Submission to the Standing Committee on Finance and Economics relating to Bill 148, Fair Workplaces, Better Jobs Act, 2017

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President
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CUPE Ontario

The Canadian Union of Public Employees (CUPE) Ontario is the largest union in the province with more than 260,000 members in virtually every community and every riding in Ontario. CUPE members provide services that help make Ontario a great place to live. CUPE members are employed in five basic sectors of our economy to deliver public services: health care, including hospitals, long-term care and home care; municipalities; school boards in both the separate and public systems; social services; and postsecondary education. CUPE members are your neighbours. They provide care at your hospital and long-term care home. They deliver home care for your elderly parents. They collect your recyclables and garbage from the curb. They plough your streets and cut the grass in your parks and playgrounds. They produce and transmit your electricity, and when the storm hits in the middle of the night, they restore your power. CUPE members teach at your university and keep your neighbourhood schools safe and clean. They take care of your youngest children in the child care centre and make life better for developmentally challenged adults. They protect at-risk children as well as those struggling with emotional and mental health issues. Our members do this work every day, and as a collective experience it equips us to make a positive and informed contribution to the discussions regarding labour and employment law in the *Fair Workplaces, Better Jobs, 2017* (Bill 148).

Introduction

The current Ontario *Employment Standards Act (*ESA) and *Labour Relations Act* (LRA) have not had a major update in decades and do not fully meet the needs of the current labour market. There is a growing inequality of power between workers and employers. Bill 148 provides an historic opportunity to help reshape labour and employment law in Ontario and address this power differential.

Advancing the goals of decent work must be central to Bill 148. Reforms must help workers who want to exercise their constitutional right to join a union and engage in meaningful collective bargaining to improve their wages and working conditions. They must also set a strong minimum floor for non-unionized workers.

The proposed changes advanced in Bill 148 have been made possible by years of mobilizing and lobbying among union members, worker advocates, anti-poverty activists, faith leaders and many more, working in collaboration with the Fight for $15 and Fairness campaign, the Ontario NDP, and the Ontario Federation of Labour's Make It Fair campaign.

We are encouraged by the inclusion of proposals in the bill such as the increase of the minimum wage to $15 an hour. However, there are many other aspects of the bill that fall far short of advancing the cause of decent work. Workers in this province are not treated equally under this bill. Instead, rights are applied on an ad-hoc basis to certain sectors instead of fairly and across the board. Furthermore, the bill does not sufficiently strengthen the minimum floor of protections provided by the ESA. The gap between needs and legislation remains problematically large.

While there are a variety of issues that could be strengthened to help workers in Bill 148, in this submission we will provide our take on the most pressing issues facing the LRA and ESA. Our recommendations in their totality would go a long way to improving workers' lives and addressing the problem of vulnerability, precarity, decent work and unequal access to the constitutionally protected right of meaningful collective bargaining. We also want to endorse the recommendations from both the Ontario Federation of Labour and the Workers Action Centre submissions.

Recommendations

Labour Relations Act Amendments:

Card check: In Canada, there are two main ways in which workers can organize into unions and establish bargaining rights: card check or mandatory vote. Card check requires that a majority of workers sign a card stating they wish to be represented by the union, and once that happens, they will be certified by the labour board as the recognized bargaining agent.

Mandatory votes require that a vote be held and that a majority of ballots cast are in favour of joining the union. Mandatory vote systems are almost never free of employer intimidation of workers before the vote. Card check encourages certification by avoiding employer intimidation and promotes union density. Currently the construction sector and, because of recent federal legislation, all workers under federal jurisdiction in Ontario have access to card check and all other sectors have mandatory vote. Bill 148 proposes to restore card check, but only for the building services industry, home care and community care industries and temporary help agency industry. We believe that card check should be available for all sectors.

Recommendation(s):

Amend 15.3 of the LRA by striking out subsections (1), (2) and (3).

Amend subsection 15.3 (4) of the LRA by striking out "specified industry".

Amend section 15.3 of the LRA to add the following:

Non-application to construction industry

(25) This section does not apply with respect to an employer as defined in subsection 126(1).

Bargaining unit consolidation: Many CUPE members work at a single employer with multiple bargaining units. In some cases, CUPE represents all of these bargaining units and in other cases there are multiple unions present. The proposed legislation gives the Ontario Labour Relations Board power to:

1. Consolidate newly certified bargaining units with other existing bargaining units, where those units are represented by the same union. This must occur within 90 days of certification.

   We agree with this idea, as it would help smaller units leverage effective bargaining power, however, we disagree with the 90-day limit; and

2. Consolidate bargaining units from multiple unions.

   We do not agree with this new consolidation power in circumstances where there are multiple unions. For any member who has been through representation votes in their workplace, they will know this happened because of a merger or amalgamation. But this change would give an employer or any other union the right to call for this at any time. This will cause representational conflicts between unions where unions spend time fighting each other over workers who are already in a union. And it gives the employer the upper hand to cause these kinds of conflicts.

Additionally, we believe that the Labour Board should be able to combine existing units into one, where there is a single union involved and a common employer operating in multiple locations.

Recommendation(s):

Amend subsection 15.2 (1) of the LRA to add the following:

3. The same union holds bargaining rights for all of the affected bargaining units

Successor rights: When a unionized business is sold, successor rights provide workers with bargaining and collective agreement rights with the new employer. One major exception is that these rights have generally not been applied to contracting out or contract tendering situations, in which a lead company contracts out its work to a subcontractor. Bill 148 extends successor rights to just the building services industry (security, food services, and cleaning). We believe that successor rights should be available for all sectors.

Recommendation(s):

Amend subsection 69.1 (1) of the LRA to reflect the following:

Successor rights, contracted services

69.1 (1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager or occupant, or by or to an enterprise owner or manager or occupant, that are related to providing services at or to the premises, occupant or

enterprise, including cleaning or housekeeping services, food services, security services and homemaking or personal support services, and any other kind of contracted services.

Repeal subsection 69.1 (2) of the LRA.

Amend clause 69.1 (3) (a) of the LRA by adding "or, in the case of homemaking services or personal support services, at premises where the employees regularly provide the services" at the end of the clause.

Amend clause 69.1 (3) (c) of the LRA to reflect the following:

(c) if substantially similar services are subsequently provided, whether at the same or different premises, under the direction of another employer.

Repeal section 69.2 of the LRA.

Repeal subsection 13 (1) of the *Fair Workplaces, Better Jobs Act.*

Repeal subsection 13 (3) of the *Fair Workplaces, Better Jobs Act*.

Anti-scab (a.k.a. replacement workers): When an employer hires scab labour during a strike or lockout, it undermines the progress of collective bargaining and can prolong labour disputes. In keeping with a long-held principle of our union and the entire labour movement, we propose that the government should introduce a ban on an employer's right to use scab workers.

Recommendations:

See Appendix 1 for amendments.

Automatic First Contract Arbitration: Employers regularly use tactics to avoid reaching a first collective agreement and undermine the viability of newly certified bargaining units. First Contract Arbitration ends the immediate dispute and after a hearing would impose an agreement, allowing both parties to establish mature and enduring bargaining relationships.

The current Labour Relations Act provides some access to First Contract Arbitration, notably when "employers refuse to accept the right of their employees to engage in collective bargaining." However, access to First Contract Arbitration is not automatic, and employers are able to find ways to block the successful completion of bargaining without triggering First Contract Arbitration.

Bill 148 grants a new type of mediation-intensive model before seeking arbitration for all first contract disputes. While this model is better than the status quo, CUPE believes that automatic FCA upon request would encourage workers who want to join a union but might be deterred if they fear that they will need to strike to get a first collective agreement.

Recommendation(s):

Amend paragraph 4 of subsection 43.1 (5) of the LRA to reflect the following:

In the case of an order under clause (2) (a), a dismissal under clause (2) (b), a party may make a second application under subsection (1) and the Board shall direct the settlement of a first collective agreement by mediation-arbitration if the Board is satisfied that, since the Board made its original decision under subsection (2), the applicant has taken all reasonable steps to engage in good faith collective bargaining with the assistance of a mediator.

Amend subsection 43.1 (6) of the LRA by adding "or paragraph 4 of subsection (5)" after "clause (2) (c)".

Exemptions to the Labour Relations Act: There is an emerging body of jurisprudence from the Supreme Court of Canada that supports the greatest possible scope for freedom of association, including the right to collectively bargaining. Currently there are several categories of workers who are not covered by the Labour Relations Act. This includes agricultural, horticultural, and domestic workers who are particularly vulnerable and the denial of their ability to access full collective bargaining rights makes matters worse. And in recognition of Ontario's commitment to the recommendation to the Truth and Reconciliation Commission, it is of added importance to end the exclusion of persons employed in hunting and trapping, a great many of whom are indigenous. The Labour Relations Act should reflect the decisions made by the Supreme Court by removing most exclusions.

Recommendation(s):

Repeal clause 1 (3) (a); clause 3 (a); clauses 3 (b), (b. 1) and (c) of the LRA.

Early disclosure of workplace information: Workers who want to unionize their workplaces face many structural barriers to achieving this goal. One such barrier is the lack of information about how many other people are employed at their workplace, and how to contact them. Providing unions with access to employee lists with full contact information and other workplace details would help remove this barrier to workers exercising their right to unionize. CUPE also believes that Bill 148 should repeal the requirement that a union's application for certification exactly mirror its initial application for the list, as employers often inflate lists with management causing difficulty in the certification process. Unions need the ability to amend their applications once they have more information.

Recommendation(s):

Repeal subsections 6.1 (12) and 6.1 (13) of the LRA.

<u>Employment Standards Act Amendments:</u>

Opting out of the Employment Standards Act: The Employment Standards Act is "the floor" or more accurately, the very minimum standards. Workers should never fall below that floor and instead it should be something to negotiate up from. The proposed legislation would allow some employers to maintain inferior provisions than the Employment Standards Act in our collective agreements. We believe that the Employment Standards Act should never allow this. Instead, the Employment Standards Act should act as a hard minimum which no worker will fall below and no loop holes should exist.

Recommendation(s):

Repeal subsection 21.4 (3) of the ESA.

Repeal subsection 21.5 (3) of the ESA.

Repeal subsection 21.6 (4) of the ESA.

Just cause: Unlike the legislation that covers workers in the federal sector, Ontario's Employment Standards Act does not require employers to have "just cause" for terminating an employee's employment. This means an employer can dismiss an employee for any reason at any time, even if they have passed probation, have seniority and did nothing wrong. This is particularly problematic in the case of temporary foreign workers. As some of Ontario's most precarious workers, employer retaliation can mean being sent back to their country of origin. The government has not proposed any legislation to protect Ontario workers in this regard. The Employment Standards Act should be amended to provide protection against unjust dismissal, meaning employees could not be dismissed without just cause, and could be reinstated if they were dismissed without cause. By extending just cause provisions to all workers, we will also be able to cover those workers who might, in reality, be terminated as a result of trying to organize a union.

Recommendation(s):

See Appendix 2 for amendments.

Equal pay for equal work: Under the Employment Standards Act it is illegal to pay a woman less for doing work that is "substantially the same" as a man. However, there are many other exceptions where it is legal to pay different wages for the same work, such as for causal or temporary workers, seasonal, part-time, students, etc. Bill 148 has proposed changes that state if workers (who are not full-time) are doing "substantially the same kind of work in the same establishment" as full timers, they must be paid the same. Our concern is that the government has proposed a variety of exemptions to this including merit, quantity/quality of production and "other factors". Even once the Equal Pay provisions come into effect, the government has written in a grandparent clause which will permit employers to continue treating workers unfairly until expiration of any collective agreement. CUPE proposes that these exceptions should be abandoned and that the only reason to allow for different pay is length of service.

Recommendation(s):

See Appendix 3 for amendments.

Sick leave & Domestic Violence / Sexual Violence Leave: Under the current legislation, workers whose employer regularly employs 50 or more employees are entitled to 10 days of unpaid Personal Emergency Leave. The government has proposed legislation that allows all workers to take Personal Emergency Leave, and introduces two days of paid leave as part of the ten days total available annually for Personal Emergency Leave. These days can be used for sick leave and can also be used for bereavement, or by workers experiencing domestic or sexual violence or the threat of sexual or domestic violence. CUPE believes that seven of these Personal Emergency Leave days should be paid for and that a separate allotment of ten paid days should be available for any workers who experience domestic or sexual violence.

Recommendation(s):

Amend subsections 50 (5) of the ESA to reflect the following:

(5) An employee is entitled to take a total of seven days of paid leave and three days of unpaid leave under this section in each calendar year.

Recommendation(s):

See Appendix 4 for amendments.

Minimum wage: The government has made admirable headway on increasing the minimum wage. However, the government proposes keeping a multi-tier wage system intact and paying students and those who serve liquor at a lower minimum wage. CUPE stands in opposition to two-tier agreements in our collective agreements and also with regards to the minimum wage. We also note that this provision is particularly discriminatory against women workers who make up almost 75% of liquor severs.

Recommendation(s):

Amend subsection 23.1 (1) of the ESA to reflect the following:

Determination of minimum wage

(1) The minimum wage is the following:

1. On or after January 1, 2018, but before January 1, 2019, the amount set out below for the following classes of employees:

i. For employees who are homeworkers, $15.40 per hour.

ii. For any other employee, $14.00 per hour.

2. On or after January 1, 2019 but before October 1, 2019, the amount set out below for the following classes of employees:

i. For employees who are homeworkers, $16.50 per hour.

ii. For any other employee, $15.00 per hour.

3. From October 1, 2019 onwards, the amount determined under subsection (4).

Repeal subsections 23.1 (2) and (3) of the ESA.

Misclassification: Since the Employment Standards Act only covers people who fit under the definition of "employee" under that Act, workers who are really employees under the Employment Standards Act are sometimes "misclassified" by their employers as "independent contractors". This leads to the employer not covering these workers under the Employment Standards Act. The proposed legislation would prohibit employers from misclassifying employees as "independent contractors." However, it would not include "dependent contractor" under the definition of employee. We believe that the definition of "employee" should also include dependent contractor as defined in the Labour Relations Act. The Bill also puts the onus on the employer to prove the person is not an employee, instead of on the worker to prove they are. Enforcement of this will largely rely on workers to file claims for misclassification. CUPE believes that a more proactive step to enforcing the new prohibition on misclassification would be to create a legal presumption of employee status for workers performing or providing labour services to the employer for a fee.

Recommendation(s):

Amend Subsection 1 (1) of the ESA to add the following:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor; ("entrepreneur dépendant")

Amend subsection 1 (3) of the *Fair Workplaces, Better Jobs Act* to reflect the following:

(3) Clause (c) of the definition of "employee" in subsection 1 (1) of the Act is repealed and the following substituted:

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees,

(c. 1) a dependent contractor, or

Appendix 1

Anti-scab

Recommendation(s):

Amend Section 78.1 of the LRA by adding the following:

Definitions

78.1 (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them; ("employeur")

"person" includes,

(a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and

(b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

Application

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
2. The strike vote was conducted in accordance with subsections 79 (7) to (9).
3. At least 60 per cent of those voting authorized the strike.

Interpretation

(3) For the purposes of this section and section 78.2, a bargaining unit is considered to be,

(a) locked-out if any employees in the bargaining unit are locked-out; and

(b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

Use of bargaining unit employees

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

Use of newly-hired employees, etc.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.

2. The work of an employee in the bargaining unit that is on strike or is locked out.

3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

Use of others at the strike, etc., location

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.

2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.

3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.

4. A person, whether paid or not, other than an employee of the employer or a person described in clause 1(3)(b).

5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

Prohibition re replacement work

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

No reprisals

(8) No employer shall,

(a) refuse to employ or continue to employ a person;

(b) threaten to dismiss a person or otherwise threaten a person;

(c) discriminate against a person in regard to employment or a term or condition of employment; or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or is locked out.

Burden of proof

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

Definition

78.2 (1) In this section, "specified replacement worker" means a person who is described in subsection 78.1 (5) or (6) as one who must not be used to perform the work described in paragraphs 2 and 3 of subsection 78.1 (5).

Permitted use of specified replacement workers

(2) Despite section 78.1, specified replacement workers may be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to provide the following services:

1. Secure custody, open custody or the temporary detention of persons under a law of Canada or of the Province of Ontario or under a court order or warrant.

2. Residential care for persons with behavioural or emotional problems or with a physical, mental or developmental handicap.

3. Residential care for children who are in need of protection as described in subsection 37 (2) of the *Child and Family Services Act*.

4. Services provided to persons described in paragraph 2 or 3 to assist them to live outside a residential care facility.

5. Emergency shelter or crisis intervention services to persons described in paragraph 2 or 3.

6. Emergency shelter or crisis intervention services to victims of violence.

7. Emergency services relating to the investigation of allegations that a child may be in need of protection as described in subsection 37 (2) of the *Child and Family Services Act.*

8. Emergency dispatch communication services, ambulance services or a first aid clinic or station.

Idem

(3) Despite section 78.1, specified replacement workers may also be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to prevent,

(a) danger to life, health or safety;

(b) the destruction or serious deterioration of machinery, equipment or premises; or

(c) serious environmental damage.

Notice to trade union

(4) An employer shall notify the trade union if the employer wishes to use the services of specified replacement workers to perform the work described in subsection (2) or (3) and shall give particulars of the type of work, level of service and number of specified replacement workers the employer wishes to use.

Time for giving notice

(5) The employer may notify the trade union at any time during bargaining but, in any event, shall do so promptly after a conciliation officer is appointed.

Idem, emergency

(6) In an emergency or in circumstances which could not reasonably have been foreseen, the employer shall notify the trade union as soon as possible after determining that he, she or it wishes to use the services of specified replacement workers.

Consent

(7) After receiving the employer's notice, the trade union may consent to the use of bargaining unit employees instead of specified replacement workers to perform some or all of the proposed work and shall promptly notify the employer as to whether it gives its consent.

Use of bargaining unit employees

(8) The employer shall use bargaining unit employees to perform the proposed work to the extent that the trade union has given its consent and if the employees are willing and able to do so.

Working conditions

(9) Unless the parties agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to bargaining unit employees who perform work under subsection (8) while they perform the work.

Priority re replacement workers

(10) No employer, employers' organization or person acting on behalf of either shall use a specified replacement worker to perform the work described in subsection (2) or (3) unless,

(a) the employer has notified the trade union that he, she or it wishes to do so;

(b) the employer has given the trade union reasonable opportunity to consent to the use of bargaining unit employees instead of the specified replacement worker to perform the proposed work; and

(c) the trade union has not given its consent to the use of bargaining unit employees.

Exception re emergency

(11) In an emergency, the employer may use a specified replacement worker to perform the work described in subsection (2) or (3) for the period of time required to give notice to the trade union and determine whether the trade union gives its consent to the use of bargaining unit employees.

Application for directions

(12) On application by the employer or trade union, the Board may,

(a) determine, during a strike or a lock-out, whether the circumstances described in subsection (2) or (3) exist and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;

(b) determine whether the circumstances described in subsection (2) or (3) would exist if a strike or lock-out were to occur and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;

(c) give such other directions as the Board considers appropriate.

Reconsideration

(13) On a further application by either party, the Board may modify any determination or direction in view of a change in circumstances.

Idem

(14) The Board may defer considering an application under subsection (12) or (13) until such time as it considers appropriate.

Burden of proof

(15) In an application or a complaint relating to this section, the burden of proof that the circumstances described in subsection (2) or (3) exist, lies upon the party alleging that they do.

Agreement re specified replacement workers

(16) The employer and the trade union may enter into an agreement governing the use, in the event of a strike or lock-out, of striking or locked-out employees and of specified replacement workers to perform the work described in subsection (2) or (3).

Formal requirements

(17) An agreement under subsection (16) must be in writing and must be signed by the parties or their representatives.

Idem

(18) An agreement under subsection (16) may provide that any of subsections (4) to (11) do not apply.

Term of agreement

(19) An agreement under subsection (16) expires no later than the earlier of,

(a) the end of the first strike described in subsection 78.1 (2) or lock-out that ends after the parties have entered into the agreement; or

(b) the day on which the parties next make or renew a collective agreement.

Prohibited circumstances

(20) The parties shall not, as a condition of ending a strike or lock-out, enter into an agreement governing the use of specified replacement workers or of bargaining unit employees in any future strike or lock-out. Any such agreement is void.

Enforcement

(21) On application by the employer or trade union, the Board may enforce an agreement under subsection (16) and may amend it and make such other orders as it considers appropriate in the circumstances.

Filing in court

(22) A party to a decision of the Board made under this section may file it, excluding the reasons, in the prescribed form in the Superior Court of Justice and it shall be entered in the same way as an order of that court and is enforceable as such.

Appendix 2

Just Cause

Recommendation(s):

Amend section 62.1 of the ESA by adding the following:

Termination without just cause

62.1 (1) Where the period of employment of an employee with an employer is three months or more, an employer shall not discharge that employee without just cause.

Complaint

(2) An employee who is discharged without just cause may make a complaint to the Ministry in accordance with section 96 (1) within • days from the date on which the employee was dismissed.

Reasons for dismissal

(3) Where an employer dismisses a person described in subsection (1), the person who was dismissed or an employment standards officer may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Officer to assist parties

(4) On receipt of a complaint under subsection (2), an employment standards officer assigned to investigate the complaint shall endeavour to assist the parties to the complaint to settle the complaint, and any settlement reached shall be governed by section 101.1.

Where complaint not settled within reasonable time

(5) Where a complaint is not settled under subsection (4) within such period as the employment standards officer endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the employment standards officer shall, on the written request of the person who made the complaint request that the complaint be referred to an adjudicator under subsection (6),

> (a) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and
>
> (b) deliver to the Minister the complaint made under subsection (2), any written statement giving the reasons for dismissal provided pursuant to subsection (3) and any other statements or documents the employment standards officer has that relate to the complaint.

Reference to adjudicator

(6) The Minister shall, on receipt of a report pursuant to subsection (5), appoint a Chair or Vice-Chair of the Ontario Labour Relations Board or an arbitrator on the Minister of Labour approved list of arbitrators as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection (3).

Hearing to be held

(7) An adjudicator to whom a complaint has been referred under subsection (6) [shall consider the complaint within 30 days of his or her appointment].

Powers of adjudicator

(8) An adjudicator to whom a complaint has been referred under subsection (6) shall determine the procedure to be followed, and has all of the powers of an arbitrator under section 48 (12) of the *Labour Relations Act, 1995*.

Decision of adjudicator

(9) An adjudicator to whom a complaint has been referred under subsection (6) shall,

> (a) determine whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
>
> (b) send a copy of the decision with the reasons therefore to each party to the complaint and to the Minister.

Where unjust dismissal

(10) Where an adjudicator decides pursuant to subsection (9) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to,

> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his or her employ; and
>
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Exception

(11) This section does not apply to a person who is a member of a bargaining unit governed by a collective agreement which provides protection against unjust dismissal.

Amend section 42 of the ESA to reflect the following:

Equal pay for equal work: Sex

42. (1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Same

(1.1) For the purposes of s. 42 (1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

Exception

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of,

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

Reduction Prohibited

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

Organizations

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

Deemed Wages

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

Appendix 3

Equal pay for equal work

Recommendation(s):

Amend Section 42.1 of the ESA to reflect the following:

Equal pay for equal work: Employment Status

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Same

(1.1) For the purposes of s. 42.1 (1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

Exception

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code.

Reduction prohibited

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

Organizations

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

Deemed wages

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

Written response

(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

Amend section 42.2 of the ESA to reflect the following:

Equal pay for equal work: Difference in assignment employee status

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Same

(1.1) For the purposes of s. 42.2 (1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

Exception

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of,

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code.

Reduction prohibited

(3) No client of a temporary help agency shall reduce the rate of pay of an employee in order to assist a temporary help agency in complying with subsection (1).

Organizations

(4) No trade union or other organization shall cause or attempt to cause a temporary help agency to contravene subsection (1).

Deemed wages

(5) If an employment standards officer finds that a temporary help agency has contravened subsection (1), the officer may determine the amount owing to an assignment employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that assignment employee.

Written response

(6) An assignment employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the temporary help agency, and the temporary help agency shall,

(a) adjust the assignment employee's pay accordingly; or

(b) if the temporary help agency disagrees with the assignment employee's belief, provide a written response to the assignment employee setting out the reasons for the disagreement.

Amend section 42.3 of the ESA to add the following:
Equal pay for Equal Work: Pay transparency

42.3 (1) No later than May 15 of every year, each employer shall file an annual Pay Transparency Report with the Minister.

Contents of report

(2) The annual Pay Transparency Report referred to in subsection (1) shall disclose the following information relating to the prior 12-month period ending on March 31 of each year:

(a) annual individual compensation of male employees, categorized by each classification and job status within the establishment,

(b) annual individual compensation of female employees categorized by each classification and job status within the establishment,

(c) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of male employees categorized by each classification and job status within the establishment,

(d) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of female employees categorized by each classification and job status within the establishment,

(e) the number of steps in a pay range by each classification and job status within the establishment,

(f) the rate of progression through a pay range by each classification and job status within the establishment.

Report to be made available

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

Prohibitions

(4) No employer or temporary help agency may do any of the following:

(a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages;

(b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.

Reprisal

(5) Section 74 applies to this Part with no exceptions.

Appendix 4

Sick leave & Domestic Violence / Sexual Violence Leave

Recommendation(s):

Amend Section 29 (1) of Schedule 1 of the Bill by deleting proposed paragraph 50 (1) (4) of the ESA.

Strike out Section 29 (2) of Schedule 1 of the Bill.

Add the following Section 50.0.1 to the ESA:

Domestic or sexual violence leave

50.0.1 (1) An employee is entitled to a leave of absence because of sexual or domestic violence, or the threat of sexual or domestic violence, experienced by the employee or an individual described in section 50 (2).

Advising employer

(2) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so.

Same

(3) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning.

Limit

(4) An employee is entitled to take a total of 10 days of paid leave and 60 days of unpaid leave under this section in each calendar year.

Leave deemed to be taken in entire days

(5) If an employee takes any part of a day as paid or unpaid leave under this section, the employer may deem the employee to have taken one day of paid or unpaid leave on that day, as applicable, for the purposes of subsection (4).

Paid days first

(6) The 10 paid days must be taken first in a calendar year before any of the unpaid days can be taken under this section.

Domestic or sexual violence leave pay

(7) Subject to subsection (8), if an employee takes a paid day of leave under this section, the employer shall pay the employee,

(a) either,

(i) the wages the employee would have earned had they not taken the leave, or

(ii) if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee had they not taken the leave; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

Domestic or sexual violence leave on public holiday

(8) If a paid day of leave under this section falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section.

Evidence

(9) An employer may require an employee who takes a leave under this section to provide evidence reasonable in the circumstances of the employee`s entitlement to leave.

Leave under ss. 49.1, 49.3, 49.4, 49.5, 49.6 and 50

(10) An employee’s entitlement to leave under this section is in addition to any entitlement to leave under sections 49.1, 49.3. 49.4, 49.5, 49.6 and 50.