Neighbourhood Legal Services (London & Middlesex) Inc.

July 08, 2015

Office of the Ministry of Labour
14th Floor, 400 University Avenue
Toronto, Ontario M7A 1T7
Tel: 416-325-5200
Fax: 416-325-5215
kflynn.mpp@liberal.ola.org

Dear Minister Flynn,

C. Michael Mitchell (Special Advisor)

And

The Honourable John C. Murray (Special Advisor):

Re: The Ministry of Labour's Changing Workplaces Review: Provincial Consulations

Neighbourhood Legal Services (London & Middlesex) is a community legal clinic funded by Legal Aid Ontario. We provide legal representation to low-income individuals in the City of London and surrounding Middlesex County. In addition, we advocate on behalf of low-income persons on a range of issues to ensure they are represented vis-à-vis poverty issues at the municipal, provincial, and federal levels.

Neighbourhood Legal Services would like to express serious concerns regarding Ontario's current Employment law regime. While we recognize and support government initiatives designed to support workers rights, our concerns relate to gaps in both Employment legislation and enforcement. These gaps have a significant impact on Ontario's most vulnerable working populations – including low-wage, non-union, part-time, temporary, casual, "independent

contract", migrant and other workers working in non-standard forms of employment.

The Changing Workplaces Review has recognized the major restructuring that has taken place in Ontario's economy since the introduction of Employment legislation currently in force. In London and Middlesex, this has resulted in a significant shift away from manufacturing – a sector that has traditionally provided stable, long-term and well-paid jobs accompanied by union support and the resulting benefits – to low-wage, non-union, service sector jobs.

Increasingly – and especially since 2008 – jobs created in London and Middlesex have been temporary, part-time and precarious in nature. This has had a significant impact on workers and their families. The loss of traditional full-time work has resulted in a dramatic increase in mental health issues. Statistics Canada and the London Free Press report that there has been a 132% increase between 2003 and 2014 for people in London and Middlesex who view their mental heath as "fair or poor" – significantly higher than the provincial average of 73%.[1]

The shift towards more precarious employment is reflected in our experiences at Neighbourhood Legal Services, where an ever increasing number of our clients are frequently transitioning between precarious work and social assistance. Very few of our clients have been provided with enough work hours to collect Employment Insurance. These clients are forced to rely on Ontario Works when their hours are reduced or eliminated without notice, when employers fail to provide wages as they fall due or when they or their family members fall ill.

Many of our most vulnerable clients have developed depression, anxiety and other mental heath conditions or have had their once controllable conditions exacerbated. Neighbourhood Legal Services sees a continual increase in clients who eventually resort to government disability schemes after the loss of numerous precarious jobs contributes to stress and mental health conditions. Other clients are unable to afford their residences, are unable to seek help and are forced into hospitals, shelters and other agencies.

The shift to precarious work in London and Middlesex has resulted in increasing numbers of people who are left with little-to-no protection or real access to enforcement under current Employment legislation. These gaps in legislation mean that the financial costs of precarious employment – through

[1] O'Brien, J. (2015, June 23). Survey shows 132 per cent hike in residents with perceived mental health problems. Retrieved from London Free Press June 24, 2015.

increased reliance on social assistance, increased costs to the health care system and increased demand on social agencies, shelters, community groups and police forces – are being shifted away from employers and onto governments and communities. This is an unsustainable shift that needs to be addressed – at least in part – through stronger legislation and enforcement for precarious workers.

As part of the ongoing Provincial Consultations, Neighbourhood Legal Services makes the following ten (10) recommendations:

1. Improve income security for workers in precarious employment

Individuals in precarious employment positions are significantly more likely to experience income stress with respect to timely payment of bills, concerns about debt, and concerns about maintaining a standard of living. Improving income security for these individuals can be achieved via several means. Increases in minimum wage as well as the standardization of wages provide additional security to workers employed in consistent positions. Income security also seeks to ensure that assistance is available to individuals as they transition from higher-paying to lower-paying employment.[2]

To that end, some stakeholders including the Canadian Labour Congress have advocated for an expansion of eligibility for employment insurance. Alternatively, wage insurance could be used to provide payments to assist workers in transition as a subsitute for employment insurance. The current iteration of the federal Working Income Tax Benefit ("WITB"), for example, supplements income, offering up to $1813 for families per year, and accommodates workers who are currently earning an irregular income. The Ontario government could harmonize the WITB with existing provincial income-security programs to maximize the amount of assistance available to a particular claimant.[3]

In lieu of this approach, stakeholders could adopt a total compensation model to address the issue of income security for workers in precarious employment positions. Employers, governments, and the labour and community sectors

[2] McMaster University/United Way, "The Precarity Penalty: The Impact of Employment Precarity on Individuals, Households and Communities", at p. 150 ["The Precarity Penalty"].
[3] The Precarity Penalty, supra, Recommendation 13.

would need to consider more than mere wages to assess a worker's job quality, and therefore eligibility for compensation.[4]

2. Standardize wages acoss categories of workers

For some employers, temporary worker agencies function as a "cheap wage strategy" to keep costs and benefits to a minimum. Meanwhile, the wage gaps between temporary workers, part-time workers, and full-time employees continue to expand. The average hourly wage of a part-time male worker sits at $12.38, rising to $15 for temporary workers, and capping at $24 for full-time employees. To put these figures into perspective, temporary workers earn 33% less than their full-time counterparts, while part-time workers earn 57% less. Increasing shifts to part-time and temporary workforces ensures employer costs remain low.[5] [6]

Other jurisdictions have introduced legislation to reduce discrimination against workers based on type of employment. The European Union, for example, passed a Directive on Fixed-Term Work in 1999 that prevents discrimination in the pay and conditions of work between fixed-term and permanent workers. Standardized wages may not necessarily lead to more stability for workers in precarious employment, but they would provide short-term gains in the form of increased quality of life and an improved living situation, as well as better stability.

3. Adopt a six-month limit on temporary work assignments

Temporary worker agencies are increasingly opting to classify their workers as independent contractors to make them more attractive to prospective employers, and ensuring they receive no employment standards entitlements. Employers and agencies often exploit the fact that the Employment Standards Act, 2000 (ESA) fails to limit the term of assignment of agency workers.[7]

Limiting the duration of temporary assignments would prevent "abuse" of the legislation, and in conjunction with the above recommendation regarding wage parity, would ensure improved quality of life for the workers affected.

[4] The Precarity Penalty, supra, Recommendation 14.
[5] Sara Mojtehedzadeh, "Ontario employers cashing in on temporary workers", Toronto Star (10 May 2015) ["Ontario Employers"]
[6] Statistics Canada, CANSIM tables 282-0069 and 282-0073.
[7] Workers' Action Centre, "Working on the Edge" (2007), at p. 5 and p.15 ["Working on the Edge"].

Alternatively, other jurisdictions have applied different models to regulate temp agency employment. Temporary workers in the UK are entitled to receive the same pay as permanent employees in equivalent positions after three months, whereas in Italy, temporary positions automatically become permanent after 36 months. In Australia, employers are required to pay a 15 to 25 percent premium on the wages of temporary workers to compensate for the fact that they do not receive benefits.[8]

4. Enhance access to benefits

The provincial government should investigate mechanisms to ensure temporary workers obtain access to benefits coverage, given that the ESA does not currently mandate it. The workforce is increasingly moving from regular, full-time employment to contractual or temporary positions, and vulnerable workers should not be barred from receiving benefits as a result. A recent survey determined that only 17% of those employed in precarious employment had company pension plans, while only 7% had access to drug, vision, and dental benefits.[9]

One proposed solution is similar to the Australian model discussed above and would involve employers paying a wage premium to workers in precarious positions to recognize the lack of benefits. Alternatively, employers could be required to purchase group insurance plans to act as a "benefits bank" available to their workers. Regardless of the chosen means of implementation, the cost implications for employers must be taken into consideration as well. Accordingly, the government should consult with representatives from both labour and management sides to explore various models for the provision of benefits for vulnerable workers.[10]

5. Introduce a basic floor of minimum universal rights and eliminate statutory exemptions

The current iteration of the ESA purports to legislate minimum employment standards, but contains a multitude of exemptions that curtails protections for certain categories of workers including those in precarious employment

[8] Ontario Employers, supra.
[9] The Precarity Penalty, supra at p. 152.
[10] Law Commission of Ontario, "Vulnerable Workers and Precarious Work: Final Report" (December 2012), Recommendation 5 ["LCO Report"].

positions. This is largely due to the fact that these workers are often engaged in periods of discontinuous employment, or fail to meet the minimum requirements of time worked at a particular job to qualify for protections. For example, certain provisions of ESA coverage, such as overtime pay, are dependent upon a qualifying period. Individuals working multiple jobs risk not qualifying for overtime if they do not work more than 44 hours for a particular employer, even if the total number of hours worked weekly across all positions is far greater. Workers in positions of precarious employment are more likely to work multiple positions for multiple employers, and are therefore less likely to qualify for overtime pay and other ESA protections.[11]

The growing number of workers in non-standard and precarious employment positions requires the ESA to adapt to serve the needs of these individuals. The Employment Standards Amendment Act, which came into force in November 2009, provided some assistance in this regard. Under this amendment, workers who obtain employment through temp agencies are deemed to be assignment employees of the agency. As a result, the termination and severance provisions of the ESA apply to them so long as the employment relationship between the two parties continues. That said, the web of exemptions under the ESA and its piecemeal amendments have resulted in an Act that is difficult to navigate and ultimately undermines the legislative purpose. Accordingly, the provincial government should develop principles that promote a broadly available minimum floor of basic rights for workers that balances public policy considerations with justifiable exemptions.[12]

6. Require employers to give advance notice of scheduling

A significant proportion of individuals in precarious employment positions report that their work schedules are frequently released less than a week before they go into effect. This practice is commensurate with current ESA policy, which does not mandate that employers give advance notice of scheduling. Furthermore, there are no penalties for cancelling an employee's shift, nor is there an obligation to guarantee part-time workers a certain number of hours per week.[13]

---

[11] LCO Report, supra.
[12] LCO Report, supra at Recommendation 1(b).
[13] Sara Mojtehedzadeh, "'Wild West' scheduling holds millions of Ontario workers hostage", Toronto Star (3 May 2015) ["Wild West"].

The ESA could be amended to require advance notice of scheduling by employers to minimize the impact of irregular shifts. Workers in precarious employment positions should be afforded an appropriate opportunity to arrange child care services, to run necessary errands, and to participate in community activities without fearing instability brought on by the current iteration of the ESA. Some cities in the US such as San Francisco have tabled municipal legislation that mandates a minimum scheduling notice period of two weeks. Ontario municipalities could consider a similar course of action if the provincial government chooses not to amend the ESA on this particular point.[14]

7. Institute mandatory minimum shift durations

The ESA contains only a single provision on the subject of scheduling and shift duration, and relates to minimum compensation for hours worked. The "three-hour rule", as it is known colloquially, requires employers to compensate employees for three hours' work if their shifts are cancelled or shortened to less than three hours after they have arrived, provided these employees regularly work more than three hours per shift. However, this rule does not apply to employees who regularly work less than three hours per shift, which is becoming increasingly common as a way of circumventing the ESA.[15]

A report by the Workers' Action Centre has proposed an amendment to the ESA that would mandate minimum three-hour shifts for all workers to guard against abuse of the rule, as well as to provide stability for the affected workers.[16]

8. Require employers to offer available hours to existing part-time workers before hiring

At present, the ESA does not require employers to offer available weekly hours to currently-employed part-time or temporary workers. Employers may instead opt to hire additional full-time workers to compensate for these available hours, without affording their existing employees the opportunity to take them on. Vulnerable workers should be afforded a right of first refusal or right of first offer, so to speak, with respect to available hours. Where an employer has

[14] The Precarity Penalty, supra at Recommendation 12.
[15] Wild West, supra.
[16] Working on the Edge, supra at p. 68.

extra weekly hours that he or she needs to fill, that employer should be required to offer these hours to existing part-time or temporary employees. Where these employees choose not to take on the totality of these hours amongst themselves, only then should an employer be allowed the opportunity to hire additional full-time workers.[17]

9. Allow workers to benefit from personal emergency leave

The ESA's current allotment of 10 days of unpaid leave per year for illness, injury, medical emergency, bereavement, or urgent situations related to close relatives is only applicable to employees whose employer regularly employs 50 or more employees. Though the ESA Policy and Interpretation Manual is silent about the eligibility of temporary workers for emergency leave, the Ministry of Labour insists that they are in fact eligible provided employer requirements are satisfied.[18]

Respondents to an inquiry performed by the Law Commission of Ontario indicated that lack of access to personal emergency leave is especially difficult for vulnerable workers who often work in smaller businesses. Accordingly, the ESA should be amended to correct the gaps that exist with respect to personal emergency leave and the size of an employer's business. To address concerns raised by smaller employers concerning their lower flexibility compared to larger enterprises, reasons for leave could be subdivided into specific categories with a number of days allocated for each category. Prince Edward Island, for example, allows three days' leave for bereavement and three days for illness and injury.[19]

10. Improve ESA enforcement mechanisms for vulnerable workers

The current ESA regulation model has been described as a mix of hard and soft law approaches. The former refers to strict enforcement via orders to pay, compliance orders, and fines, while the latter refers to voluntary employer compliance and self-regulation by companies. Given that many employers choose to weigh the costs of compliance against the low probability of being found in non-compliance and opt not to self-regulate, temporary and vulnerable workers frequently bear the brunt of non-enforcement. The

[17] Working on the Edge, supra at p. 68.
[18] LCO Report, supra.
[19] LCO Report, supra at Recommendation 6.

inequality of bargaining power in the employer-employee relationship in these contexts further exacerbates the problem, given the substantial underreporting of workplace violations and non-payment of wages due to concerns about job security, language barriers, or other issues.[20]

The provincial government should therefore concentrate on proactive enforcement mechanisms rather than emphasize an individual claims process. Workers' advocates have little confidence in the current system that encourages employees to approach their employers prior to filing a claim or to attempt wage recovery on their own. A new model that recognizes the administrative and economic barriers affecting vulnerable workers should be considered. Individuals employed in insecure positions are ill-placed to raise complaints, and so the Ministry of Labour should develop a process that allows enforcement officers to receive grievances anonymously or from a third party. Policy criteria could be developed to ensure that only complaints that are sufficiently meritorious are pursued, so that employers are not subject to unwarranted inspections by enforcement teams owing to frivolous grievances.[21]

Thank you for your time and consideration,

Sincerely,

Brian Killick
Staff Lawyer, Neighbourhood Legal Services (London & Middlesex)

Garrett Horrocks
Law Student, Neighbourhood Legal Services (London & Middlesex)

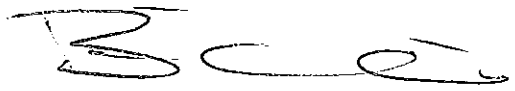
[20] LCO Report, supra.
[21] LCO Report, supra at Recommendations 15(a) and (b).

inequality of bargaining power in the employer-employee relationship in these contexts further exacerbates the problem, given the substantial underreporting of workplace violations and non-payment of wages due to concerns about job security, language barriers, or other issues.[20]

The provincial government should therefore concentrate on proactive enforcement mechanisms rather than emphasize an individual claims process. Workers' advocates have little confidence in the current system that encourages employees to approach their employers prior to filing a claim or to attempt wage recovery on their own. A new model that recognizes the administrative and economic barriers affecting vulnerable workers should be considered. Individuals employed in insecure positions are ill-placed to raise complaints, and so the Ministry of Labour should develop a process that allows enforcement officers to receive grievances anonymously or from a third party. Policy criteria could be developed to ensure that only complaints that are sufficiently meritorious are pursued, so that employers are not subject to unwarranted inspections by enforcement teams owing to frivolous grievances.[21]

Thank you for your time and consideration,

Sincerely,



Brian Killick
Staff Lawyer, Neighbourhood Legal Services (London & Middlesex)

Garrett Horrocks
Law Student, Neighbourhood Legal Services (London & Middlesex)

[20] LCO Report, supra.
[21] LCO Report, supra at Recommendations 15(a) and (b).