Revisiting Reasonable Notice Periods in Wrongful Dismissal Cases 2006 Edition

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I have previously written about reasonable notice periods using the Wrongful Dismissal Database. ("WDD") , the last time being in 1998. A list of these articles is as follows:

Measuring the Rule of Thumb in Wrongful Dismissal Cases
31 Canadian Cases on Employment Law (2d) 311

Is Occupation Still a Relevant Factor in Determining Notice Periods in Wrongful Dismissal Cases? A Case Comment on Cronk v. Canadian General Insurance Company
6 Canadian Cases on Employment Law (2d) 29

Computerised Analysis of Notice Periods - 1990 Update:
Rightful Dismissal and Wrongful Hiring
Canadian Institute - June 11, 1990

A Computerised Analysis of Notice Periods in Wrongful Dismissal Actions
Canadian Bar Association - Ontario
1988 Annual Institute on Continuing Legal Education
Employment Law Section

Now that eight more years have passed, I have decided to look at some aspects of reasonable notice in wrongful dismissal cases.

I continue to add cases to the Wrongful Dismissal Database, so that as of May 2006 there are over 2700 cases, with over 950 new cases added from 1995. The database contains virtually every Court decision in Canada where the judge has made a finding of reasonable notice. Since the seminal case of Wallace v United Grain Growers, I have also added a data field which cites not only the judges' finding of reasonable notice, but also how that notice has been " bumped up" in light of the Wallace Factor.

Are the Bardal factors still equally valid?

The classic Bardal factors continue to be cited and referred to in most cases where the judge is deciding notice.

The one surprise that I have noticed is the fact that the **Bramble v. Medis Health & Pharmaceutical Services Inc**. principle has not caught on outside New Brunswick. This important New Brunswick Court of Appeal case (46 C.C.E.L. (2d) 45) stands for the proposition that a Court, in determining the importance of the plaintiff's character of employment when assessing notice, should judge this factor based on evidence and not based on untested assumptions about how long it takes for certain occupational groups to be re-employed.. In other words, if the defendant is arguing that the fact that plaintiff is a clerical person should lessen the notice period because of the presumed availability of similar clerical jobs, the defendant must prove this proposition through evidence. If they

fail to do so then presumably the notice period is determined without reference to the plaintiff' s position.

The following somewhat lengthy extract from the Court of Appeal decision sets out the Courts' reasoning on this matter:

44. At trial, and before us, Medis Health argued that Canadian employment law has traditionally required that length of notice be, to some extent, dictated by the particular employment's character. The traditional approach would reserve longer periods for senior employees, a generic description that encompasses managerial personnel who typically have higher education, and specialized employees with higher educational training who occupy a position of higher rank and responsibility within the employer's organization. It submits that Larlee J. failed to apply the traditional approach and that, while the notice periods set by her would be appropriate for senior employees, they are out of order for junior employees such as the respondents.

45 Character of employment is indeed one of the factors specifically mentioned by McRuer C.J.H.C. in his oft-quoted dictum in Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at p. 145:

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.

46 Whether that factor must be applied in all cases as a matter of law was thoroughly debated both at trial and before this Court. It has also been a controversial question elsewhere.

47 In Cronk v. Canadian General Insurance Co. (1994), 19 O.R. (3d) 515 (Ont. Gen. Div.), MacPherson J. questioned and, ultimately, rejected the traditional precept that, as a matter of law, length of notice is dependent, to some extent, on the employee's position in the employer's job hierarchy. He did so on the basis of empirical data compiled by the Council of Ontario Universities that flatly contradicts the factual assumption upon which the traditional precept is founded, namely that it is more difficult for a senior employee to find suitable alternate employment. In the end, MacPherson J. saw no valid reason to deny Ms. Cronk, a 55 year old secretary with no university education who had worked for Canadian General Insurance Co. for 35 years, the kind of notice commonly attributed to upper-echelon employees, and he ruled that she was entitled to 20 months' notice. I note parenthetically that MacPherson J.'s views echo, to a large extent, those of the court in Johnston v. Algoma Steel Corp. (1989), 24 C.C.E.L. 1 (Ont. H.C.) at p. 13.

48 On appeal, (1995), 25 O.R. (3d) 505 (Ont. C.A.), all three judges agreed that MacPherson J. had erred in relying on extrinsic materials, the studies conducted by the Council of Ontario Universities and an article published in the Economist magazine, without affording the parties an opportunity to be heard concerning them. The majority, Lacourcière J.A. and Morden A.C.J.O., concluded that Ms. Cronk's 20 months' notice period should be reduced to 12 months. Both arrived at this result by applying the traditional approach which dictates that lengthier notice periods are reserved for senior employees.

49 While Lacourcière J.A. refers to some of the reasons that are occasionally put

forward in support of the relevance of character of employment, he appears to favour the continued application of this factor on the basis of the doctrine of stare decisis which, in his view, would foreclose a judicial reconsideration of the traditional approach. For his part, Morden A.C.J.O. leaves the door open to an eventual judicial reform of the law, if and when the proper case presents itself. In his view, Ms. Cronk's case did not lend itself to a reconsideration of the traditional approach. Two reasons were cited: first, the evidentiary record was poor since no trial as such had been held, summary judgment having been granted by MacPherson J., and, second, Ms. Cronk herself had not challenged the traditional approach in the court below. I hasten to point out that neither of these reasons avails in the case at bar.

50 Weiler J.A. dissented. She would have directed the trial of an issue as to the amount of compensation that Ms. Cronk was entitled to be paid in lieu of notice, since none of the arguments put forward in support of the traditional approach provided "a rational reason for adopting, as a principle of law, a necessary distinction between the lengths of reasonable notice given to a clerical employee and that given to a management employee of the same age and years of service". See (1995), 25 O.R. (3d) 505 (Ont. C.A.) at p. 533. In her view, what weight, if any, to accord the character of an employment was dependent on the evidence.

51 Criticism of the role that character of employment simpliciter has been allowed to play in the determination of notice has spread beyond judicial circles to the point that it now emanates not only from academics but from employment law practitioners as well.

52 In "Employment Law, Recent Developments in Employment and Labour Law", a paper delivered as part of the May 1998 civil law seminar hosted by the National Judicial Institute, Ronald A. Pink, Q.C., an employment law practitioner whose experience is undoubted, questions the role that character of employment has been allowed to play in the determination of notice:

One issue which must be considered is whether or not the Court of Appeal decision in ***Cronk*** *accurately reflects social reality. Mr. Justice MacPherson referred to research which indicated that lower level employees actually have a more difficult time in finding employment than more highly educated employees. If this is correct, should courts be perpetuating the hardship of these dismissed employees by failing to acknowledge the social reality that lower level employees have a more difficult time finding adequate replacement employment? 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? Is one more valuable than the other? Value is measured in the salary of the employee, and the salary equalizes the differences between employees, ***Bardal*** *must be refined accordingly.*

[Emphasis added]

53 Other commentators have observed that the traditional approach expresses "class prejudice". Having noted as well the existence of empirical data that contradicts the traditional approach's factual underpinning, namely that senior employees have a greater difficulty in finding new employment, some commentators have described the perfunctory justifications occasionally offered for the traditional approach as having a hollow ring "both empirically and ethically". See Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada, 2d ed. (Toronto: Butterworths, 1993) at pp. 615-17. While it is true that, in the most recent edition of their work, these authors no longer expressly challenge the ethical propriety of the traditional approach, they do nonetheless

acknowledge that "the empirical question whether high status occupations in Canada face greater difficulties in obtaining alternate work than low status groups unfortunately has not yet been conclusively answered." See Geoffrey England et al., Employment Law in Canada, 3d ed., vol. 2, looseleaf (Toronto: Butterworths, 1998) at p. 14.83.4, para. #14.120.

54 In Character of Employment and Wrongful Dismissal Notice: Cronk v. Canadian General Insurance Co. (1995), 4 Dal. J. Leg. Stud. 271, Griffith Roberts refers to a number of publications that have emphasized how higher employability accompanies higher training and education and he concludes that at pp. 279-80:

Studies based upon Statistics Canada data also suggest that the skilled and the educated are not disadvantaged when it comes to finding alternative employment. Those on long term unemployment have, on average, lower levels of unemployment than the work force in general. [G. Picot, Unemployment and Training (Ottawa: Statistics Canada, Social and Economic Studies Division, 1987) at 23. See also C. M. Beach & S.F. Kalinski, "The Distribution of Unemployment Spells: Canada, 1978-82" 40 Ind. Lab. Rel., Rev. 254]. Corak noted that statistically there is no simple relationship between education and length of unemployment, particularly during a severe economic downturn. A higher level of education
would in some circumstances imply a longer duration of unemployment, and in other circumstances, a shorter duration of unemployment. During periods of economic recovery, however, the better educated were the first to find new jobs. [M. Corak, The Duration of Employment and the Dynamics of Labour Sector Adjustment: Parametric Evidence from the Canadian Annual Work Patterns Survey, 1978-80, 1982-85 (Ottawa: Economic Council of Canada, 1990) at 3, 23.]

The assumption made by the courts that the educated or skilled worker will have a more difficult time finding suitable alternative employment, if not wrong, is clearly unfounded.

55 Finally, in A Prelude to Reform of the Law of Wrongful Dismissal: Cronk v. Canadian General Insurance Co. (1996), 18 Adv. Q. 356, at pp. 359-60, Geoff R. Hall points out that the precept that senior employees are entitled, as a matter of law, to longer notice periods than junior employees, while commonly applied, has rarely been critically examined by the courts. He makes the further observation that the jurisprudence offers no compelling rationale for its automatic application in all cases.

56 In my view, the answer to the conundrum raised by MacPherson J. in Cronk is to be found in elementary principles of employment and evidence law.

57 The relevance of any factor is a function of the objectives that the law seeks to attain through notice of termination of employment. The primary objective of notice is to provide the terminated employee with a reasonable opportunity to seek alternate suitable employment. See Duplessis v. Irving Pulp & Paper Ltd. (1983), 47 N.B.R. (2d) 11 (N.B. C.A.) at p. 25, para. 25. Its secondary objectives include the protection of the reliance and expectation interests of terminated employees, at least in cases where inducements have been offered by the employer, and the satisfaction of certain moral claims by an employee. See Wallace v. United Grain Growers Ltd. supra, at pp. 738-40 and Bishop v. Carleton Co-operative Ltd. supra, pp. 217-18, para. 10.

58 As a rule, a potential factor remains dormant, no matter what the concerned area of the law might be, until such time as the proven facts make it relevant. This truism applies with equal force in the field of employment law; a potential factor becomes relevant in the determination of what constitutes reasonable notice only once its application by the trier of fact is justified by the proven facts. That is not to say that supporting testimonial or documentary evidence will always be required. Frequently, the

relevance of a potential factor will be indisputable and, as a result, it will be accepted by the trier of fact, without the need for specific evidence on the issue. It is commonplace that judicial notice may be taken of notorious and undisputed facts, or of facts the accuracy of which can be demonstrated by resort to readily accessible sources of indisputable reliability. See Law v. Canada (Minister of Employment & Immigration) (1999), 60 C.R.R. (2d) 1 (S.C.C.) para. 77 and R. v. Peter Paul (1998), 196 N.B.R. (2d) 292 (N.B. C.A.) at pp. 308-10, para. 18; leave to appeal denied, [1998] 4 C.N.L.R. iv (note) (S.C.C.).

59 It is the evidence and, where appropriate, judicial notice that provides the factual underpinning that triggers the application of an otherwise dormant factor. Without such an underpinning, the potential or dormant factor lacks any juristic basis for its application in a given case. It is in light of this elementary principle that the oft-quoted statement by McRuer, C.J.H.C. in Bardal v. Globe & Mail Ltd. supra, must be understood. While the Supreme Court has noted that, in determining what constitutes reasonable notice of termination, the courts have generally applied the principles enunciated in Bardal , it has yet to enjoin courts to mechanically apply, in all cases, each and every factor enumerated in that case, including character of employment, without regard to the facts proven by the evidence or established through judicial notice.

60 As noted above, the four factors that were expressly mentioned in Bardal are character of employment, the employee's age and length of service as well as availability of similar employment.

61 Availability of similar employment is, on its face, germane to the attainment of notice's primary objective and, as such, the appropriateness of its consideration by the court in fixing notice is beyond debate.

62 As for length of service, its relevance to the objectives of notice is two-fold: first, where the service to the employer has been long, the notice set by the court will give legal expression to the employee's moral claim to a longer notice period; and, second, the court will take judicial notice of the difficulties encountered by long-term employees in finding alternate suitable employment. Bastarache J.A., as he then was, alludes to some of these difficulties in Bishop v. Carleton Co-operative Ltd., supra, at pp. 217-18, para. 10.

63 As well, the connection between the terminated employee's age and the attainment of notice's primary objective is indisputable. Iacobucci J., writing for a unanimous Supreme Court, in Law v. Canada (Minister of Employment & Immigration), at pp. 31-32, para. 101, acknowledges that judicial notice provides the juristic basis for the role played by that factor in determining what constitutes reasonable notice:

...It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labour force attachment and detachment. For example, writing for the majority in McKinney, supra, La Forest J. stated as follows, at p. 299:

Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Similar thoughts were expressed in Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986 at pp. 998-99, per Iacobucci J., and at pp. 1008-09, per McLachlin J., regarding the

relevance of increase age to a determination of what constitutes reasonable notice of employment termination....

64 Likewise, until very recently, character of employment weighed in the balance on the theory, frequently unstated, that judicial notice was to be taken of the fact that senior employees required more time to find suitable alternate employment. The data referred to by MacPherson J. in Cronk and by Griffith Roberts in Character of Employment and Wrongful Dismissal Notice: Cronk v. Canadian General Insurance Co., supra, have placed in serious doubt the factual assumption upon which this approach rests. The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy.

65 Bearing in mind that reasonableness of notice is a conclusion that is largely fact-driven, I find it impossible to accept as a matter of law that character of employment simpliciter is relevant in all cases, no matter what the factual record might be. Judicial notice cannot be taken of its relevance in all cases. Absent evidence showing that the character of the terminated employee's job has some relevance to the pursuit of one or more of the objectives of notice, it is irrelevant*.*

66 I am reinforced in this view not only by the realization that the traditional approach mirrors antiquated social values but, as well, by the conviction that there is no compelling policy objective or stare decisis basis warranting its retention.

67 It is now widely accepted that employment is an essential component of a person's self-worth. See Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 (S.C.C.) at p. 368, Machtinger v. HOJ Industries Ltd. supra, and Wallace v. United Grain Growers Ltd. supra, at para. 93. By treating junior employees unfavourably solely on the basis of the status of their employment, the traditional approach undermines, without any justification, their self-worth. As a result, courts have been justifiably uncomfortable with a continued adherence to the traditional view. This discomfort may go a long way in explaining why courts, despite the lip service paid to character of employment as a factor, have tended, of late, to award notice periods to junior employees that approximate those historically reserved for senior employees.

68 Nor, in my view, is there any sound policy reason for the preservation of the traditional approach. In particular, I am satisfied that there is no sound basis for the suggestion that the marginally higher termination costs that will result from longer notice periods for junior employees will have adverse repercussions on our economy. See the discussion in G. England et al., Employment Law in Canada, 3d ed., supra, at 14.1-14.7. Typically, the notice periods set by the courts of this province for senior employees have been somewhat lower than those set by courts in other jurisdictions. The reported cases where a senior employee has been found to be entitled to more than 20 months' notice are few and far between in this province. The record in this jurisdiction stands in sharp contrast to the situation elsewhere, particularly in Ontario, where damage awards to senior employees commonly reflect notice periods exceeding 20 months' notice. As a result, I do not accept that it would be reasonable or appropriate to eliminate the inequality in notice periods between senior and junior employees by lowering the notice periods to which the former are entitled down to the level traditionally reserved for the latter.

69 Finally, I am satisfied that stare decisis does not compel retention of the traditional approach. First, as noted earlier, there is no longer any juristic basis for the application, as a matter of law, of character of employment simpliciter as a determining factor.

Second, the ethics of its application is very much questionable. Third, neither the Supreme Court nor this Court has had occasion to squarely address the question so that neither has, to this date, explicitly ruled that junior employees are, by the mere fact of the status of their employment in the employer's hierarchy, entitled to less notice than senior employees.

70 In summary, judicial notice cannot be taken of the impact of the character of the terminated employee's job on his or her quest for suitable alternate employment. Moreover, the traditional approach, to the extent that it includes a consideration of character of employment simpliciter, is antithetical to the law's ultimate goal, namely egalitarian justice, and its application is not compelled by any authority binding on this Court. In my view, it behoves this Court to discard character of employment simpliciter as a relevant factor.

71 The record before us does not contain any evidence showing that the respondents, as junior employees, were likely to find new employment faster than employees above them in the corporate pecking order. Indeed, the evidence showed that the respondents encountered significant difficulties in gaining new employment and, in fact, none found similar work before the expiry of the notice period set by the trial judge. In these circumstances, Larlee J. was right in declining to set shorter notice periods on the basis of the positions occupied by the respondents. I now turn to a consideration of the reasonableness of the notice periods suggested by Medis Health.

72 While the process of determining what constitutes reasonable notice necessarily requires an exercise of judgment, it is hardly an untrammelled one. In this regard, it is common ground that trial courts should, whenever the circumstances allow, determine what constitutes reasonable notice in any given case, at least partly, by reference to prior comparable decisions, particularly of this Court. The process of identification of comparable cases requires that prior rulings be dissected and analyzed with care, bearing in mind that each is a product of its peculiar underlying factual subtleties and the larger context in which they were rendered. Once comparable cases have been found, a range of notice periods should emerge and provide guidance. By definition, prior rulings are dated. It is therefore essential that the results obtained in the comparable cases used to define an appropriate range be adjusted to take into account the current context.

73 Most of the awards in the cases relied upon by Medis Health reflect the traditional approach's negative view of the status of junior employees. Moreover, they belong to a by-gone era where the notion that 12 months' notice was the upper limit had great currency. See the obiter dictum in Johnson v. Moncton Chrysler Dodge (1980) Ltd., supra, at p. 200, para. 12, and Cormier v. Atlantic Sleep Product, supra. There is no gainsaying the depressing effect that such a cap had on awards in this province.

74 The approach favoured by our Court in more recent times is inimical to a 12-month cap for notice periods. Moreover, the trend of late has been to set somewhat higher notice periods than the ones determined while courts of this province laboured under the constricting influence of the 12-month upper limit. See Dey v. Valley Forest Products Ltd. (1995), 162 N.B.R. (2d) 207 (N.B. C.A.) (17 months' notice upheld for a 51 year old manager of forestry operations with 15 years of service), Corbin v. Standard Life Assurance Co. (1995), 167 N.B.R. (2d) 355 (N.B. C.A.) (18 months' notice upheld for a 53 year old life insurance salesperson with 18 years of service), Bishop v. Carleton Co-operative Ltd., supra, (24 months' notice awarded to a 51 year old office manager with 27 years of service), Donovan v. New Brunswick Publishing Co. (1996), 184 N.B.R. (2d) 40 (N.B. C.A.) (28 months' notice awarded to a 57 year old sports editor with 36 years of service with a publishing company) and MacNaughton v. Sears Canada Inc. (1997), 186 N.B.R. (2d) 384 (N.B. C.A.) (18 months' notice upheld for a 54 year old commissioned salesperson with 25 years service with a department store). While those cases,

particularly Donovan v. New Brunswick Publishing Co., supra, may have unique features, they nonetheless reflect a long-overdue upward trend in the length of notice periods that is in accord with the reasonable expectations of terminated employees in general. In my view, the range of notice periods suggested by Medis Health is simply too low.

As mentioned above, this revolutionary case has virtually been ignored by the judiciary and bar outside New Brunswick. I did a search on WestlaweCarswell and found 34 judicial references to this case, consisting of three from B.C., five from Alberta, and 28 from New Brunswick. No other Court in any other province, even Ontario, ever referred to this case in any of its decisions. As judges tend to cite the cases that counsel cite to them, one can only assume that Ontario lawyers are either blissfully ignorant of this case or are not aware of its significance in assisting low wage plaintiffs to achieve maximum notice periods.

For example, a survey of all cases in the Wrongful Dismissal Database from 1995 to 2006 covering employees aged 45 to 55 with between 8 and 12 years of service shows an average across all occupational categories of 9.86 months notice . However if the same sample is limited to occupational categories of lower waged plaintiffs (Labourers, Clerical, Lower Manager, Technical and Foreperson / Supervisor) then the average is only 8.26 months notice . In other words, by considering the factor of character of employment in a non-Medis manner, the plaintiff received a notice period 16% lower than if the Medis analysis had been applied.

Similarly, when the age range is changed to between 55 and 65 and the service increased from between 18 and 22 years, the average for all occupational categories is 15.45 months notice while the average for lower wage categories is only 14 months notice. This is in effect a judicial penalty of 9.3% for being a low wage dismissed employee.

What is the lesson for plaintiff's counsel who are representing clients in lower classified occupations?

1. Read the Medis case to the Court until you have memorized the relevant passages .

2. Point out to the Court that the defendant has led no evidence that would allow the judge to take into account the ease or difficulty of this occupation in getting a job.

3. Show the judge what other plaintiffs of similar age and years of service have received as notice in other cases. Make sure that you do not cherry pick cases that are only plaintiff's with senior positions otherwise you are simply applying the Bardal factor of character of employment in a misleading fashion.

This is a silver lining for defendants in this Medis analysis. Just as the analysis should raise the notice periods for low wage employees, it should lower the notice periods of higher classification employees .

Applying the same analysis as above if we look at plaintiffs between the ages of 45 and 60 with between 15 and 25 years service, across all occupational categories the average notice period is 15.55 months. However if we limit the search to only Upper Managers and Professionals , the average notice period skyrockets to 18.9 months . This accounts to an increase of 21.5% over the overall average simply because the plaintiff makes more money than the average plaintiff.

What is the lesson for defense counsel who is defending an action by a senior executive?

1. Read the Medis case to the Court until you have memorized the relevant passages .

2. Point out that the plaintiff has led no evidence that would allow the judge to take into account the ease or difficulty of this occupation in getting a job.

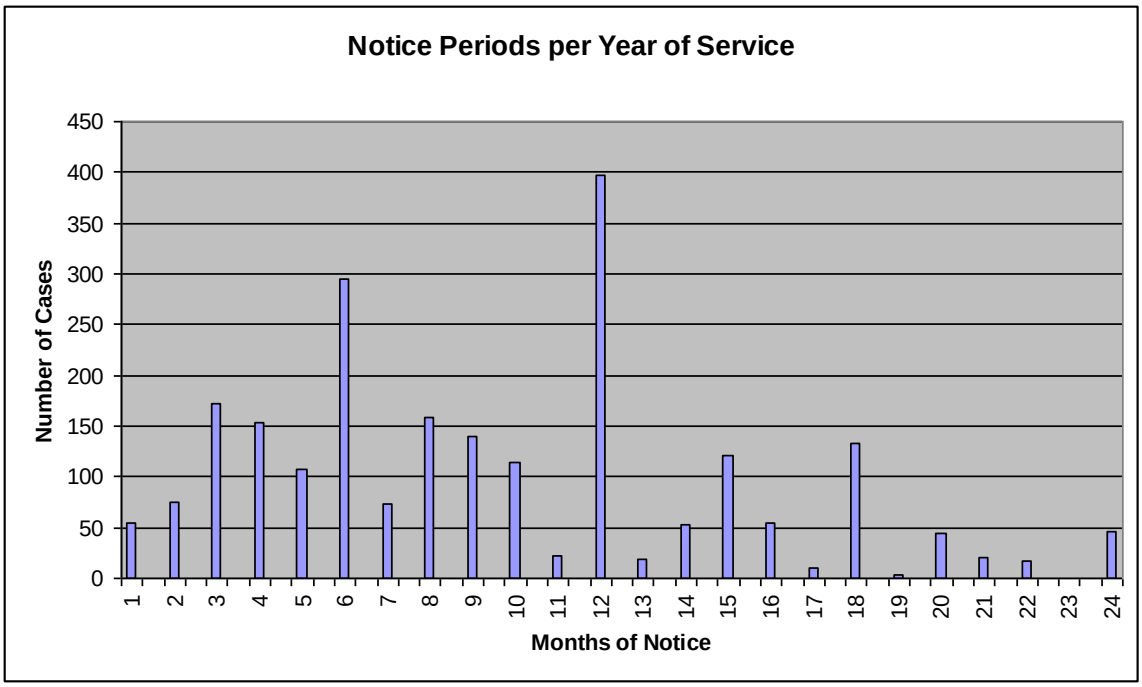
3. Show the judge what other plaintiff's of similar age and years of service have received as notice in other cases. Make sure that you do not cherry pick cases that are only plaintiff's with lower positions otherwise you are simply applying the Bardal factor of character of employment in a misleading fashion.

Are some notice periods more important than others?

Have you ever noticed that Courts rarely award notice periods of 7 months or 13 months? Why is that? Do judges like some numbers more than others?

The answer is "YES".

As this chart shows, judges definitely favour some notice periods over others. This is a chart of all the cases in the WDD from 1995 to 2006 showing simply the notice periods awarded by the Courts.



We can see that judges like 3,4,6,8,9,12,15,18,20 and 24 as notice periods.

Judges seem indifferent to 1, 2, 5, 7, 10, 14,16 and 21

Judges do not like 11,13,17,19,22 and 23.

What is the lesson for counsel?

1. When making a Rule 49 offer, choose a notice period with a number that the judge likes as you are 87.5% more likely to get a notice period of 12 months than either 11 or 13 months.

Is there a direct relationship between service and notice period ?

This is always the question most asked by lawyers and layman alike, the search for the elusive formula for determining notice periods. I heard and read about every possible " rule of thumb" from 2 weeks per year of service , 2.5 weeks , 3 weeks and the ever popular one month of notice per year of service.

The myth of any rule of thumb was abolished, at least in Ontario, in the Court of Appeal decision in Minott v. O'Shanter Development Co. 1999 CarswellOnt 174 . The relevant passage is as follows:

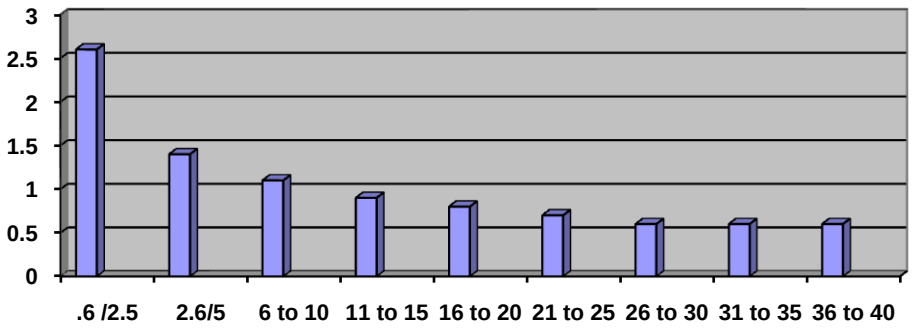
Moreover, it is not reflected in the wrongful dismissal awards made daily by trial judges. In a recent paper,[FN53] Barry Fisher used his wrongful dismissal data base (nearly 1600 cases at the time) to show that the rule of thumb had little or no validity as a predictor of reasonable notice for short term or long term employees, though it had "some validity for cases in the mid-seniority range."[FN54] Mr. Fisher concluded that the rule of thumb was not an "all embracing formula."[FN55] Indeed, Cronk itself implicitly rejects the rule of thumb approach. Ms Cronk, a 30-year employee, was awarded 20 months notice at trial, reduced to 12 months on appeal.

I decided to update that study based on the 950 cases from 1995 to 2006 . The data is as follows:

How many Months per Years of Service

Years of Service	Cases in WDD	Notice Average	Service Average	Months per Year of Service
.6 to 2.5	147	3.94	1.5	**2.6**
2.6 to 5	130	5.43	4	**1.4**
6 to 10	182	8.56	8	**1.1**
11 to 15	132	11.82	13	**0.9**
16 to 20	116	14.48	18	**0.8**
21 and 25	80	15.52	23	**0.7**
26 and 30	42	16.72	28	**0.6**
31 and 35	30	21.3	33	**0.6**
36 and 40	9	21	38	**0.6**

Months Notice



Years of Service

As we can see there is no direct 1:1 relationship between years of service and months of reasonable notice , but rather the correlation decreases as service lengthens.

What is the Wallace Bump Up Worth?

When I first looked at this issue in 1998 in The Wallace Factor. An Analysis of the Effect of the Bad Faith Dismissal Doctrine on Reasonable Notice Periods in Wrongful Dismissal Actions. (The Canadian Employment Law Super Congress, October 21-22, 1998 Canada Law Book) , I looked at 16 Wallace cases and determined that the average bump up was 33% . In other words the judge awarded Wallace damages equal to approximately 1/3 of the reasonable notice period.

I have taken a second look at this issue , this time reviewing 98 cases in which the Court not only awarded Wallace damages but also where the Court made an independent finding of reasonable notice. In other words, I have not included cases where the Court simply gave a single number in its determination of notice including the Wallace Factor . I also did not consider two cases that otherwise fit the criteria as the Wallace bump ups were so off the scale so as to distort the average (a 500% increase from 2 weeks to 3 months in Smith v Casino Rama Services (2004 CarswellOntario 3031) where the notice period was set out in the contract and a 400% increase in Mitu v New Century Foods and Produce (2001 CarswellBC 1174) where the Court said that reasonable notice was between 2 weeks and a month but awarded five months overall because of the Wallace factor).

In these 98 cases, the average Wallace bump up was 3.5 months and constituted an increase in the notice period of 43%. This is a significant increase from the first study some eight years ago.

Not surprisingly this shows that the Wallace bump up is worth real money and is here to stay.

The full list of the Wallace cases referred to in this paper can be found in Appendix A.

Ap

Appendix A
How much is the Wallace Bump Up ?

Case	Citation	Reasonable Notice in Months	Wallace Bump Up in Months	% Increase
Zimmerman v Kinderslay Transport	{1998} sj 415	1	1	100%
Youkanna v Spina's Steel World	15 CCEL (3d) 99	2	1	50%
Rowbotham v Addison	2000 lw 1939-017	3	1	33%
Robertson v Red Robin Restaurant	1998 CarswellBC 3339	3.5	2	57%
Haire v Curtis International	2003 CarswellOnt 3542	3	2	67%
Baumgarten v Jamieson	37 CCEL(3d) 119	3	2	67%
Anderson v Tecsult Eduplus	1999 CarswellNS 373	4	2	50%
Santos v Honda Canada	22 CCEL (3d) 283	4	2	50%
McCulloch v Iplatform	46 CCEL (3d) 257	3	3	100%
Goodman v Medi-Edit	2002 CarswellOnt 2608	5	1	20%
Prosser v Naziri	2005 CarwellOnt 5037	2.5	3.5	140%
Therrien v Hock Shop Canada	2005 CarswellOnt 3870	5	1	20%
de Guzman v Marine Drive	2003 CarswellBC 1953	5	1	20%
Pauloski v Nascor	16 CCEL (3d) 202	5	2	40%
Sjerven v Port Alberni Friends	30 CCEL (3d) 71	7	6	86%
Mark v Westend Development	18 CCEL (3d) 90	5	2	40%
Schimp v RCR Catering	2004 CarswellNS 51	4.5	3	67%
Rae v Attrell Hyundai Suburu	2004 CarswellOnt 7357	5	2	40%
Holmberg v Pluto Investments	2003 CarswellAlb 341	6	1	17%
Chabot v William Roper Hull	2003 Carswellalb 97	4	3	75%
Estrada v Lesperance	39 CCEL (2d) 226	4.5	3	67%
Mackenzie v King-Reed Associates	22 CCEL (3d) 238	4	3	75%
Locke v Chandos Construction	2004 CarswellAlb 1464	6	1	17%
Poole v Sask Safety Council	2005 Carswell Sask 471	5	2	40%
Reglin v Town of Creston	34 CCEL (3d) 123	4	4	100%
Mrozowich v Grandview Hospital	36 CCEL (2d) 144	6	2	33%
Stolle v Daishinpan	37 CCEL (2d) 18	5	3	60%
Sommerard v IBM Canada	2006 CarswellOnt 1899	4	4	100%
Lambe v Irving Oil	2002 CarswellNfld 346	4.5	3.5	78%
Buchanan v Goetel Communications	18 CCEL (3d) 17	3	3	100%
Troung v BC	47 CCEL (2D) 307	6	2	33%
Martin v Int Maple Leaf Spring	38 CCEL (2d) 128	6	3	50%
Fedorowicz v Pace Marathon	2006 CarswellOnt 455	8	2	25%
Dupuis v Edmonton Cellular	2005 CarswellAlb 1054	5	5	100%

Farrell v Workplace Designs	2005 CarswellOnt 330	7	2	29%
Beadall v Chevron Canada Resources	45 CCEL (2d) 26	7.5	1.5	20%
Cassady v Wyeth Ayest	38 CCEL (2D) 171	8	3	38%
Hampton v Thirty Five Charlot	48 CCEL (2d) 96	8.5	2.5	29%
Marinelli v Regis Hairstylists	43 CCEL (2d) 265	6	6	100%
Paulich v Westfiar Foods	2000 carswellMan 200	9.5	2.5	26%
Clendenning v Lowdws Lamb	4 CCEL (3d) 238	6	6	100%
Whiting v Winnipeg River	159 DLR (4th) 18	6	6	100%
Skopitz v Intercorp Excelle	43 CCEL (2d) 253	10	2	20%
Antidormi v Blue Pumpkin Software	35 CCEL (3d) 247	10	2	20%
Zadoroznaik v Community Future	38 CCEL (3d) 70	6	6	100%
Perett v harrison Galleries	18 CCEL (3d) 140	11	1	9%
Marshall v Watson Wyatt	57 OR (3d) 813	9	3	33%
Carscallen v FRI Group	42 CCEL (3d) 196	9	3	33%
Rady v Canadian Labratories	1999 CarwellOnt 5773	6	6	100%
Sawyer v Rab Energy	2001 CarswellYuk 537	11	1	9%
Baughn v Offierski	5 CCEL (3d) 283	7	5	71%
Noseworthy v Riverside Pontiac	39 CCEL (2d) 37	10	3	30%
Lafond v Belle River	1999 CarswellOnt 4821	11	2	18%
Galbraith v Acres International	8 CCEL (3d) 66	15	3	20%
Mullaly v Global Television	8 CCEL (3d) 66	16	2	13%
Squires v Corner Brook Pulp	44 CCEL (2d) 246	12	6	50%
Trask v Terra Nova Motors	9 CCEL (2d) 157	9	9	100%
Geluch v Rosedale Golf Association	32 CCEL (3d) 177	15	2	13%
McGready v Sask Wheat Pool	49 CCEL (2d) 1	14	1	7%
Hanni v Western Road Rail	17 CCEL (3d) 79	13	2	15%
Danaher v Moon Palace	15 CCEL (3d) 305	12	4	33%
Budd v Bath Creations	[1998] oj 5468	10	3	30%
Musgrave v Levesque Security	50 CCEL (2d) 59	8	8	100%
Nagy v MTCC	35 CCEL (2d) 209	15	1	7%
Horvath v Nanaimo Credit Union	39 CCEL (2d) 148	12	4	33%
Sweetland v Newfoundland	22 CCEL (3d) 122	10	7	70%
Boule v Ericatel	[1998] bcj 1353	14	4	29%
Harris v Yorkville Sound	2005 CarswellOnt 7266	10	2	20%
Black v Robinson	2000 CarswellOnt 3463	12	2	17%
Montague v Bank of Nova Scotia	30 CCEL (3d) 71	12	4	33%
Dicarlo v Labourers International	33 CCEL (3d) 143	13	3	23%
Saunders v Chateau de Char	20 CCEL (3d) 220	12	3	25%
Martin v Casilico	2001 CarswellOnt 2300	12	3	25%
Simpson v Consumers Association	41 CCEL (2d) 179	12	6	50%
Kissner		15	3	20%
Robinson v Fraser Wharves	5 CCEL (3d) 81	15	3	20%
Rinaldo v ROM	37 CCEL (3d) 1	16	3	19%
Hamer-Jackson v McCall Pontiac	3 CCEL (3d) 20	13	6	46%
Downham v County of Lennox	2005 CarwellOnt 7034	15	5	33%
Frank v Federated Co-operative	33 CCEL (2d) 243	15	5	33%
Birch v Grinnell Fire Protection	[1998] bcj 1602	18	2	11%
Schmidt v AMEC Earth	2004 CarswellBC 1739	21	1	5%

Kapitany v Thomson Canada	2000 CarswellMan 665	15	8	53%
Keays v Honda	40 CCEL (3d) 258	15	9	60%
Wallace v United Grain Growers	36 CCEL (2d) 1	15	9	60%
Bouma v Flex-N-Gate	37 CCEL (3d) 301	20	4	20%
Tanton v Crane Canada	2000 CarwellAlb 1509	22	2	9%
Smart v McCall Pontiac	1999 Carswell BC 2057	18	6	33%
Zesta v Cloutier	7 CCEL (3d) 53	21	3	14%
Zesta v Durante	7 CCEL (3d) 53	20	4	20%
Miller v ICO Canada	40 CCEL (3d) 49	22	4	18%
McNamera v Alexander Centre	3 CCEL (3d) 310	24	2	8%
McKinlay v BC Tel	2001 SCR 38	22	4	18%
Lowdes v Summit Ford Sales	2006 CarswellOnt 11	24	4	17%
Day v Wal-Mart	4 CCEL (3d) 236	17	12	71%
Mitchell v Westburne Supply	2 CCEL (3d) 87	24	3	13%
George v Imagineering	14 CCEL (3d) 102	25.5	4.5	18%
Mastroguippe v Bank of Nova Scotia	2005 CarswellOnt 7607	22	8	36%
Baranowski v Binks manufacturing	49 CCEL (2d) 170	30	6	20%
Average			3.5	43%