What motivates New Brunswick employees to sue their employers, and does the law offer a relevant response?

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ABSTRACT

Disputes between employers and employees often have damaging consequences, including employee claiming that leads to lengthy, expensive and time-intensive legal processes. It is questionable if employee-initiated legal claims always effectively respond to the concerns on which they are based. This study explores the motivations of individuals in New Brunswick, Canada in their decisions to consider legal action against their employers. It argues that more attention should be paid to the reasons why individuals elect to pursue legal remedies and to the exploration of means for avoiding litigation or addressing the resolution of such differences in more effective and efficient ways.

Adopting a multiple operationism methodology, this study has explored the motives of New Brunswick employees who consider advancing legal claims against their employers and has considered the procedural and remedial capacity of the existing common law and statutory employment law system to effectively respond to those motives. In addition, the study has examined the responsiveness of alternate justice models to the employee concerns that frequently result in the initiation of legal claims.

The study argues that many employees' legal claims are highly motivated by interests that are more dimensioned than the interests contemplated by the New Brunswick legal system and that amendments to the system should be considered. The system has been significantly informed and influenced by Classical Contract Law Theory, and the study suggests that implementation of justice concepts and processes founded on Relational Contract Law Theory will respond more effectively to the employee concerns that motive legal claims.

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CHAPTER 1: INTRODUCTION

1.0 Introduction

The purpose of this thesis is to examine the employee and employer relationship under strain within the parameters of employment law in New Brunswick, Canada. Specifically, this study explores what motivates employees to consider making legal claims against their employers and former employers, and how employees' perceptions of fairness influence their decisions with respect to making a claim.

There are several reasons why these issues deserve examination. First, management decisions that are perceived as unjust by employees frequently result in reduced productivity and diminished employee citizenship (Pate et al., 2003), both of which have been identified as impediments to organizational performance results. Second, the causes underlying employment litigation are inherently important to employers and employees because litigation is often very time-consuming, expensive and emotionally taxing. As a result, the examination of what types of drivers may motivate employees to contemplate legal action has merit. This study may assist in identifying potential opportunities to avoid or at least to reduce unnecessary legal disputes and to find collaborative resolutions. Another utility of this study lies in its contemplation of the responsiveness of the New Brunswick legal system to the concerns of employees and their perceived resolution expectations. Managers who are faced with workplace disputes that are going to result in investments of time, effort, finances and emotion may significantly benefit from understanding employees' true motivations for taking legal action. Understanding what motivates employee claims may assist employers and other stakeholders in the legal system to consider mechanisms that are better aligned to those employee motives and that lead to resolutions that respond to the needs of both employers and employees. This thesis addresses a perceived gap in the understanding of factors that precipitate employee legal claims in New Brunswick and the effectiveness of the New Brunswick legal system in its responses to these claims, which gap is made evident by the literature in the subject. Additionally, the thesis explores alternatives to the perceptions of workplace fairness imposed by the law and identifies concepts that are worthy of consideration in the New Brunswick context.

Based on Pound's observations, this investigation may help provide evidence as to what amendments to the legal system would better protect the rights of both the employee and employer that promote social justice:

> Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled with the conflicting demands of the need of stability and the need of change. The social interest in the general security has led men to seek some fixed basis for as absolute ordering of human action… But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests… Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. (Pound, 1923)

As an employment lawyer in New Brunswick, the author has had nineteen years of practice experience in dealing with the concerns of employees, the perceptions of employers and the reality of the law in respect of workplace legal claims. Throughout that experience, it has become apparent that there is often a fundamental disconnection between the expectations of the participants in employment-related legal claims and their actual experiences. The author has observed that a significant number of employee claimants and employer respondents have expressed disappointment with the uncertainty and potential length of the process as well as the remedies available. The above- noted responses have led the author to the following question: if at least some employment claims are pursued with objectives that are not the resolutions made available by the law, what are the core drivers that motivate employees to make legal claims? The likelihood that the nature of employment and its significance to employees have changed and continue to change over time invites consideration of Pound's (1923) encouragement of continual evolution of the law.

1.1 The significance of employment

Although there has been some debate as to the extent to which the common law in Canada recognizes the psychological significance of employment (Shain, 2008), the multi-faceted role that employment plays in the lives of modern workers has been acknowledged by the Canadian courts. Most notably, the Supreme Court of Canada has recognized for some time

that employment is a substantial source of emotional well-being and self-identity in society. In 1987, the Court made this oft-quoted observation:

> 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 *Chambly (Commission Scolaire Regionale) v. Bergevin*,[2] Cory, J. of the Supreme Court reiterated the prominence of employment in modern life by confirming that "To the vast majority of Canadians their work and place of work are matters of fundamental importance. Fairness in the workplace is the desire of all."

Despite judicial affirmation of the non-monetary merits of employment, the common law has maintained a long-held model of the relationship as a commercial contract:

> Notwithstanding the unique nature of the contract of employment and the fact that employees generally bargain from a comparatively unfavourable position, the courts have used the doctrine of freedom of contract to enforce rights against employees, but until recently, have generally implied terms into the contract of employment in favour of the employer. (Ball, 2003: 5-2)

As a result, the common law in Canada has historically focused on providing litigant employees with access to contract-based financial compensation, as opposed to compensation arising from the emotional consequences of perceived unfairness on employees.

The two contributions of employment to the wellness of individual employees, being financial stability and emotional well-being, raise interesting questions about the origin of disputes that inevitably occur between employers and employees. Does employment-based conflict more often arise from the employee's financial interest in paid work, or is it instead founded in the employee's need for the emotional well-being? More specific to the

[1] *Reference re Public Service Employee Relations Act (Alta)* (1987), 87 C.L.L.C. 14 at para. 9.
[2] (1994), 4 C.C.E.L. (2d) at p. 204.

motivation of employees who pursue legal claims and the remedies made available by the law in response to workplace problems, do claimant employees advance legal claims against their employers based on financial considerations, emotional concerns, or both? Whatever the motivation, how well-equipped is the New Brunswick legal system (the "System") to adequately address employee concerns which form the basis of employment disputes? For employers and other stakeholders in the System, an understanding of the cause of employee-initiated litigation provides an opportunity for effective contemplation of litigation avoidance. Insight into both issues – namely, the causes of employee litigation and the current ability of the System to answer those causes – may invite all parties to make better use of the System or actively seek non-legal resolutions.

A fundamental premise underpins this research: some employees who make work-related legal claims do so in the hope of obtaining an outcome that may not always be available within the System. Unfortunately, employees may take legal action against their employer without knowing that the System cannot provide a desirable remedy for them. If employee litigants make legal claims in pursuit of resolutions that the law does not offer, then employers and other stakeholders in the System ought to consider dispute resolution mechanisms that may address claimants' concerns more efficiently. There appears to be an opportunity for employers to become proactive and identify ways of reducing the risk for litigation. Assessing the relevance of the System's processes and remedies to employee claims motives is helpful in gauging what systemic amendments, if any, are advisable.

The number of legal claims made against Canadian employers has increased sharply over the past five years. A survey of 535 Canadian human resources professionals conducted for the Canadian Human Resources Professionals Association demonstrates that almost 70 percent of respondents viewed employee litigiousness as increasing (Balthazard, 2010). The Canadian Human Rights Tribunal, for example, reports that the number of discrimination claims that were referred to tribunals increased from 15 in 1996 to 70 in 2000 (New Brunswick Human Rights Commission 1999 – 2000). By 2007, the number of signed employment-related complaints received by the Canadian Human Rights Commission had escalated to744, and by 2009 that number had further increased to 855 (New Brunswick

Human Rights Commission, 2006 – 2007). A similar increase has occurred in the New Brunswick jurisdiction, which governs provincially-regulated industries and organizations. There, a total of 92 formal employment-related human rights complaints were received by the New Brunswick Human Rights Commission during the period from April 1st, 1999 to March 31st, 2000. Seven years later, 174 formal employment-related complaints were received by the New Brunswick Commission (New Brunswick Human Rights Commission, 2006 – 2007), and that number has remained well above 100 in each of the following years:

- 197 in 2007-2008 (New Brunswick Human Rights Commission, 2007 – 2008);
- 214 in 2008-2009 (New Brunswick Human Rights Commission, 2008 – 2009);
- 181 in 2009-2010 (New Brunswick Human Rights Commission, 2009 – 2010);
- 185 in 2010-2011 (New Brunswick Human Rights Commission, 2010 – 2011);
- 186 in 2011-2012 (New Brunswick Human Rights Commission, 2011 – 2012); and
- 149 in 2012-2013 (New Brunswick Human Rights Commission, 2012 – 2013).

In 2007-2008, the New Brunswick Human Rights Commission adopted a pre-complaint mediation process (New Brunswick Human Rights Commission, 2007 – 2008) that afforded would-be parties to a formal complaint the opportunity to resolve their disputes before a formal complaint was actually filed. A number of potential complaints were resolved by the Commission in that process, as follows:

- 25 in 2007-2008 (New Brunswick Human Rights Commission, 2007 – 2008);
- 20 in 2008-2009 (New Brunswick Human Rights Commission, 2008 – 2009);
- 10 in 2009-2010 (New Brunswick Human Rights Commission, 2009 – 2010);
- 4 in 2010-2011 (New Brunswick Human Rights Commission, 2010 – 2011);
- 15 in 2011-2012 (New Brunswick Human Rights Commission, 2011 – 2012); and
- 9 in 2012-2013 (New Brunswick Human Rights Commission, 2012 – 2013).

While detailed statistics regarding wrongful dismissal litigation are not available in New Brunswick, the author, as a lawyer practicing in the New Brunswick employment field, has observed a growth in employment litigation over the past decade. All of the reasons behind increasing employment litigation have not been identified with certainty. However,

some observations recorded in the Canadian Human Resources Professionals Association study suggest factors such as: employees having little to lose in the pursuit of litigation, due to accessibility to the System; increased employee knowledge of their legal rights; and financial imperatives imposed by a shrinking job market (Balthazard, 2010). At the same time, it seems possible that employees' understandings of their employment relationships and perceived unfairness suffered in those relationships are a significant motivation for legal claims as well. Comprehension of the potential causes of employee litigation is important for employers, who now clearly face a higher risk of being made the subject of legal claims than they did five years ago. Even aside from the negative organizational impacts of workplace disputes, it is clear that employment litigation is increasingly more costly to employers from a financial perspective. In the Canadian Human Resources Professionals Association study, 53 percent of the respondents indicated that their employment-related legal costs had escalated by 10 percent or more over the previous five years, and more than 15 percent experienced legal expense increases of 15 percent or more (Balthazard, 2010). This fact alone is a compelling reason for employers to seek a deeper understanding of the causes of workplace legal claims.

1.2 The purpose of the thesis

As previously indicated, the purpose of this thesis is to explore the motives behind New Brunswick employees' legal claims against their employers and, then, to examine the effectiveness of the System in its responses to their concerns and expectations. In researching these issues, concepts of workplace fairness will be explored with reference to two models of justice – legal justice and organizational justice. The specific questions the research set out to explore were:

1. What motivates employees to pursue or to refrain from pursuing legal action against their employers?

2. What do New Brunswick employers perceive as motives for employees to pursue or to refrain from pursuing legal action against their employers?

3. Does the New Brunswick legal system provide the remedies that individuals are seeking when they pursue litigation against their employers?

4. What do New Brunswick employment lawyers perceive as motives for employees to pursue or to refrain from pursuing legal action against their employers?

In essence, the employment relationship is one in which an employer and its employees share some mutual interests in the face of other, conflicting interests (Folger, 2004). The manner in which such conflicts are resolved is of substantial concern, as the parties' perceptions of the fairness of their particular relationship can influence the relationship itself (Folger, 2004). As Boehm proposes, "The disposition in question…is one that makes us resentful of being unduly subordinated…" (1999:170). This observation is simple and yet fundamentally challenging in the workplace justice context, as it invites questions as to the impact of "undue subordination." The extent to which a perception of undue subordination causes an employee to adopt negative attitudes or behaviours (including the contemplation and pursuit of legal claims) is an important understanding for employers and all other stakeholders of the legal justice system to develop.

1.3 Methodology

The nature of this study did not lend itself to a single methodological approach. Because it investigates the rationales behind employee legal claims in New Brunswick, the study questions the influences and appropriateness of two discernible justice models on workplace disputes and their resolutions. It is a project which enquires into the distinct fields of workplace law and organizational justice to examine the significance of the concepts, their distinctions and their relationships. Given the cross-disciplinary aims of the study, which present the potential for sometimes marrying and sometimes divorcing legal justice and organizational justice theories, the methodology utilized in the study is a mixture of doctrinal legal research and empirical social science research.

The literature review involved in this research is bifurcated. On one hand, the law and the legal system that applies to New Brunswick employees are examined for the purpose of identifying the recourses and remedies available to employees. In the course of that review, attention is paid to the historical common law underpinnings of the system which, as Deakin (2001) comments, have had significance in the manner by which patterns of employment

contracts have developed. Although the law has influenced the shaping of employment relationships into their current form, there remains some discomfort with the supposed correlation between the legal model of employment and that which employees conceive to be reality (McCallum, 1995; Deakin, 2001).

A discussion of organizational justice literature will also form a component of this thesis, in order to provide insights into employees' perceptions of fair remedies in respect of workplace disputes. Quite apart from the legal justice formulation of employment, organizational justice research has considered what workers think and feel about their employment conditions, and what they expect of the relationship. This analysis is as fundamental to the study as is its legal justice counterpart. The existing research into employee perceptions of workplace justice is, of course, instructive in the effort to confirm the extent of correspondence between legal justice and employee justice expectations.

The literature has been instrumental in designing the fieldwork for this study in that it has suggested an exploration of the extent to which legal remedies respond to claimants' preferred outcomes. Utilizing both legal and organizational justice conceptualizations of employment, a multi-staged qualitative study has been undertaken into the research questions posed above. A qualitative methodology was adopted because of the contextual nature of the subject matter: namely, individual perceptions of workplace justice, and individuals' motives for contemplating or pursuing legal claims against their employers. As suggested by Lofland and Lofland, "face-to-face interaction [with research subjects] is the fullest condition of participating in the mind of another human being…" (1995: 16). Since the data sought in this study was to be drawn from the experiences and thoughts of employees in respect of varied work conditions, it was concluded that a qualitative approach was appropriate (Berkowitz, 1996).

Three research tools have been implemented to examine distinct units of analysis in this project. The groups analysed are: New Brunswick employees who have experienced a Work Problem in respect of which they contemplated legal action (the "Employees"); New Brunswick employers (the "Employers"); and New Brunswick lawyers who practice in the

field of employment law and are members of the Canadian Bar Association's Labour & Employment Section (the "Lawyers"). These individuals were studied through the use of electronic surveys and in-depth interviews.

1.4 Justice and law, two distinct concepts

"Justice" and the "law" are not always, or even often, the same thing (Pepper, 1999). The uncomfortable relationship between justice and law has existed since at least the eighth century, as evidenced in the poems of Hesiod and Solon (Friedmann, 1949). Rawls' conceptualization of justice is that, fundamentally, it equates with fairness (Rawls, 1958). In later work, Rawls distinguishes justice from the law, defining the latter as "A family of political concepts along with principles of right, justice and the common good that specify the content of a liberal conception of justice worked up to extend to and apply to international law" (Rawls, 1993: 43). Alexander (1991) posits two reasons for "the gap" between justice and the law:

i. rule makers are fallible and create imperfect laws for society; and

ii. individuals, who are the subjects of the law, are also fallible and are more likely to act in compliance with moral principles to produce consequences consistent with those principles when required to do so by blunt legal obligation.

An expansion of the distinctions between law and justice is offered by Pepper (1999) as follows:

i. Law makers and those tasked with enforcement of the law are fallible;

ii. Law makers and those tasked with enforcement of the law are, on occasion, susceptible to motivations other than justice and morality;

iii. The law is crafted in advance, such that its impact on the many complex human events to which it will eventually be applied is not completely predictable;

iv. Further, the law is designed to apply to the whole of society and social circumstances, such that its application in particular cases may not always be acceptable;

v. Frequently, the law is designed as a "minimum standard" of conduct, rather than as an enforcement of fair or "just" behaviour; and

vi. In some circumstances, the law creates opportunities for conduct which is, though legal, immoral or unjust.

In the employment context, Alexander's "gap" theory has relevance because it draws attention to one of the inquiries of this thesis: do New Brunswick employees who make legal claims against their employers do so solely to enforce their legal rights or are they motivated to seek redress for perceived breaches of fairness by their employers?

1.5 Two models of workplace justice

Employment law in New Brunswick is, as previously stated, somewhat of a protective rights patchwork. Depending on the nature of the industry in which they work, non-unionized New Brunswick employees have access to legal rights derived from the common law and particular statutes. The integration of these legal principles has not been well managed, and the result is the existence of awkward gaps in anticipated legal protections in some circumstances and equally awkward overlaps in other circumstances. Those pragmatic issues aside, however, the outcomes made available to aggrieved employees are largely constructed on common law employment concepts which, in turn, have been heavily influenced by political and economic theories of long-past eras. Chapter 2 examines the System and its utilities for employees. It reviews two contract law theories: one that has traditionally dictated the legal justice options available to New Brunswick's provincially-regulated, non-unionized employees and another that conceptualizes the employment exchange differently and, consequently, proposes an alternative remedial model. This analysis sets the stage for Chapter 3, in which a parallel justice model – organizational justice – is reviewed.

As Rawls (1957) theorized, justice is a concept which transcends the law, and which is as boundless and nebulous as fairness itself. Organizational justice theorists offer another model of workplace justice in an effort to understand, explain and predict employee workplace attitudes and behaviour. In that model, it is not legal rights that motivate negative employee attitudes and behaviours (such as retaliation), but perceived violations of the obligation of fairness. Organizational justice has been conceptualized in several ways, including these dimensions:

i. Distributive justice, which has been defined as the "perceived fairness outcomes or allocations" that a worker has received from his employer (Folger and Cropanzano, 1988);

ii. Procedural justice, which, unlike distributive justice, contemplates that an employee will be more accepting of a management decision, whether it is viewed as favourable or unfavourable, if the employee believes that the process leading to the decision was fair (Thibault and Walker, 1975);

iii. Interactional justice, which recognizes that the conduct of employees is affected by "the quality of interpersonal treatment they receive during the enactment of organizational procedures" (Bies and Moag, 1986);

iv. Informational justice, which addresses the provision of explanations for unfavourable events (Skarlicki et. Al, 2008); and

v. Retributive justice, or the issuance of penalties, distinct from compensatory relief, for morally reprehensible actions (Darley and Pittman, 2003).

Organizational justice is related to legal justice but it will be argued that it offers further dimensions than are contemplated by the law. As a practicing employment lawyer, the researcher has observed that many of the employee claimants who consulted the researcher with a view to making a legal claim expressed litigation objectives which were unrealistic and unachievable within the legal System. This observation suggests that employees' perceptions of justice may not correlate with the law. Further, once engaged in the System, the researcher observed that many employees expressed perceptions of legal rules and procedures that Dolder described as "…incoherent and unresponsive to disputants' needs for cooperation and compliance" (2005:143). The realization that employees may be advancing legal claims by default because no more satisfactory or responsive mechanism for workplace dispute resolution exists is troubling, and is the foundation of this study.

Analysis of the effectiveness of the New Brunswick employment law System in addressing the concerns and interests of its constituents obviously invites consideration of alternatives. This consideration is hardly new; growing dissatisfaction with the complexity, formalism and low predictability of the law and legal processes has driven the development of alternative dispute resolution ("ADR") as a de-institutionalized option for workplace

disputants. In her study of the use of ADR in the Central London County Court, Genn (1998) found that, while a low percentage of litigants participated in an experimental mediation scheme, the majority of those who did achieved faster settlements in a positive manner. The apparent efficiency of ADR may stem from its less rigid parameters, allowing it to focus more on the precise issues of concern to the parties, rather than on the issues prescribed by law. That flexibility was observed by Cahn and Cahn:

> For the most part, litigation is a way of viewing the past through the eyes of the present. But perhaps justice is best done by starting with the present – the present needs and present demands – and using the past only where it reveals equitable considerations which will provide guidance in shaping a remedy…In domestic relations, industrial injuries, automobile accidents, we are finding that the quest for fault is time consuming, elusive and not particularly productive in terms of enabling human beings to get back on their feet and to cope with the present or chart a rational course for the future. (1966)

The question is this: if other resolution mechanisms regarding workplace disputes were made as readily available as the System is to the employees, would the System remain a popular option? If the law does not provide the kind of justice that is being sought by its constituents, a fundamentally important substantive objective is obviously being overlooked. An examination of employees' perceptions of justice and injustice provides an opportunity to evaluate the suitability of the legal System to the workplace disputes it seeks to resolve. In addition, alternatives to the System can also be considered as potential appropriate vehicles for bringing true resolutions to workplace conflicts.

1.6 Definitions

The following terms are referenced in the thesis; because some have meanings in New Brunswick which differ from their meanings in other jurisdictions, their New Brunswick meanings are provided below.

Collective Bargaining Agreement or Collective Agreement: means the employment contract made between an employer and an organized labour union acting as the legally "certified bargaining agent" for a bargaining unit of employees.

Dismissal: means the termination of employment by the employer, and not by the employee. Dismissal includes "wrongful dismissal" (in the common law context), "unjust dismissal" (in the *Canada Labour Code, Part III* context), "dismissal for (just) cause" and "constructive dismissal", or the repudiation of the employment contract by the employer through a change to a fundamental term of the agreement.

Dismissal for (just) cause: means the dismissal of an employee for good legal reason, such that the employer has no liability to the employee at law.

Employment: means a contract of service made between an employer and an employee. The employment relationship may be governed by either a written contract or a verbal contract, or a combination of both, but, for the purposes of this research, "employment" does not include employment which is governed by a collective bargaining agreement.

Employment Standards Law: New Brunswick employers are required to provide their employees with at least minimum compensation and benefits, which, for non-unionized, provincially-regulated employees, are stipulated in the *Employment Standards Act, R.S.N.B. 1980, c. E-7.1*. Non-unionized, federally-regulated employees are regulated by the *Canada Labour Code, Part III*. Included among these minimum legislated terms are: minimum wage, minimum vacation entitlements and more.

Fairness: the sense of justice that employees expect from their employment relationships.

Federal jurisdiction: in Canada, *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 divides legislative powers in Canada between the Government of Canada and the governments of the provinces. In essence, the Canadian Parliament legislates in areas that involve the "peace, order and good government" of the nation (which are enumerated in s. 91 of the *Act*), while the provinces and territories legislate in all other areas.

Human Rights Law: New Brunswick employees, whether provincially or federally regulated, are protected by human rights legislation from illegal discrimination. Illegal discrimination does not, however, encompass all acts of discrimination but, instead, discrimination based on

enumerated grounds which include, but are not limited to: physical disability, mental disability, sex, sexual orientation, marital / family status, race, national origin and more. Human rights law is adjudicated by statutory boards of inquiry, and not the common law courts, and it provides potential remedies which exceed those available to employees in the wrongful dismissal context.

Layoff: a layoff is an employer-dictated termination of employment due to a shortage of work. It is not the result of blameworthy conduct by the laid off employee.

Occupational Health & Safety Law: New Brunswick employers are required to meet legislated health and safety requirements that are intended to protect workers from unsafe work conditions. The *Occupational Health and Safety Act* defines the obligations of employers and extends legislated rights to employees, one of which is legal protection from discrimination arising as a result of invoking the provisions of the Act.

Provincial jurisdiction: in Canada, *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 divides legislative powers in Canada between the Government of Canada and the governments of its ten provinces. In essence, the Canadian Parliament legislates in areas that involve the "peace, order and good government" of the nation (which are enumerated in s. 91 of the *Act*), while the provinces legislate in all other areas (as referenced in s.92 of the *Act*).

Remedy or Remedies: means the resolution of employment legal issues or "problems", as made available under the common law and applicable legislation.

System: means the legal mechanisms available to New Brunswick employees, and includes the courts and statutory tribunals, such as the Labour and Employment Board, WorkSafe NB and the Workers Compensation Appeals Tribunal, the Employment Insurance Commission and the Board of Referees, the Human Rights Commission and boards of inquiry appointed under the *Human Rights Act* and, also, arbitrators appointed under the *Occupational Health and Safety Act* and the *Industrial Relations Act.*

Unjust Dismissal: particular New Brunswick employees who are non-unionized but employed in federally-regulated industries have the option of making unjust dismissal claims under the *Canada Labour Code, Part III*. That legislation creates rights and obligations similar to those existing under the common law of wrongful dismissal, but with expanded remedial options, including reinstatement.

Workers Compensation Law: most but not all New Brunswick employees have coverage for workplace injuries under the *Workers Compensation Act*. The Act prescribes a no-fault compensation scheme which pays income replacement compensation and medical expenses to injured workers. At the same time, the Act extinguishes the liability of employers and co-workers, in most cases.

Work Problem: in the context of this research, a "Work Problem" is a problem or conflict experienced by an employee in respect of his or her work for which legal advice was either obtained or considered. This includes layoff, dismissal, disciplinary action and any other employment problem or conflict.

Wrongful Dismissal: in New Brunswick, non-unionized, provincially-regulated employment relationships are governed by both legislative provisions and the common law. Under the common law, every New Brunswick employment relationship is deemed to be founded on a contract, whether written or not. Further, the common law implies terms on each employment relationship which do not expressly address particular issues, including reasonable notice of dismissal. Consequently, an employee who is dismissed from his or her employment without just cause has a common law claim for reasonable notice compensation from the employer, and the employee's reasonable notice entitlement is determined by either an expressed contractual provision in respect of the same or, in the absence of such a provision, by a common law assessment. A review of New Brunswick jurisprudence currently establishes a common law reasonable notice entitlement in the range of 3.2 – 4.3 weeks per year of service in most wrongful dismissal cases, together with potential compensation for other employer contract breaches. Reasonable notice can take the form of working notice or pay in lieu of

working notice. The NB System is not as developed as the UK system; as a result, there is no "unfair dismissal" provision.

1.7 Outline of the thesis

The thesis is comprised of seven chapters:

The Introduction introduces the research question and discussion of the literature regarding the role of employment as a relationship of both financial and emotional significance in modern western culture. This chapter will also explain why the research has been undertaken, and how it came to be of interest to the researcher. Additionally, the structure of the thesis will be outlined, and a glossary of terms will be provided to the reader. It is believed that, because the research contemplates primarily the New Brunswick legal jurisdiction, United Kingdom readers will require the assistance of a glossary to understand particular contextual terms.

Chapter Two provides an overall analysis of the "legal justice" model available to employees in New Brunswick, with particular emphasis on the remedies offered to victims of workplace injustice. An analysis of the classical contract law theory that serves as the foundation of the New Brunswick employment law system and the relational contract law theory on which some other employment dispute resolution schemes are based assists in framing two issues which are central to this study, namely, the current responsiveness of the system to workplace disputes and opportunities for system reform.

Chapter Three reviews the organizational justice literature as it relates to employees' perceptions and expectations of workplace fairness and presents a review of legal justice foundations, beginning with the treatment of the concept of justice in the law, followed by a consideration of the concept of "fair treatment" (i.e., equity and fair distribution). This chapter continues the discussion of contract law theories and their relevance to employees' current perceptions of employment.

Chapter Four introduces the research design and methodology behind this exploration of the justice expectations of New Brunswick employees and the understandings of those expectations by lawyers who practice employment law in the Province.

Chapter Five is comprised of an analysis of the survey and interview data collected from New Brunswick lawyers, employees and employers in the exploration of what motivates employees to access the New Brunswick legal system and what outcomes they expect from it.

Chapter Six discusses the data collected in the study regarding the motives behind employee legal claims and the capacity of the System to effectively respond to those claims. Chapter six also reviews the data obtained from New Brunswick employment lawyers: do they understand the motives of employees who make legal claims and, if so, do they believe that the New Brunswick legal system is capable of providing the remedies employees are seeking?

Chapter Seven summarizes the work reflected in the thesis, including conclusions, a consideration of its practical implications, and suggestions for further study.

1.8 Summary

This thesis has been undertaken to examine two issues in respect of which there appears to be insufficient understanding and a lack of research evidence: first, why do employees in the Province of New Brunswick, Canada contemplate commencing legal actions against their employers and second, are the available responses of the New Brunswick legal system adequate? The thesis analyses the remedies available under the current legal system and questions the System's ability, in its current form, to respond to workplace disputes. The intention is that the findings of this study would clarify the System's ability to respond to employment conflict, and may also identify alternative means of efficiently resolving workplace disputes.

CHAPTER 2: THE NEW BRUNSWICK EMPLOYMENT LAW SYSTEM

2.0 Introduction

Assessment of the responsiveness of the New Brunswick legal System to the motives of employees who consider and advance legal claims requires a basic understanding of the System's processes and remedial offerings. In this chapter, the multiplicative dispute resolution schemes available to employees within the System are reviewed.

In New Brunswick, employment law problems are subject to significant complexities which include jurisdictional questions arising from the constitutional division of legislative powers between the federal and provincial governments, the potential application of multiple legislative provisions and the common law, and questions of issue estoppel that arise when more than one legislative and common law remedy can be pursued by an aggrieved worker. Because the New Brunswick System is comprised of numerous employment dispute resolution schemes prescribed under separate jurisdictions and, then, distinct statutory and common law processes within those jurisdictions, a New Brunswick employee facing a Work Problem may fall within one or more of several categories. An employee in New Brunswick works in either a provincially-regulated or federally-regulated industry and within that industry is either unionized or non-unionized. Depending on which combination of those categories and sub-categories the employee falls within, he or she has access to particular common law or statutory dispute resolution processes, depending on the nature of the employee's Work Problem. For example, if the employee is a victim of alleged human rights discrimination, he or she will have access to the applicable federal or provincial human rights legislation and its prescribed dispute resolution scheme. While the complications and distinctions of the New Brunswick employment law System are described more fully in this chapter, it is important to note that this study is primarily focused on the System's treatment of provincially-regulated, non-unionized employees who have suffered a contract-based Work Problem. This focus is founded on a distinction, explained later in this chapter, between the legal treatment of Work Problems incurred by provincially-regulated, non-unionized employees and those experienced by unionized employees and federally-regulated, non-unionized employees. Essentially, unionized and federally-regulated non-unionized

employees have access to legal systems that apply relational contract-based concepts, while legal resolutions available to provincially-regulated, non-unionized employees are primarily classical contract based.

It should be observed from the outset of this discussion that the New Brunswick System is quite unlike the United Kingdom's more streamlined dispute resolution mechanisms, in which the *Employment Rights Act, 1996* addresses a variety of matters including unfair dismissals (including constructive dismissals), discrimination and contains various regulatory provisions relating to the employment relationship. Instead, the New Brunswick System consists of a complex web of federal and provincial legislation and common law principles which intersect and, in some cases, overlap. As a result, the System does not promote and facilitate certainty in the resolution of perceived workplace injustices; rather, it is a legal minefield that sometimes impedes rather than promotes the resolution of workplace disputes. Further, the System utilizes a number of specific terms for distinct but similar circumstances, which can increase the confusion of litigants. A New Brunswick dispute that would be considered an "unfair dismissal" under the *Employment Rights Act, 1996* in the United Kingdom, for example, could be described in the System as a "wrongful dismissal", an "unjust dismissal", a statutory offence under one or more of the five Provincial Statutes, or a combination of more than one of those. Even a "simple" case of wrongful dismissal which does not attract the potential application of multiple legislative provisions or unusual common law principles is not decided on a static evidentiary foundation; rather, variable principles such as mitigation and after-acquired just cause (amongst others) make the litigation outcomes of virtually all New Brunswick Work Problems difficult to predict, as they remain capable of growing, shrinking and changing course to the end. Additionally, the resolutions that the System makes available to many provincially-regulated, non-unionized employee claimants are limited and are less flexible than the remedies that are accessible by their provincially-regulated, unionized and federally-regulated non-unionized counterparts. In the cases of the latter two groups, the law has recognized employment as a relationship that is more than purely contractual and, as a result, not terminable purely at the employer's discretion. The legal rights of provincially-regulated, non-unionized employees that are the

focus of this thesis, however, are still premised on the concept of employment as a commercial-style contract made between bargaining equals.

The purpose of this analysis is not to entirely demystify the New Brunswick System or, for that matter, even to identify all of those mysteries. Instead, this basic review of the Province's employment law landscape is intended to identify the complexity of the System and the variety of legal recourses that apply or may apply to New Brunswick Work Problems and to analyse the legal theory underlying the System's approach to the resolution of workplace disputes. This legal framework provides context for the study of what motivates employees to pursue legal action against their employers, and whether or not such action provides the solutions which employees seek. In addition, potential reforms of the System derived from current debates in Canadian employment law are discussed.

2.1 Jurisdiction as an initial complicating factor in legal claims

Before a New Brunswick employee even advances a proper legal claim in respect of a Work Problem, an analysis of the legal jurisdiction that the employee falls under must be conducted. In New Brunswick, an employee's legal rights can be governed by federal or provincial laws as well as the common law. Within each of the two jurisdictions there exists a variety of statutory schemes which may or may not apply to a particular Work Problem, depending on its circumstances. An employee claim made in the wrong jurisdiction is extinguished and not allowed to proceed. As a result, New Brunswick employees who seek legal resolutions to Work Problems must not only be willing to navigate the System, but they must do so correctly. An examination of the jurisdictional issues that regulate an employee's entry into the System provides context for a review of the System's substantive concepts.

In 1867, the Fathers of Canadian Confederation determined that some issues within the newly formed nation would be regulated by federal laws and others by provincial legislation [*The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.]. The result was that industries deemed to be of national importance were designated for regulation by federal statutes, and the remaining industries were to be provincially regulated.

In New Brunswick employment law, the distinction between federal regulation and provincial regulation is a critical first consideration. Without determining the nature of the industry in which the employment exists or existed, it cannot be known what legislation applies. The first fundamental error that an employee, employer or lawyer can make in respect of a Work Problem is failing to recognize and apply the appropriate legislation and principles. Examples of industries which are governed by federal laws include telecommunications and broadcasting, inter-provincial transportation, banking, shipping and native bands. Most industries, however, are provincially-regulated and governed by New Brunswick legislation.

Without providing an exhaustive list of the laws that apply to federally-regulated and provincially-regulated employees working in the Province of New Brunswick, some of the major statutes of which to be aware are listed in Table 2.1.

Table 2.1: Statutes that are applied within the System

Federal	Provincial
Canada Labour Code, R.S.C. 1985, c. L-2	*Employment Standards Act* , S.N.B. 1982, c. E-7.2.
Public Service Staff Relations Act S.C. 1993, c. 42	*Industrial Relations Act*, R.S.N.B. 1973, c. I-4
Canadian Human Rights Act, R.S.C. 1985, c. H-6.	*Pay Equity Act*, S.N.B. 1989, c. P-5.01
Public Service Labour Relations Act, S.C. 2003, c.22.	*Human Rights Act*, R.S.N.B. 1973, c. H-11.
Privacy Act, R.S.C. 1985, c. P-21.	*Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2.
Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.	*Workers Compensation Act*, R.S.N.B. 1973, c. W-11.
	Municipalities Act, R.S.N.B. 1973, c. M-22.

The differences between the counterpart legislative provisions in each Canadian jurisdiction are significant in some areas. Two clear examples can be found in the types of processes and remedies that are prescribed in each statute. Later in this chapter an example is given in which the employee negatively affected by an employer's wrongdoing is shown to have eight potential legal claims available, six of which arise under the Provincial Statutes, one under a federal statute and one under the common law. If all eight claims were advanced, the employee would be subject to the jurisdiction of a court, three provincial administrative tribunals and one federal tribunal, and each of the five different decision-makers prescribes its own procedures and rules. The complainant employee must be aware and wary of the fact that at least three different time limitations must be met if the claims are to be advanced properly. Further, the employee must recognize that each of the eight potential claims offers its own distinct remedial schemes, some of which partially overlap but none of which fully do.

A further complicating factor is the comparison of remedial jurisdictions applicable to provincially-regulated, non-unionized employees versus a) provincially-regulated, unionized employees and b) federally-regulated, non-unionized employees. For instance, a comparison of the *Canada Labour Code* and the New Brunswick *Employment Standards Act* demonstrates that in certain circumstances, a non-unionized and non-managerial employee working in a federally-regulated industry under the *Canada Labour Code* has an opportunity to seek reinstatement to his or her position as a remedy for unjust dismissal. Neither the New Brunswick *Employment Standards Act* nor the common law provides for such a reinstatement option in a comparable situation.

Any doubt regarding the jurisdiction under which a particular employment relationship falls is resolved by reference to s. 91 of the *Constitution Act*[3]. In that legislative provision, the federal government of Canada identified which industries are of national importance and, therefore, regulated by federal employment laws.

[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, at s. 91.

2.2 Contract as the foundation of employment: transactional vs. relational

After an initial jurisdictional analysis and identification of the statutes that apply to the employment relationship in question, the legal foundation of the relationship must also be assessed. Since New Brunswick employment relationships are deemed by the System to be based in contract, identification of contractual terms is a necessity. A written contract is generally a definitive expression of the intentions of the employer and employee at the commencement of the employment relationships, and can sometimes determine outstanding issues between the parties. The legal principles that have shaped the use of employment contracts in New Brunswick and other common law jurisdictions are examined in this section.

The application of classical contract law theory (CCLT) to employment has been questioned in the legal academic community (Brodie, 2011; Bird, 2005-2006). Although discussed in more detail in Chapter 3, CCLT may be summarized as the legal characterization of an employment contract as a discrete exchange that allows one party or both to withdraw from the exchange in a manner that addresses the future effect of the withdrawal in the present. It has been argued that employment is not a discrete exchange of the nature contemplated by CCLT but, instead, a relational contract that the law is not suited to adequately address (Gudel, 1998). If the common law of contract in New Brunswick and other common law jurisdictions is designed for regulation of discrete exchanges and not on-going relationships, then the effectiveness of its application to employment disputes should be reviewed.

Macneil (1977) has argued that all human exchanges occur on a continuum, with the most discrete exchange occupying one end and the most relational exchange the opposite end (Gudel, 1998). A purely discrete transaction must have no past, present or future relationship and would have to involve an objective barter of goods (Macneil, 1977). While such completely discrete exchanges are unlikely, the concept is a useful tool of legal analysis because "…some discreteness is present in all exchange transactions and relations" (Macneil, 1977: 856). Macneil, the most distinguished of relational contract scholars, has observed that:

> We do find in life many quite discrete transactions: little personal involvement of the parties, communications largely or entirely linguistic and limited to the subject matter of the transaction, the subjects of exchange consisting of an easily monetized commodity and money, little or no social or secondary exchange, and no significant past relations nor likely future relations. (1977:856)

A legal system designed to regulate exchanges must establish normative concepts such as the encouragement of exchange, reciprocity, roles in transactions, freedom of contract and, in the case of discrete transactions, enhancement of discreteness and presentiation (Macneil, 1977). Discreteness, as outlined above, is the distinction of a transaction from all indicia of relation. Presentiation recognizes the impact of the present on the future and, in the context of supporting the discreteness of a transaction, seeks to restrict its impact on the future to the present (Macneil, 1977). Macneil has observed that CCLT encourages discreteness and presentiation by: a) making the identity of the contracting parties and their relative bargaining power irrelevant; b) commodifying the exchange as much as possible into units; c) limiting the sources of information that are used to identify the content of the contract (for example, accepting formal over informal and linguistic over non-linguistic communications); d) establishing predictable and limited remedies for contract breaches so as to restrict the legal outcomes of contract non-performance; e) clearly marking the entry into a contract so that the characterization of exchanges as contract is limited; and f) discouraging the participation of third parties in the exchange so that discreteness is maximized (Macneil, 1977). The common law advances the presentiation and discreteness of contracts by facilitating contract termination and leaving any resultant dispute to be determined through a lawsuit over money damages (Macneil, 1977).

2.3 New Brunswick application of CCLT

Employment law in New Brunswick respects a number of the central characteristics of CCLT. The following analysis identifies the points at which the System aligns with CCLT:

1. Courts in New Brunswick have repeatedly demonstrated a willingness to overlook the identity and bargaining power imbalances of employees and employers in favour of

contract enforcement. For example, in *Mayberry v. Hampton Golf Club LTD.*,[4] the New Brunswick Court of Queen's Bench enforced a written employment contract that prescribed a lengthy, one year probation term. Because the law implies particular terms to probationary employment, including the right of an employer to terminate the relationship without just cause and compensation, the employee in the case was found to be entitled to no remedy in respect of the employer's termination of his employment. The *Mayberry* case demonstrates the extent to which the System is committed to CCLT-based principles by applying common law implied probation terms to a one year period, essentially leaving the employee without the right to compensation and without any just cause explanation for termination. In another case, *Schurman v. Covered Bridge Recreation Inc.*,[5] the New Brunswick Court of Appeal overturned a lower court ruling in favour of a dismissed employee. The Court of Appeal's ruling includes a telling statement of the System's current approach to common law dismissals at paragraph 27:

> To be successful in an action for wrongful dismissal, the employee must have suffered an "injury" as a result of the employer's breach of contract. Of course, it is the employee who bears the burden of proof in that regard. *Moreover, only losses caused by the lack of due notice can be reflected in the award of damages for the employer's related breach. Any such award is designed to put the aggrieved employee in the position he or she would have been but for the employer's breach of the implied term requiring reasonable notice (emphasis added).*

The legal significance of this statement is seen in the last sentence. The Court of Appeal suggests that the state of the common law in New Brunswick, which is that an employee who is the victim of an employer's breach of contract is entitled to be put in the position they would have been in (i.e., employed) had the breach not occurred. However, while it is clear that if an employer does not breach an employment contract the relevant employee would remain employed, the common law does not intend to actually return a victimized employee to his or her pre-breach position. Instead, the common law maintains a CCLT-based remedial scheme that allows the

[4] [2007] N.B.J. No. 398.
[5] 2009 N.B.C.A 1

breaching employer to achieve what it set out to do by wrongfully dismissing the employee/victim, which is to end the employment.

2. The commodity-based treatment of New Brunswick employees' work is demonstrated by the fact that courts in the System are not empowered by the common law to award reinstatement in response to unfair terminations but, instead, are limited to financial compensation determined by either express or implied contract provisions.

3. As for its limitation of information sources that determine employment contract terms, the common law prioritizes written provisions, clear verbal agreements and, finally, its own prescribed implied terms in the absence of written or verbal statements made by the parties. What the System does not always recognize is the gradual evolution of an employment relationship based on relational amendments that are the products of action rather than express written or verbal agreement. In the case of adjustments to employment conditions, for example, the law has taken exception to unilaterally imposed employment changes even when the employer and employee have acquiesced to a relationship in which change occurs repeatedly (*Brunswick News Inc. v Sears*[6]). It is notable that the employee is frequently the beneficiary of the law's enforcement of contract terms (whether written, verbal or implied) over non-communicated practices of the employer and employee.

4. Regarding the application of predictable remedies for breach of employment contracts, it cannot be said that New Brunswick's common law employment remedies are as rigid and discrete as are remedies in pure commercial contract disputes. In the United States of America, the employment law that has informed Macneil's frame of reference is heavily influenced by the "at will" principle that reflects a highly classical approach to the regulation of employment relationships. While the New Brunswick System is not at the American end of the continuum, the remedies it offers to many employees whose employment contracts are broken by their employers are strictly limited to financial compensation (so that the nature of a dispute's outcome can be predicted, if not the extent). As for the extent of the compensation that may be

[6] 2012 N.B.C.A. 32.

awarded in a particular case, the courts have been clear that no standard calculation is available to the parties to predict the outcome with certainty. In this way, the System does not perfectly align with classical contract theory, as an employee who is the victim of a contract breach is entitled to a personalized assessment of the appropriate amount of notice compensation and may also be eligible for a limited amount of additional financial compensation. While the System does not facilitate exact prediction of the compensation amount that will ultimately be awarded in a trial, it does allow for accurate assessment of the range of that compensation and in that way provides a measure of the certainty contemplated in classical contract theory.

5. The demarcation of entry into employment contracts is another area in which the New Brunswick common law of employment deviates somewhat from classical contract law principles. The System does not require unequivocal agreement to create employment and, in fact, it sometimes re-characterizes work exchanges that have been agreed upon by the contracting parties as employment or non-employment relationships. In doing so, the System applies a common law test from the case of *Montreal (City) v. Montreal Locomotive Works Ltd.*[7] to objectively determine if an employment relationship has been created by a particular contract.

6. The New Brunswick System does generally exclude third parties from its employment agreements in the classical contract tradition. The employer – employee exchange is not able to accommodate intervention by other parties, as it is legally defined as a contract of service that commands obligations of loyalty from both participants (Ball, 1998).

In its totality, the New Brunswick common law applied to employment is rooted in CCLT. Although it deviates from the pursuit of pure discreteness and presentiation, the law treats employment as being primarily transaction-oriented (Gudel, 1998). Most notable in this regard is the System's dedication to the CCLT concept of immediate exchange termination while providing limited and relatively predictable finance-based remedies to most disputes.

[7] [1947] 1 D.L.R. 161.

2.4 An employment law alternative to CCLT

The alternative to classical contract regulation is relational contract theory (RCLT). The theory recognizes that some agreements are not discrete but evolve during a long-term relationship between the contracting parties (Gudel, 1998). Further, RCLT suggests that a contract is not always defined by the parties' initial agreement and that they may be formulated by means other than the express or implied confirmations of the parties (Gudel, 1998). A key distinction of relational contracts from classical contracts is the expectation that future exchanges in an on-going relationship will continue (Gudel, 1998). Macneil (1999-2000) identified the following "four core propositions" of relational contract theory:

1. Every contract is a component of a complex relationship.
2. Comprehension of an agreement requires an understanding of the larger relationship that surrounds the agreement.
3. The elements of the relationship that encompasses the agreement must be considered in order to analyse the exchange itself.
4. Contextual analysis of relationships and agreements is a more efficient and complete analytical process than is a non-contextual analysis. (1999-2000)

The classical contract model aligns with the transaction costs economic model, which views humans as inherently selfish but rational wealth maximizers (Gudel, 1998). Conversely, Macneil (1986) has argued that individual interest does not fully explain human interest in exchange:

> It is thus a mistake to think of "net utilitarian advantage" in its outside-of society context involving fictional maximizers of individual utility, equally powerful or not. In the real world there are only enhancers of individual utility immersed in relations creating countless counter-motives. Exchange is virtually always relational exchange, that is, exchange carried on within relations having significant impact on its goals, conduct and effect. (Macneil, 1986:577)

It is this important philosophical issue that questions the type of contract law framework that is most appropriate to satisfy and protect society's interests in exchange.

While classical contract theory is focused on the protection of discreteness and presentiation, Macneil has argued that the law should reflect, and encourage conduct consistent with, ten contract norms: 1) role integrity, which demands consistent behaviour of one's role in an exchange relationship; 2) reciprocity, or the exchange of consideration; 3) implementation of planning; 4) effectuation of consent; 5) flexibility; 6) contractual solidarity, or the intention of preserving the exchange relationship; 7) protection of restitution, reliance and expectation interests; 8) creation and restraint of power; 9) use of appropriate means to achieve an end; and 10) harmonization within the social matrix (Macneil, 1980).

On review of Macneil's ten relational contract norms, interests inherent in employment (particularly role integrity, flexibility, contractual solidarity and restraint of power) are apparent. These norms are not important in the classical contract model. Since employment relationships typically continue for lengthy periods and evolve throughout their existence in ways that are not agreed upon either expressly or impliedly, the entire context of the larger employment relationship informs the proper interpretation of the employment agreement. As a result, employment has been characterized as a type of relational contract (Macneil, 1999-2000). Bird (2005-2006) has argued that employment should be viewed as a relational contract, as well:

> Employment relationships…are well suited for relational contract theory because they contain strong relational elements. Employment relationships, with the exception of contingent work and independent contractor arrangements, are rarely short in duration and typically have no finite end…It is also quite common for the employer and employee to cooperate and enrich an employee's contractual duties over time through promotions and lateral position changes. Such career development promotes higher productivity, increases job satisfaction and primes an organization for continuous change. (Bird, 2005-2006: 153-154)

The common law courts have observed and have commented on the relational aspects of the employment agreement. For example, the Supreme Court of Canada has recognized a concern regarding the regulation of bargaining power imbalances between employers and employees (*Slaight Communications v. Davidson*[8]; *Wallace v. United Grain Growers Ltd.*[9]),

[8] [1989] 1 S.C.R. 1038 (*Slaight Communications*).

and that issue has also been observed by the English House of Lords (*Malik v. BCCI, [1997] UKHL 23*[10]). Further, in the 2001 House of Lords decision in *Johnson v. Unisys Limited,*[11] Lord Steyn confirmed that employment is a relational contract. In spite of its recognition of those characteristics of employment, "The legal system has been slow to account for the realities of relational contracts…" (Gudel, 1998: 770). That said, Gudel has suggested that the pervasiveness of relational contracts emphasizes the dysfunction of classical contract law, threatening its existence (1998). As a result, the common law has been required to react by "…creating, on a rather ad hoc basis, doctrines and exceptions to doctrines that avoid some of the worst results of a purely discrete law" (Gudel, 1998: 778).

Arguably the most extreme example of the common law's attempt to reduce the impacts of the classical contract construct on employment is found in the Supreme Court of Canada decision in *Wallace,* which is discussed in more depth later in this chapter. In *Wallace,* Canada's highest Court addressed several relational shortcomings of the common law: an unfair use of the employer's power over the employee; an egregious departure from the norm of contractual solidarity; and a violation of the employee's expectation of the exchange, which had been generated by employer comments to the effect that the employee could expect to work to retirement age in the employment. Although the Court fashioned a more effective response to the employer's violations of these relational norms than classical common law contract law had previously applied, the *Wallace* decision was heavily criticized in the legal community and, ten years after it was introduced, the case was marginalized by a new Supreme Court of Canada ruling that reinforces more traditional common law contract principles (*Keays v Honda Canada Inc.*[12])

Brodie (2011) has postulated that, in the recent past, the common law of employment has "moved closer to the set of values advocated by Macneil" (2011: 240). He points to the requirement of fair dealing imposed by the obligation of mutual trust that has received attention in Commonwealth courts. In Australia, for example, the decision in *State of South*

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[9] [1997] 3 S.C.R. 701 (*Wallace*).
[10] [2008] A.C. 20 (*Malik*).
[11] [2001] U.K.H.L. 13 (*Johnson*).
[12] 2008 S.C.C. 39 (*Keays*).

Australia v. McDonald [13] urges courts in that country to recognize the elements of common interest and partnership in employment relationships when determining workplace disputes. In Canada, the common law has acknowledged a duty of good faith in employment relationships, but has adopted a restrictive approach to the remediation of bad faith conduct:

> The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. *The normal distress and hurt feelings resulting from dismissal are not compensable.*
>
> Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98)….
>
> *Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties*, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. (emphasis added)[14]

In *Wallace*, the Supreme Court of Canada had noted that traditional common law contract principles restricted the limited extent to which the duty of good faith in terminating employment contracts was applicable:

> The appellant urged this Court to find that he could sue UGG either in contract or in tort for "bad faith discharge". With respect to the action in contract, he submitted that the Court should imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons. I cannot accede to this submission. The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. In *Farber v. Royal Trust Co.*, 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846, Gonthier J., speaking for the Court, summarized the general contractual principles applicable to contracts of employment as follows, at p. 858:

[13] [2009] S.A.S.C. 219
[14] *Mathieson v. Scotia Capital Inc.*, 2009 CanLII 64183.

> In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee. If an employer dismisses an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof.
>
> *A requirement of "good faith" reasons for dismissal would, in effect, contravene these principles and deprive employers of the ability to determine the composition of their workforce.* In the context of the accepted theories on the employment relationship, such a law would, in my opinion, be overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement (emphasis added).

These excerpts demonstrate the limits of the Canadian courts' comfort with the application of relational contract theory. While a partial adoption of the theory has been undertaken, the classical values of discreteness and presentiation are centrally maintained for the purpose of preserving the ability of employers to "…determine the composition of their workforce." No complete contextual relationship analysis of the good faith obligation has been prescribed, nor has the law in Canada undertaken to recognize employment as a partnership.

Brodie makes the point that, if the common law of employment were truly relational, it would support the continuation of employment relationships even in the face of conflict (2011). The very argument made by the appellant employee in *Wallace* and rejected by the Supreme Court of Canada, to the effect that good faith dealing ought to prevent dismissal except in the event of just cause or legitimate business reason, is referenced by Brodie as being consistent with relational contracting (2011). Brodie stated, "Such a position would acknowledge that contracts where personal relationships have emerged should not be readily discarded" (2011:237). In the United Kingdom, the evolution of the common law to that end was prevented by the House of Lords in *Johnson*, who viewed the concept of good faith dismissal as being contrary to the statutory scheme under the *Employment Rights Act, 1996.* In New Brunswick, however, there is no similar statutory preclusion, and yet no relational contract expansion of the good faith principle has occurred.

Brodie has concluded that the common law is flexible enough to respond to the ongoing needs of parties engaged in a relational contract (2011). While that may be correct, the relevant question in this study is the *extent* to which the New Brunswick System currently responds to relational employment needs. In order to answer that question, the System's processes and remedies must be examined.

2.5 The influence of express and implied contract terms on New Brunswick employment remedies

Although employment has become one of the most important non-familial relationships in our society, few New Brunswick employers (and virtually no employees) insist upon written contracts of employment. In the absence of a written contract that clearly stipulates the rights and obligations of the employer and employee, common law courts are often called upon to ascertain the express terms of the employment agreement from the context of the relationship and, also, to apply a complex body of implied contractual terms. While a functional understanding of these implied terms requires considerable study, the single most important of the implied terms is summarized as follows:

> The employee shall not be dismissed from his/her employment except with just cause or, in lieu thereof, with reasonable notice.

The subject of written and verbal employment contracts is further complicated by the imposition of legislated minimum employment standards into those agreements. In *Machtinger v. HOJ Industries Ltd.*[15], the Supreme Court of Canada determined that a written employment contract which contained a "pay in lieu of notice" provision which was inconsistent with the applicable Ontario *Employment Standards Act* notice amount was void. As a result, the clarity of the written contract was lost, and common law- implied contractual terms were imposed on the employment relationship instead. The New Brunswick Court of Queen's Bench has referenced the *Machtinger* decision in a number of cases, including

[15][1992] 1 S.C.R. 986

Cormier v. Royal Canadian Legion, Saint John Branch No. 14[16] and *Jagoe v. Recount Investments Ltd.*[17] The result is that the legislative standards that govern a New Brunswick employment relationship, including the *Employment Standards Act*, must be met or exceeded in the contract. If not, the contract itself will be void.

2.6 A comparison of legal remedies available to federally and provincially-regulated, non-unionized employees and provincially-regulated, unionized employees

While this thesis has focused on the System's treatment of provincially-regulated, non-unionized employment disputes, there is significant comparative value in reviewing the legal frameworks within which federally-regulated, non-unionized employees and provincially-regulated, unionized employees operate. In New Brunswick, it is very common for provincially-regulated, non-unionized employees to work closely with provincially-regulated, unionized co-workers. Additionally, federally-regulated, non-unionized employees often live and work in close proximity to the provincially-regulated, non-unionized employees who are the focus of this study. The justice models to which these other categories of employees have access are different from the scheme available to provincially-regulated, non-unionized workers, as those models incorporate more RCLT concepts than does the common law process available to provincially-regulated, non-unionized employees.

The work agreements of provincially-regulated, unionized employees are contained in collective agreements. A collective agreement is typically the most comprehensive written employment contract available in New Brunswick, and is normally the product of a sophisticated negotiation conducted by the employer on one hand and a labour union on the other. The parties negotiate in an atmosphere of relatively equal bargaining power, as both the employer and the union are able to exert economic pressures on each other through lockouts and strikes (Carter et al., 2002). A labour union that becomes the certified bargaining agent for a unit of employees by gaining the support of at least 51 percent of the workers negotiates the collective agreement with the employer. Employees who are subject to a collective agreement are also entitled to (and subject to) the representation of their union, and they cannot opt out of the collective agreement even if it is deemed by the employee to be

[16] [1994] N.B.J. No. 504 (Q.B.)
[17] [1997] N.B.J. No. 179 (Q.B.)

unsatisfactory. Furthermore, and depending on the wording of their applicable collective agreement, many unionized employees are not entitled to advance a grievance in respect of a workplace dispute except with the endorsement and support of their union. A fundamental difference between the rights of unionized employees and their non-unionized counterparts is found in the remedial jurisdiction of grievance arbitrations under collective agreements versus that of common law courts.

Very importantly, arbitrators appointed to resolve grievances under collective agreements possess jurisdiction similar to *Canada Labour Code, Part III* adjudicators in that they both have the ability to award reinstatement to an aggrieved employee. The common law does not extend that authority to its judges, and it was that important issue that the Parliament of Canada sought to rectify when it enacted the *Canada Labour Code, Part III* in 1978. Parliament observed the gap between legal remedies available to unionized and non-unionized employees and filled it with this legislation. At a meeting of the Standing Committee of Labour, Manpower and Immigration in March 1978, the federal Minister of Labour described the purpose of the *Code*:

> The intent of this provision (unjust dismissal) is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal protection the government believes to be a fundamental right of workers and already a part of all collective agreements.[18]

A non-unionized and non-managerial federally regulated employee may be entitled to make a complaint of unjust dismissal under the *Canada Labour Code, Part III*[19] if fired from his or her job. Stated simply, a managerial employee for the purpose of the *Code* is a person who exercises independent, high level decision-making authority within the employer's organization. The remedial powers of an adjudicator under the *CLC, Part III*, ss. 242(4) are extensive:

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[18] *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration*, 3rd Session, 30th Parliament, March 16th, 1978
at pp. 11:46-7
[19] *Canada Labour Code, Part III, supra.*

> 242(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
>
> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his employ; and
>
> (c) *do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal*.(emphasis added)

The extensive remedial jurisdiction of an adjudicator is the basis of the Make Whole Remedy for dismissed employees. The foundational distinction between the *Canada Labour Code, Part III* and the common law is that the *Code* relies on general principles of fairness and not on common law principles (Anderson and Shriar, 1999). The notion is that dismissed employees have been subjected to "the capital punishment of labour law" [*Transport Thibodeau Inc. v. St. Onge (Periard, 1994) (2283-Que.)*] and are best "made whole" with a combination of remedies, including: payment of lost wages and benefits; payment of interest on lost wages and benefits; reinstatement; payment of damages for mental distress and emotional suffering; payment of legal fees and disbursements; and, in ss.242(4) (C) "… any other thing that is equitable …" This last jurisdictional power has been exercised expansively by adjudicators who have ordered employers to provide aggrieved employees with letters of reference, letters of apology and other exceptional remedies which the common law does not offer. The Supreme Court of Canada observed, in *Slaight Communications,* that the intent of the *Canada Labour Code, Part III* is to remedy not simply the economic impact of dismissal on an employee, but also the personal effect on the employee's life.

For obvious reasons, the Make Whole Remedy has not been universally well-received by all employers. The reinstatement component of the make whole remedy lost favour with some adjudicators in the 1990s, when it became popular for employers to assert (and adjudicators to accept) that the employer-employee relationship was so far deteriorated that reinstatement would be unfavourable to both parties. An example of that rationale appears in

the case of *Zaikos v. Maritime Broadcasting System Ltd.*[20], in which the employer argued (successfully) that it would simply be unreasonable for the employee to be reinstated into the company's workforce. The notion that adjudicators could sidestep the obvious intention of Parliament in its enactment of the *Canada Labour Code, Part III*, and the further suggestion that they might do so on the recommendation of the employer, has been of some concern to legal commentators. Currently, many adjudicators are receptive to reinstatement: see, for example, *Paul v. Woodstock First Nation*[21] and *Polchies v. Woodstock First Nation*[22].

By way of contrast, a provincially-regulated non-unionized employee in New Brunswick who makes a legal claim is generally prevented (in the absence of very specific circumstances outlined in the Provincial Statutes) from pursuing reinstatement as a potential remedy. The Labour and Employment Board of New Brunswick (the "Board") is restricted in the extent of its remedial powers over dismissals governed by the *Employment Standards Act* and, as previously noted, the common law does not imbue the courts with jurisdiction to order reinstatement. Since the *Employment Standards Act* is designed to set out *minimum* standards (contractual terms) for New Brunswick's provincially-regulated employees, it is not surprising that the prescribed terms in a case of dismissal are much less beneficial to a dismissed employee than is the applicable common law principle of "reasonable notice". Even when a provincially-regulated employee who has been dismissed makes claims under both the Employment Standards Act and the common law, the combined remedies available do not match the Make Whole Remedy (see Table 2.2).

Returning to the discussion of contract law theories earlier in this chapter, the issue of reinstatement as an employment exchange remedy illustrates a key distinction between CCLT and RCLT. Since CCLT promotes discreteness and presentiation, reinstatement is incongruent with it. RCLT, on the other hand, seeks to foster the preservation of exchange relationships, making reinstatement a contemplated outcome.

[20] [2000] C.L.A.D. No. 432 (Tuck).
[21] [2001] C.L.A.D. No. 296 (Bruce).
[22] [2002] C.L.A.D. No. 440 (Kuttner).

Reinstatement can easily be worth hundreds of thousands of dollars to an employee over the life of a career and, as jobs often act as a source of self-worth, can help restore an employee's emotional security. Consequently, a New Brunswick employee who works in a federally-regulated industry has access under the *Canada Labour Code*, *Part III* to a more RCLT-based legal remedy than his provincially-regulated counterpart does. In fact, the remedial jurisdiction of an adjudicator appointed under the *Canada Labour Code*, *Part III* is more extensive than even the jurisdiction of the courts. This wider range of remedial options is commonly referenced as the Make Whole Remedy, and it was enacted as a legislative response to the limitations of the common law of employment. No slate of remedies similar to the Make Whole Remedy is available to New Brunswick's provincially-regulated employees who experience standard Work Problems. Further discussion of the Make Whole Remedy has been undertaken later in this chapter.

The New Brunswick Legislature has not made a similar effort to provide provincially-regulated, non-unionized employees with access to remedies that compare to those enjoyed by unionized workers and, therefore, New Brunswick's non-unionized workforce still has an inferior slate of resolution options available to it.

In addition to providing different remedies, the process for addressing disputes in the New Brunswick unionized context is distinct from that applied to non-unionized Work Problems. Fundamentally, a body of "arbitral jurisprudence" that is completely different than the common law is used by arbitrators to adjudicate collective agreement grievances. Additionally, it is important to note that time limitations for the advancement of grievances under a collective agreement are frequently much shorter than those applied in non-union workplaces, and the process of the grievance itself, from the type of form used to initiate a grievance to the manner in which the hearing is conducted, is substantially less formal than the court system. A unionized employee who makes a claim under a collective agreement is likely to have the grievance arbitrated more expediently than a non-unionized claimant who will have a trial in the courts, and the unionized arbitration process is less formal, less intimidating and procedurally simpler.

Stated simply, the System provides only a CCLT-based scheme for most provincially-regulated, non-unionized employees. Conversely, provincially-regulated, unionized employees and federally-regulated, non-unionized employees have access to RCLT-based dispute resolution frameworks which encourage preservation of employment relationships. Table 2.2 below demonstrates that federally-regulated, non-unionized employees have access to a broader range of remedies than their provincially-regulated counterparts do. Particularly, federally-regulated employees have an opportunity to force re-establishment of their work relationships, a remedy that is generally unavailable to provincially-regulated workers.

Table 2.2: A comparison of remedies available to federally-regulated, non-unionized employees and provincially-regulated, non-unionized New Brunswick employees in respect of employment dismissal

Type of Remedy	*Canada Labour Code, Part III*	*Employment Standards Act*	*Common Law*
1. Reinstatement	Available	Not available	Not available
2. Lost wages	Available (unlimited)	Available to a maximum of 4 weeks	Available to a maximum of reasonable notice
3. Compensation for lost benefits	Available	Not available	Available
4. Job search expenses	Available	Not available	Available
5. Legal costs	Available	Not available	Available
6. Interest	Available	Available only regarding the amount awarded (see no.2 above)	Available
7. Compensation for mental distress	Available	Not available	Limited availability
8. Exemplary damages	Available	Not available	Limited availability
9. Letter of reference	Available	Not available	Not available
10. Public apology	Available	Not available	Not available
11. Amendment of Record of Employment	Available	Not available	Not available

The common law remedies applied to Work Problems in New Brunswick are CCLT-based and, therefore, are focused on monetary compensation for contractual breaches. These remedies may arise from a written contract negotiated by the employer and the employee, but much more often the System addresses Work Problems arising from informal employment relationships which are not based on a written agreement. Even in those cases, the common law asserts that the employment relationship is founded on a contract made between equal bargainors and that the employer and employee have adopted particular implied contract terms which prescribe the remedies available to each party. Potential employee remedies under the implied contractual terms of the common law are not as

extensive as those available under provincially-regulated collective agreements or the *Canada Labour Code, Part III.* This is because the latter schemes are founded in RCLT and recognize employment as a continuing relationship that is fostered and preserved by expedient dispute resolution, in which economic power imbalances that favour employers are counter-balanced by equity-based employee rights which include reinstatement. Conversely, the common law maintains the CCLT-founded premise that employment is a contract freely made by two equally powerful bargainors who have agreed to the right of the employer to terminate the relationship with limited remedies available to the employee. This view of employment generated the century-old *Addis v. Gramophone Co.* decision of the House of Lords[23] that restricted special damages awards against improvident employer conduct in the course of an employee's dismissal. The prescription against non-pecuniary and exemplary damages, irrespective of the magnitude of an employer's "wrongful" conduct in the course of the dismissal, is virtually irreconcilable with judicial acknowledgements of employment as a fundamental component of an employee's emotional well-being.

2.7 Does the common law of wrongful dismissal provide an adequate response to workplace conflict?

All of this is to suggest that the common law of wrongful dismissal is no longer synchronized with society's understanding of the employment relationship as reflected in arbitral jurisprudence and the Canada Labour Code, Part III. In the years that followed *Addis*, employee-employer relations evolved and, until the end of the 20th century, the common law did not. Since the decision in *Addis*, the Canadian steps forward have been hesitant and, particularly in the case of the majority decision in *Wallace*, rather contorted. While it has been criticized by judges, academics and lawyers for its questionable legal foundation, the *Wallace* case is novel in that it has provided courts with the ability to redress employer wrongdoings against employees – even when those wrongs do not fit within the restrictive categories of legal liability. In 2007, the Supreme Court of Canada demonstrated the law's discomfort with its own *Wallace* decision when it minimized it in the case of *Keays*. In *Keays*,

[23] [1909] U.K.H.L. 1 (*Addis*).

Canada's highest court allowed for the payment of non-contractual damages compensation, as does *Wallace*, but it formalized and limited access to that remedy. The *Wallace* decision had advanced the law beyond the classical contract damages position taken by the House of Lords in *Addis v. Gramophone Co*, [1909] A.C. 488 (H.L.), in which wrongful dismissal damages for any non-pecuniary losses were prohibited. In *Keays*, the Supreme Court of Canada altered the law regarding damages awards for mental distress arising from wrongful dismissal (Veel, 2009).

The Supreme Court of Canada held, in *Keays*, that damages should be made available to employees who suffer reasonably foreseeable mental distress as a result of the manner of the employer's wrongful dismissal. However, the Court limited the consideration of such awards to only those cases in which unfair or bad faith conduct by an employer in the course of dismissal causes mental distress that was "within the reasonable contemplation of the parties at the time the contract was made." Veel has noted that "…the Court's emphasis on compensation in *Keays* may have the effect of making damages for mental distress more difficult to recover" (2009: 150). This is because employees who claim non-pecuniary damages must now demonstrate more clearly both the existence and the causation of the mental distress.

An RCLT-based concern that arises from the *Keays* decision is its exclusion of non-pecuniary damages awards arising from the impact of an employer's wrongful dismissal of an employee. As Veel (2009) observed, "It seems misleading…to suggest that mental distress is not a foreseeable consequence of dismissal itself" (2009: 152). The literature confirms that the loss of employment, in itself, can be highly traumatic and can cause psychological injuries (Linn et al., 1985). Consequently, it can be argued that an employer's misconduct by wrongfully dismissing an employee should be sufficient in itself to trigger an argument for employee mental distress damages. This is because the mere wrongful dismissal of the employee constitutes a breach of the employer's contractual obligations, and the psychological impact of that breach is, in most cases, "reasonably within the contemplation of the parties" (Veel, 2009). Although the *Keays* case has assisted in clarifying the law post-

Wallace, it does not eliminate the classical contract nature of the common law in respect of employment dismissal damages.

2.8 The duty of good faith as an implied contract term

Another example of a partial amendment of the common law in *Keays* is found in its handling of the good faith obligation in employment. Neither the common law in Canada nor its various statutes impose a uniform good faith standard on contracting parties (Banks, 2010-2011). As a result, the application of good faith duties has been implied on an *ad hoc* basis by the courts. In commercial transactions, the Canadian courts have implied good faith obligations within these contexts: 1) when the relationship of the parties warrants good faith (i.e., commercial partnership); 2) when the consequences of a party's arbitrary exercise of particular contract rights will be significant; and 3) when a contract provides one party with a discretion that might be exercised in a manner that adversely affects the interests of the other party or requires a party to exercise its best efforts (O'Byrne, 1995).

Until the end of the twentieth century, courts in Canada had not perceived employment as a relationship that involved employer good faith obligations (Banks, 2010-2011). Canadian employment law was significantly influenced by the *Addis* case and, although employers had the benefits of CCLT in that employment agreements were governed by discreteness and presentation principles, they also had the benefit of implied employee obligations of good faith and fidelity (Ball, 2012). While Ball (2012) has observed that long-existing employee duty as one of good faith and fidelity, Banks (2010-2011) has argued that the duty has been one of faithful service that is "not derived from good faith doctrines" (Banks, 2010-2011:551). In either case, it is clear that, regardless of what duty was owed by Canadian employees to employers under the common law, no similar duty of good faith was owed by employers to employees until the 1990s. In *Vorvis v. Insurance Corporation of British Columbia*,[24] the majority of the Supreme Court of Canada upheld the *Addis* decision and ruled that aggravated damages were not available to a dismissed employee unless the basis for such a claim was actionable independent of a wrongful dismissal claim (Banks,

[24] [1989] 4 W.W.R. 218.

2010-2011). The *Vorvis* decision precluded the existence of an employer good faith obligation, and that continued to be the law in Canada until the *Wallace* decision was issued in 1997.

The *Wallace* case is discussed in the thesis as a major landmark in Canadian wrongful dismissal law. In that case, the Supreme Court of Canada recognized an employer obligation of good faith and fair dealing, but rejected the argument that an employee could sue his employer in either tort or contract for bad faith conduct on dismissal (Banks, 2010-2011). However, the Court endorsed the awarding of additional damages in the form of increased reasonable notice compensation in circumstances where an employer acted in bad faith toward an employee in the dismissal process. It was this unusual ruling that caused confusion (Banks, 2010-2011) and attracted academic and jurisprudential attention. In 2008, the Supreme Court of Canada clarified the common law regarding employer good faith obligations in the *Keays* decision. In that case, the Court found (as discussed above) that employers are bound by an implied contractual duty to act in good faith in the manner of employee dismissals. The Court has not, however, imposed an obligation of good faith conduct during employment and has also declined to create a duty on employers to maintain trust and confidence in the course of employment (Banks, 2010-2011). In this way, Canadian jurisprudence has remained distinct from British common law developments on this subject. In Britain, the House of Lords has been more assertive in establishing a mutual duty of trust and confidence that applies to both employers and employees during their relationship (*Malik v BCCI, supra*; Bogg, 2010-2011; Banks, 2010-2011).

2.9 The System's process for claiming a Work Problem remedy

Excluding other types of Work Problems such as resignation, contract frustration, human rights violations or other statutory breaches, non-unionized New Brunswick employees are typically dismissed in one of two ways: with just cause, or with reasonable notice of the dismissal. Conversely, an employee may initiate termination of the employment contract by resignation or by a claim of constructive dismissal. In the case of constructive dismissal, it is the employer's repudiation, or alteration of a fundamental term of the employment agreement

that affords the employee a legal claim for damages as if the employer had wrongfully dismissed the employee. A more expansive discussion of constructive dismissal appears in section 2.10 below.

In New Brunswick, an employer is entitled to dismiss for just cause when the employee has behaved badly enough to breach the employer's trust. The courts reserve the right to judge when an employer's trust has been irreparably broken, but it is notable that minor employee infractions are less apt to form the basis of a successful just cause argument than are fundamental misconducts such as theft. Employers' allegations of just cause misconduct are analysed by the courts using a contextual approach, which is discussed further below. In the absence of just cause for dismissal, an employer of a provincially-regulated, non-unionized employee is still entitled to unilaterally terminate the employment relationship by providing reasonable notice of the dismissal. As in the case of just cause assessments, the courts ultimately determine what amount of dismissal notice is reasonable, unless the employer and employee have previously agreed upon a contractual notice amount that both accept as reasonable. In assessing reasonable notice in the absence of a contract, the courts take into account a number of factors which are used to assess the time that the dismissed employee will likely require to find comparable re-employment.

In the case of a dismissal for just cause, an employee who is subject to the common law is not entitled to any remedy at all and, in fact, could be required to pay court costs to the employer at the end of an unsuccessful trial. On the other hand, if the employee's behaviour is not judged by a court to have been severe enough to constitute just cause, then the dismissed employee is entitled to "reasonable notice" compensation. These are important concepts in this thesis, as dismissal is a common Work Problem in New Brunswick.

Under the common law, neither the dismissed employee nor the employer will know for certain if the employee's alleged misbehaviour constitutes "just cause" for dismissal until such time as the matter is determined by a judge or administrative tribunal. Both parties typically depend upon lawyers to provide advice on whether or not the behaviour in question

constitutes just cause. The answer to that question has arguably been made more difficult in recent years by the introduction of the "contextual approach".

The Supreme Court of Canada made a significant pronouncement on the subject of just cause in the 2001 case of *McKinley v. BC Tel*[25]. McKinley had been dismissed by BC Tel for lying to his employer with respect to medical information the company requested while he was on sick leave. Dishonesty had been previously accepted as an automatic basis for just cause dismissal, so BC Tel fired McKinley and argued that he was not entitled to reasonable notice. Ultimately, the Supreme Court of Canada concluded that, in the *context* of the employment relationship (including McKinley's circumstances, the minimal impact of this lie, the detrimental impact of the dismissal on McKinley and other factors), the behaviour in question did not constitute just cause. The Court prescribed a contextual analysis in just cause cases to assess the proportionality of the employee's misconduct in respect of the employee's substantive tasks. If the employee did not intend to repudiate the employment contract with his or her misconduct, if the employee did not benefit from the misconduct or if the misconduct was relatively minor in the context of the employment relationship as a whole, then just cause should not be found, even if the nature of the misconduct is objectively significant (i.e., dishonesty).

While some Canadian employers have expressed concern over the *McKinley* decision, it should be noted that the New Brunswick Court of Appeal had adopted a very similar approach in the 1997 case of *MacNaughton v. Sears Canada Inc.*[26] In that case, a blatant failure to comply with an express company policy was found not to constitute just cause for dismissal, again due to the *context* of the relationship. A subsequent decision in *Nickson v. Industrial Security Limited*[27] demonstrated that the category of an employee's misbehaviour is viewed by the New Brunswick courts to be of substantially less importance than is the impact of that behaviour on the employment relationship itself. In *Nickson*, the employee breached an important company safety policy, which breach could have seriously impacted the

[25] [2001] S.C.J. No. 40 (*McKinley*).

[26] [1997] N.B.J. No. 79 (C.A.).

[27][2001] N.B.J. No. 446 (Q.B.); aff'd, [2002] N.B.J. No. 355 (C.A.) (*Nickson*).

employer's business. Although the behaviour bore similarities to that of the employee in the *MacNaughton v. Sears Canada Inc.*[28] case (in which breach of a company policy was *not* found to constitute just cause), the *context* of Nickson's employment was such that he had been warned repeatedly of a number of misbehaviours over the years of his employment, and his non-compliance with an important company policy was found to have breached the trust which the employer was entitled to have in its employees. For these reasons, the Court concluded that just cause for dismissal existed. However, this contextual approach to the legal determination of just cause issues in New Brunswick courts sometimes lends itself to the complication of Work Problems rather than their resolution, as subjective interpretations of sometimes subtle facts and the *possibility* of a favourable judicial assessment of the same polarize the parties. The 2004 New Brunswick Court of Appeal decision in *Henry v. Foxco Ltd.*[29] provides a good example. In that case, the dismissed employee had used vulgar language in an aggressive and insubordinate confrontation with his supervisor. Ultimately, the Court of Appeal ultimately decided that the employee's misconduct, though inappropriate, did not amount to just cause for dismissal.

Current judicial subscription to the contextual approach regarding just cause determination requires all stakeholders in the System to think carefully before determining their response to an employment relationship breakdown. Behaviour that might have automatically constituted just cause for dismissal at one time may no longer be sufficient. Because the contextual approach increases the uncertainty in the outcome of just cause litigations, it does not facilitate expedient resolutions. In many cases, the employer and the employee both have the ability to claim a reasonable prospect of success at proving the other to be wrong. If proving the other side wrong is the objective of the litigation, then the contextual approach facilitates that end.

In cases where it is determined that an employee has been dismissed without just cause, the employee has both a "minimum notice" entitlement under the Employment Standards Act (one of the Provincial Statutes) and a larger "reasonable notice" possible

[28] [1997] N.B.J. No 79 (C.A.) (*McNaughton*).

[29] [2004] N.B.C.A. 22.

entitlement under the common law. The minimum notice entitlement is set out in ss. 30(1) of the *Employment Standards Act*:

> 30(1) Except where cause for dismissal exists, and subject to subjection (3) and to sections 31 and 32, an employer shall not terminate or lay off an employee without having given at least
>
> (a) two weeks' notice in writing, where the employee has been employed by the employer for a continuous period of employment of six months or more but less than five years; and
>
> (b) four weeks' notice in writing, where the employee has been employed by the employer for a continuous period of employment of five years or more. *Employment Standards Act*, ss. 30(1).

While the *Employment Standards Act ("ESA")* might appear to be relatively "toothless" (especially in comparison with the *Canada Labour Code, Part III*), some of its contents are of particular benefit to employees. A number of the more significant provisions of the *ESA* are summarized as follows:

> ss. 30(2) states that an employer which dismisses an employee for cause must do so in writing, and failure to do so invalidates a dismissal for cause, even if cause had existed. Despite the fact that the plain meaning of the section would support the invalidation of the "dismissal" itself (thereby restoring the employment relationship), the Board has not made any recorded decisions to that effect. However, several decisions have been made to confirm that a failure of an employer to provide a dismissed employee with written reasons for his or her dismissal has the effect of making the dismissal "wrongful" and, as a result, the employer has been forced to pay statutory notice to the employee. Furthermore, the New Brunswick Court of Queen's Bench has relied on the *Machtinger v. HOJ Industries Ltd.*[30] case to support the proposition that non-compliance with ss. 30(2) can preclude an argument of "just cause" by the employer in subsequent common law wrongful dismissal proceedings: see *Cormier v. Royal Canadian Legion, Saint John Branch No. 14* and *Jagoe v. Recount Investments Ltd.*

The *ESA* imposes a number of obligations on employers, as well as providing benefits for employees. Most of these obligations are well-known; they include minimum wage

[30] *Supra*, note 2.

payments, overtime payments, vacation entitlements, sick leave entitlements and bereavement leave entitlements. Because the legislation enforces only minimum standards, however, it does not pose the same extent of risk for employers, or offer the same level of relief for employees, as does the common law.

2.10 Common law employment rights in the New Brunswick System

In New Brunswick, employees who have chosen to pursue common law wrongful dismissal actions have been largely restricted to seeking "reasonable notice" for their dismissal. As discussed previously in respect of the recent damages development provided by the *Keays* decision of the Supreme Court of Canada, the common law now makes an award of damages in excess of reasonable notice a possibility. However, it is a remedial option that has been very rarely utilized by the New Brunswick courts. It is impossible to know for certain what will constitute reasonable notice for any given employee until the case is adjudicated by a judge or administrative tribunal. The fact that no precise "mathematical calculation" of reasonable notice can be applied in any given case has been made clear in a number of cases. While this is true, the common law remains the legal recourse which is most capable of providing non-unionized, provincially-regulated New Brunswick employees with meaningful compensation for wrongful dismissal.

Employer-initiated termination of the employment relationship is one potential outcome of a Work Problem in New Brunswick's provincially-regulated, non-unionized employment sector. However, in some cases, employees make the decision to terminate as a result of their Work Problems, and these employee-initiated terminations are collectively referenced as "constructive dismissal" within the System. The subject of constructive dismissal in New Brunswick is more complex than the issues of just cause and damages assessment. While these cases tend to be extremely fact-dependent, it should be understood that a New Brunswick employee who perceives unfair employer treatment is entitled to quit his or her job and then claim "constructive dismissal" in certain instances. A reasonable description of "constructive dismissal" was given by the Court of King's Bench in 1918 as follows:

> Dismissal may be effected by conduct as well as words. A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract of employment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract.[31]

Constructive dismissal is included amongst the Work Problems that have been considered in this study. It is a concept made more difficult in Canada and in the New Brunswick System by the fact that, although they have been more receptive in some cases than British courts have been to awards of non-pecuniary damages, Canadian courts have stopped short of recognizing a mutual duty to preserve trust and confidence. The current state of the law of dismissal, as outlined in *Keays*, enforces a duty of fidelity (if not good faith) on employees throughout the employment relationship and a duty of good faith on employers in the manner of conducting a dismissal. As discussed earlier in this chapter, the limitation of the employer's good faith obligation in this way appears to preclude relief in respect of employer bad faith in actually wrongfully dismissing employees. In other words, the employer's bad faith breach of an employment contract has not been identified as a source of compensation but only bad faith in the manner of the wrongful dismissal. In constructive dismissal, the wrongful dismissal of the employee is played out through the employer's conduct. Whether or not that conduct will be considered by Canadian courts as the manner of a constructive dismissal, such that it invites non-pecuniary damages, remains to be seen.

The concept of constructive dismissal is one of the most difficult employment law principles for laypeople to understand. The reason for the difficulty, as noted by the British Columbia Court of Appeal in *Farquhar v. Butler Brothers Supplies Ltd.*[32], is that an employer's repudiation of a contract of employment or alteration of fundamental contractual terms allows, but does not require, the employee to treat the employment contract as having ended. Consequently, an employee who complains of possible constructive dismissal may

[31] *Rubel Bronze & Metal Co. and Vos (Re)*, [1918] 1 K.B. 315 at p. 323.
[32] (1988), 23 B.C.L.R. (2d) 89 (C.A.).

choose to quit and claim constructive dismissal or, alternatively, to accept the employer's alteration of the employment contract and continue the employment. Choosing the first option is, obviously, an unforgiving prospect. If a court determines that an employer's alteration of the employment contract was not of enough significance to constitute constructive dismissal, then the employee has forfeited his or her employment for nothing.

Given the significant risk involved in a claim of constructive dismissal, it goes without saying that both employees and employers must take great care in considering the subject. While many employers are not familiar with the concept of constructive dismissal and should be aware of the potential consequences of unilaterally effecting a fundamental alteration to an employee's contract (i.e., a significant pay reduction, a substantial demotion, failure to provide benefits or a failure to provide a safe and harassment-free workplace), it is the employee who must proceed with extraordinary care to avoid financially devastating decisions.

New Brunswick employers also incur risk in respect of "employee resignations". Decades ago, employers breathed easily when problem employees finally "quit"; in fact, some employers likely pressured difficult and unproductive workers to resign by making their work conditions unbearable. It should be understood, however, that an employee's resignation may not absolve the employer from wrongful dismissal liability (or, for that matter, from liability under the *ESA*, the *Human Rights Act*, the *Occupational Health and Safety Act* and/or the *Workers Compensation Act*, amongst others). Instead, courts are entitled to look behind a resignation to determine if the employee actually *intended* to terminate his or her employment relationship.

A very good example of a resignation that resulted in employer liability is found in the New Brunswick case of *Proctor v. Sharp's Corner Drug Store Ltd*.[33] In that case, the male plaintiff had become increasingly more frustrated with his employment circumstances, to the point where, finally, he told his employer that he was quitting. The Court of Queen's Bench reviewed the circumstances of the alleged resignation with great care before concluding that

[33] [2002] N.B.J. No. 291 (Q.B.)

the plaintiff had not intended to resign and, therefore, had not terminated his employment contract.

Many employment law disputes are more emotionally charged than other types of litigation. Contractual complications (such as potential constructive dismissal or questionable resignation circumstances), which should give sufficient uncertainty to warrant serious settlement negotiations on the part of both parties, are sometimes overlooked. The parties sometimes see the litigation process as an opportunity to make a point, and only perpetuate conflict as a result. For provincially-regulated, non-unionized employees in New Brunswick there are very few options for resolution of Work Problems that provide for continued employment relationships, and those that do arise only under Provincial Statutes in limited and specific fact circumstances. No reinstatement remedy is available in response to a straightforward dismissal.

2.11 The complications of settling New Brunswick employment claims

Because the System focuses the attention of provincially-regulated, non-unionized employees and their employers on CCLT-based monetary resolutions of Work Problems rather than more RCLT-like relational remedies, the manner in which financial compensation is claimed and paid is relevant to an assessment of the System's overall responsiveness to employee claims motives. In this regard, the System governs the payment of settlement funds and even court or tribunal awards by a perplexing set of rules. Significant concerns for employees, employers and lawyers include:

2.12 Complication No. 1: Income tax withholding

The Canadian *Income Tax Act* contains a sweeping generalization to the effect that almost all payments made by an employer to an employee are taxable. Consequently, most amounts paid by an employer to an employee in respect of employment-related litigation will be subject to a prescribed tax withholding, which presently is as follows:

i. on amounts from $0.00 - $5,000.00: 10 %
ii. on amounts from $5,000.00 - $20,000.00: 20 %
iii. above $20,000.00: 30 %

While it is the employer's obligation to withhold required taxes, the withholdings themselves do not end the tax considerations which surround employment litigation. Just because the tax withholding has been made does not mean that the employee has paid all of the tax which he or she owes to the government on the settlement amount. Instead, the employee will be assessed, by the Canada Revenue Agency, at the end of the tax year when the employee's annual tax return is filed. Depending on the employee's total financial circumstances, it could very easily be the case that more taxes will be owed. This is an additional complication that detracts from the ability of employers and employees to bring finality to some types of Work Problems.

One aspect of taxation that may actually encourage litigation rather than resolution of Work Problems is the provision of tax relief on legal fees incurred by an employee to enforce a legal right. An aggrieved employee who spends money on legal representation can report the legal fees as a tax deduction; however, the *Income Tax Act* allows the Canada Revenue Agency to review the deductions and to tax such amounts as it deems excessive in comparison with the extent of the employee's claim. Normally, it is unlikely that taxes would be charged against amounts covered for compensation of legal fees; however, it is important to recognize that no absolute certainty is afforded in this area.

2.13 Complication No. 2: Repayment of Employment Insurance Commission overpayments

New Brunswick employees are, in the majority of dismissal cases, entitled to claim Employment Insurance benefits following a dismissal. Whether or not the employee is entitled to EI benefits is subject to yet another sometimes complicated legal analysis. Separate from the case law that influences the outcome of wrongful dismissal claims, another full body of case law exists in determining EI benefit entitlement issues, and the decision itself is made by a federal government tribunal which is distinct from the courts and from the

other tribunals under the Provincial Statutes that can all have a role in the same employee's Work Problem.

If an employee is successful in a claim for EI benefits, yet another complication will arise for the employee and the employer. The *Employment Insurance Act*[34] obligates employers and employees to repay "overpayments", which are amounts determined by the same federal government department that decides the employee's entitlement to EI benefits. An overpayment commonly arises when an employee who is receiving or who has received EI benefits subsequently settles or wins a wrongful dismissal claim. In those circumstances, the federal government will typically require repayment of the "overpayment" that arises from the settlement or award in the employee's wrongful dismissal claim. The concept behind this overpayment clawback is to avoid having an employee receive two amounts of compensation for the same Work Problem. The practical result, however, is to further complicate the employee claim process and, also, to significantly reduce the benefit of making a claim, since a portion of any claim compensation will likely result in an overpayment of EI benefits and will have to be paid to the federal government.

2.14 Complication No. 3: The taxation of non-wage damages

Complication No. 3 is actually based on the exceptions to complication nos. 1 and 2. When, for example, might a payment from employer to employee not be taxable? Even after an extensive review of case law, Canada Revenue Agency ("CRA") information bulletins, the opinions of accountants and tax lawyers and discussions with the CRA itself, the answer is unclear. Consider s. 56 of the *Income Tax Act*[35]:

> 56(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> 56(1)(a) *Pension benefits, unemployment insurance benefits, etc.*
>
> B any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of

[34] *Supra*, note 3.
[35] R.S.C. 1985, c.1 (5th Supp.).

> (ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement, . . .

Then, consider the wording of IT circular no. 365R2, distributed by the CRA:

> [a]ll amounts received by a taxpayer . . . that qualify as special or general damages for personal injury or death will be excluded from income regardless of the fact that the amount of such damages may have been determined with reference to [a] loss of earnings . . . However, an amount which can reasonably be considered to be income from employment rather than an award of damages will not be excluded from income.

The combined effect of these excerpts complicates and often discourages settlement of Work Problems in that non-wage compensation paid based on employer misconduct (such as mental distress damages) may or may not be non-taxable as a payment not made in respect of wages. The New Brunswick-based case of *Mendes-Roux v. Canada*[36] confirms this conclusion, as do other decisions of the federal court. On the other hand, some other cases suggest that employer payments in respect of general damages regarding employee mental distress *are* taxable *unless* the mental distress allegedly suffered was incurred by the employee *during* the employment relationship, and not as a result of the dismissal itself. A similar position seems to have been taken, in some cases, by the CRA and courts in respect of human rights complaint-induced settlements. All of this means that, for employees who make or consider legal claims in respect of Work Problems, Canadian tax laws present two major issues:

a) a lack of clarity as to what portions of any settlement are taxable, leading to a requirement for further legal analysis and potentially causing further delays in finalizing resolution; and

b) a restriction on how employees and employers are actually able to settle their disputes, in that certain types of compensation are deemed to be wages (and, thus, taxable) even if the compensation is meant to address wrongful employer conduct which is not wage-related. In this way, employees are disadvantaged as compared to non-employee litigants, who receive non-taxable compensation in respect of their legal claims.

[36] [1997] T.C.J. No. 1287.

The lesson to be taken from the case law regarding the payment of settlements and awards in New Brunswick employment-related litigation is that the entire process is fraught with serious pitfalls, and, therefore, employers, employees and lawyers must proceed with care. The parties must be aware that governmental withholdings are normally required from court or tribunal awards and settlements, and the average wrongful dismissal case (without a human rights claim, mental distress claim, defamation claim or significant mitigation expense claim - or similar "independent actionable wrong" matter) will have tax risks and consequences of concern to both sides. Particularly when payments are being made under the supposed exceptions to the withholdings and overpayment provisions of the *Income Tax Act* and the *Employment Insurance Act*, respectively, the parties should be notified of the real potential that the CRA and/or the EI Commission may still attribute statutory liabilities to the payments at a later date. Given the apparent exemption from accountability of these departments, great certainty on the subject is not a luxury that the parties can enjoy.

2.15 Barriers to employee legal claims

The making of any employment-related legal claim in New Brunswick is a multi-pronged undertaking that even lawyers find confusing and fraught with procedural pitfalls. Even the time limits that must be met to commence claims in response to Work Problems are inconsistent and sometimes force claimants to pursue actions in more than one forum with potentially contradictory results. Some of these time limits expire within days (particularly under collective agreement grievance provisions); some expire within months (see, as examples, the *Public Service Staff Labour Relations Act* and the *Canada Labour Code*); others expire in 1 year (see federal and provincial human rights legislation and the *Employment Standards Act*); and still others, including most common law-based claims, must be made within 2 years. More than one of these potential claims is often relevant to a single Work Problem. However, the claims are made in completely distinct processes with independent hearings and different potential resolutions. As an example of the degree of complexity that can arise from a particular Work Problem, consider a situation in which an employee is dismissed from his job while he is on a disability leave that was necessitated by an accident that happened while he was at work. Further, assume that the accident was caused by a safety problem in his workplace about which the employee had complained to the

New Brunswick Occupational Health & Safety authorities. The employee suspects that he has been dismissed because of his workplace injury, his safety complaint and his disability. In those circumstances, the employee should pursue the following claims:

a) A wrongful dismissal claim under the common law, which must be commenced within 2 years of the dismissal, under *Limitation of Actions Act*, S.N.B. 2009, c L-8.5;

b) A complaint under the New Brunswick *Human Rights Act*, which must be commenced within 1 year of the employer's alleged disability-triggered discriminatory action, which may be the dismissal but may be a failure to accommodate the disability at a date after the injury occurred but before the dismissal (*Human Rights Act*, R.S.N.B. 2011, c 171) ;

c) A complaint under the New Brunswick *Occupational Health & Safety Act*, which must be commenced within 1 year of the employer's alleged safety complaint-triggered discriminatory act (*Occupational Health and Safety Act*, S.N.B. 1983, c O-0.2);

d) A complaint under the New Brunswick *Workers' Compensation Act*, which must be commenced within 1 year of the employer's alleged decision to dismiss the employee because of his compensable injury under the Act (*Workers' Compensation Act*, R.S.N.B. 1973, c W-13);

e) A complaint under the New Brunswick *Employment Standards Act*, which must be made within 1 year of the date of the employer's failure to provide the minimum statutory notice prescribed under the Act (*Employment Standards Act*, S.N.B. 1982, c E-7.2);

f) A second complaint under the *Employment Standards Act*, to be made within 1 year of the date of the dismissal on the basis that the employer violated the *Workers' Compensation Act*;

g) A claim for *Workers' Compensation Act* benefits as a result of the employee's disability leave from work as a result of his work accident, which must be advanced within 3 months of the date of the accident (*Workers' Compensation Act*, R.S.N.B. 1973, c W-13); and

h) A claim for *Employment Insurance Act* benefits as a result of being dismissed through no fault of the employee must be advanced within four weeks of the date of the dismissal.

In this example, the employee could and should contemplate 8 different claims. The processes for these claims are governed by 4 Provincial Statutes, a federal statute and the common law. One process leads to a trial in court; another is ultimately addressed by a human rights board of inquiry; the *Occupational Health & Safety Act* complaint is dealt with by an arbitrator appointed under the *Act*; two processes are determined by WorkSafe New Brunswick, a department of the New Brunswick government; the two *Employment Standards Act* complaints are heard by the New Brunswick Labour & Employment Board; and the Employment Insurance Act claim is decided by Human Resources and Skills Development Canada, a department of the Government of Canada. The timing of commencement of these processes and, more importantly, the timing of settlement or decisions in the cases, is critical as an outcome in one forum can extinguish all others.

The legal principle of issue estoppel dictates that in the event of a determination of a litigated issue by one trier of fact (for example, whether or not an employee was dismissed for just cause or not) will likely preclude a claimant from obtaining a second ruling from a different trier of fact. Because claims in respect of certain New Brunswick Work Problems can be pursued in more than one dispute resolution scheme at the same time (for example, an employee who is disabled in a workplace accident and then dismissed as a consequence could

make claims under the *Human Rights Act*, the *Workers' Compensation Act*, the *Employment Standards Act* and under the common law). As a result, it is possible for a court or tribunal in one process to make findings of fact and legal rulings on issues that may well be considered by a different court or tribunal at a subsequent time. Consequently, consideration must be given to the evidentiary requirements, procedural rules, influencing jurisprudence and remedial jurisdiction of each decision-making body to determine the sequence in which each available process should be advanced. The notion that any person who is not an experienced employment lawyer can be expected to navigate this legal maze, let alone to do so in the most productive manner for his interests, is unreasonable.

2.16 An under-utilized dispute resolution tool in New Brunswick employment

The New Brunswick System as it relates to employment disputes utilizes court processes and a variety of administrative tribunals. In some but not all litigated cases, the disputants are required to participate in mandatory mediation. Mediation is also sometimes but not always available to the parties if they wish to voluntarily use it. In a very significant number of cases, however, mediation is neither required nor even made available to employees and employers who are engaged in legal disputes, and, as a result, a judicial decision must be obtained, causing the parties to incur additional expense and animosity. Although collaborative law is frequently practiced in New Brunswick family disputes, it has not been adopted by employment lawyers in the Province.

Collaborative law is a dispute resolution model that emerged in the early 1990s (Landau et al, 2009). The general premise behind the model is that:

> …the attorneys for both of the parties to a dispute agree to assist in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. The commitment to working collaboratively is reflected in an agreement between both attorneys and their respective clients that, should settlement efforts break down, the attorneys will withdraw and not participate in actual proceedings (Webb, 1996).

A key tenet of collaborative law practice is that the lawyers/negotiators resist the positional bargaining stances that are common in litigation and, instead, commit to interest-

based bargaining (Shields et al., 2003). Shields et al. state that collaborative lawyers recognize that contested divorces cause emotional turmoil and devastation, and that "…courts are not the appropriate forum for resolving family disputes, which are as much about feelings and relationships as legal issues" (Shields et al., 2003:32).

While the use of collaborative law has been expanded into the employment field in some jurisdictions, it has not been used in New Brunswick as of yet. That said, discussions regarding its use have occurred amongst some New Brunswick employment lawyers.

2.17 Conclusion

In New Brunswick, employees who experience workplace disputes have a variety of potential legal recourses to consider, depending upon the legislative jurisdiction which applies to their industry. In many cases, a single employment dispute attracts multiple recourses and potential remedies which, together, create a labyrinth of legal issues for employees and employers to consider. The complexity of these numerous options and their inter-relationships is substantial and, as a result, the New Brunswick System, in its entirety, is not user-friendly. Additionally, the System promotes a contract-driven approach to the resolution of Work Problems with a focus on financial compensation.

Several reforms of the System are worth consideration and have already been the subject of some debate amongst lawyers and judges. Procedurally, the consolidation and simplification of the System's numerous Work Problem resolution processes would help all of the System's stakeholders focus their thoughts and time on achievement of resolutions of Work Problems rather than on compliance with the myriad of intersecting and overlapping procedures that co-exist under the Provincial Statutes and the common law. Additionally, an expansion of the legal principles that currently frame the System's definition and perception of employment as a contract-based relationship would permit a corresponding expansion of remedies available to employees who incur Work Problems. Finally, the utilization of collaborative law principles now successfully applied in New Brunswick family law disputes should be considered. The discussion of alternate justice models that follows in Chapter 3

considers concepts that could be incorporated into the System for the purpose of providing workplace dispute solutions that are more responsive to employee claims motives, more time-efficient and more cost-effective for the benefit of all stakeholders.

CHAPTER 3: A CONTRAST OF THE LAW AGAINST ALTERNATIVE MODELS OF WORKPLACE JUSTICE

3.0 Introduction

In New Brunswick, non-unionized, provincially-regulated employees who experience Work Problems have access to the legal processes and potential remedies discussed in Chapter 2. A review of the New Brunswick legal System's responsiveness to employee Work Problems is warranted, especially in light of Pound's general assertion that the law must be "refitted continually to the changes in the actual life which it is to govern…" (Pound, 1923) and Laskin's critique of Canadian employment law for its lagging behind society's expectations (Beatty and Langille, 1985).

As previously reported, direct experience as an employment lawyer in New Brunswick has illustrated to the author that not all individuals who have contemplated employment-related legal claims are impressed by the remedies made available to them under the law. Many of the employees with whom the author has discussed claims did not have a clear understanding of the possible legal outcomes, and also had different outcome expectations. This experience raises the question of why employees who initially had no full appreciation of the remedies available through the System, and who were unimpressed with those remedies when appraised of them, would nonetheless pursue workplace litigation. This inquiry into the motives behind employee claims was undertaken because it appeared that at least some claims were not driven by the prospect of legal justice outcomes. Potential claimant motives have then been compared against the remedies offered by the law. This chapter also reviews alternative justice concepts, particularly in respect of psychological contract and organizational justice.

In Chapter 2, two different legal contract theories were examined. The distinctions between them illustrate that employment agreements can be perceived in more than one way. Classical Contract Law Theory (CCLT) contemplates agreements, including employment contracts, as discrete transactions which should maximize the abilities of contracting parties to extract themselves from exchange relationships such that the future impacts of contract

termination are both minimized and addressed in the present. This contract model is reflective of Victorian liberalist philosophy, and its influence is prominently illustrated in the House of Lords decision in *Addis v. Gramophone Co., supra.* It continues to have impact on New Brunswick employment law today. Conversely, Relational Contract Law Theory (RCLT) seeks to recognize and maintain relational exchanges through examination of the context underlying each relationship and the provision of flexible responses to disputes arising within them. Currently in New Brunswick, some employees (those who are federally-regulated and those who are provincially-regulated and unionized) have access to legal dispute resolution processes that contain aspects of RCLT, whereas many employment disputes involving provincially-regulated, non-unionized employees are dealt with in a CCLT-based model. It is intended that examination of the extent to which each of these contract models aligns with the perceptions and expectations of New Brunswick employees will provide insights into the appropriateness of the System and what amendments, if any, should be considered.

A CCLT-based model can nevertheless offer RCLT-contemplated processes and remedies. In fact, the System as it currently exists provides all categories of New Brunswick employees with access to relational remedies in some circumstances. However, there are a number of employment issues that New Brunswick's provincially-regulated, non-unionized employees cannot pursue relational remedies for. Using other justice models as examples, it is possible that New Brunswick could amend its System in order to add processes and remedies that may enhance the experience and satisfaction of both employees and employers who participate in employment dispute resolution. A review of the literature regarding alternative justice models and employee justice perceptions is assistive in the examination of the appropriateness of New Brunswick's existing System.

3.1 What employees think is fair

The prominence of their jobs in the minds and lives of workers informs the manner in which they perceive the "rules" of employment. As Jahoda (1972) observed, employees view their work as something more than a transaction-based relationship. Instead, workers participate in

employment relationships which are founded on a psychological contract, or a construct of beliefs about the reciprocal obligations that flow between the employer and its employees (Rousseau, 1989). It is understandable, then, that employee perceptions of injustice within the employment realm are frequently more complex than mere "breaches of legal contract". An employee's pursuit of litigation is critically influenced by the manner in which an individual perceives a dispute in psychological terms, rather than in legal terms (Bies and Tyler, 1993). However, a fact which asserts itself at the forefront of this discussion of workplace litigation is Stulberg's (1998) observation that "the meaning of fairness is not exhausted by the concept of legal justice". Bird (2005-2006) has made a similar observation, that one-third of American employees work without a contract that makes reference to dismissal laws and, therefore, work norms influence most employees` perceptions of fairness: ``…employment norms are perceived as law more than laws are. Empirical studies reveal that most employees rely upon norms, not laws, to define workplace rules`` (2005-2006:150). On this point, Kim (1997-1998) conducted a study into the understanding of 337 American unemployment insurance claimants regarding the background legal rules governing their employment relationship. All of the participants in the study were collecting unemployment insurance benefits in the State of Missouri. The data collected suggested that there existed ``…a striking level of misunderstanding among respondents of the most basic legal rules governing the employment relationship`` (Kim, 1997-1998: 133). Amongst the major mistaken beliefs of the respondents regarding employer and employee legal rights were:

a) Only 51% of respondents were aware that the law permitted firing of employees "at will";

b) 82.2 % of respondents mistakenly believed that an employer could not fire one employee in order to hire another at a lower rate of pay; and

c) 60.7 % of respondents mistakenly believed that an employer could not fire an employee because of personal dislike. (Kim, 1997-1998)

The results of Kim's (1997-1998) research suggest that American employees are not fully aware of their legal rights. This is consistent with the research findings of Walters and Haines (1988), who interviewed 492 employees regarding their knowledge and understanding of their legal rights in respect of occupational health and safety issues. In that study, it was

found that the respondents recognized the significance of workplace safety to their own well-being. However, they were not well informed of their core legal rights or effective strategies for reducing safety hazards even though knowledge of their rights under applicable legislation was linked to the advancement of safer workplaces (Walters and Haines, 1988). The indication that many employees do not know their legal rights raises the question of whether employees contemplate legal claims in order to obtain the resolutions that the law offers or because they are unaware of alternative dispute resolution options. A review of alternatives to legal justice has been undertaken as a means of developing a deeper understanding of the motives behind employee legal claims and potential efficient, non-legal resolutions of the same.

3.2 Organizational justice

Organizational justice is related to the psychological contract in that, in the context of the employment relationship, it is a conceptualization of workplace fairness (Greenberg, 1990). But what do organizational justice theorists mean by "justice"? Plato contemplated justice as something different than the application of statutes or case law:

> Therefore, when men act unjustly toward one another, and thus experience both the doing and the suffering, those amongst them who are unable to encompass the one and escape the other, come to this opinion: that it is more profitable that they should mutually agree neither to inflict injustice nor to suffer it. (Plato, 360 BCE)

In the workplace context, organizational justice theories have emerged as explanations for variations in employee attitudes and behaviours that are inexplicable by self-interest considerations alone (Bies and Tyler, 1993). It is suggested that employees seek to correct management actions which do not satisfy their concepts of fairness. In that regard, there are five dimensions of organizational justice which are most commonly referenced: distributive justice, procedural justice, interactional justice, informational justice and retributive justice. An additional dimension, fairness theory, has emerged as an amalgam of these three theories of justice. These concepts are discussed below.

3.2.1 Distributive justice

Although the concept of distributive justice has been expressed in a variety of ways, its central theme is that, when an employee feels that he has not been given a fair outcome by his employer, he will seek to restore equity in the employment relationship through psychological or behavioural responses (Bies and Tyler, 1993). Distributive justice has been defined as the "perceived fairness outcomes or allocations that an individual received" from his employer (Folger and Cropanzano, 1998). One behavioural response to perceiving inequity is the contemplation of litigation (Sheppard et al., 1992).

The manner in which individuals respond to unfair outcome distributions has been explained by social exchange theory (Blau, 1964; Homans, 1961), equity theory (Adams, 1965; Walster, Berschid and Walster, 1973; Walster, Walster and Berschid, 1978) and relative deprivation theory (Crosby, 1984; Martin, 1981). Together, Greenberg has classified these theories as reactive content theories (Greenberg, 1987). Equity and relative deprivation theories are comparable in that they involve a weighting by individuals of their contributions and outcomes with those of others as an assessment of distributive justice (Martin, 1993). In the group context, Martin (1993) demonstrated that members of a group who felt disadvantaged based on outcome distribution could cause violence or other group actions as a challenge to the legitimacy of the system of reward distribution to which they are subject. Bies and Tyler (1993) have also found that, when an employer's decision is unfavourable to an employee but, nevertheless, is perceived as the consequence of a fair decision making process, the employee will be less likely to challenge the employer via litigation. Social exchange theory, on the other hand, is more concerned with the transfer of reciprocity that was understood by the employee at the commencement of the employment relationship, and will be discussed later in this chapter.

The evolution of procedural justice as a concept led Folger (1993) to his referent cognitions theory (RCT). RCT was a step toward a "dual obligations model" of workplace justice, recognizing not only an outcome-based determinant, but also a process-based consideration. RCT considers the frame of reference on which individuals evaluate decision

outcomes. When faced with an unfavorable outcome, RCT presumes that individuals contemplate alternate outcomes and why the actual outcome occurred. (Folger, 1987). When it is perceived that an unfavorable outcome is the result of conduct by a person other than the victim, RCT predicts a harsher reaction by the victim (Folger & Cropanzano, 2001). Folger (1993) theorized that workers will react most negatively to unfavorable workplace outcomes when the consequence of the outcome is significant (a distributive justice consideration) and the conduct of the employer is perceived to be inappropriate (a procedural and interactional justice consideration). In 1993, Folger amended RCT by identifying an obligation on the part of the employer to satisfy its employees' need for dignified interpersonal treatment:

> Rather, *all* aspects of the agent's [employer's] conduct, whether or not they have a direct bearing on employee compensation or the means for determining compensation, can carry implicit messages about whether the agent views the employee as someone worthy of that minimal level of respect to which all humans should be entitled. (Folger, 1993)

As noted by Folger (1993), the evolution of organizational justice theories has led to an understanding that employees react not only to the perceived outcome unfairness of management decisions, but also to perceived procedural injustices. In 1993, McFarlin and Sweeney reported the results of their survey of 235 engineers employed by a Midwest American public utility company. The survey examined the viability of four models of distributive and procedural justice based on employees' reactions to their treatment by the employer:

1. The two-factor model suggests that both distributive and procedural justice predict employee satisfaction, but that distributive justice perceptions are more determinative of personal evaluations, while procedural justice more strongly influence global evaluations;

2. The procedural primacy model proposes that perceptions of procedural fairness are what determine whether outcomes (including distributive outcomes) are considered fair;

3. The additive model suggests that both distributive and procedural justice affect employee reactions, but they do not interrelate to do so. In this regard, employee satisfaction with pay raises was influenced by both distributive and procedural justice, but only procedural justice impacted organizational commitment; and

4. The distributive halo model is essentially the converse of the procedural primacy model. It supports the notion that distributive justice is the primary influencing factor in employee justice perceptions, and that distributive justice determines employee perceptions of procedural justice. (McFarlin and Sweeney, 1993)

The results of the study indicated that the two-factor model had the most support amongst the survey respondents (McFarlin and Sweeney, 1993). While both distributive and procedural justice predicted employee satisfaction, distributive justice influenced personal satisfaction and procedural justice more strongly determined group perceptions. Regardless of the model used, the literature makes the argument that procedural justice is an influential factor in employee justice perceptions.

3.2.2 Procedural justice

In recent years, the procedural justice dimension has received more attention from researchers than has distributive justice (Lemons and Jones, 2001). Lind and Tyler (1988) observed that, although the study of procedural justice is typically associated with the research of Thibault and Walker (1975), the concept is related to the findings of Lewin, Lippitt and White (1939) and White and Lippitt (1960) in respect of leadership behaviour and social climate. In those studies, it was demonstrated that application of autocratic and democratic decision-making processes altered the conduct and attitudes of individuals affected by the decisions (Lind and Tyler, 1988). Unlike distributive justice theory, procedural justice contemplates that employees will be more accepting of a management decision, whether it is favourable or unfavourable to them, if they believe that the process leading to the decision was fair (Thibault and Walker, 1975). Further, managerial decisions are more often viewed as fair when decision-makers who employees perceive as sincere communicate their reasoning for making management choices (Gopinath and Becker, 2000; Richard and Kirby, 1997).

Conversely, it has been suggested by Cropanzano and Greenberg (1997) and Folger and Cropanzano (1998) that unjust decision-making processes motivate unfavourable employee responses, including diminished job performance, higher employee turnover and reduced organizational commitment.

The significance of procedural justice considerations to the sustenance of employment relationships has been underscored by the research of Folger and Cropanzano (1998). Scholars have arrived at the conclusion that earlier theories which were designed to explain employee responses to perceived workplace unfairness were, when concentrated solely on distributive justice concerns, too narrowly focused (Chan, 2000). Lind and Tyler (1988) have argued that individuals who make legal claims are more concerned with the fairness of the process and less concerned with outcomes than is assumed. Litigants find fairness in processes that allow them to participate by telling their story (Tyler, 1992). Further, dispute resolution processes are perceived by participants as being fairer when the decision-maker is viewed as someone who can be trusted and who can treat the participants fairly (Tyler, 1992).

Too much emphasis on procedural justice, however, can negatively impact the employer`s work environment and arguably may cause workplace disputants to be become more litigious (Harris et al., 2012). On this latter point, the Gibbons review (2007) makes these observations about the 2004 Procedures:

> 2.8 The Regulations have had the effect of formalising disputes that would better have been dealt with informally….
>
> 2.9 As a result, parties tend to focus on ensuring all the provisions of the procedure are fulfilled, lest they are penalised later at an employment tribunal, rather than examining ways of resolving the underlying problem. The Regulations create expectations for going to tribunal rather than incentives to resolution (Gibbons, 2007:25).

Folger and Cropanzano's (1998) fairness theory (which is discussed below) emerged as a consequence of this recognition, and included consideration of not only distributive and procedural justice influences on employee conduct, but also the most recently recognized component of organizational justice: interactional justice.

3.2.3. Interactional justice

Interactional justice, or the considerateness and sensitivity applied to employees in the implementation of a management decision, has received considerable attention in recent

years. Distinct from distributive and procedural justice, interactional justice recognizes that the conduct of employees is affected by "the quality of interpersonal treatment they receive during the enactment of organizational procedures" (Bies and Moag, 1986). Sub-factors of measuring interactional justice, then, include whether an employee perceives that the reasons for a particular management decision have been clearly and fairly explained (Bies, Shapiro and Cummings, 1988) and, further, that the employer treated the employee with dignity and respect in the implementation of its decision (Bies and Moag, 1986; Bies and Shapiro, 1987; and Folger and Bies, 1989). In the context of employee layoffs, for example, it has been concluded that interactional fairness (including the provision of advance notice of layoff, reasonable explanations for the decisions, and dignified treatment of employees who leave and those who stay) reduces the focus of laid off employees on outcomes (Brockner et al., 1994).

It is known from existing literature that withdrawal of organizational citizenship is dictated more by perceived interactional injustices than by unfavourable distributive outcomes. In fact Pate, Martin and McGoldrick (2003) discovered that interactional justice is linked to job satisfaction and organizational affinity, as is procedural justice. In circumstances of perceived procedural injustice, employees are likely to become more sceptical, as is the case in circumstances of perceived low interactional justice. When interactional justice is high, personal trust in management appears to inspire increased organizational commitment. While these attitudinal outcomes were expected, Pate et al. (2003) arrived at the unexpected conclusion that there is a poor correlation between organizational injustice (psychological contract violation) and behavioural change. Based on their qualitative findings, Pate et al. (2003) concluded that one possible reason for the lack of relationship may be the disparity of power between employer and employee, such that employees are not highly inclined to display negative behavioural outcomes of psychological contract violations due to a fear of employer retaliation. Secondly, the research suggests that employees maintain an internal sense of pride in their work and camaraderie with their colleagues such that, when faced with perceived unfair treatment, they are still reluctant to change their practices toward work.

The close relationship of aspects of procedural and interactional justice is seen in the work of Jepsen and Rodwell (2009), who have suggested that the process of conducting employee performance reviews is beneficial in establishing and maintaining a perception of workplace fairness, but only when the reviews are conducted well with a high level of interactional justice. Conversely, Jepsen and Rodwell (2009) have argued that poorly conducted performance appraisal interviews may negatively influence employees' work attitudes, e.g., job satisfaction and justice perceptions. Therefore, the content of the performance appraisal interview, and not simply the conduct of the review, has an important role in changing employees' attitudes regarding workplace justice. Shuman (1993) makes a similar argument in respect of dispute resolution processes, to the effect that the degree to which disputants trust the decision-maker who determines the outcome of issues is important, and not simply the fairness of the decision-making process. In contract theory terms, these arguments invite further discussion of the value that RCLT offers in establishing felt fairness in employment dispute resolution.

It has also been suggested that interactional justice is divisible into two distinct types, interpersonal and informational justice (Roch and Shanock, 2006). Roch and Shanock (2006) have noted the definition of interpersonal to be the extent to which employees are afforded dignity and respect by their superiors and informational justice is the extent to which employees are provided with sufficient information regarding organizational procedures and outcomes. In their study on the impact of distributive, procedural, interactional, interpersonal and informational justice perceptions on leader-member exchange (LMX), perceived organizational support (POS) and pay satisfaction, Roch and Shanock (2006) argued that informational justice has a significant relationship with both LMX and POS, while the other justice types are significantly related to only one exchange mechanism. This position may be particularly significant to employers and employees in the dismissal context, where the provision of information regarding the reasons for employer actions that impact employees may affect the employees' responses to those actions.

3.2.4 Informational justice

Skarlicki et al. (2008) observed that most organizational justice research had been focused on the impacts of distributive, procedural and interactional justice on organizational outcomes and that the significance of informational justice has been examined in only a few studies. Informational justice is defined as the provision of social accounts and explanations for unfavourable employment events, such as layoffs (Skarlicki et al., 2008). Researchers have suggested that informational justice may reduce negative responses to negative outcomes (Greenberg, 1994), including employee retaliatory conduct (Lind et al., 2000).

Although it is clear that informational justice can positively influence responses to negative employment events, Skarlicki et al. (2008) have found that employer explanations are more helpful when the affected employee perceives that the employer has demonstrated a high level of integrity during the course of the their employment relationship. In fact, the research suggests that an employer who is viewed by its employees as having low integrity as a result of their employment relationships may actually exacerbate negative employee responses by attempting to act in an informationally just manner at the time of a unfavourable event (Skarlicki et al., 2008).

The research of Skarlicki et al. (2008) underscores the significance of the relational conceptualization of employment relationships. The employer-employee relationship is contextual and evolving. The manner in which an employee perceives his or her employment relationship with an employer is likely to impact the employee's response to negative employment events and, further, to the employer's explanation of those events. This is the case even when the actual explanation is truthful.

3.2.5 Retributive justice

Retribution has been defined as the imposition of an appropriate sanction deserved in response to wrongful conduct (Perry, 2006). Retributive justice is the assessment of proportional sanctions against wrongdoing (Perry, 2006). Retributive justice is sought in circumstances where societal norms and worldviews are violated (Darley and Pittman, 2003).

Perry (2010) has identified that retributive justice has gained modern recognition as a third form of legal justice distinct from distributive and corrective justice. This perspective departs from Aquinas' theory that retribution is a component of corrective justice, with rectification of the subject wrongdoing requiring attention to the impact of the wrong on the public at large and not only its impact on the individual victim (Perry, 2010). Perry (2010) argues that, even if it is accepted that a civil wrong has both private and public elements, the rectification of its public aspect through retribution must be different than the correction of its private impact. He also examines and rejects the theory of Johannes Duns Scotus that retributive justice is a component of distributive justice because it involves the distribution of punishments (Perry, 2010). Distributive justice, Perry (2010) argues, addresses the distribution of finite benefits and burdens and, because punishment can be administered without limits, it is not possible to justly distribute it. As a consequence of his analysis, Perry (2010) advocates that retributive justice is its own distinct form.

The concept of retributive justice as a deterrent against wrongdoing is also discussed by Markel (2009). In the legal context, however, Markel (2009) makes the argument that retributive or punitive damages should be awarded to the state, however, and not to the victim of wrongdoing so as to reduce the risk of a victim being too highly compensated for the wrong suffered while, at the same time, penalizing the perpetrator.

3.3 The psychological contract

In the fields of sociology and psychology, the employment relationship has been conceptualized as a "psychological contract" (Roehling, 1997). Although there is no consensus as to the precise composition of the psychological contract, its existence is widely accepted. Further, research has demonstrated that most employees are capable of describing their expectations with respect to the content of their individual work contracts (Anderson and Schalk, 1998). On this point, some early literature implied that psychological contracts are comprised of perceptions held by both employers and employees (Kotter, 1973). More recently, it has been demonstrated that psychological contract expectations may or may not be

shared by the parties, whereas implied legal contract terms are commonly understood (Rousseau, 1989). This is in part because psychological contracts are formed using information delivered and obtained in inquiry, monitoring and negotiation processes (Shore and Tetrick, 1994). Since individuals often receive and remember incomplete information, "…employees are likely to base their psychological contract on information which is only partially generated by their external environment" (Shore and Tetrick, 1994: 98). Further, it has been argued that organizations "sell" themselves to potential employees, and those efforts result in some employees receiving pre-employment information that is inconsistent with their post-hiring experiences (Shore and Tetrick, 1994: 99). In a study of 478 non-faculty employees and 283 managers at a large state university in the United States of America, for example, Taylor and Tekleab (2003) found that the employees` and managers` perceptions of employee obligations in their employment relationships were significantly different. The managers in that study perceived lower employee obligations than did the employees (Taylor and Tekleab, 2003). The results also indicated that the employees and the managers had differing views of their leader-member exchange, or the quality of the employee-manager relationship, with the managers reporting perceptions of higher quality relationships than the employees reported (Taylor and Tekleab, 2003). In their study of 12 executives and 339 employees in 4 different organizations, Porter et al. (1998) examined gaps in the perceptions of managers and employees regarding organizational inducements offered to employees on hiring. The results of the study suggested that employees interpret a greater number of inducements made by their employers than employers believe they have made, and that the inducements offered are, in some cases, viewed differently by employees and employers (Porter et al., 1998). This finding supports the suggestion of Shore and Tetrick (1994) that psychological contracts are sometimes formed on misunderstood premises.

As for the functions of the psychological contract, the first is to fill in gaps which cannot reasonably be contemplated or addressed in a formal legal contract and, by doing so, to reduce employee insecurity. It has been found that psychological contracts provide employees with the ability to predict the outcomes which ought to follow their investment of time and effort into an employer's organization (Sparrow and Hiltrop, 1997; MaGuire, 2001). Predictability in an employment relationship is not only important to employee motivation

(Vroom, 1964), but has also been linked to stress prevention (Sutton and Kahn, 1986) and to the development of trust (Morrison, 1994). Secondly, the psychological contract influences employee citizenship and behaviour, as the employee measures the employer's conduct against the terms of the psychological contract and adjusts his or her behaviour based on those observations. Thirdly, the psychological contract affords the employee a sense of input in respect to his or her relationship with the employer (McFarlane Shore and Tetrick, 1994). Rousseau and Parks have distinguished between two types of psychological contract (Shore and Tetrick, 1994) in the same way that Macneil (1977) has postulated two types of legal contract. They have associated transactional-type psychological contracts with economic exchanges and relational-type psychological contracts with social exchanges (Rousseau, 1989; Rousseau and MacLean Parks, 1993). This distinction is consistent with the CCLT – RCLT dichotomy, and suggests that legal contract and psychological contract theories mirror one another.

At its most basic, the psychological contract construct refers to the expectations and beliefs of employees as to what they are required to give and entitled to receive in the course of their employment. Those expectations are derived from three sources: 1) promises made to employees by the employer; 2) employee perceptions of the employer's culture and standard practices; and, finally 3) the idiosyncratic expectations of employees as to how their employers' organizations operate (Turnley and Feldman, 1999). Importantly, the employee expectations that inform psychological contracts are not rooted in the law, except to the extent that specific employer communications and practices make reference to legal obligations and entitlements. In fact, the differences between the psychological contract and the legal contract have been clearly identified by scholars (Rousseau, 1998; McLean Parks and Schmedemann, 1994). Unlike legal contracts, in which a formal "meeting of the minds" of the contracting parties is fundamental, it is only the perception of mutuality, and not actual mutuality, which is the foundation of the psychological contract (Rousseau, 1995).

Evidence supports the contention that the psychological contract is evolving and is influenced by a complex range of factors which can include diminished employee loyalty resulting from more frequent organizational change (Singh, 1998). For example, Kissler

(1994) has found that the "new" psychological contract appears to replace the concept of "organizational worth" with employee "self-worth" and personal accomplishment with promotion. It also places less importance on tenure. While the psychological contract may now reflect a new "protean" employee mindset (Hall and Moss, 1998), it remains a fundamental factor in employee job performance motivation, job satisfaction and organizational commitment (Guest, 1998). Further, it is apparent that a logical extension to the impacts of psychological contract performance and breach confirmed by Guest is employee legal claims motivation.

Psychological contract research has been focused primarily on the process of contract formation (Rousseau and Greller, 1994) and on employee responses to unfulfilled organizational promises (Kickul, 2001). While a considerable body of research exists regarding the effect of employer psychological contract breach on employee citizenship, much less is known about what causes employees to take proactive steps toward legal claims. As previously discussed, psychological contracts have been sub-categorized as economic exchange-based and social exchange-based (Rousseau, 1989). Some employment contracts, especially those that are intended to be long-term relationships and that evolve over time, attract analysis under social exchange theory.

3.4 Social Exchange Theory and psychological contracts

The psychological employment contract reflects what a participant understands of his obligations and entitlements arising from an exchange relationship. Early research in exchange theory demarcated a distinction between economic exchange and social exchange. For example, Blau (1964) observed the essence of economic exchange to be a transfer of specific consideration performed under a formal contract, while social exchange creates "diffuse future obligations, not precisely specified ones, and the nature of the return cannot be bargained about but must be left to the discretion of the one who makes it". The distinction between economic exchange and social exchange theories is particularly visible in the employment context where, according to Rousseau (1995), these two models represent opposite ends of the psychological contract continuum, with all employer-employee relations

falling within that range. As Pate (2001) observes, the "new" typology of economic and social exchange, being transactional and relational psychological contracts, respectively, is useful in that it demonstrates the range of employment contexts which may exist or evolve in an organization. On the other hand, the transactional – relational continuum has been criticized for its oversimplification of the psychological contract concept (Millward and Brewerton, 1999), and for its failure to appreciate social context and the complexities it introduces (Pate, 2001). Irrespective of any weaknesses in the transactional-relational typology, it has been accepted as a useful tool in alleviating the ambiguity of the psychological contract concept.

In the study of university managers and non-faculty employees described above, Taylor and Tekleab (2003) found evidence to support that the social exchange expectation of one party to an employment contract will be adjusted in response to the other party's contract fulfillment or violation, as the case may be. The authors opine that two social exchange relationships are "moderately related" to the psychological contract and influence employees' conduct and attitudes toward their employers. The first, perceived organizational support (POS), is the belief formed by employees as to their valuation by their employers (Eisenberger et al., 2004). The second is leader-member exchange (LMX), which is the perceived relationship between an employee and his or her supervisor, as a representative of the employer (Lyden et al., 2004). In both cases, employees' perceived favourable treatment by the organization and by individual supervisors (or leaders) produced felt obligations to assist the employer in achieving its objectives (Eisenberger et al., 2004; Taylor and Tekleab, 2004). Taylor and Tekleab (2004) have proposed, in fact, an integrative psychological contract model which incorporates POS and LMX in its demonstration of employee perspectives of employment relationships.

The psychological contract model supports the theory that individuals derive non-economic benefits from their employment. Roehling (1997) has noted that employees maintain expectations in respect of their psychological contracts, including an entitlement to nurturance, the regulation of social relationships within the workplace, and job security. What employees believe to be just and fair is, of course, essential is assessing both the

responsiveness of the System to employment disputes and, also, alternatives to the System. On a basic level, the discussion of how to most effectively resolve employment disputes may involve consideration of CCLT and RCLT concepts.

3.5 Fairness theory as an amalgam

Fairness theory considers not only distributive and procedural justice but, as referenced above, interactional justice. The theory underscores membership in a "larger moral community" which prescribes more broadly accepted moral principles (Chan, 2000). Skarlicki and Folger (1997) conducted a study which confirmed that retaliation within an organization was strongest when perceptions of distributive, procedural and interactional justice were all low. A negative distributive justice variation did not independently result in employee isolation, but did so when coupled with low perceptions of procedural and interactional justice. In fact, the results of the Skarlicki and Folger (1997) study indicate that, when employers demonstrate adequate sensitivity, concern and respect towards employees, those employees are more willing to tolerate distributive and procedural unfairness. This finding is consistent with Levinson's 1965 thesis, in which he argued that a manager personifies his or her employer for an employee and can mitigate unfavourable processes and outcomes through perceived interactional justice (Levinson, 1965; Skarlicki and Folger, 1997). Therefore, any belief that employee litigation is motivated by only one of the dimensions of organizational justice is not only simplistic but also incorrect. The relational aspects of employment suggest that, in some employment exchanges, perceived injustice that results in contemplated litigation can actually be a product of several combined factors, including perceived distributive, procedural or interactional injustices which, in turn, may include perceived CCLT and RCLT violations.

Even if perceived organizational injustice does not always motivate behavioural change in employees, it is clear that it is a significant motivation of those employees who do take action against their employers (Lind et al., 2000). In fact, in a study of 996 unemployed adults who had been either fired or laid off from their last jobs, Lind et al. (2000) found that "Feelings of unfair, insensitive treatment at termination had nearly twice the effect of the next

most potent factor in determining who would consider suing and who would not". Further, it was determined that the distributive outcomes of perceived injustice have less impact on behavioural change than does the extent of an employer's unfair treatment (Lind et al., 2000). What has been found to be more significant than breach of the transactional aspect of employment (Miceli, 1993) are the relational processes in organizations (Cropanzano and Greenberg, 1997). In the Lind study (2000), for example, only 3.8 percent of the respondents who felt that they had been treated ``very fairly`` during their employment filed legal claims after being fired or laid off, whereas 16.9 percent of those who reported being treated ``very unfairly`` made claims. Conversely, the perception of having being fairly paid during their employment showed no significant relationship to claiming (Lind et al., 2000). In summary, Lind et al. (2000) concluded that social psychological motives had greater impact on employee legal claims considerations than did financial motives:

> The results suggest that claiming is triggered by two sets of motives that operate in different ways. The first set of motives are social psychological, turning on feelings of injustice and poor treatment….The second set of motives involves feelings of financial harm and expectations of turning around these conditions by winning a wrongful-termination award. These economic concerns appear both to induce people to think about claiming and to increase their willingness to take action on these thoughts, but their net effects are not as strong as the effects of the psychological variables (Lind et al., 2000: 581).

While social exchange theorists have asserted that employees are motivated by self-interest (gains versus losses in acceptance of management decisions) (Blau, 1964; Homans, 1961; and Kelley and Thibaut, 1978), justice theorists suppose that employee responses to management decisions are based not solely on self-interest, but also on concepts of fairness (Bies and Tyler, 1993). Bies and Tyler (1993) conducted a 1989 survey of Chicago, Illinois employees, in which it was demonstrated that the most important factor in the consideration of employee litigation was the perception of procedural justice in respect of managerial decisions (Bies and Tyler, 1993). In that study, 303 employees were identified who: a) were working at least 20 hours per week; b) had a supervisor; and c) had recently had a positive personal experience with their supervisor. A second group of 103 employees was identified who met criteria a) and b) above but had recently had a negative personal experience with their supervisor. Then, a subset of 141 employees, comprised of those employees who had

indicated that an external agency was available to them if they wanted to make complaints about their supervisors, was analysed to assess their legal claims motives. While the results suggested that the primary litigation motive was the employee's perception of the procedural fairness of the employer's decision-making, job satisfaction also significantly influenced the contemplation of legal claiming (Bies and Tyler, 1993). This finding supports the argument that employment can be a complex relationship and, as a result, many employment disputes require a contextual RCLT-based dispute resolution process. Bies and Tyler (1993) argued that:

> …the decision to initiate litigation is not viewed solely in fairness terms or in response to a specific experience; rather, the decision is also considered in the context of one`s satisfaction with the overall job situation. It may be that workers who feel unfairly treated will refrain from suing their company if they generally feel satisfied with their job. (Bies and Tyler, 1993: 359-360)

These findings are similar to those of Lind et al. (2000) to the effect that the interactional treatment received from employers, as perceived by dismissed employees, had a very substantial impact on determining which workers pursued legal actions against their employers (Lind et al., 2000). In each study, the significance of non-pecuniary, RCLT-based employee expectations was evidenced. Further, the study data suggest that informational justice considerations influence claims activity in that employees who experience workplace disputes often seek information regarding their employers' perceptions of the causes and potential resolutions of those disputes.

Although there is evidence that perceived interactional and informational injustices sometimes motivate employee legal claims, the System provides few remedial options in these regards.

3.6 Why people sue

Legal claims arise when perceived injustices are not resolved (Felstiner et al., 1980-1981). Felstiner et al. (1980-1981) have suggested that a 'perceived injurious experience' follows a transformational process that begins with 'naming' (or recognition of the experience as

injurious). The 'naming' stage is followed by 'blaming', which involves the apportionment of responsibility for the injury to a third party. The final stage of the transformation is 'claiming', or a request by the injured party for a remedy (1980-1981). If the claim of the injured party is rejected, then the perceived injurious experience transforms further into a dispute. Felstiner et al. (1980-1981) have noted that a claim rejection is not necessarily express; it can also take a more passive form, such as a failure to respond. When a perceived injurious experience transforms into a dispute, the injured party must choose a mechanism for resolution, and that choice can be influenced by a number of factors, including the injured party's objectives. Two questions examined in this thesis are what causes employees to pursue legal claims and how well the System responds to their claims objectives.

The System, as we know it today, is best designed to address disputes amongst strangers. In fact, Barton suggests "that is perhaps its historical raison d'être" (1999). He notes that the legal system was enhanced and expanded in response to the industrial revolution, which fostered worker mobility; as a consequence, "impersonal commercial transactions" increased substantially. Since the foundation for relational communication was thereby eroded, the law developed its value proposition as a dispassionate mechanism for dispute resolution in which "personal engagement is not only superfluous, but dangerous" (Barton, 1999).

Barton speculates that even when people invoke the legal system for resolution of interpersonal disputes, they are embarrassed that they had no better approach to the problem:

> They realize that with stronger communicative skills or relationships to begin with, matters might not have come to litigation. Legal discourse, therefore, may symbolize either surrender to expedience or a fear of becoming too closely involved with others. Lawyers may have come to represent a general loss of human accommodation or community, even while the power they hold is attractive (Barton, 1999).

Perhaps Barton has answered his own question when he asks "why is it that as law becomes more and more essential to daily life, its practitioners seem to become more and

more socially despised?" In its 2005 report the Canadian Bar Association's Futures Committee confirmed the poor image of lawyers in this country as follows (2005: 20):

> Perhaps the biggest threat on the demand side is the current *poor image* of lawyers held by the public. This is in many ways unfortunate and unfair, because public views may be fashioned by weaknesses, inequities or failings in the current legal system (delays, appeal processes, filing costs, etc.) or from public misconceptions about the role of the legal profession vis-à-vis the justice system. Nevertheless, all lawyers are affected, especially when there is an actual case of impropriety or unprofessional behaviour. Stereotypes of unscrupulous lawyers are reinforced by unflattering portrayals in films, books and other media. (The issue of image is discussed in greater detail in Section 4.2.3.) Intriguingly, common knowledge holds that the vast majority of the public have the highest regard for their personal lawyer, but an unfavorable view of the profession in general.

One possible explanation for the public's growing suspicion of lawyers is offered by Markovits (2008). He suggests that the law and its administrators "penetrate" and "transform" the attitudes of disputants, and that the legal system "reconstitutes the issues" between the parties to a dispute (Markovits, 2008: 188). Additionally, Markovits (2008) submits that lawyers objectify their clients' concerns and separate them from the interests that they represent in order to make the concerns of the litigants fit within legal structures. A transformation and reconstitution of the perceptions of individuals who seek legal remedies would not be necessary, of course, if the law was able to adequately address those individuals' original concerns. Markovits (2008) points out that lawyers have a duty to deflate at least some of their clients' expectations, and that the clients will only trust the "deflationary advice" of their lawyers if they perceive that the lawyers are nevertheless faithful and sympathetic to the clients in spite of their discouragement of the clients' true remedial wishes (Markovits, 2008: 198).

Behaviour in society is regulated by both legal rules and social norms (Macfarlane, 2008). While the law is often seen as the primary mechanism of dispute resolution, it is certainly not the only justice concept that is relied upon to settle conflicts. In one example of a ranching community in California, it was observed that a dispute resolution system had been developed "beyond the shadow of the law", founded on the community's own values and

beliefs about justice (Ellickson, 1991). Although the law is only one mechanism for dispute resolution, it can be an effective ultimate recourse. Macfarlane makes the point that the "shadow" of the law is an important predictive tool for achievement of dispute settlements (Macfarlane, 2008: 168; see also Mnookin and Kornhauser, 1979).

It appears that the legal system is viewed by lay people as an impartial and objective construct that offers some equalization of power to the less powerful members of society (Macfarlane, 2008). In fact, Silbey and Ewick (1998) have found that disputants often place their faith in the legal system without having actual knowledge of its rules and principles. Although the legal system imposed demands and inconveniences such as lengthy waiting times on parties, it was found that these inefficiencies were widely accepted, likely due to the faith of the participants in the law (Silbey and Ewick, 1998). Macfarlane (2008) has made the point that the law can "get away with" time and expense inefficiencies because the public's tolerance is cultivated by a lack of understanding of the legal system.

The literature indicates that the law does not meet, and may not seek to meet, all of the expectations and objectives of the claimants who access it. While it does provide access to some explanations of and insights into what occurred in respect of an alleged wrong (subject to the restrictions imposed by evidentiary rules), the law ultimately transfers its attention to the question of financial compensation, largely at the expense of all of the other factors considered important by the patients referenced in the Gallagher et al. study (2003) above and by the claimants investigated by Relis (2007). The literature demonstrates that claimants who take their disputes to the legal system do so primarily in search of non-economic outcomes which are more relational in nature than mere monetary compensation. Investigation of non-economic motives for legal claiming in some non-employment contexts, has suggested that interactional and informational justice considerations are more prevalent than retributive justice impacts (Relis, 2007). A similar examination of claims motives in the New Brunswick employment context may provide useful insights to employers, employees and other workplace justice stakeholders, and is undertaken in this study.

3.7 Why people don't sue

Some individuals who have experienced injustice choose not to initiate legal action. The reasons why they decide not to initiate legal claims to address injustices are relevant to this study. Brodsky et al. (2004) have suggested that there are eight main factors that dissuade victims of injustice from suing:

1. *Psychological contexts:* In some cases, emotional and personal circumstances simply influence the victim against suing.

2. *Clarity of negligence:* When the nature and extent of a wrongdoer's negligence is uncertain, victims are often less likely to sue.

3. *Physical impairment:* If the victim of injustice is either not injured by it or if the injury is expected to heal quickly, the victim is less likely to make a legal claim.

4. *Sense of injustice:* Individuals who perceive the world as being personally fair to them are less likely to sue than those who perceive the world to be generally unfair.

5. *Legal history:* People who have been engaged in the legal system previously and have had unfavourable experiences are less likely to make legal claims than those who have not.

6. *Risk-benefit analysis:* The risk of social alienation or embarrassment does, in some cases, influence people against making claims.

7. *Time and energy:* Some victims of injustice are unwilling to expend the considerable amounts of time and energy required to pursue legal claims.

8. *Inertia:* Individuals who prefer to live in accordance with uninterrupted routines are less likely to commence legal actions. (Brodsky et al., 2004)

One component of the risk-benefit consideration that Brodsky et al. (2004) found to be a significant discouragement of litigation is the potential for negative stigma that could result from the public process in which the victim's dispute and losses must be considered. In two of the case studies conducted by Brodsky et al. (2004), employees expressed concern that, if they sued, they would be viewed as a risk to potential new employers.

3.8 Legal justice in New Brunswick employment

In New Brunswick, the System is founded on common law principles that emanated from Great Britain, and that have evolved in Commonwealth courts over more than two centuries. The System dictates that employment relationships are regulated by legal contracts which, in turn, are shaped by long- established common law concepts. During the last five decades, the System has supplemented the common law contract construct with legislative provisions in order to ensure that basic "minimum standard" protections (such as minimum safety standards, wage rates and vacation entitlements) are provided to employees who do not have sufficient bargaining power to negotiate those rights.

Although legal contract principles have been central to twentieth and twenty-first century employment law, it is notable that this was not always the case. As Bird has written:

> Employment and contract are different because they have entirely separate histories. Early employment relationships involved dominant – subservient bonds based upon the status of the parties. (Bird, 2005-2006: 158)

Before the enactment of the *Statute of Labourers* in the fourteenth century, for example, paid work relationships were regulated by a collection of legal obligations attributed to the "master – servant relationship", which was the precursor of "employment" (Carlson, 2001). The legal rights and duties of the "master" and the "servant" were conferred based on the status of those positions, rather than by agreement (Roehling, 2004; Freedman, 1989). Interestingly, the duties of the parties were more relational in nature than they were contractual; for example, the master was considered to be *in loco parentis* with respect to his servants, such that he was required to provide them with medical assistance when necessary and, further, to provide for their physical and moral well-being (Jacoby, 1982). Because the master – servant relationship was not governed by a legal contract, and because it was subject to a series of implied obligations which were paternalistic in nature, legal analysis of it was often found in domestic relations law books rather than in contract law treatises (Kahn-Freund, 1977).

It has been observed that, at an early stage in the development of employment, English courts adopted a sophisticated legal approach to the termination of work relationships (Feinman, 1976). The manner in which the law evolved was influenced not merely by the interests of employees and employers, but, also, by social and economic considerations which included a desire to maintain a viable and active workforce for the benefit of the whole economy (Feinman, 1976). This is consistent with Pepper's (1999) view that lawmakers are fallible and sometimes develop laws based on factors which fall outside the scope of justice. In the nineteenth century, liberalist CCLT and its focus on transaction-oriented exchange came to dominate employment law (Bird, 2005-2006). Although writing about the emergence of the American ``at will`` termination concept, Bird (2005-2006) makes a point that is equally applicable to the development of the New Brunswick common law of employment:

> The neo-classical contract model … fails to account for the full complexities of the employment relationship. The model assumes fully informed parties with equal bargaining power engaging in a transactional relationship wholly described by the text of the contract. At least initially, contract law dismisses as irrelevant the parties` identities, transactionalizing the subject matter of the contract as much as possible. (Bird, 2005-2006: 163)

Collins (1986) argues that, by viewing employment as a "market transaction", the law has not properly understood the subordinate nature of an employee's relationship with his employer. As he observes, "The simple characterization of employment as a contract fails to grasp the nature of the social relations involved." An illustration of this reality lies in the awkward imposition of contract principles on the relationship between an employee and his manager, in spite of the fact that, normally, the employee and the manager have not made a contract with one another. As a further example, Collins (1986) points to the fact that, unlike a true contract scenario, an employee's deviation from his contractual obligations (or, at least, from his employer's bureaucratic rules) leads not to a liability for economic compensation but, instead, to punitive sanctions. Essentially, Collins (1986) posits that the law of employment should concern itself with the regulation of bureaucratic power, which is the foundation on which the employment relationship is built, and not with ill-fitted contract principles.

Like the master – servant relationship, the psychological contract concept is comparable to social exchange theory in that it is premised on "voluntary actions of individuals that are motivated by the returns that they are expected to bring and typically do bring from others" (Blau, 1964). Conversely, the master – servant and the psychological contract concepts are distinguishable from strict economic exchange theory due to their unspecified obligations which command reciprocal trust amongst the parties (Blau, 1964). The legal construct of employment changed, however, in the late eighteenth and early nineteenth centuries. Classical liberalism became the dominant social theory, and with it came an emphasis on individual rights as the highest standard of democratic society (Friedman, 1949).

Amongst the rights promoted by liberal legal theorists was 'freedom of contract' which, in the employment context, was premised on the notion that workers were free to contract with the employers of their choice and, further, could do so with the strength of equal bargaining power (Ball, 1998). The rise of liberalism roughly coincided with the onset of the Industrial Revolution, and business owners seeking to inexpensively mass produce consumer goods benefitted from the increased control that freedom of contract gave them over their obligations to workers (Atiyah, 1979). Unlike the master-servant relationship, which imposed paternalistic duties on masters, employment contract law provided the parties with an ability to dictate the terms of their relationships. The result was a paradigm of employment rights which heavily favoured employers (Atiyah, 1979). Even the application of common law implied contract terms by Victorian courts benefitted the powerful employer class. A clear example of this inequality lies in the fact that the courts did not burden employers with a reciprocal obligation to act in good faith toward their employees. As Ball (1998) observes, "It is not surprising that the dominant forces of society, from which common law judges were appointed, did not feel morally compelled to use the common law to protect the servant" (Ball, 1998:1-6). It has been this legal foundation, however, on which the System has been constructed and from which concepts regarding fair treatment of employees have been derived.

3.9 Reconsidering "traditional" law as a source of adequate resolution

As discussed in Chapter 2, the New Brunswick common law, as part of the larger Canadian common law system, has been both slow and reluctant in its recognition of employment relationships as anything more than simple contract-based transactions (Laskin, 1937). The classical (CCLT) theory that has influenced the development of employment contract law is focused on the provision of predictable outcomes that allow for termination of employment relationships quickly and in a manner that finalizes the outcome in the present. An alternative contract theory, RCLT, contemplates a more relational approach to employment dispute resolution, and that model has influenced the federal *CLC, Part III*. For some time, organizational psychologists have argued that most employment relationships are substantially different than the model contemplated by the law, and that employees expect, and are seeking, workplace dispute resolutions which are simply not available in the New Brunswick judicial process.

In New Brunswick and most other common law jurisdictions, legislation has been adopted as a means of bridging some of the gaps which exist between the provisions of the common law and the perceptions of modern workers. However, that legislation addresses particular situations only, and leaves many workplace disputes in the hands of the common law. Some examples of legislation discussed in Chapter 2 that has created distinct processes for particular kinds of workplace disputes include: the *Human Rights Act*, which addresses illegal employer discrimination based on 14 prohibited grounds including disability; the *Workers' Compensation Act*, which deals with employer obligations to maintain employment for workers who are injured on the job; the *Occupational Health & Safety* Act, which provides employees with a mechanism for complaining about unsafe working conditions and protection against employer retaliation or discrimination as a result of such complaints; and the *Employment Standards Act,* which offers employees an administrative law process for enforcement of statutory minimum entitlements such as minimum wage, minimum notice of dismissal and minimum vacation pay. Two important types of workplace disputes for which statutory protections are not offered are wrongful dismissals and constructive dismissals. These arise when an employer either unilaterally dismisses an employee or when an employer

unilaterally changes the terms of employment in a significant manner. All workplace disputes and Work Problems that are not covered by statutory protections are left to be addressed by the common law which, as stated in Chapter 2, has been influenced significantly by CCLT. If the System has any intention or desire to be relevant in the context of contemporary workplace relations, it will be necessary for its stakeholders (including lawyers and judges) to regularly observe and discuss the way employment law is practiced and applied.

Generally, the common law system that governs much of the day- to- day conduct in western life diverges in a number of instances from the expectations of those who rely on it. A good example of this departure can be seen in cases of alleged medical malpractice where a patient is injured in the course of medical treatment. In that scenario, the legal system discourages open and unregulated communication between the victim and the alleged tortfeasor. Since the law requires, in medical malpractice cases, that the patient prove the physician's negligence on a balance of probabilities, there is little incentive for the accused doctor to make any disclosures of information except those which are strictly required within the legal process. In fact, the strictures of the legal process typically make it advisable for defendants to be strategic and measured in their communications with anyone other than their lawyers, and lawyers are the representatives of the legal system whose role it is to convey that tactic of silence to litigants. What can be certain is that the law has not historically encouraged expressions of remorse or even concern by defendants, and, in that sense, the law falls far short of the public's expectations.

While the System prescribes an adversarial approach to disputes which is founded on accusations by one party and denials by the other, this approach appears to be inconsistent with what some litigants perceive as fair. The wrongful dismissal litigation process in New Brunswick is similar to other traditional court-based litigation processes in that it requires the advancement of a lawsuit by the claimant/victim, a statement of defence by the defendant, an exchange of relevant documents and processing of the claim through a formalized court system involving lawyers and rules of court. Research into legal claims made in contexts other than employment may thus be instructive to this study, particularly since there is very little known about why employees choose to file wrongful dismissal lawsuits (Lind et al.,

2000). However, the causes of legal claims made by patients against their physicians have been studied extensively. There are some apparent parallels between the doctor-patient and employer-employee relationships (for example, high levels of dependency and significant trust imputations). For that reason, the researcher has examined literature in respect of motives behind medical malpractice litigation to inform this study.

In a study of the fairness expectations of medical patients, it was determined that the overwhelming majority believed that even minor medical errors should be disclosed (Mazor et al., 2004). Even beyond disclosure, research demonstrates that a high percentage of patients expect pro-activity in response to medical errors, either in the form of an apology from the physician in question or actions to prevent the same mistake from occurring in the future (Mazor et al., 2004; Duclos et al., 2005). It has been found in the medical malpractice litigation context that medical patients seek the following hierarchy of responses to medical errors:

a) a clear statement that an error has occurred;

b) an explanation of the full details of the error;

c) a sincere apology;

d) reassurances that something is being done to make sure the error does not occur in the future;

e) financial compensation for injury, pain or suffering; and

f) accountability on the part of the physician. (Gallagher et al., 2003)

The litigation objectives of medical malpractice claimants may provide insights into the motives of employee litigants. If New Brunswick employees who make legal claims expect some or all of the outcomes sought by the medical malpractice patients referenced above, then the procedural tenets of the common law and, particularly, the New Brunswick System markedly departs from perceived fairness:

i. regarding a) above, the law places the onus on alleged victims of errors and wrongdoings to identify the same and to initiate claims;

ii. as for the expectation of an explanation of the error or wrongdoing [item b) above], the System requires the victim/claimant to elicit such information from the wrongdoer through sometimes complex and time-consuming procedural investigations;

iii. as discussed in Chapter 2, New Brunswick is one of only two Canadian jurisdictions that has not enacted apology legislation to require or encourage apologies;

iv. assurances of altered future conduct, or even proactive efforts toward the same, as intimated in item d), are virtually unachievable in most claims, except if obtained voluntarily through negotiation;

v. as for the financial compensation referenced in e) above, the legal system does offer this remedy. However, it is important to note that the compensatory relief made available to litigants frequently does not address, and is not intended to address, litigants' non-economic aims.

Additional shortcomings of the System have also been discussed in the context of the compensatory damages, which are a key aspect of civil litigation. For example, the enactment of legislation which "caps" awards of non-pecuniary compensation for pain and suffering in motor vehicle accident claims has illuminated questions of the utility and appropriateness of non-pecuniary damages compensation. The debate in respect of tort claims damages for non-pecuniary, intangible losses is canvassed by Shuman (2000), who states that:

> While the award of damages to compensate tangible out of pocket losses caused by another's tortious acts enjoys firm support in the case law and commentary, the award of tort damages to compensate for intangible harm such as grief, loss of consortium, and pain and suffering has been much criticized. (Shuman, 2000)

As Shuman (2000) notes, much less concern has been expressed regarding legal compensation for pecuniary, out of pocket expenses arising from a defendant's wrongdoing. This may be so primarily because pecuniary damages are calculable and concrete; however, the more widespread acceptance of pecuniary damages award may also be founded on the social construct of humans as economic beings whose value is closely linked to earnings

generation and material accumulation. Regardless of its cause, the fact is that non-pecuniary damages, which are designed to compensate victims for intangible losses and suffering that arise from another's wrongdoing, face criticism. Shuman (2000) observed opponents' rationale for criticizing non-pecuniary damages awards as follows:

> In a limited sense, damages for tangible loss undo the harm; damages for intangible loss cannot make a similar claim. Although the emotional pain that results from the loss of a child or spouse, for example, is undoubtedly horrific, it is difficult to understand how monetary damage that is paid by or on behalf of the party that caused the loss should be expected to salve that emotional pain. (Shuman, 2000)

In response, it has been argued that, if the law did not award damages for intangible losses, an "entitlement to injure" would arise. While this maybe so, Shuman (2000) has suggested that the position has missed the fundamental point, since the use of non-pecuniary damages to discourage wrongdoing renders it a deterrence concept, rather than a mechanism for compensation. The "substitute pleasure" principle has also been advanced by Ingber (1985) as a justification for non-pecuniary damages, suggesting that, while it is impossible to compensate intangible losses, it is possible (and reasonable) to provide the victim with the financial means to engage in alternate forms of enjoyment and fulfilment. As Shuman (2000) contends, however, the substitute pleasure principle "rests on a precarious moral and clinical foundation", since the suggestion that grave emotional losses can be somehow erased or healed with substitute activities and belongings only cheapens the loss. From a clinical perspective, it has been noted that grief therapists actually recommend confrontation of losses as a means of healing. The substitute pleasure principle may dilute that benefit by encouraging victims to distract themselves from the difficulty of coping with losses through substitute activities and material goods (Shuman, 2000). While the literature is not definitive on the utility of the law's remedy for intangible losses, Shuman's (1993) research supports the position that at least some litigants enter the legal process in search of remedies other than those promoted by the law. Shuman (1993) has argued that:

> None of the research examined in this article proves that tort recovery has a therapeutic or anti-therapeutic effect on plaintiffs. Hopefully, this examination will generate research directed towards this issue. The existing research does,

> however, strongly suggest that there are both potential restorative benefits and serious restorative disadvantages to fault-based compensation….
>
> To discuss the therapeutic potential of tort law and other compensation systems recalls what therapists already know: No single therapy is right for everyone. (Shuman, 1994-1995)

Experience and research demonstrate that compensation-focused dispute resolution mechanisms, like the System, do not respond to the factors that motivate some legal claims. In the medical malpractice field, non-compensatory initiatives including simple but sincere apologies reduce the likelihood of victims taking legal action (Kellett, 1987; Haley, 1986). Furthermore, and beyond the field of tort law, a study of the experiences of victims of sexual assault found that most claimants pursued their legal claims for therapeutic reasons, rather than for financial compensation (Des Rosiers et al., 1998).

There are other indications, as well, that litigants are often seeking dispute resolutions that do not fall within the law's bounds of financial compensation. For example, Goldberg et al. (1992) have studied the impact of apologies in dispute mediations, and have concluded that victims who receive apologies are often more willing to settle their claims than those who do not receive apologies. In one persuasive example, a legal claim had been made against the Catholic Diocese of Dallas for alleged failure to protect eleven boys from sexual abuse inflicted at the hands of a priest. While a jury awarded the plaintiffs $119.6 million in compensation, the victims eventually settled the case for less than 25 percent of their award ($23.4 million) when the Diocese also agreed to issue an apology (Blaney & Dooley,1998). Although more complex factors may have operated to bring about the settlement of the case (including the risk of a successful appeal by the Diocese), the addition of an apology to the resolution significantly reduced the amount of financial compensation required. Historically, the litigation arena has not fostered the expression of apologies. In fact, apologies have been discouraged in the legal system due to their potential use as evidence to prove the apologist's liability and, in some cases, even the voiding of his or her insurance policy (MacLeod, 2008).

In her study regarding the disassociation of lawyers' understandings of litigant motives to make legal claims from/and the claimants' actual motives for doing so, Relis (2007) illustrated that 41 percent of claimants did not even articulate financial compensation in the spectrum of potential outcomes they were seeking. These findings are consistent with Shuman's observations that the legal model of damages compensation, particularly in respect of non-pecuniary losses, does not easily align with the expectations of laypeople.

In the U.K. employment law context, dispute resolution processes that had become highly focused on procedural justice and distributive justice were found in many cases to be insufficient to achieve resolution (Gibbons, 2007). For decades, the U.K. has faced a challenge of providing efficient and effective dispute resolution mechanisms for employers and employees, recognizing that the volume of workplace disputes in that country has been significant. On that point, it was found in 2005 that 42 percent of survey respondents had experienced a problem at work during the previous 5 years (Gibbons, 2007). Gibbons (2007) found that employees and employers believed that the U.K.'s workplace dispute resolution system ought to have focused increased attention on the early resolution of workplace disputes, and he recommended reform of the Statutory Dispute Resolution Procedures adopted in 2004 (The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and the Rules of Procedure, hereinafter the "2004 Procedures"). The 2004 Procedures were meant to encourage early workplace dispute resolution efforts by employers and employees and particularly targeted the concerns of small workplaces (Harris et al., 2012). They prescribed a 3-step process for addressing employment discipline and grievances: first, an employer was required to formally notify an employee of concerns by putting workplace issues in writing; second, the employer had to facilitate a meeting with the employee regarding the issue; and third, if the employee was dissatisfied with the results of the meeting, an appeal could be advanced (The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and the Rules of Procedure). The 2004 Procedures were criticized for contributing to the complexity and formality of the U.K. employment dispute resolution system:

> Furthermore, the statutory procedures appeared to have encouraged further elevation of procedure over substance (Seguret, 2006), with employers placing

> a greater value on demonstrating compliance with procedures in the event of litigation rather than seeking out sensitive, flexible workplace solutions to resolve individual disputes that took account of the particular issues involved. (Harris et al., 2012: 611)

In response to public concerns about its employment dispute resolution system and, specifically, the complexity and time inefficiencies of the 2004 Procedures, the U.K. Government commissioned Gibbons to review its system and to "…identify options for simplifying and improving all aspects of employment dispute resolution, to make the system better for employers and employees while preserving existing employee rights" (Gibbons, 2007: 7). Gibbons concluded that the system had placed too great an emphasis on procedural formality and that this had contributed to an adversarial approach which focused employers and employees on legal outcomes (Gibbons, 2007). The result was that the system discouraged early, informal settlement of workplace issues using non-legal solutions such as "an apology or changes in behaviour" (Gibbons, 2007: 9; see also Harris et al., 2012). Gibbons (2007) observed that some claimants may prefer a demonstrated acknowledgement by the employer of its wrongdoing, such as an apology or an amendment to corporate policy, over a financial award (Gibbons, 2007: 34).

In his review, Gibbons (2007) made 17 recommendations, including:

1. Repeal the 2004 Procedures and replace them with "clear, simple, non-prescriptive" guidelines for addressing workplace disputes.

2. Give the employment tribunals jurisdiction to consider the reasonableness of the respective parties' behaviour when ordering outcomes and costs in order to encourage compliance with the new guidelines.

3. Encourage early dispute resolution through use of in-house mediation and contract terms.

4. Increase the quality of advice to employees and employers in order to foster better understandings of the realities of tribunal hearings and the benefits of alternative dispute resolution.

5. Offer a free early dispute resolution service.

6. Simplify employment law so that it creates less uncertainty and costs.

7. Unify the time limits on employment tribunal claims and the grounds for extension of those limits.

8. Encourage active case management by employment tribunals in order to maximise efficiency, consistency and user confidence. (Gibbons, 2007: 55-56)

The *Employment Act (EA) 2008* was enacted in April 2009 as a response to the Gibbons (2007) review. However, it has been argued that this new legislation does not introduce the extent of systemic change required, particularly in the use of alternative dispute resolution procedures by small and medium-sized businesses (Harris et al., 2012). Harris et al. (2012) conducted 6 case studies of small private-sector companies with 25-100 employees to explore what companies perceived as their needs in addressing workplace disputes. The companies studied operated in the manufacturing and service sector. Data were collected using semi-structured interviews of owners and managers of the companies as well as through focus groups consisting of other small business employers and stakeholders. The resulting data suggested that the majority of case study owner/managers felt that the legal environment favoured employees more than employers and that formal workplace discipline and grievance procedures were viewed as the most effective mechanisms for operating within the legal system. It was suggested by Harris et al. (2012) that, presently, small and medium-sized businesses in the U.K. will be inclined toward penalty avoidance through adherence to formal processes until such time as incentives are provided to encourage the use of alternative dispute resolution procedures.

The Gibbons (2007) review and discussions regarding it have focused on shortcomings in, and means of improving, the U.K. employment dispute resolution system. Similarly, in Chapter 2, limitations of the New Brunswick System have been reviewed. One of the significant challenges of the System is that, unlike the parallel *Canada Labour Code, Part III* that vests extensive remedial flexibility in its adjudicators, judges and tribunals that decide provincially-regulated, non-unionized employment cases in New Brunswick are significantly restricted in the nature and extent of remedies that can be applied to a typical, non-discriminatory Work Problem. The Gibbons (2007) review invites consideration of

systemic amendments that may improve the efficiency and outcomes of employment dispute resolution through the use of greater flexibility than the law has traditionally permitted.

While it seems indisputable that the law's fixation on financial compensation in the absence of other settlement measures is insufficient and generally unacceptable to litigants, the rules of evidence discourage the issuance of apologies and other forms of non-monetary dispute resolution (Shuman, 2000). Relis (2007) has demonstrated that admissions of fault, efforts to avoid future wrongdoing, information regarding the causation of wrongdoing, and apologies are all prominent objectives in the pursuit of legal claims, but, as noted previously, the legal System does not encourage (or even offer) these outcomes. Once again, this complete departure from the expectations of its constituents may have contributed to questions regarding the law's relevance.

The impact of the System's remedial shortcomings should not be underestimated. Research has suggested that the dispute outcomes that are made available by the law can shape the expectations of litigants so that individuals who initiated claims to pursue a non-compensatory result may become focused on the financial aspect that the law encourages them to consider (Relis, 2006). Markovits (2008) made the same point, quoting Trubek:

> Lawyers and the legal process support transformations in disputes that 'create ends so that clients come to want – or at least accept – what the system is prepared to deliver…The legal process, to put it bluntly, secures peace only by abandoning justice. (Markovits, 2008: 191)

A question to be examined in this study is: are employees who make legal claims are motivated to do so by a desire for money compensation, or are claimants' motives simply transformed to pursue what the law and their lawyers encourage them to pursue?

In spite of the fundamental significance of employee litigation motives to employment law, very little is known about the reasons why people choose to advance wrongful termination claims against their employers (Lind et al., 2000; Goldman et al., 2009). Further, the law is a nuanced field of study in which many employee claimants are not as well versed as they would prefer (Casebourne et al., 2006) to be. In their study, Casebourne et al. (2006)

found that employees may have a very comprehensive understanding of some employment rights and little understanding of others:

> Arguably, the need for a more detailed understanding comes at the point at which an individual's rights are under threat. Therefore, workers who are most vulnerable to exploitation at work have a greater need for this detailed level of knowledge. However, as we discuss below, it is such workers who are at greatest risk of having the low levels of knowledge of key employment rights. (Casebourne et al., 2006, pp.165-166)

It cannot be fairly asserted that employee claimants are actually attracted to the processes and remedies offered by the System. Casebourne et al. (2006) observed that the highest percentages of respondents to their study made their first inquiries in response to problems at work to find out: a) what procedures or steps they should follow next (47%); and b) what their legal rights were (45%). Only 17 percent sought information on achieving justice (Casebourne et al, 2006). What this data suggests is that employees who experience problems at work seek to find out what their legal rights are and that, in turn, suggests that the employees do not know or assume they know their rights when the Work Problems occur. It may be that some employee claimants do not contemplate litigation based on their perceptions of injustice in the "legal" sense at all, but, rather, on perceived "organizational" injustice. In that regard, Felstiner, Abel and Sarat (1980-1981) are amongst the legal theorists who have asserted that an individual's psychological perception of fairness in a dispute is critical in explaining litigiousness (see also Friedman, 1989). This issue is explored in this study as it relates to the motivations of employees who consider making legal claims.

An explanation for the challenges experienced in the U.K. with the 2004 Procedures is that they imposed inflexible processes. Felstiner, Abel and Sarat (1980-1981) argued that the objectives of disputing parties are influenced by a number of factors, including the mechanisms for resolution of their dispute (1980-1981). Regarding the effect of the court system on claims objectives, Felstiner et al. (1980-1981) have referenced an argument made by Aubert (1963) that underscores the CCLT – RCLT dichotomy discussed in Chapter 2:

> Because courts, for instance, often proceed by using a limited number of norms to evaluate an even more circumscribed universe of relevant facts, "the needs

> of the parties, their wishes for the future, cease to be relevant to the solution". (Aubert, 1963:33; Felstiner et al., 1980-1981:643)

Applying this rationale, the problem experienced in the U.K. of the formalization of workplace disputes under the 2004 Procedures may be explained by the system's direction of the parties' focus to the *process* of resolution versus substantive resolution. In a similar regard, it has been argued that lawyers and other dispute resolution professionals "…almost always produce [dispute] transformation: the essence of professional jobs is to define the needs of the consumer of professional services" (Felstiner et al., 1980-1981: 645). Lawyers control the course of a client's litigation (Rosenthal, 1974), and it has been suggested that they "…shape disputes to fit their own interests rather than those of their clients" (Felstiner et al., 1980-1981:645). Trubek (1980-1981) has written that dispute possibilities are frequently defined by lawyers, who encourage or discourage disputants based on economic interests as well as their own social relations and definitions of society.

The courts also have the capacity to transform disputes "…because the substantive norms they apply differ from rules of custom or ordinary morality, and their unique procedural norms may narrow issues and circumscribe evidence" (Felstiner et al., 1980-1981: 647). Because legal rules and principles impact the prospect of success in claims, they also affect lawyers' cost-benefit calculations and how lawyers perceive relationships and disputes (Trubek, 1980-1981).

These observations of the transformational influences of the legal system on original disputes underscore the question of the extent to which the law responds to Work Problems. In common law jurisdictions like New Brunswick and the U.K., there have been varieties of employment dispute resolution processes formulated and reformulated within CCLT-founded systems. In some of those processes, RCLT concepts have emerged, which raises another question, being whether or not either of the two theories is capable of independently supporting a truly relevant and responsive workplace dispute resolution scheme.

The CCLT – RCLT dichotomy suggests that two fundamentally distinct concepts of employment exist. One of these is defined by classical contract law principles and the other

by relational context. This can lead to confusion in the minds of employers and employees as to their respective rights and responsibilities. While legal systems throughout the western world regulate employment based on contract law principles which contemplate the relationship as being transactional in nature, organizational psychologists apply a completely different "psychological contract" paradigm which captures the expectations of employees based on their work and social experiences and the experiences of workers around them. Independent of the legal contract model of employment, the psychological contract construct offers an alternate perspective of what employment relationships are. Rousseau (1990) has defined the psychological contract as an employee's perception of the mutual obligations owed by the parties in an employment relationship.

Within the larger construct of psychological contract theory, innumerable understandings of employment expectations and obligations exist, making the concept difficult to generalize. As a result, five perspectives on the relationship have emerged from the academic world, all of which help to define, but none of which is independently definitive of, employment (Coyle-Shapiro et al., 2004). These competing theories, which are examined below, are: i) employment as a social exchange; ii) employment as an economic exchange; iii) employment as an organizational justice construct; iv) employment as an industrial relations exchange; and v) employment as a legal contract. Social exchange, organizational justice and industrial relations theories all bear similarities and, for the purpose of this analysis, will be considered together as an "organizational justice" conceptualization of employment. Conversely, economic exchange and legal contract theories share congruent views of the employment relationship and will be categorized as "legal justice" constructs in this thesis. By investigating these contrasting models, a better understanding of what employment actually "is" will be achieved. That understanding has to be the first step in the process of analyzing the questions of why employment disputes arise and how they are best resolved.

3.10 Potential non-legal remedies

The issue of potential non-legal remedies arises from a question posed by Lind: what is the motivation of employees to consider litigation against their employers? Is it the violation of a legal contract or the violation of a psychological contract, and, if the latter, does apology

legislation offer a worthwhile response? Regarding the intent of the study to identify the motives behind employee litigation, it has previously been concluded that emotional and behavioural responses to contract breaches may be reduced if the affected employees identify fair processes and treatment in the course of the breach (Rousseau, 1995). Since psychological contract considerations are influenced by all three aspects of organizational justice theory, however, and not solely the procedural justice sub-theory, much remains to be known about the interaction of the legal and organizational justice models with employee perceptions of their work relationship.

Nevertheless, the inability of the legal system to fully respond to their concerns in ways that employees find meaningful and satisfactory may unnecessarily prolong employment litigation and, at the same time, may deprive the employees of the sense of closure which they are seeking. As Genn's (1999) research demonstrates, at least some disgruntled employees who commence workplace litigation do so for the primary objective of obtaining an apology. By making the provision of an apology a "safe" option for employers, the New Brunswick legislature would give stakeholders in the workplace litigation system an additional tool to implement in the search for efficient resolutions.

3.11 Does the law encourage the provision of apologies to employee litigants?

As referenced in Chapter 2, the litigation process has historically discouraged the expression of apologies. In fact, apologies have been discouraged in the legal system due to their potential use as evidence to prove the apologist's liability and, in some cases, the voiding of his or her insurance policy (MacLeod, 2008). There are strong indications, however, that apologies can restore a victim's sense of justice and reduce the desire to make a legal claim (Brodsky et al., 2004; Shuman, 2000). For those reasons, a review of the availability of apologies in New Brunswick legal claims is warranted.

Except in limited circumstances (such as cases brought under human rights legislation or the *Canada Labour Code, Part III*), non-unionized employees in New Brunswick have very little prospect of obtaining an apology from their employers, despite the existence of literature demonstrating that apologies are sought in a startlingly higher number of workplace

cases than in most other types of disputes. In fact, a provincially-regulated and non-unionized employee who has not been the subject of human rights discrimination will likely have no legal access to the very remedy that he or she may want the most. In that regard, the legal contract model of employment seems to fail, particularly when it is enforced in the climate of traditional evidentiary rules such as those which remain in force in New Brunswick. Litigants and potential litigants who are under those rules are discouraged from making any comments which could later be characterized as admissions against interest, and hence workplace dispute-related communications from employers to employees are typically devoid of the kinds of information and sentiments that employees are seeking for resolution. Apology legislation seeks to facilitate these communications.

The question to be asked is whether employers and employees are seeking traditional legal resolutions to their disputes or, instead, efficient, effective and acceptable resolutions. In some cases, the existing New Brunswick legal model may be the appropriate response to a workplace problem, in spite of the fact that the remedies it offers are sometimes limited. Without question, some employment relationships are either initiated or evolved in a transactional manner to which the common law perspective is well-suited. In those cases, employees who contemplate or initiate litigation against their employers are more likely to focus on pecuniary relief, and hence the remedial limitations of the existing legal model are less noticeable. However, the existing academic literature confirms that many employment exchanges are relational in nature, and hence employees who feel aggrieved within those relationships are more likely to seek resolutions which cannot be achieved within the New Brunswick common law model. In those cases, employees may choose to access the courts because no other option is available to them.

3.12 Alternative dispute resolution options

How effective is the New Brunswick legal System as a workplace dispute resolution construct? That question invites examination of the extent to which society perceives law as a viable mechanism for settling disputes. In addition, the effectiveness of the System is dependent on the actual capacity of the law to provide responses and remedies that claimants are seeking. Regarding the first issue, it would appear that society has mixed views. The second inquiry is not dependent on how the law is perceived but, instead, on its objective responsiveness to the desired outcomes of disputants. A very strong argument exists to the effect that the law as it currently exists in New Brunswick does not adequately respond, or does not respond at all, to a number of pressing concerns which motivate employee litigation. On one hand, it could be argued that this shortcoming is of no substantive concern if the law is perceived as an end and not as a means to an end. On the other hand, if the law is intended to bring about not merely a simple outcome to a dispute but, instead, a resolution which offers the prospect of meaning and substance to aggrieved employees as well as an encouragement of relevant outcomes for parties to employment relationships that will help to positively shape and maintain work exchanges in the future, then further exploration is required.

The adoption of alternative dispute resolution processes such as collaborative law has been encouraged by lawyers and even jurists for some time. In 1976, for example, the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association co-sponsored a symposium called the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. At that conference, it was recommended by both Justice Warren Burger and Frank Sander that more than simple "tinkering" with the legal system was needed in order to provide better justice to the public. Instead, it was recommended that a complete overhaul of the way that justice was administered be undertaken, with a view to implementing new mechanisms for dispute resolution that would focus on mediation and negotiation (Shields et al., 2003). Some of the alternative dispute resolution processes that have evolved in the years following that American discussion of justice models are considered below.

3.12.1 Therapeutic justice

One means of injecting human emotion and personal connection into legal processes is through creative problem solving and therapeutic jurisprudence (Dauer, 2005). Therapeutic jurisprudence is an interdisciplinary field which marries the law and social sciences for the purpose of analysing the role of law as a therapeutic agent (Daicoff and Wexler, 2003).

Therapeutic jurisprudence research demonstrates that lawyers have a tendency to fixate on economic "legal" resolutions to disputes while underestimating the value of psychological factors, such as a sincere apology or a demonstration of remorse (Daicoff and Wexler, 2003). Interestingly, therapeutic jurisprudence recognizes the procedural justice observation that litigants derive satisfaction from opportunities to participate fully in decision making processes (Tyler, 1992). Essentially, Tyler (1992) found that participant satisfaction in litigation depended less on outcomes than it did on having an opportunity to be heard, being treated with respect and dignity, and perceiving the authority figures in the process as trustworthy. For these reasons, the practice of therapeutic jurisprudence, with its emphasis on procedural justice factors, would likely enhance the experience of work-related litigants in court processes.

One of the difficulties in making the legal process a more interpersonal exercise lies in the fact that many lawyers appear to have a low interest in interpersonal and emotional concerns as children (Daicoff and Wexler, 2003). In fact, it has been demonstrated that many lawyers and law students prefer decision-making styles that emphasize right-based rational and logical analysis over emotional and relational concern (Daicoff, 1997).

Barton speaks of the paradigmatic problem-solving style of psychology as "accommodation", versus the problem-solving style of law as "judging". In the accommodation style, "norms provide guidance toward appropriate problem resolutions, [but] orderly predictability is far less important as a criterion of success" (Barton, 1999). The accommodation approach uses emotional well-being and the preservation of human relationships as instruments for achieving resolutions and measurements of the success of

those resolutions. On the other hand, judging is a problem-solving style which seeks order through the use of normative expectations. Judging does not rely upon emotion or relational considerations in the assessment of normative violations or, for that matter, in the reassertion of norms through invocation of power (Barton, 1999). It is recognized that the accommodation style is not suitable for, and cannot be superimposed upon, every legal problem. However, Barton (1999) posits that the use of the accommodation style in the legal context has been examined in therapeutic jurisprudence research, with promising results. He recommends that stakeholders in the legal system should facilitate understanding by providing information about legal rules and potential decisions to problem holders. As Winick (1997) has suggested, "what judges and lawyers say to the consumers of law may have a significant impact on their appreciation of requirements and may help people adapt to them in ways that have positive effects on their health and mental health" (Winick, 1997).

Barton also suggests that lawyers should facilitate "cognitive restructuring" for litigants by bluntly discussing the facts of their cases so as to encourage acceptance of responsibility where appropriate, and to reduce recidivism. Further, lawyers should, wherever possible, provide their clients with choice and responsibility; by providing clients with active input into the final resolution of their litigation, lawyers will facilitate a higher sense of commitment and compliance with that resolution (Barton, 1999).

3.12.2 Collaborative law

This method of dispute resolution was introduced in Chapter 2. It incorporates elements of therapeutic justice in that it offers:

i. a potential for a high degree of procedural justice derived from significant participant control over and involvement in the resolution process and terms; and

ii. flexibility in the formulation of remedies that are not limited by traditional legal principles and doctrines.

Collaborative law is the product of recognition amongst some family lawyers that the courts are often not able to offer appropriate resolutions to disputes that arise from emotional

relationships. Lawyers became frustrated and weary of traditional court processes that were not effective in achieving the outcomes that clients wanted and that often contributed to animosity between the litigants rather than helping to resolve it (Shields et al., 2003). According to Shields et al., collaborative lawyers undergo a paradigm shift from positional bargaining and adjudication to interest-based negotiation and resolution:

> It requires a radical change in our assumptions about the nature of conflict, the capacity of individuals to resolve their differences, our perception of our role as lawyers and our relationship with our clients, how we measure our success and how we deliver the services we provide. (2003: 33)

Macfarlane has suggested that North American legal systems are rights-based processes that turn every dispute into a question of right versus wrong, so that litigants can achieve only one of two outcomes: winning or losing (Macfarlane, 2008). As Macfarlane notes, "…many disputes are brought to lawyers that simply do not require, and are not suitable for, a rights-based argument or solution…" (Macfarlane, 2008:53). While family law has already been identified in New Brunswick and other jurisdictions as a category of disputes that is often not suitable to rights-based negotiation, it may well be that Work Problems are also inappropriate for that type of resolution.

Collaborative law offers a relatively simple opportunity for reform of the System, since it is already being utilized in New Brunswick as a family dispute resolution mechanism. The broader implementation of collaborative law into the System could be accomplished quite easily by injecting it into the existing litigation System as a step that would precede the formal adversarial processes.

3.13 Conclusion

In the final analysis, the challenge for all of the stakeholders in the New Brunswick employment law System is to find ways to increase the relevance of the law as a viable dispute resolution mechanism. Currently, the processes and remedies prescribed by the law do not correlate with the established knowledge of claimant aims and expectations. Since the alternatives to legal dispute resolution in the New Brunswick employment context are limited,

it may be that employees who advance legal claims against their employers do so because there is nowhere else to turn. The fact that resort to law occurs, however, should not be interpreted as an endorsement of the System's relevance and effectiveness in the resolution of disputes. In fact, since the law does not even offer claimants the kinds of remedies that they primarily seek, it might well be the case that employers, employees, lawyers and judges currently make significant expenditures of time, emotional commitment and money in the pursuit of somewhat hollow outcomes which are, at best, partial resolutions. What can be taken from psychological contract and organizational justice literature is that employees' perceptions of workplace fairness are often influenced by or based solely on non-legal concepts and expectations. As has been reviewed in this study, however, the remedies offered in the New Brunswick System are quite limited in scope and very traditional in nature. This study is intended to identify common motives of New Brunswick employees who contemplate legal claims, to consider the responsiveness of the System to those motives and, finally, to examine potential systemic amendments that would facilitate more efficient responses to employee claims.

CHAPTER 4: METHODOLOGY

4.0 Introduction

Chapter 3 advances a review of the literature which explores the motivations behind workplace litigation and other forms of legal claims, as well as the available remedies under the traditional legal framework and alternate forms of dispute resolution. The literature review demonstrates an apparent misalignment of the motives that cause employees to contemplate legal claims and the remedies offered by the New Brunswick legal System. In this chapter, the methodology is presented for examination of the considerations that cause New Brunswick employees to pursue workplace legal claims and their perceptions of the legal System's responsiveness.

The methodology review is comprised of three units. The first section outlines the philosophical foundations of the research. The second part addresses the research strategy. Finally, the review turns to the process of conducting the research, outlining the challenges arising from the nature of the research questions and the efforts made to overcome these. Further, the process of data analysis is also reviewed.

4.1 Research questions

The literature review identified the following research questions:

i) what motivates New Brunswick employees to pursue or not to pursue legal action against their employers?

ii) what do New Brunswick employers perceive as the motivations of their employees to pursue or not to pursue legal action against them?

An examination of potential research philosophies and approaches has been considered.

4.2 The social sciences objective

The social sciences, or the "study of man", were initiated by Compte (Hughes, 1976). A fundamental objective of social sciences is to study human behaviour from a scientific perspective to ultimately predict and control future events (Ryan, 1981). However, within the realm of social sciences there are two main research philosophies: positivism and phenomenology (Easterby-Smith et al., 1991).

Positivism is founded on the premises that reality is external and objective, and that social interaction can be measured using objective methods (Easterby-Smith et al, 1991; Burrell and Morgan, 1979). Key generally accepted understandings of the positivist research philosophy are: observer independence; value-freedom, such that decisions as to the subject matter and approach to study are objectively determined; causality, explaining predictable human behavioural responses; hypothetico-deductive, using deductive reasoning to identify observations that will confirm or disprove hypotheses; operationalism, which allows for facts to be measured quantitatively; reductionism, or reducing issues to their most basic elements; generalization, which requires research samples of sufficient size to make broadly applied inferences; and cross-sectional analysis, which proposes that generalizations are best identified by making comparisons across samples (Easterby-Smith et al., 1991). While not all positivist researchers subscribe to each one of these proposed characteristics of positivism, the characteristics themselves generally identify the positivist perspective (Easterby-Smith et al., 1991).

In contrast to the positivist philosophy is phenomenology, which is a mid-twentieth century response to the objectivist approach of positivism. Phenomenology advances the perspective that reality is a social construction and is subjectively based on the experiences and observations of individuals (Husserl, 1946). Within this philosophy, the researcher focuses on understanding the meanings that people place on their experiences. Rather than attempting to identify the external causes of human behaviour, as positivists do, phenomenologists seek to understand and explain why people have particular experiences (Easterby-Smith et al., 1991). A foundational philosophical principle of phenomenology is

that humans have a free will and are inherently capable of generating knowledge. As such, social reality can only be understood from individual experiences (Burrell and Morgan, 1979). This key distinction between positivism and phenomenology lies in the differing perceptions of what constitutes reality. Since positivists draw a distinction between external experience and internal perception which phenomenologists reject, the two philosophies explain human experiences in completely different ways (Pate, 2001). Nevertheless, it has been argued that the distinction between these paradigms is being softened by the 'rediscovery of rhetoric' (Coffey and Atkinson, 1996). This premise supposes that scientific assumptions may be challenged on the notion that findings in science have rhetorical qualities (Pate, 2001 and Coffey and Atkinson, 1996). It has also been suggested that technological advancements have allowed for a 'methodological revolution' to occur which has reduced the chasm between the positivist and phenomenological epistemologies (Richard and Richard, 1991).

Pate (2001) observes that, while the distinction between positivism and phenomenology may not be as pronounced today as it once was, an alternative approach to a study of human behaviour involves focusing less on that differentiation and more on the research problem itself. This pragmatist philosophy permits "a messy interaction between the conceptual and empirical world" in an effort to simply answer the research question rather than establish laws of human behaviour (Bryman and Burgess, 1994; Pate, 2001). Table 4.2 illustrates some of the key differences between positivist and constructivist/phenomenologist approaches to research.

Table 4.2 Comparing Positivism and Constructivism / Phenomenology

	Positivism	**Constructivism/Phenomen-ology**
Ontology – assessing reality	Reality is objective, singular and external	Reality is subjective, derived from social construction and not singular
Epistemology: the relationship of the individual being studied to the known subject matter	The researcher is independent from the knowledge being sought, and that knowledge is derived from positivists ontology	The researcher and the knowledge being sought are related and, in fact, inseparable
Axiology: the role of values and inquiry	The research is determined by objective criteria, and is value-free	The research is based on subjective criteria and is value-dependent
Generalization	Generalizations obtained through statistical probability are not contextual and are widely representative	Non-contextual generalizations to populations are not possible; generalization in respect of theory is, however, possible
Causality	There is a causal relationship between variables	Causes and effects are indistinguishable
Deductive / Inductive Logic	Deductive argument, from the general to the particular based on a hypothesis	Construction of theory based on research findings
Concepts	Operationalized in a manner that enables quantitative measurement of facts	Use of multiple methods to demonstrate a variety of perspectives
Units of Analysis	Reduction to simplest terms	Takes into account the complexities of the entire subject matter

(Neuman, 1997; Tashakkori and Teddlie, 1998; Bryman, 2004; and Al-Kilani 2007)

4.3 Generating and testing theory

Several categories of social research theory, or explanation of observed regularities, exist (Bryman, 2004). Two opposite approaches are the deductive and inductive theories. In the deductive theoretical approach, the researcher deduces a hypothesis which is then studied empirically. The researcher must first deduce the hypothesis and, then, distill from it operational terms that dictate how data will be collected to assess the validity of the initial

hypothesis (Bryman, 2004). In essence, the theory deduced by the researcher suggests the evidence that will be accumulated in the study (Neuman, 1997). An alternative theoretical approach, however, is that of inductive theory. Unlike the deductive approach, an inductive approach is commenced with detailed observations which lead to more abstract generalizations (Neuman, 1997). The research is often commenced with only a topic and, through observation, empirical generalizations emerge, such that the theory of the research is derived (Neuman, 1997).

The research approach relates to the stages of the study and manner in which the researcher focuses on the literature and data, respectively (Punch, 2005). The choice of the most appropriate research approach is made based on the researcher's ability to identify a clear theory at the outset of the study (Saunders et al., 2007). This, in turn, depends upon the aims of the research, the existing knowledge regarding the research problem and the extent of the researcher's knowledge at the commencement of the study (Punch, 2005). When the researcher commences a study with the formulation of a theory, this amounts to a choice of deductive logic over inductive logic. Conversely, an inductive approach requires an open consideration of data that leads to the formulation of theory (Easterby-Smith et al., 1991). In essence, the decision between deductive and inductive approaches is also a choice between positivists and constructivist approaches, respectively (Easterby-Smith et al., 1991). Use of the inductive approach involves the formulation of a theory constructed on data collected in respect of the same event which has occurred in different circumstances. (Easterby-Smith et al., 1991).

In this study, a predominantly inductive approach founded on a phenomenological philosophy has been adopted. The research area, employment law, is one in which the researcher has worked for nearly 20 years as an employment lawyer. A further explanation of why this approach has been taken is found in section 4.4.

4.4 The research strategy

A significant and recurring issue in this research has been the researcher's attraction to the offerings of both quantitative and qualitative methodologies. Quantitative research facilitates the pursuit of explanations of the relationship between objects and events and, ultimately, the formulation of laws which allow for prediction of future events and outcomes (Smith, 1983). The laws that quantitative research seeks to illuminate are intended to be universally applicable in order to support prediction of future outcomes. Conversely, the qualitative approach rejects the notion that laws concerning human behaviour are even discernible in the same manner that they are in the physical sciences (Smith, 1983). Instead, a focus of qualitative research is *verstehen* which, simply explained, is an understanding of the meaning that individuals attach to their experiences through an analysis of their beliefs, words and conduct. Rather than seeking to predict future outcomes, qualitative researchers pursue understandings of "why" particular social interactions occur in the ways they do.

Qualitative examination of human activity demands consideration of the context in which the activity occurs and, in turn, an understanding of the activity itself (Neuman, 1997). The objective of the analysis is an interpretative understanding of the behaviour in question which is then expressed contextually rather than neutrally (Smith, 1983). Given that subjective employee understandings of the New Brunswick legal framework relating to employment law, and their reasons for accessing the same, are central to the generation of a theory concerning the relevance of that system to employee expectations, it was determined that a primarily qualitative methodology was most appropriate for this study. In the same way that qualitative methods have been utilized by feminist researchers in psychology due to their sensitivity to women's perceptions of their own experiences (Duelli Klein, 1983; Griffin, 1986), a qualitative approach was thought to be the best means of exploration in this research.

The adoption of a qualitative / phenomenological approach is appropriate in this study because employment relationships in New Brunswick are formulated in a variety of ways and are regulated by more than one statutory scheme. Consequently, the contexts from which employees approach work problems are not always the same, and this reality in itself has

made contextual interpretation and analysis important. Additionally, this study was intended to examine the responses of employees who encountered work problems in natural rather than contrived circumstances, and it was undertaken without an hypothesis. Another important consideration has been the researcher's understanding of and involvement in New Brunswick employment law dispute resolution as a practicing lawyer, experience which has afforded an element of contextual insight which would be practically impossible to separate from the research itself. The extent to which the researcher has been immersed in the subject matter of the study is not only more consistent with a qualitative methodological approach, it also gives rise to a concern of bias and subjectivity which is inconsistent with a purely quantitative analysis, and which is more appropriately addressed in a qualitative framework (Neuman, 1997).

In the context of that work, the researcher has been immersed in the New Brunswick workplace law System and subject matter for two decades. During that period, the researcher has observed that:

i) New Brunswick employees who made legal claims and employers themselves, often expressed frustration with the applicable legal processes prescribed by legislation and by the courts and, as well, frustration with potential and actual outcomes of employment-related legal claims. The researcher observed that a significant number of employee claimants were surprised by the limited remedies available to them under the law, while numerous employers were equally surprised and disappointed by what they perceived as more expansive than appropriate potential remedies for employee claimants. Both employees and employers frequently expressed concern to the researcher about the manner in which employment legal disputes were processed, including concerns regarding lengthy procedural delays and, in some cases, concern regarding the permitted scope of inquiry into their disputes. On this latter point, some employees were frustrated by the manners in which the New Brunswick law permits employment disputes to be characterized, and the restrictions and limitations regarding evidence adduced in respect of the personal impact of employment disputes including, for example, the impacts of work-related stress and anxiety; and

ii) the researcher also noted, from his ongoing participation in employment-related court hearings and his review of court and tribunal decisions in the employment context, that courts and tribunals appeared themselves to be uncomfortable with some of the restrictive aspects of the law. Against this context which raised a question as to whether or not the law actually provided the types of remedies that employee claimants were seeking when they advanced their claims, and when a preliminary review of organizational justice literature was conducted. This initial literature review suggested that, generally, workers expect and seek more subjective applications of fairness in response to the problems giving rise to their legal claims than the financial compensation-based remedies which are central to the legal justice model.

The existence of multiple methods of research has led to the accepted practice of mixed method evaluation designs in social research (Greene, Caracelli and Graham, 1989). A frequently stated purpose of mixed methods analysis is triangulation, but it is worth noting that other valid reasons exist for adoption of this approach (Mathison, 1988). Triangulation is premised on the recognition that all methods have inherent biases and limitations, and that the use of two or more methods offers an opportunity to mitigate against the weaknesses of a single method (Greene, Caracelli and Graham, 1989). In addition to this approach, other multiple methods approaches are available, including:

i) multiplism, which contemplates use of several methods when it is unclear as to which of several approaches is most appropriate. As Cook states, "Multiplism aims to foster truth by establishing correspondences across many different, but conceptually related, ways of posing a question…" (1985, pp. 38 and 46); and

ii) mixing methods and paradigms, which is an approach that contemplates mixed method designs to investigate multiple paradigms. The purpose of this approach is to enhance understanding of a problem by exploring convergences in data obtained from alternate paradigms (Greene, Caracelli and Graham, 1989). In this study, data has been required from a variety of sources and at several stages and, for that reason a mixed methods approach has been adopted. The following section explains the details of the methods used in the study.

4.5 Methods and sampling

The field research conducted in this study was intended for the collection of data in response to these issues. That collection has posed a number of challenges, given that it was an inductive process which depended upon the subjective perceptions and experiences of New Brunswick employees in relation to the System. Further, the study sought information regarding employee reactions and responses to precise legal concepts and procedures. Consequently, it was necessary to adopt an epistemological stance founded on the contextual understandings of experiences which led employees to contemplate resort to the System. Recognition and minimization of the following research challenges was deemed to be very important:

a) *Collection of data in an identifiable legal context: resolving jurisdictional confusion*. In New Brunswick, employees are subject to either federal laws or provincial laws, depending upon the nature of the industry in which they work. Since the federal employment law system is distinct from the provincial system, and since it entails different processes and remedies, the experiences and perceptions of federally-regulated New Brunswick employees are not relevant to this study of employees who fall under the New Brunswick legal regime. Consequently, it has been necessary to filter federally-regulated employees out of the data collection process.

Similarly, unionized employees in New Brunswick have access to statutory and arbitral remedies that are distinct from those available to non-unionized New Brunswick employees. Therefore, it was also necessary to avoid consideration of unionized employees in the study;

b) *Collection of data in an identifiable legal context: maximizing chronological context.* Even after filtering the study sample to separate federally-regulated and unionized employees from the primary unit of analysis, it was important to ensure that the data collected in the study was contextually consistent in respect of the legal system which it considered.

Since provincial employment law statutes and the common law have been, and continue to be, susceptible to amendments, it was important to collect data which contemplated a specific period of time, so that it could be related to clearly identifiable legal principles; and

c) *Collection of data in an identifiable legal context: capturing relevant employee perceptions.* The fluidity of the relevant research population was a matter of concern, as well. What individual employees perceived as a Work Problem at a particular point in time could change due to any number of developments in their relationship with the employer and, hence, the population of employees experiencing Work Problems is never static.

The methods applied in this research offer an opportunity to explore the views and perspectives of New Brunswick employees in their own terms and from their own points of view (Berkowitz, 1996). Because this is so, a qualitative approach has considered to be the most effective means by which to examine not only the context in which individuals attribute meanings to their experiences but, also, the implications of those experiences in their personal lives (Rice and Ezzy, 1999). Additionally, qualitative methods have been identified as being particularly adept in the exploration of the perspectives of individuals with specific needs (Berkowitz, 1996), as is the case of employees requiring resolutions to Work Problems.

A number of research methods are available in qualitative research for the gathering of data (Ibert et al., 2001). The research strategy in this case employs several different methods of data collection and analysis, leading to a mixed methods approach. Mixed methods research has been described as a paradigm which assists in bridging the existing gap between quantitative and qualitative research (Onwuegbuzie and Leech, 2004 a). Abrahamson (1983) observed that the use of multiple methods of data collection and analysis prevents research from becoming "method-bound". Since every method has flaws, the use of several methods in one study can have the effect of counter-balancing the strengths and weaknesses of each.

The use of multiple methods has been known as triangulation (Easterby-Smith, et al, 1991). While there are several categories of triangulation, the approach in this study is one of methodological triangulation, in that quantitative and qualitative methods of data collection

have been utilized. In the quantitative context, the employee and Lawyer Questionnaires have provided a quantitative foundation for the subsequent qualitative analysis conducted via the employee and employer in depth interviews. The objective in this triangulated approach has been to collect data through several different approaches, so that stronger evidence of conclusions may be achieved through convergence and corroboration of findings. Further, it was recognized that the nature of the research questions are such that many individuals would be reluctant to answer them openly, and, consequently, a mixed methods approach provides for more confidence in the data collected.

4.6 The units of analysis: Lawyers, Employees and Employers

The nature of the units of analysis was such that three distinct sampling strategies were deemed appropriate. The units of analysis sought to be examined, after all of the considerations referenced above, were defined as: (1) New Brunswick employees who were provincially-regulated and non-unionized and who had experienced a Work Problem in respect of which they contemplated legal action (the "Employees"); (2) New Brunswick employers who had been the subjects of contemplated legal claims by their employees (the "Employers"); and (3) New Brunswick lawyers who were members of the Canadian Bar Association's Labour & Employment Section in November and December 2005 (the "Lawyers"). It was determined that, by limiting the study populations in that way, the research results could be made more precise and, therefore, more meaningful.

4.7 Procedures for data collection

The field work data is categorized as follows:

i) Employee survey data collected via electronic questionnaires from two hundred and four Employees who met the research criteria (the "Employee Questionnaire"), and who were identified through implementation of a snowball sampling approach. Data was collected from the Lawyers using an electronic questionnaire, as well (the "Lawyer

Questionnaire"). The Employee survey data were compared with the Lawyer Questionnaire results but, additionally, to enrich the design and conduct of the In-Depth Interviews;

ii) Semi-structured In-Depth Interviews were conducted with nine participants in the Employee Questionnaire sample, chosen in a manner intended to maximize the heterogeneity of the interview sub-sample by selecting participants who represent categories of identifying characteristics such as age, employment industry and educational background;

iii) Semi-structured In-Depth Interviews were conducted with nine employer participants, chosen in a manner intended to cover a broad spectrum of industries and workforce sizes; and

iv) Lawyer Questionnaire data collected via electronic questionnaires from forty-eight New Brunswick Lawyers who, during a defined timeframe, represented employees and employers in work-related legal claims. This information was seen as important for the purposes of informing the design of the Employee Questionnaire and, also, comparing the perceptions and observations of the lawyers in respect of employee litigation motives to the data collected from the Employee Questionnaire and interview samples.

The non-response rate in the Lawyer Questionnaire raises questions as to its generalizability. Researchers have, in the past, viewed response rates of less than fifty percent to be poor (Neuman, 1997), and low response increases the risk of sample-related error (Bryman, 2004). In this study, however, two considerations contextualize the low response rate. First, the Lawyers faced limitations imposed by professional confidentiality obligations. Since privacy has been an impediment to the conduct of survey research even in the general population (Sudman and Bradburn, 1983:11; Neuman, p. 247; Bryman, p. 105), it is completely understandable that some Lawyers did not wish to participate in the Lawyer Questionnaire. Secondly, it must be understood that the researcher frequently encountered, and continues to encounter, many of the Lawyers in the course of representing clients against their clients, and some Lawyers may have been suspicious of the use to which the Survey data would be put.

Another mitigating consideration in respect of the non-response rate was that, unlike most Surveys, the Lawyer Questionnaire was used in a census and, therefore, began as a more accurate examination than even a probability sample.

The Lawyer population in this study was not easily examined, given the private and confidential nature of its work and, also, its likely concerns regarding the impact the research could have on particular clients. Nevertheless, the response rate achieved in the Lawyer Questionnaire was sufficient to provide a cross-section of responses from legal professionals who were able to answer the questionnaire from a variety of perspectives. Coupled with the In-Depth Interviews, the results of the Lawyer Questionnaire provide a unique view into the very heart of New Brunswick employment-related legal claims.

4.8 The Lawyers

In essence, this study has arisen out of the researcher's observations and experiences over almost two decades as a practicing employment lawyer in New Brunswick. In the course of his practice, the researcher has noted that many employee claimants have a) demonstrated a very limited understanding of their legal rights and entitlements; and b) expressed interest in and preferences for non-compensatory remedies and outcomes which are not available to them under the law. At the same time, the researcher encountered numerous employers who, when faced with employee legal claims, attributed to the claimants a high compensatory motive.

The compensatory motive which some employers attributed to employee claimants is, in fact, consistent with the legal model available for employment dispute resolution in New Brunswick, so it was unsurprising that employers sometimes viewed the basis for employee legal claims as being financial in nature. In order to determine if the researcher's observations were not anomalous, however, it was decided that other New Brunswick employment lawyers would be questioned about their experiences. A survey of New Brunswick's employment lawyers was conducted in 2005 in order to assess their opinions of

employee and employer perceptions of the motives behind employee legal claims, based on their communications with clients. The survey questionnaire focused on two major themes: first, the assessment of the respondent lawyers as to what motivated employees to take legal action against employers and, conversely, what employers perceived to be the motives of such employees; and, second, the respondents' assessment of employee access to the legal system, leading, ultimately to the fairness of that system. In that latter regard, a very broad and general inquiry was intentionally made, with the goal of obtaining greater depth of data. The questionnaire is reproduced at Appendix A.

In New Brunswick, lawyers are permitted to practice in a number of subject areas. However, all lawyers are required to be members of the Canadian Bar Association which, in turn, provides subject "sections" for its membership. In November and December 2005, when the Lawyer Questionnaire was conducted, there were one hundred and eight members of the Canadian Bar Association (the "CBA") - New Brunswick "labour and employment section", and all of these members were forwarded the Lawyer Questionnaire.

Since membership in the CBA is mandatory for all New Brunswick lawyers, the unit of analysis in respect of the Lawyer Questionnaire was easily defined and accessed by contacting all lawyers who had joined the Labour & Employment Section. Because the lawyer population being studied was much less fluid and much more accessible than the employee population, a probability-based sample was obtained. In 2005, there were one-hundred and eight (108) practicing lawyers who self-selected themselves as employment lawyers by voluntarily joining the Labour & Employment Section of the CBA. Forty-eight (48) of those members responded to the survey, or forty-four (44%) percent.

How the survey respondents perceived employee claim motivations, and what they observed as the views of employers on the same subject, was measured using a Likert scale. It is acknowledged that a qualitative sacrifice was made in the use of the Likert scaling format (as predetermined responses were offered to the respondents), but the benefit of increased certainty in the definition of concepts was gained. The respondents were asked to rank particular employee motivations according to the magnitude of their impacts.

The lawyers who were invited to participate in the survey are all members of the Law Society of New Brunswick and the CBA. New Brunswick is unique as Canada's only officially bilingual province, and it offers access to its legal system in both French and English. Additionally and more so than some other jurisdictions, New Brunswick boasts a small but tremendously varied workforce, with employees working in a broad range of industries from agriculture, fishing, forestry and mining to telecommunications and software design. Since Canada's constitutional structure allows for the application of distinct employment-related laws to particular types of industry, the New Brunswick workforce is well positioned to represent employment relationships which are governed by the full range of legislative schemes. For the purposes of this study, however, the questionnaire responses were focused on "potential and actual legal claims considered by non-unionized, provincially-regulated employees" in respect of which the respondent lawyers had been consulted (by either employees or employers) during "the past 12 months" (the "Claims"). Limiting the timeframe under consideration allowed for confirmation of the context being considered by the Lawyer respondents. Since the common law and the legislation applicable to New Brunswick employment law disputes has changed periodically, it was deemed prudent to identify the circumstances being considered by the Lawyers in their survey responses.

4.9 The Lawyer Questionnaire

The Lawyer Questionnaire was distributed and completed between November 22nd and December 29th, 2005. It was distributed electronically to all members of the Canadian Bar Association's Labour & Employment Section in New Brunswick, who were accessed through the Canadian Bar Association's administrative office. Permission from the CBA had to be obtained before its members could be accessed.

In the survey, the Lawyers were asked to categorize themselves by years of experience in Employment practice and by the percentage of time spent representing employers and employees. In that way, assessments could be made as to the influences of their frames of

reference on the data collected. The Lawyer Questionnaire, with results summarized, appears in Appendix A.

The methodology employed in respect of the Lawyer Questionnaire is quantitative in nature, as the population being studied is more contusive to that type of analysis. Unlike the unit of analysis for Employees, the lawyers of interest in the study were identifiable (New Brunswick lawyers who practiced employment law during a defined time period) and, given the nature of the Lawyers' work, it was perceived as a challenge to have them provide qualitative, open-ended data. Given the ethical restrictions faced by lawyers in respect of divulging confidential information, the researcher determined that a quantitative research method would be most prudent, since it would pose lesser risk of inappropriate disclosure.

The Lawyer Questionnaire presents its own limitations, distinct from those of the other elements of this study. Firstly, as a quantitative process, the data collected lacks the depth of the information gleaned from the employees. Further, it is clearly a weakness that the Lawyers' responses to the survey frequently constitute second-hand accounts of employee and employer perceptions of their workplace disputes and the legal processes invoked in attempts to resolve them. In other words, much of the information obtained through the Lawyer Questionnaire represents the Lawyers' interpretations of their clients' motivations, understandings and beliefs in respect of the system. While this reality represents a weakness in the Lawyer Questionnaire, it also has afforded a somewhat unique opportunity to test the validity and reliability of the Employee Questionnaire. The Lawyers are in a uniquely insightful position regarding the observation of Employee motives to pursue legal recourses against their employers. Recognizing that employees may be tempted to retroactively attribute positive motives to their pursuit of litigation, in a manner similar to fundamental attribution error (Kelley, 1973; and Malle, 2007), having a more objective account of expressed or apparent employee motives during the contemplation of litigation is a unique and valuable opportunity to validate the Employee Questionnaire results. Since lawyers are retained as confidants of employees throughout the entire process of their contemplation and, in some cases, pursuit, of litigation, legal remedies from their employers, they have a vantage

point from which to view employee motivations which is more objective than that of the employees themselves.

The lawyer population to be studied was not only identifiable, but small enough to permit data collection by census. Although the Lawyer Questionnaire was presented to all members of the relevant groups, it was not without sampling error and generalization concerns. Non-response proved to be an issue, with only forty-four percent (44%) of the Lawyers completing the Survey.

Collection of the data from the Lawyer sample was used in the design of the Employee Questionnaire, and the Employee Questionnaire data was useful in the design of the In-Depth Interviews. In those ways, methodological coherence was created amongst the methods used. The interdependence of the multiple research methods assisted in ensuring validity by informing sampling adequacy and, in the case of the In-Depth Interviews, by allowing for negative cases to be considered (Morse et al., 2002).

4.10 The Employees

The Employees were to be studied in two ways: first, through an initial electronic survey and, then, by a smaller series of nine in-depth interviews (the "In-Depth Interviews"). Essentially, the key objective was accessing sufficient members of the relevant Employee population to generate reliable, valid and rich data on which to base theoretical responses to the research questions. Standard probability sampling techniques were not appropriate for the Employee population to be studied. In order to conduct research using a known probability of sample selection, it would have been necessary to have a sampling frame, or a list of all members in the population (Salganik and Heckathorn, 2004). However, distinguishing employees who had experienced Work Problems during the relevant time frame from other employees was recognized as a highly impractical (if not impossible) task, since the divulgence of workplace disputes can be disconcerting to employees, as can be their decisions to consult lawyers in respect of potential legal action against their employers. In those ways, the Employees being sought out represented a "hidden population", due to the sensitivity of their circumstances

(Salganik and Heckathorn, 2004; Wiebel, 1990). Recognizing the limitation imposed on the research by the nature of the hidden Employee population, a snowball sampling, or chain-referral, method was deemed to be appropriate. Social research experience has confirmed this method as an effective means of penetrating hidden populations and, while many researchers have expressed concern as to the reflection of bias in estimates derived from chain-referral samples, it has been argued that these objections are exaggerated (Salganik and Heckathorn, 2004).

4.11 The Employee Questionnaire

An electronic survey of New Brunswick employees was designed from a smaller pilot survey of ten employees. The pilot survey was utilized to test the suitability of questions for the Employee Questionnaire, and to identify areas of further inquiry. Once the Employee Questionnaire was completed, it was published electronically on a dedicated website titled www.workplacesurveys.ca. Members of the survey population were sought out to complete the Employee Questionnaire through a number of means. For example, an advertisement was placed in a New Brunswick-wide daily newspaper and business cards which promoted the Employee Questionnaire were randomly distributed to workers throughout New Brunswick. In addition, a facility for collecting responses to the Employee Questionnaire was established at a large community event held in Saint John, New Brunswick on June 17th, 2006.

By utilizing a snowball sampling approach to the collection of Employee data, it was possible to obtain survey responses from two hundred and four Employees who met the research criteria, and to do so efficiently. It was recognized that employees who met the research criteria might well associate with, or at least be aware of, other individuals in similar circumstances. As one example, employees who had been laid off or otherwise dismissed from their employment would likely attend at their local Employment Insurance office with other dismissed workers. Because of their use of social resources, Employees with Work Problems were well positioned to identify others, and could refer them to the Employee Questionnaire.

The methodology used in the Employee Questionnaire was not adopted without consideration of other options. Initially, the researcher preferred a quantitative approach to the Employee Questionnaire. However, it was recognized that any attempt to generate a probability-based sample would be highly problematic, since it would have invited survey responses from employees who had experienced workplace disputes at times other than the during the two-year period prior to the Employee Questionnaire, and whose workplace issues arose in other jurisdictions where they might have lived before taking up residence in New Brunswick. Further, the time and expense required to achieve a probability sample of New Brunswick employees would have been significant. In spite of the non-probability nature of the sample achieved in the Employee Questionnaire, however, the data obtained is contextually consistent and was gleaned in a cost and time effective manner.

Another concern arising from the manner in which the Employee Questionnaire was conducted is that of bias. The question of bias arises in all data collection strategies, and is particularly attracted to the study of hidden populations (van Meter, 1990). The primary sources of inaccuracy tend to be sampling error, sample bias and response bias (van Meter, 1990). In order to reduce the sampling error attributable to the Employee Questionnaire, a relatively large sample of two-hundred and four was obtained. As noted by Neuman, "the larger the sample size, the smaller the sampling error" (Neuman, 1997). Regarding the risk of response bias, the Employee Questionnaire was designed with randomized answers to multiple choice and Likert scale questions as a means of minimizing pattern-based responses (Neuman, 1997). Finally, and while it is acknowledged that sample bias is a weakness of snowball sampling, it is an approach which may be more effective, than conventional probability sampling in studies which focus on relationships between people (Bryman, 2004; Coleman, 1959). Because snowball sampling would provide access to the hidden Employee population being studied, and because its weakness could be minimized, it was deemed an appropriate strategy (Neuman, p. 224 and 161; Bryman, p. 102).

The use of electronic surveys provided a means of accumulating foundational findings on which to base a further examination of the subject matter via in-depth interviewing. The

Employee Questionnaire was designed to filter out respondents who did not meet the following research criteria:

a) New Brunswick employees who, in the 2 years preceding their completion of the questionnaire, were employed in a provincially-regulated industry;

b) New Brunswick employees who, in the 2 years preceding their completion of the questionnaire, were not unionized; and

c) New Brunswick employees who, in the 2 years preceding their completion of the questionnaire, experienced a Work Problem in respect of which they contemplated seeking legal advice.

In order to examine that issue, a survey of 204 Canadian employees has been conducted, using a snowball sampling methodology. While the survey respondents were asked a total of 58 questions, the filter question which determined the significance of an individual's responses for the purposes of this study inquired as to whether or not the person had experienced a "Work Problem" at any time during the two year period which preceded his or her participation in the survey. The Employee Questionnaire with included responses is reproduced in Appendix B.

It should be noted that the survey respondents were asked to apply an expansive definition to the term "Work Problem", such that they were to report any employment problem or conflict for which they considered obtaining legal advice, including a layoff, dismissal, disciplinary action, discrimination or any other similar issue. Further, it was recognized that the perception of Work Problems by employees could be influenced by social and legal circumstances which are subject to change over time. In order to contextualize the social and legal frameworks in which respondents experienced Work Problems, then, they were required to limit their considerations only to Work Problems experienced in the two years preceding their completion of the survey questionnaire. Since all of the questionnaires were completed between November 2005 and November 2006, concerns regarding the collection and consideration of non-contemporary data have been mitigated.

Essentially, the Employee Questionnaire data has been drawn from an almost equal number of management and non-management employees who fall primarily between the ages of twenty and sixty and who work, or have worked, in a broad spectrum of industries and organizations. Because this is true, heterogeneity of the survey sample is relatively high, and the results have wider relevance.

The results of this study must be read in the context of its limitations. The sample population of interest for investigation was those members of the population who had experienced a work problem. Because of the nature of the sample to be studied, probability sampling was not seen to be appropriate, and a non-probability methodology of "snowball" sampling was utilized. Consequently, the extent to which the results of this study can be generalized is limited. Furthermore, it is clear from the survey responses that, in some cases, respondents have either misunderstood or opted not to answer particular questions and, while that is true in only a few instances, it does impact on the reliability of the data. Additionally, the Employee Questionnaire and Lawyer Questionnaire data was collected in 2005, which raises questions about its relevance. The conduct of the in-depth interviews in 2010, however, assists in this regard by not only providing clearer insight into the research questions but, also, by confirming the questionnaire data. In spite of its limitations, the results of this study do provide useful information, which seeks to fill a void in the literature regarding the motives behind employee litigation, and the results are generally consistent with the existing literature.

4.12 The Employee in-depth interviews

The next phase of fieldwork which followed the completion of the Employee survey involved structured interviews with two groups of stakeholders in the employment litigation process, namely, employees and employers. The Employee Questionnaire informed the design of the interviews – particularly in respect of guiding the purposive sampling criteria and, also, in preparing interview questions. Reference to the survey data was useful in minimizing vagueness in the interview process.

Prior to the conduct of the interviews, the Employee Questionnaire and Lawyer Questionnaires were administered and together, they informed the design of the interviews – particularly in respect of guiding the purposive sampling criteria and, also, in preparing interview questions. Reference to the survey data was useful in minimizing vagueness in the interview process.

Nine Employees were recruited to participate in the In-Depth Interviews (the "Interviewees"), which were conducted in November and December 2010. Although the researcher approached several New Brunswick employment lawyers to obtain assistance in identifying employees who were contemplating or who had commenced work-related legal claims and also sought participation from willing clients of his own firm, he was unable to meet his intended quota of ten. The Interviewees were advised that neither their identities nor those of their employers would be disclosed in the data analysis of the study, so that each of them could speak freely about their workplace experiences and perceptions. The Employee Interview participant information sheet and consent form is reproduced in Appendix C-1, the Employee Interview questions appear in Appendix C-2.

The Employee Questionnaire respondents were characterized in the following groups (31 percent were between the ages of twenty and thirty years; 26 percent were between the ages of thirty and forty years; and 25 percent between the ages of forty-one and fifty years; and 12 percent between the fifty-one and sixty years). Further, the primary industries and occupations represented were: government and administration, 11 percent; manufacturing and industrial, 11 percent; information technology and communications, 19 percent; professions, 11 percent. Using these figures as guidelines, an employee interview sample was derived as follows: One of nine interviewees between the ages of 30 and 40 years; four between the ages of 41 and 50 years; three between the ages of 51 and 60 years; and one between the ages 61 and 70 years. As for industry representation, an effort was made to recruit participants from a variety of sectors. Two employees were selected from the sales sector; two were chosen from the industrial sector; one from shipping administration; one from the ground transportation industry; one from the financial services sector; one from municipal government; and one from the health care industry.

Keeping in mind that the fundamental questions which the study seeks to answer, the scripted interview questions prepared to guide the conduct of the employee interviews were focused heavily on employee perceptions of Work Problems, as well as what was done, or ought to have been done, to resolve those perceived injustices. In order to avoid ambiguity and, at the same time, to create consistency with the Employee and Lawyer Questionnaires, interviewees were provided with a concrete definition of the term "Work Problem" (see the Glossary, section 1.6). Further, a brief description of the System available to the Employees was reviewed with each interviewee in order to ensure that their responses to questions were properly contextualized. While some prompting was utilized by the researcher to ensure that the interviewees gave consideration to a range of concepts being examined in the study, care was taken to ensure that the same prompts were given to each subject, and all of the interviews were recorded and transcribed to allow for examination of the questioning and answers given in each interview (Bryman, 2004: 124, 119).

For a variety of reasons, including the general preference of employees to maintain work problems in confidence, it was again difficult to identify employees who were experiencing such issues. As a result the nine employees who participated in the interviews were provided by New Brunswick employment law practitioners known to the researcher. The researcher selected an interview sample which is heterogeneous, and which is demographically representative of the Employee Questionnaire sample. The interviewees were advised that neither their identities nor those of their employers would be disclosed in the data analysis of the study so that each of them would be encouraged to speak freely about their workplace experiences and the issues of fairness that these gave rise to.

In addition, it is recognized that the researcher is relatively well-known in New Brunswick as an employment lawyer, having been consulted and published with some frequency by local media regarding workplace dispute resolution and having instructed a significant number of courses and seminars for a wide variety of employer, employee and academic groups and institutions. The possible knowledge of the researcher's professional career may have influenced the decisions of some employees and employers to either

participate in the study or not, and may have also influenced the responses of some participants in the study. Some of the participants are familiar with the researcher's personal observations and opinions regarding workplace dispute resolution, and that awareness could have influenced the responses given by participants in the study.

4.13 The Employer in-depth interviews

Nine employers engaged in a variety of industries were asked to participate in In-Depth Interviews similar to those conducted in respect of the Employees. Again, the data collected in the Employee Questionnaire and the Lawyer Questionnaire has been used to inform the Employer In-Depth Interviews. Like the employee interviewees, the employers who were interviewed were approached because they were identified as having had or likely had workplace disputes which had led to employee legal claims in the recent past and because they operate in industries which provide a variety of insights into employment disputes and resolutions.

The employers interviewed were not identified from survey data. Instead, nine companies were approached to participate in the Employer Interviews, based on the same basic industry representation outlined above in respect of the Employee Interviews: three information technology and communications employers; two employers from the professions; one from each of manufacturing and industrial, government and administration, retail, hospitality and shipping and transportation. The Employer Interview participant information sheet and consent form are reproduced in Appendix D-1 and the Employer Interview questions appear in Appendix D-2.

Similar obstacles were encountered in the conduct of employer interviews as were encountered in the employee interviews. Perhaps because New Brunswick is a small province (less than 800,000 citizens), some employers had concerns that their perceptions regarding workplace disputes and employee claims would become known to employees, potential employees or even competitors. Consequently, a number of potential employer interviewees declined participation in the study. In some cases, managers of large employers (who do not

have independent decision-making authority to bind their employer) expressed to the researcher concerns about "getting in trouble" by participating in the interviews and, therefore, chose not to do so.

4.14 Validity and reliability

The research criteria frame the legal context of the study which, in turn, is relevant to its generalizability (Guba and Lincoln, 1981). Guba and Lincoln (1981) have recommended that the concept of "generalizability" should be replaced with "fittingness", since the latter's focus on comparing the matter which has been studied to other similar circumstances is a more realistic way of contemplating generalization than is prescribed by traditional approaches (Schofield, 1989). The significance of context in the generalizability of research such as this was underscored by Guba and Lincoln as follows:

> It is virtually impossible to imagine any human behaviour that is not heavily mediated by the context in which it occurs. One can easily conclude that generalizations that are intended to be context free will have little that is useful to say about human behaviour. (Guba and Lincoln 1981: 62)

While validity and reliability are important in establishing the quality of quantitative research, the relevance of these criteria in the qualitative research context has been debated (Bryman, 2004). The replicability which is central to the concept of external validity is of much greater concern to the quantitative researcher than his qualitative counterpart. At the heart of the qualitative research is an assumption that the study is influenced by the researcher's individual perspectives, and that the result will be a coherent and insightful description of a particular circumstance (Schofield, 1989). Some researchers have even argued that qualitative methods offer higher validity than do their quantitative counterparts (Baker, 1999). Nevertheless, it is still advisable for researchers to make some measurement of the dependability, or generalizability, of the collective data. In this context, the use of a multi-methods approach has been helpful in assessing the dependability of the responses provided by participants in the study. Through triangulation, it has been possible to identify the extent to which the data accurately reflects the perceptions of Employees in respect of Work Problems and the System's responsiveness to them.

Regarding the question of reliability, the researcher has maintained an acute awareness of his own potential personal biases in the course of conducting the study, in order to minimize their effects. In addition, the data collection process was recorded in such a manner that it could be replicated in other jurisdictions for the purpose of conducting comparative studies.

4.15 Data analysis

The analysis of research data is a process by which information is systematically arranged and presented, in the course of which comparisons, contrasts and conclusions may be deduced and explained (Burns, 1997). Coding, which is the process of classifying data into particular themes, issues, subjects and postulates (Burns, 1997), was first conducted on the Survey data and was performed by careful first-hand analyses. The In-Depth Interviews were designed and conducted after the Survey data was coded, and was assisted by the use of NVivo software. It was concluded that computer-assisted qualitative data analysis software would offer increased transparency to the review of the Interview results (Bryman and Burgess, 1994). Given the peculiar nature of the Interview samples and the researcher's desire to factor his own biases out of the research as much as possible, the use of an automated tool such as NVivo was appropriate.

The limitations of the data collection methods used in this study make generalization of the results impossible. However, and in addition to verification through triangulation with the Lawyer Questionnaire and the Employee Questionnaire and the In-Depth Interviews, the generalizability of the data has been confirmed by a secondary analysis (Neuman, 1997). The findings of this research have been compared with existing data which, though compiled in an American jurisdiction, offers additional analytical value.

4.16 Ethical considerations

Ethical considerations were never far from the forefront of this research project. Since the researcher is a practicing employment lawyer in New Brunswick, frequent and careful thought was applied to issues relating to the impacts (or possible impacts) of the study on the researcher's clients, potential clients and colleagues. It was recognized from the outset that individuals and even corporations often suffer grave consequences in respect of Work Problems, and that exacerbation of those consequences could occur through careless or harsh research techniques. Consequently, measures were imposed on the research activities to ensure that it was conducted ethically.

Regarding the Surveys, it was ensured that both the Lawyers and the Employees who responded were aware of the fact that their responses would be maintained in confidence and, in fact, they were afforded an opportunity (via the electronic questionnaires) to complete the Surveys in private and without disclosure of their identities. After the Surveys were completed, only the researcher had access to them, and they have been retained in a law office which is governed by strict privacy and confidentiality policies.

The Interviews were made subject to similar confidentiality assurances; however, it was impossible (for obvious reasons) to provide the Interview subjects with the same opportunity for anonymity that was extended to the Survey respondents. Instead, the Interviewees comprised a smaller group whose identities were known only to the researcher. The Interviews were digitally recorded, and the researcher referenced each Interviewee by a number (eg. "Interview Subject #1") with that individual's true identity being maintained on a separate index which was retained solely by the researcher. When the Interview recordings were transcribed by the researcher's office assistant, two confidentiality provisions protected the Interviewees: first, the researcher and his office assistant were (and remain) bound by privacy and confidentiality policies applicable in the researcher's law office; and second, only the researcher has access to the identity index regarding the Interviewees. Coding of the Interview transcripts was conducted manually and was also supported by use of NVivo

software. Examples of the codes used are as follows: "hurt"; "unfair"; "unfairness"; "problem"; "stress"; and "legal".

The central data collection method in this study is a structured interview process involving nine employees who have considered making legal claims against their employers. Obviously, a number of important ethical concerns exist, including a significant issue of confidentiality. The data provided by an interview respondent could be used to his or her detriment if it were made known to that person's employer or its legal representative. For that reason, the Employee Questionnaire participants were assured that any input they provide will not be attributed to them personally. In the fieldwork to date, data was collected electronically, with self-identification being voluntary.

Another ethical consideration which has arisen concerns the collection of survey data from employment lawyers. Because these individuals advocate for employers and employees in legal disputes, there is a risk that their personal views of the justice system and those who use it could be used to manipulate cases in the future. After much consideration, however, it has been decided that, as the roles of lawyers as advocates are distinct from their individual thoughts, the data collected has no real impact on the ability of lawyers to carry out their professional obligations. In fact, lawyers have a duty to the public to advance our collective understanding of the law and its role in our society.

4.17 Summary

This chapter reflects upon the research questions which have motivated this study, as well as the methodology utilized in their investigations.

A multi-methods approach has been applied to this rather unusual inquiry, which has sought to cross the boundaries between law and organizational justice concepts to determine how the two relate, or fail to relate, in response to Work Problems. In order to contribute meaningfully to the base of knowledge in each of these distinct fields, literature reviews were conducted to inform Survey fieldwork; and the Survey results then guided the collection of

Interview data. The products of all three methods were triangulated as a means of confirmation.

In the next two chapters, the Survey and Interview data are examined. That analysis leads to a discussion of the research and, then, an exploration of what insights the data offers in respect of how future Work Problems might be more effectively and more efficiently addressed by employees, employers, lawyers and policy makers.

CHAPTER 5 – FINDINGS

5.0 Introduction

The fundamental purpose of this study was the investigation of employee legal claims against their employers. In New Brunswick, employees have a variety of legal rights that arise as a consequence of real or perceived conflict within their employment. Employees who experience workplace conflict may elect to enforce their rights through a number of different venues provided within the legal system. This study demonstrates why a number of those employees who contemplate workplace legal action actually pursue it. Key considerations are the motives of employees to contemplate and initiate employment-related claims and the considerations that are made in the commencement of those claims. One element of this study was an investigation of the "categories" or types of employees who are more likely than others to contemplate and pursue employment-related claims. As discussed in Chapter 3, the legal system operates on the premise that claimants are seeking remedies that the law has to offer (e.g., financial compensation), and it provides rights-based resolutions that make one party to a dispute the "winner" and the other party the "loser". At least in the family law context, the emergence of collaborative law suggests that some disputes are more nuanced than "right versus wrong" and, hence, are better resolved through interest-based dispute resolution processes. If Work Problems fall in this category, then drivers other than legal remedies likely influence some employees' decision to make legal claims, and amendments to the current System ought to be considered.

Decisions regarding the advancement of legal claims are influenced by variables which are assessed by three stakeholder groups who determine if a claim is made in respect of any particular employment dispute: employees, employers and lawyers who are consulted by the disputant employees and employers. Understanding why an employee is suing or not suing often begins with the employee's claim and the employer's response. In a large majority of cases, the manner in which this interaction occurs can help predict how the employee is going to respond to the conflict and whether or not legal action is pursued. This chapter will provide an overview of the findings from these three participant groups in employee legal claims.

5.1 Definitions

A number of key words and phrases are frequently referenced in reporting the findings in this chapter:

"Claims" are legal actions pursued or contemplated by employees in consultation with one of the Lawyers in respect of a Work Problem.

"Employee Questionnaire" is the electronic questionnaire which was answered by 204 New Brunswick employees, as described in Chapter 4.

"Employees" are the respondents to the Employee Questionnaire.

"Employee Interviews" are the in-depth interviews of New Brunswick employees that followed the Employee Questionnaire, and that are described in Chapter 4.

"Employee Interviewees" are the respondents to the Employee Interviews.

"Employer Interviews" are the in-depth interviews of New Brunswick employers that followed the Employee Questionnaire, and that are described in Chapter 4.

"Employer Interviewees" are the respondents to the Employer Interviews.

"Employer Questionnaire" is the electronic questionnaire which was answered by 9 New Brunswick employers, as described in Chapter 4.

"Employers" are the respondents to the Employer Questionnaire.

"Fairness" is the sense of justice that employees expect from their employment relationships.

"Lawyer Questionnaire" is the electronic questionnaire that was answered by 44 New Brunswick lawyers who practice primarily in the field of employment law, and that is described in Chapter 4.

"Lawyers" are the respondents to the Lawyer Questionnaire.

"System" is the legal system available to New Brunswick employees for the resolution of Work Problems and includes the courts and statutory tribunals.

"Work Problems" are any problems or conflicts which occurred in an employee's workplace in respect of which the employee considered obtaining legal advice.

5.2 The reasons behind employees' decisions to take legal action against their employers

The Lawyer Questionnaire asked questions to ascertain the views of lawyers regarding why some employees are more likely to make legal claims. The findings from the Lawyer Questionnaire were used to develop the Employee Questionnaire. This second questionnaire focused on examining employee perceptions and motivations for making legal claims in respect of Work Problems. Two hundred and four New Brunswick employees answered the confidential on-line questionnaire that used a primary filter question to identify employees who had contemplated or pursued a legal claim against their employers in a defined period of time. After filtering, thirty four (34%) percent of the questionnaire population sample (70 of 204) reported having experienced a Work Problem during the relevant period of study. The analysis was based on a sample size of 70. Following the Employee Questionnaire, a small number of semi-structured interviews were conducted of 9 employees (the Employee Interviews) and 9 employer managers (the Employer Interviews). As stated in Chapter 4, it was challenging to find employees and employers who had been involved in Work Problems and who were willing to discuss the subject. It seemed to the researcher that many managers were concerned about the risks of disclosing information related to their human resources practices and problems to an employment lawyer, and some employees feared that they would be identified if they discussed their employment information even generally. The Employee and Employer Interviews that were conducted explored themes that arose in the Employee and Lawyer Questionnaires.

5.3 Characteristics of the Employee Questionnaire respondents

The sample of survey respondents represents a diverse population of employees divided by the following characteristics[37]:

a) *employees under the age of 20 years:* 6 respondents (2.9 percent of the survey sample), none of whom reported experiencing a Work Problem in the two years prior to their completion of the survey questionnaire;

[37] Age (See Appendix A)

b) *employees between the ages of 20 and 30 years:* 63 respondents fell between the ages of 20 and 30 years (30.9 percent of the survey population). Within this category, 14 respondents (22.2 percent) reported that they had experienced a Work Problem in the previous two years;

c) *employees between the ages of 30 and 40 years:* 52 of the respondents were in the 30-40 years of age category (25.5 percent of the survey sample). Within this age category, 18 respondents (34.6 percent) reported having experienced a Work Problem during the relevant time period;

d) *employees between the ages of 41 and 50 years:* 50 of the respondents fell between the ages of 41 and 50 years (24.5 percent of the survey sample). Within this category, 23 of the respondents (46 percent) reported having experienced a Work Problem in the relevant time period;

e) *employees between the ages of 51 and 60 years:* 24 of the respondents were in the 51-60 years of age category (12.25 percent of the survey sample). Within this category, 15 respondents (60 percent) reported having experienced a Work Problem during the relevant time period;

f) *employees over the age of 60:* only 3 of the respondents (or 1.5 percent of the survey sample) were over the age of 60. None of those 3 respondents reported a Work Problem during the relevant time period.

Within the sub-population of respondents who did report a Work Problem, a variety of industries and occupations were represented, including[38]:

i) Retail (6 of 70, or 8.6%);

ii) Government and Administration (8 of 70, or 11.4%);

iii) Manufacturing and Industrial (8 of 70, or 11.4%);

iv) Healthcare and Funeral Service (4 of 70, or 5.7%);

v) Information Technology and Communications (13 of 70, or 18.6%);

vi) Education (3 of 70, or 4.3%);

vii) Non-profit (2 of 70, or 2.9%);

viii) Hospitality (4 of 70, or 5.7%);

ix) Financial Services (2 of 70, or 2.9%);

x) Professions (8 of 70, or 11.4%);

[38] Industry (See Appendix A)

xi) Corrections (1 of 70, or 1.4%); and

xii) Shipping and Transportation (5 of 70, or 7.1%).

The educational backgrounds of the survey respondents were also varied[39]:

i) Less than high school: 1%

ii) High school graduate: 22.5%

iii) Trade school or College graduate: 22.5%

iv) University graduate: 39.7%

v) Post-graduate studies: 14.2%.

Further, the survey respondents were divided almost evenly between management and non-management, with 50.7 percent in management positions and 49.3 percent in non-management functions.[40] The respondents represented age groups from under 20 to 60+, but the groups that presented the highest percentage of respondents with Work Problems were the 20-25 and 35-39 age groups.

The explanations given by employers to the Employees for the Work Problems were examined in Question 41 of the Employee Questionnaire ("…what did your employer describe as the cause of the Work Problem?") and are reflected in Table 5.1 below. The results indicate that in 16.4 percent of the cases the employer had expressed no reason; 30.9 percent of the Work Problems were attributed to restructuring or shortage of work; 12.7 percent were based on allegations of employee incompetence by the employer; and a further 12.7 percent were attributed to employee misconduct. One case (2 percent) was described as a disability or sickness issue by an employer. The remaining 25.4 percent involved unique reasons that did not fall into the one of the defined categories. As demonstrated in Table 5.1 below, almost half of the Employees who reported Work Problems in the Employee Questionnaire were either given no explanation at all by their employers for the Work Problem or told that the Work Problem was not their fault.

[39] See Appendix A
[40] See Appendix A

Table 5.1: Employee Questionnaire – Reasons for Work Problems

Employee Questionnaire – Reasons for Work Problems ***n = number of Employees who responded to Employee Questionnaire question #41: "…what did your employer describe as the cause of the Work Problem?"***	**N=55**	**%**
No reason given by employer	9	16.4%
Shortage of work	8	14.5%
Restructuring of workplace	9	16.4%
Incompetence of Employee	7	12.7%
Misconduct of Employee	7	12.7%
Employee disability	1	2.0%
Other reasons	14	25.4%

Some of the "Other reasons" given to Employees included "personality conflict" and "He simply stated that he wasn't comfortable with me…." Of the 14 responses in the "Other reasons" category, 1 was disability related, 8 were related to personality conflicts between Employees and managers, 2 appeared to be related to the Employee's job performance, and 3 were driven by finance (presumably a "shortage of work").

Fifty-two Employees answered question 43 ("If you did not believe the reason given to you by your employer for your Work Problem, what do you believe was the true reason?") This finding suggests that a significant number of employees do not accept the reasons given to them by their employers as explanations for their Work Problems. Of the 52 Employees who indicated that they did not believe their employers' reasons for their Work Problems, 44 (84.6 percent) answered question 49 ("Did you consider taking legal action against your employer based on the Work Problem?") affirmatively. This analysis suggests a correlation between disbelief of an employer's stated reason for a Work Problem and consideration of making a legal claim against the employer. However, 15 Employees answered question 42 affirmatively ("If your employer advised you of a reason for the Work Problem…did you believe your employer?"), and 13 of those Employees (86.7 percent) indicated that they had contemplated legal action. These findings suggest that an employee's simple belief or non-

belief in the employer's stated reason for a Work Problem is not influential in a decision to pursue legal action.

A more useful indicator of employee motives to make legal claims is found in the employees' perception of the fairness of their employer's handling of the Work Problem. In response to question 46 of the Employee Questionnaire ("Do you believe that your employer handled the Work Problem fairly?"), 66 Employees answered "No". Fifty-six (86.2 percent) of the Employees who did not believe their employer had been fair contemplated legal action (question 49), but, conversely, only 50 percent (2 of 4) of Employees who believed that their Employer had handled the Work Problem fairly considered legal action. Only 1 of those 4 actually pursued a claim, whereas 40 of the Employees who answered "No" to question 46 (62.5 percent) pursued claims. This data supports a conclusion that employee perceptions of fairness influence considerations of legal claims, and that those Employees who perceive fair treatment by their employers in respect of Work Problems are significantly less likely to consider taking legal action. This finding supports the research conclusions of Lind et al. (2000:582) that "…people react not only to the outcomes they expect to receive but also to nuances of treatment and style."

The Employee Questionnaire also examined, in question 50, what types of action were most frequently considered:

i) 58.6% of Employees who experienced a Work Problem sought legal advice from a lawyer;

ii) 57.1% sought advice from friends, co-workers or family members;

iii) 17.1% sought advice from a government department or agency;

iv) 38.6% confronted their employers with respect to the Work Problem;

v) 15.7% quit their jobs; and

vi) 2.9% of the Employee Questionnaire respondents who had experienced a Work Problem indicated that they did "nothing" in respect of it.

These responses suggest that a very high percentage of New Brunswick employees who experience a Work Problem do something in response, and the majority go to the expense and effort of seeking legal advice.

5.4 Employee perspectives on their motives behind legal claims

Question 39 of the Employee Questionnaire ("If you did 'something' in response to your Work Problem, which of the following best describes your motivation for doing so?") explored what motives influenced Employee respondents to consider legal action. Those responses are summarized in Table 5.2 below.

Table 5.2: Employee Questionnaire – Motives for taking action in respect of Work Problem

Employee Questionnaire – Motives for taking action in respect of Work Problem ***n = number of Employees who responded to Employee Questionnaire question #39 "If you did 'something' in response to your Work Problem, which of the following best describes your motivation for doing so?"***	**N= 67**	**%**
"I felt that my employer had been unfair to me, and I wanted to be treated fairly"	46	68.7%
"I wanted financial compensation"	9	13.4%
"I wanted to retaliate, or get back at my employer"	0	0%
"Someone suggested it"	0	0%
"Other"	8	11.9%
"Not applicable"	4	6.0%

By a significant margin, the Employees described a desire for fair treatment as the greatest motivation behind the consideration of a legal claim. As reported in Table 5.2, 11.9 percent of those Employees who took action did so for different reasons that were found and

described in the qualitative narratives provided on the Employee Questionnaires. Below are examples of the most common themes:

I had to work so I needed to confront the problem so (sic) I could get back to work no matter how uncomfortable it would be initially [sic].

-47 year old with 3 dependents working in the non-profit sector and earning $20,000-$39,000 annually

Most of the employees in our department felt the employer should have taken care of the situation rather than let it fester.

-56 year old with a dependent spouse, earning $20,000-$39,000 annually, who was being harassed by a co-worker in the communications industry. The employer did not address the harassment issue in spite of being made aware of it.

I had no other option but to quit.

-22 year old with 1 child, earning $20,000-$39,000 annually, whose employer in the communications industry was refusing to accommodate the employee's disability despite medical documentation confirming the need for accommodation.

Job security/protection and health.

-43 year old with 1 child, earning $40,000-$59,000 annually, whose employer in the manufacturing industry refused to accommodate the employee's disability and accused the employee of "faking" the medical condition.

I wanted the co-worked (sic) who harassed me to get punished.

-29 year old employee earning $20,000-$39,000 annually in the non-profit sector who was harassed by a co-worker. The employer initially did not take action in respect of the harassment and later apologized to the employee for not having responded properly.

No other resolution was practical.

-49 year old employee earning $60,000-$99,000 annually in the shipping industry who quit the employment because the employer repeatedly failed to live up to its contractual obligations and promises.

I wanted to protect myself going forward.

-47 year old employee earning $60,000-$99,000 annually in the administrative field who was harassed by a co-worker and whose employer failed to take action.

In describing their "most significant concern with the Work Problem", the Employees ranked "financial pressure from loss or potential loss of job" (18.8 percent), "how the Work Problem would affect [their] careers" (20.3 percent) and "reputation" (21.7 percent) as prominent concerns, but the most frequently cited concern of the Employee Questionnaire respondents who answered Question 48 was "unfair treatment by [their] employer" (30.4 percent). What the data suggests, then, is that non-economic factors such as employee reputations and felt fairness rank higher in the minds of many employees than does financial compensation. This concept, that financial interests are not primary in the minds of a substantial number of employees who consider making legal claims against their employers, recurs throughout this study.

The primary motives of the Employees to contemplate legal action against their employers are summarized in Table 5.3: Employee Questionnaire – Motives for Considering Legal Claims, as taken from responses to question 53 ("On a scale of 1 to 5, with '1' being Least Important and '5' being Most Important, please rank the following considerations for considering legal action against your employer in respect of the Work Problem.")

Table 5.3: Employee Questionnaire – Most important motives for considering legal action against employer in respect of Work Problem

Employee Questionnaire – Most important motives for considering legal action against employer in respect of Work Problem ***n = number of Employees who responded to Employee Questionnaire question #53: " On a scale of 1 to 5, with '1' being Least Important and '5' being Most Important, please rank the following considerations for considering legal action against your employer in respect of the Work Problem"***	N=70	**%**
Perceived unfairness by employer	42	60.0%
Financial compensation for Employee	24	34.3%
Unanswered	4	5.7%

The Employees who considered taking legal action in response to their Work Problems cannot be easily identified by earnings or age, as shown in Tables 5.4A and 5.4B below. What the data contained in the Tables suggest is that employees from a wide variety of perspectives share a high interest in considering legal action as a means of resolving Work Problems:

Table 5.4A: Employees who considered taking legal action in response to Work Problems by age

Age Category	# of Employees who considered taking legal action and # that had a Work Problem	% of Employees who considered taking legal action
20-25	4 of 4	100%
26-29	6 of 9	67%
30-35	10 of 12	83%
36-39	5 of 5	100%
40-45	8 of 12	67%
46-49	12 of 14	86%
50-55	10 of 11	91%
56-59	3 of 4	75%

Table 5.4B: Employees who considered taking legal action in response to Work Problems by earnings

Earnings Category	# of Employees who considered taking legal action and # that had a Work Problem	% of Employees who considered taking legal action
$ 0 - $19,000	6 of 7	86%
$20,000-$39,000	21 of 26	81%
$40,000-$59,000	16 of 19	84%
$60,000-$99,000	10 of 15	67%
$100,000+	4 of 5	80%

Although the vast majority of respondents to the Employee Questionnaire who had experienced a Work Problem had considered taking legal action (84 percent), they had a

number of concerns about doing so. The single greatest concern identified (by 39 percent those who answered question 54, being "What was your single biggest concern about taking legal action against your employer?") was that an attempt to enforce their legal rights would hurt their reputations or future job prospects. Of the Employees who had experienced a Work Problem, comparable numbers described themselves in Question 20 as managers (37) and non-managers (36). In response to Question 49, similar high percentages of management Employees (88 percent) and non-management Employees (79 percent) considered legal action in response to their Work Problems, suggesting that inter-organizational stature is not a significant factor in the consideration of legal claiming. However, a total of 38 percent described their greatest concerns about taking legal action as being related to legal process flaws: 13 percent felt that legal action would take too long; another 13 percent were concerned that the process would take too long; and 12 percent could not afford the legal costs involved. Again, the data supports the literature in that it suggests non-economic concerns and potential remedies are prominent in the minds of employees who consider making legal claims.

The Employee Interviews supported the Employee Questionnaire findings in several ways. First, five of the nine Employee Interviewees described perceived unfairness as a more prominent motive than financial compensation for their consideration of legal action against their employers, as illustrated by this Employee Interviewee's response:

> I think that after putting ten years into the company and being a faithful employee – representing the company very well… I thought that it was unfair that they did not even try to come to the table and try to rectify the problem.
>
> *Male employee, aged 44, dismissed from sales position by large international technology company*

Secondly, all of the Employee Interviewees described expectations of fairness in their employment relationships which were relational rather than transactional in nature. The following comments made in the Employee Interviews on this issue demonstrate the nature of the employment relationships as perceived by the Employees:

> I expected more – I worked there for 15 years and had what I thought were good relations with people – I had positive performance evaluations so the disappointment goes back into the idea that it was more the absence of doing anything to come to an employee's aid or to help set the record straight.
>
> *Female employee aged 44, whose credibility was publicly questioned while employed in a public sector management position*
>
> …I thought that after being there 10 years – doing a good job – I never had any problems until that time so I just thought it was unfair that they would not even come a little to look into the situation and other people I know that I've worked with in the past.
>
> *Male employee, aged 44, dismissed from sales position by large international technology company*
>
> …it was the fact that nothing was getting done… In many jobs before where I have had a problem... I have been able to address my immediate supervisor of that problem and things were done to rectify …or we worked together to solve the problem. This was a case where I was spinning my wheels. The supervisor was not looking at subsequently what was happing to me. What was happening to the mind… attitude in the office…it was more of the fact of the job's got to get done. Productivity was #1…the personnel really didn't matter.
>
> *Male employee, aged 45, demoted from assistant management position to delivery position by mid-sized international manufacturing company*

These comments are indicative of Employees' perceptions of employment as relational rather than transactional. Because New Brunswick employment law is largely designed to address employment as a transaction, these findings underscore questions of the efficiency and effectiveness of the System. Amongst the Employee Interviewees, 66 percent noted unfairness as their main motive for considering a legal claim, and three of the nine (33.3 percent) identified financial compensation as their primary motivation for contemplating legal action in respect of their Work Problem. This demonstrates the importance of their employment in respect of their individual economic circumstances. For example, one Employee Interviewee explained, in the context of making a legal claim, that:

> At present moment with my age being what I am (sic) and the lifestyle I had in the past and the fact that my bills have not been paid off I need money to pay my bills.

Male employee, aged 64, dismissed from management position by small transportation company

Another of the Employee Interviewees observed that:

> My biggest psychological reaction was my concern for what my family would feel [and] protecting my family & insulating them from the impact of it in the sense that I don't tend to identify the position I had as making me the person I am but sometimes your family may see you as the primary bread winner. It puts them ill at ease with kids going to university…is the money going to be there…are the benefits going to be there for health & dental…so the uncertainty for them…is perhaps even greater than [for] me.
> *Male employee, aged 55, dismissed from senior management position by large transportation company*

While some employee claims are obviously motivated by monetary needs and expectations, the responses in the Employee Interviews support the Employee Questionnaire responses to the effect that money is often not the primary driver of employee claims.

Although all of the Employee Interviewees had considered and proceeded with legal claims in respect of their Work Problems, apprehension regarding the effectiveness and efficiency of the legal system was expressed by some:

> I don't live under any illusion that the legal process can get me what I really want. [It] can't get back what was taken away. I can't replace that through the legal system….The legal system is not designed around fairness….it's not totally unfair, it's just not designed to take into account my feelings….
>
> *Male employee, aged 55, dismissed from senior management position by large transportation company*

> …I don't think it's readily available the fact that there is possible legal assistance for instances like this factor that a lot of employees don't know their rights and unless it's brought to the forefront it is very hard for …actual employees to know that this is available.
>
> *Male employee, aged 45, demoted from assistant management position to delivery position by mid-sized international manufacturing company*

> …It [the legal claim] was almost like trying to shake [the employer] into reality. I really had a concern and continue to have a concern that my employer does not get it, doesn't understand employee rights.
>
> *Female employee aged 44, whose credibility was publicly questioned while employed in a public sector management position*

For most of the Employee Interviewees, a Work Problem resolution that involved better communication and employer assistance rather than the pursuit of financial compensation within the legal system would have been highly preferred. For example, earlier and better employer-employee communications would have helped to reach more resolutions of Work Problems and would have reduced decisions to consider and pursue legal claims.

The percentage of primarily financial compensation-motivated Employee Interviewees is slightly higher than the percentage of similarly motivated Employee Questionnaire respondents. However, both investigations indicate that financial compensation was not the primary motive for a substantial number of employees, and those who were motivated by financial compensation nevertheless viewed perceived unfairness as a significant concern.

5.5 Employer perspectives on the motives behind employee claims

The Employer Questionnaire did not produce specifically helpful responses regarding the motivations behind employment-related claims, as none of the nine Employers had experienced a threatened or actual legal claim. However, some responses in the Employer Questionnaire provide insight into the perceptions of the Employers as to the nature of Work Problems and how they can be resolved. For example, one of three Employers who provided an answer to the question "What do you believe would have helped to correct the Work Problem?" indicated that an apology would have been more effective than financial compensation. One other Employer stated that "assisting the employee in dealing with the Work Problem" would have been a more effective response than financial compensation. Similarly, the highest percentages of Employees who responded to the Employee Questionnaire described "better communication from your employer" (28.6 percent) and "assistance from [the] employer in dealing with the Work Problem" (25.7 percent) as options

for resolving workplace disputes. Is there scope here to identify a difference between the perceptions of employers and employees?

The Employer Interviews provided more specific information regarding employee motives to initiate claims. The Employer Interviewees were divided in their views as to whether or not pursuit of financial compensation had been the primary cause of employee claims. Six of the nine Employer respondents reported a belief that perceptions of unfair treatment had led employee claimants to make claims against the Employer Interviewees; the remaining three Employer Interviewees expressed a belief that the pursuit of financial compensation had been the primary motivator of employee legal demands. As was the case in respect of the Employee Interviewees, a substantial number of Employer Interviewees viewed perceptions of unfairness as the primary reason for the consideration of employee legal claims.

One of the Employer Interviewees, who is not a human resources manager but who co-owns a small company, oversees twelve employees. Of all the employers interviewed, he most clearly stated that the employee claim he had recently faced was motivated primarily by a desire for financial compensation. In fact, he described employee perceptions of unfairness and hurt feelings as being minimally important in the employee's claim. That Employer viewed the claimant employee's motivation as being purely economic, and he did not believe that the employee's claim objectives changed in any way between the times the claim arose and was resolved. The Employer explained that, while most of his employees had signed employment agreements which dictated their work terms, the employee who made a legal claim had not been required to sign a contract:

> In my mind it was always finance – again I know this person – this person was with us 10 years and the one thing we started about a year before was all of our employees' signed employment contracts. . . . We didn't have an employment contract – this person was sort of grandfathered in because they had been here so long.
>
> *Owner-manager of a small credit management company with 12 employees*

This quote represents one employer mind set: regarding employment as a transactional relationship rather than a relational exchange. However, even though the Employer Interviewees did not always view perceived unfairness as the primary motive behind employee legal claims, most of the Employer Interviewees saw it as a significant issue. One, a human resources manager of a large natural resources company, stated that, even with the passage of time:

> I think at the end of the day the only one that ends up on top is the financial [compensation]. All the others for the most part stay the same. If you define perceived unfairness, you could say perceived anger and there is a lot of that [that] goes with that.
>
> *HR manager, international natural resources company*

5.6 Lawyers' perceptions of employee claims motives

The Lawyers provided a third perspective on the motives behind employee litigation. Before addressing substantive questions regarding perceived motivations of employee legal Claims, the Lawyer Questionnaire data first illuminates characteristics of the Claims themselves. Specifically, it is clear that most of the Claims did not arise from "just cause" dismissals:

i) Slightly more than half of the Lawyers stated that 40 percent or less of the Claims they were consulted on involved "just cause" allegations; and

ii) Approximately one-third of the Lawyers indicated that fewer than 25 percent of the Claims involved "just cause" allegations.

The largest number of Claims involved recovery amounts in the range of $10,000.00 - $50,000.00, with the most infrequent Claims falling above $76,000.00.

The Lawyers were asked to rank in order of importance how, in their perceptions, the following considerations influenced employees to pursue the Claims and, also, what employers considered to be the most dominant employee motives:

i) financial compensation;
ii) retribution against employer;
iii) hurt feelings;
iv) no letter of reference provided; and
v) perceived unfairness.

The Lawyers thought that the motives behind employee legal action at the commencement of the employee claims were, in this order of importance: 1) financial compensation; 2) perceived unfairness; 3) hurt feelings; 4) retribution; and 5) no letter of reference provided. As for what the Lawyers interpreted as the employers' perceptions of the cause of employee Claims, the Lawyers felt that financial compensation was seen as the highest motive, followed by a desire for retribution. In this study, the Lawyers reported that hurt feelings were viewed by employers as the third-highest motive behind Claims, and that perceived unfairness was only fourth. The failure to provide a letter of reference was considered to be the lowest motive.

What is demonstrated, then, is that the Lawyers observed the initial motives of employee litigation and, independently, employer perceptions of those motives as being consistent in respect of "financial compensation", "hurt feelings" and "no letter of reference provided".

The difference in perspective arose in the considerations of "perceived unfairness" and "retribution against employer". Regarding "perceived unfairness", the Lawyers observed that it was very significant in the minds of employees who had contemplated Claims, ranking a close second in importance behind "financial compensation" (29 percent ranked perceived unfairness as "most important", and 49 percent ranked it as "2nd most important"). As for how employers believed the same factor was considered by employees, though, the Lawyers had a very different view: "perceived unfairness" was thought to be the "2nd least important" employee consideration, and was ranked as "most important" and "2nd most important" by only 7 percent of respondents in each case.

Similarly, the Lawyers apprehended a fundamental distinction between employee and employer contemplations of "retribution against employer" as a function of employee Claims. In assessing employee views, the Lawyers recognized the retribution factor as a relatively minor motivation ("2nd least important"). However, the Lawyers believed that employers saw retribution as much more influential in the minds of employees, ranking it as "2nd most important."

The Lawyer Questionnaire data demonstrates that, amongst all of the Lawyers, "perceived unfairness" was the "2nd most important" consideration that influenced employees to pursue legal action. In fact, the combined number of Lawyers who ranked this factor as either "most important" (5) or "2nd most important" (4) exceeds the number of those who similarly rated "financial compensation", as demonstrated in Table 5.5 below:

Table 5.5: Lawyer Questionnaire – Lawyer's perceptions of employee motives to make claims

Consideration	5 (Most Important)	4 (2nd Most Important)	Total
Financial compensation	26 Lawyers	9 Lawyers	73%
Perceived unfairness	14 Lawyers	22 Lawyers	75%

Seventy-five (75%) percent of the entire Lawyer group viewed "perceived unfairness" as very important (either "most important" or "2nd most important") in the minds of employees. As for employers, 56 percent of the Lawyers stated a belief that "retribution" had been very *important.* These normative results have been compared and contrasted with the responses of particular Lawyer sub-groups.

The Lawyers have been categorized based on their activity in Claims during the twelve months preceding the questionnaire. The collective profile of the Lawyers is an important consideration in the assessment of the survey data. Essentially, the Lawyers were asked for two types of information: their assessments of how employers and employees view

particular aspects of employment-related disputes, including the legal processes intended for resolution of those disputes, and the Lawyers' own perspectives on the legal system as it applies to employment relationships. Clearly, the frames of reference from which the Lawyers have provided their responses are relevant in understanding and weighing the resulting data. In evaluating the survey data, then, the profile of the Lawyers should remain a fundamental consideration. A summary of the population is as follows:

Total number of respondents (Lawyers):	48
Category 1:	
(*Lawyers consulted in 1-10 Claims*)	16
Category 2:	
(*Lawyers consulted in 11-20 Claims*)	13
Category 3:	
(*Lawyers consulted in 21-30 Claims*)	7
Category 4:	
(*Lawyers consulted in more than 30 Claims*)	12

Each category has been further dissected into sub-categories, using these groups:

Group A – Lawyers whose ratio of employee clients to employer clients is most closely represented as: Employee – 0 percent, Employer – 100 percent (total "Group A" respondents: 10)

Group B – Lawyers whose ratio of employee clients to employer clients is most closely represented as: Employee 25 percent, Employer – 75 percent (total "Group B" respondents: 13)

Group C – Lawyers whose ratio of employee clients to employer clients is most closely represented as: Employee – 50 percent, Employer – 50 percent (total "Group C" respondents: 10)

Group D – Lawyers whose ratio of employee clients to employer clients is most closely represented as: Employee – 75 percent, Employer – 25 percent (total "Group D respondents: 10)

Group E – Lawyers whose ratio of employee clients to employer clients is most closely represented as: Employee – 100 percent, Employer – 0 percent (total "Group E" respondents: 4)

Group F – Lawyers who did not provide an Employee – Employer ratio to describe their practices (total "Group F" respondents: 1).

The categories are sub-divided, then, into these groups, with the number of Lawyers noted for each:

Category 1: A=1 / B=5 / C=3 / D=4 / E=3 / F=0
Category 2: A=3 / B=3 / C=4 / D=2 / E=0 / F=1
Category 3: A=2 / B=2 / C=2 / D=1 / E=0 / F=0
Category 4: A=4 / B=3 / C=1 / D=3 / E=1 / F=0

The extent of a Lawyer's activity in Claims has a bearing on the reliability of his or her assessment of employee and employer perspectives, and is a factor in weighing the value of the respondent's own opinions on the System. Perhaps as important, however, is any bias that might be attributable to a Lawyer based upon the nature of that individual's practice. A Lawyer who represents employees or employers exclusively may do so because of an inherent bias or, for that matter, may have developed a bias as a consequence of that unilateral representation. Again, the survey data must be reviewed in that context, which is illustrated in the Group distributions above.

Table 5.6 shows what percentage of Lawyers represented primarily employees and, conversely, employers in Claims. The purpose of this categorization was to examine whether

or not the Lawyers' practice background in employment Claims affects or should be taken into account in the analysis of the data they have provided.

Table 5.6: Lawyers' representation of employees and employers in Claims

GROUP	A	B	C	D	E	F
Represent-ation	Employees: 0% Employers: 100%	Employees: 25% Employers: 75%	Employees: 50% Employers: 50%	Employees: 75% Employers: 25%	Employees: 100% Employers: 0%	Employees: Not disclosed Employers: Not disclosed
Number of Lawyers	9 (18.36%)	13 (26.5%)	10 (20.4%)	11 (22.4%)	5 (10.2%)	1 (0.02%)

When examining the standard response to the "perceived unfairness" consideration (75 percent ranked it as very important) against the responses of the other Lawyer groups, it is interesting to note that the Group A Lawyers were least comparable, at only 37.5 percent. The Lawyer group closest to the norm was Group C, at 75 percent, although Group D had a similar result at 79 percent. A comparable analysis arises in respect of the perceived role of "retribution" in employee Claims. According to 56 percent of the total Lawyer respondents, employers viewed "retribution" as very important to employees. In comparing the group responses, Group A, once again, provided the largest contrast (at only 18.75 percent), while Group B responses were almost identical to the larger results (at 55.8 percent). Group A Lawyers, who represented only employers, demonstrated viewpoints which differed from those of all other Lawyers who had represented at least some employees.

5.7 Motives for not claiming, including access to justice barriers

As for their considerations in respect of taking legal action, the Employees reported that the potential costs of legal action was their least prominent concern, while the fear that an attempt

to enforce their legal rights could hurt their reputation or future job prospects was the most significant issue on their minds. When faced with a question as to the extent of legal expense they were prepared to incur in order to address their Work Problems, in fact, the greatest number of respondents interestingly stated that they would be "willing to go into debt above 1,000.00 Canadian dollars".

Of the 66 Employees who expressed concern about taking legal action against their employers, 26 (39.4 percent) identified the risk of hurting their reputation and future job prospects by suing as their main fear; 9 (13.6 percent) said that legal action would be too stressful; and 9 (13.6 percent) felt that legal action would take too long. Table 5.7 below reflects the concerns that motivated considerations of employee claims, as reported by the respondents to the Employee Questionnaire. The Table illustrates that, according to the Employee Questionnaire responses, non-financial considerations such as injury to reputation, stress and length of the process are all more concerning to employees who consider claims than is the cost of legal representation.

Table 5.7: Employee Questionnaire – Concerns regarding pursuit of legal claims

Employee Questionnaire – Concerns regarding pursuit of legal claims ***n = number of Employees who responded to Employee Questionnaire question #54 regarding motive for doing "something" in response to Work Problem***	**N=66**	**%**
Could not afford the legal costs of legal action	8	12.1%
Legal action would take too long	9	13.6%
Legal action would be too stressful	9	13.6%
An attempt to enforce your legal right might hurt your reputation/future job prospects	26	39.4%
Other	14	21.2%

One of the Employee Interviewees provided insight into the impact of the length of time required to pursue litigation:

> There's a range that happens [when you consider legal action] that you go back and forth and it depends on how it goes on. This [my legal claim] was 3 years so it's been a long time getting some closure. It is extremely hard on a person or employee when its dragged out and I understand the employer just hoped that I would go away, but the time involved has not helped. And having been cleared to be back in the industry that you were or getting jobs, I basically had to retrain for a total new career, which I've done, but I sincerely hope it doesn't happen to anyone else.
>
> *Female employee aged 44, whose credibility was publicly questioned while employed in a public sector management position*

One of the Employer Interviewees intimated that, in his view, the legal system is difficult for some categories of employees to access:

> I certainly don't take a unionistic (sic) mind set of the workplace that some do but at the same time I think that the protection that could be offered to employees is not as clear as it could be. For the average person trying to find, interpret and implement into the Employment Standards Act – it's very difficult to do for the average person particularly those in the lower income brackets.
>
> *HR manager, large international education and training company with more than 1,000 employees*

Half of the Employers and Employer Interviewees felt that the legal system in New Brunswick is fair to employees, and the majority of Employer Interviewees who addressed the question of whether legal expenses are a barrier to employee claims indicated that they are not.

Considering the fact that many Claims arise from circumstances which have imposed serious vulnerability upon employees, the following question was asked of Lawyers:

> In your opinion, what percentage of employees with potential Claims were unable or likely unable to afford legal advice in respect of those Claim? (Do not consider contingent fee agreements).

The Lawyers were asked not to consider contingent fee agreements in their responses to the accessibility question on the basis that the use of contingent fee arrangements is subjectively dependent upon a series of factors, including the availability of Lawyers who are willing to enter into such an arrangement, the value of each potential Claim (which determines the economic feasibility of a contingent fee agreement) and, further, the existence of a "just cause" allegation or other evidentiary complication which would likely reduce the prospect of obtaining a contingent fee agreement. If each of these issues were to be explored, the result would be an unwieldy amount of data subject to infeasible qualifications. On the assumption that contingent fee agreements should not be considered, the highest number of Lawyers (27.7 percent) stated that between one-half and three-quarters (61-75 percent) of employees with potential Claims were unable or likely unable to afford legal advice. Added to the Lawyers who characterized almost all employees (76-100 percent) as unable or likely unable to afford legal advice, the number increased to 40 percent; in other words, 40 percent of the Lawyers believed that at least six of every 10 employees with potential claims were unable or likely unable to afford legal advice in respect of those Claims. At the other end of the spectrum, 42.2 percent of the Lawyers stated that less than 40 percent of employees with potential Claims were unable or likely unable to afford legal advice. The remaining 20 percent of the Lawyers felt that the affordability answer fell in the mid-range of 40-60 percent of employees.

No group of Lawyers overwhelmingly expressed legal expense as an insurmountable problem. Only half of each of the Group C and Group D Lawyers indicated that legal representation was unaffordable to employees. Only 27 percent of the Lawyers felt that a majority of employees could not afford to pay for legal advice. Question 14 of the Lawyer Questionnaire ("Regarding question #13 above, explain why you believe the law and its processes are fair or not fair to employees?", with question #13 being "Is the current state of the law and its processes fair to employees, in your opinion?"), was open-ended . In 15 of 38 written answers, Lawyers referenced legal expenses as a negative impact on the fairness of the System to employees. In the Lawyer Questionnaire, 9 of the 48 Lawyers described themselves as providing employer representation 100 percent of the time in their practices. Of those 9 Lawyers, 6 provided essay answers to question 14. Only one of those 6

referenced the cost of legal processes and advice as a potential source of unfairness for employees. Instead, 4 of the 6 "100 percent Employer" Lawyers expressed concern that the System: is either fairer to employees than employers or not fair to employers at all.

A theme which appears in all of the data sets regarding impediments to employee legal claims is that the expense of pursuing claims is not a significant obstacle for most employees. Instead, concerns regarding potential negative impacts of litigation on an employee's reputation and ability to find new employment are a more prominent motive against claiming, followed by the length of time required and the stress involved.

The Lawyer Questionnaire data indicates that, while the cost of legal representation was a significant contributor to employee dissatisfaction in the process, it was not the most significant concern or, for that matter, even the second most significant issue. The data suggests that "perceived unfairness" exceeds "financial compensation" in significance as a motive for employee contemplation or pursuit of legal claims against their employers.

5.8 The impacts of Work Problems on employees

In order to assess the extent to which employment issues have a psychological impact on employees, the Employee Questionnaire respondents were asked in Question 32 to identify if they had experienced any physical, emotional or psychological reactions to their Work Problems. In response, 91.7 percent (66 of 72 respondents) indicated that they had. Of the 66 Employees who did experience health reactions to their Work Problems, 65 (98.5 percent) cited stress and/or anxiety as a reaction they had encountered; 42 (63.6 percent) experienced sleeplessness; and 29 (43.9 percent) related depression as a product of their employment issues. Later, in Question 35, the Employees were asked to describe the nature and extent of those reactions. The results, as depicted in Table 5.8, suggest that Work Problems do impact substantially on the psychological well-being of many employees:

Table 5.8: Employee Questionnaire – Extent of physical or emotional symptoms suffered as a result of Work Problem

Employee Questionnaire – Extent of physical or emotional symptoms suffered as a result of Work Problem ***n = number of Employees who responded to Employee Questionnaire question #35 regarding extent of physical or emotional symptoms suffered as a result of Work Problem***	***n***	%
Mild symptoms, in that they were clearly noticeable to the Employee but the Employee was able to function normally in everyday life	19 of 69	27.5%
Moderate symptoms, in that they clearly affected the Employee but in less than half of the Employee's daily activities	18 of 69	26.0%
Serious symptoms, in that they were clearly noticeable and they affected the Employee in at least half of the Employee's daily functions	25 of 69	36.2%

Fifty (50 %) percent of the Employees obtained medical or psychological treatment in respect of their health symptoms.

All nine Employee Interviewees also reported symptoms of diminished well-being as a result of their Work Problems, including moderate stress, sleeplessness and depression. In a number of cases, interview subjects related serious physical and mental health impacts arising from their Work Problems, such that on-going medical and psychological treatments had been required. A number of Employee Interviewees described the emotional and psychological impacts of their Work Problems in graphic terms:

> When it [the Work Problem] originally occurred, I was already ill and was suffering from cluster migraine headaches and was on sick leave for that…I was just beginning to get better. [Because of the Work Problem] I actually had a worsening of the condition for probably 6 months immediately. That began to get better but, because it's like being kicked when you're down, the other thing I was diagnosed with was post-traumatic stress….
>
> *Female employee aged 44, whose credibility was publicly questioned while employed in a public sector management position*

> [It has been] very hard to concentrate at work, not having any resolution to my situation and yet still having to work for the employer. I do quite often go to bed at night and not be able to sleep, or wake up wondering when its going to be over and that does get me down. It's what I've done for 22 years and at this point I would just prefer to have it behind me but still want to be obviously treated fairly.
>
> *Male employee, aged 47, who was advised of the closure of his employer's retail business after 22 years in a management position*
>
> [Embarrassment caused by the Work Problem is] why I'm hiding in my house… to avoid that. I haven't been able to start to go back to the gym because I was feeling good again [but] I haven't been able to get there. I'm too scared of running into someone there… I went through a phase where I was quite suicidal…
>
> *Female employee, aged 53, who was accused of misconduct in her employment as a health care professional*

The majority of Employers (66.7 percent) who answered the Employer Questionnaire also observed that employees who experienced Work Problems appeared to suffer emotional or psychological reactions. Depression, sleeplessness and anger were all identified as observed as employee responses to Work Problems.

5.9 Is the legal System fair?

The Employee Questionnaire results indicate that the Employees were divided on whether or not the System is fair to both employers and employees. The majority of the Employees (64.7 percent) felt that it is fair to both sides, but 35.3 percent expressed the view that the System is unfair. Some of the key themes found in the Employees' narrative responses regarding the issue are illustrated by these comments:

> The legal system in all its detail is not easily understood. It is expensive to take legal action. Employees may feel intimidated by the employer in fear of losing their job and thus be discouraged from seeking legal counsel.
>
> There is not a proper balance. Employers usually have more resources to obtain more or better legal advice and representation.
>
> I think the legal system is fair; they can only act on what they see. However, employers have the best lawyers and usually an entire firm, they incorporate

> large resources and teams and usually make very good cases. …it's hard for individuals …to play in this league.

The majority of the employers interviewed (six of nine) felt that the legal system in New Brunswick is generally fair to both employers and employees. However, one employer, a human resources manager of a large training and education company, candidly expressed a concern that the System is not always fair to employees:

> I think that our process is fair; however, when you really look under the covers it is only fair and effective when you are dealing with a fairly long service employee who has a serious issues at a fairly reasonably or high income level where there is some ramification for either the employee or the employer. I think that, for low income people who have been in the position for a short period of time [v] current legislation doesn't do a lot to benefit them. . . [The system] is set up to benefit employers.
>
> *HR manager, large international training and education company.*

Yet another Employer Interviewee, who is the human resources manager of a large natural resources company, expressed that the New Brunswick legal system is unfair to employers, suggesting that the law places too much responsibility on employers:

> I think that we have made a major shift, putting an extreme weight of burden on employers. …There is just so much that is expected of employers. …If you have a mom and pop shop, are they going to read the definition of discrimination? These are guys that just want to make a living. The law can be very difficult to try and navigate through for those individuals. …The simple business man could never comprehend [employment law].
>
> *HR manager, international natural resources company*

The Lawyers' responses to multiple choices provided in the Lawyer Questionnaire are summarized in Table 5.9 below and demonstrate what they perceived to be the greatest disappointments for employees in the legal claiming process:

Table 5.9: Lawyer Questionnaire – What were the main causes of employees being "somewhat dissatisfied" or "completely dissatisfied" with the outcomes of their legal Claims?

Lawyer Questionnaire – What were the main causes of employees being "somewhat dissatisfied" or "completely dissatisfied" with the outcomes of their legal Claims? ***n = number of Lawyers who responded to Lawyer Questionnaire question #12 regarding the causes of employee dissatisfaction in legal Claims outcomes***	***n***	**%**
Not enough financial compensation	21 of 41	51.2%
Process takes too long	21 of 41	51.2%
Process is too stressful	8 of 41	19.5%
Legal representation is too expensive	10 of 41	24.4%
Not applicable	1 of 41	2.4%
Other	2 of 41	4.9%

The comments which were provided in the "other" category referenced in Table 8 were: "lack of transparency and lack of decision-based dispute mechanism that will prevent reoccurrences" [of the problem(s) leading to the employees' Claims, presumably]; and "perceived ability of the employer to control recovery process after settlement, which increased the sense of unfairness of treatment" [likely a reference to delayed payments of settlement funds]. All of this data led to this question (Question 13 in the Lawyer Questionnaire): "Is the current state of the law and its processes fair to its employees, in your opinion?"

In response to the "fairness" question, only 63.2 percent of the Lawyers opined that the system is fair. The remaining 36.8 percent stated that it is not. It is submitted that some concern should arise from these responses.

Plainly, the assessment of fairness is a matter of perspective. In that sense, the perspectives of the six Lawyer categories regarding the fairness of the legal System to New Brunswick employees is examined in Table 5.10.

Table 5.10: Lawyers' perceptions of the fairness of the System to employees

GROUP	A	B	C	D	E	F
Representation	Employees: 0% Employers: 100% n = 9	Employees: 25% Employers: 75% n = 13	Employees: 50% Employers: 50% n = 10	Employees: 75% Employers: 25% n = 11	Employees: 100% Employers: 0% n = 5	Employees: Not disclosed Employers: Not disclosed n = 1
The System is fair to employees	7 of 9 (78%)	12 of 13 (92.3%)	5 of 10 (50%)	4 of 11 (36.3%)	2 of 5 (40%)	1 of 1 (100%)
The System is not fair to employees	3 of 9	1 of 13	5 of 10	7 of 11	3 of 5	0 of 1

As might have been anticipated, Table 5.10 illustrates that Lawyers in categories A and B (representing mostly employers) perceived the system as largely fair to employees, while the majority of Lawyers in categories D and E (representing mostly employees) disagreed. Perhaps the best source of impartiality on the subject is offered by the category C population, which represents an equal number of employees and employers. Only 50 percent of these Lawyers believed the System affords fairness to employees.

5.10 Does the legal System provide the remedies that employees want when they make claims?

The Employee Questionnaire results indicate that the majority of Employees contemplated legal claims as a means of rectifying perceived unfair treatment by their employers. Of 59 Employees who responded to an essay response question regarding what their employers could have done to resolve their Work Problems, 44 of them (75 percent) indicated that the resolutions to their Work Problems would have been accomplished primarily by increased communication and understanding (which employers are not legally required to undertake in most instances). The remaining 15 Employees (25 percent) expressed that the resolution of their Work Problems would have required financial compensation or other "legal" outcomes such as enforcement of safety laws and human rights laws.

The majority of Employee Interviewees also indicated that they would have preferred a non-legal resolution to their Work Problems. In a number of cases, Employee Interviewees described options for what they perceived as simple, communication-based solutions to their Work Problems:

> I never missed my time. [I] did my job…It was unfair to me…I went to my manager as procedure calls for and in my mind I thought that once it was looked at, at least they would say they looked at it [and] said you have an issue or your issue is not valid. I probably would have bucked up and said ok…But that's not the way it happened. No consideration whatsoever, and as soon as he [the manager] said that I knew at that moment that I was going to be gone one way or the other.
>
> *Male employee, aged 44, dismissed from sales position by large international technology company*
>
> The unwillingness of my employer to set the record straight to say that no policies had been violated) …and no apology I think — to me the unwillingness to apologize for talking about my health…or because it became a legal issue was humiliating to me. [It caused] the inability to protect myself or to salvage my reputation or career up front.
>
> *Female employee aged 44, whose credibility was publicly questioned while employed in a public sector management position*
>
> They decided to put me out in the truck and pretty well drive me out of there so there was a depression in the fact that this was not what I signed and it was causing conflict at home where work was occupying my mind of why isn't something being solved here? Why isn't something being done? If there isn't [a solution]… please lay me off. My position has been deleted. You are completely changing it to a sales position. Please give it an end and you can get someone else to run your truck and subsequently get someone in sales.
>
> *Male employee, aged 45, demoted from assistant management position to delivery position by mid-sized international manufacturing company*

An Employer Interviewee who owns and manages a mid-sized hospitality company also expressed concern about the ability of the System to offer or even facilitate the most fair, efficient and expedient outcomes. In fact, it was suggested that the System is an impediment to these resolutions:

> [I] understand the legal system's position is to protect an employee – particularly in a situation like that where you're dealing with the rights of other employees. If the law allowed us [employers] to intervene on a personal level and said "Look, maybe we can help you with some counseling", but it's pretty clear that you can't be involved in their personal life or their personal problem as an employee. So, in some respect your hands are tied. Nonetheless, you have to react…. Years ago . . . you could sit down and have a chat with an employee and discuss [issues]. I think the laws have changed and evolved and become more bureaucratic. Quite often, I find that an employee wouldn't have to be terminated if we had the ability to speak with him . . .I think it [the law] is unfair because you can't expect your employer to have a reasonable conversation. . . . The government doesn't care about feelings. . . .
>
> *Owner/manager of mid-sized hospitality company*

According to the Lawyers who completed the Lawyers' Questionnaire, a high number of employee claimants are only "somewhat satisfied" or are "somewhat dissatisfied" with the outcomes of their legal actions. For those employee claimants who are dissatisfied with their litigation outcomes, the highest percentages of Lawyers perceived the amount of financial compensation and the length of the process to be the most common sources of the dissatisfaction. Some of the Lawyers' comments on the subject of System-related dissatisfaction included:

> The time required for legal action results in savings (unpaid salary) [for the employer] while the employee loses income.

> Dismissal can result in denial of EI benefits – leaves an employee having to scramble to make ends meet. The time consumed by a suit has less impact on the average employer because responsibility for its carriage can be delegated within the organization.

> The law, in general, is a long, expensive, complicated disaster…Litigation favours those with deep pockets, and those lawyers who like to make everything an issue to rack up their fee make things even more difficult.

> The near-poverty employee is most vulnerable, most in need of a few months' notice, and least able to weather the court system. Most employees want, but don't get, a fair and quick adjudication of their claim.

These comments suggest that, although New Brunswick lawyers have concerns about the fairness of the System for employees who claim, they (the lawyers) appear not to have a

consistent understanding of the non-monetary issues that are most important to some employees.

5.11 Conclusion

The data referenced above was collected from three employment law system stakeholders through the use of multiple methods. The intention behind the approach used was not only to capture the thoughts and motives of New Brunswick employees who contemplated making legal claims against their employers, but also to explore the perceptions of other participants in those claims who have important viewpoints of the employee-claimants' comments and actions in the claims process. The results of this approach suggest that, while some employees make legal claims in order to obtain the financial-based outcomes that are encouraged and provided under the law, the majority of employee claimants enter into the legal process for the purpose of achieving results that the law does not offer. In fact, the findings suggest that employee motives for considering and advancing legal claims against employers are often not based on legal remedies at all but, instead, on achieving non-legal Work Problem outcomes that employees perceive as fair. The study data supports the literature in suggesting that a significant number of employee claims are pursued for non-financial reasons and that, furthermore, the considerations that cause employees not to pursue legal action are also often non-financial. The findings of the study contribute to a discussion of whether or not the New Brunswick legal system is capable of adequately responding to employee claims and, further, how the System could be made more effective and efficient.

CHAPTER 6 – DISCUSSION

6.0 Introduction

This chapter examines several significant themes that have emerged from the study of New Brunswick employee motivations to consider making legal claims in respect of Work Problems and how well the law responds to those motives. An observation made is that the Employees contemplated in the study have considered or commenced legal claims against their employers for a variety of reasons and not solely for the purpose of pursuing the legal remedies that the System makes available. Therefore, predictability in the avoidance or successful resolution of employee legal claims is very difficult to achieve. A key theme of the research data is that employees, employers and lawyers sometimes fail independently and collectively to identify the true motives behind the consideration of employee legal claims. As a result, members of all three groups appear to focus improperly on the pursuit of legal resolutions that are not appropriate for or sought by the litigants. While the existing literature has identified the fact that a range of employee litigation motives exist, it does not provide an in-depth analysis of employee litigation motives in the context of the remedies available to the litigants at law and the potential suitability, if not desirability, of non-legal justice resolutions instead.

In this chapter, the findings of the study are discussed in the context of the literature review as an exploration of potential reform of the System. Additionally, the limitations of the study and its implications for future research are reviewed. The study data will be discussed in respect of the following key themes:

I. Employee fairness expectations and perceived breaches of fairness;

II. Motivations that cause employees to consider legal claims, including perceptions of unfairness;

III. The understandings of other System stakeholders (employers and the lawyers who advise employees and employers on employee claims) regarding employee claims motives;

IV. The legal remedies provided in the System; and

V. Recommendations for System Reform.

In Figure 6A (page 179), a framework is introduced that demonstrates the stages of an employee's claiming decisions, beginning with a Work Problem and ending with the outcomes which are sought after by those who proceed with litigation. Figure 6.A also illustrates the involvement of legal justice and organizational justice models in employee claims decisions. This chapter goes on to consider the ability of the legal justice system in New Brunswick to adequately answer the motivations behind employee litigation. Finally, implications are discussed for potential amendment of the New Brunswick System to allow it to more fully and efficiently address the motives behind employee legal claims.

6.1 The significance of employment in the lives of modern employees

The nature of employment as a relationship in modern society provides an important contextual background for discussion of the key themes of the study. The way that employees perceive their employment relationships defines their expectations of fairness, and consequently an understanding of the significance of employment in the lives of employees offers assistance in examining the key themes.

Data accumulated in the Employee Questionnaire and the Employee Interviews provide insight into the personal commitments made by workers to obtain employment in particular fields and areas of specialization. For example, the majority of the Employees (76.4 percent) indicated that they had completed post-secondary education in university, college or trade school programs, demonstrating an investment in career development. In addition, 78 percent of the Employees who had experienced Work Problems received employment benefits such as medical, life or disability insurance and retirement benefits beyond their wages. Eighty-one percent of those Employees who were receiving benefits described them as either "critically important" or "quite important, but not critical".

The experience of Work Problems had profound impacts on a high percentage of the Employees. The vast majority (91.7 percent) described experiencing medical symptoms as a

result, including stress, anxiety, sleeplessness or depression. Similarly, 100 percent of the Employee Interviewees described diminished well-being as a result of their Work Problems. This finding supports Gill's research conclusion that individuals have a pure psychological need for employment and that a psychological deprivation occurs when employment is terminated (Gill, 1999).

Although the impacts of Work Problems were significant in many instances, the majority of Employees (60 percent) and Employee Interviewees (7 of 9) indicated that resolutions could have been achieved with non-legal interventions such as better communication from their employers, employer assistance in dealing with the Work Problem, an apology, or even a simple demonstration of respect for the worker's efforts. As referenced in Chapter 3, Bies and Tyler made similar findings in their study of Chicago-area workers, to the effect that employees who experienced disputes in their workplaces frequently desired relational responses and solutions to those problems (1993). The results of this study are consistent with the findings of Bies and Tyler on that point and suggest that employers could resolve a number of Work Problems at an early and inexpensive stage before legal claims are made or even considered by implementing better communications with employees and by demonstrating concern and respect for the employees. From a purely organizational justice perspective, this finding underscores the importance of interactional justice.

6.2 Employee fairness expectations and breaches of fairness

The study data suggest that perceived fairness is more important to employees than financial compensation. Expectations of employer fair treatment were very high amongst the Employees and Employee Interviewees and were recognized by the Employers, the Employer Interviewees and the Lawyers. The types of fairness expected were substantially more nuanced than financial compensation, and included employers' demonstrations of respect, use of processes that allow for employee input and expression of opinions, and preservation of employee dignity. These findings underscore the research of Bies and Tyler (1993) and Lind et al. (2000) reviewed in Chapter 3, which indicated that procedural justice and interactional justice considerations were relatively prominent compared to distributive justice expectations in determining whether employees considered and pursued workplace legal claims.

In response to Work Problems, better communication with employers and employer assistance to rectify issues that have arisen were identified by the majority of Employees as preferable to monetary solutions. Frequently, Employees and Employee Interviewees expressed views that Work Problems could have been resolved or even completely avoided through respectful, honest and open communication with their employers. These findings are consistent with the literature, which argues that employee felt fairness is typically generated by a combination of distributive, procedural and interactional justice factors and not solely the financial, distributive considerations that were once viewed as the cornerstones of workplace justice (Lind et al., 2000). As a respondent to the Employee Questionnaire expressed in response to question 30 ("If your Work Problem involved unfair treatment by your employer, what would have helped to correct the situation?"):

> My employer could have provided me with more on-the-job training early on rather than expecting me to know how to do the job on my own and then penalizing me for not knowing how. My employer could have communicated the fact that due to time constraints, training was not possible, so that I would know that I had to learn on my own rather than waiting to be trained….

The study data indicates that employers' shortcomings in meeting Employees' and Employee Interviewees' fairness expectations were very common. In the majority of cases, the respondents identified non-financial measures as appropriate ways to resolve Work Problems. Most often, enhanced employee-employer communication was viewed as a strong potential solution. A recurring theme in the data is that employees who contemplated or pursued legal claims most often commenced their deliberation with a motive of achieving fair treatment rather than recovering financial compensation. The findings of the study suggest that procedural and interactional justice considerations frequently outweighed distributive, legal system-based remedies in the minds of the Employees and Employee Interviewees. In turn, this finding suggests that employment relationships are often relational in nature and not purely contractual, which is consistent with Bies and Tyler's findings in their study of Chicago-area employees (Bies and Tyler, 1993). The results of that research indicated that relational aspects of employment determined employee perceptions of organizational justice, and, in turn, those organizational justice perceptions significantly influenced employees'

decisions to commence workplace legal actions (Bies and Tyler, 1993). Similarly, Lind et al. (2000) found, in their study of 996 American employees, that transaction-based concerns were not significant motivators of employee legal claims, but that relational process violations were:

> Decisions about whether or not to file a legal claim against a former employer were neither strong nor directly related to a measure closely related to traditional exchange-based notions of the employer-employee relationship; fairness of pay during employment (Miceli, 1993) was not a significant predictor of claiming. Instead, what mattered most were factors more closely linked to the relational processes in organizations (Cropanzano and Greenberg, 1997; Tyler and Lind, 1992). One could argue that the findings of this study are among the most striking examples of relational concerns on organizational behavior. (Lind et al., 2000: 582-583).

The suggestion that RCLT-based concerns are substantially more influential in employee decisions to commence legal claims in respect of workplace problems than are CCLT issues is consistent with the findings of this study. A challenge that arises in this regard, however, is that recognition of the significance of RCLT-based concerns as motivating factors behind employee litigation appears to vary amongst the System's stakeholders. Amongst the Lawyers, for example, of those who represented only employers (as some in New Brunswick do), only 37.5 percent viewed employee perceptions of unfairness as a very important motive in employee claims considerations. Further, the Employer Interviews identified a variety of Employer viewpoints on the significance of RCLT-based concerns in employee claims considerations; however, the study data suggest that employers and their lawyers perceive employee litigation as being more significantly driven by CCLT motives than employees and non-employer lawyers do.

6.3 Motivations that cause employees to consider legal claims, including perceptions of unfairness

Figure 6A illustrates that the process by which a Work Problem may potentially generate an employee legal claim is multi-staged, with multiple options for potential claimants being potentially triggered at several stages of decision-making. A "Work Problem" was for the purpose of the study was defined as any problem or conflict regarding employment for which the employee considered obtaining legal advice, and included layoff, dismissal, disciplinary action, discrimination, and any other employment problem.

In the Employee Questionnaire, 71 of 202 Employees (35.1 percent) identified having experienced a Work Problem regarding which they had considered obtaining legal advice. This percentage of the Employee Questionnaire respondents is consistent with the percentage of employee respondents in Lind et al.'s (2000) study, in which 40 percent indicated that they had considered filing a complaint or lawsuit against their former employers. The distinction between this study and the Lind et al. study is that the Employee Questionnaire respondents were not limited to individuals who had already been laid off or fired. Bies and Tyler (1993) found that 141 of 409 survey respondents (34.4 percent) had given sufficient consideration to workplace dispute claiming to know that an external agency existed to which they could advance legal claims. Gibbons (2007) referenced 2005 U.K. Department of Trade and Industry findings that 42 percent of employee respondents had experienced a workplace dispute in the preceding five years, and Casebourne et al. (2006) found that 53 percent of those employees who experienced workplace problems sought advice. The results of all of these studies suggest that approximately one-third to one-half of employees experience workplace disputes regarding which they consider making a legal claim. The data in this study also suggest that when Work Problems occur, the preference of both employees and employers is to achieve a non-legal but fair resolution based on communication and collaboration between the parties. In a comparative study of U.K., Irish, American, Canadian and Australian workers, Freeman, Boxall and Haynes (2007) found evidence that employees want opportunities to resolve problems at work and that, more specifically, they want more cooperative communication with their managers to foster improvements in their work conditions. This cooperative communication approach between employers and employees was affirmed in a recent study of European companies, in which it was observed that employers that truly attempted to resolve workplace problems had positive work climates, higher than average productivity and even increased productivity (Cox, Higgins and Speckesser, 2011).

Gibbons suggested that "Where an employment dispute is near or at the point of crystallizing into a claim to an employment tribunal, both the parties to the dispute and Government have an interest in helping to resolve it without the need for a tribunal hearing" (2007: 31). Unlike New Brunswick, the U.K. has a well-established conciliation service for

the resolution of individual workplace disputes and also offers arbitration and mediation services, although these remain external to the legal processes and do not have legally binding outcomes. The Advisory, Conciliation and Arbitration Service (ACAS) is funded by the U.K. Government and provides employees and employers with advice and guidance, business solutions, training, mediation and conciliation (ACAS, 2012). In 2009, the statutory duty of ACAS to provide employment dispute conciliation was expanded to include a Pre-Claim Conciliation service (PCC) that is designed to assist employees and employers in reaching resolutions to workplace disputes before they progress into employment tribunal claims (ACAS, 2012). The statistics regarding the use of this service support Gibbons' contention that the parties to a dispute have an interest in resolving it before it advances through the legal system:

a) In 2011-2012, use of the PCC service rose by 34 percent over the previous year; and

b) 78 percent of the disputes referred to PCC in 2011-2012 were successfully resolved without being referred to the legal system, which was an increase of 4 percent over the previous year (ACAS, 2012).

In New Brunswick, there is no agency similar to ACAS. As a result, employees and employers do not have formalized, publicly funded pre-claim mediation and conciliation services available to them to address workplace disputes at pre-claim or early claim stages. Figure 6A demonstrates the decision-making process of a New Brunswick employee who experiences a Work Problem, as found in the data. The Figure outlines the stages of claims considerations and identifies points in the process where non-litigious resolutions could be pursued – for example, at the stages where internal dialogue is attempted and the stage that follows failed internal dialogue. In the U.K. system, these stages are more carefully identified and supported, as it is recognized that opportunity exists to achieve non-legal dispute resolution at these early points in an employee's decision-making process regarding a potential claim. In New Brunswick, however, there is no Systemic recognition of opportunities to achieve non-legal resolution of Work Problems at these preliminary stages of claim considerations and as a result employees who experience Work Problems are quickly steered in toward the System's legal processes. Even within the System, there are few mechanisms exist to encourage conciliation or mediation. In fact, the System encourages

employers and employees to focus on CCLT-based outcomes rather than RCLT-based outcomes.

Figure 6A illustrates a Work Problem arising from an employment relationship. The employer and employee, or one of them, identifies a need for action to resolve the Work Problem and internal efforts are made to achieve resolution. If the Work Problem is resolved, the issue ends; however, if the efforts of the parties to resolve the issue internally are unsuccessful, then the employee may choose to consider making a legal claim. The consideration of such a claim takes into account a variety of factors, and, if the employee decides to take legal action, the legal resolution achieved may or may not be satisfactory.

Figure 6A

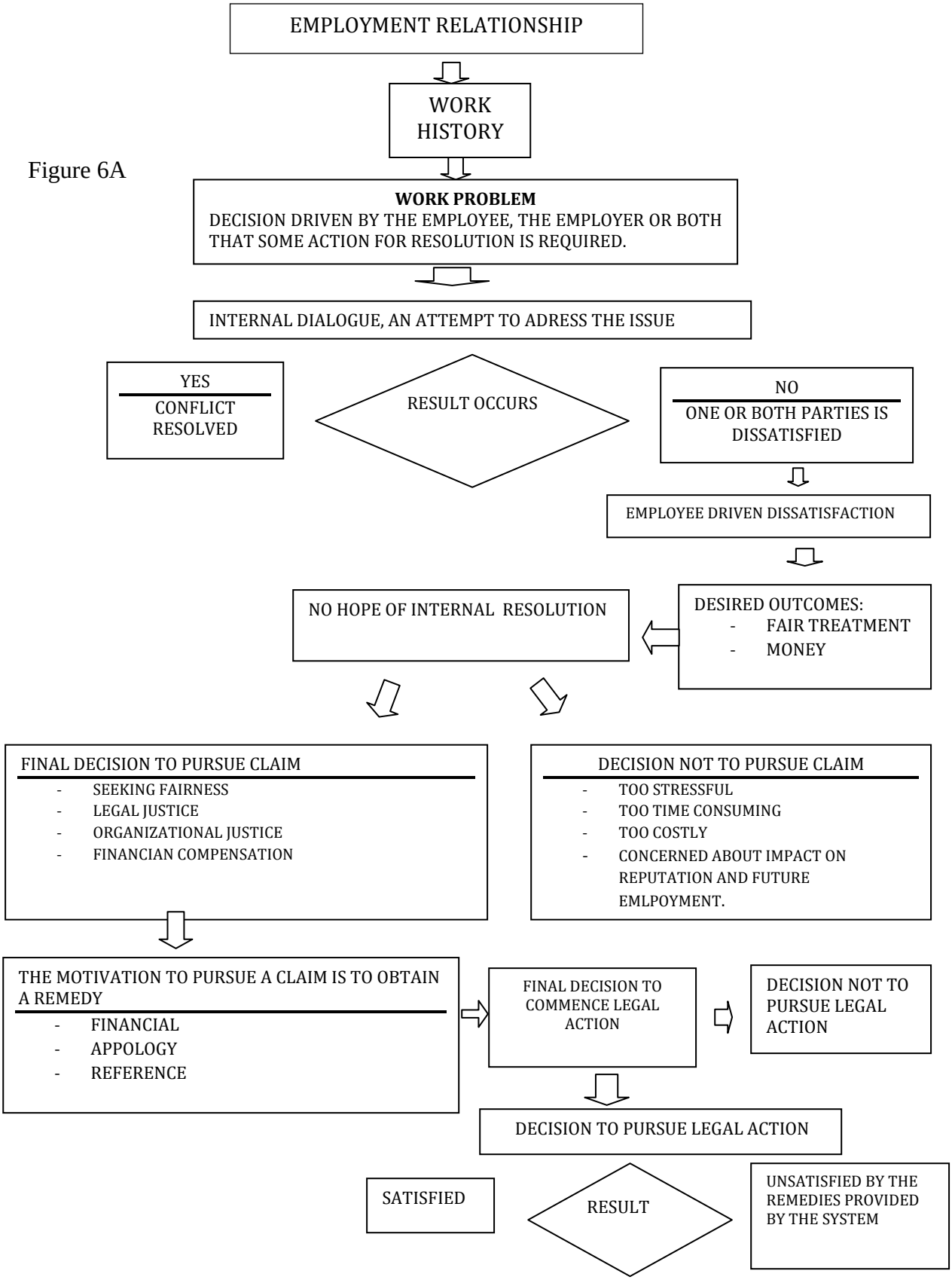
EMPLOYMENT RELATIONSHIP
WORK HISTORY
WORK PROBLEM
DECISION DRIVEN BY THE EMPLOYEE, THE EMPLOYER OR BOTH THAT SOME ACTION FOR RESOLUTION IS REQUIRED.
INTERNAL DIALOGUE, AN ATTEMPT TO ADRESS THE ISSUE
YES
CONFLICT RESOLVED
RESULT OCCURS
NO
ONE OR BOTH PARTIES IS DISSATISFIED
EMPLOYEE DRIVEN DISSATISFACTION
DESIRED OUTCOMES:
- FAIR TREATMENT
- MONEY
NO HOPE OF INTERNAL RESOLUTION
FINAL DECISION TO PURSUE CLAIM
- SEEKING FAIRNESS
- LEGAL JUSTICE
- ORGANIZATIONAL JUSTICE
- FINANCIAN COMPENSATION
DECISION NOT TO PURSUE CLAIM
- TOO STRESSFUL
- TOO TIME CONSUMING
- TOO COSTLY
- CONCERNED ABOUT IMPACT ON REPUTATION AND FUTURE EMLPOYMENT.
THE MOTIVATION TO PURSUE A CLAIM IS TO OBTAIN A REMEDY
- FINANCIAL
- APPOLOGY
- REFERENCE
FINAL DECISION TO COMMENCE LEGAL ACTION
DECISION NOT TO PURSUE LEGAL ACTION
DECISION TO PURSUE LEGAL ACTION
SATISFIED
RESULT
UNSATISFIED BY THE REMEDIES PROVIDED BY THE SYSTEM

Table 6.1 below illustrates the considerations that influence employees' decisions to make workplace legal claims. Consistent with the literature, 35.1 percent of the New Brunswick employees surveyed experienced a Work Problem, and just over half of those (58.6 percent) sought advice regarding their dispute. The primary motive for employees considering legal action was a perception of unfair treatment rather than simply a pursuit of financial compensation, and although legal action within the System would focus primarily on potential financial compensation outcomes, it can be argued that a significant opportunity exists for adoption of ACAS dispute resolution processes into the System.

Table 6.1: Employee Considerations in Making Legal Claims

1. Employees	The employees considered in the study represented a variety of constituencies (management; non-management; males; females; and age groupings beginning with under 20 years of age up to and including over 65 years of age). The employees worked in nine different fields of employment: hospitality, industrial, communications, shipping, retail sales, financial services, administration and government, professions and "other".
2. Employees who did not experience a Work Problem	"Work Problem" was defined as "any problems or conflicts regarding your employment for which you considered obtaining legal advice." The majority (64.9%) of employees who answered the Employee Questionnaire did not experience a Work Problem in the preceding twenty-four months.
3. Employees who did experience a Work Problem	Just over one third (35.1%) of the employees who answered the Employee Questionnaire reported a Work Problem.
4. Contemplating the pursuit of a resolution	The majority of Employees (58.6%) who experienced a Work Problem sought legal advice in respect of it. Others considered alternative resolutions, such as confronting the employer. Only 2.9% did nothing.
5. Perception of unfairness and desire for fairness	The primary motive of many employees who consider making legal claims.
6. Perceived entitlement to financial compensation and desire for financial benefit	The desire for financial compensation was a less prominent motive of Employees and Employee Interviewees who contemplated or made legal claims.
7. Considering a legal claim	Not every Employee who experienced a Work Problem and who considered making a legal claim actually did. A number of considerations influenced this decision.
8. Decision not to pursue a claim	More than one-third (39.1%) of Employees who considered making a legal claim ultimately chose not to proceed.
8(a). Legal action would be too stressful	Employees contemplating legal claims must consider the amount of stress that the legal process will cause them.
8(b). Legal action would be too time consuming	The amount of time required for pursuing and completing legal action is sometimes a de-motivator for Employees.
8(c). Legal action may have a negative impact on the Employee's reputation and may injure future job opportunities	Pursuing a claim may cause the Employee's former employer to speak negatively about him/her to prospective new employers or may simply advise prospective employers that a legal claim has been initiated, thereby causing reluctance in hiring.
8(d). Legal action would be too costly.	The cost of pursuing a legal claim was a factor for a minority of Employees in deciding whether or not to proceed with a claim.
9. Decision to pursue a claim	The majority of Employees who contemplated making a legal claim proceeded with it.
9(a). Fairness as a primary outcome objective of legal claims.	The majority of Employees who pursued a legal claim against their employers did so with the primary objective of attempting to achieve fairness.
9(b). Financial compensation as a primary outcome objective of legal claims.	A minority of Employees who pursued a legal claim against their employers did so with the primary objective of attempting to obtain financial compensation.
10. Legal justice.	The legal System in New Brunswick offers a greater ability for employees to access increased financial compensation than fairness.
11. Organizational justice.	The organizational justice model of dispute resolution provides greater flexibility than the law in the achievement of outcomes that were contemplated as "fair" by the Employees and the Employee Interviewees.

In this study, not all Employees had experienced a Work Problem within the defined period prior to their completion of the Employee Questionnaire. Once a Work Problem arises, either the employee, the employer or both make a decision that a resolution is required. It should be noted that, in assessing whether or not they had experienced a Work Problem, respondents were directed to conflicts or problems regarding which they had considered obtaining legal advice. While some Employees had considered consulting a lawyer, many chose alternate responses, such as seeking advice from friends, co-workers or family members, consulting a government department or agency, quitting the employment or confronting the employer.

During the transformation of the Work Problem into a potential legal claim, there are opportunities for the parties to resolve their issues without legal intervention. In fact, responses to question 30 of the Employee Questionnaire ("If your Work Problem involved unfair treatment by your employer, what would have helped to correct the situation?") suggest that the majority of Employees would have accepted non-monetary resolutions. However, Figure 6.A demonstrates that if those opportunities are either not pursued or pursued unsuccessfully, the Work Problem continues its transformation to a stage where the unsatisfied employee must decide whether or not to pursue a legal claim. Again, not all Employees who experienced Work Problems pursued legal claims. Figure 6.A illustrates that the Employees who experienced Work Problems but who did not make legal claims were influenced by four factors: (1) the stress of the legal process; (2) the time required to advance a claim through the legal process; (3) the cost involved in pursuing a legal claim; and (4) the impact of a claim on their reputations and abilities to find new employment. The majority of the Employees were substantially less concerned about the cost of litigation than they were about the impact of claiming on their reputations and future job prospects. In fact, approximately three times as many Employees chose not to make a claim because they were concerned about the impact of claiming than Employees who chose not to claim because they were primarily concerned about the cost of litigation, the time it required or the stress that it would cause.

As for the Employees who decided to pursue a claim, Figure 6.A demonstrates that the majority (68.7 percent) described a desire to rectify unfair treatment as their primary motive. By comparison, 13.4 percent indicated that financial compensation was the best explanation for why they made a legal claim. Four (4 percent) percent of the respondents to the Employee Questionnaire gave narrative explanations for their decisions to claim that related to efforts to protect their jobs. While 75 percent of the Lawyers surveyed indicated that perceived unfairness appeared to motivate employee legal claims, a significantly lower percentage (only 37.5 percent) of the Lawyers who represented only employers viewed unfairness as being very important in the pursuit of employee claims. Because the System does not require its stakeholders to focus on non-legal remedies, it is apparent that some Work Problems experienced in New Brunswick may unnecessarily proceed to adjudication without thorough exploration of alternative remedies.

As noted in chapter 5, a high percentage of Employees who experienced Work Problems (84.1 percent) considered making legal claims to rectify their issues. What causes employees to contemplate legal resolution of their workplace disputes is of critical interest in this study. The data collected demonstrates that Employees and Employee Interviewees who had experienced Work Problems were most often primarily interested in rectifying their perception of unfairness against them. The Employees and Employee Interviewees who advanced legal claims were motivated by more than one desired outcome, and in the majority of cases the claimants' preferred result was the rectification of unfairness rather than receipt of financial compensation. Similar to the findings in Lind et al.'s study (2000), the Employees and Employee Interviewees in this study suggested that financial compensation was not their primary motive in contemplating legal action in response to Work Problems. Further, when asked to identify potential satisfactory rectifications of their Work Problems, the Employees and Employee Interviewees most frequently discussed better communication with their employer and assistance from their employer to correct the Work Problems over financial compensation. Since financial compensation is, as Chapter 2 confirms, the primary remedy offered by the New Brunswick legal System, the outcome sought by the majority of Employees who pursued legal claims is currently not even made available within the applicable legal justice model and could not, except peripherally, provide a result that would

align with the purpose of the claims. The indication taken from this study is that New Brunswick employees are more likely to contemplate legal action against their employers based on RCLT motives rather than CCLT considerations.

6.4 The perceptions of the System's stakeholders regarding employee claims motives

In the Lawyer Questionnaire, 63 percent of the Lawyers indicated that they perceived financial compensation as the primary objective of employees who pursued or considered claims. As stated above, this is inconsistent with the results of the Employee Questionnaire, the Employee Interviews and the Employer Interviews, in which the pursuit of financial compensation was not viewed as the highest motive behind employee consideration of legal claims. The findings of the study suggest that in some cases lawyers who are engaged by employers and employees to help resolve workplace disputes actually misunderstand the primary motives of the claimants and may mistakenly focus on pursuing undesired outcomes. This may be explained by the fact that lawyers' perceptions of the world are shaped by the law, and, in turn, the law of employment in New Brunswick is rooted in CCLT. In the context of landlord and tenant disputes, Trubek (1980-1981:743) wrote:

> The lawyer tends to accept the property relations which are constituted by the legal rules, and thus adds support to a system which encourages the tenant to see only those possibilities defined by law.

In the context of the System, New Brunswick lawyers who are consulted by employees with wrongful dismissal-based Work Problems should recognize that the law is, in most cases, only able to provide financial compensation as a possible remedy. As a result, it is expected that lawyers would encourage employee clients to focus primarily on financial compensation as the anticipated outcome of their legal claims.

The significance of money in the claiming process was also considered in the context of the cost involved in pursuing claims. Although the Lawyers felt that the majority of employees with potential legal claims were unlikely to be able to afford professional advice to make a claim, the majority of Employer Interviewees did not view the cost of legal representation as a primary issue of concern amongst employees. That Employer perspective is consistent with the responses of the Employees and Employee Interviewees. The

Employees identified legal costs as being the least of four concerns about taking legal action, and, in fact, almost 40 percent of the Employees stated that they would go into debt in amounts exceeding $1,000.00 to address their Work Problems. Similarly, all 9 Employee Interviewees had incurred expenses to pursue their legal claims. On this point, the study data aligns with the research findings of Brodsky et al. (2004), who suggested that employees choose not to sue for a variety of reasons, and that concern about cost is not a prominent issue. In four case studies of potential litigants that included two employees with workplace problems, the interviewed respondents indicated that their decisions not to commence legal action were primarily motivated by: a desire to avoid recurring memories of hardship or injury; negative labeling; risk of losing the claims; and, in one of the cases, the potential litigant's experience of a sense of justice from having received an apology from the perpetrator of the wrongdoing (Brodsky et al., 2004).

The study data identifies that a significant disconnection appears to exist between employees, employers and the lawyers who represent them concerning the role of financial issues (in respect of both compensation and expenses) in employee claims decisions. If, as the data indicates, lawyers are overstating the role of financial compensation in motivating claims and, at the same time, underestimating the willingness of employees to incur legal expenses in the pursuit of claims, there exists a major misunderstanding of employee claims' motives. A mistake of that significance is fundamental to the capacity of the stakeholders to resolve employee claims efficiently as it likely causes the parties to focus on issues that are not the main drivers of the litigation. By arriving at a common understanding of the true motives behind employee claims, employees, employers and lawyers will be able to more efficiently address their disputes by directing their resolution efforts at the real issues behind the claims. Ultimately, it may be determined that a different model for dispute resolution such as collaborative law will be more appropriate in many cases. Currently, collaborative law is commonly applied to family law disputes in New Brunswick, but not at all to employment law conflicts. Further, use of alternative dispute resolution processes such as mediation is not strongly encouraged in the System and, in some cases, is not even an option for disputants. Particularly since the findings of the study confirm that relational considerations are prominent in workplace disputes, it would be prudent for employers,

employees and lawyers to consider alternative dispute resolution mechanisms that would offer non-legal remedies. This issue raises a potential reform of the System and is discussed further in Chapter 7.

6.5 The legal remedies provided in the System

The remedies offered to employees within the System have been an important consideration in this study. As is outlined in Chapter 2, the legal System in New Brunswick perceives employment primarily as a legal contract-based relationship that is governed by agreement as well as by implied contractual and legislative terms. As such, the System treats Work Problems as issues that can and should be resolved through application of distributive justice principles with a focus on contractual, economic compensation payable to employees for employer injustices. Many employment relationships are governed by implied contract terms imposed by the law rather than written provisions specifically agreed upon by the employers and employees. Disputes arising in those cases are sometimes resolved based on factors that the parties themselves have not even discussed, as noted by Field, Atkinson Perraton (1999:4-9) in *Remedies in Labour, Employment and Human Rights Law:*

> In the case of a contract of indefinite hire, in the absence of just cause or in the absence of specific agreement to the contrary, there is an implied term in the employment contract that the employee is entitled to reasonable notice of termination of employment. The courts determine the reasonable notice period by considering a number of factors.

Essentially, a wrongful dismissal dispute between an employee and employer could well involve lengthy and expensive litigation to determine an employee's legal compensation entitlement that, in addition to being outside of the employee's preferred outcomes may not have ever even been considered by either the employee or the employer as a potential resolution. If the law is simply a default mechanism for settlement of workplace disputes, it seems worthwhile to discuss what alternative approaches might be used and whether or not any of them could provide more acceptable and efficient resolutions.

Because of its focus on distributive justice, the only remedy that the System makes available to many aggrieved employees is pay in lieu of reasonable notice of termination.

This implied contractual term obligation imposed on employers is CCLT-based and is purely financial in nature, thus ignoring remedies contemplated in RCLT such as reinstatement and other steps toward relational restoration.

The study data suggests that financial compensation is not the primary consideration of the majority of employees who make or contemplate legal claims. Employees seem to most want a relational response to their Work Problems, including better communication with their employers to understand organizational expectations, any employer dissatisfaction with the employees' work and assistance in achieving the employers' requirements. Some employers may also view the System as being incapable of adequately resolving certain Work Problems, based on the data obtained from the Employers. Several of the Employers expressed views that employee claimants they had dealt with were seeking resolutions that the System was unable to provide. One Employer commented that the formality of the System actually prevents employers from pursuing appropriate resolutions in certain circumstances. The point made here is that the System is adversarial in nature, and each party is typically bound by their communications to the other. As a result, the parties to an employee claim can actually jeopardize their positions by communicating openly about their Work Problem. Approaches to workplace disputes used in some other jurisdictions reduce the formality and adversity of the resolution process, and these could be considered in New Brunswick. For example, the United Kingdom's protection of certain conversations between employers and employees would help to facilitate communications that may resolve conflicts at earlier stages. Further, it has been argued that mediation has, in both the United Kingdom and American contexts, produced dispute resolutions that are viewed with higher satisfaction than legal outcomes (Ridley-Duff and Bennett, 2011). Keeping in mind that the findings of this study suggest that at least some employees who initiated or considered legal claims would have preferred non-legal remedies to their disputes, the increased use of mediation as a component of the System is discussed in Chapter 7.

The survey data indicates that employees who contemplate legal claims are highly motivated by a desire to address perceived unfairness in a relational manner, rather than a pursuit of financial compensation. The data also suggests that employers frequently

misunderstand the objectives of employees who consider and advance claims, as do the lawyers who assist the employees and employers in the claiming process. These findings substantiate a concern regarding the relevance of the System, which encourages the parties to employment disputes to focus on a compensation-based outcome in an adversarial rather than relational process.

In the study, the majority of employees, employers and the employment lawyers all acknowledged relational aspects of employment which appeared to fall outside the bounds of strict contract law. Many of the Employees, Employee Interviewees and Employer Interviewees indicated a preference to have Work Problems addressed through less formal communication processes than traditional litigation. Further, their responses to questions concerning workplace disputes suggested that less formal communication than litigation for potential workplace resolution was strongly preferred. This is an indication that the legal framework that is imposed by the System is not entirely consistent with the understandings and expectations of the stakeholders. However, this study did not examine the basis for employee fairness expectations, nor did it address whether or not the "legalizing" of the employment relationship through careful and clear contract terms does or would alter the fairness perceptions of employees who experience Work Problems.

Reforms to the New Brunswick employment law System would help to make it more responsive and relevant as a Work Problem resolution mechanism. The reforms that should be considered would have the effect of extinguishing or at least delaying the current adversarial approach to employee claims. This can be achieved by making the process simpler and faster and by focusing at the outset on relational outcomes that would facilitate non-compensatory outcomes when appropriate. Potential amendments to the System will be discussed and explored in Chapter 7.

This study supports the conclusions of Lowe and Stratton (2002) to the effect that the Canadian legal process generally appears to fall short of meeting the procedural and interactional justice expectations of the public. In their study of the perceptions of Canadians regarding the fairness of their common law legal system (which bears significant similarities

with the New Brunswick System), Lowe and Stratton (2002) found that the litigation process was viewed as intimidating, impersonal and restrictive. Additionally, the Canadian legal process was seen as preventing litigants from fully communicating their issues (Lowe and Stratton, 2002). This is consistent with the findings from the research reported in this thesis. In fact, one employer respondent in this study noted the difficulty that is posed to employers and employees because the structure of the relationship is legal in nature:

> I think the laws have changed and evolved and have become much more bureaucratic. . . Quite often I find that an employee wouldn't have to be terminated if we had the ability to speak with him and if we frankly [sic] respecting their emotional responses and clearly now the law prevents that. . .

The resolution of workplace disputes is made more challenging because employers, employees, lawyers and courts are guided by legal justice processes and potential outcomes. As an adversarial system, the legal system encourages cautious communications that are designed to protect interests. Additionally, the resolutions offered by legal justice are not precise, and even lawyers recognize that the range of claims outcomes can be very broad. As a result, opportunities exist for an employer and a claiming employee to see opposite possible positive results to their dispute, and, because the System encourages a win/lose approach to claims, both sides can indulge in the expectation of a "win" at trial. The System appears to be limited in its ability to meet the distributive, procedural and interactional justice expectations of some employee claimants who initiate legal processes.

From a distributive justice perspective, Stratton and Lowe (2006) have argued that the public is disillusioned regarding the ability of the legal system in Canada to provide a fair resolution to their disputes. Regarding the suitability of remedies available to litigants, Lowe and Stratton have suggested that the Canadian public is unsatisfied with the legal system as a result of "…problems with case management, procedures and decisions that were counter to real life circumstances, and the failure of mechanisms to address their concerns and complaints" (2006: p. 7). The findings of this study suggest that dissatisfaction of employee litigants in the Canadian legal system is also predictable, since the highest motive behind litigants' claims (fairness) is generally unavailable to them. There should be no surprise that

Canada ranks well behind western European countries like Norway, Germany, the Netherlands, Sweden, Austria and the United Kingdom in the World Justice Project's Access to Civil Justice evaluation (Agrast et al., 2011). The Honourable Thomas A. Cromwell, Justice of the Supreme Court of Canada, has expressed that, in his view, the Canadian system "falls far short" of effectively dealing with civil and family law disputes (2011). In response to that shortcoming, Justice Cromwell has identified several potential amendments to the system, including a simplification of the Canadian civil court process (2012).

Regarding employee litigants' expectations of procedural and interactional justice, Lowe and Stratton (2002) argued that the Canadian legal system is more formal and less attentive than some litigants expect, and, as a result, the system's treatment of those litigants is not always perceived as fair. However, the New Brunswick perspective taken from this study suggests that the majority of employees believe the System is fair, although concerns exist regarding the ability of employees to afford the same level of legal advice and representation that many employers have. The following responses to question 57 of the Employee Questionnaire are examples of fairness concerns regarding the System. Although concerns regarding the expense of litigation are prominently voiced in these quotes, the issue of the complexity of the legal System and a need in some cases for teams of lawyers to successfully navigate the System are also identified as access to justice problems:

> I think the legal system is fair; they can only act on what they see. However, employers have the best lawyers and usually an entire firm; they incorporate large resources and teams and usually make very good cases. I believe it is harder for individuals with a single lawyer to play in this league.

- and-

> I believe the legal system can be fair to both employers and employees if both parties understand their rights and obligations under the law. This, however, is often not the case. The legal system in all its detail is not easily understood. It is expensive to take legal action. Employees may feel intimidated by the employer and fear of losing their job and thus be discouraged from seeking legal counsel. …Employers often have to spend a lot of time and money to ensure that they are covered.

Only half of the Employers and Employer Interviewees had the opinion that the System is fair to employees. One of the Employer Interviewees, who manages a small manufacturing business, described the System as "extremely unfair…you know that both parties understand each other's position and not specifically just from a legal point of view so being restricted by law and government disables your ability to deal with human resources issues fairly."

A telling assessment of the fairness of the System was provided by the Lawyers. In response to question 13 of the Lawyer Questionnaire ("Is the current state of the law and its processes fair to employees, in your opinion?"), 32.6 percent of them answered in the negative. Amongst the concerns expressed by the Lawyers about the System were these:

> I believe the litigation process is too cumbersome and lengthy for individuals who live pay cheque to pay cheque.
>
> -and-
>
> The "efficiency paradigm" should be revisited. A Canada Labour Code approach should be sought, and applied. Employers should not be able to terminate employees on a whim.
>
> -and-
>
> The law, in general, is a long, expensive, complicated disaster. All of this points to the need for a review of the System and a consideration of potential reforms.

Although the majority of the Employees indicated that legal expenses were not a major obstacle in the pursuit of litigation, many of the Lawyers perceived the issue of legal expenses differently. Almost half of the Lawyers viewed the costs of litigation as an impediment to most potential employee claimants. However, the majority of "100 percent Employer" Lawyers had the opinion that legal expenses were not unfair to employees. In fact, the majority of that group expressed concern that the System is either fairer to employees than employers or not fair to employers at all. One such response is:

> The inherent bias of the Courts towards the employee is becoming increasingly evident, to the point that "cause" is becoming virtually impossible to establish, and no matter how rich a severance package is in non-cause terminations, in

> the Courts' eyes, it is never enough; they seem compelled to add more. How could employees not be satisfied with this "process"?

A comment made by one of the "100 percent Employer" Lawyers that may provide insight into the difference between the way in which many Employees and Employee Interviewees perceive Work Problems and the way that they are interpreted by Lawyers who represent primarily employers is:

> …The problem is not with the system or the law but with Lawyers who are advising employers and employees. Most of the difficulty in cases I have been involved with are as a result of poor advice being given or even worse the lawyer providing the advice is playing to the parties emotion(sic) and not providing objective advice.
>
> *New Brunswick Labour & Employment Lawyer (100% Employer representative)*

A number of different concerns were expressed by the Employees, the Employee Interviewees, the Employer Interviewees and the Lawyers regarding the System and its ability to provide fair treatment and outcomes to its stakeholders. It is interesting to note that the shortcomings of the System are perceived differently by each stakeholder group. It is also important that the influence of lawyers on the decisions of employees and employers to initiate and perpetuate legal claims has been identified by the Lawyers as a matter of concern regarding the overall effectiveness of the System. A question that invites more study is whether or not the pursuit of objectivity by some lawyers involved in legal claims arising from Work Problems actually prevents the employees and employers in dispute from achieving more relational but less objective, contract-based resolutions to their differences.

6.6 Why employees resort to the law and why the law does not adequately respond

Organizational justice theory suggests that the emergence and resolution of workplace disputes are frequently more complex than can be addressed solely through the application of distributive justice concepts. As an employment lawyer practicing during the past two decades in New Brunswick, the researcher had come to a similar conclusion. In fact, the researcher had observed that, in many of the employment-related legal claims that he participated in, employees were far less motivated by financial compensation than was

expected or believed by employers and even lawyers. The motivations behind employee legal claims in a substantial number of cases appeared to be relational in nature rather than contractual, with aggrieved employees expressing more concern over issues such as their reputations and perceived unfair treatment by their bosses than expectations of monetary compensation. These non-compensatory concerns of numerous employee claimants with whom the researcher had contact were and are mostly left unaddressed by the New Brunswick System. As a result, the researcher questioned if the existing legal model in the province has the capacity to adequately address the real issues behind employee claims. Further, it was questioned whether the resources that are expended in the System's processes to address Work Problems could be more efficiently and effectively utilized.

Even before the sufficiency of potential outcomes offered by the System is considered, however, it should be noted that substantial concerns regarding the fairness of the System's processes were expressed by some Employees, Employee Interviewees, Employer Interviewees and Lawyers. Amongst the apprehensions were the cost of participation in legal claims, the complexity, the length of time they required and the stress they caused. Similar uneasiness with the British legal system was identified by Genn (1999) in her study of potential British litigants faced with a variety of justiciable problems. Genn concluded that "There is a widespread perception that legal proceedings involve uncertainty, expense and potential long-term disturbance and that only the most serious could justify enduring those conditions" (1999:254). Further, Genn suggested that "A clear message that emerges from the study is the profound need for knowledge and advice about obligations, rights, remedies and procedures for resolving justiciable problems" (1999:255).

The findings of this study support the observations of the researcher regarding the motivations of some employee claimants to pursue claims for non-monetary reasons. Further, the study confirms that the System as it currently exists focuses on distributive remedies rather than on procedural and interactional justice responses, and hence many employee claims are not adequately addressed. The findings of the study suggest that, at least in some cases, employee claimants pursue legal actions against their employers with the hope that they will obtain non-monetary outcomes that, in most instances, are not even achievable in the

System. Rather strikingly, one Employee Interviewee even acknowledged an understanding that the System could not address his real concerns.

6.7 Conclusion

Some serious problems that may arise as a result of the System's monetary fixation include: the encouragement of employees who would be satisfied with non-financial remedies to instead pursue monetary compensation from their employers; the expenditure of time and money on litigation that does not respond fully to the actual concerns of the claimants; and the organizational and personal damage that results from employee claims not being resolved in a manner that the participants view as just and fair.

CHAPTER 7: CONCLUSIONS

7.0 Introduction

This chapter considers the implications of this study in respect of better understanding the claims motives of New Brunswick employees and the role of perceived unfairness in their claims decisions. The influences of fairness concepts as prescribed by the law and by organizational justice on employee legal claims are considered, along with the perceptions of employers and lawyers who participate in claims. The contributions of the work to existing knowledge are discussed, as are the limitations of the study, potential systemic enhancements to be considered in light of the study findings and opportunities for future research. A key implication of the study is the determination that relational (rather than contractual) injustices are often the causes behind New Brunswick employees' considerations of legal claims. This finding is particularly significant in light of the study's review of the System's Classical Contract Law Theory (CCLT) foundation, which does not appear to provide adequate responses to at least some of the employee claims that it seeks to resolve. The study identifies likely shortcomings of the System in addressing perceived employment unfairness and, applying concepts taken from the alternate justice models discussed in Chapter 3, considers implications for law reform that may benefit employees and employers.

In summary, this thesis has been undertaken to examine the motivations of employees in New Brunswick, Canada to make legal claims or not against their employers and, more specifically, to assess the meaning and role of unfairness in the claims context. This research question arose from the researcher's personal experiences and observations over almost two decades of practicing employment law in New Brunswick. Essentially, the researcher had observed, over twenty years of employment law practice, that employees who considered making legal claims often did so with little understanding of the employment law System and what remedies the System could provide to them. The apparent absence of clear knowledge on the part of employee claimants of their legal rights regarding work disputes caused the researcher to question if the pursuit of the System's available remedies motivated employee claims or if some other motive was influential. Since the legal System is constructed on a particular theory of fairness or just treatment, a purpose of the study was to examine the

extent to which the fairness construct prescribed by the law drove employees to consider or make legal claims. While existing research had examined the motives of claimants in other contexts, such as employment claims in American and British jurisdictions and also in other forms of legal claiming (medical malpractice lawsuits, for example), no literature existed to inform an understanding of employee claims motives in the context of the remedies that the New Brunswick legal System offers. There has also been very little examination of employee claiming considerations in the specific context of the law's proposed remedies and, in that regard, two more refined questions are addressed in this study: a) do employees who consider legal claims in New Brunswick do so with full knowledge of and desire for the remedies available to them under the law? and b) does the System provide adequate responses and potential remedies to employees who claim?

The findings of the study indicate that New Brunswick employees who consider legal claims do so because the expectations they have of fair treatment by their employers have not been met. In that regard, the study suggests that, for most employees, fairness considerations are not focused solely on financial compensation-based outcomes but instead on the manner in which their employer interacts with them before and during a work dispute. In both the Employee Questionnaire and the Employee Interviews, the majority of respondents identified unfairness (and not financial compensation) as the most important motive in their consideration of legal claims. Further, responses provided in the Employee Interviews support a view that respectful communications that take into account an employee's personal circumstances and his or her commitment to the employer's organization are particularly important in satisfying the employee's fairness expectations.

Regarding the importance of respectful communications in employment it is observed that, at the time a Work Problem occurred, the Employee Questionnaire respondents' belief or non-belief of their employers' stated reason behind the Work Problem was not highly influential in their decisions to pursue or not pursue legal claims. This may be a demonstration of the concept that Skarlicki et al. (2008) referenced, to the effect that informational justice perceptions are informed by relational experiences rather than singular communications, a suggestion that underscores the significance of relational (rather than

transactional) aspects of many employment relationships. Additionally, the study data indicate that, when Work Problems occur, interpersonal responses such as increased communication between the employer and employee are preferred resolutions by many employees over legal resolutions, including financial compensation. In that way, the study provides useful insights into the significance of interpersonal, non-compensatory employer actions in both the causation and in the resolution of workplace disputes. The literature review conducted in Chapter 3 supports the view that interactional and informational justice considerations such as those emerging from the study data play a meaningful role in workplace disputes and their resolutions. The study data also expose employee reasoning for considering but ultimately not proceeding with legal claims in response to Work Problems. Again, financial concerns (in the form of litigation costs) appear to be of lesser consequence to employees than are non-monetary matters such as the potential damage that a legal claim might do to the employee's reputation. One might presume that, if employment relationships were strictly transactional, concerns of reputational damage arising from enforcement of legal rights would be relatively low. However, the study data obtained through the Employee Questionnaire and the Employee Interviews suggest that employees often perceive employment relationships as complex relational interactions rather than as legal transactions. Understanding that this complexity exists is important to the successful pursuit of time and cost-efficient workplace dispute resolutions.

The study data indicate that most employees seek advice from a third party before proceeding with legal claims, and that lawyers are frequently consulted. As a result, the views of New Brunswick Lawyers examined in the study are insightful in their suggestion that employee claimants were most often interpreted by the Lawyers as being motivated by perceived unfairness. However, the majority of respondents to the Lawyer Questionnaire expressed a view that financial compensation plays a more prominent role in employee claiming than was identified by the Employees and the Employee Interviewees. Further, the Lawyers who characterized themselves as being solely employer representatives demonstrated a significantly different understanding of employee claims motives than all other respondents to the Lawyer Questionnaire. The employer Lawyers expressed a perspective that employee claims were chiefly motivated by financial considerations much more than by perceived

unfairness. These findings raise questions as to the extent to which lawyers understand employee claims motives and, further, how they influence employee claims decisions and outcomes. In addition, the study data invite consideration of the effect that lawyers' frames of reference (as subscribers the CCLT-based System) have on employee claiming and, also, on employers' responses to those claims.

Beyond an apparent misperception by some lawyers as to the motives behind employee claims considerations, the study data also suggest that some employers have a similar misunderstanding. Almost half of the Employer Interviewees felt that financial compensation is the primary motive behind employee legal claims, which is an indication that the employer stakeholder group likely bases its responses to potential and actual workplace disputes on erroneous assumptions of what will be required for resolution. The risk of an ineffective employer response to a workplace dispute seems to be particularly high given that employers may seek advice from lawyers who represent only employers. If an employer and its legal counsel, or either of them, fundamentally misunderstands the interests of an employee claimant, it is less likely that the most efficient and effective resolution to the claim will be identified. This concern is magnified by the legal characterization of the employment contract as, fundamentally, an economic transaction rather than a relational, psychological contract as discussed in Chapter 3.

The study data regarding employee motives in respect of legal claiming draw attention to the justice concepts discussed in Chapters 2 and 3. In Chapter 2, the review of New Brunswick's employment law System illustrates that the legal justice available to employees is rooted in Classical Contract Law Theory (CCLT), rather than Macneil's (1977) Relational Contract Law Theory (RCLT). Because the System shares a common law foundation and other similarities with numerous other jurisdictions, including all of the Canadian provinces except Quebec and, also, the countries of the Commonwealth, the utility of the study data extends beyond New Brunswick. As the study identifies, CCLT is only one of several justice concepts that can be applied to employment. In both Relational Contract Law Theory (RCLT) and in organizational justice, employment is conceptualized as being less discrete than a CCLT-based transaction. RCLT contemplates employment as a complex and evolving

relationship that is influenced by employer-employee interactions and information exchanges as well as by distribution of resources and application of workplace rules and procedures.

The study findings signify that New Brunswick employees have an RCLT-based conception of their employment relationships, which is consistent with Macneil's (1977) theory of employment contracting. In demonstration of their non-transactional perceptions of employment, the majority of the Employees and Employee Interviewees ranked perceived unfairness as a greater motive than financial compensation for considering a legal claim. They felt that improved communication with their employers would provide a better resolution than financial compensation to a workplace dispute, they expressed having hurt feelings about their workplace disputes and they experienced physical or emotional symptoms arising from their Work Problems. As a result, it is not surprising that the data also suggest that employees are not always motivated to make claims by the predominantly CCLT-based remedies that the System makes available to them. This may be a function of the System's much greater focus on the concepts of distributive and procedural justice versus interactional and informational justice. The findings suggest that a significant percentage of employee claimants consider and make claims for the purpose of pursuing outcomes that are not even typically available under New Brunswick law, such as apologies, letters of reference and third party interventions into their employment relationships. The study data proposes that a significant percentage of workers who consider making legal claims do so in the pursuit of fairness, but that their perceptions of fair outcomes do not align with the law's prescribed remedies. For employers who wish to minimize the occurrence of workplace disputes and employee legal claims, the study illustrates that satisfying employee interactional and informational justice expectations, particularly in a consistent manner throughout the employment relationship, will be substantially more effective than focusing solely on distributive justice considerations. Because of the close relational nature of these organizational justice elements, it is important for employers to identify the managers and supervisors who have interactions with employees and to provide those individuals with training in interactional and informational justice-based management. Mere employer awareness of these concepts is insufficient, as it is their implementation (in the form of employee-manager communications) that is critical to satisfaction of employee fairness expectations.

Another indication arising from the study data is that a significant number of employee claimants advance legal claims not to achieve the outcomes that the System makes available, but because there is no better alternative. As has been noted, the majority of the Employees surveyed in the study indicated that the rectification of their Work Problems could have been most helped by interactional, interpersonal and informational justice interventions such as "better communication" and "assistance" from the employers. In this regard, the study findings support the conclusions of Roch and Shanock (2006) regarding the importance of these relational aspects in employment. As noted in Chapter 2, however, the legal System does not strongly encourage a relational view of employment and its procedures frequently discourage conduct that would foster interactional and informational justice perceptions. For example, the System discourages full employer disclosure because it raises risks of disclosed information being interpreted as an admission of liability by the employer or of being used in the litigation process as harmful evidence against the employer. Given that the Lawyers described the legal System's processes as costly and time-consuming, all of the System's stakeholders, with the possible exception of lawyers, should be willing to consider ADR initiatives that may provide cheaper, faster and more effective response to workplace disputes. In that regard, an opportunity appears to exist for employers to implement internal workplace dispute resolution mechanisms such as those studied by Bingham (2009) and Colvin (2004). While not all disputes will be ultimately resolved in internal ADR processes, the option of using ADR will provide employee claimants who are not seeking legal remedies with a viable resolution option.

The study data suggest that many New Brunswick employees who consider work-related legal claims do so for reasons that cannot be addressed well by the law. Given that a substantial percentage of the Employees and Employee Interviewees who participated in this study felt that non-monetary resolutions to their Work Problems were achievable, alternative dispute resolution (ADR) processes that are not primarily focused on monetary relief may provide employees who are contemplating legal claims with preferable outcomes in a more time- and cost- efficient manner. It is anticipated that employers would also benefit from more efficient dispute resolutions. As has been the case in ADR processes used in other

jurisdictions, the parties would not be limited to the financial remedies offered by the law and, as a result, they would have increased opportunities to explore non-traditional solutions, as has been endorsed by Relis (2007). The findings of the study demonstrate that the majority of Employees and Employee Interviewees would have been receptive to communication-based resolutions of Work Problems.

The conclusions generated by the study have several implications for stakeholders of the System. These include: a) recognition that, frequently, employees commence legal claims because they feel that they have been treated unfairly more so than because they want to obtain financial compensation; b) many employees who consider making legal claims view interactional and informational justice considerations such as better communication and assistance as more effective remedies to their work disputes than financial compensation; c) employment has, then, a strong RCLT base and, as a consequence, traditional CCLT remedies are not preferred; d) the legal remedies available to employee claimants are more focused on financial compensation and are very limited in their response to interactional and information justice concerns. In fact, the law often discourages open communications between employers and employees; e) some employers and lawyers who are involved in employee legal claims misunderstand claims motives; and f) legal systems could be amended to offer claimants and employers more flexible and cost-efficient RCLT-based resolutions instead of focusing on CCLT-based monetary damages.

7.1 Acknowledging the gap between legal justice and employee fairness expectations

The responsiveness of the law to employee claims motives had not been examined prior to this study. The findings of the study suggest that many employees who consider and pursue legal claims are seeking outcomes that are not available within the legal justice construct, such as better communication with their employers and more assistance from their employers in addressing work issues. This finding is consistent with existing literature that identifies the significance of relational considerations including interactional and informational justice in employment. Macneil has proposed that RCLT is a viable alternative to CCLT, which is the theory on which the New Brunswick legal System is currently based. Although not constructed to respond effectively to RCLT considerations, the System is sometimes accessed

by employees because other options are either not available or not known. However, some workplace disputes and subsequent legal claims could be resolved or avoided altogether through more open employee-employer communications and by the recognition of procedural, interactional and informational aspects of organizational justice. These findings are consistent with the concepts that: a) workplace disputes are sometimes based on evaluations of organizational unfairness rather than perceived violations of legal rights; b) some workplace problems cannot be effectively addressed by legal justice remedies; and c) not all employers and lawyers involved in employment-based legal disputes understand employee claims motives. Although Lind et al. (2000) found that feelings of unfair or insensitive treatment at termination significantly motivated employees' consideration of legal claiming, there is limited research on the subject and the researcher has found no literature that examines employee claims motives from a legal remedies perspective or from the perspectives of employers and employment lawyers. Further, there has been limited investigation of the impact of informational justice on employee legal claims motives. This study provides insights into not only the employee considerations that drive legal claims but, additionally, the gap between those motives and the legal process and remedies that govern them and also the understandings of employers and lawyers who are intimately engaged in the claims process.

As previously stated, the findings of the study support the existing literature in its indication that interactional and informational justice considerations play important roles in employee perceptions of workplace fairness. The study advances the discussion in that regard, however, by examining the constraints imposed by the System on employees and employers in respect of these considerations. Further, the study examines the responsiveness of the law to those elements of workplace fairness by illustrating the gap between employee expectations and the legal remedies that are available to them. The findings of the study support the indications of the literature that both interactional and informational justice influence employee reactions to unfavourable employment outcomes. However, the study also illuminates the impediments imposed by the System on the effective provision of interactional and informational justice by employers, as noted in the data collected in the Employer and Employee Interviews. Employer concerns regarding the legal limits of communication with

employees and the increasing risks of liability as a result of employer-employee communications are found in the study findings, and these concerns likely impede employer attempts to provide interactional and informational justice. Although not explored in this study, it may be that employer restriction of their free communications with employees as a result of legal liability concerns also impact employee perceptions of employer integrity throughout the relationships, as studied by Skarlicki et al. (2008). If that is the case, then a further concern arises about the negative impact of the current System on the provision of organizational justice to employees and the reduction of employee legal claims.

In addition to the operational impacts of the legal System on employee claiming, the study has also explored the influences of lawyers. As Macfarlane has argued, some disputes that are referred to lawyers are not suitable for resolution within the law's rights-based resolution model and, in fact, those disputes often escalate within the legal system (2008). Trubek has expressed a similar concern to the effect that some disputes are transformed by lawyers and the legal process in a manner that "…claimants come to want – or at least accept – what the system is prepared to deliver" (1988: 115). In respect of that point, the study demonstrates a disconnection between the expectations of employees who consider making legal claims and the perceptions of both the lawyers and employers who deal with those claims.

As a result of the study findings, it is identified that employers have opportunities to reduce their exposure to employee legal claims by adopting an RCLT-based approach to the provision of workplace fairness. It is also suggested that stakeholders in the legal system should consider the utilization of ADR processes that offer more flexible and less procedurally cumbersome alternatives to the traditional, CCLT-based processes of the System. Based on the findings, it is apparent that CCLT-based legal justice does not satisfactorily answer the concerns that cause employees to consider legal claims and that the law should be amended as a result.

7.2 The consideration of justice reform

The concept of substantially altering the current Canadian legal dispute resolution system is not new. In the past 12 years, the Canadian Forum on Civil Justice (CFCJ) has extensively studied access to justice and provision of justice issues and has recommended sweeping reforms that would encourage and facilitate earlier and more frequent dispute resolution efforts, simplify legal processes to improve time and cost efficiencies, and increase the public's understanding of the system (Shone, 2006). Although the CFCJ's recommendations relate to the entirety of the Canadian common law system, they were intended to apply to the New Brunswick System, as well. A number of the specific reforms that have been or could be considered in the System to address concerns expressed by the CFCJ and in the preceding pages are outlined below.

The indication of this study is that the System should be amended if it is to effectively respond to the concerns of employee claimants. It would appear that alternative dispute resolution processes would allow employers and employees more flexibility to craft settlements that more effectively respond to employee concerns and to do so in more time- and cost- efficient ways. Chapter 2 demonstrates the complexities of the System in respect of responding to Work Problems. The System is shown to be an intricate web of multiple legal structures that apply to one or more types of workplace disputes depending on factors such as federal or provincial jurisdiction, unionized or non-unionized employment, the character of the Work Problem itself, and the choices of forum made by employee claimants. In Chapter 2, it was noted that more than one claim process is available to some categories of employees who are experiencing certain Work Problems. However, other employees have only one type of legal recourse available, and some have none at all. In at least some cases, however, employees who experience Work Problems must choose one or more processes from a variety of options made available in the System and, depending on the employee claimant's choices, the responding employer may have to defend itself in numerous related claims. The problems posed for employees who resort to the System include confusion over which types of claims to make, what remedies are made available in respect of those claims, and what time limits and other procedural complications apply to each.

As explained in Chapter 2, the *Downey* case illustrates that a New Brunswick employee could make up to six different, valid claims regarding a single Work Problem:

a) A wrongful dismissal lawsuit in either the Court of Queen's Bench or in the Small Claims Court under the common law for wrongful dismissal damages and compensatory damages arising from the dismissal;

b) A complaint at the Labour & Employment Board under the *Employment Standards Act* for violation of minimum employment standards provisions such as minimum wage, dismissal without cause or without minimum notice, failure to pay statutory holiday or vacation pay, or violation of employee leave entitlements, including maternity leave;

c) A *Human Rights Act* complaint before a Board of Inquiry for alleged discrimination based on grounds prohibited by the legislation;

d) A complaint to an arbitrator under the *Occupational Health and Safety Act* for alleged discrimination based on an employee's attempt to comply with the safety provisions and rights under the Act;

e) A complaint to WorkSafe NB under the *Workers' Compensation Act* for alleged failure of the employer to preserve the employee's job if he or she is injured in an injury compensable under the Act; and

f) A *Right to Information Act* request can be made by provincially-regulated employees who work in particular government departments and Crown Corporations.

Essentially, a single Work Problem can be pursued in six distinct fora within the System, each of which imposes different rules and procedures. The consequence is that employees and employers may be understandably confused and frustrated by the claims process, since a single point of contention can generate multiplicitous legal proceedings, at least some duplication of work and expense, and increased uncertainty of outcomes.

A solution to the confusion that arises on the part of employees and employers in the current System would require the New Brunswick Government to advance comprehensive legislative reforms that would centralize the hearing of workplace legal claims at the Labour & Employment Board and, further, simplify and streamline the claims process so that Work Problems that are made the subject of legal claims are considered in a single process.

7.2.1 Reform consideration No.1: consolidate and simplify the claims processes available to employees under the provincial statutes and legislate make whole remedy jurisdiction to the Labour and Employment Board

Consolidation of some or all of the claims processes prescribed in the Provincial Statutes listed in Table 2.1 and the common law would make the System more navigable for its stakeholders by reducing the number of parallel claims options available to employees and, thus, the level of complexity that currently exists.

This option should introduce an entirely new dispute resolution scheme that draws on experiences in the more advanced systems of the United Kingdom and the United States. The new system would effectively replace the common law with a statutory rights scheme that a) reflects society's views of employment by providing the decision-making body with jurisdiction to award equity-based resolutions to Work Problems (in the same manner as the *Canada Labour Code, Part III* intends); b) provides faster interventions and resolutions of Work Problems; and c) simplifies the claims process for employees and employers by vesting jurisdiction in a single decision-making body to address all Work Problems. When the *Canada Labour Code, Part III* was passed by the Canadian Parliament in 1978, it was described by George Adams, a prominent labour and employment law scholar, as "one of the most novel employment law experiments in North America" (*Roberts v. Bank of Nova Scotia*[41]). The adoption of a comprehensive ADR-focused employment dispute resolution system in New Brunswick would likely result in a simpler, more user-friendly and cost-effective process for all stakeholders.

[41] (1979), 1 L.A.C. (3d) 259 at 263 (Adams)

42 *Employment Rights Act, 1996, supra*

7.2.2 Reform consideration No.2: investigate the potential value of dispute resolution practices used in other jurisdictions and other fields of law

As previously noted, efforts have been made in other jurisdictions to increase the relevance and efficiency of their workplace dispute resolution procedures. The U.K., as one example, has implemented a more integrated employment dispute resolution system than New Brunswick's. In the United States, as well, alternative dispute resolution processes have been mandated by some state governments and have been adopted voluntarily by some companies that seek to reduce the negative impacts of work disputes. In both the U.K. and the United States, employment dispute resolution models demonstrate flaws and have been criticized. However, both countries have embraced workplace alternative dispute resolution more aggressively than New Brunswick has. The U.K. system allow employees to advance claims more simply than does the New Brunswick System, and the U.K. already makes earlier resolution of claims more achievable by offering conciliation and mediation services through its Advisory, Conciliation and Arbitration Service (ACAS). The services offered by ACAS have been criticized in the past and continue to be analysed and amended (Gibbons, 2007). By considering workplace dispute resolution processes utilized in the U.K. and other jurisdictions, however, New Brunswick could adopt mechanisms that are based on experience. For example:

a. Facilitation of protected conversations. In the U.K., the need for opportunities to expediently and openly discuss Work Problems at their inception has been recognized and is being addressed. It has been found that many employers are reluctant to discuss sensitive employment issues with staff members due to a fear that the discussions will lead to a legal claim or will be used as evidence against the employer in a legal process. Consequently, the U.K. Department for Business Innovation and Skills is promoting legislative reforms that will allow and encourage employers and employees to have "protected conversations" about problems that could become the basis of legal claims if left unaddressed. "Protected conversations" will be prevented from being used as evidence against either party in subsequent litigation. This type of protection would increase the ability of employers and employees to discuss, understand and resolve perceived unfairness at the "naming" stage of dispute transformation (as discussed in Chapter 3) rather than at the later "claiming" or

"disputing" stages. In this study, employers expressed a concern of being restricted by legal liability risks in respect of their communications with employees about workplace disputes and problems. One of the Employer Interviewees indicated that he felt that he could not raise some job performance or behavioural concerns with an employee for fear of creating evidence that would support a subsequent legal claim by the employee.

The New Brunswick System does not generally facilitate alternative dispute resolution processes. Instead, it requires parties to litigation and their lawyers to be very strategic with the timing and manner of disclosure of facts that could become evidence in their cases. In fact, lawyers in New Brunswick are faced with a series of ethical obligations regarding the confidentiality of information that comes into their possession. The difficulty is that, without disclosure of relevant information, settlement of a dispute may be more difficult to achieve, since neither party is fully cognizant of the issues that must be resolved or the significance of not obtaining resolution. The study data suggests that employees and employers would prefer it if workplace disputes were addressed through more open communications that facilitate mutual understanding of issues and problems, as well as early identification of potential solutions.

A concern that arises from the use of protected conversations is the possibility of their misuse by employers. An employer could, for example, abuse the mechanism by using it to intentionally discourage or bully an employee. Consideration should be given to the establishment of controls on protected conversation usage, such as the creation of a legal obligation to use the mechanism fairly and an imposition of punitive damages in the event of a failure to do so.

b. *Imposition of early conciliation/mediation*. The first recommendation in the CFCJ's 2006 report on reform of the Canadian civil justice system (Shone, 2004) is that every jurisdiction:

> a) make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible...;

> b) establish, as a pre-condition for using the court system after the close of pleadings, and later as a pre-condition for entitlement to a trial or hearing date, a requirement that litigants certify that they have availed themselves of the opportunity to participate in a non-binding dispute resolution process…;
>
> c) ensure that individuals involved in helping litigants in non-binding resolution processes have suitable training and support to carry out this function. (Shone, 2006: p. 9)

Some forms of alternative dispute resolution, such as collaborative law, attempt to avoid the traditional court process through direct communication between the disputants. Mediation, however, engages a neutral third party to facilitate settlement discussions between the disputing parties (Mahoney and Klaas, 2008). The third party mediator uses interest-based bargaining principles to pursue resolutions agreeable to both sides of the dispute. Mediation offers advantages over traditional litigation that include: more cost- and time-effective settlements; reduced risk of exposure to an unpredictable court result; a process that is conducted privately and not publicly (as trials in the courts are); and the freeing of mediators from rules and limitations that restrict the form and substance of settlements that can be formulated by the parties, whereas the courts are limited by the law (Cooper et al., 2005). Mahoney and Klaas (2008) have suggested, however, that mediation is problematic in some instances because the privacy it offers may shield employers from public exposure to the employers' wrong doings. Further, the confidentiality of the mediation process that protects employers from public knowledge of internal injustices can also have the negative effect of preventing employees from learning of workplace issues and outcomes (Mahoney and Klaas, 2008). While these concerns are legitimate in respect of general societal issues such as deterrence, the findings of this study suggest that individual employees are concerned about the potential negative impacts of having their legal claims known. The findings of the study are consistent with those of Gibbons (2007) in that they indicate a desire on the part of employees and employers to resolve disputes through direct communication and in a time- and cost-effective manner.

If a multi-staged alternative dispute resolution process were mandated in New Brunswick, it would encourage employers and employees to discuss and understand Work

Problems at least from the outset of litigation and, also, outside the constraints of the legal financial compensation model. The U.K. experience of repealing its 2002 statutory procedures in favour of a flexible, more disputant-driven mediation approach focused on following the ACAS Code of Practice on Discipline and Grievance should be noted and has been discussed in more detail in section 3.7 above. Since a concern regarding rigid ADR process requirements is that they can become procedurally complex and, as a result, may hinder the achievement of expedient resolutions, it would be advisable for New Brunswick to consider a model that requires early education of claimants and respondents as to the cost, inconvenience, stress and legal risks of failing to settle their disputes through mediation.

c. *Encourage the use of mediation and collaborative law in addressing work problems.* As discussed in Chapters 2 and 3, mediation and collaborative law are ADR models that are utilized in New Brunswick primarily in the family law context. That said, it has been suggested that one of the advantages offered by collaborative law is particularly applicable to employment relationships, as well as family matters (Abney, 2009) and the same can be said in respect of mediation. In the United States, ADR is being pursued more often and, conversely, the use of civil jury trials has dropped significantly (Philbin et al., 2010). Within the American ADR context, mediation has grown in popularity because it offers greater flexibility than arbitration (Philbin et al., 2010). Similarly, collaborative law has been described as the "rising star of Alternative Dispute Resolution" (Isaacs, 2005: 833) and has become popular in New Brunswick and most other North American jurisdictions in the family law context. In collaborative law, a central objective is to facilitate the parties' negotiation of a mutually fair resolution of their dispute while avoiding the "…ritualized form of gladiatorial combat…" that often occurs in the courts (Strickland, 2006: 980). While family law practitioners have widely embraced collaborative law as an alternative to family court litigation, it has not been utilized frequently in other areas of law.

The findings of this study suggest that a significant number of Work Problems could be resolved in time and cost-efficient ways by considering RCLT-based, communication-oriented solutions rather than CCLT compensation-based outcomes. Because mediation and collaborative law offer the parties to a dispute greater flexibility than can be achieved in the

court system and even in arbitration, it is likely that many New Brunswick employees and employers could arrive at easier resolutions of their disputes by applying the flexibilities offered through mediation and collaborative law. Given the time and expense that are invested into the resolution of Work Problems in New Brunswick, there is a strong argument to be made for greater use of alternative dispute resolution processes such as mediation and collaborative law.

A number of the U.K. initiatives already enacted or currently under consideration bear similarities to the Norwegian civil justice system that ranked first in the 2011 World Justice Project study of access to civil justice in 66 countries. In Norway, the *Dispute Act 2005* has introduced court-provided, mandatory mediation in all cases before the courts. This initiative followed a pilot mediation project that commenced in 1997 and a study of the results of that pilot project by Knoff (2001). The conclusion reached by Knoff was that court-provided mediation was successful in achieving resolutions in a cost-effective and time-efficient manner (2001). Specifically of interest in this research are Knoff's findings that employment law disputes are amongst those most suited to court-provided mediation, the parties using the mediation system found it less stressful than a trial, and experienced lawyers who have made use of the mediation system are much stronger in their recommendations of it than are inexperienced lawyers (2001). Further, Knoff observed that the Norwegian court-provided mediation system offers these advantages:

1. The mediator's role allows him to identify the parties' underlying interests, which, in turn, may then be addressed in the pursuit of a resolution;
2. The parties may experience less pressure in a mediation;
3. A settlement achieved in mediation may facilitate better cooperation between the parties in the future;
4. Mediation allows the parties to avoid publicity; and
5. The total strain on parties in mediation is reduced (2001; p.22).

In addition to the western European concepts outlined above, New Brunswick should also examine potential amendments that can be taken from other Canadian jurisdictions. First, adoption of the adjudication process and the Make Whole Remedy of the *Canada*

Labour Code, Part III should be considered. The *Canada Labour Code* framework offers advantages that the System currently does not, such as: i) a comprehensive equity-based framework that offers employees the opportunity to advance a variety of claims in one process; ii) a time and cost efficient claims process that can be navigated by non-lawyers; and iii) expansive and flexible remedies that provide the ability to respond to employees' non-financial claims motives.

Collaborative law proves an opportunity for the legal profession in New Brunswick to answer the most significant concerns of the stakeholders in the System. Since it is already in use in the New Brunswick family law context, collaborative law is not an unknown dispute resolution method in the province. The benefits offered by collaborative law, as referenced in Chapter 2, have been outlined by Daicoff (2009):

i. more cost and time effective;

ii. a higher degree of privacy;

iii. greater satisfaction derived from increased procedural justice as a result of the parties gaining more control over the outcome of the their cases;

iv. a higher level of compliance with final outcomes, due to the investment of the parties in the resolution of their disputes;

v. outcomes that are more likely to be therapeutic as opposed to polarizing;

vi. less conflict than in an adversarial legal process;

vii. the options for resolution are not limited by parameters imposed by law but engage inter-disciplinary non-legal expertise from fields such as psychology, vocational training, medicine and more.

A challenge of collaborative law is the paradigm shift that it presents to lawyers. As a form of conflict resolution advocacy (versus adversarial advocacy), collaborative law requires lawyers to modify their key beliefs by recognizing that rights-based dispute resolution is not the only, and often not the best, model of resolution available to disputants (Macfarlane, 2008).

Lawyers who practice conflict resolution advocacy must assist their clients in engaging in their conflicts by confronting the strategic and practical realities of their disputes (Macfarlane, 2008). The findings of this study highlight that a difference of perception exists between some employee claimants and lawyers regarding the true nature of the employees' disputes, and this underscores the importance of lawyers reviewing their approaches to workplace conflicts.

d. Settlement agreements should be encouraged and simplified. As has been discussed in Chapter 2, the settlement of employment disputes in New Brunswick can be a complicated, lengthy process. This is because the statutory withholdings that employers are required by law to make from compensation paid to employees are often uncertain and, in some cases, require government assessment. Further, there is no standard form settlement agreement or set of forms prescribed within the System, and, as a result, the parties and their lawyers are left to debate the contents of each settlement agreement. In the U.K., it has been suggested (Gibbons, 2007) that settlement agreements between employers and employees can be achieved more readily if legislation strongly encourages their use and if simplified standard forms are made available to employers.

e. *Further time and procedural efficiencies should be mandated.* Other systems of workplace dispute resolution exist and have been used with success. Colvin (2004) studied the implementation of non-union ADR processes adopted by American manufacturing company TRW. He found that peer review and non-union arbitration processes used by TRW were at least partially successful in resolving workplace disputes and were particularly useful in generating quick resolutions in certain cases. This is consistent with the experience in U.K., where ADR processes are being used much more frequently than in New Brunswick employment cases. The findings of this study suggest that the confidentiality offered by ADR processes such as mediation, arbitration and collaborative law would be welcomed by employees who currently consider making traditional legal claims, since the most prominent concern expressed by respondents to the Employee Survey was the effect of legal action on their reputations. Other concerns expressed in the Employee Survey regarding legal claims have been recognized by the CFCJ, which has made a whole series of recommendations for

the improvement of time, cost and procedural efficiency in the Canadian system, including stringent case management processes, simplification of the legal processes, and early disclosure of facts (Shone, 2006). The CFCJ recommendations should be reviewed in the process of reforming the entire System, as discussed above.

7.2.3 Reform consideration No.3: recognize employment as a "peace of mind" relationship as a means of improving access to exemplary damages

The relevance of this issue depends in part on whether Reform consideration no.1 is pursued and, if so, the nature and extent of the resulting systemic change. If, for example, the first potential reform were fully implemented, this potential reform would become moot, as it contemplates an amendment of the existing common law perception of employment and an expansion of current common law damages. However, even if an extraordinary reconstruction of the System is not to be undertaken, then this more modest amendment, which would by statute increase the System's remedial responsiveness to Work Problems, is still worthy of consideration.

It is hardly necessary to make the observation that financial dependency on employment is very high, particularly since average Canadian household indebtedness statistics have skyrocketed in the past decade and continue to climb upward, from 66% of household income in 1980 to 150% in 2011 (Chawla and Uppal, 2012). A person's job frequently amounts to a sort of collateral against which significant credit is extended. The breach of an employment agreement can topple the foundation on which an entire household's financial position has been precariously constructed, and that prospect itself is a compelling basis for non-pecuniary, and even exemplary, damages in the face of employer misconduct. That said, the findings of this study demonstrate that the impacts of Work Problems on employees are more wide-ranging than simple financial losses. The expectations of many employee claimants would be better met if a more complete range of compensatory relief could be made available to New Brunswick employees under the common law through recognition of employment agreements as peace of mind contracts (Waddams, 1991).

Both *Addis* and *Keays* complicate an employee's pursuit of an exemplary damages or punitive damages award. Although *Keays* has relieved some of the remedial restriction imposed by *Addis* (which prevented recovery for any non-pecuniary losses arising from wrongful dismissals), it is more restrictive than the *Wallace* decision. In *Wallace,* the Supreme Court of Canada formulated a principle which allowed for the compensation of employee mental distress resulting from employer bad faith conduct in the course of employment dismissal. As Gudel suggested would occur, the response of the CCLT-based common law to the need for some measure of relational remedy in employment breakdowns has been less than strategic (1998), and the *Wallace* decision is a good example of this. Consequently, the Supreme Court of Canada conservatively modified the increased notice of dismissal compensation scheme in respect of bad faith employer conduct (as set out in *Wallace*) by concluding that mental distress damages should be awarded explicitly if: a) the employee proves the mental distress; and b) the mental distress was foreseeable as a product of the manner in which the dismissal was conducted (Veel, 2009). As Veel has observed, however, the Court's approach to mental distress compensation in *Keays* may have the effect of making these damages more difficult to recover, since employee claimants will have to "…demonstrate more clearly the causal connection between the employer's bad faith and the mental distress suffered…" (Veel, 2009:150).

New Brunswick courts have only rarely awarded exemplary damages to claimant employees, in spite of provincial legislation that provides express jurisdiction for doing so (*Law Reform Act*, R.S.N.B. 2011, c. 184). Although the New Brunswick Court of Queen's Bench has recently awarded punitive damages against an employer *MacDonald Ross v. Connect North America Corp.*[42] , the circumstances of that case were particularly severe and included a bad faith allegation by the employer of criminal conduct by the employee. In the history of New Brunswick employment law, only a very small number of exemplary damages awards have been made. However, other circumstances that could reasonably invite an award of exemplary damages include employer harassment, abuse of authority and negligent infliction of emotional distress. While it will be argued below that employment is a field in which exemplary damages are particularly necessary and worthwhile, it should be

[42] [2010] N.B.J. No 250

first noted that this category of compensation has been looked upon with some trepidation by Canadian courts in all aspects of the common law.

The reasoning in support of exemplary damages awards generally is that deterrence, as well as compensation, is a legitimate objective of the civil law.[43] In their earliest form, these awards were intended to discourage dueling and private vengeance;[44] in modern times, however, it has been thought that exemplary damages seek to illuminate misconduct that either does not fall within the criminal law or, if it does, is not adequately punished in that arena (Waddams, 1991). In the employment context, many employer transgressions fall outside of the criminal law, and are not punishable at all unless made the subject of exemplary damages.

One of the main points to be made in respect of employment damages is that a statutory expansion of the potential entitlement prescribed in *Keays* would likely have two positive effects. First, the prospect of increased relief would offset at least some of the obstacles which employees face in the pursuit of employment litigation. The cost of legal representation, the time and emotional investments needed to pursue a claim, and, very importantly, the fear that claimants are "blacklisted" by the employer in question and by other prospective employers are all deterrents to pursuing legal action. Second, more exemplary damages awards would provide employers with an incentive to act fairly toward employees – if only to lessen their risks of exposure to substantial court awards which far exceed reasonable notice damages.

It is suggested that employment cases should be permitted entry into the exclusive realm of "peace of mind" contracts. If that occurred, then punitive and exemplary damages awards could be made more easily, and that, in turn, would assist in mitigating the chronic vulnerability of many employees. Applications of punitive damages in Canadian contract cases demonstrate the utility of such awards.

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[43] *Supra*, p. 11-2.

[44] *Merest v. Harvey* (1814), 128 E.R. 761

In *Whiten v. Pilot Insurance Co.*,[45] the Supreme Court of Canada ultimately allowed an award of punitive damages to Whiten, whose family home had been destroyed by fire. Pilot had issued a fire insurance policy to Whiten in respect of the home, but when the loss occurred and the policy entitlement was claimed, Pilot not only rejected the claim but, in response, devised a "trumped up" arson allegation. As a consequence of Pilot's aggressive position, Whiten was forced into an eight-week trial and, additionally, had a dark cloud of suspicion hung over his head in the meantime.

At the conclusion of the *Whiten* trial, a jury awarded not only compensatory damages, but also punitive damages in the amount of $1 million. The magnitude of the punitive award was such that Pilot Insurance appealed the decision to the Ontario Court of Appeal, which upheld the notion of punitive damages in the case, but reduced the amount to $100,000.00. At the Supreme Court of Canada, however, the $1 million dollar award was restored, leaving Canadian insurers with a sense of anxiety. The rationale for the S.C.C. decision leads to the conclusion that the difference between "peace of mind" agreements and employment contracts is very slim indeed.

If the good faith obligation identified in *Whiten* were applied in New Brunswick employment cases, then an employer's breach of it would allow for exemplary damages awards. This principle could be used to capture an obligation on the part of employers to follow a code of practice, similar to the ACAS Code of Practice, in the course of disciplining or dismissing employees and in respect of addressing Work Problems. A failure on the part of an employer to adhere to such a code could constitute a breach of its good faith obligation and could then invite additional compensation in favour of the employee.

The second fundamental aspect of the Court's decision in *Whiten* arises from the inequality of bargaining power which is inherent in any negotiation between a large insurance company and a potential insured. In considering the duty of mutual good faith,

[45] [2002] S.C.J. No. 19.

the S.C.C. quoted from a lower court decision in which a punitive damages award had been made against an insured:

> A great deal has been made in the case law, to which this court was referred, of the fact that insurers *vis a vis* their insureds are in a superior bargaining position and one which places the insured in positions of dependency and vulnerability. Equally, insurers must not be looked upon as fair game. It is a two-way street founded on the principle of utmost good faith arising from the very nature of the contract.[46]

Of course, employment contracts also contain implied mutual duties of good faith and, hence, are indistinguishable in that regard from the insurance contract. The nature of the insurance contract, then, which bears striking similarities to the employment agreement, has been the basis for awarding exemplary damages in insurance cases, and not the impediment.

In *Whiten*, the Supreme Court of Canada reiterated a statement made by Laskin, J.A. when the case was before the Ontario Court of Appeal:

> Vindicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disasters strike.[47]

The same deterrence objective would have merit in the New Brunswick employment context given that Work Problems caused by real or perceived exploitation of workers by their employers often have serious negative financial and emotional effects. As Polinsky and Shavell (1998) have suggested, punitive damages can be appropriate in circumstances where the legal system is an inadequate deterrent for improper conduct because of the injurer's possibility of escaping liability. In this study, the data suggests that the majority of employees who suffer Work Problems do not advance legal claims and, therefore, employers have a high prospect of avoiding liability in respect of their wrongdoings.

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[46] *Wallace v. United Grain Growers Ltd.*, supra, at para.95.

[47] *Supra*, at para. 114.

The study data suggest that many New Brunswick employees perceive employment as an RCLT-based relationship from which they derive peace of mind. In fact, Work Problems caused more than 98 percent of the Employee Survey respondents to experience emotional or psychological reactions, and almost half of those had symptoms for which they sought medical or psychological treatment. For most of the Employees and Employee Interviewees, their Work Problems were the result of perceived unfair employer treatment. The *Whiten* rationale could be applied to New Brunswick employment law in order to reduce the health impacts of Work Problems by encouraging and facilitating fair treatment of employees and, also, early mediation of workplace disputes.

7.2.4 Reform consideration No.5: enact apology legislation to provide employers and lawyers with greater capacity to resolve work problems

As previously noted, the System in New Brunswick and the law generally has not fostered the expression of apologies. In fact, apologies have been discouraged due to their potential use as evidence to prove the apologist's liability and, in some cases, the voiding of his or her insurance policy (MacLeod, 2008). The very limited use of apologies in New Brunswick and the lack of specific apology legislation appear to be impeding faster resolution of at least some Work Problems, and this may be resulting in unnecessary and expensive litigation.

Except in limited circumstances (such as cases brought under human rights legislation or the *Canada Labour Code, Part III*), non-unionized employees in New Brunswick have very little prospect of obtaining an apology from their employers. In that regard, the legal contract model of employment seems to fail, particularly when it is enforced in the climate of traditional evidentiary rules such as those which remain in force in New Brunswick. Litigants and potential litigants who are under those rules are discouraged from making any comments which could later be characterized as admissions against interest, and, hence, workplace dispute-related communications from employers to employees are typically devoid of the kinds of information and sentiments that employees are seeking for resolution. Apology legislation would facilitate these useful communications and would foster more expedient

Work Problem resolutions; while the New Brunswick legislature has contemplated the idea, it has yet to enact an apology statute.

The positive impact of apologies in resolving litigation is well-documented. For example, Cohen (1999) has noted that, in the medical malpractice context, 24 percent of families who sued their physicians following pre-natal injuries did so only after learning that their physicians had been less than completely honest with them about the occurrence of the injuries in question. In another study, Witman et al. reported that 60 percent fewer patients would have sued their physicians if they had simply been advised of a "moderate physician error" (1996). Rather than financial compensation, some claimants would have preferred to receive honest information as to how their injuries arose and, when appropriate, an apology and an assurance that proactive steps would be taken to reduce the risk of similar future incidents.

In this study, the findings indicate that New Brunswick employees are willing to consider non-monetary resolutions of their Work Problems, although it should be noted that the Employee Survey respondents did not strongly consider employer apologies as potential corrections of their Work Problems. Regarding that last point, the indication that employees may not consider apologies as adequate rectifications of employer unfairness does not necessarily mean that apologies do not have a positive impact on bringing about resolutions to Work Problems. Workplace dispute research literature strongly recommends that dispute resolution processes which are more advanced than the existing "legal justice" model be adopted. Apology legislation would provide employers, employees and their respective counsel with an additional tool with which to fashion meaningful and satisfactory settlements. In their analysis of the United States Postal Service's workplace ADR system (REDRESS), Bingham et al. found that both supervisors and employees perceived that apologies were extended in approximately 30 percent of cases, and that apologies are viewed by disputants as indicators of recognition (2009). In turn, recognition has been demonstrated to increase participant satisfaction in ADR outcomes (Bingham et al., 2009). If the statutory provision were limited to use only in respect of Work Problems, it could be incorporated into the type of complete statutory revision referenced in Reform consideration no. 1 above. Otherwise, it

could be made the subject of independent legislation applicable to all New Brunswick litigation.

7.2.5 Reform consideration No.4: Apply the Make Whole Remedy in all workplace dispute claim processes

The current remedial options available to provincially-regulated, non-unionized employees who make wrongful dismissal claims in New Brunswick are CCLT-based and limited in scope. In fact, the study data suggest that the motives of a significant number of employees who consider making legal claims cannot be adequately addressed by the System. If the Make Whole Remedy were adopted as a legislated response to all employment legal claims, the result would be that:

a) Judges and other decision-makers would have jurisdiction to consider a broader range of remedies than is currently available, including non-economic responses such as the provision of letters of reference and apologies. As a consequence, the System would afford employee-claimants with an opportunity to achieve preferred outcomes that may not involve the payment of any or as much of the financial compensation that they are currently forced to pursue;

b) Employers would be required to view and address employment relationships from an RCLT-based perspective and, as a result, should be more motivated to adopt fair workplace management practices that will reduce the incidence of perceived unfairness and, consequently, will minimize employee claiming; and

c) All of the stakeholders in the System would have greater flexibility in the fashioning of awards and settlements that more accurately address employee losses and employer wrongdoings. As has been discussed in detail in Chapter 2, the System currently encourages (and arguably requires) the characterization of most employment claim compensation as taxable wages, even when the intention of the claiming employee, or even both parties in a settlement context, is to address an emotional injury or other non-wage concern. Through access to the Make Whole Remedy, judges, other decision-makers and parties

would be in a position to more easily provide non-taxable compensation when appropriate, thus providing the parties with increased options for meaningful workplace resolutions.

7.3 Steps toward simplification

In fairness to the New Brunswick System, it should be noted that some of the reforms recommended in this chapter are already being utilized in limited ways. For example, the parties to certain kinds of employment disputes are able to access System-provided mediation services, and efforts have been and continue to be made to simplify the System for its stakeholders. The concern lies in the limitations of what has been implemented to date. In the case of System-provided mediation, some types of Work Problems can be referred to mediation if both parties agree, but System-provided mediation is not available at all in the case of other types of Work Problems. As for simplification of the System, the existing multitude of possibly applicable statutes and fora for the resolution of Work Problems is proof that not enough simplification has yet occurred. Further, some practitioners in the province would argue that recent amendments to the System which have apparently been intended to simplify litigation processes have, instead, only created more complication. As an example, since 2005 New Brunswick has created three tiers of common law claims (in which a typical wrongful dismissal would be determined):

i. First, there was a Small Claims limit of $6,000, with all claims under that amount being heard in Small Claims Court. All matters involving amounts above $6,000 were heard under the "standard" *Rules of Court* in the Court of Queen's Bench Trial Division. No mediation provisions existed in Small Claims Court, but a voluntary settlement conference process was available in respect of standard claims;

ii. In 2006, the Province created a third process for claims between $6,000 and $50,000. Claims in that middle tier were referred to the Court of Queen's Bench, Trial Division, but under a distinct process with different evidentiary rules. As of 2013, the Small Claims limit has been reduced to $12,000.

Settlement conference services remained available in standard claims and were arguably available (but seldom if ever used) in respect of claims in the middle tier, but were not available in Small Claims cases;

iii. The Province amended the System again in 2010 by increasing the Small Claims limit to $30,000, abolishing the Small Claims Court, and assigning all Small Claims to the Court of Queen's Bench for hearing. As a result, the limit of the middle tier was increased to $75,000, and, consequently, the "standard" claims process involved only claims over $75,000. Small Claims of up to $30,000 were made subject to a settlement conference process which, though not mandatory in every case, could be required by the Court; and

iv. In May 2012, the Province introduced the now enacted Bill 39, which confirmed its intention to reinstate the Small Claims Court that was abolished in 2010 and to reduce the Small Claims limit to $12,500. No mediation process is contemplated in the new legislation.

The New Brunswick System currently provides provincially-regulated, non-unionized employees with a mediation process that is not uniformly required but is available to some litigants. However, Bill 39 has had the effect of reducing overall access to mediation further by making claims of $12,500 or less subject to the jurisdiction of the Small Claims Court, which is not intended to have a mediation function. Using New Brunswick common law notice principles as the basis for an estimate, it should be anticipated that the majority of employees who earn the provincial statutory minimum wage ($10 per hour) and who claim wrongful dismissal from employment during their first 7 years of employment will be encouraged to make claims in the Small Claims Court. Consequently, they will not have even the option of a System-provided mediation process.

Adoption by the New Brunswick System of even some of these reforms considered in this chapter would help to address the shortcomings of the System for employees and employers. Fundamentally, the objective would be to increase the relevance of the System by

providing employee claimants with outcomes that they are seeking. Added benefits of doing so would likely be a reduction of official claims, cost savings resulting from fewer trials and administrative hearings and greater efficiencies in those that do proceed, and a reduction in employee and employer expenses, time and stress in achieving Work Problem resolutions.

7.4 The enhancement of justice in two forms

Central to this study is the argument that the legal justice available to New Brunswick employee claimants is not particularly responsive to the motives behind many claims. This shortcoming is especially problematic when it is recognized that more effective responses would, in many cases, also be cost and time efficient for employers. In spite of opportunities to improve the provision of just and fair responses to Work Problems, however, New Brunswick has thus far been reluctant to depart from its relatively traditional, common law-based justice System. The data collected in this study encourage two general areas of Systemic amendment, as discussed above.

First, New Brunswick's existing legal justice model should adopt a broader range of remedies. As an example, the fact that common law judges in the System have no jurisdiction to award particular non-monetary relief such as apologies is clearly inconsistent with the finding that apologies are sought after by some claimants. Further, less restriction on exemplary and punitive damages would serve at least three important functions: a) employee claimants would be afforded a greater opportunity than currently exists to successfully claim compensation for non-contractual injuries incurred as a result of their Work Problems; b) employers would be at greater risk than they currently are of being ordered to pay damages for injurious conduct toward employees; and c) the System would be better able to deter improvident or malicious employer behaviours.

Second, an alternate model of workplace justice should be given serious consideration as either a replacement for or, more conservatively, a preliminary step in the System. The alternate model would incorporate faster and less formal processes such as early mediation in response to Work Problems and would provide access to a broader range of remedies than the

legal System currently does. In fact, the disputing parties would be afforded significant flexibility to fashion a remedy that best responds to their needs.

7.5 Limitations of the study

Throughout the conduct of this study the researcher has been aware of the limitations and methodological problems outlined in Chapter 4. The researcher's bias, for example, has remained a prominent concern, as his practice as an employment lawyer in New Brunswick has provided insights and experiences which have influenced his own perception of the System and its shortcomings. Although the researcher's frame of reference has presented a bias concern, it has conversely offered the benefit of primary knowledge of the System and issues arising from its application of the law. Efforts have been made to represent the findings of the study using a balanced approach that has recognized that the System as it currently exists performs an important function, although the researcher recognizes that the study invites further research into the maximization of the System's utility and responsiveness to claims motives.

In addition to researcher bias concerns, it should be noted that access to questionnaire and interview respondents was a challenge, perhaps because the subject matter can be emotionally charged and often seems to be cloaked in confidentiality and privacy. It was particularly difficult to obtain access to employers, especially in respect of the Employer Questionnaire. This is a challenge that raises two concerns: first, the impact of low participation on the value of the data received from employers in the study; and, second, the self-selection bias that could affect the Employee Questionnaire data based on the relative ease (as compared to employers) that was experienced in obtaining Employee Questionnaire respondents. The results of the Employee Questionnaire must also be read with recognition that some of the respondents who proceeded past the filter question did not complete all of the questionnaire's 57 questions, causing non-response bias.

After completion of the data collection, the researcher recognized that different methodological approaches could have been utilized to obtain more generalizable data. As

stated previously, the study data suggest that additional research into the focus points of the findings should be undertaken. The design of the further research should seek to overcome the generalization limitations of this study, which have arisen in part due to challenges in accessing data. This challenge arose in part from the reluctance of some employees to discuss their work disputes, but also from the dynamic nature of those conflicts. If more time had been available to the researcher and had the concern about accessing individuals who had experienced a Work Problem been lesser (as it now is, given that 71 of 204 respondents to the Employee Questionnaire, or 34.8%, acknowledged having had one), then the researcher would have likely undertaken a probability-based survey. In addition, expansion of the study's respondent population into jurisdictions outside of New Brunswick would have allowed for more general application of the study's findings, and the inclusion of decision-makers such as judges, tribunal chairs and arbitrators would further enrich the data.

7.6 Implications for future research

This study raises questions that should be addressed in future research. Regarding the initiation of employee legal claims, for example, the findings of this study suggest that some claims are motivated by relational (RCLT) considerations while others are motivated by contract-based (CCLT) interests. It would be useful to know more about the ways in which the expectations behind these different motives were shaped. These expectations may be influenced by factors such as personality characteristics or establishment of clearly communicated contract terms, and if that is the case, employers and employees may be able to substantially reduce the occurrence of workplace disputes proactively.

Another question to be examined is whether or not the motives of employee claimants transform further through the legal claims process. This issue relates to the impact of the legal process and its remedies on claimants' desired outcomes and asks: Does increased information about the legal system, prolonged focus on the law's money-based remedies, and extended contact with lawyers and other stakeholders in the legal system cause claimants' interests to shift from achievement of fairness to pursuit of financial compensation? The literature suggests that the legal system and lawyers encourage a transformation of employee

claims interests from RCLT-based considerations to CCLT motives. If that is the case, then the systemic amendments suggested above would likely be helpful in maintaining focus on the real issues behind workplace disputes. Related to this question is the extent to which lawyers influence employee claims considerations.

An examination of the outcome satisfaction of employees who successfully make *Canada Labour Code, Part III* complaints, as compared to the outcome satisfaction of employees who successfully make common law-based claims in the System, would also be beneficial in the assessment of the System's adequacy in responding to employee claims motives. Since the *Canada Labour Code, Part III* prescribes the Make Whole Remedy as an RCLT-type response to work disputes, the satisfaction level of claimants who proceed with claims under that legislation will provide valuable insight into the utility of adopting a similar process within the System. Since the *Canada Labour Code, Part III* claims process is less procedurally formal than many of the various procedures that comprise the New Brunswick System, the reviews of claimants who use the *Canada Labour Code, Part III* may offer important information regarding the balance between form and substance required to offer the highest level of fairness to workplace disputants.

There are several key conclusions drawn from this study. Fundamentally, employees who consider making legal claims are not always motivated to do so by the potential remedies offered by the System. In fact, some employees make claims because there is no alternative dispute resolution mechanism available to them. It appears that the System and some lawyers who practice within it do not recognize the RCLT-based motives behind some employee claims, and, consequently, the claimants are directed to focus on CCLT-driven resolutions. However, the study data suggest that, if a fair process offering non-legal and sometimes non-compensatory remedies were made available, some employers and employees would utilize it. These conclusions suggest that some New Brunswick employment disputes can be resolved in a less legalistic and more practical manner through alternative dispute resolution processes such as mediation and collaborative law practice, and that the resolutions produced would better satisfy the desires of the employees who advance claims.

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APPENDIX A

Lawyer Questionnaire with Responses

APPENDIX B

Employee Questionnaire with Responses

APPENDIX C-1

Employee Interviews : Participant Information Sheet and Consent Form

APPENDIX C-2

Employee Interviews : Questions

APPENDIX C-3

Employee Interviews : Transcripts

APPENDIX D-1

Employer Interviews : Participant Information Sheet and Consent Form

APPENDIX D-2

Employer Interviews : Questions

APPENDIX D-3

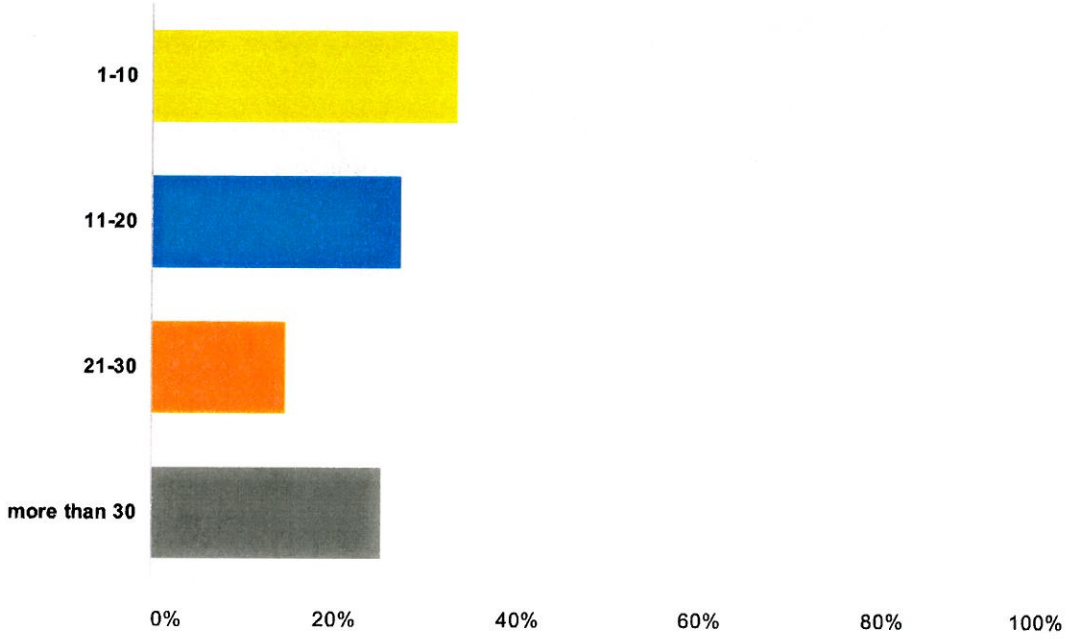
Employer Interviews : Transcripts

APPENDIX A

Lawyer Questionnaire with Responses

Q1 How many Claims (potential and actual legal claims considered by non-unionized, provincially-regulated employees) have you been consulted on, either by the employee or the employer, in the past 12 months?

Answered: 48 Skipped: 0

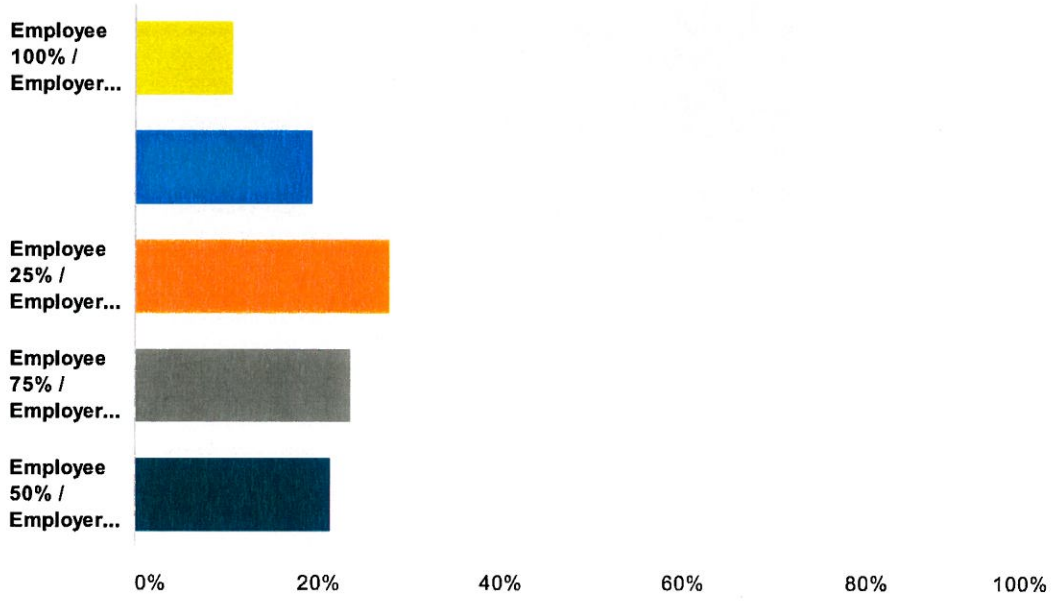


Answer Choices	Responses	
1-10	33.33%	16
11-20	27.08%	13
21-30	14.58%	7
more than 30	25%	12

Total Respondents: 48

Q2 Of the Claims referenced in question #1 above, what percentage MOST CLOSELY represents the ratio of your employee clients to your employer clients?

Answered: 47 Skipped: 1

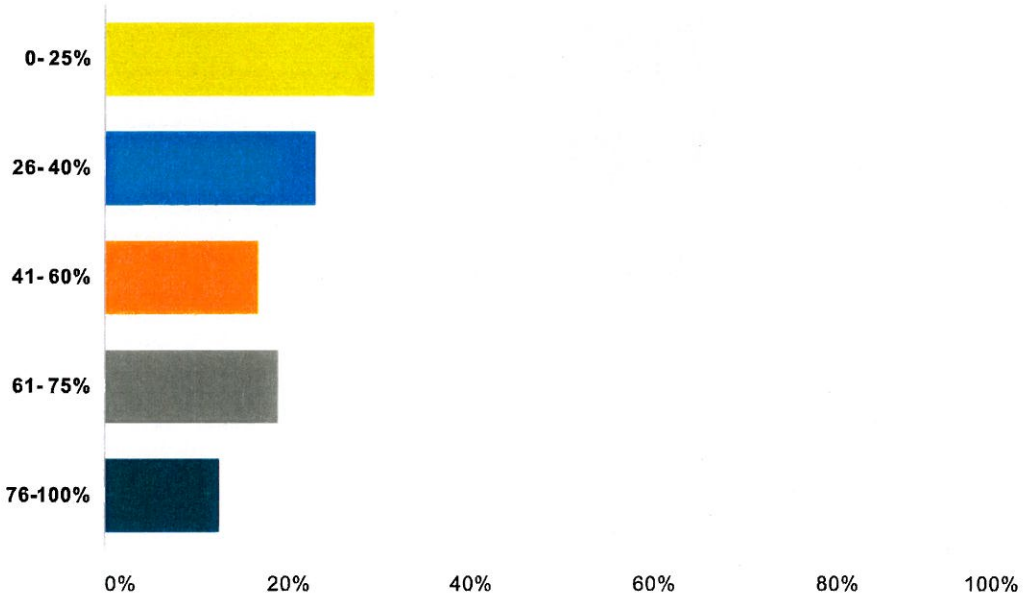


Answer Choices	Responses	
Employee 100% / Employer 0%	**10.64%**	5
Employee 0% / Employer 100%	**19.15%**	9
Employee 25% / Employer 75%	**27.66%**	13
Employee 75% / Employer 25%	**23.40%**	11
Employee 50% / Employer 50%	**21.28%**	10

Total Respondents: 47

Q3 What percentage of the Claims referenced in question #1 involved an allegation of "just cause" dismissal?

Answered: 48 Skipped: 0

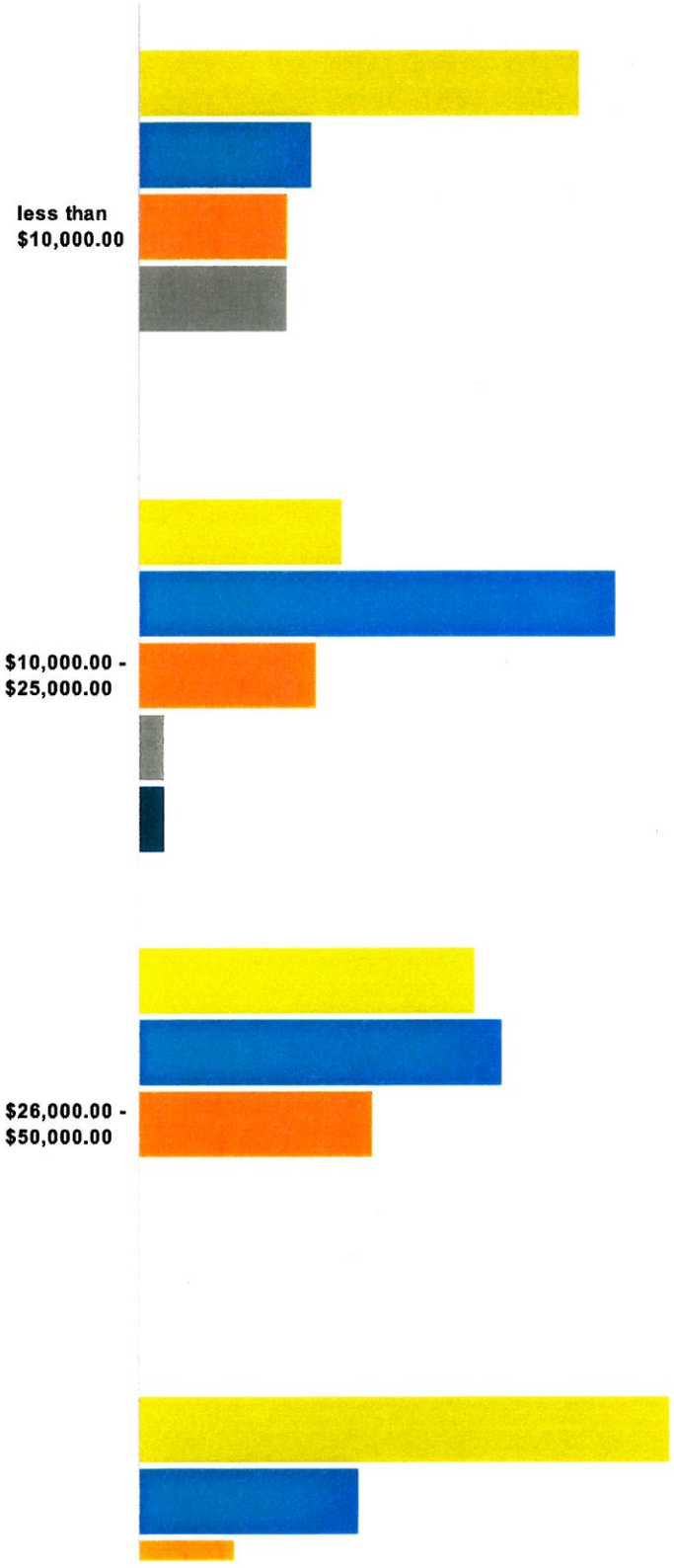


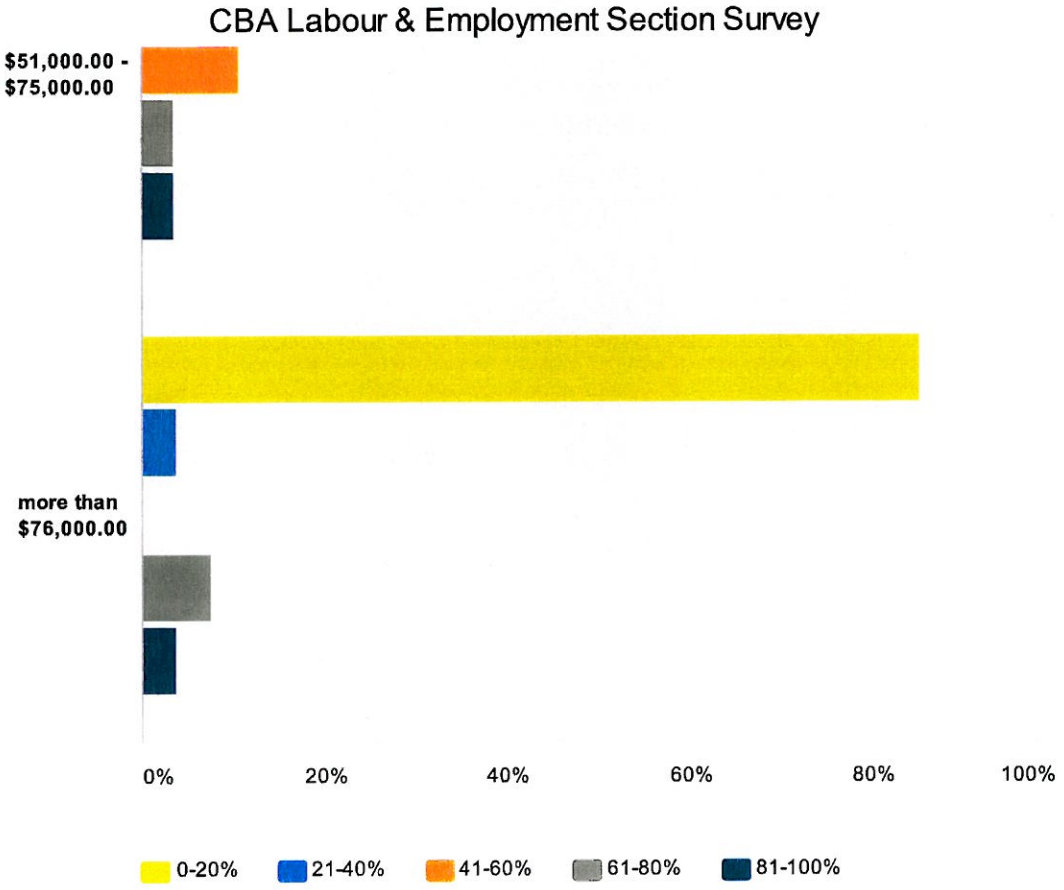
Answer Choices	Responses	
0-25%	**29.17%**	14
26-40%	**22.92%**	11
41-60%	**16.67%**	8
61-75%	**18.75%**	9
76-100%	**12.50%**	6

Total Respondents: 48

Q4 What percentage of the Claims referenced in question #1 involved compensation claims or recovery amounts of:

Answered: 47 Skipped: 1

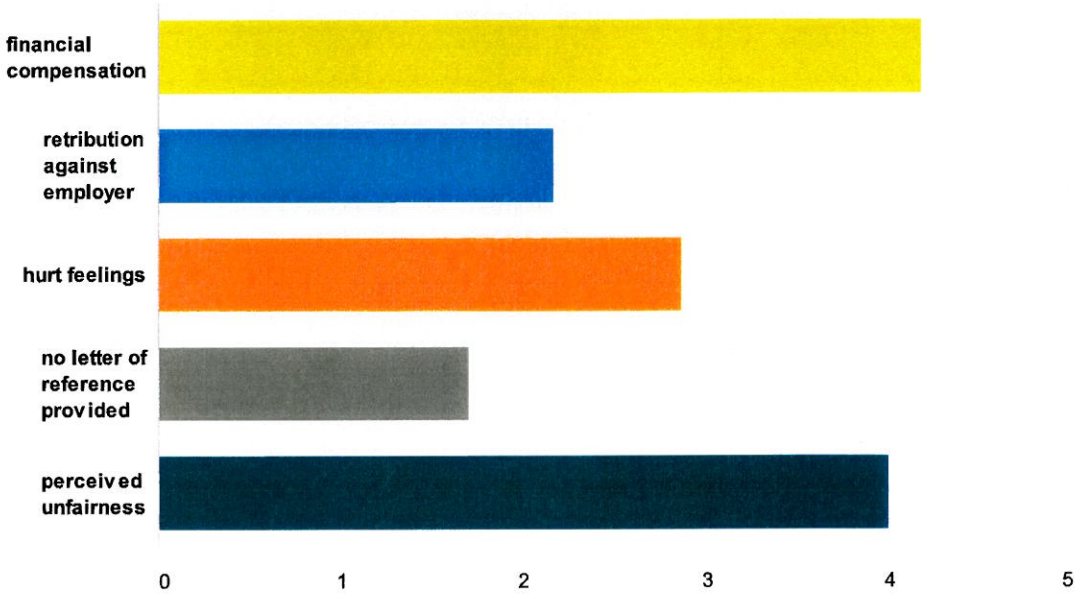




	0-20%	21-40%	41-60%	61-80%	81-100%	Total Respondents
less than $10,000.00	**48.65%**	**18.92%**	**16.22%**	**16.22%**	**0%**	
	18	7	6	6	0	37
$10,000.00 - $25,000.00	**22.22%**	**52.78%**	**19.44%**	**2.78%**	**2.78%**	
	8	19	7	1	1	36
$26,000.00 - $50,000.00	**37.14%**	**40%**	**25.71%**	**0%**	**0%**	
	13	14	9	0	0	36
$51,000.00 - $75,000.00	**58.62%**	**24.14%**	**10.34%**	**3.45%**	**3.45%**	
	17	7	3	1	1	29
more than $76,000.00	**85.19%**	**3.70%**	**0%**	**7.41%**	**3.70%**	
	23	1	0	2	1	27

Q5 On a scale of 1-5, with "1" being "LEAST IMPORTANT" and "5" being "MOST IMPORTANT", rank your perception of how the following considerations initially influenced employees involved in Claims to pursue legal action.

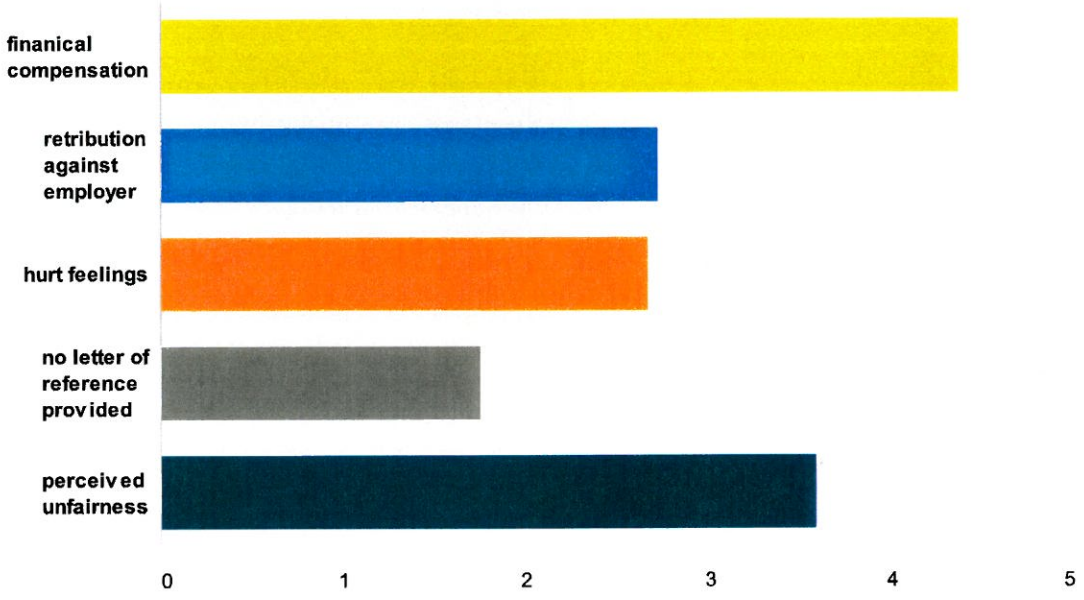
Answered: 48 Skipped: 0



	1	2	3	4	5	Total	Average Rating
financial compensation	4.44% 2	8.89% 4	8.89% 4	20% 9	57.78% 26	45	4.18
retribution against employer	28.89% 13	35.56% 16	26.67% 12	8.89% 4	0% 0	45	2.16
hurt feelings	13.04% 6	21.74% 10	41.30% 19	13.04% 6	10.87% 5	46	2.87
no letter of reference provided	55.81% 24	27.91% 12	6.98% 3	9.30% 4	0% 0	43	1.70
perceived unfaimess	0% 0	6.38% 3	17.02% 8	46.81% 22	29.79% 14	47	4.00

Q6 Did the influence of the considerations listed in question #5 change (in your perception) as the Claim proceeded? If so, how would you rank the considerations (using the same scale as in question #5) after the change? If you perceived no change, indicate the same.

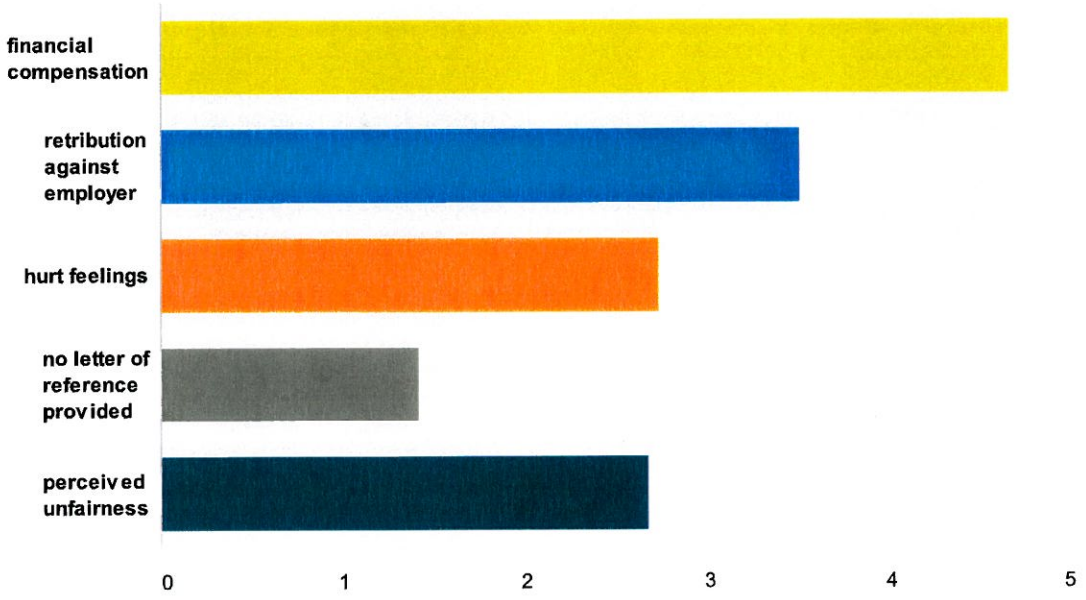
Answered: 47 Skipped: 1



	1	2	3	4	5	N/A	Total	Average Rating
finanical compensation	2.22% 1	2.22% 1	6.67% 3	13.33% 6	42.22% 19	33.33% 15	45	4.37
retribution against employer	9.09% 4	18.18% 8	13.64% 6	11.36% 5	4.55% 2	43.18% 19	44	2.72
hurt feelings	8.89% 4	17.78% 8	22.22% 10	6.67% 3	4.44% 2	40% 18	45	2.67
no letter of reference provided	30.43% 14	10.87% 5	4.35% 2	6.52% 3	0% 0	47.83% 22	46	1.75
perceived unfaimess	2.17% 1	2.17% 1	19.57% 9	28.26% 13	6.52% 3	41.30% 19	46	3.59

Q7 Using the same 1-5 scale, describe how you believe employers YOU REPRESENTED perceived the motivations of employees who made Claims.

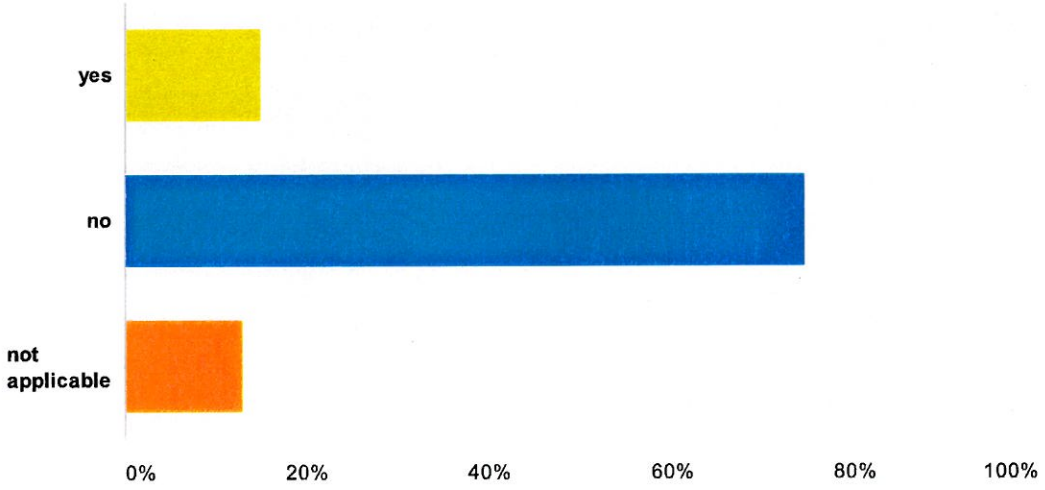
Answered: 47 Skipped: 1



	1	2	3	4	5	N/A - did not represent employers	Total	Average Rating
financial compensation	2.17% 1	0% 0	2.17% 1	17.39% 8	63.04% 29	15.22% 7	46	4.64
retribution against employer	4.35% 2	17.39% 8	6.52% 3	47.83% 22	10.87% 5	13.04% 6	46	3.50
hurt feelings	7.14% 3	23.81% 10	42.86% 18	14.29% 6	0% 0	11.90% 5	42	2.73
no letter of reference provided	65.12% 28	11.63% 5	6.98% 3	0% 0	2.33% 1	13.95% 6	43	1.41
perceived unfairness	6.82% 3	36.36% 16	31.82% 14	6.82% 3	6.82% 3	11.36% 5	44	2.67

Q8 Did the perceptions of employers YOU REPRESENTED change during the Claims process in respect of what motivated employees to make their Claims?

Answered: 47 Skipped: 1

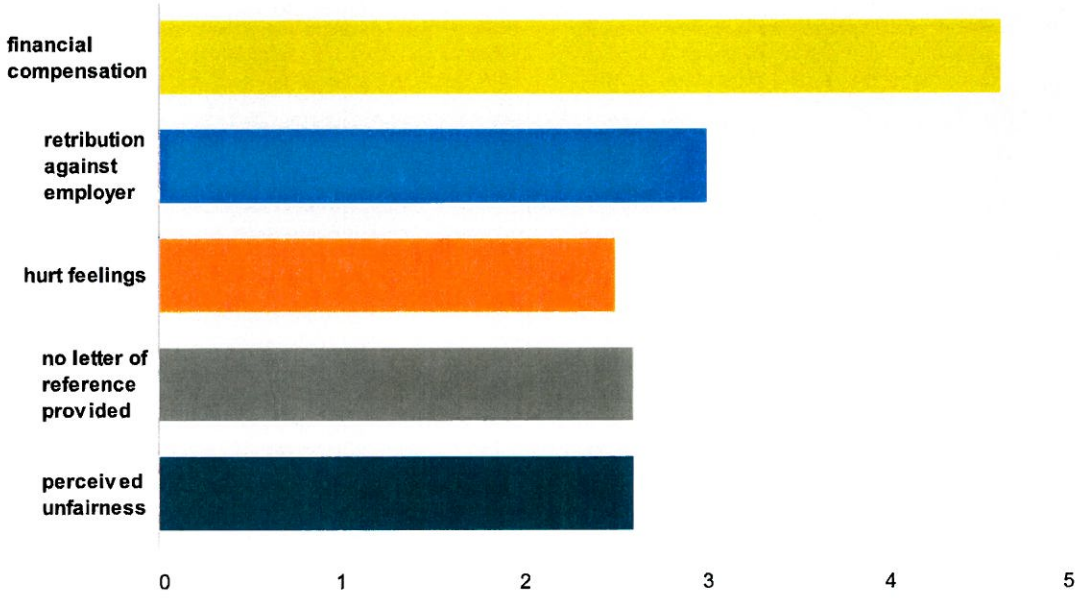


Answer Choices	Responses	
yes	**14.89%**	7
no	**74.47%**	35
not applicable	**12.77%**	6

Total Respondents: 47

Q9 If your answer to the question immediately above was "yes", re-rank the motivations of employees making Claims, as perceived by employers.

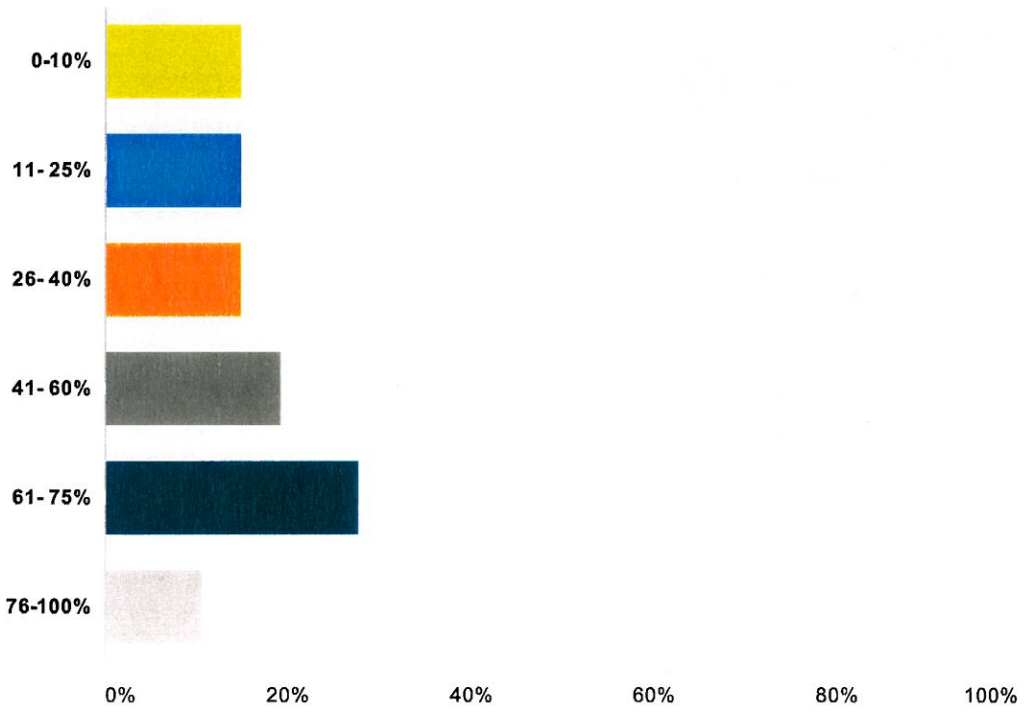
Answered: 18 Skipped: 30



	1	2	3	4	5	N/A - no change occurred	Total	Average Rating
financial compensation	0% 0	0% 0	0% 0	11.76% 2	17.65% 3	70.59% 12	17	4.60
retribution against employer	12.50% 2	0% 0	6.25% 1	0% 0	12.50% 2	68.75% 11	16	3.00
hurt feelings	11.11% 2	11.11% 2	0% 0	5.56% 1	5.56% 1	66.67% 12	18	2.50
no letter of reference provided	5.88% 1	0% 0	23.53% 4	0% 0	0% 0	70.59% 12	17	2.60
perceived unfaimess	0% 0	17.65% 3	5.88% 1	5.88% 1	0% 0	70.59% 12	17	2.60

Q10 In your opinion, what percentage of employees with potential Claims were unable or likely unable to afford legal advice in respect of those Claims? (Do not consider contingent fee agreements)

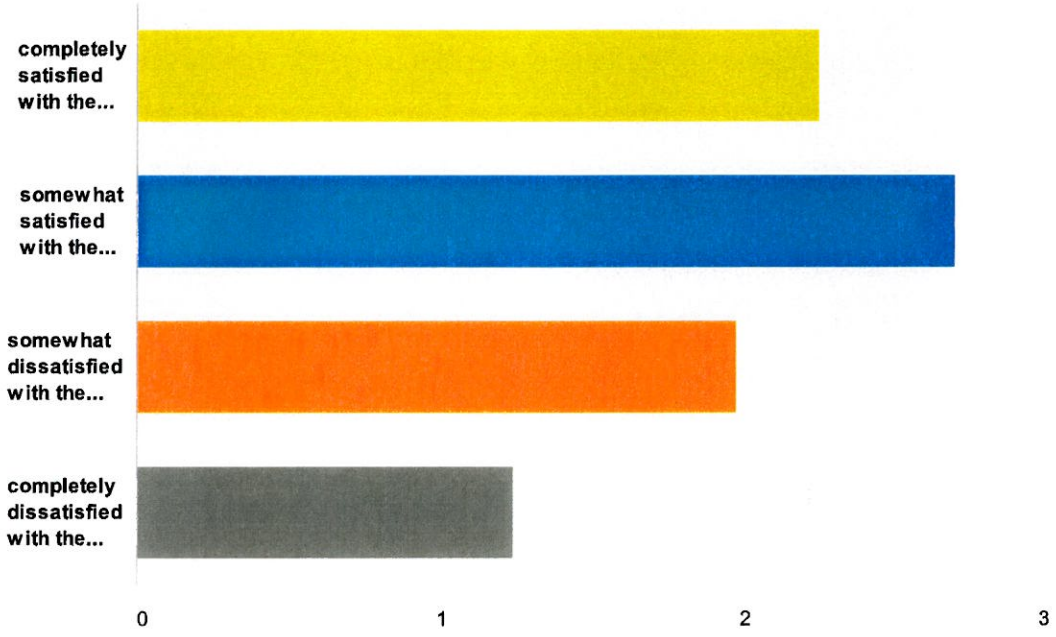
Answered: 47 Skipped: 1



Answer Choices	Responses	
0-10%	14.89%	7
11-25%	14.89%	7
26-40%	14.89%	7
41-60%	19.15%	9
61-75%	27.66%	13
76-100%	10.64%	5
Total Respondents: 47		

Q11 What percentage of employees with Claims were/are:

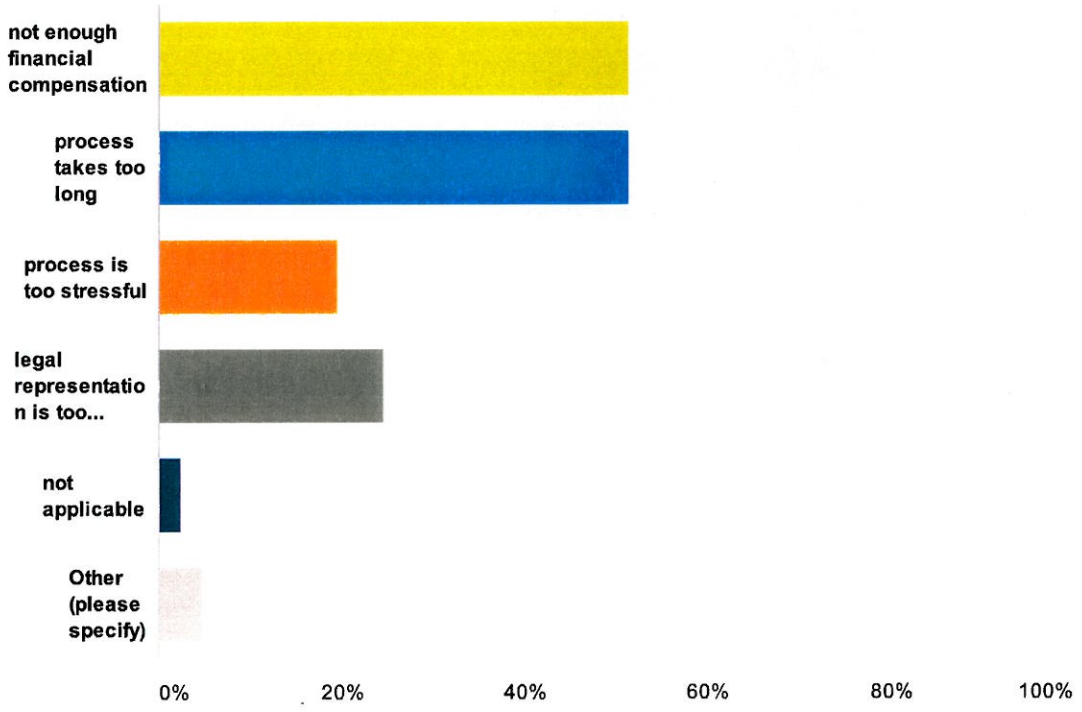
Answered: 45 Skipped: 3



	0-20%	21-40%	41-60%	61-80%	81-100%	Total	Average Rating
completely satisfied with the actual or potential outcome	**36.84%** 14	**23.68%** 9	**21.05%** 8	**15.79%** 6	**2.63%** 1	38	2.24
somewhat satisfied with the actual or potential outcome	**8.89%** 4	**35.56%** 16	**35.56%** 16	**17.78%** 8	**2.22%** 1	45	2.69
somewhat dissatisfied with the actual or potential outcome	**43.24%** 16	**27.03%** 10	**18.92%** 7	**10.81%** 4	**0%** 0	37	1.97
completely dissatisfied with the actual or potential outcome	**85.29%** 29	**5.88%** 2	**8.82%** 3	**0%** 0	**0%** 0	34	1.24

Q12 If any of the employees with Claims were/are "somewhat dissatisfied" or "completely dissatisfied" with the outcome, what was or is the SINGLE MOST COMMON source of dissatisfaction?

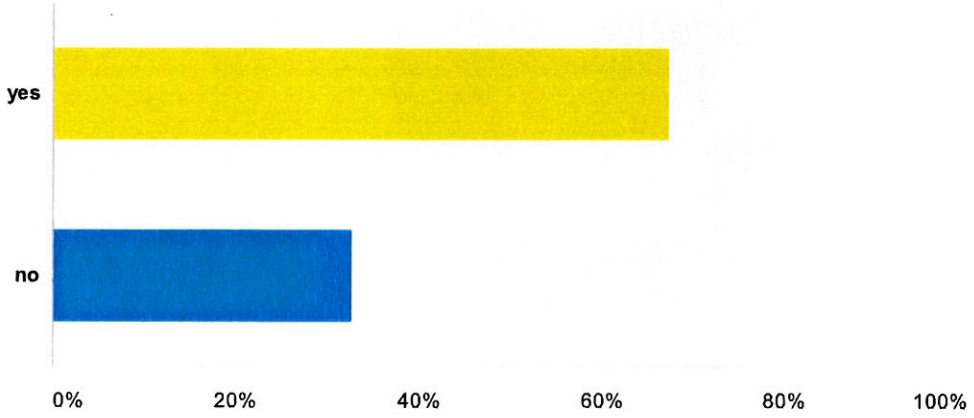
Answered: 41 Skipped: 7



Answer Choices	Responses	
not enough financial compensation	**51.22%**	21
process takes too long	**51.22%**	21
process is too stressful	**19.51%**	8
legal representation is too expensive	**24.39%**	10
not applicable	**2.44%**	1
Other (please specify)	**4.88%**	2
Total Respondents: 41		

Q13 Is the current state of the law and its processes fair to employees, in your opinion?

Answered: 46 Skipped: 2



Answer Choices	Responses	
yes	**67.39%**	31
no	**32.61%**	15
Total		**46**

Q14 Regarding question #13 above, explain why you believe the law and its processes are fair or not fair to employees. Please limit your answer to 4-5 lines.

Answered: 38 Skipped: 10

APPENDIX A : Lawyer Questionnaire – Question 14 responses

Showing **38** responses

Typically both the employer and employee can be advised early of the real exposure in regards to $ and due to the predictability of the law in this regard are often settle cases faster than they would otherwise do so.
12/21/2005 3:02 PM View respondent's answers

Cost causes potential litigants to only pursue valid claims. A resolution amy be for the small claims limit (for employment cases only) should be increased to $50,000.00 to allow for a less costly, more time efficient vehicle for resolution.
12/15/2005 8:50 AM View respondent's answers

The ability to terminate an employee for just cause has become more increasingly difficult as the law has evolved over the last ten years. The range of damages is well established for reasonable notice and further punitive damages and costs are regularly awarded by Courts for employer's whose conduct is unacceptable. In addition, the Human Rights Commissions in each province are easily accessible employees. Accordingly, I strongly feel that the processes currently in place to protect employees are very fair. The problem is not with the system or the law but with lawyers who are advising employers and employees. Most of the difficultly in cases I have been involved with are as a result of poor advice being given or even worse the lawyer providing the advice is playing to the parties emotion and not providing objective advice.
12/14/2005 2:06 PM View respondent's answers

Too expensive to fully protect their rights.
12/9/2005 8:21 AM View respondent's answers

In my opinion the current state of the statutory and common law are fair to employees. However, the process in terms of length and expense are unfair. The caveat to that is that the process is unfair to all participants in the legal system.
12/5/2005 10:39 AM View respondent's answers

To the extent that employees can finance litigation, the process is reasonably fair, albeit lengthy. For those who cannot (probably the majority) the process most surely is unfair.
12/5/2005 9:00 AM View respondent's answers

I believe the litigation process is too cumbersome and lengthy for individuals who live from pay cheque to pay cheque. At the end of the day, lawyers receive too much of the financial compensation that should be in the pockets of the employees.
12/2/2005 11:12 AM View respondent's answers

There a re a number of safeguards in place to ensure employees are treated fairly
12/1/2005 3:59 PM View respondent's answers

Process to long and expensive
12/1/2005 3:17 PM View respondent's answers

There is somewhat of a balance between the management rights of the employer and its need to survive vs. the employee's reasonable protection from arbitrary treatment by the employer.
12/1/2005 3:06 PM View respondent's answers

Employees crave and need access to formal adjudicative processes that they can afford and that have the trappings of fairness and due process to settle employment disputes quickly and decisively. Litigating these issues in a non-unionised sector, under current dispute resolution models is not

affordable, yet the issues are more relevant and significant to the individuals affected than most civil litigation issues (outside of family law matters)in our courts today.
12/1/2005 3:05 PM View respondent's answers

The "efficiency paradigm" should be revisited. A Canada Labour Code approach should be sought, and applied. Employers should not be able to terminate on a whim.
12/1/2005 12:01 PM View respondent's answers

Case law has evolved in favour of recognizing more rights and more favourable compensation for employees. Legislation protecting employee rights and imposing obligations for employers has also evolved in a similar fashion. On the other hand, it is fair to say that litigation can be long and costly for employees and that a more simplified litigation process could make things fairer for employees. Raising the limits for small claims actions could be one option.
11/30/2005 12:54 PM View respondent's answers

The Courts seem to achieve a fair balance between employee/employer rights and interests.
11/29/2005 1:14 PM View respondent's answers

Courts seem to be awarding fairly significant awards to employees and are very employee-sympathetic. Lawyers know this and are more willing to advise employer clients to settle earlier in the process.
11/29/2005 11:16 AM View respondent's answers

While there is always room for abuses, the range of protection from both a statutory and administrative services provided perspective provide an unprecedented level of assistance and protection.
11/29/2005 11:06 AM View respondent's answers

In my view the process is not fair in respect of the expense an employee faces in pursuing most wrongful dismissal claims. For many, this precludes them from obtaining fair/reasonable notice.
11/29/2005 8:55 AM View respondent's answers

Courts are resonably fair and swift in NB
11/29/2005 8:44 AM View respondent's answers

Regardless of the length of service with an employer, employees awards are reduced by the $ earned during the notice period. If an employee finds work right away, they have still lost the value of their prior years of service. The appropriate notice period with the new employer will be shorter because of the shortened length of employment. Employers who wrongfully dismiss employees should not be permitted to remove the wages earned in new employment. (Perhaps they should be discounted somehow). The problem is the employees lose the reward of long service because they were able to find new work.
11/28/2005 10:15 AM View respondent's answers

Fair in the sense that the compensation available to employees is quite significant. "Fair" in a comparative sense - more "fair" than to Employers!
11/28/2005 9:12 AM View respondent's answers

Generally, the law supports greater awards (i.e., longer notice periods). Likewise, dismissal for misconduct is not as easy to prove as it once was. Courts will accept that misconduct, even sometimes severe misconduct, may not constitute cause.
11/28/2005 8:15 AM View respondent's answers

Employees have a right of action and so can claim over and above the statutory severance. If restricted to statutory severance the amount of compensation would be too low.
11/27/2005 12:21 PM View respondent's answers

Due to the evolution of human rights law, an umbrella of protection has evolved to protect employees even in extreme situation.
11/25/2005 3:15 PM View respondent's answers

Non-unionized employees generally do not have sufficient financial resources to effectively pursue potential employment remedies in a mandatory arbitration scheme where they are compelled to share in the cost of arbitration regardless of the outcome, plus pay their own legal fees.
11/25/2005 1:05 PM View respondent's answers

The system strikes a balance between the interests of employers and employees; in some respects it favours employers in that it allows employees to generally be dismissed on notice, but the cost to the employer can be very expensive. It is not as effective as a way to make our economy most efficient, given the cost of terminating 'dead wood' employees; as a result bad employees tend to stay, to the determinant of all other employees.
11/25/2005 8:34 AM View respondent's answers

The near-poverty employee is most vulnerable, most in need of a few months' notice, and least able to weather the court system. Most employees want, but don't get, a fair and quick adjudication of their claim. 4-5 lines is not nearly enough room!
11/25/2005 8:23 AM View respondent's answers

It is a process that allows for representation and compensation.
11/25/2005 6:55 AM View respondent's answers

The time required for legal action results in savings (unpaid salary), while the employee loses income. Further, the employee is less likely to have access to legal advice.
11/25/2005 6:20 AM View respondent's answers

Disparity in financial resources. Dismissal can result in denial of EI benefits -- leaves an employee having to scramble to make ends meet. The time consumed by a suit has less impact on the average employer because responsibility for its carriage can be delegated within the organization.
11/24/2005 1:19 PM View respondent's answers

The law, in general, is a long, expensive, complicated disaster. Not just employment law. Litigation favours those with deep pockets, and those lawyers who like to make everything an issue, to rack up their fee make things even more difficult
11/24/2005 12:48 PM View respondent's answers

The majority of claims where cause is not a factor are settled through counsel within a reasonable period of time at a reasonable cost. Where cause is alleged, employees are rarely (less than 20%) satisfied notwithstanding the result whether they be negotiated or litigated.
11/24/2005 9:39 AM View respondent's answers

The inherent bias of the Courts towards the employee is becoming increasingly evident, to the point that "cause" is becoming virtually impossible to establish, and no matter how rich a severance package is in non-cause terminations, in the Courts' eyes, it is never enough; they seem compelled to add more. How could employees not be satisfied with this "process".
11/24/2005 9:00 AM View respondent's answers

The repayment of EI benefits often renders the process meaningless
11/24/2005 8:46 AM View respondent's answers

Generally all employees will receive some type of compensation and the employer will be required to pay more in circumstances where they have misbehaved. The one fault with the system is the time it takes to reach a resolution.
11/24/2005 6:58 AM View respondent's answers

Absent contingency fee arrangements, the current system would be unfair but since they exist that issue is covered. Nothing is 100% fair but each of the employer and employee suffers some degree of unfairness and this balances off overall.
11/23/2005 4:11 PM View respondent's answers

I believe that where most plaintiff counsel work on contingency, the employee knows what they're getting into re compensation/costs etc. The courts seem to be quite favourable towards employees, and the law provides for various heads of damages that they can collect on.
11/23/2005 3:27 PM View respondent's answers

Generally employees with significant claims are satisfied with recovery. The most effective way to improve employees' position re smaller claims is to increase the small claims limit. I suggest it should be at least $15,000.00. We do not need another government agency or admin process to deal with these.
11/23/2005 1:30 PM View respondent's answers

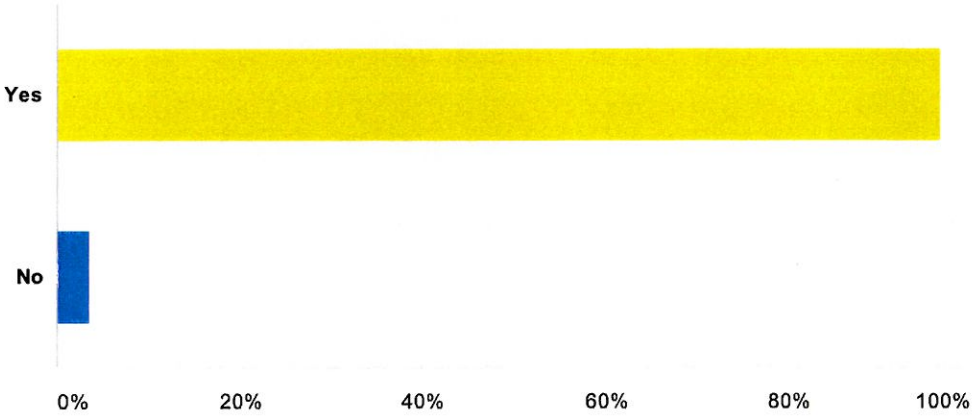
My practice is almost exclusively employer defence which does affect my perceptions. However, I believe the quasi-impossibility of establishing cause coupled with extending notice periods for bad faith levels the playing field for the employee vis a vis the employer.
11/23/2005 12:51 PM View respondent's answers

APPENDIX B

Employee Questionnaire with Responses

Q1 Do you live in New Brunswick?

Answered: 204 Skipped: 0



Answer Choices	Responses	
Yes	**96.57%**	197
No	**3.43%**	7
Total		**204**

Q2 In what city or town do you reside?

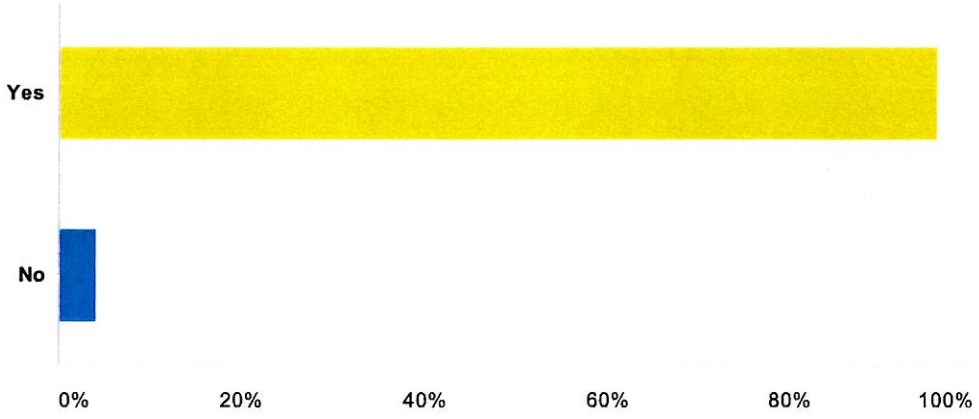
Answered: 202 Skipped: 2

Q3 How old are you?

Answered: 204 Skipped: 0

Q4 Are you a Canadian citizen?

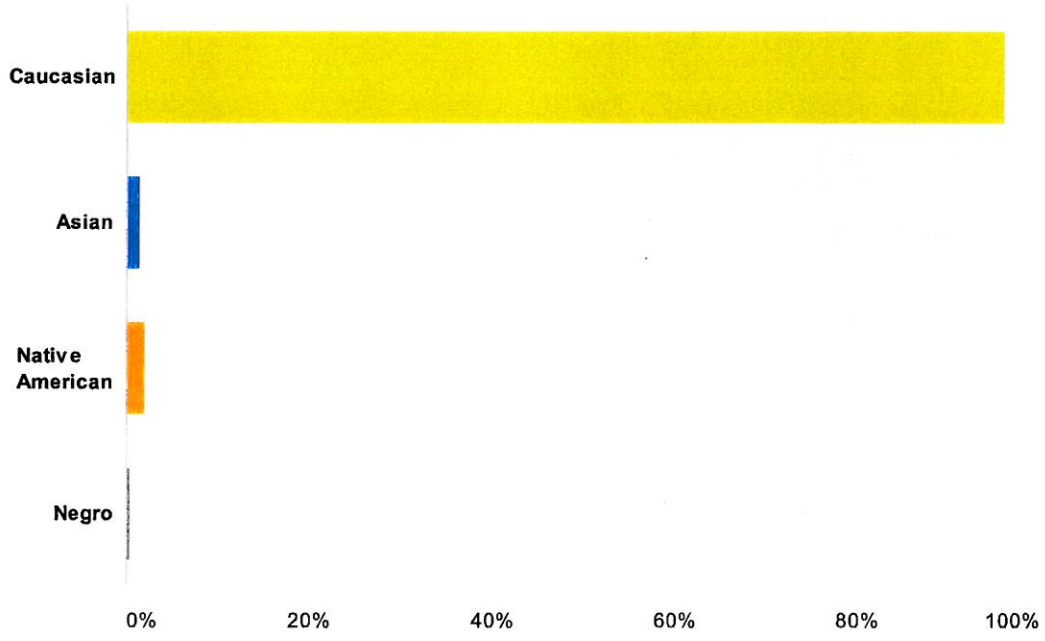
Answered: 203 Skipped: 1



Answer Choices	Responses	
Yes	**96.06%**	195
No	**3.94%**	8
Total		**203**

Q5 What is your race?

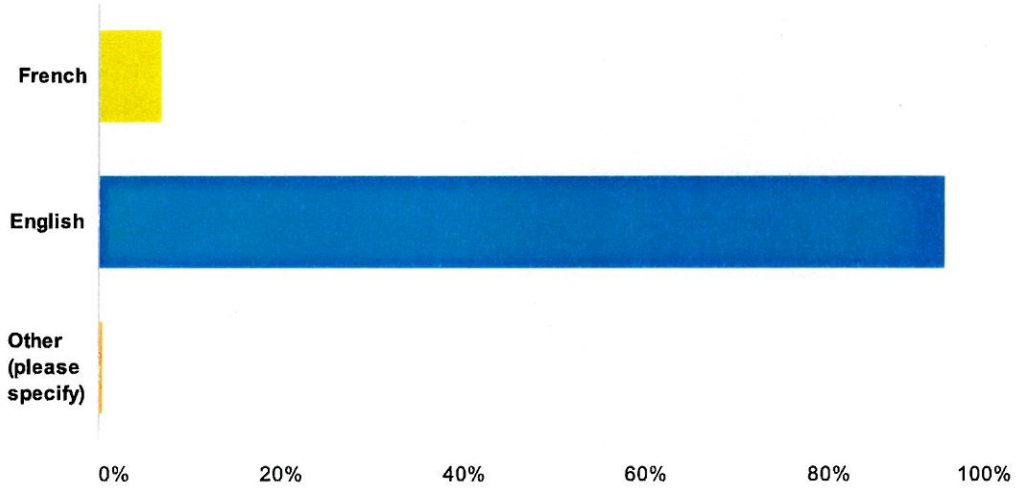
Answered: 201 Skipped: 3



Answer Choices	Responses	
Caucasian	**96.02%**	193
Asian	**1.49%**	3
Native American	**1.99%**	4
Negro	**0.50%**	1
Total		**201**

Q6 What is your primary language?

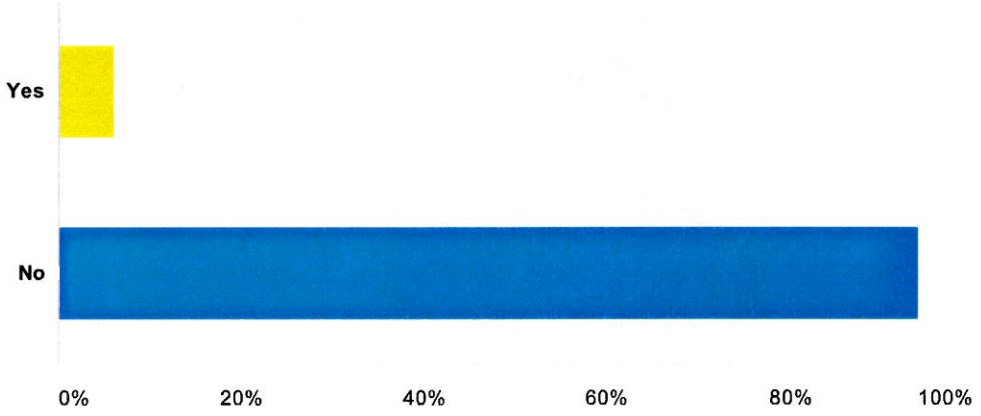
Answered: 204 Skipped: 0



Answer Choices	Responses	
French	**6.86%**	14
English	**92.65%**	189
Other (please specify)	**0.49%**	1
Total		**204**

Q7 Do you have any mental or physical disabilities?

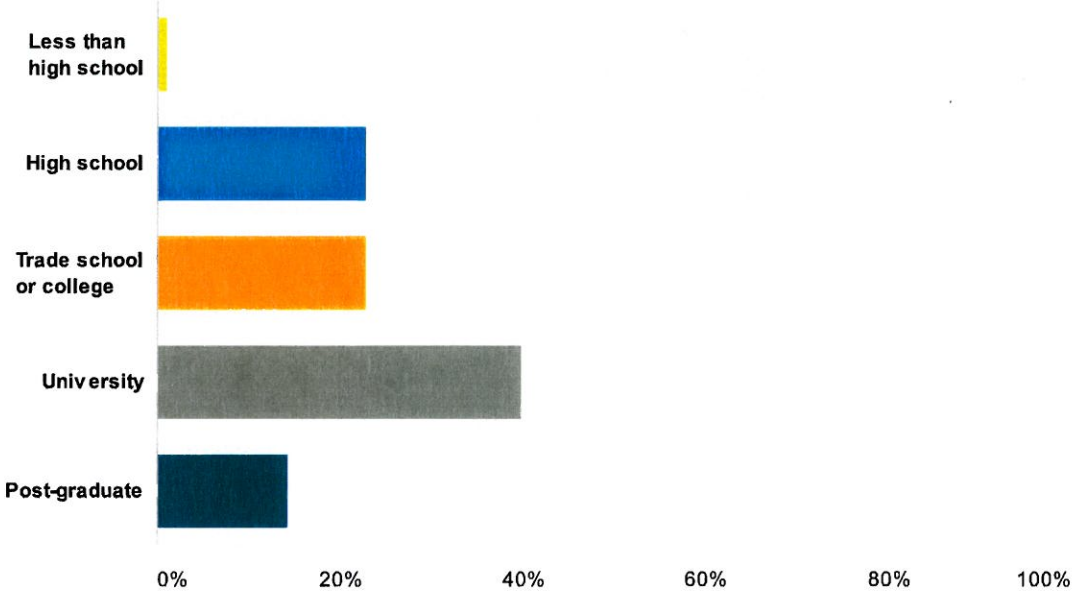
Answered: 202 Skipped: 2



Answer Choices	Responses	
Yes	**5.94%**	12
No	**94.06%**	190
Total		**202**

Q8 What was your highest level of completed education?

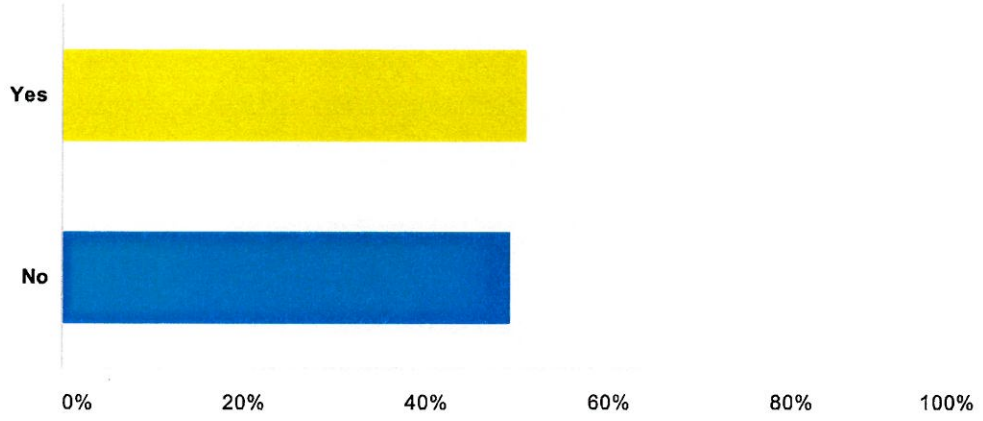
Answered: 204 Skipped: 0



Answer Choices	Responses	
Less than high school	**0.98%**	2
High school	**22.55%**	46
Trade school or college	**22.55%**	46
University	**39.71%**	81
Post-graduate	**14.22%**	29
Total		**204**

Q9 Do you have dependents?

Answered: 204 Skipped: 0



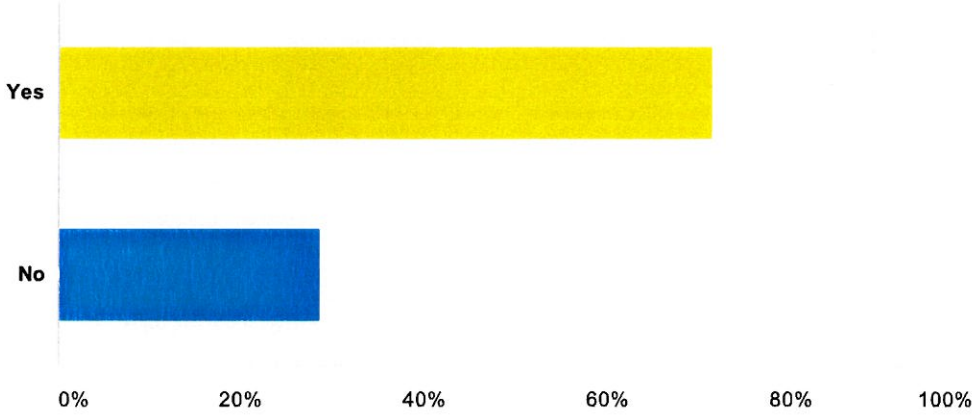
Answer Choices	Responses	
Yes	**50.98%**	104
No	**49.02%**	100
Total		**204**

Q10 If your answer to the question immediately above was "yes", please list number and type of dependents you have. (For example: "1 spouse, 3 children")

Answered: 104 Skipped: 100

Q11 Are you married or living in a long-term committed relationship?

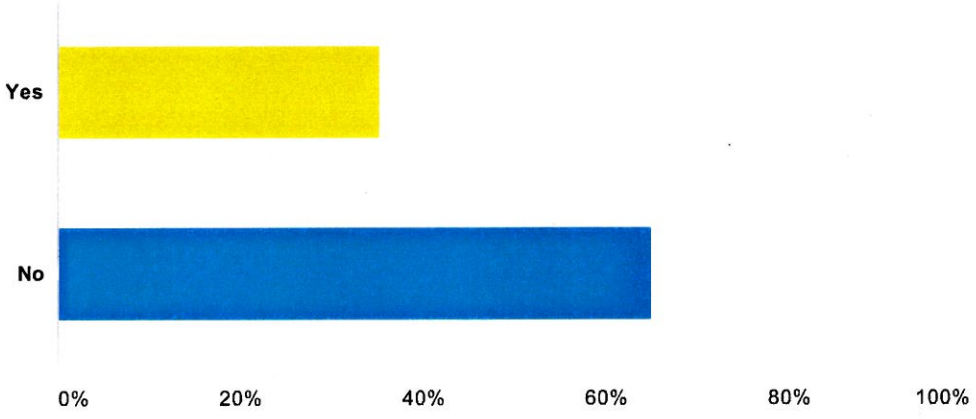
Answered: 201 Skipped: 3



Answer Choices	Responses	
Yes	**71.64%**	144
No	**28.36%**	57
Total		**201**

Q12 DURING THE PAST 24 MONTHS, have you experienced any problems or conflicts regarding your employment for which you considered obtaining legal advice (a "Work Problem")? Please note: "Work Problem" includes layoff, dismissal, disciplinary action, discrimination and any other employment problem or conflict.

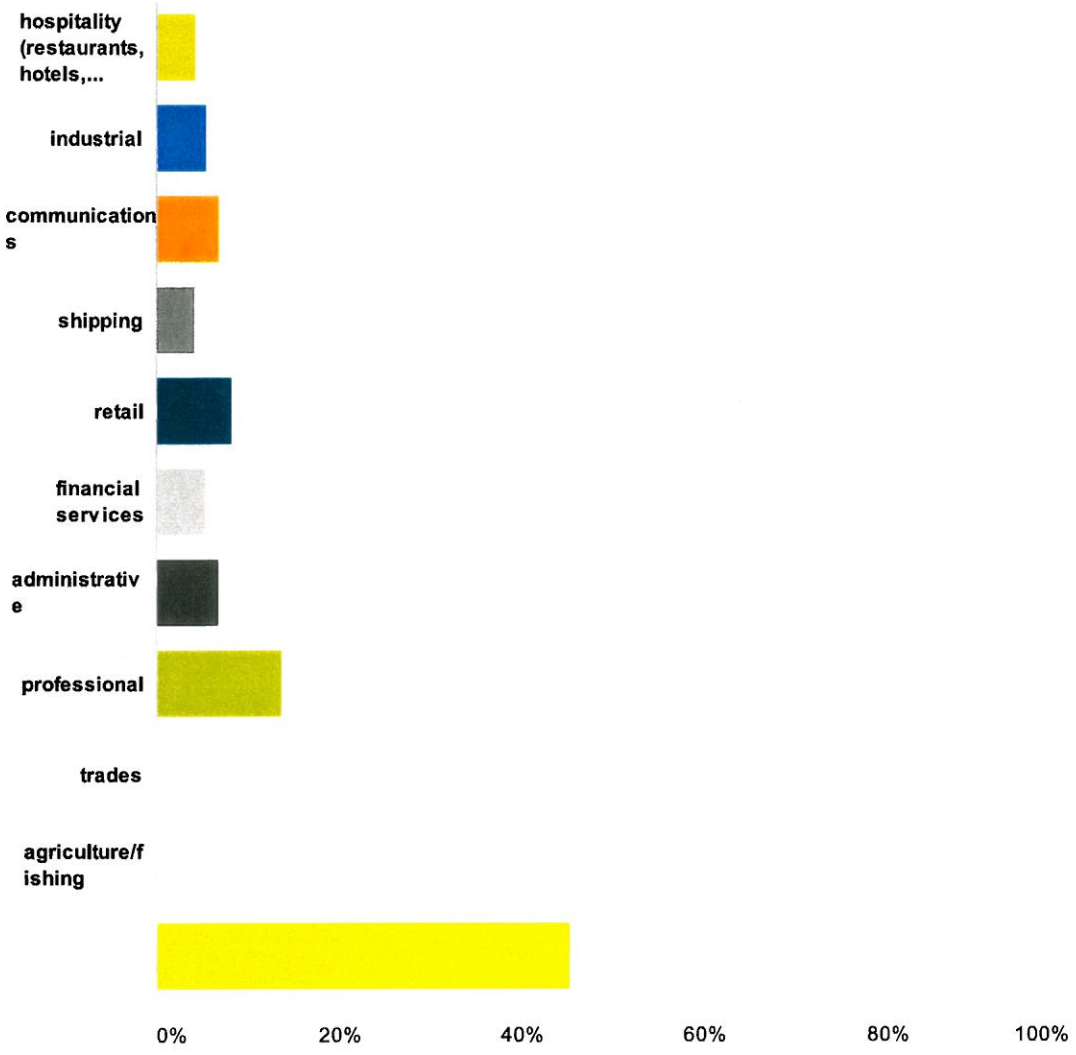
Answered: 202 Skipped: 2



Answer Choices	Responses	
Yes	**35.15%**	71
No	**64.85%**	131
Total		**202**

Q13 If you have experienced a Work Problem during the past 24 months, what type of industry were you employed in when you experienced the Work Problem?

Answered: 73 Skipped: 131

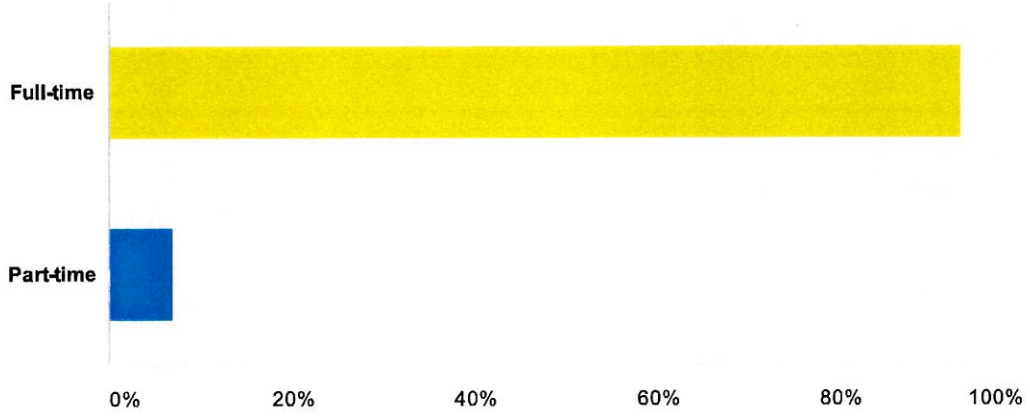


Answer Choices	Responses	
hospitality (restaurants, hotels, entertainment)	4.11%	3
industrial	5.48%	4
communications	6.85%	5
shipping	4.11%	3
retail	8.22%	6
financial services	5.48%	4
administrative	6.85%	5

professional	**13.70%**	10
trades	**0%**	0
agriculture/fishing	**0%**	0
Other (please specify)	**45.21%**	33
Total		**73**

Q14 At the time of the Work Problem, was your employment full-time or part-time?

Answered: 73 Skipped: 131



Answer Choices	Responses	
Full-time	**93.15%**	68
Part-time	**6.85%**	5
Total		**73**

Q15 For how long had you been employed before the Work Problem occurred?

Answered: 72 Skipped: 132

APPENDIX B: Employee Questionnaire – Question 15 responses

9 years
5/14/2007 3:33 PM View respondent's answers

4 years
1/30/2007 1:09 PM View respondent's answers

10years
1/29/2007 1:38 PM View respondent's answers

6 months
1/29/2007 9:25 AM View respondent's answers

3 years
1/4/2007 9:16 AM View respondent's answers

29 years
12/12/2006 10:14 PM View respondent's answers

8 years
12/10/2006 10:59 PM View respondent's answers

6 months
11/22/2006 10:05 AM View respondent's answers

Two years
11/22/2006 9:46 AM View respondent's answers

2 years
10/23/2006 11:35 AM View respondent's answers

5years
10/18/2006 4:32 PM View respondent's answers

30 years
10/13/2006 10:45 PM View respondent's answers

5 years
10/13/2006 11:44 AM View respondent's answers

10 years
10/12/2006 4:41 PM View respondent's answers

8 1/2 years
10/11/2006 9:23 PM View respondent's answers

28 years
10/5/2006 7:32 PM View respondent's answers

1 1/2 years
10/3/2006 4:08 PM View respondent's answers

Approximately 22 months
9/6/2006 1:11 PM View respondent's answers

10 months

8/28/2006 6:57 PM View respondent's answers

May 1st 2003, July 14th 2006
8/13/2006 8:05 PM View respondent's answers

Four Days
6/17/2006 3:12 PM View respondent's answers

16 MONTHS
6/17/2006 11:35 AM View respondent's answers

15 years 7 months
5/30/2006 6:45 PM View respondent's answers

15 years
4/18/2006 9:45 PM View respondent's answers

5
4/13/2006 9:11 AM View respondent's answers

18 years
3/29/2006 4:24 PM View respondent's answers

4.5 years
3/29/2006 11:08 AM View respondent's answers

10 months
3/27/2006 10:18 AM View respondent's answers

16 years
3/17/2006 8:57 PM View respondent's answers

23 years
3/10/2006 8:03 PM View respondent's answers

6 years
3/8/2006 9:15 AM View respondent's answers

6 years
3/7/2006 6:09 PM View respondent's answers

4 years
2/15/2006 7:08 AM View respondent's answers

9 years
2/8/2006 11:03 AM View respondent's answers

2 years
1/11/2006 8:59 AM View respondent's answers

2 years
1/10/2006 2:21 PM View respondent's answers

2 months
1/9/2006 9:14 PM View respondent's answers

3.5 years

1/9/2006 3:08 PM View respondent's answers

34 years
1/8/2006 6:06 PM View respondent's answers

2 years
1/8/2006 4:33 PM View respondent's answers

1 month
1/6/2006 1:08 PM View respondent's answers

1 year
1/6/2006 12:36 PM View respondent's answers

8 years
1/6/2006 12:35 PM View respondent's answers

6 weeks
1/6/2006 11:07 AM View respondent's answers

1 year 1/2
1/4/2006 12:31 PM View respondent's answers

18
1/3/2006 9:17 PM View respondent's answers

13 years
12/30/2005 2:30 PM View respondent's answers

2 years
12/24/2005 3:37 PM View respondent's answers

32 years
12/23/2005 9:56 AM View respondent's answers

3 years
12/21/2005 8:57 PM View respondent's answers

2 weeks
12/21/2005 9:00 AM View respondent's answers

3 Months
12/21/2005 12:46 AM View respondent's answers

Less than a year
12/20/2005 6:23 PM View respondent's answers

7 years
12/20/2005 2:21 PM View respondent's answers

24 years
12/20/2005 2:00 PM View respondent's answers

2 years
12/20/2005 12:05 PM View respondent's answers

3 months

12/20/2005 11:13 AM View respondent's answers

23 years
12/20/2005 8:02 AM View respondent's answers

3 years
12/19/2005 1:01 PM View respondent's answers

2 months
12/19/2005 12:40 PM View respondent's answers

5 years
12/19/2005 6:47 AM View respondent's answers

23 months
12/18/2005 10:58 AM View respondent's answers

6 months
12/15/2005 8:48 AM View respondent's answers

5 1/2 years
12/15/2005 8:29 AM View respondent's answers

13 years
12/14/2005 8:48 PM View respondent's answers

5 months
12/14/2005 6:05 PM View respondent's answers

26 Years
12/14/2005 5:37 PM View respondent's answers

7 years
12/14/2005 5:18 PM View respondent's answers

8 months
12/14/2005 8:55 AM View respondent's answers

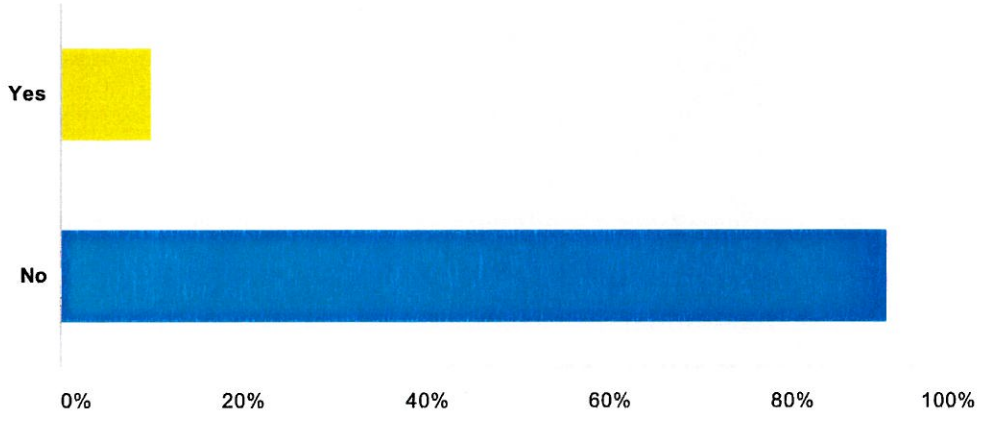
4 years, three months
12/13/2005 11:20 PM View respondent's answers

16 years
12/13/2005 6:37 PM View respondent's answers

1 day
12/13/2005 5:15 PM View respondent's answers

Q16 At the time the Work Problem occurred, were you unionized?

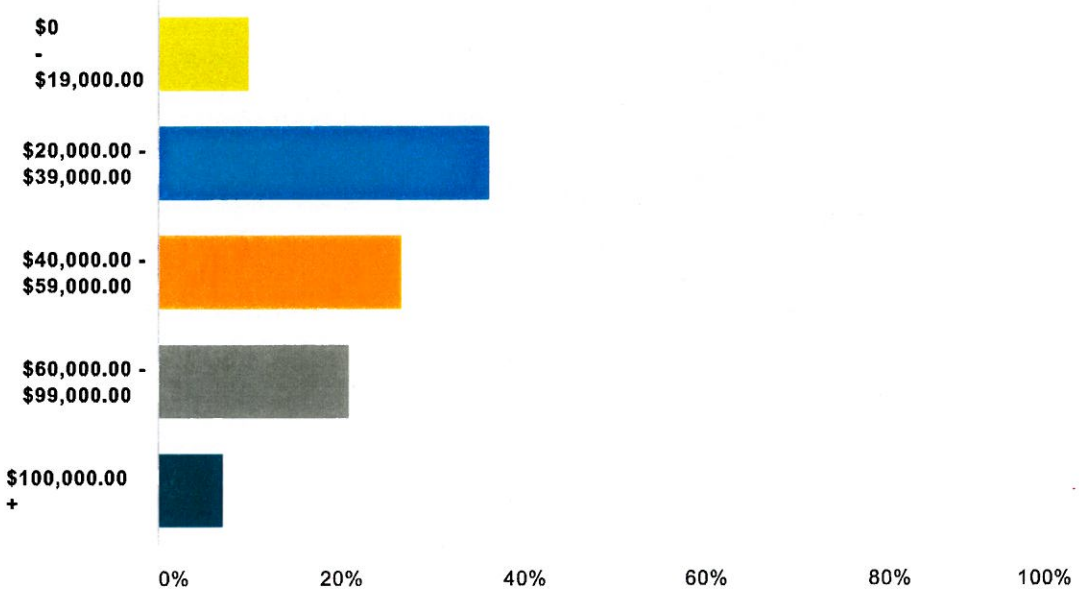
Answered: 71 Skipped: 133



Answer Choices	Responses	
Yes	**9.86%**	7
No	**90.14%**	64
Total		**71**

Q17 What range did your salary fall in at the time of the Work Problem?

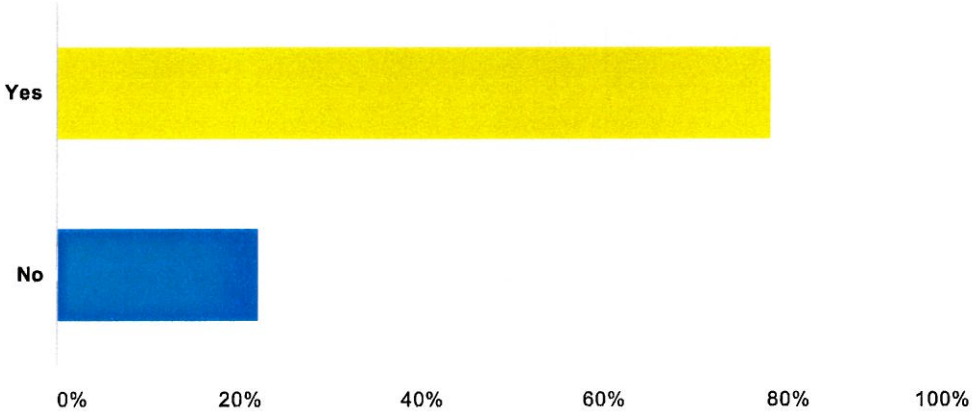
Answered: 72 Skipped: 132



Answer Choices	Responses	
$0 - $19,000.00	**9.72%**	7
$20,000.00 - $39,000.00	**36.11%**	26
$40,000.00 - $59,000.00	**26.39%**	19
$60,000.00 - $99,000.00	**20.83%**	15
$100,000.00 +	**6.94%**	5
Total		**72**

Q18 Did you have employment "benefits" (ie., medical/dental insurance, pension/retirement plan, disability insurance) at the time of the Work Problem?

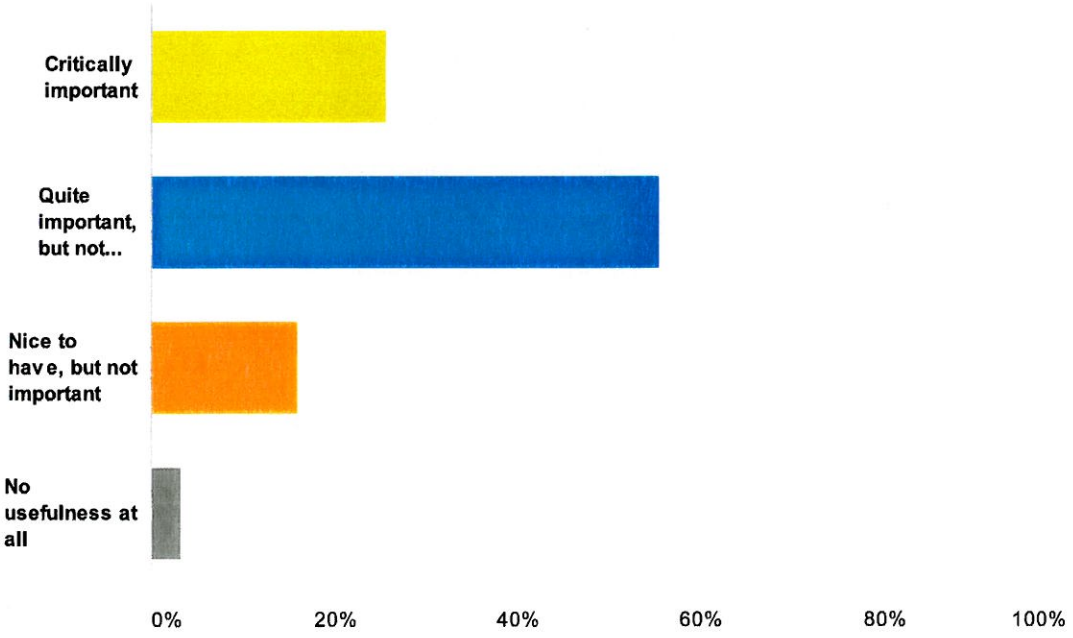
Answered: 73 Skipped: 131



Answer Choices	Responses	
Yes	**78.08%**	57
No	**21.92%**	16
Total		**73**

Q19 If you had employment benefits at the time of your Work Problem, how would you describe the importance of those benefits to you?

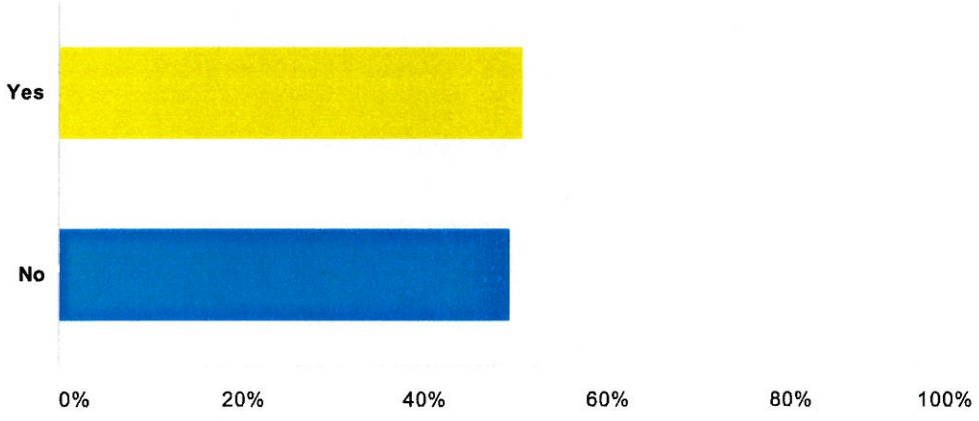
Answered: 63 Skipped: 141



Answer Choices	Responses	
Critically important	**25.40%**	16
Quite important, but not critical	**55.56%**	35
Nice to have, but not important	**15.87%**	10
No usefulness at all	**3.17%**	2
Total		**63**

Q20 At the time of your Work Problem, were you employed in a management-level position?

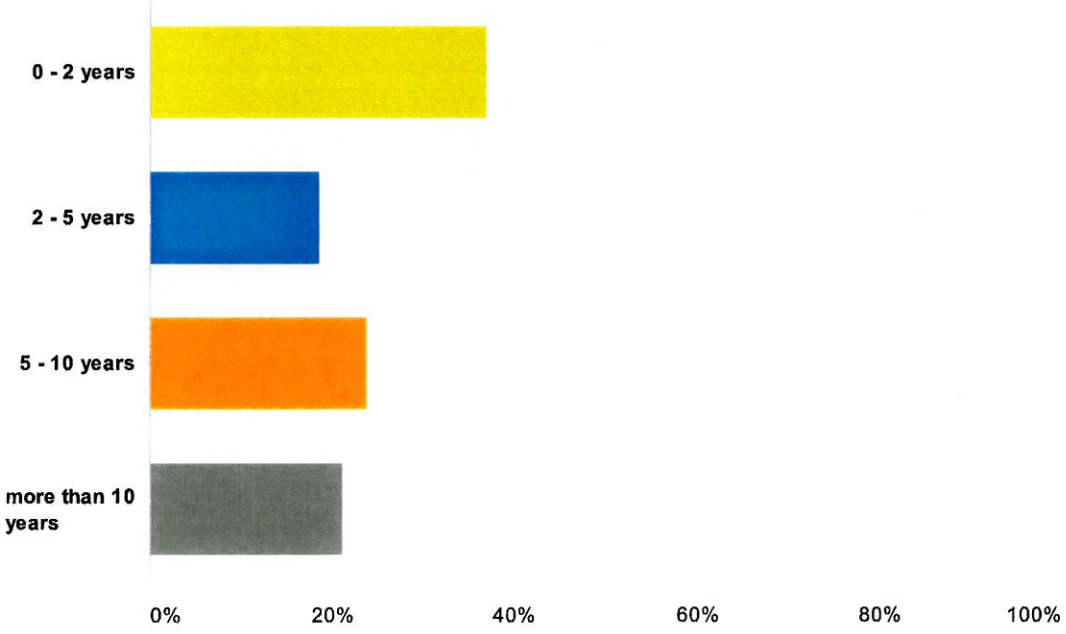
Answered: 73 Skipped: 131



Answer Choices	Responses	
Yes	**50.68%**	37
No	**49.32%**	36
Total		**73**

Q21 If "yes", for how long had you been employed in a management-level position at the time of your Work Problem?

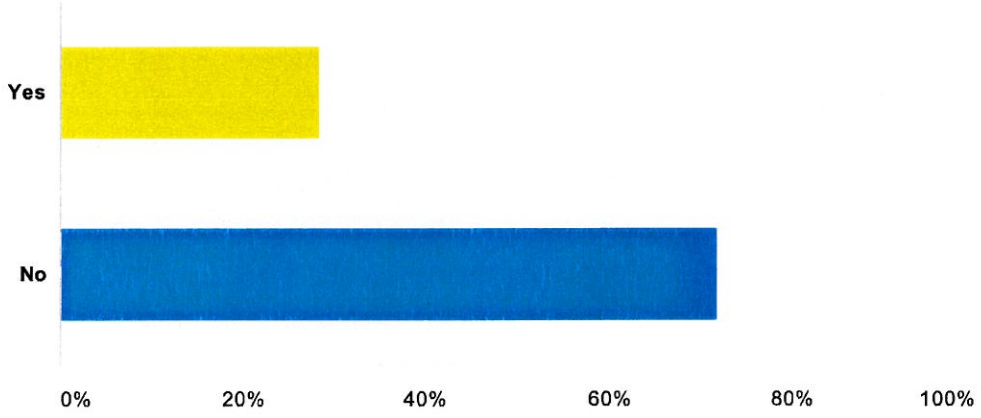
Answered: 38 Skipped: 166



Answer Choices	Responses	
0 - 2 years	**36.84%**	14
2 - 5 years	**18.42%**	7
5 - 10 years	**23.68%**	9
more than 10 years	**21.05%**	8
Total		**38**

Q22 Did your Work Problem involve an allegation of wrongdoing on your part?

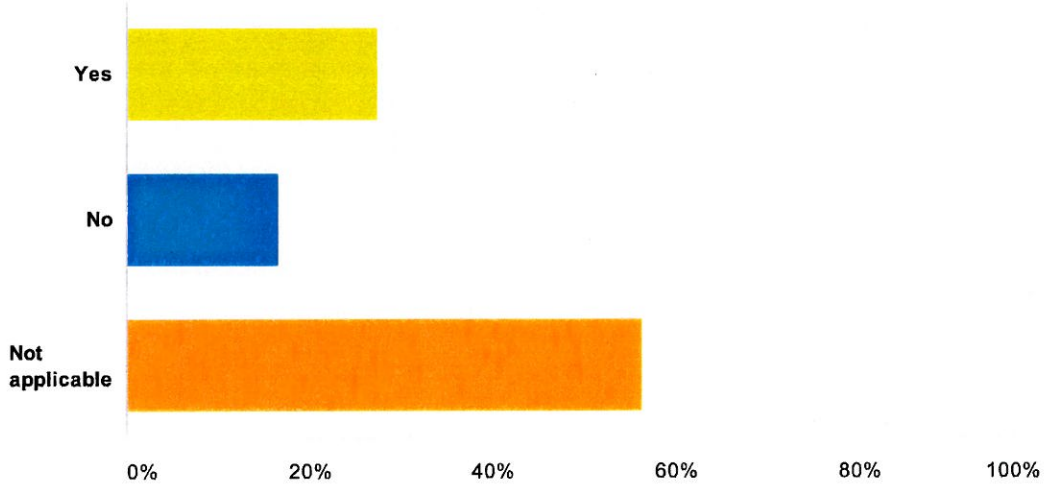
Answered: 71 Skipped: 133



Answer Choices	Responses	
Yes	**28.17%**	20
No	**71.83%**	51
Total		**71**

Q23 If "yes", were you disciplined by your employer as a result of your Work Problem?

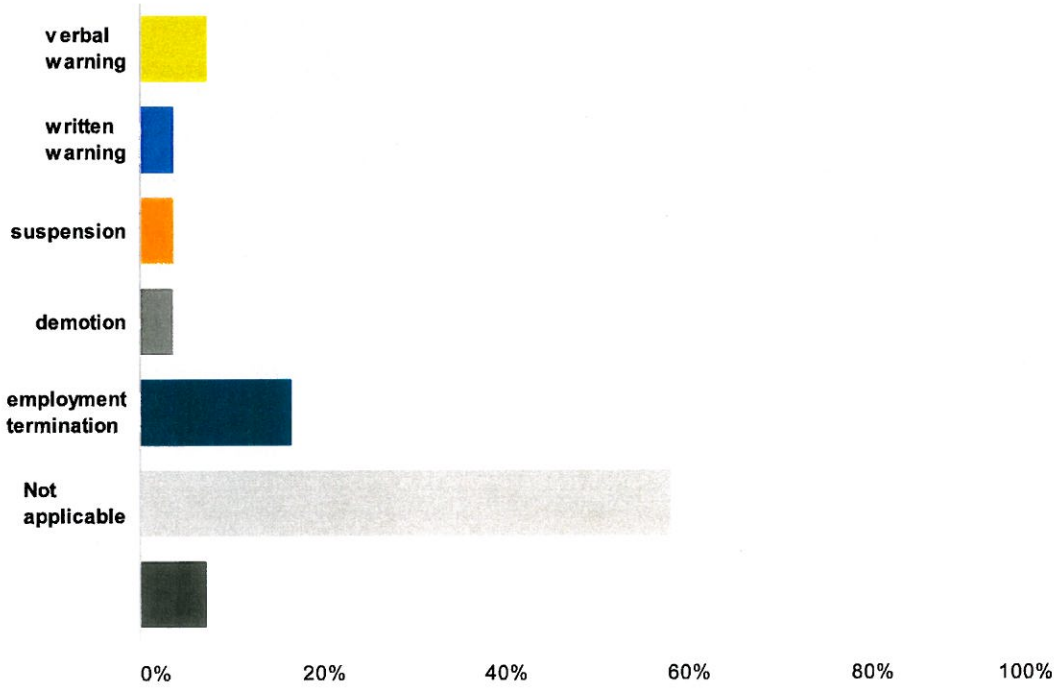
Answered: 55 Skipped: 149



Answer Choices	Responses	
Yes	**27.27%**	15
No	**16.36%**	9
Not applicable	**56.36%**	31
Total		**55**

Q24 If you were disciplined as a result of your Work Problem, what type of discipline did you receive?

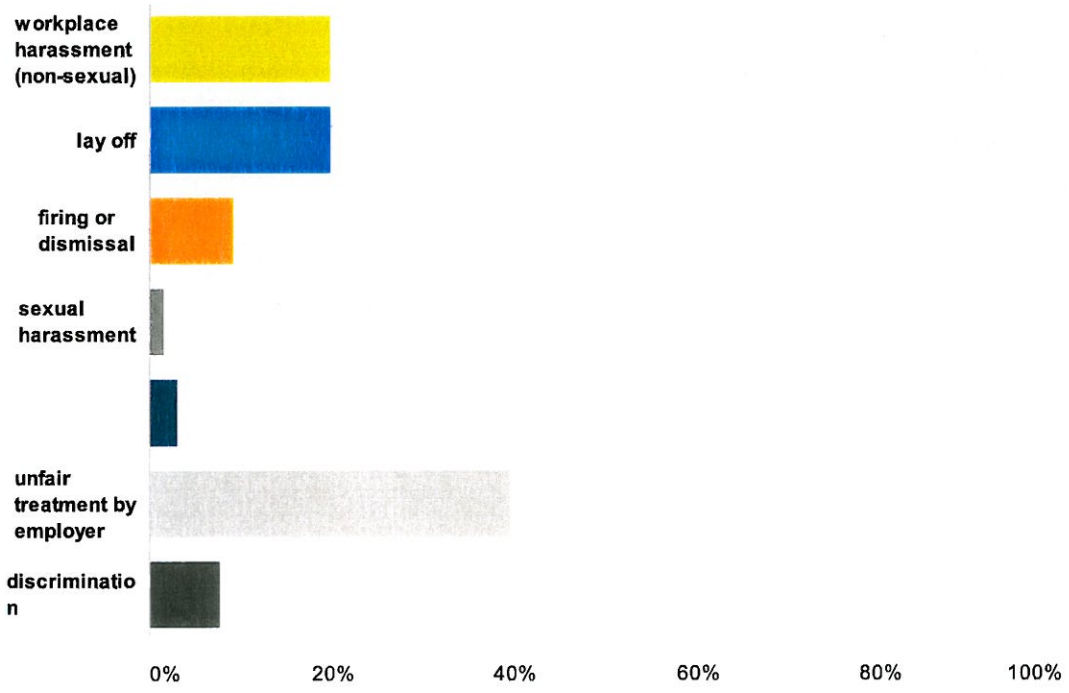
Answered: 55 Skipped: 149



Answer Choices	Responses	
verbal warning	7.27%	4
written warning	3.64%	2
suspension	3.64%	2
demotion	3.64%	2
employment termination	16.36%	9
Not applicable	58.18%	32
Other (please specify)	7.27%	4
Total		**55**

Q25 If your Work Problem did not relate to wrongdoing on your part, how would you characterize it?

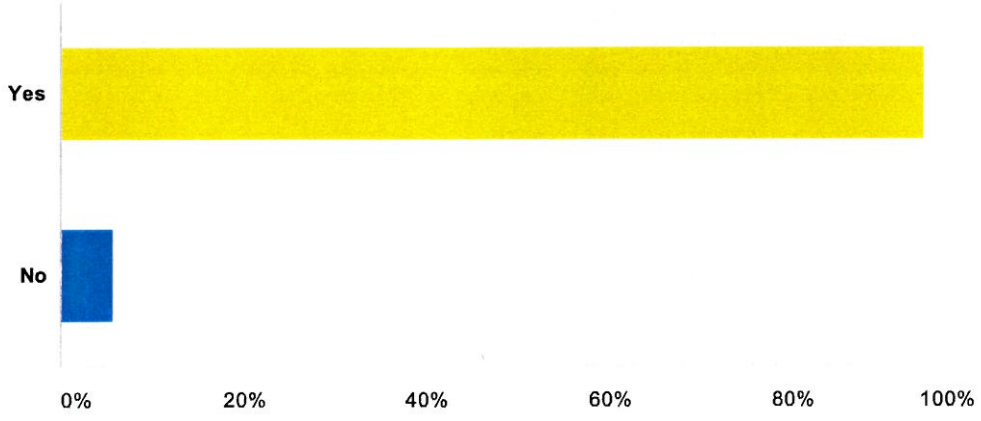
Answered: 66 Skipped: 138



Answer Choices	Responses	
workplace harassment (non-sexual)	**19.70%**	13
lay off	**19.70%**	13
firing or dismissal	**9.09%**	6
sexual harassment	**1.52%**	1
pay reduction or reduced work shifts	**3.03%**	2
unfair treatment by employer	**39.39%**	26
discrimination	**7.58%**	5
Total		**66**

Q26 Would you describe your Work Problem as unfair treatment of you by your employer?

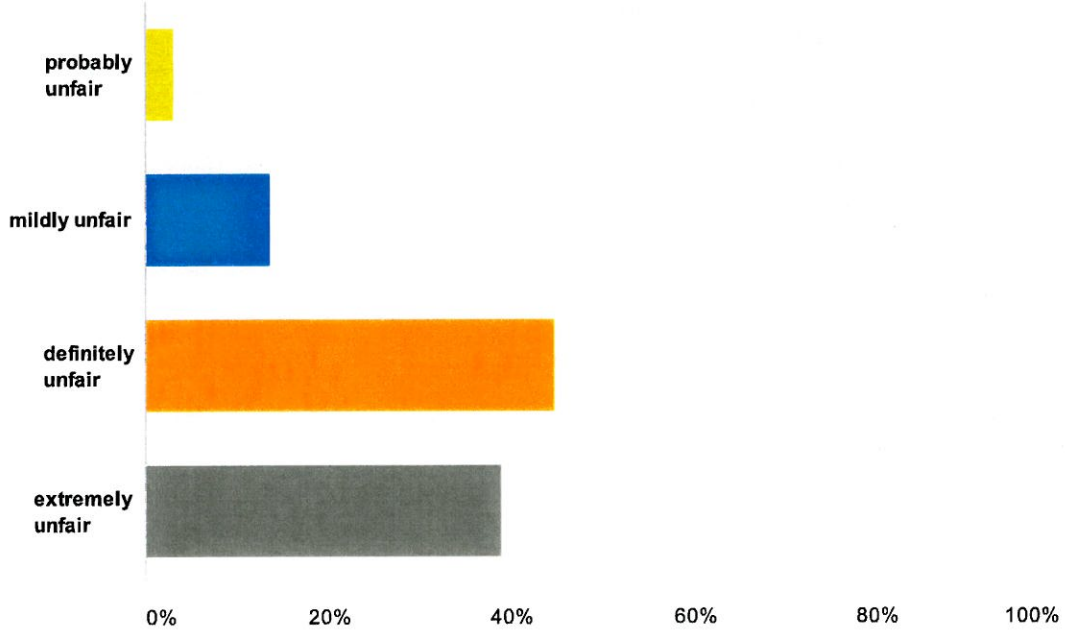
Answered: 71 Skipped: 133



Answer Choices	Responses	
Yes	**94.37%**	67
No	**5.63%**	4
Total		**71**

Q27 If "yes", how would you describe the extent of your employer's unfairness toward you?

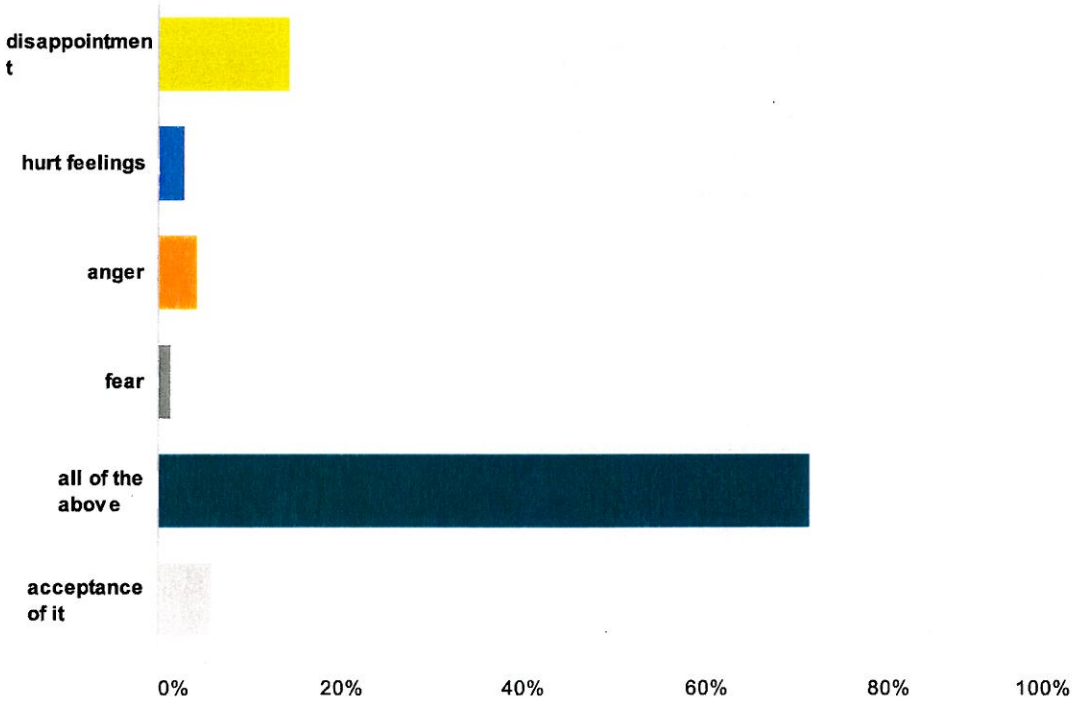
Answered: 67 Skipped: 137



Answer Choices	Responses	
probably unfair	**2.99%**	2
mildly unfair	**13.43%**	9
definitely unfair	**44.78%**	30
extremely unfair	**38.81%**	26
Total		**67**

Q28 What word or phrase best describes your reaction to your Work Problem?

Answered: 70 Skipped: 134



Answer Choices	Responses	
disappointment	**14.29%**	10
hurt feelings	**2.86%**	2
anger	**4.29%**	3
fear	**1.43%**	1
all of the above	**71.43%**	50
acceptance of it	**5.71%**	4
Total		**70**

Q29 Regarding your answer to question 28 above, explain why you had that reaction.

Answered: 62 Skipped: 142

APPENDIX B: Employee Questionnaire – Question 29 responses

I just returned from bereavement leave of my mother. I missed a deadline of sending appropriate material for a board meeting. I was sworn and yelled at within earshot of several employees. I feel that there was a reasonable and legitimate reason for this late notice.
5/14/2007 3:33 PM View respondent's answers

Resulted in less work, less stress and less dealings with the people making the decisions
1/30/2007 1:09 PM View respondent's answers

Employer intentionally took the position it was easier to ignore inappropriate behavior than to confront or address it. Ultimately the harassed party was further victimized now by the employer through inaction. The harassment and bullying continues in the workplace. Recently two of the employer's best long term employees have left to fill positions with another employer as a direct result of the situation.
1/29/2007 1:38 PM View respondent's answers

I have never dealt with anyone cursing and swearing at me in any aspect of my life before. Then, I have a regional manager who is 6ft 4" and 250lbs screaming and swearing at me. I was so scared.
1/29/2007 9:25 AM View respondent's answers

Inability to resolve the conflict with other party. I think he is a psychopath.
12/12/2006 10:14 PM View respondent's answers

No fault of mine intimidated in various ways
12/10/2006 10:59 PM View respondent's answers

I felt that way because I didn't think that there was still sexual discrimination in the work place today. My feelings were hurt by the things that the manager would say to me as well this brought along anger and fear of losing my job if I reacted to his comments. I also was angry that because of this discrimination I gave my notice to that job and during my notice they let me go and did not pay me for the hours that I was scheduled to work.
11/22/2006 10:05 AM View respondent's answers

The wrongful treatment by my employer was due to their lack of accommodations for my state of health at the time. They were discriminating against my condition despite the fact it was fully documented by doctors etc.
11/22/2006 9:46 AM View respondent's answers

Work Problem involved Health and Safety issues. No recourse available other than reporting company.
10/28/2006 11:35 AM View respondent's answers

Because I do what I can to the best of my ability
10/18/2006 4:32 PM View respondent's answers

I was extremely disappointed that the boss chose to do nothing about problems that had been building up between several employees over the past several years.
10/13/2006 10:45 PM View respondent's answers

False accusations were made against me.
10/13/2006 11:44 AM View respondent's answers

The employer would not do anything to deal with the problem even though there were options proposed.
10/12/2006 4:41 PM View respondent's answers

I am versatile in many departments, more than others. I am a hard worker, and a long-time employee. I am being let go while others who have been there less time than I will keep their jobs.

10/11/2006 9:23 PM View respondent's answers

We had signed legal agreement in 2002 should there be a change in my employment and now they are breaching the agreement.
10/5/2006 7:32 PM View respondent's answers

Because it was wrongful dismissal and happened during my sick leave.
10/3/2006 4:08 PM View respondent's answers

I felt disappointed in a company I had worked for which claims to have integrity. I was never asked for my account of the situation. Many of the staff feel [that they are] targeted. We were a strong team which always went above and beyond our job description to give exceptional customer service. When a change of management came in the GM and "higher ups" seemed intent on setting us up for dismissal, as is still going on.
9/6/2006 1:11 PM View respondent's answers

Looking forward to long career with company
8/28/2006 6:57 PM View respondent's answers

Surprised, [since I] thought that the 40 % reduction in salary was uncalled for with 2 weeks' notice. Constructive dismissal would best describe my situation.
8/13/2006 8:05 PM View respondent's answers

Disappointment due to feeling as if I had let an employer down. Hurt feelings from being yelled at and humiliated. Anger because of the wrongdoing. Fear because my employer intimidated me and threatened me.
6/17/2006 3:12 PM View respondent's answers

After almost 16 years of loyal service, being dismissed so abruptly made me angry as no reason was given. I was asked to leave immediately...I was made to feel like a criminal...leaving me hurt and disappointed...as I was instrumental in helping to build the company to what it is today. And yes I also feel fear as to what my future holds...will I land a job...so that I may still live in the standard I have become accustomed to. My success in maintaining that lifestyle rests solely on my shoulders as I am a divorcee and mine is the only source of income.
5/30/2006 6:45 PM View respondent's answers

Personal Safety was put at risk. Employer minimized. Employee involved not held accountable. Employer minimized and labeled "over reactionary".
4/18/2006 9:45 PM View respondent's answers

Completely unexpected. Scared because in the industry I have been employed in for the past 18 years, jobs are very scarce.
4/13/2006 9:11 AM View respondent's answers

The employee was not disciplined.
3/29/2006 4:24 PM View respondent's answers

There was no good reason for my lay off
3/29/2006 11:08 AM View respondent's answers

When you're loyal in all ways and an excellent employee, it hurts to be betrayed for no (understandable or knowledgeable) reason.
3/27/2006 10:18 AM View respondent's answers
Because I have worked there since I started working at 15 years of age and this is all I know and have done for the last 16 years. For me to go out and get another job I would not know where to start or how to go about it. I am angry and hurt as I have given this job a 100% of my effort and I feel that I am good at my job. To have someone treat me this way is very stressful, hurtful, and insulting.
3/17/2006 8:57 PM View respondent's answers

Fear of losing my job/income. Fear of illness reoccurring/long term damage Anger that they would not address the situation Anger over the mistruths being told. Hurt that after my years of dedicated service I would be treated so cruelly. Disappointed that I had no real recourse other that legal action Disappointed in lack of compassion by management
3/10/2006 8:03 PM View respondent's answers

I had worked very hard in the 6 years with the organization and was very entrenched in the group. I was very respected both inside and outside of my business group and had especially built respectful relationships with other leaders within the corporate structure. I had excellent performance appraisals and was even identified as a high potential employee and was placed on the critical talent list. However, my position was shared between three business groups and I reported to 3 GM's, which made my job extremely challenging as these three individuals were always warring with each other. A promotion and a new hire of two operation/commercial managers (same level on org chart as me) in one of these businesses started my slide. They were constantly attempting to work outside the accepted norms of the Company, as HR manager I was forced to be in the position of reining these individuals in, which of course did not make me very popular in their eyes. They poisoned my reputation with the GM in this group who certainly lacked the type of integrity needed in his role (I routinely caught him lying) and between the three of them they made my life at work very difficult, however, they were never in a position to actually fire me as there was no cause. But operational they were able to marginalize my status as a manager and make decisions that affected my team. I eventually started looking for work within the Irving organization, and originally thought I would be successful considering all the contacts I had made over the years. Once the GM heard I was looking, he called me in his office and for the first time explained he wasn't happy with my performance, however, he couldn't speak to any specifics. I continued looking but soon realized that no one in the organization was going to help although many expressed their understanding and new what I was up against. At this same time I was removed from the critical talent list, which I believe was calculated because Mr. Irving had only recently adopted a new strategy of doing exit interviews himself with any Hi Po's who quit. I took matters into my own hands and left the organization and I am now in a better place. However, it still stings to know that a few individuals could destroy a career that I spent years building.
3/8/2006 9:15 AM View respondent's answers

I did not see the layoff coming, so I was in shock.
3/7/2006 6:09 PM View respondent's answers

This had been an ongoing issue with other employees as well.
2/15/2006 7:08 AM View respondent's answers

My employer says openly that past employees will not work in the city again, if she has anything to say about it. She is quite a public figure with many connections. I am out on stress leave right now and I cannot obtain a new position in my field because these potential employers will not hire me due to my present employer. They do not want to upset her.
2/8/2006 11:03 AM View respondent's answers

I was terminated without warning and given no acceptable reason for the termination. I had completed a review with my employer only two months prior to the incident. No concerns were discussed during this review. I was rated as having performed "above average". My wife was 6 months pregnant at the time and we relied on my health benefits.
1/11/2006 8:59 AM View respondent's answers
I feared I would lose my job, I was angry that my manager didn't say anything before my review, I was disappointed in myself for not being able to do better, my feelings were hurt because I felt I was treated unfairly.
1/9/2006 9:14 PM View respondent's answers

Disappointment - because my employer let me down by not fully addressing the issue Hurt Feelings - because I thought my employer respected me as a person more so should have addressed the issue Anger - when nothing was done about issue Fear - for my fellow employees who may fall victim to the issue

1/9/2006 3:08 PM View respondent's answers

After agreeing to a management separation under the Company's management separation plan in place in 2003, asked to stay on for additional 6 months to June 2004, meanwhile separation plan changed and Company tried to renege on original signed agreement. Had to fight for what I would have received in Dec. 2003 and won, but it hurt.
1/8/2006 6:06 PM View respondent's answers

I left a management career of 5 years with a global company that really wanted me to stay. When I started with this new local employer, I was employed for approximately 2 years and believe I was strongly bullied, picked on, and simply did not fit in. They were looking for anything to just terminate. One disagreement with a co-worker who had been employed for 25 years and I was terminated. Saint John is such a small town and I was devastated, words cannot describe the anger, hurt, disbelief and fear I would never be rehired in Management again or at least locally. I went into a mild depression and nearly lost my marriage. My whole world turned upside down in one day - and I still have not recovered from it. I think of it often and simply worry all the time what my friends and family really think and the perception around this horrific time in my professional career.
1/8/2006 4:33 PM View respondent's answers

I didn't understand the reasoning of the decision at the time.
1/6/2006 12:36 PM View respondent's answers

It is a pattern repeated so often I've just learned to live with it
1/6/2006 12:35 PM View respondent's answers

I had been made some very large promises and as a result underwent a significant life change in order to take this job. None of the promises were kept
1/6/2006 11:07 AM View respondent's answers

I loved my job. It was exactly what I had wanted to do.
1/4/2006 12:31 PM View respondent's answers

We were lead to believe that management was going to take the next lay-off hit not the lower echelon.
1/3/2006 9:17 PM View respondent's answers

Having been in the workforce for over 30 years, this was the first instance of any type of reprimand. Was extremely shocked, very hurt and emotionally upset over the action taken - felt it was very heavy handed. Situation was handled with a very heavy hand by management and was quite disappointed in the style of management and action taken. Not 100% sure of meaning of the action - is this the beginning of a plan to eventually terminate my job?
12/30/2005 2:30 PM View respondent's answers

Disappointed with not being able to complete my objectives, hurt feelings as a result of lost trust when led to believe all was well. Anger for being treated with disrespect and fear of going into the job market at 55
12/24/2005 3:37 PM View respondent's answers

32 years of loyalty and none returned--I just happened to be one of 6 or 7 on their list of older employees they wished to put to pasture
12/23/2005 9:56 AM View respondent's answers

The employer lied and misrepresented both the reasons and the duration of the "layoff"
12/21/2005 8:57 PM View respondent's answers

Contractual obligations and promises not met.
12/21/2005 12:48 AM View respondent's answers

I started a job and less than a year was told that there was not enough work coming in to fit my skill levels. The company was too inexperienced to understand what they required and did not understand how to maximize the skills presented to them.
12/20/2005 6:23 PM View respondent's answers

I felt the company did not support my organization in a way that would make it successful
12/20/2005 2:21 PM View respondent's answers

I had a good job for 24 years, good pay and benefits and do not think I will obtain that level in next employment.
12/20/2005 2:00 PM View respondent's answers

Involves career paths and failure to provide one.
12/20/2005 12:05 PM View respondent's answers

I was disappointed in my boss for not supporting me when he clearly and admittedly knew what was going on was wrong. I was hurt that I was treated badly as I was only doing what I was hired to do. I was angry because I had gone to the job in good faith and planned to retire from there. I am fearful of the future and my ability to find equally meaningful employment that will allow me to make a contribution to my family's welfare.
12/20/2005 11:13 AM View respondent's answers

Did not know it was coming. No prior warnings of such. Embarrassed cause it was done in front of other employees. It was a month before Christmas. I had given them 2 years work faithfully.
12/18/2005 10:58 AM View respondent's answers

I was angry because the employer acted in a way that was directly in conflict with the provisions of the Employment Standards Act. She threatened to withhold pay for non-compliance with a policy that did not exist (in fact, the company has no written employment policies). It made me realize what a disorganized and unprofessional company I worked for. I lost a lot of confidence in the company.
12/15/2005 8:48 AM View respondent's answers

Loyalty and commitment to my work was important to me. I believed in the people that I was responsible for and felt it was my responsibility to ensure their happiness and feelings of worth in the organization and followed the vision and mission set out by the organization. I was disappointed to learn that being passionate about helping my employees, to improve their working conditions and making them feel valued was not supported by upper management, which is what I believe lead to my termination without just cause.
12/15/2005 8:29 AM View respondent's answers

At the time, I had 1 child at home and was devastated at my layoff. My self-confidence certainly took a beating and to this day, I am not as self-assured as I want to be.
12/14/2005 8:48 PM View respondent's answers

I was told that I could not set with a person because of my beliefs on some issue
12/14/2005 6:05 PM View respondent's answers

I am a professional person who strived to perform above the expectations of my employer while continuing to perform volunteer service in the community. Being accused of wrong-dong and terminated for it has been hard on my family and myself. I did not feel my superior was acting with the best intentions and clearly acting for personal gain.
12/14/2005 5:37 PM View respondent's answers

The person who terminated my employment was my peer until a recent promotion and I thought of her as a trusted friend and colleague. Also, the fact that my company did not investigate the allegations whatsoever, and took action based on third party interpretation.
12/14/2005 5:18 PM View respondent's answers

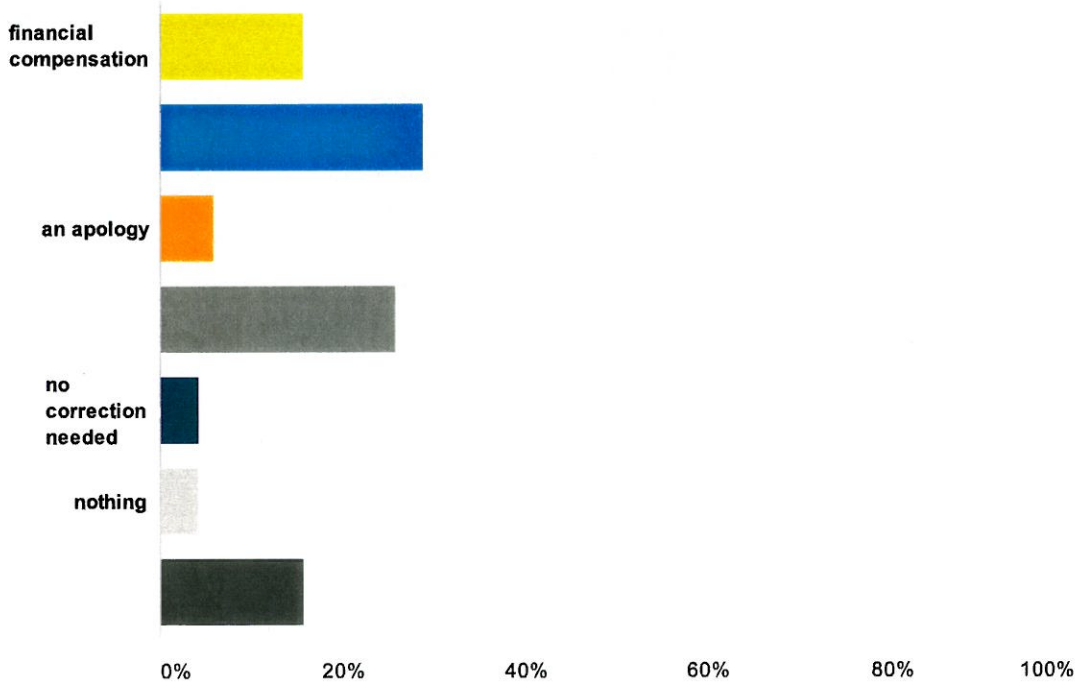
I was promised a 2 year contract, did not want to be let go since I was asked to move to this city for the job, had to move my family and to only find out 8 month later I would have no job...
12/14/2005 8:55 AM View respondent's answers

I was highly regarded by the people that counted on me the most. Who ultimately had little to say, I was a worker for the people and not the type of employee who would
12/13/2005 11:20 PM View respondent's answers

Work problem attacked my credibility being both personally and professionally. My credibility is important to me. Also, disappointed that first attempt at management ended in bitter disappointment.
12/13/2005 5:15 PM View respondent's answers

Q30 If your Work Problem involved unfair treatment by your employer, what would have helped to correct the situation?

Answered: 70 Skipped: 134



Answer Choices	Responses	
financial compensation	**15.71%**	11
better communication from your employer	**28.57%**	20
an apology	**5.71%**	4
assistance from your employer in dealing with the Work Problem	**25.71%**	18
no correction needed	**4.29%**	3
nothing	**4.29%**	3
Other (please specify)	**15.71%**	11
Total		**70**

Q31 Regarding your answer to question 30 above, how should your employer have addressed the Work Problem?

Answered: 61 Skipped: 143

APPENDIX B: Employee Questionnaire – Question 31 responses

Discuss problems with employees in private so as to give employee and employer opportunity to work it out.
5/14/2007 3:33 PM View respondent's answers

Told me of the impending changes earlier than the day i returned to work following a leave of absence
1/30/2007 1:09 PM View respondent's answers

Although the employer acknowledged the problem existed the employers response was sadly " grow some tougher skin". Until the employer addresses the problem for what it is workplace morale and productivity will continue to deteriorate and more experienced employees will certainly seek new employment.
1/29/2007 1:38 PM View respondent's answers

Suspended the regional supervisor, made him take anger management, and give me an apology.
1/29/2007 9:25 AM View respondent's answers

Immediately studying the problem and helping to negotiate a solution
12/12/2006 10:14 PM View respondent's answers

As above
12/10/2006 10:59 PM View respondent's answers

There should have been an apology and some sort of communication skills worked on. The company also needed to get the manager to understand that he could not treat woman unfairly.
11/22/2006 10:05 AM View respondent's answers

They should have been willing to accommodate my state of health as they had initially agreed on, and then reneged.
11/22/2006 9:46 AM View respondent's answers

Employer should have addressed issues and corrected them.
10/28/2006 11:35 AM View respondent's answers

Asked in kindly appropriate manner and not yelling
10/18/2006 4:32 PM View respondent's answers

We have one employee who has always been a source of problems with the rest of the employees in the department. They should have fired this employee because she has been a constant source of discord in the department, but the boss does not want to deal with it.
10/13/2006 10:45 PM View respondent's answers

To discipline the two employees involved. No actions were taken against them.
10/13/2006 11:44 AM View respondent's answers

They should have looked into the problem instead of just ignoring it.
10/12/2006 4:41 PM View respondent's answers

[If the employer had] dealt with the problem by seniority.
10/11/2006 9:23 PM View respondent's answers

By upholding the signed agreement when my last day of employment arrives, instead of causing me stress and having to go for legal advice again.
10/5/2006 7:32 PM View respondent's answers

Discussed it and if he's conclusion was anyway a dismissal, then fair financial compensation and reference letter.
10/3/2006 4:08 PM View respondent's answers

Stopped his agenda to "clean house". Furthermore after following the proper chain of command our District Manager should have taken steps to rein the GM in.
9/6/2006 1:11 PM View respondent's answers

Give notice that they were not satisfied with current performance
8/28/2006 6:57 PM View respondent's answers

"Better communication" says it all.
8/13/2006 8:05 PM View respondent's answers

He should have acted like a fair employer instead of a irrational lunatic.
6/17/2006 3:12 PM View respondent's answers

After almost 16 years...I should have been offered a better severance package...and at least 6 months of insurance benefits...to see me through till I was able to obtain work or insurance replacement.
5/30/2006 6:45 PM View respondent's answers

Validated the wrong doing on someone else's part following an investigation. Really no corrective action could be taken.
4/18/2006 9:45 PM View respondent's answers

Due to the fact that I was lured away from another stable position as well as the fact that the possibilities of my finding employment in the same industry are very slim, I felt that my severance should have been more generous.
4/13/2006 9:11 AM View respondent's answers

Treat all employees equitably.
3/29/2006 4:24 PM View respondent's answers

Fair severance
3/29/2006 11:08 AM View respondent's answers

Regarding question 25, this should have never happened.
3/27/2006 10:18 AM View respondent's answers

I feel that my manager is the most strict manager I have ever worked with in the 16 years I have worked for the company. With this manager there are no breaks from any of the rules whatsoever. She is way too strict.
3/17/2006 8:57 PM View respondent's answers

They should have investigated without bias / corrected the situation instead of covering it up and provided the support and safe work condition for their employee without making me feel threatened or intimidated
3/10/2006 8:03 PM View respondent's answers

The real problem was the management maturity of a few individuals. Interestingly, at this time the VP of our business group had understood that he had many young managers who were technically proficient but lacked basic management skills. The HR professionals within the group (myself included) were working on solutions to bridge this gap. My employer and leaders in the group should have investigated the situation and mediated a solution. They let this continue so long that I was

somewhat shut off and then I believe my behaviour was taken out of context and everyone forgot that prior to the last few months I was the go-to guy that everyone trusted. It's very complicated, they beat you down until you have no choice but to push back and when you do then you are seen as the one with the problem. My employer should have protected an asset (me) that had saved them more monies than they ever paid me in salary. Someone who worked unquestionably 60 to 80 hours weekly to get the job done and always operated with the best interest of the organization in mind. Instead I eventually realized that I was merely fodder, just another soul sent up to capture the hill. It is interesting to note that when I gave my notice of resignation I was immediately contacted by the two most senior corporate HR professionals who were surprized and advised they wanted to speak to me, I was there another two weeks our offices were on the same floor.....they never darken my door.
3/8/2006 9:15 AM View respondent's answers

I should have received more severance.
3/7/2006 6:09 PM View respondent's answers

Not expecting everyone else to walk on egg shells because of this other employee.
2/15/2006 7:08 AM View respondent's answers

Unfortunately there would be no "addressing of the work problem". My employer feels that there is "no problem" After numerous attempts of trying to let my employer know how myself and other employees felt, it was just dismissed as all the employees need to try harder because she has "incompetent employees working for her".
2/8/2006 11:03 AM View respondent's answers

I believe I was terminated to make room for another individual whom my manager preferred personally. The individual who replaced me was hired for less money. I should never have been terminated in the first place.
1/11/2006 8:59 AM View respondent's answers

My employer should have communicated her expectations to me from the beginning and expressed her concern over my progress prior to my review.
1/9/2006 9:14 PM View respondent's answers

Apologized for treating me in the manner he did, and an apology from our President for not addressing the issue. I would have felt that I was right in feeling the ways I did.
1/9/2006 3:08 PM View respondent's answers

Not tried to change separation plan as it was the Company who asked me to stay not me.
1/8/2006 6:06 PM View respondent's answers

Talk it out - allow the opportunity to be heard. Be warned, and allow time to correct behaviour (if indeed there was a behaviour that was deemed not acceptable). Listen. Listen and look at the big picture, before just making a decision to terminate.
1/8/2006 4:33 PM View respondent's answers

Severance package, as I relocated from another city to take the position, when "internal changes" or "re-direction of company" took place and my marketplace is very limited here.
1/6/2006 12:36 PM View respondent's answers

Remove senior manager. Promote to private sector.
1/6/2006 12:35 PM View respondent's answers

First, they should have been honest and second, they should have kept their commitment.
1/6/2006 11:07 AM View respondent's answers

They shouldn't of lead employees to believe that the next round of layoffs were going to be management when they probably knew fully well who was on the list.
1/3/2006 9:17 PM View respondent's answers

The situation arose over a change in management; if the change had been handled in a more professional and upfront manner with meetings and information being relayed to everyone, the tensions and uncertainty would not have surfaced.
12/30/2005 2:30 PM View respondent's answers

The employer was guilty of unfair dismissal and did not provide any opportunity to address any perceived flaws in service delivery and was not interested in finding the true faults.
12/24/2005 3:37 PM View respondent's answers

They were taking a new direction and did not want any of the long term employees to stay
12/23/2005 9:56 AM View respondent's answers

The employer should have been honest about the reason and the duration of the "layoff"
12/21/2005 8:57 PM View respondent's answers

Not making promises that they did not intend to keep.
12/21/2005 12:48 AM View respondent's answers

They needed to understand what they "do" and what skills they require now and for the future.
12/20/2005 6:23 PM View respondent's answers

They could have made me aware of their plans to move my organization and gotten my input on the viability of the plan
12/20/2005 2:21 PM View respondent's answers

Should have provided a career path and guidance.
12/20/2005 12:05 PM View respondent's answers

It should have been dealt with before I was hired as it was an ongoing, long-term situation which had caused conflict with employees in the past. I should never have been left in the dark about the seriousness of the situation into which I was getting. I should have been able to choose for myself as to whether or not I wanted to take on the challenge. When things started to badly derail in the spring, my employer should have shared with others in authority the true nature of the situation instead of letting it fester and having blame brought on me.
12/20/2005 11:13 AM View respondent's answers

Met with me to explain the situation and work with me to find an acceptable solution for both parties
12/20/2005 8:02 AM View respondent's answers

Direct Communications
12/19/2005 12:40 PM View respondent's answers

Professionally for sure. A verbal or written warning.
12/18/2005 10:58 AM View respondent's answers

The person should have apologized for treating employees with such a lack of respect. However, I realized that the company was completely unequipped to deal with any conflicts. I had written my concerns to the HR Manager-- she replied that I should take my issue up directly with the offending person and not to bother her about things like that.
12/15/2005 8:48 AM View respondent's answers

They should have followed their vision and values. Opened the lines of honest communication between us. They could have listened to the issues raised and responded appropriately without lying or stating that the problems did not exist. The problems that needed to be addressed were not addressed and terminating those that had opinions or suggestions and hiring from outside to replace those people was a poor solution.
12/15/2005 8:29 AM View respondent's answers

Should have told the other person who blamed me for something i did not do.
12/14/2005 6:05 PM View respondent's answers

My employer should have approached me with his concerns and asked to what measures could be taken to correct the situation.
12/14/2005 5:37 PM View respondent's answers

When the allegations were received, my company should have taken them serious, addressed the facts and taken steps to mediate with the third party. Instead management joked about it, reassured me it was not serious and could be fixed, that I wouldn't lose my job, and did not want to hear my side of the story.
12/14/2005 5:18 PM View respondent's answers

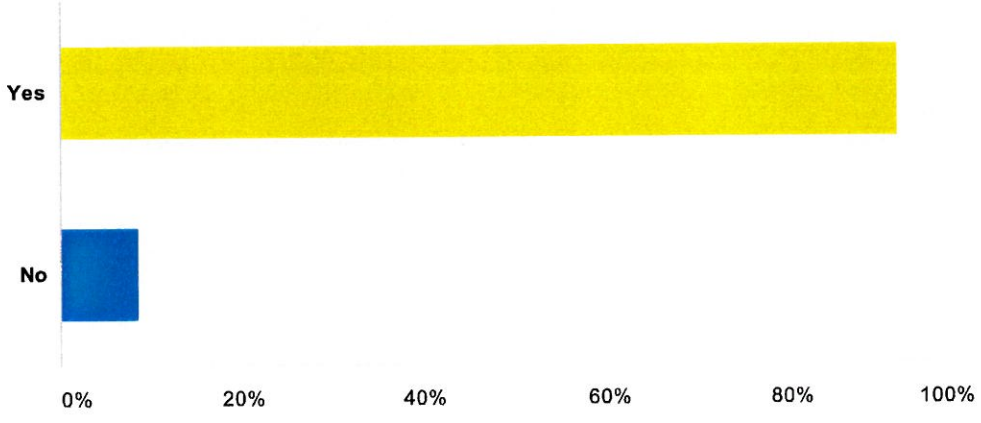
Not letting me go after only 8 months after a 2 year contract, pay me for the remainder of the 2 years and any compensation for a relocating expense
12/14/2005 8:55 AM View respondent's answers

Looked at the history of the manager, and compared that to the history of the employee and did a further analysis.
12/13/2005 11:20 PM View respondent's answers

Provide adequate support and advice dealing with problem employees.
12/13/2005 5:15 PM View respondent's answers

Q32 Did you experience any physical, emotional and/or psychological reactions to your Work Problem?

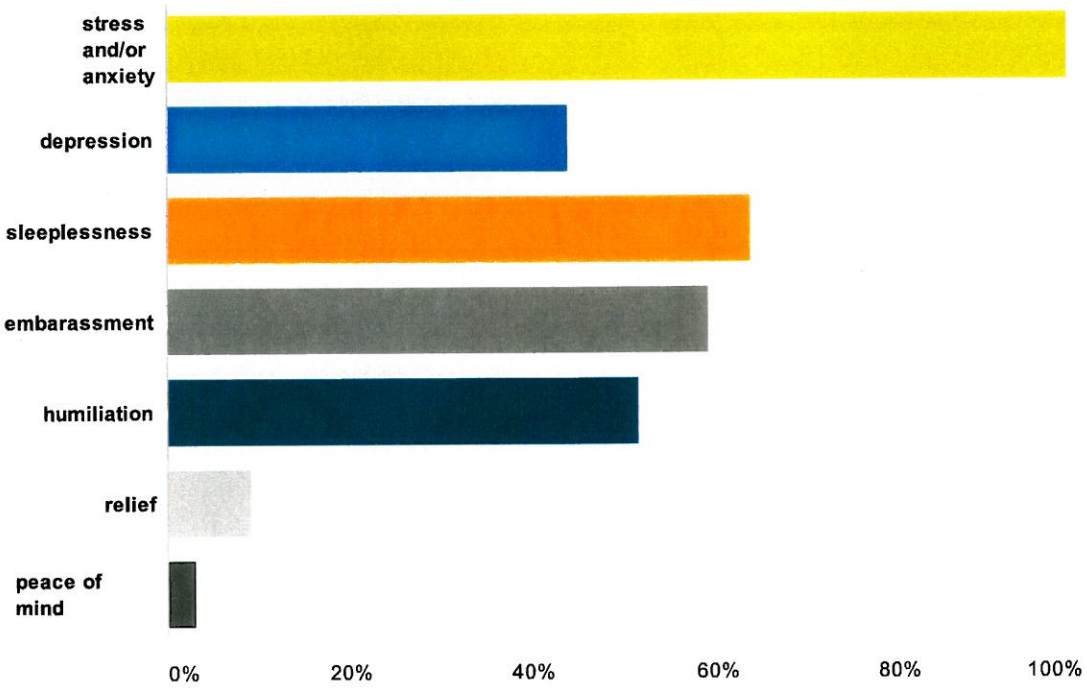
Answered: 72 Skipped: 132



Answer Choices	Responses	
Yes	91.67%	66
No	8.33%	6
Total		**72**

Q33 If your answer to question 32 above was "yes", mark the entry or entries below that best describe your condition caused by the Work Problem.

Answered: 66 Skipped: 138

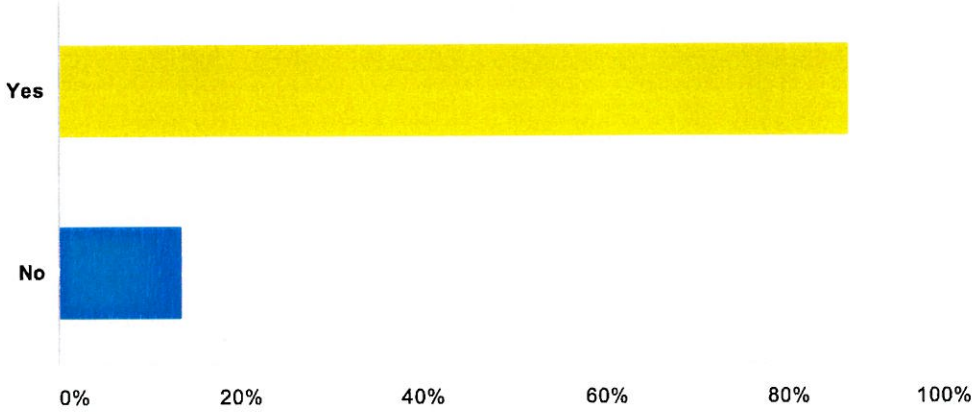


Answer Choices	Responses	
stress and/or anxiety	**98.48%**	65
depression	**43.94%**	29
sleeplessness	**63.64%**	42
embarassment	**59.09%**	39
humiliation	**51.52%**	34
relief	**9.09%**	6
peace of mind	**3.03%**	2

Total Respondents: 66

Q34 If you suffered from physical or emotional health symptoms relating to your Work Problem, were those symptoms noticed by your family members, friends and/or co-workers?

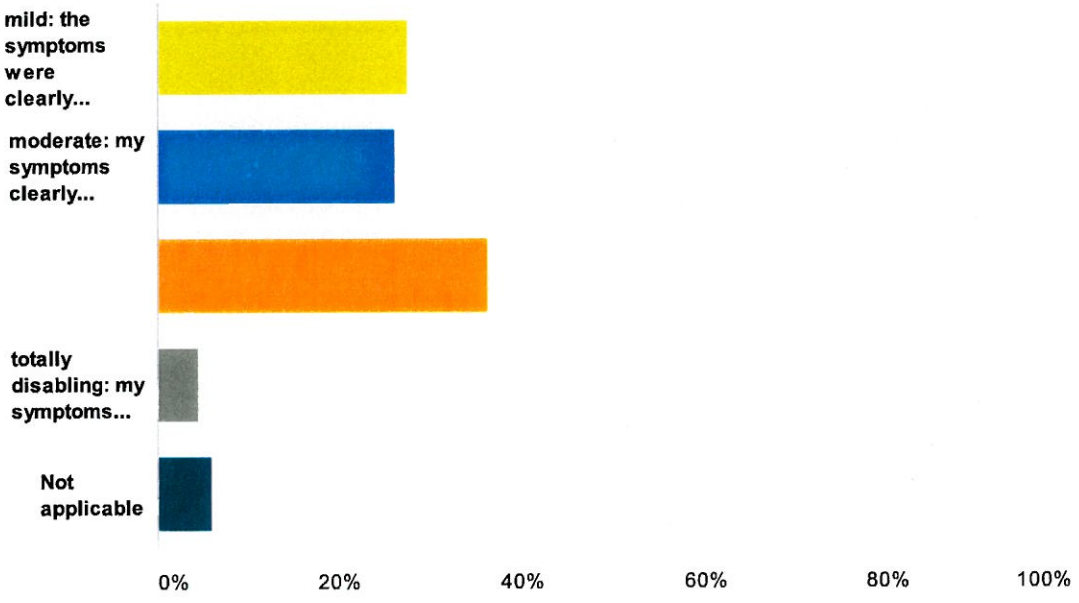
Answered: 67 Skipped: 137



Answer Choices	Responses	
Yes	**86.57%**	58
No	**13.43%**	9
Total		**67**

Q35 If you suffered from physical or emotional symptoms related to your Work Problem, choose the best description of those symptoms below:

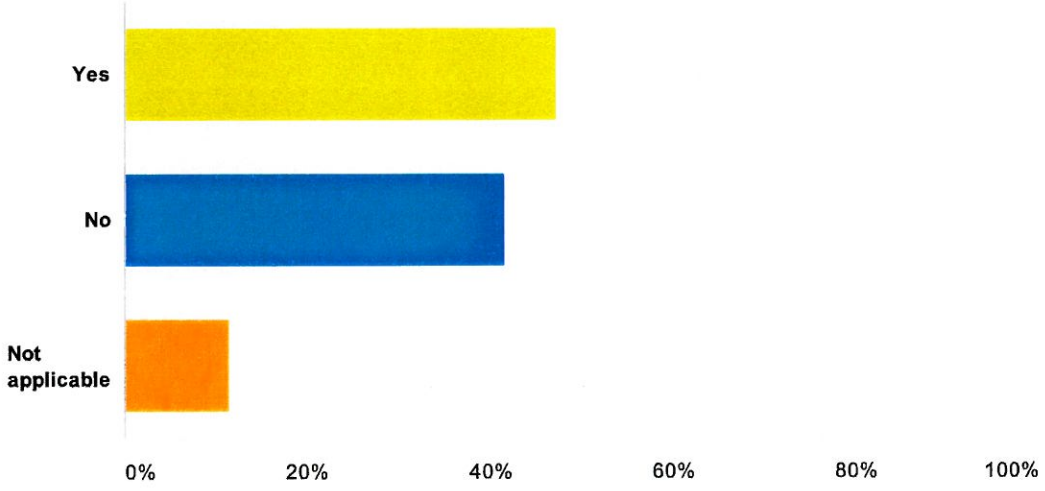
Answered: 69 Skipped: 135



Answer Choices	Responses	
mild: the symptoms were clearly noticeable to me, but as was able to function normally in my everyday life	**27.54%**	19
moderate: my symptoms clearly affected me , but affected me in less than half of my daily activities	**26.09%**	18
serious: my symptoms were clearly noticeable, and they affected me in at least half of my daily functions	**36.23%**	25
totally disabling: my symptoms prevented me from carrying out most of my daily activities	**4.35%**	3
Not applicable	**5.80%**	4
Total		**69**

Q36 If you suffered physical or emotional symptoms in relation to your Work Problem, did you obtain any medical or psychological treatment?

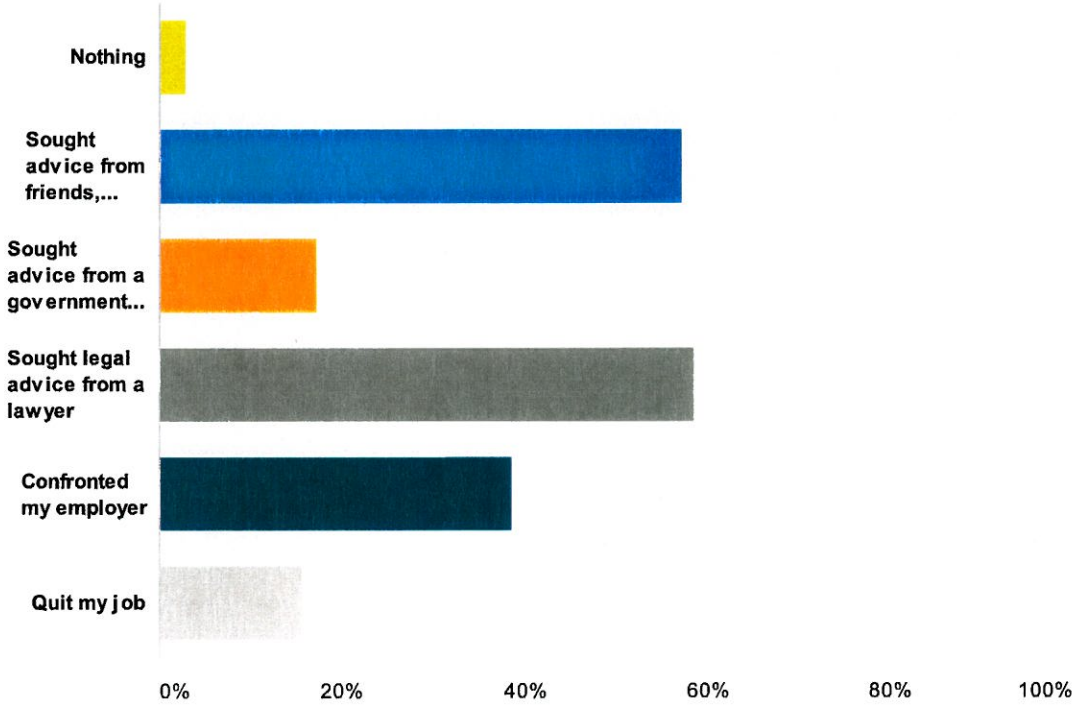
Answered: 70 Skipped: 134



Answer Choices	Responses	
Yes	47.14%	33
No	41.43%	29
Not applicable	11.43%	8
Total		**70**

Q37 What (if anything) did you do in response to your Work Problem?

Answered: 70 Skipped: 134

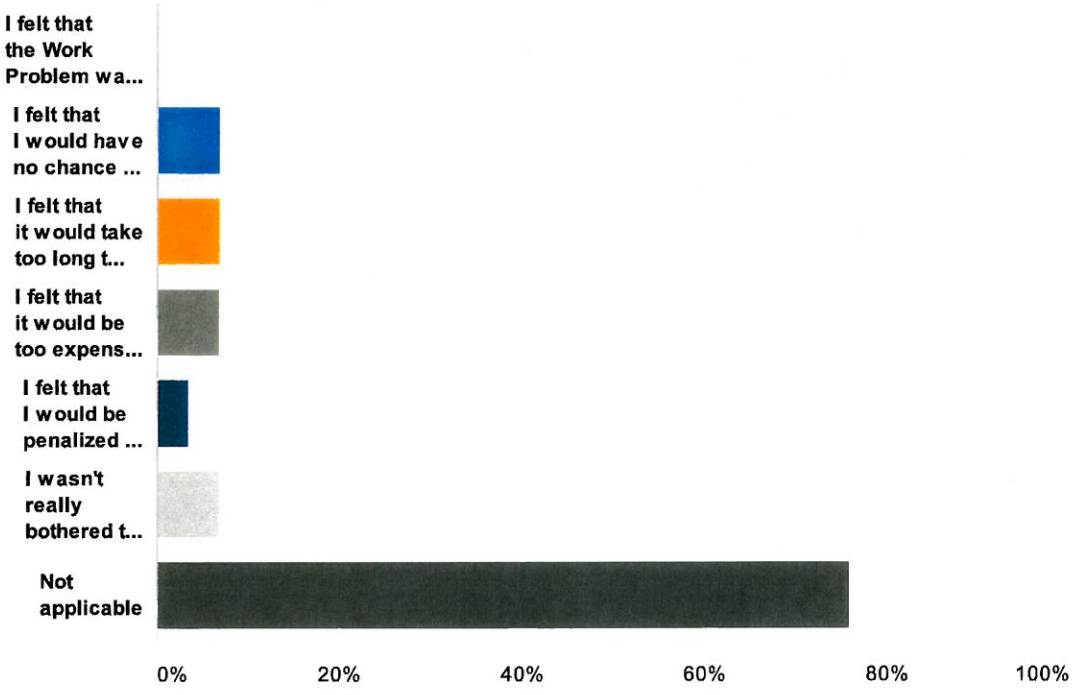


Answer Choices	Responses	
Nothing	**2.86%**	2
Sought advice from friends, co-workers or family members	**57.14%**	40
Sought advice from a government department or agency	**17.14%**	12
Sought legal advice from a lawyer	**58.57%**	41
Confronted my employer	**38.57%**	27
Quit my job	**15.71%**	11

Total Respondents: 70

Q38 If you did "Nothing" in response to your Work Problem, why?

Answered: 29 Skipped: 175

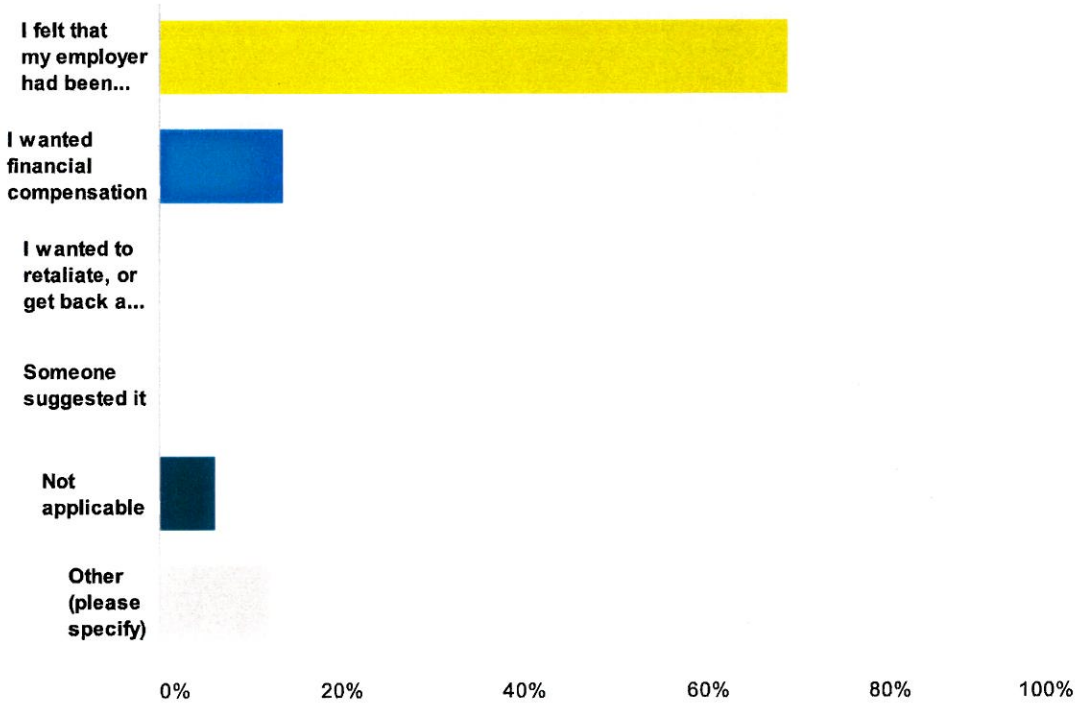


Answer Choices	Responses	
I felt that the Work Problem was my fault	0%	0
I felt that I would have no chance of "winning" against my employer	6.90%	2
I felt that it would take too long to pursue the issue legally	6.90%	2
I felt that it would be too expensive and/or that I would not be fairly compensated if I did pursue it	6.90%	2
I felt that I would be penalized or treated differently by my employer if I raised the issue	3.45%	1
I wasn't really bothered that much by the Work Problem	6.90%	2
Not applicable	75.86%	22

Total Respondents: 29

Q39 If you did "something" in response to your Work Problem, which of the following BEST describes your motivation for doing so?

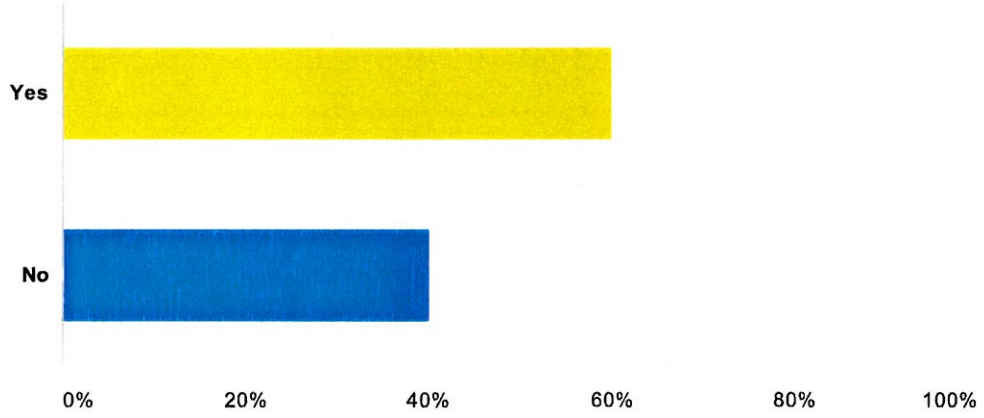
Answered: 67 Skipped: 137



Answer Choices	Responses	
I felt that my employer had been unfair to me, and I wanted to be treated fairly	**68.66%**	46
I wanted financial compensation	**13.43%**	9
I wanted to retaliate, or get back at my employer	**0%**	0
Someone suggested it	**0%**	0
Not applicable	**5.97%**	4
Other (please specify)	**11.94%**	8
Total		**67**

Q40 Did your employer advise you of what the cause of the Work Problem was?

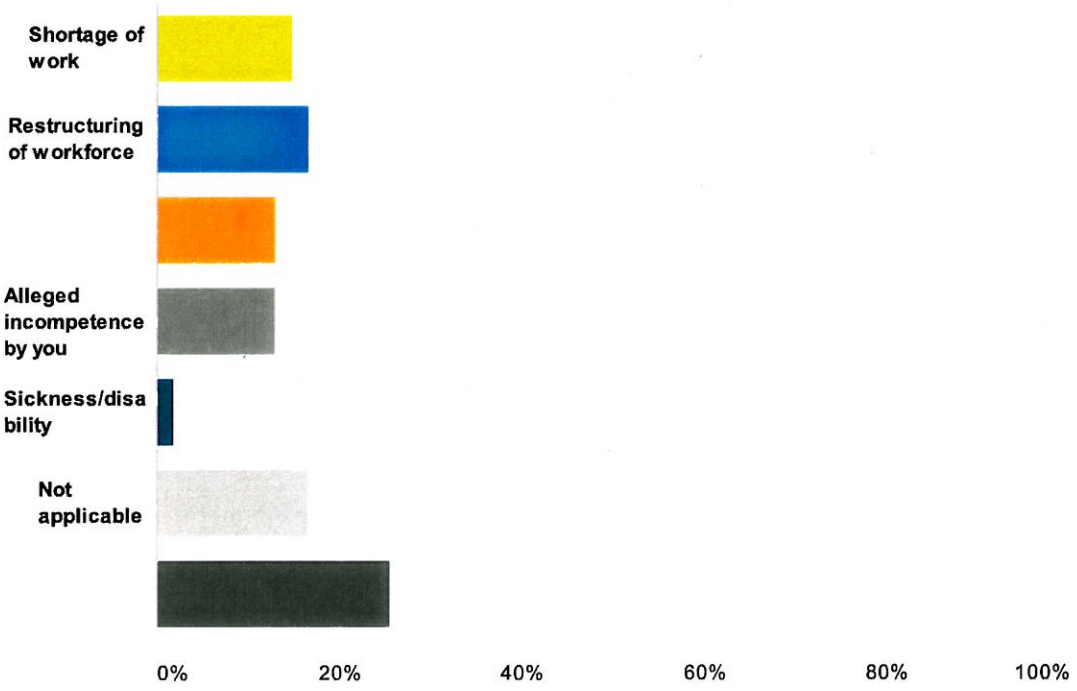
Answered: 70 Skipped: 134



Answer Choices	Responses	
Yes	**60%**	42
No	**40%**	28
Total		**70**

Q41 If "yes", what did your employer describe as the cause of the Work Problem?

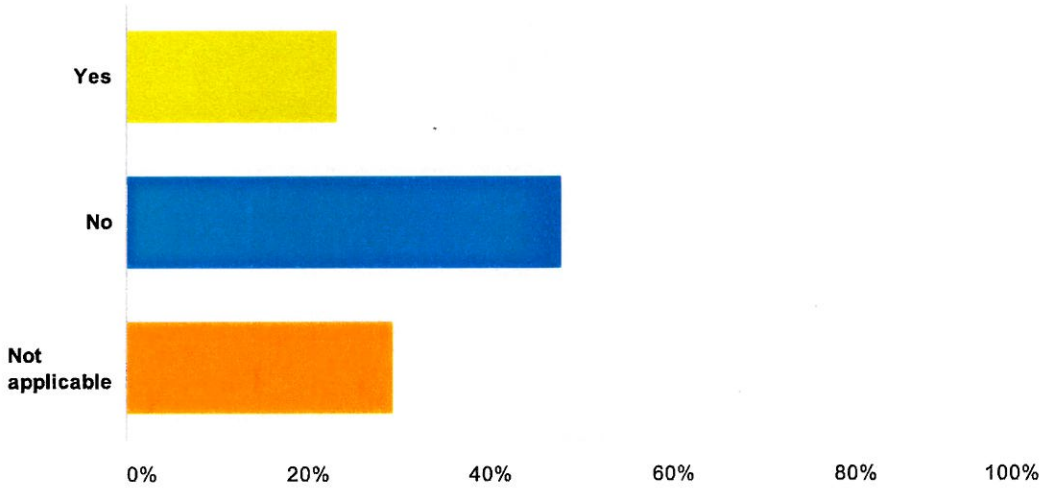
Answered: 55 Skipped: 149



Answer Choices	Responses	
Shortage of work	**14.55%**	8
Restructuring of workforce	**16.36%**	9
Alleged misconduct by you	**12.73%**	7
Alleged incompetence by you	**12.73%**	7
Sickness/disability	**1.82%**	1
Not applicable	**16.36%**	9
Other (please specify)	**25.45%**	14
Total		**55**

Q42 If your employer advised you of a reason for the Work Problem (see question immediately above), did you believe your employer?

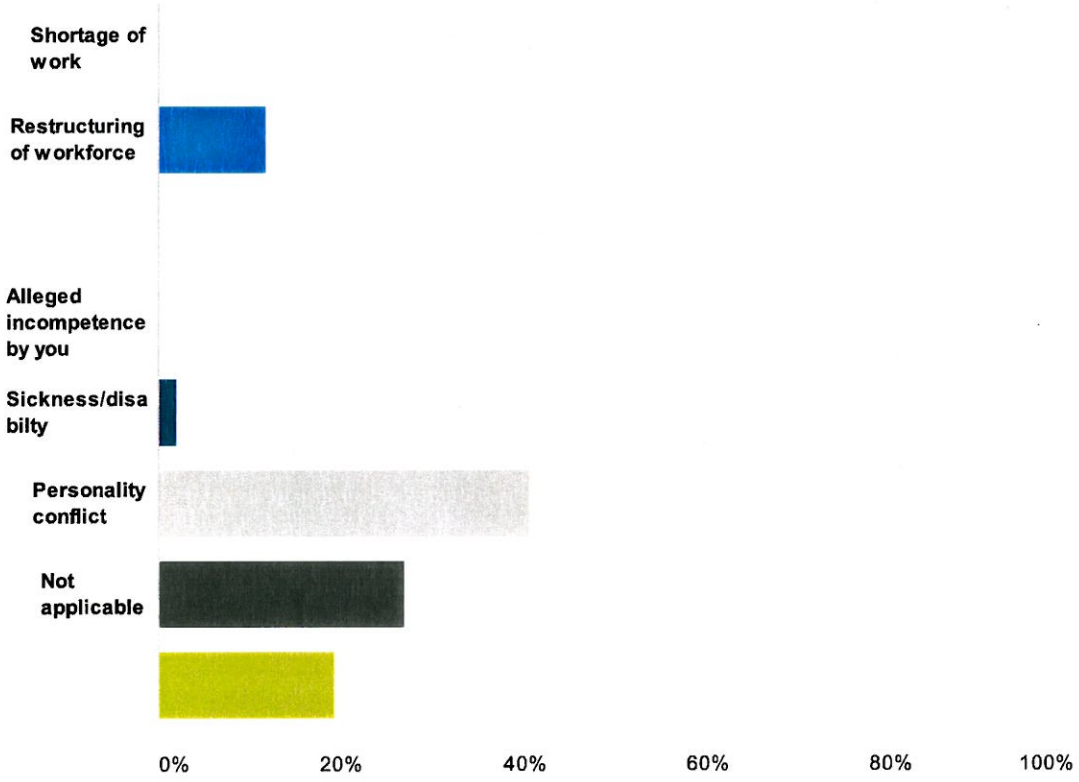
Answered: 65 Skipped: 139



Answer Choices	Responses	
Yes	**23.08%**	15
No	**47.69%**	31
Not applicable	**29.23%**	19
Total		**65**

Q43 If you DID NOT believe the reason given to you by your employer for your Work Problem, what do you believe was the TRUE reason?

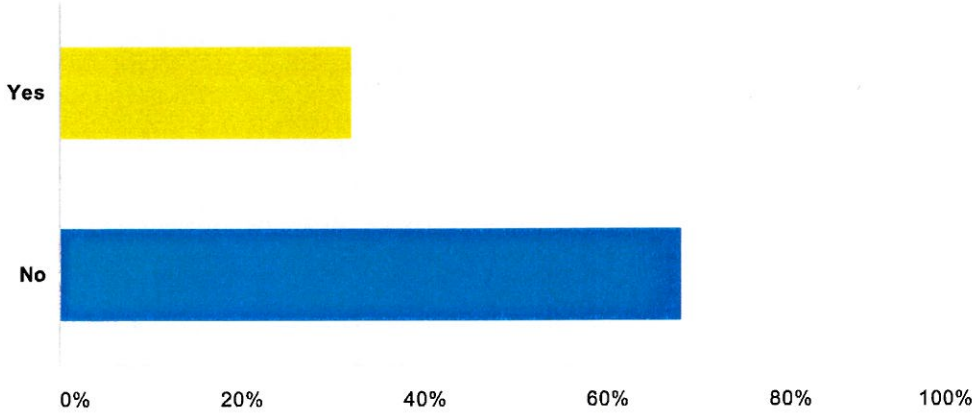
Answered: 52 Skipped: 152



Answer Choices	Responses	
Shortage of work	0%	0
Restructuring of workforce	11.54%	6
Alleged misconduct by you	0%	0
Alleged incompetence by you	0%	0
Sickness/disabilty	1.92%	1
Personality conflict	40.38%	21
Not applicable	26.92%	14
Other (please specify)	19.23%	10
Total		**52**

Q44 Did your employer provide you with any help or compensation in respect of the Work Problem?

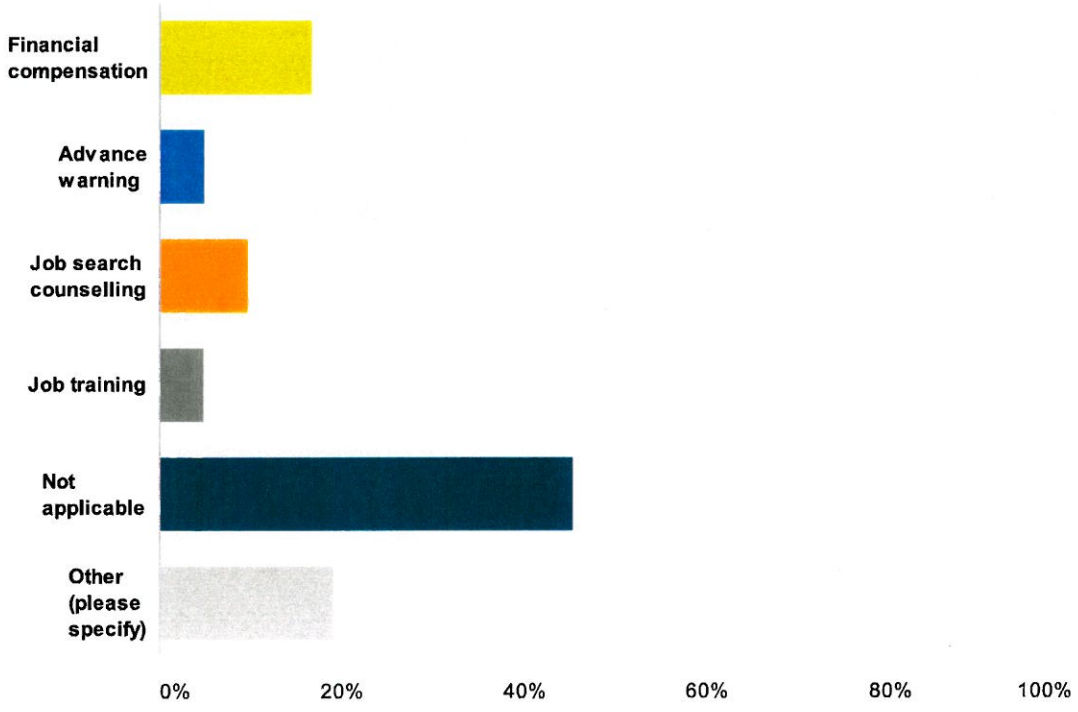
Answered: 69 Skipped: 135



Answer Choices	Responses	
Yes	**31.88%**	22
No	**68.12%**	47
Total		**69**

Q45 If "yes", what help or compensation did your employer provide?

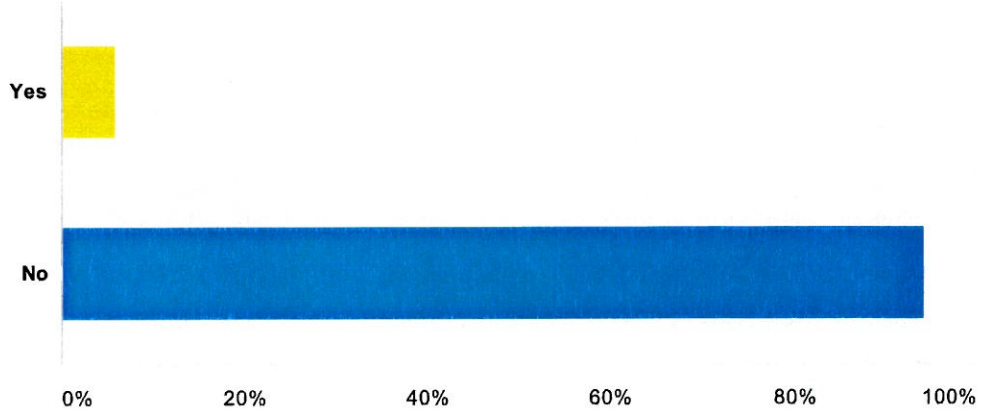
Answered: 42 Skipped: 162



Answer Choices	Responses	
Financial compensation	**16.67%**	7
Advance warning	**4.76%**	2
Job search counselling	**9.52%**	4
Job training	**4.76%**	2
Not applicable	**45.24%**	19
Other (please specify)	**19.05%**	8
Total		**42**

Q46 Do you believe that your employer handled the Work Problem fairly?

Answered: 70 Skipped: 134



Answer Choices	Responses	
Yes	**5.71%**	4
No	**94.29%**	66
Total		**70**

Q47 If "no", what could your employer have done to handle the Work Problem more fairly?

Answered: 59 Skipped: 145

APPENDIX B: Employee Questionnaire – Question 47 responses

Advance notice of job restructuring
1/30/2007 1:09 PM View respondent's answers

Done anything other than hope the problem would go away. The employer although it recognized the issue let the victims continue to be victims.
1/29/2007 1:38 PM View respondent's answers

Reprimand the supervisor, my boss, and have workplace mediation
1/29/2007 9:25 AM View respondent's answers

Change attitude and work style or perhaps leave
12/10/2006 10:59 PM View respondent's answers

There was nothing done to help me with the problem that I was having and it resulted in me leaving my job.
11/22/2006 10:05 AM View respondent's answers

The employer must be willing to accommodate their staff under all circumstances. It was completely in their ability to uphold their promise to me so that I would have been able to continue as a productive and competent employee. However, they denied me this right, and gave me no alternative but to quit, or continue being treated unfairly
11/22/2006 9:46 AM View respondent's answers

Employer could have fixed Health and Safety issues.
10/28/2006 11:35 AM View respondent's answers

[Should have] been more considerate to others.
10/18/2006 4:32 PM View respondent's answers

We have an employee who takes advantage of people's weaknesses and takes advantage of people too weak to fight back. We would like to see this employee gone because things will get back to normal for a short while but eventually the employee always goes back to their previous antics.
10/13/2006 10:45 PM View respondent's answers

Take my complaints against these two employees more seriously.
10/13/2006 11:44 AM View respondent's answers

They could have looked into the situation and attempted to remedy it.
10/12/2006 4:41 PM View respondent's answers

Lay off by seniority.
10/11/2006 9:23 PM View respondent's answers

This is ongoing. I am employed till year end. They could have lived up to the agreement signed in 2002, instead of breaching the agreement.
10/5/2006 7:32 PM View respondent's answers

If there was a problem, it should have been discussed earlier, like normal employers do.
10/3/2006 4:08 PM View respondent's answers

There was no misconduct on my part. My employer feels he is untouchable and I do not believe is competent enough to handle any work place problem fairly.
9/6/2006 1:11 PM View respondent's answers

Give notice
8/28/2006 6:57 PM View respondent's answers

To be given reasonable warning of where salary reduction would be implemented.
8/13/2006 8:05 PM View respondent's answers

Acted like a boss rather than a child.
6/17/2006 3:12 PM View respondent's answers

My employer could have offered more suitable compensation and health benefits
5/30/2006 6:45 PM View respondent's answers

The employer could have acted immediately, not minimized the impact, moved quicker in the response, not delay on action or investigation. It was only because of legal counsel outside the resulted in action.
4/18/2006 9:45 PM View respondent's answers

Given the possibility that the level of work would increase, I thought they should have laid me off temporarily. As well, the level of severance offered was entirely inadequate.
4/13/2006 9:11 AM View respondent's answers

Equitable treatment among those employee(s) involved.
3/29/2006 4:24 PM View respondent's answers

Dealt with the problem properly instead of going for a "quick fix"
3/29/2006 11:08 AM View respondent's answers

Not taken my job away. Not telling me this information upon my return to work after being disabled for 4 weeks (no income)
3/27/2006 10:18 AM View respondent's answers

She could have been a little more friendly [and could have] and talked to me about the issues she had with me first instead of writing me up. Knowing that I had already asked for a demotion on my own, she could have taken that in consideration and maybe I wouldn't be in this situation today had she given me the demotion as well as talked to me about these problems.
3/17/2006 8:57 PM View respondent's answers

My employer could have prevented the incident from even happening by listening and reacting to my initial concerns instead of waiting until the damage was done to my person. They then could have helped me stay healthy upon my return to work instead of making me fight for an acceptable workplace. Instead they accused me of faking and treated me as such.
3/10/2006 8:03 PM View respondent's answers

To handle this more fairly they first would have to truly care about their workforce. Unfortunately it is all lip service. The GM I ran into trouble with was being very successful financially and thus was untouchable, even the VP coward to him. It's the Company Way - numbers are more important than people and commercial & operations are considered more important than HR.
3/8/2006 9:15 AM View respondent's answers

Should have been given the opportunity to apply for a new position.
3/7/2006 6:09 PM View respondent's answers

Change her attitude toward her employees. Stop being a controlling person. Stop her verbal abuse.
2/8/2006 11:03 AM View respondent's answers

Not fired me in the first place. At the very least they could have been truthful.
1/11/2006 8:59 AM View respondent's answers

My employer could have provided me with more on the job training early on rather than expecting me to know how to do the job on my own and then penalizing me for not knowing how. My employer could have communicated the fact that due to time constraints, training was not possible, so that I would know that I had to learn on my own rather than waiting to be trained. My employer could have communicated her concerns before my performance review so I could better understand how to improve in time for my review as my salary increase was dependant on my review. Instead my employer used her body language to show me that she was displeased with my performance and I became nervous, intimidated and was unable to perform at my best level.
1/9/2006 9:14 PM View respondent's answers

By punishing my co-worker instead of promoting them. Treated my complaint seriously instead of describing it as a way of the world and it was much worse years ago, so this is nothing.
1/9/2006 3:08 PM View respondent's answers

Not started the problem in the first place
1/8/2006 6:06 PM View respondent's answers

Communication.
1/8/2006 4:33 PM View respondent's answers

Proper compensation for no notice, in a specialized marketplace.
1/6/2006 12:36 PM View respondent's answers

Resigned. Alert executive team of allegations (not likely!).
1/6/2006 12:35 PM View respondent's answers

It could have been addressed instead of met with a shrugging of the shoulders and a 'that's the way it is here
1/6/2006 11:07 AM View respondent's answers

Not discriminate
1/4/2006 12:31 PM View respondent's answers

Perhaps not advertise (on corporate website and job boards) for Programmers two weeks after we were lay-off. Funny they let us go and all of a sudden they needed x amount of people two weeks later, sorry I don't buy it then.
1/3/2006 9:17 PM View respondent's answers

Manager should have been able to handle on her own without bringing in District Manager, felt I was being attacked - District Manager should have met with me directly to discuss the situation and see what my perspective was - Letter was not necessary - if all parties were listened to and respected, most likely could have been resolved in a discussion rather than an 'attack' - Office where meeting took place should have been in a less visible area to other staff
12/30/2005 2:30 PM View respondent's answers

Provided an opportunity to address any concerns and to get a fair and unbiased opinion.
12/24/2005 3:37 PM View respondent's answers

Could have discussed it and came to an agreement like gentlemen instead of going to court
12/23/2005 9:56 AM View respondent's answers

It was an unfair "layoff" with misrepresentation and fraud
12/21/2005 8:57 PM View respondent's answers

Much better communication and being honest.

12/21/2005 12:48 AM View respondent's answers
Understand their needs before they hire.
12/20/2005 6:23 PM View respondent's answers

I felt the financial settlement was not correct, but I wasn't in a position to be able to contest the settlement
12/20/2005 2:21 PM View respondent's answers

There should have to be a review of the career path and there should be set standards which is currently not documented.
12/20/2005 12:05 PM View respondent's answers

Dealt with the problem that was pre-existing before I was hired. Informed others in positions of authority of the true nature of the situation in a timely manner (like at the time was hired) t so they would not be influenced against me which has resulted in a poisoned work environment.
12/20/2005 11:13 AM View respondent's answers

Direct Communications on the situation
12/19/2005 12:40 PM View respondent's answers

Considering this was the first time. A verbal or written warning of some sort. I did nothing wrong and they know it. I think it was a personal conflict on their part not mine and they did not want to deal with it.
12/18/2005 10:58 AM View respondent's answers

My employer could have acknowledged the work problem and committed to properly training the offending person.
12/15/2005 8:48 AM View respondent's answers

They could have been upfront and honest regarding my situation. If this was truly a personality conflict, than they either could have provided me training or coaching opportunities to correct the problem, opened lines of communication, or provided me the correct amount of notice for termination of my position.
12/15/2005 8:29 AM View respondent's answers

After 13 years, my employee offered 2 weeks' severance.
12/14/2005 8:48 PM View respondent's answers

He should have told the co-worker that she can't treat me the way see did
12/14/2005 6:05 PM View respondent's answers

Approached me earlier before the work problem became debilitating.
12/14/2005 5:37 PM View respondent's answers

Management training in human relations, conflict resolution.
12/14/2005 5:18 PM View respondent's answers

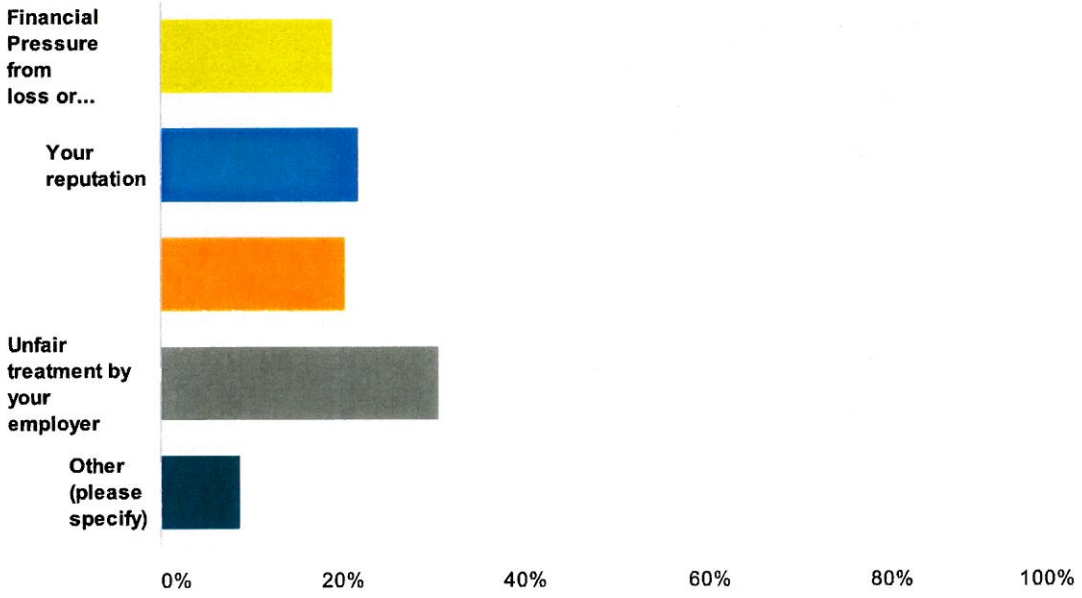
They should have told me in person that they were going to let me go, rather than call me on the telephone and tell me during a high stressed time when father just had heart attack.
12/14/2005 8:55 AM View respondent's answers

Notify me in advance of any issues. Move me to a different department reporting to a different manager or perhaps have another individual in to mediate the obvious personality conflict occurring between a manager that was in a position feeling intimidated by a subordinate.
12/13/2005 11:20 PM View respondent's answers

Provide adequate training and support regarding corporate policy/procedure and dealing with internal employee problems.
12/13/2005 5:15 PM View respondent's answers

Q48 Which of the following options best describes your most signficant concern with the Work Problem?

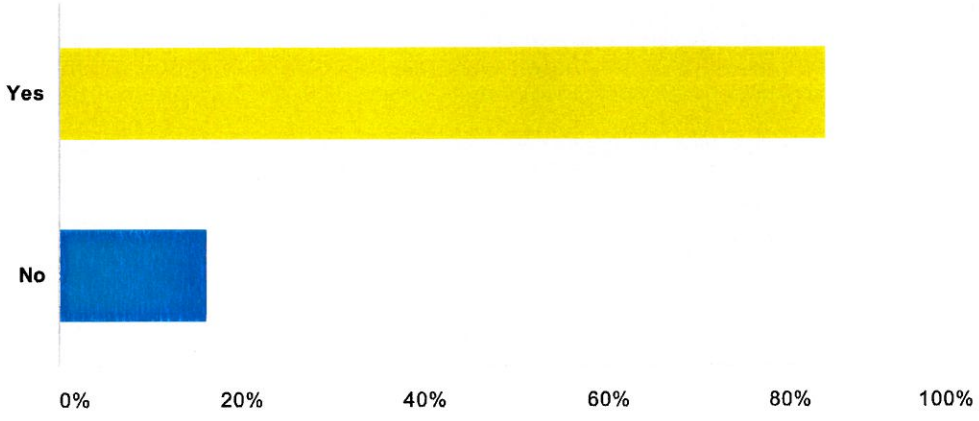
Answered: 69 Skipped: 135



Answer Choices	Responses	
Financial Pressure from loss or potential loss of job	**18.84%**	13
Your reputation	**21.74%**	15
How the Work Problem would affect your career	**20.29%**	14
Unfair treatment by your employer	**30.43%**	21
Other (please specify)	**8.70%**	6
Total		**69**

Q49 Did you consider taking legal action against your employer based on the Work Problem?

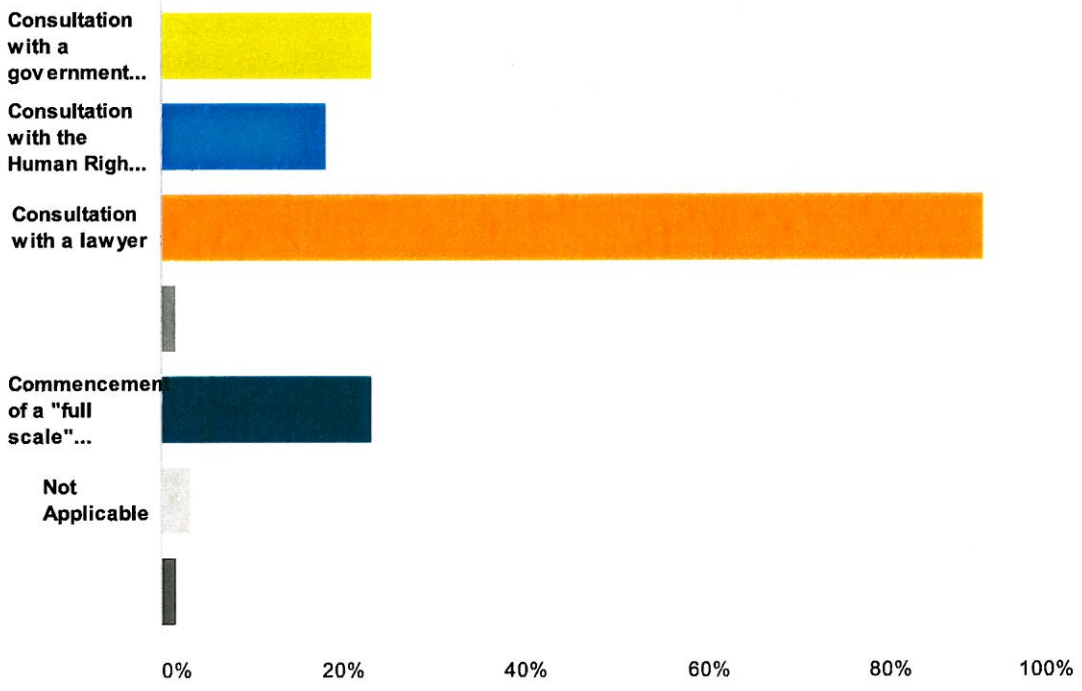
Answered: 69 Skipped: 135



Answer Choices	Responses	
Yes	**84.06%**	58
No	**15.94%**	11
Total		**69**

Q50 If "yes", what type of legal action(s) did you consider?

Answered: 61 Skipped: 143

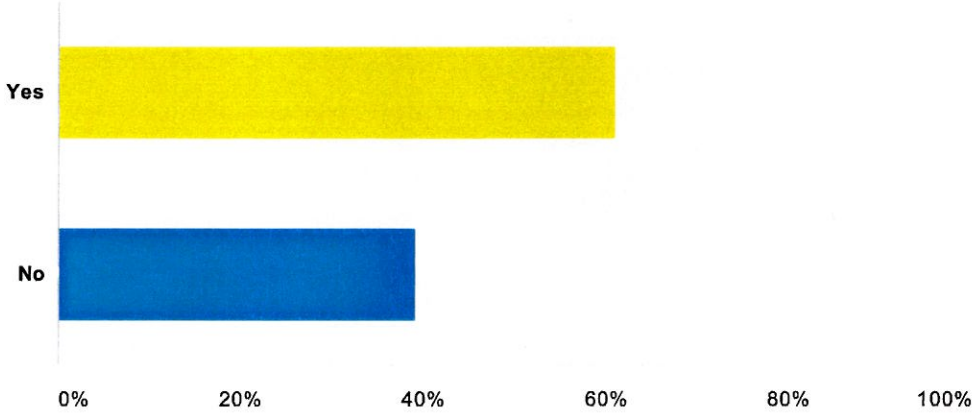


Answer Choices	Responses	
Consultation with a government "labour board" or "employment standards" official	**22.95%**	14
Consultation with the Human Rights Commission or other government agency	**18.03%**	11
Consultation with a lawyer	**90.16%**	55
Commencement of a small claims lawsuit	**1.64%**	1
Commencement of a "full scale" lawsuit	**22.95%**	14
Not Applicable	**3.28%**	2
Other (please specify)	**1.64%**	1

Total Respondents: 61

Q51 Did you pursue any of the above considerations?

Answered: 69 Skipped: 135



Answer Choices	Responses	
Yes	**60.87%**	42
No	**39.13%**	27
Total		**69**

Q52 If "yes", which ones?

Answered: 37 Skipped: 167

APPENDIX B: Employee Questionnaire – Question 52 responses

I put in a complaint to the labour board about the miss treatment and the unfair dismissal during my two week period of notice. I did not end up following through with this because it just seemed there was to much time involved and I go to school and work two jobs I do not have very much time to give to that.
11/22/2006 10:05 AM View respondent's answers

Employment Standards official
10/28/2006 11:35 AM View respondent's answers

Consultation with a lawyer.
10/11/2006 9:23 PM View respondent's answers

Consulted with my lawyer and lawsuit pending what they deliver following my last day of employment.
10/5/2006 7:32 PM View respondent's answers

Consulted a lawyer, who contacted a Human Rights Commission and sued my former employer.
10/3/2006 4:08 PM View respondent's answers

Consulted a lawyer.
9/6/2006 1:11 PM View respondent's answers

Sought legal advice from referral of client.
8/13/2006 8:05 PM View respondent's answers

I am currently in contact with the better business bureau labor board workplace health and safety and a lawyer as well as the president of the company.
6/17/2006 3:12 PM View respondent's answers

Consultation with a lawyer and a lawsuit. Contacted Labour Canada...no reason for dismissal given.
5/30/2006 6:45 PM View respondent's answers

Consultation with a lawyer
4/18/2006 9:45 PM View respondent's answers

Consulted with lawyer
4/13/2006 9:11 AM View respondent's answers

Consultation with a lawyer
3/29/2006 11:08 AM View respondent's answers

All (eventually)
3/27/2006 10:18 AM View respondent's answers

All of the above. Consult a lawyer,and the labour board.
3/17/2006 8:57 PM View respondent's answers

Appealed the WHSCC decision & was successful Have retained legal counsel and am in the process of filing a Human Rights complaint and whatever else is required to protect myself from retribution by my employer
3/10/2006 8:03 PM View respondent's answers

Lawyer
3/7/2006 6:09 PM View respondent's answers

I met with a lawyer.

2/8/2006 11:03 AM View respondent's answers

Several discussions with lawyer over several years
1/6/2006 12:35 PM View respondent's answers

Consultation with a lawyer
1/3/2006 9:17 PM View respondent's answers

Met with a lawyer to discuss situation and gain advice.
12/30/2005 2:30 PM View respondent's answers

Legal consultation and pursued lawsuit
12/24/2005 3:37 PM View respondent's answers

Full scale lawsuit
12/23/2005 9:56 AM View respondent's answers

All of the above checked in "50."
12/21/2005 8:57 PM View respondent's answers

Consulting with a lawyer.
12/21/2005 12:48 AM View respondent's answers

Consulted a lawyer to get advice on my options
12/20/2005 2:21 PM View respondent's answers

Present stage is consultation with a lawyer through whom all communications to the employer are now flowing. Future action will be determined by the employer's response.
12/20/2005 11:13 AM View respondent's answers

Legal advice
12/19/2005 12:40 PM View respondent's answers

I had a consultation with a very well recommended lawyer.
12/18/2005 10:58 AM View respondent's answers

Commencement of a full scale lawsuit.
12/15/2005 8:29 AM View respondent's answers

Consulted a lawyer
12/14/2005 8:48 PM View respondent's answers

Legal Action and Human Rights Claim
12/14/2005 5:37 PM View respondent's answers
Lawsuit for wrongful dismissal.
12/14/2005 5:18 PM View respondent's answers

legal (lawyer)
12/14/2005 8:55 AM View respondent's answers

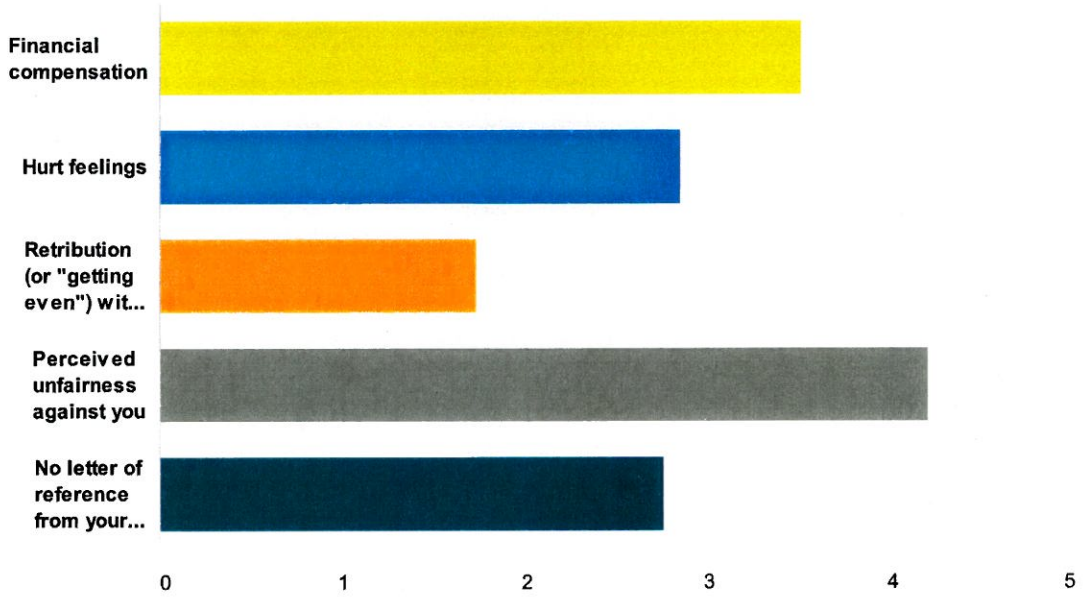
Contacting Kelly Vanbuskirk.
12/13/2005 11:20 PM View respondent's answers

Both
12/13/2005 6:37 PM View respondent's answers

consulted with lawyer. Will implement legal action if necessary.
12/13/2005 5:15 PM View respondent's answers

Q53 On a scale of 1 to 5, with "1" being LEAST IMPORTANT and "5" being MOST IMPORTANT, please rank the following considerations for considering legal action against your employer in respect of the Work Problem.

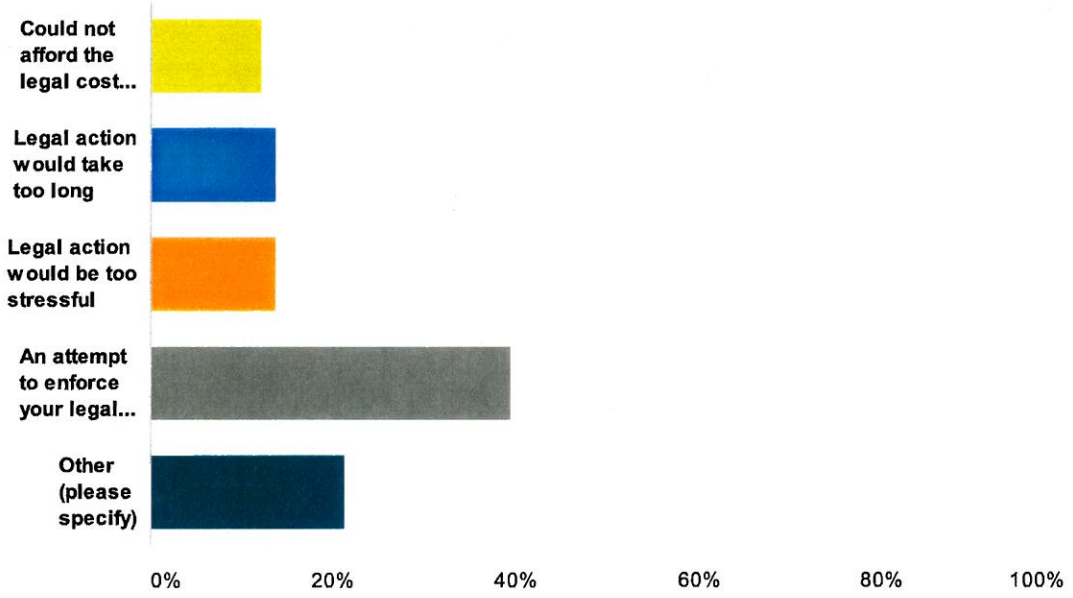
Answered: 70 Skipped: 134



	1	2	3	4	5	Total	Average Rating
Financial compensation	**17.65%** 12	**8.82%** 6	**13.24%** 9	**25%** 17	**35.29%** 24	68	3.51
Hurt feelings	**29.41%** 20	**14.71%** 10	**22.06%** 15	**8.82%** 6	**25%** 17	68	2.85
Retribution (or "getting even") with your employer	**61.76%** 42	**16.18%** 11	**13.24%** 9	**5.88%** 4	**2.94%** 2	68	1.72
Perceived unfairness against you	**8.70%** 6	**2.90%** 2	**8.70%** 6	**18.84%** 13	**60.87%** 42	69	4.20
No letter of reference from your employer	**34.33%** 23	**8.96%** 6	**20.90%** 14	**17.91%** 12	**17.91%** 12	67	2.76

Q54 What was your single biggest concern about taking legal action against your employer?

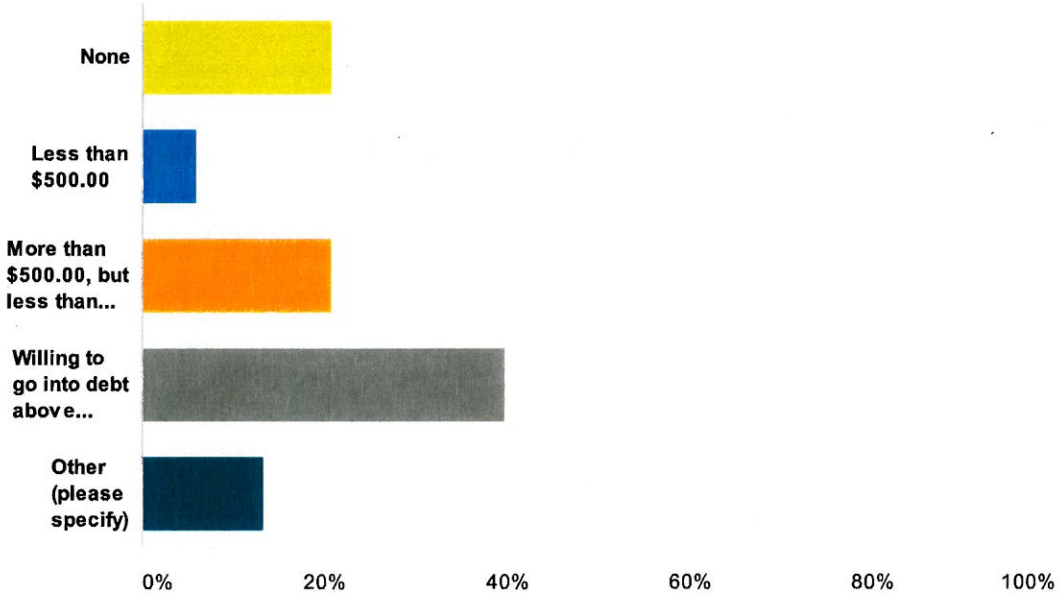
Answered: 66 Skipped: 138



Answer Choices	Responses	
Could not afford the legal costs of legal action	**12.12%**	8
Legal action would take too long	**13.64%**	9
Legal action would be too stressful	**13.64%**	9
An attempt to enforce your legal rights might hurt your reputation / future job prospects	**39.39%**	26
Other (please specify)	**21.21%**	14
Total		**66**

Q55 What extent of legal expenses were you willing to incur in order to address your Work Problem?

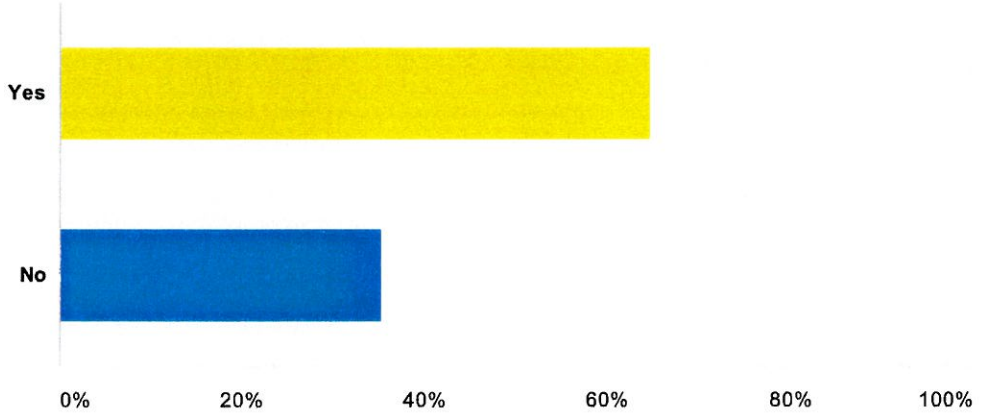
Answered: 68 Skipped: 136



Answer Choices	Responses	
None	**20.59%**	14
Less than $500.00	**5.88%**	4
More than $500.00, but less than $1,000.00	**20.59%**	14
Willing to go into debt above $1,000.00	**39.71%**	27
Other (please specify)	**13.24%**	9
Total		**68**

Q56 Do you believe that the legal system is fair to both employers and employees?

Answered: 68 Skipped: 136



Answer Choices	Responses	
Yes	**64.71%**	44
No	**35.29%**	24
Total		**68**

Q57 Explain why you believe the legal system is fair or unfair.

Answered: 50 Skipped: 154

APPENDIX B: Employee Questionnaire – Question 57 responses

I believe the legal system better protects the employee, but basically is fair for both.
5/14/2007 3:33 PM View respondent's answers

The legal system needs to define workplace bullying.
1/29/2007 9:25 AM View respondent's answers

He who has the gold makes the rule.
12/12/2006 10:14 PM View respondent's answers

Law cases result in fair outcomes in this province
12/10/2006 10:59 PM View respondent's answers

They take the evidence that is given to them and make a conclusion for the right person from that evidence.
11/22/2006 10:05 AM View respondent's answers

I believe the system itself is fair to both the employee and the employer, however, it does not protect against situations that can occur at the workplace, it only offers a structured set of solutions if something (ie., discrimination, unfair treatment) does occur, although, these solutions are not always to the benefit of the employee, and can typically be too costly or time consuming to bother pursuing
11/22/2006 9:46 AM View respondent's answers

It generally seems to work more for the wealthy and huge corporations that for the little man or woman.
10/13/2006 10:45 PM View respondent's answers

It is unfair because of what job you have. ex: a secretary is less important than a nurse, some people tend to believe. They rather keep the nurse and get rid of the secretary if there is a workplace problem.
10/13/2006 11:44 AM View respondent's answers

It is costly and time-consuming especially in non-union work environments. And the only way to take a case forward in a non-union workplace is to quit your job.
10/12/2006 4:41 PM View respondent's answers

The legal system is the key to balance between employer and employees.
10/11/2006 9:23 PM View respondent's answers

I can't explain why I believe it is. I only hope that it is, especially when one has a legal agreement which was signed and now the other party is not living up to the agreement.
10/5/2006 7:32 PM View respondent's answers

I believe that the system is more favour for employees, because they provide the jobs. In my experience system is more favourable for employees in most part of the Europe.
10/3/2006 4:08 PM View respondent's answers

I have to trust that the legal advice I received was sincere.
9/6/2006 1:11 PM View respondent's answers

I believe (thus far) that the legal system is interested in all three sides of the story, which is very fair in my opinion.
6/17/2006 3:12 PM View respondent's answers

6/17/2006 2:46 PM View respondent's answers

In theory, the system should be the same for everyone.
6/17/2006 10:35 AM View respondent's answers

Well I know there are certain guidelines and regulations to protect both the employer and the employee. But speaking from an employee's perspective, there are many toxic environments that employees are forced to work in In order to bring home that paycheck. Bullying in the workplace often happens...and the employee has not recourse except or leave the workplace...while other provinces like Quebec have legislation to protect the employee rights against bullying. I also feel that the courts in New Brunswick should also take a better look at punitive damages caused to employees forced to work in toxic environments.
5/30/2006 6:45 PM View respondent's answers

Believe that the legal system works towards impartial judgements.
4/18/2006 9:45 PM View respondent's answers

Although it is incumbent upon you to look for another job, you are penalized if in fact you do find one before any legal action is settled. My understanding is that legal action can take a very long time and family and financial pressures do not really allow many people to "wait it out".
4/13/2006 9:11 AM View respondent's answers

I believe arbitration is the best stage to present and defend allegations and to find a fair and reasonable remedy to the problem.
3/29/2006 4:24 PM View respondent's answers

I'm not sure.
3/29/2006 11:08 AM View respondent's answers

Previous life experiences. (example: Non- union restaurants)
3/27/2006 10:18 AM View respondent's answers

I feel it is fair to both the employer and the employee as it looks into both sides of the situation and then let one know whether or not they are right or wrong and if need be furthering the action.
3/17/2006 8:57 PM View respondent's answers

I won't know until I have actually completed my action - however, I do feel from the experiences I have had over the past 3 years, the employer has a lot of clout and I am just a little guy fighting the giant. Obviously I do not have the connections or financial opportunities of my employer; however I will fight for what I believe in. If I don't I give up my right to be treated fairly.
3/10/2006 8:03 PM View respondent's answers

I think the legal system is fair. They can only act on what they see. However, employers have the best lawyers and usually an entire firm, they incorporate large resources and teams and usually make very good cases. I believe it's harder for individuals with a single lawyer to play in this league.
3/8/2006 9:15 AM View respondent's answers

I believe both sides of the story will be heard and treated accordingly.
3/7/2006 6:09 PM View respondent's answers

There is not a proper balance- employers usually have more resources to obtain more or better legal advice and representation.
2/15/2006 7:08 AM View respondent's answers

I could have taken legal action if I had wanted to. I believe that had I done so, the system would have provided fair and just results. I decided to move on instead. I felt no need to linger on a negative experience. I felt it was better to learn from the experience, stay positive and move on.
1/11/2006 8:59 AM View respondent's answers

I believe the legal system can be fair to both employers and employees if both parties understand their rights and obligations under the law. This, however, is often not the case. The legal system in all its detail is not easily understood. It is expensive to take legal action. Employees may feel intimidated by the employer in fear of losing their job and thus be discouraged from seeking legal counsel. If legal counsel is not sought when it should be, how can the legal system be of any assistance - fair or not? On the other hand employers have to know when it is appropriate to involve legal counsel. Employers often have to spend a lot of time and money to ensure they are covered.
1/9/2006 9:14 PM View respondent's answers

Employers have to follow the system in the first place for it to be fair.
1/9/2006 3:08 PM View respondent's answers

Having reviewed numerous CHR cases over the years I find that the system does work in most cases, if not a little bit more towards employees then employers (big ones for sure)
1/8/2006 6:06 PM View respondent's answers

I can't see how it wouldn't be. Don't really have any direct experience with legal system as it pertains to employers and employees, though.
1/6/2006 12:36 PM View respondent's answers

Employers have bigger pockets, more access to legal recourse
1/6/2006 12:35 PM View respondent's answers

It provides the means to seek adjudication by a disinterested third party
1/6/2006 11:07 AM View respondent's answers

I believe employers have a better opportunity to take advantage of employees or maybe it just seems that way.
1/3/2006 9:17 PM View respondent's answers

I believe the system is biased towards company rights more so than employees. The rulings appear to be minimal with regards to benefits and compensation.
12/24/2005 3:37 PM View respondent's answers

It was very slow but efficient
12/23/2005 9:56 AM View respondent's answers

The employer cannot be forced to pay the compensation dictated to them by the courts.
12/21/2005 8:57 PM View respondent's answers

Answer to 56 should be not sure as I have not seen how the legal system works out i.e., my case only just beginning.
12/21/2005 12:48 AM View respondent's answers

Businesses have the money for law suits- individuals do not
12/20/2005 6:23 PM View respondent's answers

I had the opportunity to pursue legal action if I had wanted. The termination was really a negotiation so my employer was able to make a "good enough" offer so that they would avoid a legal issue. Good negotiation skill.
12/20/2005 2:21 PM View respondent's answers

The company can stonewall a person and in order to accomplish anything the cost fall back on the employee. They assume the risk and cost.
12/20/2005 12:05 PM View respondent's answers
Employment standards and human rights tribunals can support both and are, in my view, arms' length and neutral in dealing with the claims.
12/20/2005 11:13 AM View respondent's answers

I think every work place should have a human resource department. When you work for a family based company and the siblings are working for the mother and father just like you are and there is some sort of conflict with one of the siblings and the only one you can go to is the father. Ya, nothing will and did not get resolved there.
12/18/2005 10:58 AM View respondent's answers

The legal system is fair to employees. There are adequate protections and procedures for an employee to protect him/herself and to seek compensation in the event of unfair treatment. Sometimes, the legal system is unfair to employers. Employers attempting to run a business do not feel able to adjust human resources to benefit the business. They are unable to fire people who contribute to a poisonous work environment, are unproductive, and lazy.
12/15/2005 8:48 AM View respondent's answers

I believe judges make rulings based on good faith and reasonableness of the information presented to them. They make the best decision they think based on the information they have. I think the system is fair.
12/15/2005 8:29 AM View respondent's answers

The legal system has, in my opinion, made great strides in holding employers accountable to employees.
12/14/2005 8:48 PM View respondent's answers

As an employee you have options to seek legal advice.
12/14/2005 5:18 PM View respondent's answers

Well more like I hope that the legal system is fair
12/14/2005 8:55 AM View respondent's answers

Legal system is fair. Requires detailed evidence to support accusations and provides opportunity to attempt to salvage personal and financial loss.
12/13/2005 5:15 PM View respondent's answers

Q58 If you are willing to do so, please enter your e-mail address below. All identifying information will be maintained in confidence.

Answered: 18 Skipped: 186

APPENDIX C-1

Employee Interviews : Participant Information Sheet and Consent Form

RESEARCH STUDY REGARDING EMPLOYEE RESPONSES TO WORKPLACE PROBLEMS

PARTICIPANT INFORMATION SHEET

You have been invited to participate in this research study, which is part of a PhD study being conducted in Nottingham Trent University in Nottingham, England. Before you participate, it is important for you to understand why the research is being conducted and what it will entail. Please take the time to review this information carefully before you participate in the study, and please contact the researcher at the contact coordinates below if you require more information or clarification.

Who is conducting this research?

This study is being conducted by Kelly VanBuskirk, under the joint supervision of Professors Lynette Harris of the Nottingham Business School and Kay Wheat of the Nottingham Law School.

What is the purpose of the research?

The purpose of this study is to investigate the motivations of employees who consider or eventually commence legal actions against their employers. Additionally, the study intends to explore the results that the legal system is able to offer to employees.

Why have you been chosen?

You have been selected to participate in the study because you have been identified as a person who has experienced a work problem.

Do you have to participate?

There is absolutely no requirement for you to participate in this study. There is no penalty for choosing not to participate. You are free to reject the invitation to participate in the study, and you are also free to withdraw from participation in the study at any time. You are not required to give a reason for your decision to participate, to decline participation or to withdraw from participation.

What will you be asked to do?

If you decide to participate in the study, you will be interviewed by the researcher about your work problem and your feelings and responses to it. You are encouraged to answer the questions openly and honestly, and your identity will not be disclosed.

Continued...

How long will it take?

The interview will require approximately one hour of your time.

Will the interview be recorded?

Yes, the information you provide in the interview will be recorded in the researcher's handwritten notes, by electronic audio recording and, possibly, by electronic video recording.

Will your identity be kept confidential?

Yes. Your interview will be recorded electronically. The sound file will be stored and protected on the researcher's law office computer system in the same way that confidential client files are stored and protected. The sound files will be transcribed by a legal assistant who is the subject of a strict confidentiality requirement. Again, this transcription will be conducted, stored and protected in the researcher's law office in the same way that confidential client information is handled.

What will the research results be used for?

The results of the research will be published as part of a PhD thesis, and it may be that the findings will be presented at one or more conferences and/or published in one or more human resources and law journals. In all instances, no names or other identifying characteristics of the participants will appear.

What if you feel that the research is not conducted properly?

You should advise the researcher if you have any concerns regarding the manner in which the research is conducted. If your concerns are not adequately addressed, you may refer the matter to the Nottingham Trent University's Senior Pro Vice-Chancellor, Professor Peter Jones. Professor Jones may be contacted at peter.jones@ntu.ac.uk.

Who has reviewed the framework of this study?

The framework of this study has been reviewed by experts in the field of social research at Nottingham Trent University and has received the approval of the College Research Ethics Committee.

Contact coordinates for further information

If you have further questions, please contact:

Kelly VanBuskirk, 506.633.3535, kvanbuskirk@lawsoncreamer.com

Prof. Lynette Harris, +44(0)115 8486165, lynette.harris@ntu.ac.uk

Prof. Kay Wheat, +44(0)115 8484179, kay.wheat@ntu.ac.uk

Thank you for taking time to consider participation in this study.

CONSENT FORM

NOTE: By signing this consent form, you are not waiving your legal rights or releasing the researcher or involved institution from their legal and professional responsibilities.

I have read the information presented in the information letter about a study being conducted by Kelly VanBuskirk of the Nottingham Business School at Nottingham Trent University, under the supervision of Professors Lynette Harris and Kay Wheat. I have had an opportunity to ask any questions related to this study, to receive satisfactory answers to my questions, and any additional details I wanted.

I am aware that my interview will be audio recorded to ensure an accurate recording of my responses, and I consent to that recording.

I am also aware that excerpts from my interview may be included in the thesis and/or publications to come from the research, with the understanding that quotations will be either anonymous or attributed to me only with my review and approval.

I have been informed that I may withdraw my consent at any time without penalty by advising the researcher. I also recognize that, if I withdraw from the study after information I have provided to the researcher has been analyzed, that information cannot be withdrawn.

This project has been reviewed by, and received ethics clearance through, the College Research Ethics Committee of Nottingham Trent University. I was informed that if I have any comments or concerns resulting from my participation in this study, I may contact Nottingham Trent University's Senior Pro Vice-Chancellor, Professor Peter Jones. Professor Jones may be contacted at peter.jones@ntu.ac.uk.

Having full knowledge of all foregoing, I agree, of my own free will, to:

- participate in this study;

- the researcher's audio recording of my interview and any follow-up conversations;

- the researcher's use of anonymous quotations in any thesis or publication that comes of this research.

- the researcher's use of direct quotations attributed to me only with my review and approval.

DATED AT Saint John, New Brunswick on December___, 2010.

Participant Name: _____(Please print)

Participant Signature: _____

Witness Name: _____(Please print)

Witness Signature: _____

APPENDIX C-2

Employee Interviews : Questions

EMPLOYEE INTERVIEW QUESTIONS

1. Filter question

2. Basic demographics

3) How old are you?
5) What is your race?
6) What is your primary language?
7) Do you have any mental or physical disabilities?
   - o Yes
   - o No
8) What was your highest level of completed education?

   - o Less than high school
   - o High school
   - o Trade school / college
   - o University
   - o Post-graduate

9) Do you have dependents?
   - o Yes
   - o No

13) If you have experienced a work problem during the past 24 months, what type of industry were you employed in when you experienced the work problem?
   - o Hospitality (restaurants, hotels, entertainment)
   - o Industrial
   - o Communications
   - o Shipping
   - o Retail
   - o Financial sersvices
   - o Administrative
   - o Professional
   - o Trades
   - o Agriculture / fishing
   - o Other (please specify) _____

14) At the time of the work problem, was your employment full-time or part-time?
   - o Full-time
   - o Part-time

16) At the time the work problem occurred, were you unionized?

- o Yes
- o No

17) What range did your salary fall in at the time of the work problem?
   - o $0 - $19,000.00
   - o $20,000.00 - $39,000.00
   - o $40,000.00 - $59,000.00
   - o $60,000.00 - $99,000.00
   - o $100,000.00 +

20) At the time of your work problem, were you employed in a management –level position?
   - o Yes
   - o No

3. Title

18) Did you have employment "benefits" (i.e. medical / dental insurance, pension / retirement plan, disability insurance) at the time of the work problem?
   - o Yes
   - o No

19) If you had employment benefits at the time of your work problem, how would you describe the importance of those benefits to you?
   - o Critically important
   - o Quite important, but not critical
   - o Nice to have, but not important
   - o No usefulness at all

22) Did your work problem involve an allegation of wrongdoing on your part?
   - o Yes
   - o No

23) If "yes", were you disciplined by your employer as a result of your work problem?
   - o Yes
   - o No

26) Would you describe your work problem as unfair treatment of you by your employer?
   - o Yes
   - o No

27) If "yes", how would you describe the extent of your employer's unfairness toward you?
- o Probably unfair
- o Mildly unfair
- o Definitely unfair
- o Extremely unfair

28) What word or phrase best describes your reaction to your work problem?
- o Disappointment
- o Hurt feelings
- o Anger
- o Fear
- o All of the above
- o Acceptance of it

32) Did you experience any physical, emotional and/or psychological reactions to your work problem?
- o Yes
- o No

33) If your answer to question 32 above was "yes", mark the entry or entries below that best describe your condition caused by the work problem.
- o Stress and/or anxiety
- o Depression
- o Sleeplessness
- o Embarrassment
- o Humiliation
- o Relief
- o Peace of mind

34) If you suffered from physical or emotional health symptoms relating to your work problem, were those symptoms noticed by your family members, friends and/or co-workers?
- o Yes
- o No

35) If you suffered from physical or emotional symptoms related to your work problem, choose the best description of those symptoms below:
- o Mild – symptoms were clearly noticeable to me, but was able to function normally in my everyday life
- o Moderate – my symptoms clearly affected me but affected me in less than half of my daily activities

- Serious – my symptoms were clearly noticeable, and they affected me in at least half of my daily functions
- Totally disabling – my symptoms prevented me from carrying out most of my daily activities
- Not applicable

36) If you suffered physical or emotional symptoms in relation to your work problem, did you obtain any medical or psychological treatment?
- Yes
- No
- Not applicable

37) What (if anything) did you do in response to your work problem?
- Nothing
- Sought advice from friends, co-workers or family members
- Sought advice from a government department or agency
- Sought legal advice from a lawyer
- Confronted my employer
- Quit my job

38) If you did "nothing" in response to your work problem, why?
- I felt that the work problem was my fault
- I felt that I would have no chance of "winning" against my employer
- I felt that it would take too long to pursue the issue legally
- I felt that it would be too expensive and/or that I would not be fairly compensated if I did pursue it
- I felt that I would be penalized or treated differently by my employer if I raised the issue wasn't really bothered that much by the work problem
- Not applicable

49) Did you consider taking legal action against your employer based on the work problem?
- Yes
- No

53) On a scale of 1 to 5, with "1" being LEAST IMPORTANT and "5" being MOST IMPORTANT, please rank the following considerations for considering legal action against your employer in respect of the work problem.
- Financial compensation
- Hurt feelings
- Retribution (or "getting even") with your employer

- Perceived unfairness against you
- No letter of reference from your employer

APPENDIX D-1

Employer Interviews : Participant Information Sheet and Consent Form

RESEARCH STUDY REGARDING EMPLOYEE RESPONSES TO WORKPLACE PROBLEMS (EMPLOYER PARTICIPANTS)

PARTICIPANT INFORMATION SHEET

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Why have you been chosen?

You have been selected to participate in the study because you have been identified as a person who has experience as a business/organization manager in dealing with employees who have, or who claim to have, a work problem.

Do you have to participate?

There is absolutely no requirement for you to participate in this study. There is no penalty for choosing not to participate. You are free to reject the invitation to participate in the study, and you are also free to withdraw from participation in the study at any time. You are not required to give a reason for your decision to participate, to decline participation or to withdraw from participation. If you decide to withdraw before the information you provide is analyzed by the researcher, any information you have provided prior to your withdrawal will be destroyed and will not be used in the study. However, if you withdraw after your information has been analyzed, your information cannot be destroyed and will form part of the study.

What will you be asked to do?

If you decide to participate in the study, you will be interviewed by the researcher about your work problem and your feelings and responses to it. You are encouraged to answer the questions openly and honestly, and your identity will not be disclosed.

Continued...

How long will it take?

The interview will require approximately one hour of your time.

Will your identity be kept confidential?

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CONSENT FORM

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I have read the information presented in the information letter about a study being conducted by Kelly VanBuskirk of the Nottingham Business School at Nottingham Trent University, under the supervision of Professors Lynette Harris and Kay Wheat. I have had an opportunity to ask any questions related to this study, to receive satisfactory answers to my questions, and any additional details I wanted.

I am aware that my interview will be audio recorded to ensure an accurate recording of my responses, and I consent to that recording.

I am also aware that excerpts from my interview may be included in the thesis and/or publications to come from the research, with the understanding that quotations will be either anonymous or attributed to me only with my review and approval.

I have been informed that I may withdraw my consent at any time without penalty by advising the researcher. I also recognize that, if I withdraw from the study after information I have provided to the researcher has been analyzed, that information cannot be withdrawn.

This project has been reviewed by, and received ethics clearance through, the College Research Ethics Committee of Nottingham Trent University. I was informed that if I have any comments or concerns resulting from my participation in this study, I may contact Nottingham Trent University's Senior Pro Vice-Chancellor, Professor Peter Jones. Professor Jones may be contacted at peter.jones@ntu.ac.uk.

Having full knowledge of all foregoing, I agree, of my own free will, to:

- participate in this study;

- the researcher's audio recording of my interview and any follow-up conversations;

- the researcher's use of anonymous quotations in any thesis or publication that comes of this research.

- the researcher's use of direct quotations attributed to me only with my review and approval.

DATED AT Saint John, New Brunswick on December___, 2010.

Participant Name: _____(Please print)

Participant Signature: _____

Witness Name: _____(Please print)

Witness Signature: _____

APPENDIX D-2

Employer Interviews : Questions

RESEARCH STUDY REGARDING EMPLOYEE RESPONSES TO WORKPLACE PROBLEMS

2010 INTERVIEW QUESTIONS – EMPLOYERS

1. How many employees
   a. 1 – 10
   b. 11 – 20
   c. 21 – 30
   d. more than 30

2. What industry?

3. Unionized or non-unionized? Provincially or federally regulated?

4. Do you manage people or provide advice to managers (or both)?

5. How many legal claims considered by non-unionized and provincially-regulated employees have you faced in the past twelve months?

6. What percentage of the Claims referenced in question 1 above involved an allegation of "just cause" dismissal?

   a. 0 – 25%
   b. 26 – 40%
   c. 41 – 60%
   d. 61 – 75%
   e. 76 – 100%

7. What other types of Claims have you faced (not dismissal) in the past twelve months?

   _____

   _____

8. What percentage of the Claims you have adjudicated involved compensation claims or recovery amounts of:

	0 – 20%	21 – 40%	41 – 60%	61 – 80%	81 – 100%
Less than $10,000.00					
$10,000.00 - $25,000.00					
$26,000.00 - $50,000.00					
$51,000.00 - $75,000.00					
More than $75,000.00					

9. On a scale of 1-5, with "1" being "LEAST IMPORTANT" and "5" being "MOST IMPORTANT", rank your perception of how the following considerations

initially (on your first contact with them) influenced employees involved in Claims to pursue the Claims.

Considerations	1	2	3	4	5
Financial compensation					
Perceived unfairness					
No letter of reference provided					
Retribution against employer					
Hurt feelings					

10. Did the influence of the considerations listed in question 5 above change (in your perception) as the Claim proceeded? How would you rank the considerations (using the same scale as in question 5 above) at the end of your adjudication of the Claim?

Considerations	1	2	3	4	5
Financial compensation					
Perceived unfairness					
No letter of reference provided					
Retribution against employer					
Hurt feelings					

11. Using the same scale, describe what you believe managers perceived as the motivations behind the employee Claims made against the employer/respondents.

Considerations	1	2	3	4	5
Financial compensation					
Perceived unfairness					
No letter of reference provided					
Retribution against employer					
Hurt feelings					

12. In your opinion, did the perceptions of managers regarding the motivations behind the employee Claims change during your adjudication of the Claims?

Yes ____
No ____

13. If your answer to question 8 above is "Yes", please re-rank the employer/respondents' perceived motivations behind the employee Claims.

Considerations	1	2	3	4	5	No change
Financial compensation						
Perceived unfairness						
No letter of reference provided						
Retribution against employer						
Hurt feelings						

14. In your opinion, what percentage of employees who made Claims were unable or likely unable to afford legal advice in respect of those Claims? (Do not consider contingent fee agreements)

a. 0 – 25%
b. 26 – 40%
c. 41 – 60%
d. 61 – 75%
e. 76 – 100%

15. What percentage of employees with Claims were/are:

Outcome Satisfaction	0 – 20 %	21 – 40%	41 – 60%	61 – 80%	81 – 100%
Completely satisfied with the outcome of the Claim					
Somewhat satisfied with the outcome of the Claim					
Somewhat dissatisfied with the outcome of the Claim					
Completely dissatisfied with the outcome of the Claim					

16. If any of the employees who made Claims were/are "somewhat dissatisfied" or "completely dissatisfied" with the outcome, what do you perceive was or is the SINGLE MOST COMMON source of dissatisfaction?

a. Not enough financial compensation
b. Process takes too long
c. Process is too stressful
d. Legal representation is too expensive
e. Not applicable

17. Was the employer satisfied with the outcome? If not:

a. Not enough financial compensation
b. Process takes too long
c. Process is too stressful
d. Legal representation is too expensive
e. Not applicable

18. If the law had allowed you to do so, would you have awarded different remedies and resolutions in the Claims than those currently available under the law? If so, what remedies?

_____

_____

19. Is the law and its processes fair or unfair to employees? Why?

_____

_____

_____

THANK YOU.