

Employment Standards Review 2005

I will be commenting on section 3 of the discussion guide that was provided on the government website.

The compliance section of the employment standards code has left me wondering about how effective it is, as no matter how well a law is written, if it is not enforced, it becomes useless. Unfortunately through my own personal experiences, I believe that the employment standards code lacks the teeth to ensure compliance of "The Code".

The best way in my personal opinion to promote greater compliance is to ensure that those individuals that do not follow the code are punished severely. In my opinion, this would be the best deterrent that is available, which in turn would lead to greater compliance, which after all is far more effective than prosecuting a large number of individuals that choose to not follow "The Code"

For instance, I will give a little background into my personal experience that I have had with the Employment Standards Code. Recently my wife found out that she was no longer welcome back to work after a year's maternity/parental leave. Clearly with the meeting that we had with her employers initially, they were aware that this was not something that should be done, but nonetheless, they had made a business decision and had decided to terminate her employment, hoping that we would take their offer of severance and proceed with our lives. This situation is perhaps the most heinous of all employment scenarios, and one that should be dealt with more severely than other areas within the code. However, if a formal investigation was done and if there was sufficient evidence to hold a conviction, what would the former employers have to pay? Wages owing until the individual found a job (and it's important to note that the individual must try to mitigate damages), and perhaps if she's lucky, some monetary award for damages to dignity etc. There isn't even interest attached to this and this whole process could easily take close to 1 – 2 years, simply a cost of doing business in this instance. Wait the individual out, if you do lose, no harm done, simply pay the small fine and move on, no public knowledge etc. In this respect, I can see that there are a lot more situations that don't proceed, due to the hassle and lack of any measurable reward and therefore a reason to proceed.

Indeed there is no maximum recoverable in this case, however it is up to the complainant to prove that they are actively looking for work, and they are the ones that must try to mitigate damages. Ask yourself this question – With the state of daycare in this province especially for infant spots what do you do while you are looking for employment. It typically takes 2 – 3 months to find daycare arrangements for an infant. Do you find daycare arrangements and then look for a job, or the other way around? It could prove to be quite the dilemma especially for a new mother, or a single parent, or someone who doesn't have a support group to rely on. Thankfully this was not the case in our situation, but it's definitely not a far stretch to see that it could be. If this did happen to a single parent, I can see that this incident wouldn't even be pursued. The parent would take the

offer of severance, be thankful that they could get that money, and hope to find a new job before the severance monies ran out.

Lets now address the ability under “The Code” to force an employer to take this employee back into employment. I’m sure that this provision hasn’t even been used. If an employer doesn’t want you working for them, why would you go back? Furthermore, after 2 years of litigation, what would be the point of going back to work? I cannot see any reason to even keeping this option within the current employment standards code. If it were imposed, then there would be another individual that thought they had a secure job that would be out of work as well. Definitely not the ideal situation.

Coming up with appropriate enforcement techniques and tools is definitely not an easy task. One must be aware of the fact that some employers and in that case employees are ignorant of what “The Code” says and yet there are others that choose to ignore it altogether. You must balance both the ability for the employer to perform his duties to stay in business and make difficult decision, however ensure that the employee is treated equally under the law.

After thinking a great deal about this, I think that there needs to be an ability for a monetary fine to be imposed by either the director or the labour board, where the respondent is found to have contravened “The Code”. While this may not bode well for ignorance of the code – last time I checked, ignorance was not a reasonable excuse under Canadian law. Any citizen cannot do something and then say that “I didn’t know I couldn’t do that” – the courts wouldn’t allow it, therefore why would that be a reasonable excuse under labour law? Of course there must be some discretion in imposing a fine, however the fine would have to be sizable enough to ensure that it acts more as a deterrent to the law instead of trying to recover monies owed. Not paying overtime that is owed is nowhere near as damaging as failure to reinstate after a leave. On the later, if the employee was terminated and found a better job immediately after, then of course there wouldn’t be any damages, however does this make it right for the employer to do this – definitely not. This fine doesn’t even need to go to the complainant unless the director or labour board feels that some or all of it is needed. It is simply there to act as a deterrent. In the case of small businesses I think that a 5 figure fine would be a sufficient deterrent, however in the case of larger corporations, one may have to impose something in the lines of 6 figures +. This money could ensure that all claims are handled in an expedient fashion.

One must understand that any claim getting to the investigative stage is something that the individual feels strongly about and is willing to wait for an answer for. The individuals are not looking for a huge windfall, just some justice for what has been done to them. Under the current code violator’s names are not published at all. If they were, and a summary of the case was available to the public, then it would provide 2 benefits. It would deter companies from doing this in the future, and even employees as well. It would also provide the huge benefit of educating employers and employees alike. If someone had a question, they could simply find a case that was similar, and see what happened. Granted currently one can contact the 1-800 number to ask a question,

however from my personal experience, you can get two different answers to the exact same question thru this service. Something that definitely needs to be addressed.

It's important to note that we are talking about ensuring that "The Code" is adhered to. These enforcement tools are simply there to ensure compliance by ensuring that both parties know their rights and responsibilities. Any employer in their right mind if faced with a potential 6 digit fine would ensure that what he is about to do is right, and would ensure that what they are doing will stand up in a court of law.

I appreciate having this time to bring forth my point of view on this situation. Please feel free to contact me should you have any further questions.

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