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WRONGFUL DISMISSAL

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Question #1

- What is the legal foundation for a wrongful dismissal claim?

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Answer #1

- The common law
  - Contract law based
  - Legal presumption of an indefinite employment period, subject to termination on reasonable notice
  - Thus, if dismissal is wrongful (without just cause) what is reasonable notice?
  - Exception – fixed term contract

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Answer #1 cont'd

- Tort law
  - Negligent misrepresentation (*Queen v. Cognos SCC, 1993*)

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Answer #1 cont'd

- Statute Law
  - Employment Standards Act (B.C.) and Canada Labour Code
    - Minimum notice periods
  - Human rights
    - Discrimination in the workplace on a prohibited ground

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Question #2

- Is the dismissal wrongful?

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Answer #2

- Five main ways employment can be terminated
  - By agreement
  - With working notice or payment in lieu thereof
  - Dismissal for cause

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Answer #2 cont'd

- Employee quits
  - With notice
  - Accepting employer's repudiatory breach of contract (constructive dismissal)
- Wrongful dismissal

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Answer #2 Cont'd

- Dismissal for cause
  - Fairness in the employee discipline/dismissal process? (warnings, escalating consequences, investigation, right to respond)
  - Illness or disability?
  - Economic difficulties?
  - Egregious conduct or incompetence?

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Answer #2 cont'd

- Constructive dismissal
  - Unilateral changes to essential nature of the job
    - Compensation
    - Modifying job duties
    - Relocation of workplace
  - Continuing to work under altered terms

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Answer #2 cont'd

- Wrongful dismissal
  - Dismissal without cause, reasonable working notice or payment in lieu thereof

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Question #3

- What damages is a wrongfully dismissed employee entitled to?

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Answer #3

- Value of the contractual entitlements during the reasonable notice period
- Notice terms in employment contract
  - S.4 ESA
  - Inequality of bargaining positions/unconscionability
  - Contra preferentum
  - Implied terms

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Question #4

- What is reasonable notice?

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Answer #4

- Back to common law (case law)
  - General guidelines
  - Prior cases with similar facts – notice tables
  - There is no formula

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Answer #4 cont'd

- Bardal v. Globe & Mail Ltd. (1960)
  - r.n. must be decided on the particular facts of each case
  - Having regard to:
    - Character of employment;
    - Length of service;
    - Age of the employee;
    - Availability of similar employment given the experience , training and qualifications of the employee

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Answer #4 cont'd

- Character of Employment
  - Specialization
  - Status and responsibility
  - Locale
  - Prevailing economic conditions
  - Industry nature and customs

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Answer #4 cont'd

- Length of service
  - Successor employers and breaks in service
  - Generally, the longer the service the longer the notice required
  - There are exceptions - inducements in hiring, relocation
  - A cap?

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Answer #4 cont'd

- Age of employee
  - Difficulty in obtaining alternative employment
  - Proximity to retirement

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Answer #4 cont'd

- Availability of similar employment
  - Fair opportunity to find other suitable employment an important factor
  - Specialization in training and work versus adaptability

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Question #5

- Are damages other than for lack of reasonable notice available?

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Answer #5

- Aggravated damages
  - Requires employer conduct during course of dismissal that is unfair or is in bad faith (Wallace v. UGG (1997,SCC))
  - Requires proof of actual damages sustained (mental distress) (Honda Canada v. Keays (2008, SCC))

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Answer #5 cont'd

- Punitive damages
  - Rarely awarded
  - Requires advertent wrongful act so malicious and outrageous as to deserve punishment
  - Requires an independent actionable wrong?

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Question #6

- What deductions are or can be made from damages?

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Answer #6

- Duty to take reasonable steps to find replacement work (mitigate)
  - Damages will be reduced for failure to mitigate
  - Amounts earned during notice period are deducted from damages
  - Offer of continued employment or re-employment
  - Employer's onus

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Answer #6 cont'd

- Statutory deductions
  - Income tax or retiring allowance
  - Employment insurance benefits
- Disability benefits
- Settlement tax strategies
  - Deduct legal costs
  - Direct RRSP contribution

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Should you hire a lawyer?

- ESA / Small Claims vs. other Forums
- Initial Consultation
- Fee Arrangements
- Limited Retainers

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Questions?

- We would be pleased to answer any questions you may have.