

TABLE OF CONTENTS

<i>Preface</i>	iii
<i>Glossary of Important Terms</i>	xv
1 When Employment Law Does Not Apply to Your Case	1
1. Employees Who Cannot Sue for Wrongful Dismissal	2
2. Who is an Employee?	4
3. Other Categories	5
(a) Intermediate Agents	5
(b) Crown Employees	7
(c) Public Authorities	8
(d) Statutory Office-holders	8
(e) Municipal Officers	9
(f) Statutory Protection	11
(g) Probationary Employees	11
(h) Volunteers	14
4. Procedural Fairness Owed to Some	14
(a) Military Officers	14
(b) Prisoners	15
(c) Employees of Foreign States	15
(d) Deceased Employees	15
5. Authority for Hiring - Is There Any?	15
6. Statutory Remedy - Employment Standards	16
7. Proper Province to Sue	17
8. Statutory Requirements of Termination	18
9. Conclusion	18
2 Identifying the Employer and the Employee: Not as Clear Cut as You Think	21
1. Who is an Employer?	21
2. Who is an Employee?	24
3. Who Can be Sued?	25
(a) Non-profit Charitable Organizations	25

Table of Contents

(b)	Directors, Officers and Employees	25
(c)	Individuals	26
(d)	Intimidation.....	27
(e)	Third Parties.....	27
4.	Conclusion.....	27
3	The Employment Contract: Every Employee Has One.....	29
1.	Oral Terms	30
(a)	Misrepresentation or “Wrongful Hiring”.....	31
2.	Written Terms	34
(a)	Honouring these Terms	36
(b)	Changes to Terms.....	38
3.	Practice – Conduct of the Parties.....	39
4.	Implied Terms	39
(a)	Intention at Hiring.....	41
5.	Conclusion.....	42
4	Employment Contracts: The Best Possible Way to Ensure an Employer’s Protection	43
1.	Content of the Contract	43
2.	Implied Terms	44
3.	Consideration	45
4.	Express Expectations	45
5.	Interpretation	46
6.	Duration of the Contract	47
7.	Remuneration Provisions	48
8.	Termination Provisions	49
(a)	Specifying “Cause”	49
(b)	Notice.....	50
(c)	Unconscionable Contract	51
(d)	Binding Contract.....	51
(e)	Contracts Not Binding	52
(f)	Time Considerations.....	52
(g)	Employment Standards	53
(h)	Other Factors	53
(i)	Notice of Resignation.....	53
(j)	ADR	54
(k)	Conclusion.....	54
9.	Confidentiality.....	54
10.	Non-competition Clauses	55
11.	Non-solicitation Covenants.....	57
12.	Defences to Contract.....	58
(a)	Consideration	58

Table of Contents

(b)	Other Defences.....	58
13.	Failure to Enter a Formal Contract.....	61
14.	Employment Policies.....	61
15.	Conclusion.....	62
5	What is “Just Cause” for Discharge?.....	65
1.	Tests for Just Cause.....	66
(a)	Cause is Individually Determined.....	67
(b)	Reasonable Excuse - A Full and Fair Investigation - Employer’s Duty to Give Warnings.....	67
(c)	Number of Incidents Required.....	68
(d)	Discovering Cause After Dismissal.....	69
2.	Activities that Constitute Cause for Discharge.....	70
(a)	Fraudulent Misrepresentation Regarding Qualifications.....	70
(b)	Serious Misconduct.....	71
(c)	Sexual Harassment.....	73
(d)	Breach of the Duty of Fidelity.....	75
(e)	Conflict of Interest.....	79
(f)	Wilful Disobedience.....	80
(g)	Revelation of Character.....	81
(h)	Theft.....	82
(i)	Fraud and Dishonesty.....	83
(j)	Dishonesty During an Investigation.....	85
(k)	Insolence and Insubordination.....	86
(l)	Absenteeism or Lateness.....	88
(m)	Illness.....	89
(n)	Intoxication and Substance Abuse.....	89
(o)	Undermining the Corporate Culture.....	90
(p)	Outside Activity.....	92
(q)	Breach of Rules or Company Policy.....	93
(r)	Serious Incompetence.....	94
(s)	Frustration.....	97
(t)	Commencing Legal Action.....	98
(u)	Summary.....	99
3.	Employee’s Right to Know Reasons for Discharge.....	99
4.	Other Defences.....	100
(a)	Settlement Agreements.....	100
(b)	Release Agreements.....	101
(c)	Stress, Illness and Addiction.....	101
5.	No Cause for Dismissal.....	102
(a)	Personality Conflict.....	102
(b)	Lack of Work or Redundancy.....	102

Table of Contents

(c)	Retirement and Early Retirement.....	103
(d)	Lawyer’s Involvement.....	103
(e)	Refusal of a Constructive Dismissal.....	103
(f)	Reporting Misdeeds.....	103
(g)	Looking for Other Work.....	104
(h)	Garnishment.....	104
(i)	Refusal to do Unsafe Work.....	105
(j)	Sale of a Business.....	105
(k)	Resignation.....	105
6.	Conclusion.....	105
	Reference Tables.....	107
6	Condonation: Are You Turning a Blind Eye to Bad Behaviour?	113
1.	Effect of Not Dismissing an Employee Immediately.....	113
2.	Affirmations.....	117
3.	Other Factors.....	118
7	Constructive Dismissal	121
1.	The Employment Agreement.....	124
2.	“Cause” and “Notice”.....	126
3.	Requirement to Negotiate.....	126
4.	Requirement to Resign.....	127
5.	Employer’s Good Faith.....	129
6.	Employee’s Delay Can Prevent Suing.....	129
7.	Employer’s Intention.....	133
8.	Temporary Change in Conditions of Employment.....	133
9.	Motive for Resignation.....	134
10.	When Does the Notice Period Begin?.....	135
11.	Types of Constructive Dismissal.....	135
(a)	Forced Resignation.....	136
(b)	Demotion.....	138
(c)	Reduced Remuneration or Refusal to Pay.....	140
(d)	Downward Change in Reporting Functions.....	141
(e)	Unilateral Change by Employer to Job Responsibilities.....	142
(f)	Forced Transfer.....	144
(g)	Abusive Treatment.....	145
(h)	Reduced Workweek, Unpaid Overtime and Compulsory Leave of Absence.....	147
(i)	Short-term Lay-off.....	147
(j)	Suspension.....	148
(k)	Dismissal While Easing One’s Losses.....	149

Table of Contents

12.	Strategies.....	149
13.	Give Advance Notice of Changes You Wish to Make.....	150
14.	Conclusion	151
	Reference Table.....	152
8	Reasonable Notice: How Much Will be Awarded?	157
1.	Tests that Determine Reasonable Notice.....	158
2.	What is the Notice Period?	159
3.	When Does the Period of Notice Begin?	160
4.	Notice of Termination: Factors to Remember	160
5.	Factors Determining Length of Notice.....	161
	(a) Specialization and Status.....	161
	(b) Availability of Similar Employment.....	162
	(c) Industry in Recession	162
	(d) Company in Economic Difficulty	163
	(e) The Nature of the Industry.....	163
	(f) Custom in the Industry	164
	(g) Age	165
	(h) Circumstances Surrounding the Hiring.....	166
	(i) Length of Service	167
	(j) Manner of Dismissal.....	169
	(k) Conduct of the Employer.....	169
	(l) Misconduct and Superior Performance.....	171
	(m) Insecurity of Employment.....	171
	(n) Failure to Assist.....	172
	(o) Detrimental Reliance	172
6.	Notice of Resignation by the Employee	172
7.	Term Employees.....	172
8.	Types of Employment and Notice Requirements.....	174
	(a) Part-time Employees.....	174
	(b) Agency Employment.....	174
	(c) Resigning Employees	175
	(d) Statutory Requirements.....	175
9.	Conclusion	175
10.	Chart of Cases and Notice Awarded	176
	(a) Labour Notice Table	176
	(b) Skilled Notice Table	178
	(c) Sales Notice Table	180
	(d) Supervisor/Foreperson Notice Table.....	182
	(e) Lower Level Management Notice Table.....	184
	(f) Middle Level Management Notice Table.....	185
	(g) Upper Level Management Notice Table.....	187
	(h) Professional Notice Table	189

Table of Contents

9	Awarding Damages for Wrongful Dismissal: How Much is Each Month of Severance Worth?	193
1.	Valuation of Remuneration and Benefits	194
2.	Bonuses	194
3.	Profit-sharing Plans	195
4.	Insurance and Medical Plans	196
5.	Compulsory Share Sales	196
6.	Stock Options.....	196
7.	Director's Fee.....	197
8.	Disability	197
9.	Loss of Home.....	198
10.	Loss of Income in Selling or Purchasing a Home.....	198
11.	Moving Expenses	199
12.	Pensions	199
13.	Subsidized Loans	200
14.	Benefits Payable Over a Number of Years.....	200
15.	Board and Lodging.....	200
16.	Clothing Allowance	200
17.	Site Allowance.....	201
18.	Club Dues.....	201
19.	Professional Fees.....	201
20.	Company Automobile	202
21.	Parking Allowance.....	203
22.	Incentive Trips	203
23.	Employee's Discount	204
24.	Food Allowance.....	204
25.	Expenses Incurred in Mitigation.....	204
26.	Unpaid Commission Already Earned	205
27.	Commission	206
28.	Tips	207
29.	Unpaid Overtime	208
30.	Overtime and Danger Pay During the Notice Period.....	208
31.	Relocation Counselling.....	209
32.	Salary Increases.....	210
33.	Employee Starting a Business	210
34.	Salary Continuance.....	211
35.	Spousal Salary and RRSP.....	211
36.	Vacation Pay	211
37.	Notice and Severance Payments	212
38.	Canada Pension Plan and Employment Insurance	213
39.	Interest	213
40.	Cost of Obtaining Money	213
41.	Increased Tax Liability.....	213

Table of Contents

42.	Damages for Loss of Reputation	214
43.	Punitive Damages	214
44.	Damages for Sexual Harassment	215
45.	Damages for Mental Distress	216
46.	Intentional Infliction of Nervous Shock	218
47.	Damages from Accepting the Employment	219
48.	Government Assistance	219
49.	Sickness Benefits	220
50.	Conclusion	220
10	An Employee's Duty to Mitigate: How to Decrease the Employer's Damages	221
1.	Onus	221
2.	Reasonableness: What Position Must the Employee Accept?.....	222
3.	Time-frame for Mitigation	223
4.	Consequences of a Duty to Mitigate.....	224
(a)	Income	224
(b)	If Employee Could Have Mitigated	224
(c)	Resignation	226
(d)	Reduction of Notice Period	226
(e)	Trial During the Notice Period.....	227
5.	When an Offer Can be Rejected.....	227
6.	Extent of an Employee's Duty to Mitigate.....	228
7.	Starting One's Own Business	230
8.	Going Back To School.....	231
9.	Obligation to Accept Reinstatement or Demotion	232
10.	Effect of Termination from a New Position.....	235
11.	Working Notice.....	235
12.	Term Employment	236
13.	Conclusion	236
11	Strategies for Employers	239
1.	How to Change Terms of Employment Without a Constructive Dismissal	239
(a)	Adopt an Acceptable Rationale.....	240
(b)	Negotiate Changes	240
(c)	Provide a Reasonable Time for Acceptance	240
(d)	Document	241
(e)	Provide Notice.....	241
(f)	Broadly Define Rights and Positions	241
(g)	Create Employment Contracts Permitting Changes...242	
2.	Preventative Maintenance	242

Table of Contents

(a)	Application Forms	242
(b)	Selection	243
(c)	Outline of Expectations	243
(d)	Feedback.....	243
(e)	Analysis of the Cause(s) of Problems.....	243
(f)	Training of Supervisors	244
(g)	Development of Terms and Written Conditions of Employment.....	244
(h)	Transfers	244
(i)	Comparability.....	245
(j)	Corporate Severance Policies	245
(k)	Performance Review	245
(l)	Exit Interviews	246
3.	Building a Case for Cause for Dismissal	246
4.	The Art of Firing an Employee: Strategic Considerations ...	250
(a)	Pregnant Employees.....	251
5.	Employee's Concerns	252
6.	The Termination Interview	254
7.	After the Interview.....	256
8.	Whether Cause Should be Alleged	257
9.	Condonation.....	257
10.	Framing of Announcement	257
11.	Meeting With Employees	258
12.	Providing References	258
13.	Should an Offer be Made at Termination? What Type of Severance Offer?	259
(a)	Non-payment.....	260
(b)	Giving Notice	260
(c)	Lump-sum Severance Settlement	261
(d)	Bridging	261
(e)	Combination of Options	261
14.	Notice Period versus Severance Pay in Lieu of Notice.....	262
15.	Other Settlement Possibilities: Money is Not Everything.....	263
16.	Execution of a Release	264
17.	Early Retirement	265
18.	Strategies During Litigation.....	266
19.	Conclusion	267
12	Employees' Strategies: Useful for Employers to Know	269
1.	Employees' Concerns	269
2.	Duty to Mitigate	272
3.	Mental Distress	273
4.	Securing Witnesses	273

Table of Contents

5.	Reference By a Third Party	274
6.	Fortitude.....	274
7.	Conclusion.....	275
13	Suing Your Employees	277
1.	Wrongful Resignation.....	277
(a)	Whether a Resignation Exists.....	279
(b)	Resignation or Termination.....	281
(c)	Repudiation or Abandonment of Employment.....	282
2.	Inducing a Breach of Contract	283
3.	An Employer's Right to Command its Affairs	283
4.	Confidentiality.....	284
(a)	When Criminal Law Will Apply.....	287
5.	Non-solicitation.....	287
(a)	Measure of Damages for Breach	291
6.	Divesting Corporate Opportunities	292
7.	Breach of a Duty of Loyalty.....	292
8.	Indemnifying for Negligence.....	293
9.	Care of Employer's Property	293
10.	Reference Checks	294
11.	Repayment of Loans	295
12.	Damages for an Employee's Repudiation.....	295
13.	Damages for Breach of Implied Terms of the Employment Contract	296
14.	Conclusion.....	297
14	Federal Employers - Unjust Dismissal Under the <i>Canada</i> <i>Labour Code</i>	299
1.	Complaint Procedure.....	300
2.	Adjudicator's Power	301
3.	Eligibility for Unjust Dismissal Claims.....	301
(a)	Managerial Status	302
4.	Dismissal.....	303
5.	Resignation.....	306
6.	Lay-offs.....	307
7.	Just Cause for Dismissal	309
8.	Condonation.....	312
9.	Grounds for Dismissal.....	313
(a)	Serious Misconduct.....	313
(b)	Incompetence.....	313
(c)	Sexual Harassment.....	314
(d)	Conflict of Interest.....	314
(e)	Disobedience.....	315

Table of Contents

(f)	Insubordination.....	315
(g)	Dishonest Conduct, Theft and Fraud	316
(h)	Absenteeism.....	317
(i)	Illness, Disability and Incapacity.....	318
(j)	Intoxication and Substance Abuse	318
(k)	Inappropriate Conduct Outside the Workplace	319
(l)	Breach of Company Policy	320
(m)	Near Cause	321
(n)	Mitigating and Aggravating Factors	321
10.	Remedies.....	321
11.	Conclusion.....	323
	<i>Index</i>	325