

# **Some Statistical Observations On Reasonable Notice Trends in Wrongful Dismissal Cases (2000 Update)**

**Barry B. Fisher**  
**Barrister, Arbitrator & Mediator**  
**393 University Ave., Suite 2000**  
**Toronto, Ontario**  
**M5R 1E6**  
**Tel: 416 585 2330**  
[barryfisher@rogers.com](mailto:barryfisher@rogers.com)  
[www.barryfisher.ca](http://www.barryfisher.ca)

## **Introduction:**

I am the author of the Wrongful Dismissal Database (WDD), a computerized database of over 2,200 Canadian wrongful dismissal cases which determine the issue of reasonable notice. In the past I have presented several papers on various topics derived from a statistical analysis of the WDD, including topics such as whether BC was more generous than Ontario, why Judges favour certain notice periods over others, average notice periods for different occupational groups and whether there were any “Rules of Thumb” for calculating notice periods.

In this mini-study, I will look at the following questions:

1. What is the typical profile of a person who receives various notice periods?
2. Should one look at the median or the average notice period when trying to predict what a Court would award for reasonable notice?
3. What correlation is there between service and notice?

It should be noted that the sample used for this paper covers all of Canada except Quebec and does not include cases where the Court expanded notice because the existence of a Wallace Factor. The cases cover the period from 1965 ( Bardal v Globe and Mail) to October 31, 2001.

**Typical Profiles:**

| <b>Notice Period</b> | <b>Size of Sample</b> | <b>Median Service</b> | <b>Median Age</b> |
|----------------------|-----------------------|-----------------------|-------------------|
| 24                   | 32                    | 27.6                  | 55                |
| 21                   | 21                    | 24                    | 53                |
| 18                   | 107                   | 18                    | 52                |
| 15                   | 97                    | 13                    | 47                |
| 12                   | 296                   | 12                    | 49                |
| 9                    | 115                   | 8                     | 45                |
| 6                    | 225                   | 4.6                   | 43                |
| 3                    | 114                   | 2                     | 39                |

The way to read this chart is that it shows that a typical recipient of a 24-notice period is a 55-year-old person who has worked for his employer for 27.6 years.

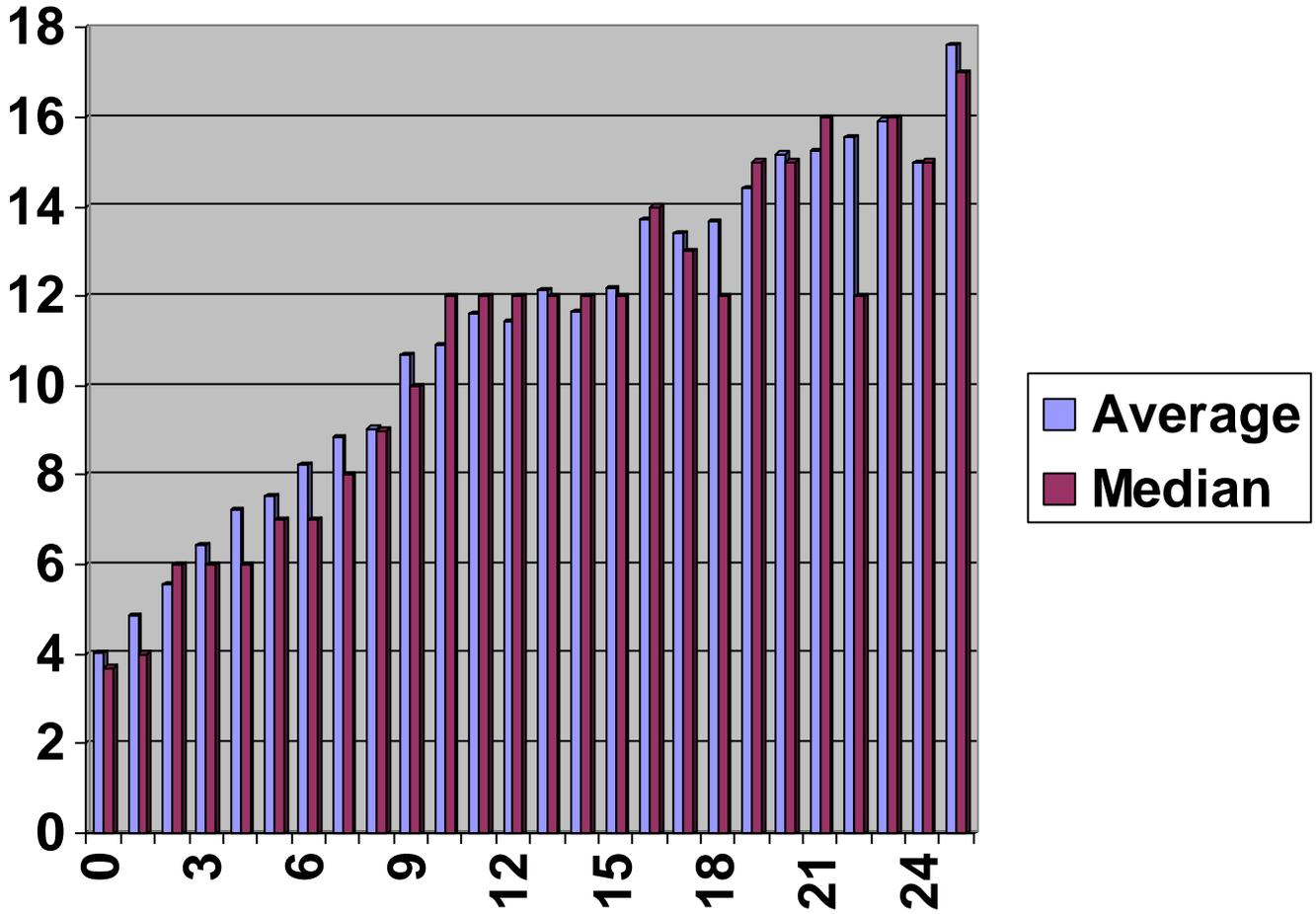
We can see from this chart that although there is an obvious correlation between age and service, the factor of service is the most important. This can be observed by the fact that the median age of a 24 month notice period recipient is 55 compared to the median age of a 18 month recipient is 52, for a spread of only 5.4%. However the difference between the service factor (27.6 compared with 18) is 35%.

It should be noted that this chart involves all types of occupations. Even though the “character of employment” is still a relevant Bardal factor, some recent cases have restricted its application ( see *Bramble v Medis Health* , 46 C.C.E.L. ( 2d) 45 , New Brunswick Court of Appeal ). Care should be taken therefore in applying this chart to an individual situation, especially where the employee’s occupation is at the top or the bottom of the hierarchy.

**Median v Average:**

The following chart and graph correlate service with the average notice period and the median notice period.

| <b>Years of Service</b> | <b># in Sample</b> | <b>Average Months Notice</b> | <b>Median Months Notice</b> | <b>Difference</b> |
|-------------------------|--------------------|------------------------------|-----------------------------|-------------------|
| 0 and 1                 | 223                | 4.03                         | 3.7                         | 8%                |
| 1.1 and 2               | 152                | 4.87                         | 4                           | 18%               |
| 2.1 and 3               | 112                | 5.55                         | 6                           | -8%               |
| 3.1 and 4               | 112                | 6.43                         | 6                           | 7%                |
| 4.1 and 5               | 95                 | 7.22                         | 6                           | 17%               |
| 5.1 and 6               | 83                 | 7.52                         | 7                           | 7%                |
| 6.1 and 7               | 87                 | 8.23                         | 7                           | 15%               |
| 7.1 and 8               | 91                 | 8.84                         | 8                           | 10%               |
| 8.1 and 9               | 69                 | 9.04                         | 9                           | 0%                |
| 9.1 and 10              | 96                 | 10.69                        | 10                          | 6%                |
| 10.1 and 11             | 65                 | 10.92                        | 12                          | -10%              |
| 11.1 and 12             | 50                 | 11.62                        | 12                          | -3%               |
| 12.1 and 13             | 57                 | 11.43                        | 12                          | -5%               |
| 13.1 and 14             | 40                 | 12.14                        | 12                          | 1%                |
| 14.1 and 15             | 46                 | 11.66                        | 12                          | -3%               |
| 15.1 and 16             | 38                 | 12.19                        | 12                          | 2%                |
| 16.1 and 17             | 40                 | 13.7                         | 14                          | -2%               |
| 17.1 and 18             | 40                 | 13.41                        | 13                          | 3%                |
| 18.1 and 19             | 26                 | 13.67                        | 12                          | 12%               |
| 19.1 and 20             | 37                 | 14.41                        | 15                          | -4%               |
| 20.1 and 21             | 39                 | 15.18                        | 15                          | 1%                |
| 21.1 and 22             | 24                 | 15.25                        | 16                          | -5%               |
| 22.1 and 23             | 24                 | 15.54                        | 12                          | 23%               |
| 23.1 and 24             | 24                 | 15.92                        | 16                          | -1%               |
| 24.1 and 25             | 28                 | 14.98                        | 15                          | 0%                |
| 25.1 and 26             | 20                 | 17.6                         | 17                          | 3%                |
| <b>Average</b>          |                    |                              |                             | <b>4%</b>         |



In the above chart, the vertical axis is Months of Reasonable Notice and the horizontal axis is the Length of Service

This data shows us that for at the lower end of the length of service continuum, the average notice period is more generous than the median, whereas at the middle and higher end of length of service, the difference is much less. Overall there is a 4% variation, meaning that looking at the average notice period will give you a notice period about 4% higher than if you look at the median.

The median reflects what judges are most likely to do in an individual case, as opposed to the average, which is affected to a greater degree by the aberrantly high or low award. Where there is a wide variation between the average and the median, it often can be explained by the fact that the notice periods for that particular search parameter are all over the map, in other words, not very predictable. This could well account for the increased difference in shorter length of service cases, which are exceptionally unpredictable.

### **Correlation between Service and Notice :**

I previously wrote on this issue in a paper entitled *Measuring the Rule of Thumb in Wrongful Dismissal Cases* (31 C.C.E.L. (2d) 311) in which I set out in detail my findings on whether or not there is a direct one to one correlation between the length of service and length of the notice period. I found in that study that there was generally not a one to one correlation between these two factors and that the correlation depended largely on occupation and whether the service period was short medium or long.

This analysis continues to hold in this data. A 1:1 correlation is still not being shown. What is shown is as follows:

1. There are three distinct groups of service, short (0 to 9), middle (10 to 15) and long (over 15).
2. The most dramatic rate of increase in notice periods is in the short service category (171 % for the average and 224% for the median).
3. The middle group shows no increase (2% for the average and 0% for the median).
4. The long service group shows a moderate rate of increase (28% average, 21% median).

### **Conclusion:**

Notice periods continue to be a conundrum for practicing employment law lawyers and their clients. Although there are definite statistical trends and predictors, many judges still cling to the belief that every case should be assessed on its individual merits and thus largely ignore or discount precedent. Furthermore, the introduction of the Wallace Factor has vastly complicated the assessment of notice periods. It still remains a challenge for counsel to try to advise clients as to the appropriateness of a proper notice period in any given fact situation. The best that a lawyer can do is to advise the client that

based on an analysis of similar cases and overall trends that the range of reasonable notice is between this and that.