**Study unit 9: Employment Contract Continuation……**

**Introduction**

Contract of employment is usually defined to mean the same as a "contract of service". A contract of service has historically been distinguished from a contract for the supply of services, the expression altered to imply the dividing line between a person who is "employed" and someone who is "self-employed". The purpose of the dividing line is to attribute rights to some kinds of people who work for others. This could be the right to a minimum wage, holiday pay, sick leave, fair dismissal, a written statement of the contract, the right to organize in a union, and so on. The assumption is that genuinely self-employed people should be able to look after their own affairs, and therefore work they do for others should not carry with it an obligation to look after these rights.

**Learning Outcomes of Study Unit :9 9**

9.1 Explain the concept of dismissal

9.2 The concept of work refusal

9.3 How to identify dangerous substances

9.4 Summary of Employment Act

**9.1 Dismissal**

It means the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct.

*What should be done by the employer before dismissing an employee?*

An employer is required to explain to the employee in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

An employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee has made. The employee should be given reasonable time within which to prepare the representations.

*What happens if an employee feels that he or she has been dismissed unfairly by the employer?*

The employee should make a formal complaint to the labour officer within three months after the date of dismissal. Otherwise, if three months passes without the formal complaint being lodged with the labour officer, it will be considered that the employee was convinced that the dismissal was justifiable.

**9.1.1 Summary dismissal**

This is the dismissal of an employee on the spot and without notice. For instance, dismissal of an employee caught stealing.

An employer is entitled to dismiss summarily, and the dismissal is justified, where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service.

An employee who has been summarily dismissed without justification may within six months after the date of dismissal present a complaint to a labour officer who shall seek to settle the matter in the first instance by mediation.

*What more should an employee who feels that his or her termination was unjustified know?*

The right of the employee to present a complaint to the labour officer is in addition to his or her right of complaint of unfair dismissal and any other infringement of his or her statutory rights. It is also in addition to any right an employee may enjoy under an agreement between the employer or group of employers and a labour union. For any complaint of unfair dismissal, the burden of proving that a dismissal has occurred rests on the employee, and the burden of justifying the grounds for the dismissal rests on the employer.

**9.2 Work Refusal**

Workers can refuse work if they have reasonable grounds to believe that the job they are performing, or are asked to perform, could pose a danger either to themselves or to another work

Workers may refuse work if they feel the physical conditions of the workplace are dangerous to their health and safety

Workers may refuse work if they believe they are in danger of workplace violence.

**9.2.1 The Right to Refuse Work**

The [Occupational Health and Safety Act](http://www.ontario.ca/laws/statute/90o01) (OHSA) gives a worker the right to refuse work that he or she believes is unsafe to himself/ herself or another worker. A worker who believes that he or she is endangered by workplace violence may also refuse work.

The Act sets out a specific procedure that must be followed in any work refusal. It is important that workers, employers, supervisors, members of joint health and safety committees (JHSCs and health and safety representatives understand the procedure for a lawful work refusal.

In specified circumstances, the right to refuse unsafe work is limited for:

* police officers
* firefighters
* workers employed in the operation of correctional institutions and similar institutions/facilities
* health care workers and persons employed in workplaces like hospitals, nursing homes, sanatoriums, homes for the aged, psychiatric institutions, mental health centres or rehabilitation facilities, residential group homes for persons with behavioral or emotional problems or a physical, mental or developmental disability, ambulance services, first aid clinics, licensed laboratories—or in any laundry, food service, power plant or technical service used by one of the above [subsection 43(2)].

**9.2.3 When can a worker refuse to work?**

A worker can refuse to work if he or she has reason to believe that:

* any machine, equipment or tool that the worker is using or is told to use is likely to endanger himself or herself or another worker [clause 43(3)(a)]
* the physical condition of the workplace or workstation is likely to endanger himself or herself [clause 43(3)(b)]
* workplace violence is likely to endanger himself or herself [clause 43(3)(b.1)]
* any machine, equipment or tool that the worker is using, or the physical condition of the workplace, contravenes the Act or regulations and is likely to endanger himself or herself or another worker [clause 43(3)(c)].

**9.2.4 What happens when a worker refuses unsafe work?**

The worker must immediately tell the supervisor or employer that the work is being refused and explain the circumstances for the refusal [subsection 43(4)].

The supervisor or employer must investigate the situation immediately, in the presence of the worker and one of the following:

* A joint health and safety committee member who represents workers, if there is one. If possible, this should be a certified member, or
* A health and safety representative, in workplaces where there is no joint health and safety committee, or
* Another worker, who, because of knowledge, experience and training, has been chosen by the workers (or by the union) to represent them.

The refusing worker must remain in a safe place that is as near as reasonably possible to his or her workstation, and remain available to the employer or supervisor for the purposes of the investigation, until the investigation is completed [subsection 43(5)]. Although not stated as such in the Act, this interval is informally known as the “first stage” of a work refusal. If the situation is resolved at this point, the worker will return to work.

**9.2.5 What happens if a worker continues to refuse to work?**

If the worker continues to refuse to work after the completion of the employer’s investigation, the worker, the employer or someone acting on behalf of either the worker or employer must notify a Ministry of Labour inspector. The inspector will come to the workplace to investigate the refusal in consultation with the worker and the employer (or a representative of the employer). If there is a joint health and safety committee member, a worker health and safety representative or a worker selected by the worker’s trade union or, if there is no trade union, by the workers to represent the worker, they will also be consulted as part of the inspector’s investigation [subsection 43(7)].

While waiting for the inspector’s investigation to be completed, the worker must remain in a safe place that is as near as reasonably possible to his or her workstation and available to the inspector for the purposes of the investigation, unless the employer assigns some other reasonable alternative work during normal working hours or gives other directions to the worker where an assignment of reasonable alternative work is not practicable [subsections 43(10) and (10.1)].

The inspector must decide whether the circumstance(s) that led to the work refusal is likely to endanger the worker (or another person). The inspector's decision must be given, in writing, to the worker, the employer, and the worker representative, if there is one. If the inspector finds that the circumstance is not likely to endanger anyone, the refusing worker is expected to return to work. If the inspector finds that the circumstance(s) is likely to endanger the worker or another person, the inspector will typically order the employer to remedy the hazard.

**9.2.6 Typical Work Refusal Process**

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| **First Stage** |
| * Worker considers work unsafe |
| * Worker reports refusal to his/her supervisor or employer. * Worker may also wish to advise the worker safety representative and/or management representative in order to create a safe environment |
| * Employer or supervisor investigates in the presence of the worker and the worker safety representative. If the issue is resolved the worker goes back to work. And if the issue is not resolved then they proceed to the second stage. |
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| **Second Stage** |
| * With reasonable grounds to believe work is still unsafe, worker continues to refuse and remains in safe place. * Worker or employer or someone representing worker or employer calls Ministry of labor (MOL) |
| * MOL Inspector investigates in company of worker, safety representative and supervisor or management representative |
| * Inspector gives decision to worker, management representative / supervisor and safety rep. in writing. |
| * Changes are made if required or ordered. Worker returns to work. |

* The refusing worker may be offered other work if it doesn't conflict with a collective agreement
* Refused work may be offered to another worker, but management must inform the new worker that the offered work is the subject of work refusal. This must be done in the presence of:
  + a member of the joint health and safety committee who represents workers; or
  + a health and safety representative, or
  + a worker who because of his or her knowledge, experience and training is selected by the trade union that represents the worker or, if there is not trade union, by the workers to represent them

**9.3 The Right to Stop Work**

The Occupational Health and Safety Act permits specified persons to stop work in “dangerous circumstances”.

In most cases, it takes both worker and management certified joint health and safety committee members to direct an employer to stop dangerous work (joint stoppage). One must be a certified member representing workers; the other, a certified member representing the employer. In some special cases, a single certified member may have this right. This chapter explains how and when work can be stopped.

**9.3.1 Avoiding a Work Refusal**

* Supervisors must respond to workers’ concerns and initiate corrective action as soon as possible by providing recommended solutions, timelines to resolve the concern, actions that have been taken to address the issue to date.
* Encourage hazard reporting from staff by providing timely feedback.
* Facilitate communication regarding safety concerns within the department by organizing regular safety meetings, newsletters or memos, 5minute safety talks, inspections of work areas with staff.
* Involve workers in the solution especially in the design of new work area, selection of new equipment.

**9.3.2 Requirements of the Occupational Health and Safety Act, Section 43**

43. (3) **Refusal to work** - A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself, herself or another worker,  
(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself, or  
(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

**Report of refusal to work**: Upon refusing to work or do particular work, the worker shall promptly report the circumstances of the refusal to the worker’s employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of:

(a) a committee member who represents workers, if any;  
(b) a health and safety representative, if any; or  
(c) a worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to present them.

(d) Who shall be made available and who shall attend without delay.

**Worker to remain near work station** - Until the investigation is completed; the worker shall remain in a safe place near his or her work station.

**Policy:**

1. An employee shall notify his or her immediate supervisor forthwith (i.e. within a few minutes) that he or she is refusing to perform unsafe work due to dangerous circumstances. Work shall cease because of an "*OHSA* work refusal" and the workplace shall be secured.
2. The "*OHSA* work refusal" and the dangerous circumstances shall be investigated at the earliest opportunity by the following investigation team:

* The employee;
* The employee's immediate supervisor;
* A certified member representing the employees from the workplace Joint Health and Safety Committee.

1. The "*OHSA* work refusal" and the dangerous circumstances shall be reported as soon as possible to the Manager, Environmental Health and Safety, by the workplace supervisor. (The workplace supervisor shall notify and convene the OHSA work refusal investigation team at or near the site of the "*OHSA* work refusal".
2. The *OHSA* work refusal investigation team shall perform a job hazard analysis and shall prepare a written investigation report with recommendations for the workplace parties, Environmental Health and Safety, and for the appropriate University Joint Health and Safety Committee.
3. Work shall resume only when the work refusal investigation report has been accepted by the workplace parties and recommendations acceptable to both parties have been implemented to ensure job-site safety.
4. Environmental Health and Safety shall advise all workplace parties about further prescribed procedures (e.g. notifying a Ministry of Labour inspector) if there are any unresolved disputes following the report of the work refusal investigation team.

**9.4 Dangerous Circumstances**

Work can be stopped only in “dangerous circumstances” [subsection 44(1)].

This means a situation in which all of the following apply:

* The Act or the regulations are being contravened, and
* The contravention poses a danger or a hazard to a worker, and
* Any delay in controlling the danger or hazard may seriously endanger a worker.

**Limitations on the Right to Stop Work**

The right to stop work in dangerous circumstances does not apply to workplaces in which police and, firefighters are employed or to correctional institutions [clause 44(2)(a)] or to workplaces in which specified types of health workers are employed and where the work stoppage would directly endanger the life, health or safety of another person [clause 44(2)(b)].

**Joint Right to Stop Work**

If a certified member of the joint health and safety committee has reason to believe that “dangerous circumstances” exist, he or she may ask a supervisor to investigate. The supervisor must do so promptly and in the presence of the certified member who made the request. This certified member may be one representing either the workers or the employer [subsection 45(1)].

**9.4.1 What happens if the certified member has reason to believe that the dangerous circumstances continue to exist?**

If the certified member believes that dangerous circumstances still exist after the conclusion of the supervisor's investigation and any remedial action taken, he or she may ask another certified member (who represents the other workplace party) to investigate [subsection 45(2)]. The second certified member must do so promptly and in the presence of the first certified member [subsection 45(3)].

The second certified member must represent the other workplace party. For example, if the first certified member represents workers, the second must represent the employer.

In prescribed instances, a certified member who represents the constructor or employer but who is not available at the workplace, may designate another person to act for him or her in a work stoppage under section 45 [subsection 45(9)].

**9.4.2 What happens if both certified members agree that dangerous circumstances exist?**

The certified members can direct the employer to stop the work or to stop using any part of the workplace or any equipment, machinery; tools, etc. [subsection 45(4)].

The employer must comply with this direction immediately and must ensure that compliance is achieved in a way that does not endanger anyone [subsection 45(5)].

After taking steps to remedy the dangerous circumstances, the employer may request the certified members of the joint health and safety committee who issued the stop work direction, or a Ministry of Labour inspector, to cancel it [subsection 45(7)]. Only the certified members who issued the direction or a Ministry of Labour inspector may cancel it [subsection 45(8)].

**9.4.3 What if the certified members do not agree with each other that dangerous circumstances exist?**

If the certified members disagree, either member may ask a ministry inspector to investigate. The Act requires the inspector to investigate and provide both certified members with his or her written decision [subsection 45(6)].

**9.5 Stop-work orders**

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

***Stop-work orders should include:***

(1) A description of the work to be suspended;

(2) Instructions concerning the contractor’s issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer shall take appropriate action to—

* Terminate the contract;
* Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or
* Extend the period of the stop-work order if it is necessary and if the contractor.

**9.6 EMPLOYMENT ACT, CAP 219**

This Act provides for the regulation of employment and other related matters. It provides for contracts of service to be in writing (S. 11), the contents of the contract are also stipulated in Section 12 (the name of employer, employee, nature of employment, etc).

Under S. 17, the employer is required to provide the employee work in accordance with the contract, unless the employee has broken the terms of the contract or if the contract is frustrated. Section 21 provides for termination of the contract either by its expiry, by death of the employee before the expiry of the employment term. Section 22 of the same Act provides for termination for failure to fulfil the contract by either the employee or employer. Section 23 provides for termination by agreement of the parties. This may be with or without recourse to court. Notice must be given by either party (Sections 25 & 26).

Sections 39-45 provide for hours of work, rest and holidays. A normal working day must not exceed 48 hours. In industrial undertakings, a normal working day shall not exceed 9 hours and any other employment shall not exceed 10 hours. An employer is entitled to a weekly rest of at least 24 hours (Section 42).

Employees are entitled to a holiday with full pay at the rate of at least one and a half working days for every completed month of actual service (S. 43). Public holidays and sick leave are not to be taken as part of the holidays, but are separate.

**9.6.1 Rights under the employment act**

The new employment act creates new rights and retains some of the existing ones

The new rights include: protection from forced labor (section 5), protection from discrimination in employment due to “race color, sex, religion, political opinion, national extraction or social origin, the HIV status or disability which has the effect of nullifying or impairing the treatment of the person in employment or occupation, or preventing an employee from obtaining any benefit under a contract of service”(section 6(3) and protection from sexual harassment by the employer(section7).other significant rights include: Regulation of working hours(section53) annual leave and holidays( section 54) and paternity leave of 4 working days 9section57).others are the right to written particulars of the contract (section 59)the right to a fair hearing before dismissal(section69), the right to reinstatement and /or compensation in cases on unfair dismissal (section71) and remedies of compensation and additional compensation in cases of unfair termination(sections77&78),and severance pay(section.87 to 89)

**9.6.2 Employment Regulations, 1977**

These Regulations provide for the procedures to be taken when recruiting employees. These include contracts of service, medical certificate. It also provides for employers to provide transport, employment cards. It prohibits the employment of workers that are below 18 years. It gives the formats for bonds, employment contracts, and the like.