# CHAPTER NINE: EMPLOYMENT LAW

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Current as of August 1, 2023

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# CHAPTER NINE: EMPLOYMENT LAW

**This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship.** All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

## I. INTRODUCTION

This chapter is intended as a basic guide to outline some of the most common issues faced by employees. Each jurisdiction has its own legislation governing employment standards and human rights, and this chapter focuses on the laws of British Columbia. Nothing in this chapter is legal advice; only a lawyer can advise an employee on their specific situation.

Most employment-related legal claims fall into one of the three categories discussed in this chapter:

- Human Rights claims;
- Violations of the Employment Standards Act; and
- Common law breaches of employment contracts.

In many cases, there are potential claims in two or even three categories. Consider and explore the potential for claims under each category.

Begin by going through **Section III: Checklist**.

# II. GOVERNING LEGISLATION AND RESOURCES

## *A. Employment and Wrongful Dismissal Legislation*

### 1. *Federal Legislation*

*Canada Labour Code*, RSC 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.
Website: https://laws-lois.justice.gc.ca/eng/acts/l-2/

*Canadian Human Rights Act*, RSC 1985, c H-6, covers discrimination in the workplace and the procedure for adjudication before the Canadian Human Rights Commission.
Website: https://laws-lois.justice.gc.ca/eng/acts/h-6/

*Employment Equity Act*, RSC 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.
Website: https://laws-lois.justice.gc.ca/eng/acts/E-5.401/index.html

*Employment Insurance Act*, RSC 1996, c 23, outlines the requirements and qualifications for Employment Insurance.
Website: https://laws-lois.justice.gc.ca/eng/acts/e-5.6/

*Personal Information Protection and Electronic Documents Act*, RSC 2000, c 5, protects personal information collected and distributed electronically for employees in federal jurisdiction.
Website: https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/index.html

### 2. *Provincial Legislation – Employees*

*Employment Standards Act*, RSBC l996, c 113, (*ESA*) sets out minimum employment standards for provincial employees. On May 30, 2019, the *Employment Standards Amendment Act* received Royal Assent, and amendments set out therein are now in force.
Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01

*Employment Standards Regulation*, BC Reg 396/95, includes provisions on the scope of coverage and the penalty regime.
Website: www.bclaws.ca/civix/document/id/loo97/loo97/396_95

*Wills, Estates, and Succession Act, ss 175-180* deal with deceased workers' wages.
Website:
www.bclaws.ca/civix/document/id/complete/statreg/09013_01#division_d2e13620

*Human Rights Code*, RSBC l996, c 210, deals with discrimination in employment, among other things.
Website: www.bclaws.ca/Recon/document/ID/freeside/00_96210_01

*Labour Relations Code*, RSBC 1996, c 244, deals with union membership, collective bargaining, and the role of the Labour Relations Board.
Website: www.bclaws.ca/civix/document/id/complete/statreg/96244_01

*Workers' Compensation Act*, RSBC 2019, c 1, governing Act of the Workers' Compensation Board.
Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_00

*Personal Information Protection Act*, SBC 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.
Website: www.bclaws.ca/Recon/document/ID/freeside/00_03063_01

*Apology Act*, SBC 2006, c 19, addresses some circumstances where a claimant is seeking an apology from their former employer. Employers can be cautious about making an apology in case the apology attracts liability. This concern can be addressed by providing an apology in accordance with the Apology Act, which specifically separates an apology from an acknowledgement of liability.
Website: http://www.bclaws.ca/civix/document/id/consol18/consol18/00_06019_01

### 3. Provincial Legislation – Contractors

*Builder's Lien Act*, SBC l997, 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.
Website: www.bclaws.ca/civix/document/id/complete/statreg/97045_01

*Repairers Lien Act*, RSBC l996, c 404, states that a repairer may put a lien on chattel for work and materials put into that chattel.
Website: www.bclaws.ca/civix/document/id/complete/statreg/96404_01

*Woodworker Lien Act*, RSBC l996, c 491, states that a woodworker may put a lien on logs or timber for work done or services performed.
Website: www.bclaws.ca/civix/document/id/consol26/consol26/00_96491_01

## *B. Resources*

### 1. 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*, Second Edition (Scarborough: Butterworths, 2005).

### 2. Other Resources

The Continuing Legal Education Society of BC holds an Employment Law conference each year. Papers are published on topics of current interest and can be found at most law libraries, or online for those with a subscription at:
Website: www.cle.bc.ca

The Employment Standards Branch publishes the Employment Standards Act Interpretation Guidelines Manual. The Manual sets out the ESB`s interpretation of the Act and Regulations. The manual is published online at:
Website:https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm

Lexis Advance Quicklaw publishes Canada Wrongful Dismissal Quantums, which summarizes wrongful dismissal awards organized according to occupation and duration of employment. The Quantums are available online to those with a subscription at:
Website: https://advance.lexis.com/api/permalink/0d69f961-3512-4e11-a43e-15a0e8f7cdf7/?context=1505209

Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. The database is accessible online at:
Website: www.wrongfuldismissaldatabase.com

vLex Canada provides a free Bardal factor calculator. By inputting your employment information, the service will provide you with some case law similar to your circumstances and estimate a range of reasonable notice periods. The tool can be found here:
Website: http://www.bardalfactors.ca/whats-reasonable

## *B. Referrals*

**Employment Standards Branch** (Employees in Provincial Jurisdiction)
Lower Mainland Regional Office — Telephone: (604) 660-4946
250 – 4600 Jacombs Road — Fax: (604) 713-0450
Richmond, B.C. V6V 3B1

**Employment Standards General Inquiry Line**
Website: www.labour.gov.bc.ca/esb — 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 — Telephone: (604) 660-1300
1066 West Hastings Street — Fax: (604) 660-1892
Vancouver, B.C. V6E 3X1
Website: www.lrb.bc.ca

**Employment and Social Development Canada, Labour Program**
11 – 300 West Georgia Street — Telephone: 1-800-641-4049
Vancouver, B.C. V6B 6G3
Website:
https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour.html

**Canada Industrial Relations Board** (Union Enquiries: Federal Jurisdiction)
Western Region Office — Telephone: (604) 666-6002
501 – 300 West Georgia Street — Toll-Free: 1-800-575-9696
Vancouver, B.C. V6B 6B4 — Fax: (604) 666-6071
Website: www.cirb-ccri.gc.ca

**Employment Standards Tribunal of British Columbia**
Suite 650 Oceanic Plaza — Telephone: (604) 775-3512
1066 West Hastings Street — Information Line: (250) 612-4100
Vancouver, B.C. V6E 3X1 — Toll-Free: 1-800-663-3316
E-mail: registrar.est@bcest.bc.ca — Fax: (604) 775-3372
Website: www.bcest.bc.ca

**B.C. Human Rights Tribunal**
1170 – 605 Robson Street — Telephone: (604) 775-2000
Vancouver, B.C. V6B 5J3 — TTY: (604) 775-2021

E-mail: BCHumanRightsTribunal@gov.bc.ca
Website: www.bchrt.bc.ca
Toll-Free (in B.C.): 1-888-440-8844
Fax: (604) 775-2020

**Workers' Compensation Board of B.C.** (WorkSafeBC – Head Office)
Main Building
6951 Westminster Highway
Richmond, B.C. V7C 1C6
Website: www.worksafebc.com
Telephone: (604) 276-3143

**Canadian Human Rights Commission**
Website: https://www.chrc-ccdp.gc.ca/en
Toll-Free: 1-888-214-1090

**Migrant Workers Centre**
302 – 119 West Pender Street
Vancouver, B.C. V6B 1S5
E-mail: info@wcdwa.ca
Website: www.wcdwa.ca
Telephone: (604) 669-4482
Toll-Free: 1-888-669-4482
Fax: (604) 669-6456

# III. CHECKLIST

## *A. Preliminary Matters*

☑ **Jurisdiction:** Determine whether the employee falls within provincial or federal jurisdiction and make a list of which statutes apply to the employee.

- See **Section IV.A: Determine Federal or Provincial Jurisdiction**

☑ **Unionized or Non-Unionized**: Determine whether the employee is working in a union environment, and if so, whether the employment relationship is governed by a collective agreement, and whether the employee is in the bargaining unit covered by the collective agreement.

- See **Section IV.C: Determine if the Employee is Unionized or Non-Unionized**

☑ **Employee or Contractor:** Determine whether the worker is an actual "employee" or an "independent contractor".

- See **Section IV.D: Determine if the Worker is an Employee or Independent Contractor**

## *B. Determine the Issue*

☑ Read through the common employment law issues and determine which issue(s) the employee is experiencing.

- See **Section V: Employment Issues**.
- If the issue respects termination of employment, complete the checklist located at **Section V.C.1: Termination of Employment Checklist** before returning to this list.

## *C. Determine the Remedy*

☑ Determine the employee's legal remedy based on the legal basis for the employee's complaint: A breach of the *Employment Standards Act* will lead to a claim at the Employment Standards Branch; a breach of the *Human Rights Code* will lead to a complaint at the Human Rights Tribunal; and a breach of the employment contract, or one of its implied terms, will lead to a claim in Small Claims Court (for claims under $35,000 as of June 1, 2017) BC Supreme Court (for claims over $35,000 as of June 1, 2017), or the Civil Resolution Tribunal (for claims $5,000 or under). As of June 1, 2017, with several exceptions, civil claims of up to $5000 will no longer be dealt with in Small Claims Court – instead, they will be resolved in B.C.'s online Civil Resolution Tribunal.

- See **Section VI: Remedies**.
- See **Chapter 20: Small Claims**.

☑ Determine the claim's limitation date. Ensure that you file the appropriate application on time. If you have missed the limitation date, look at what options you may have for late filing.

- See **Section VI.D: Limitation Periods**.

☑ Determine whether there are any written contracts, employment policies, or other written terms of employment that apply to the worker, including any release agreements the employee may have signed.

- See **Section VII.H: Defeating Signed Release Agreements**

☑ Consider other strategies and tips offered.

- See **Section VII: Strategies and Tips**.

| ***Forums for Employment Law Disputes*** | | | | | |
|---|---|---|---|---|---|
| | ***Employment Standards Branch*** | ***Human Rights Tribunal*** | ***Civil Resolution Tribunal*** | ***Small Claims Court*** | ***BC Supreme Court*** |
| ***Filing Costs*** | None | None | $100 for claims up to $3,000; $150 for claims over $3,000 (waivers may be available) | $100 for claims up to $3,000 $156 for claims over $3,000 | $200 to file, plus additional costs for applications and trials exceeding 3 days |
| ***Maximum Awards*** | No maximum dollar amount, but generally award limited to amounts owed for past 12 months only (extended collection may be possible for vacation pay owing)– See *ESA s.80.* | No maximum | $5,000 | $35,000 (as of June 1, 2017) | No maximum |
| ***Type of Claim*** | Statutory entitlements in the *ESA* (i.e., minimum wage, overtime, vacation pay, etc.) | Discrimination in employment, hiring, or dismissal | Any term express or implied in the contract; wrongful dismissal | Any term express or implied in the contract; wrongful dismissal | Any term express or implied in the contract; wrongful dismissal |

# IV. PRELIMINARY MATTERS

## *A. Determine Federal or Provincial Jurisdiction*

Employees are subject to either federal or provincial employment legislation. This section will help you determine whether the employee is covered by federal or provincial jurisdiction, and therefore which statutes apply.

### 1. Federal Jurisdiction

Employees will fall under federal jurisdiction if they are employed in connection with any federal work, undertaking, or business that is within the legislative authority of Parliament, or if they work for certain federal crown corporations. This can be a complicated constitutional question, but generally, areas of business that are federally regulated include:

- Shipping and navigation, including the operation of ships and transportation by ship anywhere in Canada;
- Interprovincial or international transportation (for example, truck, rail, ferry, or shipping routes that cross a provincial or international border);
- Telecommunications companies, such as cell phone, cable, or internet providers;
- Airports and air transportation, including any airline companies;
- Radio broadcasting stations;
- Banks (but not credit unions);
- Businesses located on First Nations reserves; and
- Other areas listed in section 91 of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

To determine jurisdiction, look to the type of work done, as well as the employer's area of business. 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 mean all of that employer's employees will be governed by federal law. In some cases, additional research must be done to determine the employee's jurisdiction. For additional details to assist in determining jurisdiction if a difficult case arises, see *Actton Transport Ltd v British Columbia (Director of Employment Standards)*, 2008 BCSC 1495 paras. 23 – 32 https://canlii.ca/t/21dvl.

Performing a BC Online company search may help determine jurisdiction. While not always determinative, a company search will provide information regarding whether the company is provincially registered, which may help determine jurisdiction. In addition, a company search will usually provide the company's director and registered office information:
www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/technology-innovation-and-citizens-services/bc-registries-online-services

### 2. Provincial Jurisdiction

Employees who are not within the scope of federal legislation generally fall under provincial jurisdiction and accordingly their employment is governed by provincial legislation.

## *B. Determine Applicable Legislation*

The following section contains statutes that may apply to an employee with an employment-related legal issue. Once you have determined the jurisdiction, make note of which statutes apply to the employee, and then continue on to the next step in the checklist: **Section IV.C: Unionized vs. Non-Unionized Employees**.

Note that this chapter focuses on provincial legislation. In cases where the employee is federally regulated, this chapter can still be of assistance as the provincial and federal statutes have many similarities, but it will be necessary to read the federal statutes to determine whether a particular provision is similar.

## 1. The Employment Standards Act

Provincially regulated employees are generally covered by the *Employment Standards Act* [*ESA*] as updated by the *Employment Standards Amendment Act*.

Be aware that certain professions and employees are exempt from the *ESA*, or parts of the *ESA*. Review the *Employment Standards Regulations* to determine if the employee is covered by the *ESA*.

See **V.A.10: Professions with Special Provisions and Limited Exemptions under the Employment Standards Act** to determine whether the *ESA* applies to the employee in question. See **V.A.6: Hours of Work and Overtime Pay** to determine if the employee is exempt from overtime.

## 2. The Labour Relations Code and Canada Labour Code

Provincially regulated employees who belong to a union are covered by the *Labour Relations Code* in addition to the *ESA*. However, some parts of the *ESA* do not apply to unionized employees.

Federally regulated employees are covered by the *Canada Labour Code* [CLC]. A significant difference between the CLC and the *ESA* is that the CLC confers a special right: If the employee is non-managerial, worked for at least one year, and was unjustly dismissed, their job can be reinstated (CLC, ss 240-246). This right exists alongside several other discretionary remedies for unjust dismissal under the CLC. A complaint must be filed within 90 days (CLC, s 240(2)).

For a discussion on the significance of the discretionary remedies for unjust dismissal available under the CLC, see the Supreme Court of Canada's decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

## 3. The Human Rights Code

Provincially regulated employees are covered by the British Columbia *Human Rights Code* (*HRC*). Federally regulated employees are covered by the *Canada Human Rights Act*. For more information on Human Rights claims, see **Chapter 6: Human Rights**.

## 4. Common Law and Contract Law

In addition to statutory entitlements, provincially and federally regulated employees have common law employment entitlements. Causes of action, such as breach of contract due to wrongful dismissal, remain the same whether the employee is provincially or federally regulated.

Employees will also often have written contractual entitlements or workplace policies. Review any written employment contract or workplace policy carefully to both clarify the terms of employment and to determine whether the contract is enforceable. See **Section V.C(d) and (c): Invalid Contracts**.

Unionized employees may have common law or contractual entitlements, but, generally, these entitlements must be acted upon by the union that is party to the collective agreement. See **Section IV.C: Unionized vs. Non-Unionized Employees**.

## *C. Determine if the Employee is Unionized or Non-Unionized*

Determine whether the employee belongs to a union. If the employee does not belong to a union, continue to the next step in the checklist: **Section IV.D: Determine if the Worker is an Employee or an Independent Contractor**.

Issues regarding unionized employees can be complex, and unionized employees should therefore generally be referred to their union representative or a lawyer. However, the following paragraph provides basic information for unionized employees.

If an employee is a union member and has a complaint regarding the employer, they 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 collective agreements will contain other critical guidelines that the employer must follow. Usually, union contracts contain different or more onerous terms than the *ESA* provisions, and union members in their collective agreements can contract out of *ESA* limitations (*ESA*, s 3) regarding such matters as hours of work, overtime, statutory holidays, vacations, vacation pay, seniority retention, recall, and termination of employment or layoff. Whole sections of the *ESA* might not apply under a collective bargaining agreement if 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 Keyword Index:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/keyword-index#C

Unions have a duty to represent their workers fairly. An employee who feels their union has not fairly represented their interests or advanced a grievance can bring a complaint under section 12 of the *Labour Relations Code*. These complaints are seldom successful, and so it is very important to have the employee document all requests for help to the union and document the union's response.

## *D. Determine if the Worker is an Employee or Independent Contractor*

Most workers are considered "employees", but some are considered "independent contractors", and some fall under an intermediate category sometimes referred to as "dependent contractors".

The distinction is important because independent contractors are generally not protected by the *Employment Standards Act*, the *Human Rights Code*, the *Canada Labour Code* or the *Canada Human Rights Act.* Additionally, independent contractors may not be entitled to reasonable notice if they are dismissed, as many employees are, although the law on this can be complex (see below).

Note that different statutes have different objectives and definitions, and as a result, "employee" and "independent contractor" may be interpreted differently under each statute. These interpretations are generally similar and sometimes follow the same tests; however, the *ESA* and particularly the *HRC* may define "employee" more broadly than the common law tests would – see **Sections IV.D.2**

**and IV.D.3**, below. As a result, those who would be categorized as dependent or independent contractors under the common law may sometimes be categorized as employees under the *HRC*.

## 1. Employees vs. Contractors – Common Law

When considering an employment-related claim, it will be important to determine if the claimant is or was an employee, dependent contractor, or an independent contractor.

This classification will determine which statute laws apply. It will also change what entitlements are available for breach of contract (including wrongful dismissal) at common law. For example, employees can make claims for severance pay in lieu of notice, a common-law entitlement that is not available to contractors.

In *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, the Supreme Court of Canada affirmed that the key to determining whether an individual is an employee or an independent contractor is the degree of control and dependency. The Court in *TCF Ventures Corp v. The Cambie Malone's Corporation*, 2016 BCSC 1521, noted that the 'dichotomy' between independent contractors and true employees is best practically assessed on a spectrum that exists between the two extremes; persons (both natural and unnatural) can find themselves on that spectrum and can bring an action for breach of an entitlement to notice of termination of their contracts, and the true nature of the relationship should be assessed on a case-by-case basis.

An employee is typically highly controlled by the employer: the employer might set the employee's hours, provide training, decide how work should be performed, require adherence to policies such as dress codes, and discipline the employee for misconduct. The employer would also typically make Canada Pension Plan (CPP) and Employment Insurance (EI) deductions, provide Worker's Compensation coverage, and pay for any business expenses and equipment. Employees tend to rely on their employment with a single employer or business as their primary or sole source of income.

An independent contractor is generally not significantly controlled by the employer: the independent contractor might set their own hours, determine how to perform the work, make their own payments for CPP, EI, and Worker's Compensation coverage, pay for their own business expenses and equipment, determine whether to hire their own employees or subcontractors to assist in performing the work, and invoice the employer for work performed. Independent contractors often contract with more than one business, and, as a result, are less dependent on a single business to earn their living.

A dependent contractor is an intermediate category, falling somewhere in the middle of the scale. A dependent contractor might set their own hours and hire their own employees but derive most of their income from a contract with one business, and thus be more dependent on that business to earn their living than an independent contractor would be.

None of the factors listed above can alone determine the categorization of the worker. One of the leading tests to apply to determine how to categorize the worker is set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983:

> […] The central question is whether the person who has been engaged to perform the services is performing them as a person in business on [their] 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 [their] own equipment, whether the worker hires [their] 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 [their] 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. Although this is one of the leading tests, it should be noted that there are other tests that courts would consider as well.

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

- The worker signs an agreement that identifies them 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 worker charges sales tax (the worker may or may not be in a lawful position to charge sales tax);
- The worker is incorporated (per *Marbry Distributors Limited v. Avrecan International Inc*, 1999 BCCA 172), However, the worker may wish to see an accountant or tax lawyer if they are an incorporated employee as they may not be entitled to all of the same tax benefits of other corporations;
- No deductions are taken from the worker's paycheque (this may simply mean that the employer is in violation of both the *ESA* and the *Income Tax Act*);
- The worker submits a "bill" for labour (it may be nothing more than a timecard); and
- The worker uses their own vehicle or provides their 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 the above factors will be considered, but are not on their own determinative.

In some cases, a worker may fall into the category of a dependent contractor. Those who fall under this intermediate category are entitled to reasonable notice. Some of the factors that are considered in determining whether a worker falls under this category are (*Marbry Distributors Limited v. Avrecan International Inc.*, 1999 BCCA 172):

- Duration or permanency of the relationship
- Degree of reliance and closeness of the relationship
- Degree of exclusivity

In the case of *Marbry*, the incorporated company, Marbry Ltd., distributed Avrecan's products almost exclusively for 11 years. Marbry Ltd. employed Mr. Marbry as well as one salesperson. Considering the above factors, the court found that the contractual relationship between Marbry Ltd. and Avrecan required reasonable notice to terminate. See also *Zupan v Vancouver (City)*, 2005 BCCA 9; *1193430 Ontario Inc v Boa-Franc Inc*, 2005 78 OR (3d) 81, 260 DLR (4th) 659; *Hillis Oil & Sales v Wynn's Canada*, [1986] 1 SCR 57.

The BCSC has adopted Alberta's ruling that dependent contractors are also entitled to reasonable notice (*Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 701). It appears there may also be a judicial shift away from the notion that dependant contractors could be entitled to a lesser degree of reasonable notice than a regular employee. In *Liebreich v. Farmers of North America*, 2019 BCSC 1074, the BCSC found there was no "principled basis to automatically give less notice to a dependent contractor than an employee".

For additional discussion of intermediate contracts, see "Intermediate Contracts of Employment", Stephen Schwartz, Employment Law Conference 2010, Paper 4.1, CLE BC.

For additional discussion of the tests used to determine whether a worker is an employee or an independent contractor, see the Canada Revenue Agency publication: *Employee or Self-Employed* (RC4110). This useful publication lists a number of indicators to help determine whether a worker is an employee or an independent contractor but note that it does not consider the category of a dependent contractor. It can be found at: www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-16e.pdf

Cases where the worker may be considered a dependent or independent contractor, rather than an employee, can be quite complex. Although this chapter includes some information regarding dependent and independent contractors, its focus is towards the rights and responsibilities of employees. Ensure that you thoroughly research case law if you have a case involving dependent or independent contractors.

If the worker appears to be a dependent or independent contractor, and the worker has a legal issue that may be covered by the *ESA* or the *HRC*, see **Sections IV.D.2** and **IV.D.3** below to determine whether these statutes' broader definitions of "employee" include the worker in question. If the worker appears to be an employee, continue to the next step of the checklist.

## 2. Employees v. Contractors – Employment Standards Act

The distinction between employees and independent contractors under the Employment Standards Act is quite similar to that under the common law. The following test for distinguishing between the employees and contractors should be used when pursuing a claim at the Employment Standards Branch.

"Employee" is defined in the *ESA*, s 1. The Employment Standards Branch has published a factsheet to assist in determining the difference between employees and independent contractors. It can be found at: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/employee-or-independent-contractor

The Employment Standards Interpretation Guidelines also offers a plain language explanation of how employees and contractors are distinguished. This can be found in section 1 of the Guidelines under the "Employee" definition tab. https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/definitions#esa

Additionally, Employment Standards Branch staff sometimes use Levitt's discussion of the control test, four-fold test, and integration or organization test in his book *The Law of Dismissal in Canada* (Aurora, Ont: Canada Law Book, 2003).

As mentioned, an independent contractor is not protected by the *ESA*. However, just because an employer calls someone an independent contractor does not make them one. Generally, at the Employment Standards Branch, the onus is on the company to show that someone is an independent contractor. If there is a disagreement, the Employment Standards Branch will use the common law tests. Generally, the longer and more continuous the relationship, and the less control the contractor has over their employment, the more likely it is to be considered an employment relationship.

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

## 3. Employees v. Contractors – Human Rights Code

The distinction between employees and independent contractors under the *Human Rights Code* should be used when pursuing a claim at the Human Rights Tribunal.

Employment is more broadly defined under the *HRC* compared to the common law and the *ESA*. It includes the relationships of master and servant, master and apprentice, and some principals and agents. In some cases, it may extend to include workers who would, under the common law, be defined as dependent or independent contractors. Additionally, some volunteering relationships could potentially be considered employment relationships, or alternately could be covered under s 8 of the *HRC* (provision of services).

The four factors that most strongly determine whether a worker is an "employee" for the purpose of the *HRC* are (*Ismail v British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079 at para 265):

- Whether the employer utilized, or gained some benefit, from the worker
- The amount of control exerted by the employer over the worker
- Whether the employer bore the burden of financial remuneration of the worker
- Whether the employer has the ability to remedy any discrimination

The Canadian Human Rights Tribunal also uses a broader definition of employment compared to the common law; see *Canadian Pacific Ltd v Canada (Human Rights Commission)*, [1991] 1 FC 571 (CA) at paras 9-15.

## 4. Employees v. Contractors – Workers Compensation

The Supreme Court of Canada recently upheld a British Columbia decision extending employer occupational health and safety obligations to contractors. See *West Fraser Mills Ltd. v. British Columbia (Workers Compensation Appeal Tribunal)* 2018 SCC 22. If a contractor has been injured in the workplace, explore whether employee occupational health and safety regulations may apply to the contractor.

# V. EMPLOYMENT ISSUES

This section is geared towards identifying the most common employment law issues for provincially regulated non-unionized employees (see **Section IV: Preliminary Matters** to determine whether the worker in question is a provincially regulated non-unionized employee). However, many issues will apply in a similar fashion to federally regulated employees, and some issues will also apply to unionized employees.

Generally, employment issues arise as a breach of the *Human Rights Code*, the *Employment Standards Act*, or an employment contract. Take note of which of these legal protections applies for the issue that you identify, and then see **Section VI: Remedies** to find out how to proceed.

## *A. Employment Standards Act Claims*

The *ESA* sets the minimum standards for various conditions of employment. The *ESA* applies to provincially regulated employees. The *ESA* addresses some of the most basic employee entitlements, such as wages, vacation pay, holiday pay, overtime, pregnancy and other leaves, and termination standards.

The *Canada Labour Code* sets these minimum standards for federally regulated employees. This section primarily discusses the *ESA*, but the *Canada Labour Code* has many similar provisions.

**Make sure the individual considering starting a claim is not exempt from the *ESA***. Be aware that certain professions and employees are exempt from the *ESA*, or parts of the *ESA*. Review the *Employment Standards Regulations* to determine if the employee is covered by the *ESA*. See *ES Regulation*, Part 7.

See **IV.C.5: Exceptions to the General Rule (Specialty Professions)** to determine whether the *ESA* applies to the employee in question. See **V.A.6.: Hours of Work and Overtime Pay** to determine if the employee is exempt from overtime.

### 1. Hiring Practices

An employer may not induce a person to become an employee or to make themselves 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. If this occurs, the employee could file a complaint at the Employment Standards Branch per section 8 of the *ESA*.

Apart from *ESA* entitlements, an employee who was hired because of false representations could potentially sue for the tort of misrepresentation. For more information about this tort, see *Queen v Cognos Inc*, [1993] 1 SCR 87.

### 2. Employment Agencies

An employment agency is any person or company that recruits employees for employers for a fee. All employment agencies must be licensed, and they must keep records. An employment agency may not receive any payment from a person seeking employment either for obtaining employment or for providing information respecting prospective employers. Any payment wrongfully received can be recovered under the *ESA*, s 11.

### 3. Talent Agencies

Several 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 *ES 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 twelve business days from receipt of payment if payment is made from outside of B.C.

Talent agencies can charge a maximum of 15 percent commission and must ensure that the employee receives at least provincial 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 section 127 of the Act gives the Lieutenant Governor in Council the power to regulate these agencies and, accordingly, the *ES Regulation* should be consulted for further information. Information on licensed talent agencies, including a list of talent agencies currently licensed in B.C., is available on the Employment Standards Branch website at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/licensing/licensing-talent-agencies

## 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 (*ES 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. The employer must have this written consent on file indicating that the parent or guardian knows where the child is working, the hours of the work, and the type of work. No person shall employ a child under the age of 12 years unless the employer has obtained permission from the Director of Employment Standards. In cases where permission from the Director is required, the Director may also set conditions of employment for the child. See *ES Regulation*, Part 7.1. For complete details of conditions, see www.labour.gov.bc.ca/esb or call 1-800-663-7867.

Common forms of allowable employment for those under 12 are found in the film and television industries. For more information on the employment of young people in the B.C. entertainment industry, consult the Employment Standards Branch fact sheet at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/hiring/young-people

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. Wages

### *a) Minimum Wage and The Entry-Level Wage*

As of June 1, 2023, the minimum wage in British Columbia is $16.75/hour. Minimum wage information from the Employment Standards Branch can be found at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/wages/minimum-wage

For liquor servers (and normally other positions that receive tips) the

employees must be paid at least minimum wage in addition to any tips or gratuities they receive, since tips and gratuities are not wages for *Employment Standards Act* purposes. However, note that tips may be considered in the assessment of an employee's entitlement to common law severance (refer to the common law severance paragraphs in this chapter).

Please note that there are other exceptions under Part 4 of the *ES Regulation*, which include live-in home support workers, resident caretakers, and farm workers. See ss 16–18 of the *ES Regulation*.

Federally regulated employees are entitled to the minimum wage of the province that they work in (*Canada Labour Code*, s 178).

## *b) Wage Claw-backs*

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. Employers who claw-back wages from commission workers must ensure that the amount of wages clawed back does not cause the worker to ultimately receive less than minimum wage.

## *c) Payment Of Wages*

**Timing**
Employers must pay wages at least 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 (*ES Regulation*, s 40). Wages, as defined in Part 1, include salaries, commissions, work incentives, 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, for instance, expenses, penalties, gratuities, or travel allowance. Travel time is considered time worked for which wages are payable, whereas commuting time is generally not.

**No Deductions for Business Costs**
An employer cannot require an employee to pay any of the employer's business costs, nor may they deduct any portion from the employee's wages.

**Wage Statements**
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 (*ESA*, s 27). Electronic statements can be provided instead under certain conditions (s 27(2)).

**Wage Payments on End of Employment**
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.

**Enforcement**

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 they are 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, Section 87 of the *ESA* provides 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] BCJ No 2524 (BCCA)).

If an employee has not been paid wages, and the limitation date under the *ESA* has passed, the employee may still be able to file a claim in Small Claims Court or the Civil Resolution Tribunal, as it is a term of any employment contract that the employee is paid for their labour. See **Chapter 20: Small Claims** and **Section VI.D: Limitation Periods**.

## *d) Allowable Deductions*

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

Allowable deductions include EI, CPP, income tax, charitable donations, maintenance order payments (such as spousal or child support), union dues, pensions, insurance (medical and dental), and payments to meet credit obligations. Benefits 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 from the employer the premiums the employee paid. However, the Branch is not able to collect costs incurred by an employee who believed they had benefits coverage (i.e., actual cost of dental work done). If an employee has suffered a loss such as this, they should consider whether they have a contractual agreement with the employer and whether it has been breached; if so, they may be able to recover the loss in Small Claims Court or the Civil Resolution Tribunal.

Section 22(4) of the *ESA* allows the employer to deduct money from the employee's paycheque to satisfy the employee's credit obligation (for example, if the employer has loaned the employee money, or if the employee has agreed to pay the employer a monthly sum for personal use of the employer's car). To do this, the employee must make a written assignment of wages to the employer.

## *e) Business Expenses Charged to An Employee*

An employer cannot require employees to pay any business costs – as either a deduction from their paycheque or out of their pockets or gratuities. 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 (i.e., 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.

## 6. Hours of Work and Overtime Pay

Under the *ESA*, employees are generally entitled to be paid at overtime rates if they work over 8 hours in a day or over 40 hours in one week. See the *ESA*, Part 4 which sets out overtime rates and entitlements.

### *a) Regular Hours and Rest Periods*

An employer must 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 who have written averaging agreements under s 37 (see the next section for more information on averaging agreements). 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 1.5 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 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) Overtime*

**Daily Overtime**: Unless they have an averaging agreement, an employee must be paid overtime wages if they work 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 their regular wage (s 40(2)). When determining the weekly overtime, employers must use only the first eight hours of each day worked (s 40(3)). This means that if an employee works six days out of the week, eight hours each day, eight of those hours must 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 to 40.

### *c) Overtime Banks*

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 be paid the overtime hours as wages or to take these hours as paid time off work at on dates agreed to by the employer and employee (s 42(3)). 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 doing so, 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)). If the employee requests the time bank be closed, or if the employment relationship is terminated, the employer must pay the employee for the hours in the time bank on the next payday.

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) Employees and Occupations Exempt from Overtime*

Part 7 of the *ES 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 Regulation for more details.

An employer may attempt to exclude an employee from overtime eligibility by calling the employee a "manager." The Employment Standards Branch uses the definition of "manager" as set forth in section (1) of the Regulation. It is the nature of the job, and not an employee's title, that makes that person a manager. Be aware that even though an employee is considered a manager (or falls within another overtime exemption), the employee is still entitled to be paid for all hours worked.

Entitlement to overtime pay may be affected by an employment contract. Review the manager's contract and see if there is a clause that deals with hours of work. If a manager or other exempt employee works more hours than set out in their employment contract, they may be entitled to additional pay for those hours at the worker's regular wage rate. If the employment contract specifies that an annual salary is in exchange for a set number of hours over 40, this may impact the employee's entitlement to be paid at an overtime rate.

If the manager does not have a contract, collect any evidence you can regarding an agreement on the manager's hours of work, and evidence on historical hours worked.

The *ESA* Interpretation Guidelines provides some helpful discussion on overtime, and can be found at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-4-section-35

### *e) Minimum Daily Hours*

When workers report for work as required by an employer, irrespective of whether they start to work, they are entitled to two hours of pay unless they are unfit for work or do not meet Occupational 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, they are

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).

### *f) Shift Work*

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

### *g) Variance*

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 Regulation, and whether any losses incurred by the employees are balanced by any gains. For more information, see:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-9-section-72

### *h) 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 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.

## 7. *Flexible Work Legislation*

Employees working for federally regulated companies now have the right under the *Canada Labour Code* to request flexible working arrangements. This includes requests to change number of hours worked, schedule of work, location of work, and other terms and conditions of employment. Similar provincial legislation has yet to be adopted in BC, but if an issue in relation to this topic is identified, be sure to check for any legislative updates.

## 8. Vacation and Vacation Pay

Employees are entitled to both a minimum amount of annual vacation and to vacation pay under Part 7 of the *ESA*. Vacation time and vacation pay are separate entitlements under the *ESA*. Employees are entitled to both vacation pay and actual time away from work.

Employment contracts must provide at least the minimum vacation and vacation pay entitlements as set out in the *ESA* (ss 57-60). Employees can be entitled to vacation and

vacation pay entitlements above the *ESA* minimums if agreed to in an employment contract.

### *a) Annual Vacations*

After each year worked, employees are entitled to an annual vacation of at least two weeks. After five years of employment, this entitlement increases to three weeks. Employees must take at least their minimum vacation time off work each year within the year or up to one year thereafter (s.57(2) *ESA*).

Annual vacation is without pay, but the employee should receive vacation pay either in advance of their vacation, or on each paycheck. See Vacation Pay explanation below.

### *b) Vacation Pay*

After 5 days of work, the employer is required to pay the employee 4% of their wages as vacation pay. After 5 years of employment, this increases to 6%.

Employers are required to bank vacation pay for an employee, and then pay the employee their banked vacation pay 7 days before the employee's annual vacation. Alternatively, with written consent, the employer can pay the vacation pay to the employee on each paycheck.
If the employee is terminated, the employer is required to pay out any vacation pay owing to the employee. Based on the timing of when vacation pay is earned and payable, this can result in some circumstances where employees will have claims for years of vacation pay owing.

For a detailed explanation of vacation and vacation pay entitlement and calculation examples, see Part 7 of the *ESA*, and the *ESA* Interpretation Guidelines found at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-7-section-58

## 9. Statutory Holidays and Statutory Holiday Pay

Employees are entitled to ten paid holidays a year: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, B.C. Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day (*ESA*, Part 5). A recent amendment to the *Employment Standards Act* added the National Day for Truth and Reconciliation as a statutory holiday.

Boxing Day, Easter Sunday, and Easter Monday are not statutory holidays in B.C. Federal employees are entitled to Boxing Day and National Day for Truth and Reconciliation, but not to B.C. Day or Family Day.

For a provincially regulated employee to be entitled to a statutory holiday under the *Employment Standards Act*, the employee must have been employed by the employer for at least 30 calendar days before the statutory holiday and must either have worked under an averaging agreement within this period or have worked or earned wages for 15 of these 30 calendar days.

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. 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.

## 10. Leaves of Absence

Part 6 of the *ESA* regulates leaves of absence. Again, Part 7 of the *ES Regulation* should be consulted to determine if an employee 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 they received while working. The employment is deemed to be continuous for the purposes of calculating annual vacation entitlement and any pension, medical, or other plans 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 they are 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 the 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 Employment Standards can order that the employee be reinstated (s 79). However, this almost never occurs (see **Section VI: 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. Termination during a leave may also give rise to a cause of action before the Human Rights Tribunal.

If an employee was dismissed due to a leave of absence but the limitation date to file a claim with the Employment Standards Branch has passed, consider whether the employee may have a Human Rights Code claim or wrongful dismissal claim; see **section V.C: Termination of Employment**.

**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*

Pregnancy leave is protected under the *ESA* and the *HRC*. An employee dismissed while on pregnancy leave may also be entitled to a larger common law severance.

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 61 weeks of parental leave where pregnancy leave was taken, or 62 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. Birth fathers and adoptive parents are entitled to up to 62 weeks of parental leave. 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. Pregnancy leave may commence up to 13 weeks prior to the estimated date of birth, and no later than the actual birth date of the child; it ends no later than 17 weeks after the leave begins. 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. Parental leave can begin at any time within 78 weeks after the birth or adoption of the child and need not conclude within that period; however, it must all be taken in one block.

Pregnancy leave can be extended by six weeks with a doctor's certificate outlining reasons related to the birth or termination. 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 they request 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 they 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 SCR 1219, https://canlii.ca/t/1ft72, should be reviewed before giving advice to individuals 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.

If an employee has a dispute with their employer regarding pregnancy or parental leave, they may also be able to file a complaint for discrimination based on sex or family status with the Human Rights Tribunal. Additionally, where an employer offers compensation benefits for health conditions and then excludes pregnancy as a ground for claiming compensation, the employer may have acted in a discriminatory fashion.

If an employee has been terminated while on leave, in some cases they may be able to make a claim for wrongful dismissal in Small Claims Court or the Civil Resolution Tribunal. The employee should at minimum be entitled to a regular severance. Consider whether the circumstances of dismissal in breach of protected leave provisions might be grounds for aggravated or punitive

damages in civil court. See Section **VI: Remedies** for further details. If there are anti-discrimination provisions in an employment contract, employees may have the possibility of a claim for failure to enforce such clauses (see *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63).

An employer can terminate the employment of a pregnant person if the termination is part of legitimate downsizing (*ESA*, s 54).

### *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). "Immediate family" is defined in the *ESA* as "the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with an employee as a member of the employee's family."

### *d) Compassionate Care Leave*

The *ESA* was amended to allow an employee to take up to 27 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 continuous. An employer must not terminate the employee 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) Reservists' Leave*

Under certain circumstances, the *ESA* now allows unpaid leave for reservists in the Canadian Armed Forces (*ESA*, s 52.2).

### *g) Leave Respecting Disappearance or Death of a Child*

An employee is entitled to up to 52 weeks of unpaid leave relating to the disappearance of a child, and up to 104 weeks relating to the death of a child (see *ESA s. 52.3 and 52.4)*

### *h) Leave Respecting Domestic or Sexual Violence*

An employee is entitled to unpaid leave of up to 10 days, plus an additional 15 weeks, if required because of domestic or sexual violence to either the employee or an eligible person (i.e., a child under the employee's care) (see *ESA s. 52.5)*

### *i) Critical Illness or Injury Leave*

An employee is entitled to up to 36 weeks of unpaid leave to provide care to a critically ill family member under 19 years of age, or up to 16 weeks of unpaid leave to provide care for a critically ill family member who is over 19 (see *ESA s. 52.11).*

### *j) Illness or Injury Leave*

After 90 consecutive days of employment, an employee is entitled to 5 days of paid sick leave and 3 days of unpaid sick leave per calendar year (see *ESA s. 49.1*).

### *k) Covid-19 Related Leave*

An employee is entitled to unpaid leave for Covid-19 related reasons as defined in section 52.12 of the *ESA,* for as long as the circumstances giving rise to the leave apply to the employee (see *ESA s. 52.12).* An employee is entitled to Covid-19 related paid leave in accordance with section 52.121 of the *ESA* and leave for Covid-19 vaccination in accordance with section 52.13 of the *ESA.* See section 11 for more details on Covid-19 related *ESA* issues.

## 11. Professions with Special Provisions and Limited Exemptions under the Employment Standards Act

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. 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.* Check the legislation directly, and any appropriate case law on the matter.

### *a) Independent Contractors*

See **Section IV.D: Determine if the Worker is an Employee or Independent Contractor** to determine whether the worker in question is an employee or an independent contractor. The *ESA* applies only to employees.

### *b) Commissioned Salespeople*

Commissioned salespeople are entitled to most of the protection the *ESA* has to offer. Look carefully at *ES 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) Farm Labourers and Domestic Workers*

The *ESA* has special provisions for farm and domestic labourers. See the Act and Regulation 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 V.A.6(h) 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 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 to collect EI from their paycheques if it is not reported**.**

**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 which are 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 workers to enter Canada. The program requires the equivalent of a Grade 12 education (equivalent to second-year university in many countries), six months of formal training in the caregiving field or one year of full-time paid work experience, and good knowledge of English or French. Further information is available from the West Coast Domestic Workers' Association (see **Section II.C: Referrals**).

### *d) High Technology Professionals*

The *ES 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 *ES Regulation* for a more detailed description, and especially if the employee deals with computers, information service, and scientific or technological endeavours.

Not all employees classified as high-tech professionals by their employer fit the definition, and, as a result, may be entitled to overtime. The BC Employment Standards Branch awarded overtime pay to a group of digital animators, finding that they did not meet the overtime-exempt definition of high-tech professionals (see ER#426308.

### *e) Silviculture (Reforestation) Workers*

Special rules apply to workers in the reforestation and related industries (as defined in *ES Regulation* s 1(1)). 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 *ES 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. See *ES Regulation* s 37.9.

### *f) Professionals*

The *ESA* does not apply to architects, accountants, lawyers, chiropractors, dentists, engineers, insurance agents and adjusters, land surveyors, doctors, optometrists, real estate agents, securities advisers, veterinarians, or professional foresters (*ES Regulation*, s 31).

### *g) Other exceptions to the ESA*

There are additional exceptions and variances to the *ESA* set out in the *ES Regulation*, Part 7. Some of the professions for which there are exceptions or variances to the *ESA* include:

- Election workers
- Fishers
- Taxi drivers
- Logging truck drivers
- Newspaper carriers
- Oil and gas field workers
- Loggers working in the Interior
- Municipal police recruits
- Aquaculture – fin fish workers
- Miners
- Foster care providers

## *B. Covid-19*

Due to the ongoing effects of Covid-19, aspects of employment law and the *Employment Standards Act* have been affected. These changes may evolve or be mitigated depending on future events. Be sure to review the most current jurisprudence if Covid-19 is a factor in the case.

## 1. Common Law and Covid-19

### *a) Mitigation*

Courts may consider Covid 19 as an economic factor arising post termination which impacts the availability of comparable employment and may consider that in the analysis of whether an employee took reasonable steps to mitigate damages. See *Mohammed v. Dexterra Integrated Facilities Management*, 2020 BCSC 2008.

### *b) Timing for Assessing Reasonable Notice*

In *Yee v. Hudson's Bay Company,* 2021 ONSC 387, https://canlii.ca/t/jct10, the Ontario Supreme Court confirmed that the length of reasonable notice is

assessed based on circumstances at the time of termination. The court did not increase the reasonable notice period for an employee who was terminated prior to the onset of the covid-19 pandemic, but argued the pandemic made it difficult for him to find new work.

In *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, the employee was terminated after the start of the pandemic. The Ontario Supreme Court acknowledged the pandemic impacted the plaintiff's job search, but it was unclear how or whether this impacted the notice period. The Court cautioned that reasonable notice remained to be assessed as of the time of termination. Employees will likely need to provide specific evidence that the pandemic impacted the availability of alternative employment, to successfully argue for an increased notice period because of the pandemic.

### *c) New Position Offered on Return from Layoff and Constructive Dismissal*

In *Mack v. Vancouver Free Press Publishing Corp*., 2021 BCCRT 370, the CRT found that an employee who was laid off during the pandemic and was offered to return to a significantly different position, did not resign by his rejection of the call back, but was in fact constructively dismissed, and entitled to a severance.

### *d) Canadian Emergency Response Benefit ("CERB") and Damages*

There is evolving jurisprudence on whether CERB benefits received by an employee should be deducted from an employee's damages for wrongful dismissal. A few recent cases support the proposition that CERB benefits should not be deducted from an employee's severance award (see Slater v. Halifax Herald Limited, 2021 NSSC 210, and Fogelman v. IFG, 2021 ONSC 4042). However, as this question is relatively new and is evolving, be sure to review the most current state of the law on this issue.

### *e) COVID-19 and Vaccine Passports*

Courts in British Columbia have generally dismissed constitutional challenges and civil suits brought against the province in relation to the vaccine passport, restrictions, and health orders arising from the pandemic. For example, see the following decisions:

In *Kassian v. British Columbia* 2022 BCSC 1603, three petitioners challenged the constitutionality of the vaccine passport provisions. Specifically, they argued that the medical exemption regime discriminated against persons with disabilities, contrary to section 15 of the *Charter*, and is unjustly coercive, contrary to section 7 of the *Charter*. The BCSC explained that the petitioners did not exhaust the remedies available to them under the legislative scheme; specifically, there was no evidence that the petitioners pursued the necessary medical opinions to support exemption requests from the vaccine passport. As such, the court declined to address the petitioner's *Charter* claims.

In *Eliason v. British Columbia (Attorney General)*, 2022 BCSC 1604, the petitioners sought judicial review realted certain public health orders which mandated vaccination as a prerequisite for entry to certain businesses and events. The petitioners did not challenge the unconstitutionality of the public health orders themselves; rather, they alleged that it was unconstitutional for

the government to provide "an effective, comprehensive, and accessible regime for medical exemptions in the Orders provisions" (para. 37). The Courts declined to consider the petitioners argument in respect to a Charter violation, on the grounds that two of the petitioners had alternate remedies available to them (in this case, vaccine exemption requests).

For further examples, see *Maddock v. British Columbia*, 2022 BCSC 1605 and *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2022 BCSC 1606

## *C. The ESA and Covid-19*

### 1. Covid-19 Related Leaves under the ESA

The *Employment Standards Act* has introduced several amendments related to Covid-19. They can be found at:
https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96113_01#section52.121

Section 52.12 of the *ESA* allows eligible employees to take unpaid leave if an employee has contracted Covid-19 or has been exposed to it, until the employee is no longer suffering the circumstance which caused them to take the leave. No note from a medical practitioner is not to be provided for this leave. Additionally, those who are required to quarantine or self-isolate under health agency guidelines, who are directed by the employer not to work, who are required to care for a child because of school or daycare closure, or who are trapped outside of BC as a result of travel restrictions (among other reasons listed in the amendment) are provided protection under the amendment. If an employer dismisses an employer who is on an unpaid Covid-19 leave, there can be a claim of a breach of the *Employment Standards Act* (see *ESA s. 52.12).* See full section for further details.

Section 52.121 of the *ESA* provided for an amount to be paid to employees taking paid leave due to Covid-19, but the eligibility period for this section ended on December 31, 2021, and this section has been repealed.

### 2. Covid-19 and Section 65 (1) (d) Impossible to Perform

Section 65 (1) (d) says that an employee is not entitled to *ESA* notice or severance if the employee is employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act.

The Employment Standards Interpretation Guidelines have been updated several times, in relation to the criteria the Branch will consider in the analysis of whether Covid-19 created an employment contract that was impossible to perform due to an unforeseeable event. See further information at:
https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-8-section-65

### 3. Covid-19 – Temporary Layoffs and ESA Amendment 2020

#### *a) Layoffs*

Under the *Employment Standards Act*, employers are only permitted to place employees on temporary layoff if there is a right to do so in the employment

contract, layoffs are customary in the industry, or the employee consents. In normal circumstances, temporary layoffs can be for a maximum of 13 weeks, at which point if the employee is not recalled the layoff becomes a termination of employment and triggers a severance obligation.

An exclusion was temporarily granted under the *ESA* for Covid-19 related temporary layoffs, extending the maximum layoff period from 13 to 24 weeks. This extension has expired. However, given the uncertainty surrounding future legislative responses to ongoing pandemic issues, be sure to check current layoff periods under the *ESA* if a layoff is in issue.

### *b) Unforeseeable Event Considerations*

Section 65 (d) states that termination pay does not apply if the employee is "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act". Employers may advance the argument that Covid-19 is an unforeseeable event which renders the employment contract impossible to perform and use that as an argument to avoid paying employees termination pay in lieu of notice.

The Employment Standards Branch interpretation guidelines have suggested that this clause may apply in some circumstances, as follows:

**Covid-19**

> If a business closure or staffing reduction is directly related to Covid-19 and there is no way for employees to perform work in a different way (for example, working from home) the exception may apply to exclude employees from receiving compensation for length of service and/or group termination pay.
>
> This exception is not automatic in all situations during the pandemic. If an employer terminates an employee for reasons that are not directly related to Covid-19 or if the employee's work could still be done (perhaps in a different way, such as working from home) the exception would not apply. Decisions on whether this exception applies are made by the Director on a case-by-case basis.

However, the threshold for impossible to perform is very high (see BC EST # D105/08), and Employment Standards interpretation guidelines, while potentially indicative of results, are not binding precedent in an Employment Standards claim.

As a result, be sure to review new Employment Standards decisions to see how this provision has been interpreted in relation to Covid-19.

## *D. Breach of Employment Contract Claims*

### 1. Severance Claims

The most common breach of an employee's contract (whether the terms of that contract are oral or in writing or a combination of the two) is a breach of a term that the employer will provide reasonable notice of dismissal.

When an employee is fired without being provided reasonable notice of dismissal or being paid money in lieu of reasonable notice (i.e., severance), the employee may have a breach of contract claim. The failure to provide reasonable notice (or pay in lieu) is also referred to as a wrongful dismissal. See **Section V.C. Termination of Employment**.

Courts may rule favorably for employees in costs awards where an employee is forced to sue to obtain a reasonable severance. In *Janmohamed v Dr . Zia Medicine PC* 2022 ONSC 6561, the parties could not agree on a costs valuation after the plaintiff accepted the defendant's Rule 49 offer. The Court awarded the plaintiff a significant costs award on the basis that the employers should not be incentivized to offer employees insufficient severance, forcing employees to sue to obtain what is justly due.

### 2. Constructive Dismissal Claims

If an employer has unilaterally changed a fundamental term of the employee's employment in a significant way, the employee may have been "constructively dismissed" and may be entitled to damages. See **Section V.C. Termination of Employment.** Examples of unilateral significant changes to fundamental terms of employment include significant changes to the type of work done by an employee, significant decreases to the employee's rate of pay, or significant changes to other working conditions.

In a cautionary tale for employees, the Alberta Court of Appeal ruled in *Kosteckyj v Paramount Resources Ltd*, 2022 ABCA 230 that 10 business days were enough for an employee to decide if a change imposed on him was a constructive dismissal. The employee's delay of more than 10 days in objecting to the change was a factor the ABCA used in overturning a constructive dismissal finding at trial. Employees considering making a constructive dismissal should be cautious not to delay action when a significant change is imposed on their terms of employment.

### 3. Bonus Clause Claims

If an employer failed to pay a previously agreed upon bonus to an employee, it may constitute a breach of the terms of an employment contract. In *Matthews v. Ocean Nutrition Ltd.*, 2020 SCC 26, https://canlii.ca/t/jb004, the Supreme Court confirmed that unless a bonus plan "unambiguously" disentitles the employee to damages for the lost bonus, the employee will receive damages. The Court set out two questions needed to be answered to determine whether bonus and other payments would be included as part of an employee's severance. First, would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right? See also *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640.

### 4. Other Contractual Claims

There are also situations during the employment relationship where an employer can breach other terms of an employment contract (other than the notice requirement).

### 5. Remedy: Court Claim

Claims for breach of contract are addressed through civil court claims, either at Provincial Court or Supreme Court depending on the potential value of the case.

Suing an employer while still on working notice is risky, as a court can find that suing an employer can amount to just cause for dismissal. Just cause means that the employer had justification to dismiss the employee without notice or severance. See **Section V.C.5 Just Cause Dismissal—General** for more information.

There is conflicting case law on whether an employer would have just cause to dismiss an employee who sues the employer while still employed. As a result, prior to suing an employer while the claimant employee is still working or on a period of notice, claimants should carefully research the law and compare the current law to the employee's particular circumstances.

Sometimes a written contract, or certain provisions within it (such as a termination clause that limits an employee's right to a severance) will be invalid. See **Section V.2 Employment Contract Considerations** to determine whether the contract or any of its provisions are invalid.

## *E. Termination of Employment*

At common law, employers can dismiss an employee at any time without cause, on provision of reasonable advance notice or pay in lieu thereof. In rare circumstances, employers can dismiss an employee for just cause, if the employee is guilty of serious misconduct.

In practice, dismissals are normally without cause. In without cause dismissal scenarios, employees are entitled to notice of dismissal, or pay in lieu of such notice, under both the *ESA* and common law (unless the employee's contract validly restricts the employee to only the *ESA* minimum severance).

Non-unionized, federally regulated employees, as covered by the CLC, are subject to different laws concerning dismissal without cause. See sections 240-246 of the CLC. Also see *Wilson v Atomic Energy of Canada*, 2016 SCC 29.

The *ESA* (or the CLC for federally regulated employees) provides statutory minimums for notice, or pay in lieu, if an employee is dismissed from their employment. The maximum an employee can receive under the *ESA* is 8 weeks of notice or pay.

In addition, employees are entitled to reasonable notice of dismissal at common law or pay in lieu of such reasonable notice. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The entitlement to notice at common law is a contractual entitlement. All employees have an employment contract, even if there is no written contract. Employment contracts can be written, oral, or a combination of both written and oral terms.

By default, there is an implied term in indefinite hire employment contracts (either oral or written contracts) that employers will provide employees with reasonable notice of termination if they dismiss the employee without cause.

Written employment contracts may contain a termination provision that sets out how much notice (or pay in lieu of notice) the employee will receive if the employer terminates the employee without cause. To rebut the presumption of reasonable notice and limit an employee's common law severance entitlement, termination clauses in employment contracts must be clear, unambiguous, and meet at least the minimum *ESA* entitlements.

If the employer fails to give the employee reasonable notice or pay in lieu, this will constitute a breach of the employment contract by the employer, and the employee could sue the employer for severance in Small Claims Court, the Civil Resolution Tribunal, or BC Supreme Court. This is commonly called a wrongful dismissal claim.

Generally, the notice periods recognized at common law tend to be larger awards than the statutory minimum.

There are many potential issues involved if an employee is terminated. The below checklist and the information in this section of the chapter merely provide a starting point for further legal research.

## 1. Termination of Employment Checklist

☑ This section applies to both provincially and federally regulated non-unionized employees, dependent contractors, and independent contractors. It is necessary to determine which category the worker falls under. See **Section IV: Preliminary Matters** to determine this.

☑ Determine whether the worker has an indefinite or fixed-term contract of employment. See **Section V.C.2(a) Successive or Expired Fixed Term Contracts** for details, as some contracts that appear to be for a fixed term may be deemed to be of indefinite duration by the courts, particularly when the fixed-term contract is renewed year after year.

- If the contract is for an indefinite term, or if the worker was dismissed partway through a fixed-term contract, go to the next step of the checklist.
- If the worker was dismissed at the end of a fixed-term contract of employment, then their contract has simply been completed and there is generally no further entitlement to severance pay (unless their contract specifies otherwise).

☑ Determine whether the worker was dismissed or if they resigned. Sometimes a worker may have been forced to resign or may have had their pay or working conditions changed significantly, a practice known as constructive dismissal. See **Section V.C. Termination of Employment** to determine whether your situation would be considered a dismissal, constructive dismissal or resignation.

- If the worker was dismissed or constructively dismissed, continue to the next step of the checklist.
- If the worker voluntarily resigned, they are generally not entitled to severance pay (unless their contract specifies otherwise).

☑ If it appears that the contract may have become impossible to perform, determine whether there has been "frustration" of the contract; see **Section V.C.16: Frustration of Contract**. Note that this is rare, and layoffs usually do not fall into this category.

- If the contract has been frustrated, there is generally no entitlement to severance pay. Otherwise, continue to the next step of the checklist.

☑ Determine whether the terms of the contract specify the amount or length of notice or severance pay the worker will receive if dismissed.

- If this amount is specified, determine whether that provision of the contract is valid; see **Section V.C(d) and (c): Invalid Contracts**. If the employment contract is valid, it will determine the amount of severance they are entitled to.
- If this amount is not specified, or if the contract or that provision of the contract is invalid, then:
  - Employees, dependent contractors, and independent contractors who are dismissed partway through a fixed-term contract may be entitled to damages for breach of the contract; see **Section V.C.4: Damages at Common Law—Fixed Term Contracts**. Use these damages in place of those damages regarding "reasonable notice" for the rest of the checklist.
  - Employees and dependent contractors who are employed for an indefinite term will generally be entitled to "reasonable notice"; go to the next step of the checklist.
  - For independent contractors with an indefinite contract, the rules are more complex; see the cases listed in **Section III.C.1** as a starting point for research as to whether the contractor may be entitled to reasonable notice. If the contractor is entitled to reasonable notice, continue to the next step.

☑ Determine whether there may be just cause for dismissal; see **Section V.C.5: Just Cause Dismissal—General**. Note that it is often very difficult for an employer to prove that there is just cause. If there may be just cause, consider whether the employee has a potential defence; see **Section V.C.6: Defences to Just Cause Arguments**.

- If you think that the employer can prove in court that they truly had just cause for dismissing the worker, and the worker does not have a defence, the worker will generally not be entitled to severance pay.
- If there is a reasonable chance that the employer did not have just cause for dismissal, or if the employer may not be able to prove that there was just cause, continue to the next step of the checklist.

☑ For those workers entitled to reasonable notice, determine an approximate length for the worker's reasonable notice period; see **Section V.C.4(d) Calculating Reasonable Notice**. Note that it is difficult to predict how much a particular worker will receive if the case goes to trial, but case law can give an approximate range. Once this is done, calculate the damages the employee would be entitled to for the reasonable notice period. This generally includes the salary and benefits that the employee would have received if they had continued to be employed during the reasonable notice period.

- If the worker was given severance pay to cover their lost wages and benefits for the length of the reasonable notice period or was allowed to continue working for the employer for that period, they will generally not be entitled to anything further.
- If the worker was given less working notice or severance pay than they are entitled to through their reasonable notice period, they may be able to claim the remainder in court; continue to the next step of the checklist.

☑ Determine whether the worker has mitigated their damages. Note that if the worker has mitigated their damages during the notice period, for example by finding a new job, they will have their severance award reduced by the amount of money they earn during the notice period. If the worker does not make reasonable attempts to find a new job, they may have their severance award reduced. See **Section V.C.14: Duty to Mitigate**.

☑ Determine whether the worker may be entitled to aggravated and/or punitive damages. If so, estimate how much they may be entitled to, and determine whether the worker has a strong case for these types of damages. See **Section V.C.13: Aggravated and Punitive Damages**.

☑ If the worker was an employee, determine what length of notice the employee is entitled to under the *Employment Standards Act* (or the *Canada Labour Code* for federally regulated employees). Note that if at least 50 employees were terminated at once, the employee is entitled to additional notice under the *ESA*; see **Section V.C.4(b): Group Terminations**. In the rare case that the employee is entitled to more money under the *ESA* than through reasonable notice, and the employee was dismissed in the past 6 months, consider filing a claim with the Employment Standards Branch. Otherwise, continue to the next step of the checklist.

☑ If the worker was an employee and was dismissed for a discriminatory reason, determine whether they have a claim with the BC Human Rights Tribunal (or the Canada Human Rights Tribunal for federally regulated employees); see **Chapter 6: Human Rights**. If they do have a potential claim, estimate how much the employee would be able to claim for (i) lost wages (minus any amount from the duty to mitigate), and (ii) injury to dignity, feelings, and self-respect. Compare this to the amount the employee could claim for (i) reasonable notice (minus any amount from the duty to mitigate), and (ii) aggravated and punitive damages. If the employee is likely to obtain more money at the Human Rights Tribunal, and has been dismissed within the past 12 months, consider filing a human rights claim. Keep in mind that it is possible to file both a civil claim and Human Rights claim for the same dismissal, but double wage loss recovery is not possible, and one claim may be deferred pending resolution of the other. See **Chapter 6: Human Rights**. Otherwise, continue to the next step of the checklist.

☑ If the potential award for (i) reasonable notice and (ii) aggravated and punitive damages is under $35,000, as of June 1, 2017, consider filing a claim in Small Claims Court; see **Chapter 20: Small Claims Court**. If the worker has a strong case for an award significantly greater than $35,000, the worker should strongly consider contacting an employment lawyer to discuss proceeding with a claim in BC Supreme Court. If the potential award is only slightly over $35,000, the employee may wish to file in Small Claims Court, and waive their entitlement to any amount over $35,000, as proceeding in Small Claims Court can be less costly than proceeding in BC Supreme Court.

## 2. Employment Contract Considerations

As mentioned, the employer-employee relationship is contractual. Every employee has an employment contract, even if a written document does not exist.

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 there is an implied term that either party may terminate the contract upon giving "reasonable notice". The implied term to give reasonable notice can be overridden by an express notice provision limiting the amount of notice the employer is obligated to give the employee. Accordingly, the courts will assume that an employee should receive "reasonable notice" prior to termination unless the contract explicitly says something different. If there is an express notice provision in the employment contract, then that clause is binding, unless there is a reason for it to be invalid (see **Section V.C.2(c) and (d) Invalid Contracts**, below).

If reasonable notice is not given, then the contract is breached, and courts can award damages in the form of compensation that would have been paid during that reasonable

notice period. However, if there is just cause for dismissing an employee, no notice need be given and so there is no breach of the contract from which damages can arise.

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, but not liability for past wages, etc.

### *a) Successive or Expired Fixed Term Contracts*

If an employee had successive fixed-term contracts, the courts may find there is, in fact, an indefinite term of employment; see *Ceccol v Ontario Gymnastic Federation* (2001), 55 OR (3d) 614.

If there was a fixed-term contract and the employee continued to work after the term's expiration, the contract then becomes an indefinite contract. If the employee had an indefinite contract, but then signed a fixed-term contract, the new contract may not be valid; **see Section V.C.2(c) and (d) Invalid Contracts**, below.

### *b) Consideration*

Once a job offer is made and accepted, a contract is in place (though as discussed above, it may be unwritten). To vary the terms of the contract after it is in place, there must normally be fresh consideration flowing from each party to the other. Consideration in contract law is the benefit one party receives from another as a result of entering into a contract with another party. This means that to change an existing contract, the new contract must contain a new benefit for both the employer and the employee. Because of this, an entire written contract might be invalid if the contract was imposed on the employee after they had already accepted the job offer: the employee would already have a contract, and the written contract would need to have some new benefit, or "fresh consideration", for the employee. Compare the signature dates on the written contract to the actual start dates to determine if there is an argument that the contract is unenforceable for lack of consideration.

The case of *Rosas v. Toca*, 2018 BCCA 191, while not an employment law case, may present an arguments for employers that contract variation should be enforceable, even if there is no valid consideration. However, in obiter in the case of *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25, https://canlii.ca/t/j4tb5, the BCCA commented that *Rosas v. Toca* may not apply in the employment context or act to "change the authority of *Singh* in the nuanced world of employer and employee contractual relationships". Moreover, the recent case of *Matijczak v. Homewood Health Inc.*, 2021 BCSC 1658, has affirmed the requirement for consideration. Taking into account the inequality of bargaining power in an employment relationship and the vulnerability of an employee relative to their employer, "fresh consideration" is still required in order for a contract variation to be valid in the employment context. Taken together, the BCSC decision in *Matijczak* and the comment from the BCCA in *Quach* are likely to affirm the requirement for fresh consideration, differentiating the employment context from that of contract law, generally.

### *c) Invalid Contracts – Vagueness or Ambiguity*

Vague or ambiguous contract terms may be unenforceable. Courts will examine the wording of the contract terms to determine whether a clause is enforceable for vagueness or ambiguity. If a clause is not enforceable, courts

may rule on the term of agreement based on the conduct of the employer and employee and pre-contractual communication between the parties. See *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252.

### *d) Employment Standards Severance Clauses and Enforceability*

Many employers enter written employment contracts that purport to allow the employer to dismiss the employee without cause by providing only the *Employment Standards Act* minimum severance. These clauses will often be enforceable. However, some arguments are available to attempt to have these *ESA* severance termination clauses unenforceable.

### *e) Termination Clause Does Not Meet ESA Minimums*

Any term of the written contract that does not meet the minimum standards set out by the *Employment Standards Act* (for provincially regulated employees) or the *Canada Labour Code* (for federally regulated employees) is invalid.

A contractual termination clause is not enforceable if, at any time, the clause would provide the employee with less than their entitlement under the *ESA*. See *Shore v Ladner Downs*, [1998] 160 DLR (4th) 76.

If a term of the contract is invalid, then the employee will likely receive whatever the common law provides instead of what the contract said.

For example, a termination clause might say the employee will receive 30 days' notice if they are being terminated without cause. Under the *ESA*, the employee could receive up to 8 weeks' notice. The contractual termination clause would be invalid because it purports to provide the employee with less than the minimum statutory entitlement.

In this example, the employee would be entitled to reasonable notice under common law. This can be greatly beneficial for the employee in cases where the common law provisions, such as the reasonable notice period, are better than the contractual provisions.

Note that in assessing whether a term of a contract breaches the *ESA*, one must consider the maximum entitlement that an employee could ever receive under the *ESA* at any point in time, rather than their current entitlement.

In the previous example, it is irrelevant whether the employee has worked for the employer long enough to be entitled to more than 30 days of notice under the *ESA*.

However, this principle may have been qualified with respect to severance clauses and fixed-term contracts (see *Miller v Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, (upheld on appeal); *Rogers v Tourism British Columbia*, 2010 BCSC 1562).

In *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, the ONCA ruled that if a section of a termination provision violated the *ESA* (even if distinct and separate from other sections) the entire termination provision will be void. The court refused to apply the general severability clause on the basis that once the clause is void, there is nothing to sever. The Court identified policy reasons for this decision, highlighting that even if an employer does not rely on an illegal termination provision, it may still gain the benefit of that

illegal clause, as employees "may incorrectly believe they must behave in accordance with these unenforceable provisions."

As this area of employment law continues to be litigated and develop, one should review the most recent state of the law prior to advising clients on potential enforceability of a severance provision.

### *f) No Severance Ceiling Set out in Termination Clause*

If a contractual *ESA* severance termination clause does not set out that this severance is the maximum an employee will receive, the employee may not be limited to such a severance.

In *Holm v AGAT Laboratories Ltd*, 2018 ABCA 23, the Alberta Court of Appeal looked at whether a termination clause was sufficient to limit a constructively dismissed employee's entitlement to severance. The termination clause provided for dismissal in accordance with the Alberta *Employment Standards Code* but did not clearly state that this entitlement was a ceiling. As a result, the clause was ambiguous and did not act to limit the employee's severance entitlement.

In *Movati Athletic (Group) Inc v Bergeron*, 2018 ONSC 7258, the court found a termination clause that allowed the employer to terminate employment without cause at any time upon providing notice or pay in lieu of notice pursuant to Ontario Employment Standards was also not sufficient to limit the employee's severance, as it did not clearly state that the minimum statutory severance was a cap.

### *g) Duty to Perform Contracts in Good Faith*

There exists a duty of honest performance of contractual obligations, including in the termination of contracts. See *C.M. Callow Inc. v. Zolinger*, 2020 SCC 45. There is also a duty to exercise contractual discretion in good faith, which operates in every contract. See *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7. These general concepts will likely have applicability in the employment context.

### *h) General Contract Construction Rules and Unconscionability*

Other general rules regarding contracts apply and may also invalidate the contract. Examples of these are duress, undue influence, and unconscionability, but these occur less frequently.

Unfair agreements may be set aside if they resulted from an inequality of bargaining power, based on the principle of unconscionability. The purpose is to protect those (i.e., employees) who are vulnerable in the contracting process. In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, the Court adopted a less stringent test for unconscionability and for setting aside contracts that were the result of an inequality of bargaining power. The SCC found that "although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party."

If an employment contract was entered into because of an inequality of bargaining power, even if the employer did not knowingly try to take advantage of the employee, one may wish to consider arguing the contract is unconscionable to relieve employees of onerous contract restrictions.

Under certain circumstances, employers and employees cannot use the above rules to invalidate a contract for their own benefit. If a new contract is imposed in which all the benefit is to the employee, the employee cannot have the contract invalidated for lack of fresh consideration to the employer to avoid a severance provision or other provision of the contract. Additionally, the employer cannot back out of a contract that only gave benefits to the employee, due to lack of fresh consideration to the employer.

## 3. Without Cause vs. Just Cause Dismissal

Employers can dismiss an employee in one of two ways:

a) Without cause, and on provision of reasonable notice or pay in lieu; or
b) For just cause.

Without cause dismissals and just cause dismissal are both express dismissals. An employer tells the employee they are being dismissed, generally by having a meeting and providing the employee with a letter of dismissal.

## 4. Without Cause Dismissal and Reasonable Notice

If an employee is dismissed without cause, the employee is entitled to reasonable notice of dismissal, or pay in lieu, under both statute and common law.

If a non-unionized, federally regulated employee has been dismissed without cause, refer to sections 240-246 of the CLC; see *Wilson v Atomic Energy of Canada*, 2016 SCC 29.

### *a) Notice Under The ESA*

Employees are entitled to notice, or pay in lieu of, under the *ESA*. These are the 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 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. After three consecutive years of employment, one additional week of wages or notice is required for each additional year of employment, to a maximum of eight weeks (s 63(3)(iii)). Additional compensation is required for group terminations (see below).

### *b) Group Terminations Under The ESA*

Group terminations (those of 50 or more at a single location) 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:

- At least eight weeks if between 50 and 100 employees;
- 12 weeks if between 101 and 300; and
- 16 weeks if 301 or more.

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 (ss 63 and 64), to which minimum notice requirements do not apply, are laid out in section 65 of the Act. No minimum notice or compensation is required of the employer by the *ESA* 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 they were 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.

### *c) Reasonable Notice at Common Law – Indefinite Term Contracts*

In addition to *ESA* notice requirements, employees are entitled to reasonable notice of dismissal at common law or pay in lieu of such reasonable notice.

The entitlement to notice at common law is a contractual entitlement. As such, there may be a valid termination clause in an employment contract which sets out the employee's entitlement to common law notice.

In the absence of a valid termination clause in an employment contract, the employee is entitled to reasonable notice of dismissal at common law. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The case of *Bardal v Globe and Mail Ltd*, 1960 294 ONSC, includes a list of the four primary factors to be considered in determining the appropriate length of a notice period:

1. the character of the employment;
2. the length of service;
3. the age of the employee; and
4. the availability of similar employment, having regard to the experience, training and qualifications of the employee.

These are known as the *Bardal* factors. The Supreme Court of Canada has endorsed this list of factors in a number of cases; see *Honda Canada Inc v Keays*, 2008 SCC 39, 2 SCR 362. However, these factors are not exhaustive, and additional factors may be considered on a case-by-case basis.

The current upper limit of "reasonable notice" is 24 months, generally for the longest-tenured, older, and senior-level employees. While there are some cases beyond this upper 24-month limit, which should be reviewed carefully if employees fall within the relevant age and years of service categories, these cases are the exception. There has been a trend over the past years with long term employees working for employers their entire lives and dismissed in their late 60s and early 70s claiming severances of 30 or more months. However, in *Dawe v. Equitable Life Insurance Company of Canada*, 2019 ONCA 512, the Ontario Court of Appeal decision suggests that *"exceptional circumstances"* must be present to award a notice period above 24 months, and that lengthy service and age would not generally suffice to enlarge a *"cap"* of beyond twenty-four (24) months.

Reasonable notice is an entitlement to assist the employee. In *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, the Ontario Court of Appeal held that the financial health of a company does not reduce its notice obligations to employees. Termination clauses in contracts are not always valid and enforceable. See Section 16 above.

In addition, be aware that employers may try to rely on termination provisions in an employee handbook or other such workplace policy documents. For example, in *Cheong v Grand Pacific Travel & Trade (Canada) Corp.*, 2016 BCSC 1321, the BC Supreme Court found that an employee handbook termination clause did not act to limit the employee's reasonable common law severance. It is important to review and question all documentation relied on to limit an employee's severance.

### *d) Calculating Reasonable Notice*

To determine how much notice an employee might get, compare their case to previously decided cases. Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. This is a helpful tool for searching for cases where an employee had a similar range of age, length of service, and job type as compared to the employee in question. The database is accessible online at:
www.wrongfuldismissaldatabase.com

Additionally, the UBC Law Library and many other law libraries hold publications with tables of cases sorted by job type, such as the Wrongful Dismissal Practice Manual by Ellen E. Mole (which is also found on Quicklaw). WestlawNext Canada also offers Quantum Services Database for wrongful dismissal. Comparing the *Bardal* factors of the employee in question with those of previous cases using either of these methods can assist in finding an appropriate range for the reasonable notice period. As a starting point, you can ask the particular employee how much time it would take or has taken to find similar work for similar pay.

Reasonable notice is concerned with a period of time, not an amount of money. A permanent part-time employee is entitled to the same notice as a full-time

employee. If an employer dismisses a part time employee with immediate effect, the fact that the employment is part-time will be reflected in the amount of pay in lieu of notice of dismissal the employee receives, not the length of the notice period. (*Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463 at para. 15).

Severance is generally awarded in a manner correlated to the length of service. However, in some circumstances, short service employees can be entitled to proportionally more severance. Senior-level short term employees, particularly upper management employees, may be entitled to proportionally more severance than their more junior counterparts. An example of an extended severance period for short service employees is found in *Chung v Quay Pacific Property Management Ltd*, 2020 BCSC 174, where the Court awarded a nine-month severance to a 53-year-old short service executive employee with only 2 years of service.

The length of reasonable notice may also be influenced by personal factors of the employee that affect how long it may take them to find similar work for similar pay. For example, the employee in *Nahum v. Honeycomb Hospitality Inc.*, 2021 ONSC 1455, was 5 months pregnant at the time of dismissal. She argued that her pregnancy should be considered as grounds for additional severance. The Court noted that pregnancy would not automatically increase the severance period, but that it could be up to the employee to demonstrate that the pregnancy is reasonably likely to have an adverse impact on the employee's ability to find alternative employment. In this case, the Court did find that the pregnancy was an important factor. She was awarded a 5-month severance despite only being employed for 4.5 months.

Similarly, gender and age may be a factor in determining the length of reasonable notice. The court in *Cordeau-Chatelain v Total E&P Canada Ltd.*, 2021 ABQB 794, took judicial notice of the "compounding negative effects that gender and age can have on a woman in the professional job market, especially at the management level".

If an employee's ability to find similar work for similar pay is affected by personal factors such as gender and age or pregnancy, there may be an argument for an increased reasonable notice period.

### *e) Extensions to Notice Period*

There is case law to support the principle that an employee's unique background and the nature of their responsibilities can outweigh an employee's short length of employment in assessing a reasonable notice period upon termination. For example, the employee's notice period was increased from 5 to 10 months in *Waterman v Mining Association of British Columbia*, 2016 BCSC 921, based on the employee's position in the company, her unique background, and the nature of her responsibilities. Also see *Munoz v Sierra Systems Group Inc.*, 2016 BCCA 140.

### *f) Damages at Common Law—Fixed Term Contracts*

Fixed-term contracts have a defined end date. In the normal course, fixed-term contracts simply end when the term expires, or they are terminated in accordance with termination provisions in the fixed-term contract itself. Reasonable notice is not normally required to end a fixed-term contract.

If an employee, dependent contractor, or independent contractor has a fixed-term contract and is dismissed before the end date of the contract, they may be able to claim damages for a breach of the contract.

Determine whether the contract itself specifies the conditions under which the employer can dismiss the worker, and what amount of notice or severance is required. If this is specified, and the contract and termination clauses are valid (see **Section V.C.2(c) and (d) Invalid Contracts**); this will generally be determinative.

If the contract does not specify the conditions of dismissal, or if the contract or the termination clause is invalid, the worker may be able to claim all the wages that they would have earned for the remainder of the contract; see *Canadian Ice Machine v. Sinclair*, [1955] SCR 777.

After determining the damages, the worker may be entitled to, return to **Section IV.D.1: Termination of Employment Checklist**.

### *g) Calculating Damages for Wrongful Dismissal – All Compensation Considered*

Employers are required to provide employees with reasonable notice of dismissal. This could be provided by advance notice, in which case the employee would work for the prescribed amount of time, and continue to receive all elements of their compensation, such as wages, benefits, pension, car allowance, etc.

If an employer provides an employee with pay in lieu of notice, that pay in lieu of notice should account for all the elements of compensation the employee would have earned had they worked for the reasonable notice period.

Of course, pay in lieu of notice would include replacement of the employee's lost wages over the course of the severance period. However, arguments can be made that severance should also include replacement of other aspects of an employee's lost compensation.

**Company Vehicle or Car Allowance**
For example, if an employee receives a company car for personal use, and that personal use is recognized by both the employer and employee as a benefit of employment, the employee is entitled to compensation for the loss of that car during the notice period.

**Benefits**
Other lost benefits, such as extended health and dental coverage are also recoverable during the notice period. A judge might calculate this loss by adding up all the medical expenses incurred by the dismissed employee during the notice period that would have been recoverable under the employer's benefits plan had the employee been working, or by awarding the employee his or her actual out of pocket costs to purchase comparable replacement benefits themselves during the notice period. In assessing damages for lost benefits, it can be useful to have the employee obtain a quote from a benefits provider for comparable replacement benefits, and attach that quote if a severance counteroffer is being made to the employer.

**Pension**
If the employee had a pension plan, the loss is generally calculated as:

> [The projected commuted value that the pension would have had if the employee remained employed during the notice period] minus [the commuted value the pension actually had at the time the employee was dismissed].

The commuted value is the net present value of the invested money, and its calculation is complicated; the pension plan administrator can provide the employee with the current and projected commuted values.

There are two general categories of pension plans: defined benefit plans and defined contribution plans. The calculation formula above is generally applicable for determining the loss of a defined benefit pension plan over a notice period. In some situations, a more simplified process of calculating the loss of employer pension contributions over the course of a notice period will be used for estimating the lost value of defined contribution pension plans. As a big picture concept, the idea is that if an employee receives pay in lieu of notice, the employee should be put in the same place financially in respect of their pension as if they had worked and continued making regular pension contributions during the notice period.

**Bonus**

An employee may be entitled to compensation for loss of bonus during the notice period. This assessment will require a consideration of whether the bonus was discretionary or based on quantifiable metrics, and whether the employee would have likely received a bonus had they worked during the notice period.

An employee may be able to claim a pro-rated portion of a bonus that was partially earned prior to dismissal. In *Andros v Colliers Macauley Nicolls Inc*, 2019 ONCA 679, the Ontario Court of Appeal considered the issue of a bonus which is payable after the expiry of the notice period but during which the employee either worked part of the year or whose notice period included part of that year. The Court found that absent clear language in the contract, it would be inherently unfair that employees terminated without cause would be precluded from seeking a *pro rata* share of their bonuses "only by virtue of the fact that the notice period ended before the bonus payment date, particularly where the bonus payment date is entirely in the discretion of the employer." Research should be done on this topic to determine potential entitlement.

## *h) Tips included in Severance Calculation*

There is authority for the inclusion of estimated tips in an award of damages for wrongful dismissal: *Patriquin, Pier Marine Pub Ltd. v. Brown,* 1992 BCJ No 2868 (BCSC). Where a plaintiff's earnings are in part from cash gratuities, damages reflecting that lost income are not assessed as the amount that the plaintiff declares and pays taxes upon: *Chapple v. Umberto Management Ltd.*, 2009 BCSC 724.

At common law, the employee is only entitled to be compensated for wages and benefits to which they would have been contractually entitled during the notice period, and not for any *ex gratia* expectancies; see *Swann v MacDonald, Dettwiler and Associates Ltd*, [1995] BCJ No 1596 (QL) (SC).

Courts have a wide discretion to determine the appropriate damages based on the evidence of the plaintiff's pre-dismissal earnings; see *Davidson v Tahtsa*

*Timber Ltd*, 2010 BCCA 528. If an employee's earnings have varied in the years prior to dismissal, some courts in BC have calculated damages by averaging the employee's annual wages; see *Krewenchuk v Lewis Construction Ltd*, [1985] BCJ No 1553 (SC). Where remuneration is based on an annual salary and not an hourly rate, a court may still assess damages based on the average salary paid in the years prior to dismissal; see *Goodkey v Dynamic Concrete Pumping Inc*, 2004 BCSC 894.

Where an employee earns a variable income, courts may average the rate of pay within the relevant notice period for calculating damages; see *O'Dea v Ricoh Canada Inc.*, 2016 BCSC 235.

After determining the damages, the employee may be entitled to, return to **Section IV.D.1: Termination of Employment Checklist**.

## 5. Just Cause Dismissal - General

If an employee is guilty of serious misconduct which goes to the heart of the employment relationship, the employer may dismiss the employee for just cause. If an employer has just cause to dismiss an employee, it is not required to provide any notice or pay in lieu of notice. Just cause it is a question of fact and must be determined by a judge on a case by case basis.

Note that in the case of independent contractors, courts may instead consider whether there was a fundamental breach that goes to the root of the contract, depriving one party of the whole or substantially the whole benefit of the contract; see *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426; *1193430 Ontario Inc v Boa-Franc Inc*, 78 OR (3d) 81; *Fernandes v Peel Educational & Tutorial Services Limited (Mississauga Private School)*, 2016 ONCA 468. The law on this topic can be complex and will require additional research.

Common law has defined just cause as conduct that is inconsistent with the fulfilment of the express or implied condition of service; see *Denham v Patrick* (1910), 20 OLR 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; see *Stein v BC Housing Management Commission* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA)). 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; see *Port Arthur Shipbuilding Co v Arthurs et al*, [1968] S.C.J. No. 82, [1969] S.C.R. 85.

An objective test is used to determine whether there has been serious misconduct or a fundamental breach. For a long term or senior employee, the employer may need more than mere misconduct; see *Mallais v Lounsbury Co* (l984), 58 NBR (2d) 345 (QB). What constitutes just cause will vary from case to case and must be something that a reasonable person would be unable to overlook; see *McIntyre v Hockin*, [1889] OJ No 36, l6 OAR 498 (Ont CA).

A single incident is usually insufficient to justify dismissal (see *Buchanan v Continental Bank of Canada* (1984), 58 NBR (2d) 333 (QB)), unless that act is extremely prejudicial to the employer such as dishonesty or immoral character that causes a failure of trust; see *Stilwell v Audio Pictures Ltd*, [1955] OWN 793 (CA).

The cumulative effect of minor instances may justify dismissal if they make the employee unable to perform their duties or result in a serious deterioration of the employment relationship; see *Ross v Willards Chocolates Ltd*, [1927] 2 DLR 461.

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; see *Dewitt v A&B Sound Ltd* (1978), 85 DLR (3d) 604 (BCSC).

Courts are required to take a contextual approach to determine whether just cause for dismissal existed, considering numerous factors. See *McKinley v BC Tel*, [2001] 2 SCR 161.

Although there is no comprehensive list of what constitutes just cause, the list below discusses some of the more common grounds for dismissal.

### *a) Insubordination/Disobedience*

Insubordination or insolence that is incompatible with the continuation of the employment relationship is just cause for dismissal; see *Latta v Acme Cheese Co* (1923), 25 OWN 195 (Ont Div CT). 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; see *Stilwell v Audio Pictures Ltd*, [1955] OWN 793 (CA). Poor judgment, insensitivity, or resentment is generally not sufficient; see *Leblanc v United Maritime Fisherman Co-op* (1984), 60 NBR (2d) 341 (QB).

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; see *Markey v Port Weller Dry Docks Ltd* (1974), 4 OR (2d) 12 (Co Ct); *Stein v BC Housing* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA); *Cotter v Point Grey Golf and Country Club*, 2016 BCSC 10. Generally, 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, neglect of duties, or a refusal to perform the job may be just cause for dismissal; see *Lucas v Premier Motors Ltd*, [1928] 4 DLR 526 (Alta CA). 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.

### *b) 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; see *Waite v La Ronge Childcare Co-operative* (l985), 40 Sask R 260 (QB)). If an employee presents an exaggerated assessment of their own skills, a company is justified in dismissing that employee after finding out their true abilities; see *Manners v Fraser Surrey Docks Ltd* (1981), 9 ACWS (2d) 155. Incompetence is assessed using an objective standard of

performance, and it is for the employer to prove that the employee fell below that standard. Usually, one isolated example of failure to meet such a test does not warrant discharge; see *Clark v Capp* (1905), 9 OLR 192. The employer must prove that:

a) reasonable standards of behaviour and performance were set and clearly communicated to the employee;
b) the employee was notified when they 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 ESB and courts require that the employer prove that all these steps were taken. There is also a requirement that the employee appreciates the significance of the warning; see *Korber v Can West Imports Limited and Satten*, [1984] BCWLD 737.

See *Hennessy v Excell Railing Systems Ltd.*, 2005 BCSC 734, for a comprehensive list of what an employer must show to establish poor performance.

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 (BCGSEU)*, [1999] 3 SCR 3). In a case of poor employee performance, the ESB will not find just cause for dismissal unless the employer can demonstrate a "neglect of duties".

### *c) Dishonesty*

Dishonesty must be proven on a balance of probabilities and the burden rests with the employer; see *Hanes v Wawanesa Insurance Company*, [1963] SCR 154. The employer must show that the employee intentionally and deceitfully engaged in the misconduct. Failure by the employer to prove dishonesty may lead to punitive damages.

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; see *Jewitt v Prism Resources* (1981), 127 DLR (3d) 190 (BCCA). In *McKinley v BC Tel*, [2001] 2 SCR 161, the Supreme Court of Canada used a contextual approach to make this assessment. The test 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 their employer. An effective balance must be struck between the severity of the misconduct and the sanction imposed.

### *d) Intoxication*

Depending on the extent of intoxication and degree of prejudice to the employer, intoxication may be a cause for dismissal; see *Armstrong v Tyndall Quarry Co* (1910), 16 WLR 111 (Man KB). However, intoxication in itself is not grounds for dismissal. The courts should undertake a contextual approach,

per *McKinley*, look at all relevant factors (i.e., work history, discipline history, and whether the position is safety sensitive. Courts may be sympathetic to alcohol abusers especially if they are long-term employees; see *Robinson v Canadian Acceptance Corp Ltd* (l974), 47 DLR (3d) 417 (NSCA).

Consider whether the intoxication is part of a larger substance abuse issue. If so, the employee may have a Human Rights claim; see **Chapter 6: Human Rights** and the duty to accommodate.

### *e) 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, particularly if it is coupled with clear written warnings from the employer.

Consider whether the lateness or absenteeism are caused by a physical or mental disability. If so, the employee may have a Human Rights claim; see **Chapter 6: Human Rights**.

### *f) Illness*

Temporary illness does not constitute just cause; see *McDougal v Van Allen Co Ltd.* (1909), 19 OLR 351 (HC). 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; see *Yeager v RJ Hastings Agencies Ltd* (l985), 5 CCEL 266 (BCSC). In some cases, a period of one year may not be too long for an employer to await the return of a valuable employee; see *Wilmot v Ulnooweg Development Group Inc*, 2007 NSCA 49. If the employee is permanently incapable of performing work duties, they may properly be dismissed; see *Ontario Nurse's Federation v Mount Sinai Hospital*, [2005] OJ No 1739. Long term illness might alternatively be considered frustration of contract, and, if the contract is frustrated, the employee is not entitled to severance pay.

Consider whether the illness is a physical or mental disability. If so, the employee may have a Human Rights claim; see **Chapter 6: Human Rights**.

### *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; see *Bee Chemical Co v Plastic Paint and Finish Specialists Ltd et al* (l979), 47 CPR (2d) 133 (Ont CA). An employee may be liable for damages for breach of contract where they are running a business contemporaneous with being an employee; see *Edwards v Lawson Paper* (1984), 5 CCEL 99 (Ont HC). An employee's conduct that is seriously incompatible with their duties and creates a conflict of interest can be grounds for summary dismissal; see *Durand v Quaker Oats Co of Canada* (1990), 45 BCLR (2d) 354 (CA). Following the end of employment, an employee is not permitted to compete unfairly against the employer, for example by using confidential information.

### *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, such as inability of an employee to function smoothly in the work 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; see *Abbott v GM Gest Ltd*, [1944] OWN 729 (Ont CA). If the inability to get along with others results in business interference, the employee may be dismissed; see *Fonceca v McDonnell Douglas Ltd* (l983), 1 CCEL 51 (Ont HC).

### *j) Breach of Confidence and Privacy Obligations*

An employee's unauthorized disclose of employer confidential information may amount to a cause dismissal. An employee's secret recording of meetings with management might be found to be a breach of confidentiality and privacy obligations amounting to cause. See *Hart v. Parrish & Heimbecker, Limited* 2017 MBQB 68.

Similarly, surreptitious recordings of co-workers may be grounds for a just cause dismissal. In *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112, the employee recorded personal and private conversations of his co-workers. The Court found that this constituted just cause given the effect on the relationship of trust.

### *k) Deleting Company Information*

Deleting or altering company information during departure from employment may in some circumstances be grounds for a just cause dismissal. However, as with all just cause cases, a *McKinley* contextual analysis should be applied. In the case of *Kerr v. Arpac Storage Systems Corporation*, 2018 BCSC 704, the court found the employee's deletion of company information around the end of employment was not enough to constitute a just cause dismissal, partially due to the employee's mental state and because the employee apologized.

## 6. Defence to Just Cause Arguments

If an employer alleges just cause for dismissal, the employee might have one of the following defenses to the just cause allegations.

### *a) No Warning*

It can be argued that an employer must warn an employee or issue escalating discipline before firing that employee for a series of trivial incidents that are not serious enough alone to justify dismissal; see *Fonceca v McDonnell Douglas* (l983), 1 CCEL 51 (Ont HC). However, if an employee is in a fiduciary relationship with their employer, a warning or escalating discipline may not be necessary if several incidents occur around the same time and cause a breakdown of trust; see *Goruk v Greater Barrie Chamber of Commerce*, 2021 ONSC 5005.

### *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; see *McIntyre v Hockin* (1889), 16 OAR 498 (CA). This applies only where the employer knows of the conduct. The employer is entitled to reasonable time to decide whether to act, and this reasonable time period commences at the time that the employer learns of the employee's conduct.

Behaviour by the employer constituting condonation may include actions or omissions such as failing to dismiss the employee within a reasonable time (*Benson v Lynes United Services Ltd*, [1979] 18 A.R. 328), tolerating an employee's behaviour without reprimand (*Johnston v General Tire Canada Ltd*, [1985] OJ No 98), giving the employee a raise (*Sjerven v Port Alberni Friendship Center*, [2000] BCJ No 608), or giving the employee a promotion (*Miller v Wackenhut of Canada Ltd*, [1989] OJ No 1993).

If an employer learns of an employee's misconduct after dismissing the employee, the employer may use that misconduct to justify the dismissal for cause. This can be referred to as "after-acquired" cause.

However, if the employer already knew of the employee's misconduct, but terminated the employee without alleging cause or gave the employee a letter of reference, in some cases the employer has been held to be estopped from alleging cause or has been taken to have condoned the employee's misconduct. However, there is conflicting case law on this subject and many cases have held that the employer may still allege cause. See *Smith v Pacific Coast Terminals*, 2016 BCSC 1876; *Technicon Industries Ltd v Woon*, 2016 BCSC 1543.

According to some case law, previous misconduct that has been condoned may be revived by new instances of misconduct, and the employer may then use the cumulative effect of the past and the new misconduct to justify dismissal. However, this is an area with conflicting case law. If the employer has warned the employee about the past misconduct, there would not be an issue regarding the revival of the past misconduct, as it would not have been condoned in the first place; the cumulative effect of the misconduct could then be used to justify dismissal.

The employee carries the burden of proving the condonation; see *Perry v Papillon Restaurant* (1981), 8 ACWS (2d) 216.

### *c) Improper Just Cause Allegations as a Litigation Tactic*

Some employers assert just cause (or file counterclaims) as a litigation tactic to deter an employee from advancing a valid wrongful dismissal claim. In these scenarios, employees may use that employer tactic as both a defence and as grounds for additional damages claims against the employer. See *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, where the court awarded moral damages, extensive costs, and $100,000 in punitive damages for improper cause allegations.

## 7. Redundancy and Layoff

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;

see *Paterson v Robin Hood Flour Mills Ltd* (1969), 68 WWR 446 (BCSC). 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; see *Young v Okanagan College Board* (1984), 5 CCEL 60 (BCSC).

"Temporary layoff" is defined in section 1 of the *ESA*. A BC Supreme Court decision, *Besse v Dr AS Machner Inc*, 2009 BCSC 1316, established that the temporary layoff provisions of the *ESA* alone do not give employers the right to temporarily lay off employees: a layoff constitutes termination unless it has been provided for in the contract of employment either expressly or as an implied term based on well-known industry-wide practice, or the employee consented to the layoff. If the right to temporary layoff exists for one of these reasons, then the limits set out in section 1 apply: 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. they 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 "layoff", it is nonetheless clear that the employee has been terminated. Note the Covid-19 temporary extension to the *ESA* temporary layoff period as described earlier in this chapter.

## 8. Probationary Employees

The Employment Standards Act does not require any payment for the length of service during the first three months of employment (s 63).

However, if no probationary period is expressly specified in the employment contract, then the employee may still be entitled to reasonable notice at common law. The dismissed probationary employee could file a claim in Small Claims Court for wrongful dismissal.

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] BCJ No 2403 (BCCA). In determining suitability, the case of *Geller v Sable Resources Ltd*, 2012 BCSC 1861, explained that the probationary employee must be given a chance to meet the standards that the employer set out when the employee was hired; the employer cannot begin imposing new standards afterwards.

In *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42, the Court held that if a company wants to fire an employee on probation, it should give the employee a fair chance to prove they can do the job. Otherwise, it may owe severance. To give an employee a fair chance to prove they can do the job, employers should:

1. Make the employee aware of how they will be assessed during the probation period.
2. Give the employee a reasonable chance to demonstrate their suitability.
3. Think about the employee's suitability based not only on work performance but also on personal characteristics such as compatibility and reliability.
4. Act fairly and with reasonable diligence in assessing suitability.

## 9. Near Cause

In the past, judges have reduced the notice period where there has been "near cause", where even if there were no grounds for dismissal, there was substantial misconduct).

The Supreme Court of Canada in *Dowling v Halifax (City)*, [1998] 1 SCR 22, expressly rejected near cause as grounds for reducing the notice period. This decision has been consistently followed.

## 10. Constructive Dismissal

In some circumstances, an employer can make fundamental changes to the terms of an employee's employment in such a way that the employee may be forced to leave their job. This is called "constructive dismissal", and an employee who is constructively dismissed is entitled to the same benefits as if they were fired without cause.

If the employer makes a fundamental, unilateral change in the employment contract, it may amount to constructive dismissal. Changes to a "fundamental term of the contract" includes changes such as a significant reduction in salary, a significant change in benefits, a significant change in job content or status, or a job transfer to a different geographic location if such a transfer is not a normal occurrence or contemplated in the employment contract. Generally, a reduction in pay of more than 10% may result in a constructive dismissal. See *Price v 481530 BC Ltd et al*, 2016 BCSC 1940.

If a dysfunctional workplace creates an intolerable and toxic workplace, it may constitute constructive dismissal. However, this is a high bar to prove, and plaintiffs who are unreasonable may have difficulty proving a constructive dismissal based on a poisoned work environment. See *Baraty v. Wellons Canada Corp*, 2019 BCSC 33.

The imposition of a temporary layoff, where it is not provided for in the contract, has also been deemed to constitute constructive dismissal (see **Section V.C.7: Redundancy and Layoff** for details).

Suspensions from work may result in constructive dismissal, particularly if the suspension is without pay. The cases of *Cabiakman v Industrial Alliance Life Insurance Co*, [2004] 3 SCR 195, and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, 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. However, an indefinite suspension without pay, particularly if there is no contractual term providing for such suspension, is likely a constructive dismissal.

A constructive dismissal claim is a drastic step for an employee, as it involves the employee leaving work (as though they were fired) and then bringing an action for constructive dismissal. The employee will no longer be receiving compensation from employment and will instead be seeking to recoup that compensation through court action.

Employees should consider providing employers with a warning of constructive dismissal and an opportunity to respond to changes in workplace conditions prior to leaving work under a constructive dismissal claim. In *Costello v. ITB Marine Group Ltd*, 2020 BCSC 438, the court disallowed an employee's constructive dismissal claim because the employee "did not give [the employer] a reasonable opportunity to respond to [her] complaint before taking the position that she had been constructively dismissed."

An employee bringing a claim for constructive dismissal is making a claim for the severance they would have received had they been dismissed without cause.

### *a) Mitigation Required*

An employee is still required to mitigate their damages if they are constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for their current employer. See *Evans v Teamsters Local Union No. 31*, 2008 SCC 20, for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

### *b) Condonation*

If an employee accepts the imposed changes without complaint, they are considered to have accepted the change, and will, therefore, be barred from action; however, employees are generally permitted a reasonable time to determine whether they will accept the changes.

### *c) Repudiation*

Employees alleging constructive dismissal bear the risk that the court finds they have repudiated their contract of employment by either leaving the workforce or commencing legal proceedings against their employer (or both). If a court finds the employee repudiated the contract (i.e., quit instead of being constructively dismissed) then the employee does not get severance.

## 11. Resignation v. Dismissal

Not all resignations are resignations, and not all dismissals are dismissals. The legal test is what a reasonable person would have understood by the relevant statements and actions, taking into consideration the context of the industry and all surrounding circumstances.

To be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign or conduct from which that intention would clearly appear; see *Koos v A & A Customs Brokers Ltd.*, 2009 BCSC 563.

For example, harassment at work may cause the employee to be unable to continue working and this might cause them to resign; in cases such as these, additional research should be done to determine whether the situation should be considered a resignation or a dismissal.

## 12. Sale of a Business

If a business is sold, unless the seller specifically dismisses the employees 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] BCJ No 2524.

## 13. Aggravated and Punitive Damages

### a) *Aggravated Damages*

Courts may award aggravated damages if the employer acted unfairly or in bad faith when dismissing the employee, and the employee can prove that they suffered harm as a result of the manner of dismissal.

The loss must arise because of the manner of dismissal, and not due to the dismissal itself.

An employee should be encouraged to obtain medical evidence such as a doctor's report connecting this manner of dismissal to a personal injury. For example, the doctor's report might document the employee's depression, anxiety, or other mental harm. It may be helpful to have a doctor testify in court to present a solid case for aggravated damages. However, an employee can provide their own testimony regarding an injury, without medical corroboration, and a court can still consider whether to award aggravated damages. See *Lau v. Royal Bank of Canada*, 2017 BCCA 253. If the employee did not suffer documented harm, see **section V.C.13.b: Punitive Damages** below.

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, damages awarded where the employer had acted in bad faith 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 SCR 701, and the awards were informally known as "Wallace Damages". Following the *Honda v Keays* decision, the practice of assessing damages by extending the notice period is no longer to be used. Now, a claimant must prove what actual losses or mental harm the employee incurred, and the employee is then compensated for those actual losses or mental distress. See *Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520.

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] NSJ No. 261 (NSCA).

In *Chu v China Southern Airlines Company Ltd*, 2023 BCSC 21, degrading demotions, humiliating public discipline, and the special insult (to the Chinese descent plaintiff) of being fired on Chinese New Years resulted in an aggravated damages award of $50,000. Punitive damages of $100,000 were awarded in connection with hardball litigation tactics, including *a pattern of conduct on the part of the defendant designed to stall and frustrate the prosecution*, the high degree of the defendant's blameworthiness for its abusive and deliberate conduct, the vulnerability of the plaintiff, the profoundly harmful nature of the conduct, and the need for an award of sufficient size to act as deterrence and denunciation towards a large corporation.

### *b) Bad Faith Performance of Contracts*

"Bad faith" has been found in cases the following cases:

- Where the employer lied to the employee about the reason for dismissal (see Duprey v Seanix Technology (Canada) Inc, 2002 BCSC 1335, https://canlii.ca/t/5jbg, where an employer told a commissioned employee

they were being released due to financial hardship, when it was found they were being released so the employer would not have to pay owed commission);

- Where an employer has deceived the employee about representations of job security (*Gillies v Goldman Sachs Canada*, 2001 BCCA 683);
- Where a senior employee was induced to leave their position under the promise of a job leading to retirement;
- Where an employer promised an employee they would keep their job after a merger, although they 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 (*Nahnychuk 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] NJ No 146 (Nfld CA));
- Where an employer has made false accusations about the employee at the time of dismissal. See *Price v 481530 BC Ltd et al*, 2016 BCSC 1940, where an employer dismissed an employee on the basis of false allegations of dishonesty contributing to the creation of a hostile work environment and ultimately their constructive dismissal; and
- Where an employer produced false evidence of the employee's absence without leave in order to argue just cause for dismissal and only offered *ESA* minimum severance (*Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235)).
- Where a law firm was ordered to pay aggravated damages to an employee for unfair, bullying, and bad faith conduct by her former employer and her former principal. The employer's objectionable conduct included dismissing the employee without proper investigation, serving the employee a termination letter and a notice of claim in front of her classmates at PLTC (a deliberate public firing), and firing the employee on the basis of harsh and unwarranted accusations based on unfounded suspicions, which allegations were maintained throughout the litigation process. *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352.

### *c) Good Faith Performance of Contracts*

The Supreme Court of Canada affirmed the principle of good faith performance of contracts and its creation of the new common law duty of honesty in contractual performance in *Bhasin v Hrynew*, 2014 SCC 71.

This case was referenced in *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621, where the court awarded $440,000 for the employer's refusal to pay awards under a long-term incentive plan, in breach of duty of honest performance and good faith.

If one suspects the employer acted in bad faith in the manner of dismissal, one should do further research to determine whether the employee has a strong case. For a table of cases in which aggravated or punitive damages were sought, and a list of the damages awarded, see "Aggravated and Punitive Damages and Related Legal Issues", Employment Law Conference 2013, Paper 8.1, CLE BC.

### *d) Punitive/Moral 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. Generally, the discretion to award punitive damages has been cautiously exercised and used only in extreme cases. Courts are wary of the risk of double compensation where punitive damages and aggravated damages are considered in the same case.

Punitive damages are currently on an upward trend in BC. Since the *Honda* decision, courts have generally required evidence showing that an employee suffered mental harm to award aggravated damages, and this has left certain employees, who are less susceptible to suffering mental harm, without that recourse. However, courts are now trending towards awarding punitive damages more often.

Deceptive, misleading, or inaccurate communications during the termination may provide grounds for punitive damages. In *Moffatt v. Prospera Credit Union*, 2021 BCSC 2463, https://canlii.ca/t/jld9k, the Court awarded punitive damages equivalent to 2.5 months of the employee's salary as a result of the employer's misleading and inaccurate termination letter, which offered the employee less severance than in the employment contract. The Court highlighted the vulnerability of employees in a termination setting as justification for the punitive damages award. In *Russell v The Brick Warehouse LP*, 2021 ONSC 4822, an employee was terminated without cause, and provided a termination letter with a severance offer in exchange for a release. The termination letter did not inform the employee he would be entitled to ESA minimums if he did not sign the release and failed to provide the accrual of vacation pay during the ESA period. Court awarded "moral damages" of $25,000 in connection with the defects in the termination correspondence.

If an employee was treated particularly harshly by their employer, even if they did not suffer documented medical harm, consider claiming punitive damages. See the paper entitled "Aggravated and Punitive Damages and Related Legal Issues" for a table of cases in which aggravated or punitive damages were sought in order to compare your situation to others and determine an appropriate amount of damages (see **section V.C.13 Aggravated and Punitive Damages**, above).

If the employee has suffered any of the following situations through the employer's conduct, consider claiming for punitive damages:

- Defamation
- Malicious prosecution, if the employer maliciously instigates criminal proceedings against an employee (*Teskey v Toronto Transit Commission*, 2003 OJ No 4547)
- Duress
- Interference with the employee's compensation
- Flawed investigation of alleged employee misconduct
- Unproven alleged cause
- Constructive dismissal
- Demotion
- Sexual harassment
- Unsafe or unhealthy work environment

- Oppression (if the employee is also a shareholder of the corporation)
- Inducement to resign, for example by offering a letter of reference only if the employee resigns (*Vernon v British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133)
- Misrepresentations by the employer (*Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235)
- Employer's behaviour before, during, or after the dismissal
- Breach of the employee's privacy
- Insensitivity to an employee's pregnancy
- Physical or verbal assault or abuse
- Interference with trade unions
- Any independent causes of action
- Being "mean and cheap in trying to get rid of an employee" (*Gordon v. Altus*, 2015 ONSC 5663)
- Unduly insensitive treatment during attempts to exercise rights to contract renegotiation (*Pepin v. Telecommunications Workers Union*, 2016 BCSC 790; overturned on appeal, 2017 BCCA 194, and remitted back to the BCSC for a new trial)
- The tort of intentional infliction of mental distress (*Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520)

### *e) Workplace Investigations*

Workplace investigations into misconduct must be carried out in a good faith manner without bias. Unfair process may entitle an employee to aggravated or punitive damages.

A flawed workplace investigation followed by a dismissal can attract aggravated damages; see *Lau v. Royal Bank of Canada*, 2015 BCSC 1639; *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328; and *George v. Cowichan Tribes*, 2015 BCSC 513.

Additional damages may be warranted for an employer's undue delay in conducting a workplace investigation, resulting in a failure to investigate a complaint in a timely manner. See *Toronto District School Board v Canadian Union of Public Employees, Local 4400*, 2021 CanLII 101010 (ON LA).

## 14. Sexual Misconduct and Bad Faith

The Alberta Court of Appeal in *Calgary (City) v. Canadian Union of Public Employees Local 37*, 2019 ABCA 388, offered some important commentary on sexual assault in the workplace, in the context of a review of a workplace sexual assault judicial review.

The Court commented that adjudicators should not downplay the seriousness of sexual assault, should analyze it with the understanding that it is sexual harassment in its most serious form, should avoid focusing on outdated attitudes, avoid relying on legal precedents that are inconsistent with modern views of acceptable behaviour in the workplace, and recognize the employer's duty to maintain a safe and respectful workplace for all employees. This decision, while in the arbitration context, may provide employees with applicable conceptual arguments in appropriate circumstances.

In *Deol v. Dreyer Davison LLP*, 2020 BCSC 771, the BCSC was presented with an employee's claim for constructive dismissal and breach of the duty of good faith and fair dealing arising from harassment, including sexual harassment.

The employer applied to strike pleadings on grounds that recovery for losses caused by sexual harassment falls exclusively within the jurisdiction of the Workers' Compensation Board ("WCB") for tortious or injurious conduct, or the British Columbia Human Rights Tribunal ("BCHRT") for discriminatory conduct. However, the BCSC disagreed, and confirmed that the "conduct alleged and particularized in this case, which is pled to amount to harassment and a failure to address it (including racial and sexual harassment), is also capable of being considered a breach of the law firm's duty of good faith and fair dealing and other enumerated implied contractual terms"

## 15. Duty to Mitigate

### *a) Common Law*

Claimants in civil court should be aware that an employee has a common law duty to mitigate their losses. An employee does not have to take every action possible to mitigate; instead, a reasonable effort is required; see *Gust v Right-of-Way Operations Group Inc*., 2016 BCSC 1527. Searching for similar work is sufficient. However, searching only for identical employment in the same industry is not sufficient to fulfil the duty to mitigate. In *Moore v. Instow Enterprises Ltd*., 2021 BCSC 930, the Court found that limiting a job search to an identical, niche role was not reasonable in the circumstances, and suggested that employees should take active steps to search for new employment. For a discussion of the relevant legal test for mitigation, see *James v The Hollypark Organization Inc*., 2016 BCSC 495.

Because of the requirement to mitigate, 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; see *Evans v Teamsters Local Union No 31*, 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] BCJ 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 Woodwards Stores Ltd* (1993), 75 BCLR (2d) 110 (CA)).

Similarly, the duty to mitigate may also require a dismissed employee to accept an offer of re-employment from the employer who dismissed them. Even if an employer makes an offer of re-employment to a dismissed employee only after receiving a demand letter from the employee's lawyer, the employee may still be required to consider and/or accept that offer, and a failure to do so may be considered a failure to mitigate. In *Blomme v. Princeton Standard Pellet Corporation* 2023 BCSC 652, the Court highlighted that even if the offer of return to work is precipitated by a demand letter, this does not relieve the employee of obligation to consider the offer, and an employee's refusal may be considered a failure to mitigate.

Employees are not required to return to a position where the fundamental terms of their job have changed or where they have been maligned such that the relationship cannot be restored. Accusations of dishonesty in negotiations or radically limited and uncertain terms in offers may result in reemployment being found to be unreasonable. 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. The employee's perception of what is reasonable is usually given more weight than that of the employer.

An employee's failure to take accept a job during their search for employment may not mean they failed to meet the requirements of mitigation if they were overqualified for the job; see *Luchuk v Starbucks Coffee Canada Inc*., 2016 BCSC 830.

In a legal dispute, the onus of proof as to whether the claimant former employee has properly taken efforts to mitigate their damages generally falls on the defendant former employer.

### *b) Employment Standards*

There is no duty to mitigate to receive statutory compensation for length of service under the *ESA*. An employee is entitled to statutory termination pay regardless of whether the employee finds new work.

### *c) Mitigation and Constructive Dismissal*

An employee is still required to mitigate their damages if they are constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for their current employer. See *Evans v Teamsters Local Union No 31*, 2008 SCC 20, for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

There are some circumstances where an employee's refusal to accept re-employment with the employer who fired them is found to be a failure to mitigate. However, this might not be the case if the trust relationship is eroded due to the employer's actions. See *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357.

### *d) Mitigated Damages*

As severance pay is designed to compensate for lost income, at court a dismissed employee who found alternate employment after dismissal will have their severance pay reduced by the amount they are able to earn in their new job.

If the employee was working a second job before being dismissed but earned more in the second job (i.e., by putting in more hours) after dismissal, their severance pay will be reduced by the extra amount they have earned. See *Pakozdi v. B&B Heavy Civil Constructions Ltd*., 2018 BCCA 23 at paras 36-51.

## 16. Employment Insurance Payback

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). Note that the employee may be able to receive the EI benefits back again if they are still unemployed and searching for work after the period

covered by the severance award; call Service Canada at 1-800-206-7218 for further details if this situation may apply to the employee.

In *LaFleche v. NLFD Auto dba Prince George Ford (No. 2*), 2022 BCHRT 88, the BC Human Rights Tribunal awarded lost wages, $14,000 for injury to dignity, and $29,000 in foregone EI maternity leave benefits to an employee who was not returned to her job after maternity leave because the employer kept the worker who covered the maternity leave. The Tribunal awarded $29,000 in foregone EI maternity leave benefits because the employee had a second child and did not have enough insurable hours to collect EI maternity leave benefits for her second child.

### 17. 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. Frustration of contract is a separate ground for termination of contract, separate from just cause, which is a breach of the employment contract by the employee.

Frustration normally arises in cases of long-term disability where the employee has been off work for 1 or 2 years. Courts will consider whether the worker is likely to be able to return to work in the reasonably foreseeable future; see *Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d`Hydro-Quebec*, 2008 SCC 43, and *Naccarato v Costco*, 2010 ONSC 2651.

If the employee suffers a serious, permanent, debilitating illness or injury, this could frustrate the contract; see *Wightman Estate v 2774046 Canada Inc*, 2006 BCCA 424. However, note that in any case where an employee is dismissed due to a disability, there may be a case at the Human Rights Tribunal; the employer must have a bona fide occupational requirement that cannot be met by the employee due to their disability, and the employer must follow a proper process to attempt to accommodate the employee, in order to avoid liability. See **Chapter 6: Human Rights** for additional details.

If an employer validly terminates a contract on the basis of frustration, they are not required to provide severance.

Prior to terminating an employment contract on the basis of frustration, employers should provide the employee with an opportunity to provide any additional medical information which might change their decision. Failure to do so might result in a finding of without cause dismissal, as opposed to frustration of contract.

## *F. Post-Employment Issues*

### 1. 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.

Whether a particular provision is a restraint of trade is determined not only by the form of the clause but by the effect of the clause in practice; see *Levinsky v The Toronto-Dominion Bank*, 2013 ONSC 5657. Restrictive covenants may also influence the assessment of reasonable notice (see "Two Topics Relating to Restraint of Trade in Employment: Practical Alternatives to Restrictive Covenants and the Impact of Restrictive Covenants on Reasonable Notice", Richard Truman and Valerie S. Dixon, Employment Law Conference 2014, Paper 3.2, CLE BC). 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, and it can be quite difficult to write a covenant narrow enough to be upheld in court. In deciding whether 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 (per *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6):

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.

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 (*Shafron v KRG Insurance Brokers (Western) Inc*). It can often be a simple matter to find an ambiguity: the length of time or geographic area might not be specified, or there may be a prohibition against soliciting clients that the employee did not work with, or the employer may have used a non-compete clause when a non-solicitation clause would have adequately protected their legitimate business interests. See *Powell River Industrial Sheet Metal Contracting Inc. (P.R.I.S.M.) v Kramchynski*, 2016 BCSC 883.

## 2. Drawing Restrictive Terms to Employee's Attention

In *Battiston v. Microsoft Canada Inc.*, 2020 ONSC 4286, the Ontario Superior Court did not uphold a contract term that excluded the employee's rights to unvested stock awards after a without cause termination, because the employer failed to sufficient draw the provision to the employee's attention. The Court awarded the employee damages in lieu of the stock awards that would have vested during the notice period.

## 3. 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 and wage rate but does not include anything about the employee's performance.

Since the decision of *Wallace v United Grain Growers*, 1997 CanLII 332 (SSC), 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.

If an employer tells an employee that they will only receive a reference letter if they resign, in order for the employer to avoid liability for severance payments, the employee may be able to make a claim for both wrongful dismissal and punitive damages; see *Vernon v British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133.

## *G. When an Employer Can Sue an Employee*

It is rare for an employer to sue an employee. This might occur if an employee breaches a term of a contract (including an implied term), or if an employee breaches a fiduciary duty. Sometimes, after an employee brings an action against an employer, the employer will make a counterclaim against the employee as a strategic move to encourage the employee to settle for a lower amount; the strength of the employer's case should be carefully considered if this occurs.\

The duties listed below are generally implied in employment contracts. This list of duties is not exhaustive.

### 1. Duty to Perform Employment Functions in Good Faith

Employees owe a duty of good faith to the employer; this is an implied term of employment contracts. An employee might breach this by actively working against one of their employment duties; for example, a supervisor who is supposed to retain employees could breach this duty by inducing the employees they supervise to resign in order to compete against the employer. See *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54, and *Consbec Inc. v* Walker, 2016 BCCA 114, for further details.

### 2. Duty to Give Reasonable Notice of Resignation (Wrongful Resignation)

An employee must give their employer reasonable notice if they are resigning. "Reasonable notice", in the case of resignations, is much shorter than the notice that employers must give to employees who are being dismissed. Although giving two weeks' notice is the usual practice, the courts may require more or less than that amount, depending on the employee's responsibilities. In rare cases, employers can be awarded damages against employees who do not provide sufficient notice of resignation; see *Gagnon & Associates Inc. et. al. v Jesso et. al*., 2016 ONSC 209.

In theory, an employee could be held liable for the profits that their continued employment would have generated for the employer during the reasonable notice period. However, this is generally only of concern if the employee generates significant profits for the employer. For further details, see *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54.

### 3. Competition Against the Employer

Employees without a valid non-competition clause (and who are not in a fiduciary position – see **Section V.E.3: Fiduciary duties**, below) may compete against an employer as soon as they are no longer employed by the employer; see *Valley First Financial Services Ltd v Trach*, 2004 BCCA 312. However, employees should be careful not to compete unfairly, or compete using confidential information obtained from their former employer.

If an employment contract contains a restrictive covenant (such as a non-competition clause or a non-solicitation clause), see **Section V.D.1: Restrictive Covenants**, above.

### 4. Duty to Not Misuse Confidential Information

It is an implied term of an unwritten employment contract that the employee will not misuse the employer's confidential information. A common example of confidential information is the employer's list of customers. Employees who take a customer list by printing it out or putting it on a USB key and taking it with them, or by emailing it to themselves, would be in breach of this duty. One notable exception is that an employee may use any part of the customer list that they have simply memorized; see *Valley First Financial Services Ltd v Trach*, 2004 BCCA 312, but this still does not relieve the employee of the restriction on misuse of other employer confidential information to compete unfairly against the former employer. Additionally, employees such as financial advisors, who have developed ongoing relationships with clients, may be entitled to take a list of their own clients to inform them that they are departing, and where they will be working in the future (*RBC Dominion Securities Inc v Merrill Lynch Canada Inc et al*, 2007 BCCA 22 at para 81, reversed in part at 2008 SCC 54; *Edwards Jones v Voldeng*, 2012 BCCA 295). Note however that this may be prevented if the employee is in a fiduciary position, and there may be limits on the permitted contact or other complications if the employee signed a non-solicitation agreement.

### 5. Fiduciary Duties

Only a small fraction of employees have fiduciary duties to their employer. They may have fiduciary duties if they are directors of the company, or if they are senior officers in a top management position; see *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592. A fiduciary position is generally one where the fiduciary (the employee) has some discretion or power that affects the beneficiary (the employer), and the beneficiary is peculiarly vulnerable to the use of that power; see *Frame v Smith*, [1987] 2 SCR 99.

Employees who are in a fiduciary relationship to their employer have duties of loyalty, good faith, and avoidance of a conflict of duty and self-interest. They cannot, for example, take advantage of business opportunities that they should have been pursuing for their employer, even if they resign from their position.

### 6. Time Theft

In *Besse v. Reach CPA Inc*, 2023 BCCRT 27 , the BC Civil Resolution Tribunal ordered an employee to repay her employer wages received after the Tribunal found the employee was guilty of time theft. The employee had brought action against their employer for wrongful dismissal, and the employer counter-claimed for "time theft," alleging that the employee had collected wages for hours not actually worked. The Court accepted evidence via a time-tracking software installed on the employee's computer, which recorded the amount of time that the employee accessed specific web-services during work hours.

## *H. Other Employment Law Issues*

### 1. Discrimination in Employment

For provincially regulated employees, the *Human Rights Code* prohibits discrimination in employment on the basis of the following prohibited grounds (*HRC* ss 13, 43):

- Race
- Colour
- Ancestry
- Place of Origin

- Political Belief
- Marital Status
- Family Status
- Physical or Mental Disability
- Sex (this includes sexual harassment, and discrimination based on pregnancy or transgendered status)
- Sexual Orientation
- Age (only those over 19 years of age are protected by this provision)
- The person was convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person
- The person complains or is named in a complaint, gives evidence, or otherwise assists in a complaint or other proceeding under the *HRC*

This prohibition against discrimination in employment includes discrimination in the hiring process, in the terms and conditions of employment, and in decisions to terminate employment. Employment agencies also must not refuse to refer a person for employment based on one of the prohibited grounds for discrimination. Trade unions, employer's organizations, and occupational associations cannot discriminate against people by excluding, expelling or suspending them from membership (*HRC* s 14).

There must be no discrimination in wages paid (*HRC* 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.

Family status protection includes childcare and family obligations. See *Johnstone v Canada Border Services*, 2010 CHRT 20. In *Harvey v Gibraltar Mines Ltd. (No. 2)*, 2020 BCHRT 193, the BCHRT determined that the requirement to show a change in working conditions may not be necessary to demonstrate discrimination based on family status.

Outstanding confusion about whether a change to term of employment was needed for there to be family status discrimination was recently clarified in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168. The court confirmed that an employer does not need to change a term of employment in order for Family Status accommodation obligations to be triggered. In other words, there can be discrimination if a term of employment results in a serious interference with a substantial family obligation.

Included in the protected ground of sex is the protection of employees from sexual harassment in the workplace. The analysis of sexual harassment by the BC Human Rights Tribunal may be shifting away from requiring the complainant to prove that the sexual harassment was unwelcome in an objective sense. As elucidated in *Ms K v Deep Creek Store and another*, 2021 BCHRT 158, to find sexual harassment contrary to the Code, the Tribunal "must determine that the conduct is unwelcome or unwanted. The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct is unwelcome. It is open to a respondent to challenge an alleged adverse impact, so long as they do not rely on gender-based stereotypes and myths."

To further demonstrate the potential changing attitude and legal analysis of this issue, the Tribunal in *Byelkova v Fraser Health Authority (No. 2)*, 2021 BCHRT 159, commented on the evolution of understanding of sexual harassment and related power dynamics in the workplace.

For more information about each of the prohibited grounds; see **Chapter 6: Human Rights, Section III.B: Prohibited Grounds of Discrimination**. See also "Recent Human

Rights Cases of Interest for Employment Lawyers", Michael A. Watt, Employment Law Conference 2014, Paper 4.1, CLE BC.

Though generally employers are prohibited from discriminating against employees, it is permitted if the discrimination is required due to a bona fide occupational requirement (*HRC* ss 11, 13). To successfully argue the defence of a bona fide occupational requirement against a prima facie case of discrimination, a respondent must show the following:

1. There is a legitimate job-related purpose for the respondent's conduct;
2. The respondent adopted the standard or acted in good faith, believing the standard or conduct is necessary to achieve the legitimate job-related purpose; and
3. The respondent's standard or conduct is reasonably necessary to the purpose, such that the respondent could not accommodate the complainant (or others sharing their characteristics) without undue hardship.

If the employee appears to have been discriminated against based on a prohibited ground, see **section V.F.1: Discrimination in Employment** of this chapter for basic information on remedies for discrimination, or see **Chapter 6: Human Rights, Section III.C: The Complaint Process** for more detailed information.

Federally regulated employees are covered by the *Canadian Human Rights Act*. Similar protections are provided to that of the *Human Rights Code*, though they are not identical. The *Canadian Human Rights Act* has recently been updated to include gender identity or expression as a prohibited ground of discrimination.

Federal legislation allows employers to impose mandatory retirement, however, the BC provincial statute was amended in 2008 to prohibit this practice.

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)).

## 2. Duty to Inquire

In *Lord v. Fraser Health Authority and another*, 2020 BCHRT 64, the BCHRT noted that if something reasonably alerts the employer that the employee might have a disability that required accommodation, this duty to inquire becomes the first step in the duty to accommodate process. If an employer thinks there is a connection between an employee's poor work performance and a disability, the employer should inquire with the employee as to whether the employee has an illness or disability that is affecting performance, prior to taking actions that adversely affects the employee. Failure to do so could be a breach of the duty to accommodate.

## 3. Harassment in the Workplace

Bullying and harassment in the workplace are developing areas of the law. There are several possible avenues for addressing a complaint in this area if the issue cannot be resolved within the workplace.

The Workers Compensation Act was amended to cover mental disorders caused by workplace bullying and harassment (*Workers Compensation Act*, RSBC 1996 c 492, s 5.1); **Chapter 7: Workers' Compensation** provides additional information on how to make a claim. Employees will have to demonstrate that the behaviour to which they were subject was bullying and harassment and that it caused a disorder requiring their medical absence from work. Working with a doctor at the early stages of the process can help with the eventual success of such an application.

If the bullying or harassment is related to discrimination based on one of prohibited grounds listed in the *Human Rights Code*, the employee may be able to file a complaint with the Human Rights Tribunal; see **Chapter 6: Human Rights** for additional information.

The BC Human Rights Tribunal has suggested that "the trend for injury to dignity awards is upward", in the case of *Araniva v RSY Contracting*, 2019 BCHRT 97. In this case, the BC Human Rights Tribunal awarded $40,000 in damages for sexual harassment. The impugned conduct related to three verbal interactions and a touch on the arm asking for a hug followed by a reduction in hours when advances were rejected. The complainant had been previously sexually abused and the harassment triggered a significant emotional reaction.

The bullying or harassment could potentially constitute a constructive dismissal for which the employee could claim damages in court; see **V.C.10: Constructive Dismissal**.

Civil court claims connected to workplace related sexual harassment can also be considered, and courts are showing an increased receptiveness to such actions.

Finally, if the bullying or harassment is of an extremely serious nature, such as serious sexual harassment, consider whether the behaviour might be criminal and whether the police should be contacted. See also section 29, Sexual Misconduct and Bad Faith, earlier in this chapter.

## 4. Retaliation for Filing a Complaint

Generally, employers are not permitted to retaliate against an employee who files a statutory complaint.

A provincially regulated employee might file a complaint against an employer at the Employment Standards Branch, the Human Rights Tribunal, or with WorkSafe. The *Employment Standards Act*, the *Human Rights Code*, and the *Workers Compensation Act* each contain provisions which prohibit retaliation for filing complaints.

### *a) Employment Standards Act Claim Retaliation*

An employer may not threaten, 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 complies with the section, cease doing the act, pay reasonable expenses, hire or reinstate the employee and pay lost wages, or pay compensation (s 79). A complaint may be filed with the Employment Standards Branch.

### *b) Human Rights Code Claim Retaliation*

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a

complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code (s 43). If a person is discriminated against in such a manner, they may file a complaint at the Human Rights Tribunal in the same way that they would complain about any other discriminatory practice; see **Chapter 6: Human Rights, Section III.C: The Complaint Process**.

### *c) Workers Compensation Act*

Employers and unions must not take or threaten discriminatory action against a worker for taking various actions in regard to the Act, such as reporting unsafe working conditions to a WorkSafe officer (s 151). Remedies include the ability to reinstate the worker to their job (s 153). Additional details are set out in the *Workers Compensation Act*, Division 6 – Prohibition Against Discriminatory Action. For more information on the *Workers Compensation Act* and WorkSafeBC, see **Chapter 7** of this manual.

### *d) Common-Law Issues/Internal Complaints*

An employee may face retaliation for bringing an internal complaint, possible through a formal complaint process outlined in an employment policy. If the employer retaliates against the employee in a significant manner, this could constitute a constructive dismissal. In addition, if the employer dismisses the employee following a legitimate complaint, this may form grounds for an aggravated damages claim because of a bad faith dismissal.

## 5. Employee Privacy

### *a) Legislation*

There are three statutes in BC that concern privacy.

The *Privacy Act*, RSBC 1996 c 373, creates a statutory tort for breach of privacy. Whether a person's actions or conduct constitutes tortious conduct depends on what is reasonable in the circumstances. An action for breach of privacy can only be brought in BC Supreme Court.

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, [FOIPPA] applies to public bodies such as governmental ministries, universities, health authorities, etc. It gives individuals a right to access information held about themselves and access to many documents held by the public bodies. It also governs the collection, use, and disclosure of personal information, including public bodies' employees' personal information.

The *Personal Information Protection Act*, SBC 2003, c 63, [PIPA] applies to almost all organizations that are not public bodies covered by FOIPPA. It governs the collection, use, and disclosure of personal information, including employees' personal information.

### *b) Balancing Employer and Employee Interests*

Generally, employers can collect information that is reasonably necessary in the circumstances. Some of the factors to be considered are whether the collection of the personal information is required to meet a specific need, whether the collection of information is likely to meet that need, whether the loss of privacy is proportional to the benefit gained, and whether there are less privacy-invasive methods of achieving the same end; see *Eastmond v Canadian Pacific Railway*, 2004 FC 852. In that case, surveillance of a rail

yard was permitted after there were a number of incidents of theft, trespassing, and vandalism. GPS tracking of employees' work vehicles has also been permitted (*Schindler Elevator Corporation*, Order P12-01, 2012 BCIPC 25), though it generally necessary for the employer to inform the employee of the GPS tracking.

Random drug and alcohol testing can run afoul of privacy legislation. If the workplace is hazardous, this is not sufficient to justify random testing. There must be an additional factor, such as a general substance abuse problem at the workplace. If this additional factor is not present, then the employer cannot randomly test everyone in the workplace but can test individual employees if there is reasonable cause to believe the employee was impaired while at work, was involved in a workplace accident, or was returning to work following treatment for substance abuse (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34). For more information about alcohol and drug testing, consult "Alcohol and Drug Tests in the Workplace", Kenneth R. Curry and Kim G. Thorne, Employment Law Conference 2014, Paper 1.1, CLE BC.

Other issues involving employee privacy may arise if an employer requests an employee's medical information, monitors computer usage, or wishes to conduct personal searches of employees. Privacy laws are constantly evolving, and research should be done to determine whether the employer may be breaching privacy legislation.

Complaints regarding a breach of *FOIPPA* or *PIPA* can be filed with the Office of the Information and Privacy Commissioner for British Columbia.

The Ontario Superior Court of Justice recognized the tort of public disclosure of private facts in *Doe v. D*, 2016 ONSC 541, so there may be a new common law remedy in the appropriate circumstances.

# VI. REMEDIES

## *A. The Employment Standards Branch*

The Employment Standards Branch is the only forum an employee can go to if they have a complaint arising from a breach of the *ESA*. If the complaint is instead regarding a contractual issue; see **section V.B: Small Claims Court** and **Chapter 20: Small Claims**.

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 administrating all disputes arising under the Act. The Employment Standards Branch's Industrial Relations Officers and Employment Standards Officers are trained to interpret the *ESA* and to assist both employers and employees with problems arising under the Act. Employees should be referred to the Employment Standards Branch if they have a complaint arising under the *ESA*.

In *WG McMahon Canada Ltd v Mendonca* (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 they 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 website at www.bcest.bc.ca.

Although the *ESA* also allows for reinstatement as a possible remedy, there are no published decisions in which it has been ordered.

Provincially regulated employees may still be able to seek reinstatement under other statutes such as the *Worker's Compensation Act* or the *Human Rights Code* if their situation qualifies.

### 1. Application and Limitation Periods

The *ESA* gives the Director of Employment Standards power to investigate complaints made under the Act. The complaint must be made in writing and within certain time limits. The limitation period for an *ESA* complaint is six months. If still employed by the company, an employee should bring a complaint within six months of the event, and 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 they were on sick leave, pregnancy leave, Workers' Compensation benefits, etc. is nonetheless considered part of the term of employment.

### 2. Filing a Claim with the Employment Standards Branch

A complainant may file their complaint with the Employment Standards Branch in one of three ways:

- filling in a form and mailing or delivering it to the nearest Employment Standards Branch;
- filling in a form at the nearest Employment Standards Branch office; or
- submitting an online complaint form.

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).

Most employment standards complaints are resolved through a process of education of the parties, mediation, and/or adjudication, but some are referred to investigation. The officer reviewing the case has the discretion to determine the approach taken. 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 the Supreme Court for enforcement (s 78).

Section 29 of the *ES 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 section 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).

Under the *ESA* (s 80), employers' liability for wages (including payments for the length of service upon termination) can now include those wages that became payable within the twelve months prior to the date of the complaint, or within the twelve months prior to the date of the employee's termination – whichever is earlier. However, because some benefits become payable long after they were earned, an employee may be able to recover those benefits that they earned more than twelve months prior to the date of the complaint or date on which they were terminated. For example, in some cases vacation pay is not payable until two years after it is earned; in these cases, an employee could potentially recover vacation pay that was earned over a longer period than the twelve-month collection limitation period. Similarly, employees may be able to recover wages that were entered into a time bank more than twelve months prior to the date of the complaint.

**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.

## 3. 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, faxed, or delivered electronically, 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 (see *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252, and *Howard v Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256).

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 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.

Although the Act does not specifically allow a party to appeal the Director's findings of fact, in certain cases the Director's fact-finding may be so flawed that it amounts to a legal error. *Gemex Developments Corp v British Columbia (Assessor of Area #12 – Coquitlam)* (1998), 62 BCLR (3d) 354) defined an error of law as including instances where the Director was "acting on a view of the facts that could not reasonably have been entertained." This test has been adopted in a number of tribunal decisions. *Delsom Estate Ltd v British Columbia (Assessor of Area No 11 Richmond/Delta*, [2000] BCJ No 331 (BCSC), restated the test as being "…that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence" and is "perverse or inexplicable". For a summary of the law relating to judicial reviews under the Employment Standards Tribunal, see *Cariboo Gur Sikh Temple Society (1979) v British Columbia (Employment Standards Tribunal)*, 2016 BCSC 1622.

The tribunal may dismiss an appeal without a hearing if the 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.

If the employee is not satisfied with the decision of the Employment Standards Tribunal, they can seek judicial review of the decision in BC Supreme Court. Employees should speak to a lawyer if they wish to pursue this possibility.

## *B. Provincial (Small Claims) Court*

For information on how to proceed with a claim in Small Claims Court or the Civil Resolution Tribunal, see **Chapter 20: Small Claims Court**.

The Small Claims approach can often yield better results than claims filed with the Employment Standards Branch, particularly for cases involving termination of employment. 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 for dismissal without just cause, whereas a common law award could extend to as much as 24 months' wages. The Employment Standards Branch is also only able to award back-pay of up to twelve months, thus the claimant may wish to pursue a remedy in Small Claims Court if they are owed more than twelve months' back pay, and you determine there is a contractual claim to these funds. It might be in the employee's best interest to pursue certain claims through the Employment Standards Branch and others in Small Claims Court. However, keep in mind that civil court will not rule on a matter that is to be decided by the Branch.

Please note that employees may be prevented from directly enforcing rights under the *ESA* in civil court and must instead use the Employment Standards Branch to enforce these rights (*Macaraeg v E Care Contact Centres Ltd*, 2008 BCCA 182). However, many of the interests protected by the *ESA* have parallel common law (contractual) remedies as well. A significant exception to this is overtime pay: employees have a contractual right to receive their normal hourly pay for all hours they work, but they can only make a claim at the Employment Standards Branch if they wish to receive 1.5 or 2 times their normal hourly rate for their overtime hours (an exception to this is if their employment contract specifically sets out that they will receive a higher rate for overtime pay, in which case this contractual right can be enforced in court). Each case should be reviewed fully before determining in which forum to proceed.

It is important to note that different stages of a dispute may appear in different forums. A finding that there was no just cause for termination through an *Employment Standards* hearing is not grounds for estoppel of an employer arguing just cause as a defence to a wrongful dismissal claim through civil court; see *Moore v. Instow Enterprises Ltd.*, 2021 BCSC 930.

Also, note that Small Claims Court only has jurisdiction for claims above $5,000 and up to $35,000. Employees with claims over $35,000 must either abandon the excess amount of the claim or proceed to BC Supreme Court. Employees should consult a lawyer before proceeding in BC Supreme Court, as it can be quite complicated and costly. Employees with claims $5,000 or under may be required to pursue their claim through the Civil Resolution Tribunal.

When naming the defendant in Small Claims Court, the employee should sue the body with which the contract of employment was made, unless they are alleging fraud or induced breach of contract – in which case, consider joining the shareholders or directors of the company. The employee may have to sue the parent company and the subsidiary if the parent company does the hiring, paying, and terminating.

## *C. The B.C. Human Rights Tribunal*

If an employee or potential employee has been discriminated against on the basis of one or more of the prohibited grounds; see **Chapter 6: Human Rights, Section III.C: The Complaint Process** for information on how to proceed with a complaint. If the employee was terminated from their position based on one of the prohibited grounds, they may be able to recover lost wages and compensation for injury to dignity, feeling, and self-respect at the Human Rights Tribunal.

The employee also has the option to file a claim in Small Claims Court, the Civil Resolution Tribunal or BC Supreme Court for wrongful dismissal: **See Section IV.D: Termination of Employment** for information on wrongful dismissal claims.

In most cases, the employee should choose one of these two options, based on which would provide the most compensation. For low-income employees who were employed for a short period of time, the Human Rights Tribunal can often provide greater compensation. However, in some cases where the employee has worked for the employer for a particularly long time before being terminated, or where the employer has demonstrated particularly egregious conduct, the employee may have better success in Small Claims Court or BC Supreme Court where they may be able to receive a larger severance award, and possibly punitive damages.

It is theoretically possible to have the employee's job reinstated by making a claim under the *Human Rights Code*. This is a significant remedy in itself and it can also be used to incentivize a former employer to make a fair settlement offer, as they often do not wish for the employee to return. However, in practice the Human Rights Tribunal does not order reinstatement, so be sure to advise employees about the extreme unlikelihood of the reinstatement remedy.

## *D. Limitation Periods*

If a client wishes to file a complaint with the Employment Standards Branch, there is a six-month limitation period from the last day of employment to file a claim (*ESA* s 74).

Applications to the B.C. Human Rights Tribunal must be made within one year of the alleged contravention or the last day of employment (HRC s 22).

In the courts, there is a two-year limitation period (See *Limitation Act*, SBC 2012, c 13) for filing a wrongful dismissal claim. Section 124 of the *ESA* sets a limitation period of two years for any court action arising from an offence under the Act.

Note that in cases where an employer has provided working notice of dismissal, the limitation period for wrongful dismissal claims likely starts when working notice is provided, not on the last day of employment. See *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc*., 2017 ONCA 1004.

# VII. STRATEGIES AND TIPS

## *A. Gather Evidence*

Employees who face employment issues should document everything so that they will be able to provide better evidence if the case goes to a hearing or trial. Employees who are dealing with work-related or dismissal-related stress should consider seeing a medical professional as soon as possible, as medical evidence can be extremely helpful at the Human Rights Tribunal and in Court. Medical evidence is often necessary if an employee wishes to make a claim for aggravated damages due to the manner of their dismissal, as only actual losses are compensable under this category of damages.

If evidence is in the possession of the employer, consider writing to the employer and asking them to put a litigation hold on all documents generally, and identify specific documents which the employee is aware exist. Warn the employer that if they do not preserve the evidence, you would be asking a court to draw an adverse inference in relation to such evidence if the matter proceeds to litigation.

Employees can also consider making a freedom of information request, such as a PIPA request, to request any information in the possession of the employer that relates to the employee.

## *B. Make a Claim for Employment Insurance*

An employee who is dismissed may receive severance pay eventually; however, sometimes this can involve a long process. If the employee is receiving Employment Insurance, they may have sufficient financial resources to wait a longer time to receive severance pay, and so they will be less likely to be forced to take a low settlement offer to pay their monthly bills. File for Employment Insurance immediately after being dismissed as Service Canada imposes time limits for filing. Make sure the employee understands that if they receive a severance settlement or judgement later on, they may have to pay back some of the EI benefits received during the severance period.

## *C. Make Reasonable Efforts to Mitigate Losses and Track Mitigation Efforts*

Employees must make reasonable efforts to mitigate their damages. This is most relevant if the employee has been dismissed; the employee will be making a claim for damages in lieu of reasonable notice in Small Claims Court or the Civil Resolution Tribunal, or a claim for lost wages at the Human Rights Tribunal, and they must make reasonable efforts to mitigate these losses by searching for similar work. The employee should document their search for work. Note, however, that if the employee is successful in finding work, they will have successfully mitigated their damages, and will, therefore, be entitled to less compensation for lost wages or reasonable notice.

Employees should also be encouraged to keep accurate records of their job search efforts, for potential use as evidence at court.

## *D. File a Claim Quickly*

Once an employee finds a new job, they begin to mitigate their damages, which will reduce their severance award. File a claim as soon as possible; if the employee can reach a settlement agreement or have the case tried before the employee finds a new job, you may avoid having a severance award reduced for mitigation income.

## *E. Consider Complexity and Strength of Claim*

If a claim is filed that is relatively simple, the employee is more likely to get through the process more quickly; this is helpful if you wish to try to finish the process before the employee gets a new job and begins mitigating their damages. However, there can also be benefits to adding claims for aggravated or punitive damages or various torts, and benefits to splitting a claim into more than one forum; namely, there is the potential for a greater award and the potential for tax advantages on the

damages received. Consider the strength of the claims, how important it will be for the employee to receive money quickly, and the likelihood of the employee finding a new job and mitigating their damages, before deciding whether to make a simple claim for severance pay or to add additional claims.

## *F. Consider Tax Consequences During Settlement Negotiation*

An employee must pay tax on the portion of an award that is given in place of the wages they would have received during their reasonable notice period.

However, if part of the damages is instead awarded as aggravated or punitive damages (in Small Claims Court or BC Supreme Court), or as damages for injury to dignity, feelings, and self-respect (at the BC Human Rights Tribunal), this portion of the award may not be taxable. Consider structuring a written settlement agreement to allocate a reasonable portion of the award to these potentially non-taxable categories of damages.

Employers will often also allow an employee to allocate an amount of a severance settlement to be paid directly to an RRSP account on a pre-tax basis, up to the employee's eligible RRSP room.

Note that this chapter, and LSLAP, cannot provide tax advice, and an employee may wish to consult an accountant or tax lawyer or the Canada Revenue Agency to determine exactly which amounts of a final settlement are taxable, and what the best strategy for payment structuring would be for a particular employee. It is helpful to obtain this recommended strategy from the employee's financial advisor at an early stage, so that the settlement structuring request can form part of the severance negotiations.

## *G. Consider Pursuing the Claim in Different Forums*

In some cases, it may be advantageous to split up the various employment issues an employee faces and proceed in different forums based on which forum will award the greatest amount of money for each legal issue.

For example, one may wish to claim overtime pay and vacation pay at the Employment Standards Branch, and claim severance pay in Small Claims Court. This may be beneficial because overtime pay is only legally required under the *ESA*, unless the employee's contract calls for overtime pay to be paid, meaning that claims for it can only be brought at the Employment Standards Branch. However, severance pay tends to be significantly greater in Small Claims Court.

Often it will be best to keep the entire claim in one forum. Note that section 82 of the *ESA* states that once a determination has been made by the Employment Standards Branch, the employee may commence another action for the same wages only if the Director gives written permission or the Director or tribunal cancels the determination. This prevents the possibility of "double recovery"; if an employee received damages for an action in one forum, they may not receive the same damages in another. However, even if an employee has already gone through the Employment Standards Branch to obtain the minimum statutory entitlement for the length of service under the *ESA*, they are still able to make a claim in court for contractual breaches such as wrongful dismissal, and therefore they may potentially obtain additional severance pay (*Colak v UV Systems Technology Inc*, 2007 BCCA 220). Nonetheless, proceeding at the Employment Standards Branch to claim the statutory minimum entitlements for the length of service can be problematic for several reasons. Firstly, if the employee is also going to be proceeding in Small Claims Court for wrongful dismissal, a claim at the Employment Standards Branch may simply cause an extra expenditure of effort with no additional benefit. Secondly, if the Employment Standards Branch makes a determination as to whether or not there was just cause for dismissal, this determination is likely to be adopted by Small Claims Court if a claim is later filed there. It should be considered that of these two forums, only the Small Claims Court decisions are made by judges, so if it is anticipated that there may be

complex legal arguments on the issue of just cause, it may be beneficial to proceed in Small Claims Court.

## *H. Consider Defeating Signed Release Agreements*

An employee may have already signed a release agreement that waives any liability against the employer. This is not the end of the claim.

In considering a signed release agreement, you should first ensure that it applies to the situation at hand. For example, a release of all liability pursuant to the *Employment Standards Act* may not prevent an employee from recovering in common law.

If the release agreement is grossly unfair for the employee, it may also be set aside on grounds of unconscionability. The British Columbia Supreme Court has recently adopted Alberta's test for unconscionability in the context of a severance release as follows: (*Manak v. Workers' Compensation Board of British Columbia*, 2018 BCSC 182 at para 90). A contract is unenforceable for unconscionability if:

- It is a grossly unfair and improvident transaction;
- The victim did not receive independent legal advice or other suitable advice;
- There exists an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
- The other party knowingly took advantage of this vulnerability.

A severance release is also unenforceable if it was entered into under duress. For more information on the law of duress, generally, see *Bell v. Levy*, 2011 BCCA 417.

# VIII. APPENDIX A: GLOSSARY OF TERMS

**Aggravated damages**: In the context of wrongful dismissal: damages awarded as compensation for an employee's reasonably foreseeable loss or harm that occurred due to the manner of their dismissal; generally awarded as compensation for psychological harm caused by the manner in which the employee was terminated from their employment.

**Bad Faith**: If an employer dismisses a person in a harsh or vindictive manner, for example by purposely humiliating the employee or by taking some other action that might mentally harm the employee, they may have dismissed the employee in a bad faith manner, and the employee may be entitled to aggravated damages.

**Constructive Dismissal**: A unilateral change by an employer to a fundamental term of an employee's contract (such as pay or job duties). The change must not be condoned and must be significant. The employee might claim this change is a constructive dismissal (or equivalent to a dismissal because of the significance of the change), even though there has been no express act of dismissal on the part of the employer.

**Contract**: An agreement between persons which obliges each party to do or not do certain things.

**Dismissal**: An employer's decision to terminate a contract of employment.

**Employment at Will**: An employment contract during which the employer may terminate the employment at any time. This is an American concept, as this type of employment does not legally exist in BC (or anywhere in Canada): if the employment contract purports to allow the employer to terminate the employee without notice, it is invalid, and the employee may be able to obtain a severance award.

**Just Cause**: Misconduct by an employee, or some other event relevant to the employee, which justifies the immediate termination of the employment contract. Note that this phrase has a different meaning in the context of Employment Insurance.

**Mitigation of Damages**: The obligation upon a person who sues another for damages, to minimize - or mitigate - those damages, as far as reasonable.

**Non-competition Agreement**: A contract or a clause in a contract in which an employee agrees not to compete against their employer. These are often found to be invalid in court, particularly if a non-solicitation agreement would have sufficed to protect the employer's interests.

**Non-solicitation Agreement**: A contract or a clause in a contract in which an employee agrees not to solicit customers of the employer.

**Reasonable Notice**: Employers must give an employee reasonable notice that their employment is to be terminated without cause, or payment of their usual salary and benefits in lieu of notice. The length of time that constitutes reasonable notice varies based on the employee's age, length of service to the employer, and employment responsibilities, and the availability of alternate employment. The reasonable notice period can be up to approximately two years.

**Restrictive Covenant**: A contract in which a party agrees to be restricted in some regards as to future conduct. There are two common types: non-competition agreements and non-solicitation agreements.

**Severance Pay**: An amount of money an employer owes to an employee in lieu of notice of the employee's termination.

**Sick Leave**: Time off from work, paid or unpaid, on account of an employee's temporary inability to perform duties because of sickness or disability.

**Union**: A defined group of employees formed for the purposes of representing those employees with the employer as to the terms of a collective contract of employment.

**Workers' Compensation**: A public benefit scheme in which qualified workers who are injured in the workplace, receive compensation, commensurate with their degree of injury, regardless of who was at fault.

**Wrongful Dismissal**: The failure to provide reasonable notice of the termination of an employment contract. Wrongful dismissal is a term that can apply to cases when an employer doesn't provide enough notice or severance in the case of a without cause dismissal, or when an employer fires an employee without any notice or severance in the case of a just cause termination.