Termination of Employment in England and Canada

by

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Abstract

This paper provides an introduction to the principal legal regimes relevant to dismissal in England for a Canadian audience, and vice versa. It examines the law on termination of employment in England and Canada, including both common law and legislation and in respect of both unionised and non-unionised workplaces, and assesses the employment protection offered under those regimes. It argues that, in England, where the common law of wrongful dismissal and the unfair dismissal statute have interacted, the result has been to limit protection for both unionised and non-unionised employees. In Canada, more limited statutory regulation of dismissal has coincided with a more protective development of the law of wrongful dismissal, and interaction with statutory intervention, in the form of minimum notice periods, has operated to increase, rather than limit, employment protection. Unionised employees in Canada benefit from a wholly separate regime for dealing with dismissal disputes.
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1. Introduction

Labour and employment law find their roots in normative considerations derived from the social context of the employment relationship. As Otto Kahn-Freund famously observed:

[T]he relation between an employer and an isolated employee is typically a relation between a bearer of power and one who is not a bearer of power…. The main object of labour law has always been… to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.\(^1\)

On Kahn-Freund’s view, labour and employment law seek to temper the power imbalance in the employment relationship by conferring rights on employees, and by imposing duties on, or limiting powers of, employers. Brian Langille and Patrick Macklem argued that this instrumental conception of labour law is not only an animating objective for this area of law, but also one of its essential qualities.\(^2\) Having observed that labour law does not have self-evident internal cohesion justifying its existence as a discipline, or even evident boundaries that prevent it from bleeding into other areas of law, they set out the following definition:

Labour law is a story of the struggle for justice for workers who confront th[e] background set of private legal entitlements that simultaneously privileges freedom of contract and pays intermittent allegiance to its feudal past. This set of entitlements has placed workers in a vulnerable position for the simple reason that it almost always renders them the weaker party to the bargain. Labour law sees workers as a vulnerable group in need of protection.\(^3\)

The objective of labour and employment law, being the protection of employees, manifests itself in myriad elements of this large body of law: examples include legislation prohibiting discrimination, legal protections for whistleblowers and employment standards legislation governing hours of work. Courts have even invoked this objective in interpreting constitutional law. In Slaight Communications Inc v Davidson, Dickson CJ, having expressed agreement with Kahn-Freund’s characterisation of the employment relationship, upheld an adjudicator’s orders restricting the content of the defendant employer’s references in relation to the plaintiff former

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employee, remarking that constitutional protection for freedom of expression must not be permitted to “constitutional inequalities of power in the workplace”.

Notwithstanding the ubiquity of labour and employment law’s objective, termination of employment is an important focal point for employment protection. As Hugh Collins argued, the power to dismiss represents the height of an employer’s superior power over its employees:

   By terminating the contract of employment, the employer deprives individual workers of their major source of income. The dismissal may also deprive workers of membership of the most significant community in their life and jeopardize their status in society more generally…. [T]here can be little doubt that in many instances the disciplinary power of an employer is equivalent or greater in its effects to that exercised by the criminal courts.

The courts have acknowledged the significance of dismissal. In Wallace v United Grain Growers Ltd, the Supreme Court of Canada once again acknowledged Kahn-Freund’s remarks about the inherent vulnerability of employees, following which Iacobucci J observed that:

   [F]or most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions…. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.

As is clear from the passages above, if conferring protection upon vulnerable employees is the central objective of labour and employment law, and employees are acutely vulnerable at the time of dismissal, it follows that labour and employment law must be particularly concerned with termination of employment. The criticality of dismissal is reflected in the devotion of a significant proportion of labour and employment legislation, as well as the common law, to the regulation of dismissal.

This paper will examine and assess the law on termination of employment in England and Canada, in respect of both unionised and non-unionised workplaces, with a particular focus on remedies available to employees. It will explore the common law of wrongful dismissal and the statutory unfair dismissal scheme in England, and the common law of wrongful dismissal in

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6 [1997] 3 SCR 701 at paras 92 and 94-95, 123 Man R (2d) 1 (SCC).
Canada, as well as the legal treatment of dismissal at unionised workplaces in both countries. It will also consider how these legal regimes interact. Throughout, this paper will identify the successes and failures of the law on termination of employment in achieving the objective of this area of law: employment protection.

This paper will argue that, in England, the common law action for wrongful dismissal offers very limited employment protection, compensating employees only for contractual notice, which tends to be short, and disregarding the manner of dismissal. The limited nature of the protection offered by English wrongful dismissal law reflects its failure to evolve beyond its historic conception of employment as a private contractual relationship between equals, in which the law ought not to intervene. Although modern courts accept, in principle, the need for employment protection, they refuse to develop the common law so as to provide that protection, on the grounds that to do so would result in inconsistency, and unacceptable overlap, with the statutory unfair dismissal scheme. As for that statutory scheme, although it was established precisely because of the limitations of the wrongful dismissal action, the employment protection offered under the scheme has been hampered, particularly in respect of the limited remedies offered, by the importation of common law wrongful dismissal concepts in the interpretation of the scheme. The overall result is that, in England, statutory regulation of the fairness of dismissal has impeded development of the common law of wrongful dismissal, and that area of the common law has, in turn, exerted a negative influence over the operation of the statutory scheme. Each has truncated the employment protection offered by the other.

In Canada, in the absence of a general statutory unfair dismissal scheme, the courts have not seen themselves as constrained from developing the common law to reflect modern conceptions of the employment relationship, and in particular the view of employment law as a vehicle for protecting vulnerable employees. As a result, Canadian wrongful dismissal has evolved well beyond the position at English common law, most notably in respect of the length of implied notice periods, the hostility of courts to employer attempts to contract out of reasonable notice and the courts’ power to compensate employees for mental distress caused by the manner of dismissal. Further, where statutory intervention, in the form of minimum notice periods, has interacted with the common law, the result has been to increase, rather than inhibit, protection for dismissed employees.
As for unionised employees, in England both wrongful and unfair dismissal apply in unionised workplaces, with the result that unionised employees are in essentially the same position as non-unionised employees with respect to legal means of challenging dismissal. In Canada, however, collective bargaining operates as a separate system in which the common law influence is largely excluded, with the result that dismissal dispute resolution through arbitration offers a high degree of protection, relative both to the common law and to the unfair dismissal scheme.

The overall argument of this paper is that in England, where the common law of wrongful dismissal and statutory unfair dismissal have interacted, the result has been to limit protection for both unionised and non-unionised employees. In Canada, such bilateral detrimental interaction of the legislation and common law relating to termination of employment has not taken place, at least not on the scale witnessed in England.

Part 2 of this paper will provide a broad overview of the legal landscape pertinent to termination of employment in England and Canada, including a brief description of how collective bargaining works in each country. Part 3 will consider the common law of wrongful dismissal in England and how its encounter with the statutory unfair dismissal scheme, in the pivotal case of Johnson v Unisys Limited,\(^7\) curtailed development of this area of the common law. Part 4 will discuss the English statutory unfair dismissal scheme and the permeation of that scheme with concepts from the common law of wrongful dismissal, which limit the employment protection furnished to employees by that scheme. Part 5 will consider the position of unionised employees in England, who are offered essentially the same legal protections as non-unionised employees.

Turning to Canada, Part 6 will examine the Canadian law of wrongful dismissal and compare it with its English equivalent. Part 6 will also discuss Machtinger v HOJ Industries Ltd,\(^8\) in which the interaction between common law and statute resulted in an expansion, rather than a contraction, of employment protection. Part 7 will discuss how the almost complete exclusion of the common law in unionised workplaces in Canada has resulted in a high degree of protection for employees in such workplaces.

\(^8\) [1992] 1 SCR 986, 7 OR (3d) 480 (SCC).
2. Overview: termination of employment in England and Canada

2.1 England

In English law, an employee working under an employment contract of indefinite duration has a common law right to reasonable notice of dismissal, unless dismissal is for a reason constituting just cause for summary termination.¹ This implied right may be displaced by an express term of the contract substituting a different notice period, subject to a statutory minimum of one week’s notice per year of service, up to a maximum of 12 weeks’ notice.² Acts constituting just cause may be specified in the contract; in the absence of such specification, just cause for summary termination requires a repudiatory breach by the employee, such as a wilful act of disobedience.³ An employee dismissed in breach of the right to notice is entitled, subject to the mitigation principle, to compensation equal to pay and benefits that would have accrued to the employee had the employer given proper notice or pay in lieu thereof.⁴ For employment under a fixed term contract, termination in breach of contract normally entitles the employee to compensation in respect of the unexpired portion of the term.⁵

Sitting alongside the common law is section 94 of the Employment Rights Act 1996, which confers the right not to be unfairly dismissed on employees with at least two years’ continuous service.⁶ In order lawfully to dismiss an employee, an employer must have a potentially fair reason for dismissal authorised by the statute: such reasons include incapacity, misconduct, redundancy, illegality or “some other substantial reason of a kind such as to justify the dismissal”.⁷ Even where such a reason is established, the dismissal will be fair only if the employer acted: (1) reasonably in dismissing the employee for that reason in the circumstances, including the size and administrative resources of the employer; and (2) in accordance with equity and the substantive merits of the case.⁸

¹ McClelland v Northern Ireland General Health Services Board [1957] 1 WLR 594 at 600; [1957] 2 All ER 129 (HL (Eng)).
² Ibid at 599; Employment Rights Act 1996 (UK), c 18, s 86(1) [ERA].
³ Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698 at 701, [1959] 2 All ER 285 (CA (Eng)).
⁵ Ibid at 473.
⁶ ERA, supra note 2, s 108(1).
⁷ Ibid, ss 98(1)(b) and 98(2).
⁸ Ibid, s 98(4). Note that where 20 or more employees are terminated in a period of 90 days or less, additional information and consultation requirements apply under the Trade Union and Labour Relations (Consolidation) Act 1992 (UK), c 52, s 188 [TULRCA].
An employee must present a claim for unfair dismissal to an Employment Tribunal within three months of dismissal, although this time limit may be extended if timely presentation was not reasonably practicable. If a Tribunal finds that the employee was unfairly dismissed, it may award re-employment or compensation, the latter being subject to a statutory maximum of the lower of one year’s salary or £76,574, except in the presence of aggravating circumstances such as discrimination or retaliation for whistleblowing. Although an employee may present claims for both unfair dismissal and wrongful dismissal, the rule against double recovery operates to prevent an employee from being compensated twice in respect of the same loss.

The English system of collective bargaining has been described as “voluntarist”. Although employers may be required to recognise a trade union for collective bargaining purposes, a collective agreement is presumed not to be binding as between the employer and trade union unless the agreement is in writing and contains an express provision stating that the parties intend that the collective agreement be legally enforceable; such provisions are unusual. Though collective agreements themselves are normally unenforceable, certain terms of such agreements may be incorporated into individual contracts of employment between employees and the employer, which continue in force throughout the employment relationship notwithstanding the recognition of a trade union or the conclusion of a collective agreement. Individual employment contracts are therefore supplemented, rather than superseded, by a collective agreement between the employer and the applicable trade union. Incorporation normally takes place via a “bridging term” in the individual employment contract, which may be express or implied, with the effect that appropriate terms of the collective agreement, in the words of Otto Kahn-Freund, “automatically” become enforceable as between the employer and the employee. Where a court is required to decide whether any particular term of a collective agreement forms part of an employee’s contract of employment, it will consider whether such

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9 Ibid, ss 111(1) and 111(2)(a).
10 Ibid, ss 114, 115, 119-123, 124(1) and 124(1ZA).
13 TULRCA, supra note 8, s 179(1); Deakin and Morris, supra note 12 at 283.
14 Marley v Forward Trust Group Ltd [1986] ICR 891; [1986] IRLR 369 (CA (Eng)).
term is “apt for incorporation”. Terms relating to relations between the trade union and the employer or to organisational matters are less likely to satisfy this test than, for example, terms relating to severance pay. An unincorporated, and therefore non-binding, term of a collective agreement may be given effect only though extra-legal channels such as industrial action. The relationship between collective agreements and dismissal will be discussed further in Part 5.

2.2 Canada

Canada is a federation, and regulation of employment is normally a provincial matter, although a relatively small number of employees in certain industries, such as banking and telecommunications, fall within the federal jurisdiction. In the federal jurisdiction and every province except Québec, the common law, historically derived from English law, governs private legal relationships, including the employment relationship. The appellate supervision of the Supreme Court of Canada over all provincial courts generates a degree of homogeneity in the common law in the jurisdictions in which it applies. The separate civil law regime that governs private law matters in Québec will not be discussed in this paper.

In common law Canada, legislation protects employees against unfair dismissal only in the federal jurisdiction and the province of Nova Scotia. Otherwise, for non-unionised employees, statutory employment protection at the point of dismissal is generally limited to minimum notice periods and, in some cases, severance pay entitlements. Statutory minimum notice periods vary between jurisdictions, but are generally short; in Ontario, for example, employees are, broadly, entitled to a minimum of one week’s notice per year of service, up to a maximum of eight weeks’ notice. The focus of this paper, as regards non-unionised employees in Canada, is on the common law of wrongful dismissal. Despite certain essential similarities with wrongful dismissal in England, such as the implication of a term requiring reasonable notice of

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16 Young v Canadian Northern Railway [1930] UKPC 94, [1931] AC 83 [Young, cited to AC].
17 See e.g. Lee v GEC Plessey Telecommunications [1993] IRLR 383 (QBD).
18 See e.g. Young, supra note 16 at 89.
23 England, Individual, supra note 22 at 295; Employment Standards Act, SO 2000, c 41, ss 54 and 57 [ESA]. Notice entitlement is non-linear as employees with at least one, but less than three, years’ service are entitled to two weeks’ notice. Longer notice periods apply in mass termination scenarios under ESA, ss 54 and 58.
termination, the Canadian common law on wrongful dismissal has taken a very different path from that taken in English law. As will be discussed in Part 6, employees enjoy far greater employment protection from wrongful dismissal at common law in Canada than in England.

The collective bargaining regime in Canada, which is based on the American Wagner Act,\(^{24}\) differs in several significant respects from the English model. Where a collective agreement is in place, the employer must recognise the trade union as exclusive bargaining agent and is prohibited from bargaining, or concluding an agreement binding employees in the bargaining unit, with anyone other than the trade union.\(^{25}\) The effect of trade union recognition in Canada is therefore to preclude negotiations about the terms of employment of employees in the bargaining unit with any individual or entity other than the trade union; this even prohibits negotiations or agreements with the employees themselves. As LeBel J said, “the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees”.\(^{26}\)

Further, in sharp contrast to the continuing individual employment relationship in unionised workplaces in England, in Canada, once a trade union is recognised in respect of a bargaining unit, individual contracts of employment no longer regulate the relationship between the employer and its employees. As Laskin CJ said in *McGavin Toastmaster Ltd v Ainscough*, following trade union recognition in respect of a bargaining unit, “it is [not] possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships”.\(^{27}\) The collective agreement, unlike a collective agreement in England, is legally binding on the employer, trade union and employees.\(^{28}\) Further, disputes arising under the collective agreement, relating for example to its interpretation or to any alleged breach thereof, are referred to final and binding arbitration.\(^{29}\) Both industrial action and access to the common law courts are precluded as means of resolving disputes arising out of continuing collective agreements.\(^{30}\) Indeed, industrial action is only lawful when a collective agreement has

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\(^{25}\) See e.g. Labour Relations Act, SO 1995, c 1, Schedule A, ss 45(1) and 73(1) [OLRA].


\(^{27}\) [1976] 2 SCR 718 at 724, [1975] SCJ No 51 (SCC) [*McGavin Toastmaster* cited to SCR].

\(^{28}\) See e.g. OLRA, *supra* note 25, s 56.

\(^{29}\) See e.g. *ibid*, s 48(1).

expired, and even then only after negotiations for a fresh agreement have reached an impasse.\textsuperscript{31}

The overall effect of the collective bargaining regime in Canada is that the “common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement”.\textsuperscript{32} Rather, the relevant collective agreement, incorporating any applicable minimum employment standards,\textsuperscript{33} and supplemented by labour relations legislation, regulates the relations between the employer, the trade union and the employees.

Paul Weiler noted that, at first blush, it may seem curious for the common law courts to be excluded from the enforcement of collective agreements, particularly as such agreements are legally enforceable.\textsuperscript{34} The deliberate policy choice to confer jurisdiction over labour disputes on arbitrators was made on the basis that court proceedings were overly formal and expensive, and that specialised labour arbitrators would be more familiar with the setting in which collective agreements operated.\textsuperscript{35} Arbitrator Laskin, as he then was, described in plain terms the exclusion of the common law from the sphere of collective bargaining in Canada:

\begin{quote}
The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree [and] involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.\textsuperscript{36}
\end{quote}

The overall difference between the English and Canadian collective bargaining models was summarised by Judy Fudge:

\begin{quote}
In Canada, unlike Britain, there is a complete separation of the law governing employees who are covered by a collective agreement from the law that regulates employees who are covered by a contract of employment. The collective agreement supersedes the contract of employment, and employees who are covered by a collective agreement do not have access to courts for actions in contract or tort arising out of a contract of employment.\textsuperscript{37}
\end{quote}

The displacement of the common law in Canadian collective bargaining has significant implications for dismissal of unionised employees, which will be discussed in Part 7.

\textsuperscript{31} See e.g. OLRA, supra note 25, ss 79(1) and 79(2).
\textsuperscript{32} McGavin Toastmaster, supra note 27 at 725.
\textsuperscript{33} See e.g. ESA, supra note 23, s 99(1).
\textsuperscript{34} Paul Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell, 1980) at 92.
\textsuperscript{35} Ibid at 92-93.
\textsuperscript{36} Peterboro Lock Manufacturing Co v United Electrical, Radio and Machine Workers of America, Local 527 (Wage Grievance) [1954] OLAA No 2 at para 7.
\textsuperscript{37} Fudge, supra note 22 at 53-54.
3. The common law action for wrongful dismissal in England

Whilst English employment law is, broadly speaking, a dynamic field, with a large and ever-expanding body of jurisprudence and a profusion of legislation, the common law of wrongful dismissal has, of late, not shared in such dynamism. As Mark Freedland observed, wrongful dismissal in England experienced its “main period of growth… at a time long before [modern] social attitudes to the contract of employment” had emerged.¹ As a result, the common law offers only very limited protection to dismissed employees, entitling them to contractual notice of dismissal and limiting compensation to economic loss flowing from the failure to give such notice. This limited employment protection is consistent with historic common law values, including a reluctance to interfere in employment relationships or management decisions and a view of employment as a contract between equals. When, more recently, employees attempted to update the common law’s conceptualisation of employment by seeking enhanced remedies for wrongful dismissal, including compensation that reflects the manner of dismissal, courts acknowledged the social importance of employment protection in modern times, but refused to develop and modernise the common law on the grounds that Parliament had enacted a statutory scheme regulating the fairness of dismissal, and such development of the common law would be inconsistent with that scheme. As such, the result of the interaction between the common law and the statutory scheme has been to stifle development of the common law, freezing it in a highly restrictive state as regards protection for dismissed employees.

3.1 Theoretical underpinnings of the action for wrongful dismissal

Contracts of employment have an enduring nature, pertaining to a relationship rather than a one-off transaction. Ian Macneil speculated that the employment contract is second only to the marriage contract as regards the depth of its relational character.² Likewise, Freedland remarked that the general rules of contract law are insufficient to explain the structure of the employment relationship.³ A contract of employment is more than simply a promise by the employer to pay wages to the employee in return for the employee’s provision of labour; whilst this exchange undoubtedly forms part of the bargain, it does not acknowledge the interests of parties in the

³ Freedland, Contract, supra note 1 at 20.
ongoing nature of the employment relationship. Freedland argued that an employment relationship is a “two-tiered structure”: one level represents the exchange of labour for wages; the second, the mutual obligations to employ and to be employed, for a fixed or indefinite period of time. For Freedland, the second level is the critical and distinguishing element of an employment contract: “mutual undertakings to maintain the employment relationship… are inherent in any contract of employment properly so called”. The essentiality of these obligations was recognised in *Carmichael v National Power Plc*, in which the House of Lords held that exchanges of the casual labour of tour guides for pay, in the absence of ongoing mutual promises to employ and to be employed, did not create an employment relationship.

For Freedland, the enduring nature of an employment contract underpins the action for wrongful dismissal: “in allowing the employee an action for wrongful dismissal, the common law recognises the employee’s interest in the continuance of his employment and gives a particular legal expression to that interest”. In *Emmens v EM Elderton*, the House of Lords accepted that wrongful termination of an employment contract founds an action wholly separate from a claim for unpaid wages: “If there is a contract to keep in the employment, it seems necessarily to follow that a dismissal from such employment is a breach of contract.” As Freedland noted, *Emmens* recognised the “implied undertaking by the employer to maintain the employment relationship”, breach of which entitles the employee to damages for wrongful dismissal.

### 3.2 Reasonable notice

The common law does not entitle the employee to perpetual employment. Absent just cause for summary termination, an employer may lawfully terminate employment by giving reasonable notice. In the absence of a contractual notice period, reasonable notice is calculated according to common law principles. As recently as 1945, it was thought that reasonable notice would be equal to the period by reference to which wages were calculated. More recently, reasonable notice has been determined by reference to the nature of the employment and the employee’s

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5 *Ibid* at 20.
6 *Ibid*.
8 Freedland, *Contract, supra* note 1 at 21.
9 *Emmens v EM Elderton* (1853) IV HL Cas 624 at 646, 10 ER 606 (HL (Eng)) [*Emmens*].
10 Freedland, *Contract, supra* note 1 at 23.
11 *Ibid* at 154.
length of service. In *Hill v CA Parsons & Co Ltd*, Lord Denning MR remarked that a 63 year-old chartered engineer with 35 years’ service was entitled to “at least six months, and [maybe] 12 months” of notice. Robert Upex suggested that common law reasonable notice for most employees would be statutory minimum notice, which is one week per year of service, up to a maximum of 12 weeks’ notice; although very senior or highly skilled employees may command six months or more, no employee is likely to be entitled to more than one year’s notice. There is, however, a dearth of modern case law in this area, *Hill* being one of the most recent cases in which a court calculated reasonable notice at common law.

The likely explanation for the paucity of recent case law on reasonable notice is that it is unusual to resort to the common law to determine reasonable notice. Employers are required by law to give statements of written particulars of employment, including notice required to terminate employment, to employees within two months of the start of employment, and it is common for employers to satisfy this requirement by issuing a written contract of employment to the employee. To the extent that the notice period is expressly agreed between the parties, the common law plays no role in determining the length of notice, as an express term will displace the implied reasonable notice period. Express contractual periods of one year or longer are exceptional, even for the most senior employees: it is instructive that notice periods of longer than one year are very rare amongst listed companies, and are explicitly discouraged under the UK Corporate Governance Code. As discussed at 6.1 below, the position is very different in Canada, which has amassed a large body of case law on reasonable notice, and where 24-month notice periods are increasingly commonplace.

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13 [1972] Ch 305 at 313, [1971] 3 WLR 995 (CA (Eng)) [*Hill*].
3.3 Remedies and the rule in Addis

The leading, perhaps notorious, case on the limitation of damages in a wrongful dismissal action is Addis v Gramophone Co Ltd. The plaintiff was given six months’ notice of termination in accordance with the terms of his contract of employment, but was prevented from working out such notice period. The employer engaged a successor, and informed its bankers of the plaintiff’s immediate departure, almost immediately after notice was given, and did not advise the plaintiff that it had taken either of these steps. The plaintiff alleged that the harsh manner of his dismissal caused him non-economic losses in addition to lost compensation during the notice period. At least one of the law lords accepted that the employer’s actions were unduly harsh and caused humiliation to the plaintiff, and made it more difficult for him to obtain alternative employment. Nevertheless, the majority held that the manner of dismissal had no bearing on the damages recoverable by a plaintiff in a wrongful dismissal claim: as the headnote unequivocally pronounced: “[w]here a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment”.

Addis has been the subject of criticism on several grounds. Firstly, Addis treated mental distress damages differently from other heads of loss. The general rule on compensatory damages in contract law is that the plaintiff is entitled “to be placed in the same situation, with respect to damages, as if the contract had been performed”, subject to the rule in Hadley v Baxendale, which limited recovery to types of loss that arise “naturally, i.e., according to the usual course of things, from such breach of contract itself, … [or] may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”. To the extent that they are foreseeable, barring recovery of mental distress

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19 Ibid at 489.
20 Ibid at 504.
21 Ibid.
22 Ibid at 488.
23 Robinson v Harman (1848) 1 Exch 850 at 855, 154 ER 363 (Exch Ct (Eng)).
24 Hadley v Baxendale (1854) 9 Exch 341 at 354-355, 156 ER 145 (Exch Ct (Eng)).
damages is at odds with the general rule on damages in contract law. Freedland described Addis as “hard to justify… in doctrinal terms” and lacking “a sound principled basis”.  

Secondly, the headnote to Addis allegedly misrepresented the judgments in that case. Grace Kessing observed that the majority agreed that the plaintiff was entitled only to recover compensation for the notice period, but arrived at that conclusion in different ways. Whilst the headnote reflected the speech of Lord Loreburn LC, other law lords rejected the plaintiff’s claims on other grounds. As Freedland noted, the judgments in Addis rejected a number of bases for compensating non-economic losses, but did not articulate the positive rule that a wrongfully dismissed employee is barred from recovering compensation in excess of notice, even where the manner of dismissal was harsh, or hampered efforts at obtaining alternative employment. That rule is nevertheless generally accepted as the ratio of Addis.

The pervasive influence of Addis is beyond dispute. Lord Hoffman said that the case “cast a long shadow over the common law”. Judy Fudge wrote that “[w]hile none of [Addis’] roots are very deep, they ramify throughout the common law of the employment contract”. Freedland argued that Addis “cemented in place [a] nexus of mutually self-sustaining ideas”:

(a) “unrestricted notice”: an employee may be dismissed at any time, for any reason;

(b) “limited wrongfulness”: a dismissal is only wrongful to the extent that it deprives the employee of the notice period to which he or she is entitled; and

(c) “limited damages”: damages for manner of dismissal or mental distress are unavailable.

Although only (c) was in issue in Addis, (c) depends on, and reinforces the legitimacy of, (a) and (b). The bundle of principles affirmed by their Lordships in Addis came to be regarded as “a self-evident truth about the common law of the contract of employment”.

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27 Ibid at 112-113.
28 Freedland, Personal Contract, supra note 25 at 357-359.
30 Edwards, supra note 29 at para 1.
32 Freedland, Personal Contract, supra note 25 at 359-360.
33 Ibid at 360.
34 Ibid at 361.
presented as positive statements of law, they do not reflect the judgements in Addis, nor are they self-evident as the only possible outcome for dismissed employees.\textsuperscript{35}

\textbf{3.4 Historic values of the common law evident in the law of wrongful dismissal}

Certain historic values animate the treatment of the contract of employment in the English law of wrongful dismissal, as exemplified by Freedland’s three ideas discussed at 3.3 above. Otto Kahn-Freund observed that although the employment relationship is marked by a disequilibrium of power in the employer’s favour, the common law is “inspired by the belief in the equality (real or fictitious) of individuals”, and a corresponding reluctance to regulate the employment relationship.\textsuperscript{36} Lord Millet observed that Addis “treated the contract of employment as an ordinary commercial contract terminable at will by either party providing only that sufficient notice was given…. The common law, which is premised on party autonomy, treated the employer and the employee as free and equal parties to the contract of employment”.\textsuperscript{37} Likewise, Hugh Collins cited the “complex moral argument” premised on the virtues of autonomy of the parties to the employment contract, equal treatment of those parties and neutrality between competing interests, which underpins the common law’s conferral of “unbridled disciplinary power” upon employers, subject only to the terms of the contract.\textsuperscript{38} The parties should be free to agree such terms and the courts should not pass judgement on “highly political” questions concerning dismissals.\textsuperscript{39} David Renton observed that the common law is preoccupied with freedom of contract at the expense of substantive values of justice or fairness, fostering judges’ deference to employers and reluctance to regulate their businesses.\textsuperscript{40}

The historic values mentioned above have coloured the common law’s development in other matters relating to dismissal. For example, courts are loath to impose even minimal procedural requirements on dismissals. In \textit{Malloch v Aberdeen Corporation}, Lord Wilberforce remarked \textit{obiter dicta} that at common law no rules of natural justice attend the decision to dismiss.\textsuperscript{41}

\textsuperscript{35} Ibid at 360.
\textsuperscript{36} Paul L Davies and Mark Freedland, \textit{Kahn-Freund’s Labour and the Law} (London: Stevens & Sons, 1983) at 12 and 36.
\textsuperscript{37} Johnson v Unisys Limited [2001] UKHL 13 at paras 71 and 72, [2003] 1 AC 518. [Johnson]
\textsuperscript{39} Ibid at 34-35.
\textsuperscript{41} Malloch v Aberdeen Corporation [1971] 1 WLR 1578 at 1595, [1971] 2 All ER 1278 (HL (Scot)).
Likewise, in Ridge v Baldwin, Lord Reid said that an employer is under no duty to hear an employee’s case before dismissal, and may terminate “at any time and for any reason or for none” subject only to the terms of the contract.\[^{42}\]

Some of the remarks cited above about the nature of the common law are, perhaps, overbroad. The common law is demonstrably capable of evolving so as to reflect modern workplace realities, as evidenced, for example, by recent developments in the law of vicarious liability.\[^{43}\] Further, as noted below at 3.6, common law judges now accept the need for legal regulation of the employment relationship. Nevertheless, the legal effects of the historic, laissez-faire values identified above remain evident in the common law of wrongful dismissal and, as will be discussed below at 3.5 and 3.6, efforts to dislodge that state of affairs have, thus far, failed.

### 3.5 Unfair dismissal and the promise of change

As discussed at 4.1 below, the limited employment protection offered at common law was in the forefront of the minds of the proponents of the UK’s statutory unfair dismissal scheme. Even following the introduction of that scheme in 1971, however, there were calls for further development of the common law. Hazel Carty noted that towards the end of the 20\(^{th}\) century, dismissed employees increasingly sought remedies at common law, despite the availability of the statutory claim, mainly because of “the disappointment in the working of the unfair dismissal laws”.\[^{44}\] In a similar vein, Collins observed that although in introducing the unfair dismissal scheme “it seems likely that Parliament assumed that few, if any, would wish to pursue a remedy under the common law”, that assumption proved false as dismissed employees sought remedies at common law in response to a number of limitations under the statutory scheme, including the short limitation period, the length of service required in order to bring a statutory claim and the limited compensation available.\[^{45}\] Some of the limitations of the statutory scheme will be discussed in Part 4. What is of note for present purposes is that those limitations generated continued recourse to the common law.

\[^{42}\] Ridge v Baldwin [1964] AC 40 at 65, [1963] 2 WLR 935 (HL (Eng)).


Further, employees’ hopes of expanding the employment protection available at common law were buoyed by the perception that common law courts’ views of the employment relationship had been modernised by those courts’ appellate supervision of the Employment Tribunals. Most significantly, the courts had developed a new implied term that the employer may not, “without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”, approved by the House of Lords in *Malik v Bank of Credit and Commerce International SA*. The term was critical to the operation of the unfair dismissal scheme, which treats as a constructive dismissal an employee’s resignation “in circumstances in which [the employee] is entitled to terminate it without notice by reason of the employer’s conduct”. Such conduct must be “a significant breach going to the root of the contract of employment”. Because any breach of the implied mutual trust and confidence term amounted to such a repudiatory breach, employees frequently invoked that term to claim constructive dismissal.

In *Malik*, the House of Lords extended the utility of the implied mutual trust and confidence term, holding that two employees were able in principle to recover damages for breach of that term, arising out of corrupt and dishonest conduct by the defendant bank that increased the difficulty the employees faced in securing alternative employment following the bank’s insolvency. Although the breaches in *Malik* were not related to dismissal, hopes were raised that the implied term was now of general application, constraining employer action at common law at all times during the employment relationship and imposing a duty on employers to act fairly when dismissing. It was even hypothesised that the rule in *Addis* had been consigned to the dustbin of legal history. By way of example, Lord Cooke said, *obiter dicta*, that *Addis* saw the relationship of employer and employee as no more than an ordinary commercial one. This is a world away from the concept now, and in [*Malik*] the House accepted that there is an implied obligation of mutual trust and confidence…. I take leave to doubt the permanence of *Addis* in English law.
In a similar vein, Freedland observed that the evolution of the implied mutual and trust and confidence term in the 1980s and 1990s exemplified a “positive symbiosis” whereby the unfair dismissal scheme offered the promise of “actually revitalising” the common law.\(^{54}\)

### 3.6 Johnson: hopes dashed

The House of Lords was to dash the high hopes for the mutual trust and confidence term in *Johnson v Unisys Limited*.\(^{55}\) The claimant in *Johnson* was dismissed summarily and paid in lieu of his contractual notice of one month. A Tribunal found that he was unfairly dismissed and awarded £11,691.88 in compensation. The Claimant then commenced proceedings in the civil courts, alleging *inter alia* that the defendant employer had breached the implied mutual trust and confidence term, causing mental distress resulting in a five-month stay in hospital and an inability to secure alternative employment. Upholding the decisions below, the majority of the House of Lords held that the particulars of claim disclosed no cause of action at common law.\(^{56}\)

In the leading judgment, Lord Hoffman remarked that *Addis* applied only to a claim for failure to give proper contractual notice and would therefore not block a claim for breach of the implied mutual trust and confidence term.\(^{57}\) However, His Lordship doubted the wisdom of extending the scope of that implied term to cover dismissals, noting that the term “is concerned with preserving the continuing relationship which subsists between employer and employee.”\(^{58}\) He accepted that some other term obliging an employer to treat its employee fairly at the point of dismissal might be implied, but cautioned that any such term would pose practical difficulties, and absent statutory intervention in the form of unfair dismissal legislation the arguments for and against implying such a term were “finely balanced”.\(^{59}\)

What tipped the balance in *Johnson* was the unfair dismissal legislation itself. The majority held that Parliament had, in enacting a statutory scheme requiring fairness in dismissal, obviated the need for any common law remedy in that regard.\(^{60}\) As Lord Millet said: “the courts might well

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\(^{54}\) Mark Freedland, “Constructing Fairness in Employment Contracts” (2007) 36:1 ILJ 136 at 137 [Freedland, “Constructing Fairness”].

\(^{55}\) *Johnson*, supra note 37.

\(^{56}\) Ibid at para 34.

\(^{57}\) Ibid at para 44.

\(^{58}\) Ibid at para 46.

\(^{59}\) Ibid at paras 47-50. These difficulties will be discussed below at 6.3.

\(^{60}\) Ibid at paras 1, 2, 58 and 80.
have developed the law in a different way by imposing [an] obligation on an employer to treat his employee fairly even in the manner of his dismissal…. But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable". 61 As Lord Nicholls said:

[A] common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed [and] would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. 62

Curiously, in Lord Hoffman’s analysis of the relationship between the statutory scheme and the common law, he asserts that an Employment Tribunal would have had jurisdiction to award compensation in respect of “all of the matters of which Mr Johnson complains”. 63 He noted that subject to the upper limit on compensation, Parliament had given Tribunals “a very broad jurisdiction to award what they considered just and equitable” and that he saw “no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life”. 64 As will be discussed below at 4.2.ii, the House of Lords has since declined to give effect to these obiter dicta remarks.

In Johnson, the statutory scheme operated to block development of the common law in two ways. Firstly, Johnson truncated the protection offered to employees by the implied mutual trust and confidence term, removing employer conduct at dismissal from that term’s scope. According to Freedland’s vivid description, the evolution of that term was “brought shuddering almost to a halt, in the view of some even de-railed… by the negative activism” of the majority in Johnson. 65 Secondly, their Lordships confirmed, obiter dicta, that Addis remained in place; at the very least they refused to overrule it. As Fudge observed, Johnson manifested a judicial “instinct to preserve Addis”, the majority having concluded that “a complete re-evaluation of the limited wrongfulness rule would be too radical a departure from the accepted state of the common law”. 66 Hugh Collins wrote that following Johnson, “[a]ny hopes that the common law

61 Ibid at paras 79-80.
62 Ibid at para 2.
63 Ibid at para 55.
64 Ibid at paras 54-55.
65 Freedland, “Constructing Fairness”, supra note 54 at 137.
66 Fudge, supra note 31 at 64-65.
of wrongful dismissal might be adjusted to reflect modern perceptions of how employees should be treated fairly and with dignity must be thrown on the bonfire of innocent carcasses”.

It is important to note that the courts are not hostile to the notion of employment protection at dismissal. In Johnson, Lord Hoffman acknowledged the recognised “deficiencies” in the law of wrongful dismissal, noting that these very deficiencies prompted Parliament to establish the statutory scheme. Lord Millet went further, declaring that “[c]ontracts of employment are no longer regarded as purely commercial contracts entered into between free equal agents”, and that the trauma of dismissal may be especially devastating if aggravated by the manner of dismissal. Likewise, in Eastwood v Magnox Electric plc, Lord Nicholls said that the proposed evolution of the common law in Johnson was “not without attraction” and that:

The trust and confidence implied term means, in short, that an employer must treat his employees fairly…. In principle, this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of his which affect a subsisting employment relationship.

Despite recognising the importance of providing legal protection to employees at the point of dismissal, the courts declined to give any role in furthering this objective to the common law.

The dissent of Lord Steyn in Johnson rejects the notion that in enacting the unfair dismissal legislation, “Parliament would have assumed the common law as reflected in the headnote in Addis’s case to be set in stone and incapable of principled development”. The strict limits on compensation in the unfair dismissal scheme were not, as the majority held, a bar to the development of a common law remedy for manner of dismissal alongside the statutory scheme, but rather an invitation for the common law to fill the void in employment protection created by such limits. Further, the rule against double recovery would prevent conflict or overlap between the common law and the statutory scheme. In light of the modern view that employment contracts were not mere commercial contracts, Lord Steyn was willing to depart from Addis; indeed, in his view the House of Lords had already done so in Malik.

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68 Johnson, supra note 37 at para 54.
69 Ibid at para 77.
70 Eastwood, supra note 29 at para 11.
71 Johnson, supra note 37 at para 23.
72 Ibid at para 23.
73 Ibid at paras 22 and 25.
74 Ibid at para 20.
Case law since *Johnson* has continued to accept that Parliament’s intervention in the field of dismissal operates to stunt the growth of the common law in that field. In *Eastwood*, the House of Lords held that whilst claims for losses arising from the manner of dismissal fall within the “*Johnson* exclusion area” and are therefore not actionable at common law, an employer’s breach of the implied mutual trust and confidence term before dismissal is so actionable, and an employee may claim for mental distress occasioned by that breach.75 Lord Nicholls accepted that this distinction produces “strange results” and “awkward and unfortunate consequences”, but repeated the reasoning in *Johnson* that “Parliament has occupied the field relating to unfair dismissal. It is not for the courts now to expand a common law principle into the same field and produce an inconsistent outcome”.76 More recently, the UK Supreme Court reaffirmed *Johnson* in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*.77

This Part has discussed the limited protection offered to employees at English common law by the action for wrongful dismissal, in particular the limitation of remedies for wrongful dismissal to compensation in respect of the notice period. This limited protection is consistent with the common law’s historic reluctance to interfere in private employment relationships, and the notion that the parties to the employment contract are equals. Although common law judges now recognise that these values are out of date, and that employment protection is a worthy social goal, they regard themselves as unable to develop the common law to offer such protection, having been precluded from doing so by Parliament’s enactment of the statutory unfair dismissal scheme. The current position of the common law echoes Kahn-Freund’s observation that the common law courts do not normally take the need for employment protection into account, and that to do so is the province of legislation and collective agreements.78 The common law’s abdication of responsibility in relation to dismissed employees places a heavy burden on the statutory scheme. Part 4 assesses that scheme’s performance in discharging that burden.

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75 *Eastwood*, *supra* note 29 at para 27.
76 *Ibid* at paras 14, 32 and 33.
77 *Edwards*, *supra* note 29.
78 Davies and Freedland, *supra* note 36 at 36.
4. The statutory claim for unfair dismissal in England

The unfair dismissal regime was Parliament’s response to the shortcomings of the common law of wrongful dismissal. However, certain concepts originating in the law of wrongful dismissal have seeped into the statutory scheme and limited the protection it offers. This is due at least in part to institutional factors. The overall result is that, just as the effect of the statutory scheme has been to inhibit the development of the common law, so has the common law limited the level of protection available to employees available under the statutory scheme. The interaction between these legal regimes has limited the employment protection afforded by each of them.

4.1 Background to the unfair dismissal scheme

The conceptual origins of the unfair dismissal scheme lie in the International Labour Organisation’s Recommendation 119 on the Termination of Employment, which set the general standard that “[t]ermination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on … operational requirements”.\(^1\) The Recommendation was non-binding and allowed for a number of different potential implementation mechanisms, including through the common law, and the government’s acceptance of it by no means guaranteed the enactment of an unfair dismissal statute.\(^2\) Legislation was nevertheless recommended by the Royal Commission on Trade Unions and Employers’ Associations, known as the Donovan Commission, which reported in 1968.\(^3\)

The Donovan Commission, citing Addis v Gramophone Co Ltd,\(^4\) noted that the common law conferred “strictly limited” protection on dismissed employees, confining remedies to the notice period and disregarding the manner of dismissal.\(^5\) This was “unsatisfactory” given employees’ vulnerability vis-à-vis their employers and the potentially devastating impact of dismissal:

In practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those

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5. UK, Royal Commission on Trade Unions and Employers' Associations, supra note 3 at para 522.
which will ensue for an employee if he is dismissed…. For workers in many situations dismissal is a disaster.\textsuperscript{6}

Added to these considerations was dismissal-related industrial strife. The Donovan Commission speculated that between 1964 and 1966, an average of 276 unofficial strikes annually might have been avoided had it been possible to refer dismissal disputes to a neutral third party.\textsuperscript{7} Its report recommended the enactment of a statutory scheme inspired by Recommendation 119 and, amongst other things, rendering dismissals unlawful unless justified by reference to specified reasons.\textsuperscript{8} The result was the Industrial Relations Act 1971,\textsuperscript{9} which established the unfair dismissal scheme currently enshrined in the Employment Rights Act 1996.\textsuperscript{10}

4.2 Limitation of remedies

In practice, the unfair dismissal scheme offers limited remedies to dismissed employees. Further, the shortcomings of the remedies under the statutory scheme may be attributed, at least in part, to the influence of the common law of wrongful dismissal.

4.2.i Re-employment

Under the ERA, a Tribunal may make one of two re-employment orders.\textsuperscript{11} An order for re-instatement “treat[s] the complainant in all respects as if he had not been dismissed”, meaning that the employee is restored to the same position he or she held pre-dismissal and awarded back pay, along with any salary increases or other improvements in terms and conditions the employee would have received had he or she remained in post.\textsuperscript{12} An order for re-engagement requires the employer to engage the dismissed employee in another post, on such terms as the Tribunal may decide.\textsuperscript{13} Re-employment is the primary remedy for unfair dismissal, in the sense that it is to be considered before compensation. On a finding of unfair dismissal, the Tribunal must ask if the employee desires re-employment.\textsuperscript{14} If the employee requests re-employment, the Tribunal may nevertheless decline to award it if re-employment is not practicable or, where the

\textsuperscript{6} Ibid at para 526.
\textsuperscript{7} Ibid at para 528.
\textsuperscript{8} Ibid at para 545.
\textsuperscript{9} (UK), c 72.
\textsuperscript{10} (UK), c 18 [ERA].
\textsuperscript{11} Ibid, s 113.
\textsuperscript{12} Ibid, s 114.
\textsuperscript{13} Ibid, s 115.
\textsuperscript{14} Ibid, ss 112(1) and 112(2).
employee has contributed to his or her dismissal, if refusing such an order would be “just”.\textsuperscript{15} The Tribunal is to award compensation where no order for re-employment is made.\textsuperscript{16}

Although re-employment is the primary remedy under the scheme, employers may refuse to comply with a re-employment order. Those who do so, absent extenuating circumstances, pay increased compensation of between 26 and 52 weeks’ pay.\textsuperscript{17} As Ormrod LJ said in \textit{Nothman v London Borough of Barnet},\textsuperscript{18} “there is no power in the Court or any Tribunal to enforce the reinstatement or re-engagement of an employee who has been dismissed. All it can do is make an order directing such reinstatement or re-engagement, leaving it to the employer to decide whether to comply with the order or face the consequences in terms of compensation”.\textsuperscript{19} Further, it is highly unusual for a Tribunal to make a re-employment award. For example, between April 2012 and March 2013 inclusive, re-employment was awarded to only five of the 4,596 employees who succeeded in unfair dismissal claims.\textsuperscript{20} David Renton observed that re-employment is so rarely granted that claimants are unlikely to seek it, and where applications for it are made they are treated as awkward and unusual.\textsuperscript{21}

The merits of re-employment have been debated since before the statutory scheme was introduced. The Donovan Commission recommended that compensation be the primary remedy, citing the historic refusal of courts to order specific performance of employment contracts, and thought that it would “accord with reality” if re-employment were only ordered with both parties’ consent.\textsuperscript{22} On the other hand, Collins noted that re-employment is an important remedy from the standpoint of corrective justice as it is most effective in putting the dismissed employee in the position he or she would have been in had the unfair dismissal not taken place.\textsuperscript{23} It may also be more effective at reducing damage to the employee’s reputation.\textsuperscript{24} Finally, it promotes employees’ dignity at work by “controlling [employer] abuses of power immediately and

\textsuperscript{15} \textit{Ibid}, ss 112(3) and 116.
\textsuperscript{16} \textit{Ibid}, s 112(4).
\textsuperscript{17} \textit{Ibid}, s 117(3)(b).
\textsuperscript{18} [1980] IRLR 65 (CA (Eng)).
\textsuperscript{19} \textit{Ibid} at para 1.
\textsuperscript{22} UK, Royal Commission on Trade Unions and Employers’ Associations, \textit{supra} note 3 at paras 551-552.
\textsuperscript{24} \textit{Ibid} at 223 and 225.
effectively”. An additional consideration is the practical effect that litigation may have on an employee’s ability to secure alternative employment, as employers may be reluctant to engage an employee who has claimed unfair dismissal in the past. There is, therefore, a strong case to be made for re-employment, and the virtual non-availability of this remedy is unsatisfactory.

The scarcity of re-employment is at least in part attributable to its inconsistency with the historic common law values discussed above at 3.4. Collins argued that both the ability of employers to refuse to comply with re-employment orders and judicial reluctance to make such orders “derive from a perspective which views the contract of employment as a personal relation between the parties [and believes] that the intimacy required between employer and employee for their successful co-operation at work cannot be imposed by the court”. As well, the common law eschews intervention on the grounds that where “the parties have become estranged, then it would be inappropriate to compel them to work together once more”. Likewise, Renton notes that the courts’ hostility to re-employment stems from their respect for “the property rights of the employer” and “[t]he common sentiment of judges [that reinstatement] would be an unjustifiable infringement of the employer’s right to manage”. Further, monetary awards are the primary remedy at common law, at least in breach of contract claims. Collins notes that the “commodification of all economic relations” so as to facilitate market exchanges is an important conceptual aspect of contract law generally. The notion that money remedies are sufficient is consistent with a reluctance to order re-employment.

4.2.ii Compensation

Where re-employment is not awarded on a finding of unfair dismissal, the ERA confers wide discretion to award compensation that is “just and equitable in all the circumstances having regard to the loss sustained by the complainant”, subject to a duty to mitigate. However, the courts have held that, as is the case at common law, non-pecuniary losses are not recoverable under the statutory scheme. Further, where Tribunals have invoked their seemingly wide discretion, they have deployed it to reduce compensation. As is the case with re-employment,

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25 Ibid at 246.
26 Ibid at 245.
27 Ibid.
28 Renton, supra note 21 at 149.
29 Collins, Justice, supra note 23 at 246.
30 ERA, supra note 10, s 123.
the restrained approach to compensation has been informed by certain historic common law values derived from the law of wrongful dismissal.

In Norton Tool Co Ltd v Tewson, Donaldson P, as he then was, acknowledged that the statutory scheme “created an entirely new cause of action” and that: “The measure of compensation for that statutory wrong is itself the creature of statute and is to be found in the Act and nowhere else.”\(^{31}\) However, His Lordship quickly slid back into reasoning consistent with the law of wrongful dismissal. Noting that the ostensibly wide discretion in the provision governing compensation must be exercised “judicially and upon the basis of principle”, Donaldson P interpreted the words “having regard to the loss sustained by the complainant” in that provision so as to exclude “injury to pride or feelings”.\(^{32}\) The discretion did not empower Tribunals to have regard to non-pecuniary matters. Rather, its purpose was to permit flexibility in calculating financial loss, as opposed to a strict arithmetic approach.\(^{33}\)

As noted above at 3.6, in Johnson v Unisys Limited, Lord Hoffman thought that the Tribunal’s discretion was wide enough to include compensation for “distress, humiliation, damage to reputation in the community or to family life”.\(^{34}\) His Lordship explicitly cast doubt over the “narrow” construction of compensation in Norton Tool.\(^{35}\) However, as Johnson concerned the common law, Lord Hoffman’s remarks were obiter dicta, and the House of Lords subsequently declined to give effect to them in Dunnachie v Kingston-upon-Hull City Council, holding that if Parliament had intended to compensate claimants for non-pecuniary losses, it would have made explicit provision for that head of loss in the statute.\(^{36}\) Lord Steyn’s speech affirmed Norton Tool and dismissed Lord Hoffman’s musings in Johnson as being of “doubtful validity”.\(^{37}\) Lord Hoffman agreed and made no reference to the about-face entailed in such agreement.\(^{38}\)

The exclusion of non-pecuniary losses is linked to the common law. As noted above at 3.3, the manner of dismissal has no bearing upon compensation at common law, under the rule in Addis.

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32 Ibid at paras 14 and 15.
33 Ibid.
35 Ibid at para 54.
37 Ibid at para 10.
38 Ibid at para 30.
As Collins argued: “whether a claim for dismissal is advanced under the common law or statute, the courts strive to apply a similar regime governing the measure of compensation. That hidden regime governing claims for compensation for dismissal finds its roots in [Addis]”\(^{39}\). It is sensible to conclude that the unspecified “principle” in Norton Tool that precluded recovery of non-economic losses under the statutory scheme is the rule in Addis. The House of Lords implicitly recognised in Dunnachie that Addis was the departure point for interpretation of the compensation provisions in the unfair dismissal legislation, as is evident from Lord Steyn’s contention that it was “implausible” to suggest that Parliament intended to allow compensation for non-economic losses in the absence of clear statutory wording to that effect.\(^{40}\) Whilst there is nothing jurisprudentially incorrect about using common law concepts to inform statutory interpretation, in Norton Tool and Dunnachie, the effect of importing such concepts was to dampen the remedial impact of the unfair dismissal scheme.

Further, the ostensibly wide “just and equitable” discretion has been deployed to reduce, rather than increase, compensation. At common law, an employer may rely on misconduct discovered post-dismissal as cause for summary dismissal.\(^{41}\) The statutory scheme departs from the common law in this regard: it is the employer’s reason for dismissal, and the surrounding circumstances at the time of dismissal, that determine fairness; subsequently discovered misconduct cannot turn an unfair dismissal into a fair one.\(^{42}\) This principle was, however, curbed significantly in Devis & Sons Ltd v Atkins,\(^{43}\) in which the House of Lords held that although the Tribunal may not consider misconduct not known to the employer at the time of dismissal in determining whether that dismissal is unfair, the Tribunal may rely on its just and equitable discretion to reduce an employee’s compensation for unfair dismissal to nil on the basis of such misconduct.\(^{44}\) Collins argued that in Devis, their Lordships were influenced by the common law rule that subsequently discovered conduct can excuse a dismissal: “The court drew directly upon the standards of the common law of wrongful dismissal in order to determine what was just and equitable in an award of compensation under the new legislation.”\(^{45}\)

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\(^{40}\) Dunnachie, supra note 36 at para 21.

\(^{41}\) Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339, [1886-90] All ER Rep 65 (CA (Eng)).

\(^{42}\) Abernethy v Mott, Hay and Anderson [1974] ICR 323 at 330, [1974] IRLR 213 (CA (Eng)).


\(^{44}\) Ibid at paras 40 and 50.

\(^{45}\) Collins, Justice, supra note 23 at 37.
There are important differences between monetary awards for unfair dismissal and wrongful dismissal. A successful claimant in an unfair dismissal case is normally entitled to a basic award based on age and length of service, capped at £13,920, in addition to the compensatory award.\footnote{ERA, supra note 10, ss 118(1)(a) and 119.} The compensatory award is not limited to the notice period, but may reflect the entire period of unemployment, subject to the statutory cap. As well, the mitigation principle does not apply so as to reduce compensation below the notice period, where no notice has been given.\footnote{Norton Tool, supra note 31 at para 20.} Finally, within the statutory cap, a Tribunal may increase the compensatory award by up to 25 per cent where an employer fails to comply with minimal procedural requirements, including meeting with the employee prior to the decision to dismiss and allowing a right of appeal.\footnote{Trade Union and Labour Relations (Consolidation) Act 1992 (UK), c 52, s 207A.} These differences notwithstanding, it is noteworthy that compensation awards are typically low: the median award in 2012-2013 was £4,832.\footnote{UK, Ministry of Justice, supra note 20.}

Obviously, it is in employees’ interests to maximise the compensation available. However, there are several other reasons why the limitations on compensation identified above undermine the employment protection offered by the scheme. Firstly, low compensation has a correspondingly low deterrent effect. Collins argued that because Parliament’s intention was to alter employers’ behaviour by requiring them to act reasonably, it is irrational to exclude compensation for non-pecuniary loss, as such compensation is the most direct means of linking awards to an employer’s departure from acceptable standards of behaviour.\footnote{Hugh Collins, “The Just and Equitable Compensatory Award” (1991) 20:3 ILJ 201 at 203 and 207.} As Collins argued just prior to the House of Lords’ decision in Dunnachie: “The law needs to send a clear message to employers that [unreasonable] behaviour will not be tolerated. One sure way to do this … is to hold that the compensatory award includes the possibility in appropriate cases of compensation for the manner of dismissal.”\footnote{Hugh Collins, “Compensation for the Manner of Dismissal” (2004) 33:2 ILJ 152 at 158 [Collins, “Compensation”].} Secondly, Collins proposed that an important objective of the scheme is to protect an employee’s dignity and self-esteem.\footnote{Collins, Justice, supra note 23 at 17.} As such, it is reasonable to expect Tribunals to have regard to non-economic considerations in assessing compensation: “If the fundamental objective of the legislation is to ensure respect for the dignity of the individual at work, it would be odd to discover that the compensation for violation of the right failed to
include an element that compensated the individual for serious violations of dignity and respect.\textsuperscript{53}

Recent statutory reforms, principally the limit on compensation to the lower of one year’s salary or £76,574, have further limited the compensation available for unfair dismissal.\textsuperscript{54} As Bob Hepple notes, these reforms are likely to affect employees’ perceptions of the usefulness of bringing or pursuing unfair dismissal claims: “The real effect of the cap will be to send a signal to employees that they should not bring claims or should settle because awards are low.”\textsuperscript{55}

\textbf{4.3 Other common law influence over the statutory scheme}

The common law of wrongful dismissal has crept into the operation of other elements of the statutory scheme. Renton argued that the common law has bequeathed to the Tribunal system a high degree of procedural fairness.\textsuperscript{56} In other areas, however, the common law’s implications for the unfair dismissal regime have been less salutary. For example, courts have interpreted the test of whether the employer acted “reasonably or unreasonably” in the statutory scheme as requiring the employer to have acted within the “band of reasonable responses”, both in respect of the decision to dismiss and the procedure undertaken by the employer in arriving at that decision.\textsuperscript{57} As several commentators have noted, this test affords a high degree of deference to the employer and therefore amounts to a high barrier to success for employees.\textsuperscript{58} This deferential approach was explicitly recognised in \textit{HSBC Bank plc v Madden},\textsuperscript{59} in which Mummery LJ cautioned against the “dangers” where a Tribunal “substitut[e] itself for the employer” in considering the merits of a decision to dismiss: “The employer, not the tribunal, is the proper person to [investigate] the alleged misconduct.”\textsuperscript{60} The significant deference accorded to employers is another manifestation of the common law of wrongful dismissal in judicial interpretation of the statutory scheme. David Cabrelli argued that such deference sprang from

\begin{footnotes}
\item[53] Collins, “Compensation”, \textit{supra} note 51 at 156.
\item[54] ERA, \textit{supra} note 10, ss 124(1) and 124(1ZA).
\item[56] Renton, \textit{supra} note 21 at 116 and 123.
\item[57] \textit{Whitbread plc (t/a Whitbread Medway Inns) v Hall} [2001] EWCA Civ 268, [2001] ICR 699.
\item[58] KD Ewing and John Hendy, “Unfair Dismissal Law Changes—Unfair?” (2012) 41:1 ILJ 115 at 117; Renton, \textit{supra} note 21 at 14.
\item[60] \textit{Ibid} at para 80.
\end{footnotes}
“the judicial reluctance towards the second guessing of managerial decisions”, and that it “represents a deep-seated policy choice on the part of the judiciary”.

4.4 Institutional setting

The institutional apparatus through which the unfair dismissal scheme is administered goes some way to explaining the pervasive influence of the common law of wrongful dismissal upon the statutory unfair dismissal scheme. Commenting shortly after the introduction of what were then known as Industrial Tribunals, Otto Kahn-Freund sounded a “note of warning” that “the entrustment of a wide range of issues arising out of the employment relationship to industrial tribunals and to the courts on appeal from them does inevitably tend to judicialise the employment relationship, however informally and empirically those tribunals conduct their business.” The common law’s influence over the statutory unfair dismissal regime may be viewed as a manifestation of the “judicialisation” contemplated by Kahn-Freund. The Employment Tribunals are not, and have never been, administrative bodies operating independently of the courts. They are very much embedded within the legal establishment.

The legally-orientated background of those who hear and argue unfair dismissal cases provides a channel through which elements of the common law of wrongful dismissal may influence the operation of the statutory scheme. From their inception, Tribunals have been under the direction of lawyers. Tribunals are presided over by full- or part-time Employment Judges, formerly known as Tribunal Chairmen, who are barristers or solicitors with at least five years’ experience in legal practice or some other “law-related activity” such as teaching. Prior to 6 April 2012, Employment Judges heard unfair dismissal cases with two lay wing members, however from that date such cases have been heard by Employment Judges sitting alone, thereby reinforcing judicial control over the statutory scheme. Parties’ increasing use of legal representation further bolsters the legalisation of the Tribunal environment. As Renton argued:

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63 Tribunals, Courts and Enforcement Act 2007 (UK) c 15, ss 50 and 52; Employment Tribunals Act 1996 (UK), c 17, ss 1(1) and 3A [ETA]; Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (UK) (SI 2004/1861), Regulation 8(3).
64 ETA, supra note 63, s 4(3)(c); Employment Tribunals Act 1996 (Tribunal Composition) Order 2011 (UK) (SI 2012/988).
The reason why [common law values] dominate, even in courts such as Employment Tribunals, which were set up in the modern era, and are the product of statute rather than tradition, is that the lawyers who appear in the Employment Tribunal, their Judges, and the Judges who hear the appeals from Tribunal cases, are all schooled in a common law tradition in which these values dominate.\(^{66}\)

Lizzy Barmes argued that the influence of judges’ background values is potentially subtle and subconscious, but strong nonetheless: “the social, cultural, historical and institutional influences on judges and on legal traditions are beyond the capacity of either any individual judge or of any collective of judges to resist”.\(^{67}\) Judges did not necessarily choose to revert to the common law of wrongful dismissal when interpreting the unfair dismissal statute; applying Barmes’ logic, it is entirely possible that, acting in good faith, they simply accepted certain well-established principles of the law of wrongful dismissal, such as the limitation of compensation to pecuniary losses or the aversion to re-employment orders, as givens.

The appellate supervision of Tribunals by the courts provides further opportunities for wrongful dismissal concepts to infiltrate the unfair dismissal scheme. Appeals from the Employment Tribunals on questions of law are heard by the Employment Appeal Tribunal, which is presided over by judges drawn from the common law courts.\(^{68}\) Further appeals, in England and Wales, lie to the to the Civil Division of the Court of Appeal and to the UK Supreme Court, which from 1 October 2009 assumed the judicial functions previously performed by the House of Lords.\(^{69}\)

Although an Employment Tribunal’s findings of fact may not be disturbed on appeal unless they are unsupported by any evidence, an error of law, including any error in the construction of a statute, may be corrected by an appellate court or tribunal.\(^{70}\) There is no curial deference in relation to, for example, Tribunals’ interpretations of statutes, such as the ERA, which fall within their areas of expertise. Even if those who sit in the Employment Tribunals were inclined to adopt novel concepts in their interpretations of the ERA, the courts would, ultimately, have the final say on such interpretations.

\(^{66}\) Renton, *supra* note 21 at 123.


\(^{68}\) ETA, *supra* note 63, ss 21 and 22.

\(^{69}\) *Ibid*, s 37; Constitutional Reform Act 2005 (UK), c 4, ss 23 and 40; Constitutional Reform Act 2005 (Commencement No 11) Order 2009 (UK) (SI 2009/1604), Article 2.

Susan Corby and Paul Latreille argued that the progressive erosion of differences between Employment Tribunals and the civil courts exemplifies the phenomenon of institutional isomorphism, whereby one institution tends to become similar to another.\(^\text{71}\) Isomorphic pressures on Tribunals include not only the institutional and professional features mentioned above, but also “mimetic isomorphism” whereby Tribunals adopt the practices and values of civil courts, the latter “enjoying higher status and greater longevity”, in order to boost Tribunals’ legitimacy.\(^\text{72}\) Taken together, isomorphic pressures render the Tribunals more like courts not only in their functioning, but also in the norms governing Tribunals’ behaviour: whereas at one point they were intended to be an industrial jury of experts on labour relations, isomorphism has led to the prevalence of legal norms, including the common law, over industrial norms.\(^\text{73}\)

The institutional setting in which the unfair dismissal scheme operates has created potential routes through which the scheme might be subject to interpretation through the prism of the common law. Despite acknowledgement, for example in Norton Tool, that the statutory scheme is independent of the common law, judges and the lawyers who appear before them are inclined to apply the common law when an ambiguity, gap or discretion appears in that scheme.\(^\text{74}\) It is interesting to contrast the experience of English Employment Tribunals in this regard with the arbitration of dismissal disputes under Canadian collective bargaining regime, discussed below in Part 7, which is far more effectively shielded from common law influence.

The Donovan Commission recommended that a statutory unfair dismissal scheme be established on the basis that the existing common law on termination of employment was inadequate in protecting dismissed employees. The protective capacity of the statutory scheme has, however, been impaired by the unhelpful influence of concepts from the common law of wrongful dismissal, which has had a particularly acute impact on the remedies available to unfairly dismissed employees. The result is that just as the statutory scheme was invoked by judges to curb the development of the common law, the common law of wrongful dismissal has, in turn, worked to inhibit employment protection under the statute. At the intersection of these legal mechanisms, each has operated to cut down the employment protection offered by the other.

\(^\text{71}\) Corby and Latreille, supra note 65 at 388.
\(^\text{72}\) Ibid at 404.
\(^\text{73}\) Ibid at 396.
\(^\text{74}\) Ibid at 395-396.
4.5 A note on unjust dismissal in Canada

It is appropriate, having examined English unfair dismissal, to note a few high-level similarities between that scheme and Canada’s unjust dismissal legislation, discussed at 2.2 above.

Like the English scheme, the Canadian unjust dismissal scheme purports to remedy a number of perceived flaws in wrongful dismissal, including the difficulty of recovering compensation for non-economic loss and the unavailability of re-employment as a remedy.\(^75\) On a finding of unjust dismissal, an adjudicator may reinstate the dismissed employee, award compensation or make other orders “to remedy or counteract any consequence of the dismissal”.\(^76\)

More interesting, for the purposes of this paper, is the operation of these remedies in practice. On one hand, as Geoffrey England and others observed, adjudicators have used their broad remedial jurisdiction to make orders requiring the employer to, for example, apologise to the employee, post a copy of the adjudicator’s decision in a visible place in the workplace or provide a reference to potential employers with whom the employee seeks work in the future; none of these remedies is available to English Tribunals in unfair dismissal proceedings.\(^77\) On the other hand, England and others note that “reinstatement is granted relatively sparingly”.\(^78\) Further, some adjudicators award compensation based on the damages the employee would have received in a wrongful dismissal action, a trend that England and others criticise as permitting employers to terminate employees for any reason whatsoever, so long as valid notice is given.\(^79\) This would appear to be inconsistent with the scheme’s purpose: “it should be obvious that the enactment of [the unjust termination legislation] would have been largely superfluous if the legislators had simply intended to duplicate common law remedies”.\(^80\)

Canada’s unjust dismissal scheme affects relatively few employees and is not the focus of this paper. However, to the extent that the infusion of statutory unfair dismissal schemes with wrongful dismissal concepts is a more general trend, it may merit further study in its own right.

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\(^76\) Canada Labour Code, RSC 1985, c L-2, s 242(4).
\(^77\) England et al, *supra* note 75 at para 17.188.
\(^78\) *Ibid* at para 17.162.
\(^79\) *Ibid* at paras 17.164-17.165.
\(^80\) *Ibid* at para 17.148.
5. Dismissal in unionised workplaces in England

There is, in England, no separate legal regime governing termination of employment in unionised workplaces. As noted at 2.1 above, individual employees’ contracts of employment remain in force notwithstanding the conclusion of a collective agreement between an employer and a recognised trade union. Unionised employees may bring claims for wrongful dismissal in the same manner as non-unionised employees, and a collective agreement will not be relevant in wrongful dismissal proceedings unless any terms that have been incorporated into the employee’s contract of employment affect contractual rights on dismissal. Likewise, claims for unfair dismissal are heard in the Employment Tribunals in the same way as for non-unionised employees.

The Employment Rights Act 1996 theoretically permits the parties to collective bargaining to supplant the unfair dismissal scheme. An employer and one or more recognised independent trade unions may conclude a dismissal procedures agreement establishing an alternative mechanism for resolving disputes relating to unfair dismissal.\(^1\) Where such an agreement has been approved by the government, the employees covered by that agreement are excluded from the unfair dismissal scheme.\(^2\) Ministerial approval of a dismissal procedures agreement requires, amongst other things, that remedies for dismissal under the scheme established by the agreement be “on the whole as beneficial” as the unfair dismissal scheme, and that disputes be resolved through arbitration.\(^3\) Hugh Collins observed that this procedure was “intended to stimulate collective bargaining over disciplinary matters”.\(^4\) However, dismissal procedure agreements have fallen into disuse: the last dismissal procedures agreement in force was terminated in 2001 and no others have been approved since that time.\(^5\) As Collins noted, despite the availability in principle of a separate forum in unionised environments, the effect of the ERA was to create one regime for all employees: “instead of promoting collective bargaining as the mechanism for

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1 1996 (UK), c 18, s 110 [ERA].
2 Ibid, ss 110(1) and 110(3).
3 Ibid, s 110(3).
resolving questions of justice at work, the unfair dismissal legislation diverts grievances into a legal forum which assesses legal rights”.

Even though both the common law and the statutory scheme apply to unionised employees, there are a number of ways in which collective bargaining may, in practice, be of some assistance to dismissed employees. The employer and trade union may agree terms relating to termination of employment, such as notice periods in excess of the statutory minimum, or enhanced redundancy or other termination payments, which would be enforceable as terms of individual employees’ employment contracts. Collective agreements may contain disciplinary or dismissal procedures; failure to follow such procedures is likely to affect the fairness of a dismissal under the statutory scheme. Likewise, to the extent that any contractual dismissal procedures are incorporated into an employee’s contract of employment, an employee’s common law right to notice may be affected by such terms: the notice period may, for example, be extended by the amount of time it would have taken to complete the contractually-agreed disciplinary procedure. On a practical level, a trade union may provide its members with advice and representation, including legal representation, in disciplinary or dismissal situations, and may bargain collectively on behalf of a dismissed employee for reinstatement or other relief.

Although trade unions are able to bargain for better terms and conditions for, and provide litigation support to, employees in unionised workplaces, those employees are essentially in the same position as non-unionised employees as regards the legal structure governing termination of employment, and enjoy the same limited employment protections discussed above at Parts 3 and 4. Unionisation does not, in itself, transform the legal position of employees in relation to dismissal. It offers no separate or additional institutional channel through which to challenge the lawfulness of dismissal. Rather, like all employees, unionised employees may pursue claims for wrongful or unfair dismissal, and unionisation offers no inherent improvement upon the limited protection offered by either of those branches of the law.

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6 Collins, supra note 4 at 254.
7 Stoker v Lancashire County Council [1992] IRLR 75 (CA (Eng)).
9 David Renton, Struck Out: Why Employment Tribunals Fail Workers and What Can be Done (London: Pluto, 2012) at 102-103; Collins, supra note 4 at 256-257.
6. Wrongful dismissal in Canada

In Parts 3, 4 and 5 above, this paper argued that the interaction between common law wrongful dismissal and statutory unfair dismissal in England has resulted in a limitation of the protection offered to both unionised and non-unionised employees under both of these actions. This Part will examine the law of wrongful dismissal in Canada.

As noted at 3.4 above, the common law historically viewed employment as a private contractual relationship between parties of equal bargaining strength, in which courts are reluctant to intervene. Although modern English courts acknowledge the need for protection for dismissed employees, they have blocked the development of the common law in pursuit of this objective, on the grounds that such development would be inconsistent with the statutory unfair dismissal scheme. As such, English common law retains a laissez-faire treatment of wrongful dismissal.

In Canada, the common law has embraced a modern conception of the employment relationship, as exemplified by the oft-cited observations of Dickson CJ:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.¹

In contrast to the historic common law view of the parties to the employment contract as equals, courts in Canada have repeatedly acknowledged the relative vulnerability of employees, particularly at dismissal. As Iacobucci J said in Wallace v United Grain Growers Ltd: “The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection.”²

In both England and Canada, therefore, judges are receptive to the concept of protection for dismissed employees. However, in Canada, where no general unfair dismissal statute operates to constrain development of the common law, such progressive judicial attitudes have manifested themselves throughout wrongful dismissal jurisprudence. Many Canadian courts view the function of common law reasonable notice as being “to ‘cushion’ the employee against the blow of unemployment”; as Geoffrey England and others have noted, this “cushion rationale” has led

¹ Reference Re Public Service Employee Relations Act (Alta) [1987] 1 SCR 313 at para 91, 51 Alta LR (2d) 97 (SCC).
² [1997] 3 SCR 701 at para 95, 123 Man R (2d) 1 (SCC) [Wallace cited to SCR].
courts to award increasingly long notice periods and to oust employer attempts to shorten such notice by contract. These trends will be examined below, along with Canadian courts’ power to award damages for mental distress caused by the manner of dismissal. All of these developments represent significant departures from English common law. The contrast between the Canadian and English legal positions was epitomised in Machtinger v HOJ Industries Ltd, in which the Supreme Court of Canada treated the intersection of common law and statute as an opportunity to enhance, rather than limit, protection for dismissed employees.

6.1 Reasonable notice

In both England and Canada, an employer must give notice of termination of employment, absent just cause for dismissal. Unless the contract incorporates an express term as to the length of notice, the court will imply a term requiring reasonable notice of termination.

As noted at 3.2 above, in England there is a dearth of modern case law concerning the calculation of implied reasonable notice. By contrast, in Canada there is a large body of jurisprudence on that calculation, which may be explained by several factors. Firstly, it is far less common in Canada than in England for the parties to enter into a reasonably complete written contract of employment, a phenomenon which is perhaps explained by the absence of any legal obligation on employers to give employees a written statement of employment terms; as discussed at 3.2 above, in England employers are required to do so. Secondly, courts routinely refuse to give effect to express contractual provisions purporting to displace the implied right to reasonable notice, a trend that will be discussed below at 6.3. Finally, as noted at 2.2 above, in Canada the vast majority of non-unionised employees do not benefit from statutory protection from unfair dismissal, with the result that the common law is a far more important source of employment rights than in England, where an alternative claim for unfair dismissal is available. The resulting profusion of judgments on reasonable notice has generated the publication of treatises devoted exclusively to the subject of wrongful dismissal, incorporating lengthy tables of notice periods.

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4 [1992] 1 SCR 986, 7 OR (3d) 480 (SCC) [HOJ cited to SCR].
In *Bardal v Globe & Mail Ltd*, McRuer CJ set out the principles governing reasonable notice:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.\(^7\)

The list of factors in *Bardal* was non-exhaustive and has evolved in subsequent cases.\(^8\) Additional factors that have been considered by the courts in calculating reasonable notice include inducement of the employee to leave previously secure employment in order to take up the post, and non-contractual promises of job security made by the employer to the employee.\(^9\) As well, some courts have questioned the continuing influence of character of employment, most notably the Ontario Court of Appeal in *Di Tomaso v Crown Metal Packaging Canada LP*, in which MacPherson JA, affirming a 22-month notice period for a mechanical labourer, suggested that character of employment was “today a factor of declining relative importance”.\(^10\)

There is no hard and fast rule governing quantification of notice. Although in the 1960s there was judicial debate as to whether a six-month cap applied to reasonable notice, from the 1970s onwards, courts were more willing to make higher awards.\(^11\) Today, there is no firm maximum on the length of the notice period, although the Supreme Court has suggested that 24 months’ notice is “at the high end of the scale”.\(^12\) Short of that soft upper limit, in calculating reasonable notice, the courts have explicitly rejected the application of formulae such as the asserted “one month per year of service” rule.\(^13\) Nonetheless, a brief mention of trends is instructive for comparative purposes. Barry Fisher’s research on judicially-determined notice periods revealed that, as a “rule of thumb”:

1. Generally speaking, employees with up to 2.5 years of service receive notice based on 2.5 months per year of service.

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\(^7\) [1960] OJ No 149 at para 21, 24 DLR (2d) 140 (Ont H Ct J) [*Bardal*].
\(^8\) See e.g. *Bishop v Carleton Co-Operative Ltd* [1996] NBJ No 171 at para 9, 176 NBR (2d) 206 (NB CA).
\(^12\) *Wallace*, supra note 2 at para 109.
2. Employees with service between 2.6 and 5 years, receive about 1.5 [months’] notice for every year of service[.]
3. Employees with between 6 and 15 years of service generally receive notice based on one month per year of service.
4. Employees with 16 or more [of] service generally receive three weeks notice per year of service, which drops down to two weeks per year of service after 25 years [of] service.
5. Managers and [professionals] do better than the average, supervisory and technical types do about the average and clerical and labourer groups do worse than the average.\textsuperscript{14}

These numbers are striking from the point of view of English law. As discussed at 3.2 above, contractual notice periods in England rarely exceed one year. Implied reasonable notice would similarly be unlikely to exceed one year, and most employees, especially those who are not managers or professionals, would receive the statutory minimum. The trend visible in Canadian implied notice periods is, from an English perspective, more akin to a generous severance scheme. For example, civil servants in the UK, who have one of the most generous redundancy payment schemes in the country, are entitled to one month’s pay per year of service for termination on compulsory redundancy, up to a maximum of 12 months.\textsuperscript{15}

\textbf{6.2 Avoidance of contracting out}

There is a potentially severe limitation on the ability of the common law to confer the generous reasonable notice periods contemplated at 6.2 above: an express term of the employment contract specifying notice will displace common law implied notice. In MacDonald v ADGA Systems International Ltd,\textsuperscript{16} for example, the trial judge’s award of 14 months’ notice was reversed by a unanimous Ontario Court of Appeal, which held that the common law right to reasonable notice had been “rebutted” by “a clear – and clearly expressed – term” providing for one month’s notice.\textsuperscript{17} In theory, an employer that secures its employee’s agreement to an express contractual notice period will, in so doing, avoid the common law entitlement. However, Canadian courts have deployed a wide range of techniques to protect employees from the perceived unfairness associated with contracting out of implied reasonable notice. As England observed, “most modern courts have recognised that the employer’s superiority of

\textsuperscript{14}Barry B Fisher, “Measuring the Rule of Thumb in Wrongful Dismissal Cases” (1998) 31 CCEL (2d) 311.
\textsuperscript{16}[1999] OJ No 146, 41 CCEL (2d) 5 (Ont CA).
\textsuperscript{17}Ibid at para 24.
bargaining power creates the danger that unduly harsh notice provisions may be included in an employment contract, something that would be unfair to the employee to enforce”. 18 Examples of judicial resourcefulness in avoiding express notice provisions include:

(a) interpreting such provisions contra proferentem in the employee’s favour, as in Allison v Amoco Production Co, in which the employee was entitled to one year’s reasonable notice, the “harsh” 30-day contractual notice period interpreted as being “a minimum”; 19

(b) finding lack of positive employee assent to the provision, as in Lyonde v Canadian Acceptance Corp, 20 in which an express notice period contained in a company handbook and known to the employee was unenforceable in the absence of explicit acceptance;

(c) avoiding for want of consideration, as in Fasullo v Investments Hardware Ltd, 21 in which the court avoided a document restricting notice to the statutory minimum, which had been signed, for nothing in return, two days after the plaintiff’s employment had commenced and several weeks after he signed his contract of employment;

(d) finding that the employment “substratum”, or the level of responsibility and status of the employment, changed between the time of the contract and termination, such that the express notice clause no longer reflects the parties’ intentions at the time it was agreed, as in Sawko v Foseco Canada Ltd, 22 in which the plaintiff’s progression from his initial post as a foundry product engineer to a more senior post of full-time resident sales representative rendered his three-month notice clause unenforceable; and

(e) refusing to enforce notice provisions that are incompatible with statutory minimum notice periods, as in HOJ, 23 which will be discussed further below at 6.4.

Considerable effort may be required in order to contract out of common law notice entitlement. Christine Thomlinson noted that “courts wish to see termination clauses drafted with care and significant clarity before an employee will be found to be deprived of her entitlement”, and that

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18 England, Individual, supra note 5 at 302.
19 [1975] AJ No 490 at para 29, 58 DLR (3d) 233 (Alta SC(TD)).
21 2012 ONSC 2809, 98 CCEL (3d) 261.
23 HOJ, supra note 4.
even the “tightest” notice provisions may be unenforceable.\textsuperscript{24} She recommended that employers wishing to oust the common law should, amongst other things, re-negotiate notice clauses each time an employee is promoted, or include wording to the effect that notice clauses remain effective despite changes in salary or position.\textsuperscript{25} Further advice was provided by Fruman J in \textit{Long v Delta Catalytic Industrial Services Inc:}

\begin{quotation}
It is incumbent on an employer to keep detailed records of everything relevant to the formation of the contract, including timing of events, meetings and delivery of documents; copies of letters, agreements and other documents given to employees; outlines of explanations and disclosures made at meetings…; opportunities given to employees to obtain independent advice; and particulars of delivery of signed documents to employees.\textsuperscript{26}
\end{quotation}

It should be noted that English courts have also avoided harsh termination provisions. In \textit{T \& K Home Improvements Ltd v Skilton},\textsuperscript{27} for example, a clause permitting dismissal “with immediate effect” for missing a performance target was interpreted so as to permit the employer to exclude the employee from the workplace, but did not remove the employee’s entitlement to three months’ notice.\textsuperscript{28} However, in contrast to the widespread interventionist activities of Canadian courts, it is not at all common for English courts to avoid contractually-agreed notice periods, and indeed the minimum notice legislation in that country expressly provides that a contractual provision providing for less than the statutory minimum notice “has effect” subject to that minimum.\textsuperscript{29}

\subsection*{6.3 Manner of dismissal}

As discussed in Parts 3 and 4 above, in England neither the common law of wrongful dismissal nor the statutory unfair dismissal scheme offers any meaningful remedy in respect of the manner of dismissal. In general, outrageous employer conduct at dismissal attracts no greater compensation. This is not the case in Canada, where employers who dismiss employees in bad faith, including through unduly insensitive or dishonest behaviour, risk incurring significant additional liabilities. Although the current legal position regarding manner of dismissal damages

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} \textit{Ibid} at 124.
\item \textsuperscript{26} 58 Alta LR (3d) 115 at para 28, 35 CCEL (2d) 70 (Alta QB).
\item \textsuperscript{27} [2000] ICR 1162, [2000] IRLR 575 (CA (Eng)) [cited to ICR].
\item \textsuperscript{28} \textit{Ibid} at 1166-1167.
\item \textsuperscript{29} Employment Rights Act 1996 (UK), c 18, s 86(3).
\end{itemize}
\end{footnotesize}
harbours both conceptual and practical difficulties, compensating employees for egregious employer conduct at dismissal adds significantly to the protection offered to employees.

6.3.i Pre-Honda

Historically, Canadian courts refused to award damages for manner of dismissal. In *Peso Silver Mines Ltd v Cropper*, the Supreme Court of Canada unanimously confirmed, in essence, the same rule as in *Addis v Gramophone Co Ltd*, that because a wrongful dismissal claim was “founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee’s] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment”. However, towards the end of the twentieth century, courts’ reluctance to interfere in the employment relationship gradually gave way to a willingness to impose certain basic standards of acceptable behaviour on employers. England observed in 1995 that: “Courts have begun to establish a duty of fairness indirectly, by incorporating its main feature into other legal doctrines regularly applied to the employment relationship.” England suggested that this trend was evident in, for example, judicial determinations regarding just cause for summary termination, with the result that courts imposed requirements that a decision to dismiss summarily be rational and proportionate.

The trend identified by England culminated in *Wallace v United Grain Growers Ltd*, which revolutionised courts’ approach to the manner of dismissal. In that case, the majority of the Supreme Court imposed on employers an “obligation of good faith and fair dealing” in dismissing employees. Iacobucci J said that “in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”. Breach of this obligation, often referred to as bad faith conduct, was to be taken into account as a factor in determining the length of notice to which the employee was

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31 [1909] UKHL 1, [1909] AC 488 [*Addis* cited to AC].
32 *Peso*, *supra* note 30 at 684.
34 *Ibid* at 558, 567-570 and 587.
35 *Wallace*, *supra* note 2.
36 *Ibid* at para 98.
37 *Ibid*. 
entitled at common law.\textsuperscript{38} Examples of bad faith conduct include failing to be open and honest about decisions relating to dismissal, permitting an employee to learn of dismissal through a newspaper advert, levelling unfounded accusations, unreasonably refusing to provide a reference and dismissing an employee immediately on return from disability leave.\textsuperscript{39} On the facts of \textit{Wallace}, the Supreme Court gave no precise indication of the increase in the notice period attributable to the employer’s bad faith.\textsuperscript{40} However, England cited research by Barry Fisher noting that so called “\textit{Wallace extensions}” added on average 33 per cent. to the notice period.\textsuperscript{41}

A residual reluctance to intervene in the employment relationship is evident in \textit{Wallace}. Iacobucci J refused to impose an implied term requiring good faith in dismissal, on the basis that such a term would be inconsistent with employers’ “ability to determine the composition of their workforce” and that to restrict the right to terminate on reasonable notice would be “overly intrusive”.\textsuperscript{42} Further, the plaintiff was unable to recover damages for mental distress arising from the dismissal, applying jurisprudence finding its origin in \textit{Addis}.\textsuperscript{43} Iacobucci J’s compromise of extending the notice period was criticised. McLachlin J, as she then was, argued in dissent in favour of implying a “duty of good faith in termination of the employment”, her reasons for doing so including that \textit{Wallace} extensions introduced potentially irrelevant considerations into the calculation of notice and that breach of the obligation of good faith was an independent wrong that should not be compensated through a wrongful dismissal action.\textsuperscript{44} England argued that providing compensation for the manner of dismissal by extending the notice period, rather than by reference to loss, could create potentially arbitrary results, and that any such compensation would be eliminated altogether by an express notice period.\textsuperscript{45}

\begin{footnotes}
\item[Ib\textit{id} at para 88.]
\item[Ib\textit{id} at paras 99-100.]
\item[Ib\textit{id} at para 109.]
\item[England, \textit{Individual}, supra note 5 at 321.]
\item[\textit{Wallace}, supra note 2 at paras 75 and 76.]
\item[Ib\textit{id} at paras 73-74 and 103.]
\item[Ib\textit{id} at paras 112 and 119-127.]
\item[England, \textit{Individual}, supra note 5 at 91 and 323.]
\end{footnotes}
6.3.ii Honda

The rule in *Wallace* was, in the event, superseded by developments in general contract law. *Addis* was overruled in *Fidler v Sun Life Assurance Co of Canada*,\(^{46}\) which held that damages for mental distress are available for breach of contract, provided that the contract offered some promise in relation to state of mind, and that the degree of mental suffering was sufficient to warrant compensation. The Supreme Court portrayed this development as a straightforward application of the rule in *Hadley v Baxendale*,\(^{47}\) which provides that a head of loss is recoverable if it is a foreseeable result of breach of contract at the time the contract is made.\(^{48}\)

Shortly after *Fidler*, the Court abolished *Wallace* extensions in *Honda Canada Inc v Keays*.\(^{49}\) Following *Honda*, damages for mental distress are available to dismissed employees, provided that the employer acted in bad faith, as defined in *Wallace*.\(^{50}\) Employers would be liable for compensatory damages, rather than “arbitrary” extensions to the notice period, where the plaintiff suffered actual loss flowing from the bad faith conduct.\(^{51}\) Further, mental distress would only be compensable if it flowed from an employer’s egregious conduct at dismissal, and not from the dismissal itself.\(^{52}\) Bastarache J, for the majority, argued that this was consistent with *Fidler* and *Hadley v Baxendale*: since *Wallace*, employers had been on notice that failure to act in good faith in dismissal could result in “foreseeable, compensable” damages, whilst dismissal itself was a “clear legal possibility” that employers may execute “without regard to the ordinary psychological impact of that decision”.\(^{53}\)

*Honda* introduced a measure of certainty by dispensing with allegedly arbitrary *Wallace* extensions. As England observed, *Honda* also offered potentially larger awards: an employee who could establish that he or she suffered mental distress because of an employer’s bad faith at dismissal could conceivably recover a significantly larger award on the basis of compensatory damages than such employee would have received by an extension of the notice period.\(^{54}\)

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\(^{46}\) 2006 SCC 30, [2006] 2 SCR 3 [*Fidler*].

\(^{47}\) (1854) 9 Exch 341, 156 ER 145 (Exch Ct (Eng)) [*Hadley v Baxendale*].

\(^{48}\) *Ibid* at para 44.

\(^{49}\) 2008 SCC 39, [2008] 2 SCR 362 [*Honda*].

\(^{50}\) *Ibid* at paras 57-58.

\(^{51}\) *Ibid* at paras 58-59.

\(^{52}\) *Ibid* at para 56.

\(^{53}\) *Ibid* at paras 56 and 58.

generally, the development of the common law in *Honda* reflected modern perceptions about the employment relationship. As England and others argued, in *Honda*, the Court recognize[d] that the psychological element of “job satisfaction” occupies a central place in the employment contract and should be compensated accordingly in wrongful dismissal actions. Today, it is realistic to suppose that both parties would reasonably expect that the employer will respect the psychological wellbeing of the worker during his or her employment. Numerous recent studies have revealed the centrality of work to [such] psychological wellbeing…. Accordingly, employers ought reasonably to foresee that psychological damage is likely to be sustained as a result of the wrongful dismissal (the more so if the dismissal is particularly callous) and therefore ought to be made liable for such damage.55

6.3.iii Conceptual problems with Honda

Upon scrutiny, *Honda*’s asserted grounding in principle withers somewhat. The Court’s analysis in *Honda* fails to explain why damages for mental distress arising from a wrongful dismissal are not recoverable unless the employer has engaged in bad faith. Given the acknowledged function of the notice period as a “cushion”, a strong case may be made that any wrongful dismissal, and the attendant absence of such cushion, is capable of adding materially to the normal mental distress of dismissal.56 To the extent that mental suffering is in the reasonable contemplation of the parties to an employment contract, at the time it is made, as the result of any wrongful dismissal, the rule in *Hadley v Baxendale* would allow recovery of such damages irrespective of bad faith on the employer’s part.57 Therefore, if a certain degree of employer misconduct beyond simple wrongful dismissal is required in order to found a claim for mental distress damages, it is plain that the legal position following *Honda* is not, as the Court claimed, a simple application of the rule in *Hadley v Baxendale* to damages for wrongful dismissal.

The conceptual problem with the rule in *Honda* is not merely academic. The link to *Hadley v Baxendale* has been invoked to deny mental distress damages on the grounds that, at the time of the contract, mental distress was not reasonably in the contemplation of the parties as a possible consequence of breach. In *Nelson v Champion Feed Services Inc*,58 the plaintiff’s claim for *Honda* damages failed, in part because “there [was] no evidence that the parties contemplated,

58 2010 ABQB 409, 30 Alta LR (5th) 162.
when Mr. Nelson was hired in 1982 at age 20, that he would suffer unduly from dismissal, or that any special circumstances existed to alert Champion to the likelihood of mental distress from Mr. Nelson's dismissal”. Similarly, in Nazir v 116847 Alta Ltd, the plaintiff was a labourer, disclosed no psychological problems and “appeared normal”, precluding recovery of mental distress damages. It is inconsistent with modern conceptions of employment protection to conclude, as the courts in the cases cited above did, that ordinary or young employees are sufficiently hardy to muddle through a dismissal free from mental distress, or that special circumstances must be known to the employer at the time of hiring for mental distress to be foreseeable. As Daniel Lublin argued, “employees will always be able to demonstrate that mental distress or damages arising from the manner of dismissal were in contemplation of the parties at the time the contract was formed”. Both England and John Swan have also argued that mental distress should be deemed to be within the contemplation of the parties to an employment contract.

One means of avoiding the conceptual problems identified above is to treat Honda as having recognised an implied obligation to act in good faith at the point of dismissal. John McCamus argued that “there does not appear to be any escape from the conclusion that”, in effect, the Court in Honda imposed such an implied obligation. In Paul-Erik Veel’s view, an implied duty of good faith was preferable to reliance on reasonable foreseeability, which was “ill-suited” to serve as the basis for awarding mental distress damages arising from bad faith conduct. In practice, many courts appear to regard Honda as having had the effect of creating such a duty. In Altman v Steve’s Music Store Inc, for example, the Ontario Superior Court awarded $35,000 to the plaintiff for “breach of its duty to deal with [her] in good faith and with fairness in the manner in which they terminated her employment”. The view that Honda is authority for an

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59 Ibid at para 140.
60 2011 ABPC 217, 208 ACWS (3d) 727.
61 Ibid at paras 31 and 32.
65 Paul-Erik Veel, “Clarity and confusion in employment law remedies: a comment on Honda Canada Inc v Keays” (2009) 59 UTLJ 135 at 153.
67 Ibid at para 132; see also Merrill Lynch Canada Inc v Soost 2010 ABCA 251 at para 16, 487 AR 389 [Soost].
implied term was given further support in *Boucher v Wal-Mart Canada Corp*, in which breach of the “duty of good faith and fair dealing” constituted an “independent actionable wrong” for the purposes of the plaintiff’s claim for punitive damages in a breach of contract claim.  

Interestingly, an implied term would also permit recovery of *Honda* damages in circumstances where sufficient contractual notice is given. In *Bishop v Cragg*, the Nova Scotia Small Claims Court dismissed the claimants’ wrongful dismissal claims but found that the employer had engaged in bad faith conduct and made an award of general damages independently of the failed wrongful dismissal claim. Although this decision would not bind other courts, it is again consistent with the view that *Honda*, in effect, created an independent obligation of good faith.

6.3.4 Practical problems with *Honda*

The rule in *Honda* also poses practical problems. Firstly, *Honda* requires courts to distinguish between mental distress caused by the fact and manner of dismissal, as only the latter is compensable. In *Johnson v Unisys Limited*, discussed above at 3.6, Lords Millett and Hoffman speculated that courts would struggle to make such a distinction. The fact-manner distinction has proved fatal to claims for *Honda* damages in several cases, including *Fox v Silver Sage Housing Corp*, in which the plaintiff employee was denied *Honda* damages on the grounds that despite his employer’s bad faith conduct and the plaintiff’s mental distress, he had not proved that such distress was caused by such bad faith conduct. In other cases, however, courts have not addressed this distinction explicitly or have simply attributed mental distress to the manner of dismissal without acknowledging explicitly how the conduct, and not the dismissal itself, caused the mental distress. The risk that the trier of fact will find that mental distress was caused by the dismissal itself appears to be inherent in the nature of the claim: in order for bad faith conduct at dismissal to take place, there must be a dismissal in the first place.

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68 2014 ONCA 419, 120 OR (3d) 481 at para 83.
69 2009 NSSM 6, 274 NSR (2d) 368.
70 *Honda*, supra note 49 at paras 56-57.
71 [2001] UKHL 13, [2003] 1 AC 518 [*Johnson*].
72 *Ibid* at paras 48 and 77.
74 2008 SKQB 321, 319 Sask R 179.
75 *Ibid* at para 44.
76 See e.g. *Prabhakaran v Fort Macleod (Town)* 2010 ABPC 35, 23 Alta LR (5th) 303; *Middleton v Highlands East (Municipality)* 2013 ONSC 763, 226 ACWS (3d) 432.
As such, it will always be open to the employer to argue that the cause of the plaintiff’s anguish was the dismissal rather than the bad faith conduct. The fact-manner distinction would therefore seem to add significant unpredictability to such claims.

Secondly, *Honda* demands that plaintiffs prove actual losses in order to receive compensation for mental distress caused by bad faith conduct in dismissal. England speculated that this requirement would significantly increase the burden on plaintiffs, as under *Wallace* there was no such requirement.\(^{77}\) Again, Canadian courts’ treatment of this element of *Honda* has been varied. In *Chapell v Canadian Pacific Railway*, the Alberta Court of Queen’s Bench said that whilst medical evidence would be of assistance to a plaintiff, there was no requirement for evidence proving loss other than the plaintiff’s own oral evidence, which was sufficient in that case.\(^{78}\) However, in other cases, courts have refused compensation for mental distress because the plaintiff did not seek medical treatment, or was otherwise unable to prove actual loss.\(^{79}\)

Finally, regarding quantification of loss, Lord Hoffman warned in *Johnson* of “the open-ended nature of liability”, remarking that employers may be liable for losses that are grossly disproportionate to fault, particularly in the case of psychologically fragile employees who may be unable to work as a result of mental breakdown following dismissal.\(^{80}\) One solution, contemplated by Lord Millett in *Johnson*, would be for courts to award “conventional sums by way of general damages” for bad faith conduct in dismissal, and this appears to have been the approach followed by many Canadian courts applying *Honda*.\(^{81}\) In *Tl’azt’en First Nation v Joseph*,\(^ {82}\) for example, the Federal Court reviewed numerous authorities and concluded that “[w]here there is general insensitivity and the employee can prove mental distress as a result, damages are awarded around the $20,000 range”, and “[w]here the conduct becomes more severe, outrageous and heavy handed, there is normally a corresponding finding of damages above $40,000”\(^ {83}\). These comments suggest a loose approach to quantum rather than a rigorous

\(^{78}\) 2010 ABQB 441 at para 101, 29 Alta LR (5th) 380; see also *Coppola v Capital Pontiac Buick Cadillac Gmc Ltd* 2011 SKQB 318 at para 63, 382 Sask R 125.
\(^{79}\) See e.g. *Macdonald-Ross v Connect North America Corp* 2010 NBQB 250, 364 NBR (2d) 222; *Elgert v Home Hardware Stores Ltd* 2011 ABCA 112, 510 AR 1.
\(^{80}\) *Johnson*, *supra* note 71 at para 49; see also England, “Evaluating”, *supra* note 54 at 339.
\(^{81}\) *Johnson*, *supra* note 71 at para 77.
\(^{82}\) 2013 FC 767, [2013] FCJ No 841.
\(^{83}\) *Ibid* at para 28.
analysis of the economic value of the plaintiff’s losses. It is somewhat less common for courts to attempt to calculate actual loss, although in Burst v AGM Limited,\textsuperscript{84} Honda damages were based partly on loss of earnings and partly on general damages for mental distress.\textsuperscript{85} In any event, although intangible losses are inherently difficult to quantify, such difficulties should not be a bar to recovery of damages, given the courts’ willingness to meet the similarly difficult challenge of quantifying physical injury.\textsuperscript{86}

Despite the limitations of the rule in Honda, that case, and its predecessor Wallace, signalled the common law’s disapproval of employer bad faith conduct at the time of dismissal. As Lublin observed: “Before Wallace, employers could play legal hardball with relative impunity. Trumped-up allegations of misconduct, bogus reasons for dismissal, malicious references, or dragged out litigation based on frivolous defences may have been improper conduct, but there was seldom an incentive to stop it.”\textsuperscript{87} Following Wallace and Honda, Canadian employers’ egregious behaviour carries the potential for significant increases to the compensation payable to dismissed employees. As discussed above at 4.2.ii, linking compensation to the manner of dismissal enhances employment protection by incentivising employers to avoid bad faith conduct at the point of dismissal. Ultimately, the problems discussed above remove neither the risk to employers that bad faith conduct will cause compensable mental distress nor the corresponding incentive for employers to avoid such conduct.

\textbf{6.4 Relationship between statute and common law: HOJ}

In Parts 3 and 4 above, it was argued that in the English law of termination of employment, the common law of wrongful dismissal and the statutory unfair dismissal scheme each worked to limit the employment protection offered by the other. This phenomenon was exemplified in Johnson, which held that the statutory scheme precluded development of the common law, thereby dashing the hopes, discussed at 3.5 above, that the statutory scheme might be invoked so as to enhance the very limited protection the common law offered to dismissed employees. This Part has, thus far, explored the more progressive evolution of the common law in Canada, where, in the near-total absence of statutory protection against unjust dismissal, the courts have

\textsuperscript{84} 2008 BCSC 1680, [2008] BCJ No 2380.
\textsuperscript{85} \textit{Ibid} at paras 171-178.
\textsuperscript{86} Mason \textit{v} Westside Cemeteries Limited [1996] OJ No 1387 at para 54, 135 DLR (4th) 361 (Ont Ct J (Gen Div)).
\textsuperscript{87} Lublin, \textit{supra} note 62 at 153.
fashioned the wrongful dismissal action into a powerful vehicle for employment protection. The focus has been on the effect of an absence of interaction of these branches of the law on outcomes for employees. However, a further observation may be made: where the common law and the very limited statutory regulation of dismissal have encountered each other, the result has not been the curtailment of employment protection witnessed in Johnson. In the key case of Machtinger v HOJ Industries Ltd, the Supreme Court of Canada, like the House of Lords in Johnson, was confronted with a question relating to the intersection of the common law action for wrongful dismissal and statutory employment protection, in this case the minimum notice provisions in the Ontario Employment Standards Act. However, the outcome in HOJ was very different from that in Johnson: the Court in HOJ interpreted the ESA so as to enlarge the employment protection conferred both by the statute and the common law.

The ESA at the time of HOJ provided that employees with five or more years’ service, but less than 10 years’ service, were entitled to four weeks’ notice of termination. The ESA also provided that the standards it imposed were minimum requirements, and that contractual entitlements conferring greater benefits would prevail over such minimum standards. Further, the ESA preserved any civil remedy an employee might have against his or her employer. Finally, and of critical significance for the parties in HOJ, any attempt to waive or contract out of the employment standards contained in the ESA was declared to be void.

The plaintiff employees in HOJ had seven and eight years’ service respectively with the respondent car dealership, and were dismissed without cause. The plaintiffs’ employment contracts provided insufficient notice under the ESA minimum standards: zero and two weeks’ notice, respectively. The plaintiffs conceded that, but for the operation of the ESA, the contractual notice periods were valid. The employer had given each employee four weeks’ pay in lieu of notice, and had therefore given notice that was compliant with the minimum standard in the ESA. However, the plaintiffs sought to avoid their express contractual notice periods,

88 HOJ, supra note 4.
89 RSO 1980, c 137 [ESA].
90 Ibid, s 40(1)(c).
91 Ibid, s 4.
92 Ibid, s 6.
93 Ibid, s 3.
94 HOJ, supra note 4 at 991-992.
invoking in place of those provisions their common law implied notice periods, which the trial judge found to be seven and 7.5 months’ notice respectively, and to recover the balance of such implied notice periods.\textsuperscript{95}

The employer argued that the Court should adopt a restrictive reading of the ESA and give effect to the intentions of the parties as expressed in the terms of the contract. It submitted that, as is the case with statutory schemes relating to labour relations and human rights, the ESA created a “self-contained [code] for establishing and enforcing rights through administrative procedures outside of the civil Courts”, and that the “corollary” to that proposition was that the Court “should not interpret a comprehensive and self-contained statutory scheme [so as] to reach out and alter contractual rights asserted in a civil action”.\textsuperscript{96} They argued that the provision avoiding contracting out should be interpreted only as having the effect of securing the minimum standards set out in the ESA, and not as rendering contractual provisions void altogether.\textsuperscript{97} The employer further submitted that the implication of a term entitling the employees to reasonable notice would be “fundamentally at odds with the legal principles governing implied terms”, as reasonable notice at common law was “contrary to the clear and mutual intention of the parties”, as evidenced by the agreed provisions.\textsuperscript{98} The Court should not, argued the employer, “limit or interfere with the right to contract” by altering the agreement between the parties, other than to substitute the minima contemplated in the ESA.\textsuperscript{99} The employer therefore sought to minimise the protection offered by the ESA and to maximise the parties’ freedom of contract.

The trial judge found for the employees, holding that the effect of the ESA was to avoid the deficient express contractual notice periods.\textsuperscript{100} However, a unanimous Ontario Court of Appeal was persuaded by the employer’s reasoning, holding that the parties had plainly not intended notice of the magnitude conferred at common law, and that the plaintiffs were only entitled to the minimum notice required under the ESA.\textsuperscript{101}

\begin{itemize}
  \item \textsuperscript{95} \textit{Ibid} at 993.
  \item \textsuperscript{96} \textit{Ibid} (Factum of the Respondent at paras 12 and 15).
  \item \textsuperscript{97} \textit{Ibid} (Factum of the Respondent at para 23).
  \item \textsuperscript{98} \textit{Ibid} (Factum of the Respondent at para 19).
  \item \textsuperscript{99} \textit{Ibid} (Factum of the Respondent at para 27).
  \item \textsuperscript{100} \textit{Ibid} at 993.
  \item \textsuperscript{101} \textit{Ibid} at 993-994 and 995.
\end{itemize}
The Supreme Court unanimously allowed the employees’ appeal. The leading judgment, given by Iacobucci J, noted the protective rationale underpinning the ESA: “The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers.”102 The Court remarked that if the ESA merely had the effect of increasing deficient notice periods to the statutory minimum, employers would have no incentive to take positive steps to ensure compliance.103 Substituting the considerably more generous measure of implied reasonable notice for deficient notice provisions would be more effective in meeting the ESA’s objective.104 Regarding the intentions of the parties, Iacobucci J held that the void provisions were “null and void for all purposes, and cannot be used as evidence of the parties’ intention”.105 As such, the effect of the ESA was to render the contractual provisions void, and the employees were entitled to common law reasonable notice. Iacobucci J’s approach was thus to give a broad and generous interpretation to the ESA, invoking that statute so as to impose the significantly longer common law implied notice period in the face of what both parties acknowledged was a freely agreed contract. The ESA was interpreted so as to increase the common law’s capacity to protect employees by limiting the parties’ ability to contract out of such protection. Likewise, the Court deployed the generous common law notice entitlements as an incentive, spurring employers to comply with the ESA. In HOJ, statute and common law worked in harmony towards a common objective of protection for dismissed employees.

Cases following HOJ have reinforced the symbiotic relationship, embodied in that case, between the common law and statutory minimum employment protections. In HOJ, Iacobucci J remarked obiter dicta that it would be open to an employer to incorporate the statutory minimum notice period into the contract by reference, thereby substituting that period for implied common law notice and achieving the outcome sought by the employer in that case.106 However, courts in subsequent cases have frustrated employers’ attempts to do so. In Shore v Ladner Downs,107 for example, the BC Court of Appeal held that an express notice term that had

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102 Ibid at 1002-1003.
103 Ibid at 1004.
104 Ibid.
105 Ibid at 1001.
106 Ibid at 1004-1005.
107 160 DLR (4th) 76, 52 BCLR (3d) 336 (BC CA).
the potential to fall foul of the statutory minimum notice periods, on a possible set of facts at some point in the future, was void ab initio; there was no need for the employee’s statutory entitlement actually to exceed the contractual entitlement in order to avoid the clause. In *MacAlpine v Medbroadcast Corporation*¹⁰⁸ the employment contract contained an express notice clause providing for termination without cause by providing such notice as required under applicable provincial law as amended from time to time. The court held that the express clause was merely an agreement that statutory minimum notice would be given, and did not amount to a waiver by the employee of his right to reasonable notice at common law. These cases, like *HOJ*, illustrate not only the courts’ hostility to attempts to contract out of common law reasonable notice, but also the instrumentality of employment standards legislation in supporting that common law right.

Even though *HOJ* preceded *Johnson* by several years and dealt with different subject matter, in important respects *HOJ* was Canada’s *Johnson* moment. In each case, the judiciary was presented with an opportunity to regulate the interaction between the common law and legislation relating to termination of employment. *Johnson* concerned the ability to pursue common law remedies for subject matter that, ostensibly, was dealt with by an act of Parliament. Likewise, *HOJ* concerned the extent to which the common law could be deployed so as to fill the gap created where a statutory provision rendered a contractual notice provision null and void. Further, in each case it was, in theory at least, open to the court to interpret the statute or craft the common law so as to maximise or minimise employment protection. In *HOJ*, the Supreme Court could have considered the intentions of the parties to the contract of employment to be paramount, and held that the effect of the ESA was merely to insert the statutory minimum notice in place of deficient express contractual provisions. The unanimous judgment of the Ontario Court of Appeal, penned by the Chief Justice of Ontario, found this reasoning to be irresistibly persuasive, thereby illustrating the potential for a minimalist interpretation of the ESA to prevail. Likewise, in *Johnson*, Lord Steyn’s strong dissent demonstrates that a plausible alternative view to that taken by the majority of the House of Lords was, at the very least, legally possible. Finally, like the Supreme Court in *HOJ*, the House of Lords in *Johnson* acknowledged that employment protection is a valid social, and indeed legal, objective. As

noted at 3.6 above, in Johnson, not only Lord Steyn in dissent, but also Lord Hoffman and Lord Millet recognised that the law of wrongful dismissal was deficient, based on outdated view of the employment relationship. The only other reasoned judgment, that of Lord Nicholls, conceded that the employee’s case had “much to commend it”. The outcome in Johnson, though unfavourable to the employee, was not based on a refusal by the judiciary to accept the importance of affording legal protection to dismissed employees.

The similar positions in which the highest courts in England and Canada found themselves in Johnson and HOJ render the difference in outcome between these two cases all the more striking. The majority of the House of Lords in Johnson could not accept that a more protective position at common law could work in harmony with the statutory unfair dismissal scheme, and therefore declined to develop the common law in the manner sought by the employee. By contrast, in HOJ, the common law was complementary to, rather than curbed by, the minimal protections conferred on employees by the ESA. Johnson saw the statute operate to cut down the protection offered at common law, whilst in HOJ each was reinforced by the other.

It is important to acknowledge the limits of the common law of wrongful dismissal. It is, in essence, not an unfair dismissal regime: ultimately an employer may still terminate an employee on notice and, in theory at least, the parties may agree any notice period that exceeds the statutory minimum. However, the purpose of this Part was to draw attention to the principal ways in which, within these limitations, wrongful dismissal in Canada has been developed by the courts so as to act as a vehicle for employment protection, namely generous notice periods, restrictions on contracting out and compensation for the manner of dismissal. Further, where the common law has encountered legislative intervention in the form of statutory minimum notice periods, the latter has not impeded the flourishing of the former, as demonstrated in HOJ. The courts, motivated by the acknowledged vulnerability of employees, have cultivated a highly protective legal environment at common law.

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109 Johnson, supra note 71 at para 2.
7. Dismissal in unionised workplaces in Canada

As discussed above at 2.2, in unionised workplaces in Canada, neither an individual contract of employment nor the common law governs the employment relationship. Instead, the relationship between the employer, the trade union and the employees is regulated by the collective agreement and applicable labour relations legislation. The common law action for wrongful dismissal is not available to dismissed employees in unionised workplaces; rather, disputes about discipline and dismissal are referred to binding arbitration. As discussed at Part 5 above, in England both the common law and the statutory unfair dismissal scheme apply in unionised environments, with the result that unionised employees enjoy the same limited remedies under these regimes as non-unionised employees. In Canada, the almost complete exclusion of the common law from unionised workplaces affords considerably enhanced protection, including a significantly wider range of remedies, to dismissed employees in those workplaces.

Disputes about dismissals in unionised workplaces are referred to arbitration under processes set out either in the relevant collective agreement or labour relations legislation.\(^1\) In *Baker v Navistar Canada Inc.*,\(^2\) the Ontario Superior Court dismissed proceedings for wrongful dismissal by unionised employees, confirming that, as is the case with other disputes in unionised workplaces, the court had no jurisdiction to hear such claims.

The substantive effect of collective bargaining on dismissal disputes was explained in *Wm Scott & Company Ltd v Canadian Food and Allied Workers Union, Local P-162,*,\(^3\) which held that the arbitrator must consider: (1) whether cause for some form of discipline exists, (2) whether the penalty the employer imposed on the facts was excessive and (3) if so, what penalty ought to be substituted.\(^4\) Regarding cause, under the provisions invariably contained in collective agreements, “an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal.”\(^5\) An employer must have an acceptable reason to terminate employment, irrespective of whether adequate notice is given.

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1. See e.g. Labour Relations Act, SO 1995, c1, Schedule A, ss 48(1)-48(3) [OLRA].
Further, where cause for some form of discipline exists, under a collective agreement the employer’s power to determine the form of discipline is curtailed. In the early case of *Port Arthur Shipbuilding Co v Arthurs*, the Supreme Court of Canada adopted a position that was deferential to employers, reversing the arbitral decision reinstating three dismissed employees:

The task of the board of arbitration in this case was to determine whether there was proper cause…. [T]here was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way [but rather] substituted its judgment of the judgment of management and found in favour of suspension…. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration.⁷

As Arbitrator Weiler noted in *Wm Scott*, legislatures overruled *Port Arthur* by conferring on arbitrators the power to vary any penalty imposed by the employer, subject to the terms of the collective agreement.⁸ Arbitrators were, by virtue of such legislation, henceforth empowered to substitute their judgement for that of management, precisely what the Court in *Port Arthur* had forbade them from doing: “it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question”.⁹

As regards remedies, arbitrators’ authority allows for both the variation of penalties and the reinstatement of employees found to have been dismissed unlawfully. Indeed, reinstatement is the normal remedy, with damages in lieu of reinstatement awarded only in exceptional cases.¹⁰

As Iacobucci J remarked in *Alberta Union of Provincial Employees v Lethbridge Community College*: “As a general rule, where a grievor’s collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be ordered. Departure from this position should only occur where the arbitration board’s findings reflect concerns that the employment relationship is no longer viable.” ¹¹ It is noteworthy that arbitrators may also make

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⁶ [1969] SCR 85, 70 DLR (2d) 693 (SCC) [*Port Arthur* cited to SCR].
⁷ Ibid at 89.
⁸ See e.g. OLRA, *supra* note 1, s 48(17); *Wm Scott, supra* note 3 at para 14.
⁹ *Wm Scott, supra* note 3 at para 14.
similar awards for mental distress arising from dismissal in bad faith to those made by common law courts as discussed above at 6.3, and may do so even where the employee is reinstated.\(^{12}\)

The approach of the collective bargaining regime to dismissal is strikingly different from that taken at common law. As Arbitrator Weiler noted in *Wm Scott*, in non-unionised workplaces, the employer was able to dismiss for any reason, subject to the duty to give reasonable notice in the absence of just cause; to this one might add the more recent obligation not to dismiss in bad faith.\(^ {13}\) Further, the only penalty available to an employer, unless the contract provided otherwise, was dismissal.\(^ {14}\) Finally, common law courts will not generally reinstate an employee.\(^ {15}\) None of these limitations applies in Canadian dismissal arbitration. It is perhaps more interesting to note the differences between Canadian dismissal arbitration and the unfair dismissal regime in England. As noted above at 4.2.i, reinstatement is exceedingly rare in unfair dismissal cases, in stark contrast to Canadian dismissal arbitration, which regards reinstatement as the default remedy, compensation in lieu being awarded only exceptionally. Further, as discussed at 4.3 above, in English unfair dismissal cases, Tribunals consider whether the decision to dismiss fell within the band of reasonable responses open to the employer, and may not substitute their judgment for that of the employer. In this latter regard, the deferential posturing of English Tribunals more closely resembles the mindset in *Port Arthur* than that of current Canadian arbitrators, who, in considering afresh all aspects of the employer’s decisionmaking, embark on an exercise that is prohibited in English Tribunals.

Hugh Collins identified potential limitations with the dismissal arbitration model, arguing firstly that arbitration may limit an employee’s access to remedies, as in order to pursue a grievance through arbitration the employee must first secure trade union support.\(^ {16}\) Whilst Collins rightly pointed out the existence of an additional procedural hurdle for Canadian unionised employees, who are unable to present claims directly to courts or tribunals, he perhaps underestimated the importance of the duty of fair representation, which prohibits trade unions from acting “in a

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12 Snyder, *supra* note 10 at para 5.216.  
13 *Wm Scott*, *supra* note 3 at para 8.  
15 Snyder, *supra* note 10 at para 5.200.  
manner that is arbitrary, discriminatory or in bad faith” in representing employees in the bargaining unit, which permits objective scrutiny of a trade union’s handling of grievances.17

Collins also suggested that arbitration confers employment protection in an “unsatisfactory” manner, as such protection is dependent upon the terms of the collective agreement, which in turn reflects the parties’ relative bargaining strength, which even under collective bargaining may be uneven.18 However, the role of arbitrators extends beyond merely applying the terms of the collective agreement. Rather, the collective bargaining regime necessitates interpretation of the agreement in light of the policy objectives underpinning that regime, among them the preservation of industrial peace.19 As Arbitrator Laskin, as he then was, explained: “The law is to be found outside the collective agreement, in principles and doctrines which must take their inspiration from the aims and purposes of collective bargaining as reflected in the elements of the policy, statutory and otherwise, of which the collective agreement is an expression.”20 In a similar vein, arbitrators hearing dismissal grievances must have regard not only to what the parties have negotiated, but also to the significant body of law in this area:

The necessarily vague term, “just cause”, has been the subject of thousands of arbitrations, giving rise to a surprisingly coherent body of law, redolent of common sense, invaluable to industry and consistent with what most Canadians think of as the central tenets of a democratic society.21

The influence of norms rooted in the regime itself, rather than in collective agreements, necessarily means that the terms of such agreements are not determinative of the outcome in individual cases, and therefore goes some way to addressing Collins’ criticism.

Employees in unionised workplaces in Canada enjoy a high degree of employment protection. Arbitrators not only review decisions to dismiss, but also exercise powers to reinstate dismissed employees, make monetary awards and vary disciplinary measures so as to do justice in the circumstances. These elements of this regime may be attributed to the near exclusion of the common law of wrongful dismissal from the employment relationship, permitting a wholly innovative treatment of dismissal in unionised workplaces.

17 Ibid at 268-269; OLRA, supra note 1, s 74.
18 Collins, supra note 16 at 267.
21 Snyder, supra note 10 at para 10.2.
8. Conclusion

This paper has argued that in the English law of termination of employment, the statutory unfair dismissal scheme and the common law of wrongful dismissal have interacted in such a way that each has operated to limit the employment protection offered by the other. The common law of wrongful dismissal languishes in a highly restrictive state, offering very little protection and unable to evolve in the face of Parliament’s occupation of the field of dismissal protection through the enactment of the unfair dismissal scheme. That scheme, in turn, has embraced concepts originating in the law of wrongful dismissal, particularly as regards remedies under the statutory scheme, resulting in a limitation of the protection it furnishes. This phenomenon affects all employees, including unionised employees, who do not enjoy access to a separate regime governing the lawfulness of dismissal.

In Canada, such widespread detrimental encounters between statute and common law have not occurred in the law of termination of employment; indeed the courts have interpreted statutory protections so as to give enhanced, rather than reduced, protection under both the common law and the statute. The common law of wrongful dismissal has developed as a powerful instrument of employment protection, conferring an implied right to relatively generous notice periods and limiting employers’ ability to contract out of that right. Further, the courts have jettisoned the common law restriction on compensation in respect of the manner of dismissal, with the result that employers are exposed to potentially significant liabilities if they fail to act in good faith in dismissing employees. As well, collective bargaining operates as a wholly separate regime, in which arbitrators may conduct a searching review of dismissal decisions and award effective remedies to do justice to the parties, free from the more restrictive aspects of the common law.

The instinctive assumption on comparing of the law of termination of employment in England and Canada may well, at first blush, be that employees in England enjoy greater employment protection because of the general statutory right not to be unfairly dismissed. As the foregoing analysis has demonstrated, the actual position is more nuanced, and perhaps counterintuitive, with the English unfair dismissal scheme being less generous than it first appears, and the Canadian common law conferring greater protection than its English counterpart.

The interaction of statutory and common law regimes presents interesting opportunities for further consideration. For example, in the field of Canadian discrimination and equality law, the
courts have declined to create a new common law tort of discrimination.¹ When Wilson JA, as she then was, attempted to do so in Seneca College of Applied Arts and Technology v Bhadauria, the Supreme Court of Canada commended her “attempt to advance the common law”, but said that such common law innovation was “foreclosed by the legislative initiative” of the Ontario Human Rights Code.² The Court’s approach in this case was, arguably, similar in principle to the English judiciary’s reluctance to develop the common law of wrongful dismissal, exemplified in Johnson v Unisys Limited:³ in both cases, legislative intervention precluded the development of the common law, mummifying it in a state that was, as each court acknowledged, inconsistent with modern social values.

Likewise, as noted at 4.5 above, at least some aspects of the Canadian federal statutory unjust dismissal scheme have been influenced, at least some of the time, by wrongful dismissal concepts. The similar English experience may indicate that such influence may be widespread, or perhaps even to some extent inevitable, in common law jurisdictions that adopt statutory unfair dismissal regimes. This hypothesis may benefit from further study.

The themes discussed in this paper are relevant to broader questions about the role of the judiciary, as custodians of the common law and ultimate interpreters of the will of Parliament. When the legislature, motivated by some perceived social problem, imposes a duty on employers or confers a right on employees, what impact does this have on common law rights and duties? Is the common law to able to evolve, so as to reflect modern values, or is such evolution an inappropriate usurpation of legislative authority by an activist judiciary? A more acute challenge for the judiciary is likely to present itself if legislatures embark on retrenchment of employment protections, as political leaders on both sides of the Atlantic have proposed to do. An erosion of statutory protections could, conceivably, lead to increased reliance on the common law for remedies when things go wrong in the employment relationship. Whether, and to what extent, judges should take up the task of employment protection is therefore a debate that is likely to continue for the foreseeable future.

¹ Seneca College of Applied Arts and Technology v Bhadauria [1981] 2 SCR 181, [1981] SCJ No 76 (SCC) [cited to SCR].
² Ibid at 194-195.
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