Changing Workplaces Review Consultation

Special Advisors' Interim Report

Submitted to: Ministry of Labour

Submitted by: Ontario Bar Association

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Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to comment on the Changing Workplaces Review Special Advisors' Interim Report (the "Interim Report"), which is seeking input on a range of issues and the options for change that are under consideration in light of the changing nature and trends of the modern workplace in today's economy.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

This submission was prepared by members of the OBA Labour and Employment Section, which is comprised of over 750 lawyers who serve as legal counsel to employers and employees in unionized and non-unionized environments, and have experience in a wide range of legal issues arising in the workplace that are dealt with through bargaining or come before the Labour Board, arbitrators, courts and human rights commissions.

Comments

As acknowledged by the Special Advisors in their Interim Report, the task undertaken by the Special Advisors is monumental in that it is the first independent review of the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA) in more than a generation. The breadth of the review has therefore been tremendous, and the number of issues and possible options are quite expansive. In line with the Special Advisors mandate, the OBA's submission reflects its members' shared concern over the changes that have taken place in the workplace, the need to ensure protections for vulnerable workers in precarious jobs, while balancing the interests of employers and providing consideration to the potential impact of any proposed change on business.

The following comments focus on Section 5.5 of the Interim Report, which outlines issues and options related to enforcement and administration of the ESA. The decision to focus

comments on this section in particular, and the OBA's endorsement of select options within that section reflects our efforts to balance the abovementioned interests, and focus on those priority areas of consensus within our diverse membership, who act for both employers and employees.

I. Section 5.5.4 –Reducing Barriers to a Claim

In considering the options under this section, the OBA endorses adopting a fair and balanced approach that considers the interests of employees in the claims process, the interests of employers in minimizing costs and administrative burden and the principles of fairness in the complaint process itself.

Support for Options 1 and 4 of the Interim Report:

> Option 1 – Maintain the status quo with a general requirement to first raise the issue with employers but at the same time maintain the existing policy exceptions and maintain current approach of accepting anonymous information that is assessed and potentially triggers a proactive inspection.
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> Option 4 – Do not allow anonymous complaints, but protect confidentiality of the complainant, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.

As outlined below, the OBA supports the above two options, but has identified concerns with the other options listed by the Special Advisors.

Maintaining the *status quo* of encouraging employees to approach their employer regarding a potential wage claim (as opposed to Option 2 of removing this requirement) promotes informal resolution of concerns with minimal time and expense and should continue to be encouraged. This approach allows for significant flexibility by expressly recognizing on the Ministry's complaint form a number of situations in which an employee is not expected to have first attempted an informal resolution, such as situations in which the employer is bankrupt, has shut down, or the employee is afraid of the employer. These and other reasons are currently stated on the complaint form as examples of "good reasons" for not initially raising the issue with the employer. As noted in the Interim Report, the Ministry does not, in practice, dismiss complaints if an employee has not contacted their employer. This approach is reflected on the Ministry's claim form, which notes that the Ministry "encourages" employees to first contact their employer before filing a claim. In the OBA's

view, the current approach strikes an appropriate and effective balance and should be maintained.

The OBA also supports the aspect of Option 1 regarding maintaining the Ministry's ability to accept anonymous information that is assessed by the Ministry and may trigger a proactive inspection. In some cases, employees, former employees, or other stakeholders may become aware of potential violations of the ESA in a workplace that, for good public policy reasons, should be investigated and addressed. The Ministry should retain the ability to assess the information provided and determine whether to conduct an inspection. Whether the Ministry exercises its discretion in any particular case may depend on the type and quality of information provided to the Ministry and the employer's known history, among other factors.

<u>No Support for Options 2, 3 and 5 of the Interim Report</u>

> Option 2 – Remove the ESA provision allowing the Director to require that an employee must first contact the employer before being permitted to make a Complaint to the Ministry.
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> Option 3 – Allow anonymous claims, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.
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> Option 5 – Allow third parties to file claims on behalf of an employee or group of employees, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.

For the reasons stated above, the OBA supports maintaining the status quo regarding contacting the employer before making a Complaint to the Ministry (Option 1) rather than Option 2 of eliminating the Director's ability to enforce this requirement.

The options described as Options 3 and 4 address a different set of issues than Options 1 and 2, namely whether anonymous complaints should be permitted and what information should be provided to the employer by an Employment Standards Officer to respond to a complaint. The OBA supports Option 4, which entails not allowing anonymous complaints, but protecting confidentiality of the complainant, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response rather than allowing wholly anonymous complaints, as would be

permitted pursuant to Option 3. In our view, the approach suggested in Option 4 strikes the right balance between ensuring that an employer has the information it needs in order to investigate and potentially remedy a complaint, and safeguarding an individual's identity when that disclosure is not necessary for a proper investigation (e.g. where a complaint is not limited to the facts of a specific individual's circumstances), such that confidentiality will be maintained to protect the employee as much as possible.

Similarly, the OBA does not support Option 5, which suggests that third parties be permitted to file claims on behalf of an employee or group of employees. Employees are already permitted to appoint a lawyer, friend or family member as their representative in the claim process (as indicated on the claim form) and in the event of group violations such as bankruptcies or closures, the Ministry already routinely issues orders addressing the workforce as a group. We do not suggest that there be any change is such allowed practice. We view Option 5 as potentially problematic and unnecessary, as it would entail the establishment something akin to a "class action" system, with third parties advocating on behalf of anonymous groups of employees. We suggest that allowing such a scheme would run contrary to the complaint process' intended purpose of providing a direct and simple method to address Complaints. Since the Ministry already has the ability to examine an Employer's practices more broadly and make broad Orders in relation to large groups of employees, and recourse is available in the Court system to advance group or class ESA Complaints as an alternative to the Ministry process, Option 5 does not appear to be necessary to enable employees to access remedies.

II. Section 5.5.6 – Applications for Review

For the reasons detailed below, the OBA supports all five Options listed under this section of the Interim Report. We note that these Options are not alternatives to each other and detail fair, complementary and likely effective improvements to the Applications for Review process at the OLRB.

<u>Support for Option 1 of the Interim Report:</u>

> Option 1 - Require ESOs to include all of the documents that they relied upon when reaching their decision (e.g. payroll records, disciplinary notices, medical certificates) when they issue the reasons for their decisions. This will ensure that the OLRB has a record before it of the documents relied on by the ESO in making an order or in denying a complaint. Such a mandatory process should lead to a more consistent quality of decision-making by ESOs and would help explain the decision

> to the affected parties and to the OLRB as well as providing a more complete record to the OLRB sitting in review. For an employee who seeks a review of a decision, this procedure would also alleviate – at least to some extent – any obligation to produce some, or all, of the documentary evidence relevant to a review.

The OBA supports Option 1 as a reasonable and fair alternative to the current process.

At this time, and as set out in the Interim Report, the ESOs make best efforts to investigate a complaint by speaking with the complainant, other employees, the employer and anyone else and by also reviewing relevant records. However, upon an Application for Review, the OLRB receives a record merely consisting of the ESO's order and the reasons for the decision which *may* refer to relevant employer records. Any documentation relevant to the ESO's order or decision is not necessarily provided to the OLRB unless the applicant *chooses* to provide such documentation at the time of filing the Application for Review and/or the parties *choose* to rely on such documentation at the hearing and are therefore required to provide it to the OLRB and each other prior to the hearing.

The result of the above noted process is that there may be documentation that the ESO has obtained during the course of his or her investigation that is significant to the decision and that no party has and that the OLRB will never see (despite reference to such documentation in a decision). Further, if the documentation is relevant to a party's case and that documentation is in the possession of the other party, there is no obligation for the party to produce the documentation, especially if it is not helpful.

The OBA acknowledges that while it is possible for a party to request that the OLRB order production of all arguably relevant documentation, such a process assumes that an unrepresented (or under represented) party will be aware of such procedural options or strategies and that a party can and will properly comply with such an order.

As such, the OBA supports open and transparent document disclosure in the Application for Review process and believes that it will improve efficiency. Specifically, it will improve the LRO mediation process by providing LROs with more information than simply the ESOs decision and OLRB documents and perhaps even improve hearing efficiency by focusing issues.

Further, the OBA agrees with the Interim Report that there are noted inconsistencies in ESO decisions and even instances where the ESO makes obvious errors in his or her interpretation of the ESA and corresponding law. The OBA is optimistic that a requirement that the ESO include all documents relied upon when issuing the decision will encourage

ESOs to ensure that the decision is in keeping with the evidence reviewed and is well-reasoned. As a result, this may even minimize the number of Applications for Review filed.

Support for Option 2 of the Interim Report:

> Option 2 - Amend the ESA to provide that on a review, the burden of proof is on the applicant party to prove on a balance of probabilities that the order made by the ESO is wrong and should be overturned, modified or amended.

Option 2 appears to address four different issues, namely, which party to an Application for Review bears the burden of proof, the standard of proof in the proceeding, the standard of review of the ESO's decision and the powers of the OLRB in the proceeding. The first, second and fourth aspects of this Option enshrine existing principles.

With respect to the first two issues, the OBA supports Option 2's suggestion to amend the ESA to clearly state the existing burden of proof that lies with the applicant and the existing standard of proof of a "balance of probabilities". Stating these existing principles expressly in the legislation would add clarity and predictability for parties to the review process who may not be familiar with the OLRB's caselaw establishing these principles.

The fourth aspect of Option 2 addresses the OLRB's powers, which are currently stated in section 119 (6) and (7) of the ESA. These provisions grant the OLRB broad powers to exercise the powers of an ESO including, but not limited to, the power to amend, rescind or affirm the Order under review, to issue a new Order, to issue an Order where the ESO refused to do so or affirm the refusal to issue an Order. These powers are broader than Option 2's wording. If the intention of this aspect of Option 2 is to reflect and not narrow the existing powers of the OLRB, then the OBA supports this aspect of Option 2 as long as the language used in the new statutory provision is revised to reflect the existing broad wording of section 119(6) and (7) of the ESA.

The new aspect of Option 2 appears to be focusing the review process on whether the ESO's Order (or presumably the ESO's refusal to issue an Order) is "wrong". This aspect of Option 2 would presumably alter the current hearing *de novo* process to instead focus the proceeding on directly reviewing the ESO's decision/Order. To the extent that this change may result in more detailed and thoughtful decisions by ESOs it would benefit the overall system and hopefully lead to stronger decision making in the first instance, saving parties the time and expense of OLRB proceedings. What is not expressly addressed in the Interim Report is if this aspect of Option 2 would remove the parties' existing ability to tender new evidence before the OLRB that was not before the ESO. The OBA supports expressly

preserving the ability to bring new evidence before the OLRB, given that at the ESO stage relevant documentation may not have been requested by the ESO, may not have been available to the parties, may not have been producible within the timeline requested by the ESO or the parties may not have recognized the relevance of various types of documentation, particularly if they were self-represented at that stage of the process. Both parties should be able to tender new evidence to support their position in the Application for Review as a matter of fairness and justice.

Support for Option 3 of the Interim Report:

> Option 3 - Increase regional access to the review process. To facilitate this, the Ministry of Labour might appoint part-time vice chairs in various cities around the province (perhaps in the main urban centres in each of the 8 judicial districts in Ontario or in the 16 centres where the Office of the Worker Adviser (OWA) has offices) who would have training and expertise in the ESA only (not in labour relations) and who could conduct reviews on a local basis. This would make attending and participating in the review process more accessible and less expensive for both employees and employers.
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> Special procedures, like pre-review meetings with the parties could be scheduled in advance to ensure narrowing of the issues, agreement on facts and perhaps settle cases, much like pre-trials in civil cases. The appointment of local ESA Vice-Chairs of the OLRB is similar to a proposal Professor Arthurs made to the federal government to deal with the special needs of distant communities (see: Fairness at Work, p. 207).

The OBA supports Option 3. While the OLRB currently hears some cases in regional centres, we understand that, as a result of their being few, if any, vice-chairs in these communities, the cost of travel, and time consumed, in attending such hearings outside Toronto is a burden to the taxpayer. The reality remains, however, that if hearings are not held in regional centres, the cost to attend such hearings in Toronto may be prohibitive for parties living in the regions, thereby decreasing the likelihood a party will file an Application for Review, even in circumstances where they may be justified. The OBA views this as an issue of access to justice.

It is acknowledged that, currently, ESA cases are not given priority at the OLRB. However, these are often the cases before the OLRB involving individuals most likely to be vulnerable parties. Option 3 would address this concern by creating a category of vice-chairs specializing in ESA matters. In addition to expediting complaints, this would also likely

result in greater consistency in the decisions of the OLRB, where those decisions are largely issues by a small, select and specialized group of vice-chairs.

Finally, Option 3 advocates for specialized procedures, like pre-review meetings, which would allow for a better use of resources by focusing the parties (often unrepresented) on the matters in issues, thereby expediting any eventual hearing. Similarly, such specialized procedures would result in additional settlement opportunities in a structured context in the presence of an expert from the OLRB. These results would benefit both the parties, and the OLRB's processes.

Support for Option 4 of the Interim Report:

> Option 4 - Request OLRB to create explanatory materials for unrepresented parties. There will always likely be a significant number of unrepresented parties at the OLRB. One straightforward way to assist is by ensuring that memoranda in plain language are prepared to assist self-represented individuals, both employees and employers, with respect to both the procedure and the applicable principles of law, including the burden of proof and basic rules of evidence. These sorts of memoranda have proven to be of great assistance to self-represented individuals in other legal proceedings including in criminal prosecutions where an understanding of the burden of proof and the rights of the accused in a criminal prosecution are of fundamental importance to the accused.

The OBA supports Option 4. Creating documents in plain language to assist unrepresented parties before the OLRB would be a common sense method of educating both employers and employees about the appeal process, burden of proof and evidentiary issues they would be required to meet. Such documents would enhance access to justice by de-mystifying tribunal processes and could improve the OLRB case load by providing appellants with more information to assess the strength of their appeal prior to attending at a LRO meeting.

Support for Option 5 of the Interim Report:

> Option 5 - Increase support for unrepresented complainants. The criticism of the settlement process at the OLRB set out above in section 5.5.5.2 would be addressed at least in part if currently unrepresented complainants were represented in the review process at the OLRB. Two possible ways of increasing support for unrepresented complainants include (a) increasing resources and expanding the mandate for the Office of the Worker Advisor (OWA); and (b) pro bono assistance.

The OBA generally supports Option 5(a) (increasing resources and expanding the mandate for the Office of the Worker Advisor (OWA)), but with certain important provisos that are set out below to ensure equal access and support for employees and employers:

> **Proviso #1:** If the OWA is to provide legal representation to unrepresented complainants, all services should be provided by properly trained lawyers or paralegals, similar to the services provided by the Human Rights Legal Support Centre to applicants under the Ontario *Human Rights Code*. In this way, it is hoped that the OWA would not only increase information and resources available to unrepresented complainants before the OLRB, but would theoretically also serve the gatekeeping function of bringing an early resolution to non-meritorious proceedings, or of discouraging such proceedings altogether.
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> **Proviso #2:** In addition to Proviso #1, to ensure fairness, if the OWA is to receive increased resources and an expanded mandate, the Office of the Employer Advisor (OEA) should also receive the same increase in resources and the same expanded mandate. There are many employers in Ontario, especially small and medium-sized businesses, who, like unrepresented complainants, would benefit from greater access to information and resources throughout the OLRB process.

With respect to Option 5(b), the OBA is generally supportive of the creation of a list of lawyers willing to provide pro bono legal assistance to unrepresented complainants, but only on the condition that a mirror list also be created for lawyers willing to assist unrepresented employers on a pro bono basis.

Closing Comments

The OBA appreciates the opportunity to provide our input to the Special Advisors' Interim Report, and hope that these focused comments will assist the Special Advisors in this broad review of the significant changes in Ontario workplaces. We hope that the comments reflected in this submission, which have endeavoured to be balanced and reflective of both employee and employer interests, will assist in this next phase of the Special Advisors' work.