

# Table of Contents

|                                                       |              |
|-------------------------------------------------------|--------------|
| <i>Preface/Dedication</i> . . . . .                   | <i>iii</i>   |
| <i>Preface to the September 2013 Update</i> . . . . . | <i>ix</i>    |
| <i>Foreword</i> . . . . .                             | <i>xvii</i>  |
| <i>Resources</i> . . . . .                            | <i>xix</i>   |
| <i>Table of Contents</i> . . . . .                    | <i>CON-1</i> |
| <i>Supplementary Table of Cases</i> . . . . .         | <i>STC-1</i> |
| <i>Table of Cases</i> . . . . .                       | <i>TC-1</i>  |
| <i>New Developments</i> . . . . .                     | <i>ND-1</i>  |

## VOLUME 1

### *Part I Overview*

#### *Chapter 1 Introductory Comments: Just Cause Is Not a “Lost Cause”*

|                                              |      |
|----------------------------------------------|------|
| 1.1 Scope of Application . . . . .           | 1-7  |
| 1.2 The Database of Case Summaries . . . . . | 1-9  |
| 1.3 Conclusion to the Introduction . . . . . | 1-10 |

#### *Chapter 2 Overview of Summary Dismissal*

|                                                                                                  |      |
|--------------------------------------------------------------------------------------------------|------|
| 2.1 What Is Just Cause? . . . . .                                                                | 2-1  |
| 2.2 Historical Concept of Just Cause . . . . .                                                   | 2-2  |
| 2.3 <i>McKinley v. BC Tel</i> —Confirmation of the Contextual Approach . . . . .                 | 2-4  |
| 2.4 The Need for Proportionality . . . . .                                                       | 2-10 |
| 2.5 Establishing Just Cause—The Degree of Misconduct Required<br>for Summary Dismissal . . . . . | 2-11 |
| 2.5.1 The Need for Warnings . . . . .                                                            | 2-16 |
| 2.6 The Different Forms of Behaviour That Can Constitute<br>Just Cause . . . . .                 | 2-17 |

## TABLE OF CONTENTS

|                                                                                                |        |
|------------------------------------------------------------------------------------------------|--------|
| 2.7 Circumstances That Do Not Constitute Just Cause . . . . .                                  | 2-19   |
| 2.7A Just Cause at Common Law vs. ‘Wilful Misconduct’ Pursuant<br>to Statute . . . . .         | 2-21   |
| 2.8 Single Incident of Misconduct vs. Repeated Minor<br>Misconduct . . . . .                   | 2-22   |
| 2.9 Cumulative Cause . . . . .                                                                 | 2-22.6 |
| 2.10 Contractually Defined Just Cause. . . . .                                                 | 2-25   |
| 2.11 The Need for a Reasoned Analysis of Allegations of<br>Just Cause . . . . .                | 2-26   |
| 2.12 Onus/Burden of Proof . . . . .                                                            | 2-28   |
| 2.12.1 Degree of Proof When Alleged Cause is Criminal or<br>Quasi-Criminal in Nature . . . . . | 2-31   |
| 2.13 Near Cause . . . . .                                                                      | 2-33   |
| 2.14 Judicial Bias Towards Employees? . . . . .                                                | 2-34   |
| 2.14.1 The Duty to Accommodate . . . . .                                                       | 2-37   |
| 2.14.2 “The Damages Formerly Known as <i>Wallace</i> ” . . . . .                               | 2-38   |
| 2.14.3 The Threshold for Bad Faith Damages . . . . .                                           | 2-38   |
| 2.14.4 The Duty to Mitigate . . . . .                                                          | 2-39   |
| 2.15 Application of Discipline Policy . . . . .                                                | 2-39   |
| 2.16 Practical Advice . . . . .                                                                | 2-41   |

### **Chapter 3 The Contextual Approach**

|                                                                       |        |
|-----------------------------------------------------------------------|--------|
| 3.1 History . . . . .                                                 | 3-2    |
| 3.2 The Supreme Court Decision in <i>McKinley v. BC Tel</i> . . . . . | 3-4    |
| 3.3 Application of the Contextual Approach . . . . .                  | 3-9    |
| 3.3.1 Length of Service . . . . .                                     | 3-10   |
| 3.3.2 Nature/Character of Employment . . . . .                        | 3-18.2 |
| 3.3.3 The Context of the Misconduct. . . . .                          | 3-19   |
| 3.4 The Relevance of the Investigation. . . . .                       | 3-20.2 |
| 3.4.1 Nanny Fired for Not Looking After Children . . . . .            | 3-23   |
| 3.5 Prior Disciplinary History . . . . .                              | 3-25   |
| 3.6 Proving Irreparable Harm to the Employment Relationship. . . . .  | 3-26   |
| 3.6.1 Surreptitious Recording of Workplace Interactions . . . . .     | 3-27   |

## TABLE OF CONTENTS

|                                                      |      |
|------------------------------------------------------|------|
| 3.6.2 Refusing to Apologize for Harassment . . . . . | 3-30 |
| 3.7 Mitigating Factors . . . . .                     | 3-32 |
| 3.8 Other Factors . . . . .                          | 3-33 |
| 3.9 Conclusion. . . . .                              | 3-34 |

### *Chapter 4 The Impact of Just Cause for Dismissal*

|                                                                       |      |
|-----------------------------------------------------------------------|------|
| 4.1 Terminating the Employment Relationship . . . . .                 | 4-1  |
| 4.1.1 The Obligation to Provide Notice or Pay in Lieu Thereof . . . . | 4-2  |
| 4.1.2 Employees that are also Tenants . . . . .                       | 4-5  |
| 4.2 The Employment Relationship . . . . .                             | 4-6  |
| 4.2.1 Who is an Employee? . . . . .                                   | 4-6  |
| 4.2.2 Independent Contractors vs. Employees . . . . .                 | 4-6  |
| 4.2.3 Dependent Contractors . . . . .                                 | 4-11 |
| 4.2.4 Unionized Employees . . . . .                                   | 4-16 |
| 4.3 Common Law Notice vs. Statutory Notice. . . . .                   | 4-17 |
| 4.4 Practical Advice. . . . .                                         | 4-18 |

### *Part II Grounds for Dismissal*

#### *Chapter 5 Dishonesty*

|                                                                                                     |        |
|-----------------------------------------------------------------------------------------------------|--------|
| 5.1 General Principles . . . . .                                                                    | 5-1    |
| 5.2 <i>McKinley v. BC Tel</i> —Confirmation of the Contextual Approach . . .                        | 5-2    |
| 5.2.1 Lying About Jail Time . . . . .                                                               | 5-5    |
| 5.2.2 Exaggerating the Conduct of Colleagues: Getting Kicked<br>in the Butt and then Fired. . . . . | 5-6    |
| 5.2.3 Giving Product Away . . . . .                                                                 | 5-6.1  |
| 5.2.4 Lying About Moving to Another Country. . . . .                                                | 5-6.2  |
| 5.2.5 Falsifying Driving Logs to Hide Safety Violations. . . . .                                    | 5-6.3  |
| 5.2.6 Lying About Absences . . . . .                                                                | 5-6.6  |
| 5.2.7 Playing Sick to Play Baseball . . . . .                                                       | 5-6.8  |
| 5.2.8 Charity Gone Awry. . . . .                                                                    | 5-6.10 |
| 5.2.9 Failing to Mention Criminal Charges . . . . .                                                 | 5-6.12 |
| 5.2.10 Teacher Falsifying Student Grades . . . . .                                                  | 5-6.13 |

## TABLE OF CONTENTS

|                                                                      |        |
|----------------------------------------------------------------------|--------|
| 5.2.11 Charging Expenses to Two Different Organizations . . . . .    | 5-6.15 |
| 5.2.12 Allegedly Lying About Medical Reason for Time Off . . . .     | 5-6.16 |
| 5.2.13 Lying About Absences. . . . .                                 | 5-6.17 |
| 5.2.14 Duty to Provide Sufficient Information . . . . .              | 5-6.18 |
| 5.2.15 Lying about Sexual Relationship with Employee . . . . .       | 5-6.18 |
| 5.2.16 Lying about Student Report of Inappropriate Contact . . .     | 5-6.19 |
| 5.2.17 Police Officer Falsifying Reports . . . . .                   | 5-6.19 |
| 5.2.18 Dishonesty in the Banking/Financial World. . . . .            | 5-6.20 |
| 5.3 Dishonesty Vis-à-Vis Colleagues. . . . .                         | 5-6.23 |
| 5.4 Failure to Reveal Relevant Information . . . . .                 | 5-6.25 |
| 5.5 Failure to Act . . . . .                                         | 5-6.25 |
| 5.6 Expectations Where Employees are not Subject to Supervision. . . | 5-6.26 |
| 5.7 Pre-Employment Dishonesty . . . . .                              | 5-7    |
| 5.8 Dishonesty and Misrepresentation . . . . .                       | 5-14.1 |
| 5.9 Dishonesty in the Course of Investigation . . . . .              | 5-16   |
| 5.9.1 Dishonesty at a Hearing . . . . .                              | 5-16.5 |
| 5.10 After-Acquired Knowledge of Dishonesty . . . . .                | 5-16.6 |
| 5.11 Practical Advice . . . . .                                      | 5-17   |

## *Chapter 6*   **Conflicts of Interest**

|                                                        |      |
|--------------------------------------------------------|------|
| 6.1 Overview . . . . .                                 | 6-1  |
| 6.2 The Degree of Loyalty Owning . . . . .             | 6-3  |
| 6.3 Fiduciary Duties . . . . .                         | 6-4  |
| 6.3.1 Who Is a Fiduciary? . . . . .                    | 6-7  |
| 6.4 Contractually Defined Duties. . . . .              | 6-9  |
| 6.5 The Spectrum of Potential Conflict . . . . .       | 6-10 |
| 6.6 Must the Employer Prove Actual Prejudice?. . . . . | 6-11 |
| 6.7 Competing with Your Employer . . . . .             | 6-11 |
| 6.8 Leaving to Join the Competition . . . . .          | 6-16 |
| 6.9 Taking Corporate Opportunities . . . . .           | 6-21 |
| 6.10 “Inconsequential” Competition. . . . .            | 6-22 |
| 6.11 Abusing Position for Personal Gain . . . . .      | 6-24 |

## TABLE OF CONTENTS

|                                                                 |        |
|-----------------------------------------------------------------|--------|
| 6.12 Abusing Position for Benefit of Third Parties . . . . .    | 6-26.4 |
| 6.12.1 Giving your Family a Break on Costs . . . . .            | 6-26.5 |
| 6.12.2 Preferring one Candidate in the Hiring Process . . . . . | 6-26.5 |
| 6.13 Competing with Customers . . . . .                         | 6-26.6 |
| 6.14 Disclosing Confidential Information. . . . .               | 6-27   |
| 6.15 Failure to Reveal Relevant Information . . . . .           | 6-28   |
| 6.16 Suing, or Threatening to Sue, One's Employer . . . . .     | 6-30   |
| 6.17 Inappropriate Relationships . . . . .                      | 6-34   |
| 6.18 Relationships with Co-Workers . . . . .                    | 6-36   |
| 6.19 Seeking New Employment . . . . .                           | 6-38   |
| 6.20 Moonlighting . . . . .                                     | 6-41   |
| 6.21 Duties During Period of Leave. . . . .                     | 6-43   |
| 6.22 Telling Customers to Shop Elsewhere. . . . .               | 6-43   |
| 6.23 Practical Advice . . . . .                                 | 6-44   |

### *Chapter 7*   **Inappropriate Relationships**

|                                                               |      |
|---------------------------------------------------------------|------|
| 7.1 General Principles . . . . .                              | 7-1  |
| 7.2 “Immoral” Conduct . . . . .                               | 7-2  |
| 7.3 Potential Impact on Ability to Carry Out Duties . . . . . | 7-3  |
| 7.4 Marriage Creating a Conflict of Interest . . . . .        | 7-9  |
| 7.5 Relationships Between Co-Workers . . . . .                | 7-11 |
| 7.6 Practical Advice . . . . .                                | 7-17 |

### *Chapter 8*   **Insolence**

|                                                          |        |
|----------------------------------------------------------|--------|
| 8.1 What Is It? . . . . .                                | 8-1    |
| 8.1.1 What It Is Not—Insubordination . . . . .           | 8-2    |
| 8.2 The Elements of the Offence . . . . .                | 8-4    |
| 8.2.1 Do Others Have to Witness the Behaviour? . . . . . | 8-12.2 |
| 8.2.2 The Use of Profanity. . . . .                      | 8-12.3 |
| 8.2.3 Violence and Threats. . . . .                      | 8-14   |
| 8.2.4 Behaviour Toward Colleagues . . . . .              | 8-17   |
| 8.3 The Impact and Intent of the Conduct. . . . .        | 8-18   |

## TABLE OF CONTENTS

|                                                                  |        |
|------------------------------------------------------------------|--------|
| 8.4 Can a Single Incident Be Just Cause for Dismissal? . . . . . | 8-22.6 |
| 8.5 Excuses/Defences . . . . .                                   | 8-27   |
| 8.6 Practical Advice—Dealing with Insolence. . . . .             | 8-29   |

### *Chapter 9 Insubordination*

|                                                                                  |        |
|----------------------------------------------------------------------------------|--------|
| 9.1 What Is It? . . . . .                                                        | 9-1    |
| 9.1.1 What It Is Not—Insolence . . . . .                                         | 9-2    |
| 9.2 Elements of the Offence . . . . .                                            | 9-2    |
| 9.2.1 The Behaviour Must Be Wilful . . . . .                                     | 9-3    |
| 9.2.2 The Order, Policy or Rule Must Be Clear and Unequivocal . .                | 9-5    |
| 9.2.3 The Order, Policy or Rule Must Have Been Known to the<br>Employee. . . . . | 9-6.3  |
| 9.2.4 The Order, Policy or Rule Must Be Lawful and Reasonable<br>. . . . .       | 9-6.4  |
| 9.2.5 Refusal to Drive Unsafe Truck . . . . .                                    | 9-8    |
| 9.2.6 The “Work Now, Grieve Later” Principle . . . . .                           | 9-8.1  |
| 9.3 Different Rules for Different Rules? . . . . .                               | 9-8.3  |
| 9.4 Moral or Other Objections to the Rule/Order . . . . .                        | 9-8.3  |
| 9.5 Zero Tolerance? . . . . .                                                    | 9-10   |
| 9.6 The Effect of the Misbehaviour . . . . .                                     | 9-12   |
| 9.6A Single Incident of Insubordination. . . . .                                 | 9-13   |
| 9.7 Whistle-Blowing. . . . .                                                     | 9-20.2 |
| 9.8 Refusal to Relocate . . . . .                                                | 9-20.5 |
| 9.9 Failing to Attend at Work . . . . .                                          | 9-20.8 |
| 9.9.1 Abandoning Your Post . . . . .                                             | 9-21   |
| 9.10 Refusal to Keep in Touch While on Long-Term Disability. . . . .             | 9-22   |
| 9.11 Refusal to Attend Training . . . . .                                        | 9-24   |
| 9.12 Cumulative Cause . . . . .                                                  | 9-25   |
| 9.13 Excuses/Defences . . . . .                                                  | 9-27   |
| 9.13.1 Union Representatives. . . . .                                            | 9-28   |
| 9.14 Related Grounds . . . . .                                                   | 9-29   |
| 9.15 Practical Advice . . . . .                                                  | 9-29   |

## TABLE OF CONTENTS

### *Chapter 10 Breach of Rules or Policies*

|                                                                                                        |            |
|--------------------------------------------------------------------------------------------------------|------------|
| 10.1 Introduction . . . . .                                                                            | 10-1       |
| 10.2 Elements of the Offence . . . . .                                                                 | 10-2       |
| 10.2.1 Need to Communicate the Policy. . . . .                                                         | 10-2       |
| 10.3 The Need for a Clearly Worded Policy. . . . .                                                     | 10-2.2     |
| 10.4 The Need for a Routinely Enforced Policy. . . . .                                                 | 10-4.3     |
| 10.5 Multi-Jurisdictional Policies . . . . .                                                           | 10-4.5     |
| 10.6 The Need for Regular Updates . . . . .                                                            | 10-5       |
| 10.7 Examples . . . . .                                                                                | 10-6       |
| 10.7.0.1 Breach of COVID-19 policy . . . . .                                                           | 10-6       |
| 10.7.1 Where There's Smoke, There's Usually Fire . . . . .                                             | 10-6.2     |
| 10.7.1(a) Vaping at Work . . . . .                                                                     | 10-6.2     |
| 10.7.2 Breach of Patient Confidentiality. . . . .                                                      | 10-6.3     |
| 10.7.3 Sexual Relationship Between a School Caretaker and<br>Student . . . . .                         | 10-8       |
| 10.7.4 Breach of Non-Fraternization Policy . . . . .                                                   | 10-8.2     |
| 10.7.5 Breach of Confidentiality. . . . .                                                              | 10-8.4     |
| 10.7.6 Breach of Safety Rules . . . . .                                                                | 10-8.8     |
| 10.7.6(a) Zero Tolerance for Safety Policies . . . . .                                                 | 10-8.10(9) |
| 10.7.6(b) Falsifying Driving Logs to Hide Safety Violations<br>. . . . .                               | 10-8.10(9) |
| 10.7.7 You Can't Give Products Away . . . . .                                                          | 10-8.11    |
| 10.7.8 Don't Hang Up on Clients . . . . .                                                              | 10-8.14    |
| 10.7.9 Teacher Gets Failing Grade for Giving Zeros—Moral<br>Objections Do Not Justify Breach . . . . . | 10-8.15    |
| 10.7.10 Abandoning Your Post . . . . .                                                                 | 10-8.16    |
| 10.7.11 Paramedics Buying Beer and Cigarettes for Teenage<br>Girls . . . . .                           | 10-8.17    |
| 10.7.12 Abuse of Residents . . . . .                                                                   | 10-8.18    |
| 10.7.13 Breach of Privacy Policy to Get a Parking Space. . . . .                                       | 10-8.20    |
| 10.7.14 Teacher Failing to Report Allegation of Inappropriate<br>Sexual Touching . . . . .             | 10-8.21    |
| 10.7.15 Inadvertent Breach of Policy . . . . .                                                         | 10-8.22    |

## TABLE OF CONTENTS

|                                                                                 |         |
|---------------------------------------------------------------------------------|---------|
| 10.7.16 Excessive Personal Use of Internet while at Work . . . . .              | 10-8.24 |
| 10.7.17 Prison Employee Breaking the Rules to Help Dangerous<br>Inmate. . . . . | 10-8.25 |
| 10.7.18 Gaming the System . . . . .                                             | 10-8.26 |
| 10.7.19 Abuse of Patients. . . . .                                              | 10-8.27 |
| 10.8 Are All Breaches Cause for Dismissal? . . . . .                            | 10-8.30 |
| 10.9 No Actual Loss is Necessary . . . . .                                      | 10-8.30 |
| 10.10 Practical Advice . . . . .                                                | 10-10   |
| 10.10.1 Zero-Tolerance Policies . . . . .                                       | 10-13   |
| 10.11 Guidelines . . . . .                                                      | 10-14   |

### *Chapter 11 Theft*

|                                                                                                      |          |
|------------------------------------------------------------------------------------------------------|----------|
| 11.1 General Principles . . . . .                                                                    | 11-1     |
| 11.2 Impact of Theft by Employees on the Employer. . . . .                                           | 11-2.2   |
| 11.2.1 Water Distribution Employee Stealing Water . . . . .                                          | 11-3     |
| 11.3 Issues of Credibility . . . . .                                                                 | 11-4     |
| 11.3.1 How Credibility Is Determined . . . . .                                                       | 11-6     |
| 11.3.2 Adverse Inference for Not Testifying . . . . .                                                | 11-7     |
| 11.4 The Standard of Proof . . . . .                                                                 | 11-8     |
| 11.5 Impact of Related Criminal Proceedings. . . . .                                                 | 11-12    |
| 11.6 Reasonable Suspicion May Be Sufficient . . . . .                                                | 11-12.3  |
| 11.6.1 Evidence Must Show Misconduct . . . . .                                                       | 11-12.4  |
| 11.6.2 Conduct Sufficiently Egregious to Warrant Dismissal<br>Even Without Prior Discipline. . . . . | 11-14    |
| 11.7 The Contextual Approach Even Applies to Theft. . . . .                                          | 11-14(1) |
| 11.7.1 Examples of Contextual Considerations. . . . .                                                | 11-14.5  |
| 11.7.1(a) Theft by Long-term Employees . . . . .                                                     | 11-14.5  |
| 11.7.1(b) Theft Outside the Workplace. . . . .                                                       | 11-16    |
| 11.7.2 Taking Food to Feed Your Own Family. . . . .                                                  | 11-17    |
| 11.7.3 Theft Costs Employee Early Retirement . . . . .                                               | 11-18    |
| 11.7.4 Excessive Employee Discounts. . . . .                                                         | 11-19    |
| 11.7.4(a) Sweethearting . . . . .                                                                    | 11-20    |



## TABLE OF CONTENTS

|                                 |       |
|---------------------------------|-------|
| 11.8 Practical Advice . . . . . | 11-20 |
|---------------------------------|-------|

### *Chapter 12 Fraud*

|                                                             |            |
|-------------------------------------------------------------|------------|
| 12.1 Introduction . . . . .                                 | 12-1       |
| 12.2 Historical Review . . . . .                            | 12-2       |
| 12.3 General Principles . . . . .                           | 12-4       |
| 12.4 Elements of the Offence . . . . .                      | 12-7       |
| 12.5 Issues of Proof . . . . .                              | 12-9       |
| 12.6 Impact of Criminal Charges . . . . .                   | 12-11      |
| 12.7 Variations of the Offence . . . . .                    | 12-12      |
| 12.7.1 Expense Fraud . . . . .                              | 12-12      |
| 12.7.2 Misuse of Company Funds . . . . .                    | 12-16.2    |
| 12.7.3 Misuse of Expense Accounts . . . . .                 | 12-16.2    |
| 12.7.4 Use of the Company Credit Card . . . . .             | 12-16.2(1) |
| 12.7.5 False Overtime Claims . . . . .                      | 12-16.4    |
| 12.7.6 Fraud Vis-à-Vis Third Parties . . . . .              | 12-16.5    |
| 12.7.7 Fraud in Employee Profit Sharing . . . . .           | 12-16.5    |
| 12.8 Other Factors . . . . .                                | 12-16.6    |
| 12.8.1 The Employee's Position . . . . .                    | 12-16.6    |
| 12.8.2 Fraudulent Schemes vs. Impulsive Behaviour . . . . . | 12-17      |
| 12.9 Proportionality . . . . .                              | 12-19      |
| 12.10 Practical Advice . . . . .                            | 12-20      |

### *Chapter 13 Absenteeism/Tardiness*

|                                                                      |         |
|----------------------------------------------------------------------|---------|
| 13.1 General Principles . . . . .                                    | 13-1    |
| 13.2 Elements of the Offence . . . . .                               | 13-1    |
| 13.3 The Nature of the Absence . . . . .                             | 13-2    |
| 13.3.1 Unilaterally Moving and Purporting to Work Remotely . . . . . | 13-6    |
| 13.3.2 Refusing to Work While on Vacation . . . . .                  | 13-7    |
| 13.3.3 Leaving Work Without Authorization . . . . .                  | 13-9    |
| 13.3.4 Playing Sick to Play Baseball . . . . .                       | 13-10.1 |
| 13.3.5 More Lies to Justify Absences . . . . .                       | 13-10.3 |

## TABLE OF CONTENTS

|                                                                                      |            |
|--------------------------------------------------------------------------------------|------------|
| 13.3.6 Working for Your Own Landscaping Business While<br>on Medical Leave . . . . . | 13-10.4(1) |
| 13.3.7 Unapproved Extension of Leave of Absence . . . . .                            | 13-10.4(2) |
| 13.3.8 Failing to Call In During Ongoing Absence. . . . .                            | 13-10.4(2) |
| 13.3.9 Innocent Absenteeism . . . . .                                                | 13-10.4(3) |
| 13.3.10 Rejection of Return-to-Work Program. . . . .                                 | 13-10.4(6) |
| 13.4 Defences. . . . .                                                               | 13-10.4(6) |
| 13.5 Condonation . . . . .                                                           | 13-10.5    |
| 13.6 The Use of Policies . . . . .                                                   | 13-10.8    |
| 13.7 The Disappearing Employee. . . . .                                              | 13-11      |
| 13.8 The Use of Doctor's Notes. . . . .                                              | 13-13      |
| 13.9 Disability Issues . . . . .                                                     | 13-17      |
| 13.10 Duty to Accomodate . . . . .                                                   | 13-20      |
| 13.11 Practical Advice . . . . .                                                     | 13-22      |

### *Chapter 14 Harassment*

|                                                       |         |
|-------------------------------------------------------|---------|
| 14.1 General Principles . . . . .                     | 14-1    |
| 14.2 Sexual Harassment. . . . .                       | 14-3    |
| 14.2.1 Conduct Outside the Workplace . . . . .        | 14-6.8  |
| 14.2.2 Degrees of Harassment . . . . .                | 14-14   |
| 14.3 Discriminatory Harassment . . . . .              | 14-16   |
| 14.4 Psychological Harassment . . . . .               | 14-16.1 |
| 14.5 Poisoned Work Environment . . . . .              | 14-20   |
| 14.6 Single Incident vs. Pattern of Conduct . . . . . | 14-20.6 |
| 14.6.1 Refusing to Apologize for Harassment . . . . . | 14-26.1 |
| 14.7 What is Consensual Conduct? . . . . .            | 14-26.2 |
| 14.7.1 Zero Tolerance? . . . . .                      | 14-26.5 |
| 14.8 Evidentiary Burden . . . . .                     | 14-28   |
| 14.9 Use of Policies . . . . .                        | 14-28   |
| 14.10 Warnings . . . . .                              | 14-30   |
| 14.11 Condonation . . . . .                           | 14-31   |
| 14.12 False Allegations of Harassment. . . . .        | 14-32   |

## TABLE OF CONTENTS

|                                                                                                   |       |
|---------------------------------------------------------------------------------------------------|-------|
| 14.12.1 Where Unfounded Allegations of Harassment Poison<br>the Employment Relationship . . . . . | 14-33 |
| 14.13 Practical Advice . . . . .                                                                  | 14-34 |

### *Chapter 15 Violence in the Workplace*

|                                                                                                      |         |
|------------------------------------------------------------------------------------------------------|---------|
| 15.1 Judicial Consideration . . . . .                                                                | 15-1    |
| 15.2 Assaulting a Co-Worker. . . . .                                                                 | 15-4    |
| 15.2(a) Assaulting a Superior. . . . .                                                               | 15-5    |
| 15.2.1 Peace Officer Assaulting Inmate . . . . .                                                     | 15-6    |
| 15.2.2 Threatening the Mayor . . . . .                                                               | 15-6.2  |
| 15.2.3 Lighting a Co-Worker on Fire. . . . .                                                         | 15-8    |
| 15.2.4 Urinating on Fellow Police Officer . . . . .                                                  | 15-8.1  |
| 15.2.5 Assaulting a Co-Worker Suspected of Having an Affair with<br>the Employee's Husband . . . . . | 15-8.2  |
| 15.2.6 Single Incident not Cause . . . . .                                                           | 15-8.3  |
| 15.2.7 Assaulting a "Scab". . . . .                                                                  | 15-8.4  |
| 15.2.8 Assaulting a Co-worker. . . . .                                                               | 15-8.5  |
| 15.3 Threats in the Workplace. . . . .                                                               | 15-8.5  |
| 15.3.1 Occupational Health and Safety Legislation. . . . .                                           | 15-8.7  |
| 15.3.2 Single Incident of Threats as Just Cause for Dismissal. . .                                   | 15-16.6 |
| 15.4 More than Just Threats . . . . .                                                                | 15-16.7 |
| 15.5 Practical Advice . . . . .                                                                      | 15-18   |

### *Chapter 16 Intoxication/Alcohol and Drug Use*

|                                                                  |         |
|------------------------------------------------------------------|---------|
| 16.1 Issues Relating to Alcohol and Drug Use. . . . .            | 16-1    |
| 16.1A Drinking and Driving Company Vehicle . . . . .             | 16-5    |
| 16.1B Drinking While Working with Residents at a Nursing Home. . | 16-6.3  |
| 16.1C Possession While at Work . . . . .                         | 16-6.5  |
| 16.1D Drunk While at Work. . . . .                               | 16-6.6  |
| 16.1E Buying Drugs From Your Staff. . . . .                      | 16-6.10 |
| 16.1F High in a Safety Sensitive Position. . . . .               | 16-6.11 |
| 16.2 Refusal to Submit to Testing . . . . .                      | 16-7    |
| 16.3 The Contextual Approach . . . . .                           | 16-9    |

## TABLE OF CONTENTS

|                                                                  |         |
|------------------------------------------------------------------|---------|
| 16.4 The Rise of Medical Marijuana . . . . .                     | 16-12   |
| 16.4A Legalization of Recreational Marijuana . . . . .           | 16-15   |
| 16.5 Defences. . . . .                                           | 16-16   |
| 16.5.1 Human Rights Concerns in the Context of Addiction . . . . | 16-17   |
| 16.5.2 Failure to Warn . . . . .                                 | 16-22.3 |
| 16.6 The Use of a Policy . . . . .                               | 16-23   |
| 16.7 Practical Advice . . . . .                                  | 16-25   |

### ***Chapter 17 From Cyber-Slacking to Cyber-Stalking: Abuse of Technology and Social Media***

|                                                                                       |         |
|---------------------------------------------------------------------------------------|---------|
| 17.1 Overview . . . . .                                                               | 17-1    |
| 17.2 The Different Concerns . . . . .                                                 | 17-2    |
| 17.3 Internet and E-mail Abuse . . . . .                                              | 17-3    |
| 17.4 Types of Internet-Related Abuse . . . . .                                        | 17-4    |
| 17.4.1 Excessive Personal Use—How Much Is Too Much? . . . . .                         | 17-5    |
| 17.4.1(a) Can You Discipline for “Innocent” Personal Use?..                           | 17-6.1  |
| 17.4.1(b) Excessive Personal Use and Abuse of Access to<br>Employer Network . . . . . | 17-15   |
| 17.4.2 Pornography—The Not So Bad, the Bad, and the<br>Really Bad. . . . .            | 17-15   |
| 17.4.2(a) Discipline for Receiving Inappropriate Materials? . .                       | 17-19   |
| 17.4.2(b) Consenting Adults as a Defence?. . . . .                                    | 17-20.2 |
| 17.4.3 Hate Sites . . . . .                                                           | 17-20.2 |
| 17.4.4 Chat Rooms and Instant Messaging/Texting . . . . .                             | 17-20.2 |
| 17.4.5 Online Gaming and Gambling Sites. . . . .                                      | 17-21   |
| 17.4.6 Blogs. . . . .                                                                 | 17-22   |
| 17.4.7 Social Networking Sites/Social Media . . . . .                                 | 17-25   |
| 17.4.8 Inappropriate Online Behaviour . . . . .                                       | 17-27   |
| 17.4.9 Downloading Copyrighted Material. . . . .                                      | 17-30.5 |
| 17.4.10 Harassment . . . . .                                                          | 17-32   |
| 17.4.11 Summary. . . . .                                                              | 17-34   |
| 17.4A Surreptitious Recording Workplace Interactions . . . . .                        | 17-34   |
| 17.5 Off-Duty Conduct . . . . .                                                       | 17-34.3 |

## TABLE OF CONTENTS

|                                                                           |       |
|---------------------------------------------------------------------------|-------|
| 17.5.1 Use of Corporate Equipment While Off Company<br>Premises . . . . . | 17-36 |
| 17.5.2 Arrest for Drinking and Driving . . . . .                          | 17-36 |
| 17.6 Protecting the Employer's Interests. . . . .                         | 17-37 |
| 17.6.1 Monitoring Behaviour . . . . .                                     | 17-42 |
| 17.7 Disciplining Offenders . . . . .                                     | 17-46 |
| 17.8 Practical Advice . . . . .                                           | 17-47 |

### *Chapter 18 Personality Issues*

|                                               |        |
|-----------------------------------------------|--------|
| 18.1 Introduction. . . . .                    | 18-1   |
| 18.2 Elements of the Offence . . . . .        | 18-2   |
| 18.3 The Context. . . . .                     | 18-6.1 |
| 18.3.1 Probationary Employees . . . . .       | 18-8   |
| 18.3.2 Long-Term Employees. . . . .           | 18-8   |
| 18.3.3 The Size of the Organization . . . . . | 18-9   |
| 18.4 Human Rights Issues . . . . .            | 18-11  |
| 18.5 Practical Advice . . . . .               | 18-11  |

### *Chapter 19 Performance Issues/Incompetence/Neglect of Duty*

|                                                                   |          |
|-------------------------------------------------------------------|----------|
| 19.1 General Principles . . . . .                                 | 19-1     |
| 19.2 Elements of the Offence . . . . .                            | 19-4     |
| 19.2.1 The Need to Clearly Warn . . . . .                         | 19-13    |
| 19.2.2 The Need for Good Faith . . . . .                          | 19-14.1  |
| 19.3 How Incompetent Is Too Incompetent? . . . . .                | 19-14.3  |
| 19.4 How Much Warning Is Necessary?. . . . .                      | 19-20    |
| 19.5 Single Incident as Just Cause . . . . .                      | 19-20(2) |
| 19.5.1 Negligence of Paramedic . . . . .                          | 19-20.2  |
| 19.6 Objective vs. Subjective Standards . . . . .                 | 19-20.3  |
| 19.6.1 Dismissal for Failure to Meet Objective Criteria . . . . . | 19-20.3  |
| 19.6.1(a) Failure to Meet Sales Quotas . . . . .                  | 19-20.6  |
| 19.6.2 Dismissal for Failure to Meet Subjective Criteria. . . . . | 19-20.7  |
| 19.6.2(a) Dismissal of Lawyer for Alleged Incompetence . . .      | 19-20.9  |

## TABLE OF CONTENTS

|                                                                        |          |
|------------------------------------------------------------------------|----------|
| 19.6.3 Customer Complaints . . . . .                                   | 19-20.10 |
| 19.6.4 Failure to Meet Licensing Criteria . . . . .                    | 19-20.11 |
| 19.6.5 Bus Driver With Frequent Crashes . . . . .                      | 19-20.12 |
| 19.7 Judicial Consideration Generally . . . . .                        | 19-20.13 |
| 19.8 Neglect of Duty . . . . .                                         | 19-35    |
| 19.9 Condonation . . . . .                                             | 19-36.2  |
| 19.10 Failing to Properly Ensure Qualifications of New Hires . . . . . | 19-39    |
| 19.11 Probationary Periods . . . . .                                   | 19-40    |
| 19.12 Practical Advice . . . . .                                       | 19-41    |

### *Chapter 20 Off-Duty Conduct (Including Online Behaviour)*

|                                                                   |        |
|-------------------------------------------------------------------|--------|
| 20.1 General Principles . . . . .                                 | 20-2   |
| 20.2 Freedom of Expression? . . . . .                             | 20-6.1 |
| 20.3 Indirect Impact on Employment. . . . .                       | 20-6.2 |
| 20.3.1 Criminal Charges for Off-duty Conduct. . . . .             | 20-13  |
| 20.3.2 Trashing your Employer Online. . . . .                     | 20-14  |
| 20.3.3 Police Officer Convicted of Assaulting Girlfriend. . . . . | 20-14  |
| 20.3.4 Facebook Posts Saying You d Break the Law . . . . .        | 20-16  |
| 20.4 Impact of Criminal Conviction. . . . .                       | 20-17  |
| 20.5 Practical Advice . . . . .                                   | 20-17  |

### *Part III Other Considerations*

#### *Chapter 21 After-Acquired Cause (After-the-Fact Evidence)*

|                                                                                                                      |         |
|----------------------------------------------------------------------------------------------------------------------|---------|
| 21.1 General Principles . . . . .                                                                                    | 21-1    |
| 21.1.0.1 Employer Can Rely On After-acquired Cause Unless<br>They Both Knew Of And Condoned The Misconduct . . . . . | 21-7    |
| 21.1.1 Misconduct in Response to Dismissal . . . . .                                                                 | 21-8    |
| 21.2 If the Dismissal was Originally Without Cause. . . . .                                                          | 21-12   |
| 21.2.1 Preferring One Candidate in the Hiring Process. . . . .                                                       | 21-18   |
| 21.3 Failure to Allege Just Cause at the Time of Dismissal<br>(Despite Knowledge of It) . . . . .                    | 21-18.1 |
| 21.4 Practical Advice . . . . .                                                                                      | 21-20   |

## TABLE OF CONTENTS

### *Chapter 22 Last-Chance Agreements*

|                                                                     |      |
|---------------------------------------------------------------------|------|
| 22.1 General Principles . . . . .                                   | 22-1 |
| 22.2 Enforceability of Last-Chance Agreements . . . . .             | 22-2 |
| 22.3 When Last-Chance Agreements Go Too Far . . . . .               | 22-3 |
| 22.4 Court- or Arbitration-Imposed Last-Chance Agreements . . . . . | 22-5 |
| 22.5 Practical Advice . . . . .                                     | 22-6 |

### *Chapter 23 Condonation*

|                                                     |        |
|-----------------------------------------------------|--------|
| 23.1 General Principles . . . . .                   | 23-1   |
| 23.2 Permissive Work Environments . . . . .         | 23-4.3 |
| 23.3 Condonation at the Time of Dismissal . . . . . | 23-6.1 |
| 23.4 Practical Advice . . . . .                     | 23-8   |

### *Chapter 24 Probationary Employees*

|                                                                                                  |        |
|--------------------------------------------------------------------------------------------------|--------|
| 24.1 General Principles . . . . .                                                                | 24-1   |
| 24.2 Do Employers Have to Wait Until the End of the Probationary<br>Period to Dismiss? . . . . . | 24-4.5 |
| 24.3 Just Cause Is Required—But Different . . . . .                                              | 24-5   |
| 24.4 The Duty to Act Fairly . . . . .                                                            | 24-8   |
| 24.5 How Much Notice Is Necessary? . . . . .                                                     | 24-11  |
| 24.6 Practical Advice . . . . .                                                                  | 24-11  |

### *Chapter 25 Progressive Discipline in the Non-Unionized Environment*

|                                                               |           |
|---------------------------------------------------------------|-----------|
| 25.1 The Availability of Lesser Forms of Discipline . . . . . | 25-1      |
| 25.2 General Principles . . . . .                             | 25-3      |
| 25.2.1 Can't Punish the Same Crime Twice . . . . .            | 25-6.4(1) |
| 25.3 Forms of Discipline . . . . .                            | 25-6.6    |
| 25.3.1 Warnings . . . . .                                     | 25-6.6    |
| 25.3.2 Suspension Without Pay . . . . .                       | 25-6.7    |
| 25.3.3 Suspension With Pay . . . . .                          | 25-10     |
| 25.3.4 Probation . . . . .                                    | 25-10     |
| 25.3.5 Demotion . . . . .                                     | 25-12     |
| 25.3.6 Other Forms of Discipline . . . . .                    | 25-12.1   |

## TABLE OF CONTENTS

|                                                      |         |
|------------------------------------------------------|---------|
| 25.4 Discipline Policies . . . . .                   | 25-12.2 |
| 25.4.1 Failure to Follow Discipline Policy . . . . . | 25-14   |
| 25.5 Progressive Discipline Going Forward . . . . .  | 25-14.2 |
| 25.6 Practical Advice . . . . .                      | 25-16   |

### *Part IV Investigations*

#### *Chapter 26 Investigations*

|                                                                                      |         |
|--------------------------------------------------------------------------------------|---------|
| 26.1 The Importance of an Investigation . . . . .                                    | 26-1    |
| 26.1.1 Failure to Investigate is a Critical Mistake. . . . .                         | 26-8.9  |
| 26.1.2 Can You Package Someone Out Instead of Investigating<br>Misconduct? . . . . . | 26-8.11 |
| 26.1.3 Failure to investigate sexual harassment may not be fatal<br>. . . . .        | 26-10   |
| 26.1.4 No Independent Duty to Investigate . . . . .                                  | 26-10.1 |
| 26.2 The Impact of the Individual's Response . . . . .                               | 26-10.2 |
| 26.2.1 Attempting to Improperly Influence Witnesses. . . . .                         | 26-31   |
| 26.2.2 Employee Behaviour During Investigation. . . . .                              | 26-33   |
| 26.3 Practical Advice . . . . .                                                      | 26-34   |

### *Part V Human Rights Considerations*

#### *Chapter 27 Human Rights Considerations*

|                                                                                                       |        |
|-------------------------------------------------------------------------------------------------------|--------|
| 27.1 General Principles . . . . .                                                                     | 27-1   |
| 27.2 Mixed Grounds for Dismissal. . . . .                                                             | 27-2.2 |
| 27.3 Duty of the Employee to Provide Documentation Supporting<br>Requests for Accommodation . . . . . | 27-3   |
| 27.3.1 The Duty to Inquire . . . . .                                                                  | 27-4.1 |
| 27.3.2 Employee Denying Disability. . . . .                                                           | 27-4.3 |
| 27.4 Misconduct Related to a Disability . . . . .                                                     | 27-4.6 |
| 27.4.1 Dismissing a Drug Addict . . . . .                                                             | 27-4.6 |
| 27.4.2 Impairment at Work . . . . .                                                                   | 27-5   |
| 27.4.3 The “Disappearing Employee”. . . . .                                                           | 27-6   |



## TABLE OF CONTENTS

|                                                                  |        |
|------------------------------------------------------------------|--------|
| 27.4.3(a) Lying about Disability . . . . .                       | 27-8.3 |
| 27.4.3(b) No Discrimination for Undisclosed Disability . . . . . | 27-8.3 |
| 27.4.4 Accommodation of Sexual Compulsivity . . . . .            | 27-8.4 |
| 27.4.5 Evidence of Disability at Trial . . . . .                 | 27-8.7 |
| 27.5 Justifying Discriminatory Decisions and Rules . . . . .     | 27-10  |
| 27.6 Duty to Accommodate . . . . .                               | 27-13  |
| 27.7 The Extent of the Duty to Accommodate . . . . .             | 27-16  |
| 27.7.1 The Duty to Accommodate in the New Age . . . . .          | 27-17  |
| 27.7.1(a) Family Status . . . . .                                | 27-17  |
| 27.7.2 Accommodating Medical Marijuana . . . . .                 | 27-18  |
| 27.7.3 Accommodating Addiction . . . . .                         | 27-21  |
| 27.8 Practical Advice . . . . .                                  | 27-22  |

### *Part VI* **Litigation**

#### *Chapter 28* **Litigation Overview**

|                                                                    |         |
|--------------------------------------------------------------------|---------|
| 28.1 Negotiations After Dismissal . . . . .                        | 28-1    |
| 28.2 Litigation Options . . . . .                                  | 28-2    |
| 28.2.1 Civil Litigation . . . . .                                  | 28-3    |
| 28.2.1(a) Settlement . . . . .                                     | 28-4    |
| 28.2.1(b) The Civil Litigation Process . . . . .                   | 28-5    |
| 28.2.1(c) The Burden and Standard of Proof . . . . .               | 28-8    |
| 28.2.1(d) The Impact of Criminal Charges . . . . .                 | 28-11   |
| 28.2.1(e) Issues of Credibility . . . . .                          | 28-11   |
| 28.2.1(f) Summary Judgment . . . . .                               | 28-12   |
| 28.3 How Credibility Is Determined . . . . .                       | 28-16.2 |
| 28.4 After the Trial . . . . .                                     | 28-16.5 |
| 28.5 Legal Costs . . . . .                                         | 28-16.6 |
| 28.5.1 Offers to Settle . . . . .                                  | 28-17   |
| 28.5.2 Awarding a Premium . . . . .                                | 28-18   |
| 28.6 Claims Pursuant to Employment Standards Legislation . . . . . | 28-19   |

## TABLE OF CONTENTS

### *Chapter 29 Damages in Wrongful Dismissal Claims*

|                                                                                              |          |
|----------------------------------------------------------------------------------------------|----------|
| 29.1 Notice of Dismissal/Pay in Lieu . . . . .                                               | 29-1     |
| 29.1.1 Calculating the Notice Period . . . . .                                               | 29-1     |
| 29.1.1(a) The <i>Bardal</i> Factors . . . . .                                                | 29-2     |
| 29.1.1(b) No “Rule of Thumb” . . . . .                                                       | 29-6     |
| 29.1.1(c) Additional Factors. . . . .                                                        | 29-8     |
| 29.1.2 Contractually Defined Notice Periods . . . . .                                        | 29-8     |
| 29.1.3 Obligations During the Notice Period . . . . .                                        | 29-9     |
| 29.1.4 Mitigation . . . . .                                                                  | 29-12.1  |
| 29.1.5 No Duty to Mitigate if there is a Fixed Notice Period. . .                            | 29-12.3  |
| 29.1.6 The Evolution of the <i>Bardal</i> Factors . . . . .                                  | 29-12.4  |
| 29.2 Damages Arising Out of Bad Faith in the Course of<br>Dismissal. . . . .                 | 29-12.7  |
| 29.2.1 The <i>Keays v. Honda Canada Inc.</i> Case. . . . .                                   | 29-12.11 |
| 29.2.2 The Post- <i>Honda</i> Era: The Damages Formerly Known<br>as <i>Wallace</i> . . . . . | 29-17    |
| 29.2A False Allegations of Cause. . . . .                                                    | 29-30    |
| 29.3 Punitive Damages. . . . .                                                               | 29-33    |
| 29.4 Double-Compensation . . . . .                                                           | 29-47    |
| 29.5 Aggravated Damages . . . . .                                                            | 29-47    |
| 29.6 Damages for Breaches of Human Rights Legislation . . . . .                              | 29-51    |
| 29.7 Overlap Between Various Forms of Damages. . . . .                                       | 29-52    |
| 29.8 Practical Advice . . . . .                                                              | 29-57    |

### *Part VII Practical Advice*

#### *Chapter 30 Summary Dismissal—Practical Advice*

|                                                          |        |
|----------------------------------------------------------|--------|
| 30.0 Hiring a Lawyer is Not Cause for Dismissal. . . . . | 30-1   |
| 30.1 Effective Use of Policies . . . . .                 | 30-2.1 |
| 30.2 Effective Use of Contracts . . . . .                | 30-3   |
| 30.3 The Importance of the Investigation. . . . .        | 30-4.9 |
| 30.4 A Contextual Approach . . . . .                     | 30-5   |
| 30.5 Approaches to Dismissal . . . . .                   | 30-6   |

TABLE OF CONTENTS

30.6 Conditional Severance Offers . . . . . 30-7

*Chapter 31 Conclusion* . . . . . 31-1

**Issues in Focus** . . . . . IF-i

**VOLUME 2**

*Case Summaries* . . . . . DIG-i

*Index* . . . . . IND-1