

Reasonable Notice Criteria in Common Law Wrongful Dismissal Cases

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Article abstract

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While most unionized workers in Canada enjoy protection against unjust discharge, less than one-third of the civilian labour force is in this advantageous position¹. At the other extreme, a small handful of business executives, sports and media personalities, and other highly skilled people are secure under written employment contracts. Statutory protection is available only to workers in Quebec, employees within the jurisdiction of the Federal government (eg. employees in banks, railways, communications, etc.), and those with at least ten years seniority in Nova Scotia. Additional protection is available for employees involved in specific activities such as providing information in government inquiries, engaging in legal union organizing drives, and exercising their rights under health and safety, employment standards, and other statutory provisions².

For the majority of Canadians, however, the only protection against wrongful dismissal is the common law doctrine on the employment relationship³. The position taken by the courts is that where an employment relationship exists, there is an implied contract for an indefinite term. Either party may terminate the contract but the other party must be given reasonable notice that such a termination is about to take place⁴. Notice is not necessary where the contract has been frustrated (i.e. circumstances make its continuation impossible) or where the other party has violated it in some way. For example, the reasonable notice requirement is waived for the

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1 LABOUR CANADA, *Directory of Labour Organizations in Canada*, Hull Québec, Minister of Supply and Services Canada, 1981.

2 Innis CHRISTIE, *Employment Law in Canada*, Toronto, Butterworths, 1980.

3 The exception is in Québec where employees are covered by civil rather than common law.

4 David HARRIS, *Wrongful Dismissal, 2nd Ed.*, Toronto, Richard de Boo Ltd., 1980.

employer when there is evidence of gross misconduct or incompetence on the part of the employee.

Dismissal can take several forms. It may, of course, be a straightforward firing or, more subtly, a forced resignation. The implied contract may also be severed when the employer unilaterally changes the conditions of the employment contract⁵. Such constructive dismissal, as it is called, includes demotions and other changes in job duties, adjustment in the hours or location of work, and all other alterations to the employment conditions which would not reasonably be expected by the job incumbent at the time of hiring.

Although any employee may seek damages for wrongful dismissal, it is not within the power of the courts at common law to grant reinstatement to the former position. Rather, damages represent the amount of earnings (and some benefits) that would have been received by the plaintiff if he or she had been properly given reasonable notice before dismissal. Thus, having established that an employment relationship existed and that the dismissal of the plaintiff was not for just cause, the judge must determine the length of notice that would be considered reasonable under the circumstances.

The purpose of this paper is to empirically analyze the criteria that Canadian courts have used to determine the length of notice to award. Two questions are addressed. First, what is the relative importance of each factor presented in the case in assessing the length of notice? Clearly, some variables are more salient than others and some may actually have negligible weight in the decision even though they are cited as guiding criteria. Second, to what extent do these criteria collectively explain the variation in reasonable notice determined from one case to another? Although the criteria guiding the decision should theoretically account for all of the dispersion in notice periods, in reality, human decision-making is not perfect. Isolated factors may sway a few decisions and some of the variance is undoubtedly due to the idiosyncrasies of the judges themselves.

REASONABLE NOTICE CRITERIA

The judiciary has repeatedly emphasized that no specific rule exists from which reasonable notice may be determined. Every decision rests upon

⁵ David HARRIS, "Wrongful Dismissal: Issues Confronting the Employee and Management", *The Business Quarterly*, vol. 44, Summer, 1979, pp. 76-78.

the specific facts of that case⁶. However, several criteria have been acknowledged to guide the courts in their assessment of a reasonable length of termination notice.

Difficulty in Finding Alternate Employment

The fundamental philosophy underlying the principle of awarding reasonable notice is that the employee should not be thrown out suddenly and unexpectedly into the ranks of the unemployed. Rather, advanced warning should be given by the employer to provide the individual an opportunity to secure alternate and *comparable* employment and thereby reduce the probability of an interruption in earnings⁷. In *Speakman v. Calgary (City)*,⁸ the court underlined the importance of considering "...the probable facility or difficulty the employee would have in procuring other employment in the case of dismissal, having regard to the demand for persons of that profession, and the general character of the services which the engagement contemplates." So far, notice periods of up to 21 months have been awarded. However, one judge has implied that future decisions might set even longer notice periods if evidence can be brought forth that the plaintiff could never regain similar employment⁹.

Presumably, the length of notice covaries to some degree with the court's assessment of the labour market situation in the plaintiff's occupation and industry at the time of dismissal. In *Munana v. MacMillan Bloedel Ltd.*,¹⁰ the judge observed that the industry was in a recession at the time the plaintiff was dismissed and that this fact served to extend the length of notice that should reasonably have been given. The difficulty of labour market conditions has also been cited as a factor in several other wrongful dismissal decisions¹¹.

Age might be thought of as a second indicator of the plaintiff's difficulty of finding alternate employment. Certainly, age is often listed as a factor in the reasonable notice decision¹². The reason for considering the plaintiff's age is that older employees who are discharged presumably re-

6 *Bardal v. Globe & Mail Ltd.*, (1960), 24 D.L.R. (2d) 140.

7 HARRIS, *Wrongful Dismissal*, op. cit., p. 2.

8 (1908) 9 W.L.R. 264.

9 *Blakely v. Victaulic Co. of Canada Ltd.* (1979) 3 A.C.W.S. 725.

10 (1977) 2 A.C.W.S. 364.

11 For example, see: *Rocca v. International Scissor Ltd.* (1981) 7 A.C.W.S. (2d) 466; *Turner v. Canadian Admiral Corp. Ltd.* (1980) 3 A.C.W.S. (2d) 162.

12 Three such cases are: *Bardal v. Globe & Mail Ltd.*, op. cit.; *Robinson v. Canadian Acceptance Corp. Ltd.* (1974) 47 D.L.R. (3d) 417; *Smith v. Tamblyn (Alberta) Limited et al.* (1980) 23 A.R. 53.

quire more time to find work elsewhere and, consequently, should be given a longer period of notice. Of course, there are exceptions. In the case of a 70 year old New Brunswick pharmacist, alternative employment was found almost immediately¹³. Nevertheless, the general assumption is that older workers have more difficulty finding another job.

Since most cases are not heard until one or two years after the dismissal, the court has the opportunity to see how the plaintiff actually fared in the labour market. However, there are conflicting views on whether or not the individual's subsequent success in job search should be taken into consideration. One school of thought is that reasonable notice should be based upon the hypothetical conditions prevailing at the time of dismissal:

"Reasonable notice is determined as of the time of dismissal, unaffected by what may happen subsequently. Because a dismissed employee obtains alternate employment in a relatively short time is not necessarily a factor to be considered by the court in determining what would have been reasonable notice."¹⁴

This position has purportedly been applied by others¹⁵. However, in a few decisions the fact that the plaintiff secured another job soon after being discharged was apparently considered relevant to the assessment of reasonable notice¹⁶. Thus, it would be useful to test the effect of the individual's actual job search experience up to the court date on the length of notice determined by the courts to be reasonable.

Quality of the Plaintiff as an Employee

The employee's contribution to the organization is another factor that apparently governs the length of notice awarded by the courts. Notice has been extended for dismissed employees who have been successful in their job and have benefited the organization¹⁷. More commonly, however, the length of notice is reduced where the quality of the employee is acknowledged by the court to have deteriorated but not sufficiently to warrant summary dismissal. In *Housepian v. Work Wear Corp. of Canada Ltd.*,¹⁸ for example, the plaintiff would have been awarded 14 months notice except for evidence of misconduct. He was given 9 months instead. In another pro-

¹³ *Ditmars v. Ross Drug Co. Ltd.* (1971) 3 N.B.R. (2d) 139.

¹⁴ *Sweet v. The Canadian Indemnity Company* (1981) 43 N.S.R. (2d) 55.

¹⁵ *Aleniuk v. Westown Ford Sales Ltd.* (1981) 28 A.R. 473; *Gillespie v. Ontario Motor League Toronto Club* (1980) 4 A.C.W.S. (2d) 88.

¹⁶ *Hunt v. Cimco Ltd.* (1977) 2 A.R. 514.

¹⁷ *Carey v. F. Drexel Co. Ltd.* (1974) 4 W.W.R. 492.

¹⁸ (1981) 125 D.L.R. (3d) 447.

ceeding the plaintiff, a salesperson, was awarded 6 rather than 9 months because he angrily hung up the telephone on a customer¹⁹.

Job Status

The importance of the plaintiff's former job status in the organization is a determinant of the length of reasonable notice which dates back to British common law. Consistently, the courts have viewed a lengthy notice period to be an inherent part of any contract with individuals holding positions in the more senior levels of the hierarchy. In *Collins v. St. John's Publishing Co.*,²⁰ the court speculated additional rationale for this practice:

"It may seem paradoxical that the higher up the employment scale one goes the longer period of notice one is entitled to. There are probably several reasons for this. One of the principal reasons probably is that there are fewer openings for alternate employment at the top than at the bottom. Probably also a person holding a job of higher status is a person of higher qualification and entitled to greater reward for his work."

Another explanation has been that individuals with higher job status are in positions of greater risk. Longer notice periods are therefore needed to minimize the fear of job termination so that people are not discouraged from accepting or continuing employment in these higher risk offices²¹. Based upon the frequency with which length of service is cited in wrongful dismissal cases as a criterion for the length of notice, it is predicted that this variable would explain a large proportion of the variance in reasonable notice from one case to another.

A related variable is the salary of the plaintiff. Although the two factors are clearly associated, salary might explain some of the variance in reasonable notice not accounted for by a job status measure. Moreover, the plaintiff's salary is usually presented in the calculation of damages and may, coincidentally, affect the judge's determination of the length of notice to be awarded.

Length of Service

Without exception, the courts have mentioned the plaintiff's length of service with the former employer as a determinant of the length of notice to be awarded. While the rationale for the inclusion of this variable is not clearly specified in any of the decisions, two explanations might be

19 *Morrell v. Grafton-Fraser Inc.* (1981) 8 A.C.W.S. (2d) 234.

20 (1980) 27 Nfld. & P.E.I.R. 56-57.

21 *Chadburn v. Sinclair Canada Oil Company* (1966) 57 W.W.R. 477.

postulated. First, as the employee's tenure with the company increases, there is increasingly an implied permanency to the employment relationship. If, in fact, the contract with a long-service worker is terminated, the period of advance notice should be lengthened to accommodate this expectation.

Second, service is an indicator of the individual's contribution to the organization. Longer service employees are generally more experienced in their work and have had more time to add to the firm's profit picture. This explains why the courts have been reluctant to allow employers to discharge long service employees without notice even though the quality of their work has been deteriorating. For instance, in *Smith v. Dawson Memorial Hospital*,²² even though the plaintiff's work performance was poor, the court granted 6 months notice on the grounds that he had over 17 years of service with the hospital.

Other Factors

Other variables have affected the calculation of reasonable notice,²³ but the above-mentioned criteria are most often cited. Nonetheless, three hitherto unmentioned criteria might also be speculated. First, it seems that the courts have been more generous in their decisions in recent years. For example, all of the reported cases with 21-month awards have been heard in the past five years. Thus, we predict that the length of notice period has a positive correlation with the year of the court decision.

A second possibility is that women are not awarded the same decisions as men even in similar circumstances. While there is no *a priori* indication that the courts discriminate against plaintiffs on the basis of their gender, it is still worthwhile to test this theory.

Finally, it has been suggested that wrongful dismissal settlements in British Columbia and Alberta have been more generous than in other provinces²⁴. It would be interesting to see whether or not this distinction exists and, if so, if it merely reflects differences in the characteristics of the plaintiffs.

²² *Smith v. Dawson Memorial Hospital and Flood* (1979) 29 N.S.R.

²³ HARRIS, *Wrongful Dismissal*, op. cit., pp. 70-71.

²⁴ "West Leads in Dismissal Settlements", *Financial Post*, May 16, 1981, p. 24.

METHOD

Sample

The sample includes all reported or summarized Canadian common law wrongful dismissal cases between January 1960 and June 1982 in which the courts awarded reasonable notice²⁵. Harris²⁶ has warned against relying on jurisprudence prior to 1960 because decisions were often based largely on an initial determination of whether the hiring was a daily, weekly, or monthly hiring. Also, until *Bardal v. Globe & Mail Ltd.*,²⁷ most courts a limit on the maximum length of notice that could be awarded (usually six months). Thus, our data include only those cases which have followed the more recent principle that the hiring is for an indefinite term.

A total of 199 court cases provided sufficient information for the basic model²⁸. Although neither random sampling nor census methods were possible for data collection, there are grounds for assuming that the cases analyzed in the present study are representative of the population of wrongful dismissal court decisions. First, although only precedent-setting cases are typically published, a series of court decision summaries in the four western provinces — *Alberta Decisions*, *British Columbia Decisions*, *Manitoba Decisions*, and *Saskatchewan Decisions* — cover all of the relevant cases since the mid-1970's. Most of the summaries provide enough information to be included in at least the basic model. Although we did not have the advantage of a similar decision summary series for the other provinces, the four Atlantic provinces — New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island — are nevertheless well represented by several law report publications. Only Ontario is substantially under-

²⁵ Case reported or summarized from the following sources were included in the analysis provided that sufficient information was available:

All Canada Weekly Summaries

Alberta Decisions

Alberta Law Reports

Alberta Reports

Atlantic Provinces Reports

B.C. Decisions

B.C. Law Reports

B.C. Unreported Decisions

Business Law Reports

Dominion Law Reports

Manitoba Decisions

Manitoba Reports

National Reports

New Brunswick Reports

Nova Scotia Reports

Newfoundland & Prince Edward Island

Reports

Ontario Reports

Saskatchewan Decisions

Saskatchewan Reports

Western Weekly Reports

²⁶ HARRIS, *Wrongful Dismissal*, op. cit., p. 78.

²⁷ *Op. cit.*

²⁸ A list of the cases is available from the author upon request.

represented. Many of the recent (since 1977) cases from this province (and other Canadian jurisdictions) are summarized in the *All Canada Weekly Summaries*, but much of the information required for the present analysis is often excluded. Thus, the results of this investigation are representative of wrongful dismissal cases in all jurisdictions with the possible exception of Ontario.

Measures

Dependent Variable. The number of months of notice awarded by the court was coded for each case. Values ranged from 1 month to 21 months.

Independent Variables. The condition of the labour market for the plaintiff was dichotomously coded. A value of '1' indicated that the labour market in the industry or occupation was unfavourable for prompt re-employment, in the opinion of the court. A positive coefficient is predicted between labour market conditions and the number of months of notice awarded.

Quality of the plaintiff as an employee was also dichotomously coded. A value of '1' was assigned to the variable only when the court acknowledged that there was a problem with the plaintiff's conduct as an employee which would have warranted dismissal without notice had it been more severe or persistent. Mere allegation by the defendant employer that the plaintiff was a poor employee was not sufficient. We expect to find a negative coefficient with the quality of the plaintiff coded in this way.

As a measure of job status, four raters independently scored each position on a '1' to '5' scale. The four scores were then summed for each job, resulting in a scale ranging from 4 to 20. Intercorrelations among the ratings ranged from .63 to .81 and a Cronbach alpha reliability coefficient of .92 was computed. A positive association between job status and the dependent variable is hypothesized.

Salary was coded as the annual earnings (in thousands of dollars) of the plaintiff either at the time that he or she was terminated or just prior to constructive dismissal. Values were transformed to 1979 dollars using the *Average Weekly Earnings Index*²⁹. This index was employed rather than the *Consumer Price Index* because it more accurately reflects changes in in-

²⁹ STATISTICS CANADA, *Employment, Earnings and Hours, January 1981*, Ottawa, Minister of Supply and Services Canada, May 1981. All salary data were recomputed into 1979 dollars using the index of average weekly earnings from the industrial composite of larger firm data (Table 5, column 1).

comes while the latter index accounts for changes in prices. We expect that plaintiffs with higher salaries will be awarded longer notice periods.

New Job indicates whether or not the plaintiff had found a comparable position by the time the court proceedings began. This is a dichotomous variable which was coded '1' if the plaintiff had found other employment. However, a temporary job or a position substantially below that held by the plaintiff at the time of dismissal (as determined by the courts) was not sufficient evidence to indicate that a new job was found. An inverse association between New Job and the number of months of notice awarded is predicted.

Data on the length of service were coded in months. Given the judicial interest in this criterion, we hypothesize that long service employees receive significantly longer notice than newer employees.

As indicated above, it appears that the courts have been awarding longer notice periods in more recent years. Thus, a positive association between the year of the decision and the number of months awarded is predicted. The year of the decision was coded using only the last two digits of the year (eg. 80 = 1980).

We hypothesize that women receive lower wrongful dismissal awards than men, although this prediction is based solely on societal sex discrimination trends and not on any specific indications from the cases themselves. In this study, a '0' value was assigned for women; a value of '1' was assigned for men.

Since the general belief is that more generous wrongful dismissal awards are found in Alberta and British Columbia, these two provinces were assigned a value of '1' while other decisions were coded '0' for the province variable. Thus, a positive coefficient is anticipated.

Finally, we hypothesize that there is a positive association between age and the number of months of notice awarded. Age was coded in years.

RESULTS

The means, standard deviations, and zero order correlations for the variables in the basic model and for salary are presented in Table 1. An average of eight and one-half months notice was awarded in the cases available for analysis. Eighty-six percent of the plaintiffs were male with an average salary of over \$32,000 (1979 dollars) and service of over eight years. Although most of the plaintiffs held professional and managerial positions, a few people were formerly employed as bank clerks, auto mechanics, and

the like. The average job status score was 12.55 which is near the mid-point on the scale.

In 28 percent of the cases, the court acknowledged that the labour market was not favourable to the plaintiff. In 17 percent of the cases, the court commented that the quality of the plaintiff as an employee was less than satisfactory. Fifty-eight percent of the decisions in the sample were from Alberta or British Columbia.

Length of service, job status, salary, and labour market were significantly ($p < .001$) correlated in the predicted direction with the length of notice awarded. Although not included in Table 1 because of the loss of data that would result, both age ($r = .31, p < .001; n = 128$) and new job ($r = -.23, p < .01; n = 136$) also correlated significantly and in the predicted direction with the dependent variable. Analysis of the scatter-diagrams (not illustrated) supported the linearity assumption between each of the predictors and the length of notice awarded. An inordinately large grouping of cases was found at the 12 month notice period, but there was generally little evidence of either non-normality or heteroscedasticity.

Table 1 also indicates that while salary and job status are correlated ($r = .64, p < .001$), the coefficient is not large enough to conclude that they are alternate forms of the same construct. That is, the two variables have a substantial degree of independence, thereby supporting the position taken by at least one judge that the nature of the position must be examined more closely than just the salary attached to it in the determination of job status³⁰.

Another point of interest is that women have had significantly lower salaries and job statuses and were more likely to face unfavourable labour markets than men. Although the associations are not significant, it also appears that women have turned to the courts for wrongful dismissal only in more recent years and that, on average, they have received slightly lower awards than men.

The results of the multiple regression analyses are displayed in Table 2. Since considerable data loss resulted from the inclusion of salary, new job, and age, these variables were added only after an investigation of the basic model (presented in the first column of Table 2) which included the other seven predictors. As can be seen, however, only the inclusion of the salary variable caused a major adjustment to the other regression weights. Specifically, the effect of job status upon notice diminished when salary was introduced into the equation. While this is due to the bivariate intercorrela-

³⁰ *Knapp v. Baker, Lovik* (1979) 1 A.C.W.S. 139.

TABLE 1
Means, Standard Deviations, and Zero-Order Correlations

<i>Variable</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>	<i>9</i>	<i>Mean</i>	<i>SD</i>
1. Labour Market (Poor = 1)	--									.28	.45
2. Qual. of Employee (Poor = 1)	-.02	--								.17	.37
3. Job Status	.04	-.10	--							12.55	4.11
4. Length of Service (in months)	.25***	.05	.25***	--						102.63	107.17
5. Year of Decision	.05	.10	-.10	-.04	--					77.54	4.01
6. Sex (Male = 1)	-.14*	-.01	.21**	.11	-.13	--				.86	.35
7. Province (Alta./B.C. = 1)	-.03	.01	.00	-.11	-.04	-.02	--			.58	.49
8. Salary (1979 dollars)	-.03	-.24**	.64***	.22**	-.15*	.30***	.06	--		32.17	18.15
9. Notice (in months)	.25**	-.07	.51***	.55***	.05	.10	-.11	.51***	--	8.59	4.52

Note: n = 163; decimal points omitted.

* p < .05

** p < .01

*** p < .001

tion of the two variables, it is noteworthy that they both retained significant independent effects upon the dependent variable. It is also evident that while collinearity is present, it is not enough to have a negative effect upon the stability of either of these predictors.

The significance and direction of the salary and job status coefficients support our hypothesis that employees higher in the organizational hierarchy are extended longer notice periods. For example, a salary difference of \$10,000 (in 1979 dollars) would, according to the basic model with salary (column 2), account for a difference of nearly one month in the judicial award, other things being equal (i.e. $10 \times .0902 = .9$ months). A single point change in job status (on a scale ranging from 4 to 20) would increase or decrease the award by nearly one-fifth of a month.

Length of service has the highest level of statistical significance and accounts for approximately two months of reasonable notice for every ten years of service. Considering that length of service among the plaintiffs included in this analysis varied from less than one month to over 500 months, this variable is, indeed, a major ingredient in the judicial decision.

Table 2 also suggests that plaintiffs who face poor labour market conditions are awarded, on average, one and one-half months more notice than those who do not appear to be entering a difficult labour market. More recent decisions have been somewhat more generous than those in earlier years. Based upon the basic model with salary (column 2), for example, a 1980 decision would award 1.46 months more notice to the plaintiff than in the same circumstances a decade earlier.

Although a positive bivariate correlation was found between sex and length of notice, the association is negative in most of the regression equations in Table 2. In none of the calculations is the relationship significant, however. Thus, there is no support for the hypothesis that the courts have discriminated against women in wrongful dismissal cases.

Contrary to expectations, awards do not appear to be higher in Alberta or British Columbia compared with those in other provinces. In fact, both the bivariate correlation from Table 1 and the regression coefficients found in Table 2 are slightly (but significantly only in one equation) negative, thereby indicating a greater probability that awards are actually lower (in terms of months of notice) in the two western provinces.

With respect to the quality of the plaintiff as an employee, the coefficients in the regression equations are in the predicted direction but are not statistically significant. Older employees have been awarded longer periods of notice but the relationship is not particularly strong and does not reach

TABLE 2
Multiple Regression Results (Standard Errors in Parentheses)

<i>Regression Coefficients</i>	<i>Basic Model (n = 199)</i>	<i>With Salary (n = 163)</i>	<i>With Salary & New Job (n = 124)</i>	<i>With Salary & Age (n = 107)</i>
Constant	-8.9340 (4.9369)	-9.0540 (5.1038)	-5.0847 (5.6490)	-15.5237* (6.7675)
1. Labour Market (1 = poor)	1.3221* (.5632)	1.5776** (.5816)	1.8483** (.5928)	1.2454 (.6830)
2. Employee quality (1 = poor)	-.8210 (.6673)	-.6219 (.6766)	-.5337 (.7149)	-.1217 (.8171)
3 Job Status 4 = low; 20 = high)	.3728*** (.0597)	.1886* (.0794)	.1714 (.0852)	.1835 (.1009)
4. Length of Service (in months)	.0187*** (.0024)	.0165*** (.0025)	.0144*** (.0027)	.0141*** (.0029)
5. Year of Decision (eg. 80 = 1980)	.1368* (.0605)	.1457* (.0628)	.1120 (.0673)	.2199** (.0773)
6 Sex (1 = male)	.32405 (.7083)	-.7078 (.7586)	-.9170 (.8349)	-1.2811 (.9790)
7. Province (1 = Alta. & B.C.)	-.2978 (.4713)	-.7593 (.5066)	-.3022 (.5569)	-5.2361* (.6161)
8. Salary (in 000's; 1979 dollars)		.0902*** (.0184)	.0751*** (.0202)	.0935*** (.0211)
9. New Job (1 = yes)			-.7214 (.6052)	
10. Age (in years)				.0389 (.0336)
R ² _t	.46	.53	.56	.60
R ² _{adj.}	.42	.48	.49	.53
ANOVA Table				
SSR	1698.45	1768.31	1209.88	1354.96
SSE	2028.94	1541.15	946.34	900.46
df ₁	1	8	9	9
df ₂	191	154	114	97
F-ratio	22.84***	25.41***	16.19***	16.22***

Note: R²_{adj.} based upon Rozeboon formula.

* p < .05

** p < .01

*** p < .001

significance. Finally, plaintiffs who had found new jobs by the time the court heard their cases received shorter notices than those who were unable to find employment, but the strength of this association is also less than statistically significant.

Table 2 also presents information on the adjusted coefficient of determination (R^2_{adj}) — the proportion of variance in the dependent variable explained by each of the regression models. The adjustment is based upon a formula recently recommended by Rozeboom³¹ rather than the traditional and less conservative calculation made in SPSS³². As can be seen, the equations explain between 42 percent and 53 percent of the variance in reasonable notice length assessed by the courts. For social science research, these are impressively large figures. They suggest that the courts are generally quite consistent in their evaluation and application of the facts in estimating the length of notice that would be reasonable under the circumstances. Of course, not all of the predictive variables might be viewed as appropriate criteria (eg. the year of the decision). Moreover, future court decisions cannot be predicted with complete accuracy from the variables in the regression models presented in this paper. Whether the unexplained variance is a function of systematic consideration of information beyond the scope of this analysis or a result of idiosyncrasies (such as personal histories and values) of the individual members of the judiciary is not clear.

DISCUSSION

The objective of this study was to establish an empirical estimate of the relative importance of several factors in the court's award of reasonable notice. We also hoped to determine the extent to which this information collectively explained the variance in the length of notice assessed from one case to another. Based upon the wrongful dismissal cases published or summarized between January 1960 and June 1982, length of service and salary information stood out about equally as the best predictors. They were followed by job status, labour market conditions, and the year of the decision as factors considered by the courts either deliberately or incidentally.

Generally speaking, the highest awards (in terms the number of months of notice) have been decided in recent years and have been found where the plaintiff had enjoyed a long employment service, high salary, and respec-

³¹ William W. ROZEBOOM, "Estimation of Cross-Validated Multiple Correlation: A Clarification", *Psychological Bulletin*, vol. 85, no. 6, 1978, pp. 1348-1351.

³² Norman H. NIE et al., *Statistical Package for the Social Sciences (SPSS)*, New York, McGraw-Hill, 1975.

table position in the former employer's organization. Awards have also been higher where the plaintiff was able to successfully demonstrate that the market for his or her services would not offer much prospect for prompt re-employment. Although the effects of age and actual success in job search following dismissal were not statistically significant in the regression equations, they were in the predicted direction and were significant as bivariate correlations with the dependent variable. Women were awarded termination notices not significantly different from those received by men in either the bivariate or multivariate analyses and the quality of the plaintiff as an employee apparently was not a determining factor. Finally, judges in Alberta and British Columbia were not more generous in their decisions as some had believed. On the contrary, both the zero-order and regression coefficients indicate a greater probability that decisions have been larger in the other provinces, although this relationship was significant in only one of the equations. Some caution should be exercised, however, since our data underrepresent the decisions in Ontario.

With respect to the explanatory power of the regression models tested in the present study, approximately one-half of the variance in the dependent variable was accounted for. This is quite large considering that only nine predictors were used at most. It is possible that information not considered in the present study is systematically being calculated into each court decision. However, it is equally likely, based upon our review of the available court cases, that more idiosyncratic factors such as the personal characteristics and values of the judiciary are at work to create much of the remaining dispersion.

Future research could be aimed in several directions. First, it might be possible that other facts which were actually considered by the judiciary in a systematic fashion have been overlooked in this investigation. The point must be repeated, however, that the criteria included in this study are those which are most often cited. While other factors have been noted,³³ they are not mentioned consistently from one case to another.

It would be interesting to compare the results of this research with those from other jurisdictions where reasonable notice is awarded through the common law doctrine on the employment relationship. It may be that courts in other countries adhering to British common law may apply different weights to these variables or might consider different information altogether.

³³ HARRIS, *Wrongful Dismissal*, op. cit., pp. 70-71.

Lastly, we recommend an empirical reassessment of this research based upon future common law wrongful dismissal cases decided in Canada. Given the marked increase in the number of dismissed workers seeking redress through the courts recently — we found over 80 published or summarized cases decided since January 1980 — analysis of forthcoming decisions will be possible in just a few years. Overall, the present investigation takes the first step toward an interesting and potentially useful field of study.

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Les délais-congé pour renvoi et la common law

Pour les travailleurs canadiens non régis par une convention collective ni protégés par la législation fédérale ou celle du Québec et de la Nouvelle-Écosse, la protection contre un renvoi injustifié n'est possible que par le recours à la doctrine du common law en matière de respect des conditions de travail. La jurisprudence des tribunaux s'appuie sur le fait qu'il existe un contrat d'une durée indéterminée entre l'employeur et le salarié auquel on peut mettre légalement fin quand une partie donne à l'autre avis de son intention de le résilier. Un tel avis n'est pas requis quand le contrat est sans valeur ou quand l'une des parties l'a violé de quelque façon.

Le renvoi injustifié a lieu quand l'employeur congédie sommairement (c'est-à-dire sans avis) un salarié sans motifs justifiables ou qu'il modifie de façon unilatérale ses conditions de travail. Bien que les tribunaux, selon la common law, ne puissent réintégrer dans son emploi un salarié congédié, ils ont le pouvoir d'accorder des dommages-intérêts au demandeur, dommages-intérêts fondés sur les gains qu'il aurait touchés si un avis raisonnable lui avait été donné. Ainsi, une importante décision à prendre consiste dans la longueur du délai-congé qui serait raisonnable compte tenu des circonstances.

En utilisant une analyse régressive, le but de la présente enquête est de déterminer l'importance relative des critères nombreux qui ont pour objet d'orienter la décision en matière de délai-congé et de voir dans quelle mesure des critères expliquent dans l'ensemble la dispersion dans les périodes de délai-congé. Les données sont tirées de 199 jugements dans des affaires de renvoi injustifié, jugements rapportés ou résumés dans les annales judiciaires entre janvier 1960 et juin 1982. On peut considérer que cet échantillonnage donne une bonne idée de telles décisions dans toutes les provinces, sauf en Ontario où il y a sous-représentation. D'autre part, étant donné que les tribunaux du Québec jugent selon le Code civil plutôt que selon la common law on a retenu aucun jugement provenant de cette province.

Dans les affaires dont on disposait aux fins d'analyse, les tribunaux ont accordé en moyenne une période de délai-congé de huit mois et demi. Plus de 85 pour cent des demandeurs étaient des hommes dont le traitement moyen dépassait \$32,000. par année (dollars de 1979) et qui avaient au-delà de huit ans d'ancienneté dans l'entreprise. Dans 28 pour cent des affaires, le tribunal a reconnu que le marché du travail était défavorable au demandeur; dans 17 pour cent, la capacité du travail du demandeur était moins que satisfaisante. Plus de la moitié des jugements (58%) ont été rendus en Alberta et en Colombie-Britannique.

La durée du service, le statut professionnel, le traitement, les conditions du marché du travail et un nouvel emploi (le plaignant avait trouvé un autre poste au moment du débat judiciaire) ont tous eu une influence quant à la fixation de la longueur du délai-congé. Dans les équations régressives, la durée de l'emploi et le traitement étaient les variables les plus importantes dans la fixation du délai-congé, suivis du statut professionnel, de la situation du marché du travail et de l'année au cours de laquelle le jugement a été rendu. D'une façon générale, les jugements les plus favora-

bles au demandeur ont été rendus dans les dernières années et se rapportaient à des affaires où le demandeur avait bénéficié de longs états de service, d'un salaire élevé et d'un poste honorable dans l'entreprise. Les jugements étaient davantage bénéfiques au demandeur là où ce dernier pouvait prouver que le marché du travail n'offrait pas beaucoup de possibilités de dénicher un emploi ailleurs. Les juges albertains et colombiens, contrairement à ce que certains ont prétendu, ne se sont pas montrés plus larges qu'ailleurs et il n'y a pas de preuve qu'ils aient exercé de discrimination à l'égard des femmes. L'âge du demandeur et le succès obtenu dans la découverte d'un nouvel emploi à la suite du congédiement ont joué dans le sens auquel on pouvait s'attendre, mais ils n'étaient pas significatifs.

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