

UK Employment law – A short introduction for Canadian Businesses

There are many differences between Canadian and UK¹ employment law. This note sets out a précis of some of the issues that Canadian businesses may wish to bear in mind when establishing or furthering a commercial presence in the UK, where such activity involves employing staff.

This note provides a short introduction to:

- Employment contracts in England and Wales, and how to protect your business;
- Staff Handbooks, and HR policies;
- Employee status;
- An overview of the most common employment related employment tribunal claims (and the level of damages awarded).

Employment Contracts in England and Wales

The clauses which are included in employment contracts can be divided into two types:

- Clauses containing particulars which must be included in the contract. Employers are obliged under statute (the Employment Rights Act 1996) to give employees whose employment is to continue for more than one month a “*written statement of particulars of their employment*” - all of those terms are commonly incorporated into a contract of employment.
- Clauses which are optional but provide additional protection for the employer. We always recommend that our clients include stringent confidentiality and restrictive covenant provisions. For technology based organisations stringent intellectual property clauses should also be included.

Information required in an employment contract

The clauses which are required according to statute include:

- The level of pay² (or the method of calculating it) and the intervals at which the employee will receive payment;
- The hours the employee will be required to work;
- Holiday entitlement and holiday pay;
- The employee's job title, or a brief description of the work;
- The length of notice which the employee is obliged to give and entitled to receive to terminate the employment³;

¹This note refers to the law of England and Wales. Scotland has a separate legal regime, and those Canadian companies seeking advice on establishing a presence in Scotland should contact the [Law Society of Scotland](#).

² England and Wales have a statutory minimum wage, the current hourly rate is £5.93 per hour for employees aged 21 or over; this is to rise to £6.08 in October 2011.

³ We recommend that this includes a probationary period for new employees.

- The employee's place of work;
- Information relating to pensions and pension schemes; and,
- Information on disciplinary and grievance procedures.

It is important to note that if you intend to list your company on the London Stock Exchange there are additional criteria, and strict rules, which you will need to consider.

Additional provisions

Employers usually include additional provisions to further protect their business, and which although not required by law, may either be commercially sensible or particularly advantageous to them due to the nature of the business they operate.

Examples of such clauses include:

- Provisions for the rights to any **Intellectual Property rights** created by an employee to be the property of the Employer.
- Clauses restraining an employee, both during and upon termination of their employment, from divulging confidential and commercially sensitive information to anyone or any company unless expressly permitted to do so by the employer.
- **Restrictive covenant** clauses restraining an employee, following the termination of their employment, from enticing clients and/or employees away from their ex-employer, or working for a company which is competition with their ex-employer (for a specified period, ordinarily between 3-6 months). If seeking to enforce such provisions employers have to be able to show a legitimate proprietary interest that it is appropriate to protect, and that the protection sought is no more than is reasonable having regard to the interests of the parties and the public interest.
- **Garden leave clause** - Such a clause is commonly invoked when an employee has tendered their resignation. Instead of paying the employee in lieu of their notice period they remain an employee for their notice period and are paid in the usual way; but they are not required to carry out work, unless specifically instructed to do so. The aim of garden leave is to keep employees out of the market place long enough for any information they have to go out of date, or to enable that employee's successor to establish themselves, particularly with customers.
- A clause containing a **warranty** on the part of the employee that they are eligible and entitled to work in the UK. The inclusion of such a clause is advisable in view of the fact that employers can be liable to a civil penalty of up to £10,000. Employers will have a defence if it checks certain documents before entering into the contract of employment. In addition, there is a criminal offence of knowingly employing someone who does not have permission to work in the UK. The UK Government has published detailed guidance on the type of documents that are acceptable as evidence to prove that an employee is entitled to work in the UK.
- A clause providing that the employee agrees that the working hours time limit (of 48 hours per week) under the **Working Time Regulations** 1998 will not apply to them.
- Although an employment contract is a legally binding agreement between employer and employee, a clause may be included which permits the employer to make "reasonable" changes to the terms of the contract (such as minor administrative matters which will not fundamentally alter the terms of the contract) without the employee's specific consent.

Staff handbooks

We recommend that employers also issue staff handbooks, which can be used to provide the details of a wide-ranging number of workplace policies and guidance for employees.

These are usually non-contractual to afford employers the flexibility to modify them in the future; for example, in response to new legislation, or where the employer has identified an issue on which it would be useful to implement or amend a workplace policy.

Matters usually covered by a staff handbook include the following procedures and policies:

- Dress Code
- Expenses Policy
- Equal Opportunities Policy
- Anti-harassment and Bullying Policy
- Sickness Absence Policy
- Capability Procedure
- Disciplinary Rules⁴
- Disciplinary Procedure⁵
- Grievance Procedure
- Whistleblowing Policy
- Maternity Policy
- Paternity Policy
- Adoption Policy
- Parental leave policy
- Time Off for Dependants Policy
- Compassionate Leave
- Bereavement Leave
- Flexible Working Policy
- Homeworking Policy
- Time Off for Public Duties
- No-smoking Policy⁶
- Health and Safety Policy
- Stress Policy
- Substance Misuse Policy
- Data Protection Policy⁷
- Electronic Information and Communications Systems Policy

There are many other issues that could be included, such as a relocation policy (for staff moving to the UK); Corporate Social Responsibility policy; anti-corruption and bribery policies (the new Bribery Act comes into force on 1 July 2011, and [guidance](#) is to be published shortly); travel allowance policy.

⁴ Workers have the right to be accompanied by a colleague or trade union official at a disciplinary or grievance hearing.

⁵ There are specific procedures that must be followed in relation to dismissals for misconduct and poor performance.

⁶ Smoking in workplaces in England has been banned since 1 July 2007.

⁷ The Data Protection Act 1998 prohibits the transfer of personal data outside the European Economic Area, unless the destination country ensures an adequate level of protection of the rights of the individual regarding data processing.

Existing Canadian HR policies

Canadian companies should consider the existing HR policies that they have in place in Canada (and the geographical extent of those policies), and consider whether they could, or should, also apply in the UK, or if they need to be adapted. Consider the type of benefits that are offered to staff, such as: life assurance; permanent health insurance; private medical insurance and company cars.

It is also important to consider whether any Canadian staff will join on secondment (in which case it is advisable to have a secondment agreement in place), and if they will continue to accrue rights and entitlements in Canada (such as bonuses or stock allowances).

Will the Canadian company require particular members of staff to work part of their time in the UK, and the other part overseas? Will the Canadian company sponsor the visa application of the employee?

It is also important to consider the HR culture of your company in Canada, and the ways in which you resolve disputes. It may be that your Canadian employment contracts (and possibly commercial contracts) contain a provision whereby any disputes should be resolved by mediation.

Employee status

Canadian companies would be well-advised to consider the capacity in which their UK staff will work for them. Are they "employees" or "workers" as defined under statute? Are they self-employed contractors who are in business on their own account?

It is important that this be considered at an early stage, especially if your company will only have a small number of staff in the UK to start with. Many companies will revert to retaining self-employed consultants, as opposed to employees, when this may not be appropriate, and/or not reflect the actual legal relationship. To avoid a potential unforeseen tax liability, it is important to ensure the relationship that an employer has with each of its staff falls as clearly as possible into the category of employee, worker or self-employed contractor, and the employer accordingly adopts the appropriate position. It is best to take early legal, and accountancy advice, upon what you are trying to achieve.

An employee is an individual who works under a contract of employment. For there to be a contract of employment there must be an obligation to personally perform the work, mutuality of obligations between employer and employee and sufficient control over the employee's work. In establishing employment or worker status, employment tribunals will look at the substance of the relationship, rather than the legal form or any labels that the parties have given to the relationship.

Where an individual is, on balance, a self-employed contractor but there are some factors which point towards employment, it may be possible for them to reach the "pass mark" to qualify as a worker, even though they do not reach the higher pass mark to qualify as an employee. Employees benefit from wide-ranging statutory protection, including the right not to be unfairly dismissed, while workers have more limited protection, including the statutory right to paid holiday.

The employment status of an employer's staff is important for reasons including the following:

- Both employees and workers enjoy various protections and different tax treatment to those who are genuinely self-employed.
- As a starting point, employers should assume that anything an employee receives because of his employment will be liable to tax, and employers should bear in mind that where an employment relationship exists, the employer is responsible for deducting income tax even if the employee has paid tax under self assessment on the basis that they were self-employed.

Employment Tribunal claims - Statistical Overview

The most recent statistics show that there has been a massive 56% increase in claims to the Employment Tribunal, with 236,100 claims in 2009/2010. To put this figure into context it is the highest amount of claims ever received by the Employment Tribunal service; and

Canadian companies moving to the UK should ensure that they have adequate procedures in place, and that any managers who are responsible for staff (including recruitment and grievance and discipline procedures) have completed adequate training in HR procedures.

Unfair Dismissal⁸	57,400
Unauthorised deduction claims	75,500
Redundancy	19,000
Breach of contract	42,400
Age discrimination	5,200
Equal pay	37,400
Redundancy	7,500

One of the age discrimination cases, referred to above, involved a well known [Canadian bank](#) operating in London, UK.

In addition to the unprecedented volume of claims, the below table offers a stark reminder of the size of the potential financial risks an employer can be exposed to should they fail to manage issues of workplace discrimination, or implement proper procedures when dismissing an employee.

⁸ An employee who has been continuously employed for at least one year has a statutory right not to be unfairly dismissed. However, there is no requirement for qualifying service where the dismissal is for certain grounds, including trade union membership or activities. If you plan to dismiss an employee be sure to take legal advice.

Claims recorded in 2009/2010	Highest award	Average award
Unfair dismissal	£234,549	£9,120
Race discrimination	£374,922	£18,584
Sex discrimination	£442,366	£19,499
Disability discrimination	£729,347	£52,087
Religious discrimination	£9,500	£4,886
Sexual orientation discrimination	£163,725	£20,384
Age discrimination	£48,710	£10,931

(c) Philip Henson, Partner, [Bargate Murray](#) solicitors, London (UK)

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Contact details:

E: philip@bargatemurray.com

T: +44 (0) 20 7375 1393

Blog – www.employmentlawupdate.wordpress.com

TW: PHBARGATEMURRAY

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