Measuring the Rule of Thumb In Wrongful Dismissal Cases

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Introduction

In recent years there have been a number of Court decisions in which the judges have relied upon a supposed ‘ rule of thumb” which stated that reasonable notice was based on one month of notice for every year of service. The first case to seem to have adopted this principal was the decision of Mr. Justice MacPherson of the Ontario Court (General Division) in Ryshpan v. Burns Fry Ltd. (1995) 10 C.C.E.L. (2d) 235, where he held at page 239:

Applying these factors to the present case, Mr. Ryshpan seeks 15 months notice . Burns Fry argued for a 9 month period. I suspect that the choice of these periods reflects the reality that in perhaps the majority of wrongful dismissal cases courts apply a “rule of thumb” that an employee should receive notice of one month for every year of service. Counsel in this case appear to recognize this “rule of thumb” and their choice of numbers , three months higher or lower , is a matter of advocacy based on their perception of whether Mr. Ryshpan’s position under the Bardal factors is better or worse than the norm.

This “rule of thumb” concept was picked up and adopted by Madame Justice Molloy of the Ontario Court (General Division) in two recent decisions. In Bullen v Proctor & Redfern Ltd., (1996) 20 C.C.E.L. 36 she made the following comment on using the “rule of thumb”:

In my opinion there is considerable merit to applying the one-month-per-year formula in this case, subject to upward and downward adjustments to reflect the particular facts of the case. This rule of thumb has the advantage of providing some predictability and certainty to the calculation of reasonable notice while at the same time allowing for flexibility by adjusting for various factors.

In McKay v. Eaton Yale (1996) 31 O.R. (3d) 216 Madame Justice Molloy expanded upon her rationale for using the "rule of thumb approach". She refers in some detail at pages 225 to 229 as to how other judges have approached the task of determining the quantum of reasonable notice.

The difficulty in calculating the appropriate notice period is in knowing were to start. One approach is to look at other cases which are similar and make appropriate adjustments to take into account the differences of this particular plaintiff. The problem with that approach is that it is never possible to find a case which is quite the same as the one before you. Also, there can be a wide range of notice periods for individuals who appear on the surface to be in similar situations. So much depends on the particular circumstances of the individual employee and her workplace, that it is very difficult to make generalizations from other cases. Obviously, it is important to consider precedent. The importance of predictability and consistency require that the notice period in any given situation should not vary widely from other similar cases. However, I consider comparison to other cases to be more of a checkpoint for guidance rather than the starting point for the determination of notice in any given case.

It has been suggested that an appropriate starting point for non-management employees is to take the 12-month notice given in Cronk and to work down from there for individuals who are younger or have less seniority than the plaintiff in that case. I reject that approach. As I have already stated, I do not consider Cronk as having established a cap for any particular class of employee. Further, even if it did, in my view the plaintiff in this case does not fall within the same status of employee as the court was dealing the in Cronk. Ms McKay was not a clerical employee.

Another suggestion was to start at the maximum of the range for notice and to adjust down from there. It was argued that, except in very extraordinary circumstances (which do not exist here), the upper limit for wrongful dismissal damages is 24 months' notice. I agree with that general proposition. There is a limit to how much any employee can recover in a case of this nature. The issue is reasonable notice. It is not reasonable that an employer should pay indefinitely until the dismissed employee finds other employment. Even where it is apparent that the employee has, through no fault of his own, been unable to obtain other work for a period of years, the period of unemployment does not become the period of notice and therefore the responsibility of the employer. Wrongful dismissal awards are damages in lieu of the reasonable notice of the dismissal which should have been given by the employer. They are not an insurance scheme.

I agree that generally speaking the upper end of the range is 24 months, no matter how old the employee, how long she has been employed or how exalted her status.

However, the fact that there is a ceiling for recoverable damages does not mean that the appropriate method for determining an individual's entitlement is to compare him to the most extreme case one can imagine and then reduce his entitlement according to where he would fall on the scale from least to most deserving. That sort of approach has been specifically rejected by the Ontario Court of Appeal in cases in dealing with the quantum of general damages of pain and suffering in personal injury cases. Although the Supreme Court of Canada in a trilogy of cases in 1978 established a cap on non-pecuniary general damages, our Court of Appeal has ruled that this does not meant that the maximum amount is reserved for cases where the plaintiff has suffered the worst possible injuries and that awards should then be scaled down accordingly for injuries of a lesser nature. A more individualized approach based on various is required. The court stated that the trilogy cases should not be viewed as "establishing a scale or tariff against which all claims for general damages of a lesser nature are to be measured": Mulroy v. Aqua Scene (1982), 36 O.R. (2d) 653 at p. 657 (C.A.): Katsiroumbas v. Dasilva, [1982] O.J. No. 36, 132 D.L.R. (3d) 696 (C.A.); Lindal v. Lindal, [1981] 2 S.C.R. 629 at p. 637, 39 N.R. 361 at p. 369, [1982] 1 W.W.R. 433 at p. 440.

In my opinion, the approach followed for personal injury, general damages is applicable to the calculation of damages in a wrongful dismissal action. It is not appropriate to start at 24 months for the most deserving employee at the upper end of the range under all factors and to work down from there. Such an approach would mean that anybody below senior management would be automatically ineligible for the maximum notice, as would anybody under the age of 60 or so, regardless of the strength of their cases under other criteria. This strikes me as a fundamentally flawed approach. More flexibility is required to deal with cases of employees whose entitlement is so strong in one or more areas that they should receive the maximum award, notwithstanding other factors which might not be so strong. There may well be situations in which an employee at the lower end of the hierarchy might be entitled to more notice than the company president. Conversely, there may be situations in which a senior executive would be entitled to the maximum award notwithstanding a relatively short period of employment. It is important to retain flexibility so that all cases are determined according to their particular combination of circumstances.

One approach which I have found to be useful in the past is to start with what I consider to be the most objective of the factors listed in Bardal, the length of service, and to apply a "rule-of-thumb" of one month notice for every year of service. The result is then adjusted upwards or downwards depending on the situation of the employee in relation to the norm under the other relevant factors. I applied this method of calculation in Bullen v. Proctor &Redfern Ltd., [1996] O.J No. 340, 20 C.C.E.L. (2d) 36 (Gen. Div.). A similar approach was used by MacPherson J. in Ryshpan v. Burns Fry Ltd. (1995), 10 C.C.E.L. (2d) 235 at p. 239, 95 C.L.L.C. 210-036 (Ont. Gen. Div.). This method has the advantage of some measure of predictability and objectivity based on years of service, but with complete flexibility to vary the result depending on the other factors, a much more subjective exercise. One could, of course, carryout the calculation process without such a structure by simply considering all of the factors as a whole and arriving at a number. Some may prefer this approach. I prefer to start from a base and then adjust. I

doubt that it matters, provided that the result arrived at falls within the appropriate range given the circumstances of the case.

Using the "rule-of-thumb" approach for Ms. McKay, she would be entitled to 23 months' notice based solely on years of service. I would not make any adjustment based on age. Since she was not a management or supervisory level employee, I would adjust downwards somewhat but not significantly in light of the factors I referred to above. I would consider a five-month reduction to be appropriate in these circumstances. Next, would adjust upwards because of the fact that, given hear education and qualifications, Ms. McKay will not be able to get another job of a similar nature. I consider this factor be of major significance for this employee. If she is ever to find employment in her field of work, she will need to complete a program of highly technical college-level training. Given her age, her previous level of education, and the one before you. I do not consider this to be a sensible or reasonable approach to the calculation of the notice period in any given case. How does one choose the comparison case against which the case at hand is to be measured? There is no particular reason why the comparison should be to the Cronk award, especially since it is acknowledged that the character of Ms. Cronk's employment was different from Ms. McKay's. However, even if a case closer to Ms. McKay's situation were found, I have difficulty basing the award in her case on the points of similarity and dissimilarity with another case. In any event, even if the comparison method was followed in this case, and even if the case to be used for comparison purposes was Cronk, I still do not agree with the conclusion urged by counsel for the defendant. The differential in character of employment between these two employees is considerable and Mr. Emblem's analysis fails to adjust adequately for that factor. Furthermore, his analysis ignores the "availability of similar work" factor which, as was emphasized by the Court of Appeal in Cronk, must be given independent weight as one of the relevant factors identified in Bardal.

Having come to the conclusion that a 24-month notice period is appropriate in this case based on a consideration of Bardal factors, the final step for me is to consider whether or not this assessment is out of line with previous decided cases and, if so, whether a further adjustment is therefore required.

In essence then, the rule of thumb becomes the starting point of the analysis. One could therefore argue that it is the most important part of the analysis because if you start in the wrong place you will probably end up in the wrong place.

What then is the juridical basis, if any, for the one-month-per –year of service formula ? Neither Justices Molloy nor MacPherson quotes any authority for such a formula. Mr Justice MacPherson refers to "*the reality that in perhaps the majority of wrongful dismissal cases courts apply a "rule of thumb " that an employee should receive notice of one month for every year of service".* However there is no indication that he conducted any sort of comprehensive survey of the reported cases to see if in fact his assumption about what other judges normally do was accurate or not. Madame Justice Molloy simply cites Mr. Justice Macpherson as her judicial authority for the one-month-per–year of service formula. Again there is no evidence that in either of her decisions did

she actually do any sort of comprehensive survey of decided cases to determine whether or not her starting point was a valid one.

I decided that it would be an interesting intellectual exercise to see if in fact the wealth of decided cases really did indicate that there was a one-month-per –year of service formula, or whether there may be in fact more than one rule of thumb.

Methodology of the Case Analysis

In order to do this research, I utilized the extensive computer database of wrongful dismissal cases that I have developed over the years in the Wrongful Dismissal Database. This is an independent database maintained by me and available to the legal profession through the Law Society of Upper Canada. It has been favorably referred to in a number of cases, both in the Ontario Court (General Division) (Slater v Reebok Canada 8 C.C.E.L 26, Mr. Justice Rosenberg) as well as the Ontario Court of Appeal (Cronk v Canadian General Insurance, 25 O.R. (3d) 505)

At the time of this paper the Wrongful Dismissal Database contained almost 1600 cases from all provinces, except Quebec. Among other factors, the Wrongful Dismissal Database records the years of service the employee worked, the employees' occupation and the notice period that was found by the Court to be reasonable. In order to determine if there was any direct correlation between Service and Notice, I first determined what the average notice period was for all cases were the plaintiff had the same Service. My results were as follows:

In all these charts, Years of Service actually cover a range of 12 months, so for instance, 6 Years of Service actually covers a range of 5.6 years to 6.5 years. The only exception is the 1-Year of Service category, which covers .6 to 1. 5 years. Cases of less than .5 years (6 months and less) were excluded from the survey.

All Occupations

Years Of Service	Number of Cases in Database Sample	Notice Average	Months Notice Per Year of Service
1	144	4.40	4.5
2	94	5.34	2.7
3	98	6.11	2.0
4	89	6.86	1.7
5	70	7.26	1.5
6	63	7.63	1.3
7	75	8.64	1.2
8	77	9.01	1.1
9	57	9.11	1.0
10	83	11.17	1.1
11	50	11.13	1.0
12	42	11.52	1.0
13	45	11.76	0.9
14	33	12.29	0.9
15	29	11.29	0.8
16	34	11.49	0.7
17	28	13.84	0.8
18	31	13.26	0.7
19	21	13.71	0.7
20	23	14.54	0.7
21	33	14.74	0.7
22	18	14.94	0.7
23	21	15.81	0.7
24	21	15.48	0.6
25	25	15.22	0.6
26	16	17.31	0.7
27	13	16.81	0.6
28	10	18.50	0.6
29	7	9.79	0.3
30	19	14.37	0.5
31	14	13.75	0.4
32	4	16.00	0.5
33	5	19.20	0.6
34	4	19.25	0.6
35	4	18.50	0.5
36	5	17.60	0.5

37	3	21.67	0.6
38	4	21	0.6
39	2	22	0.6
40	4	20.5	0.5

This chart is somewhat detailed so I also developed the following summary chart, which simply groups the Service dates in sets. The term Service Average is simply the mid-point of the Years of Service. The calculation of the Months Notice Per Year of Service is simply the result of dividing the Notice Average by the Service Average.

All Occupations

Years Of Service	Number of Cases in Database Sample	Notice Average	Service Average	Months Notice Per Year of Service
.6 to 2.5	238	4.47	1.5	2.9
2.6 to 5	257	6.69	4	1.7
6 to 10	355	6.21	8	1.1
11 to 15	199	11.57	13	0.9
16 to 20	137	13.22	18	0.7
21 to 25	118	15.19	23	0.7
26 to 30	65	15.67	28	0.6
31 to 35	29	16.41	33	0.5
36 to 40	20	20.17	38	0.5

In other words this chart shows that on average in a case where the employee has 2.5 or less years of service, the Court awards a notice period equal to 2.9 months for every Year of Service.

However, as service increases, the correlation between Years of Service and notice changes. In the period from 2.6 years to 5 years the ratio drops to 1.7 months of notice for every year of service.

Where Years of Service is between 6 and 15, the correlation is 1:1, that is for every Year of Service the Court will probably award one months notice. This is confirmation that the "rule of thumb" of one month per year of service has some validity for cases in the mid seniority range. In effect this one-month per year of service formula seems to be valid in about 35% of the cases listed in the Wrongful Dismissal Database. As the Wrongful Dismissal Database contains over 90% of the reported wrongful dismissal cases in the common law provinces where reasonable notice is a issue, one can assume with some confidence that the "rule of thumb" of one month per year of service is certainly not the all embracing formula that Justices MacPherson and Molloy seem to believe it is.

When one goes beyond the 15 year mark, the correlation between Years of Service and Notice drops below the one month mark. For long service employees in their 16^{th} to 25^{th} year, the ratio drops to .7, which means that for every Year of Service, their notice period is only .7 of a month. In other words, the "rule of thumb" for these long service employees is only 3 weeks per year of service.

Once we get to employees with over 25 Years of service, the ratio drops to .6 and .5. In other words, these employees only receive 2 weeks per year of service.

We all know from Bardal v Globe and Mail, 24 D.L.R. (2d) 140 (H.C.) that the occupation of the employee (or as it is called in the cases "the character of the employment") is an important factor in determining reasonable notice. I therefore did another analysis, this time dividing the data into three large occupational groups: Managerial, Supervisory and Clerical. For those of you familiar with the occupational categories used in the Wrongful Dismissal Database these groups consist of the following occupational groups:

Managerial:

- Upper Manager
- Middle Manger
- Sales Manger
- Professional

Supervisory:

- Supervisor
- Foreperson
- Technical
- Lower Manger
- Salesperson

Clerical:

- Clerical
- Labourer

Managerial

Years Of Service	Number of Cases in Database Sample	Notice Average	Service Average	Months Notice Per Year of Service
.6 to 2.5	119	5.85	1.5	3.8
2.6 to 5	125	8.35	4	2.1
6 to 10	183	1085	8	1.3
11 to 15	111	12.83	13	1.0
16 to 20	73	14.53	18	0.8
21 to 25	62	16.37	23	0.7
26 to 30	39	17.23	28	0.6
31 to 35	14	17.36	33	0.5
36 to 40	11	21.55	38	0.6

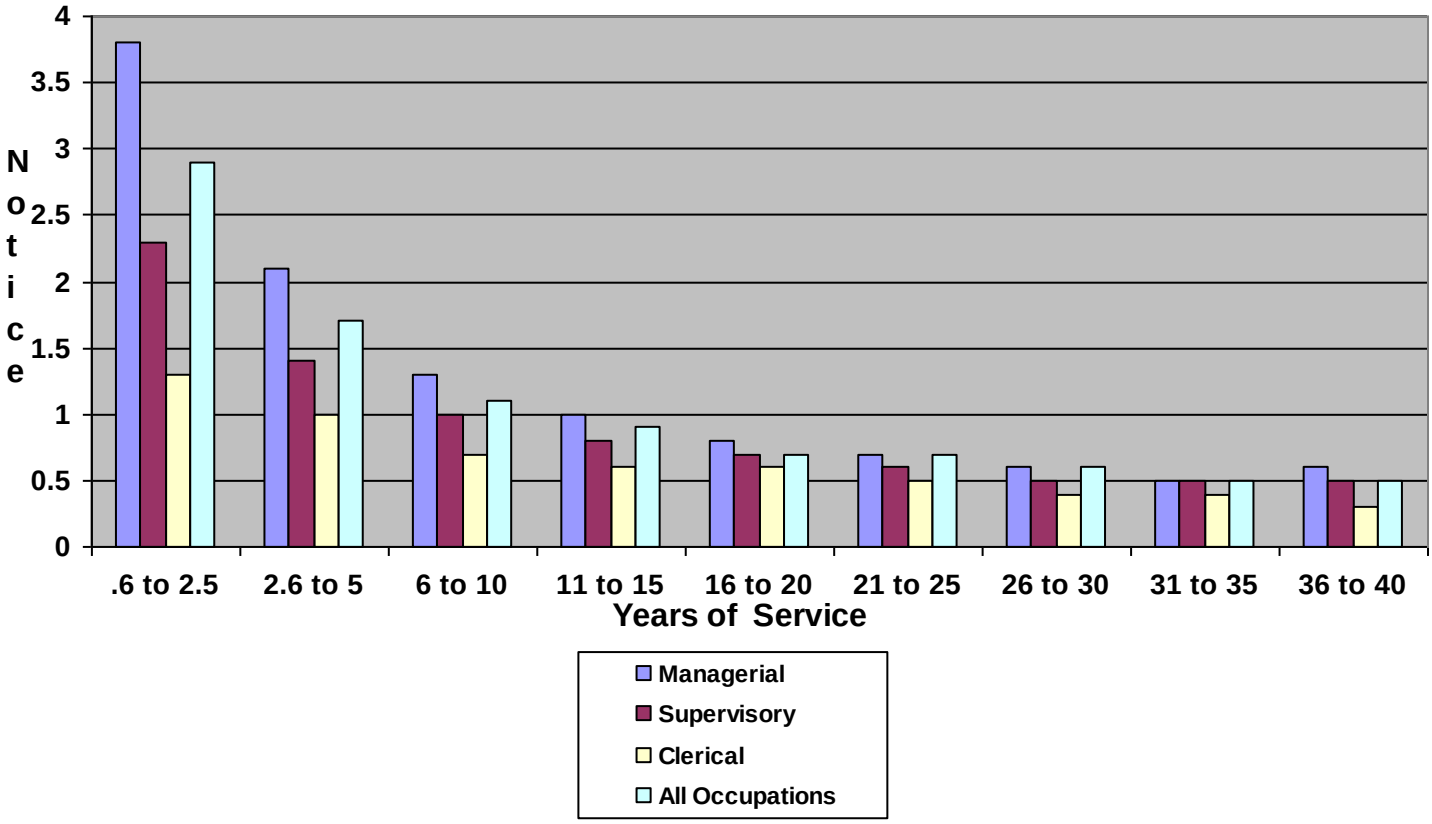
Supervisory

Years Of Service	Number of Cases in Database Sample	Notice Average	Service Average	Months Notice Per Year of Service
.6 to 2.5	84	3.53	1.5	2.3
2.6 to 5	88	5.62	4	1.4
6 to 10	129	7.94	8	1.0
11 to 15	67	10.71	13	0.8
16 to 20	46	12.26	18	0.7
21 to 25	47	14.48	23	0.6
26 to 30	19	14.03	28	0.5
31 to 35	12	16.42	33	0.5
36 to 40	9	18.00	38	0.5

Clerical

Years Of Service	Number of Cases in Database Sample	Notice Average	Service Average	Months Notice Per Year of Service
.6 to 2.5	26	3.09	1.5	1.3
2.6 to 5	36	3.88	4	1.0
6 to 10	39	5.89	8	0.7
11 to 15	17	7.70	13	0.6
16 to 20	17	10.46	18	0.6
21 to 25	9	10.83	23	0.5
26 to 30	4	11.75	28	0.4
31 to 35	3	12	33	0.4
36 to 40	3	12	38	0.3

Summary Chart of Relationship between Service and Notice



The chart above shows in graphic details the differences and similarities between the various occupation groups as compared to each other and as compared to the whole sample.

- There is a strikingly consistent pattern across all groups of a high ratio between short service and high notice periods. In the .6 to 2.5 year category, the Managerial group wins out at an amazing 3.8 months notice per year of service, while the clerical group shows a respectable 1.3 months notice per year of service.

- Beginning after 2.5 years, but certainly after 5 years of service, every group drops off dramatically and then levels out at below the magic one year per month formula after 15 years.

- The only consistent time frame in which most of the groups come near the "one month per year of service formula" is between 6 and 15 years of service, and even then the clerical group lags well behind the other two.

Conclusions

It appears that there is no consistent "rule of thumb" of one month per year of service that applies either to any particular occupational category of over any significant span of service.

However there are definitely certain guidelines or formulas that can be of assistance to judges, lawyers, employers and employees in trying to ascertain the appropriate notice period in any particular situation. These **Revised Rules of Thumb** can be summarized as follows:

1. Generally speaking, employees with up to 2.5 years of service receive notice based on 2.5 months per year of service.

2. Employees with service between 2.6 and 5 years, receive about 1. 5 months notice for every year of service

3. Employees with between 6 and 15 years of service generally receive notice based on one month per year of service.

4. Employees with 16 or more years service generally receive three weeks notice per year of service, which drops down to two weeks per year of service after 25 years service.

5. Mangers and professional do better than the average, supervisory and technical types do about the average and clerical and labourer groups do worse than the average.

I believe that any approach which enhances the predictability of determining reasonable notice is something that should be pursued. It is somewhat ridiculous that lawyers and clients still have to fight out time and time again the parameters of reasonable notice largely because of the general insistence of the judiciary to try to treat ever case as if the individual facts were paramount and unique. Unfortunately hundreds of people are terminated from their jobs every day. Determining a fair and reasonable notice period should be something that the average lawyer or the human resource advisor can ascertain with a reasonable degree of accuracy once they are familiar with the relevant facts.

It is my personal belief that the best way of determining reasonable notice is to first analyze the case along the key factors of length of service, age and position. With those factors in mind, to then examine in a methodical fashion the vast body of precedents from past cases to try to ascertain the average or the statistical mean. A valid shortcut to this case analysis may well be the use of statistically valid "rules of thumb " that are not so simplistic as to be misleading. Then, and only then, once you have an accurate picture of what the standard notice period should be, should you examine if there are any legally relevant unusual factors that should either increase or decrease the notice period from the standard. This discretion to deviate from the standard should be used sparingly, otherwise the standard will have no meaning.

I believe an approach such as I have set out would both enhance the ability of the parties to the dispute to resolve it themselves, while at the same time allowing some limited flexibility to take care of the highly unusual fact situations that arise from time to time.