

## Index

### A

#### **Absenteeism, *see also***

- Employee conduct, specific types of
- culpable absenteeism, 4.13(b)
- • attendance management program, requirements of, 4.13(b)
- • inclement weather, 4.13(b)
- employment standards leaves, 4.13(c)
- • *Employment Standards Act, 2000*, compliance with, 4.13(c)
- • “non-monitored” absences, 4.13(c)
- innocent absenteeism, 4.13(a)
- • common law doctrine of “frustration”, 4.13(a)
- • • factors considered, 4.13(a)
- • dismissal, procedural requirements for, 4.13(a)
- • employment relationship impaired, 4.13(a)
- • excessive absenteeism, 4.13(a)
- • frustration of contract by disability, 4.13(a)
- • • amendment to ESA regulation, 4.13(a)

- • • “deemed terminated”, 4.13(a)
- • incapable of regular attendance, 4.13(a)
- • innocent vs. culpable absenteeism, 4.13(a)

### C

#### **Collective agreement clauses, *see also* Unionized employees**

- introduction, 8.1
- sample clauses, 8.2
- • deemed termination, 8.2(h)
- • • “negotiated accommodation”, 8.2(h)
- • • personal circumstances and individual accommodation to be considered, 8.2(h)
- • • principles gleaned from *McGill* decision, 8.2(h)
- • • whether discriminatory and contrary to human rights legislation, 8.2(h)
- • just cause, 8.2(a)
- • non-discrimination clause, 8.2(g)
- • • affirming workplace parties’ *Human Rights Code* obligations, 8.2(g)

## Index

- Collective agreement clauses (*cont'd*)
  - • personnel files, reviewing, 8.2(e)
  - • reasons, issuing, 8.2(d)
  - • sunset clauses, 8.2(f)
  - • • examples, 8.2(f)
  - • • progressive discipline more difficult, 8.2(f)
  - • timeliness, 8.2(b)
  - • union representative, presence of, 8.2(c)
  
- D**
- Damages arising from termination of employment**
  - aggravated and punitive damages, 10.3(c)(i)
  - • examples of behaviours justifying, 10.3(c)(i)
  - • law following *Keays*, 10.3(c)(i)
  - • • compensatory damages for provable mental distress, 10.3(c)(i)
  - • • foreseeability of damages, 10.3(c)(i)
  - • • non-compensatory punitive damages, 10.3(c)(i)
  - non-unionized employees, 10.3
    - • *Canada Labour Code*, unjust dismissal, 10.3(b)
    - • • unjust dismissal provisions, 10.3(b)
    - • • • notice of termination/termination pay, 10.3(b)(i)
    - • • • severance pay, 10.3(b)(ii)
    - • common law, 10.3(c)
    - • • bad faith discharge, 10.3(c)(i)
    - • • • aggravated and punitive damages case law, 10.3(c)(i)
    - • • • mental distress damages, 10.3(c)(i)
    - • • • “Wallace damages”, 10.3(c)(i)
    - • • reasonable notice period, factors determining, 10.3(c)
    - • *Employment Standards Act, 2000*, 10.3(a)
    - • • notice of termination, 10.3(a)
    - • • severance pay, 10.3(a)(ii)
    - • • statutory notice periods, 10.3(a)(i)
    - • • termination pay, 10.3(a)(i)
    - • • where fifty or more employees, 10.3(a)(ii)
    - • loss of benefits during period of reasonable notice, 10.3(d)
      - • • group benefit plans, 10.3(d)(iii)
      - • • • disability claims during reasonable notice period, 10.3(d)(iii)

## Index

- Damages arising from termination of employment (*cont'd*)
- • • • disability payments vs. payments in lieu of notice, 10.3(d)(iii)
  - • • • implied term that coverage continuing throughout common law period, 10.3(d)(iii)
  - • • pensions, 10.3(d)(ii)
  - • • vacation pay, 10.3(d)(i)
  - overview, 10.1
  - unionized employees, 10.2
  - • arbitrator's discretion, 10.2
  - • discharge without just cause, 10.2
  - • • reinstatement with compensation, 10.2
  - • • • damages in lieu of reinstatement, 10.2
  - • employee's duty to mitigate, 10.2
- Disciplinary investigation**
- introduction, 2.1
  - necessary information, obtaining, 2.4
  - purposes of investigation, 2.2
  - • five important purposes, 2.2
  - • relevant records or reports, creating or gathering, 2.2
  - report, investigation, 2.7
  - • sample outline of disciplinary investigation report, 2.7
  - timing of investigation, 2.3
  - witnesses, interviewing, 2.5
  - • final witness being person who was subject of discipline, 2.5
  - • keys to effective interview, 2.6
  - • witnesses with any degree of involvement, 2.5
- Disciplinary letter, elements of, *see also* Disciplinary letters, sample**
- disciplinary penalty being applied, 5.4
  - disciplinary record, 5.2
  - employee support: positive aspect of disciplinary penalty, 5.5
  - infraction, 5.3
  - introduction, 5.1
  - notice of future discipline, serving, 5.6
  - sample disciplinary letter, 5.6
- Disciplinary letters, sample**
- introduction, 6.1
  - sample letters, 5.6, 6.2
  - • dismissal for damaging company property, 6.2(e)
  - • suspension for fighting, 6.2(a)
  - • suspension for theft, 6.2(d)
  - • suspension for unauthorized absence from work, 6.2(c)
  - • warning for failure to adhere to safety policies, 6.2(f)

## Index

- Disciplinary letters,
  - sample (*cont'd*)
  - • warning for unauthorized absence from work, 6.2(b)
- Disciplinary and discharge meetings**
  - after dismissal, 7.10
  - • other employees, 7.10(c)
  - • personal items, 7.10(a)
  - • post-discharge obligations, 7.10(d)
    - • • “fair competition”, 7.10(d)
    - • • fiduciary employees, 7.10(d)
      - • • • criteria for relationship, 7.10(d)
      - • • • fiduciary duties, 7.10(d)
      - • • • non-competition ban/non-solicitation agreement, 7.10(d)
      - • • • non-fiduciary employees, 7.10(d)
        - • • • • competing with former employer, 7.10(d)
        - • • • • reasonable notice of resignation, 7.10(d)
        - • • • • solicitations by customers, 7.10(d)
      - • • • proprietary confidential information, protection of, 7.10(d)
      - • • • restrictive covenants, 7.10(d)
    - • • references, 7.10(b)
    - • • employee having duty to mitigate, 7.10(b)
  - • • employer providing neutral and objective information, 7.10(b)
  - clarity and completeness, 7.3
  - disciplinary records, maintaining, 7.11
    - • *Employment Standards Act, 2000* requirements, 7.11
    - • non-unionized employees, 7.11
      - • • claim for damages for wrongful dismissal, 7.11
      - • • • limitation period of two years, 7.11
    - • unionized environment, 7.11
      - • • grievance files, 7.11
      - • • *res judicata*, doctrine of, 7.11
      - • • sunset clauses, 7.11
  - following up after disciplinary meeting, 7.8
  - introduction, 7.1
  - location, 7.6
  - resign, offer to, 7.7
  - termination meeting, 7.9
    - • checklist for conducting meeting, 7.9
    - • • structure of meeting and confidentiality, 7.9
  - timing, 7.5
  - tone, 7.2
  - witnesses, 7.4

## Index

- Disciplinary penalty, selecting appropriate**
- factors influencing discipline/discharge, 3.1
  - • collective agreement or employment contract, 3.1(a)
  - • culminating incident, doctrine of, 3.1(e)
  - • explanation of employee, 3.1(f)
  - • offence, severity and nature of, 3.1(c)
  - • policies and procedures, applicable, 3.1(b)
  - • previous cases and consistency, 3.1(d)
  - • previous record of employee, 3.1(e)
    - • • elements of record to be considered, 3.1(e)
    - • • sunset clauses in collective agreements, 3.1(e)
  - • provocation, 3.1(g)
  - • relevant circumstances, additional, 3.1(h)
    - • • context of disciplinary response, 3.1(h)
    - • • double jeopardy doctrine, 3.1(h)
    - • • personal circumstances, 3.1(h)
    - • • status of employee as union official, 3.1(h)
- key factors considered, 3.1
  - statutorily prohibited motives (Ontario legislation), 3.2
    - • *Employment Standards Act, 2000*, 3.2(a), (b)
      - • • discipline prohibited for exercising rights under ESA, 3.2(b)
      - • • order of employment standards officer, 3.2(b)
      - • • rights under ESA, 3.2(b)
    - • *Labour Relations Act, 1995*, 3.2(a)
      - • • complaint vs. civil proceedings, 3.2(b)
      - • • discipline not to be motivated by anti-union animus, 3.2(a)
        - • • • factors considered, 3.2(a)
        - • • • non-unionized employees having right to file complaints, 3.2(b)
        - • • • proceedings before OLRB, 3.2(a)
        - • • • unfair labour practices, 3.2(a)
        - • • • unionized employees bound by decision of trade union, 3.2(b)
          - • • • • subject to arbitration, 3.2(b)
    - • *Occupational Health and Safety Act*, 3.2(d)
    - • • complaint with OLRB, 3.2(d)

## Index

- Disciplinary penalty, selecting appropriate (*cont'd*)
- where disciplined contrary to OHSA, 3.2(d)
  - *Ontario Human Rights Code*, 3.2(c)
    - applications and responses, 3.2(c)
    - arbitrators in union setting having power to apply Code, 3.2(c)
    - complaint where disciplined contrary to OHRC, 3.2(c)
    - equal treatment, right to, 3.2(c)
    - orders of Tribunal, 3.2(c)
    - Pinto Report, 3.2(c)
    - remedial powers of courts, 3.2(c)
      - non-monetary personal remedies, 3.2(c)
      - restitutive power, 3.2(c)
      - time limit for filing complaint, 3.2(c)
    - where prohibited from filing application, 3.2(c)
  - *Workplace Safety and Insurance Act, 1997*, 3.2(e)
- Disciplinary procedure**
- progressive discipline, 1.2
  - disciplinary penalties involved in progressive discipline, 1.2(a)
  - demotions, 1.2(a)(iv)
  - dismissal, 1.2(a)(v)
  - suspensions without pay/final warnings, 1.2(a)(iii)
  - verbal warnings, 1.2(a)(i)
  - written warnings, 1.2(a)(ii)
  - fundamental breach, 1.2
  - non-unionized workplace, 1.2
    - constructive dismissal, 1.2
  - unionized workplace, 1.2
  - purposes of discipline, 1.1
    - confidence and respect, 1.1
    - deterrence, 1.1
    - rehabilitation, 1.1
  - rehabilitation, opportunity for, 1.2
  - when to apply disciplinary procedure, 1.3
    - poor performance addressed through “non-disciplinary” measures, 1.3

## E

**Emergency leave**, *see*  
*Employment Standards Act, 2000*

### **Employee conduct, specific types of**

- absenteeism, 4.13
  - culpable absenteeism, 4.13(b)
  - attendance management program, requirements of, 4.13(b)

## Index

- Employee conduct, specific types of (*cont'd*)
  - inclement weather, 4.13(b)
  - employment standards leaves, 4.13(c)
    - *Employment Standards Act, 2000*, compliance with, 4.13(c)
    - “non-monitored” absences, 4.13(c)
  - innocent absenteeism, 4.13(a)
    - common law doctrine of “frustration”, 4.13(a)
      - factors considered, 4.13(a)
      - dismissal, procedural requirements for, 4.13(a)
      - employment relationship impaired, 4.13(a)
      - excessive absenteeism, 4.13(a)
      - frustration of contract by disability, 4.13(a)
        - amendment to ESA regulation, 4.13(a)
        - “deemed terminated”, 4.13(a)
      - incapable of regular attendance, 4.13(a)
      - innocent vs. culpable absenteeism, 4.13(a)
      - undue hardship test, 4.13(a)
  - company rules, breaching, 4.12
  - conflict of interest, 4.9
  - criminal convictions, 4.10
  - factors considered, 4.10
  - principles in assessing response to off-duty criminal charges, 4.10
  - significant case law: sexual assaulting minor, 4.10
  - criticizing employer, publicly, 4.11
    - case law, 4.11
    - factors to consider, 4.11
    - implied duty of loyalty, 4.11
    - social media issues, 4.11
    - whistleblower protection, 4.11
  - dishonesty, 4.4
    - breakdown of employment relationship, 4.4
      - contextual approach, 4.4
      - dishonesty about medical condition, 4.4
      - *Dowling*, 4.4
      - exemplary performance record, 4.4
      - *McKinley* test, 4.4
      - nature and extent of misconduct, 4.4
      - position of trust, 4.4
    - mitigating factors, 4.4
    - when dishonesty constituting just cause for discharge, 4.4

## Index

- Employee conduct, specific types of (*cont'd*)
  - harassment, sexual and discriminatory, 4.8
    - • case law, *Simpson*, 4.8
    - • conduct outside workplace, 4.8
    - • defined, 4.8
    - • *Human Rights Code*, prohibited by, 4.8
    - • significant case law: after-hours conduct, 4.8
    - • whether offending employee knew that conduct was unwelcome, 4.8
  - insubordination, 4.7
    - • unionized environment, 4.7
      - • • “obey now — grieve later” principle and exceptions, 4.7
  - introduction, 4.1
  - last chance agreements (LCA), 4.16
    - • accommodation, form of, 4.16
    - • appropriateness of LCA, 4.16
    - • drafting considerations, 4.16
    - • limiting arbitrator’s jurisdiction, 4.16
    - • significant case law: absenteeism due to alcohol abuse, 4.16
      - • • “accommodation” under *Human Rights Act*, 4.16
  - lateness, 4.3
  - leaving work without permission, 4.2
    - • advance notice, where not possible, 4.2
    - • crime-related child death or disappearance leave, 4.2(h)
    - • critical illness leave, 4.2(g)
    - • domestic or sexual violence leave, 4.2(j)
    - • emergency leave, declared emergencies, 4.2(c)
    - • family caregiver leave, 4.2(f)
    - • family medical leave, 4.2(e)
    - • leave provisions under ESA, ensuring compliance with, 4.2
      - • • advance notice where possible, 4.2
      - • • discipline prohibited where not possible to give advance notice, 4.2
    - • organ donor leave, 4.2(i)
    - • personal emergency leave, 4.2(b)
    - • pregnancy and parental leave, 4.2(a)
    - • reservist leave, 4.2(d)
  - off-duty conduct, 4.10
    - • criteria, 4.10
    - • significant case law: racist and discriminatory beliefs, airing, 4.10
    - • • criminal conviction, assault, 4.10



## Index

- Employee conduct, specific types of (*cont'd*)
    - • • criminal proceedings, suspension, 4.10
    - • • *Ghomeshi* assault case, 4.10
    - performance issues, 4.14
    - • just cause for discharge, requirements for, 4.14
    - • • amount of time to improve performance, 4.14
    - • • documenting of performance, 4.14
    - • • • follow-up letter, 4.14
    - • • • sample letter regarding unacceptable performance, 4.14
    - • • minimum performance standards specified and detailed, 4.14
    - • performance appraisals, honest and specific, 4.14
    - • unionized employees, 4.14
    - • • progressive discipline, 4.14
    - property damage, 4.5
    - sabotage, 4.5
    - workplace intoxication and substance abuse, 4.15
    - • disciplinary sanctions, consumption or possession, 4.15
    - • legalization of cannabis, further challenges, 4.15
    - • proof of impairment, 4.15
    - • substance addiction disability and accommodation, 4.15
    - workplace violence and harassment, 4.6, *see also* harassment, sexual and discriminatory
    - • Bill 132, investigation requirements, 4.6
    - • Bill 132, reporting requirements of harassment, 4.6
    - • Bill 168, arbitrator requirements, 4.6
    - • Bill 168, policies and programs requirements, 4.6
    - • case law, *Tenneco*, 4.6
    - • cost of, 4.6
    - • *Criminal Code* violent acts, 4.6
    - • definitions, 4.6
    - • disciplinary mechanisms, 4.6
    - • reasonable performance management (OHSA), 4.6
- Employment contract clauses**
- case law, 9.4
  - common clauses, 9.4
  - • compensation, 9.4(c)
  - • curative provision, 9.4(f)
  - • discipline and layoffs, 9.4(d)
  - • entire agreement, 9.4(h)
  - • probationary period, 9.4(b)
  - • restrictive covenants, 9.4(g)
  - • severability, 9.4(i)

## Index

- Employment contract clauses (*cont'd*)
  - • term of contract, 9.4(a)
  - • termination of employment, 9.4(e)
    - • • accrued wages and vacation pay, 9.4(e)(vi)
    - • • benefit continuation, 9.4(e)(iv)
    - • • expressly exclude common law right to reasonable notice, 9.4(e)(ii)
    - • • expressly limit entitlement to ESA minimums, 9.4(e)(i)
    - • • severance pay, 9.4(e)(v)
    - • • termination by employee, 9.4(e)(iii)
  - enforceability of, 9.2
    - • compliance with statutory requirement, 9.2
    - • consideration, valid and fresh, 9.2
    - • entering into freely and without duress, 9.2
    - • unconscionability not enforceable, 9.2
  - introduction, 9.1
    - • *contra proferentem* doctrine, 9.1
    - • purpose of, 9.1
  - types of employment contracts, 9.3
    - • fixed term contracts, 9.3(b)
      - • • termination of, 9.3(b)
    - • indefinite term contracts, 9.3(a)
- Employment Standards Act, 2000***
  - damages arising from termination of employment, 10.3(a)
    - • notice of termination, 10.3(a)
    - • severance pay, 10.3(a)(ii)
    - • termination pay, 10.3(a)(i)
  - disciplinary records, maintaining, 7.11
  - *Employment Standards Act, 2000* requirements, 7.11
  - leave provisions under ESA, ensuring compliance with, 4.2
    - • advance notice where possible, 4.2
    - • absenteeism, 4.13(c)
    - • discipline prohibited where not possible to give advance notice, 4.2
    - • types of leave, 4.2
      - • • emergency leave, declared emergencies, 4.2(c)
      - • • family medical leave, 4.2(e)
      - • • organ donor leave, 4.2(i)
      - • • personal emergency leave, 4.2(b)
      - • • reservist leave, 4.2(d)
  - group benefit plans, 10.3(d)(iii)

## Index

### ***Employment Standards Act, 2000 (cont'd)***

- • continued coverage during statutory notice period, 10.3(d)(iii)
- prohibited motives for discipline, 3.2(b)
- • discipline prohibited for exercising rights under ESA, 3.2(b)
- • order of employment standards officer, 3.2(b)
- • rights under ESA, 3.2(b)

## **F**

**Fighting/violence in workplace**, *see under* Employee conduct, specific types of

## **H**

### ***Human Rights Code***

- absenteeism, culpable, 4.13(b)
- • attendance management program, requirements, 4.13(b)
- arbitrators in union setting having power to apply Code, 3.2(c)
- deemed termination clause in collective agreement, 8.2(h)
- • “negotiated accommodation”, 8.2(h)
- • principles gleaned from *McGill* decision, 8.2(h)

- • whether discriminatory and contrary to human rights legislation, 8.2(h)
- employee conduct, 3.2(c)
- harassment, sexual and discriminatory, 4.8
- last chance agreements (LCA), 4.16
- • accommodation, form of, 4.16
- • drafting considerations, 4.16
- • limiting arbitrator’s jurisdiction, 4.16
- • significant case law: absenteeism due to alcohol abuse, 4.16
- • • “accommodation” under *Human Rights Act*, 4.16

## **I**

### **Insubordination**

- unionized environment, 4.7
- • “obey now — grieve later” principle and exceptions, 4.7

## **L**

### ***Labour Relations Act, 1995***

- complaint vs. civil proceedings, 3.2(b)
- discipline not to be motivated by anti-union animus, 3.2(a)
- • factors considered, 3.2(a)
- proceedings before OLRB, 3.2(a)
- unfair labour practices, 3.2(a)

## Index

### **Last chance agreements (LCA)**

- accommodation, form of, 4.16
- appropriateness of LCA, 4.16
- drafting considerations, 4.16
- limiting arbitrator's jurisdiction, 4.16
- significant case law: absenteeism due to alcohol abuse, 4.16
- • "accommodation" under *Human Rights Act*, 4.16

### **Leaving work without permission**

- disciplinary letters, 6.2
- • suspension for unauthorized absence from work, 6.2(c)
- • warning for unauthorized absence from work, 6.2(f)
- employee conduct, 4.2
- • leave provisions under ESA, ensuring compliance with, 4.2
- • • advance notice where possible, 4.2
- • • discipline prohibited where not possible to give advance notice, 4.2

## **O**

### ***Occupational Health and Safety Act***

- complaint with OLRB, 3.2(d)
- • where disciplined contrary to OHSA, 3.2(d)

## **P**

### **Progressive discipline**

- disciplinary penalties involved in progressive discipline, 1.2
- • demotions, 1.2(a)(iv)
- • dismissal, 1.2(a)(v)
- • suspensions without pay/final warnings, 1.2(a)(iii)
- • verbal warnings, 1.2(a)(i)
- • written warnings, 1.2(a)(ii)
- non-unionized workplace, 1.2
- unionized workplace, 1.2

## **U**

### **Unionized employees**

- absenteeism, culpable, 4.13(b)
- • attendance management program, requirements of, 4.13(b)
- collective agreement clauses, 8.2
- • introduction, 8.1
- • sample clauses, 8.2
- • • deemed termination, 8.2(h)
- • • just cause, 8.2(a)
- • • non-discrimination clause, 8.2(g)
- • • personnel files, reviewing, 8.2(e)
- • • reasons, issuing, 8.2(d)
- • • sunset clauses, 8.2(f)
- • • timeliness, 8.2(b)

## Index

- Unionized employees (*cont'd*)
  - • • union representative, presence of, 8.2(c)
  - damages arising from termination of employment, 10.2
  - disciplinary records, maintaining, 7.11
  - • *Employment Standards Act* requirements, 7.11
  - • grievance files, 7.11
  - • *res judicata*, doctrine of, 7.11
  - • sunset clauses, 7.11
  - factors influencing discipline/discharge, 3.1
  - • collective agreement or employment contract, 3.1(a)
  - • status of employee as union official, 3.1(h)
  - *Human Rights Code*, 3.2(c)
  - • arbitrators in union setting having power to apply Code, 3.2(c)
  - insubordination, 4.7
  - • “obey now — grieve later” principle and exceptions, 4.7
  - *Labour Relations Act, 1995*, 3.2(a)
  - • discipline not to be motivated by anti-union animus, 3.2(a)
  - • • factors considered, 3.2(a)
  - • proceedings before OLRB, 3.2(a)
  - • unfair labour practices, 3.2(a)
  - last chance agreements (LCA), 4.16
  - • accommodation, form of, 4.16
  - • drafting considerations, 4.16
  - • limiting arbitrator’s jurisdiction, 4.16
  - • significant case law: absenteeism due to alcohol abuse, 4.16
  - • • “accommodation” under *Human Rights Act*, 4.16
  - *Occupational Health and Safety Act*, 3.2(d)
  - • complaint with OLRB, 3.2(d)
  - • • where disciplined contrary to OHSA, 3.2(d)

## W

**Workplace intoxication and substance abuse**, *see under* Employee conduct, specific types of

**Workplace Safety and Insurance Act, 1997**, 3.2(e)

**Workplace violence and harassment**, *see under* Employee conduct, specific types of

