitly refer to compliance with statutory minimum provisions (*not* Code in general). If generally referring to *ESC*, it includes s 3 (which says the Code doesn’t bar CL remedies).

- “Limited to”, “restricted to” or “only receive” are better than “in accordance with”.
- Helps to include ‘minimum’ (ex: limited by the minimums).
- Be clear/limiting, rather than ambiguous (by just referring to it).

**Nutting v Franklin Templeton Investments** [Distinguished from previous; Specificity of language]

**Facts:** Employment K contained a clause that limited the employee’s entitlements to the statutory minimums upon dismissal without cause. Paid out the statutory minimums upon termination. Seeking additional severance pay (alleges he is entitled to receive more at CL because of his dismissal).

**Held:** Claim for additional compensation for termination ought to be dismissed. This agreement expressly makes it clear that any possible common law right is overridden. Paid the amount required.

**Ratio:** Clear/unambiguous clause that limits entitlements to statutory minimums should be respected. No particular phrase/formula must be used. Instead, look to the intention of the parties (in displacing CL rights). However, the more ambiguous the terms, the bigger the risk of it not being limiting.

Analysis

- K may oust presumption of reasonable notice so long as it doesn’t violate statutory minimums.
- Distinguished from *Kosowan* about clarity of language: “In accordance with” = Obligation to comply with statute/minimums (includes a continuance of the right to pursue a civil remedy, as mentioned in s 3). No implication of limiting the employee to statutory minimums.
- **Here:** First sentence (simply stating the law), in isolation, is not limiting. However, if read as part of the whole clause, it is limiting.

**Rizzo & Rizzo Shoes Ltd (Re)** [Statutory obligations in bankruptcy; Broad interpretation of *ESC*]

**Facts:** Employees terminated because of employer’s bankruptcy. Contentious whether severance provisions are engaged (since not technically terminated *by* an employee).

**Ratio:** Employee owed termination pay whether terminated by the employer regardless of if it’s actually by the employer or by operation of law (i.e., bankruptcy).

Analysis

- **Statutory entitlement**, so look to *ESC* if these employees are entitled. No statutory entitlement if not covered by the *ESC*. Does “terminated by employer” include via bankruptcy?
- **Purpose of *ESC*:** Protect employees. Interpret broadly, in a way to encourage employers to comply with statutory minimums (extending protection to as many employees as possible).
  - o “Terminated by employer” must be interpreted to include termination from bankruptcy (broad/general approach to interpretation appropriate for benefits-conferring legislation)
  - o The way an employee is terminated (by the employer or by operation of law) has no bearing on the ability of dismissed employee to cope with the sudden economic dislocation caused by unemployment (same vulnerability).
- **Policy arguments:** Legislature doesn’t intend to produce absurd consequences. Interpretations which defeat the purpose of the statute/render some aspect of it pointless/futile are absurd.
  - o If termination pay not owed in bankruptcy, employees dismissed day before bankruptcy are entitled to pay but those terminated on day it becomes finalized wouldn’t. Absurd.
  - o Senior employees entitled to more termination pay, but it’s the more senior ones who would be employed until the bankruptcy (and would thereby lose their entitlements to the payments). They also have greater vulnerability (been there for so long).
- Since they’re unsecured creditors, even though they’re successful, they won’t recover much. There are two additional protections in bankruptcy:

- Owed wages, etc. (*Bankruptcy Act*): Super-priority for wage arrears, owed expense reimbursements and statutory vacation pay. If employer owes you money in the time you work, you get ahead of creditors in bankruptcy (up to \$2K; cap).
- Termination pay, etc. (*Wage Earner Protection Program Act*): Employer pays into government program. Protects unpaid wages/termination pay in bankruptcy. Cap of \$4K
- Applies in Alberta (same language; s 55)

## Forum: Statutory vs. Common Law Damages

**Smith v Hostess Frito-Lays** [Statutory remedies don't prevent CL remedies; Expediting termination]

Facts: On Feb 11, employee resigned (effective Sept 1; excessive notice). On Feb 24, employer advised employee that resignation was accepted effective Feb 11 and paid him 8 weeks' pay in lieu of notice (statutory minimum). Employee alleges wrongful termination (wants to sue for common law notice).

- Why fire employees who give notice? Usually mad. Other issues: (1) security/confidentiality, (2) poor performance.

Ratio: S 59 doesn't prevent an employee from pursuing a civil remedy. Employee's right to commence a civil action (to lengthen statutory minimums by CL reasonable notice) is preserved by s 3 of the *ESC*.

### Analysis

- The employer breached the K. Employee giving sufficient/excessive notice is not a breach.
- Section 59: Expediting termination
  - (1): If employee gives notice, you can expedite termination but must pay them what they would've been paid during that notice period.
  - (2): If employee's notice is greater than notice employer would've had to give (statutory minimums), employer has to pay at least the amount that they would've been paid during the notice period employer would have to give. *Doesn't prevent employee from also pursuing CL action to determine the issue of reasonable notice. Minimums can be extended by CL.*
- Employer's argument (statute displaces CL) fails b/c s 3. Nothing in *ESC* (including a remedy in another section) affects employee's right to civil remedy (can always sue for more/CL damages)
- Even if CL reasonable notice lengthens the 8 weeks, it can't go above 6 months. Put him in the position had the K been performed (i.e., not terminated). K would've ended in 6 months.

**EC&M Electric Ltd v Alberta (Employment Standards Office)** [Solving disputes through the Code]

Facts: Terminated for cause (poor performance and swearing) but gets a job the next day (mitigated CL damages, so seek statutory minimums). Employment Standards Officer found no cause and ordered the employer to pay 8 weeks' pay for lack of notice termination.

Held: Not justified in dismissing him for cause. Mitigation doesn't apply to statutory minimums.

### Analysis

- Why resolve disputes under Code (rather than in court): (1) fully mitigated damages (mitigation doesn't reduce/apply to statutory minimums), (2) quicker/cheaper (if straightforward/little \$).
- To have one mistake justify summary dismissal, it must interfere with/prejudice sale/proper conduct of the company.
  - **Here**: No progressive discipline (for poor performance). Abusive language condoned.
- Follow the claim:
  - Complain of failure to pay earnings (s 82(1)(a)) within 6 months (s 82(2)).
  - Officer decides whether to investigate (s 83). If so, makes an order (s 87(1)).
    - **Here**: Ordering termination pay implies that there was no cause found.
  - Right of appeal (s 87(3)) to an appeal body (s 95) who follows the appeal process (s 98).
    - Decision must be in writing (s 104).
    - Power to make a variety of decisions (s 107(1)). No appeal (s 107(3)).

**Wong v Shell Canada** [Remedies may be estopped if a final decision already made]

Facts: Officer found cause (violated Code of Conduct/conflict of interest rules). No termination pay due.

Held: S 3 preserves your right to pursue civil action, but since a director's decision is a final judicial decision, the principle of issue estoppel applies.

Analysis

- Just cause? Proportionality inquiry (breach of Code of Conduct not necessarily serious enough to justify summary dismissal unless the term is fundamental/essential).
- Officer found cause. Appealed to Director (s 88) who upheld decision. Can't appeal (s 88(5)).
- Although s 3 says an employee can commence an action or pursue remedies under the Code, they can't pursue both remedies in respect of the same complaint. S 3 preserves your right but doesn't bar issue estoppel (parallel proceedings contrary to the interests of justice).
  - o Issue estoppel: (1) same issue/question already decided in a prior decision, (2) that decision was final (binding; judicial review/appeal option irrelevant; interlocutory decision is non-binding, (3) same parties.
    - **Here:** Same Q (whether he's wrongfully dismissed). Director's decision is final/binding. Same parties.
- *From the beginning, he should've went to the courts: Just cause termination is complex and you may want a court to decide it. Breach of conflict of interest policy makes it complicated (need more facts). When the money is significant, think seriously about the judicial process.*

**Danyluk v Ainsworth Technologies Inc** [Discretion in applying issue estoppel if unfair]

Facts: Filed complaint under ESA seeking unpaid wages (\$300K). Without an ESA decision, she began a court action for wrongful dismissal/unpaid wages. Employer wrote to Employment Standards Officer (Burke) with proof to substantiate position (employee not copied). Burke later told employer (but not employee) that she rejected employee's claim for unpaid commissions. Employee did not apply to Director for review of Burke's decision.

Held: Regardless of the employee's procedural mistakes (failed to take advantage of appeal + started a civil suit before ESA decision rendered), her claim for unpaid commissions was never properly considered/adjudicated. Issue estoppel will not apply even though all 3 elements are met.

Ratio: Don't apply issue estoppel if it will cause a gross injustice.

Analysis

- Elements of issue estoppel met (same issue of commissions + Burke's decision became final when employee didn't appeal to Director + identical parties). Just because elements are satisfied doesn't mean issue estoppel automatically applies (judicial discretion to achieve fairness).
- Issues with relying on Officer's decision:
  - o Purpose of ESA: Quick/cheap way to resolve dispute. Putting excessive weight on ESA decision compels parties to mount a full-scale trial-type situation (defeating purpose)
  - o Lack of expertise: No legal training. Asked to decide a complex issue of K law.
    - \$300K value of contractual interpretation (complex)
    - Foreign to expertise. Legislature didn't intend to reserve the exclusionary authority to rule on the validity of the order to that tribunal.
  - o Potential injustice: Employee didn't receive notice nor an opportunity to respond.

**Gordon v CAM Distributors Ltd** [Selection of forum + Supervisory exemption from overtime]

Facts: Manager quit. Civil suit (ESA would only consider past 6 months; his claims extend back 2 years)

Ratio: Employment Standards Officers can hear only Code entitlements (ex: overtime). However, Code entitlements can also be pursued through the Courts (can hear CL and Code claims).

Analysis

- Employees are entitled to overtime pay (s 21) subject to an overtime agreement (s 23; getting time off instead of overtime pay).
  - o For an employer to make sure they fall under s 23: (1) have it in writing, (2) have the employee sign it, (3) mention the ESC ("this is an overtime agreement per s 23").

- Government can pass regulations to exempt individuals (both employees and employers) from certain Code provisions (*Employment Standards Regulation*, s 138).
  - o Exempt from overtime pay: professionals and supervisory roles.
  - o **Here:** Look at duties/substance of relationship to determine if a supervisor (job title irrelevant). Purpose of Code = protect employees (be cautious in finding an exemption).

**Vrana v Procor Ltd** [Temporary layoffs per CL and ESC]

Facts: Temporarily laid off (shortage of work) but never recalled back (employer shut down). Employee files civil suit prior to 60 days (per ESC, s 62)

Layoff: Temporary time off. Based on seniority/length of service.

- Labour law: Shorter length of service = Less seniority = Less protection (laid off first)
- Employment law:
  - o CL: Constructive dismissal (breach of substantial term: employer will pay on an indefinite basis). Sue for constructive dismissal or accept change/breach (wants to stay employed).
  - o ESC, s 62: Employer can temporarily lay off provided they follow this. On 60<sup>th</sup> consecutive day, it's termination. If employee fails to return within 7 consecutive days, they lose their entitlement to notice/pay

Held: Wrongful dismissal because of failure to give proper notice (thought he was constructively dismissed). Without notice/following s 62, it's unfair to treat employee's early complaint as repudiation.

Analysis

- Contradiction: s 3 (*can* sue for CL damages for being laid off) versus s 62 (*can* lay off)
  - o Court doesn't address this. Instead, they say employer failed to properly exercise s 62 since they didn't provide a copy of the Act (*not in the Code, but now it is; s 63(3) outlines layoff notice requirements; ensures no misunderstanding of rights/obligations*).
    - Because of a layoff's negative consequences, providing a notice of intention fits with spirit/intent of Code and ensures employee is properly advised of intentions.
  - o Still contradict if s 62 is satisfied. Since purpose of Code is to protect employees, a more protective interpretation is one that preserves their ability to assert constructive dismissal (through s 3).
- No obligation to pay any termination pay until the expiry of the 60-day period.

**Kennett v Superior Millwork Ltd** [Selling of business as a going concern; Going after purchaser]

Facts: Kennett was an employee of a company that was bought as a going concern by D. Kennett was never hired back on. Tries to rely on s 5 (employment deemed to be continuous when purchased as a going concern) when suing the purchaser of his former employer (deeper pockets).

Held: Not entitled to CL damages from purchaser (can't read statute broadly enough for CL damages).

Analysis

- Length of service is continuous if business is purchased as a going concern. Purchaser can get out of that scenario by negating previous service in new employment K (*Radwan*).
  - o If reason for termination is SALE, sue seller. Here, they go after purchaser.
- S 5: "For the purposes of the Act..." = Deemed continuity only applies to statutory minimums (which will be determined by longer length of service; includes previous service).
  - o Can't have a CL claim against purchaser. At *most*, you can claim for statutory minimums (but maybe not since you were never their employee; doesn't entitle you to continuous employment)
  - o Not informed he wasn't taken on prior to sale = Unsure if s 5 allows you to sue purchaser
- Kennett can argue: Even if he didn't *know*, purchaser is still bound by s 5. Purchaser can argue: s 5 presumes an employment relationship exists (which wasn't present).

**Unjust Dismissal: Canada Labour Code** (unique to federal jurisdiction)

**Complaint to inspector for unjust dismissal**

240(1) Subject to subsections (2) and 242(3.1), any person

(a) Who has completed twelve consecutive months of continuous employment by an employer, and  
(b) Who is not a member of a group of employees subject to a collective agreement,  
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

#### Time for making complaint

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

#### Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

#### **Reasons for dismissal**

**241(1)** Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

#### Inspector to assist parties

(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

#### Where complaint not settled within reasonable time

(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

- (a) Report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and
- (b) Deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

#### **Reference to adjudicator**

**242(1)** The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

#### Powers of adjudicator

- (2) An adjudicator to whom a complaint has been referred under subsection (1)
- (a) Shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
  - (b) Shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
  - (c) Has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

#### Decision of adjudicator

- (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
- (a) Consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
  - (b) Send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

#### Limitation on complaints

- (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where
- (a) That person has been laid off because of lack of work or because of the discontinuance of a function; or
  - (b) A procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

#### Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) Pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) Reinstatement of the person in his employment; and
- (c) Do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

**Decisions not to be reviewed by court**

**243(1)** Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

**Enforcement of orders**

**244(1)** Any person affected by an order of an adjudicator under subsection 242(4), or the Minister on the request of any such person, may, after fourteen days from the date on which the order is made, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order, exclusive of the reasons therefor.

Idem

(2) On filing in the Federal Court under subsection (1), an order of an adjudicator shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.

**Regulations**

**245** The Governor in Council may make regulations for the purposes of this Division defining the absences from employment that shall be deemed not to have interrupted continuity of employment.

**Civil remedy**

**246(1)** No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Application of section 189

(2) Section 189 applies for the purposes of this Division.

**Wilson v Atomic Energy** (SCC 2016) [*Canada Labour Code*, unjust dismissal]

Facts: Federal employer fires Wilson without a reason but with a large termination package (in excess of statutory entitlements; equivalent to CL damages).

Analysis

- *Employment Standards Act* and *Canada Labour Code* do very similar things (ex: min/max hours, maternity leave, minimum notice periods, other protections).
  - o Difference: **Unjust dismissal** – A termination without a rationale/reason behind it.
    - Remedies include reinstatement of employee (s 242(4)(b))
    - Contrast from CL (where no reasons needed so long as *HRC/ESC* not infringed)
- **Examples**: Canada Post, Airline staff, Banks, Railway staff, Telecommunications, Military.

## Human Rights in the Workplace

**Limitation on freedom of contract**: Certain things an employer can't do based on discrimination.

- *ESC*: Limits timing for termination (ex: on/entitled to maternity leave/other leaves; ss 52-53).
- *Human Rights Act*: Applies to hiring/employment/terminating. Applies to employees/employers.
  - o Sections 6, 7, 8, 11 and 32 (remedial)
- *Canadian Human Rights Act* – **EXAM**: If there's discrimination of a federally regulated employee, identify *Act*/problem.

Potential violation?

**Step 1**: Is there some action that discriminates on a protected ground? Refusal to employ? Decision to terminate? Is there some rule/policy/term of the employment K that discriminates on a protected ground?

**Step 2**: Is there a *bona fide* occupational requirement (to excuse discrimination)? See s 7(3).

- Ex: blind airline pilot (*prima facie* discrimination but allowed because it's a BFOR; need to see to fly a plane; so, not discrimination under *Human Rights Act*)

### Who's Protected by the *Human Rights Act*?

**McCormick v Fasken Martineau DuMoulin** [Partner wasn't an employee, so not protected by Act]  
Facts: Equity partners (including McCormick) voted for mandatory retirement at 65. 30 years later, McCormick (when 64) brought a claim alleging age discrimination contrary to *Human Rights Act* (s 7).

Held: Although it's possible for a partner to be an employee, in this case, Fasken was not in an employment relationship with McCormick. Important to look at control and dependency.

Ratio: The first step to a human rights complaint is making sure that the *HRA* even applies.

#### Analysis

- Purpose of human rights legislation: Prevent arbitrary disadvantage/exclusion on enumerated grounds (protect dignity of the vulnerable). Adopt expansive approach to define "employment" (includes independent contractors; same effect/vulnerability) to fill protective purpose.
  - o Similar to employment standards legislation, it deserves a large/liberal/generous interpretation (to fill its objectives; protecting rights of human dignity). Even more expansive than employment standards legislation (here, ICs are included).
- Functions of employment: (1) control exercised by employer over working conditions and remuneration and (2) corresponding dependency on the part of the worker.
- No *bona fide* occupational requirement (that older people can't practice law).
- Distinctive features of partnerships
  - o Partners have the right to meaningfully participate in decision-making process that determines their workplace conditions/remuneration.
  - o Partnership agreements create a high threshold for expulsion (like here, where a special resolution was needed to be passed by all equity partners)
  - o Partners are not employees of the partnership. Collectively, they are the employer.
    - Partners are mainly governed by partnership agreements, not employment Ks.
    - For human rights legislation to apply, there must be an express statutory provision.
- **Here:** Not vulnerable to control, but rather, he *did* control (part of group that controlled; entitled to vote on policy he's challenging; benefitted from it for years, letting other people retire and taking clients). Not dependent on Fasken (wasn't working for benefit of someone else; rather, he was working for his own benefit; the firm was run for the benefit of and by its equity partners).
- **Recourse for claims of discrimination:** "A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm" (*Partnership Act*, s 22).
  - o McCormick argues "What if there was a provision in partnership agreement that says, 'no blacks'?" Court says this provision takes care of it (NOT present in AB legislation).

*What about discrimination by a co-worker?* (BC HRT v Schrenk, SCC 2017) – Under BC legislation (s 13), an employee can sue a co-worker (or an employer for not protecting you from the co-worker).

- Apply in AB? Maybe. AB legislation says "employer", where BC legislation says "person". Look to *Rizzo* (read in 'bankruptcy') to see if "employer" can be interpreted broadly enough.

### Discrimination, BFOR & Duty to Accommodate

**BC (Public Service Employee Relations Commission) v BCGSEU** [Test for discrimination]

Facts: Meiorin (firefighter) failed a physical aerobic test and was dismissed. Testing did not differentiate between men/women and converted averages into minimum standards. Claim of indirect discrimination (adverse effect discrimination; neutral rule that has the disproportionate impact on certain people based on prohibited grounds; doesn't single anyone out; applies to everyone equally), rather than direct (discriminated because you fall into one of the enumerated grounds).

- Examples of indirect discrimination (standard applied to everyone): fitness test (disproportionate impact on women), no child care leave (disproportionate impact on women), everyone has to work Saturdays (disproportionate impact based on religious beliefs; can't work on Saturday)

- Example of *bona fide* occupational requirement: firefighters need to be able to lift heavy objects

Held: *Prima facie* discrimination. Lack of evidence that the aerobic standard was required for efficient performance of firefighting tasks. Employer failed to demonstrate that a standard more accommodating than the aerobic standard would post an undue hardship. Reinstated and compensated.

Analysis: Test for discrimination (same for indirect AND direct discrimination)

1. Complainant must establish a *prima facie* discrimination based on a protected class.
  - **Discrimination:** (1) Characteristic protected from discrimination and (2) Protected characteristic was a factor in adverse impact (*Moore v BC*). Look for adverse treatment on basis of a protected ground (don't necessarily need to find intent/stereotyping/prejudice).
  - **Here:** Disproportionately affects women (same standard for women and men; physiological difference makes it more difficult for women to meet standard). Disability/age also implicated.
2. Employer must justify standard as a *bona fide* occupational requirement (necessary to discriminate)
  - A. Rational connection: Standard/rule/requirement is rationally connected to the performance of the job (validity of general purpose behind the standard). Not difficult to meet.
    - o **Here:** Testing physical abilities is rationally connected to a physically demanding job.
  - B. Good faith: Standard was adopted in honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose. Not difficult to meet.
    - o **Here:** Go to physiologists at UVic for advice on how to develop tests (good faith).
  - C. Reasonable necessity/Duty to accommodate
    - i. Reasonably necessary: Standard reasonably necessary to accomplish the legitimate purpose
      - Why was *that* the cut score (to determine who passes/fails)? Need evidence that the score is scientifically demonstrable to represent the level at which you can safely/effectively perform the job.
        - If scientifically backed: More women failers than men failers would be *prima facie* discrimination (failing at a higher rate *because* of physiological makeup). However, BFOR (since failers can't safely/effectively perform the job).
      - **Here:** Fails. No proof that the standard is reasonably necessary to perform the job (could it be reasonably safe/necessary with *lower* standards?)
    - ii. Duty to accommodate: Impossible to accommodate without undue hardship (must accommodate someone that can't fulfill the requirement to the point of undue hardship).
      - Reasonable accommodation requires accommodation procedure and substantive accommodation
      - **Accommodation procedure:** (1) Talk to employee/doctor (important info of what he/she can/can't do), (2) Consider alternatives (look at various options to accommodate; for instance, more opportunities to pass/train) and (3) Assess costs/practicality/whether it's feasible (consider the legitimate interests of the employer).
        - See 'doctor's recommendation' in in-class discussion for more information about how to approach a (seemingly) defective recommendation.
        - **Here:** Failed to do this (didn't talk to employee).
        - A failure to meet this can lead to a hefty amount of damages. See *Richards*.
      - **Substance aspect:** Implement accommodation. Adopt working conditions so a failure to fulfill the standard doesn't result in termination (temporarily/permanently make changes to requirements/work/hours/etc.)
        - It might not be possible to accommodate if the only accommodation possible causes **undue hardship** (ex: blind pilot, asking corner store to accommodate that'll cost \$1M). *Don't make this decision unless you go through procedure!*
        - Be practical, innovative and consider costs (expected to bear more costs if larger; look at **context** – size of employer, effect on other employees, etc.)
        - Practical? Feasible? Safe? Unduly endanger lives of other? So expensive as to compromise the viability of the business?
          - Court rejects *annoyance* of employees (that employee is accommodated) as a basis for UH. Would support a morale based on discrimination

**Hydro-Quebec v Syndicat des employees de techniques professionnelles** [Steps to take with discrimination and the duty to accommodate; Absenteeism]

Facts: Employee missed 960 days of work during her last 7.5 years of employment (because physical and mental problems). Dismissed due to absenteeism, inability to work on a 'regular and reasonable' basis and the fact that no improvement in attendance was expected.

Ratio: If characteristics of illness are such that the proper operation of business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate, the employer will have satisfied the test (BFOR).

#### Analysis

- **THE STANDARD:** Show up for work.
- **HUMAN RIGHTS GROUND:** Physical/mental issues (*HRA*, s 7 – **reiterate definition**)
  - o Interpret 'disability' broadly/liberally/generously: (1) definitions (*HRA*, s 44(h)(1)) say 'any' (broad application) + (2) general objective of *HRA* legislation (inclusive/protection)
- **PRIMA FACIE (INDIRECT) DISCRIMINATION:** Adverse effect on those suffering from disabilities. Difficulties in meeting the standard as compared to those without disabilities.
- **BFOR:** (1) Rational connection (it's rational to insist upon attendance to fulfill work related purpose), (2) Good faith (met), (3) Reasonably necessary (yes – absenteeism/inability to work will reasonably/eventually result in termination; reasonably necessary to insist that someone reasonably/reliably shows up to work; difficulties managing + cost of uncertainty + lost capacity of work during this period).
  - o Possibilities: Work from home, change of work (necessary for personality issues).
  - o Impossibility (to integrate employees who don't meet the standard) is *not* the standard. Rather, it's whether you can accommodate to the point of undue hardship.
    - Considerations of undue hardship: (1) cost of possible accommodation, (2) relative interchangeability of workforce/facilities, (3) prospect of substantial interference with rights of other employees. Apply considerations with common sense/flexibility in the context of the factual situation presented in each case.
  - o **Here:** No improvements. Will continue (brings it to the point of undue hardship)
    - **UH if basic requirements of job can't be fulfilled now/into foreseeable future.**
    - **Purpose of duty to:** *Not* to completely alter essence of employment K (duty to perform work in exchange for remuneration). No duty to change working conditions in a fundamental way but does have a duty (if without undue hardship) to arrange workplace/duties to enable employee to do his/her work. Be accommodating, but not obliged to continuously/completely change the job.
      - Accommodations are not about changing basic requirements of job; it's about accommodating so you *can* fulfill the basic requirements of the job.
- If employer wants to avoid this issue: Terminate with (working) notice.

**Vantage Contracting v Marcil** [Perceived disability protected; Compounded discrimination; Remedy]

Facts: Terminated after return from ST disability leave. Discrimination claim (age/physical disability).

Ratio: Discrimination based on a disability can be subject to a human rights complaint, whether factually correct or not (real or perceived).

#### Analysis

- Red flag that disability was the reason for his termination (right when he got back).
- Although no actual physical disability (he was physically capable of going back to work), discrimination can be based on perceived disability (if perceived as disabled, still vulnerable).
- Intersectionality of grounds (age and disability) can compound one another (can argue it's a combination of the grounds that is being discriminated against).
- Remedy (See all in *HRA*, s 32): Damages for injury to dignity/self-respect (species of non-pecuniary damages). It would be wrong to award damages on the same basis as they'd be awarded for ordinary termination (if so, no disincentive for being discriminatory).

**In-class discussion:** Issues, how a court would likely resolve them and options available for him

Category 1: Just cause

- Although there was progressive discipline, discipline/concern was based on a medical issue (not known to employer). **Can't terminate based on a work issue connected to a protected human rights ground.**
- Arguments *against* just cause (besides human rights): (1) Poor performance rarely justifies termination, (2) Warning needs to be supplemented by ample opportunity for correction, (3) Insufficient warning (not specific + didn't know employment at risk because length of service and lack of progression).

Category 2: Human rights/duty to accommodate

1. Protected ground: Physical disability (interpret broadly because of statute's purpose + cite definition). **Note:** Employee should have a doctor's note (if not: suggest they get one).
2. Discrimination on the basis of the ground: Yes, *prima facie* (indirect) discrimination (neutral rule negatively impacts him). Disability is a factor in inability to satisfy neutral rule (completion of work in a timely/profitable manner).
3. BFOR regime:
  - a. Rationally connected: Yes, it is rational to have this standard.
  - b. Good faith: Yes, wanted to meet client expectations.
  - c. Reasonable necessary/DTA:
    - i. Reasonably necessary – Yes, clients have been complaining (wanting to meet client needs/don't want to disappoint). When you factor in the issue, so long as there's no evidence that the standard is being differentially applied, it'll be reasonably necessary.
    - ii. Duty to accommodate
      - o Procedure: Listen to employee/doctor. Look at medical assessment/recommendations. See if recommendation causes UH (consider length of service/context/size of employer).
      - o Substance: Recommendations don't cause UH. Duty likely means following doctor recommendation (especially since it's not a permanent change; only temporary disability).
        - Employer's arguments: Don't have a duty to alter basic functions of job (*Hydro-Quebec*) + computer use is a fundamental basis of job. However: only temporary.
        - Look at workplace: reduction *may* be UH depending on size of workforce. The fewer designers there are, the greater impact on these individuals (distributing work).

Category 3: Constructive dismissal – Does accommodation go as far as to constructively dismiss?

- Employee's argues that the accommodations are tied to a change to a change in duties/tasks (*Wilkinson*) with detrimental economic impact (on bonus/pay) and that this is over-accommodation (medical assessment says reduce work by 25% and employer reduced it by 75%).
- **Standard:** Breach of a substantial term of the contract.
  - o Substantial term: Doing work in his field (graphic design).
  - o Look at K (for terms that specify work and/or bonus structure). However: not every written term is substantial, and a substantial term can be found elsewhere (conduct of parties/length of service).
- Employer may argue that the changes were done to accommodate, but this is over-accommodation.
  - o *Honda*: Over-accommodation rises to bad faith in manner of termination. Punitive approach to accommodation (pressuring to quit/he's miserable + disincentive for others to seek accommodations).
- **Doctor's recommendation:** Don't necessarily need to follow but must operate in good faith if you want to seek your own/3P medical opinion/assessment (if you think recommendation was inaccurate). Another option: give more info to doctor to make sure recommendation aligns with workplace more accurately.

Category 4: Advice

- Damages: (1) Length of service (*Radwan*) and (2) Bonuses (take the average; *Noble*)
- Practically speaking: Consider (1) ST disability or (2) Asking employer for a better accommodation (ongoing duty; *Brewer*)

<p><b>Brewer v Fraser Milner Casgrain</b> [Condition unclassified; Failure to cooperate; Ongoing duty] <b>Facts:</b> Odour sensitivity. FMC requested medical records, but she wasn't fully cooperative. Doctor recommended accommodations (some implemented but didn't work; for instance, they moved her office to another floor, but recent renovations created a lot of smells). She filed a human rights complaint.</p>
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### Judicial history

- Human rights complaint: Dismissed at investigation phase (didn't cooperate + seen going into grocery stores/shopping)
- Trial court: Dismissal unreasonable (medical disability not required + no failure to cooperate + abandonment of accommodation procedure when they moved her office which was unsuitable).
- Appeal (not this judgment): Failure to cooperate (didn't provide access/info). Employee seeking accommodations must be (seen to be) cooperative. A failure to do so can lose you the case.

**Held:** Interpret 'disability' broadly (don't need a classification for a condition). Failure to institute recommended accommodations/their experiment in moving floors didn't reach undue hardship.

### Analysis

- Protected ground: Yes, a chemical sensitivity falls within the broad definition of physical disability. **Don't look at seriousness of disability, but rather, whether an ailment exists!**
- Disadvantage from a neutral workplace rule (to show up to work in this particular workplace).
  - o She is discriminated: Can no longer come to work because of the disability.
  - o Accommodation:
    - Procedural: Approach 3P (who gave assessment/recommendation). See casebook.
    - Substance: Recommendations didn't reach undue hardship. Things are costly but look at context (large law firm). These are part of what must be considered.
- **Ongoing duty:** Re-evaluate accommodations if initial accommodation isn't fixing situation.

### **Richards v Canadian National Railway** [Can't contract/compensate out of human rights compliance]

**Facts:** Divorced mother works for CN must transfer to Van within 15 days. She more time to figure out child care/contact the father of her children. No response from CN. Given additional time to move.

**Held:** Family situation deserves accommodation. CN didn't accommodate to the point of UH. Substantial remedies (reinstated and paid 4 years of back wages between termination and reinstatement, pain and suffering and damages for reckless discrimination)

**Ratio:** Once an employee establishes a *prima facie* case, the onus shifts to the employer to justify the rule (*bona fide occupational requirement*) and to establish adequate accommodations to the point of undue hardship. An employer can't compensate out of human rights obligations.

### Analysis

- Federally regulated employees, so follow *Canadian Human Rights Act* (which prohibits discrimination based on family status just like provincial legislation).
- **The rule:** Terminated if you don't report to Van for indefinite period of time (to cover shortage)
- **Prima facie case:** Family status is a factor in the disadvantage she faces in the workplace rule. Because of her protected characteristics/obligations as a single mother with joint custody of her children, she can't fulfill an obligation that other employees can
  - o BCCA: To limit the scope, it must be a serious interference with a substantial obligation
    - **Alberta courts reject this approach:** (1) Other grounds aren't limited in scope, (2) Legislation defines disability broadly (should do the same here), (3) Interpret legislation broadly/liberally to fulfill its purpose (to protect human rights)
  - o **Only protected for a period of time when the circumstances demand it!**
- **BFOR/Accommodation**
  1. Rationally connected to workplace objective: Yes.
  2. Rule in good faith: Yes – based on seniority (doesn't specifically target parents).
  3. Reasonably necessary to accomplishment of legitimate purpose
    - **Employee's argument:** Need conductors in Vancouver because of a shortage.
      - (1) Job calls for sacrifices (instability in hours), but they're compensated for uncertainty. (2) CA includes seniority (bargained for it/agreed to rules). She doesn't get super-protection (low level of seniority; can't circumvent rules)

- *Employee's argument*: (1) Can't contract out of legislation/protection from a quasi-constitutional statute (you're allowed to 'cut the line' if you're disadvantaged), (2) Can't compensate your way out of human rights code.
4. Accommodated to the point of undue hardship
- Failure of process: Didn't communicate/investigate. Didn't explore feasibility/costs. Ignored own accommodation policies (let others stay home b/c sickness/family; not impossible to accommodate since they made exceptions for others).
    - Didn't have an individualized process of accommodations.
  - Failure of substance: More time (their accommodation) doesn't help her.

**Shiftwork**: Single parent can't do overnight shifts (need to watch children). Need to accommodate (move her to day shifts) unless it creates undue hardship (few people employed).

- 'Annoying other employees' is not an answer.
- Look for practical solutions. Even if the employer doesn't want to accommodate, they have to until the point of undue hardship

## Drug Testing

**Issues**: (1) Different tests at different times in employment cycle, (2) Different rules for unionized workplaces and CL employment (sometimes overlap), (3) Marijuana legalization.

### Different kinds of testing

- *Pre-employment testing*: Take the test to work here [upheld].
- *Post-accident testing*: Take the test if you commit an accident in the workplace [upheld].
- *Suspected impairment testing*: Take the test if there's a reasonable belief of drug use [upheld].
- Return from treatment program + Safety-sensitive position [upheld for a reasonable period of time].
- *Randomized drug testing*: Any day, some number of people will be tested [unsure if lawful].

**Irving Pulp and Paper** (SCC, 2013): Where a workplace is dangerous (safety-sensitive work environment; significant danger to individuals/property), the employer is entitled to impose drug tests on safety-sensitive positions where there's a general problem of drug/alcohol abuse in the workplace. Upheld post-accident tests.

- This is about a unionized workplace. Unsure if we can import this into individual employment Ks.

**Stewart v Elk Valley Coal** [Indirect discrimination from a policy, rather than an enumerated ground]

**Facts**: Safety extremely important to employer. Employee must disclose dependence/addiction before drug-related incident occurred (if so: offered treatment – if not and tested positive for drugs after an accident: terminated). Stewart used cocaine, was involved in an accident and was terminated.

**Issue**: Terminated because of addiction (*prima facie* case of discrimination because **drug addiction is a protected ground**) or because of policy breach (unrelated to addiction; had capacity to comply with terms; no *prima facie* case of discrimination)?

**Held**: Test for discrimination not met. Terminated because of policy breach (not addiction).

### Analysis

#### Majority

- Policy: Post-accident drug testing. Zero tolerance/immediate termination.
- Employee argues: Failed test/terminated because he's an addict and couldn't disclose drug use (addiction prevents disclosure, so terminated because of an addiction).
- Rational connection/good faith satisfied. Addiction was *not* a factor in termination:
  1. Terminated b/c a failure to comply with policy (and for no other reason). Would've been terminated whether an addict or a casual user. Policy wasn't applied due to his disability.
  2. Not adversely impacted by policy because he had capacity to comply with its terms (make choices about drug use). Don't assume addiction diminishes ability to comply with terms.
- The mere existence of an addiction doesn't establish *prima facie* discrimination

*Concurring* – Discrimination but BFOR/DTA met

- Immediate termination is reasonable. Policy has a deterrence effect (trying to stop drug use). If they allowed exceptions, the deterrence effect would be diminished. Individualized accommodations would result in undue hardship.
- Control over drug used reduced the extent to which his dependency contributed to his termination, but it did not eliminate it as a factor.

*Dissent* – Discrimination and no BFOR/DTA

- Accommodations insufficient. Needs to be individualized (but it was applied to everyone) and if you offer accommodations that addicts can't access (unaware of disability + only applicable to post-termination by letting him re-apply after terminated), they're not accommodated.

Ex: Nurse addicted to drugs. Employer catches her stealing drugs and fires her.

- ABCA: Terminated because of theft, not because of drug use/addiction.
- Adams: This is discrimination. How is that not traced to addiction? Likely a BFOR.

**AB (Human Rights and Citizenship Commission) v Kellogg Brown & Root** [No-drug policy; focused on labeling as disabled or on safety of others?]

Facts: Hiring policy requires all prospective employees to pass a pre-employment drug test (not hired if failed). Chiasson smoked weed, took test and began working. Terminated because he failed. Alleges discrimination on the ground of disability.

Held: Not addicted. Termination not based on perception of addiction. No breach/duty to accommodate.

Ratio: A policy is discriminatory against casual drug users only if effect is to perceive anybody testing positive as drug addicted/disabled (and to impose restrictions/penalties/differential treatment on those persons based on the perceived disability)

Analysis

- Prohibited grounds include instances where an employer incorrectly perceives an employee to be disabled (failure leads to termination, implying you aren't able to perform the job) (*Marcil*)
  - o **Here:** KBR's policy doesn't perceive Chiasson to be an addict. It perceives that persons who use drugs at all are a safety risk in an already dangerous workplace (effect of weed lingers for days). Policy effects are not misdirected in their application to Chiasson.
  - o **Casual drug use is not a protected ground.** It's only an addiction that is protected.
- Logical to extend human rights protection to situations where the lives of others are at risk.
- *Issue with this case – when do you draw the line between casual use and addiction?*

**Lockerbie & Hole Industrial v Alberta** [Only employers are bound by the duty not to discriminate]

Facts: L&H (Luka's employer) had Ks to perform work on Syncrude site. Syncrude has a policy that contractors can't bring workers onto the site unless they pass a drug test. Luka tests positive for weed. Syncrude was never Luka's employer in a conventional sense (didn't pay/hire him/direct his activities)

Held: Employee of L&H, not Syncrude. No K/employment relationship with Syncrude, not a part of its organization, didn't report to it and didn't direct his work. Relationship with Syncrude too remote to justify a finding of employment. It's L&H that must ensure Luka's rights are respected.

Ratio: It will be rare to extend the definition of "employment" so far as to encompass employment by two different parties. Just because services provided will indirectly benefit someone other than the immediate employer doesn't necessarily mean that the indirect user of the services is also the employer.

Analysis

- **Employment relationship is a necessary pre-condition to a human rights claim (needs to be by the employer).**
- Human rights legislation requires a flexible/contextual interpretation to recognize its remedial intent. Where context/purpose of the statute require it, expand the definition to "**near-employment**" (including relationships where one person provides services to another but not within a traditional master/servant relationship; ask whether there's a utilization of services).

- Limitations: (1) won't usually extend to two parties, (2) just because services create a benefit for another party doesn't mean they're also the employer.
- **Factors:** (1) whether there is another more obvious employer, (2) source of employee's remuneration (and where financial burden falls), (3) normal indicia of employment (employment/collective agreements, statutory payroll deductions, T4 slips), (3) who directs activities/controls employee/hires/dismisses/disciplines, (4) who has direct benefit of (or directly utilizes) employee's services, (5) extent to which employee is a part of employer's organization (or is part of an independent organization providing services), (6) perception of parties as to who was the employer, (7) whether the arrangement has deliberately been structured to avoid statutory responsibility.
  - Other factors where more than one co-employer is alleged: (1) nexus between any co-employer and employee (including whether a direct contractual relationship between complainant and co-employer exists), (2) independence of any alleged co-employer from primary employer (and relationship (if any) between the two), (3) nature of arrangement between primary employer and co-employer (ex: whether co-employer is merely a labour broker compared to an independent subcontractor), (4) extent to which co-employer directs performance of work.
- Just because there's no remedy doesn't enable Panel to expand the Act's scope (only prohibits discrimination in certain relationships – "employment" and "providing services to the public").

*This goes against the large/generous interpretation of the human rights act.*

## Exam

**Format will be the same as last year:** (1) 6-7 short answer (focused hypotheticals; answer in about one paragraph), (2) Small essay (policy/larger thoughts about state of employment law), (3) Hypothetical

### Summary of issues

**BEFORE EMPLOYMENT** – What does the employment contract include?

- Terms that limit entitlements to *ESC* minimums? Explicitly enough to solve the *Kosowan* problem?
- Reference the *Code of Conduct* to make future claims of breach of an essential term?
- Framing restrictive covenants? No further than appropriate? Severance clause to save overbroad provisions? Non-solicitation rather than non-compete?
- Buying the business as a going concern and wanting to negate previous service?
- Indemnification clause (so old employer can sue for breaches of duty)?
- Salary/bonuses/job descriptions so an employee can make a constructive dismissal claim if something changes?
- Advantageous termination provisions (i.e., extra notice)?

### **DURING EMPLOYMENT**

- Can the employer change the K? Consideration? Working notice (*Wronko*)?
- Duty to accommodate process? Individualized accommodations!
- Progressive discipline: Investigated properly/failure? Setting up a future just cause termination by giving proportionate/clear warnings/discipline?

### **AFTER EMPLOYMENT/PROCESS OF ENDING EMPLOYMENT**

- Cause? Working notice? Combination? Paying out lump sums? Encouraging mitigation (i.e., sliding scale)?
- Selective the venue? *Code* and/or civil suit?
- Does the employment K say anything about what happens at termination?
- If claiming wrongful termination: *Bardal* factors + Damages assessment (Bad faith? Punitive/egregious?)