The Changing Workplaces Review
Deputation of Injured Workers' Consultants Community Legal Clinic
September 11, 2015

Injured Workers' Consultants is a community legal clinic that has been serving injured workers free of charge since 1969. We are here today to ask that the experience and perspective of injured workers be taken into account when reforming the employment standards regime.

With only 10 minutes to speak, I will focus on the story of a single injured worker that was reported in the Toronto Star earlier this year (on May 18th). The part of the article I want to talk about today is this:

> Toronto resident Gordon Butler asked his employer, a small construction company in Markham, for one day off work after he sliced his thumb open on the job. He says his boss told him not to come back.
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> "I didn't believe him," says Butler, 44, who has an 8-month-old child. "I tried to plead with him, and he said 'No, too bad.'"

This is but one devastating example of the law failing to protect a worker in the most basic way. In fact, it appears (even on the limited facts we know) that Mr. Butler fell through the cracks of at least three pieces of employment-related legislation intended to protect him.

We appreciate that your terms of reference focus on the *Employment Standards Act* and *Labour Relations Act*, but they do include broader issues affecting the workplace and access to the protection of labour and employment laws. In addition to commenting on the ESA, we would like to explain how other important employment laws such as the *Workplace Safety and Insurance Act* (or WSIA) are also losing their potential to protect workers in the changing economy and workplaces, and should be considered in the context of this review.

Coverage of the workforce in Ontario is very poor because industries required to have workers' compensation coverage are listed in Schedules to the Act, which have not been updated for decades. Many modern forms of work such as call centres and technology industries were unheard of at the time of the last review. A 2003 WSIB report on coverage by Brock Smith recommends that virtually all employers and workers in Ontario be required to have workers compensation coverage, and yet no action has been taken on that report. Now, in the context of your review, is a good time for the government to implement the 2003 Final Report on WSIB Coverage.

We want to encourage you to consider the WSIA as another important employment law that is an integral part of the basic rights that we are trying to protect with our employment standards legislation.

Returning to the story of Gordon Butler, who was fired after slicing his thumb at work and requesting some time to recover… First of all, the *Employment Standards Act* didn't ensure that Mr. Butler had a job-protected sick day, since he worked for a "small company", and companies under 50 employees are exempt. Even had the ESA guaranteed him a day to recover his health, thus helping to prevent further injury to himself and his co-workers, he would have suffered financially, since the current ESA only provides unpaid leave. Furthermore, the ESA did not protect Mr. Butler from being fired unfairly, since it does not contain any protection against unjust dismissal. In other words, as long as Mr. Butler was given his minimal entitlement to termination pay (which is perhaps a generous assumption in this case), what happened to him was not contrary to the ESA.

While acknowledging the shortcomings of the ESA, the employer's actions were in fact contrary to the *Workplace Safety and Insurance Act*. Mr. Butler should not have had to take a sick day under the ESA, even had he been entitled to one, since he sliced his thumb open on the job. The WSIA requires that workers be paid loss of earnings benefits by the compensation system for any time lost due to a workplace injury. In this case, not only should the employer have reported the workplace accident to the Board, but it was an offense under the WSIA not to do so. Another possible violation of the WSIA is the employer's failure to re-employ a worker after taking time off for a workplace injury.

Mr. Butler's employer also violated the *Human Rights Code*, which prohibits discrimination of employees on the basis of disability. This includes terminating an employee on account of a workplace injury.

Now, you might wonder what motivated Mr. Butler's employer to disregard several important employment laws, as well as basic standards of human dignity. Some people may believe this particular construction company is just a "bad apple", and that Mr. Butler's story is not indicative of any wider, systemic issues. But we think this overlooks an important opportunity to dig deeper and learn what is ailing what we already acknowledge is a broken system. That's why we're here today – to review and reform a system that doesn't work.

Based on our legal clinic's decades of experience with injured workers and their employers, let me tell you what we think really motivated Mr. Butler's employer to behave so reprehensibly. Money. Financial incentives set up (shockingly) by the WSIB itself through its "experience rating" program. Experience rating refers to the WSIB's practice of tying employer premiums to the cost of worker's compensation claims attributable to that individual employer. This means that, every time an employer hides a claim or fires an injured worker, they save money. This was recently studied by Harry Arthurs, former Dean of Osgoode Hall Law School, who found the system of financial incentives to constitute a "moral crisis" for Ontario's worker's compensation system.

The Board is proposing a new rate framework which it claims abolishes experience rating, however in reality, it continues to adjust employer premiums based on claims cost and history. No matter how the program or metric is structured, any system that that ties employer costs to claims costs leads to claims suppression, termination of vulnerable workers, and pushing people back to work before they are healed.

Knowing what we do about experience rating, it is easier to see what might have been motivating Mr. Butler's employer. If Mr. Butler is fired before he loses any time, then it doesn't show up on the employer's claims record, and the company's premiums won't go up.

The Special Advisers may also be interested to know that experience rating fuels the incidence of precarious work, as it leads to increased use of temporary workers. Studies have shown that employers tend to hire temporary workers to perform more dangerous work, since any injuries to those workers will not show up on that employer's claims record, but rather that of the temporary agency. Because workers new to a worksite are statistically more likely to get injured, experience rating in fact contributes to promoting unsafe workplaces.

In short, we believe that the abolishment of any "experience rating" metric at the WSIB would have the biggest single impact on improving employment standards for injured workers, and also help improve the plight of temporary and disabled workers.

In summary, several pieces of legislation should have protected Mr. Butler, yet he fell through the cracks and ended up injured and unemployed. What is truly needed is the coordination and harmonization of all employment-related legislation. In other words, the *Employment Standards Act*, the *Workplace Safety and Insurance Act*, the *Human Rights Code*, the *Occupational Health and Safety Act*, the *Employment Insurance Act*, and other relevant legislation, should all work together to create respectful, healthy, and productive workplaces.

An important piece of this puzzle is also the coordination of investigation and enforcement. The fact that the experience of Mr. Butler was only uncovered through a journalist, points to the ineffectiveness of the current system. The regulation and enforcement of employment standards should be strengthened through coordinated, proactive, and expanded investigations, with more powerful tools for enforcement. At the very least, enforcement officers should receive adequate training of the various overlapping regimes so that they can take a holistic approach, and workers should be better educated of their rights under various pieces of legislation and how to enforce them. To that end, further funding could be provided to support workers in reporting and managing violations and workplace injuries.

Our hope is that this review takes a holistic approach to assessing workplace issues, and ultimately recommends better harmonization of all employment-related legislation. This harmonization should not happen by reducing the standards to that of the lowest common denominator, but rather the entire scheme should be equalized in a way that reinforces the fullest extent of each worker's rights. In particular, workers should be entitled to:

- Universal coverage under the ESA and WSIA;
    - including paid sick days for all workers;
- Broader protection against unjust dismissal;
    - Specifically, placing a reverse onus on employers to prove that termination of someone with a disability (including a workplace injury) is not as a result of that disability or injury;
- Harmonization of employment-related legislation so that programs or provisions don't create gaps or incentivize negative outcomes;
    - In particular, recommending the abolishment of experience rating; and finally
- Proactive, coordinated, and expanded investigations, with power to effectively enforce the rules.

Injured Workers' Consultants will provide more detailed written submissions that include further recommendations for reform; however we wanted to take this opportunity to highlight the story of one injured worker, and to explain how the experience rating program and lack of harmonization in particular are creating unhealthy and unsafe workplaces, especially for injured workers. We sincerely hope that the Special Advisers will keep this in mind when making their recommendations, so that Gordon Butler and thousands like him don't continue to fall through the cracks.