APSC 450
Professional Engineering Practice

Employment Law in BC

(September 2019)

DISCLAIMER

These notes are provided strictly for educational purposes and to supplement lectures. They are intended to provide a basic introduction to employment law in BC. As such, they should not be used as a basis for making legal decisions that, in any case, should be made with the assistance of legal professionals.

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Introduction

The relationship between a non-union employee and employer is governed by the following regimes:

1) the common law, which includes written contracts;
2) the Human Rights Code, R.S.B.C. 1996, c. 210;
3) the Workers' Compensation Act, R.S.B.C. 1996, c. 492; and
4) in some cases, the Employment Standards Act, R.S.B.C. 1996 c. 113.

From the above legal regimes, these notes will touch upon the following topics:

- Common Law obligations
- Confidentiality
- Employment Contracts
- Non-Competition Agreements
- Employment Standards in British Columbia
- Human Rights Code
- Workers Compensation Act

Employment Contracts

Most employment relationships are governed by a written employment agreement between the employee and employer. In many instances the written document does not include all of the terms of the employment relationship.

Where there is no written contract or where the written contract is not complete, the common law will imply terms into the relationship and impose duties onto both the employer and the employee. The following are typical implied terms of an employment contract:

- The employer and employee each have a duty to maintain mutual trust and confidence.
- The employee has a duty to serve the employer honestly and faithfully and to not act against the interests of the employer.
- The employee has a duty to attend at work and the employer has a duty to pay the employee. (The terms of payment are often explicitly written in the contract.)
- The employee will perform her/his duties with reasonable skill and diligence.
- The employer has a duty to take reasonable care for the employee's health and safety.
- The employer will provide the employee with reasonable notice in the event of a termination, demotion or other change in the employment relationship.
- In the event of a termination, the employer must not act in bad faith.

Written employment contracts allow explicit consideration of issues such as:

- what constitutes reasonable notice
- confidentiality - some employees owe increased duties of confidentiality
- unfair competition
- ownership of intellectual property

Verbal contracts are as enforceable as written contracts but in most cases the Court will enforce the terms of a written contract. In particular, the Court is wary of enforcing contracts which restrict an employee's ability to earn income after being terminated by the employer. The Court will also not enforce a written contract which violates the Employment Standards Act, which will be discussed below.

Confidential and Proprietary Information

Written contracts stipulating what information is proprietary, and what information the employee must treat as confidential, can assist an employer to protect its information. An employer can make clear to an employee its expectations of what is confidential and remove or minimize ambiguity. A strong provision in an agreement will also act as a deterrent to an employee who may be inclined to release such information.

Simply describing particular information as confidential is not enough. Where the information was not treated as confidential or cannot reasonably be considered proprietary, the Court may decline to enforce the contract against the employee. Generally confidential information is

defined in an agreement as widely as possible but confidential information does not include information which is in the public domain or information possessed by the employee before they commenced employment. Accordingly, it is important for employers to take steps to maintain the confidentiality of information it does not want third parties to know.

Whether or not confidential information is protected in a contract, proving a breach will often be difficult.

An employer may also use Confidentiality Agreements to protect and retain intellectual property developed by the employee during the course of his/her employment and require that any such interest be assigned or transfer to the employer. The scope of the protection can cover work conceived outside regular working hours and work not specifically instructed to be undertaken by the employer. This can remove any dispute as to whether the property was truly developed outside work.

Non-Competition Agreements and Restrictive Covenants

In general, the Court seeks to protect employers against unfair competition while protecting a former employee's ability to earn income through fair competition with the employer. The line between what the Court considers to be fair and unfair competition is exceedingly difficult to draw and will depend on the particular facts relating to the specific employment relationship in question.

As a general rule, the Courts refuse to enforce contracts that are in restraint of trade on the basis that all interference with individual liberty of action in trading is contrary to public policy and therefore void. If a contract which interferes with trade falls within certain exceptions, the Court may enforce it. Restrictive Covenants will be enforceable only if they fall within an exception to the general rule, in that they are reasonable in the circumstances.

Restrictive covenants typically will restrain an employee from engaging in a competitive business in any capacity for a certain period of time in a certain geographic area. The Court will allow enforcement of a non-competition agreement where the restriction is reasonable with reference to the interest of the parties concerned and the interest of the public at large. The employer's primary interest is to prevent an employee from unfairly using the employee's confidential knowledge or special relationship to compete.

The scope of the restriction must be reasonable when viewed against each individual employee's interests. "One size fits all" contracts are at risk of being too broad to be enforced against a specific employee unless the lowest common denominator is used.

The courts will not fix the clause if it is found to be too restrictive. The whole clause will be unenforceable. The Court will not 'blue pencil' restrictive covenant clauses. The term 'blue pencil' refers to the practice of inserting alternatives into a restrictive covenant clause. For

example, the clause may state that the employee will not compete in (a) Canada or, in the alternative, (b) British Columbia, for a period of (a) 5 years, or, in the alternative, (b) one (1) year.

The Court often focuses on whether the scope of the restriction on the employee is overly broad. For example, an employer who seeks to restrain an employee from competing altogether with the employer's business will often find that the Court will not enforce the contract. By contrast, the Court is more likely to enforce a contract which restrains an employee from contacting only those particular customers with which the employee had contact during a limited time before the termination of the employment relationship, or prohibits competition only in that aspect of the business in which the employee was involved or prohibits an employee from soliciting remaining employees. Other circumstances such as the source of the business connection may be relevant in determining whether such clauses would be enforceable.

Restrictions which are too broad geographically, or too long in time will be unenforceable on the basis that they are an illegal restraint of trade.

Ownership of Intellectual Property[1]

In Canada, if no specific intellectual property clauses are included in an employment contract and common law factors (see below) do not favour the employer owning the invention, ownership of an employee's invention is retained by the employee even if made in the course of employment. This is because under the Patent Act the inventor is the deemed first owner of an invention unless there is an agreement to the contrary.

There are two notable exceptions to this rule. The first is if an employee has been hired under contract with the specific purpose of inventing. In that case, ownership will be determined by provisions in the employment contract. The second is the case of an independent contractor who was never intended to own the invention.

The content of an employment agreement, if one exists, and other factors set out by Canadian common law will play a role in determining who owns an invention. These factors include:

- Was the employee hired for the express purpose of inventing?
- At the time of hiring had the employee previously made inventions?
- Did the employer have incentive plans encouraging product development?
- Did the conduct of the employee once the invention was created suggest ownership was held by the employer?
- Was the invention the product of the problem the employee was instructed to solve?
- Did the employee's invention arise following consultation through normal company channels?
- Was the employee dealing with highly confidential information or confidential work?

[1] Adapted from https://www.heerlaw.com/employee-rights-intellectual-property

- Was it a term of the employee's employment that he or she could not use the ideas that he or she developed to his or her own advantage?

It is not unusual for parties to dispute patent ownership considering the ultimate value that a patent can have for a business or an inventor. Accordingly, it is much more time and cost effective to stipulate appropriate intellectual property provisions during the hiring process and the process of signing an employment agreement.

Duties of an Employer

Reasonable Notice

It is an implied term of every employment contract that, absent a cause for termination (described later), an employer must provide an employee with "reasonable notice" of termination. Such notice, to be effective, must be clear and unequivocal.

The purpose of providing "reasonable notice" is to provide the employee with time to find alternative employment. What constitutes reasonable notice varies from case to case. There is no set formula under the common law upon which to determine reasonable notice. The usual refrain of one month per year is not accurate and does not actually exist in common law. "Reasonable notice" under common law is also different from the notice required to be given under the Employment Standards Act, which will be discussed below.

When determining what would be a reasonable notice period, employers often consider Court decisions in similar cases. The Court determines reasonable notice on an individual basis but considers the following factors:

- age of the employee
- length of service
- character of the employment
- availability of similar employment given the training and education of the employee

Notice periods vary widely. Although no British Columbia case has awarded more than 24 months' notice or pay in lieu of notice to an employee, awards exceeding 24 months have been made where the employer has acted in bad faith. The notice period will be lengthened if the employee was induced to leave secure or long-term employment to join the employer and was then terminated by the new employer without cause.

Once notice is given the employee may be provided one of two options:

1) Work through the notice period or until s/he finds another job.
2) Accept "payment in lieu of notice", an amount equal to what the employee would have earned by working through the notice period.

Option 2 is often preferred since the employee would wish to focus on finding another job and the employer would not want a terminated employee working among the "unterminated".

Terminology

Severance is the general term used for any payment from the employer to the employee when employment is terminated without cause. Payment in lieu of notice is sometimes called *termination pay*. The term severance often refers to a benefit provided to long-serving employees upon termination.

Cause

An employer is entitled to dismiss an employee for cause without reasonable notice. The employer will bear the onus in any subsequent litigation to prove that it had cause to dismiss the employee without providing reasonable notice. In British Columbia, the Court is generally very reluctant to find that cause exists. The onus placed upon employers is a high one. The employer must show that the employee's conduct went to "the root of the employment contract" with the result that the relationship was "too fractured" to expect the employer to provide a second chance.

Examples of the type of conduct which has been found to warrant immediate dismissal include:

- **Theft**
- **Dishonesty** such as lying, and in some instances silence.
  Not all acts of dishonesty will give the employer the right to dismiss an employee for cause. The Supreme Court of Canada has held that such a determination depends upon the nature and circumstances of the dishonest conduct. The court made the following comments:

  > … I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonest conduct gave rise to a breakdown in the employment relationship. …
  >
  > In accordance with this test, a trial judge must instruct the jury to determine (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of dishonesty warranted dismissal. …
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  > ***
  >
  > Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

  Dishonesty may take the form of omission of important information, particularly where the employee is in a position of trust or where the information is of fundamental importance to the employer. Whether the employee lied or whether the employer simply avoided the issue when she knew the issue to be important, the result is the same.

- **Wilful disobedience** to clear instructions or well-known policies or procedures, without reasonable excuse. The Court has stated:

  > I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

> It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it".
>
> But it may be an answer, on the question of whether disobedience is repudiatory[2], that the employer so conducted himself that the reasonable man would conclude, and the employee did in fact, conclude, that the employer considered the rule of little or no importance. For instance, if an employer had a rule that equipment was to be covered at the end of the day and the rule was ignored by the employees to the knowledge of the employer, he could hardly come to work one morning and discharge the lot for failing to obey the rule.

To justify the dismissal on such grounds there is an onus on the employer to establish there were acts wilfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well known by the employee as being necessary in the fulfilment of the employer's objectives.

- **Insolence and insubordination**
- **Conflict of interest**, by acting in a manner which adversely affects the interest of the employer;
- **Incompetence**
  Serious or gross incompetence gives rise to the right of an employer to dismiss the employee. Where incidents are sufficiently serious, the plaintiff may be dismissed without warning.

- **Intoxication, causing harm to the employer**
- **Absenteeism or lateness**

Even with respect to theft and dishonesty, the employer must show that it has not "accepted or condoned" the conduct by not dismissing the employee or delaying in dismissing the employee.

In most cases, to succeed in dismissing an employee for incompetence, absenteeism or intoxication, the employer must show that it has warned the employee of the consequences of his conduct (that is that the employee's job is in jeopardy) and given the employee a reasonable time to correct the conduct. Again, the employer must not delay in taking action.

Bad Faith

In carrying out a dismissal, an employer must not act in "bad faith". Bad faith has not been defined definitively. The Supreme Court of Canada, however, has stated:

[2] A contract such as one of employment can be repudiated by either the employer or employee declaring that it does not intend to perform as promised. The question in this case is whether the employee's refusal to obey the employer is a repudiation of the employment contract. It is not if the employer knew disobedience occurred and did nothing about it.

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal **employers ought to be candid, reasonable, honest and forthright with their employees** and **should refrain from engaging in conduct that is** unfair or is in bad faith by being, for example, **untruthful, misleading or unduly insensitive**.

The obligation not to act in bad faith is not an independent obligation, there must also be a wrongful dismissal. Therefore, if an employer provided reasonable notice but acted in bad faith when carrying out the dismissal, there is no course of action by the employee.

Where an employer is found to have acted in bad faith, the notice period to which the employee is entitled is increased. The purpose of so doing is twofold:

- to compensate an employee for the negative impact such conduct may have on his or her ability to find alternative employment (thereby mitigating his or her damages); and
- to punish employers for callous and insensitive treatment.

In British Columbia, at least one Court has commented that the duty imposed upon an employer is "not [to] treat an employee unfairly or to create impediments to his or her search for new employment". The Court is careful not to define too rigidly the types of conduct which may constitute bad faith, nor does the Court merely look at the effect of the conduct on the employee's ability to find alternative employment. Conduct which does not affect the ability to find alternative employment may be compensated if it caused humiliation, embarrassment or damage to the employee's self-esteem.

Some examples of conduct which amounted to "bad faith" are:

- dismissing an employee abruptly, shortly after he had received a favourable review and using "hardball" tactics, including alleging cause, which made it more difficult for the employee to find alternative employment;
- dismissing an employee one day after giving her a message complimenting her on her performance and making untrue and derogatory comments about her in the close-knit industry in which she worked;
- wrongfully accusing an employee of theft or fraud and telling potential employers;
- alleging fraud and refusing to provide a letter of reference;
- making knowingly false misrepresentations about future employment prospects upon which the employee relies;
- dismissing a disabled employee on the employee's return to work from leave;
- hiring a replacement worker for an employee who was laid-off temporarily, without telling the employee of the termination;
- dismissing an employee for cause based upon allegations which were not investigated properly, were unsubstantiated and in some cases untrue; and where the employee was employed in a specialized industry with little hope of finding alternative employment in the circumstances;

- abolishing the employee's position while the employee was on vacation, and alleging and maintaining cause against the employee after his termination when it was clear that there was no basis;
- alleging cause after the termination and telling persons outside the company that the plaintiff had been dishonest and had come to work under the influence of alcohol;
- giving the employee ninety days to improve her performance, but then firing her after forty days for 'incompetence';
- making false statements to potential and an actual future employers; alleging "illegality" and fraudulent conduct, which allegations were only abandoned shortly before trial; and suggesting, then withdrawing, an allegation that monetary incentives were being paid by the plaintiff to salesmen of the defendant;
- making unfounded allegations in the close-knit industry against the employee of forgery, insurance fraud, mortgage fraud, incompetence, unprofessional organisational abilities, disobedience, drug and/or alcohol abuse, and misuse of a cellular phone;
- carrying out the dismissal in public, alleging that the employee had resigned but alleging cause as an alternative, and subsequently offering the same employee a new job with much reduced responsibilities and salary.

The following are examples of conduct which did not constitute bad faith:

- dismissing an employee without cause or reasonable notice;
- failing to negotiate a severance package;
- failing to provide a reference and making an allegation of cause which although not successful, was made on some objectively justifiable grounds, coupled with the fact that there was no evidence of emotional trauma or "hard ball" tactics on the part of the employer;
- maintaining an allegation of just cause until after examinations for discovery;
- maintaining an allegation of cause unsuccessfully, but where the employee had committed serious errors of judgment;
- telling an employee that he was being "laid off" when he was, in fact, being terminated, coupled with the fact that there was no significant impact of the conduct on the employee;
- offering a "take-it-or-leave-it" offer of income continuance, then later attempting to induce the employee to accept the minimum statutory payment in settlement of his claim, where the employer was forthright and did not allege cause;
- reducing the amount of severance pay offered after the employee refused to sign a release;
- delay in paying the statutory minimum severance pay and vacation pay;
- irritability or rudeness on the part of the employer prior to the termination, when the dismissal itself was conducted in private and the fact of the dismissal was kept confidential during the notice period, the employer gave the plaintiff an explanation for her firing which attributed no blame to the plaintiff and gave a laudatory letter of reference;

- failing to offer an employee who was being terminated at the age of 50, with 31 years service with the government, to 'bridge' him to retirement or pay out his accumulated sick time;
- making a comment to other employees after the termination that the employee "was given 'umpteen' chances to improve but never did;
- eliminating a bonus which constituted *constructive dismissal* and advising of the elimination in a written memorandum dropped in the employee's mailbox, all in the context of a deteriorating relationship between the parties;
- failing to extend early retirement benefits to two employees who had resigned and were working through their notice periods;
- making an allegation of cause then withdrawing it soon thereafter, coupled with the sudden dismissal of an employee after a long-running dispute between the employee and her superior.

Quantifying the bad faith element of the dismissal is not an easy task. Typically the more egregious the conduct, the higher will be the award, particularly where the conduct hinders the employee's ability to find alternate employment. In many of the decisions in British Columbia, the Court has not specified the extent to which the notice period was extended as a result of bad faith conduct and the Court of Appeal has stated that the existence of bad faith is just one more of the factors to be considered in determining a reasonable notice period. However, a few cases have indicated extensions of two to six months.

Wrongful dismissal and Constructive dismissal

Wrongful dismissal occurs when an employee is terminated by the employer without reasonable notice. This can happen in a number of ways, but it is usually caused by an employer being unaware of the common law requirements of reasonable notice.

Constructive dismissal occurs when the employer unilaterally changes a term or terms of the employment contract and the employee does not agree with the new terms. The nature of constructive dismissal can range from the blatant, such as a reduction in salary or benefits, to the more subtle such as creation of a toxic work environment by means of rumors or innuendo leading to a lack of trust and inability of the employee to perform her duties. The law considers such unilateral breaches of an employment contract a repudiation (rejection) of the contract by the employer. It is important for an employee to take action[3] in the event of such breaches because continuing to work for a period of time without complaint suggests the employee has accepted the changes. Based on the circumstances, the courts will decide whether the time before the employee takes action is too long.

Theoretically, unilateral changes to an employment contract that benefit the employee are breaches of the contract. However, an employee is likely to agree with the changes and continue working without complaint.

[3] This could take the form of a verbal or written rejection of the new terms or trying to re-negotiate. If these attempts fail to satisfy, consult a lawyer.

Mitigation

Employees terminated with or without notice have a duty to take reasonable steps to find alternative employment or to accept comparable alternative employment and thus minimize losses suffered as a result of the termination. Mitigation also applies in cases of constructive dismissal and wrongful dismissal. If the complaint about termination were brought to court, failure to mitigate could result in reduction of the notice period (and severance pay) awarded by the court.

Remedies

The most common remedy for wrongful dismissal is compensation in lieu of reasonable notice. This is consistent with remedies in tort law that are intended to restore the plaintiff to the original state. The intent is to place the employee in the same position s/he would have been in if the contract had not been breached.

The damages available to wrongfully dismissed employees depend on the circumstances of the employment, but may include termination pay, severance, past and future commissions, vacation and holiday pay, compensation for work done, bonuses and funds to compensate for loss of benefits, pension and equity.

Duties of an Employee

All employees owe a general duty of good faith and fidelity to their employer. In addition, certain senior employees, known as fiduciaries, owe special duties to the employer. Such duties exist during the employment and after the employment relationship is terminated.

Confidential Information and Trade Secrets

It is clear that employees are not entitled to use confidential information obtained during the course of employment. However, determining what information is truly confidential is often problematic.

One particular type of confidential information which an employee may obtain from an employer is a "trade secret". Trade secrets include a process, tool, mechanism, formulae, or recipe which is known only to the employer and the employees who are required to know it due to their employment. The employer must in fact keep the trade secret "secret", and must intend to protect the secrecy of the information. A classic example of a trade secret is the recipe or formula for making Coca Cola.

It is difficult to establish that certain information is a "trade secret", but when that is established, employees are bound by their obligations of loyalty and good faith not to disclose or make use of the trade secret in competition with the employer or in circumstances where that information may be used in competition with the employer.

In contrast, customer lists often are not considered to be confidential. For example, if a list of customers can be generated from a public document, such as an online directory or a trade journal, it is difficult for the employer to persuade the Court that the customer names are confidential. However, where a list of the employer's customers would be difficult to generate, the Court is more inclined to consider the information to be confidential and to deserve protection.

Absent a written agreement to the contrary, the current law allows a regular (non-fiduciary) employee to resign from his or her position with a company, start up or join a competitive business, and immediately begin soliciting clients of his or her former employer. This is provided that the employee does not remove any physical property belonging to the former employer, including physical or electronic customer lists, pricing information, client portfolio information or the like.

Competition with Former Employer

Unless there is a written contract or the former employee was a fiduciary, the former employee is entitled to compete with the former employer and solicit the former employer's customers, so long as the former employee does so without using the former employer's confidential information.

A fiduciary is more restricted in competing with a former employer. A fiduciary may not directly solicit business from customers of the former employer for a reasonable period of time following the termination of the employment. In most cases a fiduciary may not secure a business opportunity belonging to or offered to his or her former employer, even where the company did not and could not have taken advantage of the opportunity, and when the employee did not pursue the opportunity until after the termination of the employment relationship.

It is often difficult to determine whether an employee was sufficiently senior to be considered a fiduciary. Senior executives of the companies are likely fiduciaries. Employees who were so involved in the direction and management of a company that he or she was equivalent to a director or officer will generally be considered fiduciaries. Usually a significant senior managerial role, involving greater responsibility than minor supervisory duties, must be established before an employee will be considered by the court to be a key employee with fiduciary obligations to the employer.

Before an individual can be considered to be a "key" employee, the following circumstances must exist:

1) the responsibilities of the employee in question must include the exercise of some discretion or power;
2) the employee must be able to exercise that power or discretion unilaterally so as to affect the legal or practical interests of the employer; and
3) the employer must be peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power

Employment Standards Act of British Columbia

Employment standards in British Columbia are governed by the Employment Standards Act (the "Act"). The purpose of the Act is to provide employees in British Columbia with at least basic standards of compensation and conditions of employment.

The Act provides minimum standards. Employers and employees are free to enter into agreements which provide higher standards than the Act but cannot enter into an agreement which offers less than the Act.

To Whom Does the Act Apply?

The Act applies to all employees in British Columbia unless the employee is specifically exempted from the Act. The exemptions are contained within the Employment Standards Regulation. For example, members of professional associations such as Engineers and Geoscientists of BC (EGBC) are not covered by the Act.[4] However, these professionals do have rights in the workplace and are not excluded from protection under the Human Rights Code or the common law.

Other employees, such as "high technology professionals" who work for a "high technology company" as defined here, are exempt from parts of the Act that deal with hours of work, overtime, and statutory holidays. This has implications for engineers who might be classified as high technology professionals but are not members of EGBC.

What is the Scope of the Act?

The Act regulates the following areas:

- minimum wages
- pay days
- how wages are paid
- deductions and assignments
- wage statements and payroll records
- hours of work and overtime
- statutory holidays and vacations
- pregnancy leave and parental leave
- jury duty
- notice periods and termination

[4] There are strong public policy reasons for excluding professionals such as engineers from the Act. Membership and discipline of a profession is controlled by governing bodies who undertake to protect the public or to make a commitment to society, typically via a code of ethics. This is of significant value. Since professionals work in many different ways under conditions of varying complexity, they would have little interest in or need for the additional control that would be provided by the Act. Such control would be a deterrent to entry into the profession or would result in a decrease in the number of professionals in the workforce.

Minimum Wages

As of June 1, 2019, the minimum wage in BC is $13.85 per hour. Further increases of the minimum wage are scheduled for 2020 and 2021. Different wage rates apply for live-in home support workers, live-in day camp leaders, resident caretakers and farm workers. The minimum wage is calculated on a different basis for such workers. Further details may be found at this link.

Hours of Work and Overtime

The following is a table which outlines the rights of various employees.

REGULAR EMPLOYEES	LAWYERS, HIGH TECHNOLOGY PROFESSIONALS	OTHER EMPLOYEES OF HIGH TECHNOLOGY COMPANIES
Must pay overtime after: 8 hours per day OR 40 hours per week	No overtime pay (But no excessive hours)	Must pay overtime after: 12 hours per day OR 80 hours per two weeks
Must pay statutory holiday pay.	No statutory holiday pay	Must pay statutory holiday pay.
Must give 24 hours' notice of any change in shift.	No notice required	Must give 24 hours' notice of any change in shift.
Must give a 30 minute meal break after 5 hours of work.	No meal break	Must give a 30 minute meal break after 5 hours of work.
Split shifts must be completed within 12 hours.	No limit on split shifts.	Split shifts must be completed within 12 hours.
Must pay a minimum daily pay of 2 hours.	No minimum daily pay.	Must pay a minimum daily pay of 2 hours.
Must give 32 hours free from work each week.	No work-free period.	Must give 32 hours free from work each week.

Vacations

Under the Act, employees are entitled to two weeks of vacation per year after one year of employment and after five years of employment, the employee is entitled to three weeks.

After one year of employment an employee is entitled to vacation pay of 4% of his annual income and after five years of employment, 6%.

Maternity Leave

This part of the Employment Standards Act applies to most employees.

An employee wishing to commence maternity leave may do so commencing no sooner than 11 weeks immediately before the anticipated date of birth. The employee must request the leave in writing at least 4 weeks before the day the employee proposes to begin the leave. The employer may require that the leave request be accompanied by a medical certificate stating the expected or actual date or the date the pregnancy terminated or the reasons requesting additional leave.

The employee is entitled to up to 17 consecutive weeks' leave of absence without pay which may commence at any time up to 11 weeks prior to the delivery. Additionally, if, for reasons related to the birth of the child the employee is unable to return to work, further leaves of absence may be taken for up to an additional 6 consecutive weeks.

An employee shall not return to work before the expiration of 6 weeks following the actual date of birth of the child unless:

(a) the employee makes a request in writing to the employer at least one week prior to the date of return to work; and

(b) if required by the employer, she furnishes the employer with a certificate from a medical practitioner stating that she is able to resume work.

In cases where a pregnancy has terminated prior to actual birth or where birth was premature resulting in the employee being unable to make the normal written request for leave of absence, then upon the employee's request, the employee may be granted a leave of absence without pay for up to 6 consecutive weeks.

A request for maternity leave must be made in writing at least 4 weeks before the employee proposes to begin his or her leave. An employer may require requests for maternity leave be accompanied by a medical practitioner's certificate stating the expected or actual birth date or the date the pregnancy terminated.

The Employment Standards Act prohibits the employer from terminating an employee for reasons relating to the pregnancy. Additionally, an employer is prohibited from changing the conditions of employment for reasons related to the pregnancy unless it first obtained the employee's written consent.

Parental Leave

In addition to the 17 weeks of maternity leave, a birth mother may take up to an additional 35 unpaid weeks as parental leave. A maternity leave and a parental leave must be taken consecutively for a maximum total leave of absence of 52 weeks. If no maternity leave is taken, a birth mother may take an unpaid parental leave of 37 weeks, to be completed within 52 weeks after the birth of the child.

Birth fathers and adoptive parents are entitled to a parental leave of absence, without pay, for a period of up to 37 weeks, to be completed within 52 weeks after the birth of the child or after the child is placed with the adoptive parent.

A birth father, birth mother, or an adoptive parent may take up to 5 additional weeks of unpaid leave, beginning immediately after a parental leave, if the child has a physical, psychological or emotional condition requiring an additional period of parental care.

A request for parental leave, with the exception of a request for parental leave made by a birth father or an adopting parent, must be made in writing at least 4 weeks before the employee proposes to begin his or her leave. An employer may require requests for parental leave be accompanied by a medical practitioner's certificate or other evidence of the employee's entitlement to leave.

Effect of Maternity and Parental Leaves

An employer is not required to pay an employee during maternity or parental leave. Employees can claim benefits for these leaves under the Employment Insurance Act.

The service of an employee who is absent from work due to pregnancy is considered continuous for the purposes of vacation entitlement, vacation pay, severance pay and notice of termination, and any pension, medical or other plan beneficial to the employee. The employer shall continue to make payments to such plans in the same manner as if the employee were not absent if the total cost of the plan is normally paid by the employer. The employee may elect to continue to pay his or her share of any plan that is paid jointly by the employer and the employee, in which case employer contributions must continue as well.

The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken.

Notice Periods and Termination

The following notice periods are required under the Act:

- Less than three months – none
- After three months – one week
- After 12 months – two weeks
- After three years – one week for each completed year of employment, to a maximum of eight weeks

The notice periods required by the Act are lower than the notice periods required by common law. Accordingly, an employee is entitled to both common law notice and notice under the Act.

Effect of Written Employment Contracts

Written contracts may appear to offer a way to avoid some of the provisions of the Act. However, section 4 of the Act provides that any provision of an employment agreement which violates the Act is of no effect. Upon that basis, the Employment Standards Tribunal and the Court will only give effect to a contract which meets or exceeds the provisions of the Act

Under section 4, an employee cannot agree to waive the protections guaranteed by the Act. Even if the employee agrees in writing to waive the protections under the Act, he can change his mind.

Upon the basis of section 4, the Employment Standards Tribunal has struck down the following types of agreements:

- waiver of minimum wage;
- working for free, on a trial basis;
- paying wages late;
- paying straight time for overtime worked;
- working as an independent contractor;
- permitting deductions for salary of such items as property damaged or lost by the employee;
- calculation of salary to include overtime;
- setting the reasonable notice period at thirty days.

An employer and an employee may enter into a contract which provides better terms than an employee would get under the Act alone. In such an instance, the employer would be bound by the contract.

How are Complaints Made under the Act?

Complaints may be made at any time while an employee continues to be employed by a particular employer, but only issues arising up to one year before the date the complaint is received will be reviewed. Otherwise complaints must be made within six months of the last day on which the employee worked for an employer and only issues arising during the last year of employment will be reviewed. For example, if an employee claims she is entitled to overtime, she can make a claim for overtime pay up to six months after she stops working and that claim would apply to the last year of her employment.

After a complaint is made, the Director must accept and review the complaint and may conduct an investigation. Prior to making a determination, and in accordance with the complaint resolution process, the Director may arrange a mediation session between the parties. If the parties agree on a solution, the Director may draft a settlement agreement. Otherwise, the Director of Employment Standards will issue a Determination. A party may appeal a Determination to the Employment Standards Tribunal. The Tribunal may:

- refuse to hear an appeal;
- decide the appeal on the information it already has before it;
- accept submissions in writing;
- conduct a full hearing.

If the Tribunal conducts a hearing, it will not hear evidence which was not made available to the investigator. Accordingly, the parties to a complaint should co-operate fully with the Director when an investigation is being carried out.

Remedies under the Act

Under the Act, the usual remedy is that an employees are paid compensation. However, if the employee is dismissed as a result of requiring leave under the Act or the employer misrepresents the nature of the position to a potential employee, that employee may be re-instated to the original position or paid compensation in lieu of reinstatement. The employer may also be required to pay the employee or other reasonable and actual expenses incurred because of the contravention.

Section 79(4) provides the remedy:

> (4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
>
> a) hire a person and pay the person any wages lost because of the contravention;
>
> b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> c) pay a person compensation instead of reinstating the person in employment;
>
> d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

In the Tribunal decisions thus far, reinstatement has not been awarded. In most cases, compensation is awarded. The Tribunal has described the remedy as follows:

> In our opinion, Section 79(4) is perhaps the most restorative remedial provision in the Act, giving the Director broad jurisdiction to place the terminated employee in the same position he or she would have been in but for the wrongful action of the employer. As a remedial provision, it calls for a liberal and broad interpretation: Machtinger v. Hoj Industries Ltd. (1992) 91 D.L.R. (4th) 491 (S.C.C.).
>
> In our view, the remedies under the Act must be fair, compensatory and promote compliance. These principles are reflected in the purposes of the Act set out in Section 2 and the Act itself. With respect to compensation, the general principle of damages must be to put the individual in the same position the individual would have been in but for the breach of the statutory obligation. Section 79(4) permits a remedy not available at common law. We are not in any way limited to, for example, such damages as might have been awarded in an action for wrongful dismissal. In our view, the statutory remedy should not be narrowly constructed and we have the power to fashion a remedy that is fair, compensatory and promotes compliance with the Act. In short, the remedy depends on the extent of the injury suffered because of the breach. Some of the factors we have considered are those relied on by the Tribunal in a recent decision Afaga Beauty Service Ltd. (BCEST # D318/97): length of employment with the employer; the time needed to find alternative employment; mitigation efforts undertaken; other earnings during the period of unemployment; projected earnings from previous employment; etc. The Tribunal is not limited to considering only those factors as which factors are appropriate will depend on the specific circumstances of each appeal. We do not agree with the Director that Ms. Prickrell's entitlement to compensation extends to the date of the Determination (November 4, 1997). As noted above, there was an inordinate and unexplained delay between the date of Ms. Prickrell's complaint and the date of the Determination. We consider that compensation for "loss of employment" is included in the total amount of compensation to which Ms. Pickrell is

> entitled when we adopt and apply the various factors enunciated above and in Afaga Beauty Service Ltd. (BCEST # D318/97).

In that decision, the pregnant employee was dismissed on September 20, 1995, ostensibly for cause. She gave birth to her child in October, 1995. The compensation she was awarded was in the Determination was lost wages from the date of her dismissal to the date of the Determination, some two years later.

There have been determinations where damages have been awarded for emotional pain and suffering - usually under the heading of "expenses". However, the Tribunal has found that such damages are not provided under the Act but fall within the scope of the Act.

Overlap between the Court and the Act

The following actions are ones which can be pursued through the Court:

- a claim for damages for wrongful dismissal;
- a claim for damages for the breach of any term of an employment contract;
- an action in debt to recover amounts owing to the employee.

The above actions overlap with certain provisions of the Act: such as the right to severance pay, unpaid wages. There may also be overlap where there is a contract of employment which deals with vacation pay, overtime and statutory holiday pay.

The Effect of Section 118 of the Act

The Act itself contemplates that there will be an overlap of rights and avenues to pursue. Section 118 of the Act provides:

> Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

Section 82 of the Act provides:

> Once a determination is made requiring payment of wages, an employee may commence another proceeding to recover them only if
> a) the director has consented in writing, or
> b) the director or the tribunal has cancelled the determination.

Thus, section 82 prohibits concurrent actions to recover wages which are the subject of a determination.

What claims may not be brought in the Courts?

- Claims in respect of which a determination is made: section 82. However, since the limitation period for unpaid wages extends back only two years under the Act, there may still be a right on the part of the employee to seek unpaid wages going back beyond that time.
- Claims for vacation pay, overtime, minimum wage, etc. where there is no contractual right to such pay.

Human Rights Code

In 1974, the Human Rights Code came into operation. This legislation has now been superseded in 1984 by the Human Rights Code.

Discriminatory Publication

The Human Rights Code prohibits any person (which includes an employer) from publishing or displaying before the public a notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons in any manner prohibited by the Act.

Discrimination in Employment Advertisements

The Human Rights Code prohibits any person from publishing an advertisement in connection with employment or a prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, physical or mental disability, sex, sexual orientation or age unless a limitation, specification or preference is based on a bona fide occupational requirement.

Discrimination in Wages

The Human Rights Code provides that an employer shall not discriminate between his male and female employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work. The concepts of skill, effort and responsibility are used to determine what is similar or substantially similar work.

The Human Rights Code provides that a difference in the rate of pay between employees of different sex based on a factor other than sex does not constitute a failure to comply with the Human Rights Code where the factor on which the difference is based would reasonably justify the difference. Examples might include a seniority system or an incentive program. The Human Rights Code also prohibits an employer from reducing the rate of pay of one employee in order to comply with this section.

In situations where an employee is paid less than the rate of pay to which he is entitled under this section, he is entitled to recover from his employer the difference between the amount paid and the amount to which he is entitled, together with the costs, but no action can be commenced later than 12 months from the termination of the employee's services and the action applies only to wages of an employee during the 12 month period immediately preceding the date of the

termination of his services or the date of the commencement of his action, whichever date occurs first.

Discrimination in Employment

The Human Rights Code prohibits a person from refusing to employ or refusing to continue to employ a person or discriminating against a person with respect to employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because of his conviction for a criminal conviction charge that is unrelated to the employment or to the intended employment of that person. Age discrimination is prohibited only in respect of persons between the ages of 19 and 65.

This provision does not apply as it relates to age, to any bona fide scheme based on seniority, or as it relates to marital status, physical or mental disability, sex or age, to the operation of any bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan. Also the provision does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

The Question of Intention

The prohibitions in the Human Rights Code apply to practices whether or not there was an intention to discriminate.

What is a Bona Fide Occupational Qualification?

The Human Rights Code provides for discrimination in employment decisions if it is based on a bona fide occupational qualification or requirement.

Bona fide occupational qualifications or requirements, depending on the legislation in use, have been dealt with extensively in human rights cases. It is the employer's obligation to show that a bona fide occupational requirement exists. This was addressed in Ontario Human Rights Commission et al. v. The Borough of Etobicoke (1982) 40 N.R. 159 (S.C.C.), where Mr. Justice McIntyre stated at pp. 165 66:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code.
>
> In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.
>
> The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned.

Workers' Compensation Act

British Columbia employers are required to register with Worksafe BC and abide by its scheme.

The scheme set up under the Workers' Compensation Act allows workers to be compensated for lost wages and expenses as a result of work place injuries and illnesses. The employer pays for this scheme through assessments as a percentage of payroll. The amount of assessments are based on the inherent danger of the employer's industry and on the employer's experience rating. The more accident prone the employer's work place is, the higher its assessments will be.

The benefit of the scheme to the employer is that the Act bars employees from suing their employers or other employers for additional monies as a result of a work place injury or illness.

Occupational health and safety is also governed by this Act. Worksafe BC has many inspectors responsible for enforcing safety standards and is given extensive powers to compel employers to provide a safe work environment.