

CHAPTER SIX: EMPLOYMENT LAW

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CHAPTER SIX: EMPLOYMENT LAW

I. INTRODUCTION

A. *Scope of the Chapter*

This chapter is not intended to be a comprehensive work on the law relating to employer-employee relations. This is a vast area of law, and to properly assist a client in this area students must look at the relevant statutes and case law. Further, each jurisdiction in Canada has its own legislation that governs employment standards in that jurisdiction. This chapter outlines a number of the basics in the areas of employment and wrongful dismissal, focusing on British Columbia.

B. *Governing Legislation, Regulations, and Resources*

1. Employment

a) *Federal Legislation*

- Canada Labour Code, R.S.C. 1985, c. L-2, sets out minimum employment standards for federal employees including standards governing collective bargaining and occupational health and safety. There are three general parts to the Act: Part I: Industrial Relations, Part II: Occupational Health and Safety, and Part III: Standard Hours, Wages, Vacations and Holidays.
Web site: laws.justice.gc.ca/en/L-2
- Canadian Human Rights Act, R.S.C. 1985, c. H-6, covers discrimination in the workplace and the procedure for adjudication before the Canadian Human Rights Commission.
Web site: laws.justice.gc.ca/en/H-6
- Employment Equity Act, R.S.C. 1995, c. 44, helps achieve equality in the workplace with particular attention to inequalities that exist for women, Aboriginal peoples, persons with disabilities, and visible minorities.
Web site: laws.justice.gc.ca/en/e-5.401
- Employment Insurance Act, R.S.C. 1996, c. 23, outlines the requirements and qualifications for Employment Insurance.
Web site: laws.justice.gc.ca/en/E-5.6/49004.html
- Personal Information Protection and Electronic Documents Act, R.S.C. 2000, c. 5, protects personal information collected and distributed electronically for employees in federal jurisdiction.
Web site: laws.justice.gc.ca/en/p-8.6

b) *Provincial Legislation – Employees*

- Employment Standards Act, R.S.B.C. 1996, c. 113, (ESA) sets out minimum employment standards for provincial employees.
Web site: www.qp.gov.bc.ca/statreg/stat/E/96113_01.htm

- Employment Standards Regulation, B.C. Reg. 396/95, includes provisions on scope of coverage and the penalty regime.
Web site: www.qp.gov.bc.ca/statreg/reg/E/EmployStand/396_95.htm
- Estate Administration Act, R.S.B.C. 1996, c. 122, deals with deceased workers' wages.
Web site: www.qp.gov.bc.ca/statreg/stat/E/96122_01.htm
- Human Rights Code, R.S.B.C. 1996, c. 210, deals with discrimination in employment, among other things.
Web site: www.qp.gov.bc.ca/statreg/stat/H/96210_01.htm
- Labour Relations Code, R.S.B.C. 1996, c. 244, deals with union membership, collective bargaining, and the role of the Labour Relations Board.
Web site: www.qp.gov.bc.ca/statreg/stat/l/96244_01.htm
- Workers' Compensation Act, R.S.B.C. 1996, c. 492, governing Act of the Workers' Compensation Board.
Web site: www.qp.gov.bc.ca/statreg/stat/W/96492_00.htm
- Personal Information Protection Act, S.B.C. 2003, c. 63, sets out ground rules for how private sector and not-for-profit organizations may collect, use, or disclose information about an individual.
Web site: www.qp.gov.bc.ca/statreg/stat/P/03063_01.htm

c) *Provincial Legislation – Contractors*

- Builder's Lien Act, S.B.C. 1997, c. 45, provides that a builder may file a lien against property for work and materials put into that property and sets out the procedure for filing a lien.
Web site: www.bcli.org/pages/projects/builderslien/BLAsupport/bla-sbc97-ch45.htm
- Repairers Lien Act, R.S.B.C. 1996, c. 404, states that a repairer may put a lien on chattel for work and materials put into that chattel.
Web site: www.qp.gov.bc.ca/statreg/stat/R/96404_01.htm
- Woodworker Lien Act, R.S.B.C. 1996, c. 491, states that a woodworker may put a lien on logs or timber for work done or services performed.
Web site: www.qp.gov.bc.ca/statreg/stat/W/96491_01.htm

2. Wrongful Dismissal

a) *Provincial Legislation*

- Employment Standards Act, R.S.B.C. 1996, c. 113, Part 8, sets out minimum notice requirements for termination.
Web site: www.qp.gov.bc.ca/statreg/stat/E/96113_01.htm

b) *Books*

- Howard A. Levitt. The Law of Dismissal in Canada, (Aurora, Ont.: Canada Law Book, 2003). This textbook is used by Employment Standards Branch staff.

- Malcolm Mackillop. Damage Control: An Employer's Guide to Just Cause Termination, (Aurora, Ont.: Canada Law Book, 1997).
- Ellen E. Mole. The Wrongful Dismissal Handbook, (Scarborough: Butterworths, 1997).

3. Referrals

Employment Standards Branch

(Employees in Provincial Jurisdiction)

Deer Lake Centre
210 - 4946 Canada Way
Burnaby, B.C. V5G 4J6

Telephone: (604) 660-4946
Fax: (604) 660-7047

- Other Branches in the Lower Mainland are located in Surrey, Port Coquitlam, Burnaby, and Abbotsford.

Employment Standards Act Inquiry Line

E-mail: infosb@system6.lcs.gov.bc.ca

Web site: www.labour.gov.bc.ca

Telephone (Prince George): (250) 612-4100

Telephone (Rest of B.C.): 1-800-663-3316

Fax: (250) 612-4121

Labour Relations Board

(Union Enquiries: Provincial Jurisdiction)

Suite 600 Oceanic Plaza
1066 West Hastings Street
Vancouver, B.C. V6E 3X1

Telephone: (604) 660-1300

Fax: (604) 660-1892

Human Resources Development Canada, Labour Program

Labour Standards

(Employees in Federal Jurisdiction)

125 East 10th Avenue
Vancouver, B.C. V5T 1Z3

Telephone: (604) 872-4384

Toll Free: 1-800-668-5155

Emergency: 1-800-668-5155

Fax: (604) 666-3166

Canada Industrial Relations Board

(Union Enquiries: Federal Jurisdiction)

410 - 757 W Hastings Street
Vancouver, B.C. V6C 1A1

Telephone: (604) 666-6002

Toll-free: 1-800-575-9696

Fax: (604) 666-6071

Employment Standards Tribunal of British Columbia

Suite 650 Oceanic Plaza
1066 West Hastings Street
Vancouver, B.C. V6E 3X1

Telephone: (604) 775-3512

Fax: (604) 775-3372

Web site: www.bcest.bc.ca

B.C. Human Rights Tribunal

1170 – 605 Robson Street
Vancouver, B.C. V6B 5J3

Phone: (604) 775-2000

TTY: (604) 775-2021

Toll-free (in B.C.): 1-888-440-8844

Fax: (604) 775-2020

Web site: www.bchrt.bc.ca

Workers' Compensation Board (Head Office)

Main Building
6951 Westminister Highway
Richmond, B.C.

Web site: www.worksafebc.com

Canadian Human Rights Commission – British Columbia and Yukon

301 – 1095 West Pender Street
Vancouver, B.C. V6E 2M6

Web site: www.chrc-ccdp.ca

Telephone: (604) 666-2251
Toll-free: 1-800-999-6899
TTY: 1-888-643-3304
Fax: (604) 666-2386

West Coast Domestic Workers Association

02 - 119 W Pender Street
Vancouver, B.C. V6B 1S5

E-mail: wcdwa@telus.net
Web site: www.vcn.bc.ca/wcdwa

Telephone: (604) 669-4482
Fax: (604) 669-6456

II. JURISDICTION

A. *Determining Federal/Provincial Jurisdiction*

The first thing to do in determining whether or not LSLAP can assist the client is to determine which jurisdiction their employment falls under. The lines between provincial and federal jurisdiction are not clearly defined, and the clinician must look to the type of work, as well as the employer to determine jurisdiction. It is important to note that a single employer could have both federally and provincially regulated employees. Although an employer may be subject to federal jurisdiction, it does not follow that all of that employer's employees will be governed by federal law.

1. Federal

The Canada Labour Code covers employees in federal jurisdiction. The division of companies into provincial or federal jurisdiction is a constitutional question, and is often complicated. The Canada Labour Code applies to employees in federal works, undertakings, and businesses. This includes, for example, air transportation, railways, ship lines that link provinces or countries, telecommunications, banks, and works and undertakings declared to be for the benefit of Canada. The limitation period for offences under the Code is three years.

The Canada Labour Code has one major advantage over provincial legislation. A non-managerial employee who loses his or her job through unjust dismissal can apply to Labour Canada to be reinstated within 90 days of the job loss. This time limit can be extended, but one should not rely on an extension. An arbitrator can be appointed to determine if the person should get his or her job back.

2. Provincial

Most clients that reach our program will fall under provincial jurisdiction. Provincial matters regarding labour relations are covered by the Labour Relations Code, which was created to replace the Industrial Relations Act. Provincial matters regarding employment standards are covered under the Employment Standards Act [ESA], and if they qualify clients must be referred to the Employment Standards Branch, which handles complaints regarding breaches of the ESA.

a) *Checklist for Employees Under Provincial Jurisdiction*

- i) Determine whether the client is an employee as defined in the ESA. Refer to Employment Standards Regulations B.C. [ES Regulations], Part 7 to determine if the client is an employee who is excluded from the ESA. Note that although

an employee may fall under the Act, certain parts of the Act may not apply to them.

- ii) Determine whether the client belongs to a union. If the employee is a union member and has a complaint regarding his or her employer, he or she must first advise the union's representative. The employee can contact either the shop steward at the workplace, or an external union representative, to see what the union can and will do. The ESA provides minimum standards that generally must be met, but the collective agreement will contain other critical guidelines that the employer must follow. In most cases, union contracts contain different or more onerous terms than the provisions in the ESA, and union members in their collective agreements can contract out of ESA limitations (ESA, s. 3) regarding such matters as hours of work and overtime, statutory holidays, vacations, vacation pay, seniority retention, recall, termination of employment or layoff. Whole sections of the ESA might not apply under a collective bargaining agreement as long as they have been addressed by the agreement. The collective agreement does not necessarily have to meet minimum guidelines for certain sections of the ESA. For more information consult the Employment Standards Branch fact sheet on employees covered by collective bargaining agreements on their web site at www.labour.gov.bc.ca/esb/facshts/collagr.htm.
- iii) If the employee thinks that he or she has been inadequately represented by a union, that employee can file a complaint with the Labour Relations Board (Labour Relations Code, ss.12-13). If an employee has a complaint against the union, then he or she may need the help of counsel.
- iv) Determine whether there has been a breach of any of the Acts.
- v) Determine whether this is a problem that the Employment Standards Branch will handle. Does the client fall within the jurisdiction of the Employment Standards Branch (i.e. is the client an "employee")? Have less than six months elapsed since the end of the employment contract?
- vi) Look for a remedy in the appropriate Act, and take necessary steps to have the legislation enforced.
- vii) If none of the Acts apply, then the client may still have a remedy in Small Claims Court. The client may choose to launch a civil action rather than seek a remedy through the Employment Standards Branch. Determine which route to take before proceeding any further. The Employment Standards Branch is only able to award back-pay of up to six months, thus the client may wish to pursue a remedy in Small Claims Court if he or she is owed more than six months' back pay. Do not automatically assume that the Employment Standards Branch is the best approach. The Small Claims approach can often yield better results (for example, the ESA only requires an employer to pay one week's wages per year of service notice to a maximum of 8 weeks in wrongful dismissal, whereas a common law award could extend to as much as 24 months' wages). It may also be in the client's best interest to pursue certain claims through the Employment Standards Branch and others in Small Claims Court. Note that since the BCCA decision in *McCarraeg v. E Care Contact Centres Ltd.* 2008 BCCA 182 employees may no longer seek to directly enforce rights under the ESA in civil court, and must instead use the Employment Standards Branch (but recall that many of the interests protected by the ESA have parallel common law remedies as well). Students should review this case before making any decisions. All options should be carefully considered before advising a client on the appropriate course of action.

III. EMPLOYMENT STANDARDS

A. *The Legislation*

1. **Labour Relations Code (Provincial)**

In the early 1990s, the Industrial Relations Act was replaced by the Labour Relations Code. The Labour Relations Code covers all aspects of the collective bargaining process and the settlement of disputes about union certification and collective bargaining. The Labour Relations Code generally strengthens the position of labour *vis-à-vis* management. This is because the Labour Relations Code encourages collective bargaining, as well as restricts the use of replacement workers during strikes and lockouts.

The Labour Relations Code applies only to workers' rights in provincial undertakings and therefore does not apply to employees within federal jurisdiction. Part 9 of the Labour Relations Code sets up the Labour Relations Board and describes its structure, powers and jurisdiction. The Board hears complaints under the Labour Relations Code or its regulations.

The courts may overturn decisions made by the Labour Relations Board interpreting the Labour Relations Code if certain criteria are met. The Supreme Court of Canada has significantly revamped the common law regarding the judicial review of administrative decisions, such as those rendered by the Board, in *Dunsmuir v. New Brunswick* 2008 SCC 9. The applicable standard of review of these decisions will now be either “correctness” (for most questions of law), or “reasonableness” (for findings of fact). See **Chapter 20: Public Complaints**.

2. **Employment Standards Act**

To effectively apply the ESA to a client's particular situation, students should be familiar with the standard interpretation of its provisions. The Employment Standards Regulation is necessary to correctly interpret the Act. The Employment Standards Branch web site at www.labour.gov.bc.ca/esb also provides an Interpretation Guidelines Manual that is intended to facilitate uniform interpretation of the ESA among Ministry employees, as well as provide useful guidelines for others. To this end, the Manual provides links to various pages, each of which deals with a particular section or regulation under the ESA. The application and scope of the provision is addressed and case studies are given which demonstrate this application. The manual can be searched by keyword index and has a detailed table of contents.

The Employment Standards Branch web site further provides access to a number of publications, including topical reports and publications from review panels and commissions, which shed light on recent and upcoming developments in this area of law in British Columbia.

Interpretation of the Act can also be facilitated by reference to the decisions of the Employment Standards Tribunal, which can be accessed on Quicklaw, or on the Tribunal web site at www.bcest.bc.ca.

Since the ESA covers all areas of employment, it is useful to examine the stage of employment in which the client feels a breach has occurred.

B. The Beginning of Employment (Hiring Practices)

1. Employment Protection

An employer may not induce a person to become an employee or to make him or herself available for work by deceptive or false representations or advertising respecting the availability of a position, the nature of the work to be done, the wages to be paid for the work, or the conditions of employment (ESA, s. 8; for common law discussion see *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87).

An employer also may not threaten or terminate, suspend, discipline, penalize, intimidate, or coerce an employee because the employee filed a complaint under the ESA (s. 83). If this does happen, the Employment Standards Branch may order that the employer comply with the section, cease doing the act, pay reasonable expenses, hire or reinstate the employee and pay lost wages, or pay compensation (s. 79).

2. Employment Agencies

All employment agencies must be registered and keep records. An employment agency is any person who recruits employees for employers for a fee, but does not include a person who operates solely for one employer.

An employment agency may not receive any payment from a person seeking employment either for giving or procuring employment, or for providing information respecting prospective employers. Any payment wrongfully received can be recovered (ESA, s. 11).

3. Talent Agencies

A number of the most recent amendments to the ESA deal with talent agencies and impose minimum standards on what was previously an unregulated industry. A talent agency must be licensed annually under the Act. Once an agency is licensed, it may receive wages on behalf of clients who have done work in the film or television industry. Section 38.1 of the Employment Standards Regulation provides that wages received by a talent agency from an employer must be paid to the employee within a prescribed period: five business days from receipt of payment if payment is made within B.C. and 12 business days from receipt of payment if payment is made from outside B.C.

Talent agencies can charge a maximum 15 percent commission, and must ensure that the employee receives at least minimum wage after this deduction. The only other fee a talent agency may charge is for photography, and this charge must not exceed \$25.00 per year. This fee may only be deducted from wages owed to the employee. When a talent agency is named in a determination or order, unpaid wages constitute a lien against the real and personal property of the agency. A 1999 amendment to s. 127 of the Act gives the Lieutenant Governor in Council the power to regulate these agencies and, accordingly, the Employment Standards Regulation should be consulted for further information. A list of talent agencies currently licensed in B.C. is available on the Employment Standards Branch web site.

4. Child Employment

Employing a child is an offence for which both the employee and the employer are liable. The ESA does not apply to certain types of employment such as babysitters and some students (Employment Standards Regulation, s. 32). Section 9 of the ESA states that children under the age of 15 cannot be employed unless the employer has obtained written permission from a parent or guardian. No person shall employ a child under the age of 12 years unless the employer has obtained permission from the Director of the Employment

Standards Branch. In cases where permission from the Director is required, the Director also has the ability to set conditions of employment for the child. Common forms of allowable employment for those under 12 are found in the film and television industries. For more information regarding children in the film and television industry consult the employment standards branch fact sheet on this matter at www.labour.gov.bc.ca/esb/chldflm.

If an employer is accused of illegally using child employment they will carry the onus in proving that it was either justified, or that the child was of legal age.

5. Minimum Wage and the Entry Level Wage

The minimum wage is presently \$8.00 per hour for all persons in B.C. However, there are exceptions under Part 4 of the Employment Standards Regulation, which include live-in support home workers, caretakers, and farm workers. See ss. 15 – 18 of the Regulations for more details.

Workers with no paid employment experience before November 15, 2001 and those with fewer than 500 hours of cumulative paid employment experience with one or more employers will be eligible for the entry level wage of \$6.00 per hour. Although cutting lawns or babysitting on a casual basis does not qualify as previous working experience, almost any other kind of employment would. For example, working a couple of days back in Grade 10 prior to November 15, 2001 can exempt the worker from the entry level wage. Cutting lawns or childcare on a regular basis also qualify, provided they are declared as earnings. The First Job/Entry-level wage rate does not apply to “non-hourly” rates set under the Regulations. These include piece rates for picking fruits, vegetables and daffodils; daily rates for live-in home support workers and live-in camp leaders; and, monthly rates for resident caretakers in apartment buildings. Work outside of Canada constitutes valid work experience, although proof of employment could be an issue. Proof of previous employment can include: records of employment, pay stubs, T4 slips, and written or verbal references.

Section 16 of the ESA deals with the issue of “claw-backs”. This term refers to an employer who gives an employee an advance on future wages or commissions. Section 16 states that when the employer re-claims such advances, they must not take back an amount that would leave the employee under the minimum wage rate for the hours worked.

Federally regulated employees are entitled to the minimum wage of the province that they work in (Canada Labour Code, s. 178). Federal employees working in British Columbia are therefore entitled to \$8.00 per hour.

6. Uniforms

Where special apparel or uniforms are required by the employer, the employer is responsible for providing the apparel as well as for any cleaning and repair that is necessary without cost to the employee (ESA, s. 25). A dress code is not considered a uniform.

C. During the Course of Employment

The ESA sets the guidelines for how an employer can act during the course of employment. While most employees will fall under the general rules set by the ESA, there are some notable exceptions. Commissioned Sales People and Independent Contractors will have variances regarding how they can receive wages, and jobs involving farm work, domestic labour, and silviculture stand exempt from the minimum wage requirements. There are also limitations on the overtime High Technology Professionals can receive. For more information refer to the relevant subsection below.

1. Wages

a) *Payment of Wages*

Wages must be paid semi-monthly and no later than eight days after the end of the pay period (ESA, s. 17). This section does not apply to public school teachers and professors (Employment Standards Regulation, s. 40). Wages, as defined in Part 1, include salaries, commissions, and work incentives. Also included are compensation for length of service (ESA, s. 63), money by order of the tribunal, and money payable for employees' benefit to a fund or insurer (in Parts 10 and 11 only). The definition does not include travel allowance (however, travel time is considered time worked for which wages are payable), expenses, penalties, or gratuities. However, an employer cannot require an employee to pay any of the employer's business costs. Every payday, employees must be given a statement showing hours worked, wage rate/overtime wage rate, deductions, method of wage calculation, gross/net wages, and time bank amounts (s. 27). Electronic statements can be provided instead under certain conditions (s. 27(2)).

If an employee quits, all wages and vacation pay owed must be paid within six days of the last day worked. When the employer terminates the employment, all wages (and vacation pay) must be paid within 48 hours of termination (ESA, s. 18). Certain notice requirements dictated by the ESA are set out later in this chapter.

To enforce the payment of wages, the ESA provides that the Director can arrange payment of wages to the employee, or to the Director, if he or she is satisfied that wages are owed to the employee. Under the ESA, only the Canada Customs and Revenue Agency has priority over the Employment Standards Branch. Finally, the ESA provides under s. 87 that unpaid wages in a determination, settlement agreement or an order constitute a lien on real property owned by the employer. The enforcement mechanisms available to the Employment Standards Branch are such that the lien often gets priority over other claims against the property (see also *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)*, [1995] B.C.J. No. 2524 (B.C.C.A.)).

Federally regulated employees must be paid their wages on the regular payday as established by the regular practice of the employer. Wages and any other entitlements must be paid no later than 30 days after the time when entitlement to wages arose (Canada Labour Code, s. 247).

b) *Allowable Deductions*

Only certain deductions can be made from an employee's wages (ESA, ss. 21 and 22). There must be written assignment.

Allowable deductions include EI, CPP, income tax, charity, union dues, pensions, insurance (medical and dental), and anything else for the benefit of the employee that is authorized by the Director. Benefit packages often allow a whole range of deductions from employee wages. In the case of an employer who fails to remit these deductions, the Employment Standards Branch will collect the premiums the employee paid from the employer. However, the Branch is not able to collect costs incurred by an employee who believed he or she was insured, i.e. actual cost of dental work done. No deductions may be made as a set-off, counterclaim, assignment or for any other such purpose. Furthermore, an employer cannot require employees to pay any business costs – as either a deduction from their paycheque or out of their pockets. Examples of business costs include loss due to theft, damage, breakage, or poor quality of work, damage to employer's property,

or failure to pay by a customer (e.g. dine-and-dash). If an employer deducts business costs from an employee's wages they can be required to reimburse the employee for the amount, and can be fined by the Employment Standards Branch for failing to follow the ESA. Section 22(4), however, allows for deductions (technically, assignment of wages) for credit obligations that the employee has incurred, if certain formalities are satisfied.

2. Hours of Work and Overtime

Part 7 of the Employment Standards Regulation excludes certain groups of employees from the following rules under Part 4 of the ESA. They may be excluded from Part 4 of the Act as a whole, or excluded from certain sections only. Please check the Regulations for more details. A common situation is where the employer attempts to exclude the employee from overtime eligibility by calling the employee a manager. The Employment Standards Branch uses the definition of manager as set forth in the Regulations, which has been recently amended to provide for a wider definition. It is the nature of the job, and not an employee's title, that makes that person a manager.

It is possible for an employer to apply for a variance to exclude employees from certain provisions of the ESA. To apply for a variance, the employer must write a letter to the Director of Employment Standards, and must have the signatures of at least 50 percent of the employees who are to be affected. When reviewing the application, the Director must consider whether the variance is inconsistent with the purpose of the ESA and the Regulations, as well as whether any losses incurred by the employees are balanced by any gains.

For more information see www.labour.gov.bc.ca/esb/facshts/variances.htm.

a) *Regular Hours and Rest Periods*

An employer shall not require or permit an employee to work more than eight hours per day or 40 hours per week as a rule, unless the employer pays overtime wages (ESA, s. 35). An exception to this overtime rule is made for workers in averaging agreements under s. 37. An employer must ensure that no employee works more than five consecutive hours without a half-hour meal break (s. 32). Such eating periods are not included in hours of work. There is no entitlement to coffee breaks.

Employees are also entitled to at least 32 consecutive hours free from work each week or double pay for the time worked during that period, and eight hours free from work between shifts, except in the case of an emergency (s. 36).

Federally regulated employees cannot work more than eight hours per day or 40 hours per week as a rule, but unlike provincially regulated employees there is a 48 hours a week maximum, even with overtime rates being paid (Canada Labour Code, s. 171). Averaging agreements are allowed under the federal legislation. There are no specifications for meal breaks. Employees are entitled to one day off from work each week (Sunday if possible). There is no requirement for time off between shifts.

b) *Averaging Agreements*

Under s. 37 of the ESA, an employee and employer can agree to average an employee's hours of work over a period of up to four weeks for the purposes of determining overtime. These agreements must be in writing and be signed by both parties before the start date of the agreement and must specify the number of

weeks over which the agreement applies. It must also specify the work schedule of each day covered by the agreement and specify the number of times if any that the agreement can be repeated. The employee must receive a copy of this agreement before the agreement begins. The work schedule in such an agreement must still follow certain conditions outlined from ss. 37(3) – (9). The employer and employee may agree at the employee's written request to adjust the work schedule (s. 37(10)). The Employment Standards Branch will not get involved unless a complaint is made.

c) *Overtime*

Daily Overtime: Unless he or she has an averaging agreement, an employee must be paid overtime wages if he or she works more than eight hours in any one day. Employees are to be paid one and a half times their regular wage rate for time worked beyond eight but less than 12 hours in one day, and two times their regular wage rate for any time worked beyond those 12 hours in one day (ESA, s. 40(1)).

Weekly Overtime: Unless part of an averaging agreement, overtime must also be calculated on a weekly basis. For any time over 40 hours per week, an employee will receive one and a half times his or her regular wage. When determining the weekly overtime, employers must use only the first eight hours of each day worked (s. 40(2)). Essentially, this means that if an employee works six days out of the week, eight hours each day, eight of those hours have to be paid at one and one half times the regular rate. However, if an employee works 10 hours a day for four days a week, it would be calculated under daily overtime as the weekly hours still add up to 40. There are no longer provisions relating to weekly overtime when days off are given instead of statutory holidays.

Section 42 of the ESA allows for the “banking” of overtime hours on a written request from the employee, if the employer agrees to such a system. Hours are banked at overtime rates. The employee may ask at any time to take these hours as paid time off of work, or to be paid the overtime hours as wages. The employer must always meet such requests. Also, the employer must ensure that all wages in the time bank are paid out, or taken as time off with pay, within six months of when the wages were earned. The employer may close the employee's time bank with one month's notice to the employee at any time (s. 42(3.1)) and within six months of closing the employee's time bank must either pay the employee for the hours in the time bank, allow the employee to take time off with pay equivalent to the amount in the time bank, or some combination of the two (s. 42(3.2)).

Many of the problems encountered by the Employment Standards Branch involve conflicts between the records of employers and the claims of employees regarding regular and overtime hours worked. **Employees should always keep consistent records of the hours they work.**

Federally regulated employees cannot opt for time off in lieu of overtime pay. All overtime hours must be paid at one and a half times the regular rate of pay (Canada Labour Code, s. 174).

d) *Minimum Daily Hours*

When workers report for work, whether or not they start work, they are entitled to two hours of pay unless they are unfit for work or do not meet Industrial Health and Safety Regulations. Whether or not an employee starts work, if an employer had previously scheduled an employee to work for more than eight hours that day, he or she is entitled to a minimum of four hours pay, unless inclement weather or

other factors beyond the employer's control caused the employee to be unable to work, in which case the worker is entitled to just two hours' pay (ESA, s. 34).

e) *Shift Work*

An employee is entitled to at least eight hours free between shifts, unless there is an emergency. Split shifts must be confined to a 12-hour period (ESA, s. 33).

3. Vacation Time

Employees will be entitled to different amounts of paid and unpaid vacation time depending on the type of employment, and their employment contract. Remember an employment contract or agreement cannot be in violation of the statutory minimums set out by the ESA, ss.57 - 60.

a) *Vacation With Pay*

After each year worked, employees are entitled to an annual vacation of at least two weeks with pay, calculated at 4 percent of total wages from the previous year. This may be calculated after the employee has been working for exactly one year, or the company can set a common anniversary date for all employees on which to calculate vacation pay. After five consecutive years of employment the annual vacation increases to three weeks with pay, calculated at 6 percent of total wages. The vacation must be taken within 12 months of the anniversary date of each year of employment. Employers shall permit the holiday to be taken in at least one-week increments. If any statutory holidays fall during the vacation period, the employee must be compensated with an extra vacation day.

Vacation pay must be paid at least seven days prior to the vacation, or upon termination of employment. If an employee is terminated part way through the year, he or she is entitled to vacation pay earned up to that point. Vacation pay can be paid out to the employee on each paycheque, but this arrangement requires the permission of the employee and must also be in writing (ESA, s. 58(2)(b)).

b) *Statutory Holidays*

Employees are entitled to nine paid holidays a year: New Year's Day, Good Friday, Victoria Day, Dominion Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day (ESA, Part 5). (Federal employees are entitled to Boxing Day but not to B.C. Day.)

Employees who work on a statutory holiday receive one and one-half times their regular rate of pay for the first 12 hours worked – any further time worked should be paid at twice the regular amount of pay. Where a statutory holiday falls on a non-working day, the employer must give the employee a regular working day off with pay. To be entitled to a statutory holiday, an employee must have been employed by the employer for at least 30 calendar days before the statutory holiday and either have worked under an averaging agreement within this period or have worked or earned wages for 15 of these 30 calendar days. An employee who is given a day off on a statutory holiday or a day off instead of one must be paid statutory holiday pay equal to at least an average day's pay.

An average day's pay is the employee's gross earnings in the past 30 days, divided by days worked, where:

Amount paid is the total amount paid or payable to the employee for the work done and wages earned during the 30 calendar day period preceding the statutory holiday including vacation pay for any days of vacation within that period, less any amounts paid or payable for overtime; and

Days worked are the number of days the employee worked or earned wages within the 30 calendar day period.

4. Leaves of Absence

Part 6 of the ESA regulates leaves of absence. Again, Part 7 of the Regulations should be consulted to determine if a client is covered by this part of the Act. Those employees who are not protected by the ESA may have protection under the governing statutes of their specific profession.

An employee who is on leave under any of the following categories maintains several of the same protections he or she received while working. The employment is deemed to be continuous for the purposes of calculating annual vacation entitlement and any pension, medical, or other plan beneficial to the employee (ESA, s. 56). At the time of reinstatement, employees on leave are entitled to return to their previous position or to a comparable one, and are also entitled to any wage and benefit increases that they would have received had they remained at work (s. 54). An employer may not terminate an employee for taking a leave he or she is entitled to take under the ESA. In the case of an alleged contravention of Part 6 by the employer, the burden is on the employer to prove that the reason for a termination was not a pregnancy, jury duty or other leave allowed by the Act (s. 126(4)(c)). When there is an infraction of this section of the Act, the Director of the Employments Standards Branch can order that the employee be reinstated (s. 79), however this almost never occurs (see **Section IV: Remedies** for more details). Section 79(2) is a very powerful "make whole remedy" which allows the Director to reinstate the employee and pay them any wages lost due to the contravention of the Act.

NOTE: The protections offered under ss. 54 and 56 of the ESA do not apply if the leave taken by the employee is greater than that allowed by the Act (s. 54).

a) *Pregnancy and Parental Leave*

Under ss. 50 and 51 of the ESA, a birth mother is entitled to take up to 17 consecutive weeks of unpaid pregnancy leave if the leave starts before birth or termination of the pregnancy. In addition, the birth mother can take a further 35 weeks of parental leave where pregnancy leave was taken, or 37 consecutive weeks of parental leave where pregnancy leave was not taken. Although the employer does not have to pay wages during a pregnancy or parental leave, Employment Insurance may cover a portion of the wages during this period if the person qualifies. Please refer to **Chapter 8: Employment Insurance** for more information. The parental leave periods to which birth fathers and adoptive parents are entitled were also extended by the ESA from 12 to 37 consecutive weeks. Employees must give their employer four weeks written notice of pregnancy or parental leave, but even if they do not, they are still protected by the ESA.

The employer may request a medical certificate to verify an anticipated birth date or the date of pregnancy termination. The leave may commence 11 weeks prior to the estimated date of birth, or later at the employee's request. Parental leave can be taken at any time within one year of the birth or adoption of the child; however, it

must all be taken in one block. To request pregnancy leave for a period shorter than six weeks following the birth of the child or termination of the pregnancy, an employee must provide one week written notice to the employer and may have to supply a medical certificate confirming the employee's ability to return to work. Pregnancy leave may be extended a further six weeks with a doctor's certificate outlining reasons related to the birth or termination, and parental leave can be extended by five weeks where the child has a psychological, physical, or emotional condition that requires such an extension.

An employer has a duty to allow the employee the leave he or she requests under the provisions of the ESA. Furthermore, upon the employee's return from leave, the employer has a duty to place the employee in the same or comparable position to the position he or she held before the leave. The employer must not terminate employment because of leave taken, or change a condition of employment without the employee's written consent.

Maternity rights are being quickly developed by the courts. Supreme Court decisions such as *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R., 1219, should be reviewed before giving advice to clients with this type of grievance. This case says that pregnancy, while not considered a sickness or accident, is a valid health-related reason for absence from work. Where an employer offers compensation benefits for health conditions and then excludes pregnancy as a ground for claiming compensation, the employer has acted in a discriminatory fashion.

b) *Family Responsibility Leave*

An employee is entitled to up to five days of unpaid leave each year to meet responsibilities related to the health of an immediate family member or the educational needs of a child in the employee's care (ESA, s. 52). These days need not be consecutive, and their use is not restricted to emergencies. They may be used for meetings about a child's schooling, meetings with a social worker, or other similar commitments.

c) *Bereavement Leave*

An employee is entitled to up to three days of unpaid leave on the death of a member of the employee's immediate family (ESA, s. 53).

d) *Compassionate Leave*

As of April 27, 2006 the ESA was amended to allow an employee to take up to eight weeks of unpaid leave to care for a family member who is gravely ill and faces a significant risk of death within 26 weeks (s. 52.1). The employee must provide a certificate from a medical practitioner stating that the family member faces significant risk of death. The eight weeks do not have to be taken consecutively, but they must be used within the 26-week period. If the family member is still alive after 26 weeks but still gravely ill, a further eight weeks can be taken; however, a new medical certificate must be provided by a medical practitioner. While on compassionate leave the employment is considered to be continuous. An employer must not fire, or change the conditions of employment while an employee is on compassionate leave unless they obtain their written consent to do so. An employee may also qualify for a maximum of six weeks of pay through Employment Insurance for compassionate leave. For more information please refer to **Chapter 8: Employment Insurance**.

e) *Jury Duty*

An employee is entitled to unpaid leave to meet the requirements of being selected for jury duty (ESA, s. 55).

f) *Armed Forces Leave*

Under certain circumstances the ESA now allows leave for reservists in the armed forces (ESA, s. 52.2).

5. Exceptions to the General Rule (Specialty Professions)

Some professions remain excluded from the requirements of the ESA. However, this does not always mean an employer is fully excluded; they may only be exempted from parts of the legislation. In addition, employers not commonly covered can apply to the Employment Standards Branch for a variance, making them fully exempt from the requested parts of the ESA. For greater accuracy one should check the legislation directly, and any appropriate case law on the matter.

a) *Independent Contractors*

Only employees, as opposed to independent contractors, are protected under the ESA. The ESA provides the definition of “employee” which the Employment Standards Branch and Tribunal use in making its determinations. The ESA definition is broader than that of the common law. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J. sets forth the factors to consider in determining whether someone is an employee or a contractor at paragraphs 47 - 48:

[...]The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Employment Standards Branch staff often use Levitt's discussion of the control test, “four-fold” test, and integration/organization test in his book The Law of Dismissal in Canada.

An independent contractor is not protected by the ESA. However, just because an employer calls someone an independent contractor does not make him or her one. Generally, the onus is on the company to show that someone is an independent contractor. Again, if there is a disagreement, the Employment Standards Branch will use the common law tests to determine whether someone is an employee. Generally, the longer and more continuous the relationship, and the less control the

contractor has over his or her employment, the more likely it is to be considered an employment relationship.

Some examples of conditions that are not, by themselves, enough to ensure someone is considered a contractor are:

- The employee signs an agreement that identifies him as a contractor. (Section 4 of the ESA states that you cannot contract out of the Act. If you sign an independent contractor agreement, you still must meet that definition);
- The employee charges GST (the employee may or may not be in a lawful position to charge GST);
- No deductions (this may simply mean that the employer is in violation of both the ESA and the Income Tax Act);
- Submits a “bill” for labour (it may be nothing more than a time card); and
- Drives own vehicle/provides own tools. (It may simply be considered a condition of employment. Note that employment related expenses are recoverable and cannot be charged to the employee);

All of these will be considered, but do not determine the issue.

Generally speaking, the ESA is to be given a wide and liberal interpretation (per s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 and *Rizzolo & Rizzolo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). The legislation is always construed broadly when determining whether someone is or is not an employee.

b) Commissioned Sales People

Commissioned sales people are entitled to most of the protection the ESA has to offer. Look carefully at Employment Standards Regulation s. 37.14. They are entitled to receive at least minimum wage, unless they sell heavy industrial/agricultural equipment, or sailing/motor vessels. If a salesperson is entitled to minimum wage and the total commission falls short of that, the employer must make up the difference.

The first issue to examine in the case of a commissioned salesperson is the terms of the employment contract. These will tell you when the commissions are to be paid. Employers are not bound to bi-weekly payment of commissions. However, even if the employee must wait for sales to be reconciled before being paid their commission, they must still be paid wages bi-weekly.

c) Servers

Servers are entitled to receive at least minimum wage. Tips do not count as wages for the purpose of the Act. This means that regardless of how much the server may be making in tips they are still to receive the minimum wage for the hours they have worked. Tips are also excluded from the Employment Standards Branch’s definition of wages for the purpose of wage compensation.

d) *Farm Labourers and Domestic Workers*

The ESA has special provisions for farm and domestic labourers. See the Act and Regulations for more details.

A domestic worker must have a written employment contract and be registered with the Employment Standards Branch (ESA, ss. 14 and 15). The Employment Standards Branch is working in cooperation with federal immigration officials to curb abuses of the program. The federal agency will ensure that the employer is registered with the Branch before entry of a new immigrant is authorized. In 2002, under the banner of creating a more flexible workforce, the ESA was changed to exclude domestic and farm workers from certain overtime laws. Essentially domestic and farm workers can have their hours averaged without the need for consent (see above at **Section III.C.2(b): Averaging Agreements**).

Most migrant farm labourers will be paid in accordance with the amount of work produced, i.e. payment per weight of crop picked. While this practice is legal, it should be noted that hours must still be recorded, and payments made for the purpose of Employment Insurance. Abuses by employers in this area have been significant, and workers should be aware that the government may try and collect EI from their paycheques if it is not reported.

NOTE: Since there has been significant opposition to the legislative changes regarding overtime and farm/domestic labourers, one should check current events and case law to see if any changes have arisen.

NOTE: The federal government via Citizenship and Immigration Canada administers the Live-in Caregiver Program. The Program came into effect on April 27, 1992. The purpose of the program is to prevent abuse and exploitation of domestic workers. The program was to clarify the employer-employee relationship by providing information on the terms and conditions of employment and on the rights of workers under Canadian law.

The program also sets out educational requirements for live-in caregivers designed to aid a worker's ability to get a job after gaining permanent residency status and leaving domestic employment. While the first-year assessment interview and in-Canada skills upgrading have been eliminated, the remaining requirements are very high, thereby forming a serious barrier for these women to enter Canada. The program requires the equivalent of a Grade 12 education (equivalent to second-year university in many countries) and six months of formal training in the care-giving field, or one year of experience and fluency in English or French.

Further information about the program is available from the West Coast Domestic Workers' Association (see **Section I.B.3: Referrals**, above).

e) *High Technology Professionals*

The Employment Standards Regulation makes special provision for workers in the high technology sector. Most importantly, these professionals are exempt from the ESA provisions relating to hours of work, overtime, and Statutory Holidays (Parts 4 and 5). It is not easy, however, for an employee to qualify as a high technology professional – the criteria are very specific. See s. 37.8 of the Employment Standards Regulation for a more detailed description, and especially if your client

deals with computers, information service, and scientific or technological endeavours.

f) *Silviculture Workers*

Special rules also apply to those working in reforestation and related industries. A silviculture worker is paid on a piece rate basis. This is defined as a rate of pay based on a measurable amount of work completed, i.e. payment by the tree. Whatever the rate, it must exceed the minimum wage rate. The Employment Standards Regulation lays out specific requirements that employers in these industries must meet relating to shift scheduling, holiday pay, and overtime. The special regulations are intended to address the remote job sites and special piece rate payment schemes that are popular in this industry.

D. *Termination of Employment*

This section deals with the law on wrongful dismissal, which is composed mainly of the common law. There is some statute law on this subject in the ESA and in the Canada Labour Code, but these statutes merely provide statutory minimums, and do not necessarily negate any right to a court action. Section 82 of the ESA restricts an employee from starting another action when a determination has been made under the Act. In most cases, then, the client will need to choose his or her preferred course of action at the outset of the claim. In some cases, however, an employee may divide the claim into separate parts and pursue one part under the Act and the other in a civil suit. For this to be possible there must be no overlap between the parts. The Director will refuse to act on part of a claim that is before the courts and will advise the employee that settlement under the Act will preclude civil action on that issue.

The principles discussed below have evolved out of many court decisions. The cases given in brackets are only examples of decisions made, and merely provide a starting point for research.

If a collective agreement is in effect, the common law does not apply – as the terms of the agreement will bind the parties, and the court has no jurisdiction.

1. Checklist (see Appendix A: Employment Information Sheet)

NOTE: In considering the following factors, consider the substance of the factors and not the form. Consider the underlying issues and not just what happened on the face of things.

- a) Determine whether the employee falls within provincial or federal jurisdiction.
- b) Determine whether the employee is working in a union or non-union environment, whether the employment relationship is governed by a collective agreement, and whether the employee is in the bargaining unit covered by the collective agreement.
- c) Determine whether the employee has an indefinite contract of employment or fixed term contract of employment. If an employee had successive fixed term contracts the courts may find there is in fact an indefinite term of employment (see *Cecol v. Ontario Gymnastics Federation* (2001), 55 O.R. (3d) 614). If there was a fixed term contract and the employee continued to work after the expiration of the term, the contract is then an indefinite contract.
- d) Determine whether the employee was actually dismissed. Ask to see the Record of Employment (ROE) as soon as possible. Consider that quitting in the heat of the moment may not be really quitting, as there has to be true voluntary resignation.

Similarly, dismissal or termination in the heat of the moment may not be a true dismissal or termination.

- e) Contact the employer and find out if there was just cause for the dismissal (this is now included in the Employment Standards Branch's self-help kit).
- f) Look at length of employment, type of employment, and the availability of similar work to determine reasonable notice. Look to the ESA and other statutes mentioned in this chapter to determine this information.
- g) Determine salary/wage and other benefits to which the employee is entitled.
- h) If the action has occurred within the past six months, consider sending the client to the Employment Standards Branch. However, be aware that short-term employees (i.e. those employed for less than three months) are not entitled to any notice.
- i) Determine if the dismissal was a discriminatory action covered by the B.C. Human Rights Code. If so, consider sending the client to the B.C. Human Rights Tribunal.
- j) If the possible damages are high, refer the client to a lawyer.
- k) If it is within the monetary jurisdiction of LSLAP, consider beginning a small claims action.

2. The Employment Contract

The employer-employee relationship is contractual. In any contract for personal service, the courts will not enforce the performance of the service. The courts will not reinstate a wrongfully dismissed employee, but will give a remedy of damages instead (see **Section IV: Remedies**, below).

Most employment contracts are contracts of indefinite hiring. This means that no definite term of employment was set out at the time of the contract and either party may terminate the contract upon giving reasonable notice. "Reasonable notice" is an implied term of the contract and is overridden by an express notice provision. If there is an express notice provision in the employment contract, then that clause is binding, unless it is expressly or impliedly no longer in effect or it is unlawful, in which case the contract may be terminated upon reasonable notice.

There is an implied term in employment contracts that if reasonable notice is not given, damages in the form of wages that would have been paid during that period are to be given instead. However, if there is just cause for dismissing an employee, no damages need be paid, and no notice need be given. Note that any wage claims that crystallized before the termination of the contract are not eliminated by just cause for dismissal. Just cause only relieves the employer from notice and severance pay requirements.

a) Frustration of Contract

If the contract becomes impossible to perform through no fault of the employee or the employer, then the contract is frustrated, and may be terminated without liability. The contract must be impossible to perform, not merely less profitable. The impossibility of performance must be unforeseen, there must be no alternative to termination, and termination must not be self-induced (e.g. the employee suffers a serious, permanent, debilitating illness or injury). Frustration of contract is a separate ground for termination of contract, separate from just cause, which is a breach of the employment contract.

b) *Illness*

Temporary illness does not constitute just cause (*McDougal v. Van Allen Co. Ltd.* (1909), 19 O.L.R. 351 (H.C.)). For a lengthy illness, one must consider the nature of the services to be performed, the intended length of service of the employee, and other factors (*Yeager v. R.J. Hastings Agencies Ltd.* (1985), 5 C.C.E.L. 266 (B.C.S.C.)). In some cases, a period of one year may not be too long for an employer to await the return of a valuable employee (*Wilmot v. Ulnooeweg Development Group Inc.* 2007 NSCA 49). If the employee is permanently incapable of performing work duties, he or she may properly be dismissed (*Ontario Nurse's Federation v. Mount Sinai Hospital*, [2005] O.J. No. 1739). Illness is usually considered frustration of contract, and is not grounds for dismissal for just cause.

c) *Dismissal (see Appendix C: Sample Letter of Dismissal)*

Dismissal may be express or implied (constructive) (see s. 66 of the ESA). If the employer refuses to perform their part of the bargain, and this refusal is serious enough to amount to repudiation or an intention to abandon the contract, the employee is also freed from the contract. If the employer makes a fundamental, unilateral change in the employment contract, it may amount to constructive dismissal. Constructive dismissal is complicated, and the law is in a state of flux. A “fundamental term of the contract” includes changes such as: reduction in salary, change in benefits, a change in the method of wage calculation, a large change in job content or status, and job transfers if they are not a part of the employment contract. If an employee accepts these changes without complaint, he or she is considered to have accepted the change, and will therefore be barred from action. *Cabiakeman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195 reinforced an employer’s right to impose a suspension for administrative reasons, with pay, provided the employer is acting to protect legitimate business interests, the employer is acting in good faith and fairly, and the suspension is for a relatively short period.

Not all resignations are resignations, and not all dismissals are dismissals. In determining whether there has been a dismissal, it may be useful to ask whether a reasonable person would understand the words/actions of management to be a dismissal – taking into consideration the context of the particular industry, and all surrounding circumstances.

If a business is sold, there may be an implied assignment to the new owner if the employee continues to provide services as before and the new owners accept those services (ESA, s. 97). See also *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)*, [1995] B.C.J. No. 2524.

d) *Notice*

The ESA establishes minimum statutory requirements for compensation for individual terminations. For periods of employment greater than three months, the employer must pay severance to the employee, or satisfy that obligation by giving a written notice of termination. For service between three months and one year, one week of wages (or notice) is required. For one to three years, two weeks’ wages or notice are required. For three years, three weeks’ wages or notice are required. Each additional year’s work after three years requires an additional week of wages or notice up to a maximum of eight weeks (s. 63).

The courts can, and often will, provide for a much longer notice period. It is often assumed that courts will award an employee one month’s notice for each year of

service; however, this is not a rule of law. The employee's service is only one of many factors that must be taken into account when determining an appropriate notice period (e.g. nature of the position, the employee's age, and current labour market conditions). There is no exhaustive list of criteria that the courts will consider as they are fact based and will vary from case to case. The case of *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) includes an excellent, but non-exhaustive, list of four factors to be considered in determining the appropriate length of a notice period: i) character of the employment; ii) the length of service; iii) the age of the employee; and iv) the availability of similar employment, having regard to the experience, training and qualifications of the employee. The Supreme Court has endorsed this list in a number of cases; see e.g. *Honda Canada Inc. v. Keays*, (2008) SCC 39. The current rough upper limit of "reasonable notice" is 24 months.

Group terminations (those of 50 or more) have additional requirements under the ESA. First, the employer must give written notice to the Minister, to each employee being terminated, and to the union. This notice must specify the number of employees being terminated, the date(s) of termination, and the reason for termination.

According to s. 64, the number of weeks notice for group terminations varies with the number of employees being terminated:

- eight weeks if between 50 and 100 employees;
- 12 weeks if between 101 and 300; and
- 16 weeks if more than 300.

If an employee is not covered by a collective agreement, these notice requirements apply in addition to the statutory minimum for individuals.

Exceptions to these guidelines, to which minimum notice requirements do not apply, are laid out in s. 65 of the Act. No notice or compensation is required of the employer when the employee:

- has not worked for a consecutive period of three months;
- quits or retires;
- is fired for just cause (see discussion of just cause below);
- worked on an on-call basis doing temporary assignments he or she was free to accept or reject;
- was employed for a definite term and the employment ends in accordance with the end of the term of employment;
- was hired for specific work to be completed in 12 months or less;
- cannot perform the work because its performance has become impossible due to an unforeseeable event or circumstance (i.e. frustration of contract);
- was employed at one or more construction sites by an employer whose principal business is construction;

- refused reasonable alternative employment from the employer; or
- was a teacher employed by a board of school trustees.

NOTE:

When a client has a complaint about lack of notice or severance pay, he or she needs to choose between pursuing a civil action in the courts, and filing a complaint with the Employment Standards Branch. Section 82 of the Act states that once a determination has been made by the Branch, the employee may commence another action only if the Director gives written permission or the Director or tribunal cancels the determination. There have been court decisions on this issue that hold that a determination granting the employee minimum compensation under the ESA bars further action for wrongful dismissal. In any event, no “double recovery” is possible. If a client received damages for an action in one forum, he may not receive the same damages in another.

(1) Additional Damages Attributed to the Manner of Dismissal

Courts can award additional damages if the employer has acted unfairly or in bad faith when dismissing an employee. The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal. In *Honda Canada Inc. v. Keays*, (2008) SCC 39, the Supreme Court of Canada held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include mental distress stemming from the manner of dismissal. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

Prior to the *Honda v. Keays* decision, these types of damages were assessed by simply extending the notice period to which the employee would otherwise be entitled. This practice was based on the Supreme Court of Canada’s decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and the awards were informally known as “Wallace Damages”. However, following the *Honda v. Keays* decision, the practice of assessing damages by extending the notice period is no longer to be used.

What constitutes “bad faith” is for the courts to decide, and has in the past centred on deception and dishonesty. Mere “peremptory” treatment is not sufficient: see for example *Bureau v. KPMG Quality Registrar Inc.*, [1999] N.S.J No. 261 (N.S.C.A.). Sexual harassment has been held not to give rise to additional damages (*Chiang v. Kejo Holdings Ltd.*, 2005 BCSC 414). See, however, *Sulz v. Minister of Public Safety and Solicitor General* 2006 BCCA 582 where punitive damages were awarded for sexually harassing conduct in the employment context. “Bad faith” has been found in cases the following cases: i) where the employer lied to the employee about the reason for dismissal (see *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335, where an employer told a commissioned employee he was being released due to financial hardship, when it was found he was being released so the employer would not have to pay owed commission); ii) where an employer has deceived the employee about representations of job security (*Gillies v. Goldman Sachs Canada*, 2001 BCCA 683); iii) where a senior employee was induced to leave his position under the promise of job leading to retirement; and iv) where an employer promised an employee he would keep his job after a merger, although he knew differently (*Bryde v. Liberty Mutual*, 2002 BCSC 606). In one case, a

response by employer's counsel to an employee's counsel containing an allegation of just cause where none existed was held not to constitute bad faith (*Nabmychuk v. Elite Retail Solutions Inc.*, 2004 BCSC 746). However, in another province, a letter threatening to allege just cause where none existed, for the purpose of forcing a settlement, even though just cause was not plead in court was held to give rise to additional damages (*Squires v. Corner Brook Pulp and Paper Ltd.*, [1999] N.J. No. 146 (Nfld.C.A.)).

Given the development of this concept it is safe to say that if one suspects "bad faith" on the part of the employer during dismissal, research should be done to determine the current appropriate means of laying a claim.

(2) Punitive Damages

If the conduct of the employer was especially outrageous, harsh, vindictive, reprehensible, or malicious, then the court may award punitive damages (see *Honda Canada Inc. v. Keays*). The focus will be on the employer's misconduct, and not on the employee's loss; the damages are not designed to compensate, but rather to punish and deter. This discretion to award punitive damages should be cautiously exercised and used only in extreme cases; courts should be wary of the risk of double-compensation where punitive damages and additional damages are considered in the same case.

e) ***Duty to Mitigate***

An employee has a duty to mitigate his or her losses, but need only take reasonable steps to do so. Searching for similar work is considered sufficient. However, there is no duty to mitigate in order to receive statutory compensation for length of service under the ESA.

Because of this requirement, the employee may have to take another job the employer offers, as long as the new job is not at a lower level than the previous one, and the change does not amount to constructive dismissal. Similarly, a dismissed employee may have to accept an employer's offer to work through the notice period (*Evans v. Teamsters Local Union* 2008 SCC 20).

Retraining may be considered part of mitigation if it is to enter a job field with better prospects. This applies where an employee tries and fails to obtain alternate suitable employment (*Cimpan v. Kolumbia Inn Daycare Society* [2006] B.C.J. No. 3191).

In many cases, the duty to mitigate may require a constructively dismissed employee to stay on the job while seeking other employment (*Cayen v. Woodward's Stores Ltd.* (1993), 75 B.C.L.R. (2d) 110 (C.A.)).

An employee does not have to take every action possible to mitigate. The employee's perception of what is reasonable is usually given more weight than that of the employer. The employee is not expected to act in the employer's best interest to the detriment of their own interests. For example, if an employee was ill at the time of dismissal they are not required to make strenuous efforts to find new employment. Similarly, an employee in the late stages of pregnancy may not be required to seek new employment until several months after the birth of their child.

If an employee receives damages for wrongful dismissal, this money is treated as earnings, and the employee will be required to pay back the appropriate amount of

EI benefits received while waiting for the court case to be heard (EI benefits are not deducted from the amount of the damage award).

3. Just Cause

As stated earlier, if there is just cause, an employer may terminate an employment contract without notice. Since it is often difficult to determine whether there is just cause to terminate an employee, the matter has been left to the common law. It is a question of fact, which means that it is up to the judge or jury to decide. The particular act justifying dismissal without notice depends upon the character of the act itself, upon the duties of the worker, and upon the nature of the possible consequences of the act. The Supreme Court of Canada in *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 set forth the test for just cause, particularly in cases of dishonesty.

a) *Common Law Definition*

Common law has defined just cause as conduct that is inconsistent with the fulfilment of the express or implied condition of service (*Denham v. Patrick* (1910), 20 O.L.R. 347 (Div. Ct.)). It is conduct inconsistent with the continuation of the employment relationship, which constitutes a fundamental breach going to the root of the contract (*Stein v. B.C. Housing Management Commission* (1989), 65 B.C.L.R. (2d) 168 (S.C.), (1992), 65 B.C.L.R. (2d) 181 (C.A.)). This includes serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the employee's duties or prejudicial to the employer's business, or wilful disobedience to the employer's orders in a matter of substance (*Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85). An objective test is used to determine whether there has been a serious misconduct or a fundamental breach. For a long term or senior employee, the employer may need more than mere misconduct (*Mallais v. Lounsbury Co.* (1984), 58 N.B.R. (2d) 345 (Q.B.)).

What constitutes just cause will vary from case to case and must be something that a reasonable person would be unable to overlook (*McIntyre v. Hockin* (1889), 16 O.A.R. 498 (C.A.)). A single incident is usually insufficient to justify dismissal (*Buchanan v. Continental Bank of Canada* (1984), 58 N.B.R.(2d) 333 (Q.B.)), unless that act is extremely prejudicial to the employer such as dishonesty or immoral character that causes a failure of trust (*Stilwell v. Audio Pictures Ltd.*, [1955] O.W.N. 793(C.A.)). The cumulative effect of minor instances may justify dismissal if they make the employee unable to perform his or her duties or result in a serious deterioration of the employment relationship (*Ross v. Willards Chocolates Ltd.*, [1927] 2 D.L.R. 461 (Man K.B.)). Where an employer accepts a certain standard of performance over a period of time, the employer cannot without warning treat such conduct as cause for dismissal (*Devitt v. A&B Sound Ltd.* (1978), 85 D.L.R. (3d) 604 (B.C.S.C.)).

b) *Disobedience/Insolence*

Insolence or insubordination that is incompatible with the continuation of the employment relationship is just cause for dismissal (*Latta v. Acme Cheese Co.* (1923), 25 O.W.N. 195 (Ont. SCAD)). A single incident that is very severe and interferes with and prejudices the safe and proper conduct of the business will be just cause for dismissal (*Stilwell v. Audio Pictures Ltd.*, above). Poor judgment, insensitivity, or resentment, is generally not sufficient (*Leblanc v. United Maritime Fisherman Co-op* (1984), 60 N.B.R. (2d) 341 (Q.B.)).

An intentional and deliberate refusal of an employee to carry out lawful and reasonable orders will generally suffice as cause for dismissal. However, should an order be outside the employee's job description, then such an order will not be

considered “lawful and reasonable”. Frequent less serious instances of disobedience can justify dismissal where they are combined with other misconduct (*Markey v. Port Weller Dry Docks Ltd.* (1974), 4 O.R. (2d) 12 (Co. Ct.); *Stein v. B.C. Housing*, above). Generally, however, one isolated act of disobedience will not, in itself, be cause for dismissal.

For a breach of company policy or company rules to constitute just cause for dismissal, the rule or policy must have been made clear to the employees and must have been regularly enforced by the employer.

NOTE: A refusal to co-operate, a neglect of duties, or a refusal to perform the job may be just cause for dismissal (*Lucas v. Premier Motors Ltd.*, [1928] 4 D.L.R. 526 (Alta. C.A.)). However, if an employer proposes a unilateral change in position, job function, pay, hours, etc., it is not just cause if the employee refuses the change. Rather, it may be considered a constructive dismissal. Failure to accept a reasonable transfer not involving demotion or undue burden or hardship may be cause for dismissal, if such a transfer is determined to be an express or implied term of the contract.

c) *Poor Employee Performance*

Where there is actual incompetence, not just dissatisfaction with an employee’s work, the employee may be dismissed with cause if such incompetence is the fault of the employee (*Waite v. La Ronge Childcare Co-operative* (1985), 40 Sask. R. 260 (Q.B.)). Should an employee present an exaggerated assessment of his or her own skills, a company is justified in dismissing that employee after finding out his or her true abilities (*Manners v. Fraser Surrey Docks Ltd.* (1981), 9 A.C.W.S. (2d) 155). Incompetence is assessed using an objective standard of performance, and it is for the employer to prove that the employee fell below the standard. The arbitrariness of the test makes it difficult to assess incompetence, so usually one isolated example of failure to meet such a test does not warrant discharge (*Clark v. Capp* (1905), 9 O.L.R. 192). The employer must prove before the Employment Standards Branch that:

- a) reasonable standards of behaviour and performance were set and clearly communicated to the employee;
- b) the employee was notified when he or she did not meet those standards;
- c) the employee received training and was allowed adequate time to meet those standards; and
- d) the possible repercussions of failing to meet those standards were clearly communicated.

Just cause for termination exists when an employee fails to respond to these measures. However, the Employment Standards Branch requires that the employer prove that all these steps were taken.

There is also a requirement that the employee appreciate the significance of the warning (*Korber v. Can West Imports Limited and Satten*, [1984] B.C.W.L.D. 737). Incompetence as grounds for dismissal needs to be considered in light of the Human Rights Code and the bona fide occupational requirement (“BFOR”) test (see *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3). In a case of poor employee performance, the Employment Standards Branch will not find just cause for dismissal unless the employer can demonstrate a “neglect of duties”.

d) Dishonesty

Dishonesty must be proven on a balance of probabilities and the burden of proof rests with the employer (*Hanes v. Wawanesa Insurance Company*, [1963] S.C.R. 154). Dishonesty may be a cause for dismissal, especially if it indicates an untrustworthy character or is seriously prejudicial to the employer's interests or reputation (*Jewitt v. Prism Resources* (1981), 127 D.L.R. (3d) 190 (B.C.C.A.)). In *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161, the Supreme Court endorsed a contextual approach; the test for just cause is whether the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

e) Intoxication

Depending on the extent of intoxication and degree of prejudice to the employer, intoxication may be a cause for dismissal (*Armstrong v. Tyndall Quarry Co.* (1910), 16 W.L.R. 111 (Man KB)). However, intoxication in itself is not grounds for dismissal. The courts inquire into all relevant factors, particularly work record through previous years, and are sympathetic to alcohol abusers especially if they are long-term employees (*Robinson v. Canadian Acceptance Corp. Ltd.* (1974), 47 D.L.R. (3d) 417 (N.S.C.A.)).

f) Absences and Lateness

When an employee is frequently absent from work, the absence occurs at a critical time, or the employee lies about the absence, it may be a cause for dismissal. Chronic lateness may also be cause for dismissal.

g) Conflict of Interest

An employee has a duty to be faithful and honest. Information obtained in the course of employment may not be used for their own purposes or purposes that are contrary to the interests of the employer (*Bee Chemical Co. v. Plastic Paint and Finish Specialists Ltd. et al.* (1979), 47 C.P.R. (2d) 133 (Ont. C.A.)). An employee may be liable for damages for breach of contract where the employee is running a business contemporaneous with being an employee (*Edwards v. Lawson Paper* (1984), 5 C.C.E.L. 99). Also see *Durand v. Quaker Oats Co. of Canada* (1990), 45 B.C.L.R. (2d) 354 (C.A.), which held that a conflict of interest can be grounds for summary dismissal.

h) Off-Duty Conduct

Private conduct will be considered just cause for dismissal if it is incompatible with the proper discharge of the employee's duties, or is prejudicial to the employer. This depends on the conduct and the nature of the job. Alleged criminal conduct or conduct that interferes with the internal harmony of the workplace, if it is prejudicial to the employer, may also be just cause.

i) *Personality Conflict*

A personality conflict, i.e. inability of an employee to function smoothly in a working environment on a personal level, is not grounds for dismissal unless it is inconsistent with the proper discharge of the employee's duties or is prejudicial to the employer's interests (*Abbott v. G.M. Gest Ltd.*, [1944] O.W.N. 729). If the inability to get along with others results in an interference with the business, the employee may be dismissed (*Fonceca v. McDonnell Douglas Ltd.* (1983), 1 C.C.E.L. 51 (Ont. H.C.)).

j) *Redundancy and Permanent Lay-off*

Where the company no longer requires the employee, or the employer encounters economic difficulties or undergoes reorganization, the employee is still entitled to reasonable notice (*Paterson v. Robin Hood Flour Mills Ltd.* (1969), 68 W.W.R. 446 (B.C.S.C.)). In times of economic uncertainty, redundancy is not cause for dismissal. The economic motive for terminating a position does not relate to an individual's conduct and hence is not adequate cause (*Young v. Okanagan College Board* (1984), 5 C.C.E.L. 60 (B.C.S.C.)).

"Lay-off" is defined in s. 1 of the ESA. Where an employee has been laid off for more than 13 consecutive weeks, and this has not been extended either by agreement or by the Director, the employee is considered to have been terminated permanently, and is entitled to severance pay. He or she also may be able to sue for wrongful dismissal before the 13-week period has expired. This would be the case where, although the employer has used the term "lay-off", it is nonetheless clear that the employee has been terminated.

k) *Probationary Employees*

The general rule is that probationary employees may be dismissed without notice, assuming that during the probationary period the employee has not shown the ability to meet the job requirements (*Markey v. Port Weller Dry Docks* (1974), 4 O.R. (2d) 12). In British Columbia, there is a developing judicial trend towards extending the right to be treated fairly to probationary employees. The test in British Columbia for terminating probationary employees is that of suitability, not just cause, as set forth in *Jadot v. Concert Industries*, [1997] B.C.J. No. 2403, (B.C.C.A.). The ESA presumes a three-month probationary period, where no termination pay is required for termination that occurred in the first three months of employment.

l) *Near Cause*

On occasion, judges have reduced the notice period where there has been near cause (i.e. where even if there were no grounds for dismissal, there was substantial misconduct). Although trial judges may use it, appellate courts have generally rejected this doctrine, saying that reasonableness of the shortened notice period is irrelevant if there is no just cause found for termination (*Steinicke v. Manning Press Ltd.*, [1984] 4 W.W.R. 491 (B.C.C.A.)). The Supreme Court of Canada in *Dowling v. Halifax (City)*, [1998] 1 S.C.R. 22 abolished near cause as grounds for termination.

4. Defences to Just Cause Arguments

a) *Warning*

It can be argued that an employer must warn an employee before firing that employee for a series of trivial incidents that are not serious enough alone to justify dismissal (*Fonceca v. McDonnell Douglas*, above).

b) *Condonation*

If an employer's behaviour indicates that they are overlooking conduct, which gives cause, that employer cannot later dismiss the employee without new cause arising (*McIntyre v. Hockin*, above). This applies only where the employer knows of the conduct. The employer is entitled to reasonable time to decide whether to take action. If an employee is let go and no cause is alleged at the time (even when there is cause), or where the employer gives the employee letters of reference, the employer may be estopped from later alleging cause. Past misconduct that has been condoned may be revived by new instances of misconduct. The employee carries the burden of proving the condonation (*Perry v. Papillon Restaurant* (1981), 8 A.C.W.S. (2d) 216).

5. Post-Employment Issues

a) *Restrictive Covenants*

It is becoming increasingly common for employment contracts to include restrictive covenants that prevent former employees from doing certain things, including but not limited to: divulging company secrets, working for competitors, or setting up their own competing business. While restrictive covenants have historically applied to upper level employees, they are more and more common for all types of employees as specialization increases and more companies sell information as opposed to goods.

As a general common law rule, restrictive covenants are presumed to be invalid. It is up to the party trying to enforce the covenant (usually the employer) to prove that it should be enforced. In deciding whether or not to enforce a restrictive covenant, the court must balance the interests of society in maintaining free and open competition with the interests of individuals to contract freely. The "public policy test" that emerges from the common law consists of the following considerations:

- i) the employer must show a legitimate business interest for imposing the covenant on the employee - there must be a connection between the covenant and the business interest that is sought to be protected;
- ii) the covenant must minimally impair the employee's ability to freely contract in the future ;
- iii) the restraint must be fair and reasonable between the parties, and must be in the public interest, having regard to the nature of the prohibited activities and the length of time and geographic area in which it will operate; and
- iv) the terms of the covenant must be clear and unambiguous – it will not be possible to demonstrate the reasonableness of an ambiguous covenant.

See *Elsley v. J.G. Collins Insurance Agencies*, [1978] 2 S.C.R. 916 and *Shafroon v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6.

Courts will sometimes re-write restrictive covenants that might be found otherwise unenforceable because they were not reasonable with respect to geography, time or scope (*Jones v. Prostar Painting and Restoration Ltd.* [2006] B.C.J. No. 1556). However, the goal of the court must be to rectify the contract so that it accurately reflects the intention of the parties at its creation. The courts are unwilling to re-write restrictive covenants if they contain uncertain and ambiguous terms; these covenants are deemed *prima facie* unreasonable and unenforceable (*Shafroon v. KRG Insurance Brokers (Western) Inc.*).

b) *Record of Employment and Reference Letters*

There is no statutory requirement under the ESA for an employer to provide a reference. Employers are required to provide former employees with a record of employment, which includes information such as the length of service, wage rate, but does not include anything about the employee's performance.

Since the decision of *Wallace v. United Grain Growers*, the view has been that an employer should provide a reference unless they have good reason not to. Failing to provide a reference could be construed by the courts as evidence of bad faith. In practical terms however, there is no way for a former employee to force their employer to provide a suitable reference letter without making some other sort of claim covered by the ESA or the common law.

IV. REMEDIES

A. *The Employment Standards Branch*

The ESA established the Employment Standards Branch to deal with complaints and to disseminate information about the Act to both employees and employers. The Employment Standards Branch is responsible for informing employers and employees of their rights under the ESA, and for administering all disputes arising under the Act. The Employment Standards Branch's Industrial Relations and Employment Standards Officers are trained to interpret the ESA and to assist both employers and employees with problems arising under the Act. Clients should be referred to the Employment Standards Branch if they have a complaint arising under the ESA, including those related to wrongful dismissal.

In *W.G. McMabon Canada Ltd. v. Mendonca* (16 September 1999), BCEST Decision No. 386/99, the Employment Standards Tribunal set forth the "make whole remedy", which permits the employee to receive compensation instead of reinstatement. The employee is essentially "made whole" financially by way of a compensation order, such that the employee would be in the same economic position he or she would have been in had the infraction not occurred. This is an extraordinary remedy but one which allows for significant compensation. The above case can be located on the Employment Standards Tribunal web site at www.bcest.bc.ca.

1. Application

The ESA gives the Director of Employment Standards Branch power to investigate complaints made under the Act. The complaint must be made in writing and within certain time limits. The Branch will deal only with complaints that have arisen within six months from the date of the complaint, if the complainant is still employed by the company. If the complainant is no longer employed with the defendant company, the complaint must be filed within six months of the termination date (s. 74). When an employee is terminated after

a temporary layoff, the last day of the temporary layoff is deemed to be their last day of employment for the purpose of calculating the six-month limitation period. If this six-month time period has elapsed, there may still be an action in Small Claims Court.

NOTE: Time during which an employee was not working because he or she was on sick leave, pregnancy leave, Workers' Compensation benefits, etc. is nonetheless considered part of the term of employment.

A clinician should inform the client of the neutral stance taken by the Branch towards disputes. With the powers granted to the Branch come responsibilities, one of which is to remain neutral. All the rules of natural justice apply to the Employment Standards Branch: there must be no apprehension of bias, both sides in a dispute are given an opportunity to speak, parties receive a written decision with reasons where a formal determination is made, and parties have appeal rights. If the client believes the Branch did not meet these responsibilities, the clinician can act on his or her behalf to investigate the matter; judicial review of the decision may be appropriate.

2. The Employment Standards Branch Self-Help Kit

Due to cutbacks in the budget of the Employment Standards Branch, complainants must first use a "self-help kit" as a means of weeding out complaints that do not need to be filed. In the kit the claimant must first contact his or her employer with a written explanation for their claim and how much they want as compensation. The employer then has a chance to reply. If there is still a conflict between the two, the claimant can then file a complaint with the Employment Standards Branch. The Employment Standards Branch will not accept a complaint unless it has written proof that the complainant has tried to solve the problem using the kit. The self-help kit can be found at: www.labour.gov.bc.ca/esb/self-help.

3. Filing a Claim with the Employment Standards Branch

After completing the "self-help kit" the complainant may then lodge their complaint directly with the Employment Standards Branch at the branch closest to where the complainant was employed.

The Director may refuse to investigate a complaint if it is not made in good faith or if there is insufficient evidence to support it. The complainant may request, in writing, that any identifying information gathered for the purpose of the investigation remain confidential. However, the Director may disclose information if disclosure is deemed necessary to the proceeding or in the public interest (s. 75).

Breach of any section of the ESA may be a basis for an investigation. At the conclusion of an investigation, the Director will give their determination (their decision) based on the evidence given. The Director has the power to settle the claim in a variety of ways, including:

- arranging payment to the complainant;
- forcing compliance with the Act; or
- requiring a remedy or cessation of the action (ss. 78 - 79).

The Director also has the power to help parties settle a complaint and reach a binding settlement agreement that may be filed in Supreme Court for enforcement (s. 78). Section 29 of the Employment Standards Regulation provides an augmented penalty provision that grants the Employment Standards Branch more power to enforce the Act. The penalty provision is also used to enforce the offences listed in s. 125 of the ESA.

Penalties per offence are:

First Determination: \$500
Second Determination: \$2,500
Third Determination: \$10,000

Under Part 11 of the ESA, an officer or director of a corporation is personally liable for up to two months' unpaid wages per employee if the officer or director held office when the wages were earned or were payable – however, officers or directors of a corporation are not personally liable on bankruptcy of the corporation (s. 96(2)). Also directors and officers may be considered a common employer and be held jointly and severally liable (s. 95). If the business is sold, transferred, or continued after bankruptcy, the subsequent business may be considered a successor business and “the employment of an employee is deemed ... to be continuous and uninterrupted” (s. 97).

Liability for employers is reduced from 24 months at common law to six months (s. 80) under the Act.

NOTE: Employers cannot terminate, suspend, or discipline employees because they have filed, or may file, a complaint (s. 83). The Branch can order an employee's reinstatement for contravention of this section and for violations of s. 8 and Part 6.

4. Appeals

Anyone who wishes to appeal a determination of the Director must make an application to the Employment Standards Tribunal, a separate body established under Part 12 of the Act, at the conclusion of an investigation (s. 115). The request must be made within certain time limits, which depend on the manner in which the decision is served. If the decision is hand-served or faxed, an appeal must be filed within 21 days. If the decision is sent by registered mail, an appeal must be filed within 30 days. After reviewing the decision, the Adjudicator of the Employment Standards Tribunal may confirm it, alter it, or refer it back to an officer. The appeal is decided based on the correctness of the Director's determination.

Sections 112 and 114 of the ESA confine the grounds of appeal to the tribunal to situations where:

- a) **The Director erred in law:** An error in law may encompass the interpretation of a particular statutory provision, or its application to the facts presented. It can also be used when the appellant feels the Director acted unreasonably, or without evidence.
- b) **The Director failed to observe the principles of natural justice in making the determination:** This ground of appeal encompasses a wide variety of circumstances such as bias on the part of the decision maker, procedural unfairness (refusing an adjournment without good reason), or when the appellant feels generally they have not been given the right to be heard (a right codified in s. 77 of the Act).
- c) **Evidence has become available that was not available at the time the Determination was made:** The new evidence must be material, in the sense that if the Director had been given the chance to review it the Determination in whole or in part would have been different.

The tribunal may dismiss an appeal without a hearing if the new requirements are not met, or if payment of a possible appeal fee, set up by regulation, has not been made. There are provisions for an appeal fee to be charged but there is currently no fee nor are there plans to charge one.

B. *Civil Court*

While in most cases the Claimant will need to be referred to the Employment Standards Branch for redress, there are circumstances where civil court may be more appropriate. For example if the deadline to file with the Employment Standards Branch has passed, or if the claimant's case is complicated and likely to be refused, civil court may be more appropriate. Please note that since the appeal decision in *Macaraeg v. E Care Contact Centres Ltd.* 2008 BCCA 182, rights under the ESA can no longer be enforced through a civil suit. Additionally, keep in mind that civil court will not rule on a matter that is to be decided by the Branch.

C. *The Human Rights Tribunal*

If the client has a problem pertaining to any form of discrimination in a provincially regulated place of employment, then they fall under the jurisdiction of the Human Rights Tribunal. An employer can be in full compliance with the ESA but still be liable if they are discriminatory in their treatment of employees. The Human Rights Code governs matters dealt with by the Human Rights Tribunal, and complaints of discrimination under the Human Rights Code should be made to the B.C. Human Rights Tribunal (ESA, s. 21). Complaints to the Tribunal may be made using the forms available on the web site (www.bchrt.bc.ca). The Tribunal has the power to inspect records in the investigation of a complaint, but is not obligated to investigate every complaint it receives.

1. The Human Rights Code

The Human Rights Code addresses discrimination in many areas of life, one of which is employment relationships. In s. 13 the Code bans discrimination in employment on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or because a prospective employee has been convicted of a criminal or summary conviction offence that is unrelated to the employment.

Employment is broadly defined and includes the relationships of master and servant, master and apprentice, and some principal and agent relationships. The protections under the Human Rights Code apply to issues arising in current employment and to cases of wrongful dismissal.

An employer cannot discriminate in employment advertisements unless the discrimination is based on a bona fide occupational requirement (s. 11). There must be no discrimination in wages paid (s. 12). Men and women must receive equal pay for similar or substantially similar work. Similarity is to be determined having regard to the skill, effort, and responsibility required by a job.

An employer cannot refuse to hire a person for reasons relating to a protected ground unless the refusal is based on a bona fide occupational requirement (s. 13).

With respect to physical disability, the BC Court of Appeal has recently ruled that an employer is not guilty of discrimination if he or she dismisses an employee for misconduct (e.g. theft in the workplace) that would independently justify dismissal, even if that employee's drug or alcohol dependency was a contributing factor to the misconduct; see *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357. The critical question to be asked is whether the employer's decision was influenced by the employee's protected characteristic, or whether instead, the employer would have reached the same decision respecting any other employee guilty of the same misconduct.

Trade unions, employer's organizations, and occupational associations cannot discriminate against people by excluding, expelling or suspending them from membership (s. 14).

It is possible to have the employee's job reinstated by making a claim under the Human Rights Code.

NOTE: Federal equal pay provisions in the Canadian Human Rights Act are somewhat broader than those found in B.C.'s Human Rights Code. It is discriminatory under the Canadian Human Rights Act to pay male and female employees different wages where the work that they are doing is of comparatively equal value. This means that even if the work itself is not demonstrably similar, the pay equity provisions may still be enforced if the value of the work is similar. Factors that are considered in determining whether work is of equal value include: skill, efforts and responsibility required, and conditions under which the work is performed (Canadian Human Rights Act, s. 11(2)).

For more detailed information see **Chapter 19: Human Rights**.

V. LIMITATION PERIODS

If your client wishes to file a complaint with the Employment Standards Branch, there is a six-month limitation period from the last day of employment. Applications to the B.C. Human Rights Tribunal must be made within six months of the alleged contravention (s. 22). It is possible for this deadline to be extended if it is found that it is in the public interest to accept the complaint, and no substantial prejudice will result to any person because of the delay. In the courts, there is a six-year limitation period for pure economic loss arising from breach of contract (wrongful dismissal would qualify). Damages that arise out of contract that are to the person or to property have a two-year limitation period. (See the Limitation Act, R.S.B.C. 1996, c. 266). Section 124 of the ESA sets a limitation period of two years for any court action arising from an offence under the act. If you file a complaint with the Employment Standards Branch for wages, then you are barred from filing an action in court regarding the same matter. You must sue the body with which the contract of employment was made, unless you are alleging fraud or induced breach of contract – in which case you may want to join the shareholders or directors of the company. You may have to sue the parent company and the subsidiary if the parent company does the hiring, paying, and terminating.

Employees under federal jurisdiction have a special right. If the employee is non-managerial and worked for at least one year, his or her job can be ordered back if he or she is unjustly dismissed. A complaint must be filed within 30 days, although extensions are possible.

APPENDIX INDEX

- A. EMPLOYMENT INFORMATION SHEET: QUESTIONS TO ASK THE CLIENT
- B. SAMPLE LETTER OF DISMISSAL
- C. SAMPLE RELEASE

APPENDIX A: EMPLOYMENT INFORMATION SHEET

PLEASE PRINT

NO. _____

DATE _____

EMPLOYMENT INFORMATION SHEET

NAME: _____

ADDRESS: _____

TELEPHONE: _____

COMPANY NAME: _____

ADDRESS: _____

HOW LONG HAVE YOU WORKED THERE? _____

WHO REFERRED YOU TO US?

PLEASE LIST VARIOUS POSITIONS WITH ABOVE EMPLOYER:

	Position	Wage	From (date)	To (date)
1.	_____			
2.	_____			
3.	_____			

WHAT WAS YOUR WAGE PER MONTH WHEN YOU WERE DISMISSED?

GROSS: _____ NET: _____ TIPS: _____

WAS YOUR JOB COVERED BY A UNION? _____

DID YOU HAVE A WRITTEN CONTRACT WITH YOUR EMPLOYER? _____

DID YOU AND YOUR EMPLOYER EVER AGREE AS TO HOW LONG YOU WOULD WORK FOR THEM? _____

DID YOU RECEIVE ANY NOTICE OR SEVERANCE PAY?

HOW MUCH NOTICE? _____

HOW MUCH SEVERANCE PAY? _____

WERE YOU ENTITLED TO ANY FRINGE BENEFITS; PENSIONS; MEDICAL; ETC.?

HAVE YOU SUFFERED MENTAL ANGUISH FROM THE DISMISSAL?

HAVE YOU SEEN A DOCTOR?

WHAT WAS THE DATE OF YOUR DISMISSAL?

HAVE YOU STARTED WORK SINCE YOUR DISMISSAL?

IF SO, WHEN? _____

WHAT ARE THE PROSPECTS OF GETTING ANOTHER JOB?

WHAT REASONS WERE GIVEN WHEN YOU WERE DISMISSED?

SEPARATION CERTIFICATE:

CLIENT COPY: _____

REASONS FOR DISMISSAL

ADVICE:

WARN OF 2 OR 6 YEAR LIMITATION

APPENDIX B: SAMPLE LETTER OF DISMISSAL

Mr. John Doe
ADDRESS

Dear John:

Further to our discussion earlier today, it is with regret that I have to tell you that effective (date) , your services will no longer be required by our company. I would like to thank you for your (number) years' of service and I am sorry that that service could not continue.

In order to assist you in finding a suitable position elsewhere, and to provide you with some financial security while doing so, I would like to offer you the following severance package:

1. Your regular monthly salary of (amount) will continue to be paid to you biweekly for a period of up to (number) months from today.
2. You will continue on all Company benefits for a period of up to (amount) months from today.
3. If, during those (number) months, you find other employment, then the salary and Company benefits will cease but you will be paid an amount equal to 50% the balance of the salary that would have been paid had you not found other employment.
4. (company name) will pay up to (amount) in fees for employment counselling in order to assist you to find other employment.

It is a condition of this severance package that you execute the enclosed Release. I would suggest that you take some time to consider this package, get whatever professional advice you feel necessary and respond within three weeks of today's date.

I wish you every success in the future.

Yours truly,

Fred Bloggs
ABC Power Corporation

APPENDIX C: SAMPLE RELEASE

WHEREAS JOHN DOE was employed by (COMPANY NAME) in the capacity of (JOB DESCRIPTION);

AND WHEREAS that employment was terminated on (DATE);

AND WHEREAS JOHN DOE and (COMPANY NAME) are desirous of settling all matters outstanding between them and each of them as of the date of this Release;

NOW THEREFORE this Agreement witnesseth that in consideration of the promises and of the mutual covenants hereinafter set forth, and in consideration of the severance package attached hereto and in recognition of his/her service to (COMPANY NAME) and his/her loss of office and employment and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged);

JOHN DOE HEREBY RELEASES, ACQUITS AND FOREVER DISCHARGES (COMPANY NAME), its officers, directors, employees, agents, successors and assigns and by these presents does for his/her heirs, executors, administrators, successors and assigns RELEASE AND FOREVER DISCHARGE (COMPANY NAME), its officers, directors, employees, agents, successors and assigns from any and all actions, causes of action, claims and demands and otherwise whatsoever and howsoever arising which he/she has or which hereinafter he/she can, shall, or may have, for or by any reason, or arising out of any cause, deed, matter, thing, omission, or otherwise, whatsoever and howsoever existing up to the date of this Release; and in particular, but without restricting the generality of the foregoing, arising out of the employment relationship between JOHN DOE and (COMPANY NAME);

IT IS HEREBY understood and agreed by JOHN DOE that this settlement is made, and this Release is executed, and the aforesaid monies are voluntarily paid and accepted for the purpose of making a full, final and irrevocable settlement of any and all claims whatsoever and howsoever arising out of the employment relationship between JOHN DOE and (COMPANY NAME);

JOHN DOE HEREBY ACKNOWLEDGES AND WARRANTS that he/she has considered the terms of this settlement and has read the foregoing Release and knows the contents and fully understands the same.

THIS RELEASE contains the entire agreement between JOHN DOE and (COMPANY NAME) and the terms of this Release are contractual and not a mere recital.

IN WITNESS WHEREOF this Release has been executed this ____ day of _____, 20__.

Signed, Sealed and Delivered
by JOHN DOE in the
presence of:

Name

Address

Occupation