CHANGING WORKPLACES REVIEW

INTRODUCTION

The Centre for Spanish Speaking Peoples Legal Clinic provides advice, representation, public legal education and law reform services to the Spanish speaking peoples of Ontario. One of the priority areas for our clinic practice is the area of workers' rights.

As stated in the Law Commission of Ontario's report on Vulnerable Workers' (Executive summary):

> The nature of employment is evolving and the standard employment relationship based on full-time, continuous employment, where the worker has access to good wages and benefits, is no longer the predominant form of employment, to the extent it ever was. Today, more work is precarious, with less job security, few if any benefits and minimal control over working conditions. Precarious work may be contract, part-time, self-employment or temporary work. While this change has affected all groups of workers, women, racialized person and recent immigrants are more likely to be "vulnerable workers" engaged in precarious work.

Spanish speaking workers are for the most part vulnerable workers. Many of our clients are first generation immigrants whose command of English is limited. The majority of Spanish workers seek income in vulnerable sectors or industries that are partially or totally exempt from *ESA* provisions such as cleaning, painting, construction work, building superintendents or cleaners and factory work. Most of our clients come from Latin American countries whose culture and legal systems are

different. Latin-Americans historically develop a sense of protection of their jobs, showing loyalty toward employers based on the stability of employment while expecting reciprocity from employers in terms of fair compensation, increasing salaries, seniority and secure employment. There is also the belief that the Canadian legal system will not allow employers to take advantage of them. This idealized perception of rights can result in a disadvantage for these workers, who do not speak English, who believe they are protected and who do not know how to deal with the legal system in Ontario.

These submissions will outline the *ESA* in the context of these workers, outlining the issues that these workers experience within the *ESA* system and provide proposed solutions to these issues.

ISSUES

These submissions will discuss the following three areas:

1. Legislative issues;
2. Procedural issues; and
3. Enforcement.

1. Legislative Issues

a) Lay Off

Spanish speaking workers often have difficulties with the lay off provisions of *ESA*. It is common for our workers to face a lay off during the winter months and in recent years some employers have laid off workers for a time due to the economic situation. When workers are laid

off they apply for Employment Insurance (EI) benefits. EI requires the workers to look for work. Workers do not know the length of the lay off and are not sure how to proceed if the lay off is for an extended time. The lay off provisions are complicated in terms of when a worker can deem his or her employment to be terminated.

ESA lay off provisions increase the power of the employer to withhold work or pay workers. Lay offs are solely the jurisdiction of the employer. When a worker is laid off the *Act* relies on objective factors such as earnings, weeks worked and timeframe to deem the employment terminated. This results in a limbo situation for the workers which affects their ability to maintain an income. Should the employer choose to do so, they can manipulate the lay off provisions to ensure the employment can not be deemed terminated. It is our position that workers should have clear knowledge about when their employment can be deemed to be terminated.

Furthermore, these workers should be entitled to termination or severance pay. Pursuant to s. 2 (2)1 of the Regulation 288/01 an employee can't claim termination or severance pay while on temporary lay off.

There are two scenarios in the *Act* that apply to lay offs:

i) If the employee does not get benefits for which the employer makes substantial contributions for the period of lay off the *Act* states that the employment contract can be deemed terminated if the employee has not worked at least 13 out of 20 consecutive weeks; and

ii) If the employee gets benefits during lay off for which the employer makes substantial contributions the employment is

deemed terminated if the employee has not worked at least 35 out of 52 weeks.

In both cases the *Act* establishes what percentage of earnings determines whether the week is part of the lay off period. For the purposes of termination the week will count if the worker receives less than 50% of normal earnings. For severance the week will count if the worker receives less than 25% of normal earnings.

We have created a hypothetical chart showing earnings during a 52 week lay off.

Week	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**
Earnings	0	0	51%	40%	51%	0	51%	40%	0	0

Week	**11**	**12**	**13**	**14**	**15**	**16**	**17**	**18**	**19**	**20**
Earnings	0	51%	51%	0	51%	0	0	51%	51	20%

Week	**21**	**22**	**23**	**24**	**25**	**26**	**27**	**28**	**29**	**30**
Earnings	51%	51%	0	51%	51%	0	0	41%	0	51%

Week	**31**	**32**	**33**	**34**	**35**	**36**	**37**	**38**	**39**	**40**
Earnings	51%	51%	51%	51%	40%	0	0	51%	51%	0

Week	**41**	**42**	**43**	**44**	**45**	**46**	**47**	**48**	**49**	**50**
Earnings	51%	51%	51%	51%	40%	0	0	51%	51%	0

Week	**51**	**52**
Earnings	51%	51%

As this chart shows there is no 13 week period or 35 week period the worker could deem the employment relationship terminated resulting in a serious reduction in wages but leaving the employee no option to end the uncertainty. The employer can use the statutory minimum of weeks and earnings to prevent the employee from deeming the employment relationship terminated. This is exacerbated by the EI provisions which require workers to actively seek employment to be eligible. This leaves workers in a situation in which they have to decide whether to accept another offer and give up termination pay or wait and hope their employment starts again soon.

Recommendations

- Remove the current formula of 13/20 or 35/52 and the earnings rules of 50% or 25% and provide workers with the ability to deem employment terminated if earnings are reduced more that 20% in a period of 6 weeks
- Give workers the option to claim termination of employment if they find work during a temporary lay off
- Provide workers in these situations with termination pay upon the termination of the employment relationship

b) Disability and Illness

Formerly, workers who became disabled or sick for an extended period of time were not entitled to claim termination pay but this section was amended due to human rights provisions. Workers who become disabled or ill are only entitled to EI sick benefits, a total of 17 weeks including the 2 week waiting period. Many employers do not offer short term or long term disability benefits.

When it is medically determined that a worker will not be able to return to employment the worker can try to convince the employer that she or he is entitled to termination pay but the onus is on the employee to establish this. This can involve costly medical reports. Employers may be hesitant to terminate employment due to the provisions of the *Human Rights Code* and the need to accommodate a disabled employee. The result is often that the employee is left in limbo, no longer able to work but not able to obtain termination or severance pay.

ESA should facilitate enforcement of termination pay for disabled or ill employees by establishing a threshold test and by ensuring employees are not required to produce medical reports they cannot afford. The issue in these cases is always going to be the determination of the point at which the employer has a duty to take action. Under the *Human Rights Code* there is a positive duty on employers to make inquiries as to the status of the disability. There is presently no such duty under *ESA.* While employers in this situation are always going to be bound by the *Human Rights Code*, additional guidance as to when employment can be terminated would be helpful to both employers and employees.

Recommendations

- Develop a test to determine when the employment contract can be due to disability ended when the employee is no longer able to return to work and will not be able to return to work due to disability
- Create a positive duty for employers to provide termination pay in these situations

c) Termination Pay

Many of our workers have worked for the same employer since they began working in Canada. As a result many have worked for the same employer for over 20 years.

As opposed to the severance provisions, the provisions relating to termination pay limit termination pay to a maximum of 8 weeks. For these employees the *ESA* provisions are insufficient. The only way these workers can get a reasonable payment is to commence an *Act*ion in Small Claims Court for wrongful dismissal, a long, cumbersome, complicated and expensive process requiring legal representation.

The provisions of *ESA* should be amended so termination pay reflects the years of employment the worker has contributed.

Recommendation

- Amend the provisions relating to termination pay to be similar to severance pay provisions to reflect and adequately compensate workers for long term employment

d) Exemptions

Many workers are not covered under *ESA*. For example, those working as superintendents are not fully covered. They are entitled to notice and termination pay but their hours of work and holidays are not covered. Generally, superintendents are given a free apartment as a term their employment. The *Residential Tenancies Act* has provisions that allow a superintendent to be given only 7 days notice to vacate the apartment.

While *ESA* requires notice and termination pay in lieu of notice, the fact is that the worker has to leave the rental unit in 7 days which puts him/her at a disadvantage if the employer does not pay termination pay. In this situation many employers do not pay termination pay because they know the worker will be gone. These are precarious workers who stand to lose their homes and their employment with minimal notice and have no protection.

As another example, we have many clients who advise that they are picked up by a vehicle every morning and taken to work and are returned to the pick up spot after work. Often these jobs include painting or other work on construction sites. Because construction is an exemption, these workers have no rights to claim termination pay.

Recommendation

- All employees should be covered by the *ESA*
- Exemptions should be considered only in exceptional circumstances
- If an exemption is considered the impact of this must be considered in relation to other federal or provincial legislation

2. Procedural Issues

a) *ESA* Process

The *ESA* process involves two stages of investigation which necessarily results in a lengthy process. Under the present procedure, once a claim is filed it is initially seen by an *ESA* officer to ensure the claim is complete and to make initial attempts to try to resolve the claim. If the

claim is not resolved or if it is longer then 20 days the claim is transferred to another *ESA* Officer to continue the investigation. This transfer can take a considerable amount of time. The *ESA* Officer may call the worker and/or the employer to get additional information. The assessment of the claim is all done over the phone making it difficult to assess credibility. Once this process is complete it is usual for the decision maker to issue a decision.

In the past often the *ESA* Officer would schedule a meeting of the parties. These meetings were usually held in Mississauga, Newmarket or Scarborough, destinations it is difficult for the workers to access. These meetings had none of the requirements of procedural fairness that a hearing would require. The decision is based on the information provided in the meetings.

The major issues that arise in this stage of the process are:

a) Meetings are no longer held;
b) The meetings were inaccessible to those in Toronto;
c) The length of the process; and
d) The process does not contain procedural fairness. Witnesses are not sworn, the worker has no knowledge of the employer's case and has no access to the employer's documents and no knowledge of the case to meet so no ability to bring witnesses or documents that could counter the employer's evidence.

Recommendations

- If meetings are to be held they need to be accessible and provide procedural fairness to the parties

- Streamline the investigation process so workers can receive an answer within 30 days of the date of the claim

b) Application for Review

If the worker or the employer disagrees with the decision of the *ESA* Officer he or she can make an Application for Review to the Labour Relations Board. This is a trial *de novo*. The application process itself is cumbersome and is not available to our clients without representation. Mediation is held before the matter is set down for a hearing. If the matter is not resolved through mediation the matter proceeds to a trial.

In our experience Board members do not want to hear these cases and will usually exert pressure on the parties to settle before trial. This can be a double edged sword. On the one hand, our clients are intimidated by the formality of a trial and are willing to settle to avoid a trial. On the other hand most settlements amount to approximately half of the claim amount. Because the amount of the claim is usually low, half of that amount can result in a minimal payment to the worker. Although there can be an advantage in most cases to workers to settle in that a settlement is usually paid by the employer, when the employer does not pay the worker is required to submit the settlement to the Ministry of Labour for enforcement. There is no opportunity to go back to trial thereby creating a concern to agreeing to settle a matter.

If the employer does not agree with the decision of the Employment Standards Officer he or she can file an Application for Review however upon filing the review the employer must pay the amount of the Order into the Board. If a Director of the employer's business files the application no payment into the Board is required. We have run into

problems with this in the past. The worker settled the matter for less than the claim secure in the knowledge that he would receive payment promptly. He did not receive payment for over two years. It is clearly not justice that this worker settled the claim, giving up a substantial amount, in order to get payment quickly and payment was delayed over two years because the application was filed in the name of a Director.

The major issues that arise in the appeal process are:

a) The process is intimidating and requires representation for our workers due to the language issues and lack of knowledge of the legal process and what is required to prove a claim;
b) The worker usually has to give up a substantial amount of the claim in order to settle the matter; and
c) If the settlement is not paid the worker cannot claim the full amount of the claim, only the amount of the settlement.

Recommendations

- Simplify the review process so it is more accessible for workers

3. Enforcement

Enforcement is one of the most fundamental issues when dealing with employment situations. If there is little or no enforcement of the provisions of the *ESA* employers can take advantage of workers, particularly those who do not speak English. There is a lack of meaningful penalties and minimal investigation. It is usual for Orders issued by the Ministry to go unpaid, again leaving the worker at a disadvantage.

a) Multiple Employers

The vulnerability of workers is further exacerbated by a workplace scenario in which there is more than one employer. Many employers are choosing to use temporary agencies to distance themselves from their employment obligations. It may be very difficult for an employee to know who the employer is. While *ESA* provisions cannot stop the ability of companies to organize in the most effective and efficient manner, the *ESA* must have the ability to intervene when a worker's basic employment rights are threatened.

b) Lack of Knowledge re Employer

As mentioned previously there are many workers who do not know who the employer is. They are picked up, taken to the jobsite, and delivered back to the pick up spot at the end of the day. They do now know who the employer is or how to contact them. Clearly these are cases in which the employer does not want to be known which leaves the workers in a very vulnerable position both from an Employment Standards perspective as well as from a health and safety perspective. In these cases, a request for relevant information from the business and a temporary prohibition against certain activities until the business is "registered" as an employer and has provided the necessary information could assist in resolving complaints in an expeditious manner.

Recommendations

- Require employers to provide workers with information including name, address, phone number and other contact information
- If this information is not provided to workers and a claim is filed an interim ruling to limit business activities until all information is provided to the Ministry
- Maintain an employer registry workers can access

c) Enforcement of Orders

Orders need to be enforced. There is no incentive to pay the amounts required and no penalties for failing to pay. At this point in time many *ESA* Orders are never paid and employers know this. If someone on social assistance neglects or refuses to pay a debt to the Crown, the debt is transferred to Canada Revenue Agency to seize all amounts payable to pay back to the Crown. This is a severe financial hardship as, by definition, recipients or former recipients of social assistance are financially challenged.

There are no penalties for failure to comply with the *Act.* There appear to be no interest provisions to encourage an employer to pay. In the absence of these types of measures employers can continue to ignore these cases and can neglect to pay Orders.

As an example, under the *Residential Tenancies Act*, the Landlord and Tenant Board can assess a fine against a landlord who has been found to have violated the provisions of the *Act*. The *RTA* further provides that Board shall not issue an Order for a landlord who has a fine that has not

been paid. There is therefore a strong incentive to abide by the terms of the legislation and to pay the fine expeditiously to ensure access the Board.

Recommendations

- Fines and penalties for employers who default in payment or who have failed to comply with the *ESA*
- Increased fines and penalties for employers who default in payment or who have failed to comply more than once
- Better collection proceedings possibly including the ability to file the Order with CRA

d) Employer Registry

As part of this process it is necessary for the Ministry of Labour to keep track of employers who do not comply with the *Act* and against whom Orders have been issued. If there are numerous claims against one employer clearly there may be evidence of a workplace that should be investigated. There are no penalties for failure to comply with the *Act.* There appear to be no interest provisions to encourage an employer to pay. In the absence of these types of measures employers can continue to ignore these cases and can neglect to pay the Order.

Recommendations

- Keep track of employers against whom Orders have been issued and publicize this information
- Investigate when there a serial Orders against an employer

CONCLUSIONS

Spanish speaking workers are vulnerable workers, often working for most of their working lives at minimum or low wage jobs. They are vulnerable due to the lack of English and a blind faith that the employers and or government will protect them. As a result they can often be victims of unscrupulous employers. The *Employment Standards Act* is the only protection these workers have to ensure a healthy and productive working life. At this point in time, Ontario has the highest percentage of minimum wage earners in the country. These workers deserve to have a system that is more accessible, more balanced and more equitable to oversee their employment experiences. While it is understood that the Ministry of Labour has to balance the interests of workers and employers it is hoped that this review will assist these workers in their goal of working in employment that is respectful, safe

RECOMMENDATIONS

- Remove the current formula of 13/20 or 35/52 and the earnings rules of 50% or 25% and provide workers with the ability to deem employment terminated if earnings are reduced more that 20% in a period of 6 weeks
- Give workers the option to claim termination of employment if they find work during a temporary lay off
- Provide workers in these situations with termination pay upon the termination of the employment relationship
- Develop a test to determine when the employment contract can be due to disability ended when the employee is no longer able to return to work and will not be able to return to work due to disability
- Create a positive duty for employers to provide termination pay in these situations
- Amend the provisions relating to termination pay to be similar to severance pay provisions to reflect and adequately compensate workers for long term employment
- All employees should be covered by the *ESA*
- Exemptions should be considered only in exceptional circumstances
- If an exemption is considered the impact of this must be considered in relation to other federal or provincial legislation
- If meetings are to be held they need to be accessible and provide procedural fairness to the parties
- Streamline the investigation process so workers can receive an answer within 30 days of the date of the claim
- Simplify the review process so it is more accessible for workers

- Require employers to provide workers with information including name, address, phone number and other contact information.
- If this information is not provided to workers and a claim is filed an interim ruling to limit business activities until all information is provided to the Ministry
- Maintain an employer registry workers can access
- Fines and penalties for employers who default in payment or who have failed to comply with the *ESA*
- Increased fines and penalties for employers who default in payment or who have failed to comply more than once
- Better collection proceedings possibly including the ability to file the Order with CRA
- Keep track of employers against whom Orders have been issued and publicize this information
- Investigate when there a serial Orders against an employer