Canada and the United Kingdom share a common language and a legal system based in the common law, excluding Québec which follows the Civil Code for private matters. In both countries the employment contract is the foundation of the relationship between employer and employee. However, this is supplemented by significant domestic legislation and case law.

As we celebrate the first anniversary of the combination of our Canadian and UK practices, Gowling WLG’s employment, labour & equalities lawyers compare key areas of Canadian and UK employment law.

1. Applicable law

Canada

In Canada, labour laws are governed by both the federal and provincial governments. The applicable labour laws are determined by the nature of the employer's business. Federal labour laws will apply to employers who operate in federally regulated industries, such as interprovincial trucking, telecommunications, nuclear energy, railways and shipping. The vast majority of employers are governed by provincial laws, and an employer operating in more than one province must comply with each province’s legislation. Approximately 10 per cent of the Canadian workforce is governed by federal laws, such as the Canada Labour Code and the
federal Employment Equity Act. Even if an employer is federally regulated, it must still conform to certain provincial laws.

While the laws are substantially similar across the country, there are important variations regarding minimum wage, hours of work, statutory leaves, vacation entitlements, entitlements upon termination, and health and safety.

The discussion that follows assumes that the employer is non-unionised, as there are very different requirements imposed on the employer once a collective agreement is in place.

**UK**

In the UK, employment relationships are governed by contract law but within a statutory framework comprising both domestic and, at least for the time being, European Union law.

England and Wales, Scotland and Northern Ireland each have separate legal jurisdictions and systems. Contract law in each country is largely the same, although there are some differences in Scotland. The statutory employment protection legislation is common to England, Wales and Scotland. While employment law in Northern Ireland is very similar, there are some differences particularly with regard to discrimination law addressing sectarian religious belief and political opinions.


**2. The employment contract**

**Canada**

Canadian employment law is based on the premise that the employment relationship is a contract. The applicable legislation will imply certain terms and, in the absence of written contractual terms, the courts and tribunals will imply a host of contractual obligations on both parties under the common law, or in the case of Québec, set out in the Civil Code.

There are some minimum statutory requirements which override contractual provisions in relation to matters such as minimum wages, hours of work and entitlements upon termination.

All employees have an implied legal obligation to keep secret the confidential information of their employers. However, it is prudent to have a written agreement determining what the employer
UK

A written statement of the key terms of employment must be provided within two months of commencement of employment. This must cover terms such as working hours, pay, annual leave, place of work, job title and length of notice of termination. These are known as the 'Particulars of Employment'. However, to ensure that both parties are clear about the expectations of the employment arrangement, a more detailed written contract of employment is usually put in place and will typically set out a range of additional provisions. There are some minimum statutory requirements which override contractual provisions covering matters such as pay, working hours and notice periods.

Certain terms are implied into all employment contracts during employment. For example, employees must exercise reasonable care and skill, carry out reasonable orders and not divulge confidential information or work for competitors. Employers, in turn, must preserve a relationship of mutual trust and confidence with their employees.

It is possible, though not mandatory, to incorporate into individual contracts terms from other sources such as collective agreements and works rules. Once incorporated, such terms are as much part of the individual contract of employment as other terms.

3. Termination by the employer

Canada

Most employment relationships are considered to be of indefinite duration. There is no "at will" employment in Canada - some courts have even found that 'probationary' employees are entitled to a fair opportunity to demonstrate their competence.

The vast majority of employer-initiated terminations will be without cause. When terminating without cause, the employer will be required to provide working notice or monetary compensation in lieu of notice. In general, an employee's entitlement to notice of termination is derived both from statute and the common law, or in Québec the Civil Code ("reasonable notice").

Applicable provincial and federal employment laws prescribe minimum periods of notice or pay
in lieu of notice ("PILON") that must be given to a dismissed employee. Statutory minimums usually range from one to eight weeks. The parties are not permitted to "contract out" of the statutory minimums.

In Ontario, some employees are also entitled to an additional lump-sum payment known as "statutory severance pay," which ranges from five to 26 weeks of regular earnings.

It is a mistake to assume that the statutory minimums are the employer's only obligation to an employee, in the event of a termination without cause. Employees also have rights under common law or under the Civil Code (in Québec). In the absence of a contractual stipulation to the contrary, an employer will routinely be obliged to provide far greater notice periods under common law than those prescribed by the applicable statute.

Certain employees governed by federal, Québec or Nova Scotia laws have special protections against terminations without cause:

- Québec - under the Civil Code employees may not contractually renounce their right to be provided with a reasonable notice of termination or waive their right to obtain damages in instances where the manner of 'resiliation' (termination) is abusive. Therefore, it is important that a contractual termination clause reflects the prevailing norms regarding what is a fair and appropriate notice period. Moreover, an employee who has at least two years of uninterrupted service and who believes that he/she was dismissed without just cause can challenge the employer’s decision and seek reinstatement.
- Nova Scotia - an employee with 10 or more years of service may seek reinstatement or damages in lieu of notice. To defend such an order, the employer must prove that it had good reason or just cause for the termination.
- Federally regulated employers are governed by the Canada Labour Code. Non-managerial employees with 12 months' service may challenge their termination and seek reinstatement or damages in lieu. The onus is on the employer to establish 'just cause' for the dismissal. Many mid-level managers would not be considered to be true managers for the purposes of the Canada Labour Code.

If an employer wishes to terminate an employee's employment without providing notice or compensation in lieu, the employer must establish 'just cause'. In the courts and tribunals in Canada, this 'just cause' is a difficult burden. Effectively, the employer must establish that the employee's conduct amounted to a repudiation of the employment contract and that which it has ruptured the trust inherent to the employer-employee relationship. Examples of just cause include:
• Serious acts of dishonesty or theft;
• Gross misconduct, such as violence or harassment;
• Breach of the duty of confidentiality;
• Persistent neglect of duties, with a failure to respond to corrective action; and
• Gross insubordination.

Whether conduct amounts to 'just cause' will be determined in the specific circumstances of each case, including factors such as the seriousness of the conduct at issue, whether or not warnings have been provided, and the employee's period of service and overall work record. It is extremely difficult to terminate a long serving employee for 'just cause', even where they engage in serious misconduct. There is no such thing as 'near cause' or "diminished notice" and so just cause really is an all or nothing proposition.

UK

Like Canada, most employment relationships are considered to be of indefinite duration. There is no 'at will' employment in the UK. Termination provisions are generally included in employment contracts. Employment contracts may provide for notice periods which are longer, but not shorter than those prescribed by law. For employees with one month to two years' service the minimum notice period is one week. For employees with more than two years' service, one week's notice must be provided for each completed year of service, up to a maximum notice period of 12 weeks. Much longer periods of contractual notice are common and vary due to seniority of role.

Contracts may include a PILON clause permitting the employer to pay employees instead of requiring them to work their notice. Service of such notice (or payment in lieu) will satisfy an employee's contractual rights, but further statutory rights against the employer may arise on termination.

Similar to the position in Canada, dismissal without notice is permissible when an employee has committed gross misconduct typically concerning dishonesty, violence, disobedience or negligence.

Even where an employer complies with the notice requirements or is entitled to dismiss without notice, in certain circumstances, termination of the employment contract may give rise to claims for 'unfair dismissal'. Employees with two years' service or more (one year for Northern Ireland) must not be unfairly dismissed. To avoid a claim for unfair dismissal, employers must ensure that dismissal is made for one of five potentially fair reasons, being conduct, capability,
redundancy, illegality or 'some other substantial reason' and that they act reasonably in all circumstances in dismissing the employee (procedurally fair).

There are also various reasons for dismissal including: pregnancy, maternity leave, union membership, and protected disclosures ('whistleblowing') for which the two years' service rule does not apply and which are automatically unfair (ie.an employer will have no grounds on which to argue that the dismissal was reasonable).

Note: Consideration of fixed-term contracts is beyond the scope of this alert, but please contact our Employment, Labour & Equalities team should you require more information on this topic.

4. Termination by the employee

Canada

Employees may resign their employment. While both common law and statutes require that employees provide reasonable notice, there are very few cases where an employer has been able to obtain redress from the courts or tribunals due to inadequate notice from a departing employee.

In certain cases, employees may resign on the basis that the employer has made unilateral and fundamental changes to an important aspect of the employment relationship, referred to as 'constructive dismissal'. An employee who establishes constructive dismissal is able to sue for damages equivalent to the notice the employer would have had to pay upon termination without cause.

UK

Where an employee has at least one month's continuous employment, he/she must provide a minimum of one week's notice to his/her employer. It is usual for much longer notice periods to be agreed in the contract.

As in Canada, in certain circumstances, an employee may terminate their employment without notice if an employer has committed a 'repudiatory breach' of an express or implied term of the employment contract. If the employee can show he/she was entitled to resign due to the conduct of the employer, (e.g. discrimination in the workplace or some other major breach of contract by the employer, including a breach of duty of trust and confidence which is very wide ranging), he/she can resign and claim to have been dismissed. He/she may be entitled to
compensation for both wrongful (under common law) and unfair dismissal (under statute), even if the employer had no intention of terminating the employment.

5. Collective dismissal

Canada

There may be separate and additional obligations in situations involving the termination of a group of employees including the obligation to provide additional notice, and the obligation to provide advanced written notice to a specific government department.

The threshold for group dismissals and the applicable notice periods vary depending on the jurisdiction. For example, in Ontario the mass dismissal provisions are triggered when 50 or more employees' contracts are terminated within a four-week period, but in Saskatchewan, ten or more dismissals within a four-week period will trigger the group dismissal requirements.

UK

A collective redundancy situation may arise where an employer proposes to make 20 or more employees redundant within a period of 90 days or less at one establishment. Under these circumstances, employers must consult (individually) with affected employees and seek to place them in alternative positions within the business where possible. The employer must also comply with a strict obligation to inform and consult (collectively) a recognised trade union or (in the absence of a union) with elected employee representatives prior to serving notice on any affected employee. Failure to do this may lead to a tribunal ordering the employer to pay a penalty of up to 90 days' pay per affected employee. Employers also have a requirement to give advance notice to the Secretary of State.

Employees with at least two years' service are entitled to a statutory redundancy payment, the amount of which varies depending on age and length of service. It is relatively common for employers to invite volunteers for redundancy and to supplement the statutory minimum redundancy payment. Note that there are different definitions of redundancy depending on whether it is a collective or individual redundancy situation.

6. Post-employment Restrictive Covenants

Canada
Employers often wish to implement post-termination restrictions on employees’ business activities. These clauses are usually divided into two categories: non-solicitation and non-competition clauses.

The general rule is that any restrictive covenant:

- must be clear and not vague;
- must be limited to what is strictly necessary to protect the employer's legitimate interests;
- must be reasonable in terms of geographic, temporal and scope of work limitations; and
- cannot be contrary to public policy.

There is a strong public-policy interest in permitting individuals to work freely in the market. Therefore, courts are very reluctant to enforce restrictive covenants that they deem unreasonable.

The clause must be clear and precise so that an employee will understand what their obligations are. If a clause is vague, courts will not rewrite a provision to make it enforceable and the circumstances in which they will use the "blue-pencil" (otherwise known as redacting or striking out portions of unenforceable clauses) are limited. Courts will only use the "blue pencil" rule when the provision is clearly severable, trivial and not part of the main purpose of the restrictive covenant.

**UK**

Like Canada, employers often wish to implement post-termination restrictions on employees' business activities. Again these fall within the broad categories of: non-solicitation and non-competition.

The general rule is that all contractual restraints on a former employee’s freedom to work are void and unenforceable as being in restraint of trade and contrary to public policy, **unless** they can be shown to be no wider than necessary to protect the employer’s legitimate business interests. Courts typically examine reasonableness in terms of duration, scope of the business, position of the employee and geographic limits.

As in Canada, the circumstances in which courts will use the 'blue pencil' test to strike out an unenforceable portion to leave a valid enforceable provision, are limited. A court will not re-write a covenant to make it enforceable if it is too broad. Nor will it construe a wide (and void) restriction as having implied (and valid) limitations.
The reasonableness of a restrictive covenant is judged at the time it was entered into, not at the time when the employer seeks to enforce it. Employers should review restrictive covenants, particularly when an employee is promoted, to see that they are appropriate to the changed circumstances and decide whether they need to be entered into afresh.

7. Maternity & paternity

Canada

Most pregnant employees are entitled to 17 or 18 weeks' unpaid leave, depending on the jurisdiction. An employer cannot force or require an employee to commence their pregnancy leave early.

New birth and adoptive parents are entitled to take unpaid parental leave for 32 to 37 weeks, depending on the jurisdiction. In Québec, an employee is entitled to five uninterrupted weeks of paternity leave without pay.

At the end of the pregnancy and/or parental leave, the employee is entitled to be reinstated to active employment. The rules regarding the nature of reinstatement differ slightly across jurisdictions. In some provinces, the requirement is to reinstate to the same job if it still exists, or to a comparable job if it no longer exists.

UK

All women are entitled to 52 weeks of maternity leave, during which period the employment contract continues. Although the contract of employment continues, contractual obligations in relation to normal remuneration cease to apply. A woman must take at least two weeks' leave immediately after giving birth as maternity leave

Provided a woman has worked for her employer for a continuous period of 26 weeks, she will be entitled to 'Statutory Maternity Pay' for 39 weeks (first 6 weeks at 90% of normal pay and 33 weeks at a statutory flat rate). It is common for employers to offer enhanced contractual maternity pay.

A woman who takes up to 26 weeks' maternity leave is entitled to return to the same job, if returning after 27 to 52 weeks' leave she has the right to return to the same job but if that is not reasonably practicable, to a similar job on terms and conditions which are no less favourable.
Fathers are also eligible for paternity leave of two weeks, which can be taken in a continuous period at any point within 56 days of the child's birth. In many cases, employees will also be entitled to receive statutory paternity pay for a period of two weeks. Mothers who meet qualifying conditions can elect to end their maternity leave and pay period early and convert any remaining balance to 'shared parental leave and pay'. This enables the mother to share the converted leave period with the father/her partner either concurrently or consecutively up to the child's first birthday. Similar rules apply in the case of adoptive parents.

Parents with one year's employment are also entitled to take up to 18 weeks of unpaid parental leave per child. This can be taken any time up to the child's 18th birthday, though no more than 4 weeks' parental leave is permitted in any given year.

8. Sickness

Canada

Many employers provide employees with sick pay for a certain number of days off due to illness. However, employers are generally not legally obliged to provide employees with sick pay for periods during which they do not work. Depending on the jurisdiction, there may be specific job protected leave granted to employees who need to take time off due to a serious personal illness.

UK

UK employers are required to provide employees with written terms and conditions relating to sickness and ill-health. Employees who are off-sick for four or more consecutive days are eligible to receive Statutory Sick Pay (SSP) for a maximum of 28 weeks. Before paying SSP, an employer has the right to require proof of incapacity. Note that the rate of sick-pay offered by many UK employers exceeds SSP and is commonly paid from the commencement of any period of illness though this is not mandatory.

9. Annual leave & working time

Canada

Employment standards laws generally prescribe minimum paid vacation entitlements. In several provinces, the minimum vacation entitlement is typically two weeks per year, rising to three
weeks after five years of employment. The calculation of vacation pay is technical and can lead to unexpected liability for employers. Vacation pay is often a percentage of all earnings, including commissions and bonuses.

The statutes will typically provide for maximum hours per day and per week, as well as mandatory intervals between shifts.

The employment standards legislation typically contains rules regarding maximum working hours, as well as mandatory breaks and intervals between shifts. With respect to restrictions on working hours, most jurisdictions limit the number of hours that can be worked in a day and in a week. For example, in Ontario, an employer cannot allow an employee to work more than 48 hours a week without obtaining prior approval from the Director of Employment Standards. Regulations in each jurisdiction provide for exceptions to the maximum hours that can be worked in certain industries.

Employees in all jurisdictions are also entitled to overtime pay for hours worked in excess of a specified amount. The numbers of hours an employee can work before becoming entitled to overtime pay differs across jurisdictions. In Alberta and Ontario, the entitlement begins at 44 hours; in Québec, it is 40 hours. Overtime pay in most jurisdictions is equal to 1.5 times an employee's regular hourly rate of pay.

UK

All workers, regardless of length of service, are entitled to a minimum of 5.6 weeks' holiday a year - for full-time employees that equates to 28 days each year.

The calculation of a worker's 'normal pay' for holiday purposes can be complex for those who regularly work overtime or earn commission and those with irregular hours.

Like Canada, statute provides for maximum hours per day and per week, as well as rest breaks. An employer cannot allow an employee to work more than 48 hours a week on average unless they have signed a valid opt-out agreement or fall within another of the statutory derogations.

10. Discrimination and harassment

Canada

Human rights legislation in every jurisdiction prohibit discriminatory practices in the context of
employment or hiring practices. Generally, the applicable human rights legislation provides that every person has a right to equal treatment in their employment without discrimination based upon race, ancestry, place of origin, colour, religious or political beliefs, ethnic origin, language, citizenship, creed, physical or mental disability, sex or gender (including pregnancy), sexual orientation, age, source of income, marital status, same-sex partnership status, or family status. Some jurisdictions also prohibit discrimination on the basis of an individual's record of offences (e.g. a conviction for which a pardon has been granted) and virtually all jurisdictions have recently amended their human rights legislation to make discrimination on the basis of gender identity and gender expression illegal.

Once discrimination based on a prohibited ground is established, an employer must generally establish that the conduct was based on a bona fide occupational requirement.

While mandatory retirement policies were once common across Canada, they are now increasingly treated as a form of age-related discrimination. As such, employers are required to establish a bona fide occupational reason why an employee must retire at a certain age.

Employees also have a right to freedom from harassment and bullying in the workplace based upon any of the prohibited grounds of discrimination - whether at the instance of the employer, an agent of the employer or by another employee.

**UK**

The law on discrimination is very well established in the UK and is now consolidated in the Equality Act 2010. The Equality Act protects people against discrimination on the grounds of sex, marital status/civil partnership, race, religion/belief, disability, sexual orientation, pregnancy, gender reassignment and age.

Employers are bound by these discrimination laws not just during the employment relationship, but also during the recruitment process and even after the employment relationship ends. Diversity training for staff and implementing a diversity/equal opportunities policy to avoid discrimination in the workplace are essential for all companies employing staff in the UK who wish to be able to defend discrimination claims successfully.

Employees also have a right to freedom from harassment in the workplace based upon any of the prohibited grounds of discrimination - whether at the instance of the employer, an agent of the employer or by another employee.

While mandatory retirement policies were once common across UK, since April 2011,
compulsory retirement will amount to a form of age-related discrimination, unless it can be objectively justified.

11. Transfer of a business

Canada

Employees are not specifically protected from dismissal either before or after a business transfer. However, employment standards legislation ensures that a sale of a business does not interrupt an employee’s length of service for the purpose of calculating their entitlement to statutory benefits.

In a share transaction, the common law (or in Quebec the Civil Code) deems employees' employment to be continuous. As such, from a legal perspective, there is no disruption in the employment relationship as a result of the transaction.

In an asset transaction, the common law deems employees' employment to terminate at the point of sale even if they accept new employment with the purchaser. The employment standards statutes of most Canadian jurisdictions, including Alberta, British Columbia and Ontario, modify the common law position by deeming the service of such employees to be continuous for the purposes of determining the employees' statutory entitlements (that is, paid vacation and notice of dismissal). Quebec, has probably the broadest and most significant ramifications for successor employers, as both the Civil Code and the employment standards legislation will deem the service of an employee to be continuous.

UK

An asset transaction is likely to be subject to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). If so, employees employed in the business at the time of the transfer will automatically transfer to the buyer on their existing terms of employment, together with any rights and liabilities relating to them. TUPE also applies to a 'service provision change' (outsourcing or insourcing).

The parties to a deal cannot contract out of TUPE.

TUPE does not apply to a sale of shares in a company which owns an undertaking or business, since there is no change in the identity of the employer in such circumstances. However, TUPE may apply to an asset transfer carried out prior to a share sale or following a intra-group
The crucial factor is not what the parties call the transaction but is whether, as a matter of fact, the business in which the employee is employed has been transferred from one employer to another.

This is a complex area and legal advice should be sought at an early stage on the employment law implications of any transfer.

The latest Organisation for Economic Cooperation and Development's survey on employee protection put Canada marginally below the UK. While the basic legal principles guiding employment law have many similarities, there are import differences employers operating in both Canada and the UK need to know. When it comes to labour and employment law, the best option is always to avoid problems in the first place. Our teams in both Canada and the UK are here to help you to reduce risk while ensuring managers act commercially.

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