

# **“A Different Yardstick”: Measuring Damages in Employment Law**

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## “A DIFFERENT YARDSTICK”: MEASURING DAMAGES IN EMPLOYMENT LAW

Damages are measured by the plaintiff’s loss, not the defendant’s gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick.

*Attorney General v Blake*, [2001] 1 AC 268 (HL) at p 278.

### INTRODUCTION

When undertaking any damage analysis in wrongful dismissal claims, the policy considerations that come into play in the employment context generally must be remembered. For as recognized by the Supreme Court of Canada: “employment is of central importance in our society... work [is] fundamental to an individual’s identity.”<sup>1</sup> Such policy considerations lay the foundation for any employment relationship and, in turn, a wrongful dismissal action. As a necessary corollary, the evolution of the law of damages incorporates these concepts and a number of general rules build on this foundation. Such general rules include: that “damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract”<sup>2</sup>; that damages arising out of a breach of contract must be governed by the expectation of the parties at the time the contract was entered<sup>3</sup>; and that the plaintiff is not entitled to be put into a better position than he or she would have been in absent the conduct of the other party.

However, between the trenches of these general rules lies a nuanced expanse in which compensation may be “measured by a different yardstick.”<sup>4</sup> Understanding how to anticipate and gauge damages is key for any practitioner in employment law. There are voluminous tomes and copious cases devoted to the assessment of damages in the employment context.<sup>5</sup> This paper will provide a brief overview of the issues to consider as part of a damages assessment, particularly:

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<sup>1</sup> *Machtiger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 998 at para 30 [*Machtiger*].

<sup>2</sup> *IBM Canada Limited v Waterman*, 2013 SCC 70 at para 2 [*Waterman*].

<sup>3</sup> See *Waterman* at para 2.; *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*].

<sup>4</sup> *Attorney General v Blake*, [2001] 1 AC 268 (HL) at p 278, cited with approval in *Waterman*, *supra* note 2 at para 36.

<sup>5</sup> See e.g. Stacey Ball, *Employment Law in Canada*, loose-leaf (Aurora: LexisNexis, 2016); David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 2013); Howard Levitt, *The Law of Dismissal in Canada*; 3<sup>rd</sup> ed. loose-leaf (Toronto: Thomson, 2016). See also the Wrongful Dismissal Database: <http://www.wrongfuldismissaldatabase.com>.

reasonable notice, additional damages (punitive, exemplary, aggravated), mitigation, and other causes of action.<sup>6</sup>

## 1. REASONABLE NOTICE

Either party to an employment agreement may validly terminate that agreement (subject to human rights considerations). Termination of the employment agreement, on its own, does not necessarily constitute “wrongful dismissal”.<sup>7</sup> Rather, a wrongful dismissal action is born of the implied term in the employment agreement that an employer provide reasonable notice of the intention to terminate the relationship absent just cause.<sup>8</sup> If the employer fails to provide reasonable notice, the employee can commence an action for breach of that implied term.<sup>9</sup>

The Supreme Court has described the “general rule” for damages in the employment context as being limited to “the loss suffered as a result of the employer’s failure to give notice.”<sup>10</sup> These damages relate to the failure to provide notice and are not intended to punish or penalize the employer for dismissing the employee (which is the employer’s right).<sup>11</sup> The notice period is designed to provide employees with the opportunity to seek alternate employment and arrange their affairs.<sup>12</sup> The “reasonable” in “reasonable notice” references the length of the notice to be provided.<sup>13</sup> It does not reference that the dismissal needs to be—in and of itself—reasonable.<sup>14</sup>

At the outset, any reasonable notice period must include the statutory minimums set out in Alberta’s *Employment Standards Code*.<sup>15</sup> Section 56 establishes the mandatory termination notice period and s. 57 allows for termination pay in lieu of notice. These provisions serve as the baseline—if there is an employment agreement in place which clearly provides for notice in excess of the statutory

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<sup>6</sup> Additional items such as interest and court costs have not been examined in this paper, but necessarily must be reviewed in the context of a wrongful dismissal claim.

<sup>7</sup> *Merrill Lynch Canada v Soost*, 2010 ABCA 251 at paras 9-13 [*Merrill Lynch*].

<sup>8</sup> *Honda Canada Inc. v Keays*, 2008 SCC 39 at para 50 [*Honda*].

<sup>9</sup> *Ibid*. If an employee fails to provide sufficient notice of the intention to resign, an employer may commence an action for damages associated with that failure: see e.g. *GasTOPS Ltd v Forsyth*, 2009 Canlii 66153 (ON SC), aff’d 2012 ONCA 134. The reasonable notice period may be longer for fiduciary employees: see e.g. *Carlsen v Physique Health Club Ltd (Physique Fitness Store)*, 1996 ABCA 358.

<sup>10</sup> *Ibid*, citing *Addis v Gramophone Co*, [1909] AC 488 (HL) [*Addis*].

<sup>11</sup> *Addis*, *supra* note 10.

<sup>12</sup> *Evans v Teamsters Local Union No 31*, 2008 SCC 20 at para 28 [*Evans*].

<sup>13</sup> *Merrill Lynch*, *supra* note 7 at para 10.

<sup>14</sup> *Ibid* at paras 9-11.

<sup>15</sup> *Employment Standards Code*, RSA 2000 c E-9 at Preamble, s 4 [*Code*].

minimums, then the calculation can be a fairly straightforward one.<sup>16</sup> Although a discussion on drafting enforceable employment agreements falls outside the boundaries of this paper, it is important to note that the termination clauses must provide for at least the statutory minimums, and that if the employer intends to limit the employee to the statutory minimums, there must be clear language in the agreement to that effect.<sup>17</sup>

If there is no written agreement, then the parties will likely have to turn to the common law to determine reasonable notice. At common law, any determination of reasonable notice must be undertaken on a case by case basis. Canadian courts have typically applied the factors espoused in the decision of *Bardal v Globe & Mail Ltd.*:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.<sup>18</sup>

The *Bardal* factors are not an exhaustive list.<sup>19</sup> Over time, additional factors have been added to the list, including inducement, the promise of job security, the employee's place in the business structure, an employee's specialized skill set, and poor economic conditions.<sup>20</sup>

Akin to damage assessments in other areas of the law, the analysis can always be guided by authorities with similar facts, always bearing in mind the particularities of the given case. It bears noting that, contrary to some jurisprudence and practice among practitioners,<sup>21</sup> the so-called "Rule of Thumb" (of one month per year of service) has been rejected by some courts as having no application in determining

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<sup>16</sup> The validity of the agreement as based on other grounds, including among other things: certainty of terms, duress, misrepresentation and lack of consideration must also be analyzed. In the context of employment agreements, one must always consider whether this is a fixed term agreement or an agreement of indefinite duration. There is ample authority for the proposition that reasonable notice does not apply to fixed term agreements: see e.g. *Ceccol v Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA). An employer who prematurely terminates a fixed term agreement must pay the employee for the amount that would have been earned had he or she worked for the balance of the term: see *Lovely v Prestige Travel Ltd*, 2013 ABQB 467 at paras 135-136 [*Lovely*]; *Thompson v Cardel Homes Limited Partnership*, 2014 ABCA 242 at para 22 (in *obiter*). This requirement may be ousted by clear and unequivocal language in the contract: *Lovely* and *Howard v Benson Group Inc*, 2016 ONCA 256 at paras 20-30.

<sup>17</sup> *Kosowan v Concept Electric Ltd*, 2007 ABCA 85; *Gillespie v 1200333 Alberta Ltd*, 2012 ABQB 105.

<sup>18</sup> *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 at p 145 (Ont HCJ) [*Bardal*]. These are commonly known as the "Bardal factors" and were adopted by the Supreme Court in *Machtiger*, *supra* note 1 at 998.

<sup>19</sup> *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 82 [*Wallace*].

<sup>20</sup> *Ibid* at paras 83-84; *Garcia v Crestbrook Forest Industries Ltd*, 1994 CanLII 2570 (BC CA); *Smith v McElhanney Survey & Engineering Ltd*, [1979] BCJ No 160 (SC); *Farmer v Foxridge* (1992), 134 AR 55 (QB) (aff'd 1994 ABCA 41); *Lederhouse v Vermilion Energy*, 2015 ABQB 387 at paras 33-35 [*Lederhouse*]. See also the discussion in Section 3 of this paper.

<sup>21</sup> See e.g. *Paulich v Westfair Foods Ltd*, 2000 ABQB 74; *Agarand v Farm Business Consultants Ltd*, 2000 ABQB 244.