



ADAM MICKIEWICZ
UNIVERSITY
IN POZNAŃ

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The Factors Influencing Value of Compensation for
Wrongful Dismissal in Israeli Legal System

By

Yael Ilany

Supervisor: Prof. Michał Skąpski

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Introduction

Topic of the research

Labor law is a unique area of law which is fundamentally justified in that it recognizes a presumption of basic inequality between the employer and employee. Labor laws are designed to counteract this asymmetry in the employer-employee relationship and recognize the employee's need for protection resulting from the inherent inequality of the employee's bargaining power. Thus, the law provides protection through minimum standards legislation and by allowing collective bargaining¹.

Israeli Labor Law finds its roots in the British common law, but has also been influenced by European continental law. The influence of the American labor law developments is also significant. Thus, Israeli labor law constitutes a mixed jurisdiction influenced by several legal systems².

Since its establishment in 1969³, the Labor Court has played a major role in the Israeli system of labor law. The labor court is a dynamic forum of adjudication and lawmaking that the parties rely on and turn to for assistance. The labor system in Israel is based on both legislation and case law. Both the labor courts and the High Court of Justice play an active role in developing and interpreting the law through judgements including judicial legislation⁴.

¹ Davidov Guy, *The (changing?) Idea of labour law*, INTERNATIONAL LABOUR REVIEW, 146.3/4,311-320 (2007). And see BEN-ISRAEL RUTH, LABOR LAW (Open University, Vol. 2, 2002(HEBREW)).

² Mundlak Guy, *The Israeli System of Labor Law: Sources and Form*, 30 Comp. Lab. L. & Pol'y J. COMP. LAB. L. & POL'Y J. 159, 2008-2009, at 160 Mundlak states that the Israeli labor system is characterized as "... eclectic, drawing on various sources and influences".

³ See Labor Court Law, 1969, Book of Laws 1969, 553, 70.

⁴ See also in Ben-Israel Ruth, Menachem Goldberg, *Termination of Employment in Israel*, 5 COMP. LAB. L. 275 (1982), at 276.

Guy Mundlak maintains that the decline in collective agreements has increased the involvement of the courts in labor relations and promoted the process of juridification⁵. Yitzhak Lubotzky⁶ shares Mundlak's view and claims that as a result of decisions of the Supreme Court and following the enactment and interpretation of the Basic laws⁷, labor law has become heavily constitutionalized. The Labor Court, adopting the same spirit as the Supreme Court, has promoted liberal legal norms.

One example is the use of good faith by the courts to provide protection from dismissals⁸. Other protections for dismissed employees are found in specific protective laws, in collective agreements and under due process requirements such as the hearing and good faith duties⁹. Dismissal of employees contrary to the limitations provided by these statutes, collective agreements and due process requirements are deemed wrongful dismissals¹⁰.

An employee wrongfully or illegally dismissed may sue his employer and claim remedy from the court. The court may enforce the labor contract by reinstating

⁵ Mundlak *supra* note 2, at 178 and see e.g., replacing social norms by legal norms regarding dismissals. Reference in note 47 to MUNDLAK GUY, *FADING CORPORATISM: ISRAELI LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION*, Cornell University Press, 2007, Ch. 6 at 153- 187. Mundlak explains the process of juridification as the extensive intervention of the judiciary and the legislature in the labor market by regulation." Juridification is the process of establishing mandatory legal norms that substitute for extralegal regulation of social or economic relationship".

⁶ LUBOTZKY YITZHAK, *TERMINATION OF EMPLOYMENT 3-71*, Bar Association publication, 4th ed. Sep. 2013 (Hebrew), Chapter 5 at 31.

⁷ Mundlak, *supra* note 2 at 179: Namely enactment and interpretation of two Basic Laws: Basic law: Human Dignity and Liberty, 1992, Book of Laws 1992, 1391, 150. Basic Law: Freedom of Occupation, 1994, Book of Laws 1994, 1454, 90.

⁸ See also: Rabin- Margalioth Sharon, *Regulating Individual Employment Contracts Through Good Faith Duties*, 32 COMP. LAB. L. & POL'Y J. 663, 2010-2011, and see Ben Israel and Goldberg, *supra* note 4 elaborate on this topic at 279, and see BEN-ISRAEL RUTH, *supra* note 1 at 672.

⁹ Israeli legal system applied the duty to conduct a hearing prior to dismissal of an employee. See chapter 3.3.1.2 of the study.

¹⁰ BEN-ISRAEL RUTH, *supra* note 1; FEINBERG NACHUM & GOLDBERG MENACHEM, *TERMINATION OF THE LABOR RELATIONSHIP*, Sadan Press, 2009 (Hebrew); LUBOTZKY YITZHAK, *supra* note 6.

the employee or by granting him a compensatory remedy, the far more common remedy under the labor law¹¹.

Apart from a handful of specific laws that expressly stipulate limits on the compensation allowed, there are hardly any statutory guidelines or principles governing the award of compensation for wrongful dismissal. Specific grounds for wrongful dismissal have a maximum limit of compensation that is provided in specific legislation, although a mandatory sum is not provided¹². Thus, aside from certain broad limits set in statutes and case law, the judge in a specific case is quite unrestricted in deciding the value of compensation.

Court compensation rulings for wrongful dismissal vary in accordance with the court's discretion and the circumstances of the specific case. Each judgement implements different considerations and factors relevant to the specific case for determining the compensation awarded. As a result, there are no consistent, coherent guidelines or principles regulating the award of compensation for wrongful dismissal¹³. Lubotzky presents some auxiliary factors set by the National Labor Court for determination of compensation however, these factors are very case specific to the circumstances involved and generally are not relevant as part of a general guideline¹⁴.

¹¹ Law of Contracts (Remedies for Breach of Contract), 1970, Book of Laws 1970, 610, 16 [hereinafter: "Contract Remedy Law"], § 2, § 3 (2) and see FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10.

¹² As such, the rate of compensation may be any amount along a range of sums from zero to the limit of the statutory ceiling *E.g.*, Equal Opportunities Employment Law, 1988, Book of Laws 1988, 1240, 3. [Hereinafter: EOEL]§ 10(A) (1): an amount of up to NIS 50,000 (EUR 11,500) stipulated as compensation without proof of damage in cases of discrimination. See Amendment number 18 of the Equal Opportunities Employment Law, Book of Laws 2406, 2013,203. The amount was increased to NIS 120,000(EUR 28,000), however it was not yet apparent in the research period.

¹³ LA (National) 21781-10-10, Lulu Rashad v Regional Committee for planning and construction-Alonim, Nevo, July 2013, at 31 paragraph 65. For example, in Lulu Rashad, where the National Labor Court went on the weigh myriad factors starting with the circumstances of the case for determining the rate of compensation by considering the severity of the flaw in the dismissal, the damage inflicted upon the employee due to loss of income, the personal circumstances, the seniority of the employee and the extent of injury to the employee's dignity.

¹⁴ LUBOTZKY YITZHAK, *supra* note 6 chapter 5 at 68 note 332. Such as: the employment circumstances and the dismissal circumstances, the resignation of the employee from his previous

Claims of wrongful dismissal are a common lawsuit and quite frequently filed in the Israeli labor courts. Courts in Israel may bestow quite substantial amounts of compensation for wrongful dismissal claims, including punitive damages. Moreover, several types of damages may be awarded cumulatively to the employee leading to very high amounts of compensation¹⁵. Nevertheless, the process in which these assessments of compensation are made and the manner in which the final amount bestowed is determined by the court remain largely unknown and unpredictable to the parties involved and to the wider public. The problem this research confronts is the manner in which courts value compensation for wrongful dismissal. Currently, certainty or consistency in the area of compensation rulings for wrongful dismissal hardly exists.

To date, no empirical research has been conducted regarding the assessment and determination of compensation for wrongful dismissal in the Israeli court system. The idea for this research germinated from the empirical research conducted by Tamar Gidron, Roy Eloz and Roy Ranzilber in the area of libel. They examined empirical data regarding compensation rulings by Israeli courts for breaches of the libel law (Defamation Act, 1965)¹⁶. In spite of the fact that labor and libel are different fields of law, a similar type of compensation regime is regulated in some labor statutes as in the Defamation Act. In both, the court has judicial discretion in awarding compensation without proof of damage up to a set limit set forth in the statutes. Although in labor cases another type of

work in order to take the present job, the period of unemployment after dismissal, the amount of time spent finding other work and how long it took to find it.

¹⁵ For example, an employee wrongfully dismissed could be awarded both actual damages, such as loss of income, and also intangible damages, such as mental anguish. Types of damages, including punitive damages will be discussed in chapter 1.4.3, 2.5, 3.2.2, 3.2.3, 3.3,3.4 of the study.

¹⁶ See: Gidron Tamar, Eloz Roy, Ranzilber Roy, *Compensation in slander - empirical situation report*, 43 (2) *Mishpatim* 453, 2012 (Hebrew). The study shows, among other things, findings regarding the extent and range of damages that are ruled by the court. Various labor laws contain provisions awarding compensation without proof of damage, similar to the provisions of the Defamation Act. See: Defamation Act, 1965, Book of Laws 1965,464,240.

compensation awarded is for intangible damages that are often mixed with awards without proof of damage¹⁷. Similarly, in both areas, courts have broad discretion in assessing and determining the compensation value.

Aim of the research

The main objective of this study is to reveal factors, considerations and circumstances influencing court rulings of compensation for wrongful dismissal. An additional objective is to reveal the manner in which these factors, considerations and circumstances influence court rulings on compensation. The research also seeks to identify the prevailing tendencies of court rulings on compensation for wrongful dismissal.

The data collected in this paper from court judgments of compensation in cases of wrongful dismissal can set out a comprehensive bank of factors and tendencies influencing compensation ruling. These factors and tendencies of court rulings of compensation for wrongful dismissal can contribute important and significant legal knowledge, enriching legal science. The use of this data would benefit the courts and cause compensation rates to be less unpredictable and more consistent and unified. This research has an overriding importance in leading to more consistency and certainty of compensation rulings in wrongful dismissal cases.

Consequently to revealing knowledge about tendencies of court rulings of compensation for wrongful dismissal, the research can serve also as a practical guideline. For an employee, deliberating over whether it is worthwhile to bring an action against his employer for wrongful dismissal¹⁸ or whether it is worthwhile to pursue an out of court settlement regarding a compromise in the

¹⁷ See in chapter 1.4.3, 2.5.1, 3.3.2 and 3.4.3 of this study.

¹⁸ See The Contract Remedy Law, *supra* note 11: for labor contract the main remedy is compensation rather than enforcement, as will be discussed in chapter 2.4 and 2.5 of this study.

dispute¹⁹. Similarly, for an employer deliberating over whether to dismiss or continue retaining an employee. The employer can better weigh the cost of employment of the employee against the financial cost of risking a wrongful dismissal judgment²⁰.

The assumption of the research is that there are indeed factors, circumstances and considerations influencing court rulings and that certain tendencies exist in court compensation rulings for wrongful dismissal. The research aims to collect, identify, reveal and analyze these factors, considerations, circumstances and tendencies. As such, the research aims to set an evidential picture of the reality created by the courts in Israel in cases of compensation rulings.

The specific objectives of the study presented in the questions of the research are as follows:

1. What are the factors, considerations and circumstances influencing court's rulings on compensation for wrongful dismissal?

The assumed factors influencing court rulings are: the salary level, reason for dismissal (justification), age, period of employment, occupation and gender of the plaintiff.

2. How do these factors influence compensation rates granted by the court?
3. What are the identifiable tendencies in court rulings awarding compensation for wrongful dismissal?
4. Does the court consider the influencing factors differently in cases involving wrongful dismissal in violation of a statute from cases involving wrongful dismissal in violation of due process?

¹⁹The Court's Law [Consolidated Version] 1984, Book of Laws 1984 198; 2003 506 §79A, 79C: determines compromise, arbitration and mediation as measures for settling disputes. And see about mediation in the labor court: Ilany Yael, *The Experience of Mediation in the Tel Aviv Regional Labor Court*, In *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, Andrzeja Swiatkowskiego ed., 729, 2015.

²⁰ E.g., EOEL, *supra* note 12. Violation of this law may award up to NIS 50,000 (EUR 11,500) in addition to actual damages, as will be explained in chapter 2.5.1 and may be a significant amount.

Additional aim of the research is to discover knowledge regarding the ongoing discussion about woman employment in the Israeli labor market. The issue of equality for women in the workplace and especially pregnant women is a concern to both employers and employees due to the extensive protection granted to women in legislation and court rulings. The cases involving wrongful dismissal of pregnant women is a major focus of the research regarding dismissals violating a statute²¹.

Similarly, the ongoing discussion regarding the extensive implementation of due process requirements in the termination of employees and in particular the hearing duty, is also a major concern to employers and employees in Israel. The research aims to reveal the considerations and rates of compensation awarded by courts for violations of due process and to add a deeper understanding to the discussion by presenting an accurate picture of court's rulings on the topic²².

The research also aims to contribute to the broader debate regarding the assessment of compensation for intangible damages in contract and tort law generally²³. Scholars argue that awards of compensation for intangible damage by courts is mostly arbitrary and difficult to quantify²⁴. For example, Yifat Bitton²⁵ contends that Israeli courts tend to grant arbitrary compensation without considering the assessment of non-financial damages²⁶. She claims that this leads to inconsistency in compensation rates awarded by the courts²⁷. The

²¹ See chapter 4 of the study.

²² See chapter 5 of the study. For instance, the actual average award for hearing violations was found by the research to be relatively low as opposed to the belief among employees that the hearing violation will be awarded a high number of salaries.

²³ Damage that is not financial damage, such as mental anguish. See chapter 3.2.3 and 3.3.2 of this study.

²⁴ SHALEV GABRIELA, ADAR YEHUDA, *infra* note 44 at 300. And see DOBBS DAN B., *infra* note 152 at 211 claims it is not possible to quantify and prove in evidence non-pecuniary harm. And see: FRIEDMAN DANIEL AND COHEN NILI, *infra* note 47 at 675: they note that non-pecuniary damages are difficult to assess, because they are not economical.

²⁵ Bitton Yifat, *Dignity Aches: Compensating Constitutional Harms*, 9 MISHPAT UMIMSHAL (Haifa University LR) 2 137 (2005) (Hebrew) [hereinafter: Bitton].

²⁶ Karassin Or, *The Israeli Doctrine of Punitive Damages: a Reassessment*, BAR ILAN LAW STUDIES 29(2) 571, 2014, (Hebrew) www.biupress.co.il/website/index.asp?id=946. At 548 note 48.

²⁷ *Id.*

question of arbitrary awards for intangible damages also arises in labor law area and in particular in cases of wrongful dismissal.

Methodology of the research

The research was conducted by reviewing and analyzing of case law judgments of Israeli labor courts regarding compensation for wrongful dismissal. The method chosen for the research was empirical legal research.

The use of empirical research methodology has accelerated in the legal academia in recent years, but is relatively new in Israel²⁸. Empirical legal research obtains and analyzes a collection of facts from a computerized legal database. Theodore Eisenberg claims that the modest aim of such research is to collect data about the way the legal system operates. It is a way to collect systematic substantial knowledge about how the legal system works, without connection to the normative implications of this knowledge.

Eisenberg claims the legal empirical approach has developed rapidly and is growing. He finds legal empirical research serves as a useful bridge between legal academia and legal practice²⁹. Similarly, Frans L. Leeuw claims legal empirical research is blossoming and expanding. The method of research developed from a diversity of disciplines. Leeuw addresses the problem of a gap between the facts gathered by the research and the value attached to the facts. He claims that this gap leads to a problem in the translation of the facts in a way that it will be understood and used by scholars, lawyers and legislators³⁰.

²⁸ Berlin Lior, Katz Maayan, Faust Abigayle, Ed., *Empirical legal studies: Introduction*, 34 TEL AVIV U. L. REV. 293 2011 (Hebrew), at 293,294. See at 296 claim there is a common structure for the legal empirical research of IMRD: Introduction, Method, Results, Discussion.

²⁹ Eisenberg Theodore, *The Origins, Nature, and Promise of Empirical Legal Studies*, 34 Tel Aviv U. L. Rev. 303, 2011(Hebrew) at 310 -311.

³⁰ Frans L. Leeuw, *Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training*, 11 UTRECHT L. REV. 19 2015, at 21-22.

The empirical legal research conducted was of a computerized online database of Israeli decisions published by "Nevo Publishing". The scope of the research was 143 cases collected for the period of research in the years 2013, 2014 and 2015. The interest of the research is to identify the current tendency of the court and therefore only the most recent years were chosen.

The research database contains two parts: the first part concerns wrongful dismissal in violation of a statute. The focus is on cases involving the wrongful dismissal of pregnant women in violation of the statutes either the Women Employment Law ("WEL")³¹, Equal Opportunities Employment Law ("EOEL")³² or both statutes. Cases gathered by the research, yielded 47 cases of which 12 cases applied the WEL, 25 cases applied the EOEL and 10 cases applied both the EOEL and WEL.

The second part of the research concerns wrongful dismissal in violation of due process by violating the hearing duty or the good faith duty. Cases gathered by the research yielded 128 cases of wrongful dismissal without due process with 110 cases involving wrongful dismissals in violation of the hearing duty and 18 cases involving wrongful dismissal in violation of the good faith duty. In some cases, wrongful dismissal violated both duties and the violations of the hearing duty and good faith duty were intertwined. An attempt to separate these two components was made in the research. However, this separation at times was somewhat artificial³³.

In addition, in several cases wrongful dismissal involved several grounds of violation involving hearing, good faith, and /or statute violations. Thus, several sources of wrongful dismissal applied to the same case and the court gave one

³¹ Woman Employment Law, 1954, Book of Laws 1954 160, 154. [Hereinafter: WEL].

³² Equal Opportunities Employment Law, *supra* note 12.

³³ For instance, when the hearing was conducted without good faith by presenting a false reason for dismissal to the plaintiff. Wrongful dismissal was due both to improper conduct of the hearing and violation of the good faith duty and compensation for both was awarded together by the court.

cumulative award for various grounds violations. Nevertheless, the cases collected in the research, even if they contain several grounds of violation, were recorded only under one ground of violation. Appendix A contains the list of the cases for each kind of violation, including violations of WEL, EOEL, both WEL and EOEL together, and violations of the hearing duty and the good faith duty³⁴.

The cases collected were reviewed and analyzed according to the assumed influencing factors. The cases were also analyzed according to the following factors: rate of compensation, level of salary of the plaintiff, type of compensation for cases violating a statute, reason for dismissal, period of employment, occupation, the age and gender of the plaintiff. These two last factors of age and gender were not relevant to wrongful dismissal violating a statute in the case of pregnant women.

The reasoning of the court for awarding the rate of compensation was noted in every case where provided by the court. The data regarding compensation rates and influencing factors was analyzed and summarizes into tables and the aforesaid explanations provided by the courts were applied to the data results.

Order of the research

The research and conclusions of the study have been presented as follows:

Chapters 1 to 3 of the study contain the theoretical framework for the research. Two theoretical bases have been identified as relevant for the

³⁴ See Appendix A.

study. The first theoretical base is the remedy of compensation and the second theoretical base is regulation of dismissal and wrongful dismissal.

Chapter 1 reviews the remedy of compensation generally under Israeli law. In the Israeli legal system, the general contract law applies to labor contracts. Since wrongful dismissal is a breach of the labor contract³⁵, remedies for breach of contract are available and are reviewed. Remedies for breach of contract are regulated under the Contract Remedy Law³⁶ and apply when the labor contract is breached. Therefore, the compensation remedy in the contract remedy law is surveyed in this chapter.

Chapter 2 presents the legal framework for dismissal and wrongful dismissal under Israeli law. The Israeli approach to termination of employment is reviewed and the basis of wrongful dismissal in the Israeli legal system is presented followed by the applicable remedies for wrongful dismissal. One of the remedies is reinstatement which invokes enforcement of the contract and a second remedy is the compensation remedy which is the main remedy used in labor law.

Chapter 3 presents the assessment and determination of compensation rates in Israeli courts. A comparison is presented of the process of assessment and determination of compensation between the general courts and the labor courts. The idea and application of punitive compensation in both general courts and labor courts is surveyed, since the approach of the labor court to punitive damages is different than that of the general courts. Consequently, a differing approach to

³⁵ Ben-Israel Ruth, *supra* note 1.

³⁶ The Contract Remedy Law, *supra* note 11.

punitive damages influences the rates of compensation awards in the labor court and leads to higher compensation awards than prevail in the general courts.

Chapters 4 and 5 discuss the findings of the research undertaken. Two bases of wrongful dismissal were researched and compared. The first base is wrongful dismissal in violation of a statute, presented in chapter 4. The second base is wrongful dismissal in violation of due process, presented in chapter 5. In each of these chapters, the empirical legal methodology of the research is presented followed by the findings of the research.

The discussion of wrongful dismissal in violation of a statute focuses on the case of pregnant women. This issue was chosen, because it is of major interest to employers and employees in Israel. The topic of equality of women in labor relations and the treatment they receive from the court has been the subject of an ongoing discussion in Israel.

The research conducted for wrongful dismissals in violation of due process, relates to violations of the hearing and the good faith duties. In Israel, there is an obligation to conduct a hearing prior to dismissal. There is also a duty that the dismissal be made with good faith. The issue of violations of due process requirements in dismissals is a major concern in the Israeli labor market.

Finally, conclusions of the research are presented. Factors found as influencing the award of compensation and the way they influence compensation rates are presented. A comparison is made of the two grounds of wrong (wrongful dismissal in violation of a statute and wrongful dismissal in violation of due process) in order to identify

different tendencies of the court towards each of these grounds of wrong.

Chapter 1

The Remedy of Compensation in Israeli Law

1.1 Introduction

This chapter displays the concept of the remedy of compensation awarded for wrongful dismissal under Israeli law as the introduction to latter research³⁷. Remedies are an integral part of many fields of law and are not treated as a separate area of law. Part 2 (Section 1.2) of this chapter reviews the award of remedies as applied generally in the different contexts of Israeli law. Part 3 (Section 1.3) focuses on the use of remedies in contract law and to a lesser extent in tort law³⁸, while part 4 (Section 1.4) concentrates on the specific remedy of compensation for breach of contract.

The use of remedies in Israeli Labor law derives primarily from contract law and to a lesser degree tort law. Stephen Adler, the former President of Israel's National Labor Court³⁹, explains that since there is no specific Israeli labor contract law governing labor contracts, the courts have been looking to the general contract law in dealing with labor contracts⁴⁰. In this context, labor relations are contractual relations between an employer and employee whereby, the employer provides financial reward in consideration for the work provided by the employee⁴¹.

³⁷ Meaning in the research: Compensatory damages or damages.

³⁸ Remedies exist in other fields of law that are not in the scope of the study such as: property law, unjust enrichment law. Tort law is less relevant to the research because it is not applicable in labor court: See *infra* note 45.

³⁹ Adler Stephen assisted by Adv. Ariel Avgar, *National Labour Law Profile: The State of Israel*, International Labour Organization (ILO), 17 June 2011. http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158902/lang--en/index.htm#banner at Chapter iii "Contract of Employment". Stephen Adler served as President of the National Labor Court between the years 1997-2010.

⁴⁰ The law that applies is: Law of Contracts (Remedies for Breach of Contract), *supra* note 11.

⁴¹ HONEYBALL SIMON, HONEYBALL & BOWERS' TEXTBOOK ON EMPLOYMENT LAW, Oxford University Press, Twelfth edition, 2012 at 44.

Therefore, a labor contract breached by wrongful dismissal will be deemed a violation of the employee's right under his contract that may entitle him to a contractual remedy⁴². Gabriela Shalev and Yehuda Adar state that it is the contract law that is the basis for awarding remedies in labor disputes and, indeed, it is applied regularly⁴³.

Concerning remedies, it is important to note that in contract law, the right to a remedy stems from the violation of the contract between the parties, whereas in tort law, the remedy right is triggered by an event of civil wrong⁴⁴. In the area of labor law, the examination of remedies derived from breach of contract is central and will be reviewed in depth, while remedies in tort for civil wrong will be dealt with more summarily⁴⁵.

1.2 Remedy in Israeli law

1.2.1 The position of remedy in Israeli law

Under Israeli law there is no statutory definition of the word "remedy"⁴⁶. Israeli judges and scholars use the two terms "remedy" and "relief" interchangeably⁴⁷. Shalev and Adar state that there are many definitions to the word "remedy", however, they define it as "an entitlement arising out of the breach of an obligation (or duty) and taking the form of a burden imposed on the person

⁴² See BEN-ISRAEL RUTH, *supra* note 1 at 678: wrongful dismissal is a breach of contract.

⁴³ Shalev Gabriela and Adar Yehuda, *The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, May 2008, <http://www.ejcl.org/121/art121-1.pdf> at 19 note 85.

⁴⁴ SHALEV GABRIELA, ADAR YEHUDA, *THE LAW OF CONTRACT — REMEDIES FOR BREACH, TOWARDS CODIFICATION OF ISRAELI CIVIL LAW*, Din Publishers, Ltd. 2009 (Hebrew) at 20. And see Frenkel Tsvi, *Compensation without proof of damage, compensation without proof of pecuniary damage and exemplary damages in labor statutes in Israel*, IN STEVE ADLER BOOK, Nevo Publishing 2016, 497 at 499.

⁴⁵ The Labor Court has no authority to rule on tort law claims: The Labor Court Law, *supra* note 3 § 24(A) (1) prohibits the labor courts to rule on tort claims. And see § 24(A) (1B) determines an exception of tort law related to labor disputes.

⁴⁶ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 12- 16.

⁴⁷ *Id.* at 15: SHALEV GABRIELA, ADAR YEHUDA Interpret "Relief": granted by the law to a person in distress or trouble in order to ease his suffering, without connection to the question of an infringement. And see: FRIEDMAN DANIEL AND COHEN NILI, *CONTRACTS*, Vol.4, Aviram Publishing Ltd., 2011(Hebrew) at 48 find remedy and relief synonymous.

responsible for that breach"⁴⁸. Daniel Friedman and Nili Cohen describe the remedy as an entitlement arising from the injury, denial or transfer to another of a legal right in an unlawful manner⁴⁹.

As mentioned, remedy law in Israel is not a separate distinctive area of law⁵⁰. As such, remedies are usually applied in a specific legal area and will often receive different treatment depending on the field of law⁵¹. In Israel, remedies for breach of contract and remedies for tort are governed by separate legislation and belong to different branches of law⁵². There are also other distinct remedy laws, however, with less relevance to labor law, that have developed in other fields, such as remedies in property law and movables or chattels law⁵³.

Israel has a mixed law system shaped by both the Common Law and European Continental Civil Law. The dual influence of the two systems is especially apparent in the law of remedies⁵⁴. Shalev and Adar note that laws enacted in Israel generally follow the patterns of the European codification in terms of

⁴⁸ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 3. And also see SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 16: describe remedy as an entitlement granted by the law to a person whose legal right was violated or that is about to be violated in the future, by another person. The person violating the legal right carries the burden to better the violation.

⁴⁹ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 48.

⁵⁰ SHALEV GABRIELA, ADAR YEHUDA *supra* note 44 at 5: The law of remedies is a legal field of knowledge dealing with research of remedies bestowed and regulated by the law.

⁵¹ SHALEV GABRIELA, ADAR YEHUDA *supra* note 44 at 6.

⁵² FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 67-69: discuss grounds for the separation of tort and contract remedies, the difference between them and question the appropriateness of the separation.

⁵³ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 67.

⁵⁴ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 1, 17. And see: Cohen Nili, *Remedies for Breach of Contract: From Right to Remedy; From Remedies Law to the Code Draft*, IN COHEN NILI, GROSSKOPF OFER EDITORS, DANIEL'S BOOK, INQUIRIES IN THE SCHOLARSHIP OF PROFESSOR DANIEL FRIEDMAN, Nevo Publishing ,2008, 57(Hebrew) at 68 [hereinafter: Cohen Nili , Daniels Book 2008] Cohen states the Israeli legal system is a mixed jurisprudence based on the English law and on the Continental law. And see Cohen Nili, *Israeli law as a mixed system. Between common law and continental law*, Global Jurist Topics; 2001; 1, 3, 1. Cohen described the Israeli system as affected and influenced by Turkish law, Jewish law, English law, Continental law and original Israeli law. And see: Mundlak Guy, *supra* note 2 ,claims the labor law field in Israel is a mixed jurisdiction influenced by several legal systems originated from British Common Law and influenced by Continental European Law.

style, structure, scope and substance⁵⁵. This is true for the two statutes concerning contracts: The Law of Contract (General Part), 1973⁵⁶ (hereinafter: the "Contract General Law") and The Law of Contract (Remedies for Breach of Contract), 1970⁵⁷ (hereinafter: the "Contract Remedy Law"). This paper will focus on The Contract Remedy Law as it is applied to the remedy of compensation for wrongful dismissal.

In the area of tort law, Israeli law is based on English legislation and reflects English tort law⁵⁸. In Israel, torts are governed by the Torts Ordinance, 1968⁵⁹ (hereinafter: the "Tort Law"), that stipulates that it should be interpreted in accordance with English Common Law principles⁶⁰. This has led to the development of Israeli tort law under a mixed statutory and case law regime according to principles of the common law. A further complication in Israeli tort law has arisen from the courts interpreting Tort Law provisions in an inconsistent manner⁶¹. In contrast, Israeli contract law has developed under a civil law approach with clearly established rules⁶².

A further complication under Israeli tort law is the judicial activism in designing tort rights. Nili Cohen claims that courts use their discretion to shape material rights in tort law through the expansion of the negligent wrong⁶³. In her

⁵⁵ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 17. And see SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 9: the authors state the Continental legal systems mostly unifies remedy regulations for breach of civil obligations. However, the continental systems do not yet see the law of remedies as an autonomous branch of law and do not distinguish between right and remedy.

⁵⁶ Law of Contracts (General part), 1973, Book of laws 1973, 694,118 [hereinafter: "Contract General Law"].

⁵⁷ Contract Remedy Law, *supra* note 11.

⁵⁸ Enacted by the British Mandate (British administration in Palestine) ruling Israel prior to foundation of the state of Israel between the years 1917-1948.

⁵⁹ Tort Ordinance (New version), 1968, ISL 1968, 10,266 [hereinafter: "Tort Law"].

⁶⁰ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 20.

⁶¹ *Id.* at 20 note 91.

⁶² *Id.* at 20.

⁶³ Cohen Nili, Daniels Book 2008, *supra* note 54 at 90.

opinion, the judicial activism in expanding these rights may convert the exception to the rule into becoming the rule⁶⁴.

The identification of rights is central. Once a violation of a legal right has been identified, a basic principle of Israeli jurisprudence provides that a violation of a right gives rise to entitlement for a remedy⁶⁵. This principle is apparent in both Section 2 of the Contract Remedy Law⁶⁶ and in Section 3 of the Tort Law⁶⁷, which together provide that a person harmed by breach of contract or by a civil wrong is entitled to the remedies stated in the respective laws⁶⁸.

Unfortunately, readily identifying the various remedies and their application and interrelation is not so simple. As Shalev and Adar have pointed out, there is a lack of academic literature concerning the interrelations between the various fields of private law and the applicable remedies deriving from such fields of the civil law⁶⁹. Moreover, remedies are not taught as a separate subject in Israeli law schools and research on this topic has hardly been undertaken⁷⁰. The importance of a unified view of remedies is underscored by a proposal to unify the laws of remedies in the Civil Code. This important proposal will be discussed below⁷¹.

1.2.2 Proposal for the unified treatment of Remedies in the Civil Code

⁶⁴ *Id.* at 92.

⁶⁵ FRIEDMAN DANIEL AND COHEN NILI *supra* note 47 at 51: present the relation between the right and the remedy and models describing these complex relations.

⁶⁶ Contract Remedy Law, *supra* note 11.

⁶⁷ Tort Law, *supra* note 59.

⁶⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 20.

⁶⁹ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 20.

⁷⁰ *Id.* at 21.

⁷¹ The Civil Code Proposal, 2011, Law Proposal 595,712 [hereinafter: "Civil Code proposal"]. And *see* Shalev Gabriela and Adar Yehuda *supra* note 43 at 21: describe the proposal as "ground-breaking development" in the Israeli law system.

Israeli scholars have suggested that the law of remedies should be unified in private civil law on account of the similarity between the various remedies in the different branches of law. Cohen claims that the boundaries between tort and contract are blurred further reinforcing the appropriateness of creating an all-inclusive treatment for remedies⁷².

This viewpoint is embodied in the draft Civil Code Law Proposal, although it has yet to be enacted⁷³. According to Gabriela Shalev, the Proposed Civil Code Law will operate to sever the Israeli law from the English law and move it towards an independent and original Israeli law⁷⁴. She claims it will establish an independent jurisprudence based on sound, uniform, clear and systematic basic legal concepts. This is in stark contrast to the apparent existing judicial process in Israel, whereby the written law is only an initial point of support in creating the law. However, Shalev doubts that the Proposed Civil Code symbolizes a transformation of Israeli civil law from reliance on legal precedents towards the words and phrases approach general in European code based law⁷⁵.

Nili Cohen has a different view⁷⁶. She argues that the civil code will not extinguish the existing judicial process. She believes the English law system is a stable and balanced system and the code will provide clear, stable and orderly rules. However, the Continental European judicial approach strains the codified rules using "super principles" in order to achieve desirable results. She claims

⁷² Cohen Nili, Daniels Book 2008, *supra* note 54 at 95.

⁷³ Civil Code Proposal, *supra* note 71.

⁷⁴ Shalev Gabriela, *Language, concept and Jurisprudence: Towards Civil law codification*, 327-360 LEVONTIN BOOK, 2013 (Hebrew) at 345-353.

⁷⁵ *Id.* Shalev Gabriela, at 351,352: In her opinion, it is worthy to return to the language of the law and its concepts. She finds the cornerstones of the codification legal system are the fundamental basic concepts and language of the legal norms. To her view, the legal formalism, does not contradict values, reason or purposefulness. There is benefit in formalism. She finds jurisprudence of purpose, values or goals as instable and having a dynamic and instable relation between the law and its various and changing objectives.

⁷⁶ Cohen Nili, Daniels Book 2008, *supra* note 54 at 107.

that the conflict between code based rulings and judge made rulings is a problem in the relation between form and essence. She finds the code contains space for discretion together with sympathy to rules⁷⁷.

Shalev and Adar assert that the Civil Code Proposal embodies the resemblance between the remedial principles of tort law and contract law, as far as both the type of remedies available and the legal rules governing their application⁷⁸. They believe that the law of remedies should be based on dealing with the specific problems which arise when a right has been violated and not on the nature of the initial right that was violated⁷⁹.

To date, the ongoing attempt to enact a Civil Code in Israel and thereby unify the treatment of remedies has not succeeded. It has been an ongoing process commencing with a first draft of a Civil Code Proposal in 2004 and leading to the most recent draft published in 2011⁸⁰. As such, remedies in Israel still are treated in relation to specific fields of law, however, the objective in awarding remedies in each of these fields derives from one overriding principle: "restitutio in integrum", which will be explained hereinafter in the context of Israeli law.

1.2.3 Aim and justification of the remedy

The purpose of a remedy is to protect the existence of the legal right and correct the damage caused by the violation of the right⁸¹. Thus the fundamental principle governing the law of remedies is the principle of "restitutio in integrum". The meaning is that the injured party is entitled to

⁷⁷ *Id.* at 108.

⁷⁸ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 22.

⁷⁹ *Id.* at 24 and at 22 note 92: Draft Civil Code, Vol. II (Commentary for the Public) 201(2004).

⁸⁰ *Id.* and Civil Code Proposal, *supra* note 71, Explanatory comments at 700-701: Prof. Uri Yadin Initially prepared the draft.

⁸¹ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 49.

restitution from the offender. The offender should restore the plaintiff to the situation he was prior to the violation⁸². The Israeli Supreme Court has determined that this central principle of remedies is applicable in all areas of private law even beyond contract and tort law⁸³.

Friedman and Cohen, Shalev and Adar all point to "corrective justice" as a justification for *restitutio in integrum* that stands at the heart of private law and especially contract law⁸⁴. This theory was developed by E.J. Weinrib⁸⁵, who believed that a remedy corrects the injustice caused to the plaintiff by the defendant. Weinrib claims that remedies are a correlative response to the injustice caused by the defendant and a way to realize justice in life⁸⁶.

However, the theory of corrective justice is criticized by Israel Gilead in the context of tort law⁸⁷. He claims the legal reality of tort law goes beyond correcting the correlative injury of the parties. Reality is more complex than the bilateral relations of the parties concerning the wrong done. According to Gilead, a wide range social goals need to be considered⁸⁸, such as distributive justice⁸⁹. Therefore, corrective and distributive justice considerations coexist⁹⁰.

⁸² SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 23.

⁸³ See Judge Cheshin in CA 4466/98 Dvash V. The State of Israel, 56(3) 73, 98-99, Nevo 2002. States that the principle of "*restitutio in integrum*" applies in cases where the balance is violated and the law intervenes to restore the balance. When a person has violated law and order and changed the balance between him and others, the legal system will order him to restore the situation to the position it was prior to the violation. The restitution can be by specific performance or when it is not possible, by money as a substitute to restitution. And see: SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 22.

⁸⁴ *Id.* at 24. And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 49.

⁸⁵ See generally WEINRIB E. J., *THE IDEA OF PRIVATE LAW* 2nd. Ed., Cambridge Harvard University Press, 2012. And see generally: WEINRIB ERNEST J., *CORRECTIVE JUSTICE*, Oxford University Press, 2012. And see: Weinrib E., J., *Punishment and Disgorgement as Contract Remedies*, 78 CHI-KENT L. REV. 55 ,2003 at 57, 59, and 60: Weinrib questions the justification of punitive damages and engorgement because they aim to remedy beyond the plaintiff's entitlement.

⁸⁶ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 24-25.

⁸⁷ GILEAD ISRAEL, *TORT LAW- THE LIMITS OF LIABILITY*, Nevo Publishing, 2012 (Hebrew).

⁸⁸ *Id.* at 66.

⁸⁹ *Id.* at 62: Distributive justice takes into account considerations of promoting social goals of equality, solidarity, fair distribution of resources, efficiency, distribution and deterrence of damages.

⁹⁰ *Id.* at 70.

In my opinion, the goal of remedies in labor law resembles the goals in tort law as presented by Gilead, on account of the wider considerations that are taken into account in cases of breaches of labor contracts. These considerations are beyond the relations of the two parties involved in the dispute. The considerations relate to employers as a public, aiming to deter them from inappropriate behavior and educating them to appropriate conduct - conduct that protects employee rights and prevents employers from violating employee rights and dignity. Chapter 3 below expands upon the special considerations relating to labor contracts.

1.3 The Contract Remedy Law

1.3.1 Remedy for Breach of Contract

The Contract Remedy Law determines remedies for breaches of contract. The term "breach" is defined in the Contract Remedy Law as "an action or failure to act that are contrary to the contract"⁹¹. Freidman and Cohen consider the definition as broad and including any event that does not coincide with the contracts obligations⁹². Shalev and Adar interpret the definition more narrowly relating to specific behavior of a party that is contrary to the contract. They also note that a breach can only occur if there is a valid existing obligation between the parties⁹³.

The Contract Remedy Law stipulates the types of remedies that are available for a breach of contract⁹⁴. These remedies are (1) enforcement of the contract (in case of wrongful dismissal in labor law the meaning is reinstatement), (2)

⁹¹ Contract Remedy Law, *supra* note 11 § 1(a).

⁹² FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 83.

⁹³ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 111. And *see*: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 83 and discussion of different types of breach of contract see at 87-100.

⁹⁴ Contract Remedy Law, *supra* note 11 § 2. See English version of the section at Shalev Gabriela and Adar Yehuda, *supra* note 43 at 18.

rescission of the contract⁹⁵ and (3) the remedy of compensation which may be awarded in addition to or in lieu of the other remedies⁹⁶. The remedy of coercive enforcement is defined by the law as the primary remedy, but there are exceptions for its application determined in the law⁹⁷.

Shalev and Adar claim that accordingly to the Contract Remedy Law, Israel has adopted the Continental European approach regarding the remedy of coercive enforcement as a primary remedy. In contrast, Israel has taken the Common Law approach in connection with the provisions governing the award of compensatory damages and the remedy of rescission. Thus, to Shalev and Adar the Remedy Law reflects a mixture of Continental European and Common Law approaches⁹⁸.

Nili Cohen, however, is of the opinion that the placing, by the Contract Remedy Law of the enforcement remedy at the top of the remedy hierarchy, symbolizes the transfer from a Common Law orientation towards remedies to a Continental European orientation⁹⁹. Yet, even under the Continental system, enforcement is not an exclusive remedy and there are exceptions to the primacy of its application¹⁰⁰.

⁹⁵ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 18: The remedy of termination of the contract is accompanied by restitution for both parties.

⁹⁶ Contract Remedy Law, *supra* note 11 § 2. And see Shalev Gabriela and Adar Yehuda, *supra* note 43 at 18: The remedy of compensatory damages includes liquidated damages.

⁹⁷ Contract Remedy Law, *supra* note 11 § 3 and see Shalev Gabriela and Adar Yehuda, *supra* note 43 at 19. And *e.g.* § 3(2): exception applying to labor contract.

⁹⁸ Shalev Gabriela and Adar Yehuda, *supra* note 43 at 19.

⁹⁹ Cohen Nili, Daniels Book 2008, *supra* note 54 at 67.

¹⁰⁰ *Id.* at 84-85. And compare to the American law: Eisenberg, Theodore and Miller, Geoffrey P., "Damages versus Specific Performance: Lessons from Commercial Contracts", 2013. New York University Law and Economics Working Papers. Paper 334. http://lsr.nellco.org/nyu_lewp/334. They examine the behavior of contracting parties regarding remedy in commercial contracts. They claim specific performance is subordinate to damages in commercial contracts. The rule is that damages are preferred over enforcement of the contract and only when damages are inadequate enforcement will be ruled by the court.

The Contract Remedy Law itself accords the plaintiff a preferable position allowing him to choose among the remedies permitted by the law¹⁰¹. The discretion of the plaintiff to choose between remedies is subject to limitations and exceptions. For example, the plaintiff's obligation to mitigate his damage, limits his compensation award to the damage after mitigation¹⁰². In other instances, the availability of the enforcement remedy is subject to the court's discretion that may deny the use of the remedy by the plaintiff in certain circumstances¹⁰³. Shalev and Adar present another limitation to plaintiff's right to choose a remedy which is the principle of good faith as required under the Contract General Law¹⁰⁴. They also point out that a breach does not result in an automatic termination of the contract or to its expiration. As long as the injured party does not terminate the contract, it is valid despite the breach and the plaintiff may choose a remedy of rescission or other remedy¹⁰⁵.

An important issue regarding choice of remedies is the accumulation of different remedies within the same claim, because in labor law, remedies as well as types of compensation awarded for wrongful dismissal are cumulative. According to Yehuda Adar and Moshe Gelbard, the remedy accumulation rules

¹⁰¹ Contract Remedy Law, *supra* note 11 § 2. And see *e.g.* CA 5131/10 Asimov v Binyamini, Nevo, 2013 at 16 paragraph 15[hereinafter Asimov case]. And see: Adar Yehuda and Gelbard Moshe, *Restitution, Compensation, Accumulation of Remedies and Freedom of Contract (An Analysis of Supreme Court Civil Appeal No.4630/04 rendered 13.12.2006)*, 40 MISHPATIM (HEBREW UNIVERSITY LAW JOURNAL), 2011, 827(Hebrew)[hereinafter: Adar Yehuda and Gelbard Moshe 2011]: Adar and Gelbard refer to Judge Shamgar in CA 1846/92 Levy Naphtali v Mabat Building Ltd., PD 47(4)49, 55, Nevo, 1993: The freedom of the plaintiff to choose remedy was also reinforced by the Supreme Court.

¹⁰² Contract Remedy Law, *supra* note 11 § 14. And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 724-725: If the plaintiff did not fulfil his duty, compensation will be reduced by the amount he could have minimized his damage. Burden of proof that the plaintiff did not act as required to mitigate the damage is on the defendant. At 725-726: The explanations for the mitigation principle are: the duty of good faith in which the plaintiff reduces the amount of compensation in order to protect the defendants' interest; the unexpected damage of the breach of contract the plaintiff may reduce in reasonable measures and an economical-social explanation of avoiding waste of resources.

¹⁰³ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 76 and see Contract Remedy Law, *supra* note 11 § 3 (1) - (4): exceptions to enforcement.

¹⁰⁴ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 113. And Contract General Law, *supra* note 56 § 39. And see *e.g.*, SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 286- 290 at § 7.06 claim plaintiff acting without good faith may lead to reduction of the compensation rate awarded by the court.

¹⁰⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 113.

in Israel were developed by the court¹⁰⁶. They claim that the issue of cumulative remedies has yet to receive full clarification in the case law and legal literature¹⁰⁷. The basic principle in contract law is that a plaintiff may choose the remedies he seeks or accumulate his remedies¹⁰⁸. However, there are restrictions. For instance, the rule of essential contradiction, that one remedy cannot contradict another, limits the plaintiff. An illustration would be the remedies of enforcement and rescission. A plaintiff that terminated the contract cannot obtain the performance of the contract¹⁰⁹. Another restriction that is called by Adar and Gelbard "double remedy" prevents a plaintiff from double compensation for the same damage as a result of the application of two remedies. This would result in overcompensation and constitute an unjust enrichment to the plaintiff¹¹⁰.

1.3.2 The remedy of enforcement and exceptions to its use

Nili Cohen¹¹¹ cites Daniel Friedman¹¹² who asserts that the remedy of enforcement expresses the idea that the contract is a material essential right

¹⁰⁶ Adar Yehuda and Gelbard Moshe 2011, *supra* note 101 .And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 757- 761; and at 764-777 discuss combination of remedies.

¹⁰⁷ Adar Yehuda and Gelbard Moshe 2011, *supra* note 101 at 841.

¹⁰⁸ Contract Remedy Law, *supra* note 11 § 2. And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 760: the fundamental principle is that the injured party is entitled to choose between remedies. And see: SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 484-486: For example, claim according to section 11(a) for loss of value and claim for any other damages caused by the breach, according to section 10 or 13 may be claimed accumulatively. Any other damage may be direct or indirect damages such as: non-pecuniary damage suffered by the plaintiff. If the two claims aim at correcting the same damage, it is not possible to claim accumulatively.

¹⁰⁹ Adar Yehuda and Gelbard Moshe 2011, *supra* note 101 at 844.

¹¹⁰ *Id.* at 847. In case law "double compensation". At 947- 853 see discussion about the question of double remedy.

¹¹¹ Cohen Nili, Daniels Book 2008, *supra* note 54.

¹¹² Friedman D., *Remedy for Breach of Contract*, 1973 IN COHEN NILI, GROSSKOPF OFER EDITORS, DANIEL'S BOOK, INQUIRIES IN THE SCHOLARSHIP OF PROFESSOR DANIEL FRIEDMAN, Nevo Publishing 2008, 17(Hebrew).

and its performance should be preserved. The power of the promise derives from the moral rational that promises must be honored¹¹³.

In *Adras v. Harlow* judge Aharon Barak exemplified this idea in discussing the approach of the Contract Remedy Law: "When a contract to sell a horse is made the buyer purchases the right to receive a horse and not the right to compensation if he does not receive the horse"¹¹⁴.

Judge Barak views enforcement as the primary remedy for breach of contract, because contracts must be performed and not just compensated. Honoring promises is fundamental to our life as a society and nation. Therefore, parties need to be encouraged to honor their promises¹¹⁵. This idea, presented by Judge Barak, is appropriate and justified, to my opinion. However, in labor law, the value of the promise embodied in the labor contract is somewhat more complex than general commercial contracts, due to the fact that the labor contract is a special contract involving people and ongoing relationships. In some circumstances, it may not be possible to honor the promise of the contract due to its special nature. Furthermore, enforcing the parties of the labor contract to honor the promise and fulfil the contract may be forceful and harmful particularly for the employee.

The primacy of the enforcement remedy is subject to a number of limitations set out in the Contract Remedy Law¹¹⁶. These include enforcement of a contract that is impossible to perform¹¹⁷ or enforcement of performance or

¹¹³ Cohen Nili, Daniels Book 2008, *supra* note 54 at 79. See at 69: Cohen finds there is a moral command to perform contracts. And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 105: the moral obligation of promise in the contract.

¹¹⁴ Further Hearing 20/82 *Adras Building Supplies Ltd v Harlow & Jones*, PD 42(1) 221, Nevo 1988, at 277.

¹¹⁵ *Id.* at 278.

¹¹⁶ Contract Remedy Law, *supra* note 11 § 3: "Right of Enforcement". And see: Cohen Nili, *The Justice Exception in Enforcing Contracts*, 33 TEL AVIV U. L. REV. 241, 2010-2011 (Hebrew). And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 110.

¹¹⁷ Contract Remedy Law, *supra* note 11 § 3(1). And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 167-197 expand about this restriction.

acceptance of a contract for personal work or service¹¹⁸. A third limitation would be where the implementation of the enforcement, imposes an unreasonable level of supervision on the court¹¹⁹. A fourth limitation provided in section 3(4) of the Contract Remedy Law would be where enforcement would be unjust under the specific circumstances of the situation¹²⁰.

In addressing this last limitation, the court in *Asimov v. Binyamini* stated that there is no clear list of rules for implementing this limitation of section 3(4) of the Contract Remedy Law¹²¹. Each situation must be determined according to its specific circumstances while considering the interests of both parties¹²². This use of "justice" as a limitation needs to be interpreted carefully so that enforcement, the "queen of remedies," will not become the exception and its denial the rule¹²³. Similarly, Nili Cohen warns that the wide and vague formulation of Section 3(4) makes the section a catch-all clause. She claims that implementation of the 3(4) limitation may lead to it undermining the general rule of enforcement supremacy¹²⁴.

Among the various limitations listed on the enforcement remedy in the Contract Remedy Law, the most relevant to labor law is section 3(2)¹²⁵ that forbids using an enforcement remedy that would compel " ... the performance or acceptance of personal work or of a personal service"¹²⁶. Section 3(2) does not distinguish

¹¹⁸ Contract Remedy Law, *supra* note 11 § 3(2). And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 197 – 214 expand about this restriction. And will be discussed in chapter 2.4 of the research.

¹¹⁹ Contract Remedy Law, *supra* note 11 § 3(3). And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 214-217 expand about this restriction.

¹²⁰ Contract Remedy Law, *supra* note 11 § 3(4). And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 217- 280 expand about this restriction.

¹²¹ *Asimov case*, *supra* note 101.

¹²² *Id.* at 19 paragraph 18.

¹²³ *Id.* at 17 paragraph 15-16. See there refers to Cohen Nili.

¹²⁴ Cohen Nili, *supra* note 116 at 250.

¹²⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 201: They claim this restriction applies to work or service supplied in labor contract and also in contractorship agreement.

¹²⁶ Contracts Remedy law, *supra* note 11 § 3(2).

between enforcing the supply or the receipt of personal work or service: both are forbidden¹²⁷.

Friedman and Cohen claim that implied in this exception to enforcement regarding labor contract is that the employer has the power to breach the contract. Breaching the labor contract by wrongful dismissal cancels the contract and therefore the employee may not compel the employer to enforce the contract on account of Section 3(2). The plaintiff in this case loses his choice of remedy granted to him by section 2 of the Contract Remedy Law¹²⁸. However, developments in case law presented in chapter 2, changed this notion to some extent and opened a path for an employee seeking reinstatement to receive this remedy under some circumstances.

In comparison, the English law does not enforce contracts of personal service¹²⁹. The primary remedy for an employee that is dismissed in breach of the contract is compensation, not enforcement. This is similar to the Israeli law approach, as will be discussed below.

Another remedy for the employee under English law is a declaration that the dismissal was wrongful or invalid, but not the remedy of specific enforcement (reinstatement). Unfair dismissal in the United Kingdom, according to the English Employment Right Act, 1996, is not normally treated as a breach of contract and the remedy of reinstatement or re-engagement of an employee may be ordered¹³⁰. If it is not complied with, the employer can pay compensation only. In practice, with some few exceptions, enforcement of employment contracts in England is minimal¹³¹. However, under Israeli labor law, unfair or wrongful dismissal is indeed treated as breach of contract. The

¹²⁷ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 201,202.

¹²⁸ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 199.

¹²⁹ PEEL EDWIN, TREITEL THE LAW OF CONTRACT, 13th. Edition, Sweet& Maxwell, 2011 at 1110.

¹³⁰ Employment Right Act 1996, Pt X.

¹³¹ See: Johnson v. Unisys Ltd. [2001] UKHL 13; [2003] 1 A.C. 518 .Lord Millet at [78]:"... reinstatement or re-engagement is effected in only a tiny proportion of the cases that come before the industrial tribunals"; Lord Steyn at [23] "-In practice, however, only about 3% of applicants are reinstated... My understanding is that about 3% still represents the reinstatement figure. Not surprisingly, the award of compensation by a tribunal has to be the primary remedy".

enforcement claim excluded by the Contract Remedy Law in labour contracts is nevertheless applied by the labor courts as we shall see shortly.

Treitel claims that the English courts are willing to reconsider the catch-all equity rule, because of changes in the modern employee - employer relationship to a less personal relationship¹³². Similarly, the Israeli courts also address the issue of less personal relationship in employment relations. In my opinion, there is a difference in the Israeli court approach in that Israeli courts are more willing to enforce employment contracts¹³³.

1.4 The Remedy of compensation for breach of contract

1.4.1 What is compensation?

The term "compensation" used in the literature means the amount of money paid to the plaintiff by the defendant. The term also is referred to as "compensatory damages" or "damages". The legal right for compensation due to breach of contract in Israel is determined in the Contract Remedy Law¹³⁴. Shalev and Adar describe the remedy of compensation as a judicial remedy granted to the injured party in order to compensate him for the damage inflicted upon him by the defendants' breach of contract. It appears as a judicial injunction ordering the offender to make amends, by paying money in the amount of the damage that the law ascribes to the breach of contract¹³⁵.

¹³² PEEL EDWIN, *supra* note 129 at 1111.

¹³³ See chapter 2.4 of the research.

¹³⁴ Contract Remedy law, *supra* note 11 §§ 2, 10-16.

¹³⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 282: they mention that compensation may be granted in different situations and not only for breach of contract, an example is the remedy of compensation awarded for breach of the obligation of good faith. See Contract General Law, *supra* note 56 §39 and 12(b), determines the duty to conduct the contract negotiations and the execution of a contract, in good faith. Breach of the obligation of good faith may result in compensation payment.

According to the Contract Remedy Law, compensation can be claimed as an independent remedy or as a remedy additional to the enforcement remedy or even the rescission remedy¹³⁶. Shalev and Adar claim it is used for cases that one remedy is not enough to fulfill the performance interest of the injured party. However, compensation and enforcement are, in a sense, interchangeable remedies that respond to the plaintiff's interest in performance¹³⁷. This means the plaintiff cannot claim performance of the contract by enforcement and compensation for the performance of the contract. Claiming performance of the contract and at the same time claiming the damages of the loss of the contract is not possible. However, a claim for compensation may accompany the claim for enforcement in regards to damages that enforcement cannot remedy, such as non-pecuniary damages (e.g., mental anguish). In this case, compensation is a complementary claim to enforcement¹³⁸.

By comparison, in labor law, usually a claim for reinstatement will not be accompanied by a claim for compensation from this same reason. Claiming performance of the contract is not possible at the same time as claiming for damages of the loss of the contract. However, in the case of an employee wrongfully dismissed due to her pregnancy, reinstatement and pecuniary damages (actual damages) could be claimed at the same time. Compensation would be awarded for the actual loss of wages resulting from the time the plaintiff was wrongfully dismissed until the time of reinstatement, and would accompany the claim for reinstatement.

¹³⁶ Contract Remedy law, *supra* note 11 § 2.

¹³⁷ FRIEDMAN DANIEL AND COHEN NILI, CONTRACTS, *supra* note 44 at 533: Compensation in addition to rescission of the contract due to breach of contract, may function as performance compensation or it may function as restitution, as long as the same item is not recovered twice. The different interests are not in the scope of the research and discussion is not expanded regarding this topic.

¹³⁸ *Id.* at 536-537.

Scholars describe the remedy of compensation as a legal right that the court does not have discretion to refrain from awarding the injured party¹³⁹. It is a powerful and stable remedy that is not subject to considerations of justice, benefits to the parties, effectiveness or reasonableness¹⁴⁰. The compensatory remedy is an entitlement, a vested right of the breach victim that the court cannot deny by considerations of justice¹⁴¹. This is in contrast to the enforcement remedy that the court may deny the plaintiff due to equitable considerations. However, in awarding compensation, the court does have discretionary power concerning the assessment of the rate of compensation, as will be discussed below¹⁴².

1.4.2 The aim of compensation

The aim of compensation for breach of contract is to place the plaintiff, through the payment of money, in the situation he would have been if the contract would have been performed. In this sense, the compensation remedy comes to express the "performance interest" of the plaintiff. Friedman and Cohen claim this is the classic formulation of the aim of compensation in contract law¹⁴³. The legal right for compensation is derived from the principle "restitutio in intergrum" as is the aim of remedy generally, discussed above in part 1.2.3 of this chapter. The principle acknowledges the right of the injured party – through compensation - to substitute and thereby fulfill the performance

¹³⁹ *Id.* at 540-541.

¹⁴⁰ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 286.

¹⁴¹ *Id.* at 286 note 22 refer to Judge Barak in CA 260/80 Niva Novitz v. Sofia Leibowitz, PD 36(1) 537 Nevo, 1982 at 545.

¹⁴² FRIEDMAN DANIEL AND COHEN NILI, *supra* note 44 at 541. And see: chapter 3 of the research.

¹⁴³ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 44 at 531 and at 549 see discussion on controversy regarding the opinion that instead of performance compensation the plaintiff may claim reliance compensation, meaning expenses the plaintiff spent in reliance on the contract. Opposed opinion is that Section 10 of the Contract Remedy Law does not permit claiming reliance compensation.

interest¹⁴⁴. According to Shalev and Adar, protecting the performance interest of the injured party is the same aim as the enforcement remedy¹⁴⁵.

Compensation is a financial substitute of what the plaintiff was entitled to receive according to the contract. The compensation aims to foresee the future of a hypothetical situation in which the contract would have been performed¹⁴⁶. Nevertheless, Judge Barak claims that the objective of the compensation remedy is not to punish the defendant, but rather to compensate the plaintiff¹⁴⁷. Shalev and Adar do not find this to be an accurate delineation of the objective of the compensatory remedy, but acknowledge that even when punitive considerations are involved, they do not raise the compensation limit above the performance interest¹⁴⁸. In contrast, as presented in chapter 3 of the study, labor law, treats punitive considerations differently than contract law. The labor court does punish the defendant in some cases and the compensation can raise above the limit of the performance interest. This is in accordance with statutory regulations determined in several labor laws and in accordance to the policy of the labor court to educate and deter employers from violation of employees' rights.

English Law also discusses the aim of compensation and notes that compensation is based on the loss to the plaintiff and not on the gain to the

¹⁴⁴ Judge Barak in: CA 7302/96 Bank Mizrahi HaMeuhad Ltd. v. Josef Lilof, PD 55(3) 200, Nevo, 2001 Paragraph 11. Referred by SHALEV GABRIELA, ADAR YEHUDA *supra* note 44 at 282: Restitution places the injured party in the situation he would have been in if the contract would have been performed, thus the compensation is for the injuring of the "Expectation Interest". And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 531: determine the expectation interest is the same as the performance interest.

¹⁴⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 283.

¹⁴⁶ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 532.

¹⁴⁷ Judge Barak in: RCA 2371/01 Einstein v. Osy planning construction building and developing Ltd., PD 57(5) 787,792 Nevo, 2003 stated "...the concept of compensation rejects the punitive relief and focuses on the remedial relief that is meant to remove the damage and better it".

¹⁴⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 285. And see criticism of Adar: ADAR YEHUDA, THE PUNITIVE AWARD AS A SANCTION IN CONTRACT, Dissertation submitted to the Hebrew University in Jerusalem 2003, Nevo publishing (Hebrew) [hereinafter: ADAR YEHUDA] at 91-101, 204-213 . And see chapter 3.4 of the research.

defendant¹⁴⁹. Loss includes any harm of the plaintiff and any injury to his economic position in a broad sense. The English court will consider the overall position of the plaintiff as a basis for assessing damages so that the compensation will not make the plaintiff's situation better than it would have been if the contract had been performed¹⁵⁰. Compensation aims at putting the plaintiff in the same place as if the contract had been performed. It is a quantified sum of money that represents the loss of the plaintiff¹⁵¹.

Similarly, according to Dan B. Dobbs, in American law, the traditional goal of compensation is to award a sum of money that will put the plaintiff in as good a position as he would have been in, if the contract had been performed¹⁵². However, Dobbs claims that this definition is not completely accurate in practice since many victims of breach of contract are under-compensated, because some losses cannot be proven adequately. To my opinion, under-compensation may also occur in the Israeli courts. However, due to wide discretionary power of the labor court, failing to prove the amount of damage may not always lead to under-compensation.

Another definition in American law is that compensation is the amount of money necessary to put the plaintiff in the rightful contract position, but not necessarily the full performance position¹⁵³. According to Dobbs, the law does not aim to give the plaintiff a perfect substitute for full performance. He claims that there are other purposes of compensation, such as providing public

¹⁴⁹ PEEL EDWIN, *supra* note 129.

¹⁵⁰ *Id.* at 989-990.

¹⁵¹ *Id.* at 1010.

¹⁵² DOBBS DAN B., *LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION, ABRIDGEMENT*, Second Ed., West Publishing, 1993 at 763. Claims the goal is to avoid overcompensation or undercompensation. The objective is to give the plaintiff the benefit of the contract, the profit or gain he would have made upon performance of the contract.

¹⁵³ *Id.* at 764.

sympathy to an injured person and supporting rights the legal system deems as justified, as in the case of constitutional rights¹⁵⁴.

Shalev and Adar claim that the compensation remedy, at least in Israel, takes into account and includes educational, administrative, economic, distributive and deterrence considerations. They argue that Israeli courts take these factors into account and integrate them into compensation rulings¹⁵⁵. As presented later in the study (chapter 3), the labor court takes educational and deterrence considerations into account when determining compensation rates for wrongful dismissal.

1.4.3 Types of compensation for breach of contract

At its heart, compensation claimed as a remedy is the plaintiff's damage resulting from breach of contract. The term "damage" is not defined in the Contract Remedy Law. Shalev and Adar suggest using the term to describe any bad influence on the welfare of the plaintiff, created by the breach of his right¹⁵⁶. The forms of damage created by breach of contract include bodily injury, property damage, economic damage and mental damage¹⁵⁷.

This paper focuses on the following types of compensation, which are relevant to labor law¹⁵⁸: one type of compensation is compensation with proof of damage that is divided to compensation for pecuniary damages and to compensation for non-pecuniary damages; the second type of compensation

¹⁵⁴ *Id.* at 210-214.

¹⁵⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 287 note 27.

¹⁵⁶ *Id.* at 298.

¹⁵⁷ *Id.* at 298: Mental damage is the type of damage stipulated in section 13 which is non-pecuniary damage. Will be discussed in chapter 4 of the research.

¹⁵⁸ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 542-546: There are several ways to classify compensation e.g. distinction according to the type of damage physical or economical.

is compensation without proof of damage¹⁵⁹. An injured party, claiming compensation, must prove the damage caused to him by the defendants' breach of contract or prove the damage that the law presumes occurred in the circumstances (i.e., compensation without proof of damage)¹⁶⁰. The right to compensation for pecuniary damages accompanied by proof of the damage is determined under Section 10 of Contract Remedy Law. Non-pecuniary damage is determined under Section 13 of the Contract Remedy Law¹⁶¹. These two sections are discussed in detail in chapter 3 below¹⁶².

The Contract Remedy Law also provides for the treatment of compensation without proof of damage. Compensation without proof of damage is determined under Sections 11 and 15 of the Contract Remedy Law. Section 11 is probably not applicable to labor law according to Shalev and Adar as will be explained henceforth. Section 15 deals with liquidated damages pursuant to specific clauses in the contract agreed by parties at the time of entering into the contract and prior to the breach. These two sections of the law are discussed immediately below. It should be kept in mind that under the Contract Remedy Law, a plaintiff has the option to claim compensation with proof of damage or alternatively compensation without proof of damage. In either case, the court may reduce the compensation in favor of the defendant¹⁶³.

¹⁵⁹ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 294: the basic distinction is between compensation with proof of damage and compensation without proof of damage. And see Frenkel Tsvi, *supra* note 44 at 498, claims that there are three types of compensation in labor laws: compensation without proof of damage, compensation without proof of pecuniary damage and compensation that are not dependent on damage.

¹⁶⁰ *Id.* at 281.

¹⁶¹ Also relevant is Contract Remedy Law, *supra* note 11 §: mitigating damages.

¹⁶² See chapter 3 of the research.

¹⁶³ Contract remedy Law, *supra* note 11 § 12: There is a restriction in the final section. The court may intervene in favor of the defendant when the consideration (payment) was unreasonable or when there was no consideration at all. The court may chose the lenient standard to calculate the rate of compensation. And *see at*: SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 484-485.

Section 11 of the Contract Remedy Law governs compensation without proof of damage. For purposes of the labor law, several statutes determine entitlement to compensation without proof of damage¹⁶⁴. The idea of compensation without proof of damage in contract law is first examined and then applied to labor contracts.

In contract law, a plaintiff is entitled to claim compensation without proof of damage based on the legal premise that a breach of contract causes the plaintiff damage. According to Shalev and Adar, the logic of the provision is that certain damages are a predictable and natural result of certain breaches¹⁶⁵. Institutional considerations of efficiency and reducing litigation costs, justify exempting a plaintiff from proving the occurrence of the damage and the amount.

Judge Barak described the essence of Section 11 in the Einstein case as providing an objective and abstract compensation as opposed to concrete subjective compensation. It can be taken as a rule of thumb that when the conditions set out in Section 11 exist, compensation will be granted without the need to examine the damage resulting from the specific breach. This rule contains efficiency advantages, but also potential disadvantages of over-compensation in special circumstances¹⁶⁶.

Section 11 provides two situations in which the law assumes the damage caused by the breach of contract¹⁶⁷. Section 11(a) applies to a breach of an

¹⁶⁴ See *e.g.*, Equal Opportunities Employment Law, *supra* note 12 § 10(a)(1) determines the court may award compensation even if pecuniary damage did not occur at a rate it deems appropriate under the circumstances without proof of damage. Translation (unofficial) see at: Employment (Equal Opportunities) Law, 5748-1988 <http://www.moital.gov.il/NR/rdonlyres/2654DA40-7F3A-44DE-AC90-813996BD7570/0/25.pdf> State of Israel, Ministry of Labour & Social Affairs, and Division of Labour Relations. Jerusalem, 2000. [Hereinafter: unofficial translation].

¹⁶⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 470.

¹⁶⁶ Einstein v. Osy case, *supra* note 147 at 793-794.

¹⁶⁷ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 472: The section allows the plaintiff to win compensation for the typical damage of "loss of value" that is an expected damage. Loss of value- loss of the opportunity to buy the asset or service according to the contract, in a price that is lower from the

obligation to supply or receive a property or service¹⁶⁸. Section 11(b) applies to a breach of a monetary obligation¹⁶⁹. It would seem that Section 11(a) which applies to a breach of an obligation to supply or receive a property or service is the more relevant to labor contracts.

Section 11(a) requires three cumulative conditions to exist in order to obtain an award of compensation. The first condition is that there is an obligation to supply or receive property or service. The second condition is there was a rescission of the contract. The third condition is that there exists a positive difference (financial gain) between the consideration for the property or service under the contract and its value on the date of the rescission of the contract. This is the financial value¹⁷⁰.

Shalev and Adar raise several questions concerning the terms of section 11(a). Most relevant to the issues under labor law examined in this study is the question concerning the term "service" in Section 11(a). Does "service" include personal services such as service supplied in employee-employer relations¹⁷¹? Shalev and Adar claim this question has not yet been determined by the courts. In their opinion, there is no place to expand the interpretation of Section 11(a) to employment relations. This is because the financial value of services of a

market value. The market value is the price paid later on for the substitute of the same asset or service by the plaintiff. When the breached obligation was to sell an asset or service, the typical damage of loss of value is the loss of opportunity to sell the asset or service according to the contract.

¹⁶⁸ Contract Remedy Law, *supra* note 11 § 11 (a).

¹⁶⁹ *Id.* § 11 (b). This section is not relevant to labor law.

¹⁷⁰ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 480: The value referred to in section 11(a) is the market price of the property or service. If there is no data concerning the market value of the property or service the court may rely on value known at an early date, index linked. And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 571-578: discussion about possible dates to calculate the damage. And *see* there at 569: they claim this requirement contradicts the title of the section "compensation without proof of damage" because the plaintiff does actually have to prove damage. When the plaintiff does not provide evidence of this positive difference (financial gain), his claim for compensation without proof of damage will be denied. In this case, the legal premise that the breach of contract has caused damage, is contradicted.

¹⁷¹ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 474.

non-pecuniary nature (such as employment services) are difficult to calculate¹⁷². They justify their opinion on the grounds of simplicity, certainty and reduction of judicial resources that form the core rationale for compensation without proof of damage.

In my opinion, the claim that Section 11(a) does not apply to labor contracts is appropriate. However, the idea of compensation without proof of damage and its justification on the basis of judicial efficiency and utility as presented above are relevant to the labor contract and apply to it, even if Section 11(a) does not. Several Labor statutes provide for compensation without proof of damage and are frequently applied by the labor court.

Section 15 of the Contract Remedy Law governs situations of compensation without proof of damage on account of liquidated damages¹⁷³. In the liquidated damages situation, the parties agree in advance that in the event of breach under the contract, the offender will pay a set sum of money to the injured party, without connection to the actual damage. Friedman and Cohen claim this is actually compensation without proof of damage, because the plaintiff is not required to show a financial value¹⁷⁴.

The purpose of the liquidated damages clause is to save the parties the cost of litigation. The parties estimate in advance of the occurrence of a breach, the rate of damages in the event of a breach. However, liquidated damages also may serve as punitive damages, since they are an incentive for the parties to perform according to the obligations stipulated in the contract¹⁷⁵.

¹⁷² *Id.* at 475.

¹⁷³ Contract Remedy Law, *supra* note 11 §15. These are agreed compensation. The court may reduce these compensation if the amount is not reasonable or foreseeable.

¹⁷⁴ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 685. That as opposed to section 11(a) that does actually require proof of damage.

¹⁷⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 488- 495: It seems to Shalev and Adar that the parties are not prevented to determine punitive damages in order to deter each other from violation of the contract, although the common legal rule is against punitive damages. And see FRIEDMAN DANIEL AND COHEN NILI *supra* note 47 at 682.

Freidman and Cohen claim the plaintiff has a legal right to recover the amount of the liquidated damages and this is not dependent on the discretion of the court¹⁷⁶. In practice the court may reduce liquidated damages, but does so with moderation and sparingly, as clarified by the Supreme Court in Israel¹⁷⁷. However, a reduction of liquidated damages is not the rule but the exception¹⁷⁸.

The Pinhas Hoze case demonstrates the intervention of the Labor Court in the application of liquidated damages in a labor contract¹⁷⁹. The parties had agreed that in case of a fundamental breach of the contract, the employee would pay USD 50,000 to the employer for each breach of a non-competition and confidentiality clause. The Labor Court concluded that it is not compelled to accept the liquidated damages clause "as is" and may intervene and determine a different amount. In Pinhas Hoze, the court changed the contractual rate of damage, because the amount stipulated was not proportionate and not reasonable. To my opinion, this case is an example of the approach of the Labor Court in Israel that exercises its discretion in a broad way and does not hesitate to intervene and override the contractual consent of the parties.

¹⁷⁶ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 694-695. However, see the Contract Remedy Law, *supra* note 11 § 15(b): The plaintiff is entitled to waive the remedy of liquidated damages and prefer other remedies with proof of damages. And also see SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 522: reference to CA 628/87 Josef Huri v. Israel Electric Corporation Ltd., 46(1), 115, Nevo, 1991 at 123-124 paragraph 9. Former President of the Supreme Court, Shamgar determined the plaintiff may file a claim for liquidated damages and other damages with proof of damage accumulatively if they origin from different heads of damage and there is no overlap between the liquidated damages and the other compensation. And see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 700-708: discuss the relations of liquidated damages to other remedies.

¹⁷⁷ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 504. And see at 495-508: the rules for reducing liquidated damages by the court. And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 708- 712: reducing liquidated damages.

¹⁷⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 504 footnote 659 referral to Judge Mishael Cheshin in CA 4481/90 Israel Aharon v. Ben Giat engineering and building company Ltd. 47(3) 427 Nevo, 1993 at 433. The rule gives validation to the liquidated damages stipulations and the authority to intervene in the stipulation is applied by the court in a literal and limited way. The court respects the parties' will and therefor interpret their authority narrowly.

¹⁷⁹ LB (TA) 8910/01 Pinhas Hoze Insurance Agency Ltd., v Yossi Cohen Et. Al, Nevo, 2008 at 5 paragraph 11, at 12 paragraph 39; at 14 paragraph 45.

1.5 Conclusion

Remedies for a breach of contract determined under the Contract Remedy Law apply to labor contracts and therefore, the Contract Remedy Law is a relevant source for understanding the treatment of remedies upon dismissal in labor contracts. The application of the remedies aforementioned, will be reviewed in the context of wrongful dismissal.

Chapter 2

Wrongful Dismissal in Israeli Labor Law

2.1 Introduction

This chapter examines remedies for a breach of a labor contract by wrongful dismissal. Labor contracts have several unique aspects that distinguish them from other contracts subject to the Contract Remedy Law. The chapter will first review the special features of the labor contract and the approach of the Israeli Labor Court (hereinafter: Labor Court) to such contracts. Then it will explain the meaning and application of both dismissal and wrongful dismissal in Israel. This chapter serves as a basis for the discussion in chapter 3 concerning the assessment and determination of compensation for breach of contract in Israel.

Part 2 (Section 2.2) describes the legal approach to termination of employment contracts in Israel. The idea of wrongful dismissal is discussed in part 3 (Section 2.3). Reinstatement remedy for wrongful dismissal is presented in parts 4 (Section 2.4) (enforcement of the contract) and compensation remedy is presented in part 5 (Section 2.5).

2.2. Termination of employment relations initiated by the employer

2.2.1 The unique nature of the labor relationship and the labor contract

In a labor contract, the employer provides financial reward in consideration for the work provided by the employee¹⁸⁰. Hugh Collins describes the employment contract as workers selling their labor in return for wages¹⁸¹. Israeli courts and legal scholars have expanded the scope of this quid pro quo by describing the

¹⁸⁰ HONEYBALL SIMON, *supra* note 41, at 44.

¹⁸¹ COLLINS HUGH, *EMPLOYMENT LAW*, second Ed., Clarendon law Series, Oxford University Press 2010 at 4.

labor contract as a relational contract¹⁸². The labor contract is characterized by an ongoing close relationship between the employer and employee¹⁸³, requiring that it must be performed in good faith¹⁸⁴, trust, fairness and with concern for the other party¹⁸⁵.

However, labor contracts provide workers with much more than wages. Collins notes that workers are people, not merchandise and must be treated with respect and humanity¹⁸⁶. Thus, a major concern of the labor law is to protect employees from the "commoditization" of the worker¹⁸⁷. Labor law also recognizes that work is the primary source of income not only for the employee, but also for his dependents. A final consideration important to the labor law is the understanding that the work performed is a significant source of the

¹⁸² See e.g., BEN-ISRAEL RUTH, *supra* note 1 at 536; And for comprehensive discussion see : Adar Yehuda and Gelbard Moshe, *Contract Remedies - A Relational Perspective*, in Grundmann Stefan, Cafaggi Fabrizio and Vettori Giuseppe Editors, *THE ORGANIZATIONAL CONTRACT ,FROM EXCHANGE TO LONG-TERM NETWORK COOPERATION IN EUROPEAN CONTRACT LAW*, Ashgate Publishing 269,2013 in <https://haifa.academia.edu/YehudaAdar/Papers> [hereinafter: Adar and Gelbard 2013] . Discuss the interface between remedy rights and relational contracts. They find special remedy rules should be applied to this kind of contract. And see Adar Yehuda and Gelbard Moshe, *The Role of Remedies in the Relational Theory of Contract: A Preliminary Inquiry*, *EUROPEAN REVIEW OF CONTRACT LAW* 2011 in <https://haifa.academia.edu/YehudaAdar/Papers> [hereinafter: Adar and Gelbard 2011] at 409 claim that scholars refrain to provide a rigid definition of "relational contract" and agree a flexible definition that can include almost any contract is sufficient.

¹⁸³ LC 55/3-145, *The State of Israel v Jacob Bucharis*, PD 36, 1, Nevo, 2001, 6 paragraph 6: with signing the labor contract begins a relationship that may continue a long period of time.

¹⁸⁴ *Contracts General Law*, *supra* note 56 §§ 39, 12. Determines a contract should be performed in good faith and negotiations should be conducted in good faith. For elaboration on the good faith duty in employment relations see Rabin- Margalioth Sharon, *supra* note 8 at 674, 677-680 Rabin- Margalioth claims the good faith duty serves as a regulatory mechanism to design employment process rights. An example is regulating due process rights of termination of the employment contract- the hearing process. And see: LUBOTZKY YITZHAK, *supra* note 6 at 36-44: dismissal should be in good faith. e.g., dismissal due to political reasons is dismissal without good faith- reference to H CJ 4284/08 Kelpner v. Mail Company of Israel Ltd., Nevo, 2010.

¹⁸⁵ LA 189/03 *Girit Ltd. v Aviv* ,PDL 39 , Nevo, 2004 ,728, 742 Paragraph 1;LA 300053/96 *Nittai v Beit Hatfutsot*, PDL 37, 311, Nevo, 2002, 319 paragraph 1

¹⁸⁶ COLLINS HUGH, *supra* note 181 at 4.

¹⁸⁷ *Id.* at 5. And at 4 Collins contests the slogan "labor is not a commodity" by claiming employees sell their labor, time, effort, and skill like a commodity. And see the origin in annex I(a) at 23 of the Constitution of the International Labour Organisation as amended by the constitution of the international labour organization instrument of amendment, 1946 , *INTERNATIONAL LABOUR OFFICE GENEVA* 2012, <file:///C:/Users/user/Downloads/constitution-18092012.pdf>

employee's meaning in life, personal fulfillment, social status, self-worth and dignity¹⁸⁸.

The former President of Israel's National Labor Court, Stephen Adler, expanded on the meaning of work in the Checkpoint case¹⁸⁹. To Adler, the expertise, experience, knowledge, skills and professional qualifications of the employee are and remain his property and his human capital¹⁹⁰.

The view of the labor contract as a contextual relationship is not unique to Israel. In discussing English law, Collins describes the labor contract as the expression of legal, economic and social relationships in the performance of work¹⁹¹. He claims the unique features of the employment relationship make the general law of contracts unsuitable for resolving the disputes that arise from labor relations¹⁹².

Similarly, Simon Honeyball notes the different needs of labor contracts in English law¹⁹³. While he acknowledges that the employment relationship fits into a contract model, it often does so uncomfortably. Therefore, it is the labor law that deals with the shortcomings of contract law in the employer–employee relationship. It provides protection for employees as a policy

¹⁸⁸ COLLINS HUGH, *supra* note 181 at 4.

¹⁸⁹ LA 164/99, Dan Frumer and Checkpoint Ltd. V Redguard Ltd. Nevo, 1999; English publication : Israel National Labor Court ,Dan Frumer and Checkpoint Ltd. V Redguard Ltd., 20 INTN'L LAB. L. REP. 2002, 45. This is a leading case in Israel concerning the freedom of occupation.

¹⁹⁰ *Id.* at 53, 60 English version. At 49: Adler described work as the employee's ". . . property and the source of his livelihood". And see Davidov Guy, Eshet Ido, *Job security: Toward Balanced Intermediate solutions*, 43 MISHPATIM 143-181, 2012 (Hebrew) [hereinafter: Davidov and Eshet] at 152: Work is seen as a source of personal, psychological and social development. Work has a major role in the employee's life as a source of self-realization, as well as defining personal identity, creating confidence, and acting as a source of social status and good social relations.

¹⁹¹ COLLINS HUGH, *supra* note 181 at 5.

¹⁹² *Id.* at 6 note 3 refers to Otto Kahn-Freund observing the labor relations as containing "submission", "subordination" and "inequality of bargaining power". At 6-13, Collins elaborates on these concepts and claims labor law evolved to cope with four features of the employment contract: submission, opportunism, subordination, and the need to balance between working time and life itself.

¹⁹³ HONEYBALL SIMON, *supra* note 41 at 43.

requirement under the modern view that an employer has obligations towards his employee¹⁹⁴.

In light of these wider obligations, Collins stresses that the private law assumption in favor of the principle of freedom of contract, retreats before the special requirements and procedures of the employment law¹⁹⁵.

The same point was expressed by Judge Elisheba Barak in *State of Israel v. Bucharis*, where she concludes that parties to a labor contract are not free to choose the terms of the contract¹⁹⁶. They are subordinated to the terms determined by society. The labor contract protects fundamental values, including ethics, democracy, and the dignity of both the employee and employer. It also must account for minimal social standards and the obligation to take care of the employee's humanitarian rights. The labor contract is different because these values and the rights expressed by them cannot be waived¹⁹⁷.

The special character of the labor contract has been recognized by Israeli Knesset in the Contract Remedy Law itself. This law itself provides that its provisions apply only if there is no specific labor law with special provisions concerning the matter¹⁹⁸. Similarly, the Contract Remedy Law states that the remedy of enforcement (performance of the contract) will not be the primary remedy for breach of contract in labor law, in contrast to its role in contract law¹⁹⁹. The law specifically acknowledges that the rationale for these

¹⁹⁴ *Id.* at 45 see example.

¹⁹⁵ COLLINS HUGH, *supra* note 181 at 33.

¹⁹⁶ *Bucharis*, *supra* note 183 at 6-7.

¹⁹⁷ *Id.* at 6-7.

¹⁹⁸ The Contract Remedy Law, *supra* note 11 § 22(b). LA (National) 573/09 Dov Zaidman v ECI Telecom Ltd., Nevo, 2010 at 15 Paragraph 19: Contract law applies to the labor contract with the changes necessary to the nature of labor contract. The "special provisions" of the labor law include compensation for damage. Damages laws must be adjusted to the special labor field.

¹⁹⁹ The Contract Remedy Law, *supra* note 11 § 3(2). The main remedy for breach of contract is enforcement of the contract. The exception to the enforcement rule determined in section 3(2), forbids enforcement that leads to compulsion of " ... the performance or acceptance of personal work or of a

special provisions is based on the unique relationship between the parties of the labor contract.

Moreover, these special aspects of the labor contract are reinforced by the unique character of the Labor Court itself. One of these characteristics, as described by Adler, is the special role of the Labor Court judge. Adler claims that the Labor Court judge has a different agenda than the general jurisdiction judge - to protect the social rights of workers. Means to that end is the use of effective remedies²⁰⁰.

According to Adler, Labor Courts support employees in enforcing their rights and labor judges, when setting fundamental labor standards, play a role in developing social laws and protecting employees²⁰¹. Adler finds that the Knesset has empowered the Labor Courts to develop labor law by "judge made law"²⁰². He explains that as a result, Labor Courts, when implementing contract laws have developed a body of case law appropriate to the special traits of the labor contract²⁰³. This may be readily seen in the treatment of a breach of the labor contract by wrongful dismissal. The balance of this part will discuss first dismissal and then wrongful dismissal.

2.2.2 The approach to dismissal

To understand wrongful dismissal in Israel, it is first appropriate to survey the meaning of dismissal and its treatment in other legal systems. Dismissal will then be compared to the Israeli system in order to clarify the Israeli approach.

personal service", as in the labor contract. Therefore, the main remedy for breach of labor contract is compensation. For elaboration on this topic see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 197 – 214. And see SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 173-196, 201-211.

²⁰⁰ Adler Stephen, *The Role of Judges in the Implementation of Social Policies*, 18 INT'L J. COMP. LAB. L. & INDUS. REL. 341, 2002 at 341, 342, 375.

²⁰¹ *Id.* at 343: Adler abstains from calling this "judicial activism" but rather filling in the gaps where "...using social values to relate to issues to which existing statutes and precedents provide no answer"

²⁰² *Id.* at 355- 356.

²⁰³ Adler Stephen, *supra* note 39 at part III.

Around the world there are different approaches to the issue of termination of employment initiated by the employer²⁰⁴ .

The American approach to termination of labor contracts is based on the free-market model. The basic rule of this "Employment at Will" approach is that the employer does not have to give reasons or justify the cause for dismissal²⁰⁵. The employer may terminate the labor agreement at any time just as the employee may resign at any time. As discussed in American case law, the employer can fire the employee for good reason, bad reason or no reason at all²⁰⁶. Over the years, quite a few exceptions to this approach have evolved, which impose restrictions on dismissals. However, these limitations prevent at most a few "bad reasons" for dismissal. According to Guy Davidov and Ido Eshet they are very limited²⁰⁷.

A second approach employed by most European countries, anchors in legislation the rule requiring "sufficient cause" or "just cause" for dismissal²⁰⁸. Three central reasons can justify dismissal. The first is for reasons of incompatibility, whether personal or professional. The second is on account of disciplinary action. The third is for economic reasons, unrelated to the employee or his performance (such as redundancy)²⁰⁹ .

²⁰⁴ Davidov Guy, *In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws*, 23/1 THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS, 117, 2007 [hereinafter: Davidov 2007]; Davidov and Eshet, *supra* note 190 ; Lubotzky Yitzhak, Frenkel David A. *The Dilemmas Involved in the Managers' Prerogative to Dismiss, in the "Constitutional Revolution" Era*, 3 LAW AND BUSINESS, 161-188, July 2005 (Hebrew)[hereinafter Lubotzky Yitzhak, Frenkel David A] ; Mundlak Guy, *Characterizing the Legal Regulation of Dismissals: Contractual Default Rules, Mandatory Rules and Other Options in-between*, 22 TEL AVIV L. REV. 819 ,1999 (Hebrew)[hereinafter: Mundlak 1999].

²⁰⁵ Davidov and Eshet, *supra* note 190 at 147: apart from Montana State that deviated from the doctrine by a court ruling and legislation requiring a justified cause for dismissal.

²⁰⁶ *Id.* see at 147 note 4. And see: Davidov 2007, *supra* note 204 at 118. And see Mundlak 1999 *supra* note 204 at 820.

²⁰⁷ Davidov and Eshet, *supra* note 190 at 147.

²⁰⁸ *Id.* see at 148 note 9.

²⁰⁹ *Id.* at 148.

Davidov and Eshet maintain that the term "sufficient cause" or "just cause" used both in collective agreements and in different countries' legislation, has no one uniform definition²¹⁰. In the United Kingdom, for example, the legislature selected a negative formulation by prohibiting "unfair dismissals". Nonetheless, even in the English context, dismissal needs to be justified by one of the reasons for "just cause" to be considered legitimate and sufficient grounds for dismissal²¹¹. In Israel, however, dismissal is treated differently as set forth below.

2.2.3 The approach to dismissal in Israel

The approach to dismissal in Israel is unlike that of the American or European legal systems, yet it has been influenced by both. Israel's approach has evolved over the years and developed into a unique system. In the Tseri ruling, the Israeli Supreme Court determined that the American concept of "Employment at Will" is the norm of dismissal in Israel²¹². However, the court recognized that the concept of "Employment at Will" is only a starting point insufficient for the Israeli employment milieu. The reason is that the power of the Israeli employer to dismiss is limited by protective laws, collective agreements, contractual arrangement and the principle of good faith²¹³.

²¹⁰ *Id.* at 148. And see: Davidov 2007, *supra* note 204: Davidov supplies a justification for "just cause" law. Davidov finds two grounds for justification. One is preventing unnecessary harm to the employee. Second is ensuring a fair price of security for employees in return for their subordination and submission to the democratic deficit. Davidov argues that the employer has the power to dismiss an employee on grounds of incapability under the "just cause" law. He claims it is crucial that the dismissal should be quick and inexpensive when the cause is justified. In order to achieve this goal, the procedure of dismissal should be improved.

²¹¹ Davidov and Eshet, *supra* note 190 at 148 note 11: Employment Right Act, *supra* note 130 c.18 s 98.

²¹² HCJ 254/73 Tseri pharmaceutical and chemical company Ltd v. The National Labor Court, Nevo 1974. And see further discussion by Mundlak 1999, *supra* note 204.

²¹³ Mundlak 1999, *supra* note 204 at 820. And see the Contract General Law, *supra* note 56 §§ 12, 39: The parties to an employment contract must act with good faith and this duty also applies to decisions of dismissal of an employee.

Since the "Employment at Will" approach was largely impractical in Israel, it was not contested in practice by employees. For many years, it was perhaps not necessary, because the exceptions in collective bargaining agreements and expansion orders²¹⁴ were very broad and actually implemented the "sufficient cause" standard for the dismissal of most employees²¹⁵.

However, with the decline of collective coverage in Israel since 1995, less and less employees enjoy broad protection from dismissal due to collective agreements²¹⁶.

As a result, the Israeli legislator and courts have stepped in to fill the gaps created by the decline in collective bargaining protection for employees²¹⁷. The Knesset has actively adopted protective employment laws, while the courts have cast a wide net of protection for employees expanding the individual labor and social security laws²¹⁸.

The exceptions to the "Employment at Will" approach in Israel are substantial²¹⁹. The principle of good faith in the dismissal context is one of the

²¹⁴ See the legal source of expansion orders: Collective Agreement Law, 1957 Book of Laws 1957 221,63 § 25-32: expansion orders expand provisions of general collective agreements to workplaces that are not organized and are not subject to collective agreements.

²¹⁵ Mundlak 1999, *supra* note 204 at 821-822.

²¹⁶ See about the changes in Israeli industrial relations: Mundlak G. Team Director, *Industrial Relations in Time of Transition*, The Israel democracy Institute, 2004 (Hebrew) at 152: coverage of collective agreements declined from 80% to approximately 50%. And see Mundlak Guy et.al. *Union density in Israel 1995-2010: The Hybridization of Industrial Relations*, INDUSTRIAL RELATIONS, Vol. 52, No. 1,78,2013. See there further research of union density in Israel, which is indicated by collective coverage and trade union membership. Trade union membership declined from 80% to 45% by 2000 (at 85). Collective agreement coverage declined from 80% at 1980s to 56% by 2000. By 2006 –membership in trade union declined from 45% to 34 %.(at 85), however collective coverage remained stable on 56 %.(at 87).

²¹⁷ Mundlak 1999, *supra* note 204 at 821-822.

²¹⁸ Adler, *supra* note 39 at part II: "The Labor Courts and their contribution to labor regulation" at 5/30. And compare to Davidov and Eshet, *supra* note 190 at 150-151. According to Davidov and Eshet, restrictions on dismissal - set out in legislation and collective agreement or extension orders – are criticized by neo-liberal researchers, who believe that such intervention in the free market is misguided.

²¹⁹ Davidov and Eshet, *supra* note 190 at 148. And see at 152-153: Claim the justifications for restrictions on dismissal, begin in the employment contract. Any deviation from the terms of the

more important restrictions on employment at will²²⁰. Davidov and Eshet claim that the courts in Israel developed a strong prohibition to dismiss an employee without good faith, including dismissal without sufficient cause and arbitrary dismissal²²¹. Indeed, the procedural rule requiring a hearing prior to dismissal forces the employer to state the real reason for dismissal in order for the employee to defend himself in a hearing. This actually implements the rule to dismiss only for justifiable cause²²². In this way a procedural restriction on employee dismissal actually serves as a substantive restriction on dismissal.

A second group of restrictions are legal provisions preventing dismissal due to "bad causes", such as pregnancy, discrimination or activity in a labor organization²²³. The focus of this study is on wrongful dismissal connected to these two groups of restrictions on the right of the employer to dismiss an employee: the procedural rule requiring a hearing prior to dismissal and the legal provisions prohibiting dismissal. However, before expanding on these two categories, it is necessary to mention the type of payments due to Israeli employees upon termination, which are governed by mandatory legislations.

contract requires justification. Furthermore, they find justification in the value of human dignity and the principles of procedural justice, the unique nature of labor relations and the importance of work for the employee. Additionally, in contracts of employment, the employee consents to subjecting himself to the employer and accepts a degree of subordination and essentially accepts the democratic deficit. This is in exchange for certain security of continuity of the employment relationship. And see : Horovitz Michal, *The Normative Status of Worker's Claims to Labor Security*, 8 LABOR, SOCIETY AND LAW, 127 ,2001 (Hebrew) : Horovitz claims that the right to labor security should be recognized in Israeli law as part of the social right of employees. The right to labor security is a constitutional right and therefore employees should be granted its protection.

²²⁰ Davidov and Eshet, *supra* note 190 at 149 and at 158-160.

²²¹ *Id.* at 160.

²²² *Id.* at 159. And see: Adler, *supra* note 39 at part III at 11/30: "Termination of the contract of employment": Similarly, Adler claims the labor court developed case law implementing the good faith duty on dismissal. This is apparent in the duty to inform the employee of the reason of dismissal for him to answer in a hearing and the reason cannot be arbitrary. And also see: Lubotzky Yitzhak, Frenkel David A., *supra* note 204 at 176: the good faith duty restricts the right of the employer to dismiss an employee. And also see at 180: An employee dismissed by his employer should be dismissed with dignity and fairness, as claim Yitzhak Lubotzky and David A. Frenkel. They suggest a "formula for managing fair dismissal". This formula balances the employer's property right and the employee's dignity.

²²³ Davidov and Eshet, *supra* note 190 at 149.

2.2.4 Obligatory payment for employees: Severance pay and early notice

In Israel, every employee that meets the conditions of the Severance Pay Law is entitled to severance compensation upon termination. The severance payment calculation is based on the last salary received by the employee multiplied by the number of years of employment²²⁴. The entitlement to severance pay is regardless of the process of termination or the cause of termination. A key feature of the statute is that the entitlement to compensation applies to a dismissed employee and therefore a resigning employee is not entitled to severance pay²²⁵. The objectives of the law are to compensate the employee for his past years of labor and to sustain him until he finds a new job²²⁶.

An additional payment to be made to the dismissed employee arises from his entitlement to advanced notice prior to dismissal pursuant to the Advanced Notice of Discharge and Resignation Law. The law applies to both dismissal and resignation²²⁷. Under Section 2 of the statute, the employer must provide written notice to the employee prior to his dismissal and the employee must provide written notice prior to resignation²²⁸. In both instances, the dismissed or resigning employee remains employed during the period of the notice. For instance, the notice period would be one month for an employee having completed one year of employment²²⁹. However, the employer has the option

²²⁴ Severance pay law, 1963, Book of Laws 404, 1963, 136 § 12.

²²⁵ *Id.*, § 1, states an employee who worked for one year for the same employer or at the same workplace continuously and was dismissed is entitled to severance pay. However, the resigning employee will be able to receive his severance under one of the exceptions to the dismissed employee requirement: *e.g.* § 7 states that an employee resigning in order to take care of his/her newborn baby is entitled to severance pay.

²²⁶ Adler, *supra* note 39 chapter iv: "Advances notice of dismissal or resignation" at 11/30. Adler states scholars criticize distinguishing between dismissed and resigned employees in the statute.

²²⁷ Advanced Notice of Discharge and Resignation Law, 2001, Book of Laws 1788, 2001, 378 § 2.

²²⁸ *Id.* § 2.

²²⁹ *Id.* § 3. However, this period may be increased by agreement between employee and employer.

to pay the employee the equivalent compensation for the notice period and not require his attendance at the workplace²³⁰.

These payments are obligatory and in addition to any compensation received for wrongful dismissal. Entitlement of mandatory payments upon dismissal of an employee, are due for lawful dismissal and for wrongful dismissal equally. Compensation for wrongful dismissal will cumulate to the obligatory payments. A question discussed later in the research, is whether the extent of the obligatory payments influence the court's determination of the compensation rate for wrongful dismissal.

2.3. Wrongful dismissal in Israel

2.3.1 Sources of the restrictions

A termination of employment initiated by the employer can be lawful and legal or unlawful and illegal. An illegal dismissal will be referred to herein as a wrongful dismissal. There are restrictions on the managerial prerogative to dismiss an employee²³¹. A dismissal contrary to these restrictions will be deemed a wrongful dismissal and entitle the dismissed employee to various remedies. There are several sources of restrictions upon the employer's dismissal right. The classification to the different sources is not clear-cut, but scholars have tended to classify them as follows²³².

The first source of restrictions on dismissal is that set out in legislation. These statutes generally prohibit dismissal and focus on the cause of the dismissal. A second source is the restrictions placed in the contract or agreement itself.

²³⁰ *Id.* § 6(a).

²³¹ See *e.g.* LA 359/99 *Lea Levin v. Israel Broadcasting Authority*, PD 36, 400, Nevo, 2001 at 408: the managerial prerogative of the employer originates from his property right in the workplace, which is a constitutional right.

²³² LUBOTZKY YITZHAK, *supra* note 6; FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10; BEN-ISRAEL RUTH, *supra* note 1 at 669-672.

These restrictions are by their nature consensual and included as part of a collective agreement or personal contract. For example, an employer may be required to obtain the prior approval of the labor union (trade union) in order to dismiss an employee (consultation duty). A third area of restriction is that imposed by duties of good faith and rules of natural justice. These restrictions concern the procedure of dismissal and the duty of good faith²³³. For instance, they require the need to conduct a hearing prior to the dismissal. As part of this procedure, the employer must note the real and true reason for dismissal.

The focus of this study is on two areas of wrongful dismissal. The first area is that of wrongful dismissal prohibited by statute. This area generally focuses on the cause of the dismissal. The other area discussed looks to the manner of the dismissal. It asks if the dismissal was contrary to due process, such as violating the obligation to conduct a hearing and contrary to the good faith duty.

Restrictions on the procedure for dismissal that are set forth in a contract agreed upon between parties (usually by way of collective agreement) deal with a very specific situation and particular parties and therefore will only be mentioned briefly²³⁴.

2.3.1.1 Dismissals contrary to a labor statute

The legal rule in Israel is that dismissal contrary to a protective or mandatory law is void ab initio²³⁵. The result of such a violation is that the dismissal is

²³³ See *supra* note 184 about the good faith duty. And see: BEN-ISRAEL RUTH, *supra* note 1 at 670.

²³⁴ See *e.g.*, Lea Levin, *supra* note 231 at 411-414, paragraph 3: the court determined redundancy dismissal without consultation with the labor union is wrongful dismissal. And at 414 paragraph 4: consultation duty also derives from the good faith duty.

²³⁵ D48/8-3 (National), Avner Koppel, Insurance Agency v. Adi Weiss Arlovich, PD 20, 57 Nevo, 1988 at 59. The employee was dismissal contrary to the Women Employment Law and the court determined that she was entitled to continue her employment or receive compensation in the rate of her salary, because the dismissal was void. And see: Lubotzky Yitzhak, Frenkel David A., *supra* note 204

deemed to have had no effect and the employee is entitled to his job; the dismissal is invalid and void. This will be discussed further in Section 2.4 below in the context of the appropriate remedy.

A number of labor statutes prohibit or limit the right to dismiss an employee²³⁶. An example of such a statute is the Women Employment Law. This statute enacts prohibitions and limitations on the termination of the employment of a woman during pregnancy, during fertility treatments, during maternity leave, and for sixty days after the woman's return to work from such a leave²³⁷. The prohibitions apply once certain conditions have occurred, such as the employee has been employed in the specific workplace for six months or more²³⁸. The legal rule is that dismissal of pregnant women is prohibited. Once the employee is entitled, the prohibition is absolute and any of such a dismissal would be void, subject to the following exceptions. An exception to the rule is that only after six months of employment this prohibition applies²³⁹.

Another exception is that it would be possible to terminate the woman employee's contract with the permission of the authorized government minister, however, the minister has to be convinced that the dismissal was not connected to the employees' pregnancy, fertility treatments and maternity leave or it involved a situation where the employer had ceased to operate or

at 164. And see: LUBOTZKY YITZHAK, *supra* note 6, chapter 5 at 6 and 3, and see there reference to: LA 1334/02 Haley Nosezky v. State of Israel, PDL 40, 16, Nevo, 2004 at 27 Paragraph 20. [hereinafter: Haley Nosezky].

²³⁶ See *e.g.* presented at: FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10 at 32- 46. And at: LUBOTZKY YITZHAK, *supra* note 6, chapter 5 at 3-18. And see additional examples: The Minimum Wage Law, 1987, Book of Laws, 1211, 1987, 68, which prohibits dismissal of an employee due to his complaint or claim regarding violation of this law or assistance to another employee to complain or claim. (§ 7A). Another law is The Sick Pay law, 1976, Book of Laws, 814, 1976, 206, which prohibits dismissal of an employee during his sick leave and that is up to 90 days (§ 4A(a)).

²³⁷ Women Employment Law, *supra* note 31 §§ 9(a); 9(e) (1); 9(c) (1); 9(c) (1a).

²³⁸ *Id.* § 9(a).

²³⁹ LA 1353/02, Margalith Appelboim v Niza Holtzman, PD 39, 495, Nevo, 2003 at 504 paragraph 8.

declared bankruptcy²⁴⁰. Once the authorized minister concludes the dismissal was connected to the employee's pregnancy, the minister is not allowed to permit the dismissal. If the minister finds the dismissal was not connected to the pregnancy, he then has discretion to permit or to deny the dismissal²⁴¹.

Furthermore, once the authorized minister is convinced the dismissal was connected to the pregnancy, the minister is not permitted to address or consider the issue of the quality of the employees' work. It is no longer relevant, if there are other reasons for dismissal. There is also no legal relevance to the knowledge of the employer about the employee being pregnant. It is enough that the employee was pregnant when dismissed even if the employer was not aware of it²⁴².

To my personal knowledge, the legal situation presented above often leads employers to avoid employment of women in fertility age. The risk of violating the Women Employment Law for an employer is vast. For instance, an employer that was not aware of the employee being pregnant at the time of dismissal, unknowingly violates the statute. Perhaps employers find it is not worthwhile taking the risk. The aforementioned is consistent with the opinion presented by Sharon Rabin Margalioth in chapter 4 of the study.

Another example is discriminatory dismissal which is prohibited by the Equal Opportunities Employment Law ²⁴³ . Employers are prohibited from discriminating workers and work applicants on factors such as gender, sexual

²⁴⁰ Minister of Economy, formerly was Minister of Industry, Commerce, and Employment (formerly the Minister of Labor and Welfare). The Women Employment Law, *supra* note 31 §§ 9(c) (a); 9 (c) (b); 9B. And see: The official announcement gazette, 5815, 5.6.2010, 3309: The authority of the minister was transferred to the manager of administration regularization and enforcement in the Ministry of economy .For simplicity will be called "the minister".

²⁴¹ Haley Nosezky, *supra* note 235, at 22 paragraph A.

²⁴² LA (National) 593/08, Neot Hasharon Nursing Center v Isa Walla, Nevo 2010, 10-11 paragraph 17.

²⁴³ Equal Opportunities Employment Law, *supra* note 12 § 2(5). Another law prohibiting discriminatory dismissal: The Equal Rights of Persons with Disabilities Law, 1998, Book of Laws 1658, 1998, 152, §8(A) (5).

inclination, personal status, pregnancy, parenthood, age, race, religion, nationality²⁴⁴. The prohibition applies to dismissal, among other situations, including hiring practice and working conditions²⁴⁵. Thus for example, dismissal due to the age of the employee is discriminatory and would be deemed a wrongful dismissal²⁴⁶. Another example which is one of the research topics is dismissal of pregnant women. Pregnant woman dismissal would violate the discriminatory provisions of the statute relating to gender, parenthood and pregnancy of the employee and would be deemed a wrongful dismissal.

The Collective Agreement Law, provides another statutory based limitation on dismissal. Under the statute, for instance, an employee may not be fired on account of his joining or being active in a labor union (trade union), or taking actions to unionize the workplace²⁴⁷. Prior to amendments of the law in 2001 and 2009, protection of the right to organize was provided on a case law basis. However, the amendments of the law now anchor the prohibition relating to dismissal for union activity in legislation²⁴⁸. Thus, dismissal of an employee due to his union activity constitutes a wrongful dismissal.

²⁴⁴ Equal Opportunities Employment Law, *supra* note 12 § 2(a): additional bases of discrimination are: fertility treatments, in vitro fertilization treatment, country of origin, residence, outlook, political party, military reserve force, call to serve in the military reserve force or expected service including the duration and frequency of the service.

²⁴⁵ *Id.* § 2(a) (5). Other situations discrimination is prohibited are: acceptance to work, work conditions, promotion at work, professional training, payments and benefits granted to the retiring employee.

²⁴⁶ See *e.g.*: LC 9466/08 Yoram Shoal v. I.B.M. Global Services Israel, Nevo, 2011. The court determined Shoal was wrongfully dismissed due to his age.

²⁴⁷ The Collective Agreement Law, *supra* note 214, § 33(10) (A).

²⁴⁸ *Id.* §§ 33(10) - 33(16). Amendment number 6, Book of Law, 1772, 2001 at 123, determines prohibition to dismiss an employee. Additional amendments: Amendment number 7, Book of Law, 2203, 2009 at 243 and Amendment number 8, Book of Law, 2208, 2009 at 316. And see CDA (National) 24/10 Hot Telecom Ltd. v National Labor Federation (Histadrut) and Yony Mendel, Nevo 2010 at 13-16 paragraph 17 [hereinafter: Hot Telecom].

2.3.1.2 Dismissal contrary to due process: the hearing and good faith duty

Another source of wrongful dismissal is dismissal not in good faith or without due process which is presented below. The obligation for a hearing developed in the administrative law and has been recognized in the case law as part of the rules of natural justice²⁴⁹. Michal Horovitz cites the origin of the right to a hearing in the Bible, referring to the story of Abimelech in Genesis, who was saved from death by the hearing, which God granted him²⁵⁰.

Haim Beranzon notes there are several legal normative sources of the hearing right, among them is the fundamental constitutional right derived from Basic law: Human Dignity and Liberty. Another cited source has been in Jewish Law and the story of Adam and Eve in Genesis where God granted them a hearing before expulsion from Garden of Eden. The obligation of justice appears not only in the Jewish Bible, but also in the Oral Law set forth in the Talmud. Administrative law and an inherent duty of fairness of the government authority to allow a citizen a hearing before deciding his fate have also been cited as sources for the right to a hearing²⁵¹.

Thus derived from many sources, the hearing is deemed a fundamental right in the Israeli law system and in labor relations²⁵². It is a primary right of the

²⁴⁹ Horovitz Michal, *A Hearing conducted in a Superficial Manner –The Principle of a Hearing From an Analytical Perspective*, 9 LAW AND BUSINESS, Radzyner School of Law Pub., 311, 2008-2009 (Hebrew) at 328.

²⁵⁰ *Id.* at 315 refers to: Genesis chapter 20: Abimelech took Sarah the wife of Abraham to his home but did not approach her. God came to him in his dream and said he was a dead man for taking a man's wife. Abimelech explained she was the sister of Abraham as Abraham introduced her and he did not approach her. God answered he would not kill him if he returned Sarah to Abraham.

²⁵¹ Berenson Haim, *The scope of the hearing duty and the right of inspection in fair administrative hearing procedure in labor relations*, in ESSAYS IN HONOR OF ELIKA BARAK USSOSKIN 327, Adler Stephen ed. Nevo publisher, 2012 (Hebrew) at 335: refers to Basic law: Human Dignity and Liberty, 1992, *supra* note 7; Genesis chapter 3; Deuteronomy chapter 1, note 19; Zaks case. And see at 331: the hearing applies to any change to the worse in employment conditions or derogation from the employees' rights. However, the hearing in these situations is out of the scope of the research.

²⁵² LA 1027/01 Dr. Yossi Guterman v. Emek Yizrael Academic College, 37 PDA 311 Nevo 2003 at 455 paragraph 14.

employee to know what allegations are being asserted against him that led to his dismissal and the right to respond to these allegations²⁵³. Once this right has been established, the employer has an obligation to present the allegations against the employee fairly, openly and truthfully²⁵⁴.

The dismissal hearing is a formal meeting between the employer and the employee where the employer states the reason for dismissal. The employee then has the opportunity to argue against the claims and try to convince the employer not to dismiss him. An employee attending a dismissal hearing may be accompanied by a lawyer or a union representative²⁵⁵. There are no formal legal rules for conducting the hearing, but the courts have developed some "rules of thumb"²⁵⁶.

The employer must inform the employee in advance and in writing of the reasons for the dismissal, in order the employee could prepare for the hearing²⁵⁷. Rabin Margalioth claims that oral notice may be sufficient²⁵⁸. In my opinion, there is an evidential problem with an oral notice to a hearing. An employer sued by a dismissed employee for using an inappropriate dismissal procedure will have difficulty proving his actions followed the proper procedures. It is in the interest of the employer conducting a hearing to have

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See Shoval, *supra* note 246 at 17 paragraph 72: the employee is entitled to get help from a lawyer to answer the allegations. However, Shoval was accompanied in the hearing by representative of the labor union. See LB (TA) 6741/04 Merav Halperin v. The state of Israel- Office of Security, Nevo, 2008 at 15 paragraph 12 [hereinafter: Halperin]: it is the obligation of the employer to allow the employee to be accompanied by his lawyer.

²⁵⁶ Rabin- Margalioth, *supra* note 8 at 678.

²⁵⁷ *Id.* at 678: Due process requires employers to detail candidly, prior to making the final decision, the reason for discharge. This stage is termed the "reasoning stage." And see: Shoval, *supra* note 246 at 19 paragraph 83: An invitation explaining the meeting is a hearing and details of reasons for the hearing must be presented in order for the employee to prepare himself. And at 21 paragraph 88: Several hours or a few days are not a sufficient time frame for the employee to prepare for the hearing.

²⁵⁸ Rabin- Margalioth, *supra* note 8 at 678. And Shoval, *supra* note 246 at 19 paragraph 83.

written proof of the invitation and also a protocol of the hearing itself, proving it was conducted appropriately²⁵⁹.

At the hearing, the employer is required to listen to the employee willingly and with an open mind and should be prepared to change his decision²⁶⁰. After the hearing, the employer must take the time to check the employee's claims and only after consideration to submit his decision²⁶¹. It is necessary to disclose the real reason for dismissal so that the employee can properly defend himself at the hearing. An announcement of a dismissal, which does not disclose the true reason for dismissal would be deemed a dismissal not in good faith²⁶². The obligation to explain the grounds for dismissal will ensure the exercise of the right to dismiss an employee in an accepted way and in good faith²⁶³. Rabin Margalioth notes that the basis for each of these stipulations is the employer's duty of good faith.

It was the National Labor Court that declared that the due process requirements relate to all types of employment and employers²⁶⁴. The hearing obligation, originally grounded in the public law, expanded from the public to the private employers²⁶⁵. Since 2003, all employers including private sector employers must make termination decisions subject to due process requirements²⁶⁶.

²⁵⁹ See Shoval, *supra* note 246 at 17 paragraph 72: there is a duty to write a protocol of the hearing and to explain the decision.

²⁶⁰ Rabin Margalioth, *supra* note 8 at 678 refers to the "hearing stage," in which the employee has the opportunity to address the issues raised by his employer, and attempt to convince the decision-maker that the termination is unwarranted, unjust, or prohibited by the terms of the contract or statutory provisions.

²⁶¹ *Id.* at 678.

²⁶² Halperin, *supra* note 255 at 18 paragraph 15.

²⁶³ FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10 at 49.

²⁶⁴ Rabin Margalioth, *supra* note 8 at 678 claims the requirement was applied "across the board", and see referral at note 86 to: LA 415/06 Dani Malka v. Supersal Ltd., Nevo, 2007, at 5 paragraph 6, [hereinafter: Dani Malka].

²⁶⁵ Berenson Haim, *supra* note 251 at 331.

²⁶⁶ Rabin- Margalioth, *supra* note 8 at 677 refers to: Guterman, *supra* note 252. And see *e.g.* Shoval, *supra* note 246 at 18 paragraph 73.

Reut Shemer Begas maintains that the hearing obligation required by judicial legislation promotes procedural justice in the workplace and safeguards the dignity of the dismissed employee²⁶⁷. However, she criticizes the extensive application of an administrative hearing process to private sector employers. She suggests that a distinction should be made between public employers and private employers, concerning the application of the procedure of a hearing.

Michal Horovitz believes that there is a need to emphasize the economic benefits of exercising the right to a hearing, so it will not become perfunctory, especially in the private sector, simply to "go through the motions". She claims that the right has become devoid of meaning and does not provide protection for employees²⁶⁸.

Haim Berenson points to the judicialization of the hearing procedure in both the private and the public sector and claims that in the last decade hearing procedures have become more and more formal, due to the involvement of lawyers on both sides²⁶⁹. Berenson believes that the supreme value of the law, including both administrative and labor law, is justice. Therefore, justice should be realized in the hearing procedure²⁷⁰.

Common to the views presented above is the concern regarding the way that the hearing is being implemented in dismissal situations²⁷¹. This concern is not detached from the reality of the labor environment. To my own personal knowledge, the hearing process as currently used has been criticized by employers and employees as being a superficial event that does not fulfill its stated goals. It is perhaps not surprising that the Labor Court has also been

²⁶⁷ Shemer Begas Reut, *Procedural justice and employee dignity in dismissal- reflection on the rule of hearing*, 3 LABOR SOCIETY AND LAW, 175-217,2012 (Hebrew).

²⁶⁸ Horovitz Michal, *supra* note 249 at 340 part 5 she finds the hearing is an interest of the employer: it is a tool to receive information about the workplace, a base for trust relationship with the employees, a way to maintain his reputation, a tool to refrain from additional costs and a way for presenting administrative fairness. And see at 313.

²⁶⁹ Berenson Haim, *supra* note 251 at 341.

²⁷⁰ *Id.* at 360.

²⁷¹ Horovitz Michal, *supra* note 249, Berenson Haim, *supra* note 251 and Shemer Begas Reut, *supra* note 267.

criticized for the pervasive use of the hearing process. In my opinion, the judicial emphasis on dismissal hearings is a way for the court to protect employees from wrongful dismissal and this itself is a worthy reason.

Nonetheless, an objective of this paper is to examine the award for compensation and the factors influencing such an award when there has not been a hearing or the hearing was not conducted properly. In Chapter 5, the paper will examine the factors influencing the courts' rulings, indications or tendencies in the rulings of the courts and produce data to assist the debate taking place on this issue.

At this point, we will now turn to remedies granted by the courts for wrongful dismissal. The remedy of reinstatement will be examined first, followed by that of compensation in the next section.

2.4 The reinstatement remedy

2.4.1 The Tseri ruling

A known remedy for breach of contract is enforcement. In labor law this translates practically as reinstatement of the employee to his job. This paper will use the terms enforcement and reinstatement interchangeably. As presented above, the Contract Remedy Law restricts reinstatement since it compels performance or acceptance of work for personal service²⁷².

Initially, the Israeli Supreme Court interpreted this restriction broadly, as prohibiting in all cases the enforcement of work relations on the employer and employee.

In the leading case of Tseri, it was determined that every work that contains an expression of the skills and personal qualities of the employee are deemed

²⁷² The Contract remedy Law, *supra* note 11 § 3(2).

personal work or personal service²⁷³. There it was determined that it is impossible to compel a medicine factory to re-employ a doctor that served as a medical representative and was dismissed. The court also found that if the dismissal was wrongful, the only remedies for the employee were compensation and perhaps a declaration that the dismissal was illegal.

Gabriela Shalev and Yehuda Adar claim that the Tseri rule originated from English equity law that forbids the enforcement of personal service contracts. The principle purpose of the doctrine was to protect employees from a violation of their personal liberties caused by the forced return to work against their will. Additional reasons for the equity doctrine was concern that an employee forced to return to work will damage the market economy, the difficulty of the courts to supervise the enforcement of such a contract, and the desire to end an unsuccessful personal relationship and an atmosphere of distrust²⁷⁴. However, Shalev and Adar claim that in today's work environment many of these reasons seem outdated. During the intervening years, the Tseri ruling also has been criticized by scholars and the Labor Court.

Today, the need to protect employees, the recognition of the interest of employees in job security and the development of the collective labor law has placed new challenges for the classic contract law. The need to limit the power of the employer to dismiss an employee and to provide him with protection from unjust dismissal increasingly has been recognized in the last decades²⁷⁵.

2.4.2 The Stations Operators Decision

The turning point concerning the treatment of reinstatement was in the ruling of the National Labor Court in the case of Stations Operators Ltd²⁷⁶. The

²⁷³ Tseri, *supra* note 212.

²⁷⁴ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 206.

²⁷⁵ *Id.* at 207.

²⁷⁶ LD (National) 56 / 3-209 Stations Operators Ltd. v. Israel Yaniv, 33 PD 289, Nevo, 1996.

National Labor Court deviated from the Tseri ruling and determined that it is no longer justified to follow Teri's reluctance to reinstate employees.

In Stations Operators, the court confirmed an enforcement order of the Regional Labor Court instructing an employer to re-employ two employees that were dismissed wrongfully, because of their activity as members of the labor union²⁷⁷ .

The President of the National Labor Court at the time, Judge Goldberg, determined that a labor contract will be deemed personal work only when there is an actual direct and permanent working relationship including trust, between the performer of the work and the owner or manager of the employer²⁷⁸. In places where there are numerous employees and the employee does not have a personal relationship with the employer, it is not considered personal work. Therefore reinstatement is an acceptable remedy.

Shalev and Adar find that the personal relationship test formulated in Stations Operators is an appropriate test for protecting the employee from a disproportionate injury to his dignity and freedom²⁷⁹. The court did distinguish between forcing the employer to accept the work and forcing an employee to perform the work. An employee still will not be forced to accept work by the court, even when there is no personal relationship between the employee and the employer²⁸⁰.

2.4.3 Labor statutes permitting reinstatement

²⁷⁷ This was prior to enactment of the section in the Collective Agreement Law prohibiting dismissal of employee organizing the workplace. See *supra* note 214 and see amendments *supra* note 248.

²⁷⁸ Stations Operators, *supra* note 276 at Paragraph 21 .SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 208.

²⁷⁹ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 210.

²⁸⁰ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 208 note 112 refers to Stations Operators, *supra* note 276 at paragraph 21:"...when the employee breaches the contract...enforcement of the employment contract has the odor of slavery".

Although ordinarily the Contract Remedy Law prohibits reinstatement, the legislator intervened by enacting special labor statutes that allow reinstatement. Since dismissal contrary to the law is void ab initio²⁸¹, the employee would be entitled to continue his job and has the right to prevent his wrongful dismissal by submitting his claim to the court²⁸². Yitzhak Lubotzky maintains that the claim should be submitted as soon as possible before the reality of the workplace changes and in order to prevent delayed action argument²⁸³. The most compelling situations for a court to prevent dismissal is where the wrongful dismissal violates a statute²⁸⁴. A wrongful dismissal on account of mild violations of the dismissal procedure usually will not be overturned by the court and reinstatement will not be ordered²⁸⁵.

One example of a labor statute permitting reinstatement is the Equal Opportunities Employment Law that prohibits discrimination in the workplace, including discriminatory dismissal. The remedies of both compensation and reinstatement are available to the courts for an employee dismissed due to discrimination²⁸⁶. The court is empowered by the law to grant an injunction for reinstatement, if it finds that compensation alone will not be just. In this way, the legislator prefers the principle of equality over the principle of freedom of contract²⁸⁷. The freedom of a contracting party – in this case, the employer - to pay compensation and not perform the contract - retreats before the equality values of the worker. The employee is accorded the right to impose reinstatement and ignore the employer's presumptive freedom of the breaching

²⁸¹ Avner Koppel, *supra* note 235 at 59. The employee was dismissed contrary to the Women Employment Law and the court determined that she was entitled to continue her employment or receive compensation in the rate of her salary, because the dismissal was void. And see: Lubotzky Yitzhak, Frenkel David A., *supra* note 204 at 164. And see: LUBOTZKY YITZHAK, *supra* note 6, chapter 5 at 6 and 3, and see there reference to: Haley Nosezky *supra* note 235 at 27 Paragraph 20.

²⁸² See LUBOTZKY YITZHAK, *supra* note 6, Chapter 5 at 46-59.

²⁸³ *Id.* at 46. Meaning the plaintiff postponed his claim or submitted the claim too late.

²⁸⁴ *Id.* at 50.

²⁸⁵ *Id.* at 54.

²⁸⁶ Equal Opportunities Employment Law, *supra* note 12 §§ 10(1); 10(2).

²⁸⁷ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 201-203.

party to pay and not perform. In this case, the goal of the legislator is to promote the principle of equality and abolish discrimination by authorizing the courts to enforce performance of the labor contract²⁸⁸.

Another statute permitting reinstatement is the Collective Agreement Law, which grants courts the authority to reinstate employees for dismissal in breach of contract due to the employees' activity in a labor union²⁸⁹. Judge Stephen Adler stated in the Hot Telecom case that the statute prioritizes the enforcement remedy as the preferred remedy²⁹⁰.

There are several additional labor statutes that permit enforcement of labor contracts, however, these statutes grant only judicial discretion to the court in bestowing the reinstatement remedy²⁹¹. Under these statutes, the preference of the plaintiff claiming reinstatement is subordinate to the courts discretion whether this remedy is appropriate. The considerations the court will use are explained below.

2.4.4 Considerations for reinstatement

The claim for restoration of labor relations is a discretionary remedy. Although in most situations the remedy of compensation is the primary and preferable remedy, in certain circumstances the remedy of reinstatement is justified. In selecting the appropriate relief, the court will look to the special circumstances of the specific case and analyze reinstatement within a framework of balance

²⁸⁸ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 202.

²⁸⁹ Collective Agreement Law, *supra* note 214, §33(11) (A) (1) and see FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 203.

²⁹⁰ Hot Telecom, *supra* note 248 at 16 Paragraph 17. See Collective Agreement Law, *supra* note 214 § 33 (11) (A) (1).

²⁹¹ See *e.g.*, Protecting of Employees Law (Exposure of Offenses of Unethical Conduct and of Improper Administration) 1997, Book of Laws 1997 1611, 66, § 3(a) (2); Women Employment Law, *supra* note 31 § 13A (a) (2).

and proportion²⁹². Shalev and Adar claim that the courts need to form a consistent policy and are entitled to force employers to fulfill their contractual obligations in appropriate cases²⁹³.

Yitzhak Lubotzky maintains that compensation does not always preserve the fundamental rights of workers and labor courts should enforce labor relations in cases where fundamental rights have been violated²⁹⁴. An appropriate example would be the protection of the fundamental right to organize collectively at issue in the Hot Telecom case²⁹⁵. The court there reinstated an employee that was dismissed due to his union activity and determined that compensation in this case would not promote the goal of creating collective relations in the work place. Therefore, reinstatement, and not compensation, was the appropriate remedy²⁹⁶.

The Labor Court is cautious in regards to requiring reinstatement in the private sector²⁹⁷ and it will be ordered more easily with a public employer than with a private employer²⁹⁸. In the Peltzman case, involving a public sector employer, Judge Procaccia ordered the IDF (Israel Defense Force) to prolong the plaintiff's service and find her a different post in the IDF. The court ruled that the discharge from the IDF accompanied by monetary compensation will not

²⁹² FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10 at 61.

²⁹³ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 210-211.

²⁹⁴ LUBOTZKY YITZHAK, *supra* note 6. And see Rabin- Margalioth Sharon, *Turning Points in individual labor law*, 6 DIN VE DVARIM ,341, 2011 (Hebrew) at 352, 353: notes cases where dismissal goes against an important interest of the employee or the public, and monetary compensation could not remedy the damage of dismissal.

²⁹⁵ Hot Telecom, *supra* note 248.

²⁹⁶ *Id.* at 19 paragraph 20. The court found the real reason for dismissal was Mendel's efforts to organize the work place and not his professional conduct, like the employer claimed.

²⁹⁷ LA 300178/98 David Bibas v. Supersal Ltd., PDE 36 481 Nevo, 2001. Judge Barak Elisheba in minority opinion found it is justified to enforce employment relations in the private sector, as opposed to President Adler in the majority opinion. At 500 Paragraph 5, the court determined reinstatement in the private sector will be awarded when the dismissal violated constitutional rights of the employee. Reinstatement is possible but exceptional and is for outstanding cases which was not the case with Bibas.

²⁹⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 209. And see HCJ 4485/08 Rebeca Elisha V. Tel Aviv University, Nevo, 2009 at 17 Paragraph 18, [hereinafter: Rebeca Elisha HCJ].

remedy the wrong inflicted upon the plaintiff. The dismissal in this case had followed a complaint by the plaintiff against her commander²⁹⁹.

Rabin-Margalioth maintains that a new spirit expanding the reinstatement remedy has been injected by the Supreme Court³⁰⁰, and adopted by the labor court³⁰¹. The considerations for reinstatement to be used by the court are (1) the nature of the employer, whether in the public or private sector, (2) the severity of the fault in the dismissal and the good faith of the employer, (3) the impact of the remedy on the employee, (4) the time that has passed since the dismissal and (5) the nature of the relationship between the employee and the work place³⁰². Rabin Margalioth contends it is apparent that an arbitrary dismissal that constitutes breach of the labor contract is a cause for imposing the reinstatement remedy³⁰³. Lubotzky claims that in cases of a violation of the hearing duty, the remedy usually will be compensation and not reinstatement³⁰⁴. Reinstatement, however, will not be awarded when the fault of the wrongful dismissal is not severe³⁰⁵.

After all that is said, nonetheless, the compensation remedy continues to be the main remedy in labor cases today. However, there is now more openness

²⁹⁹ HCJ 6840/01 Peltzman v. Chief of General Staff, IDF, PD 60 (3)121, Nevo 2006, Judge Procaccia at 144,145.

³⁰⁰ Rabin- Margalioth, *supra* note 294 at 354 refers to: Rebeca Elisha HCJ, *supra* note 298; and Kelpner v. Mail Company, *supra* note 184. In both cases importance was given to the fact that the employer was a semi public entity: Tel Aviv University (Elisha) and the Mail Company (Kelpner). In the Kelpner case the dismissal was due to political considerations.

³⁰¹ Rabin- Margalioth, *supra* note 294 at 354. LA 506-09 Ruth Horovitz – Bait Hanna Association, Nevo, 2010: Horovitz was a teacher dismissed due to a dispute she had with an association connected to the school regarding residence. The Labor Court reinstated Horovitz although a long time passed since her dismissal, because the circumstances of the case were exceptional in their severity.

³⁰² Ruth Horovitz, *supra* note 301 at 26 Paragraph 56.

³⁰³ Rabin Margalioth, *supra* note 294 at 354. And *see* same list of considerations taken by the court for reinstatement: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 204-205. And *see*: SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 208-209.

³⁰⁴ LUBOTZKY YITZHAK *supra* note 6, chapter 5 at 58 refers to LA 300235/98 Sultan v. Rahat Municipality, Nevo 2002 at paragraph 14. The court determine the violation is not suitable to the remedy of reinstatement. The injury of the plaintiff does not lead to invalidity of the dismissal act. And *see* Horovitz Michal, *supra* note 249 at 329.

³⁰⁵ LUBOTZKY YITZHAK, *supra* note 6 at chapter 5 at 59.

to a plaintiff's request for reinstatement, if he can convince the court that it is the appropriate remedy for his circumstances³⁰⁶. Lubotzky maintains that the power of the Labor Court to intervene in labor contracts by preventing dismissals is due to a legal system which is paternalistic when it comes to labor contracts - more so than for general contracts³⁰⁷. Even so, enforcement of labor contracts is not the rule and the tendency of most courts is to bestow compensation³⁰⁸.

2.5 The compensation remedy

2.5.1 Compensation for wrongful dismissal due to a labor statute violation

An award of compensation for wrongful dismissal due to violation of a labor statute is provided for in several labor statutes. The statutes provide for pecuniary compensation for the actual damage caused under the specific circumstances of the case and for non-pecuniary (non-financial) damages. Another kind of award is compensation without proof of damage that the court may award upon a violation of the statute up to defined limits set forth in the statutes. The court has the discretion to decide upon the rate of compensation within the allowed limits (although in rare situations a court may make an award in excess of the limits).

One such statute is the Equal Opportunities Employment law aforementioned. This law provides that a plaintiff is entitled to compensation for non-pecuniary damage at the rate the court deems appropriate under the circumstances of the matter and additionally the court is permitted to award compensation

³⁰⁶ *Id.* And see Rabin- Margalioth, *supra* note 294 at 355 .And see: FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10 at 61 claim the "King's Highway", referring to the main road or the common route of remedy in labor law in the private sector, is the remedy of financial compensation. And see Bibas, *supra* note 297 at 501 Paragraph 2-3.

³⁰⁷ LUBOTZKY YITZHAK, *supra* note 6.

³⁰⁸ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 205.

without proof of damage up to the statutory limit³⁰⁹. The statutory limit was originally NIS 50,000 (approximately EUR 11,000). In 2013 this amount was raised to NIS 120,000 (approximately EUR 28,000)³¹⁰. It seems that the higher modified amount is not yet apparent in court rulings in the period of the research and this issue will be examined below.

In court rulings where discrimination is the main reason for dismissal, for example in a case of wrongful dismissal of pregnant women, the plaintiff may be awarded pecuniary damage in the amount of her salary from the time of dismissal until the time of birth and payment for a protected period of 60 days after the maternity leave as well as a childbirth payment. In addition, non-pecuniary damages or compensation without proof of damage will be awarded, taking into account the severity of the discrimination of the pregnant woman³¹¹. The nature of the statutory compensation without a required proof of damage or compensation for non-pecuniary damage (such as, compensation for pain and sorrow) is punitive and aims to deter employers, as will be explained in chapter 3 of the research. The amount, however, must be reasonable and proportional³¹².

Moreover, even if pregnancy was only one of the reasons for dismissal, it will "stain" the dismissal as wrongful. This is the "staining model" applied by the court, whereby it is enough that one of the reasons considered by the employer was the pregnancy in order to categorize the dismissal as wrongful³¹³.

Another such a statute is the Women Employment Law³¹⁴. The dismissal of a pregnant woman is prohibited as stated in section 9 of the law and deemed a

³⁰⁹ Equal Employment Opportunities Law, *supra* note 12 § 10 (a) (1).

³¹⁰ Amendment number 18 of the Equal Opportunities Employment Law, *supra* note 12.

³¹¹ LA (National) 363/07, *Sharona Arbiv v Poamix Ltd., Nevo*, 2010 at 27 paragraph 44.

³¹² LA 697/09 *Plonit v Almony, Nevo* 2011 at 18 paragraph 24. LA 178/06 *Plony v Almonit, Nevo* 2010 at 31 paragraph 32: the amount of compensation awarded should be proportionate to the severity and the circumstances of the case.

³¹³ *Sharona Arbiv*, *supra* note 311 at 13 paragraph 19.

³¹⁴ Women Employment Law, *supra* note 31.

wrongful dismissal. The law accords discretion to the court to award compensation that will not be less than 150% of the monthly salary that the worker is entitled to during the pregnancy period (plus the period of maternity leave and an additional 60 day protected period), unless the court decides, for other reasons that it will note in its opinion, to award compensation of another sum. In addition, the court is entitled to issue an injunction for reinstatement or to award compensation without proof of damage³¹⁵. The objective of the statute is to increase deterrence and promote enforcement of the law on employers that prohibits the dismissal of pregnant women³¹⁶.

A third statute is The Collective Agreement Law that provides that a court may award non-pecuniary compensation at a rate it deems appropriate under the circumstances³¹⁷. The court may award exemplary compensation, which are not related to damage up to an amount of NIS 50,000 or up to NIS 200,000 (approximately EUR 45,000) if the violation of the law was severe³¹⁸.

This statute is beyond the scope of this paper for several reasons. First and foremost because it belongs to the special area of collective labor law. In Israel, the collective labor law is influenced by unique policy considerations that are beyond the purview of this paper which focuses on the issues at the individual labor law level. Second, the most common remedy for wrongful dismissal due to a violation of Collective Agreement Law is reinstatement. Third, on account of the first two reasons, there are hardly any rulings of compensation by the court due to violation of this law. As such, it is less relevant to the research of this paper which examines in particular the compensation feature of awards. Nevertheless, the importance of this law is presented here to demonstrate the

³¹⁵ *Id.* § 13 A. And see LA (National) 627/06 Orly Morey v M.D.P. Yellow Ltd., Nevo 2008 at 13 paragraph 27: the amount of compensation is not less than 150%. According to the section the court needs special reasons to award less than 150% of the salary.

³¹⁶ Proposal Women Employment Law (amendment number 36) (remedies and jurisdiction), 2005, Law Proposals- Knesset, 23.11.2005, 46, explanatory comments of amendment of § 13A.

³¹⁷ The Collective Agreement Law, *supra* note 214 § 33(11) (A) (2).

³¹⁸ *Id.* § 33(11) (B) (1).

attitude of the legislator in Israel towards wrongful dismissal due to violation of collective rights of employees.

However, it is awards under the first two statutes presented which form the basis of the investigation presented in this paper. The rulings of the court on cases of wrongful dismissal due to violation of these laws will be presented and examined. Furthermore, the specific topic of wrongful dismissal of pregnant woman discussed in this section is governed by these two statutes. The reason this topic is important is because claims of this nature are common and frequent in Israeli Labor Courts and will be discussed in detail later.

Nevertheless, wrongful dismissal may violate several labor statutes and the Labor Court may determine the rate of compensation from several sources, cumulatively³¹⁹. Claims of wrongful dismissal of pregnant women usually are submitted according to the two specific statutes mentioned and they may both apply to the same circumstances³²⁰. In Israeli court rulings, it has been determined that dismissal of a pregnant women is discrimination even if no statute applies due to the principle of equality – a fundamental principle applicable to the entire Israeli legal system. Dismissal in this context is implementing the labor contract without good faith³²¹. The enactment of the Basic law: Human Dignity and Liberty has elevated even more so this principle to the level of a constitutional right³²².

2.5.2 Compensation for wrongful dismissal due to violation of hearing duty and good faith

³¹⁹ *E.g.*, LA (National) 1156/04 Home center (Do it yourself) Ltd. v Orit Goren, Nevo, 2007 at 30 [hereinafter: Orit Goren]. And see BSA (National) 135/10 Naman counselling and guidance for the golden age v Adva Zafon Benyamin, Nevo, 2011 at 14 paragraph 16.4. The relationship between the Equal Opportunities Employment Law and the Woman Employment Law is that they coexist and the rates of compensation accumulate.

³²⁰ See for example: Margalith Appelboim, *supra* note 239.

³²¹ *Id.* at 507, paragraph 12.

³²² Orly Morey, *supra* 315 at 19 paragraph 36. And see: Basic law: Human Dignity and Liberty, *supra* note 7.

2.5.2.1 Violation of the hearing duty

Compensation awarded by the court for the absence of a hearing or improper hearing procedure prior to dismissal is usually calculated according to multiples of one to twelve monthly salaries in the court's discretion. Granting compensation which is above an annual salary is rare³²³.

In the Merav Halperin case, Halperin was awarded 10 salaries for wrongful dismissal due to flaws in the dismissal process, dismissal based on causes that were not the true causes and mental anguish³²⁴. The flaws in the hearing process included denying the worker a lawyer at the hearing. The court also found that the employer violated the labor contract and the employer's good faith duty by dismissing the plaintiff for an untrue cause³²⁵. Several reasons for finding a wrongful dismissal were determined by the court, but the amount of compensation was not attributed separately to each reason. However, the calculation was calculated according to monthly salaries.

In Israel Electrical Company v. Turgeman, the court determined that while the absence of a hearing is a flaw in the dismissal, it was not an absolute flaw and does not necessarily lead to cancelling the dismissal or to a compensation award to the employee. The type and extent of the remedy depends on the circumstances of the case, nature of the employment, the expectations of the employee to long time employment, the justification of the dismissal, any

³²³ Halperin, *supra* note 255 at 17-18 paragraph 16: the court determined that the top limit rate of compensation for wrongful dismissal is one year's salary. Only in exceptional cases the amount will exceed one year salaries. Halperin was awarded ten salaries. And see: LA (National) 17365-11-11 Jaclyn Swisa v. Yahud Municipality, Nevo 2014 at 57 paragraph 73. And see LA (National) 456/06 Tel Aviv university v. Elisha, Nevo, 2008[hereinafter: Rebeca Elisha LA] and see Rebeca Elisha HCJ, *supra* note 298: the HCJ decision on the same matter: dismissal circumstances of an employee were severe and the remedy of enforcement was not possible due to the passage of time - the court granted particularly high compensation of 24 salaries. And see LUBOTZKY YITZHAK, *supra* note 6 chapter 5 at 67 note 328.

³²⁴ Halperin, *supra* note 255 at 17-18 paragraph 16.

³²⁵ *Id.* at 17 paragraph 15.

special arrangement of the employer and such other considerations as are determined by the court in its discretion³²⁶.

Similarly, in the Lulu Rashad case, the court ruled that the compensation amount in cases of wrongful dismissal due to flaws in the hearing process is determined by considering all the circumstances of the case. These include the severity of the flaw in the dismissal, the pecuniary damage that occurred from lost income, the personal circumstances of the employee, employee's seniority at work, the extent of the injury to the dignity of the employee caused by the manner of dismissal³²⁷.

Shemer Begas claims that the right to a remedy due to an improper dismissal procedure is an independent source of remedy and a separate category of tort³²⁸. Furthermore, she maintains that an award of compensation on the basis of the number of salaries sends the wrong message to employees and employers that the dignity of employees is derived from their salary. She claims a more worthy judicial policy should be to disconnect the rate of compensation from the salary and to decide each case on its merit³²⁹.

2.5.2.2 Violation of the good faith duty

In Israel, the good faith duty and the hearing duty are intertwined. As part of the good faith duty, the employer must present the employee with the real reason for his dismissal in order for him to explain and rebut the allegations against him in the hearing³³⁰. However, there are other situations of wrongful dismissal due to a violation of the good faith duty. For the purposes of this

³²⁶ LA (National) 701/07 Israel Electrical Company Ltd. v Shlomy Turgeman, Nevo, March 2009 at 11 paragraph 17.

³²⁷ LA (National) 21781-10-10, Lulu Rashad v Regional Committee for planning and construction-Alonim, Nevo, July 2013, at 31 paragraph 65.

³²⁸ Shemer Begas, *Supra* note 267.

³²⁹ *Id.*, at 216-217. Shemer Begas refers to the benchmark of 50,000NIS in Equal Opportunities Employment Law as it expresses the non-pecuniary damage caused to the employee (Shame and grief).

³³⁰ Halperin, *supra* note 255 at 18 paragraph 15. And see FEINBERG NACHUM & GOLDBERG MENACHEM, *supra* note 10 at 49.

paper, an attempt has been made to separate the hearing and good faith duties in order to conduct a precise and accurate analysis. Yet, the division between hearing duty and good faith duty is not clear cut. At times, the good faith duty is applied by the court to wrongful dismissal that is not connected to the hearing duty. At other times, it is applied as the principle reason for dismissal done in violation of the hearing duty.

The good faith duty is referred to by the court in several situations of wrongful dismissal. In the Halperin case³³¹, the court determined there was an absence of good faith, where the employee was dismissed on the basis of an incorrect justification. The cause of dismissal presented to the employee was not the true cause. The court then found that this constituted conduct without good faith by the defendant and a breach of the labor contract³³².

A different instance of a violation of the good faith duty may be found in the absence of good faith in the circumstances of a dismissal without connection to the hearing duty. In the Mey- Tal case for example, an employee was dismissed after 10 days of employment. Mey-Tal had been hired for the job without the qualifications needed for the job. This was known and so stated by the employer. The employer, however, declared that Mey-Tal would be acquiring the qualifications during the first three month of employment. Nonetheless, the employer dismissed her after 10 days before she could acquire training on the basis that she was not qualified for the position. The court determined the employer had acted without good faith in the dismissal³³³.

The Labor Court also has referred to wrongful dismissal due to breach of labor contract by conduct without good faith. In the Margalith Appelboim case, the

³³¹ *Id.*, *supra* note 219.

³³² *Id.*, at 17 paragraph 15.

³³³ DM 54842-03-11, Ronny Mey-Tal v Optica Hador Hashlishy Ltd., Nevo 2012. Appeal: ruling confirmed 2013: BRA (National) 41339-10-12.

court determined that even when the statutes prohibiting dismissal of pregnant women do not apply, the dismissal of a pregnant women itself will be deemed wrongful due to conduct under the labor contract without good faith³³⁴.

Thus, it can be seen that a violation of the good faith duty may be due to the presentation of an untrue reason for dismissal, as in the Halperin Case, or a violation of the good faith duty as a result of the general behavior of the defendant or the reason leading to the dismissal, as in the Mey-Tal Case. A violation of good faith duty may also be by the conduct of the labor contract without good faith in dismissal, as in the Margalith Appelboim Case and Halperin Case. However, once the violation has been found, the calculation of compensation usually is according to salaries, as was demonstrated in the above cases.

2.6 Conclusion

This chapter reviewed breach of contract by wrongful dismissal in Israel. It examined the meaning and sources of wrongful dismissal and the remedies applied by the court. Compensation for a wrongful dismissal in violation of a statutory provision, is usually awarded by the court within the statutory limit stipulated in the relevant law. Compensation for a wrongful dismissal in violation of the duty of good faith and hearing procedure are usually calculated by the court on basis of monthly salaries. In every case the court has discretion to assess and determine the amount of compensation. However, it was demonstrated that the court has a flexible range for determining and assessing compensation rates. Furthermore, the division among factors in the calculation of compensation is not clear cut.

³³⁴ Margalith Appelboim, *supra* note 239 at 505 paragraph 10, at 506-507 paragraph 12.

Chapter 3

Assessment of Compensation in Israeli Courts

3.1 Introduction

This chapter examines and contrasts the award of compensation for breach of contract in Israel's Labor Courts and courts of general civil jurisdiction ("General Court"). The chapter reviews the differing considerations taken into account by the Labor Courts and General Courts and suggests that Labor Courts use broader discretionary powers and look to wider policy considerations in awarding compensation for breaches of contract. It is contended that the basis for the Labor Court's willingness to exercise wider discretion is found in the distinct features of the labor contract and the special characteristic of the labor relationship, as presented in chapter 2. This contrast in treatment between the courts is relevant to this paper's research of Labor Court awards of compensation for breach of contract by wrongful dismissal. The research assumption of this paper is that the assessment and determination of compensation awards is influenced by several factors and that the tendencies can be seen in the determinations of the Labor Court. Therefore, identifying the special considerations influencing Labor Courts rulings, in contrast to those of the General Court, serves as an important comparative base for the research underlying this paper.

Compensation is awarded as a remedy for a plaintiff suffering damage or loss inflicted by the defendant's breach of contract. In both Labor Courts and General Courts, a breach of contract is subject to Israel's Contract Remedy Law³³⁵, which applies both to general contracts³³⁶ and labor contracts³³⁷. In both court systems, discretion is exercised by courts in determining this

³³⁵ The Contract Remedy Law, *supra* note 11.

³³⁶ Governed by The civil court system. See: The Courts Law, *supra* note 17.

³³⁷ Governed by The labor court system. See: The Labor Court Law, *supra* note 3.

compensation. However, the Labor Court receives additional discretionary powers under specific labor statutes³³⁸ that grant it further discretion to award compensation where these statutes are violated.

Part 2 (Section 3.2) of this chapter reviews the categories of pecuniary and non-pecuniary compensation for breach of contract under the Contract Remedy Law and the determination of such compensation by General Courts. Part 3 (Section 3.3) reviews the determination and award of pecuniary and non-pecuniary compensation by Israel's Labor Courts. Part 4 (Section 3.4) contrasts the significantly different treatment of punitive damages in the Labor and General Court. The differing treatment highlights the influence of special agenda and wide policy considerations in Labor Court rulings.

3.2 Assessment and determination of compensation rates in General Court

3.2.1 Characteristics of the process of assessment of compensation

The assessment and determination of compensation rates for breach of contract by the courts in Israel is complex, involving broad judicial discretion. The great latitude of this discretion leads to uncertainty due to the flexible manner in which Israeli courts reach their determinations³³⁹. Daniel Freidman and Nili Cohen have pointed out the importance of legal certainty so that parties may know in advance whether their actions will be wrongful or not³⁴⁰. The uncertainty of damage awards in breach of contract cases would seem to undermine this central value of Israel's legal system.

³³⁸ *E.g.*, Equal Opportunities Employment Law, *supra* note 12.

³³⁹ FRIEDMAN DANIEL AND COHEN NILI, CONTRACTS, *supra* note 47 at 63-66.

³⁴⁰ *Id.*,

Nonetheless, in the specific area of breach of contract, Friedman claims that there is no entitlement to certainty regarding remedies³⁴¹. This is due to the difficulty of predicting in advance the extent of defendant's liability and plaintiff's loss caused by the breach. The uncertainty is inherent on account of court rules that provide a "built-in flexibility" which makes prediction of the result of a breach of contract difficult³⁴². Friedman and Cohen note the extensive discretionary powers of Israeli courts in determining the rate of compensation³⁴³. In some instances, the discretion is explicit³⁴⁴. In other cases, discretion is disguised in directives based on frame terms³⁴⁵.

The difficulty and imprecision of rules relating to damages is a problem not only of Israeli law³⁴⁶. As Treitel cites from an English case, "the assessment of damages is not an exact science"³⁴⁷. Judges are granted with a large degree of discretion when assessing damages and rules of law governing the recovery of damages are flexible³⁴⁸. Similarly, Dobbs claims rules for computing damages are flexible and subject to practical limitations of proof and understandings³⁴⁹.

³⁴¹ Friedmann Daniel, *Rights and Remedies*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 3, Cohen Nili and McKendrick Ewan eds., Hart Publishing, 2005.

³⁴² Friedman Daniel, *supra* note 341 at 16.

³⁴³ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 541.

³⁴⁴ The Contract Remedy Law, *supra* note 11 § 13: "Compensation for Non-Pecuniary Damages": "... the court may award compensation ... at the rate it deems appropriate under the circumstances of the matter".

³⁴⁵ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 540-542: Terms that leave the court space to perform discretion such as: "foreseeability of damage" (The Contract Remedy Law *supra* note 11 § 10) and "reasonable measures" (The Contract Remedy Law, *supra* note 11 § 14).

³⁴⁶ TREITEL G.H., *REMEDIES FOR BREACH OF CONTRACT, A COMPARATIVE ACCOUNT*, Clarendon Press 1988 at 174-179. Referred to by SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 287 note 27.

³⁴⁷ TREITEL G.H., *supra* note 346 at 174. At 176 claims the court may disregard the rules, override the rules or choose between the rules of assessment as part of the discretion conferred upon them.

³⁴⁸ *Id.*, at 174. Treitel claims that the discretionary power of the court to choose between different bases and methods to assess the damage caused by the breach result in different amounts of awards. Rules of remoteness and foreseeability of loss, rules of reasonable mitigation are all rules that are vague, imprecise and uncertain leaving the court a large degree of discretion. Treitel discusses discretion of courts to reduce compensation or even to deny them. See at 177-178.

³⁴⁹ DOBBS DAN B., *supra* note 152 at 763,764. Dobbs claims damages assessment rules are imprecise resulting from an environment of practical limitations of evidence and understanding and further limited by specific conditions overlaid by the parties themselves.

In general, imprecise rules for ascertaining damages lead to broad judicial discretion in determining the assessment of damages.

In Israel, the process of assessing compensation for breach of contract starts with the case law principle of "restitutio in integrum"³⁵⁰, that compensation aims to place the plaintiff in the situation he would have been had the contract been performed³⁵¹.

The two primary categories of damage for breach of contract assessed by Israel's courts are pecuniary and non-pecuniary damages. The categories are recognized under Section 10 (pecuniary) and Section 13 (non-pecuniary) of the Contract Remedy Law. The treatment of Israeli courts of these categories of damage is set forth below.

3.2.2 Compensation for pecuniary damages in contract law

Pecuniary damages are governed by section 10 of the Contract Remedy Law³⁵². Pecuniary damages are financial and economic harm caused to the plaintiff by the defendants' breach of contract, as opposed to physical damages that are bodily damages³⁵³.

The plaintiff must prove four elements in order to succeed in a claim for pecuniary damages³⁵⁴. The first element is Damage, whereby the plaintiff must

³⁵⁰ Judge Barak in Einstein case: RCA 2371/01 Einstein v. Osy planning construction building and developing Ltd., PD 57(5) 787, Nevo, 2003 at 792,793.

³⁵¹ *Id.*

³⁵² *Supra* note 11 § 10: "Right to compensation". And see chapter 1 of the study: section 11 does not clearly apply to the labor contract and therefore will not be discussed.

³⁵³ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 544-545 they state bodily damages are mainly relevant to tort law. Pecuniary - financial damages subtract the revenue or property of the plaintiff, at 545. *Compare* to the tort law, defines pecuniary damages as: "'Financial Loss" - any actual loss or expense which is capable of estimation in money and of which particulars can be given", see Tort Ordinance, *supra* note 59 § 2.

³⁵⁴ The determination of the compensation is on a subjective basis of the damage caused to this particular plaintiff and not on the objective basis. FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at

define the precise damage that occurred. The second element is Causation. The plaintiff must show the causal relation between the breach of contract and the damage suffered. The third element is Foreseeability, in which the plaintiff must show that the defendant foresaw or should have foreseen that the breach of contract would cause the damage. The last element is the Amount of Damage. The plaintiff must produce evidence of the rate of damage caused and not leave it to the estimation of the court³⁵⁵. The first three elements are explicitly mandated in the statute, however, the final element of the rate of damage is not explicitly stated in Section 10, but rather has been developed through case law in the interpretation of Section 10. The first element of damage relates to all the bad effects on the welfare of the plaintiff created by the breach of contract. The fourth element of the amount of damage relates to the specific quantitative amount, of the damage created to the plaintiff³⁵⁶. That said, judges nonetheless will estimate the rate of compensation when there is not enough evidence presented on the rate of damage³⁵⁷. These four elements are cumulative and plaintiff's failure to establish any one of the elements will result in a denial of the claim for compensation³⁵⁸.

537-538 : Objective base of damage is the damage caused to a reasonable person in the plaintiff's situation under market conditions. The Contract Remedy Law § 10 supports the subjective basis of damage calculations. However, Friedman and Cohen stress that some objective measures are implemented on the calculation of compensation. For example, rules concerning foreseeability of damage may limit the rate of compensation and are an objective measure. The damage caused to the plaintiff may be large subjectively but if it was not foreseeable damage he will not be compensated for this damage. And See and compare The Contract Remedy Law § 11: "Compensation without Proof of Damage" which is based on an objective base of calculation.

³⁵⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 295, 348. And see Judge Barak in CA 355/80 Nathan Anisimov Ltd v. Bat Sheba castle hotel Ltd. PD 35 (2) 880, Nevo, 1981, at 808, 809 paragraph 4.

³⁵⁶ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 295, 296, 297, 298.

³⁵⁷ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 348.

³⁵⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 295.

The Einstein case³⁵⁹ illustrates the application of section 10³⁶⁰ and the determination of compensation by a general court. There, defendant breached a contract to sell property and the value of the property increased beyond the price of the contract. Judge Barak explained that although the tests for determining damages are numerous and change according to the circumstances, the court must begin with the principle of "restitutio in integrum"³⁶¹. Based on this principle, Barak concluded that the relevant calculation for the Section 10 rate of damage is the difference between the (now higher) market price of the asset and the contract price³⁶².

3.2.3 Compensation for non-pecuniary damages in contract law

Non-pecuniary damage are governed by Section 13 of the Contract Remedy Law³⁶³. Non-pecuniary damages include pain, suffering, grief and shame³⁶⁴. These are spiritual, immaterial damages as opposed to pecuniary damage that are material, financial damages. In spite of its non-financial nature, it is assumed that a monetary value can be attached to the intangible pecuniary damage. However, since it is difficult to do so, an award under this category is understood to be largely arbitrary³⁶⁵.

The question of the somewhat arbitrary compensation rates is discussed in the following chapters of the research regarding compensation for wrongful dismissal. Since part of the compensation awarded by the court are for non-

³⁵⁹ Einstein case, *supra* note 350 at 792,793.

³⁶⁰ The Contract Remedy Law, *supra* note 11.

³⁶¹ Einstein case, *supra* note 350 at 792,793.

³⁶² Einstein case, *supra* note 350 at 793 paragraph 8: the plaintiff is obligated to mitigate his damage according to section 14(a) of the Contract Remedy Law.

³⁶³ *Supra* note 11 § 13:"Compensation for Non-Pecuniary Damages".

³⁶⁴ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 545.

³⁶⁵ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 300. And see DOBBS DAN B., *supra* note 152 at 211 claims it is not possible to quantify and prove in evidence non-pecuniary harm. And see: FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 675: they note that non-pecuniary damages are difficult to assess, because they are not economical.

pecuniary damages, it may appear that the tendency of the court prevails for awards of compensation for wrongful dismissal.

In a claim for non-pecuniary damages, the plaintiff must prove the same elements required under Section 10 of the Contract Remedy Law for pecuniary damages. Concerning the first three elements, plaintiff has the burden to prove the existence of damage, causation, and foreseeability. However, in contrast to Section 10, plaintiff does not need to prove the rate of damage for non-pecuniary damages³⁶⁶ .

Here, the court has explicit statutory discretion to determine the rate of compensation for non-pecuniary damages³⁶⁷ . Unfortunately, the flexible discretionary judicial power conferred by the Israeli legislator in Section 13 of the Contract Remedy Law creates uncertainty in the assessment of compensation, as mentioned above.

Moreover, the relevant considerations for granting compensation and the rate of compensation for non-pecuniary damages are not stipulated in Section 13³⁶⁸. Shalev and Adar assert, the considerations most used by the courts concern the nature of the injury: quality of the injury, type of interest injured, volume and extent of the injury, continuity of the suffering and the influence of the injury on the plaintiffs and his family routine of life³⁶⁹.

³⁶⁶ The Contract Remedy law, *supra* note 11 and see: SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 295.

³⁶⁷ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 302. And see: The court is authorized, according to section 13, to determine compensation "... at the rate it deems appropriate under the circumstances of the case".

³⁶⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 302 and FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 676: Section 13 stipulates that: "... the court may award compensation ...". The court is permitted to bestow compensation but is not obligated to. That is in contrast to the legal right for compensation in case of pecuniary damage that is a vested right and not subject to the courts discretion.

³⁶⁹ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 308.

Courts also take into account the institutional and social implications of an award of non-pecuniary damages. These considerations include the potential flooding of the courts with similar claims, the resulting deterrence of economic activity and the potential fabrication of evidence due to the speculative nature of these non-financial injuries³⁷⁰.

Shalev and Adar maintain that these factors lead Israeli courts to award non-pecuniary damages only in special, limited cases and at rates of compensation that are modest³⁷¹. They also contend that court judgments awarding non-pecuniary damages do not include discussions regarding the entitlement to such compensation and the rate of compensation. These discussions are either absent from the judgment or the explanation is minimal - merely stating that the non-pecuniary compensation is appropriate under the circumstances. Most often, there is no explanation at all or statement that compensation for non-pecuniary damage is discretionary and therefore routinely granted³⁷². Similarly, when awarded, the rates are similar and rarely exceed a few thousand NIS³⁷³.

Freidman and Cohen note that rulings of non-pecuniary compensation are not based on decisive legal rules, but rather on the perception that normal compensation is not adequate and needs to be supplemented. The primary

³⁷⁰ SHALEV GABRIELA, ADAR YEHUDA *supra* note 44 at 309. And see at 311: Examples of cases the general court awarded non-pecuniary compensation are the following: loss of spiritual enjoyment; mental anguish and humiliation of a woman due to breach of promise to marry her; inconvenience and mental anguish due to delay in delivery of an apartment and so on.

³⁷¹ *Id.* at 304 and see note 78: the common tendency is to minimize compensation for non-pecuniary damages in case of breach of contract.

³⁷² *Id.* See examples at 304 reference to: CA 3437/93 Egged Israel Transport Cooperative Society Ltd. v. Yoel Adler, PD 54(1) 817,835 Nevo, 1998. Judge Mazza determines that prior to the court determining such compensation the plaintiff must prove the non-pecuniary damage and the causal relation between the breach and the damage. The plaintiff did not succeed in proving it and was not awarded compensation for his mental anguish; CC 3141/01 Michael Kedmi v. G.M.H.L. Building Company 1992 Ltd., Nevo, 2006. Paragraph 307, Judge Drori repeats Judge Mazza in the Egged case but determined that the plaintiff did prove the non-pecuniary damage and the causal relation between the breach of contract and the damage and was awarded compensation. The Judge states that the compensation is moderate. Paragraph 308.

³⁷³ SHALEV GABRIELA, ADAR YEHUDA *supra* note 44 at 308 note 91; and ADAR YEHUDA, *supra* note 148 at 104 note 79 for the typical rates granted: 5000- 10,000 NIS. (Approximately EUR 1,100- 2,200).

consideration in these types of situations is the behavior of the parties. Friedman and Cohen claim that compensation for non-pecuniary damages serves as a substitute for punitive damages by that they have a punitive character that punishes the defendant when the defendant's behavior is problematic

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Another source for comparison is the Israeli tort law. The Tort Ordinance, at least explicitly, allows only pecuniary damages³⁷⁵. Shalev and Adar claim that in tort cases based on negligence, the right to pure non-pecuniary damage was not acknowledged in the past. This approach was changed by the Supreme Court in Jerusalem Municipality V. Gordon³⁷⁶. There it was determined that tort law may protect a person from injury of a fundamental right and may compensate for intangible damages (i.e., non-pecuniary damages). Shalev and Adar also consider the enactment of the Basic Law: Human Dignity and Liberty, 1992³⁷⁷ as elevating non-pecuniary values of dignity and liberty to a constitutional position supporting damage awards³⁷⁸.

Yifat Bitton³⁷⁹, contends that courts tend to grant arbitrary compensation without debating the assessment of non-financial damages³⁸⁰. Bitton claims this

³⁷⁴ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 681-682.

³⁷⁵ The Tort Ordinance, *supra* note 59 § 76: "Compensation": § 76 (1) determines damage caused directly and by the natural event from the wrong. § 76 (2) determines pecuniary damages.

³⁷⁶ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 306-307 and Bitton Yifat, *supra* note 25 at 150-151 refers to CA 243/83 Jerusalem Municipality v. Eli Gordon, 39(1) 113, 139-143 Nevo, 1985. [Hereinafter: Gordon case]. The court compensated Gordon whose liberty was injured, for non-pecuniary damages caused to him by false arrest. The court determined that there is a general duty of care also in the tort of negligence concerning pure non-pecuniary damages. Judge Barak stated that as the court is allowed to award compensation for non-pecuniary damages in contract law according to section 13 of contract remedy law, the same should apply in tort law.

³⁷⁷ Basic law: Human Dignity and Liberty, *supra* note 7.

³⁷⁸ SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44 at 307 and see Bitton, *supra* note 25, addressing injury to constitutional rights in tort law.

³⁷⁹ Bitton, *supra* note 25.

³⁸⁰ Karassin, Or., *supra* note 26, at 548 note 48.

leads to inconsistency in compensation rates awarded by the courts³⁸¹. She maintains non-pecuniary compensation assessment is done by estimation and one of the problems of estimation is that the courts assume the level of damage is low³⁸². A poignant example is the low compensation amounts awarded to a rape victim which are often characterized by the court as "estimated damages"³⁸³.

Bitton stresses that in these situations the conceptualization of the damage by the court is absent and the result is difficulty in assessing the rate of compensation³⁸⁴. The decisions are missing a clear, decisive discussion and an independent financial measure performed by the courts in its assessment of compensation. She cites in support the recurring rulings of the same NIS 50,000 for compensation for injured emotions. The source of this amount is found in several statutes in sections dealing with determining compensation without proof of damage³⁸⁵.

In her opinion, judges are fixated on this amount of compensation and ignore the special circumstances of the case before them. They, thus, adopt a formulaic ceiling determined in advance for compensation claims that by their nature must be differing. Bitton claims that courts use this arrangement as a tool to simplify the proving of damage and not as a tool indicating an understanding of the uniqueness of the compensation needed³⁸⁶. In my opinion

³⁸¹ *Id.*

³⁸² Bitton, *supra* note 25 at 149- 150.

³⁸³ *Id.*, at 150 refers to CC (TA) 113233/98 Marmur Dganit v. Maoz Daniel, Nevo, 2003 at 13: The court found the plaintiff is entitled to protection of her body as a fundamental and constitutional right. This right was violated by the defendant. The court stated that it may award punitive damages in order to punish and deter the defendant and other potential offenders. The judge states that according to this obligation and appropriate judiciary policy, she awards 18,000 INS. This amount is low compensation.

³⁸⁴ Bitton, *supra* note 25 at 156.

³⁸⁵ *Id.*, at 157. *E.g.* Defamation Act, 1965, *supra* note 19; Preventing of Sexual Harassment Law, 1998, Book of Laws 1661, 1998, 166.

³⁸⁶ Bitton, *supra* note 25 at 158.

this is quite an accurate observation and is consistent with the findings of the research presented in chapters 4 and 5.

Discussion about non-pecuniary damages is also found in both American and English law. According to Dobbs³⁸⁷, American law courts may award substantial amounts for non-pecuniary damages, such as pain and suffering in cases of personal injury.

In England, according to Treitel³⁸⁸, the general rule is that the right to recover damages for injured emotions is restricted by the decision of the House of Lords in *Addis v. Gramophone Co Ltd*³⁸⁹. This case concerned wrongful dismissal, but is applied to other areas as a general rule. In the *Johnson v. Unisys* case, the House of Lords denied an attempt to recover additional compensation for mental distress based on the common law as a "parallel remedy" not limited by amount³⁹⁰.

In Israel, the concern of uncertainty resulting from wide judicial discretion seems most acute in the area of non-pecuniary damages where the Contract Remedy Law provides broad judicial discretion. However, General Courts have perhaps dealt with this uncertainty by generally limiting non-pecuniary awards to relatively small, if not de minimis, amounts. The position of the Labor Courts in assessing damages is somewhat different.

³⁸⁷ DOBBS DAN B., *supra* note 152 at 211.

³⁸⁸ PEEL EDWIN, *supra* note 129 at 1038-1039.

³⁸⁹ [1909] A.C.488 and see *Johnson v. Unisys Ltd.* [2001] UKHL 13; [2003] 1 A.C. 518 [hereinafter: *Johnson v. Unisys*], Lord Millett at 69:" That case established the principle that damages are awarded for breach of contract and not for the manner of the breach; accordingly nothing can be recovered for mental distress, anxiety, injury to feelings or (so it is said) damage to reputation."

³⁹⁰ *Johnson v. Unisys Ltd.* *supra* note 389 .The employee was dismissed, complained of unfair dismissal to an industrial tribunal and was awarded compensation .As a result of the dismissal he suffered psychiatric illness and instituted proceedings for breach of contract and negligence on the ground of the manner of his dismissal. He claimed his dismissal breached the implied term of trust and confidence of the employment contract. The claim was not accepted and the employee appealed .The appeal was dismissed. Lord Steyn at [15]:"... ruled out special damages for loss of employment prospects flowing from the manner of a wrongful dismissal." Lord Hoffmann at [56], [57]:"... The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit. ... I do not think that it is a proper exercise of the judicial function of the House to take such a step."

3.3 Assessment of compensation in the Labor Court

3.3.1 Compensation for pecuniary damages

Labor contracts are similarly subject to Sections 10 and 13 of the Contract Remedy Law and therefore a plaintiff can obtain compensation for pecuniary and non-pecuniary damages. Judge Ilan Itah in *Plony v. Almonit*³⁹¹ explained that contract laws applied to labor contracts are adjusted to the special features of labor relations, including the determination of damages³⁹². *Plony v. Almonit* involved a breach of a labor contract by wrongful dismissal³⁹³. Although non-pecuniary damages were not awarded to the plaintiff, the case is important for setting out rules clarifying the court's approach towards pecuniary and non-pecuniary damages, as described hereinafter.

As in general contract law, there are two main categories of compensation for breach of contract – pecuniary and non-pecuniary damages³⁹⁴. Concerning pecuniary damages, Section 10 of the Contract Remedy Law³⁹⁵ requires the plaintiff to prove each of the four elements: damage, causation, foreseeability and the rate of damage. For the labor contract, the loss incurred is lost wages and the calculation of the rate of damage is the period of loss of income multiplied by the salary of the employee³⁹⁶.

³⁹¹ LA (National) 43380-06-11, *Plony V Almonit*, Nevo, 2014.

³⁹² *Id.* at 16 paragraph 29: The right for compensation due to damage, determined in section 10 of the Contract Remedy Law, is modified to the labor field.

³⁹³ *Id.* at 10 paragraph 18, Judge Ilan Itah explains that wrongful dismissal is a breach of the labor contract, may include violation of good faith duty and violation of statute. *Plony* was not awarded non-pecuniary damages due to his bad conduct (sexual harassment complaints against him and delay in claiming his rights).

³⁹⁴ *Id.* at 10 paragraph 18, and as mentioned above in sub chapter 1.1.

³⁹⁵ *Supra* note 11.

³⁹⁶ *Plony* case, *supra* note 391 at 17 paragraph 30: The income of the employee is calculated on base of monthly salary plus additional benefits. The question of adding the benefits is subject to debate in case law. And see LUBOTZKY YITZHAK, *supra* note 6 at 70 affirms Judge Itah.

However, there are two types of labor contracts regarding the term of the contract. The first is the fixed term contract. On such contracts, the pecuniary damage is the loss of income calculated until the end of the contractual period³⁹⁷ .

The second and more common type of labor contract is the contract with an unlimited term³⁹⁸. However, it is difficult to assess the pecuniary damage for a breach of an unlimited term labor contract, because the period of loss of income is open ended and unknown. As a result of this problem, courts have used the period of one year as the duration of the unlimited contract for purposes of calculating pecuniary damages. This time period is based on the premise of yearly employment and the assumption that employment is contracted for a year³⁹⁹.

Judge Itah ruled that while the period for calculating damages was to be in the range of one year, the court would also look to the circumstances surrounding the breach, including the severity of the flaw in the dismissal, the pecuniary damage that occurred and personal circumstances of the plaintiff ⁴⁰⁰ . Nonetheless, in exceptional circumstances, there is no bar to the court from

³⁹⁷ Plony case, *supra* note 391 at 11 paragraph 20. And LUBOTZKY YITZHAK, *supra* note 6 at 69.

³⁹⁸ Plony case, *supra* note 391 at 11 paragraph 20. In these two cases the employee had the duty to mitigate his damage (Section 14 the Contract Remedy Law). *Compare* with LUBOTZKY YITZHAK, *supra* note 6 at 69-70 (claims the duty does not apply in every case). See, FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 729-730: Mitigation in labor contracts means that the employee that was dismissed in breach of his contract must try to find a new job. However, the employee is not required to accept employment that is beneath his skills or rank. When an employee has little chance to win reinstatement, he has little choice but to find substitute employment. In the past, enforcement was not awarded to employees and dismissal put an end to the contract with no chance of reinstatement. The employee was obligated to find a substitute job and minimize his loss. Later developments allowed employees to obtain reinstatement in certain situations. In these cases, the employee cannot mitigate his damages by seeking another position, because getting a substitute job would contradict the reinstatement.

³⁹⁹ Plony case, *supra* note 391 at 12 paragraph 22. And LUBOTZKY YITZHAK, *supra* note 6 at 67

⁴⁰⁰ Plony case, *supra* note 391 at 13 paragraph 23: such as plaintiff's age, and the harm caused to the employee's dignity.

determining the calculation of pecuniary damages for a period longer than one year⁴⁰¹.

3.3.2 Compensation for non-pecuniary damages

The second category of damages is non-pecuniary damages under Section 13 of the Contract Remedy Law⁴⁰². As described in the discussion on general contracts, the Contract Remedy Law allows the Labor Court to award compensation at a rate it deems appropriate under the circumstances and exempts the plaintiff from having to prove the rate of damage. However, the plaintiff is not exempted and still must prove the remaining three elements for a claim: damage, causation and foreseeability⁴⁰³.

Labor Courts have interpreted this section as granting judicial discretion to award compensation for sorrow, pain and suffering, mental anguish, among other types of non-pecuniary damage, but they claim to award these damages only in rare and special cases⁴⁰⁴. Judge Itah doubts that Labor Courts will restrict themselves and claims that there is no impediment from awarding compensation for mental anguish in suitable cases. Appropriate scenarios for the award of non-pecuniary damages would include breaches that harm constitutional rights, such as dismissal based on discrimination or dismissal without due process⁴⁰⁵.

⁴⁰¹ *Id.* at 13 paragraph 25 refers to Rebeca Elisha case where the court determined 24 month compensation rate. Rebeca Elisha LA, *supra* note 323; Rebeca Elisha HCJ, *supra* note 298. And LUBOTZKY YITZHAK, *supra* note 6 at 67.

⁴⁰² *Supra* note 11.

⁴⁰³ Plony case, *supra* note 391 at 18 paragraph 31.

⁴⁰⁴ *Id.* at 18 paragraph 32. And see LC (TA) 303630/98 Alma Levy v. Rad Ramot Advanced Technological Incubators Ltd ,Nevo, 2002, at 23 Paragraph 46: Compensation for mental anguish is awarded in exceptional and difficult cases.

⁴⁰⁵ Plony case, *supra* note 391 at 18 paragraph 33.

Judge Itah also contends that the determination of the compensation rate for mental anguish should not be calculated on the basis of the employee's monthly salary. Mental anguish is not related to pecuniary damage. It may be that there had been no pecuniary damage, but mental anguish had been inflicted. Moreover, the sorrow of the employee earning a high salary is not greater than the sorrow of the employee that earns a low salary⁴⁰⁶. Since compensation is awarded due to unsuitable conduct and the sorrow caused by it, this is not connected to the salary rate of the employee⁴⁰⁷.

Similarly, Reut Shemer-Begas⁴⁰⁸ claims that the rate of compensation for non-pecuniary damages awarded to an employee, should embody the intensity of his injury and is not connected to the employee's salary⁴⁰⁹.

According to Judge Itah, the labor court, when bestowing compensation for wrongful dismissal, actually takes into account wide policy considerations that are beyond the damage caused, both pecuniary and non-pecuniary. These considerations include policies such as deterring certain employer actions and guiding the conduct of the parties in employment relations⁴¹⁰. These considerations influence the rates of compensation awarded by the court as shall be seen below.

3.4 Punitive considerations in compensation assessment

3.4.1 Punitive damages in contract law

⁴⁰⁶ *Id.* at 18 paragraph 34.

⁴⁰⁷ *Id.* at 18 paragraph 34 referring to judge Engelberg in AR(National) 20418-03-13 Moshe Said v Manosevich Reut, Nevo, 2013.

⁴⁰⁸ Shemer Begas Reut, *supra* note 267.

⁴⁰⁹ *Id.* at 216-217 She claims the worthy judicial policy should be to disconnect the rate of compensation from the salary and to decide each case on its merit. And See the argument in chapter 2 of the research

⁴¹⁰ Plony case, *supra* note 391 at 16 paragraph 29.

We have seen that Labor Courts have been more willing to assess non-pecuniary damages than General Courts. Another distinction in the award of damages between Labor Courts and General Courts is in the award of punitive damages for breach of contract.

Under Israeli general contract law, there is no legal authority allowing the award of punitive damages in the case of breach of contract⁴¹¹. The common view of the Israeli judicial system is that punishing the defendant is not considered when determining the right and extent of compensation awarded to the plaintiff⁴¹².

Yehuda Adar ⁴¹³ defines punitive compensations as a : "...monetary award which a civil court may impose on a defendant in favor of a plaintiff, with the explicit intention of punishing the defendant for his exceptionally reprehensible conduct"⁴¹⁴.

A problematic aspect of awarding punitive compensations is its contradiction of the basic aim of compensation: "restitutio in integrum" - since punitive compensations may place the plaintiff in a better position and enrich him beyond the wrong caused to him by the defendant⁴¹⁵. Yehuda Adar claims, that the prevailing "traditional rule"⁴¹⁶ in Israel denies application of punitive damages in contract law while having a limited application of punitive damages

⁴¹¹ FRIEDMAN DANIEL AND COHEN NILI, *supra* note 47 at 542-544: The Contract Remedy Law does not mention it.

⁴¹² *E.g.*, CC 1148/97 Illouz v. Haim Zaken Building and Investments Ltd. Nevo, 2006, Paragraph 68: The court determines the purpose of section 13 is to compensate the plaintiff and not to punish the defendant: The legal rule is that "... the purpose of compensation is to compensate the harmed party and not to punish the offender."

⁴¹³ Adar Yehuda, *Touring the Punitive Damages Forest: A Proposed Roadmap*, ODCC 2/2012, 301-349 (OSSERVATORIO DI DIRITTO CIVILE E COMMERCIALE) in <https://haifa.academia.edu/YehudaAdar/Papers>

⁴¹⁴ *Id.* at 303.

⁴¹⁵ *Id.* at 311-314, 343-344 *see* elaboration on the problems arising from acknowledgment of the practice of awarding punitive damages by the courts. And *see* Karassin Or, *supra* note 26.

⁴¹⁶ ADAR YEHUDA, *supra* note 148 at Appendix qqg as defined by Adar.

in tort actions⁴¹⁷. Yet, Adar claims that a court may use the discretionary powers bestowed on it by Section 13, in order to grant punitive compensations disguised as non-pecuniary damages⁴¹⁸. Adar further argues that Israeli judges recognize that punitive considerations are relevant and legitimate in assessing damages in contract law in extraordinary cases comprising severe behavior by the defendant⁴¹⁹.

In contrast, Nili Cohen⁴²⁰ finds a tendency in the Israeli courts to recognize punitive damages in tort law cases, but not in contract law. Furthermore, she claims the attempt to use Section 13 of the Contract Remedy Law as a means to grant punitive compensations has not been accepted⁴²¹.

3.4.2 Punitive damages in tort law

Or Karassin claims the Tort Law determines compensation of damages caused directly from the defendant's civil wrong and does not determine punitive damages. In Israeli tort law there is no legal authority allowing punitive damages and legal policy does not support punitive damages⁴²². The

⁴¹⁷ *Id.*, at qqq claims limited application of punitive damages exist in tort law. And see: Karassin Or, *supra* note 26, at 584-585: claims the purpose of punishment is legitimate in the tort law but it should be implemented with care. One reason is that punitive damages usually exceed the actual damage of the injured party and better his situation beyond the damage caused to him.

⁴¹⁸ ADAR YEHUDA, *Supra* note 148 at 104 note 79.

⁴¹⁹ *Id.* at 104-111 and at 104 note 78. He claims punitive damages would be appropriate in cases of an "outrageous" breach of contract, in which the defendant's behavior should be condemned as immoral and deserving punishment. And at chapter 7, Appendix aaaa *see* definition Adar offers for "outrageous": "Outrageous behavior - behavior which reflects a significant deviation from every reasonable standard of behavior, and is expressed in an wrongful act that injured the plaintiff ..."

⁴²⁰ Cohen Nili, Daniels Book 2008, *supra* note 54 at 104-105.

⁴²¹ *Id.*, Cohen suggests punitive damages may be justified in fields of standard contracts such as consumer contracts. As comparison, the legislator explicitly allows exemplary damages in case of violation of the Law Protecting Consumers, 1981, Book of Laws 1023, 1981, 248 § 31A determines the court is permitted to determine compensation that is not depending on damage- exemplary compensation.

⁴²² Karassin, *supra* note 26 at 603 refers to section 76 of the Tort Ordinance, *supra* note 59. The Civil Code proposal, *see supra* note 71 determines "exemplary compensation" that are not dependent on damage caused in case of malice breach and the author finds it as an origin of punitive damages.

assessment of punitive damages is uncommon and exceptional⁴²³. However, Karassin claims that in the rare and outstanding circumstances where the courts have decided to award punitive damages, they have found the authority to do so⁴²⁴.

The rationale and purpose of punitive damages is both deterrence and punishment⁴²⁵. Yehuda Adar analyzes the deterrence objective of punitive damages as having a future effect on wrongdoers⁴²⁶. Adar refers to empirical research that shows that punitive damages have a deterrence effect upon corporations not wanting their reputation damaged and thereby reducing their value and profits⁴²⁷.

According to Karassin, the objective of punishment is legitimate in the tort law, but should be implemented with care. One reason is that punitive damages usually exceed the actual damage of the injured party and thus better his situation beyond the damage he suffered⁴²⁸. She claims that Israeli courts, when determining punitive damages, attribute great importance to the severity of defendant's intentions and much less importance to the severity of the result of the civil wrong⁴²⁹.

⁴²³ Karassin, *supra* note 26 at 602.

⁴²⁴ *Id.*, at 603; at 605-638, discusses the conditions in which the courts impose punitive damages, such as intension and malice, outrages breach and the question of double penalty.

⁴²⁵ *Id.*, at 577.

⁴²⁶ Adar Yehuda, *supra* note 413 at 323: Punitive damages deterrence "...seek to achieve aims to eradicate or eliminate specific patterns of behavior."

⁴²⁷ *Id.*, at 327.

⁴²⁸ Karassin, *supra* note 26 at 584, 585. And see at 639 reefer to the Civil Code Proposal, *supra* note 71, Explanation to section 461: The author mentions the Civil Code proposal explanatory notes that detail the considerations the court may take into account when imposing punitive damages and determining their rate. Considerations such as the extent and severity of the breach, the extent of abuse of the plaintiffs' weakness, the profit the defendant gained from the breach, the sort of interest protected and its importance.

⁴²⁹ *Id.*, at 640, Karassin suggests attributing the same importance to these two components when imposing punitive damages

Similarly, Bitton claims that the courts find the authority to award punitive damages in tort law when there is a malicious civil wrong and the behavior of the defendant is blameworthy. When a constitutional right is harmed, the courts also will consider whether punitive damages should be awarded⁴³⁰. Bitton finds ideological proximity between tort law and labor law, in the area of discrimination prohibition in employment law. In both tort and employment law exists the duty of personal compensation. However, she states that labor law is not based on tort, but mandatory prohibitions imposed by the labor laws⁴³¹. She claims that the labor laws provide a less rigid framework than the tort law⁴³². Concerning constitutional rights where employee plaintiffs are harmed by discrimination on the basis of religion, race and nationality, she claims the Labor Court views this type of discrimination as a humiliating and severe injury to personal dignity. Bitton cites the Yigal Cashani case, where a worker was found to have been wrongfully dismissed due to his refusal to work on "Shabbat" for religious reasons⁴³³. In light of the constitutionally discriminatory aspect of the case, the award for the harm to human dignity resulted in an award of NIS 50,000 (approximately EUR 11,000).

Adar states that most courts interpret punitive damages as an independent extra remedy that is separate from the normal compensatory remedy⁴³⁴. He

⁴³⁰ Bitton, *supra* note 25 at 177 note 193 refers to CA 9656/03 Martsiyano deceased inheritance v. Zinger, Nevo, 2005 at 18 paragraph 34 (1): punitive damages should be treated with caution and reservation and should focus on malicious intent when the offenders' behavior is blameworthy. The court did not find this was the case here; CA 140/00 Etinger Inheritance v. The Jewish quarter developing and rehabilitating company Ltd, Nevo, 2004 at 68 paragraph 77, 79 referred to in the case of Martsiyano.

⁴³¹ *Id.*, at 166: points to explicit prohibition of authority of the Labor Courts to rule in tort claims. See: The Labor Court Law, *supra* note 3 § 24(A) (1).

⁴³² *Id.*, at 168.

⁴³³ *Id.*, at 167 referred to LC (TA) 4785/02 Cashani v. Municipality of Ra'anana, Nevo, 2002. At 27-28, paragraph 144-147: The Labor Court stated that in order to assess the extent of the discrimination, the plaintiffs' personal situation should be examined. The court offered guidelines for assessment and determination of compensation as follows: The intention accompanying the discrimination; reoccurring discriminating behaviour; extent of humiliation accompanying the discrimination; type of discrimination; result of the discrimination.

⁴³⁴ Adar Yehuda, *supra* note 413 at 307.

believes that the courts should take into account moral considerations such as fairness, when imposing punitive damages⁴³⁵.

Thus far, we have seen the approach of the General Courts to punitive damages in both contract and tort law⁴³⁶. The approach of the Labor Court to punitive damages is somewhat different.

3.4.3 Punitive damages in Labor Law

Unlike in contract and tort law, several labor law statutes permit courts to assess punitive damages⁴³⁷. Moreover, they allow for punitive compensation without proof of damage⁴³⁸. In assessing punitive damages, the statutes generally provide a cap on the compensation either of an amount up to a certain ceiling or a rate the court deems appropriate under the circumstances⁴³⁹. Some of the statutes also allow compensation for both non-pecuniary damages and/ or exemplary compensation. Frenkel states that exemplary damages are compensation without proof of damage that are not

⁴³⁵ *Id.*, at 339. At 335: He addresses the moral legitimacy of civil punishment. At 331: refers to the role of civil law in punishment as problematic because it is the role of criminal law. At 340: he finds advantages in civil punishment over the criminal punishment.

⁴³⁶ And compare to English law: PEEL EDWIN, *supra* note 129 at 1000: Treitel claims a general rule is that punitive damages cannot be awarded for breach of contract because the objective is to compensate the plaintiff and not to punish the defendant. In tort law punitive damages are awarded by the court in order to express disapproval of the defendants conduct.

⁴³⁷ See ADAR YEHUDA, *supra* note 148 at 95, and see Karassin, *supra* note 26 at 604: In addition to court rulings that implement punitive damages, specific statutes permit implementation of punitive damages. And see for example the Wage Protecting Law, 1958, Book of Laws 1958 247,86, which determines that an employer delaying wages is obligated to pay the employee in addition to his wages "wage delay compensation". The wage delay compensation is a punitive payment imposed on the employer with no connection to the rate of damages caused to the employee. The objective is to punish the employer for delaying payment of wages from his employee.

⁴³⁸ Preventing of Sexual Harassment Law, *supra* note 385 § 6(b): The court may award compensation up to 120,000 NIS. And see: Women Employment Law, *supra* note 31 § 13A (a) (1): The court may award compensation even if damage did not occur in the rate it deems appropriate in the circumstances. § 13A (B) (1): the court may award other amount of compensation, for special reasons that will be noted.

⁴³⁹ Labor statutes such as: Preventing of Sexual Harassment Law, *supra* note 385 § 6(b); Women Employment Law, *supra* note 31 § 13A; Protection of Employees Law (Exposure of offences of unethical conduct and improper administration) 1997 § 3; Collective Agreement Law, *supra* note 214 § 33 (11).

dependent on damage⁴⁴⁰. Punitive damages are sometimes included within an award of pecuniary damages or in non-pecuniary damages. An open question remains whether punitive damages (and exemplary damages) should constitute a separate category of damages⁴⁴¹.

Compensation may be cumulative for an act that violates several statutes and provides for different types of damage (for instance, non-pecuniary damages, compensation without proof of damage or exemplary damages)⁴⁴² so long as there is no double recovery for the same category of damage⁴⁴³.

The Dizengoff Club case⁴⁴⁴ provides a demonstration of the application of a labor law statute that provides for exemplary compensation in situations where the employer violates the obligation to provide employees with a seat at work (the Cashiers Law). The exemplary compensation under the law is up to a limit of NIS 200,000 (approximately EUR 45,000)⁴⁴⁵. Tsvi Frenkel states that the legislator uses exemplary compensation in order to deter employers from violating employees' rights and to enhance awareness of employees to their rights. He claims that along the years there is a clear and consistent tendency

⁴⁴⁰ Frenkel Tsvi, *supra* note 44 at 530. And see Collective Agreement Law, *supra* note 214 § 33 (11) (b) (1): The court may impose exemplary damages that are not dependent on damage up to 50,000 NIS but may impose up to 200,000 NIS considering severity of violation or circumstances. At § 33 (11) (a) (2): the court may award compensation at the rate it deems appropriate in the circumstances.

⁴⁴¹ Plony case, *supra* note 391 at 19 Paragraph 36.

⁴⁴² See for example: LA (National) 33680-08-10, Dizengoff club Id. v Zoily, Nevo 2011.

Reference to statutes that determine non-pecuniary damages at 23 paragraph 28 and exemplary damages at 26 paragraph 33.

⁴⁴³ *Id.*, at 24 paragraph 30. And see: Recently the Supreme Court determined in CA 7426/14 Plonit v. Ori Daniel, Nevo 14.3.2016, that compensation without proof of damage will not be awarded in addition to award for non-pecuniary damages. (Paragraph 79 at 71). Compensation would be awarded in two alternative routes: compensation without proof of damage up to the statutory limit or compensation for non-pecuniary damages. The court acknowledges that due to the difficulty to prove and quantify non-pecuniary damages, often there is not much difference between compensation without proof of damage and non-pecuniary damages. However, they should not be awarded cumulatively. This ruling was given after the period the research was conducted.

⁴⁴⁴ Dizengoff case, *supra* note 442.

⁴⁴⁵ The Right to work while seated law, 2007, Book of Laws 2084, 2007,128 (known as "the Cashiers Law") § 4(b) (1).

of the Israeli legislator to determine powerful sanctions aiming to enhance the enforcement of labor laws and to deter employers from violating them⁴⁴⁶.

In the Dizengoff Club case⁴⁴⁷, the court explained that exemplary compensation was not connected to the damage and is not based on correction or cure, but on punishment and deterrence⁴⁴⁸. Frenkel stresses that exemplary compensation will be awarded by the court in addition to any damage proven by the plaintiff. As such, punitive compensation reflects the behavior of the offender and not the damage caused⁴⁴⁹. The legislation over the years has increased the use of forceful sanctions for violation of labor rights with the goal of increasing enforcement of labor laws and deterring employers from violating them⁴⁵⁰. It would seem that the courts will bestow these additional forms of compensation primarily in severe and outstanding situations or when a constitutional right was violated. The intent being to obtain effective deterrence⁴⁵¹.

In the Dizengoff Club case, the court detailed factors influencing the amount of compensation for violating the Cashiers Law as follows: the extent and severity of the violation; the duration of the violation; whether the violation was committed knowingly by the employer; the essence of the injury caused by the violation and the personal circumstances of the employee; and finally the public deterrence interest⁴⁵².

⁴⁴⁶ Frenkel Tsvi, *supra* note 44 at 498. And see Karassin, *supra* note 26 at 637 claims exemplary compensation may be awarded also when the employer has been convicted and a criminal penalty has been imposed upon him. The court may consider this conviction when awarding the compensation.

⁴⁴⁷ Dizengoff case, *supra* note 442.

⁴⁴⁸ *Id.*, at 30 paragraph 35.

⁴⁴⁹ Frenkel Tsvi, *supra* note 44 at 531. And see Dizengoff case, *supra* note 442 at 25-26 paragraph 32.

⁴⁵⁰ *Id.*, at 29 paragraph 34.

⁴⁵¹ *Id.*, at 26 paragraph 32.

⁴⁵² *Id.*, at 31-32 paragraph 36.

The Equal Opportunities Employment Law, mentioned above, provides for punitive damages⁴⁵³. The law allows the Labor Court to award non-pecuniary compensation and compensation at an amount it deems appropriate up to NIS 50,000 (approximately EUR 11,000) without proof of damage⁴⁵⁴. This amount was increased to NIS 120,000 (approximately EUR 28,000) in 2013⁴⁵⁵.

The Plotkin case demonstrates the labor courts' approach to punitive damages and its application of this law. Frenkel contends that in the Plotkin case, the labor court instructed the detachment from the limited approach of the courts regarding section 13 of Remedy Contract Law for non-pecuniary damage. The labor court developed a different attitude, a deterrent and punitive approach⁴⁵⁶. Sharon Plotkin claimed that she was discriminated against on the basis of gender in a job interview and sued the employer for violating The Equal Opportunities Employment Law⁴⁵⁷.

The Regional Labor Court found that the employer discriminated against Plotkin and awarded NIS 3,000 in compensation. Plotkin appealed the rate of compensation to the National Labor Court and the amount was increased to NIS 50,000 on appeal⁴⁵⁸. Judge Elisheba Barak ruled that the defendant had

⁴⁵³ *Supra* note 12.

⁴⁵⁴ *Id.* Equal Opportunities Employment Law § 10 (a)(1). An unofficial translation: The court may "...award compensation... to an amount deemed appropriate by it in the circumstances of the case ... (at) a sum not exceeding NIS 50,000 without proof of damage."

⁴⁵⁵ Modification number 18 of the Equal Opportunities Employment Law, *supra* note 310. Adjudications presented in the research regard cases before the modification was applied. Application of the modified amount by the court is an open question to be examined in the future.

⁴⁵⁶ LA 56/ 3-129, Sharon Plotkin – Isenberg Brothers Ltd., PD 33, 1999, 481, Nevo 1997. And see Frenkel Tsvi, *supra* note 44 at 516.

⁴⁵⁷ *Supra* note 12 § 2(a) (1): "Prohibition of discrimination", Prohibition of discrimination includes job applicants and interviews for seeking employment. "Prohibition of discrimination: 2. (a) An employer shall not discriminate among his employees or among persons seeking employment on account of their sex....in any of the following: (1) acceptance for employment;" This is an unofficial translation.

⁴⁵⁸ Plotkin case, *supra* note 456 at 504.

violated a constitutional right (the right of equality) and acted upon stereotype regarding women⁴⁵⁹.

In Plotkin, Judge Elisheba Barak went on to interpret the Equal Opportunity Law as allowing compensation for both non-pecuniary damage and punitive damage⁴⁶⁰. She stated that the purpose of the law leads to the conclusion that the legislator intended to allow punitive compensation beyond quantifiable damages⁴⁶¹. According to judge Barak, the goal of compensation is twofold: first, to compensate for the actual damage and second, to compensate as a punitive damage. The objective of punitive compensation is to educate employers to conduct that does not discriminate between people and does not nourish stereotypes. It is, therefore, necessary that this compensation should be effective⁴⁶².

Judge Barak cites Frances Raday⁴⁶³ in describing non-pecuniary damages as a civil penalty aimed at deterring an employer from unacceptable behavior. The purpose of such non-pecuniary damages is a punishment for the violation of the law itself⁴⁶⁴. Furthermore, she finds the rate of the compensation must be significant and beyond the actual damage that the discrimination created in order to provide a substantial economical deterrence to prevent the law from becoming a dead letter⁴⁶⁵.

⁴⁵⁹ *Id.* Plotkin preferred an outside of office salesman job but was declined. The reason the employer gave was that woman are not suitable for this job because need to go home by 16.00.

⁴⁶⁰ *Id.* at 501-502.

⁴⁶¹ *Id.* at 502.

⁴⁶² *Id.* at 500.

⁴⁶³ Raday Frances, *Women in the Workforce*, in WOMAN'S STATUS IN ISRAELI LAW AND SOCIETY, 64-116, F. Raday, C. Shalev and M. Liban-Kobi eds., Shoken Publishing, Israel, 1995, (Hebrew).

⁴⁶⁴ *Id.* Raday at 114. And Plotkin case, *supra* note 456 at 501.

⁴⁶⁵ Raday, *supra* note 463 at 115. Plotkin case, *supra* note 456 at 502. This opinion was reinforced and repeated in later cases: see *e.g.*: Orit Goren, *supra* note 319 at 29: The rational is compensation that are punishment, deterrence and educational, beyond damage caused to the plaintiff.

A similar punitive approach of the labor court was demonstrated in the Alma Levy case⁴⁶⁶. Levy was dismissed due to her pregnancy and was awarded NIS 50,000 in compensation for non-pecuniary damages according to the Equal Opportunity Employment Law⁴⁶⁷. Judge Alia Fogel determined that the nature of this award was punitive damages bestowed due to a violation of a constitutional right⁴⁶⁸. She determined that even if the Equal Opportunities Employment Law were not applicable, Levy, nonetheless, would have received the same amount of compensation for the mental anguish caused by the breach of contract, due to section 13 of the Contract Remedy Law⁴⁶⁹. Although compensation for mental anguish is awarded in exceptional and difficult cases, Levy constituted such a case⁴⁷⁰.

Thus, in the area of punitive damages for breach of a labor contract or a violation of a labor statute, the Labor Courts have found legal authority to award punitive damages with the goal of deterring and educating employers.

3.5 Conclusion

The sections of The Contract Remedy Law are applied with the same principles in both the Labor Courts and General Courts to determine compensation for breach of contract; however, they are adjusted to the circumstances of the field of law.

Concerning pecuniary damages, in the general contract, (as seen in the above example of a contract for the sale of property), the assessment of compensation was according to the market price of the property. Under the

⁴⁶⁶ Levy case, *supra* note 404.

⁴⁶⁷ *Supra* note 12.

⁴⁶⁸ Levy case, *supra* note 404 at 23 paragraph 44.

⁴⁶⁹ *Id.* at 23 paragraph 46.

⁴⁷⁰ *Id.* And see and *compare*: Bitton, *supra* note 25 at 166, claims that in the Levy case, *supra* note 404 and in the Cashani case, *supra* note 433, a narrative approach developed in the Labor Court, which presents the damage as described in the language of the plaintiff without categorizing the damage in rigid legal categories. At 168: However, she claims only few rulings use this method to assess the damage of discriminated employees.

labor contract, as seen in wrongful dismissal, compensation is determined on the basis of the plaintiff's wages.

Regarding non-pecuniary damages, both courts are conferred with explicit judicial discretion. Performance of this discretion is governed by different considerations taken by the different courts and lead to different rates of compensation. While the General Courts award minimal amounts of non-pecuniary compensation, the Labor Court will award significant compensation when it deems it appropriate.

Yitzhak Lubotzky argues that this is due to the objective of the Labor Courts to deter employers from improper actions regarding employees and to put them on notice when dealing with the dismissal of employees⁴⁷¹. As a result, the Labor Court, as opposed to the General Courts, takes into account punitive considerations.

As Judge Itah determined, that among the components of compensation for wrongful dismissal exists an ingredient of compensation that is discretionary and not connected to the damage itself, but rather to wide policy considerations unique to the Labor Courts⁴⁷². As President Adler stated, the Labor Court has an agenda of developing social laws and protecting employee rights⁴⁷³. This is reflected in effective and significant compensation rates for breach of contract.

⁴⁷¹ LUBOTZKY YITZHAK, *supra* note 6 at 62, 64-65. And at 63: The rate of compensation for dismissal without hearing is calculated on base of salaries. At 65, claims in labor court rulings, the amount of NIS 50,000 originated in the Equal Opportunities Employment law, *supra* note 12 and Law for the Prevention of Sexual Harassment, *supra* note 385, and has become over the years a yardstick of compensation rate.

⁴⁷² Plony case, *supra* note 391 at 16 paragraph 29.

⁴⁷³ Adler, *supra* note 200.

Chapter 4

Empirical Research on Compensation Award by the Israel Labor Court in Case of Dismissals in Violation of a Labor Statute

4.1 Introduction

This chapter displays the research concerning factors influencing compensation awarded in cases of a wrongful dismissal in violation of a statute. In order to examine compensation award by the Israel Labor Court in case of wrongful dismissal in violation of a statute, the issue of pregnant women wrongful dismissal was chosen. The reason is that the employment issues relating to women in the workplace, including the employment and dismissal rights of women and in particular the dismissal of pregnant women, are important topics in the Israeli conversation on the equality of women in the workplace. This chapter presents a review of empirical legal research⁴⁷⁴ and analysis of Israeli Labor Court rulings of compensation awards for wrongful dismissal of pregnant women. As presented in chapter 2⁴⁷⁵, the dismissal of pregnant women in Israel is deemed to be a wrongful dismissal and is a frequent topic of claims submitted to the Israeli Labor Court. Consequently, the subject is of major interest to Israeli employers and employees.

Part 2 (Section 4.2) of this chapter presents the issue of wrongful dismissal of pregnant women in violation of the WEL and EOEL. Part 3 (Section 4.3) presents the research questions examined and explains the data gathering process for the research. Part 4 (Section 4.4) presents the findings of the research for cases applying the WEL, cases applying the EOEL and those applying both WEL and EOEL. The conclusions of the research and the comparison between the cases applying the different statutes- WEL, EOEL and both WEL and EOEL- are provided in Part 5 (Section 4.5).

⁴⁷⁴ See about the legal empirical research: Eisenberg Theodore, *supra* note 29, he reviews the origins of the legal empirical research, its relationship with other fields of research and its impact on legal research.

⁴⁷⁵ Chapter 2.3.1.1.

4.2 Compensation awards in cases of dismissals in violation of a statute: the case of pregnant women wrongful dismissal

Sharon Rabin Margalioth claims that the broad protection of women from dismissal provided by Israeli legislation and judicial rulings, leads to reluctance by employers to employ women. On account of prohibitions, regulations and court mandated restrictions protecting women and pregnant women in particular, it is claimed that it is not economically justified to employ women⁴⁷⁶. The costs resulting from regulations protecting women employment and factors influencing the court determination of compensation award in case of wrongful dismissal of pregnant women, will be examined in this chapter.

The empirical legal research of court rulings on compensation awards for violation of two specific labor statutes which regulate wrongful dismissal of pregnant women, among other issues, are presented. The first statute is the Women Employment Law ("WEL")⁴⁷⁷ and the second statute is the Equal Opportunities Employment Law ("EOEL")⁴⁷⁸. These two statutes were presented in chapter 2 of the study.

Claims for wrongful dismissal of a pregnant woman may be submitted according to either the WEL or the EOEL or both laws when they both apply to the circumstances⁴⁷⁹. A claim submitted under both statutes occurs when a wrongful dismissal violates the specific dismissal prohibitions provided under the WEL and will also violate the EOEL for a dismissal that is discriminatory. As explained in chapter 2.5, Israeli court rulings have determined that the dismissal of a pregnant women is per se discriminatory even if no specifically legislated protective statute applies to the dismissal. This is due to the widely

⁴⁷⁶ Rabin- Margalioth Sharon, *supra* note 294 at 17. And see in chapter 2.3.1.1 of the study.

⁴⁷⁷ Woman Employment Law, *supra* note 31.

⁴⁷⁸ Equal Opportunities Employment Law, *supra* note 12.

⁴⁷⁹ See for example: Margalith Appelboim, *supra* note 239.

held principle of equality in Israeli law, a fundamental principle applicable to the entire Israeli legal system. Dismissal in this context is also a violation of the obligation to operate under the labor contract in good faith⁴⁸⁰.

4.3 Research methodology: Explanation about gathering of information in detail

The research was conducted by review of case law (judgments) of Israeli labor courts regarding compensation for wrongful dismissal. The methodology used was empirical legal research which is a collection of facts from the computerized legal database, in order to gather data about the way the legal system works⁴⁸¹. The database of cases for the research includes court rulings gathered from the online computerized electronic legal database published by "Nevo Publishing Ltd."⁴⁸².

The research period includes court rulings of compensation for wrongful dismissal from 1/1/2013 to 31/12/2015⁴⁸³. The recent tendency prevailing in Israeli courts is the focus of interest of the research and therefore it is the decisions of recent years that comprise the period reviewed. The research does not look for changes occurring during the years examined.

The keywords used for the search from the database are the following: "labor"; "equal opportunity employment"; "pregnant women"; "pregnancy"; "parenthood"; "women employment"; "dismissal of pregnant women".

The research questions as presented in the Introduction of the study contain several factors assumed to influence compensation award by the court. The assumption of the research was that the following four factors influence the

⁴⁸⁰ *Id.* at 507, paragraph 12.

⁴⁸¹ See *supra* note 29, Eisenberg Theodore at 310 -311.

⁴⁸² Nevo is one of the largest and most used computerized legal publishers in Israel. Nevo database contains court rulings of Israeli courts, legislation and legal literature

⁴⁸³ 2016 data for the full year was not available at time of research.

court determination of compensation in the case of wrongful dismissal of pregnant women:

1. The salary earned by the employee: does the level of wages influence the compensation determination?
2. The reason for dismissal: does a justified or unjustified cause for dismissal due to the conduct of the employee or the employer influence the compensation determination?
3. Period the plaintiff was employed in the workplace: does the seniority of the employee influence the compensation determination?
4. The occupation or type of work performed by the employee: does the occupation of the employee influence the compensation determination?

Nationality, religion or citizenship are grounds for discrimination determined in the EOEL. These grounds have not been assumed as factors affecting the rate of compensation since there are few claims submitted to the courts on these basis.

Age and gender of the plaintiff are two additional influencing factors presented in chapter one that are less relevant to the research in the case of pregnant women dismissal, therefore they were not included in the research questions. Pregnant women are all female in the range of approximately the same age. The focus of the research was on working women in Israel which usually begin working after military service, mostly at the age of 20. Thus, in the cases comprising the study applying WEL and EOEL, the assumption was that the age of the women was an unchanged factor ranging approximately between ages 20 to 42 years old.

The study reviewed decisions of the following court: rulings of the Regional Labor Court and National Labor Court⁴⁸⁴. For cases that were commenced in the Regional Labor Court and appealed to the National Labor Court, only the decision of the National Labor Court was included in the study since this was

⁴⁸⁴ The lower instance is the Regional labor Court and the higher instance is the National Labor Court. See: Labor Court Law, *supra* note 3 § 2.

the final ruling of the particular case. However, some cases have an appeal pending in the National Labor Court that still has not been decided upon. These cases and the status of the appeal are indicated in appendix A, including the current legal proceedings.

Cases gathered by the research, yielded 47 cases which are listed in appendix A⁴⁸⁵:

12 cases applied the WEL

25 cases applied the EOEL

10 cases applied both the EOEL and WEL

The judgments included in the study were those that granted compensation awards for violations of the WEL and EOEL statutes. Cases that ordered reinstatement or cases where compensation was denied by the court were not included in the study.

4.4 Findings of research

The compensation awarded by the court is presented and categorized as pecuniary damages ("P damages or compensation") and non-pecuniary damages ("NP damages or compensation"). In some cases other payments were awarded due to obligatory payments triggered by a discontinuance of employment, such as severance pay. These payments are specific to the case and incident to dismissal, but are not connected to wrongful dismissal. Nevertheless, they are part of the total amount awarded. A question arises whether the amount awarded on account of obligatory payments influences the compensation award for wrongful dismissal? It may be that a large amount awarded for obligatory payments may prompt the court to award lower compensation for wrongful dismissal. Nevertheless, this issue was addressed in

⁴⁸⁵ Appendix A – all cases of the research cited. Referral to cases of the research listed and cited in the appendix will be by number of the case in this appendix.

one of the cases reviewed for wrongful dismissal without due process (chapter 5). There the court determined that increased severance pay were a factor influencing compensation award for wrongful dismissal⁴⁸⁶.

In order to have a common base for analyzing compensation amounts bestowed by the court in the different cases, the total amount of compensation awarded by the court is displayed as the equivalent number of salaries of the plaintiff. The total monetary amount is divided by the salary of the plaintiff to produce number of salaries. Hence, there is a comparative base for analyzing the data and comparing between the different court rulings and different sums of compensation awarded. The term "salary number" will be used hereinafter to refer to the amount of compensation in equivalent number of salaries of the plaintiff. Furthermore, an average number of salaries awarded to plaintiffs was calculated in order to produce a common base line for compensation awards⁴⁸⁷. An award above this average of salaries will be deemed a high award of compensation. An award below this average will be deemed a low award of compensation. The reference to high compensation and above the average compensation will be referred to interchangeably. Low compensation and below the average compensation will be used interchangeably. However, in some cases information about salary level was absent.

A noted limitation of the research is that the rate of compensation awarded by the court is presented in equivalent of multiple salary numbers of the plaintiff. However, the court usually awards a comprehensive sum of compensation for wrongful dismissal in violation of a statute. The only exception is for P compensation that is calculated by number of salaries. This is in contrast to

⁴⁸⁶ Arye Raz case 71, paragraph 50 at 11, was awarded 7 salaries compensation for wrongful dismissal without a hearing. Raz received increased severance pay. However, the circumstances were different from the circumstances of a pregnant women wrongfully dismissed. For example, one of the differences was that the plaintiff was approaching retirement age, a factor that is not relevant for pregnant women.

⁴⁸⁷ Total amount of compensation is also presented by Euro. Calculated by currency exchange - <http://www.hamara.co.il/currency-exchange/ils-ils/ils-eur/> April till June 2016 currency exchange rate: ils- eur: 0.23...; eur- ils: 4.3....The calculation of the average was by adding the salary numbers awarded and dividing the total to number of cases to produce an average. See Babylon v.10.3.0.14: "value calculated by adding together several quantities and then dividing the total by the number of quantities" www.babylon-software.com.

award for wrongful dismissal in violation of due process, which usually is awarded by salary numbers. Thus, for wrongful dismissal in violation of a statute the calculation by salaries was done for the research purpose and mostly was not calculated as such by the court.

In Israel, there is a mixed attitude regarding the calculation basis for measuring salaries in awards of compensation, as presented in chapter 3 of the research. The P compensation which is the actual damage of loss of income is calculated according to the law by number of salaries. However, determination of the NP damage is up to the court to rule upon and *prima facie* is not connected to the salary of the plaintiff. Judge Ilan Itah in *Plonit v. Almonit* maintains that the determination of the compensation rate for mental anguish (an NP category) should not be calculated on the basis of the employee's monthly salary. The sorrow resulting from dismissal for an employee earning a high salary is not greater than the sorrow of an employee earning a low salary⁴⁸⁸. Similarly, Reut Shemer-Begas⁴⁸⁹ argues that award of compensation on basis of the number of periodic salaries by the court, provides the wrong message to employees and employers that the dignity of employees is derived from their level of salary. She claims that the rate of compensation for NP damages awarded to an employee should be decided for each case on its merit and should embody the intensity of the injury without connection to the employee's salary⁴⁹⁰. I agree with both opinions stated above, and believe the level of salary should not be an influencing factor for determination of compensation by the court. However, the findings of the research displayed hereinafter show that empirically it is indeed a factor influencing compensation award.

⁴⁸⁸ *Plony v Almonit*, *supra* note 391.

⁴⁸⁹ *Shemer Begas Reut*, *supra* note 267.

⁴⁹⁰ *Id.* at 216-217.

4.4.1 Dismissal in violation of Women Employment Law

Multiples of salary awarded (see Table B)

In 12 cases included in the research, compensation was awarded for wrongful dismissal in violation of the WEL. The average number of salaries of compensation awarded in the WEL cases surveyed was 9 salaries. The lowest number of salaries awarded was 2.5 salaries and the highest number was 16.5 salaries⁴⁹¹.

Table B: Multiples of salary awarded

Number of salaries	Number of cases (Total 12 cases)
Above average	7 cases
Below average	5 cases

The distribution of the cases below and above average of salaries does not show a significant tendency. In 7 cases out of 12 cases the award was above average compensation. In 5 out of the 12 cases the award was below the average compensation. Nevertheless, table B1 presented below shows some important deviations from the average in which 7 out of 12 cases were awarded around or above 10 salaries. 5 out of 12 cases were awarded compensation far below 10 salaries.

However, an analysis of the division between the P compensation and the NP compensation in awards, show there was a different influence of each type of damage on compensation. As explained above, the total salary award includes all other payment due to obligatory payments triggered by a discontinuance of

⁴⁹¹ However, the court may award actual damage (P) of 150% salary, according to the WEL, *supra* note 31 § 13A (b). In that case calculation of the total amount divided by the salary does not produce an accurate number of salaries but rather a higher number of salaries. When the P damages are calculated by 150% salary, the average number of salaries of compensation awarded was lower. However, not every case was awarded 150% of salaries and so presentation of the findings refer to the 100% of salary average which was 9 salaries.

employment, such as severance pay. Thus, P compensation and NP compensation displayed in column three and four of table B1, do not sum into the total salaries awarded as displayed in the second column of table B1.

Table B1 - Division between P compensation and NP compensation

Case	Total salaries awarded	P compensation	NP compensation
1 Shiri Rubin	4	2.5	Less than 1
2 Tatiana Zaslavsky	7.2	5.2	0
3 Simcha Mamu	15	7.2	5
4 Enbar Amiga	15	10	3.6
5 Naama Peleg	16.5	12.7	0
6 Alberta Skora	11.5	7.9	0
7 Helena Maymaran	9.4	2	4.5
8 Vinugray Elizabeta	10	6.9	0
9 Hadas Yekotiely Boubilil	6.3	0	6.3
10 Michal Golan	2.5	2	0
11 Naama Hershkovitz	2.8	2	Almost zero
12 Rachel Amona Saul	10	3.3	2.7

An analysis of the division between P compensation and NP compensation in awards shows that the greatest influence on the total amount of compensation was due to the P compensation, the actual damage. Generally, when the P compensation was high, the total number of salaries was high⁴⁹². For instance, a total compensation award of 16.5 salaries in Naama Peleg⁴⁹³, was comprised from 12.7 salaries of P compensation and zero NP compensation. In a similar manner, when the P compensation was low, the total number of salaries was low, as in Shiri Rubin⁴⁹⁴. She was awarded total compensation of 4 salaries

⁴⁹² See: Simcha Mamu, case 3; Enbar Amiga, case 4; Alberta Skora, case 6; Vinugray Elizabeta, case 8.

⁴⁹³ Case 5.

⁴⁹⁴ Case 1, and see Tatiana Zaslavsky, case 2.

from which P compensation were 2.5 salaries and NP compensation was less than a salary.

Number of salaries that are awarded for loss of income (P) are influenced by the time left from the dismissal until the plaintiff gives birth. When the dismissal is at the beginning of the pregnancy the loss of income is greater⁴⁹⁵. Later on during the pregnancy, during the protected period of 60 days after return from maternity leave or at the end of this period, the loss of income is very low or may be none⁴⁹⁶. However, the court determined that the amount awarded for P damages must be considered as an influencing factor in the total amount awarded. Furthermore, in *Enbar Amiga*, The court stated that accumulating amounts of compensation awarded from every type of damage should be considered by the court and as such are an influencing factor on the rate of compensation⁴⁹⁷. The compensation awarded for P damages were high and after adding NP compensation the court refrained from adding compensation from other sources. The explanation provided by the court was that the amount awarded reflected the circumstances of dismissal.

Generally, the compensation awards show that no NP compensation was included or only very low amount and that the courts were cautious when exercising their discretion to award NP compensation. However, in two cases a different approach was apparent and the NP compensation was higher even than the P compensation and provided the greatest influence on the total amount awarded⁴⁹⁸. For instance, in one of these cases, *Hadas Yekotiel Boublil*

⁴⁹⁵ For example: *Naama Peleg*, case 5, awarded 12.7 salaries from dismissal till giving birth (150%) and additional 60 days salary.

⁴⁹⁶ For example: *Helena Maymaran*, case 7 was dismissed after maternity leave, during protected period of 60 says. The P damage was 2 salaries.

⁴⁹⁷ *Enbar Amiga*, case 4, at 27 paragraph 42. The P compensation was 10 salaries, the NP compensation was 3.6 salaries. The court determined that compensation for violation of EOEL and hearing duty could theoretically be added but the total amount was sufficient as it was. See also *Malky Graivsky*, case 38.

⁴⁹⁸ See *Helena Maymaran*, case 2, the P compensation was low but the NP was high and so the total number of salaries was high. And see *Hadas Yekotiel Boublil*, case 9, the whole amount of compensation awarded was NP compensation.

, the court looked at recent National Labor Court ruling and concluded that the NP damages amount awarded of NIS 25,000 (approximately EUR 5,840) is appropriate and therefore, awarded NP damage in a similar amount⁴⁹⁹. The court used this set amount as an outline comparable to this case in ruling the NP damages amount. The case illustrates a tendency of the court to reach decisions on NP compensation, by looking to a total sum amount that is perceived as an appropriate amount by the court.

Salary level

The total amount of compensation bestowed by the court in WEL cases may have been a high aggregate sum, but they were not the highest awards in relation to the number of salaries. In examining the cases, it appears that the higher the employee's salary, the higher the total amount of compensation awarded upon wrongful dismissal.

It was found that in Tatiana Zaslavsky⁵⁰⁰, the equivalent of 7.2 salaries of NIS 24,200 (approximately EUR 5564) produced a total amount of NIS 176,083 (approximately EUR 40,489). By contrast, in Alberta Skora⁵⁰¹, the larger equivalent of 11.5 salaries of NIS 612 (approximately EUR 142) produced a total amount of only NIS 7,070 (approximately EUR 1642) due to the low salary level. In Simcha Mamu⁵⁰², an award equivalent to 15 salaries of NIS 3,000 (approximately EUR 690) produced a total amount of NIS 45,450 (approximately EUR 10,450). Thus, a high number of salaries (15) in Mamu case produced a lower total sum of money than the Zaslavsky case (7.2 salaries) due to the salary level. It is not surprising, due to the finding that P damages play a leading role in calculating the whole amount of compensation,

⁴⁹⁹ Hadas Yekotiel Boubilil, case 9 - This amount includes compensation for way of dismissal - without hearing and there is no place for separate compensation, as was determined in the Orly Murry case. However, the plaintiff claimed a lower amount and that amount was bestowed by the court.

⁵⁰⁰ Case 2.

⁵⁰¹ Case 6.

⁵⁰² Case 3.

that the level of wages is a primary factor that influences the total sum of compensation.

Reason for dismissal (see Table B2)

It is important to clarify again that where the WEL applies, the prohibition to dismiss pregnant women is absolute. However, when the dismissal was justified on account of redundancy, or due to the liquidation of the business, the NP compensation was zero⁵⁰³. When the reason for dismissal was the end of a project and not connected to the pregnancy, the courts awarded NP compensation in an amount of less than one salary⁵⁰⁴. This shows that for NP compensation, the reason for the dismissal influences the amount of the NP award.

Justifications for dismissal due to the conduct of the employee also seem to be an influencing factor. For instance, an employee who attempted to steal from her employer, did not receive NP compensation⁵⁰⁵. Similarly, in Simcha Mamu case, the employee refused to return to work offered by the employer, after the employer canceled the wrongful dismissal and offered reinstatement. The court determined that the negative conduct of the employee would result in a low NP compensation. However, it should be noted that in that case the NP compensation was nonetheless the equivalent of 5 salaries. This number of salaries does not seem particularly low, although the court claimed it to be so in its ruling⁵⁰⁶. In Vinugray Elizabeta case, involving conduct of the employee, the plaintiff did not act to minimize her damages and was denied part of the compensation to be awarded by the court⁵⁰⁷. In contrast, a different approach of the court towards the duty to mitigate damages was apparent in Enbar

⁵⁰³ Naama Peleg, case 5; Tatiana Zaslavsky, case 2.

⁵⁰⁴ Shiri Rubin, case 1.

⁵⁰⁵ Alberta Skora, case 6.

⁵⁰⁶ Simcha Mamu, case 3.

⁵⁰⁷ Vinugray Elizabeta, case 8.

Amiga. There the court determined that wrongful dismissal contrary to WEL is void and therefore there is no direct duty applying on the plaintiff to mitigate her damage. However, mitigating damage by the plaintiff can show her good faith and can influence the courts' ruling⁵⁰⁸. In conclusion, the courts seem to find different justifications for adjusting or denying NP compensation.

The conduct of the employer also seems to be an important influencing factor and can significantly increase the compensation award. In instances where an employer gave a false reason for dismissal⁵⁰⁹ or an employer caused the plaintiff mental anguish and violated the WEL and EOEL, NP compensation awarded by the court were quite high⁵¹⁰.

Table B2: Reason for dismissal WEL

Number of salaries awarded	Justified reason for dismissal	Unjustified reason for dismissal
	5 cases	7 cases
Above average	3 cases	2 case
Below average	2 cases	5 cases

As displayed in table B2, the distribution of cases between above average and below average compensation does not show a significant tendency of compensation award related to the reason for dismissal. Nevertheless, below average compensation were awarded to five cases with an unjustified reason for dismissal whereas two cases were awarded above average compensation. For example, Hadas Yekotiel Boublil⁵¹¹, dismissed for an unjustified reason, was awarded 6.3 salaries for NP compensation and no compensation were awarded for P damages. Again it seems, the influence the court has on the total sum of compensation was limited to the NP component of compensation. The

⁵⁰⁸ Enbar Amiga, case 4 at 26 paragraph 38, 39.

⁵⁰⁹ Enbar Amiga, case 4, NP compensation awarded by the court was 3.6 salaries.

⁵¹⁰ Helena Maymaran, case 7, NP compensation awarded by the court was 4.5 salaries.

⁵¹¹ Case 9.

unjustified reason for dismissal may have influenced the NP compensation but not the P compensation.

Period of employment

In Shiri Rubin case, the court has noted that the length of employment is a factor influencing the compensation rate. There, the court considered 1.5 years of employment as short and the NP compensation awarded was less than one salary⁵¹². However, Shiri Rubin case involved other factors that were taken into account to reduce the award, such as a reason for the dismissal was the end of the project.

Nonetheless, in other cases the time of employment has not been mentioned as a factor by the court. There was also no recognizable tendency in the court rulings studied basing NP awards on this factor. Moreover, plaintiffs who worked the same period of time received differing amounts of compensation. For instance, Simcha Mamu, employed for 9 month was awarded compensation equivalent to 15 salaries. Helena Maymaran, employed for a similar period of 10 month, was awarded a lower 9.4 salaries compensation. On the other hand, Vinugray Elizabeta, who was employed for a shorter period of 6 month, was awarded a similar amount of compensation equivalent to 10 salaries⁵¹³.

Furthermore, examination of the cases surveyed for the research shows that the period of employment of the plaintiffs ranged from six month up to three years. Therefore, all cases reviewed applying WEL were relatively of a short period employment plaintiffs. In my opinion, this is due to the homogeneous nature of group of plaintiffs claiming for wrongful dismissal due to pregnancy. The plaintiffs belong to the same age group, childbearing age and also belong to a relatively short time employment group of plaintiffs. In this context it seems that period of employment overall had little or no influence on the amount of compensation awarded.

⁵¹² Shiri Rubin, case 1.

⁵¹³ Simcha Mamu, case 3. Helena Maymaran, case 7. Vinugray Elizabeta, case 8.

Occupation

The type of job performed by the employee was not mentioned by the court as an influencing factor. For cases involving occupations viewed as high ranking professions such as a project manager, computer programmer and shop manager, some claimants were awarded compensation above the average, while others received awards that were below the average. Similarly, for cases involving employees in lower ranking occupations such as a clerk, worker in a food store and cleaner, some were awarded compensation below the average and others received awards that were above average.

Nevertheless, it may seem that higher level positions (for example, a project manager or computer programmer) with the higher salaries actually received wrongful dismissal compensation equivalent to a lower number of salaries, although the total sum of the award was high due to the high salary⁵¹⁴. Lower ranking jobs, such as a cleaner, secretary or a clerk, received a higher number of salaries, although, the total amount of compensation was lower due to the lower salary of these positions⁵¹⁵.

A question is whether the court looks to the occupation of the plaintiff as a factor or does the court look to the level of salary that accompanies that occupation? The cases examined do not provide a clear cut answer to this question. It may be that the court looks to the bottom line of total amount awarded, however the cases surveyed did not produce a conclusive answer on this issue.

⁵¹⁴A project manager Shiri Rubin, case 1, with a salary of NIS 13,000 (EUR 2989) was awarded a total amount of compensation equivalent to 4 salaries, which is relatively low. A computer programmer Tatiana Zaslavsky, case 2, with a salary of NIS 24,200 (EUR 5564), received compensation equivalent to 7.2 salaries.

⁵¹⁵Alberta Skora, case 6, a cleaner at a private home received 11.5 salaries but the salary was low NIS 612 (EUR 142) and the total amount was low NIS 7,070 (EUR 1642). A secretary, Simcha Mamu, case 3, received amount of compensation equivalent to 15 salaries. Due to the low salary the total amount was not relatively high. A clerk was awarded 9.4 salaries Helena Maymaran, case 7.

4.4.2 Dismissal in violation of the Equal Opportunities Employment Law

Multiples of salary awarded (see Table C)

In cases of wrongful dismissal under the EOEL, the number of salaries awarded by the court ranged between 2.5 to 23.8 salaries with the average number of salaries awarded being 11.5 salaries. In four cases out of 25 applying EOEL there was no information about the salary level of the plaintiff. Out of the 21 cases in which the salary of the plaintiff was presented, ten cases were awarded above average compensation. Eleven cases out of 21 were awarded below average compensation. Nevertheless, the deviation from the average shows that 12 cases out of 21 were awarded around and far above 10 salaries while 9 cases were awarded below and far below 10 salaries.

Table C: Multiples of salary awarded

Number of salaries	Number of cases (total 25 cases)
Above the average	10 cases
Below the average	11 cases
Unknown salary	4 case

As regards to the division between the P compensation and NP compensation, table C1 shows the different influence of each type of compensation on the total amount. In the cases where a low level of compensation was awarded, the award of P compensation was low or nonexistent and also a low number of salaries for NP compensation was awarded. For instance, the total compensation amount equivalent to 2.5 salaries were awarded to Shdamit Har Zahav⁵¹⁶, from which P compensation were zero and NP compensation were 2 salaries. In contrast, where a high number of salaries was awarded, there was both a high actual damage award of P compensation and a high NP damage award. For example, Anat Bashearim was awarded a total amount of compensation equivalent of 22.5 salaries, from which the P compensation were 8 salaries, and the NP compensation were 7.6 salaries. The NP compensation

⁵¹⁶ Shdamit Har Zahav, case 24.

of 7.6 salaries were composed from 3 salaries awarded for violation of EOEL and 4.6 salaries awarded for violations of the hearing and good faith duties and breach of contract. Thus, it seems that the court does not limit itself to rigid definitions of the origin for the compensation amount awarded and will award NP compensation based on several factors in accordance with the circumstances⁵¹⁷. Furthermore, it seems the court exercises its discretion and awards NP compensation with less reluctance in EOEL cases than in the WEL cases⁵¹⁸.

Table C1 - Division between P compensation and NP compensation

Case	Total salaries awarded	P compensation	NP compensation
13 Ela Greenberg Nachshon	14.3	6.2	5.7
14 Yafit Galy	14	5.9	3.6
15 Orit Busy	13.8	4.9	8.8
16 Enbal Harel	9.5	4.2	3.1
17 Danit Zachariah	7.8	4.5	2
18 Liron Biton	3.5	0.5	2
19 Efrat Rubin	18.4	8	5.6
20 Karin Ortesy	7.7	4.5	3
21 Lital Berenfeld levy	7	4.5	2.4
22 Shlomit Matana	9	6.9	2
23 Yazbalam Kabada	unknown	0	Almost all the sum
24 Shdamit Har Zahav	2.5	0	2
25 Nataly Yitzhaky	6.6	1.8	3
26 Anat Bashearim	22.5	8	3+4.6=7.6
27 Adi Arel	7.8	3.4	2.3
28 Liana Gerry	2.5	0	2.5
29 Shindler Nataly	18	3.3	13.6
30 Litav Jos Vaaknin	23.8	5	12.5
31 Svetlana Cogan	unknown	Half of the sum	Third of the sum
32 Shirin Espanola	12.5	0	7.7

⁵¹⁷ Anat Bashearim, case 26.

⁵¹⁸ The lowest amount of NP compensation bestowed by the court was equivalent to 2 salaries. The highest amount bestowed was 13.7 salaries (table C1). And see Esti Kremer, case 36; Odelia Maoz, case 37.

33 Matana Parco	14	0	12.9
34 Karin Regev	5.2	0	2.3
35 Hadas Silvering Shemesh	21.9	8.1	13.7
36 Esti Kremer	unknown	0	All the sum
37 Odelia Maoz	unknown	0	All the sum

Salary level

The case of Orit Busy is a leading case of the National Labor Court and is binding for all Labor Courts. It had not yet been published at the time of the study of the cases surveyed in the research and as such the cases do not yet reflect the influence of this decision⁵¹⁹. In Orit Busy, the National Labor Court reduced an award of compensation by the Regional Labor Court, because it considered it exceptional and not proportional⁵²⁰. The court determined that the level of salary should not influence the compensation sum, but it may be a factor in some circumstances and have an influence on deterrence considerations. The court determined that the overall situation of the case should be examined and the amount of P damages awarded should be taken into account.

Nonetheless, it seems the level of salary does have an influence on the total amount of compensation. A high number of salaries awarded does not necessarily mean a larger sum of total compensation, if the salary itself is low. Conversely, a low number of salaries does not mean low total sum of compensation, if the salary is high⁵²¹.

⁵¹⁹ Yisum company Ltd., - Orit Busy case 15.

⁵²⁰ *Id.*, 13.8 salaries were awarded. The court reduced the award from 21.6 salaries. P- 4.9 salaries .were reduced from 7 salaries.NP – 8.8 salaries were reduced from 14.6 salaries.

⁵²¹ For example, 18.4 salaries awarded in Efrat Rubin case 19, reached a total amount of NIS 58,360 (EUR 13,539), the salary was NIS 3,170 (EUR 735). In Lital Berenfeld case 21, 7 salaries were awarded to a total of NIS 56,790 (EUR 13,175), the salary was NIS 8,000 (EUR 1,856). So higher number of salaries award led to approximately the same amount of compensation. When the salary was relatively high, the total amount of compensation was high even if number of salaries was not relatively high.

Furthermore, it seems that there are different perspectives in the courts regarding a low or high total compensation amount. Two cases awarded the same number of salaries, yet it was regarded in one case as a low level of compensation and in the other case as a high level of compensation⁵²². This illustrates that the definition of low or high compensation is not uniform among the courts. It also seems to show that the individual salary level will influence the approach to the total sum of compensation awarded.

Reason for dismissal (see Table C2)

The reason for the dismissal plays a role in determining the amount of compensation. In Anat Bashearim, a high total compensation amount was awarded to the plaintiff due to the severe conduct of the employer that dismissed the plaintiff solely due to her pregnancy. In addition the employer accused the plaintiff of being unprofessional in order to cover the real reason for dismissal. The employer provided a false reason for dismissal and caused mental anguish to the plaintiff⁵²³. Ela Greenberg Nachshon case, in which the primary cause of dismissal was discrimination due to pregnancy, the court determined that the plaintiff was entitled to all the direct damages resulting from the dismissal. In addition, the plaintiff was awarded NP compensation and this was deemed a violation of WEL, although it was not applicable⁵²⁴. In Nataly Yitzhaky case in which the only reason for dismissal was the pregnancy, the court granted NP compensation taking into account the severity of the injury to the plaintiff and the violation of the principle of equality under Israeli law⁵²⁵.

⁵²² In, Nataly Yitzhaky case 25, the NP compensation of 3 salaries of NIS 5280 (EUR 1,225) was total amount of NIS 15,850 (EUR 3,664) and was regarded by the court as a high level of compensation due to the circumstances. In, Karin Ortesy case 20, award of 3 salaries of NIS 6,250 (EUR 1450) was a total of NIS 20,000 (EUR 4,624), was regarded as low compensation. However, in terms of sum of money, the low compensation in case Karin Ortesy was actually higher than the high compensation of case Nataly Yitzhaky.

⁵²³ Anat Bashearim, case 26– 22.5 salaries were awarded by the court .The court award of NP compensation took into consideration the injury to an engineer at the beginning of her career.

⁵²⁴ Ela Greenberg Nachshon case 13. The number of salaries awarded by the court was 14.3.

⁵²⁵ Nataly Yitzhaky, case 25, the total amount of compensation awarded was not high: 6.6 salaries. This was due to reducing other earning of the plaintiff in this time form the P compensation. Another reason was that the plaintiff claimed a lower amount than the amount she was entitled to and this

In contrast, low NP compensation was awarded where there was justification for the dismissal through the conduct of the plaintiff. In Danit Zachariah case, the main reason for dismissal was the apparently unjustified absence of the plaintiff from work⁵²⁶. In Liron Biton case, the defendant cancelled the dismissal and offered to reinstate the employee, however, the plaintiff refused. The court determined that in these circumstances, there was no room for punitive compensation and awarded a low level of NP compensation⁵²⁷. In Karin Ortesy case where the dismissal was due to incompatibility, but the timing of dismissal was due to the pregnancy, the court determined the staining model applied. NP compensation was awarded, but the amount was influenced by the weak causation between the discrimination and the dismissal⁵²⁸.

It seems that the reason of dismissal is an influencing factor on compensation rates. Justified cause for dismissal may lead to a lower NP compensation rate⁵²⁹. Where the cause of dismissal is solely due to pregnancy it will lead to higher compensation rates⁵³⁰.

Table C2: Reason for dismissal EOEL

Number of salaries awarded	Justified reason for dismissal	Unjustified reason for dismissal
	6 cases	15 cases
Above average	0	10 cases
Below average	6 cases	5 cases
Unknown salary		4 cases

amount was what the court considered. Also the short time of employment (3.5 month) was considered by the court.

⁵²⁶ Danit Zachariah, case 17. Similarly, in case Shdamit Har Zahav, case 24, the court doubted that the dismissal was connected to the pregnancy. The reason for dismissal was the conduct of the plaintiff that was absent from work. The total amount awarded was 2.5 salaries from which the NP compensation was 2 salaries.

⁵²⁷ Liron Biton case 18. NP compensation was 2 salaries.

⁵²⁸ The reason of dismissal in Karin Ortesy, case 20, was that the employer was not satisfied with the plaintiffs work, therefore the NP compensation for discrimination was relatively low (3 salaries). However, one of the reasons for dismissal was the pregnancy and according to the staining model it is wrongful dismissal.

⁵²⁹ Liron Biton ,case 18– 3.5; Shdamit Har Zahav ,case 24– 2.5 salaries;; Lital Berenfeld levy, case 21, The NP salaries was 2.4.

⁵³⁰ Ela Greenberg Nachshon ,case 13– 14.3 salaries; Anat Bashearim, case 26- 22.5 salaries.

As presented in table C2, all six cases with a justified reason for dismissal were awarded below average compensation. This finding supports the conclusion that the reason for dismissal is an influencing factor leading to lower compensation award when wrongful dismissal is for a justified reason. From fifteen cases with an unjustified reason for dismissal, ten cases were awarded above average compensation and five cases were awarded below average compensation. The distribution of these cases between compensation awards below average and above average indicates that more case were awarded higher compensation when the reason for dismissal was unjustified. Nevertheless, ten cases of wrongful dismissal for an unjustified reason were awarded above average compensation compared to no case of wrongful dismissal for a justified reason awarded above average compensation. This finding suggests that the tendency of the court was to award higher compensation to plaintiffs that were wrongfully dismissed for an unjustified reason.

Period of employment

The period of employment is a major factor influencing compensation rates in EOEL cases. The court has addressed this factor in two situations. The first is connected to the timing of the dismissal. In several cases the dismissal was hurried and swift in order to avoid the six month employment condition and the application of WEL⁵³¹. In Yafit Galy case, a plaintiff was dismissed swiftly after 5 month and 11 days of employment. The court determined that the timing of the dismissal was due to the pregnancy and in order to avoid application of WEL. The court determined that taken into account was the period of employment and the aim of the statute. The court concluded that dismissal due to pregnancy is conduct without good faith and entitles the plaintiff to P and NP damages. As such, NP compensation was awarded as punitive damages. Nevertheless, the ruling was reversed by the National Labor

⁵³¹ WEL, *supra* note 31, § 9(a).

Court that determined the plaintiff failed to meet the burden of proof and therefore EOEL was not violated. Compensation awarded by the Regional Labor court for violation of EOEL was canceled⁵³².

Similarly, Efrat Rubin, was dismissed two days prior to reaching 6 months of employment⁵³³. Enbal Harel was dismissed after 5 month and 27 days of employment. There the court awarded damages and determined that the pregnancy was a major factor in the timing of the dismissal in order to avoid the application of WEL⁵³⁴.

A second situation is where the courts have addressed the factor of time in connection with awards based on the length of employment itself. For example, an employee that was wrongfully dismissed for pregnancy after a short period of employment (2 months) was awarded a low NP compensation. The court determined the time of employment is a factor that needs to be taken into account⁵³⁵. Similarly, the court awarded low NP compensation for a wrongfully dismissed plaintiff employed for only 1.5 month. Nevertheless, a different ruling of the court that awarded high amount of compensation to an employer employed for only one day was due to the bad conduct of the employer⁵³⁶.

It should be notes that cases surveyed in the research for violation of EOEL, apart from three case, were cases of plaintiffs employed for a relatively short

⁵³² Yafit Galy, case 14 – was awarded 14 salaries. However, in appeal the award of NIS 69,500 was cancelled, see LA (National) 11260-10-13 Formaika Center Ltd. v Yafit Galy, Nevo, November 2016.

⁵³³ Efrat Rubin, case 19. The total amount awarded was 18.4 salaries.

⁵³⁴ Enbal Harel, case 16, was awarded 9.5 salaries.

⁵³⁵ Shlomit Matana, case 22. The court awarded the plaintiff 9 salaries, from which 2 salaries were for NP damage.

⁵³⁶ Shdamit Har Zahav, case 24, the court awarded 2.5 salaries taking into account the short time of employment (1.5 month). However, the low compensation awarded was due also to the doubt that the dismissal was connected to the pregnancy and the conduct of the plaintiff that was absent from work. And see: Yazbalam Kabada, case 23, the court mentioned the 4 month employment as a factor taken into account for assessing the compensation rate. And see: Adi Arel, case 27, the court awarded NP compensation of 2.3 salaries and determined the NP was influenced by the period of employment. However, there were other reasons for dismissal apart from the pregnancy and so the NP compensation was lower. In total compensation was 7.8 salaries. And see conversely: Litav Jos Vaaknin, case 30, awarded total of 23.8 salaries including defamation compensation. 12.5 salaries were due to NP compensation.

time of less than 6 month. One case was of a plaintiff employed for 9 month which is also a relatively short period of employment. However, in one of the three cases, the employment was of four years but the WEL was not applicable in the circumstances of the case.

Most likely the reason for the short time employment cases is that the EOEL applies for wrongful dismissal of pregnant women without condition of time of employment, as opposed to the WEL. For a plaintiff wrongfully dismissed after less than 6 month the WEL does not apply and the only route for a legal claim of a pregnant women wrongfully dismissed is by application of the EOEL. Moreover, if the WEL does not apply for other reasons than the reason of period of employment, the application of EOEL is the legal path to claim for wrongful dismissal due to pregnancy⁵³⁷.

Occupation

In the case of Anat Bashearim, the occupation was a factor taken into account by the court leading to a high NP compensation .The plaintiff was an engineer at the beginning of her career, accused by the employer of being unprofessional in order to cover the real reason of dismissal - pregnancy⁵³⁸ . However, apart from this case, it seems the occupation does not have an influence on the compensation award and the courts have not mentioned it.

Plaintiffs having similar occupations received differing compensation amounts. For instance, cases involving claimants of similar occupations, such as telephone sales representatives, received differing amounts of compensation of 7.8 salaries and of 18.4 salaries⁵³⁹.

Furthermore, both supposedly high and low ranking occupations received compensation above average. For instance, a secretary received 14 salaries

⁵³⁷Liron Biton ,case 18, employed for 9 month. The employer canceled the dismissal and offered to reinstate the plaintiff. Thus the WEL did not apply. In contrast, see Litav Jos Vaaknin case 30 dismissed after one day of employment.

⁵³⁸Anat Bashearim, case 26, was awarded 22.5 salaries.

⁵³⁹ Danit Zachariah, case17, and Efrat Rubin, case 19.

and a coordinator service and legal advisor received 14.3 salaries⁵⁴⁰. Compensation below average were awarded both to supposedly low and high ranking occupations. For instance, a social instructor was awarded 3.5 salaries, and an accountant was awarded 7.7 salaries⁵⁴¹. It seems there was no apparent tendency concerning the occupation of the plaintiff.

4.4.3 Dismissal in violation of both Women Employment Law and of Equal Opportunities Employment Law

Multiples of salary awarded (see Table D)

The average amount of salaries awarded in cases where there were violations of both the WEL and EOEL was equivalent to 15 salaries. The case with the lowest number of salaries awarded was 6.3 salaries and the case with the highest number of salaries was 42.2 salaries. Out of the ten cases applying both WEL and EOEL, two cases were awarded compensation above average and eight cases were awarded compensation below average. Thus, mostly compensation below average were awarded by the court. Nevertheless, the deviation of cases shows that 8 cases out of 10 were awarded compensation below 15 salaries. Two cases were awarded compensation above 15 salaries and especially one case was far above 15 salaries. The case with average of 42.2 salaries is presented below.

Table D: Multiples of salary awarded

Number of salaries	Number of cases (total 10 cases)
Above the average	2 cases
Below the average	8 cases

⁵⁴⁰ Ela Greenberg Nachshon, case 13 and Yafit Galy, case 14.

⁵⁴¹ Liron Biton, case 18 and Karin Ortesy, case 20.

In some cases, the same amount of NP compensation was awarded for the violations of each of the statutes - WEL and EOEL, as demonstrated in table D1⁵⁴². However, in Malky Graivsky the court held that it must take into account the cumulative amount of money paid due to the different sources of damage and awarded one NP compensation amount together for both statutes (WEL and EOEL). An additional amount of NP compensation was awarded due to wrongful dismissal, mental anguish and the employer's failure to provide a hearing. As such, the total NP compensation was from different sources, including those provided by both the WEL and EOEL⁵⁴³. It is apparent from this case that the court does not limit itself to rigid sources of compensation⁵⁴⁴ .

In most of the cases (apart from two cases) involving both statutes, the P compensation was nonexistent or very low. Most of the compensation awarded was due to NP compensation, as demonstrated in table D1⁵⁴⁵. This means there was no actual damage or low actual damage resulting from the dismissal, at the end of the protected period (60 days after return from maternity leave, there is no loss of income), yet the tendency of the courts was to award relatively high NP compensation. In some of the cases, the court declared that the high NP award was on account of punitive and deterrence considerations. In Plonit v Almonit, in which the highest number of salaries was awarded, the court explained that punitive considerations were important factors leading to the substantial amount of compensation awarded. The high amount of 42.2 salaries awarded in this case were comprised from 18.4 salaries of NP compensation .The same amount of 9.2 salaries was awarded for each of the

⁵⁴² See table D1: cases. 39, 40,41,42,46.

⁵⁴³ Malky Graivsky, case 38 – a low number of salaries was awarded, 8.3 salaries.

⁵⁴⁴ See also Anat Bashearim, case 26.

⁵⁴⁵ Example: Inesa Volloshin. Case 43. P compensation was 3.6 salaries and NP compensation awarded was 9.3 salaries and the total number of salaries awarded was 19.5 salaries However, the court denied claim for mental anguish because it determined it was included in compensation awarded for EOEL. The two cases that demonstrated a different tendency are Olga Shamis, case 44 and Reut Bar, case 45.

statutes: WEL and EOEL to the total of 18.4 salaries. 4.5 salaries were awarded for P compensation, 11 salaries were awarded for violation of the hearing duty and the remaining salaries were due to obligatory payments. Nevertheless, in Shiran Batito the court determined compensation should be reasonable⁵⁴⁶. The total compensation awarded to Batito was equivalent to 14.3 salaries. NP compensation award was 13.8 salaries, composed from 6.9 salaries for WEL and 6.9 salaries for EOEL violations. The plaintiff suffered a natural abortion 3 days after dismissal and so P compensation was accordingly very low (3 days salary). The NP compensation was due to suffering, humiliation and punitive compensation awarded on account of violation of both statutes. Her additional claim for mental anguish compensation was denied since compensation amount should be reasonable.

In contrast, Reut Bar was awarded high P compensation which comprised the total amount of compensation awarded. No NP compensation were awarded and the P compensation were calculated by 100% and not by 150% salary as the law permits. The court determined that in this case no punitive considerations should be taken into account because the employer acted in good faith and had justified reason for dismissing the plaintiff whereas the plaintiff acted without good faith⁵⁴⁷.

⁵⁴⁶ Plonit v Almonit, case 39. And see Shiran Batito, case 42 at 17 paragraph 66.

⁵⁴⁷ Reut Bar, case 45.

Table D1 - Division between P compensation and NP compensation

Case	Total salaries awarded	P compensation	NP compensation
38 Malky Graivsky	8.3	0	3+ WEL and EOEL 3=6
39 Plonit v Almonit	42.2	4.5	WEL 9.2+EOEL 9.2=18.4
40 Nurit Kurtnizky	12.8	0	WEL 2.8+EOEL 2.8=5.6
41 Lilach Rosenberg	11.4	2	WEL 2.5+EOEL 2.5=5
42 Shiran Batito	14.3	3 Days till abortion	WEL 6.9+EOEL 6.9=13.8
43 Inesa Volloshin	19.5	3.6	EOEL 9.3
44 Olga Shamis	14.5	8	WEL+EOEL 4
45 Reut Bar	9	9	0
46 Sandrine Asoline	6.3	2	WEL 1 + EOEL 1= 2
47 Enva Neter	13.2	5	EOEL 2.7

Salary level

In cases in which both WEL and EOEL apply, it happens that the highest number of salaries awarded was also the largest total amount of compensation⁵⁴⁸. However, the lowest number of salaries bestowed was not the lowest total amount of compensation. The lowest number of salaries was 6.3 salaries awarded to Malky Graivsky, at a total of NIS 71,040 (approximately EUR 16,325). However, a higher number of 14.3 salaries awarded to Shiran Batito, produced a lower total of NIS 62,570 (approximately EUR 14,532)⁵⁴⁹. Therefore, it would appear that the level of salary influenced the total amount of compensation.

⁵⁴⁸ Plonit v Almonit, case 39, 42.2 salaries total amount NIS 227,800 (EUR 52,380).

⁵⁴⁹ Malky Graivsky, case 38, compared to Shiran Batito, case 42.

Reason for dismissal (see Table D2)

In Reut Bar case the court determined that the dismissal was justified and not connected to the pregnancy. Therefore, no NP compensation were awarded and only actual damage were awarded. In all cases, apart from this one case, involving a violation of both the WEL and EOEL, the reason for dismissal was the employee's pregnancy. This seems to have led to a relatively high NP compensation amounts⁵⁵⁰. In Plonit v Almonit, the maximum amount stipulated in the EOEL for NP compensation (NIS 50,000 or approximately EUR 11,490) was awarded for violation of each of the statutes: WEL and EOEL. The dismissal was deemed discriminatory on the basis of parenthood, pregnancy and worldview. The court determined the dismissal violated primary rights and therefore punitive considerations resulted in a substantial award⁵⁵¹ .

In the Shiran Batito case, the court also found a direct connection between the pregnancy and the dismissal. The court determined that the plaintiff was entitled not only to compensation for her suffering and humiliation, but punitive compensation as well in order to deter employers from such actions⁵⁵² . In several cases, the court has found that pregnancy was the reason of dismissal where the plaintiff was dismissed at the end of the protected period without receiving the opportunity to reintegrate in work. The court in calculating the compensation took into account the mental anguish suffered by the plaintiff, the violations themselves of both the WEL and EOEL, the circumstances of the dismissal and the period the employee worked⁵⁵³.

⁵⁵⁰See Reut Bar, case 45. And see In Inesa Volloshin, case 43, the court determined the pregnancy was the only reason for dismissal and this influences the amount of compensation. The amount equivalent to 19.5 salaries was awarded, which 9.3 salaries ascribed to NP compensation.

⁵⁵¹ Plonit v Almonit, case 39, 42.2 salaries total amount NIS 227,800 (EUR 52,380).

⁵⁵² Shiran Batito, case 42, the main reason for dismissal was the pregnancy and the total compensation bestowed by the court was equivalent to 14.3 salaries.

⁵⁵³ Malky Graivsky, case 38. Similarly, Nurit Kurtvizky, case 40, the plaintiff was dismissed without permission of the minister after end of protected period and the court awarded an amount equivalent to 12.8 salaries.

Table D2: Reason for dismissal EOEL and WEL

Number of salaries awarded	Justified reason for dismissal	Unjustified reason for dismissal
	1 case	9 cases
Above average	0	2 cases
Below average	1 case	7 cases

Nine cases applying WEL and EOEL demonstrated wrongful dismissal cases with an unjustified reason for dismissal. Seven of the cases were awarded below average compensation and two cases were awarded above average compensation. Most cases with an unjustified reason for dismissal were awarded below average compensation. In one case applying WEL and EOEL the court determined the dismissal was justified and the compensation awarded was below the average. Nevertheless, the average number of salaries bestowed by the court for wrongful dismissal contrary both to the WEL and the EOEL was a high average of 15 salaries.

Period of employment

The court has mentioned the period of employment as a factor taken into account in several cases, yet it seems the period of employment was a minor factor in determining the amount of compensation. For example, in the Malky Graivsky case, the court took into account plaintiff's 5 years employment together with the circumstances involved⁵⁵⁴. In the case of Plonit v Almonit the court stated that an 8 year period of employment was taken into account⁵⁵⁵. However, in several other cases the time of employment was not mentioned at all and plaintiffs who worked the same period of time received differing

⁵⁵⁴ Malky Graivsky, case 38, the amount of compensation awarded was equivalent to 8.3 salaries.

⁵⁵⁵ There the amount bestowed was substantial and equivalent to 42.2 salaries.

amounts of compensation⁵⁵⁶. For example, Lilach Rosenberg⁵⁵⁷, employed for 9 month was awarded compensation equivalent to 11.4 salaries. Shiran Batito⁵⁵⁸ employed the same period of 9 month, was awarded compensation equivalent to 14.3 salaries.

At the same time, plaintiffs with different lengths of employment service were awarded a similar number of salaries in compensation. Nurit Kurtznizky, employed for 9 years was awarded compensation equivalent to 12.8 salaries. Lilach Rosenberg, employed for 9 month was awarded compensation equivalent to 11.4 salaries⁵⁵⁹.

Period of employment in cases surveyed for the research applying both WEL and EOEL, ranged from 9 month to 9 years. There was a diversity between plaintiffs regarding period of employment. In four cases the period of employment was above 5 years, which can be referred to as long time employment (see in chapter 5). However, there was no tendency apparent in cases of above five years employment. The award of compensation was variant (6.3 salaries, 8.3 salaries, 42.2 salaries and 12.8 salaries) and there was no tendency demonstrated related to the period of employment⁵⁶⁰. It seems the period of employment was not a major influencing factor on compensation rate in cases violating both the WEL and the EOEL.

⁵⁵⁶ In Lilach Rosenberg, case 41, the time of employment was 9 month and the compensation amount bestowed was equivalent to 11.4 salaries. The same time of employment of 9 month was in Shiran Batito, case 42, and the amount of the compensation awarded was equivalent to 14.3 salaries.

⁵⁵⁷ Case 41.

⁵⁵⁸ Case 42.

⁵⁵⁹ Nurit Kurtznizky, case 40. Lilach Rosenberg, case 41. And compare: Amount of the compensation equivalent to 19.5 salaries was awarded in Inesa Volloshin, case 43 employed for 3 years. The court determined that the amount of compensation was influenced by the pregnancy being the only reason for dismissal.

⁵⁶⁰ Sandrine Asoline, case 46, Malky Graivsky case 38, Plonit v Almonit, case 39, Nurit Kurtznizky case 40.

Occupation

The occupation or type of work performed by the plaintiff was not mentioned by the court in cases involving violations of both statutes. Furthermore, it would seem that the occupation of the plaintiff had little or no influence on the compensation amount. No tendency to consider occupation by the court was apparent.

For instance, a department coordinator, viewed as a high ranking occupation was awarded compensation equivalent to 12.8 salaries⁵⁶¹. A salesperson, viewed as a lower ranking occupation was awarded a similar sum of compensation equivalent to 11.4 salaries⁵⁶². A seller in a shop, also supposedly of a low ranking occupation was awarded higher compensation equivalent to 14.3 salaries⁵⁶³. However, a clerk, supposedly of a low ranking occupation was awarded even higher compensation equivalent to 19.5 salaries⁵⁶⁴. The only exceptional award was to a teacher that received a substantially higher amount of compensation however, it seems that several factors together led to this result⁵⁶⁵.

4.5 Summary and conclusions (see: Table E)

The findings presented show that many of the factors that were assumed to influence compensation awards indeed do so. Nevertheless, there were two factors among those presented that at first were not assumed to be influencing factors, but were revealed to be material in the research. The first of these factors was the specific statute or statutes that were violated by the wrongful dismissal – whether the WEL, EOEL or both statutes. Table E displays the range of compensation rates awarded, in total amounts and in average number of salaries, for wrongful dismissal in violation of the different statutes.

⁵⁶¹ Nurit Kurtvizky, case 40.

⁵⁶² Lilach Rosenberg, case 41.

⁵⁶³ Shiran Batito, case 42.

⁵⁶⁴ Inesa Volloshin, case 43.

⁵⁶⁵ Plonit v Almonit, case 39, the court awarded amount of compensation equivalent of 42.2 salaries.

It was found that a lower number of salaries were awarded in cases of wrongful dismissal in violation of the WEL (9 salaries average) or in violations of the EOEL (11.5 salaries average). Claims submitted for violations of both statutes (WEL and EOEL) together received a higher number of salaries award (15 salaries average). In these cases, the court awarded NP compensation for each of the statutes cumulatively and the amount of compensation in equivalent number of salaries was higher. Furthermore, in some cases involving violations of both statutes, the court awarded a similar amount of NP compensation for the violation of each of the statutes. However, one case awarded compensation in the outstanding amount of 42.2 salaries, has influenced significantly the average of 15 salaries. Not taking into account this one case would have resulted in an average of 12 salaries, similar to the average of cases involving EOEL⁵⁶⁶.

Table E - Compensation amounts for cases of WEL, EOEL, WEL+EOEL

Case	Total amount range	Number of salaries range	P compensation salaries range	NP compensation salaries range
WEL	NIS 7,070-176,083 (EUR 1642 - 40,489)	2.5 – 16.5	2 –12.7	0 - 6.3
EOEL	NIS 17,255 - 116,200 (EUR 4003- 26,958)	2 - 22.5	0 - 8	2 -13.6
WEL+EOEL	NIS 62,570 - 227,800 (EUR 14,532 - 52,380)	6.3 -42.2	0 - 9	0 - 18.4

<http://www.hamara.co.il/currency-exchange/ils-ils/ils-eur/> April till June 2016 currency exchange rate: ils- eur: 0.23...; eur- ils: 4.3...

The second factor was the division in awards between P damages and NP damages. The highest number of salaries for P compensation were awarded in WEL cases, while the lowest number of salaries for P compensation were

⁵⁶⁶ In five cases out of ten NP compensation was awarded at the same amount for each statutes. The case with outstanding number of salaries awarded was Plonit v Almonit case 39.

awarded in cases involving both WEL and EOEL violations. On the other hand, cases involving violations of both WEL and EOEL awarded the highest number of salaries for NP compensation.

In WEL cases, the court generally exercised its discretion cautiously and refrained from awarding NP compensation or awarded a low amount. It seems generally, the actual damage (P) calculated by the loss of income was to a lesser degree subject to the courts discretion, if at all. As such, it was to a lesser degree an influencing factor on the total sum amount awarded. On the other hand, the NP compensation which was subject to the discretion of the court and therefore to a greater degree in its control, had a greater influence on the total sum awarded to the plaintiff. The courts have been relatively unrestricted in determining the amount of total compensation through adjustment of the NP compensation. This supports the conclusion that the courts look to the bottom line of the amount awarded to the plaintiff. Furthermore, this reinforces the assertion that the courts use punitive damages to apply policy considerations to both deter and educate employers – a policy actually stated openly by the court⁵⁶⁷.

The remaining factors assumed to influence compensation award were discovered to be so, apart from occupation of the employee. It seems that for application of WEL, EOEL and both WEL and EOEL occupation of the employee was not an influencing factor.

The level of salary, seems to be a factor influencing compensation although the National Labor Court determined it should not be a factor. However, the court has stated that it may be a factor in some circumstances and has implications in providing deterrence⁵⁶⁸.

On account of the different levels of salary, cases with the highest amount of total compensation awarded were not necessarily those granting the highest number of salaries and vice versa. This was apparent in all the cases involving

⁵⁶⁷ See in: Malky Graivsky, case 38; Shiran Batito, case 42 and Plonit v Almonit, case 39.

⁵⁶⁸ Orit Busy, case 15.

the WEL alone and cases of the EOEL and most of cases involving both WEL and EOEL. However, a higher salary produced higher compensation than a lower salary, especially for the P compensation calculated by multiples of salaries. Nonetheless, it seems the level of salary does have an influence on the total amount of compensation.

In awarding compensation, the court provided that the amount awarded should be proportionate and reasonable⁵⁶⁹ and be appropriate to the circumstances⁵⁷⁰. The court emphasized the importance of taking into consideration the overall situation and the court also noted that an assessment of the NP compensation must consider the amount awarded for P damages⁵⁷¹. This indicates that the total sum of money awarded from all sources of compensation is a concern of the court⁵⁷². The questions of whether the court takes the level of salary into consideration and whether the court looks to the total bottom line that will be reached according to the level of salary are essentially the same and the research here suggests they are influencing factors.

The circumstances of the dismissal also influence the amount of NP compensation awarded and include several factors. One factor is the reason for the dismissal. A second factor is the conduct of the parties and a third factor is the length of employment.

In WEL cases when there was a justified reason for dismissal due to the employees' conduct, no or very low NP compensation was awarded. However, when the court found the circumstances appropriate, it exercised its discretion and awarded NP compensation.

In EOEL cases, the conduct of the employee providing a justification for the dismissal led to lower compensation awards. When the pregnancy was the only

⁵⁶⁹ *Id.*,

⁵⁷⁰ Nurit Kurtvizky, case 40; Malky Graivsky, case 38.

⁵⁷¹ Orit Busy, case 15.

⁵⁷² Malky Graivsky, case 38.

reason for dismissal the compensation rate was higher. In addition, in situations where the dismissal caused the employee mental anguish, suffering or humiliation, the compensation was influenced by these factors and the compensation was higher⁵⁷³. Similarly, in EOEL cases, where the employers' conduct considered the timing of the dismissal and performed hurried and brisk dismissal in order to avoid application of the WEL, this led the court to award higher compensation⁵⁷⁴. Swift and hurried dismissal were also viewed by the court as a dismissal without good faith⁵⁷⁵.

In cases involving violations of both the WEL and EOEL, the reason for dismissal - pregnancy related - was a clear and obvious factor influencing the amount of compensation. The court awarded high levels of compensation when the pregnancy was the only reason for dismissal and there was a clear connection between the dismissal and the pregnancy⁵⁷⁶.

The period of employment was a major factor influencing compensation rates in EOEL cases: dismissal in order to avoid application of WEL prior to 6 month employment. Where the employer considered the timing of the dismissal and performed hurried and brisk dismissal in order to avoid application of the WEL, this led the court to award higher compensation. The timing of dismissal also was considered by the court in regards to those having been employed for a short time. This usually resulted in lower compensation award. Period of employment in cases involving WEL or both WEL and EOEL together, was a minor factor, if at all.

It also seems that in cases in which several factors together influence the determination of compensation there will result in a higher compensation⁵⁷⁷.

⁵⁷³ Malky Graivsky, case 38; Shiran Batito, case 42.

⁵⁷⁴ Yafit Galy, case 14 – 14 salaries; Enbal Harel, case 16- 9.5 salaries; Efrat Rubin, case 19 - 18.4 salaries.

⁵⁷⁵ Enbal Harel, case 16.

⁵⁷⁶ In Nurit Kurtvizky, case 40, the employer claimed redundancy was the reason of dismissal but the court found this as a false reason, so there was no justification for the dismissal.

⁵⁷⁷ Example: Plonit v Almonit, case 39- The circumstances of dismissal were severe, contrary to WEL and in violation of EOEL. The plaintiff was discriminated on base of parenthood, pregnancy and

The conclusion is that a combination of several factors together influenced compensation to a greater degree than an isolated factor.

A final comment concerning the influence on the court of the factor of cause of dismissal. The influence of this factor may point to a European influence⁵⁷⁸. In a similar fashion to that of the European legal system, the court considered the factor of circumstances that led to the dismissal, even though the dismissal itself was prohibited. It was found that a justified cause for dismissal did influence the courts determination of compensation rates. Thus, the justified cause of dismissal was relevant at least in the consideration of compensation rates by the courts. Justified cause for dismissal led to low award of compensation. However, in the case of pregnant women dismissal, as in the European legal system, the prohibited dismissal will not be justified and nonetheless will be deemed wrongful dismissal even if there was a justified cause to dismiss the employee.

worldview that are primary rights. Time of employment was substantial (8 years), perhaps also the occupation (teacher) and age (41) were added circumstances that accumulated to the severe situation.

⁵⁷⁸ See the rule requiring "sufficient cause" or "just cause" for dismissal in European countries: Davidov Guy, Eshet Ido, *supra* note 190 at 148. The American approach of "Employment at Will" see at 147. In Israel the approach to dismissal is unlike that of the European legal systems, yet it has been influenced by both European and American system, and is a unique system.

Chapter 5

Empirical Research on Compensation Awards by the Israel Labor Court in Cases of Dismissals in Violation of Due Process: the Hearing and Good Faith Duty

5.1 Introduction

This chapter presents the supporting research relating to the factors influencing compensation awarded in cases of a wrongful dismissal in violation of due process. The particular due process violations examined here concern the duties to provide a hearing and to act in good faith. As explained in chapter 2 (Section 2.3.1.2), the Israeli labor law system places a duty on employers to conduct a hearing prior to the dismissal of an employee. It also requires that dismissals should be conducted in good faith.

Part 2 of this chapter (Section 5.2) presents the attitude apparent in court rulings towards wrongful dismissal in violation of the hearing and good faith duties. Certain limitations of the research are noted, in particular the problem of separating the results concerning wrongful dismissal in violation of the hearing duty from those pertaining to wrongful dismissal in violation of the good faith duty. Part 3 (Section 5.3), presents the methodology used in the research. The findings of the research are set out in Part 4 (Section 5.4): the findings relating to wrongful dismissal in violation of the hearing duty are presented first, followed by the findings relating to dismissals in violation of good faith. Part 5 (Section 5.5) provides a summary and conclusions.

5.2 Compensation awards in cases of dismissals in violation of the hearing or good faith duty

There is no one mandated method in which the labor court must determine compensation amounts for wrongful dismissal in violation of the hearing or good faith duty. As discussed in chapter 2.5 above, compensation for a violation of the hearing duty usually will be determined by the court using a calculation based on a multiple of salaries of the plaintiff. However, in some cases, compensation has been determined by the court as an all-inclusive amount.

Similarly, compensation for violations of the good faith duty may be determined by an award based on a multiple number of salaries or as an inclusive amount.

Claims submitted to the labor court regarding violations of the hearing and good faith duties are often part of a larger and more complex claim for wrongful dismissal. As such, it is often difficult to isolate the element relating to good faith or hearing violations within the total award. Furthermore, most of the judgments examined in the framework of the research were based on claims that included additional bases of wrongful dismissal and therefore were examined in the context of a larger sum awarded to the plaintiff. For example, wrongful dismissal can be due to a violation of a statute or the absence of hearing or to conduct without good faith or a combination of violations. A claim may be submitted by the plaintiff for wrongful dismissal in violation of the EOEL due to discriminatory dismissal, as well as an absence of good faith and also without having held a proper hearing as in the case of Meir Sagi⁵⁷⁹. In Meir Sagi, the employee was wrongfully dismissed due to age discrimination. The employer however presented the employee with a false reason for the dismissal which was found to violate the good faith duty. Moreover, the hearing itself was not conducted properly and the plaintiffs' right for a hearing was violated. Sagi received compensation for all these components of his claim cumulatively, therefore making it difficult to isolate the award for the specific violations of good faith and hearing.

In light of the courts often mixing of awards, the research has attempted to separate the elements of the hearing duty from those of the good faith duty in awards where both claims were identified. However, often both claims are intertwined and in some cases the court referred to them together as one, as explained in chapter 2.5.2.2 of the study. Moreover, there is no one uniform approach of the court to the hearing and good faith duties and judgments differ. Nevertheless, in presenting the findings of the research, an attempt to

⁵⁷⁹ Meir Sagi, case 66.

find a tendency in the court rulings and factors influencing compensation concerning both duties has been done.

Furthermore, as apparent from the findings of the research, the court addressed the good faith violation in several ways. In some cases, the court regarded the good faith violation as a part of the hearing procedure. In other cases, the court referred to violations of good faith unconnected to the hearing duty, but as an independent source of wrongful dismissal.

Referral to the good faith duty as part of the hearing duty was demonstrated in Shiri Lahav⁵⁸⁰ case. The court found a "heavy cloud of absence of good faith and illegality" in the dismissal without hearing of a civil servant in a position of trust (involving an office manager of the deputy minister of the Foreign Affairs Office). The absence of the hearing was itself perceived by the court as a breach of the good faith duty.

In another case, Adv. Taufik Tibi⁵⁸¹, the court found a series of flaws in his dismissal, including that the defendant did not provide the real reason for the dismissal; no hearing was conducted and no opportunity to change the decision was given to the plaintiff; the dismissal was after a short time of employment; the defendant did not consider the impact of the dismissal on the plaintiff; and that the swift dismissal injured the reputation of the plaintiff. The court declared that all of these factors constituted wrongful dismissal without good faith. Thus, the hearing duty and the good faith duty were interwoven, this time in the context of a lack of good faith⁵⁸².

⁵⁸⁰Case 48, Dismissal without a hearing, after the end of the 60 days protected period after maternity leave. The defendant requested permission to dismiss the employee but permission to dismiss was denied.

⁵⁸¹Case 52.

⁵⁸²Similarly, in Yitzhak Tomer, case 59, flaws of the dismissal procedure that were determined as dismissal without good faith were: the employer did not conduct a hearing, did not inform the plaintiff about the intention to dismiss him, no opportunity to present his side was given and no protocol was written. The reason given for dismissal was not the true reason and the dismissal was not by the competent authority. And also *see* Josef Katan, case 50.

In *Ela Greenberg Nachshon*,⁵⁸³ the treatment of the good faith duty was analyzed without connection to the hearing duty. The court determined that the employee's dismissal had been implemented without good faith. In that case, the employee was dismissed one day before the requirements of the WEL would have applied (6 months after employment)⁵⁸⁴. This case differs from the above examples, since the dismissal without good faith was not connected to the hearing duty, but rather to the conduct under the labor contract without good faith.

Similarly, in *Marian Bonany*⁵⁸⁵, the employee was wrongfully dismissed on account of her pregnancy, however, the EOEL and WEL statutes did not apply. The court determined that the dismissal was discriminatory contrary to the equality principle and to the duty of good faith. Again in *Michal Spector Danino*,⁵⁸⁶ the court determined that EOEL and WEL did not apply in a similar situation. The employee was dismissed due to her pregnancy and the court stated that this constituted dismissal without good faith.

*Aragawi Ameleset*⁵⁸⁷ is yet another example where the plaintiff was dismissed because she inquired about her labor rights. The court found the dismissal as contrary to the good faith duty. The court looked to the duty of good faith as an independent source for finding a wrongful dismissal⁵⁸⁸.

An approach apparent in court compensation rulings was that the court determined compensation for both the hearing and good faith duties as part of a comprehensive amount and occasionally also included several other bases of

⁵⁸³ Case 13.

⁵⁸⁴ WEL, *supra* note 31 § 9.

⁵⁸⁵ Case 140.

⁵⁸⁶ Case 108.

⁵⁸⁷ Case 142.

⁵⁸⁸ Similarly, *Dana Harel Weber*, case 99, was dismissed partly due to her pregnancy. EOEL and WEL were not applicable. The court determined that the dismissal was wrongful because the pregnancy was a factor in the timing of dismissal and therefore it stained the dismissal as wrongful. The dismissal was wrongful due to conduct without good faith of the employer. The reason for dismissal partly was discrimination due to the pregnancy. So again, the origin of wrongful dismissal determined by the court was the good faith duty without connection to the hearing duty.

wrong in the award. For instance, in *Israela Hasson- Rabikovich*⁵⁸⁹, the court awarded one comprehensive amount for the wrongful dismissal of a plaintiff at the end of her maternity leave. The real reason for the dismissal was that the substitute worker was a better worker than the plaintiff. However, the reason presented to the employee was severe deficiencies in the plaintiff's work – a reason that was false. The court determined that even if the EOEL did not apply, the court may award compensation for breach of contract based on an improper cause for dismissal and the procedure of the dismissal. Thus, the court found violations of the hearing duty and good faith duty, as well as, a breach of contract. The decision was at the appellate level so this comprehensive approach should be a major directive for the labor courts.

Certain limitations in the research result from the mixing of awards as presented above. One limitation found is that compensation awarded for wrongful dismissal in violation of the hearing and good faith duties may be part of a larger sum awarded by the court. The additional amounts awarded for other types of dismissal violations may influence the court in determining the amount to be allocated for the specific violations of the hearing and good faith duties.

Another limitation derived from cases where the court awarded a comprehensive amount for several claimed wrongs⁵⁹⁰. For instance, in several cases the court awarded compensation for a violation of the hearing duty that was combined with compensation for other components of damage such as mental anguish⁵⁹¹. As a result, the number of salaries awarded was not isolated only for the violations of the hearing or good faith duty. In cases that the amount awarded was combined with other violations, it was difficult to draw a conclusion.

⁵⁸⁹ Case 67. The court increased the amount of compensation in appeal due to breach of right to hearing and injury to equality.

⁵⁹⁰ For example in *Malky Graivsky* case 38, the award was for wrongful dismissal, mental anguish and absence of hearing at an equivalent of 3 salaries. This amount was part of 8.3 salaries that were awarded for the above listed and also on behalf of violation of WEL and EOEL.

⁵⁹¹ Example: *Meir Sagi* case 66: Wrongful dismissal without good faith and mental anguish.

The cases examined had the further limitation that in some decisions the underlying salary level was not mentioned by the court. Thus, an important element for comparison between rulings was missing. As explained in chapter 4.4, an important basis for analyzing and comparing the compensation amounts awarded in different cases is the multiple of monthly salaries received by the plaintiff. When the underlying salary of the plaintiff is not provided in a decision, it makes the comparison of the result to other cases more difficult. Nonetheless, the level of the employee's salary generally was included in the reported cases studied and even where absent, the tendency of the court in awards may still be discerned.

A final limitation on the research of wrongful dismissals for violations of the good faith duty was the limited base of data. There were eighteen cases of wrongful dismissal based on a violation of good faith violation identified for the period researched. Among the 18 cases, only 12 cases included information on the salary level of the plaintiff. As a result, only for these 12 cases could comparisons be made of the compensation amount bestowed by the courts. Nevertheless, it should be noted that the limited number of claims for wrongful dismissal in violation of good faith submitted during the period of the research, serve as an indication of the relative rareness of this type of claim, as will be discussed in the conclusion of the study.

5.3 Research methodology: Method of collecting information

As explained in section 4.3, the research conducted was legal empirical research through a review of cases included in the computerized online database of court rulings maintained by "Nevo publishing Ltd." The research period chosen was the most recent three years available, 2013, 2014 and 2015, because the interest of the research was to examine the current tendency in court rulings⁵⁹².

⁵⁹² See chapter 4.3 of the research: court rulings of compensation from 1/1/2013 to 31/12/2015.

As part of the identification of the relevant cases, database searches were conducted using the following keywords: "labor"; "dismissal"; "hearing duty"; and "absence of good faith".

The cases obtained by the research amounted to 110 cases of wrongful dismissal without hearing. However, a number of these cases were listed as those involving claims pursuant to the EOEL or WEL. As such, there is an overlap between the cases of hearing, and good faith, and those relating to WEL and EOEL.

As mentioned, 18 cases were identified involving wrongful dismissal in violation of the good faith duty, however, some of these cases also had been included in the research under other grounds for wrongful dismissal. Among these other cases, several were included under violations of the hearing duty and others for violations of the WEL or EOEL with yet others based on other grounds for wrongful dismissal. Nevertheless, every case is listed once under Appendix A⁵⁹³.

For purposes of this study, only rulings granting compensation awards were included in the study. Cases where compensation was denied by the court were not included in the study. The study also reviewed decisions of the Regional Labor Court and National Labor Court⁵⁹⁴, as explained in chapter 4.3.

The research questions of the study focus on the factors relevant to understand their influence on court rulings of compensation. As presented in chapter one, the initial assumption of the research was that there are six factors that influence court determinations of compensation: salary level, reason for dismissal, period of employment, occupation, the gender and the age of the plaintiff. As explained in chapter 4.3, the two last factors listed- gender and age of the plaintiff- were not relevant for the research undertaken for wrongful dismissal contrary to the statutes WEL and EOEL. However, in cases of wrongful

⁵⁹³ As explained in chapter 4, cases referred to in the study will be by number of cases in appendix A that lists and cites each one of the cases.

⁵⁹⁴ See *supra* note 487.

dismissal without due process, it was found that the gender and age of the plaintiff vary and it was assumed to influence the compensation award by the court. Nevertheless, the age of the plaintiff was not mentioned in every case and therefore was not noted in some of the findings.

5.4 Findings of research

5.4.1 Dismissal in violation of the hearing duty

Multiples of salary awarded (see Table F)

Information about the level of the salary of the plaintiff was present in 89 cases out of 110 cases included in the research. In 21 cases out of 110, the salary of the plaintiff was unknown⁵⁹⁵. Therefore, the base for comparison between the cases was 89 cases. The lowest award of compensation by the court for wrongful dismissal in violation of the hearing duty was half a salary⁵⁹⁶. The highest compensation award by the court was 18 salaries⁵⁹⁷.

The average number of salaries⁵⁹⁸ of compensation awarded for a violation of the hearing duty was 3.4 salaries. Therefore, an average of 3.4 salaries will be used as a standard or yardstick in connection with compensation awards for wrongful dismissal without hearing. As explained in chapter 4 (Section 4.4) an award above this average of salaries will be deemed a high award of compensation. An award below this average will be deemed a low award of compensation.

An analysis of the number of salaries awarded shows that compensation below the 3.4 average was awarded in 64 cases out of 89 cases. Compensation above

⁵⁹⁵ For instance, Dina Fisher, case 49, was awarded compensation for violation of EOEL, wrongful dismissal and absence of hearing NIS 50,000 (EUR 11,500) and her salary was unknown.

⁵⁹⁶ Gideon Shimoni, case 88.

⁵⁹⁷ Ezra Saadia, case 96 - However, in appeal (7/2/2015) payment of half of the total amount (compensation for mental anguish and flaws in dismissal procedure) awarded by the Regional Labor court was delayed by the National Court till the appeal will be decided. On January 2016 this was confirmed as a compromise of the parties and case was closed.

⁵⁹⁸ See *supra* note 487. As explained in chapter 4: calculation of the average was by adding 89 salary number awarded and dividing the total to 89 cases to produce an average.

the average was awarded in 25 of the 89 cases. Thus, the tendency of the court was mostly to award below the average compensation for wrongful dismissal in violation of hearing. This indicates that the court tends to award low compensation for violation of the hearing duty. Furthermore, in my opinion, the 3.4 average salaries awarded by the court seems fairly low. The court has declared that the number of salaries awarded for a violation of the hearing duty should be between one and twelve salaries based on the premise of yearly (annual) employment⁵⁹⁹. The average of 3.4 salaries itself suggests that the courts were looking towards a lower number of salaries for violation of the hearing duty.

There was however an indication in the findings that the court viewed even these low numbers as nonetheless a high grant of compensation. In Eyal Cohen⁶⁰⁰, a grant of 4 salaries was deemed a high compensation by the court. In Dov Klina⁶⁰¹, the court determined that 6 salaries will be awarded for violation of the hearing duty only in exceptional cases. Nevertheless, there were cases in which much higher numbers of 11 and 12⁶⁰² salaries were awarded by the court for violation of the hearing duty.

Table F: Multiples of salary awarded

Number of salaries	Number of cases (Total 110 cases)
Above average	25 cases
Below average	64 cases
Unknown salary	21 cases

⁵⁹⁹ See chapter 2.5 of the research.

⁶⁰⁰ Case 60.

⁶⁰¹ Case 102- was awarded 2 salaries compensation.

⁶⁰² Eliahu Greenboim, case 82- 11 salaries; Plonit v Almonit. Case 39- 11 salaries; Yitzhak Tomer case 59- 12 salaries.

Salary level

An analysis of the amounts awarded by the court shows several interesting findings. Some may seem obvious. For instance, a higher salary level will usually yield a higher amount of compensation awarded⁶⁰³. An award of one salary or less than one salary often produced differing amounts of total compensation due to the differing level of salary. Thus we find that in Ina Marosiak⁶⁰⁴, the equivalent of one salary of NIS 5,000 (EUR 1,150) was awarded by the court, while in the case of Shiri Rubin less than one salary was awarded. Yet, the total amount awarded in Shiri Rubin of NIS 10,000 (EUR 2300) was twice the award in Marosiak, since in Shiri Rubin the level of salary was NIS 13, 000 (EUR 2989)⁶⁰⁵. It seems the level of salary influenced the total amount of compensation. The higher the salary level, the higher the compensation amount.

It should be noted that obviously a large number of salary awards may lead to a larger sum of compensation. For instance, in Plonit v Almonit⁶⁰⁶, 11 salaries were awarded for a total compensation amount of NIS 60,000 (EUR 13,800). However, the larger number of salaries awarded may lead to higher compensation if the level of salary is higher. A lower salary will produce a smaller sum of compensation.

In some cases, the court declares explicitly that the level of salary was taken into account in determining the total compensation⁶⁰⁷. In Plonit v Asher Shinua, the court maintained that it had taken into account that the salary level of the plaintiff was minimum wage and that her job was a part time job. The resulting

⁶⁰³ For instance, Nava Ashton, case 65, was awarded 4 salaries at a total of NIS 56,040(EUR 12,940). Her salary was NIS 14,000 (EUR 3,230). So the relatively high salary produced a quiet large sum of money. An award of 3 salaries of a lower salary of NIS 2,490(EUR 572), in the case of Bat Sheba Cohen, case 51 produced an amount of NIS 7,470 (EUR 1710), which was much smaller sum of money.

⁶⁰⁴ Case 54.

⁶⁰⁵ Case 1.

⁶⁰⁶ Case 39- salary of NIS 5,400 (EUR 1,240).

⁶⁰⁷ See: Vaks Eduard, case 105, Suzanna Kropizky, case 80, Yanai Raine, case 131, Ofira David, case 112.

amount awarded was made as one combined amount for all violations including the violation for the absence of hearing. The case did not reveal how the level of salary influenced the final amount awarded. However, the very fact that the level of salary was a factor was identified and established by the court. Similarly, In Amalia Sima Reifen case, the salary of the plaintiff (NIS 11,000 (EUR 2,558)) was listed by the court as one of the factors influencing the total amount. The court awarded 13.6 salaries, however the amount was due to absence of hearing and violation of the EOEL together⁶⁰⁸ . It appears therefore that the court when determining the number of salaries was aware of the level of salary and it influenced the total amount of compensation.

Reason for dismissal (see Table F1)

The reason for dismissal concerns a wider question than the question presented by the absence of a proper hearing. One aspect is the justification for dismissal – or the question whether there was a justified cause for dismissal or an unjustified cause for dismissal? The manner and procedure of the dismissal are another aspect. Was the procedure of the hearing influenced by the cause for dismissal? Was the manner of dismissal flawed on its own? The separation of the reason for dismissal from the procedures employed is not precise. The circumstances surrounding the manner and proceedings of the dismissal may be intertwined with the reason of dismissal.

This problem was demonstrated in Plonit v Almonit⁶⁰⁹. There the plaintiff was wrongfully dismissed due to discrimination on the grounds of parenthood, pregnancy and worldview and her primary rights were violated. She also was

⁶⁰⁸ Plonit v Asher Shinua, case 55, Amalia Sima Reifen, case 134. And see Nina Rudinsky, case 121, the court listed the salary level of the plaintiff as one of the factors influencing the amount of compensation awarded.

⁶⁰⁹ Case 39.

dismissed without a hearing. The absence of a hearing was only a part of a wider picture of severe circumstances of wrongful dismissal⁶¹⁰.

In Malky Graivsky⁶¹¹, the procedure surrounding the dismissal itself was severe. She was dismissed by email without a hearing and removed from her work place by the police. The court found this constituted unacceptably bad faith behavior by the employer with no justification after years of employment by the employee⁶¹². The court considered the circumstances of the dismissal procedure in the case as severe and compensation was awarded for mental anguish and the absence of hearing. However, compensation also was awarded for violations of WEL and EOEL. As such the separation between the reason for dismissal and the manner of dismissal as factor influencing compensation in this case was blurred.

Table F1 – Reason for dismissal

Number of salaries awarded	Justified reason for dismissal 45 cases	Unjustified reason for dismissal 65 cases
Above average	10 cases	15 cases
Below average	26 cases	38 cases
Unknown salary	9 cases	12 cases

⁶¹⁰ *Id.*, the court determined that punitive considerations lead to substantial sum of money award. The total of 42.2 salaries were awarded for the discriminatory dismissal, 11 salaries were bestowed by the court for absence of hearing.

⁶¹¹ Case 38.

⁶¹² *Id.*, the court, considering the circumstances and time of employment, including mental anguish of plaintiff the amount determined was 3 salaries at a total of NIS 25,500 (EUR 5866).

Wrongful dismissal with a justified reason for dismissal

As displayed in table F1, in 45 cases out of 110, the reason for dismissal was justified by the court. However, in 9 cases of the 45 cases, there was no information about the salary level⁶¹³. Therefore, a total of 36 of these cases included information relevant for analyses and this was the base for reference for the following findings.

Below average multiples of salaries were awarded for a violation of the hearing duty in 26 out of 36 cases⁶¹⁴. Thus, when the dismissal was justified, the compensation for violations of the hearing duty was usually below the average monthly salaries awarded. For example, in Noam Zandar⁶¹⁵ the employee was awarded less than one salary for flaws in the hearing procedure. The court determined that the termination of relations was justified on account of theft from the employer. The court declared that when dismissal was due to legitimate and relevant reasons, the compensation awarded for flaws in dismissal procedure should be low⁶¹⁶. The court noted that the plaintiff did answer the allegations against him, although not in a hearing. However, the court continued that even if there would have been a hearing, the outcome of dismissal would not have changed. Thus, a justified reason for dismissal was a factor influencing the compensation award.

Similarly, the court found that although a proper hearing was not conducted in Doron Avitan⁶¹⁷, there had been other talks with the employee although not in the framework of a hearing wherein the employee explained himself to the employer. The court concluded that dismissal was justified (theft from employer) and noted additionally the plaintiff did not want to continue working.

⁶¹³ For instance, Shiri Lahav ,case 48, was awarded an inclusive sum for mental anguish, wrongful dismissal without good faith and without hearing of NIS 30,000(EUR 6,900). Her salary was unknown.

⁶¹⁴ For example: Doron Avitan (53), Ina Marosiak (54), Dana Tal (56), and Benny Kedem (58) were awarded up to two salaries.

⁶¹⁵ Case 87.

⁶¹⁶ Case 87 at 17 paragraph 39.

⁶¹⁷ Case 53.

Concerning the violation of the hearing duty, the court awarded only one salary as compensation.

In this context, an important statement of the court was declared in Gil Moshe Shpilfogel⁶¹⁸. The court stated that not every violation of the duty to conduct a hearing will result in an award of compensation and the compensation will be determined by the circumstances and the severity of the violation. The circumstances in this case involved a justified dismissal and the violation of the duty was not severe. It seems the justified reason for dismissal was an influencing factor on the half salary compensation awarded in the case. The severity of the violation was also examined and found not to have been severe. In contrast, above average multiples of salary were awarded for violations of the hearing duty in ten of the 36 cases. For instance, a relatively high 8 salaries was awarded in The Negev Development Authority⁶¹⁹, even though the dismissal was justified. On appeal, the National Labor Court affirmed the amount determined by the Regional Labor Court and found it reasonable. The reason for the high number of salaries bestowed by the court was the severe flaws in the dismissal procedure. Thus, a high multiple of salaries was awarded where the reason for dismissal was justified, but the process of dismissal was flawed and wrongful.

As opposed to the assumption of influence, this case would seem to support the proposition that the justification of the dismissal does not influence the compensation for absence of hearing. However, there were other factors in the case that may have led to this unusual outcome. One of the factors was that the employer was a public entity, the importance of which will be discussed below. It is also important to recognize that this was a decision on appeal and so it presents the opinion of the National Labor Court and constitutes a binding precedent for the Regional Labor Court.

⁶¹⁸ Case 94- awarded half a salary also due to the short time of employment.

⁶¹⁹ The Negev Development Authority, case 70 – amount of compensation for hearing NIS 104,000 (EUR 24,010).

The case of Ezra Saadia⁶²⁰ is another case supporting the proposition that the justification for dismissal is not a factor influencing the compensation award for a violation of the hearing duty. In Ezra Saadia, the employee was awarded 18 salaries for his wrongful dismissal. The reason for dismissal was justified since the position held by employee was itself cancelled, however, there were severe flaws in the dismissal procedure. The flaws of the hearing were examined separately from the reason of dismissal and they led to the high compensation. However, several other factors were considered by the court, including employee's age (62), his personal situation, the long period of employment (20 years) and the employer's status as a public entity. Furthermore, the compensation award was based not only on the hearing violation, but also for his dismissal without good faith. Unfortunately, it is not possible to separate both factors to come to a definitive conclusion.

The situation of a high compensation award by the court on account of a flawed dismissal procedure appears in several cases⁶²¹. For instance, in Merav Pinhas⁶²², the employee was awarded 5 salaries. The court found that the dismissal was reasonable and for a relevant reason of redundancy resulting from economic difficulties. However the process of the hearing itself was flawed, because representation of the plaintiff in the hearing by the Labor Union was not proper and there was a possibility of a contrast of interests. Thus, the factor that led to a high compensation award was the manner of dismissal and not the reason for dismissal.

Concerning a reason for dismissal due to redundancy, the court determined in Naama Peleg⁶²³ that the hearing duty was limited in redundancy dismissals and a low compensation of one salary was awarded for the violation of the hearing duty. Similarly, the court declared in Golan Moshe⁶²⁴ that in redundancy

⁶²⁰ Case 96. 18 salaries were a sum of NIS 142,630 (EUR 32,760). In appeal payment of half of the total amount (compensation for mental anguish and for flaws in dismissal procedure) awarded by the Regional Labor Court was delayed by the National Labor Court, see LA 34225-10-14 Givatayim Municipality v Ezra Saadia, Nevo, 2014. On 2016 the appeal was closed by compromise.

⁶²¹ Nava Ashton case 65: awarded 4 salaries, Suzanna Kropizky case 80: awarded 4.5 salaries.

⁶²² Case 84.

⁶²³ Case 5 Naama Peleg – 1 salary awarded.

⁶²⁴ Case 81- awarded 1.6 salaries compensation.

dismissals the hearing duty was limited. As such, it can be seen that in these cases the reason for dismissal of redundancy was an influencing factor leading to low compensation award, in contrast to Merav Pinhas.

Nevertheless, common to the cases with justified dismissal and above average compensation award seems to be the severe flaws in the procedure of dismissal. It was the severe manner of dismissal that led to the high compensation regardless of the justified reason for dismissal. However, in the majority of cases with a justified reason for dismissal, the plaintiff employees were awarded compensation multiples below the average. This suggests that when the reason for dismissal was justified, the compensation for violation of the hearing duty generally will be lower than the average. The reason for dismissal was an influencing factor in the majority of cases, however, in certain cases where the manner of dismissal was flawed severely above the average compensation was awarded even though the dismissal was justified.

Wrongful dismissal with an unjustified reason for dismissal

As presented in table F1, there were 65 cases of wrongful dismissal where the reason for dismissal was unjustified and the dismissal violated the hearing duty. In twelve of these cases there was no information about the salary level of the plaintiff, so the relevant database for analysis was 53 cases. In 38 of the 53 cases, the court awarded a salary multiple below the average for violations of the hearing duty. Thus, in most cases, the courts awarded below average multiples of compensation for violation of the hearing duty when the dismissal was unjustified. This finding suggests that the reason for dismissal was not an influencing factor. Although the dismissal was unjustified, the court did not give a high compensation award for hearing violations.

This same tendency of the court towards low multiples of compensation was apparent in cases of hearing violations both for justified and unjustified reasons for dismissal. Cases of justified or unjustified reasons for dismissal mostly were awarded below average salary multiples. This suggests the reason of dismissal was not overall an influencing factor on the compensation determination.

Nevertheless, a further examination of cases awarding below the average compensation for violation of the hearing duty show that the unjustified reason for dismissal influenced the total compensation amount and not the compensation amount for the hearing violation. For instance, in *Baruch Zur*⁶²⁵ the employee was dismissed for an unjustified reason of discrimination. The case involved age discrimination while at the same time the dismissal procedure was flawed. The plaintiff was awarded compensation for violations of EOEL and hearing duty in the amount of NIS 50,000 (EUR 11,540) that was equivalent to 3.5 salaries. The total award of compensation was equivalent to 9.5 salaries. The court explained the determination of the total award was influenced both by the reason of dismissal (age discrimination) and other factors such as the time of dismissal (one and a half year before retirement) and the length of employment (6 years). The court also stated that the unjustified reason for dismissal influenced the total compensation award. However, it seems the reason for dismissal did not influence compensation for the violation of the hearing duty. Nevertheless, the award was made as a total for both the hearing and discriminatory EOEL violations, so the finding concerning the compensation rate for the hearing violation is not accurate.

Another case of age discrimination was the *Meir Sagi*⁶²⁶ case. Below average compensation were awarded for a hearing violation even though the reason for dismissal was unjustified. Nonetheless, the total compensation awarded of 11.6 salaries was due to the reason for dismissal and accompanying factors such as the employee's age and length of employment. Perhaps a factor influencing the reduced amount bestowed for the hearing violation was the large total award for other wrongful dismissal violations. Yet in comparing the cases, although the same unjustified reason for dismissal was present in both cases, a low compensation was awarded for the hearing violation, which suggests that the reason for dismissal was not an influencing factor on the compensation for the violation of the hearing duty.

⁶²⁵ Case 64.

⁶²⁶ Case 66 - The plaintiff, 63 years old, worked for 29 years in the workplace. Awarded 2 salaries for violation of the hearing duty.

A different aspect appeared in the case of Yitzhak Chen, where the behavior of the plaintiff led to a low compensation award for an employee who was dismissed for unjustified reason. The court determined that the low compensation for the hearing violation was appropriate, because the plaintiff refused the invitation to a hearing⁶²⁷. The defendant was found to have fulfilled his obligation to conduct a hearing by inviting the plaintiff to a hearing. The refusal to the invitation by the plaintiff led to the low compensation. In this case, the reason for dismissal was not an influencing factor on compensation. It was found that in 15 of 53 cases of unjustified dismissals, the number of salaries awarded were above the average number of salaries for a hearing duty violation. Thus, it would seem that in these situations the unjustified reason for dismissal was an influencing factor. However, further examination show there were other additional factors apart from the reason for dismissal that influenced the compensation award.

For instance, in Yitzhak Tomer⁶²⁸, the employee was awarded 12 salaries for a violation of the hearing duty. The flaws in the dismissal process were found by the court to be deemed a dismissal without good faith. The court explained that the compensation amount reflected the severity of the flaws in the dismissal procedure, as well as the circumstances and the period of employment. Here, the dismissal was both unjustified and the procedure severely flawed. Perhaps the fact that the employer was a hybrid public/private entity had an influence on the amount awarded on account of the increased duty of such an employer towards its employees.

⁶²⁷ Yitzhak Chen case 104. Awarded 1.5 salary for absence of hearing. The court determined that on the one hand the defendants dismissed the plaintiff without a hearing and within 30 days of army reserve service. On the other hand the one sided actions of the defendants were performed out of concern from injury the plaintiff caused the defendants, and the fact that the dismissal was not connected to the army reserve service the court. Also time of employment was taken into account (3.5 years).

⁶²⁸ Case 59 –awarded NIS 150,000 (EUR 34,500). The flaws in dismissal: no hearing was conducted, the plaintiff was not informed about the intention to dismiss him, reason for dismissal was not provided, the employee was not given an opportunity to present his version, a protocol was not written. The dismissal was performed by an incompetent authority and an untrue reason for dismissal was eventually declared.

Another case of unjustified dismissal combined with a severely flawed procedure of dismissal was Ilana Shlomo⁶²⁹. In this case, the twin factors of unjustified reason for dismissal and severe flaws in the dismissal procedure seem to have influenced the compensation award, however, there were other factors in the case including an age discrimination factor and that the case involved an employer that was a public authority. It may be that these several factors together led to the high compensation and the reason for dismissal was only one of them.

In another case, Yehuda Reuven⁶³⁰, the court found that the dismissal was triggered due to the plaintiff suing the defendant in court. The court determined that this reason for dismissal was improper and such dismissals may deter employees from suing their employers for their rights. The court declared that a message of deterrence must be conveyed to employers for such actions and compensation awarded should be punitive. The compensation awarded in the case was attributable to both the absence of a hearing and an unjustified reason of dismissal. However, the court also took into account the economic difficulty of the defendant, the age of plaintiff (close to retirement) and his longtime of employment.

The above findings show that common to the cases involving an unjustified reason for dismissal and an above average award of compensation were the severe circumstances of the dismissal and the severe flaws of the dismissal procedure. However, these cases often involved other influencing factors such as the employee's age, period of employment and the type of entity of the employer⁶³¹.

⁶²⁹ Case 76 - awarded 10 salaries - NIS 65,520(EUR 15,130).

⁶³⁰Case 101- awarded NIS 40,000(EUR 9180) 6.3 salaries.

⁶³¹Eliahu Greenboim ,case 82- awarded 11 salaries - NIS 86,530 (EUR 19,980).The dismissal was by non-renewal of a limited time contract and was without hearing. A false reason presented for dismissal was bad function of the plaintiff that was meant to defame him. In the circumstances, including the age of the plaintiff, the time of employment, the severe flaws in the dismissal, the fact that the defendant did not prove any flaw in the plaintiffs conduct the suitable compensation was as determined.

Entity of the employer

The findings show that a factor influencing compensation award by the court was the entity of the employer and specifically whether the employer was a public or hybrid public/private entity. The courts considered the fact that the employer was a public employer or a hybrid public/private employer. In some of the case this led to higher compensation award however in other cases it did not affect the compensation rate. For instance, the Hana Sultany⁶³² case involved a violation of the right for a hearing and the court stated it was a procedural and substantial severe injury to the plaintiff. Among the factors influencing the award of compensation was the fact that the employer was the State of Israel. The court determined that stricter obligations apply to the state regarding their employees and the dismissal of employees.

Shiri Lahav⁶³³ also involved an employee of the State of Israel (Foreign Affairs Office). There the court determined that dismissal without a hearing of a civil servant was a violation of the good faith duty. The court declared that the state as an employer was obligated to act in fairness and good faith in terminating employees.

In Yitzhak Tomer⁶³⁴, an employee of a hybrid public/private employer was awarded 12 salaries in compensation for severe flaws in dismissal procedure. The court determined that the rules of public and administrative law apply to the hybrid public/private entity similar to their application to a public employer. This meant that heightened duties of fairness and good faith applied to the hybrid public/private entity and that the dismissal procedure will be examined

⁶³² Case 69- She was awarded NIS 70,000(EUR 16,160) for violation of the hearing duty and mental anguish, however, her salary was unknown so it was not possible to calculate number of salaries.

⁶³³ Case 48, Dismissal without a hearing, after the end of the 60 days protected period after maternity leave. The defendant requested permission to dismiss the employee but permission to dismiss was denied.

⁶³⁴ Case 59 –awarded 12 salaries at a total of NIS 150,000 (EUR 34,500).

under administrative laws. In Avir Hamis case, the court determined the hybrid public/private entity will be subject to principles of natural justice and public and administrative law obligations, including the duties of good faith and fairness⁶³⁵.

Another case involving a public employer (in this case a municipality) was Ezra Saadia⁶³⁶. The dismissed employee was awarded an extraordinary number of 18 salaries for his wrongful dismissal. Again, one of the factors influencing the amount of compensation was the type of entity of the employer. However, a further examination in other cases of public entity employers shows different findings. In Shiran Israeli⁶³⁷, a public employee was awarded only one salary in compensation. The court found that a quasi- hearing held with the employee had been conducted and it resembled a dismissal hearing and was sufficient. In Osnat Cohen⁶³⁸, another employee of a hybrid public/ private entity also was awarded only one salary for flaws in the hearing procedure. The court explained that the flaws in the hearing did not cause significant injustice to the plaintiff. Thus, the increased obligations towards employees of public and hybrid public/ private employers did not lead to high compensation in these cases. Therefore it appears that in some cases the entity of the employer was an influencing factor and in other cases it was not⁶³⁹.

It would seem that the severity of flaws in the dismissal procedure were a factor influencing compensation viewed in combination with the entity of the employer. When the flaws in the dismissal procedure were significant, as in Ezra Saadia, the fact that the employer was a public entity did influence the compensation. When the flaws in the hearing were not significant like in Osnat Cohen, the entity of the employer was not an influencing factor.

⁶³⁵ Yitzhak Tomer, case 59 at 8 paragraph 18, 21. Avir Hamis, case 115.

⁶³⁶ Case 96. 18 salaries were a sum of NIS 142,630 (EUR 32,760). However see *supra* note 620.

⁶³⁷ Case 95.

⁶³⁸ Case 92.

⁶³⁹ See also appeal The Negev Development Authority, case 70 – 8 salaries. And see Ilana Shlomo, case 76 awarded 10 salaries compensation.

Period of employment and age (see Table F2)

The research shows that in several cases, the factors of age and period of employment were interrelated. There appears to be a tendency of the court to link between the age and period of employment of the plaintiff and as a result the courts often present both factors together.

In several cases where the employee's age and employment period were mentioned, no information had been provided concerning the employee's salary level. For instance, in the Dina Fisher⁶⁴⁰ case, no information was provided about the employee's level of salary. Fisher was discriminated on base of ethnic origin and awarded NP compensation of NIS 50,000 (EUR 11,500) for: violation of EOEL, wrongful dismissal including absence of hearing. The plaintiff was 56 and she had been employed for 8.5 years. Both of these factors were mentioned by the court and taken into consideration in determining the compensation award. However, since she was awarded an aggregate amount and her salary level was not provided, it was not possible to isolate the influence on the award of her age and length of employment for a hearing duty violation.

Table F2 sets forth the cases according to the age of the employee and the period of employment. For purposes of the research, a period of employment of less than five years was deemed a short term period of employment, while period of five years or more were considered long term employment. Nevertheless, in several cases employment period was less than a year.

⁶⁴⁰ Case 49.

Table F2: Age and period of employment

Number of salaries	Age first group 20-50	Age second group 51-67	Short term period of employment (less than 5 years)	Long term period employment (5 years or more)
Above average	Case number 39 (1 cases)	Cases number 59, 71, 76, 82, 96, 26, 101, 134 (8 cases)	Cases number 59, 60, 80, 84, 93, 26, 109, 110, 117, 130, 136 (11 cases out of 61)	Cases number 39, 65, 61, 70, 71, 83, 76, 82, 96, 101, 105, 113, 134, 139 (14 cases out of 28)
Below average	Cases number 52, 87, 91 (3 cases)	Cases number 50, 66, 64, 81, 116, 120, 135, 144 (8 cases)	Cases number 1, 51, 53, 52, 54, 56, 58, 16, 68, 5, 72, 73, 85, 74, 86, 75, 87, 89, 94, 95, 20, 88, 21, 98, 41, 105, 91, 102, 103, 104, 107, 17, 111, 114, 118, 119, 122, 125, 126, 131, 133, 137, 138, 47, 29, 32, 33, 34, 10, 144. (50 cases out of 61)	Cases number 38, 50, 66, 64, 81, 92, 79, 100, 116, 120, 124, 128, 132, 135 (14 cases out of 28)
Unknown salary			Cases number 48, 55, 57, 67, 77, 97, 99, 108, 112, 121, 129, 31 (12 cases)	Cases number 78, 69, 90, 62, 115, 123, 127 (8 cases)

In 50 of 61 cases of short time employment the court awarded compensation in an amount below the average compensation⁶⁴¹. In only 11 of these 61 cases did the court award above the average compensation. This is a significant tendency of the court awarding low compensation for short time employees. Moreover, in several cases, the court determined explicitly that short time employed plaintiffs should be awarded a low compensation for violation of the hearing duty⁶⁴².

⁶⁴¹See example: Ofir Greenvald, case 107 was awarded 1 salary for absence of hearing. The court declared that short time employment was taken into account. And see: Dana Harel Weber case 99 short time of employment was taken into account.

⁶⁴²For example Gil Moshe Shpilfogel, case 94: the court awarded half a salary and determined that the time of employment was short so the compensation should be low. And *see* Enbal Harel, case 16; Efrat Buganim, case 72.

For instance, in Benny Kedem, the short time of employment (only 5 month) was mentioned by the court as one of the reasons for the award of only one monthly salary as compensation. In *Diab Gasar* case, the court awarded half a salary compensation due to wrongful dismissal without hearing. The court determined that despite the fact that the dismissal process was not in accordance with the law and the case law, the amount is influenced by the short period of employment (4 month)⁶⁴³. In Danit Zachariah ⁶⁴⁴ the employee had been employed for only 2 months, and was awarded 2 monthly salaries. The court provided that the short period of employment was a factor influencing its decision to lower the award.

However, in Suzanna Kropizky⁶⁴⁵, the employee had been employed for only few days and yet received a compensation of 4.5 salaries which was above the average. Nevertheless, whether in raising or lowering the compensation, the findings show that period of employment was an influencing factor on awards. However, generally, a short period of employment led to below average compensation. This finding was significant, appearing in 50 of the 61 cases involving short time employment, where plaintiffs were awarded below average compensation⁶⁴⁶.

Concerning cases involving long periods of employment, in 14 out of 28 cases the compensation awarded by the court was above average. Similarly, in 14 cases the compensation awarded was below average. Hence, employees with long periods of employment were awarded above and below the average compensation equally by the court. This equal distribution of cases suggests there is no prevailing tendency of the court regarding long period employment employees.

⁶⁴³ Benny Kedem, case 58, Diab Gasar, case 119.

⁶⁴⁴ Case 17.

⁶⁴⁵ Case 80- the court explained the award of compensation due to the plaintiffs' salary level and to the fact that she was pregnant and would have difficulties finding a job.

⁶⁴⁶ More examples: Michal Spector Danino, case 108, was awarded 1 salary for absence of hearing due to the short time of employment and her salary (that was unknown). Gideon Shimoni, case 88, employed for 1.5 month was awarded the amount he claimed (less than half a salary): NIS 10,000(EUR 2300). The Plaintiff was dismissed inappropriately, by text message without hearing, at time of anger.

However, in several cases involving long periods of employment, the court mentioned the employment period as a factor to be considered in determining compensation. In Ziona Buchbut case, the court determined that the long period of employment of eighteen years was a factor influencing the compensation amount. The award for violation of the hearing was below average compensation however, the total compensation amount was 13.7 salaries due to age discrimination in violation of the EOEL⁶⁴⁷. In Plonit v Almonit⁶⁴⁸, the employees eight years of employment were taken into consideration in awarding plaintiff 11 salaries. In Rinat Cohen⁶⁴⁹, the court emphasized that when an employee was employed for a long period of time (14 years), it was incumbent on the employer to consider carefully and seriously a dismissal and not immediately dismiss the employee. In Shmuel Dahan, the court declared that the long period of employment (8 years) was taken into account for determining compensation for immediate dismissal without a hearing. Although in this case the court awarded only 3 salaries, this was because this was the amount claimed by the plaintiff, thereby limiting the court from awarding a higher amount⁶⁵⁰.

In another case of long term employment, Galit Rahamimov⁶⁵¹, the employee was awarded the full amount requested, thus the recovery was limited by the amount claimed by the employee. The plaintiff was dismissed without a hearing after nine years of employment. The court determined that the need for a hearing was even more critical when breach of discipline was the cause of dismissal. In Rahamimov, the employer claimed that the plaintiff stole from

⁶⁴⁷ Ziona Buchbut, case 116. And See Malky Graivsky, case 38: 5 years of employment were mentioned by the court as a consideration for compensation. And see Nava Ashton, case 65, the court stated that taking into account 15 years of employment the compensation was determined on 4 salaries. And see Avital Pod, case 61, 5 years of employment were taken into account by the court as one of the influencing factors determining the amount of 4 salaries.

⁶⁴⁸ Case 39.

⁶⁴⁹ Case 62- the amount awarded by the court was not high, however the salary was unknown so a conclusion cannot be reached.

⁶⁵⁰ Case 100 - When the plaintiff claimed an amount the court cannot award him a higher amount than claimed: at 11 paragraph 15.

⁶⁵¹ Case 106.

the employer, however, the court rejected this claim. Moreover other claimed breaches of discipline by the employee were not proven. The court determined that in consideration of the long period of service by the employee, the employee should be awarded 6 salaries for the violation of the hearing requirement. Although in this case the court referenced the period of employment, it should be noted that in other cases the period of employment was ignored⁶⁵².

The court took an interesting approach towards the period of employment apparent in several cases. In these cases, the court used the period of employment as a measurement for compensation award, essentially awarding the equivalent of one monthly salary for each year of employment⁶⁵³. In Eyal Cohen⁶⁵⁴, the court stated that the multiple of salary awarded should be viewed in the context of the years employed. In that case, the plaintiff worked almost four years and received compensation of four monthly salaries. It should be noted that this accords with the treatment under Israeli law of severance where employees are awarded severance on the basis of one month per year of employment (see chapter 2 section 2.2.4). Similarly, in Bat Sheba Cohen⁶⁵⁵, the court awarded three salaries in light of the employee's seniority of three years. The period of employment was used by the court as a yard stick to determine the compensation, and, as such, was a central feature influencing the determination of compensation. This use of period of employment was surprising and unexpected, but was found to be a recurring factor in determining awards in cases of wrongful dismissal without a hearing. In my opinion, parties cannot rely on this approach in predicting awards, but should be aware of the possibility that the court may rule by this standard.

⁶⁵² For instance, Doron Avitan, case 53, worked for 9 years in the workplace but was awarded 1 salary without consideration to the long period of employment.

⁶⁵³ See Avihay Oziel, case 89. And see Roman Vilchovsky, case 83 at 7 paragraph 30: 6 salaries due to 6 years employment were awarded.

⁶⁵⁴ Case 60, at 14 paragraph 72.

⁶⁵⁵ Case 51, at 11 paragraph 34.

The age of the employee was another factor closely related to the period of employment. The age factor was categorized for the research purpose into two groups, as presented in table F2. The first age group was defined from 20 to 50 years old and the second group was defined from 51 to the retirement age of 67 years old. Four cases involved employees in the first age group (20-50)⁶⁵⁶. In three of these cases⁶⁵⁷, the employee was awarded below average compensation and in the remaining case the award was above average. Although a small sample, the "20 to 50" age group was mostly awarded below average compensation.

The older age group (51-67) was mentioned in 16 cases. Eight of the sixteen cases of this age group were awarded above average compensation by the court. In eight cases the employees were awarded below the average compensation. Thus, the distribution between above and below average compensation in cases involving the second age group was even.

The link between the age of the plaintiff and the period of employment in the findings has been highlighted in red in table F2. The highlighted "red" cases are those where the case mentions information concerning both the age of the employee and the period of employment. They, therefore, appear twice, once under the age group and once under the period of employment. In twenty cases, the age and the period of employment were identified by the court. In the remaining 90 cases, the age of the employee was unknown.

In eight cases, above the average compensation were awarded to the plaintiffs in the older second age group. In six of these cases, the older plaintiff was also a long time employee and was awarded above the average compensation. In

⁶⁵⁶ For instance, in Yamit Michal Vaalani, case 91, the court mentioned the plaintiff was 30 years old. She was awarded 2 salaries for violation of the hearing duty. This was below the average compensation award so the young age in this case perhaps led to a low number of salaries. In Shiri Lahav case 48, the court mentioned she was young however the salary was unknown therefore the influence of the young age was inconclusive.

⁶⁵⁷ Cases 52, 87, 91.

the remaining two cases for this age involving short time employment, the plaintiff was also found to have been awarded above average compensation. Thus, the employees in the second age group who had served in long time employment generally were awarded above average compensation (6 cases out of 8)⁶⁵⁸.

In contrast, in the three cases identified with first age group employees, the court awarded below the average compensation. All three cases were also plaintiffs with a short time employment. Thus, although a small sample size, the result is not surprising that the younger employees of the first age group who had a short time employment received a below average compensation in the cases where these features had been identified.

Employees in the second age group received below the average compensation in eight cases. Seven cases involved employees with long time employment and one case involved an employee with a short time employment. Thus, the combination of second age group employees and long time employment in these cases identified led to below average compensation. On its face, this last finding seems to contradict the conclusion presented above that the combination of a second age group employee with long time employment will mostly lead to above average compensation. However, as presented above, the majority of these cases (6 of 8) of second age group employees with long period employment were awarded above average compensation.

By comparison, a majority of the cases from first age group employees who had a short period employment (3 of 4 cases) were awarded below average compensation. This last finding is more significant than the finding that the second age group was awarded below average compensation.

An explanation to the possible contradiction may be found in the examination of some of the cases involving long time employees in the second age group

⁶⁵⁸ See also Yehuda Reuven, case 101 awarded NIS 40,000(EUR 9180) - 6.3 salaries. Taken into account were: cause of dismissal, absence of hearing, defendants' economic difficulty, age of plaintiff - close to retirement and longtime of employment.

that had been awarded below average compensation. In Josef Katan⁶⁵⁹, a 55 year old employee was dismissed after 30 years of employment and was awarded 2.7 salaries for a hearing violation. However, he was awarded an additional 18 salaries for other flaws in the dismissal. The court determined that on account of the advanced age of the plaintiff and his long term of employment, it was justified to grant a high compensation award. Therefore, although a below average compensation was awarded for the hearing violation, the total award for all violations was far above the average compensation⁶⁶⁰.

Similarly, in Baruch Zur⁶⁶¹ and in Meir Sagi⁶⁶², both cases of wrongful dismissal due to age discrimination, although the total award in each case was above average, the portion of the award relating to the hearing violation was below average. Thus, it can be seen in these cases of long time employment of employees in the second age group, that although these types of employees can be expected to receive high awards, and indeed were awarded an aggregate award above the average compensation, nonetheless, the element of the award for the hearing violation was below the average for such awards. It may be that the determination of compensation for the hearing violation is influenced and reduced by the large amounts awarded by the court for other violations of the wrongfully dismissed employee's rights. In other words, when the employee is receiving large sums for the underlying dismissal, the courts take this into consideration when determining the weight of the more procedural hearing violations.

However, in another case, Golan Moshe⁶⁶³, a 63 year old employee with 21 years' service was awarded 1.6 salaries due to flaws in the dismissal hearing.

⁶⁵⁹ Case 50.

⁶⁶⁰ Nevertheless, in appeal a consensual compromise between the parties was reached and 6 salaries were reduced from the total compensation amount. See LA (National) 57704-04-13, Management Company Bait Clal Ltd. v. Josef Katan. Nevo June 2015.

⁶⁶¹ Case 64- awarded compensation for violation of EOEL and Hearing duty 3.5 salaries. However it was part of a larger award of 9.5 salaries.

⁶⁶² Case 66- was awarded 2 salaries for flaws in hearing however, the total amount awarded by the court was 11.6 salaries for wrongful dismissal due to age discrimination, dismissal without good faith and flawed hearing.

⁶⁶³ Case 81.

His salary was relatively high, so the aggregate award for all the dismissal violations was NIS 60,000(EUR 13,850). The employee's age and period of employment were factors taken into account, but other factors were more substantial, such as the reason for dismissal (redundancy) and the conduct of the defendant that led to low compensation award. It may be that the redundancy reason for dismissal in this case led to the low hearing award.

The link between the factors of age and period of employment in court awards was demonstrated in the findings. For instance, in Eliahu Greenboim⁶⁶⁴, a 56 year old employee who had been with the employer for 11 years was awarded high multiple number of salaries (11). This was due to several factors, in particular the employee's age and long period of employment. In Hana Sultany⁶⁶⁵, the court noted that in light of employee's seniority (30 years) and in consideration of her age (50), the compensation should be high. Similarly, in Ilana Shlomo ⁶⁶⁶ the plaintiff was awarded 10 salaries due to severe flaws in the dismissal procedure. The court considered the age of the plaintiff (55) and the long period of employment (23 years).

In Ezra Saadia⁶⁶⁷, a 62 year old employee was dismissed after a long period of employment (20 years) without a proper hearing. The court held that an exception to the 12 month salary compensation was justified and 18 salaries were awarded⁶⁶⁸. The long period employment and age were linked by the court as influencing factors.

Not only for longtime and older employees were age and service linked, but the courts also linked employee age and length of service in cases of younger

⁶⁶⁴ Case 82.

⁶⁶⁵ Case 69- She was awarded NIS 70,000(EUR 16,160) for violation of the hearing duty and mental anguish, however, her salary was unknown so it was not possible to calculate number of salaries.

⁶⁶⁶ Case 76.

⁶⁶⁷ Case 96.

⁶⁶⁸ See chapter 2 section 2.5.2: The court has determined that compensation for violation of the hearing duty should be between one and twelve salaries of the plaintiff based on the premise of yearly (annual) employment.

employees of the first age group with short periods of employment, leading to below the average awards. For instance, in Noam Zandar⁶⁶⁹, a twenty year old employee that had been employed four years was awarded less than one salary for flaws in the hearing process. In Yamit Michal Vaalani⁶⁷⁰, a 30 year old employee employed for 2.2 years was awarded only 2 salaries. The court explained that this was the appropriate amount in the circumstances.

Gender (see Table F3)

When looking at gender, the division of the 110 cases researched between female and male plaintiffs was 68 cases involving female employees and 42 cases involving male employees. The employee's salary was unknown in 17 of the 68 cases involving females and in 4 of the cases involving males, so the net basis for analysis was 51 cases for females and 38 cases for males.

Sixteen of the 51 female plaintiffs were awarded above the average compensation for violation of the hearing duty, while 35 female plaintiffs were awarded below the average. Ten of the 38 male plaintiffs were awarded above the average compensation for violation of the hearing duty, while 28 male plaintiffs were awarded below the average compensation. Therefore, most female and male plaintiffs were awarded below average compensation. It seems there was no tendency of the court concerning gender as a factor influencing compensation for a violation of the hearing duty.

⁶⁶⁹ Case 87.

⁶⁷⁰ Case 91.

Table F3- Gender

Number of salaries	Female 68 cases	Male 42 cases
Below average	16 cases out of 51	10 cases out of 38
Above average	35 cases out of 51	28 cases out of 38
Unknown salary	17 cases	4 cases

Occupation

In the cases researched, there was a variety of occupations. For cases involving the same occupation, such as claims by accountants, some accountant claimants were awarded compensation above the average and some below⁶⁷¹. The same was apparent for secretaries⁶⁷², where some were awarded compensation above the average, while others received awards that were below the average. Similarly, salespersons were awarded compensation both above and below the average compensation⁶⁷³. Thus, occupation itself did not seem to affect the compensation award with both supposedly high ranking and low ranking occupations receiving compensation both above and below the average compensation.

⁶⁷¹ Below average compensation awarded to accountants in Karin Ortesy case 20, Gil Moshe Shpilfogel, case 94. Above average compensation in Eyal Cohen, case 60, Nava Ashton, case 65 Eliahu Greenboim, case 82 (Senior Accountant).

⁶⁷² Malky Graivsky, case 38, Bat Sheba Cohen, case 51, Efrat Buganim, case 72- all awarded below average compensation. Above average compensation awarded to secretary was Ilana Shlomo, case 76.

⁶⁷³ Below average compensation were awarded in Enbal Harel, case 16, Lilach Rosenberg, case 41. Above average compensation were awarded in Baruch Zur, case 64.

Furthermore, occupations viewed as high ranking professions such as advocates⁶⁷⁴, project managers⁶⁷⁵, electronic engineers⁶⁷⁶, human resource managers⁶⁷⁷ were awarded compensation below the average. Therefore, a supposedly high ranking occupation did not necessarily lead to receiving above average compensation. On the other hand, a high ranking occupation did not necessarily mean that the employee would receive low compensation amount, as for instance, an accountant⁶⁷⁸.

Similarly, employees in lower ranking occupations, such as an employee in charge of sports hall, were able to receive above the average compensation⁶⁷⁹. However, other supposedly low ranking occupations, such as secretaries, did not necessarily receive high compensation⁶⁸⁰. It seems the court did not consider the occupation of the plaintiff as significant when awarding compensation and it was not an influencing factor on the award. No identifiable tendency was found in the court rulings regarding the occupation of the plaintiff in awards for compensation in violation of the hearing duty.

5.4.2 Dismissal in violation of the good faith duty

Multiples of salary awarded (see Table G)

In 18 cases identified for the period of the research, the court found that the dismissal violated the good faith duty. Six of these cases did not contain information about the salary of the plaintiff. Among the 12 cases where the

⁶⁷⁴ Adv. Taufik Tibi, case 52.

⁶⁷⁵ Shiri Rubin, case 48, Golan Moshe, case 81.

⁶⁷⁶ Meir Sagi, case 66.

⁶⁷⁷ Israel Morgenstern, case 68.

⁶⁷⁸ Above average compensation in Eyal Cohen, case 60, Nava Ashton, case 65, Eliahu Greenboim (Senior Accountant), case 82.

⁶⁷⁹ See: Ezra Saadia, case 96 awarded above average compensation.

⁶⁸⁰ Malky Graivsky, case 38, Bat Sheba Cohen, case 51, Efrat Buganim, case 72- all awarded below average compensation.

salary level was disclosed, the lowest multiple of monthly of salaries awarded was 1.7 salaries⁶⁸¹. The highest number of salaries awarded was 18 salaries⁶⁸² and the average number of salaries awarded for wrongful dismissal in violation of the good faith duty was 7.4 salaries. Above the average salaries were awarded in 6 of the 12 cases⁶⁸³, while below average salaries were awarded in 6 cases⁶⁸⁴. This distribution of cases between above and below average compensation award does not reveal a significant tendency of the court rulings.

The overall average for good faith violations of 7.4 salaries was relatively high in relation to the 3.4 average awarded for violations of the hearing duty. It may be that the court regards violation of the good faith duty more severely than the violation of the hearing duty. This is an important indication of a tendency of the court to treat wrongful dismissals in violation of good faith more severely than violations of the hearing duty and awarding higher compensation.

Table G: Multiples of salary awarded

Number of salaries	Number of cases (total 18 cases)
Above average	6 cases
Below average	6 cases
Unknown salary	6 cases

⁶⁸¹ Case 140.

⁶⁸² Case 96.

⁶⁸³ Case 96, 50, 59, 66.

⁶⁸⁴ Case 72, 52, 13, 140, 73, 79.

Salary Level

In Elizabeth Gomer⁶⁸⁵, a plaintiff was awarded compensation of only two salaries for a violation of the good faith duty. The court explicitly noted that the low level of plaintiff's annual salary was a factor in awarding the low level of compensation for the violation. Another case involving a relatively low annual salary was that of Marian Bonany⁶⁸⁶. Here too the plaintiff was awarded only 1.7 salaries for a relatively low award of NIS 5000 (EUR 1140). In the case of Adv. Taufik Tibi⁶⁸⁷, the employee was awarded only two monthly salaries in compensation, but because he earned a relatively high annual salary, the amount of the award was a significant NIS 25,000 (EUR 5,750). Therefore, it can be seen that awards of similar multiples of monthly salaries produced very different totals for compensation due to variations in the level of the base annual salary.

A relatively high number of 18 monthly salaries was awarded in Ezra Saadia⁶⁸⁸ for a total amount of NIS 142,630 (EUR 32,760). Similarly, in Yitzhak Tomer⁶⁸⁹ the employee was awarded 12 salaries which led to a total award of NIS 150,000 (EUR 34,500) due to a relatively high base salary. Thus, awards of a large multiple of salaries when combined with a relatively high base salary resulted in relatively high compensation. In Meir Sagi⁶⁹⁰, an employee with a high base salary was awarded 7.6 salaries for a high total award of NIS 190,000 (EUR 43,690). The interaction of salary and months awarded can be seen in that although the number of salaries awarded in Sagi was much lower than in Saadia and Tomer, the total award was higher when factoring in the higher base salary of the employee. Therefore, it can be seen that the level of salary is a significant influence on the compensation amount and is a factor influencing compensation rates. A question remains to what extent does the salary level

⁶⁸⁵ Case 79.

⁶⁸⁶ Case 140- earned a salary of NIS 2790 (EUR 640).

⁶⁸⁷ Case 52- salary of NIS 12,000(EUR 2760).

⁶⁸⁸ Case 96- salary of NIS 7,920(EUR 1,810).

⁶⁸⁹ Case 59- salary of NIS 12,510 (EUR 2,870).

⁶⁹⁰ Case 66- salary of 25,000 (EUR 5,750).

influence the number of salaries awarded? If a salary is high will fewer months be awarded?

Reason for dismissal (see Table G1)

Wrongful dismissal with a justified reason for dismissal

In four of the eighteen cases involving violations of the good faith duty, the court found the dismissal was justified. In two of these cases, the court awarded above average compensation. In one case below average compensation was awarded and in one case the salary level was unknown. In the Ezra Saadia⁶⁹¹ case previously mentioned, the employee was dismissed on account of the cancellation of his position, so the reason for dismissal was deemed justified. However, the defendant acted without good faith in its dismissal and violated the rights of the plaintiff. Due to the severity of flaws in the dismissal, the absence of good faith in defendants' actions and certain other factors (such as age discrimination), the court granted a high 18 monthly salaries in the award. However, the reason for dismissal was not an influencing factor on the compensation rate.

Similarly, in Arye Raz⁶⁹², the court found that although the reason for dismissal was justified, the manner of dismissal and the conduct of the employer towards the employee were without good faith. In making the award of 7 salaries, it can be seen that the reason for dismissal did not influence the compensation award, but rather the other factors relating to the dismissal process were considered relevant. In both of these cases, a justified reason for dismissal did not result in a low compensation award.

⁶⁹¹ Case 96.

⁶⁹² Case 71.

The justified reason for dismissal did influence the compensation in Dana Harel Weber⁶⁹³. In that case, the dismissal was wrongful and without good faith, since the pregnancy of the plaintiff was a factor in the timing of the dismissal. However the poor performance of the plaintiff did justify her dismissal. Similarly, Efrat Buganim⁶⁹⁴, the employee justifiably was dismissed due to incompatibility and poor performance in the workplace. However, there were flaws in the dismissal procedure. It seems that in this case, the justified reason for dismissal and short time employment led to a low compensation award. In these two cases, the justification for the dismissal apparently led to lower compensation awards and therefore was a factor influencing the compensation award. Nevertheless, the tendency of the court appears inconclusive and the base of data is rather small.

Table G1- Reason for dismissal

Number of salaries	Justified reason for dismissal 4 cases	Unjustified reason for dismissal 14 cases
Above average	2 cases	4 cases
Below average	1 case	5 cases
Unknown salary	1 case	5 cases

Wrongful dismissal with an unjustified reason for dismissal

Most of the cases in which the court found violation of the good faith duty involved unjustified dismissals (14 of 18 cases). However, in these cases the awards of compensation diverged. The level of the employee's salary was not

⁶⁹³ Case 99- The compensation amount awarded was low NP NIS 5000 (EUR 1,140). Information about level of salary was not presented. Also the short time employment was an influencing factor.

⁶⁹⁴ Case 72.

disclosed in five of the cases⁶⁹⁵. The compensation amount was determined as an all-inclusive amount according to courts discretion. The remaining nine cases where the level of salary was included were analyzed to determine if there was a tendency of the court in awarding compensation in cases involving an unjustified reason of dismissal⁶⁹⁶.

In four of the nine cases, above average compensation was awarded⁶⁹⁷ and in five cases the award was below average⁶⁹⁸. As such, an unjustified reason for dismissal did not lead to higher compensation award for violation of the good faith duty.

For example, below average compensation was awarded in Ela Greenberg Nachshon⁶⁹⁹ involving an unjustified dismissal. In that case, the employee was dismissed one day before WEL would have applied. The court determined this was a dismissal without good faith, as well as, conduct under the labor contract without good faith. The court awarded 5.7 salaries for the good faith component, which was below the average, although itself not a low number of salaries. Nevertheless, in Marian Bonany, 1.7 salaries were awarded for a dismissal without good faith and contrary to equality principle due to the plaintiffs' pregnancy⁷⁰⁰. An influencing factor mentioned by the court in determining compensation was the scope of her job as a part time employee and certain circumstances of her dismissal. Here, the unjustified reason for dismissal was a part of the circumstances of the dismissal, but not a significant factor in determining the award. However, Talia Kissin was awarded 10 salaries for wrongful dismissal in violation of the good faith duty. The court determined that she was dismissed without cause and without good faith. Additionally, Kissin was 58 years old and the court took that factor into consideration. However, in appeal the National Labor Court reversed this ruling and

⁶⁹⁵ Case 48, 108, 67, 141, 142.

⁶⁹⁶ Case 79, 73, 66, 59, 140, 13, 52, 50, 143.

⁶⁹⁷ Case 59, 50, 66,143.

⁶⁹⁸ Case 52,13,140,79,73.

⁶⁹⁹ Case 13.

⁷⁰⁰ Case 140. And see equality principle and good faith duty as explained in chapter 2.5.1.

determined the dismissal was not without good faith and was not without cause. The National Labor Court noted that the Regional Labor Court cannot intervene and replace the employers' discretion in requirements from its employees in administrative role. The award of compensation granted by the Regional Labor Court was cancelled⁷⁰¹.

An example of an above the average compensation for unjustified dismissal was Josef Katan⁷⁰². In Katan, the court awarded a high 18 salaries where it determined that the dismissal was wrongful for three reasons: the cause for the dismissal was false; the procedure of the dismissal was improper in that it was done without a hearing; and the manner of the dismissal had been accomplished without good faith. There were several factors leading to the high award of compensation, such as the age of the employee (55) and the lengthy period of employment (30 years). Although the unjustified reason for dismissal was one of the factors, the lack of good faith in the way the dismissal took place influenced the high compensation award even though this was not connected to the reason for the dismissal.

In Yitzhak Tomer⁷⁰³, the flaws in the dismissal were found to constitute a dismissal without good faith. Not only was a false reason given for the dismissal, but the way of dismissal was both flawed and without hearing. The employee was awarded 12 salaries for both the hearing and good faith violations. Here, the reason for the dismissal was unjustified as was the way of dismissal flawed and perhaps both were influencing factors.

In Meir Sagi ⁷⁰⁴ the employee was awarded 7.6 salaries for a wrongful dismissal without good faith and mental anguish. The reason for the dismissal was due

⁷⁰¹ Case 143. See LA (National) 8636-05-15 Hamashbir Department Stores Ltd v Talia Kissin, Nevo, July 2016.

⁷⁰² Case 50.

⁷⁰³ Case 59.

⁷⁰⁴ Case 66.

to age discrimination and the court determined that the dismissal itself was without good faith, because the employee was given a false reason for his dismissal. It seems that both the unjustified reason for the dismissal and procedurally improper giving of a false reason for dismissal were influencing factors on the award.

On the other hand, it appears that the reason for dismissal was not a major influencing factor for determining compensation for violations of the good faith duty. Occasionally, the conduct of the employer without good faith was not connected to the reason for dismissal but rather to the way the dismissal was executed, as in Josef Katan⁷⁰⁵. In other cases, the unjustified reason for dismissal constituted conduct without good faith of the employer, as in Ela Greenberg Nachshon⁷⁰⁶. However, there the compensation was below the average, so it was not a major influencing factor.

An unjustified reason for dismissal accompanied by violation of the good faith duty have resulted in low compensation awards⁷⁰⁷. On the other hand, when the reason for dismissal was justified, a violation of the good faith duty can result in exceptionally high awards⁷⁰⁸. Therefore, the reason for dismissal seems not to be a major factor influencing compensation for violation of the good faith duty.

Period of employment and age (see Table G2)

On account of the link between age and employment period both factors are presented together. As displayed in table G2, 11 cases included information on the period of employment and 6 of these cases also contained information on

⁷⁰⁵ Case 50.

⁷⁰⁶ Case 13 – dismissal in order to avoid application of the WEL, *supra* note 31.

⁷⁰⁷ See example: Ephraim Galis case 73.

⁷⁰⁸ See Ezra Saadia case 96.

the age of the employee. Those cases containing both the age of the employee and the period of employment are highlighted in red in table G2.

In 6 of the 18 cases, the salary level was unknown. For example, in Shiri Lahav case, the court mentioned that the plaintiff was young however, her salary was not disclosed. The compensation amount was calculated as an inclusive amount and not by salary number and so the relevant information for comparison between awards of the different cases was missing⁷⁰⁹.

Table G2: Age and period of employment

Number salaries	Age first group 20-50	Age second group 51-67	Period Short (Less than 5 years)	Period Long (5 years or more)
Above average		Cases number 59, 50, 66, 96, 71, 144 (6 cases)	Case number 59, 144 (2 case)	Cases number 50, 66, 96, 71 (4 cases)
Below average	Case number 52 (1 case)		Cases number 52, 13, 140, 72, 73 (5 cases)	Case number 79 (1 case)
Unknown salary			6 cases	

Regarding the period of employment, 13 cases involved a short period employment and the salary was mentioned in 7 of these cases. Furthermore, in most of these seven cases involving short time employment (5 of 7) the employees were awarded below average compensation. In these cases, the court mentioned that the short time employment was an influencing factor⁷¹⁰.

⁷⁰⁹ Case 96, 66, 59, 52, 50, 71. And see Shiri Lahav, case 48.

⁷¹⁰ See: Ephraim Galis, case 73 was awarded 3 salaries. However, above average compensation was awarded to Yitzhak Tomer, case 59. The explanation provided by the court was that this amount reflects the severity of flaws in the dismissal procedure, circumstances of dismissal and the time of employment.

In the examination of several cases in which the dismissal was after several months of employment, the court stated that the short time employment was taken into account⁷¹¹. For instance, in Marian Bonany⁷¹², the employee was awarded 1.7 salaries for a dismissal after 1.5 month of employment. The short term of the employment also was noted by the court in Michal Spector Danino⁷¹³. Similarly, the consideration of short terms of employment led to low compensation in both Efrat Buganim⁷¹⁴ and Dana Harel Weber⁷¹⁵. In Ela Greenberg Nachshon⁷¹⁶, the period of employment, although short term, was a major factor, when the employee was dismissed one day before the WEL would have applied upon reaching 6 months of employment. This had been done in order to avoid application of the law. The court found this as conduct under a labor contract without good faith and a discriminatory dismissal. Although the importance of the specific time of employment was a key factor influencing the compensation due to avoidance of WEL, the compensation awarded was below average. It seems that generally a short time employment will be a factor leading to a low compensation amount.

Long periods of employment were found in 5 cases. Plaintiffs in these cases of long employment were awarded above average compensation (in 4 of 5 cases). In only one case out of 5 was the employee awarded below average compensation. In Elizabeth Gomer⁷¹⁷, the age of the plaintiff was not disclosed in the case, but the plaintiff had been employed for 15 years. This long term of employment was mentioned by the court, but in this case it was not a major

⁷¹¹ Adv. Taufik Tibi, case 52, was dismissed after 2 month employment and was awarded 2 salaries.

⁷¹² Case 140.

⁷¹³ Case 108- She worked for 4 month and was awarded NIS 20,000(EUR 4,590) .Her salary was not presented.

⁷¹⁴ Case 72.

⁷¹⁵ Case 99.

⁷¹⁶ Case 13- awarded 5.7 salaries for dismissal without good faith.

⁷¹⁷ Case 79- awarded 2 salaries.

factor influencing the compensation amount. Rather, the low level of salary seems to have been the major influencing factor.

Regarding the age factor, the employee in *Adv. Taufik Tibi*⁷¹⁸ was 46 years old (as such categorized in the first age group) and had been employed for a short period employment (2 months). He was awarded below average compensation. Although the combination of first age group employee and short time employment led to low compensation, it is doubtful if a conclusion can be reached concerning these factors since it appeared in only one case.

The second older age group was apparent in 6 cases⁷¹⁹. In all 6 cases the employee was awarded above the average compensation. As such, it seems that membership in the second age group was an influencing factor leading to high compensation. Two cases of second age group involved a short period employment and the employee was awarded above average compensation. In *Talia Kissin* case, the employee was 56 years old, employed for 3 years and awarded compensation of ten salaries. The court determined that there was justification for bestowing a significant compensation amount due to wrongful dismissal without good faith and without cause. The court mentioned that for determining the rate of compensation it takes into consideration the age of the plaintiff and that it will be difficult for her to find a new job. However, this ruling was reversed in appeal and compensation awarded was canceled by the National Labor Court⁷²⁰. In the other four cases, the plaintiffs were employed for a long time⁷²¹ and in all four cases above average compensation was awarded by the court. So a combination of long term employment and employees in the second age group seem to lead to high compensation.

⁷¹⁸ Case 52.

⁷¹⁹ Cases 50, 59, 66, 96, 71, 143.

⁷²⁰ *Talia Kissin*, case 143. And see *supra* note 701. The other case was case 59.

⁷²¹ Case 50, 66, 96, 71.

For example, in Josef Katan⁷²², the court determined that in consideration of the age of the plaintiff (55) and his long term of employment (30 years), it was justified to grant a high level of compensation equivalent to 18 salaries. An award of 18 salaries also was granted in Ezra Saadia⁷²³ for a 62 year old employee with 20 years of service. In Meir Sagi⁷²⁴, a plaintiff, aged 63 and employed for 29 years, was awarded 7.6 salaries for dismissal without good faith and mental anguish. The court reasoned that the compensation amount was determined after considering all the circumstances including the period of employment. In Arye Raz⁷²⁵, a 65 year old employee was awarded 7 salaries in compensation. The court found that the defendant did not look for alternative employment for the plaintiff for the two years left until his retirement. The court determined that not seeking alternative employment for the plaintiff employee was not consistent with the long term of employment of the plaintiff (18 years) and constitutes a violation of good faith.

Thus, it can be seen that generally a long period of employment led to higher compensation and a short time employment generally led to low compensation. The tendency of the court to link age, when relating to an older employee in the second age group, and long periods of employment was apparent and in cases where both were demonstrated, the compensation was mostly above the average.

Gender (see Table G3)

Among the 18 cases, ten involved female plaintiffs and in eight the plaintiff was male. There was no information about the salary level in 5 of the 10 cases with female plaintiffs⁷²⁶. Thus there were only five cases of female plaintiffs were

⁷²² Case 50.

⁷²³ Case 96.

⁷²⁴ Case 66.

⁷²⁵ Case 71 – the award of 7 salaries was after taking into account the increased severance pay the plaintiff received.

⁷²⁶ Case 142, 99, 67, 108, 48.

the salary of the plaintiff was known. In four cases the female plaintiff was awarded below the average compensation. In one of the cases of a female plaintiff, the plaintiff was awarded above the average of salaries⁷²⁷.

Table G3: Gender

Average salaries	Female 10 cases	Male 8 cases
Above average	1 case	5 cases
Below average	4 cases	2 cases
Unknown salary	5 cases	1 case

Only one of the male plaintiff cases did not have data about the employee's salary level⁷²⁸. Therefore, there were 7 cases for analysis and the male plaintiff was awarded above the average compensation in 5 of these cases⁷²⁹. An award below the average of salaries was awarded in the remaining 2 cases⁷³⁰. In conclusion, most of the male plaintiffs were awarded above the average of salaries.

One of the female plaintiffs was awarded above the average compensation and the remaining cases were awarded below the average compensation. It would seem that the court significantly took gender into consideration when awarding compensation for dismissal without good faith and this factor influenced males receiving higher compensation than females.

However, this conclusion is limited since in 5 of the 10 cases of female plaintiffs, the salary was unknown, leaving a base of only 5 cases for analysis of female compensation awards. This may suggest that the conclusion is not accurate.

⁷²⁷ Case 13, 140, 72, and 79 - below average. Case 143 above average. However, the ruling was reversed in appeal and compensation award cancelled. See *supra* note 701.

⁷²⁸ Case 141.

⁷²⁹ Case 96, 66, 59, 50.

⁷³⁰ Case 52, 73.

However, this issue will be further discussed when addressing conclusions of the study.

Occupation

It was found that the employees that received above the average compensation were from a variety of occupations. For instance, a maintenance man was awarded 18 salaries⁷³¹, an internal controller was awarded 12 salaries⁷³², an electronic engineer was awarded 7.6 salaries⁷³³, and a worker in charge of sports hall was awarded 18 salaries⁷³⁴. It seems there is no common characteristic identifiable for these occupations. Some of these occupations are supposedly high ranking occupation, such as an electronic engineer. Others are supposedly low rank occupations, such as a maintenance man and worker in charge of sports hall.

Employers that received below the average compensation were also from a variety of occupations. For instance, an advocate was awarded only 2 salaries⁷³⁵, while a part time worker assisting in a kindergarten was awarded 1.7 salaries⁷³⁶ and a secretary was awarded 2.4 salaries⁷³⁷. A human resources manager was awarded 3 salaries⁷³⁸, a piano teacher, 2 salaries⁷³⁹, and a service coordinator and legal advisor was awarded 5.7 salaries⁷⁴⁰. It would again seem that there was no common base for these occupations. A human resources

⁷³¹ Case 50.

⁷³² Case 59.

⁷³³ Case 66.

⁷³⁴ Case 96.

⁷³⁵ Case 52.

⁷³⁶ Case 140.

⁷³⁷ Case 72.

⁷³⁸ Case 73.

⁷³⁹ Case 79.

⁷⁴⁰ Case 13.

manager is a supposedly high rank occupation, while a part time worker in a kindergarten is supposedly a low rank occupation. Therefore, it seems that the occupation of the plaintiff will not be an influencing factor for the court in determining compensation for wrongful dismissal without good faith.

Entity of the employer

A factor revealed as an influencing factor was the type of entity of the employer. In both *Shlomo Ben Shoshan and others*⁷⁴¹ and *Shiri Lahav*⁷⁴², the court awarded the total all-inclusive amount claimed by the plaintiffs. In *Ben Shoshan*, the employer, a municipality, misused a legal situation resulting from a change in the law in order to dismiss the plaintiffs and prevented them their right for a hearing. The flaws in the dismissal process were severe and the court determined that the municipality had acted without good faith. The gravity of flaws in the dismissal were intensified due to weak position of the workers who supplied a service to fragile children who were dependent on the workers. The court determined that the rate of compensation in the award must express a suitable reaction to the deviation of the defendant - a municipality - from normative labor standards. The rate of compensation was driven both by the nature of the flaws in dismissal, as well as, the exploitation of weak and fragile populations⁷⁴³.

In *Shiri Lahav*⁷⁴⁴, the employer was the state itself, in this case the Office of the Minister of Foreign Affairs. The court determined that the state, in its status as an employer, was obligated to conduct in fairness and good faith in its termination of employees who are in a position of trust. The plaintiff was

⁷⁴¹ Case 141.

⁷⁴² Case 48.

⁷⁴³ Although the employment was by manpower agency and the municipality, the court found the municipality as the employer for payment of the claim. The award was NIS 18,000(EUR 4130) each plaintiff for wrongful dismissal, as claimed.

⁷⁴⁴ Case 48- the plaintiff was awarded the amount claimed of NIS 30,000(EUR 6,900). Level of salary was not presents so the number of salaries was unknown.

awarded an inclusive total amount for all her claims including mental anguish, wrongful dismissal without good faith and dismissal without a hearing.

In *Ezra Saadia*⁷⁴⁵, no proper hearing had been held and the dismissal had been done without good faith. The court awarded compensation and determined that a public employer has a heightened duty to conduct a hearing. In *Yitzhak Tomer*⁷⁴⁶, the employer was a hybrid public/private entity. The court determined that due to flaws in the dismissal, the dismissal had been done without good faith. The calculation of the award in multiples of salaries was for the maximum of 12 salaries available in that case. The high amount reflected the court's view of the severity of flaws in the dismissal procedure and circumstances as well as the long period of employment.

An analysis of the cases seems to indicate that when confronted with good faith duty, the court holds public and hybrid public/ private employers to a higher standard of good faith conduct towards their employees. Indeed, in all the identified cases involving a public or hybrid public/private entity, compensation was above average or in the amount claimed by the plaintiff. Thus, the employers' entity status was an influencing factor on compensation and in cases of wrongful dismissal without good faith, the court can be expected to grant high compensation against a public or hybrid public/private employer.

5.5 Summary and conclusions

There were 110 cases identified for the period researched involving wrongful dismissal with violations of the hearing duty. The extensive number of cases shows how frequently such claims for violations of the hearing duty were submitted to the court. In contrast, there were only 18 identified cases involving wrongful dismissal in violation of the good faith duty for the same period, so far fewer claims were submitted for violations of the good faith duty. Claims

⁷⁴⁵ Case 96- The court awarded 18 salaries compensation.

⁷⁴⁶ Case 59.

for wrongful dismissal in violation of the good faith duty were less common and it is suggested here that this good faith claim will probably become more common in the future. One of the reasons of why it is expected that the number of such claims will increase is the higher compensation awarded by the court for wrongful dismissal involving violations of the good faith duty. The average number of salaries awarded for violations of the hearing duty were lower (average of 3.4), than the number of salaries awarded for violations of the good faith duty (average of 7.4).

The lower average number of salaries awarded for violation of the hearing duty is an important indication of the courts tendency towards limiting compensation for this violation. Although the range of awards for the hearing violation has been between 1 and 12 salaries, the recent tendency of the court has been to award a relatively low number of salaries for this violation. In my opinion, this empirical finding suggests that the court may be hearing the debate going on in Israel about the pervasive implementation of the hearing duty in event of termination of labor relations. The courts broad application of the hearing duty on all types of employees and all employers including private employers, has been a topic for debate and criticism in Israel. Michal Horovitz, mentioned above, stressed that due to the court applying the hearing to the private sector, it has become an artificial procedure performed in order to "go through the motions" without sincere mining and without protection for the employee. Similarly, Reut Shemer Begas criticizes the extensive application of the hearing to the private sector employees⁷⁴⁷. The low compensation the courts award for violation of the hearing duty may suggest that the court is aware of the criticism and reduces awards for this violation. Although the duty for a hearing has been widely applied by the court, the penalty for violation of the duty is mostly not high.

⁷⁴⁷ See: Horovitz Michal, *supra* note 249, Reut Shemer Begas, *supra* note 267 and see section 2.3.1.2 of this study.

Concerning salary level, it was found in several wrongful dismissal cases, involving violations of both the hearing duty and the good faith duty, which the court declared explicitly that it takes into account the level of salary of the plaintiff in determining compensation. In this context of courts declaration, the opinion expressed by Reut Shemer Begas is emphasized. She claims that the court sends the wrong message to employees and employers that the dignity of the employee is derived from his level of salary⁷⁴⁸. I agree with this statement of Shemer Begas. Furthermore, the findings confirm that the level of salary is a factor considered by the court for calculation of compensation rates. The level of salary was found empirically as a factor influencing the amount of compensation. Since the award amount generally is calculated as a multiple of monthly salaries, it follows that a higher base salary will result in a higher compensation award. In my opinion, the fact that the court considers the salary level of the plaintiff as a factor in awarding compensation suggests also that the court considers and calculates total amount that will be reached when a multiple of salaries is applied to the level of the monthly salary. Nevertheless, in cases where levels of salary of the plaintiffs were not disclosed, it seems that the court awards a predetermined end sum that the court finds appropriate in the circumstances of the specific case. As such, the appropriate sum of compensation as perceived by the specific judge ruling in a specific case cannot be predicted by looking to the level of salary. To some extent the final award seems to be somewhat of a plug number and arbitrary.

For cases involving a wrongful dismissal in violation of the good faith duty, it may seem that the reason for the dismissal was not a major factor influencing the determination of compensation. However, in wrongful dismissal cases involving a violation of the hearing duty, the reason for dismissal was an influencing factor. Generally, when the reason for the dismissal was justified,

⁷⁴⁸ See: declarations of the court that it considers salary level for calculation of compensation in Vaks Eduard case 105, Plonit v Asher Shinua, case 55, Elizabeth Gomer, case 79. And see Reut Shemer Begas, *supra* note 267 and see section 2.5.2.1 of this study.

the compensation for a violation of the hearing duty was lower than the average. This seems to support the idea that when dismissal was justified, the court found violations of the hearing and hearing process less significant. Therefore, the violation of the hearing duty was treated by the court with less severity and resulted in lower compensation when the dismissal was justified. On the other hand and contrary to the above, the findings show also that for unjustified dismissals, most cases were awarded below average compensation for violation of the hearing duty. Thus, in my opinion, it would seem the court in most cases, treated violation of the hearing duty with less severity than expected, without regard to the justification of the dismissal. To my opinion, the importance of the hearing duty has been eroded by the court and therefore compensation awarded are low. As stated previously, it seems the courts have been listening to the criticism against the broad application of the hearing duty. However, severe flaws in the procedure of dismissal were common to the cases where above average compensation was awarded with the procedural violations not connected to the reason for dismissal. So in these cases, the manner of dismissal led to the high compensation regardless of the reason for dismissal.

The findings also show that the period of employment and age of the employee were influencing factors on compensation rates for wrongful dismissal in violation of both the hearing and good faith duties. A short time of employment generally resulted in below average compensation. This finding was particularly significant in cases of wrongful dismissal involving violations of the hearing duty⁷⁴⁹. In cases where there had been a long period employment, plaintiffs generally were awarded above the average compensation by the court. Concerning the age factor, above average compensation generally was awarded to the older second age group (51-67).

⁷⁴⁹ More examples: Michal Spector Danino, case 108, was awarded 1 salary for absence of hearing due to the short time of employment and her salary (that was unknown). Gideon Shimoni, case 88, employed for 1.5 month was awarded the amount he claimed (less than half a salary): NIS 10,000(EUR 2300). The Plaintiff was dismissed inappropriately, by text message without hearing, at time of anger.

It was most common that the combination of the employee being in the second group age (51-67) and having served a long time employment led to above the average compensation. In contrast, most cases of wrongful dismissal in violation of the hearing duty and involving short time employees from the younger first age group resulted in below average compensation. However, for cases involving violations of the good faith duty, it was not possible to examine the combination of a short term employees part of the first age group, since the employee age was unknown in these cases (except in one case).

Occupation was not found to be an influencing factor in cases of wrongful dismissal in violation of either the hearing duty or good faith duty. There was no tendency found in the court rulings regarding occupation of the plaintiff. Gender also was not found to be an influencing factor on compensation awards for wrongful dismissal in violation of the hearing duty. However, in cases involving wrongful dismissal in violation of good faith, the findings show a significant difference of compensation amounts in favor of males. The tendency of the court was to award higher compensation to male plaintiffs than to women plaintiffs in cases of wrongful dismissal without good faith.

Another tendency of the court was in its consideration of a collection of factors leading to a higher compensation, rather than an isolated factor. In addition, the entity form of the employer as a public or hybrid private/public employer was a factor influencing awards made by the court.

In cases of wrongful dismissal in violation of a hearing duty, the status of the entity of the employer, when combined with severe flaws in the dismissal procedure did influence compensation. In cases of wrongful dismissal in violation of the good faith duty, it was clear that in all cases involving a public or hybrid public/private entity, high compensation was awarded by the court unless limited by the claim amount of the plaintiff. The above conclusions of the research will be discussed and analyzed more fully in the following and final chapter of the study.

Conclusions of the Research

Introduction

The motivation to conduct this research was rooted in the need to discover the factors and considerations that influence courts in Israel in determining compensation amounts in cases of wrongful dismissal. The necessity to establish sources of information regarding compensation awards for wrongful dismissal is due to the prevailing situation in Israeli courts where there are hardly any guidelines or principles regulating compensation in these cases. The lack of information regarding both the process in which awards are made and the possible compensation outcomes that can be expected from the courts for wrongful dismissal was the gap in knowledge at the heart of this research.

The aim of the research was to establish a base of information containing factors and considerations that courts take into account when determining compensation rates for wrongful dismissal. The goal was to reveal the way in which these factors and considerations influence compensation rates for wrongful dismissal and the judicial tendencies applying.

By creating a database of information concerning court rulings on compensation rates for wrongful dismissal, it was hoped to contribute to legal knowledge and to assist several differing audiences. A first audience are the courts who need to determine the compensation for wrongful dismissal in an environment that lacks information or identified guideline.

The second audience is the parties themselves – the plaintiff and defendant. In assessing and conducting their litigation, a crucial element is the question of the possible range or scope of compensation rate likely to be granted by the court. Currently, it is largely unknown and unpredictable to the parties. Parties confronting a claim of wrongful dismissal cannot predict or assess properly the risks they are facing regarding the amount of compensation. Another related and similarly affected group are the lawyers who represent and counsel the parties.

The database presented herein, containing some elements that influence determinations of compensation, the manner in which they influence compensation and common tendencies of the court for granting compensation, can assist these stakeholders: judges confronting and managing legal claims for wrongful dismissal, parties and lawyers.

In this final chapter of the study, the research database relating to two particular sources of wrongful dismissal is compared. One category was compensation awarded in cases of statutory violations relating to pregnant women and the second category was compensation awarded for violations of due process.

The findings revealed from the research on the court rulings are not uniform or constant, but rather are varied. Nonetheless, the findings show that there are several identifiable factors that influence the determination of compensation rates awarded for wrongful dismissal of pregnant women in violation of a statute and for wrongful dismissal in violation of due process.

Comparison between research findings for specific grounds of wrongful dismissal: statutory violations and due process violations

The research confirmed that indeed certain factors influencing compensation awards seem to be more significant than others, however, the extent of the influence of a specific factor often depended on the grounds of the claim for wrongful dismissal. In particular, it was found that certain factors influenced statutory violations differently than they influenced due process violations.

Table H: Factor influence: Statute and Due Process Violations

Factor	Statute WEL	Statute EOEL	Statute WEL+EOEL	Due process: Hearing violation	Due process: Good faith violation
Average number of salaries	9	11.5	15	3.4	7.4
Level of salary	yes	yes	yes	yes	yes
Reason for dismissal	yes	yes	yes	minor factor	minor factor
Age	-	-	-	yes	yes
Period of employment	minor factor	yes	minor factor	yes	yes
Occupation	no	no	no	no	no
Gender	-	-	-	no	yes
Aggregate of factors	yes	yes	yes	yes	yes
Entity of employer	-	-	-	minor factor	yes

Table H displays the different factors that were assumed to influence compensation rates for wrongful dismissal awards. The research revealed that two additional factors influenced compensation awards: one was an aggregate of factors acting together in a case; and the second was the type of entity of the employer, whether as a private or public employer.

For wrongful dismissals that violated a statute, the specific violations of statutes that were identified were violations of the WEL, EOEL or both statutes together. It was found that the type of statute violated was an additional factor influencing compensation. A lower number of salaries were awarded in cases of wrongful dismissal in violation of either the WEL (an average of 9 salaries) or the EOEL (an average of 11.5 salaries) when only one statute had been violated. However, in situations where both WEL and EOEL had been violated within the same dismissal, the employee received a higher number of salaries award (an average of 15 salaries).

In a similar way, the average number of salaries awarded for wrongful dismissal in violation of a statute was higher than the average number of salaries awarded for wrongful dismissal for violations of due process. Concerning the due process violation of the hearing obligation, the average compensation level was 3.4 salaries, while for violations of good faith, the level was 7.4 salaries. Thus, the findings show that the courts treated wrongful dismissal in violation of a statute more severely than dismissals in violation of due process. As such, parties to a wrongful dismissal claim can expect a higher compensation award for statutory violations than for violations of due process.

A contributor to the differences in award levels may be the scope and limits imposed upon compensation award options for the different grounds of wrong. For violations of a statute, the compensation as determined by the law allows both the actual damage (P), as well as, additional intangible damage (NP)⁷⁵⁰.

As explained above, each statute contains provisions addressing the issue of compensation including P and NP compensation⁷⁵¹. The WEL determines P compensation as calculated by numbers of salaries from the dismissal and until after birth. In addition, the WEL grants the court discretion to award NP compensation. Whereas the EOEL, provides for a set limit amount for compensation without proof of damage that the court then uses as a milestone. Thus, in both statutes, the legislator has declared the extent and boundaries of compensation the court may award.

The findings of the research show that the actual damage (P) inflicted upon the pregnant women wrongfully dismissed may constitute a major part of the compensation awarded. However, the P compensation itself is influenced by both the specific circumstances of the case and the time remaining between the employee's dismissal and the birth. As such, it was found that the P element has a smaller influence on the total sum of the compensation awarded than the

⁷⁵⁰ WEL, *supra* note 31§ ,13A, EOEL *supra* note 12, § 10.

⁷⁵¹ See chapter 2 (2.5) of the study.

NP compensation. Generally, it was found that the NP compensation has the greater influence on compensation awards since the court is quite unrestricted when it exercises its discretion to adjust the NP compensation and thereby influence the total compensation. The court appears also to use NP compensation as a means to award punitive compensation in order to educate employers and deter them from inappropriate conduct. Hence, compensation was highest in cases applying both WEL and EOEL since the award aggregates the P and NP damages of both statutes. Specifically, the policy of the labor court to educate and deter employers from wrongfully dismissing pregnant women has led to this high compensation.

This empirical finding of the research is consistent with the policy of the labor court in Israel to award punitive compensation as presented in Chapter 3 of the research. As stated by Judge Ilan Itah, the judicial discretion granted to the labor courts to award NP compensation for sorrow, pain, suffering and mental anguish is exercised by the court quiet freely when circumstances are appropriate. Appropriate circumstances are breaches of the labor contract based on discrimination or injury of constitutional rights. Wrongful dismissal of pregnant women harm the constitutional right for equality and are discriminating. Judge Itah states that the labor courts when bestowing compensation for wrongful dismissal, take into consideration punitive considerations beyond the pecuniary and non-pecuniary damage. Punitive considerations aiming to deter employers from inappropriate conduct towards employees⁷⁵². This statement expressed by Judge Itah has been confirmed in the findings of the research. To my opinion, the policy of the labor court in awarding significant NP compensation for wrongful dismissal in violation of a labor statute, aligns also with statements of Frances Raday and Judge Elisheba Barak. They claim that in order to deter employers and educate them to conduct that does not discriminate between people, compensation rates should be effective and of a significant amount⁷⁵³. The findings of the research show

⁷⁵² Plony case, *supra* note 391. Section 3.3.2 of the study.

⁷⁵³ Plotkin case, *supra* note 456. Section 3.4.3 of the study.

that significant amounts of compensation are bestowed by the labor courts in cases of wrongful dismissal of pregnant women, in violation of statutes.

Regarding a violation of due process, the award is made within a range of annual salaries of the plaintiff as established by case law. As a result, the extent and scope of compensation awards are more limited than where the increased options are available as under the statute. Similarly, in due process cases, the court has a largely free hand in determining compensation within the limit of multiple monthly salaries based on annual employment.

Nevertheless, in special cases, the court will exceed this limit, if it finds the circumstances appropriate. Here too, the court aims to deter employers from conducting dismissals violating hearing and good faith duties. However, this deterrent policy does not lead to compensation at the high levels awarded for wrongful dismissal in violation of a statute. Yet, in my opinion, the different levels of compensation awarded by the court for violations of a statute and violations of due process are not only due to technical limits, but due to the substance of the right protected by each of them.

It seems that a violation of the significant right of equality for pregnant women as set forth in a statute was viewed with greater severity by the court than violations of due process. The courts in exercising their discretion awarded more effective and higher punitive compensation in these statutory cases and seemed to have been more motivated to deter employers from wrongful conduct for dismissals contrary to statutes than for wrongful dismissals based on violations of due process. As presented above in chapter 2, the court determined in *Israel Electrical Company v. Turgeman* case, that the violation of the due process duty was not an absolute flaw in the dismissal and will not lead to cancellation of the dismissal or even to award of compensation in every

case⁷⁵⁴. In contrast, wrongful dismissal in violation of a protective law is deemed *void ab initio* and as a result the dismissal is invalid and void⁷⁵⁵. Yitzhak Lubotzky claims the most compelling situation for the court for preventing the dismissal and reinstating the employee is wrongful dismissal in violation of a statute⁷⁵⁶. Thus, the different treatment towards wrongful dismissal in violation of statute and wrongful dismissal in violation of due process are established and known. To my opinion, the findings of the research further confirm this treatment. Violation of a statute by wrongful dismissal is treated by the court more severely than violations of due process, as apparent in compensation rates awarded.

Concerning due process violations, the research shows that the court viewed good faith violations more severely than violations of the hearing duty. Thus, it can be anticipated that a plaintiff will receive a higher award for a wrongful dismissal for a good faith violation than a hearing violation. Moreover, the average number of salaries awarded for hearing violations (3.4 salaries) generally were themselves at the low range of the number of salaries awarded. In my opinion, the criticism expressed by scholars, as well as the parties to labor relations concerning the broad application of the hearing duty to a wide range of situations and its expansion to all employers and all employees has led to deterioration of awards for hearing violations.

Scholars contend that the hearing duty has become an artificial process performed by employers without a genuine sincere intention to hear the employee's claim⁷⁵⁷. The low average number of salaries awarded for hearing violations suggests that the court has been influenced by this criticism. Although the duty is applied widely by the courts, the penalty paid by employers for violations were usually not high.

⁷⁵⁴ See *supra* note 326. Section 2.5.2.1 of the study.

⁷⁵⁵ See Avner Koppel case, *supra* note 235. Section 2.3.1.1 of the study.

⁷⁵⁶ See Lubotzky, *supra* note 6. Section 2.4.3 of the study.

⁷⁵⁷ See: Horovitz Michal, *supra* note 249 and see Shemer Begas Reut, *supra* note 267.

Another apparent finding was that claims for wrongful dismissal without a hearing were more common (110 cases) during the period researched, than claims for wrongful dismissal without good faith (18 cases). In my opinion, claims for wrongful dismissal without good faith could become more common, because plaintiffs would find that submitting good faith claims could result in a higher compensation award than claims for hearing violations.

Furthermore, it seems the court is expanding the application of the good faith duty to more situations of wrongful dismissal. For example, in some cases the court found a violation of good faith duty for bad behavior of the employer in manner of dismissal⁷⁵⁸. In other cases, a good faith violation was found by the court in a maternity case, even when the statute was not applicable⁷⁵⁹. Similarly, the court imposed a good faith duty in connection with a violation of a hearing duty⁷⁶⁰. It is suggested that the list of circumstances and situations where the court will find wrongful dismissal based on a lack of good faith is open and expanding. As presented in chapter 2 of the study, Guy Davidov and Edo Eshet claim, that the courts in Israel developed a strong prohibition to dismiss an employee without good faith⁷⁶¹. In my opinion, the tendency of the courts to expand the list of situations determined as good faith violations, further strengthen the good faith prohibition of dismissal and is compatible with Davidov and Eshet's opinion.

Another factor examined was the level of the employee's salary. It was found that the salary level of the plaintiff was an influencing factor on the level of

⁷⁵⁸ Adv. Taufik Tibi, case 52, dismissed after a short time of employment and the swift dismissal injured the reputation of the plaintiff, real reason for dismissal was not presented and no hearing was conducted.

⁷⁵⁹ See Marian Bonany, case 140, Michal Spector Danino, case 108 – dismissed due to pregnancy. Ela Greenberg Nachshon, case 13 dismissed one day before the WEL would have applied (6 month).

⁷⁶⁰ Shiri Lahav, case 48, the court determined that dismissal without hearing was absence of good faith

⁷⁶¹ See Davidov and Eshet, *supra* note 190. Section 2.2.3 of the study.

compensation awarded in cases both of wrongful dismissal in violation of a statute and those in violation of due process.

Concerning salary level as a factor, it was found that, generally, a higher salary level will yield higher total compensation award and a low salary will yield a low amount of compensation. This empirically supports the statements of Reut Shemer Begas and of Judge Ilan Itah⁷⁶². As presented in chapter 3 of this study, both scholars claim that by bestowing NP compensation based on multiples of plaintiff salaries, the court actually sends a message to employers and employees that the compensation amount is derived from the salary level of the plaintiff. Begas and Judge Itah also express concern regarding the connection between the level of salary and the amount of compensation awarded by the court. They claim the compensation amount should be determined by the intensity of the injury and the sorrow inflicted upon the plaintiff and not be measured by the salary level of the plaintiff.

The findings confirm that a high salaried employee will generally be awarded higher total compensation for wrongful dismissal than a low salaried employee. Thus, according to Shemer Begas and Itah, the court conveys the message to parties that the sorrow and pain of a plaintiff earning a higher salary is worth higher compensation than that of a plaintiff earning a lower salary. This claim that the sorrow and pain of the employee is measured on the basis of his salary instead of according to the intensity of his injury was confirmed in the research. I agree with the viewpoint of Shemer Begas and Itah, that determining compensation rates according to salary level sends the wrong message to parties of employment relations. Compensation rates for wrongful dismissal should not be connected to salary level but rather to the severity of the violation of the employees' right. I agree that the value of human dignity is not connected to the salary earned by the employee. Dignity of a low salaried employee is not worth less than dignity of a high salaried employee.

⁷⁶² See chapter 3.3.2 of the study.

However, in *Orit Busy*, a leading case in appeal, the National Labor Court determined that salary level should not be considered for determining compensation rate, but it may have influence on deterrence considerations⁷⁶³. Thus, the findings of the research have confirmed that the practice of the courts, which takes into consideration salary level of plaintiffs, contradicts this leading judgment. However, the ruling was applied for wrongful dismissal in violation of a statute and not for due process violation. Furthermore, this judgment had not yet been published at the time of the study of the cases surveyed in the research and as such the cases do not yet reflect the influence of this ruling. It is interesting to see how this ruling will be applied in the future.

Nonetheless, an award of high number of salaries combined with a high salary will produce high compensation⁷⁶⁴. However, a high level salary may produce a relatively high amount of compensation even if the number of salaries awarded is low⁷⁶⁵. Furthermore, a similar award in multiples of monthly salary will produce a different total amount of compensation based on the differing salary levels of the employees. In conclusion, the level of salary was indeed an influencing factor on compensation awarded.

The question raised was whether the court determines the total amount of compensation according to the level of the employee's annual salary or alternatively awards a multiple of salaries without considering the total monetary amount that will be reached when multiplying that number of salaries by the employee's level of salary?

The answer to this question according to the findings shows that the court is concerned with the total sum of money awarded from all sources of

⁷⁶³ See *Orit Busy*, case 15. Section 4.4.2 of the study.

⁷⁶⁴ See example *Yitzhak Tomer*, case 59.

⁷⁶⁵ See example *Nava Ashton*, case 65.

compensation⁷⁶⁶. The court provided that in cases of wrongful dismissal contrary to a statute, the amount awarded should be proportionate, reasonable and appropriate to the circumstances⁷⁶⁷. The court noted that an assessment of the NP compensation must take into account the amount awarded for P damages⁷⁶⁸. This indicates that for wrongful dismissal contrary to a statute, the total sum of money awarded from all sources of compensation is a concern of the court and subject to adjustment by the court⁷⁶⁹.

For wrongful dismissal in violation of due process, the court has declared explicitly that the level of salary of the plaintiff was taken into account for determining the compensation rate⁷⁷⁰. Therefore, in my opinion, the court determines the compensation amount according to the level of salary of the plaintiff and less so the number of salaries.

The reason for the dismissal was also a major factor influencing compensation awards in cases of the wrongful dismissal of pregnant employees in violation of a statute. It is important to emphasize that the restrictions imposed by law on the dismissal of pregnant women is absolute⁷⁷¹. Therefore, in cases involving such a dismissal, the dismissal is deemed a wrongful dismissal and compensation will be awarded by the court. Nevertheless, the extent of compensation awarded by the court in cases involving the dismissal of pregnant women was influenced by the reason for her dismissal.

A reason for dismissal connected to the pregnancy itself resulted in higher awards of compensation than dismissals based on a justified cause not

⁷⁶⁶ Malky Graivsky, case 38.

⁷⁶⁷ See example: Nurit Kurtzky, case 40, Malky Graivsky, case 38.

⁷⁶⁸ Yisum Company Ltd. - Orit Busy, case 15.

⁷⁶⁹ Malky Graivsky, case 38.

⁷⁷⁰ See for example, Vaks Eduard, case 105, Suzanna Kropizky, case 80, Plonit v Asher Shinua case 55.

⁷⁷¹ See chapter 2.3.1.1 of the study: the WEL prohibits dismissal of pregnant women, after six month employment. However, an employer can request permission from the minister to dismiss a pregnant women.

connected to the pregnancy. The influence expressed itself mostly in the award of NP compensation. In contrast, when the reason for dismissal was not connected to the pregnancy, the factor for NP compensation resulted in a lower award by the court for this component of the claim. This seems to accord with both the purpose of these statutes and the policy of the labor court to educate employers to treat female employees, and especially pregnant women, equally. The court seems to convey a message to employers that wrongfully dismiss pregnant women that there is a significant price to pay for such dismissals.

In contrast to statutory violations, it was found that the reason for dismissal was only a minor factor in cases of dismissal without due process. Cases with a justified dismissal and cases with an unjustified dismissal, were both generally awarded low compensation amounts. Thus, without connection with the reason for dismissal, the compensation awards for wrongful dismissal in violation of the hearing duty were low.

Nonetheless, the manner of dismissal was a significant influencing factor on compensation for wrongful dismissal without due process. The behavior of the employer in the dismissal proceedings was a greater influencing factor. It was found that when the proceedings of the employer terminating the employee were severe, this led to higher compensation.

The differing treatment of the court when confronting an improper reason for dismissal contrary to a statute, as opposed to a wrongful dismissal for a violation of due process, in my opinion, results from the difference in the nature of these two sources of wrong. The statute is specifically designed to protect women employees from dismissal due to pregnancy and so the reason for dismissal is a very relevant factor. It can be understood that higher compensation will be awarded in order to enforce the purpose of the law and the policy of the court. However, the essence of due process requirement is mostly procedural. As a result, the procedure followed in the dismissal is not connected to the reason for dismissal, but rather to the manner of dismissal.

Nonetheless, Davidov and Eshet claim that the procedural rule of the hearing requiring the employer to state the real reason for dismissal in order for the employee to defend himself in the hearing, is not only a procedural rule but also a substantive one⁷⁷². In my opinion, the findings regarding the reason of dismissal in wrongful dismissal without due process, are consistent with the statement of Davidov and Eshet. The implications of this statement is twofold. One implication is that the employer needs a real reason to dismiss the employee and so dismissal cannot be arbitrary or without a cause. This has a substantive implication and actually implements the doctrine of dismissal for justifiable cause. The second implication is procedural, where the real reason should be disclosed and not a false reason. The employee cannot defend himself in the hearing if the reason disclosed for dismissal is not the real reason. The procedure of the hearing will not be conducted properly in this case. These two implications of the reason for dismissal were demonstrated in the findings of the research. The court has determined that employers disclosing a false reason for dismissal or dismissing an employee without cause or arbitrarily, violates the hearing duty and also acts without good faith⁷⁷³.

Nevertheless, when confronting wrongful dismissal without good faith, in some cases the court approached the duty taking into consideration the reason for the dismissal - for instance, when the statute did not apply⁷⁷⁴. When the reason for dismissal was on account of pregnancy and the statutes prohibiting the dismissal did not apply, the court determined this was wrongful dismissal without good faith thereby making the reason for dismissal relevant.

Moreover, when dealing with violations of the hearing duty, various rulings of the court indicate that in certain situations, the reason for dismissal remains relevant even for wrongful dismissals involving the more procedural hearing

⁷⁷² See Davidov and Eshet, *supra* note 190. Section 2.2.3 of the study.

⁷⁷³ For example: Yitzhak Tomer, case 59, Meir Sagi, case 66, Josef Katan, case 50.

⁷⁷⁴ For example: Marian Bonany, case 140.

duty violation. In a case involving a dismissal based on the reason of redundancy, the court stated that the awards for a violation of the hearing duty was limited in redundancy dismissals and would result in low compensation⁷⁷⁵. When the reason for dismissal is a breach of discipline by the employee or an accusation of theft, there have been differing rulings of the court. On the one hand, the court determined that when a breach of discipline was the cause of dismissal, the need for a hearing was intensified and the award of compensation will be higher⁷⁷⁶. On the other hand, the court found that in a case where a proper hearing had not been conducted, other talks with the plaintiff were sufficient to fulfill the hearing duty even though the reason for dismissal was theft⁷⁷⁷. Here, the court was satisfied with a weakened version of a hearing despite the reason for dismissal being a breach of discipline.

It also seems that the impact of due process violations on dismissal is not absolute, but rather relative, when compared to the impact of dismissals in violation of a statute. A dismissal of a pregnant woman is prohibited under the statutes without regard to her behavior or the circumstances of the violation of the statute. It is prohibited even if the employer did not know the woman was pregnant at the time of dismissal⁷⁷⁸. The relativity of the impact of the due process violation is apparent from the many statements of the court on this point. For instance, in Gil Moshe Shpilfogel, the court stated that not every violation of the duty to conduct a hearing will award compensation. The compensation will be determined by the circumstances and the severity of the violation⁷⁷⁹. This is consistent with statement of the court in Turgeman case, presented in chapter 2 of the study, that flaws in the hearing procedure were

⁷⁷⁵ Naama Peleg, case 5, awarded 1 salary, Golan Moshe, case 81, awarded 1.6 salary.

⁷⁷⁶ Galit Rahamimov, case 106, 6 salaries were awarded.

⁷⁷⁷ Doron Avitan, case 53 – one salary was awarded. Noam Zandar, case 87 awarded less than one salary.

⁷⁷⁸ See chapter 2.3.1.1 of the study.

⁷⁷⁹ Gil Moshe Shpilfogel, case 94 - awarded half a salary.

not absolute flaws and will not always lead to compensation award⁷⁸⁰. The court also has stated that the refusal of a plaintiff to attend a hearing would lead to a lower compensation award⁷⁸¹. It can be seen that the duty to conduct a hearing also is dependent on the behavior of the plaintiff. When the plaintiff does not attend a hearing to which he was invited to by his employer, he harms his potential award of compensation.

The relativity of the due process impact on dismissal is also apparent in cases where the court recognized employer-employee discussions as quasi hearings sufficient to fulfill the hearing obligation, even though no proper hearing was held⁷⁸². In these cases, although the procedural stages of a proper hearing were absent, the employee was awarded a low compensation since some form of talks had taken place. This was found to be the situation for both justified and unjustified reasons for dismissal. It seems that the requirement for properly conducting a hearing under this duty, as well as the penalty for not applying it properly, is deteriorating.

In my opinion, this deterioration in the hearing requirement and the dilution of compensation awards for hearing violations are problematic for cases where the cause of dismissal was unjustified. In these cases, a hearing conducted truthfully and genuinely can lead the employer to cancel the dismissal. This generally would be overall a better result certainly for the employer than dismissal with compensation. As explained, an aim of the hearing duty is for the employer to hear the employee and consider changing its dismissal decision, particularly in cases where the dismissal is unjustified. The tendency of the court to downgrade the importance in conducting such hearings and reducing awards for violations undermines the objectives of the hearing duty.

⁷⁸⁰ See Shlomy Turgeman, *supra* note 326, chapter 2.5.2.1 of the study.

⁷⁸¹ Yitzhak Chen, case 104- awarded 1.5 salaries. The reason for dismissal was unjustified in this case.

⁷⁸² For example: Noam Zandar, case 87 awarded less than a salary, Doron Avitan, case 53- awarded 1 salary , Shiran Israeli, case 95- awarded 1 salary.

Concerning the factor of the age of the employee, it was found not to be significant in cases of wrongful dismissal in violation of a statute relating to pregnant women, because all plaintiffs involved were in the same range of age. Similarly, the length of employment was found to be only a minor influencing factor except in cases applying the EOEL⁷⁸³.

However, in cases of wrongful dismissal in violation of due process, the period of employment combined with the employee's age were major factors influencing the compensation award. In cases of wrongful dismissal in violation of due process, there was a clear tendency of the court to award lower compensation to short time employees. It was also found that courts tended to award higher compensation to older employees with long periods of employment. The court explained the difference by emphasizing that an older, long-employed employee has less chance to find a new job. Therefore, the employer must consider the dismissal of such an employee carefully and will end up paying a higher rate of compensation for wrongful dismissal of such an employee. In my opinion, the due process basis in wrongful dismissals is used by the court as a social policy tool. The view expressed by the court that a senior worker should receive special treatment from the employer upon dismissal than a short period employee is appropriate.

As noted in chapter 5, a tendency of the court regarding the period of employment was to use the period of employment as a standard to determine compensation for hearing duty violations and making awards in terms of one monthly salary per year of employment⁷⁸⁴. For example, in Bat Sheba Cohen, an award of 3 monthly salaries was awarded to an employee employed for 3 years⁷⁸⁵. However, in my opinion, although there is an identifiable tendency of the courts to approximate awards to years of employment, this tendency can only be used by the parties to a case as a general guideline since any specific

⁷⁸³ Dismissal prior to 6 month employment in order to avoid application of the WEL, *supra* note 31§ 9.

⁷⁸⁴ See Avihay Oziel, case 89, Roman Vilchovsky, case 83. Eyal Cohen case 60.

⁷⁸⁵ Case 51.

award cannot be finally predicted due to the many circumstances of each individual situation.

The factor of employee's occupation was assumed to be an influencing factor on compensation. However, the findings show that the court was neutral towards the occupation of the employee in situations of wrongful dismissal in violation of a statute as well as in cases of wrongful dismissal in violations of due process.

The tendency of the court was to consider the violation and its severity equally to all ranks of workers. High level employees did not receive better treatment from the court than low ranking workers or vice versa. In my opinion, this is a particularly important finding of this research. It shows that the court is influenced by factors relevant to the circumstances of the case without being affected by the rank, prestige or social connections of the plaintiff wrongfully dismissed. In this, the court sends a message that employees at all levels of employment will be treated equally.

The research on wrongful dismissals in violation of a statute focused on the statutes relating to pregnant women. The starting point of the research was that gender is a relevant and influencing factor. The court applied the relevant sections of the statutes regarding compensation and exercised judicial discretion quite freely. Women employees receive special treatment under the statute and by the court. In the cases, they were awarded higher compensation, because they are women. This aligns with the stated policy of granting protection to women in labor relations, especially pregnant women. In my opinion, this tendency of the court is praiseworthy, because women employees are at a disadvantage in the labor market, particularly pregnant women.

However, Sharon Rabin Margalioth claims the added protection women receive at the exit point from employment conveys a wrong message to employers.

She claims this protection discourages employers from employing women in the first place⁷⁸⁶. I believe this argument is correct and is apparent in the Israeli employment market. Nevertheless, the long way towards achieving gender equality in labor relations must include protection for women even if it is at the exit point from employment.

Gender was not an influencing factor in dismissals without a hearing. However, in cases of dismissal in violation of good faith, male employees received higher compensation than females. This is an interesting finding and suggests that the court perceived the harm of a violation of the good faith duty to be more severe for males than for females. In my opinion, this is contrary to the principle of equality that should be guiding the court.

Yet, a close examination of the cases in which males were awarded a higher compensation does show a correlation to a long period employment and an older age. A possible explanation is that in the Israeli labor market male employees usually feature these characteristics of long periods of employment and belonging to older age group. It may be that gender in itself was not the influencing factor on compensation, but rather the plaintiff specific age and period of employment of the employee that influenced the decision. Furthermore, the only case in which a female employee received a high award of compensation for violation of the good faith duty, was of an older age employee. Although she was employed for a short period, the court determined that due to her older age she will have difficulties finding a new job, thus, her age was an influencing factor on compensation award⁷⁸⁷. Further reinforcement for the explanation presented, may be found in a recent case of wrongful dismissal of a 60 years old female employee, employed for 35 years,

⁷⁸⁶ Rabin- Margalioth Sharon, *supra* note 294.

⁷⁸⁷ Talia Kissin, case 143 However, in appeal the ruling was reversed and compensation was canceled see *supra* note 701.

which was awarded high compensation (14.5 salaries) for violation of the hearing duty, absence of good faith and discrimination as an inclusive sum⁷⁸⁸. She also featured characteristics of long period employment and belongs to older age group.

It is noted that in cases of both wrongful dismissal in violation of a statute and violations of due process, an aggregation of factors operated in concert in the same case and influenced compensation more so than would have resulted from an isolated factor. Therefore, it may be expected that a claim for wrongful dismissal involving several influencing factors will result in higher compensation awards by the court.

Another influencing factor to note was the nature of the entity of the employer, especially in cases of wrongful dismissal in violation of the good faith duty. In all cases involving a public or hybrid public/private entity, compensation for violation of the good faith duty were high. The court expected a public and hybrid public/ private employer to conduct itself with a higher level of good faith towards employees than smaller and more private firms.

For wrongful dismissal in violation of the hearing duty, the findings were less significant. However it seems that the severity of the flaws in the dismissal procedure, combined with the type of entity of the employer were factors influencing compensation. An employee of a public or hybrid public/private entity carrying out a severely flawed procedure of dismissal generally was awarded high compensation. For wrongful dismissals in violation of a statute, the factor of the type of entity of the employer did not have an apparent influence.

⁷⁸⁸ See and compare to LD 4701-05-16 Madi Levy v IBM. Nevo August 2016, paragraph 38, 51.

To conclude, the research undertaken in this paper reveals that there are indeed identifiable tendencies regarding certain factors that would indicate the parameters of an award for compensation in cases of wrongful dismissal. The research reveals tendencies regarding certain factors that may help parties and their lawyers to predict to some extent the scope of the compensation award to be expected. However, there is no unity in court determinations of compensation. Some judges follow a pattern or a guideline for determining compensation⁷⁸⁹, while others find reasoning to support their decision that fit the specific case⁷⁹⁰.

The above described results of the empirical research widen the legal knowledge on real consequences of illegal dismissal in Israel. For the first time the empirical research on case law has been undertaken in the field of dismissal remedies enforced by labour courts. The results are important for number of actors on Israeli employment scene. First of all it has to be emphasized, that the new and innovative findings simply lead to better understanding of phenomenon and behavior of parties on labour market. This knowledge is potentially important for employment policy, shaping future rulings of labour courts and for the parties of employment contracts as well. The empirical

⁷⁸⁹ For instance, determination of compensation by multiple of number of years of employment and salary.

⁷⁹⁰ For instance, in some cases, the court states the determination of compensation is "due to circumstances". (See- Ephraim Galis, case 73, awarded 3 salaries; Elizabeth Gomer, case 79: the court determined 2 salaries for compensation taking into account the circumstances. And For instance, in Saria Abramov, case 74, the court determined that considering the circumstances the plaintiff was awarded the amount she claimed. Meir Sagi, case 66 was awarded 7.6 salaries for wrongful dismissal without good faith and mental anguish. The amount determined was after considering all the circumstances of the case). Similarly, the court reasons that determination of compensation is of an appropriate compensation amount in the circumstances for dismissal, without further explanation. (See: Yamit Michal Vaalani, case 91 –awarded NIS 20,800(EUR 4,770)). In some cases the court declared that the amount that was claimed by the plaintiff will be the amount of compensation awarded. (See- Shiri Lahav, case 48 claimed NIS 30,000(EUR 6,900) for NP damages and was awarded this amount. And see Shlomo Ben Shoshan and others, case 141). Another way the court determined the amount of compensation was by comparing to other cases awarded by the court. (See - appeal Israela Hasson-Rabikovich, case 67, the court increased the compensation amount to NIS 50,000(EUR 11,540) from NIS 30,000. The explanation the court gave was that severe breach of right to hearing and injury to equality justify increase of compensation similar to Orly Murry and Sharon Arbiv cases. In this case one inclusive amount was awarded for wrongful dismissal without hearing and in violation of EOL or violation of good faith duty.)

findings revealed by the research would aid parties and their lawyers to predict an expected range of a compensation award in a situation of wrongful dismissal. It also may serve as a guideline and basis for courts in making rulings of compensation for wrongful dismissal.

Nonetheless, as presented in chapter 3 of the research, Nili Cohen and Daniel Friedman stress that the rule of legal certainty, does not apply to the area of breach of contract regarding remedies. They claim the parties are not entitled to legal certainty due to the difficulty to predict the extent of the loss caused to the plaintiff by the breach of contract. Uncertainty is inherent regarding compensation rates awarded, due to the courts flexibility and wide discretionary powers to assess the rate of compensation⁷⁹¹. In my opinion, this uncertainty prevails also in compensation awards for labor contract breaches. However, uncertainty is somewhat less extensive for assessment of compensation rates by the labor court, in that compensation rates are more substantive than in regular commercial contract breaches. Higher rates of compensation are awarded by labor courts for labor contract breaches by wrongful dismissal, due to the unique nature of the labor contract and due to the unique characteristics of the labour court rulings⁷⁹². Labor court Judges apply social policy considerations to their rulings in order to deter and educate employers to appropriate conduct towards employees. As stated by former President of Israel's National Labor Court, Stephen Adler, the labor court judge has an agenda to protect the social rights of workers and therefore awards effective remedies in case of breach of the labor contract⁷⁹³. In my opinion, the findings of the research confirm that the labor court quite freely uses its discretionary powers granted to the court in labor statutes and in case law, when awarding compensation for wrongful dismissals. Compensation rates bestowed by the courts for wrongful dismissal are substantive rates and hopefully effective in achieving the goal of social policy of the labor courts.

⁷⁹¹ Daniel Friedman and Nili Cohen, *supra* note 47. Section 3.2.2.

⁷⁹² See section 2.2.1 of the study.

⁷⁹³ Stephen Adler, *supra* note 200. Section 2.2.1 of the study.

However, the amount a particular judge will award in an individual case is influenced by the individual view of the judge and is ultimately not easily predicted. Thus, in my opinion, the amount of compensation finally awarded by the courts depends on the judge's approach and perception of the case and the amount that he or she considers appropriate. As such, although factors will indicate direction and an expected scope for an award, the basis used by a judge in exercising his or her discretion is not easily predictable and may be to a certain extent arbitrary.

The notion of somewhat arbitrary determinations of compensation amounts by the courts was in accordance with the opinions of the scholars referred to in chapter 3 of this study⁷⁹⁴. Yifat Bitton contends NP compensation awards determined by the courts were arbitrary and inconsistent⁷⁹⁵. Shalev and Adar claim NP compensation granted by the court are arbitrary, because it is difficult to attach a monetary value to intangible damage⁷⁹⁶. In my opinion, it seems that the findings revealed in this research confirm this somewhat arbitrary nature of these awards to some extent.

Finally, it is suggested that this research would contribute certain principles and guidelines to assist Israeli judges in making awards in cases of wrongful dismissal. Since the principles and guidelines were obtained from a study of the court rulings themselves, they should be more acceptable to the Israeli judge as deriving from an internal judicial source of information. Hopefully the assistance of this information will lead to less arbitrary rulings of compensation amounts for wrongful dismissal.

⁷⁹⁴ See: Bitton Yifat, *supra* note 25 and *see* SHALEV GABRIELA, ADAR YEHUDA, *supra* note 44.

⁷⁹⁵ *Supra* note 25 and *see* chapter 3.2.3 of the study.

⁷⁹⁶ *Supra* note 44 and *see* chapter 3.2.3 of the study, note 365.

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Appendix A: Research Cases

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3. LD 50851-02-11, Simcha Mamu v Eldad- Segev Law Firm, Nevo, June 2013 (Appeal settled in compromise)
4. LD 52260-11-10, Enbar Amiga v Hagit Tasa Ltd., Nevo, October 2013
5. LD 51501-03-12, Naama Peleg v Am Haadma Ltd., Nevo, January 2014 (Appeal settled in compromise)
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7. LD 57763-02-13, Helena Maymaran v kochav Zurim Ltd., Nevo, September 2014 (Appeal settled in compromise)
8. LD 43970-10-11, Vinugray Elizabeta v Karl Berg Ltd., Nevo, October 2014
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10. LD 48181-03-13 Michal Golan v Zmorot Hagefen LTD ,Nevo, March 2015
11. LD 45859-09-13 Naama Hershkovitz v Zevet 5 Avtaha LTD , Nevo, November 2015
12. LD 14394-10-10 Rachel Amona Saul v Elad Municipality and other.Nevo, December 2015

EOEL

13. LCT 3404-10, Ela Greenberg Nachshon v Proporzia, Nevo, June 2013 (Appeal settled in compromise)
14. LD 27457-03-12, Yafit Galy v Formaika Center Ltd., Nevo, July 2013 (Appeal –cancellation of EOEL payments due to burden of proof. Hearing payment applies.)
15. LA (National) 30585-09-12 , Yisum company Ltd., - Orit Busy , Nevo, August 2013
16. LD 51666-06-12, Enbal Harel v Global Israel, Nevo, September 2013 (Appeal deleted)
17. LD19728-07-10, Danit Zachariah v Insurance Services Lamizrach Ltd, Nevo, November 2013
18. LD44586-12-10, Liron Biton v Ben Shemen Youth village, Nevo, December 2013
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19. LD 10332-09-11, Efrat Rubin v E.T Cooperation, Nevo, May 2014
20. LD 4954-09-11, Karin Ortesy v Maya Tor Ltd., Nevo, May 2014
21. LC 12179-09, Lital Berenfeld levy v Modiin Mall Ltd., Nevo, June 2014
22. LD11/07/4344, Shlomit Matana v Al Batuach company Ltd., Nevo, July 2014
(Request for appeal denied)
23. LD 43908-02-12, Yazbalam Kabada v S. Albert Public works Ltd., Nevo, August 2014 (Appeal and decision)
24. LD 25795-02-13, Shdamit Har Zahav v R.A.S Ltd., Nevo, August 2014 (Appeal)
25. LD 24547-12-12, Nataly Yitzhaky v Pina Barosh Ltd., Nevo, October 2014 (Appeal deleted)
26. LD 7097-09-12, Anat Bashearim v Maymon David Ltd., Nevo, November 2014 (Appeal settled in compromise)
27. LD 55016-06-12, Adi Arel v Onot Ltd., Nevo, November 2014

28. LD 4273-11-12, Liana Gerry v Liderim Ltd. Nevo, January 2015
29. LD 41997-04-13, Shindler Nataly v Yechiel Amnon, Nevo, February 2015
30. LD 48758-07-11, Litav Jos Vaaknin v Marmenet Organizing and Managing Projects LTD and others, Nevo, March 2015 (Appeal pending)
31. LD 40274-06-13 Svetlana Cogan v Fahn Kanne, Nevo, June 2015 (Appeal deleted)
32. LD 60479-06-14 Shirin Espanola v Osama Perch Engineers advisors LTD. Nevo, June 2015 (Appeal deleted)
33. LD 43375-04-12 Matana Parco v Beit El Zichron Yaakov. Nevo, July 2015
34. LD 29941-09-13 Karin Regev v Horizon technologies L.D. LTD. Nevo, August 2015 (Appeal dismissed)
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36. LD 35169-09-13 Esti Kremer v T.S. Israel Defence LTC. Nevo, September 2015 (Appeal deleted)
37. LD 13459-06-14 Odelia Maoz v Beautycare E.G.LTD. Nevo, November 2015. (Appeal partly accepted)

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38. LC 3238-09, Malky Graivsky v Delta Ltd., Nevo, January 2013 (Appeal settled in compromise)
39. LCT 12137-09, Plonit v Almonit, Nevo, March 2013
40. LCR 1003-09, Nurit Kurtznizky v Developing company Ltd., Nevo, October 2013
41. LD 32358-10-10, Lilach Rosenberg v Milouoof Ltd., Nevo, June 2014
42. LD 23806-04-12, Shiran Batito v Abraham Asiag, Nevo, June 2014 (Appeal settled in compromise)
43. LD 28334-07-12, Inesa Volloshin v Shemesh Hay Ltd., Nevo, September 2014 (Appeal deleted)
44. LD 21700-08-12, Olga Shamis v Jo Parlov Educational Incentive LTD, Nevo, May 2015
45. LD 35830-02-12, Reut Bar v Guardian Information Systems LTD. Nevo, April 2015
46. LD 36109-06-13, Sandrine Asoline v Ha'modia Paper LTD., Nevo, November 2015
47. LD 44448-12-12 Enva Neter v S. Nir Security Maintenance and cleaning Systems LTD. Nevo, November 2015

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48. LA 44309-05-11, Shiri Lahav v State of Israel-Foreign Affairs Office, Nevo, January 2013
49. LCR 7757-09 ,Dina Fisher v Regional High School Training Center, Nevo, January 2013(Appeal partly accepted)
50. LC 12233/08 Josef Katan v Clal house management Company Ltd. Nevo, March 2013 (Appeal settled in compromise)
51. LD 46048-01-11, Bat Sheba Cohen v Ramat David Special Education, Nevo, March 2013(Request for appeal denied)
52. LCR 3752-10, Adv. Taufik Tibi v Adv. Doron Afik, Nevo, April 2013
53. LCR(TA) 3086-09, Doron Avitan v Mishmar Hasharon Alon Holdings Ltd., Nevo, April 2013

54. LD(NZ) 14831-03-11, Ina Marosiak v Plakstroniks (Israel) Ltd., Nevo, April 2013(Appeal settled in compromise)
55. LD 48531-07-11, Plonit v Asher Shinua Ltd., Nevo, May 2013
56. LD 41112-02-12 , Dana Tal v Barnoam and Co. Ltd., Nevo, May 2013
57. LD 56167-10-10, Yitzhak Tayar v Briut Teva Market Ltd., Nevo, July 2013
58. LD 1172-07-09 , Benny Kedem v Ma'alot Tarshiha Municipality, Nevo, July 2013
59. LD 9895-09 , Yitzhak Tomer v The Management College, Nevo, October 2013
60. LD (TA) 18588-06-10, Eyal Cohen v Accountant Zeev Salomon , Nevo, October 2013(Appeal accepted partly)
61. LD 50287-12-12 , Avital Pod v Huri brothers Ltd., Nevo, October 2013
62. LD 13805-01-12 , Rinat Cohen v Magen Company Ltd., Nevo, November 2013
63. LD 47986-07-10, Lia Naidor v Coah Ozma Ltd., Nevo, November 2013
64. LD 140-12-10, Baruch Zur v Yisraco Ltd., Nevo, November 2013(Appeal pending)
65. LD 3347-10 , Nava Ashton v Israel Land Development Company (Hahsharat Hayeshuv) Ltd., Nevo, December 2013
66. LD 47439-08-11, Meir Sagi v Apcon Holdings Ltd., Nevo, December 2013(Appeal settled in compromise)
67. LA(National) 16117-07-10, Israela Hasson- Rabikovich v 3M Israel Ltd., Nevo, December 2013
68. LD (TA) 52630-03-12, Israel Morgenstern v Reshet Bitachon Ltd., Nevo, December 2013
69. LA (National) 14039-07-11, Hana Sultany V State of Israel, Ministry of Education, Nevo, December 2013
70. LA(National) 40553-09-12 , The Negev Development Authority - Shulamite Bar ,Nevo, December 2013
71. LD (TA) 54360-01-11, Arye Raz v Agriculture Insurance Ltd., Nevo, December 2013(Appeal deleted)
72. LD (NZ) 16413-11-11, Efrat Buganim v Aviv Agencies Ltd., Nevo, December 2013(Appeal deleted)
73. LC(TA) 12896-08, Ephraim Galis v Crocker International Ltd., Nevo, December 2013(Appeal decision)
74. LD 60194-10-10, Saria Abramov v Or Orly Kenyonim Ltd., Nevo, January 2014
75. LD (JM) 44121-12-11, Naif Blbisi v Catering Ltd., Nevo, January 2014 (Appeal deleted)
76. LC 11323-09, Ilana Shlomo v Holon Municipality, Nevo, January 2014
77. LD(TA) 16430-08-10, Taha Alhativ v Ramla Municipality, Nevo, February 2014
78. LD 36808-06-12, Dror Bokobza v Pelephone Communication Ltd., Nevo, February 2014
79. LD 13049-11-11, Elizabeth Gomer v Community Center Company Ltd., Nevo, February 2014
80. LD 31277-01-12, Suzanna Kropizky v Israel Electricity Company Ltd., Nevo, March 2014
81. LC 3989-10, Golan Moshe v Amdocs Israel Ltd., Nevo, March 2014 (Appeal deleted)
82. LD 21929-03-11, Eliahu Greenboim v Keshet Association, Nevo, March 2014(Appeal deleted)
83. LD55472-08-10 Roman Vilchovsky v Alomot Holon Ltd., Nevo, April 2014

84. LD 9302-03-13, Merav Pinhas v Halamish Government Company, Nevo, April 2014
85. LD 26372-04-13 , Rinat Yitzhaky v Reshet Bitachon Ltd., Nevo, May 2014 (Appeal deleted)
86. LD 35434-06-11, Nataly Shmueli v Don Vito Ltd., Nevo, May 2014
87. LD 9122-10-12, Noam Zandar v Orgad Ltd., Nevo, May 2014
88. LD 1520-01-13, Gideon Shimoni v M. Agam Contraction Ltd., Nevo, May 2014
89. LD 4903-09-11, Avihay Oziel v Rod Media Ltd., Nevo, May 2014
90. LD 5234-10-11 , Hasna Rhyel v Ramat Tivon Ltd., Nevo, June 2014
91. LD 1201-02-11, Yamit Michal Vaalani v Asaf Vidslvasky, Nevo, July 2014 (Appeal settled in compromise)
92. LD 5776-02-13 , Osnat Cohen v Student Association Emek Yizrael College, Nevo, August 2014
93. LD 59662-05-12, Plonit v Almonit, Nevo, August 2014
94. LD 7633-03-12, Gil Moshe Shpilfogel v Medical Care Towers, Nevo, August 2014
95. LD 32299-10-12, Shiran Israeli v Fox Vazel Ltd. Nevo, September 2014
96. LD 53875-10-10, Ezra Saadia v Givatayim Municipality , Nevo, September 2014(Appeal settled in compromise)
97. LD 7074-05-13, Yehuda Cohen and Rotem After v Banda Plast Industry Ltd., Nevo, September 2014
98. LD 56244-11-13, Olga zlanchok v Medical Center Anita Ltd., Nevo, September 2014
99. LD 47642-12-11, Dana Harel Weber v Agadat Ein Karem Ltd. Nevo, October 2014
- 100.LD 55571-06-13 , Shmuel Dahan v Ziv kitchens Ltd., Nevo, November 2014
- 101.LD 35120-11-12 , Yehuda Reuven v M.Z.M.A (1992) construction Company Ltd., Nevo, November 2014
- 102.LC 7301-09, Dov Klina v Fox Maind Ltd., Nevo, November 2014 (Appeal dismissed)
- 103.LD 39065-04-13, Lotem Aviv and Nofar Kmnaker v Ziv Cohen- "Master Visa", Nevo, December 2014 (Appeal dismissed)
- 104.LD 36419-07-12, Yitzhak Chen v Andy Engineering ltd., Nevo, December 2014 (Appeal dismissed)
- 105.LD 57883-01-13, Vaks Eduard v Galey Hazuk Ltd., Nevo, December 2014
- 106.LD 6883-09-11, Galit Rahamimov v Tiv Taam Ltd., Nevo, December 2014 (Appeal dismissed)
- 107.LD 21606-09-12 , Ofir Greenvald v Alorit Ltd., Nevo, December 2014
- 108.LD 40925-03-11, Michal Spector Danino v A. Nave Law Office Ltd., Nevo, November 2013
- 109.LD 47915-09-13, Eleanor Moyal v Global Africa Industries Group Ltd. , Nevo, January 2015
- 110.LD 44795-09-13, 35656-10-13, Alexander Tzelevitz v Yehuda Pladot Ltd., Nevo, January 2015 (Appeal partly accepted. Petition to High Court of Justice by plaintiff was dismissed)
- 111.LD 30867-07-12, Orit Kamir v Peres Academic Center Ltd., Nevo, February 2015
- 112.LD 31306-04-12, Ofira David v Uriel P.G. Ltd., Nevo, March 2015
- 113.LD 63085-12-12, Almasi Sofer Smadar v Crocker International Ltd., Nevo, April 2015
- 114.LD 25231-10-12, Naama Shahar v Doron Haft, Nevo, April 2015 (Appeal dismissed)

- 115.LD 31699-08-12, Avir Hamis v The Baptist School Association in Nazareth, Nevo, April 2015
(Appeal dismissed by consent of parties)
- 116.LD 33660-07-12, Ziona Buchbut v Migdal Or Educational Campus, Nevo, April 2015(Appeal settled in compromise)
- 117.LD 30738-04-12, Tami Blstara v LCS laser Cutting System Ltd., Nevo, April 2015
- 118.LD 43864-11-12, Uriel Brad v Canasto Ltd., Nevo, June 2015 (Appeal dismissed)
- 119.LD 43765-12-13, Diab Gasar v G. Yekuti Earthworks and Infrastructure Ltd., Nevo, June 2015
- 120.LD 33813-09-10, Zvi Feldman v Carmel Olefinim Ltd., Nevo, June 2015 (Appeal deleted)
- 121.LD 21940-07-12, Nina Rudinsky v Ministry of Social Affairs and Social Services , Nevo, July 2015
- 122.LD 1692-11-13, Tamir Alush v The Little Prince Company- Aviv and Oren Ltd., Nevo, July 2015
- 123.LD 45566-02-14, Boris Zilberman v Channel 9 Ltd., Nevo, August 2015
- 124.LD 19267-04-14, Talia Lev v Isrotel Ganim Ltd. and others, Nevo, August 2015(Appeal partly accepted. Compensation for hearing violation increased by NIS 20,000)
- 125.LD 50002-03-11, Avi Ben David v Top Ace Ltd., Nevo, October 2015
- 126.LD 20666-07-13, Eva Rosen v Supermarketing Dynamic Marketing Systems Ltd., Nevo, October 2015
- 127.LD 17517-04-11, Galit Daniel v K.A.A. Assemblies and Wiring Electronic Devices Ltd., Nevo, October 2015 (Appeal settled in compromise)
- 128.LD 51191-02-14, Zehava Haimovitz v Doron Amir , Nevo, October 2015 (Appeal dismissed)
- 129.LD 25333-11-13, Liron Ohayon v Shopmind Ltd. Nevo, October 2015
- 130.LD 1470-06-11, Emanuel Nektalov v The Standards Institution of Israel , Nevo, October 2015
- 131.LD 41777-01-13, Yanai Raine v Hometex R.A.S.N. Ltd., Nevo, November 2015 (Appeal pending)
- 132.LD 31597-01-12, Yitzhak Hadad v Kadima Party, Nevo, November 2015 (Appeal settled in compromise)
- 133.LD 33806-01-13, Nathaniel Peretz v Otsar Ha-Hayal Bank Ltd., Nevo, November 2015
- 134.LD 12657-12-13, Amalia Sima Reifen v Community Centers Network- Matnas Kiryat Yam Mendel Ltd., Nevo, November 2015
- 135.LA 27600-10-11 Dr. Gershon Aharonov v Ariel University Center of Samaria, Nevo, December 2015 (Appeal partly accepted. Compensation for hearing violation granted NIS 40,000)
- 136.LD 12762-02-12, Hila Halevy v The State of Israel- Ministry of Education, Nevo, December 2015
- 137.LD 28064-11-13, Smadar Chen Mazuz v Elad Municipality and others, Nevo, December 2015
- 138.LD 12127-07-11, Oded Viner v Lilit Cosmetics ltd., Nevo, December 2015
- 139.LD 55486-06-13, Idit Teperson v Habima National Theater Ltd., Nevo, December 2015
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- 140.LD 35036-10-10, Marian Bonany v Noa Avicaisar, Nevo, August 2013

- 141.LD 9413/08, Shlomo Ben Shoshan and others v Ram K.R.M Company Ltd., Nevo, March 2014(Appeal dismissed)
- 142.LA 13652-10-13, Aragawi Ameleset v I.B. See Mashabim Ltd., Nevo, November 2014
- 143.LD10587-05-12, Talia Kissin v Hamashbir Department Stores Ltd., Nevo, March 2015(Appeal partly accepted. Award of NIS100,000 was cancelled)