Changing Workplaces Review Submission

Niagara Workers' Activist Group

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The Niagara Workers' Activist Group is a coalition of community groups and activists from a variety of organizations including the Niagara Poverty Reduction Network (wipeoutpoverty.ca), the Niagara Injured Workers Centre (niagarainjuredworker.com), and the Niagara Regional Labour Council (niagaralabour.ca).

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The presenter for the Changing Workplaces Review was Lisa Britton, and this report was written by Mark Carter.

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Introduction

Employment is one of the cornerstones of most people's lives, and it touches every aspect of a person's life. Given that capitalism is driven by profit, productivity, and competition, the human aspect is often forgotten. We have employment standards legislation ostensibly to ensure that workers are treated no worse than the minimum baseline defined by our vision of a just and fair society.

Time has shown that many employers do not attempt to go any further than the bare minimums required by the Employment Standards Act (ESA), and in fact they employ various strategies to undermine those bare minimums. To deal with those undermining strategies, to address changing times, and to ensure that the vision of a just and fair society embodied in employment standards is actually being achieved, the Employment Standards Act needs to be significantly strengthened.

We need to acknowledge that many employers do not see employment standards as a bar to be surpassed, but rather as a floor beneath which they cannot sink. As such, employment standards need to be set high enough that society's expectations for safe, fair, and dignified work can be met.

The Niagara Workers' Activist Group has identified several areas of the Employment Standards Act and Labour Relations Act (LRA) which we believe are core to improving employment standards in Ontario, and we provide recommendations below.

Hours of Work

Rates of pay mean little if there is not enough work offered to make a living. To that end, the Employment Standards Act needs to address not only maximum hours of work, but also minimum hours of work. We have several recommendations regarding hours of work:

- s.141 of the ESA provides for a minimum of three hours pay with the proviso that the employee normally works more than three hours per day.

  This limitation should be removed, and the minimum hours of pay should be raised to four.

  For an employee to attend work and be paid for less than four hours, they have

lost the opportunity to work a half day elsewhere. Also, by removing the proviso that they normally work more than three hours per day this would essentially set a minimum shift length of four hours for any time an employee works.

- s.18(3) of the ESA states that "An employer shall give an employee a period of at least eight hours free from the performance of work between shifts *unless the total time worked on successive shifts does not exceed 13 hours* or unless the employer and the employee agree otherwise." **This allows an employer to impose a non-standard work arrangement without the employee's consent.**

  Exempting employers from the requirement to give employees eight hours between shifts if the total time is less than 13 hours is very problematic. This wording needs to be removed, so that the employer and employee must agree to such work arrangements. Working split shifts is disruptive to employees' lives, and limits availability for other work.

  - **s.18(3) should be amended by removing "unless the total time worked on successive shifts does not exceed 13 hours or"**

  - **s.18(3) should be amended by changing "eight hours" to "twelve hours".** Eight hours between shifts does not allow for proper rest or personal activities, and can lead to significant fatigue-related health and safety issues.

  - **All hours worked in a 24 hour period must be consecutive unless the employee specifically agrees otherwise.**

- **The ESA should be amended to require employers to provide employees a schedule of work two weeks in advance. Similarly, employees should be protected from reprisal if they are unavailable for work when they have not been given at least two weeks notice of the shift.** With the growth of low-paid part-time precarious work, employers need to take responsibility for demanding such "flexible" work conditions by being organized in their scheduling such that employees are able to manage the second or third jobs that they often have to take to make ends meet.

- **The overtime threshold set in s.22(1) of the ESA should be lowered to 37.5 hours per week (or 40 hours including unpaid eating periods).** This would work well with the maximum hours per week of 48, essentially allowing one extra shift of overtime pay in a week. This would also be a progressive step in improving the working conditions in Ontario by bringing the

overtime threshold back into alignment with most other industrialized countries.

- **The overtime averaging provisions in s.22(2) of the ESA should be removed.** Flexibility in the workplace should not come at the expense of employees' incomes.

- **The exemption that payment is not required (s.21) for the statutory 30 minute eating periods should be removed.** If an employee was not scheduled to be working during that time, would they choose to spend 30 minutes eating at or near the vicinity of their workplace? Clearly they would not, and therefore a 30 minute eating period integrated into a shift of five hours or longer should be considered part of their paid employment.

- **The ESA needs to address workers who are considered "on call" (those who carry a pager or cell phone and may be called in to work at any time).** The costs of workplace flexibility should not be borne entirely by workers.

    - **There needs to be a provision to compensate the worker for time on call (not just the time worked when called in)**, as otherwise the worker pays a large opportunity cost in lost alternative work and/or restricted personal time in order to be available to the employer at a moment's notice.

    - **There needs to be some provision to prevent "on call" being used as a loophole to the maximum allowable hours of work in a week.** For instance, requiring immediate adjustment of a worker's schedule to provide lieu time if "on call" work plus regularly scheduled shifts would exceed 48 hours in a week.

- **There are health and safety issues surrounding shift work.** Often workers work in isolation, there are a variety of hazards associated with working at night, and the IARC has designated shift work that disrupts sleep patterns as Class 2A, probably carcinogenic to humans. We recommend the following regarding shift work:

    - All hours outside an 8am-6pm workday should be considered overtime hours.

    - Shifts outside daylight hours should require a minimum of two people assigned to work.

    - Workers should have the right to refuse non-standard (8am-6pm) work hours.

- **Termination pay should be based on the best 12 weeks out of the past 52 weeks.** This would not be an administrative burden, as employers are already required to provide the past 52 weeks of earnings on a Record of Employment. This would help people who work variable hours (s.60(2), s.61(1.1), and s.65(6)), and protect workers from having their hours reduced prior to termination.

Time Off

Time off (emergency leave and vacation time) is an area where the Employment Standards Act has a great deal of room for improvement.

Personal Emergency Leave

- **Emergency leave should be a paid leave.** Currently, having the right to emergency leave is meaningless to most workers, because exercising that right will put them in a precarious financial situation. For emergency leave to be meaningful, s.50(1) of the ESA must be amended so that emergency leave is with pay.

- **Emergency leave should be increased from 10 to 15 days** (s.50(5)), as it is a broad category including not only things such as bereavement leave but also personal illness.

- **The limitation in s.50(1) that does not grant personal emergency leave to anyone whose employer does not regularly employ 50 or more people must be removed.** Societal standards of common decency in how a person is treated should not be dependent on the size of one's employer. Employment standards should apply to all workers.

Vacation Time

Ontario and the Yukon are the only jurisdictions in Canada that don't increase mandatory paid vacation time to three weeks after a period of time. Saskatchewan is the leader in Canada with three weeks vacation time after a year, increasing to four weeks vacation time after 10 years. The European Union, by contrast, has set a floor of four weeks (20 days) paid vacation time that is exceeded by many member states.

- **We recommend that Ontario set a minimum standard of three weeks paid vacation time after one year of employment, increasing to four weeks after a period of five years.**

- **s.35 and s.35(1) of the ESA need to be amended so that the timing of a vacation is determined by the employee.** Vacation time is by definition time away from work and the employer. Employers do not own their employees. The employer should not have control of when a vacation is to be taken. Instead, employers should be required to accommodate reasonable requests for vacation time.

Fairness for Non-Standard Work

For a significant portion of the workforce, "non-standard" work arrangements have become the norm. Whether they are considered part-time, "casual", or have been misclassified by their employer as an independent contractor, the employees in these precarious work situations all have a common denominator in that they are treated differently by their employer from full-time employees doing the same work.

Equal Pay for the Same Job

"In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds." - EU Directive on Part-Time Work (1997)

Apart from the number of hours worked, employers often compound the precariousness of jobs by paying lower wages to part-time workers, and by not offering the same (or any) benefits. To address this, we offer the following recommendations:

- **When workers are working a job that is substantially the same, they should receive the same hourly wages and benefits.**

- **Benefits should be offered with the same conditions to part-time and full-time workers.** The types of benefits, eligibility requirements, and waiting periods should not be different.

Fair Access to Hours of Work

When we are talking about workers and employers, we are fundamentally talking about people. There is a duty of care and responsibility that goes in both directions when a worker enters an employment relationship with an employer. However, many employers fall short in that duty by treating their employees as tools to be rented by the hour rather than as people.

In contrast to a consultant who charges a commensurately higher price per hour to compensate for the infrequent use of their services, an employee enters into the employment relationship at a lower rate of pay with the expectation that the employer will be using their services on a regular basis that will be sufficient to make a living.

- **Employers should be required to offer more hours to part-time workers prior to hiring new workers.**

- **Reduction of hours worked should be prohibited as an act of reprisal or discipline against an employee.**

- **A worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment.**

Enforcement of Employment Standards

Misclassified Workers

Employers often style workers as independent contractors to evade contributions to the Canada Pension Plan, WSIB, and Employment Insurance. This seriously erodes the social safety net for those workers, who are often already in precarious work, and it puts a greater burden on social services. To remedy this, we recommend that:

- **The burden of proof should be placed on the employer to prove that someone is <u>not</u> an employee.**

- **That specific criteria be set to determine if someone is an employee.** The Canada Revenue Agency document *RC4110: Employee or Self-Employed?* is a good reference for determining appropriate criteria to determine if an employment relationship exists.

Just Cause, Fairness, and an End to Exemptions

Currently the Employment Standards Act allows an employee to be terminated without cause at any time. This does not reflect a respectful employment relationship, but rather one where employees are treated as disposable.

- **The ESA needs to be amended to include Just Cause provisions for termination.** This would provide protection and job security to workers that is currently sorely lacking.

- **Employers should be required to have a discipline policy which is communicated to employees when they begin employment.** Discipline procedures must be fair, timely, and follow a system of progressive discipline. The practice of "constructive dismissal" needs to end. Many employees have been bullied out of jobs by this practice.

- **Exemptions to the ESA should be rare exceptions.** All current exemptions should be reviewed with an eye towards removing them, as the ESA hardly reflects any kind of enforceable employment "standards" when it is riddled with exemptions. For rights to be meaningful, they should apply to all workers.

Improving the Complaint Process

Unjust and constructive dismissal complaints after employment is lost should not be a worker's only options. The complaint process should be streamlined, timely, and accessible to front-line workers so that workplace disputes can be resolved while the worker is still employed.

- **Worker education on their rights under the ESA should be mandatory,** similar to the Occupational Health and Safety Awareness and Training regulation (Regulation 297/13 of the OHSA).

- **It should be made clear to all workers that they cannot waive their rights under the ESA.** Many employers require employees to sign lengthy forms as a condition of their employment. It should be clearly emphasized that regardless of what an employer requires an employee to sign, they cannot sign away their rights.

- **Instructions on filing a complaint should be added to the "Your Rights at Work" poster in every workplace.**

Timely Enforcement and Meaningful Remedies

Currently too much of the burden of enforcement lies upon the individual worker to stand up for his or her rights, usually at great risk of reprisal for which there is often no meaningful remedy.

- **Employment Standards Officers should be able to levy fines against employers.**

- **Employment Standards Officers should be able to order immediate redress of violations of the ESA.**

- **Anti-reprisal protections should be strengthened by significant penalties.**

- **Arbitrators/adjudicators should be given broader powers to order fines and remedies.**

- **Upper limits for fines and offences should be raised to $1 million, and/or applied per each instance in violation of the Act.** The costs of fines and offences should be significant enough that they cannot simply be dismissed as the cost of doing business.

- **A 25% labour relations surcharge should be levied for offences under the ESA and LRA,** similar to the 25% victim surcharge levied for offences under the Occupational Health and Safety Act, and that money should be applied towards ensuring there is adequate support and staff for enforcement of the ESA and LRA.

Accessible Unionization

- **There should be greater use of sector-specific advisory committees.** For sectors of the workforce which have low union representation and/or a high percentage of precarious work or misclassification of employees, advisory committees as per s.141(11) of the ESA should be established to address sector-specific issues. There should be significant worker representation on any such advisory committee.

- **Card-based union certification needs to be restored to the Labour Relations Act.** The current additional step of a mandatory ballot allows employers a period of time to unduly influence the certification process.

- **Employers should be required to disclose lists of employees when employees are initiating a drive to certify a union.** This would provide a solid basis for determining at the outset what the required threshold was for certification, and it would also shine light on any undue changes to staffing made in response to the drive for union certification.

- **Replacement workers should be expressly prohibited during a work stoppage.** s.78(1) of the Labour Relations Act prohibits strike-breaking behaviour and the use of professional strike-breakers. The definitions need to be made clearer so that the employment of workers to replace workers engaged in lawful strike action is clearly prohibited.

Conclusion

It's time for the ESA and LRA to be changed to reflect changes in the world of work. Currently too many people are falling through the cracks and not being afforded the minimum standards for working conditions and standard of living which the Employment Standards Act is supposed to embody. Further, the Labour Relations Act is not doing its job in ensuring that workers can organize their workplaces and gain an effective voice in improving their working conditions. It's time that workers begin to be treated respectfully.

References

Vacation time across Canada chart: http://www.payworks.ca/payroll-legislation/VacationPay.asp

EU Directive on Part-Time Work: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31997L0081

WHSC ResourceLine on Shift Work: https://www.whsc.on.ca/Files/Resources/Hazard-Resource-Lines/Shift-Work-WHSC-Resource-Line.aspx

CRA RC4110: Employee or Self-Employed? http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html

Health and Safety Awareness training (as a potential model for ESA training): http://www.labour.gov.on.ca/english/hs/training/

Still Working on the Edge, a report from the Workers' Action Centre: http://www.workersactioncentre.org/press-room/policy-papers/

A Higher Standard, a report from the Canadian Centre for Policy Alternatives: https://www.policyalternatives.ca/publications/reports/higher-standard