TERMINATION OF EMPLOYMENT

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If as Parliamentary critics would have us believe, more and more Canadians are soon to become "consumers of social services", Professor Harrison's article is indeed timely. In the following pages one aspect of the law of master and servant is explored—that of termination of employment. Looking at both the employee's position and that of the employer, the author discusses the rights and obligations of each when the employment contract has, or is about to be, terminated. Difficult aspects of this area of the law—wrongful dismissal, the defences, the bars, the appropriate period of notice, and the quantum of damages are all discussed, both in their historical context and against the social policies and pressures of today.

I. INTRODUCTION

1. Purpose

The story of the corporate executive who never takes his lunch to the office, because his job might not last until noon, may not be particularly humorous but is significant as an indication of a modern industrial phenomenon—the spread of insecurity in employment from unskilled workers to skilled employees and senior management. The labourer has always been in a precarious position, but it has been only in the past couple of decades that semi-skilled workers, professional employees and even senior executives with long records of service in so-called permanent employment have had to face the possibility of arriving at work on Monday morning to be told that their services are no longer required.

It is not surprising to find, therefore, that litigation arising from termination of employment is becoming more frequent, and plays an increasing part in the day to day advice given by legal practitioners. Indeed, the Canadian Petroleum Law Foundation considered that the subject had become topical enough to form the theme for its Midwinter Conference in December, 1970. As a member of the discussion panel at that Conference,[1] it became immediately apparent to the author that the legal problems involved in termination of employment are often presented to lawyers for advice and, further, that there is a substantial body of Canadian law on the subject. These considerations alone would justify a review of the law.

However, subsequent research has revealed a more important reason for writing on the subject. As will be seen, many of the problems involved in resolving a dispute which arises out of termination of employment turn on questions of fact. The resolution of questions of fact, of course, depends on the circumstances of each case in the light of general social and economic conditions prevailing at the time. Yet, there has been a tendency in many cases to regard the findings of fact in previous cases as binding precedent, thus treating a question of fact as one of law. For example, at one time it was considered to be a rule of law in Ontario that the maximum period of notice required to ter-

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[1] The other panelists were: G. M. Burden, Law Department, Imperial Oil Ltd.; D. O. Sabey, Q.C., of Messrs. Saucier, Jones & Co.; Dean G. H. L. Fridman, Faculty of Law, University of Alberta. I wish to thank these gentlemen for providing me with copies of the results of their research on this subject.

minate employment was six months. In truth, the question is always one of what would be reasonable in the circumstances of the particular case.[2] This tendency to overlook the underlying principles of the cases, and look only to the factual conclusion, may be arrested by a restatement of those principles.

A failure to generally appreciate the changes which have occurred in the nature of the relationship of employer and employee may also lead us to question some of the rules of law themselves. These rules, as will be seen,[3] are of ancient origin, born in days of serfdom and villeinage. In this day and age, the employee finds himself in a very different position, although still perhaps one of subservience. This change has been recognized judicially on occasions. For example, in 1905, Anglin J., said:[4]

> No doubt the rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are today. Many of those rights which arose out of the feudal system of villenage are inconsistent with modern ideas of human liberty and the inalienable freedom of citizenship.

Yet, notwithstanding such occasional enlightenment, there has been little attempt to review the whole body of law relating to termination of employment in the light of changed circumstances. It is significant that many decisions and texts still speak of the law of master and servant rather than the law of employment.[5]

The purpose of this article, then, is twofold: first, to provide a guide to the basic principles relating to the law of termination of employment by reviewing the Canadian decisions;[6] secondly, to attempt some evaluation of the validity of existing rules in modern industrial, commercial and social conditions.

2. Development of the law

Originally the relationship of master and servant arose from status or tenure of land and was not governed by contract. This was due largely to the prevailing social and economic conditions which tied service under the feudal system to the lord of the manor and also to the famous series of Statutes of Labourers commencing in 1562.[7] These Statutes treated the relationship of master and servant as one of status completely. Thus it was not until they fell into disuse[8] that a contractual relationship emerged, but even then some of the common law principles which did emerge, such as termination by notice, dismissal for cause and yearly hirings, were influenced by concepts introduced by the first Statute.

However, before passing to a consideration of these provisions, it is interesting to note that the Statute represented the early entry of the State into the field of socially protective legislation. According to its preamble the Statute was designed to relieve the "poor labourer and

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[2] *Infra*, at 265.

[3] *Infra*.

[4] *Sheppard Publishing Co.* v. *Harkins* (1905) 9 O.L.R. 504 at 507.

[5] The need for new terminology is discussed in G. H. L. Fridman, *The Modern Law of Employment* (1963) at 30-32.

[6] In accordance with my view that the prevailing social and economic conditions of the community where a dispute arises are of the utmost importance, the judicial authorities cited are almost exclusively Canadian with only occasional references to the leading English decisions.

[7] 5 Eliz. c.4.

[8] They were repealed finally in 1875 by the Conspiracy and Protection of Property Act (Imp.) 38 & 39 Vict. c.86, s. 17.

hired man" from the "great grief and burden" of existing legislation. In fact its provisions were exceedingly harsh, at least in retrospect. A large class of workers in many trades and occupations was required to serve upon the request of any person engaged in such trades.[9] A minimum term of one year was prescribed for most hirings[10] and hours of work were prescribed.[11] Wages were to be assessed by Justices of the Peace[12] with penalties imposed on both the master and servant for respectively paying and receiving *more* than the taxed amount.[13]

The sections dealing with termination of the relationship of master and servant introduced the two concepts with which we are primarily concerned—termination by notice and dismissal for cause. They provided:

> V. And be it further enacted, That no Person which shall retain any Servant, shall put away his or her said Servant, (2) and that no Person retained according to this Statute, shall depart from his Master, Mistress or Dame, before the End of his or her Term; (3) upon the Pain hereafter mentioned; (4) unless it be for some reasonable and sufficient Cause or Matter to be allowed before two Justices of Peace . . . to whom any of the Parties grieved shall complain; (5) which said Justices . . . shall have and take upon them . . . the Hearing and Ordering of the Matter betwixt the said Master or Mistress, or Dame and Servant, according to the Equity of the Cause.
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> VI. And that no such Master, Mistress or Dame, shall put away any such Servant at the End of his Term, or that any such Servant shall depart from his said Master, Mistress or Dame at the End of his Term, without one Quarter's Warning given before the End of his said Term, either by the said Master, Mistress or Dame, or Servant, the one to the other, upon the Pain hereafter ensuing.

Fines were imposed for non-compliance with these provisions.[14]

As previously mentioned, the Act fell into disuse and the concept of a contractual relationship between master and servant emerged. It is now well established that the master and servant (more accurately the employer and employee) may agree to any form of contract of service which does not involve an illegal purpose and which is not contrary to public policy, subject however to certain statutory exceptions the extent of which varies with the jurisdiction. Therefore, it is primarily to the common law that we must turn for the basic principles of the law of master and servant with which we are concerned. As the author of one work on the subject says:[15]

> The basis of our contract law is the common law, not statute, and the essentials of the law of master and servant are thus founded on the common law, for in spite of many statutes regulating the relation of master and servant, the creation and termination of that relation depends upon the free argeement of the parties, and the enforceability of agreements is in the main a matter of the common law and not of statutory regulation.

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[9] Statute of Labourers s. 4 & s. 7.

[10] *Id.* s. 3.

[11] *Id.* s. 12. And be it further enacted by the Authority aforesaid, That all Artificers and Labourers, being hired for Wages by the Day or Week, shall betwixt the Midst of the Months of *March* and *September* be and continue at their Work at or before five of the Clock in the Morning, and continue at work and not depart until betwixt seven and eight of the Clock at Night (except it be in the Time of Breakfast, Dinner or Drinking, the which Times at the most shall not exceed above two Hours and a Half in a Day, that is to say, at every Drinking one half Hour, for his Dinner one Hour, and for his Sleep when he is allowed to sleep, the which is from the Midst of *May* to the midst of *August*, Half an Hour at the most, and at every Breakfast one Half Hour:) (2) And all the said Artificers and Labourers, between the Midst of *September* and the Midst of *March*, shall be and continue at their Work from the Spring of the Day in the Morning until the Night of the same Day, except it be in Time afore appointed for Breakfast and Dinner; (3) upon Pain to lose and forfeit one Penny for every Hour's Absence, to be deducted and defaulked out of his Wages that shall so offend.

[12] *Id.* s. 15.

[13] *Id.* s. 18 & s. 19.

[14] *Id.* s. 8 & s. 9.

[15] Batt, *The Law of Master and Servant* 17 (1967).

But before turning to the common law principles relating to termination of employment, an introductory discussion of the nature of the relationship with which we are dealing is necessary as the courts frequently, although perhaps mistakenly, insist upon the presence of such a relationship before applying these principles.

3. Nature of the relationship

The essence of the relationship of master and servant is that the servant agrees to render services to or for the use of or on behalf of the master in return for a consideration. But while "[i]t is often easy to recognise a contract of service when you see it",[16] it is difficult in many cases to state wherein lies the difference between this and other relationships. Its existence is always a question of fact,[17] the determination of which in many cases involves an examination of the whole of the various elements which constitute the relationship.[18] Yet the courts repeatedly have emphasised one test in particular, the "degree of control" test, perhaps the clearest statement of which is that of Lord Porter in *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Limited.*[19] His Lordship said:[20]

> [A]mongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. . . . But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.

Apart from the difficulty of application to particular facts, the test is not satisfactory in principle, especially when applied to members of some professions.[21] Furthermore, its persistent application by the courts has tended to obscure the relevance of other considerations such as the nature of the task undertaken, the freedom of action allowed, the retention of the right to prescribe the exact work and the fact that the person in question devotes either the whole of his time to the work directed or so much thereof as the person directing the work shall require as and when directions are given.[22]

The error has been exposed occasionally. For example, in 1946, a year before the *Mersey Docks and Harbour Board Case* which emphasised the degree of control test,[23] Lord Wright had said:[24]

> In earlier cases, a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in

[16] Per Denning L.J., in *Stevenson Jordon and Harrison Ltd.* v. *Macdonald and Evans* [1952] 1 T.L.R. 101 at 111 (C.A.).

[17] *Fleuty* v. *Orr* (1906) 13 O.L.R. 59 at 61 (Div. Ct.); *Gould* v. *Minister of National Insurance* [1951] 1 K.B. 731 at 734.

[18] *City of Montreal* v. *Montreal Locomotive Works Ltd.* [1946] 3 W.W.R. 748 at 757 (P.C.).

[19] [1947] A.C. 1 (H.L.). *See also, Farthing* v. *R.* [1948] 1 D.L.R. 385 at 391 (Ex. Ct.); *Mulholland* v. *The King* [1952] 2 D.L.R. 114 at 122 (Ex. Ct.).

[20] [1947] A.C. 1 at 17.

[21] *See* the comments of Kane J.A., in *Marine Pipeline & Dredging Ltd.* v. *Canadian Fina Oil Ltd.* (1964) 48 W.W.R. 462 at 470, where he said:

> [T]he test of superintendence or control may require to be modified in relation to employees who are members of certain professions and skilled trades.

[22] *McDonald* v. *Associated Fuels Ltd.* [1954] 3 D.L.R. 775 at 777 (B.C.S.C.).

[23] *Supra*, n. 20.

[24] *Supra*, n. 18 at 756-757.

> order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. . . . Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade-union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or, in other words, by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

While this test may be no easier to apply to individual fact situations than the degree of control test, it is, with respect, a more accurate statement of the real question.

However, the courts continue to rely largely on the control test. Furthermore, while that test was formulated in cases concerned with vicarious liability for the tortious acts of servants, it has been applied to determine whether a particular relationship is that of master and servant for many other purposes. The application of workmen's compensation legislation has been held to depend on the existence of such a relationship as established by the degree of control of one party over the other.[25] The meaning of "employee" under annual holidays legislation,[26] the right of a person to rank as a preferred creditor for arrears of "salary or wages" under a company winding-up[27] and the application of a masters and servants ordinance to a claim for wages[28] have all been determined by the same process.[29]

A discussion of the validity of these uses of the test, in view of its original purpose, is beyond the author's terms of reference but its application in the context of termination of employment may be questioned.[30] First, the issues involved in an action between the parties to an employment contract are very different from those involved where the action is brought by a third party who is relying on the vicarious liability of an employer for the torts of his employee. The distinction has been phrased in this way:[31]

> The test often applied in cases in which it is sought to make a master liable for the acts of the servant is not applicable here. The question is not the same. In the one case the inquiry is as to the liability of the master for the servant's acts. In the other the inquiry is as to the existence of an implied contract to terminate the relationship only upon reasonable notice.

Secondly, the implied right to reasonable notice to terminate a contract for services, or of services, does not necessarily depend upon the presence of the technical relationship of master and servant. Although this right does not extend to a true independent contractor, there is, nevertheless, an intermediate class of cases where such a right will be

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[25] *Cassidy* v. *Blaine Lake Rural Telephone Co. Ltd.* [1933] 3 W.W.R. 641 at 645-8 (Sask. C.A.); *Suart* v. *Pennant School District* [1927] 1 W.W.R. 949 at 954 (Sask. C.A.).

[26] *Clarke* v. *Clear and May Company Ltd.* (1959) 28 W.W.R. 673 (Sask. D.C.).

[27] *Re Parker Elevator Co. Ltd.* (1916) 31 D.L.R. 123 at 129, 131 (Ont. App. Div.).

[28] *R.* v. *Pinkiert* (1905) 3 W.L.R. 89 (Dawson Police Ct.).

[29] *See also, Canadian Performing Right Society Ltd.* v. *Canadian National Exhibition Association* [1938] 2 D.L.R. 621 (Ont. S.C.), and *Canadian Performing Right Society Ltd.* v. *Ming Yee* [1943] 3 W.W.R. 268 (Alta. D.C.), where the test was applied in determining liability for infringement of copyright.

[30] For an example of the application of the test in this context, *see Bole* v. *Pelissier's Ltd.* [1930] 3 W.W.R. 510 at 516-7 (Sask. C.A.).

[31] Per Middleton J.A., in *Carter* v. *Bell & Sons* [1936] 2 D.L.R. 438 at 440 (Ont. C.A.).

implied. Thus, in implying a term requiring three months' notice of termination of a mercantile agent's contract, Middleton J.A., said:[32]

> Where a contract is made falling outside of the technical relationship of master and servant there is not necessarily this implication and the terms of the contract must be looked at to ascertain the intention of the parties. There are many cases of an intermediate nature where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied.

The decision was distinguished on the facts in the more recent case of *Keshen* v. *Lipsky Co. Ltd.*[33] where the plaintiff was carrying on other gainful employment and was earning no more than forty per cent of his gross income under his contract with the defendant. However, the existence of the intermediate category described by Middleton J.A., was not denied. Furthermore, an earlier decision had held the law of master and servant to be applicable to entitle a commission sales agent to six months' notice of termination of the contract without specifically deciding that the relationship of master and servant had been established on the facts.[34]

What these decisions would indicate is this: where the relationship of master and servant is established, or admitted, on the facts, in the absence of express agreement, a term requiring reasonable notice of termination *will* be implied[35] but where such a relationship does not exist, the same term *may* still be implied. The following description of the nature of an implied term may assist the discussion:[36]

> What is an implied contract or an implied promise of law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile.

In terms of this definition, the relationship of master and servant of itself, and with nothing more, authorizes the inference of a term that it may be terminated by reasonable notice in order to give the transaction that effect which the parties must have intended. Other relationships may contain elements which give rise to an inference that the parties must have intended them to have a particular effect. In the one case it is the relationship itself, whereas in the other all of the circumstances must be considered.

Now if this view is correct, it would seem to lead to the conclusion that in a case involving termination of employment, where the relationship of master and servant is denied by one party, the inquiry ought to be directed to the question of whether the circumstances warrant the inference of a term requiring reasonable notice, not to the degree of control which one party exercises over the other, or, for that matter, any of the other factors considered relevant to establishing the relationship of master and servant for the purposes of vicarious liability. The result in most cases will be the same regardless of which line of

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[32] *Id.*

[33] (1956) 3 D.L.R. 438 (Ont. H.C.).

[34] *Pollard* v. *Gibson* (1923) 54 O.L.R. 419 (Ont. H.C.). *Cf.* more recently, *Lowe* v. *Rutherford Thompson McRae Ltd.* (1970) 75 W.W.R. 765 (B.C.S.C.), where, in an action for wrongful dismissal by a real estate salesman, it was held to be the "intention of the parties" that the contract could be terminated at will.

[35] The subject of termination by reasonable notice is discussed *infra*, at 263 *et seq.*

[36] *State Vacuum Stores of Canada Ltd.* v. *Phillips* (1954) 12 W.W.R. 489, per Sidney Smith J.A., Robertson J.A., concurring, at 493.

inquiry is adopted, although not always.[37] However, the approach suggested is more consistent with the true nature of the problem presented.

The final matter to be mentioned in connection with the nature of the relationship of master and servant is that a dual relationship may exist between the parties to an employment contract. Hence, the relationship of landlord and tenant has been held to exist concurrently between employer and employee respectively, even though the use of the premises constituted part of the employee's remuneration, with the result that it was the employee as tenant, and not the employer as landlord, who was responsible for a claim under principles of occupier's liability.[38] But where the employee occupies the premises as a necessary part of, or for the more satisfactory performance of his duties, the whole relationship is that of master and servant.[39]

II. TERMINATION BY PERFORMANCE

1. Contracts for the life of the employee

Termination of a contract of employment by performance involves a discussion of the duration of employment. Except in the case of a contract to do a certain amount of work,[40] the criterion for the termination of the employment relationship by performance will be the expiration of the period which it covers. Obviously, the parties may specify expressly the period of employment. In such a case, any problems resulting in litigation usually will be restricted to an interpretation of the particular terms used and need not concern us further at this stage, except to point out that there is some suggestion that harsh terms will not be enforceable.[41]

One context in which this suggestion becomes particularly relevant is that of contracts for life. A series of English decisions has held that a contract for the life of the employee is valid and not terminable at the option of the employer, even by reasonable notice. In *Salt* v. *Power Plant Company Ltd.*,[42] the plaintiff was employed as secretary of the defendant company on the terms of a letter dated December 24, 1925. The letter provided that the engagement would be for a minimum of three years subject to the company's right to cancel the agreement in case of wilful default, and further:

> The company shall have the right to terminate the agreement after the expiration of the above-mentioned period by giving 6 months' notice in writing prior to the ensuing Dec. 31, and in the absence of such notice the engagement to remain in force as a permanent one.

The company gave the plaintiff six months' notice to expire on December 31, 1936. In an action for wrongful dismissal, the Court of Appeal held that, in the absence of notice to determine the employment prior to the December 31 immediately after the three year term, the plaintiff's engagement was to be for his life and there had been a breach.

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[37] It is doubtful if the question had been one of vicarious liability to a third party that the plaintiff would have been held to have been a servant in *Carter's Case, supra*, n. 31.

[38] *Couture* v. *Witney & Smythe* [1947] 2 W.W.R. 982 (Sask. C.A.).

[39] *Id.*

[40] *E.g., R.* v. *The Inhabitants of Woodhurst* (1818) 1 B. & Ald. 325; 106 E.R. 120.

[41] In *W. H. Milsted & Son Ltd.* v. *Hamp and Ross & Glendinning Ltd.* (1927) 71 Sol. Jo. 845, Eve J., held that an agreement whereby the plaintiffs employed the defendant for three years and thereafter from year to year subject to three months' notice by the plaintiffs was wholly one-sided and unenforceable.

[42] [1936] 3 All E.R. 322 (C.A.).

Greer L.J., even suggested that the plaintiff would have been entitled to damages for the loss of a life appointment should the company have gone into liquidation during the plaintiff's life.[43]

Other decisions are to the same effect[44] but it is significant that in all of those of which the author is aware, it has been the employee who is suing for damages for wrongful dismissal. Logically, if the employee is entitled to damages for breach of a contract to serve for life, so would be the employer in a situation where the employee left the employment, even after reasonable notice of his intention to do so. In other words, in the absence of express agreement for termination by notice by the employee,[45] is not a contract for the life of an employee a contract that the employer will employ the employee for his life and that the employee will serve the employer for life? One possible escape from this conclusion could be found in the suggestion already made that harsh terms will not be enforceable.[46] Perhaps a court could be persuaded that it would be harsh to subject to an action for damages an employee who had given reasonable notice of his intention to leave a life appointment. However, it would not ordinarily be harsh to deny recovery to the employer as his damages would, in any event, be restricted to the value of the departed employee's services during the period necessary to find a replacement. In view of the usual shortage of labour, this would not be expected to be very long, although it must be admitted that this would not be true of all occupations and professions. Although we are dealing with a contractual problem, it may be that the question who is in the better position to bear any loss is relevant here. In most cases the answer would be the employer.

For these reasons, it is suggested that there is no objection in principle to permitting an employee to recover damages for loss of a life appointment[47] while denying recovery to an employer where the employee terminates such a relationship by reasonable notice. It may well be that the problem is not of great practical significance in view of the opinion of Lord Keith that "it would need the clearest language to convince me that a contract of personal service was intended to be a contract for life. . . ."[48]

The little Canadian authority on the problem appears to support Lord Keith's view. In *Robinson* v. *Galt Chemical Products Ltd.*, [49] a contract whereby the plaintiff agreed to act as brokerage agent provided:

> This agreement as signed, is effective from November 1st, 1925, until such time as may be deemed expedient to have said agreement mutually dissolved by both parties concerned.

On June 3, 1931, the defendants gave notice terminating the arrangement as of August 30, 1931, but the plaintiff continued working until November 31 of that year. At trial, it was held that the agreement should be rectified by substituting the following term:

> This agreement as signed is effective from November 1, 1925, until such time as it is terminated by either party on reasonable notice.

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[43] *Id.* at 325.

[44] In *Wallis* v. *Day* (1837) 2 M. & W. 274; 150 E.R. 759, a covenant to serve for life was held to be good in law.

[45] A precedent for such an express arrangement is found in the contracts of tenured university professors under which the university as employer may dismiss the professor only for cause, but otherwise is bound to employ him for life. The professor, on the other hand, may terminate the contract by giving specified notice.

[46] *Supra*, n. 41.

[47] There would, of course, be a duty on the employee to mitigate such loss by obtaining other employment. This duty is discussed *infra*, at 284.

[48] *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129 at 139 (H.L.).

[49] [1933] O.W.N. 502 (C.A.).

The plaintiff's action was dismissed. On appeal, Riddell J.A. (Latchford C.J., concurring), held that there was no evidence to justify rectification. He continued:[50]

> But it is of no importance whether this should be the conclusion or not—the result will be the same whatever the conclusion arrived at.
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> This is a business contract; and such contracts must be interpreted in a business way; and it would be a palpable absurdity to consider such a contract as a perpetual chain on the defendant to oblige it for all time to continue the plaintiff in such work; the only reasonable way of interpreting it is to consider it as terminable on reasonable notice. . . . So that, in any view, the question simply is, Was the notice given a reasonable notice?

While this approach leans against interpreting the contract as being one for the plaintiff's life, it should be noted that the contract itself did not provide that it was to be "permanent" as was the position in the *Salt Case*.[51] Nevertheless, the view that it would be "a palpable absurdity to consider such a contract as a perpetual chain", it must be admitted, could be an obstacle to acceptance of the treatment suggested for contracts for the employee's life.

2. Other contracts for a certain term

As already mentioned in passing, the major problem involved where a contract of employment specifies a fixed duration is one of interpretation. This will depend upon an examination of the terms of each agreement so that there is little value in pursuing the matter in the abstract.

However, it is important to note that, where the term is clearly fixed, questions of termination by notice become irrelevant, in the absence of agreement. Such a contract terminates by its own terms at the expiration of the period provided for and cannot be sooner terminated by notice. Thus, in *Sinclair* v. *Canadian Ice Machine Company Ltd.*,[52] the plaintiff retired in 1946 from his position as manager of the defendant's Vancouver branch. Under a written agreement entered into between the parties, the plaintiff was to hold himself available as a consultant to the defendant, for which he would be paid $200 per month for two years, and $150 per month thereafter. The agreement also provided:

> 1. From the date of his retirement as hereinbefore provided until the tenth day of December, 1953, the Company will employ Mr. Sinclair as an engineering and general consultant . . .

The company terminated the agreement by notice dated January 30, 1951, to be effective April 30, 1951. The company having failed to establish that the agreement had been terminated for cause, the Court of Appeal held that the agreement could not be determined without the consent of the plaintiff "at any time prior to December 10, 1953."[53]

3. Contracts without fixed term

In the absence of agreement, the duration of the contract is a question of fact to be determined from all the surrounding circumstances. Generally, a hiring at a monthly salary is presumed to be a monthly hiring[54] and a hiring "at a salary of $7.50 per day" is a daily hiring

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[50] *Id.* at 505.

[51] *Supra*, n. 42.

[52] (1954) 11 W.W.R. 244. (B.C.C.A.)

[53] *Id.* per Bird J.A. at 252.

[54] *Johns* v. *Winnipeg Electric Railway Co.* [1925] 2 W.W.R. 282 (Man. C.A.).

unless the circumstances show that the parties contemplated differently.[55] Yet if a definite term be proved, there is nothing in the fact that the wages are payable weekly or monthly.[56] Conversely, where the contract provides that the salary is to be paid at a certain rate per month, and that either party has the right to terminate the hiring by giving a month's notice, the hiring is to all intents and purposes a monthly hiring although other terms refer to it being on a yearly basis.[57]

The fundamental problem involved in presuming a monthly, weekly or daily hiring, as the case may be, can be seen by asking: What does it matter anyway? If the decisions mean no more than that, *prima facie*, a month's, week's or day's notice is necessary to terminate such a contract, they are unobjectionable, although we may still ask what is the relevance of calling it a monthly, weekly or daily hiring and then saying the equivalent period of notice is necessary to terminate the relationship. But some decisions draw a distinction between the period of hiring and the period of notice necessary to terminate that hiring. In other words, they hold that even where there is what they call a monthly or weekly hiring, the period of notice required to terminate the relationship is some different period. For example, in *Payzu* v. *Hannaford*,[58] Darling J., said:[59]

> The magistrate has held that in the case of a weekly hiring, where nothing is said as to the giving of notice to terminate the employment, it is not an implied term of the contract that notice shall be given. . . . This is, in my opinion, contrary to the general rule, which is that *a reasonable notice* must be given.

So, too, in *Speakman* v. *City of Calgary*,[60] Beck J., said:[61]

> That arrangement, in my opinion, was the employment by the defendants of the plaintiff as a civil engineer, on a yearly hiring . . . which therefore was determinable on *reasonable notice*. . . .

Many of these contracts are in fact general hirings for an indefinite period with the rights and liabilities of the parties fixed by reference to monthly, weekly or daily periods. It is true that with most of them, the period of notice necessary to determine the relationship will coincide with the period by reference to which other rights and liabilities are fixed. But it must be remembered that the two periods may differ. The better approach where a question of termination is involved is to regard hirings without express terms as general hirings in which case they may be terminated by reasonable notice. As was observed in one case:[62]

> [T]he trend of judicial authority now is to treat the general hiring of persons, who are not agricultural labourers, as a hiring for an indefinite period terminable by a reasonable notice at any time.

The same approach had been adopted earlier in *Blair* v. *Mutual Supplies Ltd.*,[63] where a hiring at $250 a month payable bi-monthly for an in-

[55] *Dickenson* v. *Rural Municipality of Stonehenge* [1920] 1 W.W.R. 235 (Sask. C.A.). For an example of a hiring at a weekly salary being held to be a weekly hiring, *see Fiddes* v. *Famous Players* [1924] 4 D.L.R. 1260 (Man. C.A.).

[56] *Noble* v. *Gunn Ltd.* (1910) 16 O.W.R. 504 (Ont. S.C.).

[57] *Braden* v. *Reid & Co.* (1913) 9 D.L.R. 668 (Alta. D.C.).

[58] [1918] 2 K.B. 348.

[59] *Id.* at 249-50. Emphasis added.

[60] (1908) 9 W.L.R. 264 (Alta. F.C.).

[61] *Id.* at 265 (Sifton C.J., Scott and Harvey JJ., concurring). Emphasis added.

[62] *Havard* v. *Freeholders Oil Company Ltd.* (1952) 6 W.W.R. 413 at 420 (Sask. Q.B.). However, there are *dicta* to the effect that, where the hiring is a monthly one, a month's wages is the utmost that can be allowed. *See* Strong J., in *Guildford* v. *Anglo-French Steamship Co.* (1883) 9 S.C.R. 303 at 309.

[63] [1935] 3 W.W.R. 578 (Alta. Tr. Div.).

definite period was held to be an indefinite hiring terminable upon reasonable notice which, on the facts, was three months.

The point of emphasizing this approach is that the cases which presume a monthly, weekly or daily hiring misleadingly imply a series of individual contracts successively renewable at the end of each period for a similar period. If there were such a series of individual contracts, then logically no notice would be necessary to determine any one of them at the expiration of each successive period. But, obviously, this is not the conclusion we are supposed to reach for the decisions are clear that notice is necessary. The confusion is well illustrated by the remarks of Roach J.A., in *Lazarowicz* v. *Orenda Engines Ltd.*[64] In deciding the period of notice necessary to terminate the employment of a professional engineer after three years' service, he went to great lengths to determine whether the hiring was on a weekly basis or for an indefinite period which would entitle him to "some substantial notice of the termination of his employment."[65] Thus, the major issue, as he saw it, was the period of employment. Yet, if the views in the *Payzu Case*[66] and the *Speakman Case*[67] are correct, even if it had been a weekly hiring, the plaintiff would still have been entitled to reasonable notice, which could have been substantial on the basis of the other factors to be considered. It is interesting that, in deciding whether it was a weekly or indefinite hiring, Roach J.A., applied criteria such as the character of the work performed, the employee's position at the time he changed from his preceding employer and the availability of other employment, which are conspicuously similar to those criteria other decisions have held to be the determining factors in establishing what is reasonable notice.[68]

The way out of this confusion, it is suggested, is to regard the question as being always one of what is reasonable notice and to forget about whether it is a monthly or weekly hiring, except insofar as payment of wages on a monthly or weekly basis is one factor to be considered in determining what is reasonable.

4. Presumption of yearly hiring

The preoccupation of many decisions with the length of an indefinite hiring, rather than the period of reasonable notice, may be a hangover from the common law presumption that a hiring without term was a hiring for a year.[69] No doubt the rule can be traced to Section 3 of the Statute of Labourers[70] and was maintained thereafter by the close association of most forms of labour with agriculture. While the fact that wages were payable weekly or monthly was strong evidence that the hiring was weekly or monthly as the case may be, this was not a conclusive rebuttal of the presumption,[71] and at least one case has held that even where the services were to be paid for at a certain rate per day,

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[64] (1960) 26 D.L.R. (2d) 433 (Ont. C.A.).

[65] *Id.* at 436.

[66] *Supra*, n. 58.

[67] *Supra*, n. 60.

[68] These factors are discussed more fully, *infra*, at 265 *et seq.*

[69] *Fiddes* v. *Famous Players* [1924] 3 W.W.R. 619 at 621 (Man. C.A.).

[70] *Supra*, n. 7. *See* the comment of Osler J.A., in *Harnwell* v. *Parry Sound Lumber Co.* (1896) 24 O.A.R. at 115, where he attributes the origin of the rule to the Statute.

[71] *Vernon* v. *Findlay* [1938] 4 All E.R. 311 (K.B.D.).

the presumption operated to imply a hiring for a year.[72] The sufficiency of facts to overcome the presumption and establish a hiring for a shorter term is a question for the jury.[73]

However, the presumption has never been favoured by the Canadian Courts, although it may still apply to agricultural labourers.[74] As early as 1898, Taschereau J., said:[75]

> It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from the facts, the determination of which depends upon the circumstances of each case.

By 1927 it was established that the presumption was really "an inference of fact drawn from the circumstances prevailing in most general contracts of hire [which] is not only rebuttable, but is easily rebuttable."[76] A similar trend developed in England also.[77]

It is doubtful that these *dicta* go far enough. The presumption ought to be buried and forgotten for two reasons. First, it perpetuates the confusion already discussed between the period of employment and the length of notice required to terminate the relationship. Secondly, there is some suggestion that where the presumption does apply, no notice is necessary to terminate the contract.

An illustration of the first objection is found as recently as 1955 in *Fraser-Brace Terminal Constructors* v. *McKeen*[78] where the plaintiff's contract of employment as auditor for the defendant company for an indefinite period was found to be a hiring for a year. Yet, three months' notice was sufficient to terminate the contract.[79] This approach is impossible to rationalize with the view of at least one English case that an employee dismissed from a yearly hiring after only three months was entitled to receive his salary for the unexpired portion of the year.[80] However, this latter decision would appear to be consistent with the view of one judge that such a hiring can be terminated by reasonable notice to expire *at the end of the current year*.[81]

Yet it has been held that no notice at all is necessary to terminate a yearly hiring at the end of the year.[82] Such an approach, it is respectfully suggested, would be totally unacceptable in modern conditions, except where the parties have agreed upon a year certain from the

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[72] *Gould* v. *McCrae* (1907) 14 O.L.R. 194 (Ont. Div. Ct.).

[73] *Butler* v. *C.N.R.* [1939] 3 W.W.R. 625 at 632 (Sask. C.A.).

[74] *Havard* v. *Freeholders Oil Company Ltd.*, *supra*, n. 62 at 420.

[75] *Bain* v. *Anderson & Co.* (1898) 27 S.C.R. 481; *applied* in *Strickland* v. *North American Collieries Ltd.* [1926] 2 W.W.R. 529 (Alta. S.C.). *See also*, *Dickenson* v. *Rural Municipality of Stonehenge* [1920] 1 W.W.R. 235 (Sask. C.A.).

[76] Per Dysart J., in *Bloomfield* v. *Monarch Overall Manufacturing Co. Ltd.* [1927] 2 W.W.R. 18 at 23 (Man. K.B.).

[77] *See* the comments of Greer L.J., in *De Stempel* v. *Dunkels* [1938] 1 All E.R. 238 at 246, where he said: "I also think that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only.... Each particular case must depend upon its own circumstances."

[78] [1955] 5 D.L.R. 267 (N.B. App. Div.).

[79] See also *Bole* v. *Pelissier's Ltd.* [1930] 3. W.W.R. 510 (Sask. C.A.), where Turgeon J.A., applied the presumption of yearly hiring and then said at 515: "In such a case the length of notice to which the plaintiff is entitled, and the amount of his damages in default of proper notice, are matters which are left largely to the determination of the jury...."

[80] *Buckingham* v. *The Surrey and Hants Canal Company* (1882) 46 L.T. 885 (Q.B.). *See also*, *Vernon* v. *Findlay*, *supra*, n. 71. *Cf. Parker* v. *Beeching* [1923] 3 W.W.R. 63 (Alta. App. Div.), where Hyndman J.A. said at 65, the issue is "whether or not the hiring was a yearly one and the plaintiff entitled to a year's salary (not having received any notice before the expiration of the former year of his employment)...."

[81] Martin J.A., in *Bole* v. *Pelissier's Ltd.*, *supra*, n. 79 at 517.

[82] *Langton* v. *Carleton* (1873) 9 Ex. 57. *Cf.* Middleton J.A., in *Messer* v. *Barrett Co. Ltd.* [1927] 1 D.L.R. 284 at 286 (Ont. App. Div.).

start, but that is not the case we are dealing with. It would mean that a man hired on a yearly salary could arrive at work on the first day of his second year to be told that his job was no longer there. He would have no recourse whatsoever.

All of these difficulties are attributable to the presumption of yearly hiring which, therefore, ought to be unequivocably overruled and not merely watered down which is all that the cases have done so far, with two exceptions. In England, Lord Denning M.R., in his inimitable style, recently said:[83]

> In olden times, when England was an agricultural community, there was such a presumption; but there is no such presumption today. It has ceased to be valid in our modern industrial society.

The second exception has already been adverted to and it is the view of Thompson J., that general hirings without a fixed period are really hirings "for an indefinite period terminable by a reasonable notice at any time."[84]

5. Employees "holding over" under fixed term contracts

A problem which arises with fixed term contracts, whether they be for an agreed term or for a year under the presumption of a yearly hiring, concerns the position of the employee who continues in his employment after the expiration of this term. This will continue to occur frequently if the concept of yearly hirings is perpetuated.

The general principle appears to be that after the expiration of the fixed period, the contract will be treated as an indefinite hiring terminable upon reasonable notice. The same principle applies whether the initial period was a year by implication or was agreed upon between the parties. An illustration is found in *Parker* v. *Beeching*[85] where the plaintiff was employed by the defendant as his farm manager for a period of three years, which term expired on October 20, 1921. He continued to act, but on October 20, 1922, was discharged by notice. The original agreement had provided for three months' notice. Beck J.A. (Clarke J.A. concurring), said:[86]

> After the expiration of the three years certain, I think that in this jurisdiction it ought to be held that the hiring was for an indefinite period terminable on reasonable notice. I say in this jurisdiction, because the question of the duration of the implied hiring after the period of three years and the terms upon which it could be terminated, is one, not of law, but of fact, to be inferred from the circumstances of the parties, the nature of the employment and other such like circumstances and the general customs of the community, dependent largely upon the general social and economic conditions and customs of the country at large, making inapplicable many English decisions which are really decisions by way of inferences of fact under social and economic conditions quite different from ours.

It also appears that where there is a holding over after a fixed term and nothing is said as to salary or wages, then remuneration is to continue on the same terms as before.[87]

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[83] *Richardson* v. *Koeford* [1969] 3 All E.R. 1264 at 1266 (C.A.).

[84] *Havard* v. *Freeholders Oil Co. Ltd., supra*, n. 74 at 420 (Sask. Q.B.).

[85] [1923] 3 W.W.R. 63 (Alta. App. Div.). Other examples are *Messer* v. *Barrett Co. Ltd.* [1927] 1 D.L.R. 284 (Ont. App. Div.) and *Hague* v. *St. Boniface Hospital* [1936] 2 W.W.R. 230 (Man. K.B.).

[86] [1923] 3 W.W.R. 63 at 64.

[87] *Re Halter & Co. and Goody* (1911) 17 W.L.R. 261 (Sask.).

6. Contracts for employment "during pleasure"

The final matter to be discussed in relation to the duration of employment contracts and their consequent termination by performance or expiration of the term, is that of contracts for employment during the pleasure of the employer. The problem usually arises by virtue of statutory authority.[88] It appears to be settled that such provisions permit dismissal without notice[89] although it has been suggested recently that they do not impose a limitation upon the power of the statutory authority to contract in other terms.[90] Furthermore, a distinction has been drawn between officers and employees for the purposes of these sections.[91]

The unanswered question appears to be: if the statutory authority has the power to dismiss without notice, can the officers leave without notice? In the only case which the author has found where the argument was made it was disposed of in the following manner:[92]

> Plaintiff was hired during 'the pleasure of the council at $75 per month.' This would, I think, be a monthly hiring to last so long as it pleased defendants, and plaintiff could be dismissed at the end of any month without notice. If this is the proper construction to put on this hiring, plaintiff certainly could not leave until the end of a month, and if he should do so he would forfeit his whole month's salary. If it had been at the rate of $75 per month, a different construction might be put upon it, but where it is for a definite period, for a specific amount, he must serve the whole term before he can recover anything. This is in accordance with the general rule which applies to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum, he can recover nothing unless the work be done.

First, it should be noted that the suggestion that the council could dismiss without notice only at the end of a month is not supported by the authorities already cited.[93] But secondly, surely it would not be unreasonable to permit the officer the corresponding right of leaving at pleasure unless his contract specifically provides that he give notice of a prescribed period.

The problem does not always arise by virtue of statutory provisions. In *McGuire* v. *Wardair Canada Ltd.*,[94] the defendant company's articles of association empowered the directors, in the absence of agreement to the contrary, to terminate the services of its "officers", of whom the plaintiff was one, at any time with or without cause. Kirby J., held that the plaintiff's employment as general manager of the defendant company was distinct and apart from his appointment as director and vice-president and his services were terminated in the former capacity. In that capacity he was entitled to reasonable notice.[95]

III. TERMINATION BY NOTICE

1. In general

The general principle is that a contract of employment may be terminated by reasonable notice given by either party. Although the con-

[88] *E.g.*, The Municipal Government Act, R.S.A. 1970, c. 246, s. 81. We are not concerned here with contracts which by their terms expressly provide for termination without notice. These are discussed *infra*, at 267 *et seq.*

[89] *Dickenson* v. *Rural Municipality of Stonehenge* [1920] 1 W.W.R. 235 (Sask. C.A.); *White* v. *Town of Liverpool* (1970) 8 D.L.R. (3d) 173 (N.S.S.C.); *Irwin* v. *Blairmore* (1914) 6 W.W.R. 1032 (Alta.); *Newby* v. *Municipality of Brownlee* (1916) 10 W.W.R. 249 (Sask.).

[90] Per Laskin J.A. (Wells J.A. concurring), in *Crossman* v. *City of Peterborough* [1966] 2 O.R. 712 at 722 (Ont. C.A.).

[91] *See* the comments of Morrison J., in *Ziegler* v. *City of Victoria* [1922] 1 W.W.R. 75 at 77 (B.C.S.C.).

[92] *Sheddon* v. *City of Regina* (1907) 5 W.L.R. 436 at 439 (Sask.).

[93] *Supra*, n. 89.

[94] (1969) 71 W.W.R. 705 (Alta. Tr. Div.).

[95] *Id.* at 716-18.

cept of termination by notice was introduced by the Statute of Labourers,[96] its extension as a general rule of the law of employment is best explained on the basis of custom. In *Carter* v. *Bell & Sons,*[97] Middleton J.A., said:[98]

> In the case of master and servant there is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement. . . . This is a peculiar incident of the relationship of master and servant based largely upon custom. The master and servant when nothing is said are presumed to contract with reference to this usage and so stipulation as to notice is implied.

The policy justification for the principle was clearly expounded in *Morrison* v. *Abernethy School Board,*[99] where Lord Deas said:[100]

> The object in both classes of cases is the same, to give the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world, with, it may be a wife and family to support, and no means, either from savings or otherwise, of supporting himself or them.
>
> It is even more necessary that this rule should be applicable to the higher class of servants, such as managers and other officials of banks, insurance offices, railway companies, and many other companies and employers, than those in an inferior position, because it is much more expedient and much more common that such persons should hold their appointments during pleasure than that servants of an inferior class should do so; and there is a more clear implication in the one case than in the other that a considerable period of employment is reasonably to be expected, although not actually stipulated for.
>
> In all cases of exuberant trust it is important for the master or employer that he should be able at any moment to stop the actings and intromissions of his servant, and the higher the position of the servant the more necessary this power comes to be. But, on the other hand, the higher the position of the servant the greater is the expediency, on grounds of public policy, that he should not be discouraged from accepting and continuing in such precarious employment by the additional risk of being left at any moment without either time or means to enable him to look out for and obtain another situation.

The author would question the emphasis which this *dictum* places on the greater necessity for enforcing the rule in the case of "the higher class of servants"—the lower class of servants has the same wife and family to support and probably far less by way of savings or otherwise to support them. Yet, its underlying premise is sound. Furthermore, it is the only attempt the author has found in the cases to justify the rule on grounds of public policy, and that as long ago as 1876.

Policy aside, the principle is firmly entrenched in our common law. Indeed, the courts usually will require strong evidence that it does not apply to a particular case. Thus, in the leading Alberta case of *Chadburn* v. *Sinclair Canada Oil Company,*[101] a written contract of employment provided that either party could terminate the agreement "at any time, with or without cause." Riley J., held that this provision did not rebut the plaintiff's implied right to reasonable notice of termination.[102]

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[96] *Supra*, n. 7.

[97] [1936] 2 D.L.R. 438 (Ont. C.A.).

[98] *Id.* at 439.

[99] [1876] 3 Sess. Cas. 945.

[100] *Id.* at 950. *Approved* in *Chadburn* v. *Sinclair Canada Oil Company* (1966) 57 W.W.R. 477, per Riley J., at 483-4 (Alta. Tr. Div.).

[101] (1966) 57 W.W.R. 477 (Alta. Tr. Div.). *See also, Carter* v. *Bell & Sons* [1936] 2 D.L.R. 438 at 439 (Ont. C.A.); *Speakman* v. *City of Calgary* (1908) 9 W.L.R. 264 at 265 (Alta. S.C.).

[102] Citing *Re African Assn. Ltd. and Allen* [1910] 1 K.B. 396, where it was held that a clause giving the employers the right to terminate an engagement "at their absolute discretion" did not mean that the servant could be summarily dismissed.

2. Reasonable notice

What, then, is reasonable notice? A plaintiff's entitlement thereto is a mixed question of law and fact,[103] but what amounts to reasonable notice in any case is a question of fact alone.[104] While there can be no catalogue laid down as to what is reasonable in particular classes of cases,[105] there are, nevertheless, some factors which clearly weigh more heavily than others in this assessment. Among these are the character of the employment, the length of service of the employee, the age of the employee and the availability of similar employment, having regard to the experience, training and qualifications of the employee.[106]

It is respectfully suggested that many cases have placed far too much emphasis on the grade and character of the employment.[107] This tendency favours employees in senior positions, whereas the need may well be greater among employees in lower ranks. The problem was alluded to in the recent Alberta decision of *Wright* v. *Board of Calgary Auxiliary Hospital etc.*,[108] where the plaintiff was a fifty-five-year-old laundress who had worked at the defendant's hospital for nine years and had, in all, more than forty years' experience. At the time of her dismissal, she was supervisor of the wash-floor with the responsibility of training others and supervising their duties. In holding that she was entitled to twenty-six weeks' notice of termination of her employment, Cullen J., said:[109]

> The character of the employment is the first item that we must consider, and while the work the plaintiff was doing is a task that involves hard work and . . . may be in the nature of menial employment, it is of tremendous necessity in the operation of an auxiliary hospital, and forms an important part of the function of that hospital, with the result that persons employed there require, in order to operate properly, a considerable amount of background experience and willingness to do that type of work. There are not many jobs in that field available. *We play down, I suppose, menial work because in the past menial work was that type that used up the people who had no special qualifications, and there were many jobs available to those people, and accordingly, the law of supply and demand applied, and wages accordingly were small.* In the present case this is a specialized type of difficult work, and while it may be in the character of menial as opposed to professional, it is still an important type of employment and should be regarded as such.

His Lordship proceeded to emphasize the lack of availability of similar employment, particularly to a person fifty-five years old.

While this factor has been considered in the past,[110] it is suggested that it ought to be the determining factor. If the purpose of the rule is "to give the servant a fair opportunity of looking out for and obtaining another situation,"[111] then the character of the employment, and length of service for that matter, ought to be irrelevant, except insofar as they may indicate the likelihood of other similar employment being obtained.

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[103] *Guldford* v. *Anglo-French Steamship Co.* (1883) 9 S.C.R. 303, per Gwynne J., at 310.

[104] *Twamley* v. *Metcalfe Construction Co.* [1944] 1 W.W.R. 54 (Alta. App. Div.).

[105] *Bardal* v. *The Globe & Mail Ltd.* (1960) 24 D.L.R. (2d) 140 at 145 (Ont. H.C.); *Bole* v. *Pelissier's Ltd.* [1930] 3 W.W.R. 510 at 518 (Sask. C.A.).

[106] *Bardal* v. *The Globe & Mail Ltd.*, *supra*, n. 105 at 145.

[107] *E.g.*, *Speakman* v. *City of Calgary*, *supra*, n. 101; *Robinson* v. *Galt Chemical Products Ltd.* [1933] O.W.N. 502 (Ont. C.A.); *Bole* v. *Pelissier's Ltd.*, *supra*, n. 105.

[108] [1971] 1 W.W.R. 532 (Alta. Tr. Div.).

[109] *Id.*, at 533. Emphasis added.

[110] *Woods* v. *Miramichi Hospital* (1967) 67 D.L.R. (2d) 757 at 760 (N.B. App. Div.); *Baker* v. *Canadian Tygard Engine Co. Ltd.* (1922) 23 O.W.N. 81 (Ont. S.C.); *Bardal* v. *The Globe & Mail Ltd.* (1960) 24 D.L.R. (2d) 140 at 145 (Ont. H.C.).

[111] *Supra*, n. 100.

This approach would also permit greater weight to be given to changing social and economic conditions which the courts have already accepted as being relevant in determining what is reasonable notice.[112]

On the decisions as they stand, however, generally a month's notice is sufficient to terminate a monthly hiring,[113] and a week's notice for a weekly hiring.[114] It was at one time thought to be the rule in Ontario that six months' notice was the maximum that could be required,[115] but this has more recently been rejected.[116]

Finally, it should be noted that where reasonable notice has been given, there is no need for any reason to be given by the employer or the employee.[117]

3. Some examples

Remembering that the question is always one of fact, so that previous decisions do not in any way form a precedent, a few examples of what the courts have considered to be reasonable will illustrate the application of the factors we have been discussing. The longest period of notice the author has found in the Canadian reports was fifteen months for a vice-president and export sales manager with twenty years' experience.[118] One year has been held to be reasonable for a general company representative with eight years' service,[119] the general manager of an airline,[120] the branch manager of a farm equipment company with twenty-seven years' service[121] and the advertising manager of a newspaper with sixteen years' service.[122] Six months' notice has been alllowed the branch manager of a mortgage company,[123] an accountant,[124] a travelling salesman,[125] a laundress, [126] the manager of a drug store[127] and an engineer.[128] Three months was appropriate for the manager of a stock exchange brokerage firm,[129] an auditor for a construction company,[130] a professional engineer,[131] a mine manager[132] and a railway conductor.[133] Lesser periods of two months have been allowed a vulcanizer with only

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[112] *Duncan* v. *Cockshutt Farm Equipment Ltd.* (1956) 19 W.W.R. 554 at 557 (Man. Q.B.); *Warren* v. *Super Drug Markets Ltd.* (1965) 53 W.W.R. 25 at 35 (Sask. Q.B.); *Chadburn* v. *Sinclair Oil Company* (1966) 57 W.W.R. 477 at 486 (Alta. Tr. Div.); *Wright* v. *Board of Calgary Auxiliary Hospital etc.* [1971] 1 W.W.R. 532 at 534 (Alta. Tr. Div.).

[113] *Johns* v. *Winnipeg Electric Railway Co.* [1925] 2 W.W.R. 282 at 283 (Man. C.A.).

[114] *Fiddes* v. *Famous Players, supra,* n. 69 at 624.

[115] *Norman* v. *National Life Assurance Co. of Canada* [1938] O.W.N. 509 at 511 (Ont. H.C.).

[116] *Bardal* v. *The Globe & Mail Ltd., supra,* n. 105 at 144.

[117] *Baker* v. *The Denkera Ashanti Mining Corporation (Limited)* (1903) 20 T.L.R. 37.

[118] *Paterson* v. *Robin Hood Flour Mills Ltd.* (1969) 68 W.W.R. 446 (B.C.S.C.).

[119] *Johnston* v. *Northwood Pulp Ltd.* (1968) 70 D.L.R. (2d) 15 (Ont. H.C.).

[120] *McGuire* v. *Wardair Canada Ltd.* (1969) 71 W.W.R. 705 (Alta. Tr. Div.).

[121] *Duncan* v. *Cockshutt Farm Equipment Ltd.* (1956) 19 W.W.R. 554 (Man. Q.B.).

[122] *Bardal* v. *The Globe & Mail Ltd., supra,* n. 105.

[123] *Vos* v. *Security Trust Company Limited* (1969) 68 W.W.R. 310 (Alta. Tr. Div.).

[124] *Tracy* v. *Swansea Construction Co. Ltd.* (1964) 47 D.L.R. (2d) 295, *aff'd.* (1965) 50 D.L.R. 130 (Ont. H.C.).

[125] *Bewell* v. *Wheat City Flour Co.* (1908) 8 W.L.R. 273 (Man. C.A.).

[126] *Chadburn* v. *Sinclair Canada Oil Company* (1966) 57 W.W.R. 477 (Alta. Tr. Div.).

[127] *Warren* v. *Super Drug Markets Ltd.* (1965) 53 W.W.R. 25 (Sask. Q.B.).

[128] *Speakman* v. *City of Calgary, supra,* n. 60.

[129] *Normandin* v. *Solloway Mills & Co.* (1931) 40 O.W.N. 429 (Ont. H.C.).

[130] *Fraser-Brace Terminal Constructors* v. *McKien* [1955] 5 D.L.R. 267 (N.B. App. Div.).

[131] *Lazarowicz* v. *Orenda Engines Ltd.* (1960) 26 D.L.R. (2d) 433 (Ont. C.A.).

[132] *Blair* v. *Mutual Supplies Ltd.* [1935] 3 W.W.R. 578 (Alta. Tr. Div.).

[133] *Halliday* v. *C.P.R.* (1912) 7 D.L.R. 198 (Ont. H.C.).

four weeks' service,[134] one month for a physician[135] and two weeks for a farm labourer.[136]

4. Implied agreement and custom

An agreement as to the period of notice necessary to terminate an employment contract may be implied as, for example, when rules are posted in a factory,[137] although it may be that in such a case it is necessary to show that the rules were known to the employee. Similarly, a usage or custom may determine the requisite notice.[138]

The existence of a custom is a question of fact, not necessarily dependent upon antiquity or universality but rather upon whether it is a usage "so general and well understood in fact with reference to the business, place, and class of persons, that the parties are presumed to have made their contract with tacit reference to it, in the same way, and to the same extent, as other like persons in like cases."[139] Even then it may be defeated if it could not be sanctioned by the court.[140] However, it has been accepted that a month's notice is locally the customary notice in the Alberta coal industry.[141] It seems also to be well established that domestic servants are entitled to one month's notice, the reason being that:[142]

> the character of the service is such, by reason of the intimate relations that exist between the employer and the employee, that it might be not only advisable to put an end to the service, but it would be very inconvenient and uncomfortable if the service could not be put an end to in this way.

This particular custom has, on occasions, been held to apply also to menial servants.[143] A farm hand is a menial servant for this purpose.[144]

If the earlier suggestion that the courts ought to be more concerned with the availability of other employment is accepted, then the existence of such customs ought to be ignored, or, at least, rebuttable on the slightest evidence. It is interesting that the courts themselves have occasionally been unable to agree on what period of notice is provided for by a so-called well established custom. Thus, in one case it has been said that in the case of domestic servants, "there is a consensus that two weeks' wages is sufficient."[145] Of course, the parties may exclude the operation of a custom by agreement.[146]

5. Express agreement

The employer and employee may provide expressly for any period of notice that is to be given or may exclude the requirement of notice altogether although, as is suggested by the *Chadburn Case*,[147] clear

[134] *Mitchell* v. *Sky* [1939] 4 D.L.R. 712 (Ont. C.A.).

[135] *Deacon* v. *Crehan* [1925] 4 D.L.R. 664 (Ont. S.C.).

[136] *Adams* v. *Burns* (1925) 36 B.C.R. 217 (B.C.C.A.).

[137] *Carus* v. *Eastwood* (1875) 32 L.T. 855 (Q.B.).

[138] *Andrews* v. *Pacific Coast Coal Mines Ltd.* (1910) 13 W.L.R. 306 (B.C.C.A.).

[139] *Id.* at 308-10.

[140] *Id.*

[141] *Strickland* v. *North American Collieries Ltd.* [1926] 2 W.W.R. 529 (Alta. Tr. Div.).

[142] *Manson* v. *McKen* (1906) 4 W.L.R. 545 (N.-W.P.).

[143] *Bole* v. *Pelissier's Ltd., supra*, n. 105 at 517.

[144] *Peidl* v. *Bonas* [1931] 1 W.W.R. 225 (Sask. C.A.). *Cf. Little* v. *Laing* [1932] 1 W.W.R. 210, where a plaintiff who was employed "to operate and manage" the defendant's farm was held not be a menial servant (Sask. C.A.).

[145] *Montague* v. *G.T.P.* (1915) 8 W.W.R. 528 at 535 (Man. C.A.). *See also, Adams* v. *Burns* (1925) 36 B.C.R. 217 (B.C.C.A.) where two weeks' notice was sufficient for a farm labourer.

[146] *Burgess* v. *St. Louis* (1899) 6 Terr. L.R. 451 at 460.

[147] *Supra*, n. 101.

language will be necessary. In *Doyle* v. *Phoenix Insurance Co.*,[148] it was held that a clause providing that either party might terminate the agreement "by giving the other written notice to that effect" entitled either party to terminate the contract at a moment's notice. This is difficult to reconcile with the conclusion of the *Chadburn Case,* which, it is submitted, adopts the preferable approach.

6. Formalities of notice

A notice terminating employment need not be in writing nor take any particular form. If a month is necessary, the notice may be given at any time to terminate at the end of a month therefrom,[149] although it will be necessary to allow the full period. A notice served on April fourth to take effect on May third is not thirty days' notice.[150]

IV. TERMINATION WITHOUT NOTICE—DISMISSAL

1. In general

As previously mentioned, the Statute of Labourers[151] provided for the dismissal of a servant for cause, but only by reference to justices for a determination. In 1817, in the decision in *Spain* v. *Arnott*,[152] where a servant was dismissed for disobedience, Lord Ellenborough held that "the master might have obtained relief by applying to a magistrate; but he was not bound to pursue that course, the relation between master and servant, and the laws by which the relation is regulated, existed long before the statute."

Invariably the plea of dismissal for cause is raised by the employer by way of defence to an action by the employee for damages for wrongful termination, i.e., a claim by the employee that he was entitled to notice of termination of his employment. This gives rise to a practical consideration which, it is suggested, has not been given sufficient emphasis in the decisions. Presumably, if an employer has dismissed an employee for what he believes to be cause, he will be happy to let the matter rest at that. At least, this would seem to be indicated by the dearth of reported cases in which an employer has sought any further judicial remedy, with the exception of the enforcement of a restrictive covenant if one is contained in the original agreement.[153] In the ordinary case, the employer, having rid himself of an employee, from his point of view, justifiably, and thinking, no doubt, that that is the end of the matter, is suddenly faced with an action for damages for wrongful dismissal. In many cases, his reaction will be one of resentment and, perhaps, even hostility. This leads to the situation where, as has been said in one case, "[a]s is usually the case in actions of this type . . . the whole career of the employee during the course of the employment is gone into in painful detail, and much is sought to be made of minor matters."[154]

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[148] (1893) 25 N.S.R. 436 (N.S.C.A.).

[149] *Johns* v. *Winnipeg Electric Railway Co.* [1925] 2 W.W.R. 282 (Man. C.A.).

[150] *Pierce* v. *Board of Trustees Mylor School District* [1929] 3 D.L.R. 49 (Sask. C.A.).

[151] *Supra*, n. 7.

[152] (1817) 2 Stark. 256; 171 E.R. 638.

[153] A discussion of the enforcement of restrictive covenants and actions for damages for breach of confidence are beyond my terms of reference. For a recent comment on the latter problem, *see* Jones, *Restitution of Benefits Obtained in Breach of Another's Confidence* (1970) 86 L.Q.R. 463; Gordon, *Misuse of Confidential Information and the Employer-Employee Relationship* (1968) 15 Inst. Min. L. 133.

[154] Per Middleton J., in *Bashforth* v. *Provincial Steel Co.* (1913) 10 D.L.R. 187 (Ont. S.C.).

The point is this: in cases where dismissal for cause is raised as a defence to an action for wrongful dismissal, more consideration should be given to the fact that dismissal is a harsh penalty. The cases have occasionally recognized this,[155] but to date have extended their sympathy for the employee only to a suggestion that the employer might forego his costs of the action[156] and have even extended a discretion to the employer to take a serious view of the alleged misconduct or not as he chooses.[157] While it is clear that an employer may condone misconduct and thereby lose his right to dismiss therefor,[158] to imply that his taking a serious view of something may convert an otherwise innocuous act into a ground for dismissal is to misconceive the essential inquiry. Nevertheless, it must be admitted that it is not always easy for an employer to point to a single instance which would justify dismissal, yet he ought not to be liable to damages for wrongful dismissal.[159]

The suggested shift in emphasis, it is submitted, could be easily achieved within the framework of existing principles governing dismissal for cause. Essentially, the question is whether the conduct complained of was "inconsistent with the fulfilment of the express or implied conditions of service so as to justify dismissal."[160] As with the determination of what is reasonable notice, it is impossible to lay down any broad categories as every case must depend upon its own circumstances.[161] The question is one of fact for the jury,[162] although it is for the judge to say whether the facts are sufficient in law to warrant dismissal.[163] If the question is one of fact, then it is one of fact in all the circumstances, and it is submitted that relevant facts include the length of service of the employee and the likely consequences to him if he is dismissed without notice. In other words, as between this particular employer and employee does the act complained of justify the extreme measure of dismissal. The answer may well differ for the same conduct depending upon whether the employee has been employed for one week or one year.

2. Disclosure of grounds

Apart from the fact that his working career will be examined in minute detail and much sought to be made of trivial matters, the employee faces a further handicap. It appears to be settled that the employer need not disclose the grounds for dismissal, at least until he files his pleadings, and, furthermore, need not even know of any grounds at the time of the dismissal. The history of this rule was traced by Trant P.M., in *Goby* v. *Gordon Ironsides & Fares Co.*,[164] where he said:[165]

> In *Cousins* v. *Skinner*, 12 L.J. Ex. 347, Baron Parke said: "It would be necessary for the defendents, to justify the discharge, to show that, at the time of the discharge,

[155] *See* the comments of Trant P.M., in *Goby* v. *Gordon Ironsides & Fares Co.* (1910) 15 W.L.R. 258 at 260 (Sask. Po. Ct.); MacLennan J.A., in *McIntyre* v. *Hockin* (1889) 16 O.A.R. 498 at 501 (Ont. C.A.).

[156] *Bashford* v. *Provincial Steel Co.* (1913) 10 D.L.R. 187 at 191 (Ont. S.C.).

[157] Per MacDonald J.A., in *Edgeworth* v. *New York Central R. Co.* [1935] 4. D.L.R. 408 at 410, 415 (Ont. S.C.).

[158] Condonation is discussed *infra*, at 277 *et seq.*

[159] *See* the remarks of Galt J., in *Ross* v. *Willards Chocolates Ltd.* [1927] 2 D.L.R. 461 (Man. K.B.).

[160] Per Lamont J.A., in *Berg* v. *Cowie* (1918) 40 D.L.R. 250 at 252 (Sask. C.A.), citing *Clouston* v. *Corry* [1906] A.C. 122 (P.C.).

[161] *Bashforth* v. *Provincial Steel Co.*, *supra*, n. 156 at 190.

[162] *Guildford* v. *Anglo-French Steamship Co.*, *supra*, n. 103 at 307, 309.

[163] *McIntyre* v. *Hockin* (1889) 16 O.A.R. 498 (Ont. C.A.).

[164] (1910) 15 W.L.R. 258 (Sask. Po. Ct.).

[165] *Id.* at 260.

> they knew at least of the act of misconduct." This was in 1842, and is supported by other cases down to 1850. In this year, however, a different view began to prevail, and in *Willets* v. *Green,* 3 C. & K. 59, it was laid down that, if an employer discharges his servant, and at the time of the discharge a good cause for dismissal in fact exists, the employer is justified in discharging the servant, although, at the time of dismissal, the employer did not know of that cause. The matter was finally set at rest in 1888 by the far-reaching case of *Boston Deep Sea Co.* v. *Ansell,* 39 Ch. D. 339. In this very strong case it is emphatically laid down that improper acts previous to the dismissal and unknown at the time of dismissal yet justify the dismissal, though the acts may have occurred years upon years ago.

The principle has been affirmed by the Supreme Court of Canada as recently as 1961.[166]

While the principle may be justified on the basis that an employer ought not to be liable for damages where, if cause existed in fact, the employee is the guilty party and has, by definition, repudiated the contract by his breach, nevertheless, it would seem to aggravate the risk of an employee being subjected to a witch-hunt of his past. Perhaps the solution would be to warn juries of the special risk of trifling matters being magnified out of proportion where no ground is relied upon at the time of the dismissal. The employee would still be at a disadvantage in view of the election he is required to make as to whether he will accept or reject the dismissal with corresponding consequences to his subsequent rights.[167] Would it really cause any great injustice to the employer to revert to the previous rule? In the meantime, the employee's only protection is that the grounds of alleged justification for dismissal must be specifically pleaded[168] and full particulars given.[169]

3. What amounts to dismissal

Before proceeding to examine particular grounds justifying dismissal, we should consider what constitutes dismissal. Again, the question is one of fact with no express words or formalities necessary.[170] Thus, the dismissal may be implied from conduct as, for example, where the keys which a brewmaster held were demanded from him, the brewery stock was carried away and the plant dismantled,[171] or where a surveyor is asked for the keys to the instrument box, left unoccupied for a day by his employer's agent and then told to go and see the employer who was four miles away.[172] Being asked to resign may also amount to dismissal especially where a time limit is fixed[173] but it is otherwise where a police officer resigned after being told it would be better for him to do so, as it was established that the Board of Police Commissioners did not intend to, nor want to, discharge him.[174] So too, a unilateral change in the terms of employment, as by the employer indicating he could not pay wages through the winter,[175] or by reducing the employee from the position of general superintendent to yard foreman,[176] may amount to

[166] *Lake Ontario Portland Cement Co.* v. *Grover* (1961) 28 D.L.R. (2d) 589. *See also, Tracey* v. *Swansea Construction Co. Ltd.* (1964) 47 D.L.R. (2d) 295, *affirmed* (1965) 50 D.L.R. (2d) 130 (Ont. C.A.); *Bancroft* v. *C.P.R.* [1920] 2 W.W.R. 865 (Man. C.A.). Still more recently, *see Cyril Leonard & Co.* v. *Sims Securities Trust Ltd.* [1971] 3 All E.R. 1313 (C.A.).

[167] *See infra* at 280 *et seq.*

[168] *Messer* v. *Barrett Co. Ltd.* [1927] 1 D.L.R. 284 at 286 (Ont. App. Div.).

[169] *Scott* v. *Mewbery* (1901) 3 O.L.R. 252 (In Chambers).

[170] *Burgess* v. *St. Louis* (1899) 6 Terr. L.R. 451 at 455.

[171] *Varrelman* v. *Phoenix Brewery Co.* (1894) 3 B.C.R. 135 (B.C. Div. Ct.).

[172] *Feneron* v. *O'Keefe* (1884) 2 Man. R. 40.

[173] *Smith* v. *Campbellford Board of Education* (1917) 37 D.L.R. 506 (Ont. App. Div.).

[174] *Seel* v. *Sinking Fund Trustees of City of Winnipeg* [1943] 2 W.W.R. 371 (Man. K.B.).

[175] *Burgess* v. *St. Louis, supra,* n. 170.

[176] *Brown* v. *Canada Biscuit Co. Ltd.* [1935] 2 D.L.R. 81 (S.C.C.).

dismissal although if the change is accepted, there is a new contract.[177] Once dismissed, the dismissal is good, and the employee is entitled to quit although the employer has a change of heart.[178]

4. Disobedience and neglect of duty

While we must emphasize that the question of what sort of conduct will justify dismissal is one of fact in the circumstances of each case, we should note that, at the same time, the courts have traditionally categorized various grounds for dismissal. These categories are not exhaustive and, furthermore, many of the cases dealt with under any particular heading could have been dealt with under some other heading with the same result. It is important to remember, therefore, that the following examples are really only illustrations of the general principle.

One of the most common grounds for dismissal is disobedience. In *Laws* v. *London Chronicle (Indicator Newspapers) Limited,*[179] Lord Evershed M.R., said:[180]

> [T]he question must be—if summary dismissal is claimed to be justifiable—whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no soubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

Thus in *Youngash* v. *Saskatchewan Automobile and Gasoline Engine Co.*,[181] it was held that, where deliberate disobedience to lawful orders has been proved, it is not necessary to prove that a loss resulted therefrom in order to justify dismissal, although a *dictum* in that decision that a dismissal may be justified by "a single and trifling act of disobedience"[182] would appear to be of doubtful validity as a generalization. A narrower, and it is suggested more accurate, view is found in *Smith* v. *Mills,*[183] where it was held that wilful disobedience means a deliberate and intentional refusal to do that which the employer has directly ordered the employee to do.

It would appear that disobedience is more easily established where a specific instruction or rule has been disregarded, as, for example, where an employee was required to submit his weekly warehouse reports in the Tuesday mail and that "[n]o excuse will be accepted for nonfulfillment of this rule."[184] So too, dismissal was justified where a travelling salesman did not keep in communication with his employer and failed to travel with his trunks in spite of instructions that this was absolutely essential.[185] And in another case,[186] where a baggageman disregarded a company rule that he must "remain in the baggage car during the entire trip, except when called elsewhere to perform other duties," it

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[177] *Johnston* v. *Northwood Pulp Ltd.* (1968) 70 D.L.R. (2d) 15 (Ont. H.C.).

[178] *Michaud* v. *Stroobants* [1919] 3 W.W.R. 46 (Sask. C.A.).

[179] [1959] 1 W.L.R. 698 (C.A.).

[180] *Id.* at 700.

[181] (1911) 16 W.L.R. 268 (Sask. Tr. Div.).

[182] *Id.* at 271.

[183] (1913) 3 W.W.R. 1066 (Sask. S.C. *en banc*).

[184] *McEdwards* v. *Ogilvie Milling Co.* (1888) 5 Man. R. 77.

[185] *Braden* v. *Reid & Co.* (1913) 9 D.L.R. 668 (Alta. D.C.).

[186] *Edgeworth* v. *New York Central R. Co.* [1935] 4 D.L.R. 408 (Ont. S.C.).

was held that dismissal was justified although severe and resulting in the loss to the employee of twenty years' seniority.

Failure to carry out an order may result from neglect of duty as well as wilful disobedience. The degree of neglect which will justify dismissal was discussed in *Baster* v. *London and County Printing Works*[187] where the question was whether one act of neglect or forgetfulness by a machinist in the printing trade was sufficient to justify dismissal because damage to the extent of fifty pounds was done to the printing machine:[188]

> It was argued on behalf of the appellant that mere forgetfulness could not amount to neglect; but I think that to forget to do a thing which it is of great importance you should remember may well show such a careless regard to your master's interests as amounts to neglect. Neglect as often arises from forgetfulness as from anything else; and, if the forgetfulness is with respect to an important thing it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be good ground for dismissal in every case. Some trivial acts of forgetfulness might not even justify a complaint or remark; but to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to fellow-servants, may be a serious neglect of duty. . . . It was argued that forgetfulness is not neglect unless it is habitual; but how can any rule be laid down as to how many times—once, twice, or more—a man may forget before his conduct amounts to neglect justifying dismissal? The line cannot be drawn; the question must depend upon the particular circumstances of the case.

In a British Columbia case, it was doubted that a single act could be sufficient, although of course, a series of incidents, each in itself minor, would be relevant to support a plea that the particular individual was not efficient.[189]

5. Incompetence

Closely related to neglect of duty as a ground for dismissal is incompetence. A servant hired for the performance of specified duties impliedly warrants that he is possessed of the requisite skill and, if he does not possess it, may be dismissed.[190] However, it is a warranty only that he is "reasonably competent"[191] which is not breached where he merely lacks skill in the sense that a more skilful person might have done better.[192] A fair test must be made of the employee's capacity to fulfil his duties[193] and allowance made for differences in local conditions where he is brought from another jurisdiction.[194] Mere dissatisfaction is insufficient to justify dismissal[195] even where the employer's business has lost money[196] but it is otherwise where the employee's management of a branch of the employer's undertaking results in heavy financial loss.[197]

Obviously, the degree of skill or competence required will vary with the character of the employment. In unskilled and perhaps even semi-

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[187] [1899] 1 Q.B. 901.

[188] *Id.* at 903.

[189] *Re Arbitration Act, Super-Valu Stores (B.C.) Ltd. and Retail and Drug Clerks Union* (1960) 32 W.W.R. 390 (B.C.S.C.).

[190] *Allcroft* v. *Adams* (1906) 38 S.C.R. 365.

[191] *Grove* v. *Domville* (1877) 17 N.B.R. 48 at 52 (N.B.S.C.).

[192] *Pearson* v. *Black* (1922) 22 O.W.N. 20 at 20-1 (Ont. S.C.).

[193] *Williams* v. *Hammond* (1906) 4 W.L.R. 208 at 211 (Man.). *Affirmed* (1906) 5 W.L.R. 41.

[194] *Jeykal* v. *Nova Scotia Glass Co.* (1888) 20 N.S.R. 388 (N.S.C.A.).

[195] *Carveth* v. *Railway Asbestos Packing Co.* (1913) 9 D.L.R. 631 (Ont. S.C.).

[196] *Abbott* v. *G. M. Gest Ltd.* [1944] O.W.N. 524 (Ont. H.C.), *affirmed* [1944] O.W.N. 729.

[197] *Bashforth* v. *Provincial Steel Co.* (1913) 10 D.L.R. 187 (Ont. S.C.).

skilled occupations, there probably has to be disobedience or neglect of duty to justify dismissal.

6. Misconduct

All forms of conduct which justify dismissal of an employee are really instances of misconduct. However, the courts have traditionally considered under this heading such matters as conduct prejudicial to the employer's interests, unlawful or dishonest conduct, immoral conduct and insolence or insubordination.

The authorities require that the employee observe good faith towards his employer and even that he bestow the same care, attention and diligence as he would if the business were his own.[198] Thus, it is misconduct justifying dismissal to enter into a partnership with other parties for the purpose of carrying on the same kind of business[199] or to act as agent for a rival insurance company.[200] This particular problem frequently arises where the employee, in preparation for his impending departure to start a rival business, takes steps to promote his own business, such as soliciting the employer's customers to entrust their business to his new undertaking.[201] Two cases will illustrate the general rule. In *Canada Bonded Attorney & Legal Directory Ltd.* v. *Leonard-Parmiter Ltd.*,[202] the plaintiffs published a "List of Lawyers in Canada" which they recommended to their customers to make mercantile collections. Leonard was employed as a traveller and later became a director of the company. He and Parmiter left to form an opposition company, the defendant, which published a "Guide to Bonded Lawyers". While renewing subscriptions for the plaintiff, he canvassed support for his new proposed publication. In reply to the argument that he had faithfully discharged his duties to the plaintiff by obtaining renewals of subscriptions to the plaintiff's publication, Riddell J., said:[203]

> [I]t is true he obtained a renewal, but it was his duty to obtain that in such a way as not to prejudice its further renewal.
>
> In the present case, the defendant Leonard might very steadily and very faithfully collect and account for renewals or new business, and yet very steadily and very completely destroy the enterprise.

In the second case of *Martin* v. *Brown*,[204] the plaintiff was employed by the defendants to sell their advertising calendars and novelties. He prepared a mailing list of customers and a card-index of names. These, it was held, were the property of the defendants but a list of probable customers outside of his territory, which the plaintiff had prepared in anticipation of joining the services of a new firm, was in a different position. Mathers C.J., said:[205]

> It was not compiled for the purpose of the plaintiff's business, but for use only after he had left the defendant's employ. Its preparation involves no breach of duty on the plaintiff's part. He had a right to look ahead to the time when his engagement with the defendants would terminate, and make preparation for that event, provided only that he did not fraudulently undermine his employer by breaking the confidences reposed in him.

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[198] *Tozer* v. *Hutchison* (1869) 12 N.B.R. 548 (N.B.S.C.).

[199] *Id.*

[200] *Eastmure* v. *Canada Accident Assurance Co.* (1895) 22 O.A.R. 408 (Ont. C.A.), *affirmed*, (1895) 22 S.C.R. 691.

[201] See *supra*, n. 153.

[202] (1918) 42 D.L.R. 342 (Ont. C.A.).

[203] *Id.* at 347.

[204] (1910) 14 W.L.R. 237 (Man. K.B.).

[205] *Id.* at 245.

He was awarded damages of two hundred and fifty dollars for the destruction of this list by the defendant.

Conduct prejudicial to the employer's interests may take forms other than competition with the employer as, for example, where a manager of a commercial agency speculated in margins on the stock and grain exchange thereby becoming indebted beyond his ability to pay, a rival concern had made capital out of his being posted improperly in the stock exchange and he had refused to give up speculation.[206] Similarly, where an employee endeavoured to make his fellow employees believe that the employer had committed a criminal offence, dismissal was justified,[207] but borrowing money from the employer's customers, at least where they swore it had not affected their dealings, and even permitting the employer's samples to be seized for non-payment of rent, were insufficient. The latter could be compensated for by damages.[208]

Another common form of misconduct which may justify dismissal is employee dishonesty. In this context, it may be that the misconduct itself need not relate directly to the employment. So, in one case where an employee lied under oath about the circumstances surrounding the making of a contract, it was held that dismissal was justified by "not so much the misconduct itself as the fact he was capable of it. . . ."[209] Misuse of the employer's property for personal purposes may also justify dismissal.[210] It has been held that failure to account for money received as agent for the employer is sufficient misconduct whether due to negligence or dishonesty[211] but where an employee in charge of a fund provided by the employer and employees jointly for an annual picnic, negligently, but without any intention to misappropriate, used some of the fund for his own purposes and afterwards repaid it, the employer was not justified in dismissing him.[212] Finally, there is no wrongful dismissal of an employee hired to travel for his employers and assist their local agents in selling goods where the reason for the dismissal was the employee's receipt of a bonus from the agents for his assistance to them.[213]

The authorities appear to vary as to the degree of immoral conduct which will justify dismissal. Perhaps a distinction should be drawn between immoral conduct directly affecting the employment or fellow employees and such conduct outside the employment. Examples of the former, which were held to justify dismissal, are an employee boasting to his fellow workers of his illicit relations with his neighbour's wife,[214] a cook being unduly familiar with the waitresses in a restaurant[215] or seducing the employer's daughter.[216] However, where it does not so affect either the employment directly, or fellow employees, there are *dicta* to the effect that the misconduct must be "so grossly immoral that all reasonable men would say that he cannot be trusted."[217] A

[206] *Priestman* v. *Bradstreet* (1888) 15 O.R. 558 (C.P.D.).

[207] *McGeorge* v. *Ross* (1901) 5 Terr. L.R. 116.

[208] *McDougal* v. *Van Allen Co. Ltd.* (1909) 19 O.L.R. 351 (Ont. S.C.).

[209] *Lake Ontario Portland Cement Co.* v. *Groner* (1961) 28 D.L.R. (2d) 589, per Ritchie J. at 598 (S.C.C.).

[210] *Aspinall* v. *Mid West Collieries* [1926] 2 W.W.R. 456 (Alta. App. Div.).

[211] *Bohme* v. *G.N.R. Co.* [1917] 1 W.W.R. 1255 (B.C.C.A.).

[212] *Charlton* v. *B.C. Sugar Refinery Co. Ltd.* [1925] 1 W.W.R. 546 (B.C.C.A.).

[213] *Tebb* v. *Baird* (1912) 3 D.L.R. 161 (Ont. H.C.).

[214] *McPherson* v. *City of Toronto* (1918) 43 D.L.R. 604 (Ont. S.C.).

[215] *Chow* v. *Paragon Cafe Ltd.* [1942] 1 W.W.R. 519 (Sask. D.C.).

[216] *Wood* v. *Barker* (1909) 12 W.L.R. 225 (Sask. F.C.).

[217] *Pearce* v. *Foster* (1886) L.R. 17 Q.B. 536 at 539-40 (C.A.).

further distinction appears to be drawn between domestic and other servants, a higher moral standard being expected from the former, including those who have access freely to the household.[218]

Insolence or insubordination may also justify dismissal but it is not sufficient where in the course of a nagging, provoking interview, the employee thoughtlessly and in an angry outburst advised his employer's manager "to go chase himself" or "to take a run"[219] or where the remark is provoked by a grave reflection on the employee's capacity by the employer.[220]

It is important to consider that the employee does not contract that he never was guilty of misconduct in any previous employment. All that he is required to do when seeking employment is to tell the truth concerning himself when asked.[221]

7. Alcohol and drugs

Perhaps surprisingly, there appear to be few authorities on the degree of alcoholic intoxication necessary to justify dismissal. Again, the question is one of fact but in this particular context has been phrased as follows:[222]

> Was the plaintiff so conducting himself that it would be injurious to the interests of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master?

The answer may vary according to the type of employment[223] but where alcohol is consumed while on duty it would usually justify dismissal.[224]

The question of the degree of drug abuse which will justify dismissal would appear to be the same.[225] There is, however, this difference—the mere possession of certain restricted drugs is an offence whereas possession and consumption of alcohol are not in most circumstances. The courts may be inclined to the view that the commission of an offence, rather than the consequences flowing from the use of drugs, may be sufficient to justify dismissal.

8. Absence from work

Mere temporary absence from employment, even in the absence of an acceptable explanation, will not usually justify dismissal. Extended absence may be excused if the employee can establish a leave of absence.[226] Similarly, temporary illness will not justify dismissal provided the employee is willing to carry out his duties save for his incapacity[227] but it is otherwise where the disability is permanent. The distinction has been explained as follows:[228]

> There is no analogy between such permanent disablement and temporary sickness. The law permits the latter on the ground of common humanity to be offered as an

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[218] *Denham* v. *Patrick* (1910) 20 O.L.R. 347 (Ont. H.C.).

[219] *Goldbold* v. *Puritan Laundry Co. Ltd.* (1917) 12 O.W.N. 343 (Ont. C.A.).

[220] *Williams* v. *Hammond* (1906) 4 W.L.R. 208 (Man), *affirmed* (1906) 5 W.L.R. 41.

[221] *Grove* v. *Domville* (1877) 17 N.B.R. 48 (N.B.S.C.).

[222] *Armstrong* v. *Tyndall Quarry Co.* (1910) 16 W.L.R. 111 at 116 (Man. K.B.).

[223] *MacDonald* v. *Azar* [1948] 1 D.L.R. 854 (N.S.S.C.).

[224] *Marshall* v. *Central Ontario Railway Co.* (1897) 28 O.R. 241 (Ont. D.C.).

[225] *Cf. McDougal* v. *Van Allen Co. Ltd.* (1909) 19 O.L.R. 351 (Ont. S.C.).

[226] *Lucking* v. *Thomas* [1919] 3 W.W.R. 585 (Sask. C.A.).

[227] *Colman* v. *Naish* (1914) 28 W.L.R. 486.

[228] *Dartmouth Ferry Commission* v. *Marks* (1903) 34 S.C.R. 366 at 374-5.

> excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from work. But while releasing the permanently disabled workman from damages for the non-performance of his contract, it does not permit him to recover wages without doing work.

It seems that the courts will be quite willing to find in an employee's favour on questions of absence through illness. One employee was permitted to recover damages after he was discharged for absence through illness which had been brought on to a great extent "by his own folly" in allowing himself to become addicted to cocaine which he had started using as a catarrh cure.[229]

9. Modern relevance of older grounds

Many of the older decisions on conduct which will justify dismissal must be read in the light of modern social conditions, remembering that the question is always one of fact in the circumstances. In *Laws* v. *London Chronicle (Indicator Newspaper) Ltd.*[230] an advertising representative was summarily dismissed for refusing to obey an order given by the chairman and managing director of the defendant company. During a business meeting, her immediate superior had a dispute with the chairman and left the meeting, inviting the plaintiff to follow. She left the room although the chairman told them to stay. The Court of Appeal held that summary dismissal was not justified. Lord Evershed M.R., refused to accept the authorities cited to the Court as holding that every act of disobedience of a lawful order must entitle the employer to dismiss. After pointing out that "a contract of service is but an example of contracts in general, so that the general law of contract will be applicable,"[231] he found that the conduct did not amount to "such a deliberate disregard of the conditions of service"[232] as would justify the employer in accepting her repudiation, treating the contract as ended and summarily dismissing her.

It is suggested that this approach of treating contracts of employment as being governed by the general law of contract, so that a repudiation entitling the other party to treat the contract as ended will be necessary to justify dismissal, indicates a trend away from accepting as a matter of course the older, recognised heads of conduct justifying dismissal. Thus, in *Pepper* v. *Webb*[233] the plaintiff, a gardner, refused to carry out an order given by his employer's wife to put in certain plants and subsequently in the same day said to the employer: "I couldn't care less about your bloody greenhouse or your sodding garden." Harman and Russell L.JJ., held that this remark and his conduct on the same day were clearly repudiatory of the contract of employment. Karminski L.J., held that dismissal was justified on the ground of wilful disobedience of a lawful and reasonable order. None of their Lordships justified the dismissal on the simple ground of insolence which, it is submitted, would have been indicated by the older authorities.

If these decisions do indicate a trend towards placing more emphasis on the repudiatory aspect of the employee's conduct, then it is suggested that many of the older grounds for dismissal will lose their significance.

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[229] *McDougal* v. *Van Allen Co. Ltd.* (1909) 19 O.L.R. 351 (Ont. S.C.).

[230] [1959] 1 W.L.R. 698 (C.A.).

[231] *Id.* at 700.

[232] *Id.* at 702.

[233] [1969] 1 W.L.R. 514 (C.A.).

10. Express agreement

Express provisions that a contract of employment may be terminated by specified notice do not restrict the employer's right to dismiss without notice for cause.[234] However, sometimes the parties attempt to expressly provide for the grounds which will justify dismissal by the employer. The most common form is a provision that the employer shall be the sole judge of the sufficiency of any grounds for dismissal. Such provisions have been held to entitle the employer to dismiss the employee at any time, provided the right is exercised fairly and honestly.[235] The courts may be anxious to find that there has not been a *bona fide* exercise of such rights. Thus, it was said in one case:[236]

> If we could find a single caprice in the fact of their dismissal, it would be our duty to protect them, but it is evident that it was not so, and that they were dismissed from the employment of the company in good faith and upon reasons given by those in authority. Even if they had been injudicious, provided they were in good faith, it would be sufficient.

Such clauses may also be struck down for uncertainty as in *Hague* v. *St. Boniface Hospital,*[237] where the plaintiff's contract as a physician required him to conform with "the Moral Code by which all Catholic Hospitals are governed." He admitted having authorized a newspaper report that he thought "legalized euthanasia would be an admirable thing." The court held that the reference to the "Moral Code" was too vague to permit the adjustment of legal rights thereby.

It would appear from all these cases that there are manifest difficulties involved in any attempt to specify in advance the grounds upon which a contract of employment may be terminated, by either party, without notice. A possible solution may be to provide in the contract for the arbitration of disputes. Arbitration provisions in such contracts have been upheld,[238] provided they are a condition precedent to the plaintiff's right to sue and are not merely collateral agreements.[239] It is suggested that the inclusion of binding arbitration provisions may produce a more satisfactory result for both the employee and the employer. The resentment caused by the institution of legal proceedings may be minimized and in many cases there would be a speedier disposition of the matter. Furthermore, as the questions involved are invariably questions of fact, an arbitrator would be as competent to reach a fair result as a court.

11. Condonation

Conduct which amounts to just cause for dismissal without notice may be condoned by the employer in which case the right to dismiss is lost.[240] However, the condonation must be with full knowledge of the facts and without any concealment on the part of the employee. It is revived by subsequent misconduct.[241]

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[234] *Braden* v. *Reid & Co.* (1913) 9 D.L.R. 668 (Alta. D.C.); *Buxton* v. *Lowes* (1915) 31 W.L.R. 768 (Alta. App. Div.).

[235] *McRae* v. *Marshall* (1891) 19 S.C.R. 10.

[236] *Allman* v. *Yukon Consolidated Gold Fields Co.* (1908) 8 W.L.R. 373 at 376.

[237] [1936] 2 W.W.R. 230 (Man. K.B.).

[238] *Caven* v. *C.P.R.* [1925] 3 W.W.R. 32 (P.C.).

[239] *Griggs* v. *Billington* (1868) 27 U.C.Q.B. 520.

[240] *Deacon* v. *Crehan* [1925] 4 D.L.R. 664 (Ont. S.C.).

[241] *Lucas* v. *Premier Motors Ltd.* [1928] 4 D.L.R. 526 (Alta. App. Div.).

An election by the employer to discharge by notice waives any right to dismiss for cause.[242] However, the employer is entitled to a reasonable time to decide whether or not he will dismiss.[243]

V. TERMINATION BY EMPLOYEE

1. By notice

The general rule, that a contract of employment may be terminated by reasonable notice, applies equally to termination of the relationship by the employee. The period of notice required to end a particular employer-employee relationship, in other words, will be the same whether it is the employer or the employee who is giving the notice.

However, as a practical matter, the problem rarely arises. Indeed, with one exception, the author has not found a single Canadian case in which an employer has alleged that the employee has left without giving reasonable notice.[244] The reason presumably is that an employer is usually able to quickly replace any employee and will not be concerned to recover any damages. This has already been alluded to in relation to the fact that the grounds justifying dismissal are invariably raised by the employer as a defence to an action by the employee.[245] But it applies equally to the situation where the employee simply leaves without giving sufficient or, indeed, any notice.

2. For cause

An employee may, however, be justified in leaving his employment without notice. In such a case he will be entitled to damages for the period of reasonable notice which would have applied if the relationship had been terminated in that way. Generally, the test of what conduct on the part of the employer will justify the employee in abandoning his employment is the same as that for conduct justifying dismissal. In other words, was the employer's conduct inconsistent with the fulfilment of the express or implied conditions of service.[246] But here, it is important to remember the subservient position of the employee. Because he is bound to treat his employer with respect and obey his orders, there may be a tendency to overlook the unreasonableness of the employer's conduct in particular situations. Put another way, the courts may be too ready to consider only the apparent disobedience or insolence without analysing it in the context of the overall relationship between the parties. While the employer is entitled to respect, the employee is also entitled to decent treatment. This problem has been adverted to from time to time as, for example, in *Berg* v. *Cowie,*[247] where Lamont J.A., said:[248]

> There are many servants whose feelings are as fine and whose sensibilities are as susceptible as those of the master, and a master has no right to make the conditions of living, on the part of his servants, intolerable to a man of decent feeling.

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[242] *Chow* v. *Paragon Cafe Ltd., supra,* n. 215.

[243] *Tracey* v. *Swansea Construction Co. Ltd.* (1964) 47 D.L.R. (2d) 295 (Ont. H.C.), *affirmed* (1965) 50 D.L.R. 130 (Ont. C.A.); *McIntyre* v. *Hockin* (1889) 16 O.A.R. 498.

[244] *Clint* v. *Martin* (1909) 11 W.L.R. 27 (Dist. Ct.), where it was held that a master is not entitled to damages for insufficient notice of leaving by the servant where the servant is replaced within the period of notice which he in fact gave.

[245] *Supra,* at 268.

[246] *Berg* v. *Cowie* (1918) 40 D.L.R. 250 at 251 (Sask. C.A.).

[247] *Id.*

[248] *Id.* at 251.

But even this does not go far enough if it implies that the conditions must be intolerable before the employee is justified in leaving. The question ought to be simply, was it unreasonable to expect the employee to continue in these circumstances? However, it must be recognised that conflicts of personality will frequently occur and should not be sufficient justification for terminating the contract. In *Owen* v. *James*,[249] Wetmore, J., said:[250]

> Some men have the idea that if their employer 'looks crooked' at them they are at liberty to put an end to the most binding agreement. That is not the law. Men are human and when they get into relations such as those which existed between the plaintiff and the defendant they must bear with each other's humanities, unless they become unbearable and unreasonable. A mere expression of opinion by an employer that his hired man is not doing as much work as he ought to do, at any rate unless the remark is couched in language which a reasonable man would not submit to, is not sufficient to justify a hired man breaking his contract of hire.

There has been some suggestion, too, that the employee must give the employer an opportunity to remedy a complaint,[251] although this would appear to be inconsistent with the right of an employer to dismiss without having to give the employee an opportunity to mend his ways. Presumably, an employee will be entitled to quit if the employer insists upon his doing work which he is unfit to do. At any rate, it is established that the employer is not entitled to dismiss in such circumstances.[252]

A common cause of an employee's leaving his employment is the employer's refusal to pay wages or the full amount of wages due. Clearly, this is repudiatory of the contract and entitles the employee to leave, sue for wages due and for damages for termination without notice.[253] However, it may be otherwise where the contract expires and the employee continues in the employment knowing in advance that the business is losing money and would not be kept going without reduction of expenses and salaries.[254] But in another case, where the employee entered into a contract for eight months at a monthly rate of wages to be paid at the end of the period, with small amounts advanced as they were needed, and he left after being refused $30 which he needed because of his wife's illness, a divided court held that he was not entitled to leave.[255]

VI. EMPLOYEE'S RIGHTS AFTER TERMINATION

1. In general

One of the least satisfactory areas involved in the termination of employment is that of damages. The general rule is that the employee is restricted in his recovery to the equivalent amount of wages he would have received if the contract had been terminated by notice. This does not allow for the situation where it in fact takes him considerably longer than this period to obtain other employment and is inconsistent with the obligation he is under to mitigate his damages so that he will re-

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[249] (1899) 4 Terr. L.R. 174.

[250] *Id.* at 176.

[251] *Pratt* v. *Idsardi* (1915) 23 D.L.R. 257 (B.C.C.A.).

[252] *Michaud* v. *Stroobants*, *supra*, n. 178.

[253] *Festing* v. *Hunt* (1890) 6 Man. R. 381; *Abramoff* v. *Podratz* [1920] 2 W.W.R. 6 (Sask. C.A.); *Evans* v. *Fisher Motor Co. Ltd.* (1915) 8 O.W.N. 19 (Ont. S.C.).

[254] *Bain* v. *Anderson & Co.* (1898) 27 S.C.R. 481.

[255] *Neville* v. *MacDonald* [1917] 3 W.W.R. 240 (Sask. C.A.).

cover even less should he obtain employment within the period of reasonable notice. Furthermore, until recently, other expenses, such as the expense of relocating, appear not to have been considered in the assessment. A further difficulty is that the decisions rarely give a breakdown of the sum awarded so that it is often difficult to know just which claims have been allowed.

2. Employee's alternatives

In no circumstances will a contract of personal services be enforced by specific performance.[256] Thus, the employee is always forced to recover by way of damages, but here it seems he has an election of alternative remedies. Some cases divide the alternatives into simply two divisions dependant upon whether the employee elects to accept the breach by the employer or whether he prefers to treat the contract as still subsisting,[257] while others would divide the remedies into an action for damages for breach, an action for *indebitatus assumpsit* and an action upon a *quantum meruit*.[258]

The difficulty in extracting principles from the decisions is that rarely will all alternatives be open to a plaintiff in any particular case so that the cases do not need to discuss all the possibilities. Doing the best we can to exhaust the possible variations the position would seem to be as follows. Up to the point of termination of his employment, the employee may sue for wages accrued due, and upon a *quantum meruit* for part of any period for which the wages have not fallen due. He may also sue upon a *quantum meruit* where there is no express agreement as to payment.[259] Where the master is justified in terminating the employment, the authorities appear to be divided as to whether the employee can recover anything at all, but this will be discussed in a moment. Certainly he can recover nothing for any period after the termination. But where the termination is not justified, he may alternatively recover, in addition to wages due, damages for breach of the contract. These, as shall be seen, will usually be the wages for the period of notice which would have been required if notice had been given on the date of termination. This remedy he may pursue immediately but he may be met with a plea of mitigation which will result in a reduction in damages whether he in fact obtained other employment, or should have obtained other employment. Thus, it may in some circumstances be advantageous for the employee to wait and pursue his further alternative remedy in *indebitatus assumpsit,* relying on the doctrine of constructive service.[260] This may only apply to fixed term contracts which are terminated wrongfully before the expiration of the full term, but there seems to be no reason in principle why the time from termination to the point where notice would have expired if it had been given should not be treated as a fixed term contract for these purposes.

An election between these various alternatives has been held to bind the employee. Thus, in *Gregory* v. *Williams,*[261] the plaintiff was hired by the defendants on May 7th, 1913, for one year at a salary of $2,000

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[256] *McDonald* v. *Rose* (1870) 17 Gr. 657 (Ont. Ch. D.); *Howarth* v. *Prince George (City)* (1957) 24 W.W.R. 585 (B.C.S.C.).

[257] *Gregory* v. *Williams* (1916) 30 D.L.R. 279 (N.B.S.C.).

[258] *Doherty* v. *Vancouver Gas Co.* (1905) 1 W.L.R. 252 (B.C.S.C.).

[259] *Ness* v. *Babcock* (1913) 3 W.W.R. 1144 (Sask. S.C. *en banc*); *Slater* v. *Tunnicliffe* (1906) 4 W.L.R. 120.

[260] *Doherty* v. *Vancouver Gas Co., supra,* n. 258 at 254.

[261] (1916) 30 D.L.R. 279 (N.B.S.C.).

payable monthly. He was dismissed on December 15th and in February, 1914, he sued to recover wages for November and December, 1913, and January, 1914. He was successful in this claim for wages to December 15th. In November, 1914, he commenced the present action for damages for breach of contract. It was held that he could not pursue both remedies and was bound by the election he had made by bringing the first suit. The decision is difficult to understand. It is not clear why in the first action the plaintiff was successful in recovering wages only to the date of termination when one would have expected recovery in *indebitatus assumpsit* to the end of January, 1914. Nevertheless, it does indicate that there are circumstances in which an election of remedies may be crucial. A further example is *Hayes* v. *Harshaw*[262] where the plaintiff was again engaged for a year and was dismissed without cause on October 11th, 1912. He sued and recovered for wages for October and then commenced the present action for $225 being the balance due for the three months remaining of the one year engagement. The court held that the judgment in the plaintiff's favour in the first action being for wages due for October estopped the parties from saying that the plaintiff was not entitled to that sum *qua* wages for the month of October. Therefore, whatever the facts, there had been no wrongful dismissal in October and the plaintiff was entitled to damages for wrongful dimissal as from November 1st. Here it is to be noticed that the first action for wages did not bar a subsequent action for damages as in the *Gregory Case*[263] but the election by the employee to sue for wages in the first action bound the *employer*.

The solution, it is suggested, is to allow recovery to the date of dismissal for wages due and thereafter as damages for breach. When, then do wages become due? Here the answer will depend to a large extent on the terms of the contract so that for example, wages payable monthly accrue due at the end of each month and not before, but if the contract is for a fixed term with the wages payable only at the expiration of that term, no wages are recoverable until then.[264] This would seem to be the rule as well where a term is fixed but nothing is said as to payment.[265] However, where an employee either leaves his employment without cause, or is justifiably dismissed, during a wage period, there are *dicta* to the effect that he can recover nothing.[266] While there may be some justification for this approach where there has been a serious breach of the contract, such as by the embezzlement of the employer's money, or other criminal offenses,[267] the preferable view is that the employee can recover for wages due to the last wages period prior to that in which he is dismissed.[268] Thus, in one case it was said:[269]

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[262] (1913) 18 D.L.R. 619 (Ont. App. Div.).

[263] *Supra*, n. 261.

[264] *Mousseau* v. *Tone* (1907) 6 W.L.R. 117.

[265] *Id.* at 118-9. *See also, La Plante* v. *Kinnon* (1915) 8 W.W.R. 332 (Sask. S.C. *en banc*); *Neville* v. *MacDonald* [1917] 3 W.W.R. 240 (Sask. C.A.).

[266] *Blake* v. *Shaw* (1853) 10 U.C.Q.B. 180.

[267] *See* the remarks of Newlands J., in *Wood* v. *Barker* (1909) 12 W.L.R. 225 (Sask. F.C.).

[268] *Ord* v. *Public Utilities Commission of Mitchell* [1936] 1 D.L.R. 540 (Ont. S.C.). In *Knight* v. *Ducklow Motors Ltd.* [1926] 3 W.W.R. 684, the Saskatchewan Court of Appeal held that the master was not precluded from refusing subsequently to pay any wages from the date of the last pay day to the date of justifiable dismissal where he had offered them to the employee but they were refused.

[269] *Canada Bonded Attorney & Legal Directory Ltd.* v. *Leonard-Parmiter Ltd.* (1918) 42 D.L.R. 342 at 348 (Ont. S.C. App. Div.).

> The rule that misconduct in one part of the duty does not necessarily disentitle to remuneration has been followed in our own Courts.
> *Falsus in uno, falsus in omnibus,* is not always true. I can see no reason why [the plaintiff] is not entitled to his salary till June . . .
> He cannot have disentitled himself to previously earned wages by his conduct . . . more than if he had died then and there; and no one could say that that would be a bar to the recovery by his personal representative of the wages previously earned.

This, of course, presumes that the employee is dismissed during the wages period in which the misconduct justifying dismissal has occurred. Where the misconduct is not discovered until some time later, the position probably is that he can recover only to the end of the wages period prior to that in which the misconduct has occurred. The same principles would apply to a share of profits which has fallen due. However, neither wages,[270] nor profits,[271] will be recoverable if the contract is entire.

Where the termination is not justified, there are suggestions that the employee is entitled to wages for the period between the date of the last pay period and the date of dismissal.[272] As wages do not become due until the expiration of any wage period, it is submitted that technically such recovery is upon a *quantum meruit,* not for wages due.

Generally speaking, the performance of his work is a condition precedent to recovery of wages by the employee. However, in some situations, an employee will be able to recover wages for time absent from work, such as where he is absent through temporary illness.[273] But the servant may be absent for reasons other than illness and yet be entitled to recover his wages as, for example, where he is given permission to be absent.[274] So too, the servant is entitled to recover where he has done no work because the employer has provided him with none.[275] An employee may also be entitled to wages during his suspension.[276]

3. The measure of damages

So far we have discussed the rights of the employee to recover for wages, or upon a *quantum meruit* up to the point of termination of the employment. Where the employment has been justifiably terminated that is the end of the matter but where the termination was not justified, the employee may recover additional damages for the breach of contract. Where the contract is for a fixed term, these will amount to the unearned salary or wages for the balance of the term, less any amounts the employee is likely to earn.[277] Where, however, the contract is terminable by notice, either expressly or impliedly, the employee will generally be restricted in his recovery to the amount of wages for the period of notice.[278] The rationale for this is that the employer could at any time have terminated the contract by notice. The most that the employer would have earned would therefore have been wages for the period of notice.

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[270] *Owen* v. *James* (1899) 4 Terr. L.R. 174.

[271] *MacDonald* v. *Azar* [1948] 1 D.L.R. 854 (N.S.S.C.).

[272] *Berg* v. *Cowie* (1918) 40 D.L.R. 250 (Sask. C.A.).

[273] *Supra,* at 275.

[274] *Blain* v. *Britannia Smelting Co.* (1908) 7 W.L.R. 368 (B.C. Co. Ct.).

[275] *McPhillips* v. *I.O.O.F.* (1910) 16 O.W.R. 214.

[276] *Thompson* v. *City of Windsor* (1928) 35 O.W.N. 117.

[277] *Armstrong* v. *Tyndall Quarry Co.* (1910) 16 W.L.R. 111 (Man. K.B.).

[278] *Pierce* v. *Mylor School District* [1929] 1 W.W.R. 223 (Sask. C.A.); *Johns* v. *Winnipeg Electric Railway Co.* [1925] 2 W.W.R. 282 (Man. C.A.).

But is this good enough? It must be remembered that we are dealing with a contract and that the measure of damages for breach of contract is the loss flowing from the breach. While this will often be no greater than the wages which would have been earned during the period of notice or, hopefully, the employee will obtain other employment, in some cases there will be other losses involved. In this area, there seems to be a marked trend among recent cases to allow a sum by way of general damages to compensate for these additional losses. The fact of the matter is that there are many other "fringe benefits" apart from salary or wages which will be lost upon termination of employment. Such benefits as retirement allowances, group life insurance, and savings and bonus plans are becoming a more common feature of employee benefits. Unfortunately, many cases in which claims for the loss of these benefits have been advanced have not dealt with the assessment of damages[279] but two recent Alberta cases have discussed the matter in more detail and may well be indicative of a new approach by the courts to the assessment of damages for wrongful termination of employment.

The first is an unreported judgment of Milvain C.J., in which he said:[280]

> Now, on the question of compensation for this wrongful dismissal, after all, ignoring a lot of unnecessary tripe that has been said about it, it amounts in law to just this, that is compensation for a breach of contract. What is right and just depends on the surrounding circumstances of almost each individual case . . . In my view under the circumstances he would be entitled to one year's notice. However, in addition to the fact that he was dismissed without notice, there are other factors which are considered in assessing damages. One consideration that one takes into account is the fact that because of a dismissal he had to make a very hurried up job in disposing of his property; he had to travel around to find employment, employment of the nature he was dismissed from is not available in this Province; there is some intangible but nevertheless valuable loss in his having been deprived of the possibility of future benefits under the superannuation and pension scheme; and he has, in addition, been faced with defending allegations that his conduct was such that it was just and right on the part of his employer to terminate his employment after some nearly fourteen years' service.

So, too, in *Vos* v. *Security Trust Company Ltd.*,[281] general damages of $2,500 were awarded "arbitrary though it may be".[282]

While these approaches are to be commended in that they attempt to compensate the employee for his real loss, there is a serious theoretical problem to be resolved. The action for wrongful termination of employment is based upon an implied term in the contract that reasonable notice be given. The damage flowing from breach of that term, theoretically at least, can be no more than the wages which would have been earned during the period of notice. That is the whole basis of the implied term—that the employment may be terminated lawfully in that way with no further liability. Yet, as the fact of these decisions would indicate, this is not satisfactory from the employee's point of view and the courts are becoming more sympathetic to that view. But if general damages are to be awarded there must be limits, for otherwise there would seem to be no reason to exclude recovery for the fact that a

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[279] *E.g., Chadburn* v. *Sinclair Oil Company* (1966) 57 W.W.R. 477 (Alta. Tr. Div.).

[280] *Thurlow* v. *Alberta Government Telephones* (Unreported) Alberta Supreme Court No. 30328, March 18, 1963.

[281] (1969) 68 W.W.R. 310 (Alta. Tr. Div.).

[282] *Id.* at 314.

particular employee is unable to obtain other employment at a salary as high as that which he was earning until the employment was terminated. On the decisions as they stand, he is able to recover such difference for any time that he works between his dismissal and the expiration of the necessary period of notice, but not beyond.[283]

Sympathetic though we may be to the view that the employee should be compensated for his actual loss, it would seem to be contrary to the whole principle of termination of employment by notice. The difficulty involved not only in justifying general damages but in fixing the limits thereof would suggest that perhaps the problem is one for legislative action.[284]

4. The duty to mitigate damages

The cases clearly establish that an employee dismissed without notice is under a duty to mitigate his loss by taking other employment.[285] But here the courts have been moderately lenient towards the employee. The duty was summarized in *Van Snellenberg* v. *Cemco Electrical Manufacturing Co. Ltd.*[286] as follows:[287]

> It is not difficult to understand that when a discharged person has accepted the contract as terminated it would be unreasonable for him not to try to lessen his damages by obtaining or seeking to obtain some suitable employment. But it is correspondingly easy to understand that circumstances may also exist in which a discharged person may reasonably regard it as essential to the protection of his rights and interests that he should insist on the contract continuing and not seek other employment . . . Once he takes other employment he renders himself incapable of performing the first contract and that incapacity would disable him from claiming damages upon a subsisting contract . . . His acceptance of other employment is inconsistent with his keeping the first contract alive. But while he may have the right to keep the contract alive and to refrain from seeking other employment during that time, it must appear as a reasonable course for him to have pursued, if he later seeks damages for the full period of the contract equal to what his salary and commissions would have totalled . . . In my opinion the true test to be applied in deciding what damages the respondent suffered is not whether he used due diligence in obtaining other employment, but rather, whether, in the circumstances then existing, it was reasonable for him to refrain from seeking other employment. The latter test . . . treats as a question of fact the decision to be reached upon whether it was reasonable for him to refrain from seeking other employment.

Here, it is suggested, is an opportunity to lessen the burden on the innocent employee. If the employer is not to be liable for any greater damages than wages for the period of reasonable notice, regardless of whether the employee has in fact obtained other employment by then or not, would it be unreasonable to disregard mitigation altogether? In view of the fact that the whole basis of what we are discussing is an implied term, it would be relatively simple to treat that implied term as being one to pay a fixed amount in the nature of liquidated damages. Perhaps the way is clear in practice by treating the duty to mitigate as one of fact, as suggested in the passage cited.

5. Taxation of damages

At one time, following *British Transport Commission* v. *Gourley*,[288] it was held that damages for wrongful dismissal were to be based on

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[283] *Bardal* v. *The Globe & Mail Ltd.* (1960) 24 D.L.R. (2d) 140 (Ont. H.C.).

[284] *Infra*, at 285.

[285] *Lamberton* v. *Vancouver Temperance Hotel Co. Ltd.* (1904) 11 B.C.R. 67 (F. Ct.).

[286] [1945] 3 W.W.R. 369 (B.C.C.A.).

[287] Per O'Halloran J.A., at 374-6.

[288] [1956] A.C. 185.

net income.[289] However, applying *R.* v. *Jennings*,[290] it now appears clear that damages are to be based on gross income.[291]

VI. LEGISLATIVE DEVELOPMENTS

To conclude this survey of the law relating to termination of employment by notice and dismissal for cause, it is perhaps appropriate to make reference to some recent statutory developments in England.

In that country, the Contracts of Employment Act 1963[292] prescribes certain minimum periods of notice which cannot be limited by contractual agreement although longer periods may be agreed or, it appears, implied. Under Section 1, an employer must give at least one week's notice to an employee after his continuous employment for thirteen weeks, two weeks' after two years, four weeks' after five years, six weeks' after ten years and eight weeks' after fifteen years. An employee must give at least one week's notice after twenty-six weeks of employment. It is provided that temporary absences, lock-outs and strikes do not break continuity of employment, although the period of a strike is subtracted from the total number of weeks worked for the purposes of calculating the appropriate period of notice. A change of employer does not break continuity where the trade, business or undertaking is transferred, an Act of Parliament replaces one corporate body with another as employer, the employer dies and the personal representatives carry on the business or the employers are a partnership, personal representatives or trustees and they change.

It will be recalled that at common law, it was not necessary for the employer to assign any reason for termination of employment by notice so long as the appropriate period of notice in the circumstances was observed. Thus, he could remove employees under this procedure without further liability. This has now been changed to some extent in England by the Redundancy Payments Act 1965[293] which obliges employers to make redundancy payments to employees who lose their employment due to redundancy, being laid off or kept on short time. Contributions are made by employers to a fund maintained by the Treasury with partial rebates to employers who make payments under the Act. Although a detailed examination of its provisions is beyond the scope of this paper, its policy, and some indication of the multitude of problems of interpretation, is apparent from the following opinion of Lord Denning M.R.:[294]

> [A redundancy payment] is payable when a man of long service is dismissed. It is not unemployment benefit. It is payable even though he straightaway gets other work. It is compensation to the man for loss of his job. It must, of course, be an established job. He must have held it for at least two years. Then his compensation increases with his years of service. The longer his service, the more redundancy payment. He is entitled to it if he "is dismissed by his employer by reason of redundancy" . . . Those words are not defined in the Act. The Act only gives us a recital of cir-

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[289] *Walker* v. *Copp Clark Publishing Co.* (1962) 33 D.L.R. (2d) 338 (Ont. H.C.).

[290] [1966] S.C.R. 532.

[291] *Harte* v. *Amfab Products Ltd.* (1970) 73 W.W.R. 561 (B.C.S.C.); *Wright* v. *Board of Calgary Auxiliary Hospital etc.* [1971] 1 W.W.R. 532 (Alta. Tr. Div.).

[292] 11-12 Eliz. II, c.49, as *amended* by the Industrial Relations Act 1971, 19-20 Eliz. II, c.72.

[293] 13-14 Eliz. II, c.62. *See* Grunfeld, *The Law of Redundancy* (1971).

[294] *Hindle* v. *Percival Boats Ltd.* [1969] 1 W.L.R. 174 at 176-7 (C.A.).

> cumstances in which a man is *deemed* to be dismissed for redundancy . . . But an important provision in the present case is section 9(2)(b), which says that
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> "an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy."
>
> That is a compelling presumption. The employer has to prove that the man was *not* dismissed for redundancy. He has to prove a negative — always a difficult thing to do.

Such legislation, obviously, is aimed at providing one solution to the problem of reconciling economic progress and human security and, it is suggested, can reasonably be expected to set a pattern for future legislation in relation to termination of employment. In the Canadian context, this view is supported by the Freedman Report on the introduction of railway "run-throughs" resulting in the redundancy of many employees.[295] The Report found that an obligation rested on the company in that case to take reasonable steps towards minimizing the adverse effects which a "run-through" might have upon its employees. That obligation, it found, had its root in the principle that when a technological change is introduced the cost of reasonable proposals to protect employees from its adverse consequences was a proper charge against its benefits and savings.

More recently, the controversial Industrial Relations Act 1971[296] has introduced extensive provisions dealing with the rights of an employee upon termination of his employment. A detailed examination of this Act is beyond the scope of this article[297] but it is to be noted that several provisions have obviously been included in an attempt to ease the difficulties discussed in this article, which are faced by an employee in bringing an action for damages for breach of contract. Broadly speaking, unjustifiable dismissal constitutes an "unfair industrial practice"[298] entitling the employee to bring a complaint before an industrial tribunal which may award compensation or, where it "considers that it would be practicable, and in accordance with equity, for the complainant to be reengaged by the employer," it may recommend reinstatement.[299] If this recommendation is not accepted, then compensation is to be awarded. Compensation shall be "such amount as the . . . tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party. . . ."[300]

VII. CONCLUSION

What these legislative developments indicate is, it is suggested, a trend towards the re-establishment of the relationship of employer and employee as one of status "created by Acts of Parliament laying down precisely what obligations shall be deemed to exist between every employer and every employee, and putting it beyond their powers to arrange their own terms of service."[301] True, it is certainly a status far different from that which the employee found himself in under the Statute of Labourers,[302] but nevertheless one which is largely independent

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[295] *Report of Industrial Enquiry Commission on Canadian National Railways "Run-Throughs"*, Queen's Printer, Ottawa, November, 1965.

[296] 19-20 Eliz. II, c.72.

[297] *See* Clark, *Remedies for Unjust Dismissal, Proposals for Legislation* (1970).

[298] 19-20 Eliz. II, c.72, s.22-32.

[299] *Id.* s. 106.

[300] *Id.* s. 116.

[301] Batt, *supra*, n. 15 at 27.

[302] *Supra*, n. 7.

of the common law. As we have seen, there are several aspects of the common law rules relating to termination of employment which are not satisfactory in modern conditions. It is inevitable that we will see in this country statutory developments, if not identical to, at least based upon the underlying philosophy of those which have recently been enacted in England.