# Ontario Bar Association
# Litigating An Employment File - The Essential Course
# (October 14, 2020)

# PROVIDING THE INITIAL OPINION:
## Potential Pitfalls: Record Preservation, Damages, Employment Insurance, Mitigation, Litigation Costs/Offers to Settle and Limitation Periods

Arleen Huggins, Partner, Koskie Minsky LLP, with the assistance of
Elie Waitzer, Articling Student, Koskie Minsky LLP

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# POTENTIAL PITFALLS: Record Preservation, Damages, Employment Insurance, Mitigation, Litigation Costs/Offers to Settle and Limitation Periods

When you first meet with a client in an employment file, there are a number of potential pitfalls leading up to the time of litigating the file that they may not be aware of. It is your obligation as a lawyer to raise these issues with your client in the initial consultation, or shortly thereafter, so that they can make a fully informed decision prior to commencing litigation.

While it is important to address the merits of the claim with the client, it is also crucial to address the client's relative chance of success, record preservation in order to prove the claim, the damages which they may be able to recover and the impact of mitigation, the costs of litigating and the consequences of offers to settle and the length of time that litigating an employment file may take. A client should not come to the decision to litigate without first being made aware of the significant time and financial, and emotional, drain that litigating employment files can have.

This paper will provide an overview of the most important pitfalls to bring to your client's attention during the initial consultation, or shortly thereafter, including: employment insurance, damages and mitigation, record preservation, litigation costs and the impact of offers to settle and limitation periods. A check-list is appended to this paper to provide a summary of the pitfalls to keep in mind during the initial consultation with a client.

## I. Employment Insurance

A common question clients raise when considering suing their employees after being dismissed is, "should I apply for employment insurance ('EI')?" There is no one-size-fits-all advice for this

question. It is important to advise the client about the advantages and disadvantages of applying for EI while they litigate their termination.

First, the client should be advised of the importance of protecting their rights in a case where they were terminated for "just cause". Service Canada will not pay EI benefits where an Employment Insurance Officer determines the employee was terminated because of "misconduct".[1] Though the *Employment Insurance Act* (the "*EI Act*") does not define the term "misconduct", the case law indicates that the term means conduct that is wilful or so reckless as to approach wilfulness.[2] There must also be a causal link between the misconduct and the dismissal.[3]

If misconduct is alleged, you must discuss with the client the potential implications to their EI entitlements. While dismissal does not automatically translate into misconduct under the *EI Act*, care must be taken to ensure that a decision to deny benefits is not taken solely on the employer's subjective appreciation of events.[4]

Second, the client should be advised that if they succeed in a wrongful dismissal action against their employer and are awarded damages (or if they reach a settlement with their employer), their employer is obligated to withhold the overpayment created by virtue of the employee's receipt of any EI benefits after being terminated which coincide with the time period represented by the damage award or settlement. This is because under sections 45 and 46 of the *EI Act*, there is an obligation on employers to withhold payments and remit them to Service Canada in respect of any overpayment of EI.[5] Recently, some Service Canada offices have established a practice of directing

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[1] *Employment Insurance Act*, SC 1996, c 23, ss 29-30 [*EI Act*].
[2] *Attorney General of Canada v. Tucker,* Federal Court Decision #A-381-85 (March 27, 1986).
[3] *R. L. v. Canada Employment Insurance Commission*, 2015 CanLII 107547 (SST) at para. 32.
[4] *Hossein v. Attorney General of Canada*, Federal Court Decision #A-732-
[5] *EI Act*, ss 45-46.

the employee to repay the overpayment directly. This seems to be in direct contradiction with the *EI Act* provisions stated above. In such cases, the employee should be cautioned to obtain a letter to that effect from Service Canada to provide to the employer so that the employer does not hold the funds indefinitely waiting for Service Canada to issue a Notice of Debt.

Many clients will balk at applying for EI because they do not want to go through the frustrating process of repaying their benefits. However, there are ways to avoid or attenuate the EI claw back that your client should be made aware of before deciding whether or not to apply.

Specifically, if the employee wants to avoid an overpayment being created in the expectation of an early settlement, they can request that Service Canada suspend their claim until further notification to avoid the payout of EI benefits for a period of time.

Also, in the case of a settlement, there are several types of payments that have been held to be immune from the EI claw back, including: legal fees;[6] damages for emotional distress, health, reputation, and human rights violations;[7] payment for unpaid overtime, banked lieu time, or vacation;[8] and waiving rights to reinstatement.[9] Drafting well-structured minutes of settlements that apportion settlement funds to minimize employment insurance claw back can lead to a better result for the client.

Finally, employees should be cautioned to make their claim for EI benefits in a timely manner; being as soon as they receive their Record of Employment ("ROE"), which many employers file directly online. If the ROE is not received in a timely manner, the employee should contact Service

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[6] *G.N. v. Canada Employment Insurance Commission*, 2019 SST 279 at para 14.
[7] *E.L. v. Canada Employment Insurance Commission,* 2019 SST 468 at para 11; *D.P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 559 at paras 43-45.
[8] *G.N. v. Canada Employment Insurance Commission*, 2019 SST 279 at para 15.
[9] *G.N. v. Canada Employment Insurance Commission*, 2019 SST 279 at para 15.

Canada directly. This is to avoid a finding by Service Canada denying benefits due to delay in filing an application for benefits.

If there is any uncertainty as to whether the employee will mitigate their damages, it is best to have the employee file an EI claim, even if you believe they have a strong claim against their employer.

## II. Mitigation and Damages

### i. Mitigation Efforts

Where an individual's employment is terminated, the individual has a duty to mitigate their damages by seeking alternate employment as soon as is reasonable. The employer bears the onus in a wrongful dismissal action of proving that the employee did not act reasonably in mitigating their damages.

The general rule is that the employer must show the employee could have procured similar employment after termination, thereby limiting the damage caused by the wrongful dismissal.[10] The court has stated that the employee's efforts in mitigating damages need not be perfect; they need only be reasonable.[11] An employer will often not only claim that an employee did not make diligent efforts to find work, but that they delayed in doing so. It is therefore critical that the employee be advised at the earliest possible time of their mitigation obligations and given instructions as to what kind of evidence will be acceptable to show their mitigation efforts should an employer request same as a condition of settlement or should the matter proceed to litigation. Securing the necessary evidence after the fact can be extremely difficult for an employee, especially with the prevalence of online job postings and job application forms which do not remain on line after the recruitment period has concluded.

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[10] *Michaels v. Red Deer College,* [1976] 2 SCR 324 (SCC) at p 331 [*Michaels*].
[11] *Hussain v. Suzuki Canada Ltd.,* 2011 CarswellOnt 12251 (Ont SCJ), at para 6.

The seminal case on mitigation in employment law is *Michaels v. Red Deer College,* where Laskin C.J. described the onus on the employer as follows:

> "12 Cheshire and Fifoot expressed the position more tersely as follows:
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> **But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.**
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> 13 In my opinion, the obiter statement of *MacDonald J.A. in John East Iron Works Ltd. v. Labour Relations Bd. of Sask.*, [1949] 1 W.W.R. 842, [1949] 3 D.L.R. 51 at 57 (Sask. C.A.), that "the onus of proving that the employee took reasonable efforts to obtain other employment and failed to do so is upon the employee" does not state the law correctly. I contrast this observation with that in *Yetton v. Eastwoods Froy*, [1967] 1 W.L.R. 104, [1966] 3 All E.R. 353, a wrongful dismissal case, where Blain J. said (at p. 115):
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> **... if he can minimise his loss by a reasonable course of conduct he should do so, though the onus is on the defaulting defendant to show that it could be or could have been done and is not being and has not been done**." [12]

Generally, an employee is not required to mitigate with their employer after termination. The leading case in this area is the Supreme Court of Canada decision in *Evans v. Teamsters, Local 31*, which held that an employee is only expected to mitigate damages with the employer who terminated them where it would be reasonable to do so.[13] Factors to be considered in assessing reasonableness include whether the compensation is the same, whether the working relationship would be acrimonious, and whether working in the new position would be demeaning.[14]

The timing of an offer of employment is crucial when considering whether such an offer triggers an employee's obligation to mitigate with their former employer. In *Farwell v. Citair Inc.,* the Ontario Court of Appeal followed *Evans,* finding that an employer must make an offer of

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[12] *Michaels* at p 332.
[13] *Evans v. Teamsters, Local 31*, 2008 SCC 20 [*Evans*].
[14] *Evans* at para 30.

employment *after* the employee makes it clear they consider their termination to constitute a wrongful or constructive dismissal:

> "To paraphrase *Evans*, the appellant's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. **To trigger this form of mitigation duty, the appellant was therefore obliged to offer Mr. Farwell the clear opportunity to work out the notice period *after* he refused to accept the position of Purchasing Manager and told the Appellant that he was treating the reorganization as constructive and wrongful dismissal."** [15]

### ii. Damage Awards Available in Employment Files

It may be the case that when a dismissed employee contacts you, they already have some notion of the types of damages that may be available to them as a plaintiff. Nonetheless, it is necessary to manage the client's expectations and walk them through the types of damages that courts award in employment matters besides income loss, and discuss the viability of such damage awards in their case. The following provides an overview of the damage awards for general damages, special damages, moral damages, punitive damages, aggravated damages, and human rights damages.

#### a. General Damages

General damages are intended to compensate an employee who has been unjustly dismissed without reasonable notice by placing the employee in the same monetary position as they would have been in had the contract of employment been performed.[16]

Under the *Employment Standards Act* (the "*ESA*"), an employee who has been continuously employed for three months or more is entitled to at least one week of notice if the period of employment is less than one year, two weeks if the period of employment is one year or more and fewer than three years, and thereafter an additional week of notice for each additional year of

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[15] *Farwell v. Citair, Inc.,* 2014 ONCA 177 at para 20.
[16] *Harris v. Robert Simpson Co.*, [1984] AWLD 1040 (Alta QB).

employment up to a maximum of eight weeks.[17] In addition, certain employers are required to provide qualifying employees with statutory severance pay in addition to any statutory notice or termination pay in lieu thereof.[18] The courts have held that while statutory termination pay aims to "cushion" employees against the adverse effects of losing their employment without notice, statutory severance pay aims to compensate longer-service employees for their "investment" in the employer's business.[19] Statutory notice or statutory termination pay in lieu thereof is not subject to mitigation.

However, an employee's entitlements under the *ESA* are minimum entitlements only, and may not reflect the employee's entitlement to "reasonable notice" at common law. The basic factors established by the courts for determining reasonable notice are: "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."[20] While courts have historically applied a general rule of one month of notice per year of service, the general practice today is to avoid formulaic approaches in recognition of the principle that determining reasonable notice requires a weighing of the factors at play in each case.[21] However, absent exceptional circumstances, the courts have generally applied an upper limit of 24 months.[22]

It is important to review the employee's contract to ascertain whether it contains an express term defining the notice period. Courts will generally enforce such a term provided it (a) meets the minimum standards in the *ESA*, and (b) is not otherwise contrary to contract law principles under

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[17] *Employment Standards Act, 2000*, SO 2000, c 41, s 57 [*ESA*].
[18] *ESA*, s 64(1).
[19] *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 (SCC).
[20] *Bardal v. Globe & Mail Ltd.* (1960), [1960] OWN 253 (Ont HC) [*Bardal*].
[21] *Minott v. O'Shanter Development Co.*, [1999] OJ No 5 (Ont CA).
[22] *Lowndes v. Summit Ford Sales Ltd.*, [2006] OJ No 13 (Ont CA).

the doctrines of duress, undue influence, and unconscionability.[23] If the contractual term provides for a lesser notice period than the statutory minimum, courts have held that the term is "null and void" for all purposes and the employee is entitled to reasonable notice at common law.[24]

An employee's claim for general damages is not limited to the wage or salary they would have received had proper notice been given. If an employee is wrongfully dismissed, they are entitled to recover all reasonably foreseeable damages flowing from the breach of the employment contract.[25] General damages may be appropriate to provide compensation for the following benefits that typically accompany employment: bonuses,[26] insurance and medical plans,[27] stock options,[28] pension rights and benefits,[29] retiring or long service allowance,[30] board and lodging, [31]club dues,[32] automobile allowance and expenses,[33] tips,[34] shift premiums,[35] overtime,[36] salary increases,[37] vacation pay,[38] *Canada Pension Plan* premiums,[39] unemployment insurance premiums,[40] and commissions.[41] Accordingly, it is important to go over every detail of your client's compensation package before making a claim.

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[23] *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 (SCC) [*Machtinger*].
[24] *Machtinger*.
[25] *Peck v. Levesque Plywood Ltd.* (1979), 80 CLLC 14,005 (Ont CA).
[26] *Bagby v. Gustavson International Drilling Co.* (1979), 20 AR 244 (Alta TD); var'd (1980), 24 AR 181 (Alta CA)
[27] *Stelco Inc., Re* (2005), 2005 CarswellOnt 5177 (Ont SCJ [Commercial List]).
[28] *Martell v. Ewos Canada Ltd.* (2005), 2005 CarswellBC 2700 (BC CA) [*Martell*].
[29] *Bardal.*
[30] *Doyle v. London Life Insurance Co.*, 1984 CarswellBC 1125 (BC SC); aff'd (1985), 68 BCLR 285 (BC CA).
[31] *Bernath v. Potash Corp. of Saskatchewan Mining* (1981), 11 Sask R 417 (Sask QB).
[32] *Roscoe v. McGavin Foods Ltd.* (1983), 2 CCEL 287 (BC SC).
[33] *Martell.*
[34] *Zaglanikis v. Dana West Hotels Ltd.* (1982), 20 Sask R 59 (Sask QB); aff'd (1983), 27 Sask R 319 (Sask CA).
[35] *Mackin v. Jim Pattison Industries Ltd.* (1982), 1982 CarswellBC 1397 (BC SC).
[36] *Dubey v. CDA Industries Inc.* (2004), 2004 CarswellOnt 1127 (Ont SCJ) .
[37] *Busch v. GTE Sylvania Canada Ltd.* (1982), 40 AR 189 (Alta CA).
[38] *Gass v. Canadian Pacific Hotels Ltd.* (1981), 13 Sask R 21 (Sask QB).
[39] V*orvis v. Insurance Corp. of British Columbia* (1982), 17 BLR 150 (BC SC); rev'd in part (1984), 53 BCLR 63 (BC CA); aff'd (1989), 36 BCLR (2d) 273 (SCC).
[40] *Aleniuk v. Westown Ford Sales Ltd.* (1981), 28 AR 473 (Alta QB).
[41] *Wallace v. Westerman* (1928), 40 BCR 35 (BC CA).

**b. Special Damages**

In contrast to general damages, which compensate losses flowing directly from the breach of an employment contract, special damages are intended to compensate an employee's indirect losses. Typically, special damages represent an employee's loss of income and/or expenses incurred in mitigating their damages from the breach.

For example, special damages have been awarded to a wrongfully employee for the following consequential losses: the expense of starting a business after dismissal;[42] treatment costs for severe depression;[43] benefits denied during the notice period;[44] compensation for loss of a position in a bargaining unit;[45] losses on the sale of a home;[46] and lost opportunities for other employment due to accepting the position from which the employee was wrongfully dismissed.[47]

**c. Moral Damages**

Moral damages arising from the manner of dismissal are available where an employer engages in conduct that is unfair or in bad faith. Moral damages are recoverable if the employer breaches its duty to act fairly and in good faith by being, for example, untruthful, misleading or unduly insensitive during dismissal.[48]

Moral damages are now available under a separate head of damages rather than through an extension of the notice period, as was the practice in the past.[49] To be entitled to moral damages,

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[42] *Shiels v. Saskatchewan Government Insurance* (1988), 20 CCEL 55 (Sask QB).
[43] *Speck v. Greater Niagara General Hospital* (1983), 43 OR (2d) 611 (Ont HC); aff'd (1985), 51 OR (2d) 192 (Ont CA).
[44] *Card Estate v. John A. Robertson Mechanical Contractors (1985) Ltd.*(1989), 26 CCEL 294 (Ont HC).
[45] *Johnston v. Algoma Steel Corp.* (1989), 24 C.C.E.L. 1 (Ont. H.C.)
[46] *Earl v. Northern Purification Services Ltd.* (1980), 1 CCEL 267 (Ont HC); aff'd (1981), 1 CCEL 267n (Ont CA).
[47] *Carnaghan v. Bernard Freedman Insurance Co.* (August 23, 1982), Glube J (NS TD).
[48] *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para 58 [*Keays*]; *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 (SCC) at para 98 [*Wallace*].
[49] *Wallace* at para 95.

the employee must prove that an employer's conduct with respect to the dismissal was unfair or in bad faith, and also that the conduct resulted in *actual* harm – substantiated by evidence of such harm.[50]

In *Galea v. Wal-Mart Canada Corp*, Emry J. reviewed the appellate jurisprudence and summarized the factors to assess whether a wrongfully terminated plaintiff is entitled to moral damages:

> 1. An employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
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> 2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;
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> 3. It was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;
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> 4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and
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> 5. The grounds for moral damages must be assessed on a case by case basis.[51]

Given that not all clients will meet the criteria necessary to establish an award for moral damages, it is your responsibility to alert the client to this fact, and provide them with a realistic opinion as to whether there are factors in their case which may result in such an award and a reasonable estimate of the quantum which could be awarded in their circumstances.

**d. Punitive Damages**

Punitive damages are rarely awarded and are only available as a result of an independent actionable wrong in the manner of dismissal, where the employer's conduct is malicious, oppressive and high-

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[50] *Keays* at para 57.
[51] *Galea v. Wal-Mart Canada Corp.,* 2017 ONSC 245 at para 232 [*Galea*].

handed such that it offends the court's sense of decency.[52] Punitive damages serve to punish the defendant's behavior and deter similar misconduct, not to compensate the plaintiff.[53] Only where compensatory damages are insufficient to satisfy the goal of denunciation and deterrence do courts impose a punitive damages award.[54]

In *Whiten v Pilot Insurance Co.*, the Supreme Court of Canada held that misconduct worthy of such sanction must be "so malicious, oppressive and high-handed that it offends the court's sense of decency."[55] The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behavior.[56]

Moreover, punitive damages awards must observe the proportionality principle by remaining rationally connected to the underlying goals of retribution, denunciation and deterrence.[57] This means that the award must be proportionate to the level of blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff and the harm or potential harm directed at them, the need for deterrence, the gain wrongfully obtained through the defendant's misconduct, and finally to the overall penalty imposed on the defendant.[58]

In a wrongful dismissal case, the aspects of proportionality outlined in *Whiten, supra*, relate to the importance of the employment relationship and the vulnerability of an employee at the time of termination.[59] When advising a client in a wrongful dismissal case, it is important to emphasize

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[52] *Ruston v. Keddco Mfg.*, 2018 ONSC 2919 at para 136 [*Ruston*].
[53] *Ruston* at para 136.
[54] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 199-200.
[55] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para 36 [*Whiten*].
[56] *Whiten* at para 36.
[57] *Whiten* at para 111.
[58] *Whiten* at paras 112-125.
[59] *Galea* at para 293.

the rarity in obtaining a punitive damage award, as well as the high threshold that must be met in order to establish an independent actionable wrong.

**e. Aggravated Damages**

Aggravated damages are rarely awarded in a wrongful dismissal case because there must be an "independently actionable wrong" to justify such an award.[60] The distinction between aggravated and moral damages is a fine one, and the Supreme Court of Canada has stated that "there is no reason to retain the distinction between 'true aggravated damages' resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination."[61] If an employee can demonstrate that the manner of dismissal caused mental distress that was in the contemplation of the parties, the employee will be compensated not through an extension of the notice period but through an award under the separate head of aggravated damages.[62]

Examples of conduct in dismissal resulting in compensable aggravated damages include: attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision to dismiss the employee, or dismissal meant to deprive the employee of a pension benefit or other right.[63]

**f. Human Rights Damages**

Traditionally, a complaint based on a breach of Ontario's *Human Rights Code* (the "*Code*") was adjudicated by the Human Rights Tribunal and not by the courts in a civil wrongful dismissal action.[64] However, since the *Code* was amended in 2008 to allow a court to order remedies for

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[60] *Wallace* at para 73.
[61] *Keays* at para 59.
[62] *Keays* at para 59.
[63] *Keays* at para 59.
[64] *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 SCR 181 at para 27.

human rights infringements where the human rights claim is joined together with another cause of action, clients should be advised that they can claim human rights damages pursuant to the *Code* in a civil wrongful dismissal action.[65]

Ontario courts have largely adopted the same principles that the Human Rights Tribunal has established in assessing damages for claims of discrimination,[66] except that it would not appear that any court has of yet awarded a remedy of reinstatement and the court's jurisdiction to do so in the context of human rights damages remains questionable.

Under the Ontario *Code,* any person who believes that person has been discriminated against or harassed on a *Code*-protected ground may apply to the Human Rights Tribunal for relief.[67] An employee who has been discriminated against or harassed in the course of employment based on their age, race, ethnicity, disability, gender identity, sex, or sexual orientation may be entitled to human rights damages.[68] The Human Rights Tribunal has wide remedial powers, including the power to order an employer to pay monetary damages (including loss of income), order reinstatement and/or make other monetary restitution to the employee to compensate for "injury to dignity, feelings and self-respect".[69] Human rights jurisprudence has established that the *Code*'s purpose is remedial, not punitive. Therefore, human rights damages awarded by a human rights Tribunal will generally be awarded with the intent of compensating the employee for their suffering and not with a view towards punishing the employer for its behaviour.

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[65] *Human Rights Code*, RSO 1990, c H-19, s 46.1 [*Code*].
[66] *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799.
[67] *Code,* s 34.
[68] *Code*, s 1.
[69] *Code*, s 45.2(1).

There is no jurisdiction under human rights legislation in Ontario (or federally under the *Canadian Human Rights Act*) to order costs. This should be discussed with the client as a consideration of the relative merits of proceeding by way of a civil action or a human rights application.

Generally, when advising a client in a wrongful dismissal case, it is important to have the client consider that even if they suffered some form of discrimination by their employer and may wish such claims to be adjudicated by "expert" Tribunal members, there may be advantages to bringing all their claims in one civil action before a judge. However there must also be a clear discussion with the client as to the remedies available, the costs implications, the time such an action might take, and the implications of Rule 49 Offers to settle prior to making a final decision as to the appropriate forum.

## III. Record Preservation

When an employee is wrongfully dismissed, it is typically the case that their employer will cut off access to their company phone, email and hard drive abruptly. In such cases, it is critical to advise the client to make a detailed timeline of the events surrounding their dismissal while their memory is still fresh and to attempt to gather any relevant email correspondence, files, and other records they may still have access to.

Be mindful however that the employer will usually have an employment policy which forbids the retention of company documents after termination. If that is the case, it may be helpful for the employee, through counsel, to disclose that the employee has retained employment documents/records in contemplation of litigation and that such documents will be fully identified in an Affidavit of Documents at the appropriate time.

In cases where a client believes they may have a claim for constructive dismissal based on a series of actions by their employer, the client may be seeking legal advice while still employed. At the

initial consultation, the client should be advised to preserve copies and/or backups of all relevant records in contemplation of litigation, including the associated "metadata". The client should also be advised to conduct all correspondence with their employer in writing, preferably over email, so that any allegations forming the basis of their wrongful dismissal claim can be easily substantiated.

It is also important to make the client aware of the possibility that their correspondence and other work records may be reviewed by a court in the foreseeable future. Therefore, the client should be advised of the importance of using good judgment in creating documents and correspondence. All documents should include dates and times to assist a court in piecing together the body of evidence before it, and ultimately gain a better understanding of the client's case. Correspondence should be focussed only on the facts, and be written in a professional and fair tone that will reflect positively on the client. The client should be advised to refrain from using mean-spirited or overly emotional language in their correspondence with the employer. This type of evidence will only serve to undermine the client's credibility in the eyes of the judge, and may justify bad-faith conduct by the employer.

## IV. Limitation Periods

At the outset of any consultation with a client who wishes to litigate their dismissal, it is crucial to find out whether their claim may be statute-barred by the expiry of a limitation period. As the applicable limitation period and discovery date will vary depending on the specific claim, it is important to confirm with the client which claims they wish to pursue.

In Ontario, wrongful dismissal claims are governed by the basic two-year limitation period set out in the *Limitations Act, 2002*.[70] The limitation period commences when the cause of action arises.

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[70] *Limitations Act, 2002*, SO 2002, c 24, Sched B, s 4.

In a breach of contract, the cause of action arises when the contract was breached.[71] Recent Ontario jurisprudence has confirmed that the limitation period for bringing a claim in respect of a wrongful dismissal claim commences on the day that the employee is provided notice of the termination, not on the last day the employee worked.[72] However, as an employer's failure to pay statutory severance is generally only discoverable after an employee has ceased to work,[73] the limitation period in respect of bringing a claim for statutory severance pay runs from the earlier of the end of the statutory notice period or the end of active employment.[74]

It should also be noted that applications to the Ontario Human Rights Tribunal must be filed within one year from the date of the incident, or the last incident in a series of incidents.[75] This shorter one-year limitation period has been applied quite stringently, but exceptions are made where the applicant can demonstrate that the delay was incurred in good faith and that it will cause no substantial prejudice.[76] Recent Tribunal decisions have held that the applicant need only establish a "reasonable explanation" for the delay.[77]

After exploring your client's claims in detail, if a limitation period is approaching on the horizon it is prudent to manage your client's expectations by explaining the amount of time you will require to prepare the pleadings. If the client is still unsure about whether to make a claim, it is helpful to provide a timeline by when they should give you instructions as to same to ensure that you are left with ample time and do not run into any limitation period arguments by the employer.

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[71] *Jones v. Freidman*, 2006 CanLII 580 (ONCA) at para 4.
[72] *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc.*, 2017 ONSC 1789 at para 75.
[73] *ESA*, s 66.
[74] *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc.*, 2017 ONCA 1004 at para 7.
[75] *Code*, s 34(1).
[76] *Code*, s 34(2).
[77] *M.C. v. London School of Business*, 2015 HRTO 635 at para 44.

## V. Costs of Litigation

Litigation is a time-consuming and costly endeavour – the vast majority of cases are settled before trial for this reason. In Ontario, the *Rules of Civil Procedure* (the "Rules") recognize this reality by encouraging parties to make reasonable offers to settle and encouraging the early resolution of disputes.

Before litigation is commenced, an offer to settle can be made and withdrawn at any time and in any manner.[78] However, once litigation begins, Rule 49 of the Rules impose significant cost consequences on a party who fails to accept what turns out after trial to have been an offer that should have been accepted before trial.[79] In simple terms, where the plaintiff makes an offer that is refused and subsequently obtains a judgment that is as favourable as or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs from the outset of the litigation to the date the offer was served, and substantial indemnity costs from the date the offer was served to the end of the proceeding.[80] Conversely, where the defendant makes an offer that is refused and the plaintiff subsequently obtains a judgment that is less favourable or only as favourable as the terms of the offer, the plaintiff is entitled to partial indemnity costs from the outset of the litigation to the date the offer was served, and the defendant is entitled to partial indemnity costs from the date the offer was served to the end of the proceeding.[81]

In order for the cost consequences of Rule 49 to apply, the offer must strictly satisfy the following prerequisites: the offer must have been made in writing, the offer must have been made at least seven days before the commencement of the hearing, the offer must not have been withdrawn or

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[78] *York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.*, 70 OR (2d) 317 (CA) at para 8.
[79] *Rules of Civil Procedeure*, RRO 1990, Reg 194, r 49 [*Rules*].
[80] *Rules*, r 49.10(1).
[81] *Rules*, r. 49.10(2).

expired before the commencement of the hearing, and the offer must not have been accepted.[82] Finally, it is important to note that a Rule 49 is not terminated by a counter-offer or rejection. Where a party to whom an offer is made rejects the offer or makes a counter-offer that is not accepted, the same party may thereafter accept the original offer unless it has been withdrawn or the court has already disposed of the claim in respect of which it was made.[83]

Due to the significant cost consequences associated with a Rule 49 offer and the fact that accepting such an offer creates a binding contract, it is important to carefully explain to your client the foregoing principles and to convey to your client all settlement offers received from opposing counsel in a timely manner, regardless of your opinion on their worth. While a fully-informed client may decide that litigation is the preferable course of action in their circumstances, lawyers in Ontario have a professional obligation to "advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis".[84]

## Conclusion

Litigating an employment file can be a time-consuming and expensive process. The most important way to guarantee client satisfaction is to manage your client's expectations at the initial consultation by outlining all the potential pitfalls involved in litigating their file. Once the client has a sense of the range of likely outcomes should they decide to litigate, they will be able to commit to an informed decision. Among the most important pitfalls that should be flagged to the client are the consequences of applying for employment insurance, the relationship between

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[82] *Rules*, s. 49.10.
[83] *Rules*, s. 49.07(2).
[84] Law Society of Ontario, *Rules of Professional Conduct*, (1 October 2014; amendments current to 3 October 2020) at r 3.2-4.

mitigation and damages, the variety of damages available for wrongful dismissal, the importance of record preservation, the applicability of limitation periods, and the costs of litigation.

# Appendix 1 – Checklist of potential pitfalls to avoid

1. **Employment Insurance**
    a. Has the employee applied for employment insurance?

        i. If your client is an employee, inform them that there is an obligation on employers, when a settlement is reached or when a damages award is granted, to withhold payments and remit them to Services Canada in respect of overpayment of employment insurance.

        ii. If your client is an employer, inform them that there is an off-set obligation under the *Employment Insurance Act* that requires the employer to withhold payments and remit them to the Service Canada.

2. **Mitigation**
    a. Inform the client that they will need to maintain an active record of all the jobs they have applied to for the purposes of demonstrating that they have been mitigating their damages (include information about employers they have interviewed with, informal chats, coffee meetings, updates to their resumes)

    b. Raise the possibility that the employer may provide the plaintiff with an offer of employment after the plaintiff commences a claim. Ask the client if they would be willing to accept such an offer if it provided for the same level of remuneration and discuss the legal implications of rejecting same.

    c. Damages:

        i. Discuss with the client the forums available to litigate their dispute and the relative advantages and disadvantages in terms of remedies, time, and recovery of costs.
        ii. Alert the client to the fact that they may not receive a large damages award. While they will likely receive general damages (i.e. Notice Period) and special damages (i.e. costs incurred in mitigating damages), obtaining moral, punitive and aggravated damages is rare.

3. **Record Preservation**
    a. If the client is still employed, advise them to conduct all correspondence with the employer in writing and to save copies of all potentially relevant records. The client should be reminded that any records they create may be reviewed by a court in the near future.

    b. If the client has been dismissed and does not have access to their company email, phone and/or files, advise them to create a detailed timeline of events while their memory is still fresh.

**4. Limitation Period**

a. The date your client was provided notice of termination is the date that the limitation period begins to run

   i. At your first consultation, alert the client to the fact that their claim must be made before the end of the two-year limitation period
   ii. If the limitation period is approaching, candidly inform your client as to the amount of time you will require to prepare the pleadings, and provide them with an appropriate timeline by which they should instruct you as to whether they would like to proceed with a claim

b. If the client raises matters that occurred outside of the two-year limitation period, inform them that a claim cannot be brought on the basis of those occurrences

c. Be mindful that a human rights claim brought before the Human Rights Tribunal has a limitation of one year, instead of the usual two-year period

**5. Costs of Litigation**

a. Explain to your client the difference between pre-litigation offers and Rule 49 offers, and the principles applicable to a Rule 49 offer.

b. Inform your client about the significant time and money required to litigate their matter, and encourage your client to be open to settlement where appropriate