



# FIELD LAW

## Labour and Employment

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### Reasonable Notice and the Older Worker



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There was once an expectation that workers would retire by age 65. That expectation is changing. For a variety of reasons, many workers now want or expect to work later in life. As it can no longer be assumed that employees will retire at a certain age, employers will encounter issues about dismissing older and long-serving employees. In recent years, we have seen a number of claims relating to dismissal of older and long-serving employees. To pick a few examples:

- An employee with 37 years of service claimed for constructive dismissal. The employee had worked for the same employer since he was 16 – his entire working life. He never completed high school, having quit school to take up full-time employment with the company. He was in his early 50s when the constructive dismissal claim arose: *Russo v Kerr Bros. Ltd.*, 2010 ONSC 6053.
- A 65 year old employee claimed for wrongful dismissal after he lost his job due to restructuring. The employee had worked for the same employer since immigrating to Canada 36 years before, and had no other Canadian work experience: *Hussain v Suzuki Canada Ltd.* (4 November 2011), CV-11-421472 (Ont SCJ).
- An employee, who was 67 at the time of termination, alleged discrimination based on age when the employer eliminated her position and decided not to hire her for a similar position at a lower level: *Cowling v Alberta (Employment and Immigration)*, 2012 AHRC 12.
- Two workers who were in their early 80s at the time of termination received substantial damages for wrongful dismissal: *Filiatrault v Tri-County Welding Supplies Ltd.*, 2013 ONSC 3091.

When an employee is dismissed without cause, the amount of working notice or pay in lieu of notice that should be provided depends on a number of factors. The factors set out in the leading case, *Bardal v Globe & Mail Ltd.*, are: the character of employment, length of service, age of employee, and availability of comparable employment in light of the employee's experience, training and qualifications. No one factor outweighs another, and they must be applied on a case-by-case basis.

For many older workers, the *Bardal* factors add up to a lengthy notice period. Not only does the reasonable notice period tend to increase with the age of the employee, but older employees may also be long-serving employees. An older employee who has spent all or most of her working life with one employer may have upwards of 30 or even 40 years of service. At the same time, an older worker may have difficulty mitigating damages as age may be a barrier to finding comparable employment after dismissal.

It has been rare for Canadian courts to award more than 24 months' compensation as damages for wrongful dismissal. Nonetheless, there is no cap on awards for wrongful dismissal. Courts have repeatedly affirmed that there is no maximum period of reasonable notice. There have been a handful of decisions awarding a dismissed employee more than 24 months of compensation. In *Hussain*, for example, the court determined the reasonable notice period was 26 months.

In addition, discrimination based on age is prohibited by the *Alberta Human Rights Act* and human rights legislation in other jurisdictions. If age is a factor in the decision to dismiss, an employer also faces potential liability for discrimination. Human rights tribunals have not limited damages in the same way as courts, and may award any amount necessary to put a complainant back in the position she would have been if not for the discrimination. Human rights tribunals also have the power to reinstate an employee. Damages for a successful human rights complaint may be greater than damages for wrongful dismissal, and can be significantly more than 24 months' compensation. In *Cowling*, for example, the complainant was reinstated by the Alberta Human Rights Commission and awarded damages for loss of pay and benefits in the five years between termination and the date of the hearing.

Before dismissing an older or long-serving employee, it is wise to seek legal advice. Field Law can help employers determine appropriate severance offers and offer advice to minimize legal risks when dismissing an employee.

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