

Brief to the Nova Scotia Department of Environment and Labour re: Averaging Provision

May 10, 2004

We are writing in response to your invitation of March 18, 2004 for the Nova Scotia Federation of Labour to be a part of the review and provide feedback on the averaging of hours which followed by regulation, as per the changes made to the Labour Standards Code (LSC) last fall respecting minimum overtime.

We would like to begin by stating that we were and remain in full support of the initial and actual changes made to the LSC regarding this issue and we had and still have some concerns and questions on the regulations that followed regarding the averaging of hours for the purpose of overtime. Although we do not agree with these changes, we believe we know why they were made.

In addition to supporting the changes to the LSC which sees workers being paid time and one half their actual wage rather than time and one half of the minimum wage, we are also supportive of the changes which provide three weeks vacation after eight years as well as the changes that recognize family leave. Also, we are very supportive of the commitment to an annual independent review of the minimum wage.

All of these are changes that have been long overdue and we are pleased to see our LSC starting the process of providing some of the benefits that workers in other jurisdictions are enjoying.

Although we are participating in this review process, which includes a look at how other jurisdictions are working or dealing with the averaging issue; we are at the same time disappointed that we are only doing this on this one issue and not looking at the full picture of all the positive changes that could and should be made to provide more and better working conditions and benefits for the workers of Nova Scotia changes which would bring us up to the standards provided to workers elsewhere.

We are of the firm view and position that rather than following a cherry picking approach, we should be looking at a total modernization of all the laws that are intended to provide for workers' rights and benefits as well as establish a process and support system to foster employer/employee relations. In essence, it is time that the workers of Nova Scotia received the same rights, benefits and protections as workers of other jurisdictions, including those who are covered by the Canada Labour Code.

When reviewing the issue of overtime and overtime pay, one should remember and review the historic intent of the paying of a higher or premium rate for working long hours.

The paying of a higher or premium rate of pay for working beyond the normal work hours or schedule was not intended as a benefit, although it does provide more income for hours worked. It was and is intended as a deterrent and penalty against the employer for working long or excessive hours; in favour of full employment and job creation, while at the same time providing or improving work and quality of life.

Unfortunately, the general trend seen today and as reflected in the comments from some employers in the aftermath of the changes of last fall; is to prefer that workers put in excess hours rather than hire more employees. This is done under the guise of the use of experienced workers but in reality it is a cost-saving/profit enhancing measure for many by avoiding having to pay such items as UI/EI, CPP or Workers' Compensation premiums or other benefits required for additional employees.

Also, many spoke out against the changes and pushed hard for the averaging formula adopted by regulation based on the premise that the increased cost would have a negative impact on the ability to operate competitively and to bid on future projects/work due to this loss of competitive edge.

When in reality, most, if not all whom our industries would be competitive with are under the same or similar rules with their counterparts in other jurisdictions.

In addition, in workplaces that are unionized and which are in the respective industries covered, the overtime provisions are quite often more structured with a higher rate of pay for working longer or excessive hours.

Many of these unionized workplaces bid and compete with some of the very employers who had railed against the changes made to the LSC, and they seem to be able to compete and to make a profit.

I guess it all depends on how much profit one wants to make and how fair you want to be to your employees, their families and their communities.

Also, if our laws were reviewed and updated on a more regular and frequent basis, most would be a bit more accustomed to change and progress and may not react in the manner witnessed on this occasion.

Quite obviously we do not support the concept or the notion of averaging for a variety of reasons.

If the principle of paying overtime after 48 hours of work, is and has been established in the LSC for many years, with the difference being that now the fair and proper overtime rate of time and a half of the actual wage is paid and not time and a half the minimum wage; what is the reasoning or justification to go to averaging?

It is very clear the majority of any benefit of averaging goes to the employer for they have the authority and workplace power to ensure they and not the worker benefit from averaging, e.g. scheduling of work hours. In fact it is dubious if there would be any actual benefit to the worker from averaging.

In addition, if the accepted principle and language of the LSC for paying overtime is after 48 hours, where did the 110 hour exemption for the construction and property maintenance workers come from and what is the justification for this exemption?

As stated, given that the LSC is clear in that the overtime provisions kick in after 48 hours, one must question the legality of the averaging change that is made by regulation.

We are of the view that a regulation is to explain, clarify or outline a process reflected or stated in law, we do not believe a regulation can change or supercede a law.

In addition to questioning the legality of this provision of averaging; we would also like to point out that, other than PEI, no other jurisdiction in the country references such a high number of hours before there is a requirement to pay overtime.

In fact, other than PEI, all jurisdictions have a substantially lower number of required hours to work before the requirement to pay overtime kicks in.

Also, reference is made or the question is raised in the discussion paper of perhaps an expanded use of averaging into other workplaces and we anticipate you will hear from some employers in areas or workplaces not under the averaging issue, urging consideration of expansion of this regressive provision, to better their profit margin at the expense of the employees.

We would like to make it very clear that not only do we totally oppose the notion or thought of expanding the use of averaging into other workplaces, we believe the concept of averaging should be abandoned in favour of ensuring fairness and consistency; in that all workers would be entitled and receive overtime pay at time and a half their normal rate of pay for any time worked beyond 48 hours.

The paper also implies that averaging is the norm in other jurisdictions, when in fact, the regulation adopted in Nova Scotia is the most rigid and restrictive of any other jurisdiction. At best, other jurisdictions have the question of averaging as an optional or discretionary process often requiring agreement.

If we are of the view that the averaging regulation adopted in Nova Scotia is of benefit and economic gain for the employers to whom it applies, it naturally follows that we are of the firm belief that it is the workers who are paying for this economic gain.

For greater clarity, we sincerely believe this regressive regulation means a loss of wages for workers, taking hard earned money from them, their families and their communities, due to the expanded hours and the averaging provision.

We equally believe this averaging regulation has another regressive factor to it, in that it results in the loss or erosion of quality time, the increase in hours means workers will have less time to spend with their families or to pursue other interests of community or social benefit.

Also, as previously stated, the premise or principal of higher pay for working overtime is meant to be a deterrent or penalty for working longer hours in favour of more job creation, it therefore stands that we believe the overtime averaging regulation is counterproductive to this principal and will result in less employment.

Finally, but certainly not the least of our concerns is the negative impact this measure could have on health and safety in the workplace and on workers.

Working long hours and/or long shifts can be contributing factors in decreased workplace Occupational Health and Safety and this regulation with its averaging provision of 110 hours, could be setting the bar at a dangerous level.

In summary and conclusion, we urge that not only should the notion of expanding the coverage of the averaging regulation be discarded; but the averaging regulation should be discarded in favour of the language and intent of the LSC -- paying the overtime rate of time and a half at the workers rate of pay for all hours worked beyond 48 hours.

We would like to thank the Department of Environment and Labour for the opportunity to provide these comments on this matter, and we would also like to express our thanks for the understanding and extension to submit.