



# Wrongful Dismissal

*Presented on June 13, 2013 for Community Legal Education Ontario*

## Basic Principles in Wrongful Dismissal

Generally, an employer can dismiss an employee as long as the employer gives the employee sufficient notice or pay in lieu of notice.

There are certain exceptions to the above rule. For example, an employer cannot dismiss an employee, even with sufficient notice, if the reason for the dismissal contravenes the *Human Rights Code*.

An employer can dismiss an employee without giving him or her notice or pay in lieu of notice if the dismissal is for cause, wilful misconduct, disobedience, or wilful neglect of duty that is not trivial.

## Basic Principles in Wrongful Dismissal: The Notice Period

How do we determine what is an appropriate notice period?



## Legislated Minimums in the Employment Standards Act

### Termination Pay

3 months to 1 year of service = 1 week pay

1 year to 3 years of service = 2 weeks pay

3 years to 4 years of service = 3 weeks pay

4 years to 5 years of service = 4 weeks pay

5 years to 6 years of service = 5 weeks pay

6 years to 7 years of service = 6 weeks pay

7 years to 8 years of service = 7 weeks pay

8 years and up = 8 weeks pay

## Legislated Minimums in the Employment Standards Act

### Severance Pay

- $1 \text{ week pay} \times \text{number of years of employment completed} \times \text{number of months of employment completed that were not included in the number of years of employment} / 12$
- Severance pay entitlement cannot exceed 26 weeks pay
- In order to qualify for severance pay, the employee must have at least 5 years of employment AND the employer must have an annual payroll of more than \$2.5 million or dismissed 50 or more employees in the previous 6 months.

## Common Law

Common law considers various factors in order to calculate the appropriate notice period. There are, however, four main factors that the Courts always consider.

## Four Main Factors Considered in Common Law

(1) Length of Service



## Four Main Factors Considered in Common Law

(2) Age of Employee





## Four Main Factors Considered in Common Law

(3) Availability of Similar Employment



## Four Main Factors Considered in Common Law

### (4) Character of Employment



Hi, I am  
Employment. And I  
am one bad #\* @!  
character.

## Some Other Factors Considered in Common Law

- Economic circumstances
- Inducement to leave previous employment
- Existence of restrictive covenant

## Common Law: Average Notice Period

### All Occupations

0.6 to 2.5 years of service = 2.9 months notice per year of service

2.6 to 5 years of service = 1.7 months notice per year of service

6 to 10 years of service = 1.1 months notice per year of service

11 to 15 years of service = 0.9 months notice per year of service

16 to 20 years of service = 0.7 months notice per year of service

21 to 25 years of service = 0.7 months notice per year of service

26 to 30 years of service = 0.6 months of notice per year of service

## Common Law: Average Notice Period

### Clerical/Labourer Occupations

0.6 to 2.5 years of service = 1.3 months notice per year of service

2.6 to 5 years of service = 1.0 months notice per year of service

6 to 10 years of service = 0.7 months notice per year of service

11 to 15 years of service = 0.6 months notice per year of service

16 to 20 years of service = 0.6 months notice per year of service

21 to 25 years of service = 0.5 months notice per year of service

26 to 30 years of service = 0.4 months of notice per year of service

## Common Law: Character of Employment

“Character of employment” factor will affect most of our clients negatively.

*Cronk v. Canadian General Insurance Co.*, 1995 CanLII 814 (ON C.A.)

At trial, a 55 year-old secretary with 35 years of service received 20 months’ notice. The Court of Appeal reduced the notice period to 12 months because it determined that lengthier notice periods are reserved for senior employees.



**I told you I was a  
character.**

## Common Law: Character of Employment

***Bramble v. Medis Health and Pharmaceutical Services Inc.*, [1999] N. B. J. No. 207**

“Should Canadian Courts continue to award less adequate compensation in dismissal situations by virtue of the fact that the employee in question is less educated than other employees?... Simply put, is the decision of the Court of Appeal [in Cronk] elitist?... If justice is blind, why does it see rich businessmen as more needy than clerks?”

***Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469**

“Recent jurisprudence suggests that, if anything, [character of employment] is today a factor of declining relative importance.”

## Basic Principles in Wrongful Dismissal

	<b>Small Claims</b>	<b>ESA</b>
<b>Test</b>	Just Cause	Wilful Misconduct
<b>Award Limit</b>	\$25,000	\$10,000*
<b>Time Limit</b>	2 years	6 months*
<b>Risk of Paying Costs</b>	Yes	No
<b>Duty to Mitigate</b>	Yes	No
<b>Chance to Settle</b>	Yes	Sometimes

\* This is a simplified summary. Please consult the applicable legislations/jurisprudence for detailed analysis.



## Reprisal Award under ESA & OHSA

- You can receive compensation if you are punished for asserting your rights under the *Employment Standards Act* or the *Occupational Health and Safety Act*
- There is no monetary limit for reprisal awards
- The employer has the burden of proof in reprisal claims

## Further Methods of Increasing Awards at Court

- In addition to pay in lieu of notice, ask for the value of lost employment benefits (e.g. dental and medical), compensation for lost employer contribution to the Canada Pension Plan, reasonable expenses incurred for employment searches, etc.
- Remember to keep track of your mitigation attempts in order to ensure that the Court does not reduce your pay in lieu of notice.



What? You couldn't find a nice clip art for this slide?



# Wrongful Dismissals

## Human Rights Complaints

Remember too that you need to assess your case for any human rights violations. If there are any human rights violations, then you will need to consider the option of a Human Rights Tribunal application.

# Wrongful Dismissals

Thank You



How about you and I go for drinks?



No, I didn't mean U.

