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Wage and Inequalities in Canada (2018)

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SALARY AND INEQUALITIES IN CANADA

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Introduction

Canada is a federal state and, pursuant to its constitution, labour and employment law is principally a matter of provincial jurisdiction. The federal government's powers in this field are limited to the federal public service and federally regulated businesses, which is estimated to cover about 10% of the labour force. Therefore, there are no nationally applicable laws governing the minimum wage or employment discrimination. In the discussion that follows, we refer to the common features that can be found in all or most Canadian jurisdictions, but draw principally upon the Province of Ontario, Canada's most populous province, for specific examples.

As of October, 2018, the average hourly wage in Canada for all workers 15 years and over was $27.04. Hidden within that figure, however, are significant disparities. For example, younger workers aged 15 to 24 years make $16.59 or about 58% of what workers 25 years and over earn, while women make about 87 cents for every dollar a man earns. Workers with union coverage earn about 20% more than those without union coverage and permanent employees make about 24% more than temporary workers. There are also enormous occupational differences. Managers, the highest paid category, earn on average $43.40 an hour while sales and service workers, the lowest paid category, earn on average $17.77 an hour, or about 41% of what managers earn.[150]

We can more fully appreciate the scope of income inequality if we consider annual median before tax incomes. In 2015, the annual median income was $34,204. However, the median income of the top 10% of income earners was $93,739 and the median income of the top 1% was $234,130. Moreover, income inequality has been increasing. In 2015 the top 1% earned 6.8 times as much as the median, up from 5.8 times the median in 1995.[151]

[150] Statistics Canada, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410032002.

[151] Calculated from data provided in Andrew Jackson, "Census Data Shows Income Inequality Remains a Major Challenge" (Globe and Mail, 8 October 2017), online at https://www.theglobeandmail.com/report-on-business/rob-commentary/census-shows-income-inequality-is-on-the-rise/article36524022/.

1. Does your legal system legally regulate a minimum wage?

The minimum wage in Canada varies by province.[152] In Ontario, the *Employment Standards Act* [*ESA*] sets a minimum wage of $14 per hour.[153] There are exemptions to the minimum wage that allow certain groups to be paid less, including students and some tipped workers. Under the current law, the minimum wage will remain $14 per hour until October of 2020, after which it will be subject to an annual inflation adjustment. The minimum wage is highly contested in Ontario, with the current Conservative provincial government eliminating a planned increase to a $15 per hour minimum wage that would have begun in 2019.

2. Is it frequent for collective agreements to recognize seniority bonuses? And complements or bonuses related with productivity?

Neither Canadian collective bargaining law nor Canadian human rights law prohibit pay differentials on the basis of seniority or productivity. Indeed, pay equity statutes typically provide that differences in wages based on a formal seniority system or a merit compensation plan based on formal performance ratings are permissible.[154] It is common for more senior workers to earn more than less senior workers doing the same job, although often the wage scale stipulates a maximum that employees will reach within a set number of years. Merit pay is less common in the collective bargaining context because unions are typically reluctant to provide employers with the power to make discretionary judgments related to pay.

3. Does your legal system allow, without existing a situation of discrimination, to establish a double wage scale by collective agreement (that is, different wage for work of equal value based on the date of entry into the company)? Is it allowed for the employer, without existing a situation of discrimination and without a collective agreement, to pay different wages to different employees for work of equal value?

As mentioned in answer to question 2, the law in Ontario unambiguously allows for seniority-based compensation. This is true in both unionized and non-unionized contexts.

[152] For current Canadian minimum wages, see http://srv116.services.gc.ca/dimt-wid/sm-mw/rpt1.aspx.
[153] *Employment Standards Act*, 2000, S.O. 2000, c. 41, s. 23.
[154] For example, see Ontario's *Pay Equity Act*, R.S.O. 1990, c. P.7, s. 8(1)(a)(c).

While Ontario has legislation mandating equal pay for work of equal value, it only guards against pay inequality on the basis of sex. Ontario also has legislation requiring equal pay for equal work, but it similarly only applies to pay inequality between sexes.

There have been recent initiatives in Canada to prohibit employers from having different pay rates for full-time, part-time and temporary agency employees performing substantially the same kind of work under similar working conditions. For more detail, see the answer to question 8.

4. What is the effect of increases on wages introduced by law or collective agreement on workers that already perceive a higher salary? Are such wage increases compensated or absorbed?

When minimum wages are increased, no adjustment is required to increase the wages of those who were earning above the minimum wage. Therefore, it is quite common to find that in the immediate aftermath of a minimum wage increase, the percentage of workers paid the minimum wage increases and the composition of minimum wage earners changes.[155] However, it is common for differentials to re-assert themselves as employers will often face wage pressure from workers who were working near the old minimum wage to raise their wages above the level of the new minimum wage.

5. What is the legal and case law treatment of wage discrimination on the grounds of sex?

There are several pieces of legislation that impact gender-based wage inequality in Canada.

Pay Equality and Pay Equity Legislation

There is legislation in Ontario mandating equal pay for equal work (*ESA*, s. 42) as well as separate legislation requiring equal pay for work of equal value (*Pay Equity Act*). The key distinction between these two regimes is that equal pay for equal work is about the *work itself* being the same, whereas equal pay for work of equal value is about the *value* of the work being the same. Under both approaches, pay inequality stemming from formalized seniority or merit systems is permissible.

[155] René Morissette and Dominique Dionne-Simard, *Recent Changes in the Composition of Minimum Wage Workers* (Statistics Canada, 13 June 2018) online at https://www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54974-eng.htm.

Ontario's equal pay for equal work model requires that men and women receive the same pay in circumstances where they are doing substantially the same work, requiring substantially the same skill, effort and responsibility, and performed under similar working conditions.[156] It is primarily enforced through investigation by the Ministry of Labour, although there is also a mechanism for employees to complain directly to their employer.

Ontario's equal pay for work of equal value model seeks to address the undervaluation of work done predominantly by women.[157] Ontario has adopted a proactive approach. It requires all private employers with 10 or more employees (and all government employers) to perform a comparative evaluation of the wage rates of male and female job classes with similar value, which is determined by a gender neutral job evaluation process. If pay inequity is revealed, the employer is required to raise the wage rate for the female job class to match that of the male job class performing work of equal value. This is a complex process, often marked by disputes about what constitutes a gender neutral system of job evaluation. Once pay equity is established, employers are required to maintain it – a requirement that has been the focus of both administrators and critics of the system.[158]

Anti-Discrimination Legislation

Section 15 of Canada's *Charter of Rights and Freedoms* [*Charter*] constitutionally entrenches a prohibition on discrimination on the basis of several grounds, including "sex".[159] However, the *Charter* only applies to government employers. Private sector workers are instead covered by provincial and federal human rights legislation. In Ontario, the *Human Rights Code* protects against discrimination on the basis of "sex", "sexual orientation", "gender identity", "gender expression", "marital status" and "family status",[160] as does the federal *Canadian Human Rights Act*.[161] The inclusion of sexual orientation, gender identity, and gender expression means that these provisions can be used to challenge wage inequality on the basis of gender broadly, instead of solely as between men and women.

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[156] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 42.

[157] *Pay Equity Act*, R.S.O. 1990, c. P.7, preamble.

[158] Emanuela Heyninck, "Gender Pay Equity in Ontario," (2017) *Policy Options*, online http://policyoptions.irpp.org/magazines/june-2017/gender-pay-equity-in-ontario/

[159] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15.

[160] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1.

[161] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3.

An employee that wants to use either the *Charter* to remedy perceived gender-based wage discrimination could sue in court, while an employee seeking recourse under human rights legislation could bring a complaint at the appropriate human rights tribunal in their jurisdiction.

6. Which measures does your legal system include to promote wage equality? Does the company have the obligation to adopt wage transparency measures (external audit, publicity of wages, etc.)?

In addition to the measures discussed in response to Question 5, some provinces have adopted wage transparency legislation. For example, in 2018 the former Liberal government of Ontario enacted the *Pay Transparency Act*.[162] The Act prohibits employers from seeking compensation history from a job applicant and requires the employer to post a salary range for an advertised position. It prohibits employers from retaliating against employees for making inquiries about their compensation or disclosing their compensation to another employee. It also requires employers with 100 or more employees to prepare pay transparency reports that include information about the workforce composition and differences in compensation with respect to gender and other prescribed characteristics.[163]

7. What is the impact salary when calculating the compensation for termination of the employment contract? How is such compensation calculated? Briefly, what are the most frequent cases of termination of the labor contract?

There are two parallel regimes governing entitlements to compensation when employment is terminated without grounds for summary dismissal, the common law and minimum standards legislation. Under the common law, contracts of employment can be terminated by providing notice or pay in lieu of notice. If appropriate notice or pay in lieu of notice has not been provided prior to the termination, the employee can sue for wrongful dismissal and the court will determine the length of notice that was required using four factors: length of service, character of employment, age of employee, and availability of similar employment.[164] Courts have adamantly rejected the view that there is a fixed formula for determining notice, and insist that it will depend on the facts of each case. Once the number of months of notice is calculated, the employee is entitled to the amount of money they would have earned during the notice period based on their salary and benefits at the time of termination.

[162] S.O. 2018, c. 5.

[163] At the time of writing, no other characteristics had been prescribed.

[164] *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (ON HC).

The minimum standards regime provides terminated employees with an entitlement to notice and severance pay. Notice is based on years of service. For example, in Ontario, after three months of employment, employees are entitled to one week's notice. The length of notice increases for each year of service, up to a maximum of eight weeks. Employers have the option of providing notice or pay in lieu of notice. There are also special notice requirements in the case of mass terminations.[165]

Some employees may also be entitled to severance pay. To be eligible in Ontario, an employee must have been employed for five of more years and either have an employer with a payroll of $2.5 million or be terminated in a group of 50 or more employees. The amount of pay is based on the number of years of employment. For each year of employment, the employee is entitled to a week of severance pay, up to a maximum of 26 weeks.[166]

Because termination and severance pay in both the common law and the minimum standards regimes are calculated in terms of weeks of notice or pay, other things being equal, higher salary workers will get more compensation than workers with lower salaries.

The most common reason given by employers for terminating the contract of employment is the end of temporary or casual employment, followed closely by business reasons and seasonal employment.[167]

8. Does the legal system establish a principle of equal treatment in wages in cases of outsourcing? And when hiring workers through Temporary Employment Agencies?

The law in Ontario does not mandate equal pay for outsourced work or for work performed by temporary employment agency workers. In both cases, the law generally does not recognize workers who perform outsourced work as employees of the firm to whom they are providing service, whether they are providing the service as independent contractors or as employees of a subcontractor. Similarly, for the purposes of minimum standards laws, temporary agency workers are usually considered the employees of the

[165] *Employment Standards Act* 2000, R.S.O. 2000, c. 41, ss. 54-62.

[166] Ibid, s. 63-67.

[167] Statistics Canada (2017). Labour force survey [public-use microdata]. Ottawa, ON: Statistics Canada. Accessed via UT/DLS Microdata Analysis and Subsetting with SDA. Retrieved from: http://sda.chass.utoronto.ca/cgi-bin/sda/hsda?harcsda4+lfs2017v6. Thanks to Professor Andrea Noack for running the data.

agency, not the client. This feature of Ontario law is one of the key motivations for companies to outsource work.

As mentioned in the answer to question 3, the former Liberal government of Ontario enacted a version of equal pay for equal work that expanded protection to cover unequal pay on the basis of different employment status.[168] The provision, now repealed by the current Conservative government, mandated equal pay for work of equal value regardless of whether the employee was permanent or temporary, full-time or part-time, or working through a temporary employment agency. As it stands today, equal pay for equal work in Ontario only applies to sex.

9. Is it possible to introduce a minimum wage in a public tender offer?

Yes. There is a long history of legislation and regulation requiring employers on public works projects to pay at least a stipulated rate. The most recent example of a measure of this sort is the *Government Contract Wages Act*, enacted by the former Liberal government of Ontario.[169] The Act provides for the establishment of minimum government contract wages for building cleaning and security services work in buildings owned and occupied by (or, in some cases, leased by) government entities – and also for construction work provided under contracts with government entities. However, not all Canadian jurisdictions have such statutes and, indeed, in some jurisdictions legislation of this kind has been repealed, as is the case of the Federal jurisdiction, which repealed its *Fair Wages and Hours of Work Act*, effective January 1, 2014.[170]

10. Is it possible for the company to modify (by lowering) workers' salary established in the labor contract or the collective agreement? If so, in which cases? And what are the limits?

In a unionized environment, the employer cannot unliterally modify the collective agreement for any reason, including for the purpose of lowering employee compensation. If the employer wants to make changes, it can seek the union's agreement to alter the collective agreement. The union may agree to the changes, particularly in a context in which the employer is in dire financial circumstances, but the bottom line is that the employer cannot unilaterally modify the agreement without the consent of the union.

[168] *Employment Standards Act 2000, R.S.O. 2000, c. 41,* s. 42.1.
[169] 2018, S.O. 2018, c. 9.
[170] Repealed, S.C. 2012, c. 19, s. 441.

In a non-unionized environment, the consent of both parties is also required. Any unilateral modification of compensation that may result in reduced pay or benefits can be treated by the affected employees as a constructive dismissal.[171] If the employee chose to pursue this option, they could sue for wrongful dismissal and be entitled to notice and termination pay as damages.

References and case law

See footnotes to text.

[171] *Farber v Royal Trust*, [1997] 1 SCR 846.