SOCIAL PROTECTION FOR ATYPICAL WORKERS: THE CANADIAN EXPERIENCE TO DATE

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Abstract: This paper is an attempt to highlight the Canadian experience to date with regard to atypical work and social protection. More specifically, part-time work, agency work, and limited term contracts are discussed. First the content and recommendations of the major public studies on atypical work in Canada are presented. Given that social protection is dependent on employee status, such status is presented in common law and statute. With employee status the minimum employment protection for these workers is then discussed. The paper concludes that this social protection remains limited, and Canada needs to go further in the social protection of such atypical workers.

Özet: Bu makale atipik çalışma ve sosyal korumaya ilişkin Kanada'nın bugüne kadar yaşadığı deneyimlere dikkat çekmeyi amaçlamaktadır. Özellikle, yarı zamanlı çalışma, geçici istihdam ve sınırlı süreli iş sözleşmeleri ele alınmıştır. İlk olarak, Kanada'da atipik çalışma üzerine olan önemli kamu çalışmalarının içerikleri ve önerileri sunulmuştur. Sosyal koruma, çalışanların kanun ve tüzüklerde düzenlenen statülerine bağlı olarak ele alınmıştır. Bu sebeple çalışmada, çalışanların statüleri ile asgari istihdam korumaları tartışılmıştır. Çalışmanın sonucunda Kanada'da sosyal korumanın sınırlı düzeyde kaldığı ve atipik çalışan işçilerin sosyal korumalarına yönelik daha ileri adımlar atılması gerektiği ortaya çıkmıştır.

INTRODUCTION

Although Canada has tended to be a free-trading nation, the increasing globalization of the last forty years, or so, has tended to erode the traditional employment relationship that has characterized the post-war experience.

Just-in-time logistics that ensure efficient use of materials in production is often now coupled with the employer's need to effectively manage and to readily adjust the supply of labour. One could argue that this need for numerical flexibility has increasingly so created a just-in-time market for, and use of, labour. In an attempt to manage numerical flexibility, part-time, fixed-term contracts, and agency work have become more common.

In an early Canadian study England (1985) characterizes these workers as atypical. As such they are likely to enjoy significantly less benefits and con-

ditions of work than 'traditional' employees. Furthermore such work is often not permanent. Given inferior conditions of work and lack of permanency such work has also been referred to as precarious (Vosko 1983).

In a similar fashion, the European Union has identified atypical workers as needing increasing social protection (Peers 2013) and issued three Directives as follows: Part-time Work Directive 97/81/EC; Temporary Agency Directive 2008/104/EC; and, Fixed-term Work Directive 99/70/EC.

Although not meant as an exhaustive account of atypical or precarious employment, the intent of this paper is to attempt to highlight the Canadian experience with regard to these three modes of employment relations.

I. MAJOR CANADIAN PUBLIC STUDIES ON ATYPICAL WORK

1. Commission of Inquiry into Part-Time Work (1983)

Funded by Canada's Department of Labour, and lead by a business woman Joan Wallace, this study is among the earliest comprehensive studies to address the topic of atypical work in Canada.

This study was driven in part by feminists who were not only aware of the rapid rise in part-time work, but also that the majority of such workers were women at 72 per cent. A much more limited study had been conducted earlier by the Advisory Council on the Status of Women. Regarding the rise in part-time employment, in 1953 only 3.8 per cent of those employed were doing so on a part-time basis. This had risen to 13.5 per cent of all Canadians employed in 1983.

The terms of reference for the Commission were as follows:

- to define part-time work under existing employment laws
- to determine factors contributing to the expansion of part-time work
- collective bargaining rights for part-time workers
- personal and demographic characteristics of part-time workers
- remuneration for part-time workers
- the possibility to prorate wages and benefits for part-time workers
- to make recommendations to improve the overall quality of part-time work in Canada.

Among the discussions worth noting some 30 years later are those regarding labour relations and benefits and pensions for part-time workers.

Whereas in 1983 union density in Canada was at some 35.2 per cent, only 15 per cent of part-time workers were unionized. The ambiguous role of unions and part-time work is well documented as follows: some unions were promoting the interests of part-time workers; others are making some efforts to help part-timers; and, a third of unions are totally opposed to allowing part-time workers in the workplace.

Part of the solution for better protection for part-time workers was an increased level of unionization for part-time workers. Wallace recommended that all full-time and part-time workers. Also the Commission recommended that labour relations legislation be changed in order to facilitate the unionization of part-time workers. Given the subsequent decline in the trade union movement, there has been little further impetus to pursue this path by policy makers.

With regard to wages and benefits, the approach of the Commission is similar to the substantive content of EU Directives with two recommendations as follows:

- it should be ensured that part-time workers receive the same protection, rights and benefits (on a prorated basis) as those now guaranteed to full-time workers; and,
- part-time workers should receive equal pay for equal work of equal value regardless of the number of hours worked.

These two recommendations that are at the crux of eliminating unequal treatment and discrimination against part-time workers. Unfortunately in the thirty two years or so since the Wallace Commission these recommendations have not been implemented.

2. Federal Labour Standards Review (2006)

Lead by the highly regarded and leading labour academic Harry Arthurs, this review was intended to examine the current changing workplace and to update Part III of the *Canada Labour Code*—employment standards covering about 10 per cent of the Canadian workforce under federal jurisdiction. Given this scope, it does specifically address some key issues specific to the atypical workers being discussed here.

Arthur's findings found in *Fairness at Work: Federal Labour Standards for the 21st Century* are far-reaching and are the results of broad consultations with academics, workers, unions and employers. Underlying this study is a fundamental principle of decency at work that is the benchmark for the proposals:

> Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life (Arthurs 2006, p.x).

Fairness at work begins with a broad socio-economic contextual analysis dealing with the new Canadian economy, a changing society and a renewed agenda for labour standards. At the risk of oversimplification such changes can be broadly characterized in a two-fold fashion as follows:

First, who is doing the work has changed over the last forty years or so. More females have entered the workface, the working population is aging, and Canada has a more diverse workforce.

Second, the type of work being done has changed with a rise in precarious work. Precarious work combines relatively low pay with one or more of the following: unstable or at risk source income, few or no benefits, limited legal protection, or little prospects for other compensatory privileges or advantages.

Arthurs notes that today only 60 per cent of Canadian workers might be deemed as permanent full time, and the rest being temporary and/or part-time. According to his data, 75 per cent of temporary employees would prefer permanent employment, and about 25 per cent of part-time workers would prefer full-time work.

Among the recommendations made specific to atypical workers are as follows:

- part-time workers should receive equal pay if they perform the same work as full-time permanent workers.
- temporary workers should be entitled to accumulate periods of service that would make them eligible for such statutory benefits as vacation leave or access to unjust dismissal adjudication. They should also be eligible for permanent work after one year, or a similar probationary period established by the employer.
- if employment agencies fail to pay workers wages or benefits while working on assignment for client firms, those firms should be liable for any sums owing.
- vulnerable workers are often ineligible for other employment benefits such as drug insurance, disability insurance, and pensions. Given this, the federal government should establish a benefits bank that would assist workers in small firms and businesspersons coverage.

In short Arthurs wants to modernize existing employment standards for the new economy of the 21st century and argues for reregulation, not deregulation. In fact a high level of employment standards are needed to achieve high levels of productivity.

3. Vulnerable Workers and Precarious Work (2012)

This study was carried out for the Law Commission of Ontario by Leah Vosko, a leading Canadian academic on atypical work.

For Vosko precarious work is characterized by job instability, lack of benefits, low wages and degree of control of the process. Furthermore, the forms of work and types of work can often be described as precarious as follows: temporary work agency; self-employment; part time; casual; or, temporary migrant work.

The focus for this Law Commission Study is on reform, and to alleviate the often devastating effects such as intergenerational poverty and illness that precar-

ious work can engender. Forty-seven recommendations are made in improving employment standards, health and safety, and training. Nonetheless, our concerns here are the recommendations dealing with basic employment standards and the three forms of work earlier described as atypical. They are as follows:

- Recommendation 4. The Ontario Government, taking into account the complexities of the issue, consider what amendments could be made to the ESA to ensure part-time workers are paid proportionately the same rate as full-time workers in equivalent positions where there is no justification for the difference based on skill, experience or job description.
- Recommendation 5 With regard to temporary work, this recommendation argues for something similar to the French experience; that is, that a benefits bank and short-term contract premium for those on fixed term contracts and temporary agency workers.
- Recommendation 6 argues for emergency leave provisions be provided in workplaces with under 50 employees, and include part-time, casual and temporary employees.

Many of the remaining recommendations deal with improved public awareness programs and pro-active inspections for better compliance with existing legislation in employment standards and occupational health and safety.

II. EMPLOYEE STATUS IN COMMON LAW AND STATUTES

1. Common Law

One could argue that the minimum social protection of employment standards is determined by employee status, and not primarily by the nature of the work. Employee status is in turn determined by common law and by statute.

At stake in common law is whether the relationship is a contract of service or a contract of services. In order to make the distinction, it is worth noting Lord Denning's famous account of the integration test:

> *... under a contract of service, a man is employed as part of the business, and his work is done as integral part of the business; whereas under a contract for services, his work, although done for the business is not integrated into it, but is only accessory to it. (Stevenson Jordon & Harrison Ltd. V MacDonald and Evans, [1952] 1 T.L.R. 101 at 111 (C.A.)*

In addition to the integration test, Canadian courts have also looked at a complex test of who is a master and who is a servant that involves the following: control; ownership; chance of profit, and risk of loss (England 2000).

Given that an employer-employee relationship exists, determining who is the actual employer relies on the subordination test: who decides what work is to be done; who supervises it; and, who controls it.

This was test applied in the Supreme Court of Canada case *Pointe-Claire (City of) v Qubec Labour Court.* Interestingly enough, in this case the temporary

agency worker was deemed to be an employee of the city, and not the agency. In this case the Court wanted to ensure that the employee enjoyed the better benefits of the collective agreement.

In order to make a final determination on an employee status, courts rarely rely on one test, nor are all the features of a particular test needed for it to be considered in the decision.

2. Defining Employee Status by Employment Standards Legislation

With regard to labour and employment law, Canada is divided by jurisdiction with ten provinces and three territories as well as the federal jurisdiction. Not surprising, then, a defining feature of this legal experience has been jurisdictional fragmentation. Although substantively the law tends to be the same across the country, there are differences that reflect regional socio-economic differences, and differing governmental efforts for compliance.

Representative of Canadian legislation defining who is an employee is presented from Quebec's *An Act Respecting Labour Standards (CQLR cN-1.1)* as follows:

> (10) "employee" means a person who works for an employer and who is entitled to a wage; this word also includes a worker who is a party to a contract, under which he or she
>
> (i) undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person;
>
> (ii) undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him or her; and
>
> (iii) keeps, as remuneration, the amount remaining to him or her from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract.

Differing from other Canadian jurisdictions, and differing from the mainstream position made earlier, the Quebec legislation is particularly unique here in that it provides coverage for independent contracts for services as well.

Although there is no specific mention here, part-time, agency, and limited term employees are guaranteed at least minimum standards of social protection. Our discussion will now turn to the content of these standards.

III. THE SOCIAL PROTECTION OF CANADIAN EMPLOYMENT STANDARDS

The following is an attempt to highlight the content of employment standards common to all Canadian jurisdictions:

- minimum hourly wage
- hours of work and provisions for breaks and overtime pay

- paid vacation leave
- paid national holidays
- unpaid leave—maternity, paternity, sickness, family matters
- notice or pay in lieu of notice regarding termination of employment—dismissal or layoff
- complaint/dispute resolution procedures

The above are meant to at least provide a floor of social protection for the individual worker. This is not to say that the benefit level, or scope in coverage, or enforcement is satisfactory to all (Gallina 2005).

However, in particular for the non-unionized sector, there is an attempt to balance in part the unequal power relationship between the employer and worker. These minimum employment standards provide better working conditions than he or she might be able to individually bargain for.

Although beyond our discussion here, the contract of employment also tends to guarantee the following: health and safety protection and the provision for workers' compensation for workplace injuries; human rights and the protection against discrimination and harassment; employer and employee contributions to an earnings based national pension scheme; and a joint employer-employee insurance scheme in the case of unemployment; and pay equity provisions for women guaranteeing equal pay for equal work of equal value. Finally it may be worth noting that Canada has a free national health care system—this is dependent upon residency status, and not a contract of employment.

The above statutory protections are identical for all workers, atypical or not.

IV. SPECIAL EMPLOYMENT STANDARDS FOR ATYPICAL WORKERS

Whereas the above employment standards apply to the atypical workers under examination, this does not mean that their conditions of employment are the same as the permanent worker. There remain few provisions for the part-time, agency, or limited contract worker in Canada to be paid at same rate of pay as a full-time worker doing the same work.

There is even less probability of such an individual having access to a broader private benefit package common to unionized workplaces that includes most of the public sector, and to a lesser extent in the non-unionized context. Such benefits could include: dental and drug insurance; payment for eye examination and corrective measures; orthopaedic shoes; and, provisions for health insurance when travelling outside the country.

Finally there are no statutory provisions that limit the use of atypical workers by employers, and provide for and provide for a transition to permanent status.

Despite the above limitations, there are some provisions in some jurisdictions for further protecting atypical workers.

With regard to agency workers many Canadian provinces provide extra provisions in the policy statements specifically related to temporary agency workers (England 2005). The provisions relate to charging a worker for the services of an agency, and also prevent a worker from taking permanent employment from an agency client. An example from the Government of Ontario (2015) is as follows:

1. A temporary help agency is not allowed to charge a fee to an assignment employee, or prospective assignment employee, for:
   - becoming an employee of the agency;
   - the agency assigning or trying to assign the employee to perform temporary work for a client; or,
   - the agency providing the employee with help in preparing résumés or in preparing for job interviews, even if the employee is told he or she can choose whether to take that assistance or not.
2. An agency is prohibited from attempting to restrict an assignment employee from accepting direct employment with an agency client. It also cannot charge the employee a fee for accepting direct employment with a client of the agency.

With regard to part-time work there is little additional provisions in the statutes for protection. Only the province of Quebec has provided further coverage for part-time workers although these provisions are available only to workers that are making less than double the minimum wage. However, Bernstein (2006) makes the case that these provisions have been rarely been tested in the courts.

With regard to workers who are on limited term contracts, there would not appear to be any special provisions in Canadian statutes. However, such workers are at an additional disadvantage when it comes to notice, or pay in lieu of notice. In most instances the employment contract would provide notice in advance regarding the end of a particular contract that would preclude a worker from any additional entitlements.

CONCLUDING COMMENTS

One could argue that the degree of regulation in employment relations in Canada can be characterized as moderate—somewhere between the deregulated US experience, and the more extensive social democratic models of the EU.

Whereas across jurisdictions in Canada there is some social protection for atypical workers given their legal status as employees, for the most part the work experience of such employees could still be characterized as precarious. The work is not permanent. Furthermore there are no guarantees equal pay and benefits for prorated equal work vis a vis full-time workers

For over thirty years Canadian policy studies have recommended better protection for such workers. It is time that a fairer workplace for atypical workers be created in fact, and not just written about.

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