**Chapter 20: The Contract of Employment**

**Relationship of Master and Servant** – the contractual relationship between an employer and an employee

The Employer’s Liability  
**Liability in Contract**  
- parties to a contract often understand that they will not perform personally (vicarious liability)  
- either employees or an independent contractor will perform  
- promisor remains liable for satisfactory performance

**Liability in Tort**  
- business is liable for damages to a 3rd party for the consequences of any tort an employee may commit in the course of employment  
- the employer may not have authorized the wrongful act, but it is still liable

**Notice of Termination of Individual Employment Contracts**

**Notice** – advance warning that the employment relationship will end

**Fixed Term** – a contract of employment with defined start and end dates

**Indefinite Hiring** – a contract of employment for an undetermined length of time, with no expectation of termination or described end date

**Reasonable Notice** – the acceptable length of notice of termination considering the nature of the contract, intentions of the parties, circumstance of the employment, and characteristics of the employee

- in the absence of an express term about termination in a contract of employment, the common law rule is that reasonable notice shall be given

**Payment In Lieu of Notice** – payment of the amount of compensation the employee would have earned during the reasonable notice period

- if an employer dismisses an employee without notice, it may satisfy its obligation to give reasonable notice if it tenders an additional amount of pay for a period equal to the time required for reasonable notice; this is known as payment in lieu of notice

An employee is justified in leaving without giving the usual notice if he can show that he was obliged to work under dangerous conditions that the employer refused to correct or if he is ordered to perform an illegal act.

**Demotion** – transferring an employee to a job with less responsibility and/or income potential

**Constructive Dismissal** – a substantial change to an employee’s job that amounts to termination of the existing employment

**Dismissal For Cause** – dismissal without notice or further obligation by the employer when the employee’s conduct amounts to breach of contract

- an employer need not give notice when it can show that the employee was dismissed for cause

4 Grounds for Dismissal:  
a) Misconduct  
b) Disobedience  
c) Incompetence  
d) Illness

Misconduct may be a crime associated with employment, such as embezzlement, or it can be dismissal for cause related to conduct outside of employment.

Wilful disobedience of a reasonable and lawful order from an employer is grounds for immediate dismissal without notice.

**Job Description** – a description of the responsibilities of a position including objectives, qualifications, and supervisor  
- an accurate job description help an employer avoid employee confusion about expected behaviour and disobedience

An employer must make an effort to remedy incompetence with training and education. If these efforts fail, then the employer may dismiss without notice.

Permanent disability or constantly recurring illness entitles an employer to consider the contract at an end, regardless of any terms in the contract requiring notice. An employer cannot recover damages from an employee for breach of contract in these circumstances. A disable person’s employment may only be terminated after all reasonable efforts to accommodate the disability have been exhausted.

Any of the 4 grounds for dismissal set out above permit an employer to treat the contract of employment as discharged. Misconduct, disobedience, or incompetence amounts to discharge by the employee’s breach, but illness discharges the contract by frustration.

Only the most serious events entitle an employer to terminate an employee after the first incident. Most circumstances require an employer to warn the employee that the offending conduct is unacceptable and further occurrences will result in termination.

Adverse economic conditions do not excuse an employer from its implied obligation to give employees reasonable notice of termination. An employer might overcome this implied obligation by getting his employee to agree expressly that in adverse economic conditions eh may be dismissed without notice.

**Wrongful Dismissal**

Damages  
- must show that the employer has broken the contract, as when it fails to give the employee the notice to which she is entitled  
- an employer often defends its actions either by claiming that the employee was dismissed for cause or that reasonable notice was given

- first task for the court is to determine what length of time would have been reasonable notice  
- the court then multiplies the employee’s rate of pay and the value of fringe benefits by the length of reasonable notice to calculate the damages

Mitigation  
- a party injured by breach of contract is expected to act reasonably in order to mitigate her loss  
- accordingly, the employer may be able to defeat or reduce the employee’s claim for damages by proving that she has not made a serious attempt to obtain reasonably comparable work elsewhere

Reinstatement  
- a form of specific performance by which the court orders the employer to continue to employ the aggrieved employee

**Employer Risk-Management Strategies:**  
- include precise notice requirements in employment contracts for an indefinite term  
- create clear job descriptions and codes of conduct describing employee responsibilities  
- follow consistent warning and discipline processes that allow employees to respond to allegations  
- offer incompetent employees training or education  
- document infractions and responses  
- dismiss employees in the most sensitive, fair, and respectful manner possible

Pay Equity  
- principle of “equal pay for equal work”   
– law prohibits different levels of pay for essentially the same kind of work performed in the same establishment, requiring more or less the same skill, effort, and responsibility, and performed under similar working conditions  
- a 2nd approach requires a focus on the jobs “comparative value” and less on gender

**Comparative Value** – equal pay for work of equal value

Recent pay legislation is based on **systemic discrimination** – discrimination that is pervasive throughout an employer’s work force. It abandons the complaint system in favour of a regulatory model that not only prohibits wage discrimination but also places positive obligations on employers to scrutinize their pay practices and ensure that these practices comply with the legislation.

Employment Equity  
- employers may be required towards making their work force reflect the various underrepresented classes of disadvantages persons in the general population

General Working Conditions  
- each province has a variety of statues prohibiting child labour, regulating the hours of work of young people, and providing for the health/safety of employees along with minimum wage rates

Workers’ Compensation  
The employer might be defending from damages if it could show that the injury:  
  
a) resulted from the contributory negligence of the employee showing that he was partly responsible for the accident, even in a small degree  
  
b) was caused by the negligence of a fellow employee (or fellow servant), provided the employer took reasonable care to hire competent workers, the usual result being that the employer escaped liability for the negligence of one employee that caused injury to another  
  
c) was an **assumed risk**, accepted by the employee as a normal incident of the type of work he had agreed to do - and broadly interpreted, it might defeat almost any action by an employee, for it could be argued that every risk is a risk an employee assumes in accepting a particular employment