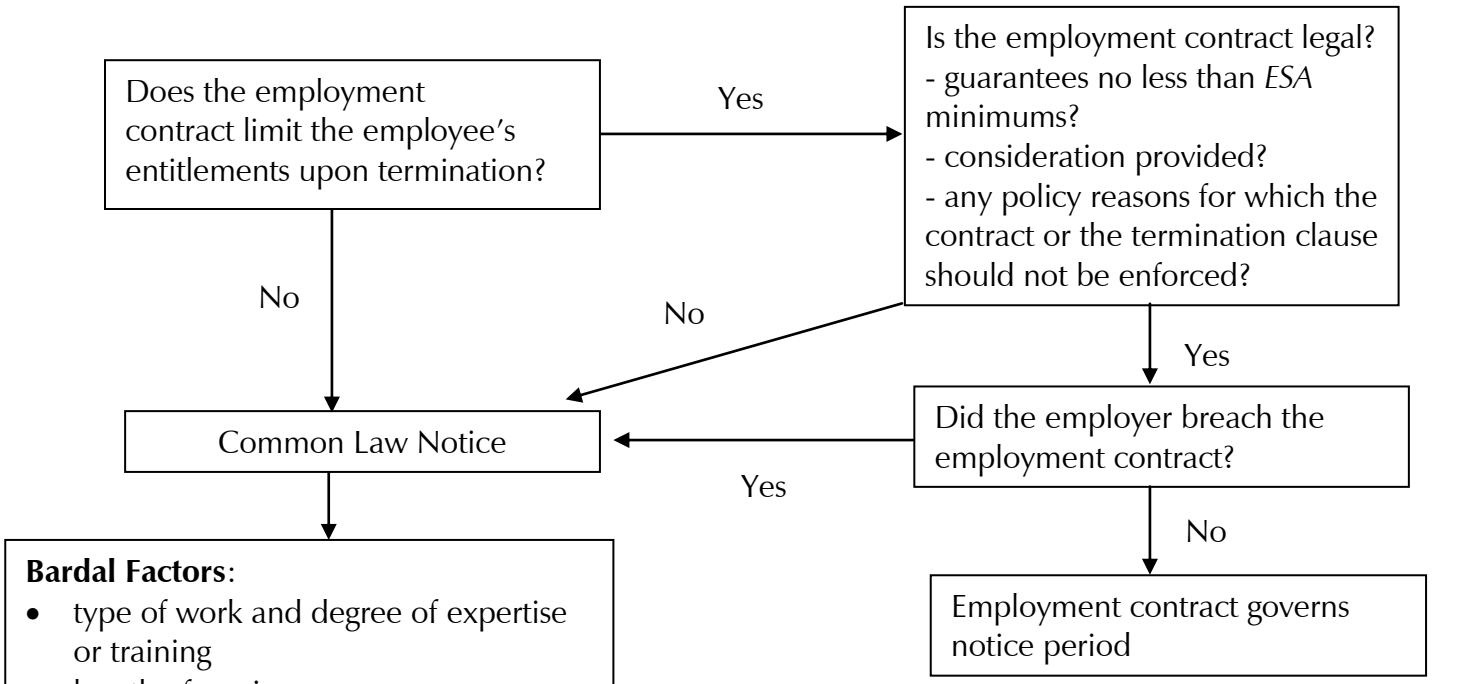
Recent Trends with Wrongful Dismissal Damages



Bardal Factors:

- type of work and degree of expertise or training
- length of service
- age of employee
- quantum of compensation
- availability of alternative employment
- custom in the trade or business regarding termination
- circumstances surrounding the hiring of the employee

Trend #2: Longer Notice Periods for Long Service employees/Traditional retirement age not limiting notice period

Case Name	Length of Service	Notice
Kotecha v Affina Canada ULC, 2014 ONCA	20 years of service (70-year-old labourer)	18 months notice – reduced from 22 months
Di Tomaso v Crown Metal Packaging, 2011 ONCA	33 years of service (62-year-old unskilled worker)	22 months notice
Hussain v Suzuki Canada Ltd, 2011 ONSC	36 years of service (65-year-old assistant supervisor)	25.5 months notice – reduced from 26 months
Systad v Ray-Mont Logistics Canada Inc, BCSC 2011	18 years of service (65-year-old labourer/ truck driver)	18 months notice

Trend #1: Longer Notice Periods for Short Service Employees

Case Name	Length of Service	Notice
Harvey v Shoeless Joe's Ltd, 2011 ONSC	5.5 months: upper level management	2.5 mo
Taner v Great Canadian Gaming Corp, 2008 BCSC	6 months: upper level management	10 mo
Gingerich v Kobe Sportswear, 2008 ONSC	5.5 months: middle level management	2.5 mo
Dwyer v Mark II Innovations, 2006 ONCA	5 months: upper level management	8 mo

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Mitigation

What is Mitigation?

- Obligation on the part of the employee to take reasonable steps to limit losses arising from the termination of employment

When does the obligation arise?

- wrongful dismissal
- constructive dismissal

But not:

- if contract stipulates amount
- *ESA* amounts

Where can an employee mitigate?

- "Elsewhere"
- "Here"

What role does the employer play in mitigation efforts elsewhere?

- reference letter
- outplacement
- start building a file

What happens to the employee's salary once they mitigate?

- claw-back
- updates

Why would an employer permit mitigation in "here"?

- oops
- constructive dismissal
- reduce financial exposure in wrongful dismissal

When should the offer for mitigation "here" be made?

- After the termination; or
- After the allegation of constructive dismissal

Is the employee obligated to return to their previous employer to mitigate?

- Test is whether a reasonable person in the position of the terminated employee would accept

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