MERIT ONTARIO
Merit OpenShop Contractors Association of Ontario
A Merit Canada Partner

October 3, 2016

Mr. Michael Mitchell & Mr. John C. Murray
Changing Workplaces Review
ELCPB 400 University Ave., 12th Floor
Toronto, Ontario M7A 1T7

Re: Changing Workplaces Review

Dear Messrs. Mitchell and Murray:

I am writing on behalf of the Merit OpenShop Contractors Association of Ontario ("Merit"). Merit is an organization dedicated to addressing the concerns of open shop employers from across the province of Ontario and promoting an equitable and competitive marketplace for construction contractors.

We have read your Interim Report and we are writing to provide our submissions with respect to the Report. We are concerned that several of the potential amendments run contrary to some of the founding principles of Merit, which are as follows:

- Management has the right to direct the activities of a business according to the policies and goals established by its own leaders, searching for efficiency and productivity.

- Each employee has the voluntary choice to belong or refrain from belonging to a labour organization and is paid and promoted based on his/her skills, initiative and responsibility for individual accomplishment, rather than employment seniority alone.

Below, we have provided comments on the issues which are of greatest concern.

Temporary Hire Agencies

One of the options identified in the Interim Report is "*regarding THAs* [temporary hire agencies] *and their client businesses… creating a rebuttable presumption that an entity directly benefitting from a worker's labour (the client business) is the employer of that worker for the purposes of the LRA*". This proposal simply begs the question of whether a company should be considered a "temporary help agency" or whether the responding party "directly benefits from a worker's labour". It would lead to disputes and litigation over the meaning of these terms.

Secondly, the proposal is unfair to employers in the construction industry. Unions often file applications for certification against general contractors and, in support of these applications, rely on membership cards signed by a subcontractor's workers. In these situations, the general contractor would not be familiar with the employees in question. It would find it difficult to provide enough information to rebut the presumption, especially within the tight timelines for responding to certification applications.

Finally, this proposal appears to be ill-suited to the construction industry, where it is common to see a series of subcontracts involving multiple employers. For example, a general contractor may subcontract all of the mechanical work on a construction project to one company, who then subcontracts the heating installation to another company. If the heating subcontractor engages a labour supply company, all three contractors (ie. general, mechanical, heating) could be found to directly benefit from the labour of these workers. The Interim Report does not comment on how such situations should be resolved.

Prosecutions and Penalties

It is currently possible for a company to be convicted of an offence under the *Act* and fined. However, before pursuing a prosecution, a party must seek consent from the OLRB, and the OLRB has stated that it will not grant consent as a matter of course. Its reasoning was explained in *Federated Contractors Inc.*, [2003] OLRB Rep. January/February 61:

> *Prior to July, 1975 the Board's remedial powers under the Act were quite limited and it was necessary for parties to resort to criminal sanctions to secure compliance with the Act. Since that time, the Board has been reluctant to grant its* ***consent*** *to a prosecution as the Board's powers under the Act can be deployed to provide a "labour relations"* ***remedy*** *that is sensitive to the parties' issues and labour relations concerns rather than have the complaining party rely on the blunt instruments available to the provincial offences court when it finds that a violation of a provincial statute has been established.*

As the OLRB notes in this passage, the decision on whether provide consent to prosecute is a difficult one, which must be made by assessing the available remedies and determining whether any of them would be adequate to resolve the dispute. This can be a complicated inquiry that involves consideration of the purposes of the *Act* and the labour relations consequences of the violation. Such questions are best left to expert tribunals such as the OLRB, which is staffed by Vice-Chairs and Board Members with labour relations experience and industry knowledge.

One of the proposals in the Interim Report is to eliminate the requirement for consent to prosecute and allow prosecutions by the government or by private parties. This proposal, essentially, would strip the OLRB of its authority to answer these difficult questions, and place it in the hands of private parties who may not be as knowledgeable or sensitive to labour relations realities.

Of greater concern is the fact that the OLRB is an impartial tribunal. If placed in the hands of private parties, the power to prosecute could be exercised for improper political or economic reasons. For example, it is easy to imagine a union hanging the threat of a frivolous prosecution over the head of a company in order to gain leverage in bargaining or a certification application. The Interim Report does not consider any amendments that would allow parties to be held accountable for malicious prosecution (eg. costs).

Consent to prosecute is rarely granted by the OLRB, which means there are few situations in which the OLRB concludes its existing remedies are inadequate. There is simply no evidence of a need for more prosecutions.

Another proposal would allow the OLRB to impose administrative penalties of $100,000. This proposal is also flawed. Just as private parties may not be capable of making decisions about

whether prosecution is appropriate, the OLRB is ill-equipped to impose fines. Regulatory penalties are currently dealt with by provincial courts, who have developed procedures to adjudicate these charges and are familiar with the applicable legal principles. The OLRB is an expert tribunal when it comes to labour relations, but it has no experience in the administration of regulatory penalties. Expert tribunals are created to focus on a particular area of law, which allows them to develop significant expertise in the area. Requiring these tribunals to deal with other issues may make it difficult to focus on the issues they were created to address.

Related Employers

Page 69 of the Interim Report states that the related employer provision could be amended or expanded by providing that the OLRB may make a related employer declaration where an entity has the power to carry on associated or related activities with another entity under common control or direction, even if that power is not actually exercised. This proposal runs contrary to the purpose of section 1 (4) of the *Labour Relations Act* (the "*Act*"), which is to "*prevent the intentional or incidental erosion of bargaining rights due to changes in structure or form of what is, for practical labour relations purposes, a single business activity*" (see *515422 Ontario Ltd.*, [1993] O.L.R.B. Rep. 459).

The proposal would allow the OLRB to make related employer declarations in circumstances where there has been no erosion of bargaining rights, due to speculation that such erosion may occur in the future. The OLRB has repeatedly stated that it will not make orders or award remedies on the basis of speculation; there must be hard evidence that a union's legal interests have been compromised. It is not apparent why related employer declarations should be an exception to this principle. It could result in employers becoming bound to a union when their employees have not expressed any desire to be represented by the union and the employer has done nothing to undermine the union's bargaining rights with other employers.

We are also concerned by the suggestion that the *Act* could be amended to state which factors should be considered when determining whether a declaration should be made. As the OLRB stated in *Gemstar Canada Inc.*, [2010] O.L.R.D. No. 3437:

> *Determining whether or not there has been any actual or potential activity on the part of the entities which are alleged to be* ***related employers****, and/or the transfer of something (be it real or intangible), which has given rise to an* ***erosion*** *of a union's bargaining rights/work is a factual matter. As such, each case must be determined on its own particular circumstances. The facts and particulars which are relevant to the Board's determination in any particular situation will vary on a case-by-case basis and the list of such facts and particulars which may be relevant in making such a determination is potentially endless.*

It is simply not possible to list all of the facts that may be relevant to the question of whether a related employer declaration should be made. Any attempt to do so will result in factors that are either so broadly-worded as to be meaningless or so specific as to constrain the OLRB's ability to consider all appropriate factors.

Union Access to Employee Lists

The proposal to allow unions access to employee lists and contact information gives rise to a number of concerns. First of all, the Interim Report states that one of the reasons for providing unions with access to employee lists is that it is often difficult for unions to determine the number of employees in a bargaining unit. It then goes on to state that unions could be provided with a list of employees once it achieved a certain threshold of support (eg. 40%). If a union was unable to determine the number of employees in a bargaining unit, it would not be able to confirm that it had reached a certain threshold of support. The union could not ask the employer to confirm that it had reached the requisite level of support, as the employer could not confirm this without reviewing membership cards. It is simply not clear how this rule would be applied in practice.

Secondly, providing unions with the contact information of employees puts the privacy of employees at risk. Unions are often accused of intimidating or coercing employees, and it is not unheard of for union organizers to attend uninvited at the homes of employees and speak to their family members. This proposal would create opportunities for such misconduct.

First Contract Arbitration

One of the options considered in the Interim Report is imposing first contract arbitration after the parties have been in a legal strike or lockout position for a certain period of time. As it currently stands, a union must apply to the OLRB to gain access to first contract arbitration. The OLRB will then consider whether an employer is making a legitimate effort to conclude a collective agreement.

If first contract arbitration was ordered as a matter of course, parties may have little incentive to conclude a collective agreement. The result of a failure to bargain would no longer be a strike or lockout. Rather, it would be interest arbitration, which is much less disruptive to a business. In fact, one of the parties may actually prefer arbitration to collective bargaining. Interest arbitration can be an attractive option for one party for reasons that have nothing to do with the other party. For example, a union may favour interest arbitration because it has various competing factions within its ranks that make it difficult to reach consensus. In these situations, an employer may be dragged into the expensive, time-consuming process of interest arbitration even if it has conducted itself properly during bargaining.

The negotiation of a first collective agreement provides both parties with an opportunity to develop their relationship and their ability to work together. Removing incentives to cooperate at this critical time would be counterproductive.

Electronic Membership Evidence

The requirement of signed membership cards provides important protection against fraud. It is not easy to forge a signature. However, unlike signatures, e-mails and text messages do not contain unique identifying characteristics that allows the identification of their creator. Allegations of fraudulently obtained membership evidence are common during organizing drives, and allowing electronic membership evidence would make it difficult to confirm whether membership evidence has been obtained fraudulently.

Interim Orders

The *Act* currently requires unions to establish that a number of conditions have been met before an interim order is granted. Although unions may feel that the existing test is too difficult to satisfy (pg. 103 of the Interim Report), a stringent test is appropriate when the Board is making orders without hearing oral evidence or making findings of fact.

In an application for interim reinstatement, the Board determines whether the employee should be reinstated without regard to whether there was actually just cause for the termination. Employers may be required to re-employ and continue paying workers who have engaged in misconduct that would justify termination in any other context. Reinstatement amounts to a significant intrusion on management's right to direct its workforce and discipline employees as it sees fit. Such a remedy should only be granted in very narrow circumstances, so removing or diluting the existing requirements would be inappropriate.

Unions appear to be particularly critical of the requirement to prove that interim reinstatement is "necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives". However, Merit submits that this requirement accurately reflects the purpose of interim relief, which is to remedy prejudice that could not be adequately addressed by a final order. If the harm caused by the dismissal or discipline of a union supporter (eg. lost wages) can be remedied by a final order, an interim order serves no purpose. This requirement is necessary to ensure that the extraordinary remedy of interim relief is only used in appropriate circumstances.

Conclusion

Most of the potential amendments described in the Interim Report would make union organizing easier. Increased penalties could deter employers from communicating openly with their employees during an organizing drive. The rules about temporary hire agencies will make it more difficult for employers to refute allegations that certain workers should be considered their employees for the purposes of a certification application. Unions may obtain access to employee lists and contact information and they will not have to meet a number of stringent conditions before obtaining an interim order. Electronic membership evidence and first contract arbitration would remove barriers to union organizing.

In contrast, there are few amendments in the Interim Report that are directed towards easing the regulatory burdens on Ontario's employers. The upshot is that if these changes are implemented, union organizing will likely increase and there will be more pitfalls for employers trying to defend applications for certification. Merit submits that such changes are inappropriate in the absence of concrete evidence that the existing labour relations regime presents undue barriers to organizing.

In closing, we would like to thank you for taking the time to consider our submissions. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Michael Gallardo
Executive Director