Employment Standards Act:
Who Can File a Complaint?

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Introduction:

This paper shall set out who can and who cannot file a complaint under the Employment Standards Act of Ontario. All references to section numbers are to the Employment Standards Act, unless otherwise specified.

1. To qualify under the Employment Standards Act, you must be an "employee" as defined under the Act.

I will not deal with this in detail because this topic has already been covered extensively in Jim Henderson's paper.

2. The Employer must be under Provincial jurisdiction.

Under Canadian constitutional law, jurisdiction for labour relations is dependent on which level of government is responsible for the type of business involved. The default mode is provincial jurisdiction, so unless the business falls under a defined head of Federal jurisdiction, it is under provincial jurisdiction.

Examples of enterprises under Federal jurisdiction would be airlines, railroads, TV stations, cable systems, radio stations, inter-provincial trucking or bus lines, Indian Band schools, inter-provincial couriers, and maritime shipping.

3. The Employee must work in Ontario.

In order to be covered by the Employment Standards Act, Section 2 (2) requires that either the work or services be performed in Ontario or that where the work is performed both in and out of Ontario, that the non-Ontario work be a continuation of the of the Ontario work.

For the first part of the test. note that the residence of either the employee or the employer is not relevant. So if a Texas company sends a Michigan technician to Toronto to work at a customer site, the Act applies so that the employee would be bound by the Employment Standards Act overtime rules etc.

However, if an Ontario employer sends a Ontario based employee to Texas to work at a client site , the Employment Standards Act would continue to apply to that employee even though he was physically working in the US. However, if the assignment was not of a temporary nature then the Employment Standards Act would probably not apply as the foreign work would probably not be viewed as a " continuation of the work in Ontario"

Where an employee works for one Employer, first outside Ontario and then in Ontario, only the Ontario service is counted as years of service for the purpose of calculating termination pay and severance pay. (See Ontario Divisional Court decision in Singer v Tullett & Tokyo Forex (Canada) Inc. 46 C.C.E.L (2d) 160.

4. The Employee must not fall within one of the prescribed exemptions

There are two types of exemptions: general and specific.

The general exemptions are found in Section 2 (1) of the General Regulation (General Regulation 325). These relate to special work relationships such as:

- High school students involved in an authorized work experience programme
- Community college or university students working under special programs
- Welfare recipients under the Ontario Works programme (Workfare)
- Inmates of provincial jails who work under Ministry programmes.
- An offender serving a community sentence

The special exemptions are also found in part in the General Regulation. Each Part of the Act has a list of special exemptions. For instance the Overtime provisions (Part VI) do not apply to employees who grow mushrooms or keep fur-bearing animals. More importantly these provisions to not apply to managers, as that term is used in the Act.

Exemptions are also found within the body of the Act. For instance one of the exemptions from severance pay under Section 58 is employees who work in the construction industry where the employee actually works at the work site. However the exemption from termination pay under Section 57 is found in Section 2 (e) of the Termination Regulation (Regulation 327) and relates to persons engaged in construction who work at the site.

The exemption provisions are extremely important to understand and are at the same time quite difficult to comprehend. One should never assume that an exemption applies because of either logic or common practice. Employers often, for instance, assume that overtime provisions only apply to hourly paid employees. That is completely false, although the calculation of overtime owing depends on whether the employee is hourly rated, salaried with set hours or salaried with no set hours. Similarly, commissioned employees are entitled to receive overtime pay unless they fall within the exclusion which exempts only those commissioned salespersons who normally make sales off the Employer's premises (Section 3 (h) of the General Regulation).

A third exemption applies to the Provincial government and its various agencies. By way of the application of Section 2 (1) of the Act, only the following provisions of the Act apply to the Crown;

- Sale of business and successor employers
- Equal pay for equal work
- Benefit plans
- Pregnancy and parental leave
- Lie Detector Tests
- Termination of employment

5. The employee cannot be covered by a Collective Agreement.

Under Section 64.5 , where an employee is covered by the terms of a Collective Agreement (either a current one , a continued one or during the freeze period) although the aggrieved employee is covered by the substantial provisions of the Act, they cannot use the enforcement provisions open to non-unionized employees, which is to file a complaint with the Ministry of Labour, Employment Practices Branch. Instead, unionized employees must go through the arbitration procedure under the

Collective Agreement. As such ,it is the Union that normally decides whether or not to file the grievance, and the only legal remedy that a employee has where the Union refuses to process such a grievance is to file a Duty of Fair Representation complaint with the Ontario Labour Relations Board under the Labour Relations Act. The Director of the Employment Practices Branch has the authority to allow a claim to be filed even when the employee is covered by a Collective Agreement. I am unaware as to whether this exemption has ever been applied.

6. The claim for wages cannot exceed $10,000 per employee.

Although technically an employee can file a claim for any amount, Section 65 (1.3) limits the amount he or she can recover to $10,000 except where :

- The order either relates to compensation by way of back pay and damages for violating provisions for which the Employment Standards Act Officer has the power to order the dismissed employee reinstated. The specific areas include violation of the pregnancy and parental leave provisions, violation of the ban on lie detectors in the workplace, violation of the right of some retail establishment workers to refuse Sunday and statutory holiday work and violation of the prohibition against terminating one's employment because they are subject to a court ordered garnishment order.
- The order relates to termination pay and/or severance pay where the cause of the dismissal was related to one of the violations set out above.

This monetary limitation to a large degree means that claims in excess of $10,000 are processed by way of Court litigation rather than administrative tribunal.

7. The Employee cannot have started a wrongful dismissal action or other civil action in the Courts.

Under Section 64.3 if you choose to enforce your rights to receive wages owing under the Act by way of filing a complaint with Ministry of Labour, you are then barred from commencing a civil action over the same subject. The same applies to wrongful dismissal actions in that once you file a complaint for either termination pay or severance pay, you are barred from later commencing a wrongful dismissal action. Thus if you were fired by your employer and were owed $9,000 for termination and severance pay under the Act and $50,000 for common law damages for wrongful dismissal, and you filed a Employment Standards Act complaint, you would only be entitled to recover the $9,000 statutory payment and would be forever barred from pursuing the $50,000 wrongful dismissal action. Because of the enormity of the consequences of this decision, the Act provides that if an employee withdraws his Employment Standards Act complaint within two weeks of having filed it, then the bar against civil actions is lifted.

Similarly under Section 64.4 , if you start a civil action for wages or wrongful dismissal , you are immediately barred from filing a complaint over the same matter with the Ministry.

8. The claim can only extend back 6 months from the time of filing.

Under Section 82.3, an employee cannot recover money that was due more than 6 months prior to the date upon which the claim is filed with the Ministry. The one relevant exception is that you can actually go back 12 months if the violation alleged is the same and the person is also entitled to wages from a violation that occurred in the last 6 months. This is called the “continuing violation provision “.

For instance, if 9 months ago an employer failed to pay overtime and one month ago the employee was terminated without payment of termination pay, the employee could only file a claim for the termination pay but not the overtime.

However if the employee claimed that for the last 11 months he was not being paid properly for working on a statutory holiday, the entire claim would be accepted.

If the employee's only claim was that 9 months ago he was unjustly dismissed his claim would be time barred.