

Response to the

Liberal Government's
Amendments on

Overtime
and
Improved Enforcement of the
Employment Standards Act,
Bill 63

by the

Employment Standards
Work Group
and the
Ontario Federation of Labour

May 5, 2004

1. Introduction

On Monday, April 26, 2004, Labour Minister Chris Bentley promised tougher enforcement of labour standards, outreach to vulnerable workers and an end to the 60-hour work week.

Unfortunately, the government failed to provide changes that would enable workers to enforce their rights while at work. Contrary to Minister Bentley's claim to end the 60-hour work week, the government's proposed legislative changes to the *Employment Standards Act* (ESA) would allow employers to obtain permits for work weeks longer than 60 hours a week.

The following briefly examines the government's Bill 63 that would provide permits for excessive overtime and overtime averaging and the Minister of Labour's commitment to enforce employment standards.

2. Bill 63 - An Act to Amend the *Employment Standards Act* on Hours of Work and Overtime

2.1 Overtime Beyond the Weekly Maximum

Bill 63 would re-enact the old permit system for excessive overtime (s. 17.1) that existed prior to the *Employment Standards Act* (ESA), 2000. The proposed legislation would enable employers to apply to the Ministry of Labour to have its employees work more than 48 hours in a week. Employees would have to individually agree in writing to work more than 48 hours. (If a union is present, the union can agree on behalf of the individual employee (s. 7 of ESA, 2000)). Once having agreed in writing, employees must then work any assigned overtime hours. The only way to refuse excessive overtime once an employer has a permit is for the worker to give two weeks notice in writing. The pre-ESA 2000 permit system did not require the employee in a workplace with a permit to give the employer any notice, much less notice in writing. Workers need to retain the right to refuse overtime after 44 hours per week and eight hours (or standard work day) under the permit system without having to provide written notice.

2.2 Bill 63 Allows 60-Hour Work Weeks and More

Minister Bentley introduced Bill 63 as a measure to revoke the Tory's "60-hour work week". Yet the Bill allows employers to seek permits for work weeks longer than 60 hours (17 (3) (c)). The only constraint on this excessive permit would be that the term is one year rather than a maximum of three years for permits allowing overtime under 60 hours per week (17.1 (14)).

Unlike the previous permit system which set a limit of 100 hours per year per employee of excessive overtime, there is no maximum on excessive hours of work per week or per year in Bill 63. The Bill leaves it up to the Ministry of Labour to determine what maximum overtime permits will be allowed for employers and industries.

Bill 63 enables 60-hour work weeks and more. The failure of Bill 63 to establish weekly and annual maximums on excessive overtime permits is misguided public policy. At the very least we need a 100-hour per employee, per year cap on excessive overtime permits. We need weekly maximums established of 50-hours per week (that would be 10 overtime hours based on a standard 40-hour week).

2.3 Permit Approvals

The government should not accept as a given that employers require greater flexibility to allow more than 48 hours in a week for business reasons. Instead, businesses should be required to show compelling reasons why it requires excessive hours of overtime. Employers should be able to anticipate extra staffing requirements that may occur. The Ministry should compel employers to demonstrate that all other reasonable alternatives to overtime have been sought prior to applying for an excessive overtime permit (documented recall of laid-off staff for example).

One potentially good provision of Bill 63 is the criteria that the Ministry would consider in the permit approvals process:

- any current or past contraventions of the ESA, 2000 or its regulations on the part of the employer;
- the health and safety of employees; and

- any prescribed factors (s.17.1 (8)).

We need clear and transparent guidelines for these criteria that truly can protect health and safety of individuals and groups of workers and promote job retention and development, not job loss and an increase in precarious employment. Guidelines to safeguard health and safety should include:

- an assessment of hazards in the workplace so that high-risk workplaces are not granted permits. (Workplace Safety and Insurance Board rate groups could serve as a guide with higher rate groups demonstrating higher health and safety risks.)
- no permits for work that is repetitive in nature as longer hours increase likelihood of repetitive strain injury.
- no permits for work with hazardous chemicals because longer hours increase exposure and health risks.

Further, advocates with experience at the Employment Standards Branch have not seen any indication of tracking of previous violations of the ESA. Indeed, the Branch often refuses to look at past employer violations. The Ministry should publicise what companies have permits and duration of permits to assist workers and their advocates in monitoring employer compliance.

The application and overtime permit must be posted “in at least one conspicuous place in every workplace” (17.1(6)) and the Director may also “impose conditions on an approval” and “revoke an approval”. Minister Bentley promised that spot audits would be conducted by the Ministry. To date there have been few spot checks and with the Minister failing to announce any new resources for inspections we have no confidence that enforcement will improve.

2.4 Employee “Agreements” to Work Excessive Overtime

Bill 63 requires employers to obtain employees’ agreement in writing to work beyond the 48-hour work week. The underlying assumption is that there is a level playing field between employers and employees. In our experience non-unionized workers fear,

having witnessed or experienced reprisals, not accommodating employer demands for overtime. Without real protection from being fired, disciplined or intimidated, workers have no free “choice” to sign or not sign an “agreement”. As one worker said about the Minister’s announcement, “So there is no real change. We still won’t be able to refuse 60-hour work weeks much less get overtime pay.”

Workers need two forms of protection to make agreements a viable measure of employee ‘choice’. First, the ESA anti-reprisals measures must be strengthened to include interim reinstatement. That would mean that a worker would be reinstated while the Ministry of Labour investigates his or her claim that the employer fired the worker for asking about or trying to enforce ESA standards. Second, anti-reprisal measures are not enough. Workers need ‘just cause’ protection. That would mean that the employer has to demonstrate that there is ‘cause’ for firing a person. This will take away employers’ current ability under the ESA to fire people without cause and thus improve workers ability to try and enforce their employment standards in the workplace.

2.5 Fact Sheets

Minister Bentley says Bill 63 will protect workers right to refuse excessive overtime by requiring employers to give workers a fact sheet about rights about hours of work and overtime pay (21.2(1)). Surprisingly, the fact sheet will not refer to s. 74 of ESA 2000, which says that a worker cannot be penalized or dismissed for exercising his or her rights under the *Act*. At the very least the fact sheet should inform workers about their right to refuse excessive hours of work and what to do if penalized or terminated. Workers should be given the unsigned agreement with a one-week period to seek legal or other advice.

2.6 No Real Floor of Hours of Work Provisions in Bill 63

Bill 63 fails to take a comprehensive approach to responsibly addressing hours of work, overtime and enforcement by hiving off excessive hours of work and overtime averaging for legislative change. Bill 63 keeps much of the Tory Government’s erosion of Ontario’s hours of work rules, for example it fails to revoke employer’s ability to establish regular maximum work days up to 13 hours a day! It also fails to address the confusing myriad of industry and occupation exemptions and special rules for hours of work and overtime. These measures mean that there is no real floor of maximum work

weeks, rather a bewildering array of 'special rules' that works against protecting health and safety of workers, protecting those with little individual bargaining power or encouraging job development.

Instead of moving backward and increasing the amount of time people must spend at work, we need to reduce the maximum hours of work. Not only is this important for ensuring people's health, it is important for enabling people to balance family responsibilities and be active and involved citizens.

Both the Employment Standards Work Group (ESWG) and the Ontario Federation of Labour (OFL) have consistently lobbied for a 40-hour work week where after overtime would have to be paid. Thus overtime would start after 40 hours not after 44 hours.

The government had a chance to make this change in their amendments, but failed to do so. Thus Ontario remains out of step with many other jurisdictions across the country. The work week is 40 hours in British Columbia, Saskatchewan, Manitoba, Quebec, Newfoundland, Nunavut, Yukon and Northwest Territories and under federal jurisdiction.

In calling for a 40-hour work week we remain cognizant of the need for some overtime. At the same time we see the need for progressive labour market policies that facilitate the distribution of work by curbing excessive overtime by those already working full-time and increasing the likelihood of those with short hours gaining additional work and income. By implementing such policies a number of countries have moved to reduce unemployment and under-employment.

Statistics Canada's *Labour Force Survey* reports that the number of people working overtime has doubled over the last 18 years. Ontario's official unemployment rate hovers around 7% while the real figure, similar to the real under-employment rate, is much higher. The number of people in Ontario working in part-time, casual or temporary employment has increased with many in search of full-time work. The gross inequality of hours of work is such that it is no longer sufficient to leave the issue to well

documented articles on the topic in Statistics Canada's, *Perspectives on Labour and Income*¹. Yet, the government's amendments show no change on this vital issue.

Overtime is also a health issue. Fatigue from long hours of work has serious workplace health and safety implications. Researchers have found that those working 60 hours or more a week were 60% more likely to be involved in accidents that resulted in fatalities and injuries. These findings are not only known and accepted in the relevant research communities, but were referenced in the earlier submissions of both the ESWG and the OFL. The government therefore cannot claim to be unaware of the detrimental effects of long hours of work. It deliberately chose to ignore such findings.

2.7 Overtime and Averaging

Overtime averaging is a big gift to employers. Averaging was brought in by the Tories under the ESA 2000 and allows overtime to be averaged over up to 4 weeks (rather than being paid after 44 hours in one week). Good public policy would have repealed this regressive rule enabling employers to force employees to work longer hours for less pay. Averaging gives employers huge control over scheduling with harsh consequences for employees, especially those who have family responsibilities. By reducing employers' overtime costs, this policy encourages excessive overtime, not job stability and creation. Instead, the Liberal Government is proposing changes to require that employers apply to the Ministry of Labour to average overtime. Employees would have to agree in writing to overtime averaging.

While the Tories at least limited overtime averaging to four weeks, the Liberal Government would do away with limits on the number of weeks that could be averaged (s 22 (2)). Further, the maximum term of agreement under the ESA 2000 is two years. Bill 63 would do away with maximum terms for an averaging permit. The term is left up to the "agreement" between the employer and employee and the Ministry's permit approval process (s. 22 (2.1)).

¹Duchesne, D., Working Overtime in Today's Labour Market, *Perspectives on Labour and Income*, 9 (1997).

As under other provisions of the amendments the Director can refuse to approve an application, impose conditions on an approval or revoke a permit to average. But whether such authority will be used is highly questionable. Indeed, as Minister Bentley said while announcing Bill 63, “Last year, there were 15,000 claims against employers and only one prosecution was started”.

There are two problems here. The first problem is that of averaging itself. Averaging, together with the overtime provisions in the amendments, enables employers to not only work people excessive overtime, but to do so without paying them time and a half after 44 hours in a week. In short, erratic work schedules will continue in Ontario and excessive overtime will continue in Ontario. They will persist without the employer paying the overtime that people deserve, without any public policy commitment to even examine how work could be more equitably distributed and without any concern for balancing family and work life commitments.

The second problem is that of the “agreements” to average overtime. Non-unionized workers do not have ESA protections or Ministry of Labour enforcement to enable workers to refuse to sign agreements without penalty or job loss.

3. Enforcement

Labour Minister Chris Bentley announced on April 26, 2004, his government's commitment to *Employment Standards Act* (ESA) enforcement. Workers have suffered too many years under an employment standards regime that does not protect and enforce basic rights. Unfortunately, the government failed to provide changes that would enable workers to enforce their rights while at work.

The *Employment Standards Act* should provide a floor of rights for working people in Ontario. These rights are essential for ensuring that all workers – especially those that are most vulnerable such as young workers, women workers, people of colour and workers who are new to Canada – are not exploited. The ESA is not worth the paper it is written on if workers do not have the power to enforce their rights while at work and the Ministry of Labour does not enforce these rights. While a start, the Minister's commitment to use existing ESA enforcement tools does not go far enough.

Non-unionized workers are vulnerable in the workplace. The employer has the power to unilaterally deprive an employee of his or her livelihood. Workers need the legislative protection to exercise their ESA rights while at work without getting fired or penalized. The Minister failed to ensure that employers must have just cause for firing a worker. That means workers do not have the protection from being fired or disciplined when exercising rights to refuse overtime, overtime averaging and other basic rights. Workers can't exercise rights at work if they face penalty, firing and going months without pay while pursuing a claim for reprisals against an employer. Workers need interim reinstatement to make pursuit of anti-reprisal claims against employers a real choice.

Minster Bentley said he would dedicate resources to investigate alleged violations and prosecute employers. Indeed he promised to conduct 2,000 pro-active inspections of workplaces, focusing on high-risk employers. Yet there is no new money for Ministry of Labour investigations, putting into question the McGuinty Government's real commitment to this initiative. Further, workers need to be able to make anonymous complaints of ESA violations and obtain copies of the results of the investigation, similar to the *Occupational Health and Safety Act*. It should be mandatory that a copy of such reports be posted in the workplace.

The government has an abysmal track record of making bad bosses pay workers hard earned wages. \$214 million dollars, that's 73% of monies that the government has ordered employers to pay workers, has gone unpaid in the past eight years. The government failed to address how it would go after dead beat employers who from 1995 to 2003 owe over 63,000 workers their wages and improve enforcement of orders against employers who break the law.

Minister Bentley says the McGuinty Government is committed to enforcing the ESA. Yet workers have not seen improved enforcement of Employment Standards in the first six months of the new government. So we are asking the new government to demonstrate to the public that it is serious about improvements.

We ask them to:

Take action on the cases below within the next month and by so doing confirm that they will truly enforce basic employment standards in the workplace.

NorthStar Trading – over \$40,000 is owed to employees. This company continues to hire immigrant workers and not pay wages.

Glamour Look Inc. – \$648,000 wages and \$1.2 million in termination and severance pay are owed to 300 workers who faced years of *Employment Standards Act* violations.

TPM Machining – two workers owed over \$12,000 in unpaid wages by a company who declared bankruptcy but kept operating the same factory (with the same owners, managers, machinery and employees) to avoid paying workers' wages.

Beautiful South – a garment worker has a Ministry of Labour order of \$6,000 for unpaid wages from her employer that has gone unpaid since January 2003. Beautiful South continues to operate and not pay workers.

A-Plus Express – the Ministry ordered the company to pay a worker \$1,600 in unpaid wages 17 months ago but has failed to enforce the order.

Respectfully submitted,

**Employment Standards Work Group
and the
Ontario Federation of Labour
May 5, 2004**

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