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by e-mail (original by mail)

December 21, 2005

Secretary
Employment Standards Review
614-401 York Avenue
Winnipeg, MB R3C 0P8

Dear Sir/Madam:

I have practiced labour and employment law in Winnipeg since 1993. As such, I would like to comment about the *Employment Standards Code* ("the Code") and how it can be improved.

Firstly, a general observation: in non-unionized workplaces, it is crucial that employers and employees not be allowed to contract out of any aspect of the Code. I have learned that the reality of these workplaces is that, with very few exceptions, employers draw up employment contracts and offer them to new employees on a take-it-or-leave-it basis. In these workplaces, with very few exceptions, employees have no practical ability to influence the wording of their employment contracts. Therefore, if any form of contracting out is allowed, we can safely assume that employers will take advantage of the situation by building such contracting out into their standard-form agreements. Over the long-term, contracting out will become the norm, and the right in question will effectively become moot.

Another general observation: Winnipeg employers regularly violate the Code and get away with it. This is particularly true in workplaces where the staff tends to be young, and turnover tends to be high. For example, I know of a large Winnipeg workplace (which happens to be under federal jurisdiction), owned by a very large national employer, where employees are required to report for work 10 minutes early, but are never paid for those 10 minutes. Though this has gone on

for years, to my knowledge, no employee has ever complained, although this is a blatant violation of the *Canada Labour Code*.

Over the years, I have had numerous young employees in non-unionized Winnipeg workplaces contact me about Code violations by their employers. In some cases, I have volunteered to represent these young people *pro bono*. However, when I explained the process of pursuing their legal rights, some of these young people have lost interest, or simply focused their limited time on searching for a new job. As a result, their employers continue to get away with routinely violating the Code.

Therefore, based on my experience, the single most important change to the status quo is one which would require no amendments at all to the Code. Under section 117 of the Code, the Director of Employment Standards may investigate whether an employer is violating the Code and may take enforcement action against the employer. The reality is that the Employment Standards branch does not have the staff or budget to put section 117 into effect in a meaningful way. If the provincial government really wants to improve the lives of employees in non-unionized workplaces, it will increase the branch's budget so as to allow the branch to hire at least two full-time time staff whose only duties will be to implement section 117.

<u>Managers</u>

The Manitoba media have recently discovered that that the overtime provisions of the Code apply even to employees who are labeled "managers" by their employers. There is nothing new about this. The fact is that employers who want their senior staff to work long hours are free to structure their employment contracts in such a way that the employees work more than 40 hours a week, that the employees' annual remuneration is known in advance, and that the Code

is complied with. If the employer wants the employee to work 60 hours a week, and wants to pay them X dollars a year, the contract can say that the employee will be paid Y dollars an hour for the first 40 hours of work each week, plus 1.5Y dollars an hour for the next 20 hours a week, such that $52(Y \times 40 + 1.5Y \times 20) = X$, as long as Y is greater than minimum wage. This is not rocket science. Any large employer can easily structure contracts in this way.

In short, there is no need to exempt "managers" from the overtime provisions of the Code.

<u>Incentive-based work</u>

How do the minimum-wage provisions of the Code apply to so-called "incentive-based" work (what used to be called piece-work)? No doubt some employers would like to give employees piece-work to do either in the workplace or in their own homes, and would like to pay piece-work rates so low that some of the employees would wind up earning less than minimum wage. The question is: what good reasons could exist for amending the Code to allow for this?

Firstly, note that the Code only applies to "employees", not to independent contractors. If the person being paid to do the piece-work is truly an independent contractor, the minimum wage laws are irrelevant.

Secondly, note that employers are free to give to employees whatever production-based bonuses they wish over and above the minimum wage.

Thirdly, employers may legally terminate employees who are unable to maintain a reasonable production standard. If the termination occurs within the first 30 days of employment, the employer does not even have to give one pay period's notice, as per section 62(d) of the Code.

Therefore, there is no good reason to amend the Code to exempt employees doing piece-work from the minimum wage provisions. The interests of employers are already well protected.

Agricultural Workers

Section 3(1)(a) of the *Minimum Wages and Working Conditions Regulations* ("the Regulation") says that most of the effective part of the Code does not apply to employees engaged in agriculture. "Agriculture" is not defined. It should be. In the Supreme Court of Canada's decision in *Dunmore v. Ontario*, [2001] SCR 1016, we learned that workers in an Ontario mushroom factory were deprived of the right to join a union because Ontario labour legislation deemed them to be agricultural workers. At paragraph 4 of its decision, the court notes this fact.

It should go without saying that there is no logical reason to treat employees who work in a food-processing factory any differently than employees who work in any other factory, for purposes of the Code.

Though, to my knowledge, there has not been any litigation in respect of section 3(1)(a) of the Regulation, an amendment would be prudent. Additional language could be added along these lines: "For greater certainty, an employee is not deemed to be engaged in agriculture solely because that employee handles food or food products in the course of their employment."

Bereavement Leave

Section 210 of the *Canada Labour Code* contains modest provisions in respect of bereavement leave. All employees are entitled to up to three days unpaid leave.

In addition, employee with at least three months' service are entitled to receive this leave with pay. For compassionate reasons, the Code should contain similar provisions, at least providing for some form of bereavement leave. If the federal provisions are felt to be unduly generous, perhaps some compromise can be arrived at. Perhaps one day of paid leave plus up to two days of unpaid leave would be reasonable. In any event, Manitoba employees should be entitled at least to some amount of unpaid leave.

Termination Notice

Section 61 of the Code, dealing with individual termination, requires at least one pay period's notice of termination. Section 62(a) carves out an exception when the employer has a different general custom or practice. Section 63(1) adds that employers may establish such a practice by giving certain notice to employees and posting the notice. This is a pretty low threshold. It makes it pretty simple for employers to avoid giving any notice at all for individual terminations. This is not reasonable.

In my experience, a fair number of Winnipeg employers simply ignore section 61 altogether, particularly when dealing with young or unsophisticated employees. That is bad enough. It adds insult to injury when we make it relatively simple for employers to legally escape section 61 by using the relatively simple procedures set out in section 63(1). It would be reasonable to delete section 63 altogether.

Deductions

I was once approached by a young employee in a Winnipeg retail business. His employer had a policy: if there was a cash shortage, all employees on that shift would have the shortage automatically deducted from their wages. No effort was

made to discover who was to blame for the shortage, or if it was the result of theft or mere carelessness. Though I offered to represent the young employee *pro bono*, he lost interest and lost contact with me. For all I know, the employer is still doing the same thing today.

More than once I have been approached by young and unsophisticated employees, who have just been fired and whose employers have unilaterally deducted various amounts from their final paycheques. Often the pretext is that the employee has damaged some item in the workplace through their carelessness. Rather than suing the employee in Small Claims Court and having to prove that the employee was negligent, and having to prove the actual value of the damage, the employer simply sets a value and makes a deduction.

Various laws require employers to deduct income tax, CPP and EI from employees paycheques. In unionized workplaces, not only are union dues deducted, but it is common for deductions to be made in respect of various group insurance and pension plans. Even in non-unionized workplaces, there are sometimes compulsory group insurance and pension plans.

However, in order to protect employees such as ones mentioned above, it would be reasonable for the Code to contain new provisions in respect of deductions from wages. The Code should prohibit all deductions other than those required by law, those made pursuant to a collective agreement, or those made in respect of group insurance or pension plans. Based on my experience, there is a real need for this sort of protection in Manitoba today.

<u>Union Dues</u>

Section 90 of the Code makes corporate directors personally responsible for up to six months' unpaid wages and for unpaid vacation allowances. This section provides very valuable protection to employees in situations of bankruptcy,

receivership and winding up of businesses. It would be reasonable to extend section 90 to include up to six months of unpaid union dues. I will explain why. Take two workplaces, the first non-unionized and the second unionized. In the first, let's say workers are paid $10 an hour. The whole $10 is wages. If the corporation fails to pay the $10, the corporate directors are personally liable for the $10.

Say that workers in the second workplace are also paid $10 gross, but that 25 cents is deducted for union dues. Unions provide various services for their members, including retaining legal counsel to protect the legal rights of members when necessary. The worker still gets $10 of value: $9.75 in cash (direct value), and 25 cents in union protection (indirect value).

Why should the corporate directors have less personal liability in the second workplace than in the first? In short, there is no logical reason why they should. The directors in the first should be liable to pay $10 to the employee. The directors in the second should be liable to pay $9.75 to the employee and 25 cents to the union. This should be explicitly set out in the Code.

Thank you for giving me the opportunity to share my comments with you. Good luck in your important work.

Yours truly,

Elliot Leven