

**A New & Improved Theory of
Reasonable Notice for
Wrongful Dismissal after
Honda Canada Inc. v. Keays**

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Introduction:

The foundations of the law of reasonable notice in wrongful dismissal cases has been since 1965 based on the case of *Bardal v Globe & Mail Ltd.* (24 D.L.R. (2d) 140 (H.C.)). The famous citation listing the relevant criteria in the determination of reasonable notice has been cited hundreds if not thousands of times in employment cases, including most recently in the Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays*, 2008 SCC 39.

It is not the purpose of this paper to go through the history of the law of wrongful dismissal, as this has been exhaustively done by Mr. Justice Echlin in the 2007 Special Lectures of the Law Society of Upper Canada in his paper entitled *From Master and Servant to Bardal and Beyond: 200 years of Employment Law in Ontario, 1807 to 2007*.

Rather, the purpose of this paper is to first of all point out the shortcomings of our present methodology in determining reasonable notice, second to see if this has changed following the *Honda* decision and third to propose both a legislative and/or judicial way to improve how we determined reasonable notice in wrongful dismissal cases.

Problems with the present system of determining reasonable notice in wrongful dismissal cases:

1) Unpredictability:

How many times have we all heard the famous first line of the *Bardal* quote:

There can be no catalogue laid down as to what was reasonable notice in particular classes of cases.

In fact, the Justice Basterache in *Honda* has again reiterated the importance of the *Bardal* test.

In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in Bardal, 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.

[29] *These four factors were adopted by this Court in Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986. They can only be determined on a case-by-case basis.*

[31] *This position is consistent with the original formulation of the Bardal test where McRuer C.J.H.C. stated:*

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. [Emphasis added; p. 145.]

I ask, why not? Why do we institutionalize unpredictability? What is so different about every single wrongful dismissal case that mandates a fresh look at every case?

The theory behind *Bardal* is supposedly is that the law of wrongful dismissal should be flexible enough to take into consideration all the relevant factors. Howard Levitt, in the second addition of his book entitled *The Law of Dismissal in Canada*, listed 105 separate factors that courts have used in determining the length of reasonable notice.

Of course, in an effort to give an individualized assessment of reasonable notice to each plaintiff and defendant we have completely sacrificed predictability and certainty.

I believe that we do a gross disservice to both individuals and companies in perpetuating an inherently unpredictable and uncertain method of calculating reasonable notice in wrongful dismissal cases. I believe that both employees and employers would prefer a more predictable and certain methodology.

Recently terminated employees, as has been noted by the Supreme Court of Canada in *Machtiger v HOJ Industries (40 C.C.E.L. 1)* are in an extremely vulnerable position. Their entire world has been thrown for a loop and their fear of the future, both short and long term, can be overwhelming. Surely an employee in this situation would be better served by being told by his or her lawyer “ Based on the objective criteria in your case, your employer is obligated to pay you 14 months of reasonable notice, not 13 and not 15, but 14.”

Instead, he or she hears, “Based on the information you have provided me, and without any knowledge of what the other side’s information is, and assuming that you can wait until this matter gets to court, I believe your case is worth between 12 and 18 months, largely depending on which judge we get at trial”

Similarly, when you are called by your employer client and are told that they want to terminate a 45-year-old sales manager with 15 years service, they simply want to know what it will cost to terminate this employee. You estimate that the notice period would be between 12 and 18 months notice if the matter went to court, but of course, because we can basically starve the plaintiff, you could probably get away with giving him or her around eight to nine months. How is this businessman supposed to plan for the future? What construction company would tell a client “I can build you this warehouse and the cost will be between \$2 and \$4 million, but I will tell you until the end how much it actually costs.”

It is not as if termination of employment is their rare or unpredictable event. Thousands of people every year are terminated, and thousands of times a year people must ask themselves: What is reasonable notice in my case?

In other areas of the law that we have moved successfully from individualized assessment to an assessment based on established and fair guidelines. For instance, in the area family law, the Federal Child Support Guidelines have greatly reduced disputes over the level of child support. This has served all parties well as resources previously used to litigate these matters can now be used to actually pay support payments instead of fighting over the quantum. Moreover, increasing the predictability of a result, has the effect of decreasing the bargaining power of the stronger party as each side knows what the result will be if there is no agreed resolution. In employment terms, this means that plaintiffs often get less than the law requires because of the risk and expense in determining what is the proper number of months notice actually is.

In addition, termination of employment is a common event affecting people from all walks of life. Besides divorce, it is likely the most common way in which the average person comes into a legal dispute. In these types of cases the law should seek to enhance the predictability of the outcome so that scarce resources are not misspent on litigating essentially the same issue time and time again.

Therefore, the New & Improved Theory of Reasonable Notice must enhance the certainty and predictability of the outcome, even at the expense of some theoretical loss of individualized assessment.

2) Irrelevant considerations:

Bardal lists of the following factors as the primary factors:

- a) Character of Employment
- b) Length of Service of the Employee
- c) Age of the Employee.
- d) Availability of Similar Employment, having regard to the Experience, Training and Qualifications of the Employee.

In the real world, this is how we deal with these factors:

a) Character of Employment.

Without any scientific, statistical or qualitative analysis at all, this element has been treated as generally standing for the proposition that the more money one makes the more notice one gets. This is presumably based on the theory that it is harder to find a CEO position than a carpenter position, as there are less CEO positions available at any given time than carpenter positions. It completely ignores the fact that although there may be fewer CEO vacancies at any time, there are also probably fewer unemployed CEO candidates, whereas although there may be more vacancies for carpenters there will also likely be more candidates competing for those limited vacancies. What really matters therefore is the ratio between vacancies and candidates. If there is a 1 to 3 ratio with respect to CEO vacancies to CEO candidates as opposed to a 1 to 10 ratio between carpenter vacancies and carpenter candidates, then the CEO will have a easier time getting a job than a Carpenter. If the policy reason behind reasonable notice is provide a sufficient time to find comparable employment, then should not the CEO receive less notice than a carpenter?

I have never seen a judge do an analysis of this of this nature. This is because they either do not analyze the issue at all from a point of first principles, or they only look at cases of other CEOs to consider what is reasonable notice. As a matter of blind adherence to precedent, we continue to follow what in 1965 seemed like a social given, that is that a CEO is entitled to more notice than a carpenter. I should remind the younger readers of this paper that in the “olden days” when I started practicing in this area, it was still called the Law of Master and Servant. Many social mores from the 60’s have been reexamined and so to does this one deserve to be reexamined. Therefore we should be vigilant in ensuring that the basis for our laws remains relevant and not simply built on biases and outdated morals of the past that are no longer relevant or deemed to be fair by society in general.

In fact, the New Brunswick Court of Appeal in a groundbreaking case called *Bramble v Medis Health & Pharmaceutical Services Inc* 46 C.C.E.L. (2d) 45 did just that. This case held that although the character of employment was still a relevant factor, (presumably remembering that in *Machtiger* the Supreme Court of Canada quoted with favor the *Bardal* test), it was a factor that required evidence to be led and that without such evidence, it was not to be considered as a factor in assessing reasonable notice. For a fuller discussion of this case and the fascinating policy analysis done by the Court, see my article entitled *Revisiting Reasonable Notice Periods in Wrongful Dismissal Cases, 2006 Edition, 53 C.C.E.L. (3d) 60* . Interestingly, a recent check of how many times this case has been referred to in Canadian cases, shows that on Westlaw ECARSWELL that it has been followed 42 times, but not even referred to yet in any Ontario case, except for the *Honda* case, and then only before the Supreme Court of Canada.

I am not aware of any case in which either a plaintiff or a defendant has actually led such evidence as to the availability of employment based on the character of employment. However character of employment continues to raise its head in most wrongful dismissal cases, especially in Ontario. How else can we explain the Court of Appeal of Ontario's decision in *Cronk v Canadian General Insurance Co.* 14 C.C.E.L. (2d) 1, whereby it seems clear (at least from the reasoning of Mr Justice Lacourciere) that given the mere fact that Mrs. Cronk was a clerical worker, her recovery was limited to 12 months whereas a management employee would face no such ceiling based on the character of his or her employment. Frankly, it is time for the Ontario Court of Appeal or better still, the Supreme Court of Canada to remove from our case law the stain of *Cronk* with the enlightenment of *Bramble*.

Well, the Supreme Court of Canada had the opportunity in *Honda* to get it right and they certainly seem to be going that way. This is what Justice Basterache had to say about the character of employment issue.

[30] It is true that there has been some suggestion that a person's position in the hierarchy should be irrelevant to assessing damages for wrongful dismissal (see Bramble v. Medis Health and Pharmaceutical Services Inc. (1999), 214 N.B.R. (2d) 111 (C.A.), and Byers v. Prince George (City) Downtown Parking Commission (1998), 53 B.C.L.R. (3d) 345 (C.A.). The traditional assumptions about the relevance of a person's position in the hierarchy was not directly challenged in this case. It will therefore suffice to say here that Honda's management structure has no part to play in determining reasonable notice in this case. The "flat management structure" said nothing of Keays' employment. It does not describe the responsibilities and skills of that worker, nor the character of the lost employment. The particular circumstances of the individual should be the concern of the courts in determining the appropriate period of reasonable notice. Traditional presumptions about the role that managerial level plays in reasonable notice can always be rebutted by evidence.

I would suggest that this extract shows that the Supreme Court is very willing to accept the principle in the *Bramble* in that it is saying that the only reason you look at the actual job being performed by the plaintiff is to help determine how long it should take this person to find a comparable job. The comment about "can always be rebutted by evidence" is inviting plaintiffs to present evidence to the Court about how difficult this particular plaintiff's job will be to replace, notwithstanding its status. It will be interesting what the Court does when this issue of the "traditional assumptions about the role that managerial level plays in reasonable notice" is directly challenged in a case before it. I predict that when that day comes the Court will wholeheartedly accept the *Bramble* analysis and that character of employment will no longer be as important a factor in assessing reasonable notice as it is today, and furthermore will play no part in the Bardal analysis unless the parties lead actual evidence on the issue.

The fact that one should look at real factors that affect job availability and not preconceived assumptions based on job status is also reflected in what the majority found relevant in assessing whether the 15 month notice period was a reasonable one.

(32) *Keays was one of the first employees hired at Honda's plant. He spent his entire adult working life with Honda. He did not have any formal education and suffered from an illness which greatly incapacitated him. All these factors will substantially reduce his chances of re-employment and justify an assessment of 15 months' notice.*

Note what is not mentioned in this analysis, that is any reference to the level or importance of the plaintiff's position, as that would seem to be largely irrelevant in determining how long this plaintiff will likely take to get a new position.

Therefore the New & Improved Theory of Reasonable Notice should de-emphasize or perhaps even eliminate character of employment as a factor, as there is simply no rational basis for assuming that this factor affects the expected period of unemployment, nor is it any more socially acceptable to create a legal entitlement which unreasonably rewards high wage earners and punishes low-wage earners.

c) Length of service:

As the length of service is an objectively determined fact, it is no wonder that this factor is not only important, but also used as the only factor in statutory schemes to determine notice and/or severance.

Interestingly, I have never seen any evidence of any study being presented in court that would confirm this assumption, that is, with all other factors being equal, a 45-year-old sales manager with one-year service will have a far easier time getting a job than a 45-year-old sales manager with 10 years service.

Rather, the widespread use of the length of service in both judicial and legislative schemes of termination as a key factor in assessing damages seems to come from a commonly held belief, acceptable largely by both employers and employees, that recognizes seniority at the time of discharge as a way of determining compensation for the discharge is both fair and reasonable. The expression of this is found in the following quote from the New Brunswick Court of Appeal from *Bramble*:

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.

This deeply held belief in the sanctity of seniority can have some adverse consequences in that it is based on the false assumption that everyone has the same opportunity to put in the same period of time with one employer so therefore it is reasonable and equitable to treat all people within the same service category the same. This ignores the fact that some groups, by their very nature, may not have had the same

opportunity to work for one employer for the same length of time. For instance, older adult immigrants, people with certain disabilities, and people who have had to move geographically more often than the average may well not have the opportunity to obtain the same service with a single employer as others.

However, given that no factor is perfect, length of service has the following advantages over the other Bardal factors:

- a) It is easy to measure.
- b) It is generally nondiscriminatory.
- c) It is consistent with widely held beliefs that already exist among both employers and employees.

Therefore length of service properly belongs as an important and relevant factor in determining reasonable notice under the New & Improved Theory of Reasonable Notice

d) Age of the Employee:

Generally speaking, the older one is at the time of termination, the greater the reasonable notice period. This is presumably based on the premise that older workers have a more difficult time getting a job than younger workers. Again, this seems to be an assumption accepted by the courts without any statistical analysis or reliance on actual data flowing from terminated employees.

This is illustrated in the following quote from the New Brunswick Court of Appeal in *Bramble*:

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....

In fact, one can easily imagine that a very young worker may have a more difficult time getting a position than a middle-aged worker. However, the law generally awards lower notice periods to younger workers and higher notice periods to older workers. Interestingly enough, where the older worker has short service, the age factor is generally not emphasized (see *Wrongful Dismissal Handbook 4th Ed by Mr Justice Sproat*, Section 6.1(h)(xiii))

In effect, the age of the employee often becomes a substitution for or an additional way of looking at the service of the employee as opposed to being treated as an independent factor. For instance, look at cases where the employee is over the normal age of retirement and in all likelihood, he or she is longer going to seriously look for a job. Logically, the employee should not receive any notice at all as they are effectively out of the job market and therefore do not need time to look for new job. However, the courts do not apply that logic, and instead workers over the age of normal retirement continue to receive a reasonable notice even though they are effectively not going to reenter the workforce.

In reality, it is probably true that older workers have a more difficult time obtaining a job than younger or middle-aged workers. If we are to stick to the general theory of reasonable notice, which is that the court is trying to estimate the period of time that a person of similar circumstances will probably take to find alternative employment, then age should continue to be a factor for older workers and less of a factor for young and middle-aged workers in the New & Improved Theory of Reasonable Notice.

e) Availability of similar employment considering the experience, training and qualifications of the employee:

Given that the theory of reasonable notice is based on the premise that an employee should be provided with sufficient time to find alternative employment, one would of thought that this the particular factor would be the one most discussed and relied upon by the courts in assessing reasonable notice. In fact, again quoting *Bramble*:

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.

However in most wrongful dismissal cases, there is little if any mention of this particular issue, and rarely is any evidence, statistical or otherwise, actually presented to the Court. Typically the Court simply takes seems to take judicial notice of this factor, and one wonders what could it be based on anything other than the judges' personal view of how many carpenter vacancies there are in Toronto at the relevant time.

There is a practical reason for this problem. For a lawyer to actually produce evidence to the Court as to the availability of particular employment in a particular geographic area would require the lawyers to either call expert evidence or present evidence of a statistical nature that is not readily available. In other words, the actual cost of proving this issue in Court would probably be uneconomic given the amount at stake in most wrongful dismissal actions. We are therefore left with anecdotal information and personal impressions, which is not a good basis for making important legal decisions.

The solution is to either come up with a cost-effective methodology whereby actual evidence of availability of similar employment can be presented to the Court and failing that, to deemphasize this factor in assessing reasonable notice.

Summary of Defects in the Bardal Methodology:

Someone should undertake an actual study of how reasonable notice determinations done by a Court actually size up to how long people are actually unemployed. In other words, does it take the average 45 year old middle manager with 10 years service 12 months to find comparable employment? With this real life data we could then actually compare the actual average period of unemployment with our Bardal Guesstimate and see if what the Courts do has any relation to reality. I suspect it does not.

Why don't we just admit that our determination of reasonable notice is actually unrelated to how long either this person or similarly situated persons are generally unemployed and instead devise a system that is intellectually honest, easy to calculate, objective, not full of biased assumptions, gender, position and salary neutral and most importantly, fair to the broad spectrum of society in both the employer and employee community.

Possible Solutions

a) Legislative :

The existing Employment Standard Act minimums for termination pay and severance pay should be retained, however a new section should be added which would in essence mimic the common law implied term of reasonable notice.

The essential features of this amendment would have the following features:

1) There would be a scale of increasing notice periods based solely on service, with a base of perhaps 3 months and a cap of 24 months. Increments could be based on a formula of perhaps one month per year of service. The scale could therefore look as follows:

Service in Years	Months of Notice
Less than 2	3
2	4
3	5
4	6
5	7
6	8
7	9
8	10
9	11
10	12
11	13
12	14
13	15
14	17
15	18
16	19
17	20
18	21
19	22
20	23
21 and more	24

2) The compensation required to be paid during the notice period would be based on a model of total compensation, i.e. base, bonus, options, benefits etc.

3) The employee would be obligated to mitigate his or her damages and the same consequences that flow from the common law (i.e. poor mitigation leads to lesser notice period , partial mitigation reduces compensation) would apply.

4) This provision would apply unless the parties opted out of it in writing and substituted another severance arrangement. In order to properly opt out, the new severance contract would have to first clearly set out what the statutory provision is and then indicate how the new severance arrangement is different. This will insure that both parties will know what their rights and obligations are before they agree otherwise and also show exactly how their new severance arrangement would differ from the statutory one. There would only be the right to opt out of the statutory scheme if there was a contractual substitute which dealt with the same subject matters. An ineffective opt out would be of no effect and the statutory clause would then apply. As the opt out mechanism would be affecting important statutory rights, it may be necessary to ensure that employees have the opportunity of obtaining independent legal advise before an alternative severance agreement can be enforceable.

5) The present relationship between ESA minimums and common law notice would apply, which is that they are not stacked (see *Stevens v Globe & Mail* 1996 CarswellOnt 1590)

b) Judicial

These are some practical things that judges could start doing immediately to start improving the methodology of determining reasonable notice:

1) Adopt a Bramble approach to the evidence.

If a party makes a submission that the reasonable notice period should be increased or decreased for some factor other than length of service or age, demand that they lead proper evidence on the issue. Referring to past judicial cases is not evidence. The term “judicial notice” should not be a substitute for lawyers too lazy to present evidence or information gleaned by the judge from that morning’s newspaper headlines. This would apply to both the character of employment issue as well as the availability of alternative employment issue.

2) When looking at previous cases, look primarily at the age and service of the employee and look at a large enough sample so that you get a broader picture.

Any body can find five cases on notice to support any proposition of reasonable notice. Data is easily available to both counsel and judges that will insure that broader based objective data showing large number of cases can be looked at to determine the average or median notice periods for plaintiffs of similar ages and years of service.

In my article entitled *Revisiting Reasonable Notice Periods in Wrongful Dismissal Cases, 2006 Edition 53 C.C.E.L. (3d) 60*, I determined that when we just look at length of service, the cases show the following relationship between reasonable notice and length of service:

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

In other words, the average 10 year employee would get a reasonable notice period of 11 months (10 years x .9 months per year of service) and the average 28 year employee would get a notice period of 16.8 months (28 years x .6 months per year of service)

3) The months based on years of service can serve as a base for then adding or subtracting from by applying the other factors.

This was the approach used by Madam Justice Malloy in *McKay v Eaton Yale Ltd (1996) 31 O.R. (3d) 216 (Gen. Div.)*, where she sets out her methodology as follows:

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 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.

Other than her reliance on the wrong standard (the Court of Appeal determined that there was no such rule of thumb in *Minott v O’Shanter Development Co. (1999) 40C.C.E.L. (2d) 1*) the methodology is a good and practical one . However, rather than applying any single rule of thumb which by definition creates a straight line correlation between service and notice, thereby shortchanging short service employees and overcompensating long service employees, the Court should apply formulas which already take into account the non-linear correlation as set out in the above table.

We who practice in the area of wrongful dismissal know that the largest area of unpredictability is the short service employee, whose notice periods, even without the issue of inducement, are all over the map. On a go forward basis, given the fact that employees are more likely now to switch employers a few times in their careers than did their parents, dealing effectively with the short service employee is vitally important. Very few children and grandchildren of the boomer generation will be terminated after 25 years of employment with one employer.

4) When making adjustments for the standard, use restraint

Adjustments from the standard notice period should be done sparingly and cautiously, otherwise the goal of greater predictability will be illusionary. The adjustments themselves should be within an acceptable range from the norm, perhaps no more than 33 % and no less than 10%. In other words, if the standard notice period was 12 months, then the adjustment should be no less than 1.2 months and a maximum of 4 months.

5) Distinguish clearly between reasonable notice and other damages.

If you are going to award Wallace damages, then first fairly determine the notice period without Wallace factors and then apply the Wallace analysis. If there are tort damages or human rights damages, again first fairly determine reasonable notice and then add on the other claims. Where a additional claim is unrelated to the plaintiff's employability, (i.e. the harsh termination meeting which does not directly affect the plaintiff's ability to look for alternative employment,) consider using a tort like determination of damages which is not related to the plaintiff's wages. For an excellent example of this see Mr Justice Ferguson's decision in *Downham v County of Lennox and Addington* 56 C.C.E.L.(3d) 112. Only where the employer's bad behavior has had a demonstrable negative effect on the plaintiff's employability (i.e. where the employer wrongly tells the community at large that the employee was dishonest) should the award for bad behavior be based on the employee's monthly earnings.

In *Honda v Keays*, Justice Basterache adopted a arguably new approach to the whole issue of how we label and award non- reasonable notice damages.

56] *We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of Fidler: "what did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.*

[57] *Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in Wallace, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).*

[58] *The application of Fidler makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. Fidler provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In Wallace, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). **At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages.** As aforementioned, this Court recognized as much in Fidler itself, where we noted that the principle in Hadley "explains why an extended*

period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).

[59] *To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in Wallace, at paras. 99-100).*

[60] *In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.*

Thus it seems that from now on, the only real damages beyond reasonable notice are Wallace damages and that these damages are not to be calculated based on the reasonable notice period or for that matter the level of compensation of the plaintiff. Rather, they presumably will be determined on a more tort like basis, where we look at the harm caused and not the salary lost. Thus a poorly treated carpenter and a equally poorly treated CEO should receive the same monetary amount for their same mental distress. It also refocuses the damage component on the harm done to the plaintiff, so that one could anticipate that the same bad behavior by an employer with respect to two plaintiffs could result in different monetary awards where the mental distress suffered by the plaintiffs was different because of their different psychological makeup. The *Honda* case also reminds us that all damages require actual proof, so that for plaintiff's to recover these new Wallace damages, there may be an increased need for medical and/or other evidence to show the impact of the bad behavior on the plaintiff.

An interesting issue will also arise whether this principle will also incorporate the ratio of *Mustapha v Culligan of Canada Ltd* , 2008 SCC 27 with respect to the foreseeability of psychological injury in cases where the plaintiff is unusually fragile. I suspect that plaintiff's counsel will urge the Court to focus on this extract from the case

in arguing that the employer should still be liable because they knew of the particular weakness of the plaintiff.

[17] I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

As a matter of law, although these comments on reforming Wallace damages are helpful and progressive, since Mr Keays was denied any Wallace damages at all as it was found that the facts did not support a finding of a bad faith discharge, aren't all these comments mere obiter, and thus not binding on a lower Court?

Conclusion:

We now have an opportunity, following *Honda v Keays*, to bring the determination of reasonable notice and related damages into the 21st century, unshackled from the unfounded assumptions and biases of the past, towards a new methodology which is both just and fair to both parties but also predictable enough so that both employers and employees can better deal with the issue of termination of employment.