Manitoba Employment Standards Review 2005
December 12, 2005

The Workers' Organizing Resource Centre (WORC) welcomes the opportunity to make a submission to this review panel. Our experience over the past 7 years has convinced us that the Manitoba Employment Standards Code, and the compliance and enforcement mechanisms, must be altered dramatically if the legislation is to provide adequate protection for workers in this province. It is our hope that this panel will make recommendations that lead to changes that will enable workers, unions and community organizations such as WORC to use the legislation as a tool to advance the interests of all workers in Manitoba.

What is WORC

The WORC began in 1998 as an initiative of the Canadian Union of Postal Workers (CUPW) and community activists drawn from several areas of interest and experience. We have one paid part-time coordinator and a network of volunteers from the progressive community and the organizations that use and support WORC.

The WORC mandate is;

1. To help establish, maintain and facilitate community organizations that represent and enforce people's rights within our community;
2. To advocate on behalf of unorganized workers for protection of their rights in the workplace and beyond; and
3. To organize the unorganized.

Through the Coordinator and volunteers, WORC provides public education and advocacy for workers on a broad range of issues. In our first four and one-half years of operation we provided direct assistance to 2,400 people. Almost half of these cases involved employment standards issues ranging from the rights of independent contractors, unauthorized pay deductions and failure to pay for hours worked and holidays to unjust dismissal and psychological harassment.

The Purpose of Minimum Labour Standards

Labour standards are necessary to establish a minimum level of rights and benefits for workers and to reduce opportunities for abuse by employers. Adequate labour standards can provide dignity for workers and promote a work environment that is free from hostility. Law is necessary because of the imbalance of power between workers and employers. With increased competition in all spheres of our society, too often employers compete on the basis of their ability to exploit workers rather than their ability to use technology and organize work efficiently.

Effective legislated standards have become more important in the context of increased contracting out by employers who often use contracting out as a means of avoiding a collective agreement. The employers then impose lower wages and benefits often circumventing the provisions of labour law by designating their workers as self-employed contractors.

Our experience has led us to the conclusion that the provincial employment standards legislation is not working effectively for the very people it was designed to protect. Workers are excluded; they do not know their rights and the law is not being enforced. Law should protect the interests of the most vulnerable in our society and our employment standards code must be amended and enforced with that objective in mind.

We believe that the provincial government has a responsibility to provide leadership when it comes to minimum standards. Increased competition has placed greater pressure on provinces to lower standards and relax enforcement as a means of attracting investment. This downward spiral must be stopped and reversed. It is necessary for the provincial government to provide minimum standards that can be used effectively to protect workers instead of allowing employers to undermine what little rights workers have.

Psychological Harassment

Psychological harassment is a growing phenomenon that is reaching epidemic proportions in the workplace. It is something we can all relate to as any one of us may eventually suffer the consequences or we may witness it's effects on coworkers, friends or family. The recent innovative Quebec Employment Standards legislation defines psychological harassment, in part, as….

> *"any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.*

Unfortunately, workers in Manitoba do not have any protection against bosses who bully or who allow psychological harassment to persist in their places of business. Management by fear is unacceptable from both a business and moral standpoint. It creates high staff turnover, high rates of absences and low morale. Workers cannot address this issue because of their lack of power in the workplace and the lack of legislation to deal with it.

One statistic, discovered a few years ago from a web site called bullybusters.org, said that 82% of individuals suffering under psychological harassment end up quitting their jobs. Another statistic, from a report entitled Fairness for Whom, a study of WORC cases from 1999 to June 2003, tells us that 11% of our calls were from people who were being psychologically harassed.

Workers looking for relief from this despicable behaviour, contact the Human Rights Commission, only to be told the commission does not cover psychological harassment. Still looking for help, they end up calling the WORC. The study also indicates that 12% of our intakes came to us by way of the commission. Since then, we have experienced a 7% increase in this type of referral as of June 2004.

We cannot accept that an employer is allowed to humiliate an employee in Manitoba as long as it is not based on a prohibited ground as listed by the Human Rights Commission. Although the panel's discussion paper did not include psychological harassment, the WORC urges you to consider following in Quebec's footsteps and address this ancient problem that plagues our modern workplaces and our modern families.

Wrongful Dismissal/Unjust Termination

It is common sense that a statute claiming a mandate to promote fairness in the workplace would establish a system to determine and regulate whether the termination of an employee was just or unjust. How can the Code promote fairness on the one hand but on the other allow employers to terminate employment relationships for any reason. Other jurisdictions have realized this contradiction by including wrongful dismissal legislation in their Employment Standards Code.

Unfortunately Manitoba does not deal with this contradiction. There is not even an appearance of a balance of power or fairness when it comes to issues of termination. One should question if the

provision to provide one pay period of notice prior to termination resembles anything close to fair. Even more of a tragedy is the fact that employers have the ability to opt out of this provision.

We think that people generally believe in the principles of justice including the fact that they should not be terminated without just cause. The WORC report, Fairness for Whom, shows that 27% of our intakes came from workers wanting to know what their rights were regarding wrongful dismissal. Workers are shocked and surprised when they are told that they have no rights under the Employment Standards Code regarding this issue.

WORC believes that most cases of employee/employer disagreements on the job are not serious enough to warrant dismissal. How can it possibly be just to dismiss someone because they had the unfortunate luck to become ill or injured? There should be a system of progressive, corrective discipline in place to provide the worker with the opportunity to change behaviour that the employer perceives as unsatisfactory. Progressive discipline can even be used to improve an employee's job performance or enforce rules in the workplace.

Under the Canada Labour Code part III, workers under federal jurisdiction have access to such a system. Generally, systems of progressive discipline have several steps which may include a verbal warning, a written warning, and suspension. Dismissal should be the last resort and only where employees fail to respond to these measures.

Termination Notice

Section 61 of the Code deals with terminations of employment and indicates that one pay period of notice be provided prior to ending the employment relationship. WORC believes that requirements allowing a worker to prepare themselves for the loss of their source of income must be consistently applied to all workers in Manitoba. Is it really fair then to provide the same length of notice to someone who has been employed for 10 years as someone who has been there for 3 months? WORC supports a system of graduated notice where employers must provide notice based on the workers length of service.

In all employment relationships, there exists an imbalance of power between the employee and the employer. To address this, we support the workers ability to terminate their employment without penalty. As was stated in the discussion paper, Manitoba is one of a few jurisdictions that allows an employer to collect a financial penalty from the worker.

Furthermore, Manitoba is the only jurisdiction in this day and age that allows employers to unilaterally establish their own notice policy, effectively circumventing the legislation. Because of this ability to opt out of the minimum requirements, many employers are indicating this "no notice" policy right on the application form. This is blackmail in our opinion. It is coercion by the employer, forcing workers to sign away one of their very few rights. Ultimately, if a worker does not sign the application, their chances of being hired are pretty much zero. We have not encountered a case of anyone being hired after refusing to sign an application form.

It is understandable that labour legislation would provide a probationary period to allow employees and employers to determine if the employment relationship works for them without having to provide notice if it doesn't. Nonetheless, beyond this grace period there is no reason why a Code that promotes fairness in the workplace would allow employers to opt out of this basic provision.

Unauthorized Deductions

In our efforts to assist workers in Manitoba to understand and enforce their rights at work, we discovered another segment to the imbalance of power between workers and employers. Some employers are coercing workers into signing authorization forms allowing them to deduct monies that effectively help businesses offset the cost of doing business. The Code is ambiguous on this issue as it suggests that unauthorized deductions cannot occur because it says deductions require the workers permission.

The problem with this is that employees are under economic pressure to sign pretty much anything in order to keep their employment or even get employment. The statistic from Fairness for Whom, that 2% of WORC intakes deal with this issue, generally represents only those workers terminated who were seeking remuneration for past deductions. If workers were not concerned with losing their jobs if they complained, or if they understood their rights, we believe this number would be higher.

Specifically, WORC has identified a local gasoline retail chain that has created a strategy around taking unauthorized deductions from employees. In one case, WORC was contacted by a young woman who had been intimidated into signing a blanket authorization form that was used to deduct monies from her pay cheque based on till shortages. Three separate amounts were taken from her pay, $310.18, $144.65 and $21.00. These monies were taken from earnings that were rightfully hers according to the Employment Standards Code. Has anyone stopped to think that by clawing back this money, this worker's income may have been reduced to below minimum wage? What's the point to minimum wage laws if an employer can simply take it all back yet again circumventing another employment law.

Independent Contractor

The fundamental issue leading to precariousness for same-day couriers is the legal form of their employment contract. Couriers are generally "employed" and required to sign contracts for service. This legal relationship means that rather than being considered employees, couriers are "owner-operators", "independent contractors", or "self-employed entrepreneurs." Employers are misleading workers about their rights under the Employment Standards legislation. Workers are accepting offers of employment with the understanding that they are not covered by the Code. Until recently, when the WORC began assisting couriers to file complaints, even the Employment Standards Branch was re-enforcing this myth by telling couriers they could not accept their complaint because they were not employees therefore they were not covered by the legislation.

Union activists associated with the WORC pursued Dynamex v. Mamona which is regarded as a precedent setting case in the courier industry. This decision, which has been affirmed by the Supreme Court of Canada, found that couriers are employees for the purposes of labour legislation and therefore entitled to vacation and holiday pay. Since then, WORC, the Delivery Drivers Alliance of Manitoba (DDAM) and CUPW volunteer advocates have been successful in winning more than $50,000 in compensation for dozens of courier workers from 11 different same-day courier operations, in both federal and provincial jurisdictions, who had been denied their rights under employment standards.

Workers in this sector are also very vulnerable to discriminatory practices from their employers. Same-day couriers are not guaranteed a set number of deliveries. Workers that complain about conditions or file labour standards complaints can have their deliveries reduced and effectively be forced out of their jobs. Since there is not established workplace, and most couriers do not know who else works for the

company, there is usually no way for the worker to establish if a reduction in deliveries is actually a form of discipline.

Incomes in the same-day market are extremely low, often below minimum wage after expenses and hours worked are taken into account. In a case study of the courier industry in Winnipeg, the average gross income for car driving couriers was $24, 211.20. It is important to note that a courier's net pay is variable because they incur all costs associated with doing business. Additionally, couriers cover the employer's portion of CPP and have deductions taken off for rental of uniforms, insurance and equipment. These expenses cost the average courier in the study $9,000.00 per year. Therefore the average net income of a car courier after taxes in the study is $13, 346.67. A person working 40 hours per week works 2,080 hours per year. Divide the net income by those hours and the hourly wage is $6.42.

Compliance and Enforcement Mechanisms

The same-day courier industry in Winnipeg is also a prime example of the failure of the Employment Standards Legislation. Despite the fact that the Supreme Court of Canada affirmed the HRDC decision in Dynamex v. Mamona, which found that couriers are employees for purposes of labour legislation and entitled to vacation and holiday pay, most couriers continue to be denied these rights. The reality is that most workers still do not know their rights and many of those that do are afraid to implement them for fear of reprisals. Even where employees have been successful in obtaining back pay for vacation and overtime, it is common for employers to continue to violate the law concerning their other employees.

There is no compliance policy. We believe this review panel should see enforcement of the law as a central feature in its conclusions and recommendations to government. There must also be a much more pro-active approach to enforcement.

There are several aspects to consider. The first is the responsibility of the state to promote and educate citizens concerning their rights under the law. This is not occurring and it should. Secondly it is essential that unions and advocacy organizations have access to the complaints mechanism. Relying on vulnerable individuals to enforce their rights is not working. It should also be noted that minimum labour standards are not only protections for individuals, they are social guarantees and collective rights.

Finally, there must be protection for workers who do file complaints. In the courier industry for example, it is virtually impossible for workers to gather evidence that their deliveries have been reduced in response to an action that may have been taken concerning enforcement of their rights. Shifting the onus of proof on to the employer is a practical way of addressing this difficulty.

Our experience leads us to make the following recommendations.

1.) Employee should be defined in the legislation to include any person who is paid to work or provide services. We cannot continue to allow certain workers such as agricultural workers, to be isolated and excluded from basic rights and protection.
2.) The complaint-based system, which relies on a worker knowing their rights and being able to file a complaint when those rights are violated, should be expanded to permit unions and advocacy organizations such as WORC to submit complaints against employers who are in violation of the legislation.

3.) When a company has been found guilty of violating the rights of a worker there should be a mandatory process of investigations on behalf of all current and past employees with no time limits with respect to back pay.
4.) There should be a reverse onus protection for workers in relation to discipline or dismissal in the aftermath of a complaint.
5.) There should be a widespread educational campaign to notify workers of their rights under the Employment Standards Code. Employers should be required to notify all workers of the minimum standards contained in the Code and that all employees are entitled to them.
6.) Employers should understand that having salaried employees is not a way around the 8 hour day/40 hour week hours of work regulation. There must be recognition and appropriate compensation for working additional hours especially when it happens on a continuous basis.

Employers generally have far deeper pockets than an individual worker. Employers can afford to hire lawyers to represent their interests but who represents the workers' interests? This shows again, the imbalance not only of power but of resources between the employer and the worker.

Workers are usually unfamiliar with filing a complaint and if it goes to appeal, the combination of points of law and legislation, and the appeal process itself, is an overwhelming and intimidating maze of red tape and regulations.

When you look at other agencies, such as Manitoba Public Insurance or the Workers' Compensation Board, you will see that they have an advocacy component or department designed to assist individuals when they encounter difficulty with that particular agency. One wonders why a government agency such as the Employment Standards Branch does not also have advocates to assist workers at times when they are most vulnerable.

As an advocacy organization for the poor and low paid workers, we are painfully aware of the inadequacy of many of the current provisions in the law. It should also be noted that minimum standards do not only affect the workers who benefit from them, they also affect the families of those workers and raise the overall standards within our community.

Thank you for this opportunity to tell you about our experiences and express our ideas on how we might improve the work life for all workers in Manitoba.

Submitted by

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