

GENDER BIAS IN THE NEGOTIATION OF SEVERANCE PAY IN LIEU OF “REASONABLE NOTICE”

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ABSTRACT

Canadian employees working under indefinite-term employment contracts are presumptively entitled to “reasonable notice” of dismissal. Employees dismissed without just cause or reasonable notice can sue for “severance pay in lieu of reasonable notice.” The damages payable (which can range up to 24 months’ wages) reflect the compensation the employee would have earned during the reasonable notice period. Although there is no statutory or common law formula for determining reasonable notice, various factors, such as the employee’s position, tenure, and age, and extant labour market conditions, are relevant considerations. The present study addresses the issue of whether women face gender-based discrimination (or gain any advantage) in the determination of their reasonable notice entitlement. This study examines the impact of gender on *negotiated* outcomes in wrongful dismissal claims, and the results indicate that women suffer a marked disadvantage in negotiated severance pay settlements.

THE CANADIAN “REASONABLE NOTICE” DOCTRINE

Canadian employers do not have the legal right to summarily dismiss indefinite-term employees (i.e., employees for whom there is no predetermined termination point) unless they have just cause to do so. In other words, unlike the situation in the United States, there is no general “employment at will” doctrine (see Di Matteo, Bird, & Colquitz, 2011, for a recent review and critique of this doctrine).

Canadian employees working under indefinite-term employment contracts are presumptively entitled to “reasonable notice” of dismissal—the employer must give the employee advance “working notice” that his/her employment will end as of a specified date. The “reasonable notice” doctrine does not apply if the employer has “just cause” for dismissal (for example, theft of the employer’s property or gross insubordination), in which case the employee may be summarily terminated without any notice, or if the employee is employed under a fixed-term contract. Further, the reasonable notice doctrine does not apply if the parties have negotiated a lawful termination provision, that is, one that meets the minimum statutory standards (*Honda Canada v. Keays*, 2008; *Machtinger v. HOJ Industries*, 1992; *Wallace v. United Grain Growers*, 1997).

If an employer dismisses an indefinite-term employee without just cause or reasonable notice, the employee may sue for compensatory damages known as “severance pay in lieu of reasonable notice.” The damages payable (which can range from the equivalent of a few weeks’ wages to as much as 24 months’ wages depending on a variety of factors) reflect the compensation the employee would have earned during the reasonable notice period less any wages that were earned during this period (this latter adjustment is known in law as “mitigation”). Accordingly, the severance pay ultimately recovered in a successful wrongful dismissal action simply represents the adjudicated notice award (typically expressed in months) multiplied by the employee’s total monthly compensation. In exceptional circumstances, where the employer has acted in bad faith relating to the manner of termination, additional damages may be recovered (these are known as “*Wallace* damages” following the Supreme Court of Canada’s decision in *Wallace v. United Grain Growers*, 1997). In *Wallace*, the Supreme Court of Canada increased a 15-month reasonable notice award in favour of a 59-year old former industrial sales representative to 24 months (while also acknowledging that 24 months was “at the high end of the scale”) because of the employer’s misconduct in relation to the dismissal. Specifically, the employer knowingly advanced an unfounded “just cause” allegation that, in turn, frustrated Mr. Wallace’s attempts to find new employment. The court also observed that Mr. Wallace’s dismissal was “abrupt,” that Mr. Wallace had an impeccable work history, and that throughout the entire matter the employer engaged in “hardball” tactics.

Although minimum statutory notice and/or termination payments (which vary modestly by province) are based solely on the employee’s tenure and do not generally exceed about 2 months’ notice or wages, there is no common law formula for determining reasonable notice in a particular case. Further, provision of the statutory minimum notice does not relieve an employer from its contractual obligation to provide reasonable notice. The leading authority regarding the determination of reasonable notice is *Bardal v. The Globe & Mail* (1960), in which Ontario High Court Chief Justice McRuer delineated several factors (now commonly known as the “*Bardal* factors”) that govern reasonable notice assessments:

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. (*Bardal v. The Globe & Mail*, 1960: 145)

The Supreme Court of Canada, Canada's highest court, expressly endorsed the application of the *Bardal* factors in *Machtinger v. HOJ Industries* (1992), *Wallace v. United Grain Growers* (1997), and *Honda Canada v. Keays* (2008). While the *Bardal* factors are not, nor are they intended to be, an exhaustive listing of all relevant criteria, certainly, the nature of the employment, the prevailing labour market conditions, and the plaintiff's age, tenure, education, and experience remain key factors in judicial determinations of reasonable notice. Although provincial trial courts initially determine reasonable notice, the governing legal principles apply equally across the country.

Several studies, all using multiple regression analysis, have shown that the *Bardal* factors can explain between 50% and 80% of the variance in reasonable notice awards (Lam & Devine, 2001; Liznick, 1987; McShane, 1983; McShane & McPhillips, 1987; Thornicroft, 2010; Wagar, 1995, 1996; Wagar & Jourdain, 1992). It should be noted that neither Chief Justice McRuer nor any other judge since, to my knowledge, has suggested that the plaintiff's gender is a relevant consideration when determining reasonable notice. Nevertheless, it may be that the plaintiff's gender affects the determination of reasonable notice, and this matter is examined in the experiment reported here.

Since the determination of "reasonable notice" reflects a consideration of a variety of independent factors that are assessed "globally" rather than separately, neither the employer nor the employee can predict, with absolute precision, the outcome of a particular "wrongful dismissal" action. Accordingly, the parties have an incentive to reduce litigation risk by settling rather than litigating severance pay disputes. The vast majority of civil claims (including wrongful dismissal claims) are settled short of trial—indeed, often short of any court proceedings whatsoever. It is frequently asserted that something in excess of 90% of all civil litigation claims are settled before trial. In British Columbia, for example, during the period 2005 to 2010, the overall average settlement rate of civil claims (including wrongful dismissal actions) was over 97% (Supreme Court of British Columbia, 2011).

As is the case for civil matters in general, the vast majority of wrongful dismissal cases (especially those where just cause is not in dispute) are settled without judicial determination, and many of these negotiations are conducted directly between the employer and employee. While many claimants have legal representation (or seek legal advice) during the course of negotiations, a surprising number of claims are settled directly between the employer and employee, with only peripheral involvement of legal counsel. Thus, in this study, I examine whether there is any gender effect in the negotiation of reasonable notice where the

parties do not have legal representation (for example, where the employer might be represented by a member of the human resources or labour relations department, and the employee might be represented by a union official).

GENDER EFFECTS IN JUDICIALLY DETERMINED SEVERANCE PAY AWARDS

Several recent studies indicate that a person's gender affects almost every aspect of the contemporary employment relationship, including initial hiring and subsequent promotion (Bertrand & Hallock, 2001; Booth, Francesconi, & Frank 2003; Boschini & Sjögren, 2007; Smith, Smith, & Verner, 2011), compensation (Cardoso & Winter-Ebmer, 2010; Muñoz-Bullón, 2010; Ransom & Aaxaca, 2010), the type of work undertaken (Olivetti & Petrongolo, 2008; Young, 2010), access to networking and mentoring opportunities (Kumra, 2010; Ramaswami et al., 2010), performance assessment (Gneezy, Niederle, & Rustichini, 2003; Price, 2008), absenteeism rates (Dionne & Dostie, 2007; Zhang, 2007), perceived participation in decision-making (Denton & Zeytinoglu, 1993), and voluntary resignation (Dryfhout & Estes, 2010; Laband & Lentz, 1993).

Several studies have examined the impact of gender on the determination of just cause both in grievance arbitrations and in civil actions for wrongful dismissal. Some studies have found that women are more favourably treated in grievance arbitration than similarly situated men (Bemmels, 1990; Caudill & Oswald, 1993; Mesch, 1995), but other studies have found the opposite effect (Rodgers & Helburn, 1985), or no gender effect whatsoever (Crow & Logan, 1994; Steen, Perrewe, & Hochwarter, 1994; Thornicroft, 1995a, 1995b; Zirkel & Breslin, 1995). The consensus that emerges from the few published studies regarding gender effects in civil claims for wrongful dismissal is that females, relative to males, may enjoy a modest advantage (Eden, 1993; Knight & Latreille, 2000; Morris, 1996; Wagar, 1996; Wagar & Grant, 1996).

DETECTING GENDER EFFECTS: REASONABLE NOTICE NEGOTIATIONS VERSUS JUDICIAL DECISIONS

The present study addresses the issue of notice entitlement rather than just cause. More specifically, when women are discharged without cause, do they face any gender-based discrimination (or gain any advantage) in the determination of their reasonable notice entitlement? This study examines the impact of gender on *negotiated* outcomes in wrongful dismissal claims rather than, as in previous studies, the impact of gender on *adjudicated* awards of reasonable notice. The question of the impact of gender on negotiated outcomes has not been, to my knowledge, previously examined in a published study.

While factors other than gender (e.g., the plaintiff's age, tenure, position, education, experience, skills, etc.) can be "controlled" statistically by including these

independent variables in a regression equation, this approach can be problematic. First, relevant personal characteristics are often not recorded in the judge's decision. The problem of missing information is significant in previous studies; typically, there was a 30% to 50% reduction in the initial case population, and techniques for dealing with missing information (for example, "mean replacement") are problematic. Second, information that is available must be meaningfully coded (e.g., "job status" is often inappropriately captured by a 4- or 5-point Likert scale intended to reflect a continuum from clerical worker to CEO; the plaintiff's work record is typically dichotomously coded as either "good (clean)" or "poor (blemished)" as stated in the judge's reasons for decision. Relevant factors are often omitted from the judge's reasons, and, equally often, they are identified only in an arithmetically imprecise fashion (e.g., the plaintiff may be described as being a "middle manager" or as an "older" or "long-serving" employee). Even when information is precisely recorded in a decision, if two variables, say, age and tenure, are highly correlated (as they often are), it is difficult to statistically isolate the unique impact of each variable.

Quite apart from those judicial decisions where relevant information is missing or inadequately particularized, it may well be that other unstated factors affect the actual determination of reasonable notice in a given case. For example, a judge might conclude that the employer treated an employee unfairly, but rather than making an explicit *Wallace* "bad faith" award (*Wallace v. United Grain Growers*, 1997), the judge may simply award the plaintiff reasonable notice at the "upper end" of a given continuum. Reasonable notice awards, unlike individual termination pay mandated by federal and provincial employment standards statutes (which is based solely on the employee's period of continuous service), do not lend themselves to precise specification. Provided a reasonable notice award is within a permissible range (say, 6 to 8 months), an award at either the upper or lower end of that range is not likely to be disturbed on appeal (*Minott v. O'Shanter Development Company*, 1999; Thornicroft, 2010).

Even if the relevant factors affecting judges' reasonable notice determinations (other than gender) are controlled statistically, the few studies published to date regarding gender effects in reasonable notice cases are based on overwhelmingly male-dominated samples. For example, in McShane (1983), male plaintiffs constituted 86% of the 107-case sample; to put the matter another way, the study included only 15 female plaintiffs. Similarly, in McShane and McPhillips (1987), 86% of the 102 plaintiffs were male—thus there were only 14 females in the "full model" analysis. Liznick (1987) included only 67 cases and a mere 7 female plaintiffs. In Wagar (1996), female plaintiffs constituted only about one-fifth of the 214-case sample. Finally, the Lam and Devine (2001) sample included only 75 cases and, assuming a gender distribution in line with previous studies, there would have been only about one dozen female plaintiffs (the authors did not report the sample's gender distribution).

Liznick (1987), McShane (1983), McShane and McPhillips (1987), Wagar (1996), and Wagar and Jourdain (1992) all found no "gender effect" in the

judicial determination of reasonable notice awards. However, given such an overwhelming preponderance of male plaintiffs in the “reasonable notice” studies published to date, it is hardly surprising that gender has not yet proved to have much predictive value. Nevertheless, it should also be noted that these studies consistently reported a positive correlation between male gender and the reasonable notice award.

Why are there so few female plaintiffs? I offer three principal explanations. First, for the most part, only middle- and senior-level managerial, technical, or professional employees file wrongful dismissal claims. For example, in Rollings-Magnusson (2004), 201 of the 232 plaintiffs (nearly 87%) were either managerial or professional employees (the rest were clerical employees or tradespersons). Women remain comparatively underrepresented in the managerial and professional occupational categories. Statistics Canada (2006b) reported that in 2006 over 1 million males were employed in “management occupations,” about double the number of females in these occupations (see Statistics Canada, 2011, for occupational definitions). A similar pattern prevails in the United States—a Bureau of Labor Statistics (2009) report indicated that over 9.8 million men held “managerial” or “financial operations” positions compared to less than 6.7 million women in the same occupational categories.

Second, there is evidence that women, relative to men, are more risk averse in areas relating to personal finances. While there are numerous published studies supporting this observation, one of the most frequently cited studies is Jianakoplos and Bernasek (1998). There is some evidence that women are less likely to file grievances in unionized workplaces (Bamberger, Kohn, & Nahum-Shani, 2008; Bemmels, 1994). Grant and Wagar (1992) found that women were less likely than men to pursue wrongful dismissal claims. It may be that women are more willing than men to accept severance pay proposals that are at the low end of the scale rather than rejecting the offer and pursuing uncertain (in terms of both cost and outcome) legal proceedings.

Third, pursuing a civil claim involves substantial transaction costs (legal fees and disbursements; time away from a new job), and women, who generally have lower earnings than men, may be less able to underwrite such costs. A *Canadian Lawyer* litigation counsel survey published in June 2011 indicated that the legal fees for a 2-day civil trial averaged \$36,778 (Todd, 2011). According to the 2006 Canadian Census, the median and average full-time annual earnings for males and females in the “management occupations” category were as follows: males: \$64,111/\$90,917; females: \$46,836/\$57,462 (Statistics Canada, 2006a). Most “wrongful dismissal” actions are pursued by “management” personnel (Thornicroft, 2010), and thus women may be comparatively less financially able to pursue employment-related litigation.

There are inherent difficulties in uncovering gender effects in adjudicated severance pay awards. Further, the overwhelming majority of severance awards are negotiated, not adjudicated. Accordingly, this study directly examines gender

effects by way of an experiment in which the focus is on negotiated, rather than adjudicated, outcomes.

METHODOLOGY

The negotiators involved in this study were 688 upper-level undergraduate (B.Com.) and graduate (M.B.A.) business students. The experiment was conducted as part of a course module on employment law and was administered to students in several separate classes. The students were randomly assigned to represent either the employer or the employee in a scenario based on an actual B.C. Supreme Court decision in which the plaintiff was awarded 24 months' notice. In the background information provided to the students, the plaintiff was described as a 60-year-old former assistant manager of a municipal electrical utilities department (supervising 12 unionized employees) with 22 years' service. The plaintiff was further described as a high school graduate who had worked for a provincial power utility for 15 years prior to joining the municipality's electrical utilities department. The plaintiff was identified in the simulation materials as either a male or female by the description of the plaintiff as "he" or "she"; however, the gender of the plaintiff was not specifically drawn to the students' attention in any fashion and the students were wholly unaware that the purpose of the study was to identify any "gender effect" in the negotiation of severance pay. Two versions of the simulation, identical apart from the plaintiff's gender, were evenly distributed between male and female plaintiffs. The entire simulation—including introductory remarks, negotiation, and debriefing—typically took about 90 minutes to complete (the actual negotiations occupied about 20 to 30 minutes).

Prior to the commencement of the negotiation simulation, the students were briefed (through class lecture/discussion and assigned readings) about the legal principles governing the determination of reasonable notice and the personal and economic factors (i.e., the *Bardal* factors) that influence the determination. The students were advised that the "rough upper limit" of reasonable notice, consistent with Supreme Court of Canada jurisprudence, was 24 months. The students were further advised that they were not required to reach a settlement (although a settlement was achieved in over 95% of the negotiations) and that the only issue to be negotiated was the plaintiff's notice entitlement.

The results reported here are based on 327 successfully negotiated outcomes (i.e., the parties agreed on a "reasonable notice" figure) involving 654 students (295 females—45.1% of the sample; 359 males—54.9% of the sample). There was a male plaintiff in 162 (49.5%) of the simulations and a female plaintiff in 165 (50.5%) of the simulations. The students were required, following the conclusion of their negotiations, to complete and sign a form setting out the terms of the settlement. Accordingly, the gender of the individual negotiators could also be identified for purposes of analysis.

HYPOTHESES

Studies examining gender effects in severance pay disputes generally suggest that males, relative to females, may enjoy a modest advantage, although Thornicroft (2010) found that females suffered a statistically significant disadvantage. Of course, these results reflect adjudicated rather than negotiated outcomes and, *ex ante*, there is no particular reason to believe that young adult business students, relative to much older—and generally male (see Office of the Commissioner for Federal Judicial Affairs Canada, 2012)—superior court judges, would necessarily display any gender bias. However, merely as a starting point (since, to my knowledge, this question has not previously been empirically examined), I assume that there will not be any significant gender-based differences in the negotiated severance pay awards. Thus, the first hypothesis to be examined is as follows:

H1: There will not be any significant differences in mean negotiated severance pay awards as between male and female plaintiffs.

Second, I examine whether there is a “gender affinity” effect. In other words, will females negotiate comparably higher awards for female plaintiffs (and will a similar pattern prevail when males represent male plaintiffs)? Voter preference studies suggest that females are significantly more likely to vote for female candidates and that this result holds even if personal affinities between the voter and the candidate and the candidates’ personal characteristics are controlled (Antonovics, Arcidiacono, & Walsh, 2005; Dillingham, Ferber, & Hamermesh, 1994). More recently, however, Dolan (2008) concluded that gender *per se* had no significant impact on voter choice as between male and female candidates. The “gender affinity” hypothesis is as follows:

H2: Mean negotiated awards will be comparably higher when the plaintiff and plaintiff’s representative are of the same gender.

This experiment, mirroring what typically occurs in actual negotiations between dismissed employees and their former employers, is a distributive (or “zero-sum”) negotiation. In other words, the employee’s gain (i.e., a larger severance pay award) is solely at the employer’s expense; there is no opportunity for an integrative outcome where both parties can gain without imposing any costs on the other party. A number of studies have shown that in distributive bargaining scenarios, although women are more likely than men to achieve a negotiated result, women nevertheless more commonly achieve a lesser result than men. The many studies dealing with gender effects in negotiation were canvassed by Paddock and Kray (2011: 232), who concluded that “men’s behaviour on average is more competitive than is women’s behaviour [and] men’s economic negotiation outcomes are typically better than are women’s negotiation outcomes” (see also Eckel, de Oliveira, & Grossman, 2008; Kolb, 2009; Miles & Clenney, 2010). It may be, however, that women achieve somewhat better negotiated outcomes when they are

negotiating on behalf of a third party rather than on their own behalf (Amanatullah & Morris, 2010). In this study, a lesser bargaining outcome would be either a comparably lower average notice award when a female represents the plaintiff (irrespective of the plaintiff's gender) or a higher average notice award when a female represents the employer. Thus, the third and final hypothesis examined in this study is as follows:

H3: Women, when bargaining directly with men, will achieve poorer average bargaining outcomes compared to average male/male bargaining outcomes.

ANALYSIS AND RESULTS

The results of the negotiations were analyzed using “analysis of variance” (“ANOVA”). ANOVA is a statistical technique utilized to determine whether differences among group means are “statistically significant” (in other words, are the observed differences in means unlikely to have resulted from mere random variance?). ANOVA is a particularly appropriate technique for analyzing differences among group means in an experiment where several independent variables are manipulated to determine the effect on a given dependent variable. The dependent variable in this experiment is the negotiated “reasonable notice” settlement (specified in months). The independent variables are the plaintiff's gender and the gender of the individual negotiators representing the employer and the employee in the negotiation. The experiment is thus a $2 \times 2 \times 2$ factorial design.

The ANOVA results are reported in Table 1. There were statistically significant main effects for both the plaintiff's gender and the employer's representative's gender but not for the employee's representative's gender. None of the two-way interactions was statistically significant and neither was the three-way interaction.

Contrary to the expectation reflected in Hypothesis 1, female plaintiffs appear to be at a marked *disadvantage* relative to male plaintiffs in negotiated severance pay awards. The overall mean negotiated severance pay award was 15.59 months; however, the mean settlement for female plaintiffs (14.64 months) was 1.93 months lower than the mean settlement for male plaintiffs (16.57 months). In other words, in absolutely identical personal circumstances, save for gender, male plaintiffs received a 13% “notice premium” relative to female plaintiffs. Based on a \$75,000 annual salary, this gap represents a \$12,063 severance pay premium in favour of male plaintiffs and a \$16,083 premium at a \$100,000 annual salary level.

The comparison between the negotiated results for male and female negotiators is also enlightening. Male negotiators seemingly negotiated a somewhat “harder bargain” when they represented the employer, regardless of the plaintiff's gender (i.e., lower average notice awards), although, once again, male plaintiffs fared much better than identically situated female plaintiffs (by 2.14 months). Female plaintiffs were apparently even more disadvantaged when represented by female negotiators (contrary to the expectation reflected in Hypothesis 2). The lowest

Table 1. Analysis of Variance Results

Source	<i>df</i>	Sum of squares	Mean square	<i>F</i> -test	<i>p</i> -value
Main Effects					
Plaintiff Gender (A)	1	239.04	239.04	15.02	.0001
Employer Representative Gender (B)	1	206.03	206.03	12.94	.0004
Employee Representative Gender (C)	1	11.67	11.67	.73	.3925
Two-Way Interactions					
AB (Plaintiff × EeRep Gender)	1	16.35	16.35	1.03	.3116
AC (Plaintiff × EeRep Gender)	1	17.57	17.57	1.10	.2942
BC (ErRep × EeRep Gender)	1	10.84	10.84	.68	.4099
Three-Way Interaction					
ABC (Plaintiff Gender × ErRep × EeRep Gender)	1	1.61	1.61	.10	.7507
Error	319	5077.86	15.92		

mean settlement occurred when a female represented a female plaintiff and a male negotiator represented the employer (13.62 months). The highest mean settlement (17.29 months) was secured in the scenario in which a male represented a male plaintiff in negotiations where a female represented the employer.

Women do not appear to show any particular affinity for female plaintiffs. The mean award negotiated in favour of female plaintiffs by their female representatives was 14.41 months (.44 months less than the mean notice award negotiated by males for their female clients). This result stands in marked contrast to a mean settlement of 16.80 months when females represented male plaintiffs (an award .41 months higher than the mean award secured by males for their male clients). Alternatively, it could be argued that females are best positioned to advance the interests of female plaintiffs when they represent the employer, since the employer actually funds the negotiated severance package. The smallest “gap” between male and female plaintiffs (albeit still with a premium in favour of male plaintiffs) occurred when females represented the employer (1.41 months).

Males did not appear to display any gender affinity. Indeed, when males represented the employer, the mean award for male plaintiffs (15.97 months) was very close to the overall mean settlement of 15.59 months and was actually lower than the mean award for male plaintiffs as a whole (16.57 months).

These results provide some limited support for the third hypothesis, inasmuch as women, on average and compared to men, achieved a lesser result for the party

they represented, although this result was statistically significant only in the case of employer representation. As Table 2 shows, regardless of the individual plaintiff's gender, women agreed to comparably higher awards on the employer's behalf (i.e., a disadvantageous result for the employer) compared to the situation in which a male represented the employer. It should also be noted that, on average, female plaintiffs achieved higher negotiated awards when they had male, rather than female, representation.

DISCUSSION

Although some studies suggest that women receive more favourable treatment than men in adjudicated "just cause" cases (Wagar, 1996; Wagar & Grant, 1996), it is possible that any observed favourable treatment toward women is a statistical artifice if, in fact, women proceed to trial only when they perceive themselves to have very good prospects for success (see Grant & Wagar, 1992). Most studies dealing solely with the adjudication of notice rather than just cause (e.g., Lizabeth, 1987, McShane & McPhillips, 1987; Wagar, 1995) indicate that gender does not affect judicially determined notice periods (at least not to a degree that is statistically significant)—Thornicroft (2010) being the one notable exception. However, these studies involve overwhelmingly male populations, and it is difficult to isolate gender effects with very small female sample sizes. Further, in each of these studies, the regression results indicated that females

Table 2. Mean Negotiated Notice Awards by Plaintiff's and Parties' Representatives' Gender

Plaintiff Gender	Employer Rep. Gender	Employee Rep. Gender	Mean Negotiated Notice Award (months)	Std. Dev.	N
Female			14.64	4.32	165
Male			16.57	3.75	162
Female	Female		15.80	4.38	68
Female	Male		13.83	4.12	97
Male	Female		17.21	3.69	78
Male	Male		15.97	3.74	84
Female		Female	14.41	4.49	78
Female		Male	14.85	4.18	87
Male		Female	16.80	3.78	71
Male		Male	16.39	3.75	91

received comparably lower notice awards, although, as previously noted, in all but one of these studies the results were not statistically significant.

Although Thornicroft (2010) found that there was a statistically significant bias against female litigants, this result reflected adjudicated awards made by appellate courts where older (since they are almost invariably appointed from the ranks of superior trial court judges) male judges predominate (Office of the Commissioner for Federal Judicial Affairs Canada, 2012). There is no particular reason to believe that severance pay settlements negotiated by contemporary young adults would necessarily reflect a gender bias, and certainly not a bias by women against their own gender. Nevertheless, the results of this experiment strongly support the notion that there is a gender bias in the negotiation of reasonable notice awards. More troubling, the results also support the somewhat counterintuitive notion that females have a more pronounced gender bias (and in favour of males) than do their male colleagues. This latter result is all the more startling when one considers that the female negotiators involved in this study represent a generation that has had more educational and vocational opportunities open to its members than any previous female cohort. That female negotiators favoured male plaintiffs, and to a significant extent, is a surprising result. Based on prior voter affinity research, one might have expected that females would have, if anything, favoured female plaintiffs.

Women endeavouring to resolve their wrongful dismissal claims through negotiation may face two barriers. First, women who settle their wrongful dismissal claims before trial might well have to settle for less notice than similarly situated male plaintiffs. Second, since the actual dollar value of a wrongful dismissal settlement depends, for the most part, on a simple “months’ notice x monthly wage” formula, even identical notice settlements will result in lower average dollar settlements for female plaintiffs vis-à-vis similarly situated male plaintiffs, to the extent that females earn comparably lower wages. Although labour economists dispute the magnitude of, and the reasons explaining, gender-based wage differentials (see, e.g., Caranci & Gauthier, 2010; Farrell, 2005), few argue that such a wage gap does not exist. According to data collected by Statistics Canada, in 2010 women earned, on average, only about 74.5% of what men earned (Catalyst Inc., 2011); a similar pattern prevailed in the United States, where, according to Bureau of Labor Statistics data, women’s median wage across all occupations was only about 81.2% of the male median wage in 2010 (Catalyst Inc., 2011).

The results also show that males, significantly more so than females, negotiate a “harder bargain” when they represent the employer. Consistent with the implications that flow from the gendered organizations literature, it may be that men, relative to women, more closely identify and align themselves with the employer, since stereotypically male characteristics still define the organizational culture within many organizations’ managerial cohorts (see Acker, 2006). This dynamic, in turn, may affect males’ negotiating behaviour on behalf of employers.

CONCLUSION

In this study, and by reason of its experimental design, the unique impact of gender has been isolated in the negotiation of reasonable notice awards. Overall, the negotiations resulted in male plaintiffs recovering nearly 2 months' additional notice relative to identically situated female plaintiffs. More surprisingly, women were equally as likely as men to display a gender bias against female plaintiffs.

Although the plaintiff in the simulation was not formally described as an "engineer" (and did not have an engineering degree), the plaintiff held a job that is commonly described as that of a "city engineer." Municipal engineering departments, and the engineering profession as a whole, are strongly male dominated. In 2010, women represented just under 18% of students enrolled in Canadian undergraduate engineering programs and only about 13% of the profession as a whole (Engineers Canada, 2011). If the student negotiators, and particularly the female students, were concerned that a woman, relative to a man, might face a more difficult labour market when seeking new employment, that might have been reflected in a comparative female advantage in the negotiated notice awards. In fact, however, women consistently recovered less notice even when represented by a female negotiator (see Table 2). One of the consistently reported findings in the gendered organizations literature (see, for example, Acker, 2006; Britton & Logan, 2008; Budig, 2002; Ely, 1995; Martin & Collinson, 2002) is that well-educated women in male-dominated organizations (such as law firms and other professional services organizations) tend to undervalue their skills and abilities compared to those of men in the same organizations. Perhaps a similar behavioural pattern was at play in this experiment, with women, if only subconsciously, undervaluing the worth of a female engineer, and this was reflected in lower negotiated notice awards. If the plaintiff had been identified as someone formerly employed in a more gender-neutral occupation, perhaps the observed female notice disadvantage might have been attenuated.

It must also be acknowledged that the negotiators in this simulation were business students, not actual managers and human resources professionals. It may be that these results are not necessarily generalizable to the latter populations. Further, these results may not be generalizable to negotiations in which the parties are represented by legal counsel.

Nevertheless, these results are troubling in that women, relative to men, (i) appear to be more likely to achieve lower settlements; (ii) will recover settlements that are likely to be calculated based on comparably lower wage rates; and (iii) are less likely to pursue their rights in court when faced with a "lowball" settlement offer.

The results of this experiment should give rise to some considered reflection, if not outright consternation. There is no principled reason why gender, per se, should affect severance pay settlements. Further, the fact that women are apparently themselves the source of an antifemale bias is particularly troubling. If

any cohort ought to be free of a gender bias toward women, it should be the current generation of young adult females enrolled in business schools. And yet, this is apparently not the case.

The first step toward a gender-neutral assessment of reasonable notice awards must surely be its recognition. Several years ago, Canadian courts realized that assessing young girls' future income losses (say, in a personal injury lawsuit) based on historical female wages tables inherently biased the ultimate damages awards against females. This problem was recognized and rectified—the courts now simply refuse to utilize historical “female wage tables” when calculating young girls' future income losses, preferring instead to use male tables, albeit with some adjustments (see *Steinebach v. Fraser Health Authority*, 2010, for a recent review of the matter).

One approach toward rectifying the gender bias in severance pay awards might be the extension of minimum severance payments mandated by statute (which are gender-neutral in that they are solely based on years of service) to cover common law claims for reasonable notice. An appropriate formula could be fixed by statute that would allow for various factors that are already taken into account by the common law courts (for example, age, tenure, and salary level) and that would then preclude any possibility of gender coming into play. Parties could, of course, be given the freedom to negotiate their own separate formulae, and this would allow for unique circumstances in any particular employment relationship to be taken into account. Since negotiated settlements are principally based on the severance pay awards that are issued by the courts, the gender bias in negotiated awards would tend, one would hope, to diminish, if not disappear entirely, over time.

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