BRIEF OF THE COMMUNITY LEGAL ASSISTANCE SOCIETY REGARDING CHANGES TO THE EMPLOYMENT INSURANCE PROGRAM

SUBMITTED TO THE STANDING COMMITTEE ON HUMAN RESOURCES, SKILLS AND SOCIAL DEVELOPMENT AND THE STATUS OF PERSONS WITH DISABILITIES (HUMA)

APRIL 9, 2021

Submitted by Kevin Love, Lawyer
Community Legal Assistance Society
300 – 1140 West Pender Street
Vancouver, BC V6E 4G1
(604) 673-3104
klove@clasbc.net

Thank you for this opportunity to make submissions with respect HUMA's review of the employment insurance (EI) system.

About the Community Legal Assistance Society (CLAS)

CLAS is a non-profit law firm that has served the people of British Columbia since 1971. We provide legal assistance and work to advance the law to address the critical needs of those who are disadvantaged or face discrimination. CLAS pursues this mandate through a range of direct legal services, strategic litigation, and law reform activities. CLAS's work focuses on five key areas of law that impact the critical needs of our clients: housing security, income security, workers' rights, mental health, and human rights. A key component of CLAS's mandate is to serve the needs of low-income, vulnerable, and precarious workers, many of whom struggle to access EI benefits.

CLAS's Submissions

CLAS supports all the recommendations set out in the brief sent by the Inter-Provincial EI Working Group (the "Working Group"). All of these changes are urgently needed to ensure that Canada's EI system meets the needs of unemployed workers. Without diminishing the importance of any of the Working Group's recommendations, CLAS's submissions will highlight and elaborate upon those recommendations that are most critical to improving EI coverage and access for the low-income clients we serve.

1. **Reduce the qualifying requirement to 360 hours or 12 weeks of work in all regions**

In most insurance contexts, coverage starts the moment premiums are paid. Yet in the EI system, workers must accumulate between 420 and 700 hours of insurable employment to qualify for EI despite the fact that premiums are paid starting from the very first hour worked. Many workers pay premiums for several months before they gain any EI coverage at all. This is particularly problematic for part-time employees, seasonal workers, and other workers who do not enjoy significant job security.

While some qualifying threshold is necessary given the nature of the EI system, it should be lowered dramatically to minimize the number of workers who pay premiums but receive nothing from the system when unemployed. CLAS recommends a universal qualifying requirement of 360 hours or 12 weeks of work in all regions of the country. There is no justification for increasing the qualifying requirement based on the rate of unemployment where the worker happens to live. The system should focus on the needs of the individual worker. The impact of unemployment for a worker struggling to meet their most basic needs is not diminished by the general rate of unemployment in their region.

2. Eliminate, or at least restrict, the overly harsh disqualifications for misconduct and voluntarily leaving employment

Until the late 1990s, a disqualification for misconduct or voluntarily leaving employment was time limited and did not result in a total loss of all EI benefits. Now, the worker loses everything. To make matters worse, these disqualifications are being applied in an overly broad manner that imposes extremely harsh consequences for relatively minor infractions. Workers are routinely disqualified from receiving EI for minor instances of misconduct even if the employer's decision to terminate the worker is disproportionate and the misconduct would not amount to just cause for the purposes of employment law. Indeed the Federal Court of Appeal has confirmed that "[t]he jurisprudence dealing with misconduct is substantially more unforgiving than the jurisprudence dealing with just cause."[1] This makes little sense in a system specifically designed to provide temporary income support to unemployed workers.

The overly harsh consequences of being dismissed for misconduct have a disproportionate impact on low-income and precarious workers. These workers are more likely to be fired for minor incidents of misconduct than workers in secure, long-term employment. Research has also found that racialized workers are more likely to be disqualified due to misconduct.[2]

[1] *Karelia v. Canada (Human Resources and Skills Development)*, 2012 FCA 140 at para. 20.
[2] Melissa Latimer, "A Comprehensive Analysis of Sex and Race Inequities in Unemployment Insurance Benefits" (2003) 30:4 J. Soc. & Soc. Welfare 95 at 113-114.

The total disqualification for voluntarily leaving employment is equally problematic. Low-income workers who voluntarily leave their job to upgrade skills and improve their long-term employment prospects often cannot access EI. Workers who must leave a job due to family caregiving responsibilities – disproportionately women – can also be disqualified from accessing EI. And even if a worker has a perfectly good reason for leaving an unfair or abusive employment relationship, the worker must deal with the uncertainty that a decision-maker will find, often applying hindsight after the fact to a difficult situation, that there were other alternatives the worker could have pursued.

These overly harsh and punitive disqualifications should be eliminated entirely, or at the very least significantly restricted. Any disqualification should be time limited to no more than 6 weeks. The meaning of misconduct should be restricted to ensure that relatively minor infractions do not result in a worker losing benefits. Any disqualification for voluntarily leaving employment should not capture necessary and beneficial activities like pursuing training or attending to caregiving responsibilities. "Just cause" for leaving employment should be established if the claimant has acted reasonably in the circumstances, without a probing examination after the fact into what other alternatives existed.

3. Simplify the process for obtaining and challenging rulings about misclassification

Misclassification occurs when a worker who is really an employee covered by the EI system is treated by their employer as an independent contractor. Misclassification is a significant problem for low-income and vulnerable workers. The gross inequality of power, knowledge, and bargaining position between these workers and the employer gives little opportunity for push back. CLAS fully supports the Working Group's suggestion that there be a "blitz" to identify employees who have been misclassified as independent contractors. To further combat misclassification, CLAS recommends that the process for obtaining and challenging rulings about the insurability of a worker's employment be simplified and better integrated with the EI system.

The EI system is complicated enough. Yet workers who have been misclassified must often navigate not one, but two different systems. This is because decisions about whether a worker is an employee or an independent contractor must be made by the Canada Revenue Agency (the "CRA") and appealed through a separate appeal stream ending with the Tax Court of Canada. Even workers familiar with the EI system may have no idea how to obtain or challenge a decision about misclassification.

The two systems should be better coordinated to ensure that workers challenging misclassification do not miss deadlines or experience significant delay mistakenly pursuing issues in the wrong place. An example, albeit in a different context requiring modification, would be s. 28(2) of the *Old Age Security Act*, R.S.C., 1985, c. O-9, which places a responsibility on the Social Security Tribunal to appropriately refer certain issues falling outside its jurisdiction that arise in the course of an appeal.

4. Increase the EI benefit rate to 70% with a minimum benefit for low-income workers

Surviving on 55% of your income is difficult for any worker. For low-income workers who were barely getting by before losing their job, it is often impossible. The EI benefit rate should be increased to 70% of the worker's earnings. There should also be a minimum weekly benefit, or at least a higher benefit rate, for very low-income workers to ensure they can meet their most basic needs.

5. Ensure migrant workers have fair access to the EI system

If migrant workers pay into the EI system just like other workers, they should be able to access benefits like other workers. Many special benefits are routinely paid to workers residing outside of Canada. Migrant workers should not be treated differently simply because they no longer have a valid Social Insurance Number ('SIN"). The requirement to have a valid SIN in order to receive special benefits while outside of Canada should be eliminated.

Further, the deep flaws in Canada's immigration system create barriers for many unemployed migrant workers who want nothing more than to return to work. Clarification is needed to ensure that these workers are not denied regular EI benefits on the basis of being unavailable for work.

Thank you for considering these submissions and we would be happy to provide any further clarification the committee requires.

Sincerely,

Kevin Love
Lawyer, Community Legal Assistance Society