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Labour

Unjust Dismissal

A Guide to the Hearing Process

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Unjust Dismissal

A guide to the hearing process

This brochure is a step-by-step guide to representing yourself in an unjust dismissal complaint proceeding under Part III of the *Canada Labour Code*. Knowing and understanding how the process works will help you feel more comfortable as you prepare for and present your case.

As you read this brochure, you will find words in **bold** print. These are terms commonly used in the legal resolution of disputes and are explained at the back of this booklet. Understanding what these terms mean will also help you before and during the unjust dismissal complaint proceeding.

Although this brochure attempts to provide a general overview of how the unjust dismissal complaint process under the *Canada Labour Code* works, it does not contain any legal advice. If you have specific legal questions or concerns, it is recommended that you contact a lawyer.

What is the unjust dismissal complaint process?

Part III of the *Canada Labour Code* provides workers and employers under federal jurisdiction with an affordable and effective way to resolve disputes about dismissals from employment. After investigating a complaint

of an unjust dismissal, a federal Labour Affairs Officer will try to settle the complaint. If he or she is unable to achieve a settlement, the employee has the right to request that the complaint be sent to **adjudication**.

What is adjudication?

Adjudication is a legal process which will determine the employer's and the employee's rights concerning the dismissal. A hearing is held during which the employer and employee can make arguments, present evidence and use witnesses to prove their respective cases. The rules followed and procedures used in adjudication are less formal than in a court of law, allowing for more flexibility in the process.

Who hears and decides the case at adjudication?

The Minister of Labour will appoint an **adjudicator** to hear the case. Adjudicators are appointed from an inventory of persons who have experience hearing unjust dismissal complaints. An adjudicator is an independent, neutral person not connected to or associated with the employer or employee involved in the complaint. The adjudicator will make an objective decision about the alleged unjust dismissal based on the facts and evidence presented at the hearing.

Who pays for the adjudication?

The cost of the hearing room, as well as the adjudicator's fees and expenses, are paid by the Department of Human Resources and Skills Development Canada. Any preparation you need for the hearing (i.e. making photocopies, arranging for witnesses to be present, etc.) is at your own expense.

Can I be represented by a lawyer at the hearing?

You can represent yourself or be represented by an agent or a lawyer at the hearing. If you choose to be represented by a lawyer, you are responsible for paying your lawyer's fees.

When and where will the hearing take place?

The adjudicator will contact both you and the other **party** (participant) to schedule a hearing date, time and place that is acceptable to everyone involved. If an agreement cannot be reached, the adjudicator has the power to decide on a date, time and place of hearing.

The hearing is generally held in the place or city where the employee reported for work. If, however, the adjudicator feels that having the hearing at this location may be unfair to one or both parties (for example, if the location impairs the ability of a party to present his or her case), the adjudicator does have the power to choose another location.

The adjudicator will advise you by letter of the date, time and place of the hearing once it is established. The letter may also include further instruction as to the procedures to be used before and during the hearing.

What if I can't attend on the date set for the hearing?

Sometimes other important matters come up after the hearing date has been established. If, for good reason, you can no longer attend on the date agreed to, contact the adjudicator and the other party as soon as possible. Provide your reasons for not being able to attend, and request that a new hearing date be set. The adjudicator will then decide whether or not to reschedule the hearing.

How long will the hearing take?

The length of the hearing will depend on the complexity of the case and the number of witnesses expected to give evidence. Typically, however, hearings take an average of two (2) full business days.

How do I get ready to present my case?

Before the hearing, you should prepare and organize all the evidence that supports your case. It is important to think about the order in which you will offer your evidence. It should be presented in a well-organized, logical way that makes it easy for the

adjudicator to understand both your case and the facts that support it. Often the best way to introduce evidence is chronologically. In other words, tell the facts in the order in which they happened.

What evidence can I use?

Types of evidence that you could use to support your case include:

(1) documents such as employment contracts or employee records,

(2) testimony of witnesses; and

(3) photographs, drawings or diagrams.

For documentary evidence, it is a good idea to have the person who prepared the document **testify** at the hearing to prove the document is authentic and to speak about its contents.

The best witnesses are those that have personal and first-hand knowledge of what they will testify about. If you or your witness tell the adjudicator what someone else said, that is considered **hearsay**. Hearsay evidence may not be allowed by the adjudicator, or, if it is allowed, the adjudicator will give it less consideration when making his or her decision. It is much better to have the person who actually performed the act or saw someone else do something testify.

How do I get witnesses to attend the hearing?

When you receive the letter from the adjudicator fixing the dates, be sure to let all your witnesses know of the date, time and place of the hearing. Ask them to be prepared to spend the whole day at the hearing since they could be asked to testify at any time during the day.

If someone does not want to testify on your behalf, you can ask the adjudicator to issue a **subpoena** which requires them by law to attend the hearing and testify. If you want the person to bring documents with them, ask the adjudicator to specify those documents in the subpoena. A subpoena can also be useful if a witness needs to provide an explanation for missing work to his or her employer.

If you do obtain subpoenas from the adjudicator, it is your responsibility to deliver them to the witnesses before the hearing, at your expense.

How do I prepare my witnesses to testify?

Before the hearing, it is recommended that you talk with your witnesses about their testimony. Let them know what questions you will ask them and what information you need them to share with the adjudicator to support

your case. It is, however, illegal to ask your witnesses to be untruthful or to lie on your behalf.

What else must I do before the hearing?

Before the hearing date, the adjudicator may direct you and the other party to provide each other with copies of documents you plan on using as evidence during the hearing and/or the names of witnesses you intend to have testify on your behalf. This is often referred to as **pre-hearing disclosure**. If the adjudicator gives this **order**, you must follow it.

You must also prepare and organize your documents prior to the hearing. For ease of reference, it is recommended that you place your documents into a binder. Each separate document should be tabbed and page-numbered. You will be required to bring three (3) or four (4) copies of this binder to the hearing: one for you, one for the adjudicator, and one for the witnesses to use. You must also bring a copy to give to the opposing party if you have not already done so in pre-hearing disclosure.

If you have any questions or concerns about pre-hearing disclosure or how to arrange your documents, contact your adjudicator.

What happens at the hearing?

Typically, the hearing happens in three stages: (1) opening statements, (2) the presentation of evidence, and (3) closing arguments. Each stage is explained in greater detail below.

Although the outline below explains how a typical hearing will proceed, it is important to remember that adjudicators have the power to set their own procedure. It is recommended that you contact your adjudicator before the hearing to find out what specific procedures and rules will apply in your case.

Opening Statements

At the beginning of the hearing, you and the other party will each have the opportunity to make a short opening statement. The employer will go first, followed by the employee.

Your opening statement is a short summary of your case. It should act as a "road map" for the adjudicator, allowing him or her to better understand your case and what you want the adjudicator to decide. It should include: (a) an outline of the dispute, (b) a summary of the evidence you will present, and (c) a brief discussion of what **remedy** you want the adjudicator to give (see the section on "Closing Arguments" below for a greater discussion on remedy).

Presentation of Evidence

After the opening statements, each party gets to present evidence and call witnesses. All evidence is given under oath or affirmation.

Usually, the employer will present its evidence first. It will call and question its first witness. This is called **direct examination**. The employee will then have the opportunity to question the employer's witness. This is called **cross-examination**, and its purpose is to point out any factual mistakes or inconsistencies in the witness's story. After cross-examination, the employer may ask additional questions of its witness on points raised during the cross-examination. This is called **re-direct**, and its purpose is to clarify evidence. This process will be repeated for each of the employer's witnesses.

Once the employer has presented all of its evidence, the employee will have the same opportunity to present evidence and call witnesses. The employer will have the chance to cross-examine the employee's witnesses, and the employee will have the opportunity to ask questions of the witnesses on re-direct to clarify any answers.

When the employee has finished, the employer has the right to call **rebuttal** evidence to challenge or discredit the

employee's evidence. The employer does not have to call rebuttal evidence, but can if he or she feels it is necessary.

Closing Arguments

After all the evidence is presented, each party will have the opportunity to make a closing statement. During your closing statement, you should: (a) briefly summarize the evidence that supports your case, (b) make arguments why you should win, and (c) indicate the remedy you want the adjudicator to give you.

A remedy is what you want the adjudicator to give you to right the wrong you believe has been done. For example, if you are the employee, the remedy you might request is to be reinstated in your former job with back pay or given some amount of severance payment. If you are the employer, you will want the adjudicator to declare that the employee was not unjustly dismissed.

What's the best way to give evidence?

The best way to give evidence is to be clear and direct. Start at the beginning of your story and tell the adjudicator what happened in the order in which it happened. Avoid adding details or facts that aren't important to your case.

At times, the adjudicator may ask questions of you or the witnesses to clarify the testimony and get a better picture of what

happened. Answer the questions clearly, directly and truthfully.

If you have any documents that you want to use to support your case, present them to the adjudicator while you are giving your evidence or through your witnesses as they testify.

Who has to prove what at the hearing?

It is the **employer** who has the responsibility of proving that the dismissal of the employee was justified. The employer must persuade the adjudicator that there is sufficient evidence to support the dismissal. If the employer fails to do this, the adjudicator will decide in favour of the employee.

What does the adjudicator consider when making his or her decision?

Adjudicators will consider a number of factors when deciding whether or not the dismissal was justified. For example, he or she may consider:

(1) **Seriousness of the problem**: Did the action/inaction of the employee have serious or only minor consequences for the employer?

(2) **Degree of orientation**: Had the workplace rules been clearly explained? Was the employee informed about the employer's job performance expectations?

(3) **Past discipline**: Has the employee been disciplined for improper workplace behaviour in the past?

(4) **Employee's work history**: Has the employee's work performance been satisfactory in the past?

(5) **History of organization's disciplinary practice**: Have other employees who engaged in similar improper conduct been disciplined for it?

(6) **Extenuating circumstances or mitigating factors**: Was the employee facing pressures such as personal problems or provocation which may have led to the improper behaviour?

Adjudicators might also rely on past unjust dismissal adjudication decisions when deciding your case. They are not obligated to follow those decisions, but they can serve as helpful guides. You do not have to refer to past decisions when making your arguments, but can if you like. Past adjudication decisions can be found at your local Labour Program office or in on-line legal databases such as LexisNexis and SOQUIJ, which can be subscribed to for a fee. Information about past unjust dismissal decisions can also be found in labour and employment law textbooks, which may be available at your local library.

What happens after the hearing?

After hearing the evidence and the arguments, the adjudicator will make a decision. It is possible that the adjudicator may not make a decision on the day of the hearing. Rather, the adjudicator may **reserve judgement**, meaning that he or she wants more time to review the facts, evidence and law before making a decision. In that case, the adjudicator will mail or fax a copy of the written decision to both parties and the Minister of Labour once it is made.

Can I appeal the decision of the adjudicator?

You cannot appeal the decision of the adjudicator. It is considered final and binding on both parties.

In limited circumstances, a process called "**judicial review**" (review by a court of the referee's decision) may be available if the adjudicator has made an **error of jurisdiction** or failed to observe a principle of **administrative fairness**. You should consult a lawyer should you wish to seek judicial review as there are short time frames and complex procedures that must be followed.

Can the complainant recover expenses paid to present his or her case?

As noted above, the cost of the hearing room and the adjudicator's fees are paid by the department of Human Resources and Skills Development Canada. Sometimes, however, the complainant will have to spend some money to prepare to present his or her case (i.e. making photocopies, having witnesses attend). This money is commonly referred to as **costs.** If the complainant is successful, the adjudicator has the power to order the employer to pay some or all of the complainant's costs. When making closing arguments, the complainant may wish to ask the adjudicator for costs in the event the dismissal is found to have been unjust. Awarding costs is entirely at the adjudicator's discretion.

What happens once a decision is issued?

If the dismissal is found to have been justified, the complaint is dismissed.

If the dismissal is found to have been unjust, the employer must comply with the remedy ordered by the adjudicator as soon as possible, or within the time frame set out in the adjudicator's decision. If the employer does not comply with the adjudicator's decision, the complainant may want to file

the decision with the Federal Court. The complainant can do this on his or her own, or a Labour Affairs Officer will help with this process upon request. A decision can be filed with the court fourteen (14) days (or later) after the date of the adjudicator's decision or the date by which the employer must comply with the order (whichever is the latest). Once the decision is filed with the Court, it becomes an order of the Court and can be enforced through the court system.

Commonly used terms

These words and terms are commonly used in the unjust dismissal adjudication process. Understanding what they mean may be helpful to you.

Adjudication: A legal process used to determine the employer's and the employee's rights concerning a dismissal. Adjudication involves a hearing during which the employer and employee can make arguments, present evidence and use witnesses to prove their respective cases. The rules followed and procedures used are less formal than in a court of law.

Adjudicator: The person who will decide whether or not the employee has been unjustly dismissed based on the facts and evidence presented at the hearing. The adjudicator is an independent, neutral

person not connected to or associated with the employer or employee involved in the complaint.

Administrative Fairness: Principles of administrative fairness include having an unbiased decision-maker, the parties are given an opportunity to present their evidence and arguments, the decision is given in a timely manner (without undue delay), and the reasons for the decision are clearly explained.

Costs: The charges or expenses paid when preparing your case. The adjudicator may, at his or her discretion, order the employer to pay some or all of the complainant's costs if the dismissal is found to have been unjust.

Cross-Examination: The questioning by the opposing party of a witness who has already given evidence. Its purpose is to check or discredit the witness's facts, knowledge, or credibility.

Direct Examination: The questioning of a witness by the party calling the witness on his or her behalf.

Error of jurisdiction: An error of jurisdiction occurs when the adjudicator makes a decision or a finding outside of the area of law that he or she has the authority to interpret and apply.

Hearsay: Evidence given by someone who does not have direct or personal knowledge of the matter but rather has been told about it by someone else. Hearsay evidence is sometimes not allowed in a hearing. If it is, the adjudicator may give it less consideration when making his or her decision.

Judicial Review: A review of the adjudicator's decision by a court of law.

Order: A direction given by the adjudicator. An order is legally binding on the party or parties it is given to, meaning that the party/ parties must follow it.

Party / Parties: The complainant and the employer.

Pre-Hearing Disclosure: The sharing of documents and/or names of witnesses with both the adjudicator and the other party before the hearing. This must be done if the adjudicator orders it.

Rebuttal Evidence: Evidence presented by the employer to challenge or discredit the employee's evidence.

Re-Direct: The questioning of a witness for a second time by the party calling the witness to testify on his or her behalf, after cross-examination. The purpose is to clarify evidence.

Remedy: What you want the adjudicator to give you to right the wrong you believe has been done.

Reserve Judgement: Where the adjudicator postpones making the decision to a later date, allowing him or her more time to review the facts, evidence and law.

Subpoena: A legal document, issued by the adjudicator, which requires someone to attend the hearing and testify. A subpoena can also specify documents the witness has to bring with him or her to the hearing.

Testify: To provide facts or information, under oath or affirmation, during a hearing.

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