



Employment Law Manual

**An overview of employment law
and the laws of wrongful dismissal
in Ontario**

Employment Law Manual

**An overview of
employment law
and the laws of
wrongful dismissal
in Ontario**

*Prepared as a pro bono project by the Clerks
for the Court of Appeal for Ontario, 2003–2004*

PRO BONO LAW
ONTARIO



Note

THIS HANDBOOK WAS PREPARED as a pro bono project by the following Clerks of the Court of Appeal for Ontario, 2003–2004: Katherine Cornett, Nikiforos Iatrou, Tammy Law, Asha Kaushal, Paul Sheridan and Dena Varah. The clerks would like to thank the Honourable Justices Weiler, Goudge and Echlin for their assistance and guidance in the preparation of this manual.

Contents

1. Introduction	4
2. The Employment Relationship	5
3. Governing Legislation	6
4. Duties of Employer	9
5. Duties of Employee	11
6. Termination of Employment Relationship	12
7. Pursuing Your Case in Court	16
8. Damages	21
9. Alternatives to Small Claims Court	23
10. Resources and Services	28

Introduction

This manual is intended to provide a brief overview of employment law and the law of wrongful dismissal. If you have been dismissed from your job, this manual may help you figure out if you have been wrongfully dismissed, learn your rights and think about your options.

Please keep in mind, however, that this manual covers many areas of law, and is accordingly introductory and general. Because individual circumstances vary widely and because the laws are always changing, it is always a good idea to speak with someone about your unique situation. While every effort was made to ensure completeness and accuracy, the reader should be aware that the applicable law, statutes and rules may change from time to time. *This manual is not intended as a substitute for legal advice.*

Links to web site resources are provided throughout this manual. If you encounter a broken link, use your browser to conduct a key word search for the missing resource. If possible, please report the broken link to info@pblo.org.

The Employment Relationship

IT IS IMPORTANT to first determine whether you are an employee or an independent contractor. This distinction is important because you can only sue for wrongful dismissal if you are an employee. If you are an independent contractor, you may be able to sue for breach of contract (for example, if you have a six-month contract that is terminated after only three months), but you cannot sue for wrongful dismissal.

The courts consider a variety of factors in determining whether a worker is an employee or an independent contractor. These factors include:

- A. Control** — How much freedom do you have over your work? Do you decide when and how your work is to be performed? Are you required to work specific hours? Do you determine your own lunch hours? Are you subject to company policy and discipline? The more freedom you have over your work, the more likely it is that you are an independent contractor. If you have little freedom over your work, then it is likely that you are an employee.
- B. Entrepreneur versus Employee** — Are you carrying on business for yourself or are you performing work for a superior? Do you have the power to delegate the work you do? Do you own your own tools? Does your work involve a chance of profit? Does it involve a risk of loss? Do you have other customers? The more you appear to be carrying on business for yourself, the more likely it is that you are an independent contractor. If you do not appear to be carrying on business for yourself, then it is likely that you are an employee.
- C. Organization** — To what extent are you integrated into the business you work for? Do you have a workspace within the business? Do you make use of services provided by the business such as secretarial services? How long have you been working there? The more you appear to be integrated into the business you work for, the more likely it is that you are an employee. If you are not integrated into the business you work for, then it is likely that you are an independent contractor.

Depending on the type of work you do, it may be difficult for you to determine whether you are an employee or an independent contractor. For more information on this topic, see publication RC4110 on the Canada Revenue Agency web site at:

- <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/README.html>

Governing Legislation

YOUR EMPLOYMENT may be governed by federal or provincial legislation, depending on the type of organization you work for. Ordinarily, employment relationships are governed by provincial legislation. However, your employment will be governed by federal legislation if (1) you are an employee of the federal government (including Crown corporations) or (2) you are an employee of a business that is regulated by the federal government. The federal government has authority over a wide variety of businesses, including banks, airlines, railways, shipping companies, and television and radio stations. For more information on the types of businesses regulated by the federal government, see:

- <http://www.hrsdc.gc.ca/en/lp/lo/fil/about-fil.shtml>

Whether your employment is governed by provincial or federal legislation, it will be subject to the following types of legislation:

A. Employment Standards Legislation — The purpose of employment standards legislation is to set out the minimum standards of an employment relationship. The minimum standards set out in employment standards legislation apply to most employment contracts. Employment standards legislation deals with the minimum wage, hours of work and overtime pay, vacation pay, public holidays, and termination of employment. In Ontario, minimum employment standards are set by the *Employment Standards Act, 2000*. The employment standards of organizations subject to federal regulation are set by the *Canada Labour Code*. For more information on Ontario's employment standards, see:

- <http://www.labour.gov.on.ca/english/es/index.html>

For more information on federal employment standards, see:

- http://www.hrsdc.gc.ca/eng/labour/employment_standards/index.shtml
- http://www.hrsdc.gc.ca/eng/labour/employment_standards/federal/index.shtml

B. Human Rights Legislation — The purpose of human rights legislation is to protect individuals from certain forms of discrimination (including discrimination with respect to employment) and violations of their human rights (including workplace harassment). An employer may not discriminate against an employee on the basis of race, colour, ethnic origin, creed (religion), sex (including pregnancy), sexual orientation, disability, age, marital status, family status, or same-sex partnership status. The applicable human rights legislation in Ontario is the *Human Rights Code*.

The *Human Rights Code* is enforced by the Human Rights Tribunal of Ontario. For employees of organizations regulated by the federal government, the applicable human rights legislation is the *Canadian Human Rights Act*. The *Canadian Human Rights Act* is enforced by the Canadian Human Rights Commission. For information on bringing a human rights complaint to the Human Rights Tribunal of Ontario, see the Chapter 9, Alternatives to Small Claims Court, or see:

- <http://www.hrto.ca>

For information on bringing a human rights complaint to the Canadian Human Rights Commission, see:

- <http://www.chrc-ccdp.ca/faq/page4-en.asp?highlight=1>

C. Occupational Health and Safety Legislation — The purpose of occupational health and safety legislation is to prevent workplace accidents and injuries. Under this legislation, an employee has (1) the right to a safe and healthy workplace, (2) the right to information and training concerning the safety of their workplace, (3) the right to refuse dangerous work, and (4) the right to participate in the management of health and safety issues in his or her workplace. In Ontario, the occupational health and safety legislation applicable to most workplaces is the *Occupational Health and Safety Act*. For organizations subject to federal regulation, occupational health and safety standards are set by the *Canada Labour Code*. For more information on Ontario's occupational health and safety standards, see:

- <http://www.labour.gov.on.ca/english/hs/>

For more information on federal occupational health and safety standards, see:

- <http://www.hrsdc.gc.ca/en/gateways/topics/oxs-gxr.shtml>

D. Labour Relations Legislation — In contrast to the other legislation listed here, labour relations legislation does not apply to all employees. Labour relations legislation only applies to unionized employees: employees represented by a union. In Ontario, the applicable labour relations legislation is the *Labour Relations Act, 1995*. For organizations subject to federal regulation, labour relations are governed by the *Canada Labour Code*. A unionized employee cannot personally sue their employer for wrongful dismissal. If you are a unionized employee and you believe that you have been wrongfully dismissed by your employer, you must bring your complaint to your union. Your union will listen to your complaint and then decide whether to bring a grievance against your employer. Contact your union for more information about your union's grievance procedure.

Employment Contracts

Employment standards legislation applies to most employment contracts, written or oral. A written contract will set out the terms of the employment relationship and may include the duties of the employee, the benefits that the employee will receive and the way the relationship can be ended. If there

is an oral agreement, or if the employer and employee do not discuss the terms of employment at all, then the parties are bound by an unwritten contract.

If a written contract has been entered into freely, represents the product of a fair and equal bargaining process and has been set out clearly, the contract may be upheld. This means that as an employee, you may be held to its terms.

If a dispute arises in an unwritten contract situation, usually a number of terms will be read into the contract, based on what the employer and employee would have agreed to had they discussed the employment relationship. These terms usually include reasonable notice upon dismissal, or payment instead of reasonable notice.

An employer is not allowed to “contract out” of certain provisions of employment standards legislation. In other words, your employer cannot avoid requirements of the legislation by putting it into your contract. However, since employment standards legislation only provides minimum standards, where an employer has agreed to provide benefits greater than those set out in the legislation, the employer will be bound to that promise.

Exemptions

Some employees and employers are not covered by employment standards legislation, or are exempted from certain parts of the *Employment Standards Act*, such as those governed by federal legislation. Other exemptions include individuals performing work in an experience program authorized by a school board, college or university; inmates taking part in work programs; and people doing community work under the *Ontario Works Act, 1997*. For a complete list of job categories not covered by the *Employment Standards Act*, see the Act:

- http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm

or, check the ESA Exemptions and/or Special Rules chart at:

- http://www.labour.gov.on.ca/english/es/guide/guide_22.html

Duties of Employer

UNDER PROVINCIAL legislation, an employer must:

- Pay employees minimum wage.
- Pay employees on a regular, recurring pay day and provide them with a statement showing their wages and deductions.
- Provide the employee with wages in cash, through a negotiable instrument such as a cheque, or through direct deposit into the employee's bank account. An employer cannot make deductions from wages earned to recover sums that the employee owes to the employer, unless authorized to do so in writing (for example, in a contract). The employer must bring a claim for that money.
- Provide the employee with breaks – 30 minutes for every five hours of consecutive work.
- Provide employees with at least 11 consecutive hours off work each day, and a minimum of 24 consecutive hours of rest per week, or at least 48 consecutive hours of rest in each two week period.
- Pay employees overtime pay (equal to 1 ½ times the employee's regular pay) for all hours worked in excess of the standard workweek set by legislation (usually 44 hours a week). An employer cannot force his or her employee to work overtime, but they can both agree to a longer workweek. If the employer and employee agree to a workweek longer than 60 hours, this arrangement must get approval from the Ministry of Labour. Normal overtime pay rules will still apply to the agreement.
- Pay employees for public holidays (there are eight in Ontario). If an employee works on a public holiday, the employee should receive public holiday pay plus premium pay for the hours worked, or their regular rate of pay and a substitute holiday with holiday pay.
- Allow employees to take vacations and pay wages for that time. In Ontario, employees who have worked for at least one year are entitled to at least 2 weeks vacation at a pay of 4 per cent of their annual earnings. If an employee is terminated before his or her annual vacation, that employee is still entitled to his or her vacation pay at whatever rate is applicable depending on the employee's length of service.
- Allow women who have worked for at least 13 weeks to take pregnancy leave. Employees are required to provide two weeks' written notice to their employer of their intention to take pregnancy leave. Employees can take up to 17 weeks of unpaid leave and are entitled to have their benefits continue throughout. If an employer provides benefits such as short-term disability or sick leave credits to other employees, denying these benefits to a pregnant employee during a health-related absence or during her pregnancy may constitute discrimination on the basis of sex.

-
- Allow new parents who have worked for at least 13 weeks to take 35 weeks (if you have taken pregnancy leave) or 37 weeks (if you have not taken pregnancy leave) of unpaid parental leave. This includes adoptive parents. At least two weeks' notice must be given to the employer. Note that employees are entitled to take both pregnancy and parental leave. The period of pregnancy and parental leave is included when calculating the employee's length of employment, service and seniority. These are important when calculating vacation entitlement or reasonable notice.
 - Offer an employee returning from either pregnancy or parental leave the same job, or a comparable job with equivalent wages and benefits. Employers are not allowed to punish an employee who wishes to take pregnancy or parental leave. If an employee is dismissed during pregnancy or parental leave, the notice period does not begin to run until the employee's expected return date to work.
 - Provide "emergency leave" – up to 10 days – to an employee if there are 50 or more employees at the employee's place of work. This leave covers situations such as the employee's own illness or medical emergencies or those of a family member. These days are job protected – an employer cannot penalize you for taking them.
 - As mandated by the *Employment Insurance Act*, provide employees with "compassionate leave" to care for seriously ill family members. At the time of publication, federally regulated employees are currently entitled to compassionate leave, while the provinces are in the process of amending their employment standards legislation to provide compassionate leave. In Ontario, employees are entitled to up to eight weeks of compassionate leave.
 - Pay their employees all outstanding wages (including overtime pay, vacation pay, living allowances and bonuses) after termination. There is no duty on an employer to provide an employee looking for other employment with a reference letter. However, if an employer refuses to do so, or provides an unfair letter, a court may increase the period of reasonable notice of termination to reflect the increased period of unemployment.
 - Provide equal pay for work of equal value.
 - Comply with the *Human Rights Code*.

Duties of Employee

EMPLOYEES ALSO OWE their employers certain duties whether or not they have a written contract of employment. Employee duties include:

- The duty to be loyal, faithful and to advance the employer's business interests.
- The duty of confidentiality and honesty.
- The duty to obey orders as long as they are lawful, reasonable and within the scope of employment.
- The duty to be competent and to perform work in a non-negligent manner.
- The duty not to be frequently absent or late.
- The duty not to be drunk or engage in sexual harassment or moral impropriety.

Termination of Employment Relationship

EMPLOYERS ARE ENTITLED to terminate an employee at any time. What an employer *cannot* do is terminate your job unfairly – this is what is meant by “wrongful dismissal”. For example, an employee *cannot* be terminated for demanding their rights under the *Employment Standards Act*. Termination is unfair when it is done without notice or payment instead of notice. In addition, termination is unfair when you are fired or quit because you are not prepared to accept significant changes in your job – this is referred to as “constructive dismissal”.

Reasonable Notice

An employer must provide termination notice, or payment in lieu of notice (termination pay), unless you are dismissed for the following: willful misconduct, disobedience, willful neglect of your duties, or if you have worked for less than three months.

The length of notice required is defined by statute and court decisions (referred to as the common law). The *Employment Standards Act* provides a minimum notice requirement, while court cases assist in determining whether the notice is “reasonable”.

The statutory minimums set out by the *Employment Standards Act* increase with the length of employment. Here are the minimum notice periods required under the *Employment Standards Act*:

Period of Employment	Minimum Notice Period
3 months – 1 year	1 week
1 year – 3 years	2 weeks
3 years – 4 years	3 weeks
4 years – 5 years	4 weeks
5 years – 6 years	5 weeks
6 years – 7 years	6 weeks
7 years – 8 years	7 weeks
8 years +	8 weeks

The notice of termination should be in writing and must be clear and direct. Most notices will specify the exact date when employment is to end.

The notice periods in the *Employment Standards Act* are statutory minimums. Generally, it is not enough for an employer to merely provide notice of termination: this notice must be “reasonable”. What is “reasonable” depends on factors such as age, length of service, position, compensation and likelihood of getting alternative employment. If the notice is not “reasonable”, an employee may sue for wrongful dismissal even if it meets the statutory minimums. In many cases, courts will require that an employee receive more notice.

If your employment is governed by contract, the notice periods in the contract may apply. These periods, however, must at least meet the statutory minimums. If your employer fails to provide at least the statutory minimum, the court may find the contract provision unenforceable. If unenforceable, you will not be limited to the statutory notice period, but will be entitled to whatever period the court determines to be reasonable under the circumstances.

If no notice is given, then your employer has to make payments instead. The amount of termination pay you receive should reflect the wages and benefits you would have received during the reasonable notice period.

Under the federal Wage Earner Protection Program, you may also be eligible for up to \$3,000 for unpaid termination pay in circumstances where your former employer has become bankrupt. You must apply for these benefits within eight weeks of being terminated or your employer going bankrupt. For details of this program see:

- http://www.servicecanada.gc.ca/eng/sc/wepp/changes_wepp.shtml

Constructive Dismissal

Constructive dismissal occurs when significant changes to the employment relationship have been imposed upon an employee. Not every change in the employment relationship amounts to constructive dismissal. Such changes must not be trivial and must be imposed without the employee’s consent. The change must affect a fundamental term in the employment contract. For example, lower wages, changes in job responsibilities, geographical relocations, and changes in working conditions are fundamental changes that may amount to constructive dismissal.

To succeed in a constructive dismissal claim, you must show that the change put you in a situation that an objective person, informed of all the facts, would find unreasonable, unfair, and impossible in the circumstances. It is not necessary that your employer actually intended to end your employment, as long as that intention can be inferred from your employer’s conduct. The key issue in constructive dismissal is not your employer’s intention, but whether the change amounts to a repudiation of the employment contract.

If you suspect that you might be subject to constructive dismissal, you should seek legal advice as early as possible. If you are presented with a change and continue to work, the court may decide that you have accepted the change – this is called condonation. A finding of condonation means you can no longer claim of constructive dismissal. If you cannot afford legal advice, other options include speaking

with your employer directly, getting help from a legal aid clinic, or getting 30 minutes of advice for \$6.00 from the Law Society of Upper Canada Lawyer Referral Service (1-900-565-4577).

Just Cause

An employee may be dismissed for “just cause” if he or she has engaged in serious misconduct or conduct which breaches the basic obligations of the employment relationship. There is no fixed rule defining the degree of misconduct that will justify dismissal, although it has often been described as conduct which effects the fundamental terms of the employment contract.

The focus is on the conduct of the employee, and whether he or she has engaged in conduct that amounts to a rejection of the employment contract. Note that it is not just cause when an employer dismisses an employee because of dissatisfaction with the employee’s performance. Rather, dismissal for “just cause” can only occur if the employer can prove a pattern of misconduct or a serious isolated incident of misconduct that would justify immediate dismissal. Examples of “just cause” include:

- Repeated willful disobedience of a superior’s reasonable orders.
- Absenteeism or lateness which seriously prejudices the employer.
- Intention to defraud or deceive the employer.
- Criminal conduct such as theft.
- Intoxication that prejudices an employer’s interests or poses a risk to life or property.
- Sexual or other types of harassment.
- Certain instances of incompetence.

The fact that an employee’s position has become redundant does not amount to “just cause”.

In general, your employer bears the burden of proving in a court of law that the conduct in question amounts to “just cause” – your employer must show that it is more probable than not that the misconduct took place. In addition, if your employer is aware of your misconduct and fails to take any action to address it, a court may infer that your employer accepted the behavior. The presence of acceptance could prevent the court from finding that there is “just cause” for the dismissal.

When you are dismissed for “just cause”, your employer does not need to provide you with reasonable notice or payments. In these situations, your employer can dismiss you without reasonable notice even if you have worked long enough to meet the minimum notice periods set out in the *Employment Standards Act*.

After Dismissal

In Ontario, an employer must pay an employee unpaid wages within seven days of dismissal, or the day that would have been the employee’s next pay day, whichever is later. There are *Employment Standards Act* complaints processes to assist you in collecting any unpaid wages after dismissal (see Section 9B,

Claims under the *Employment Standards Act*). However, there are also limitation periods that limit the time in which you can bring a claim for the wages against your employer.

Certain employees might be entitled to severance pay (an extra payment, above termination pay) when dismissed. In Ontario, only those employers who terminate more than 50 employees in six months or less due to an operation closing, or those who have a \$2.5 million or more payroll, are required to pay severance. Severance is also restricted to employees with five or more years of service. Severance pay is generally equal to one additional week's pay for every year of work, up to a maximum of 26 weeks' additional pay. Employees may not receive severance for some of the same reasons they are not entitled to notice, i.e. dismissal for just cause.

Employees who are dismissed can receive Employment Insurance benefits if they were terminated for no fault of their own and are able to work but can't find a job. To be eligible you must have been without work and pay for at least seven days and in the last 52 weeks since your last claim, have worked the required number of "insurable hours" (determined based on where you live and the unemployment rate in the region – usually between 420 and 700 hours).

To apply for benefits, you can fill out an application on-line:

- <http://www100.hrdc-drhc.gc.ca/ae-ei/dem-app/english/home2.html>

or in person at your local Human Resources and Skills Development Canada office:

- http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/our_offices.shtml#100

Request a Record of Employment from your last employer (if you later receive any unpaid wages or vacation pay, your employer should re-issue your Record of Employment). If you do not receive your Record of Employment within 14 days of your last day of work, submit your application with other proof of employment, such as pay stubs.

Other information you will need includes a Social Insurance Number, personal identification, complete bank information and your detailed version of the facts and details about your last employment. Usually it takes about 28 days to receive benefits. Benefits can be paid from 14 to a maximum of 45 weeks. The basic benefit rate is 55% of your average insured earnings, to a maximum of \$413 per week. Employment Insurance payments are taxable income, meaning federal and provincial or territorial taxes will be deducted. You could receive higher payments if you are in a low-income family with children and you or your spouse receive the Canada Child Tax Benefit:

- <http://www.cra-arc.gc.ca/bnfts/cctb/menu-eng.html>

You are then entitled to the Family Supplement:

- <http://www.servicecanada.gc.ca/en/sc/ei/family/familysupplement.shtml>

For more information on Employment Insurance, see Employment Insurance Frequently Asked Questions:

- http://www.servicecanada.gc.ca/eng/ei/faq/faq_index_individuals.shtml
- <http://www.servicecanada.gc.ca/eng/ei/menu/eihome.shtml>

Pursuing Your Case in Court

IF YOU DECIDE that you wish to pursue your case in court, a number of details have to be kept in mind. The following summary is meant to give you an overview of the process. For more precise information, it is highly recommended that you contact the court to obtain a guide to their process. Most of the information provided below has been drawn from the *Small Claims Court Guides to Procedures*, available online at:

- <http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides>

or a hard copy can be obtained at the Small Claims Court office. In Toronto, the Small Claims Court office is at 47 Sheppard Ave. E. and the phone number is (416) 326-3554. Any forms referred to below can also be obtained at that office or can be found online at:

- <http://www.ontariocourtforms.on.ca/english/forms/scc/index.jsp>

A list of the Small Claims Court offices can be found at:

- <http://www.attorneygeneral.jus.gov.on.ca/english/courts/cadaddr.asp>

Limitation Period

A limitation period is essentially a time limit for starting legal proceedings. In Ontario, since January 1, 2004, a new *Limitations Act* applies which, for most cases, sets the time limit at two years. The clock generally starts ticking on the day that the event in question occurred. If you were unfairly dismissed, you would have two years from the date of dismissal to begin your lawsuit (beginning your lawsuit is also known as initiating your claim).

Where to Initiate Your Claim

If you are going to take a former employer to court over what you perceive to be your wrongful dismissal, there are a number of steps you must take and forms you must file at the court.

The first decision you must make is which court to sue your former employer in. If your claim is for less than \$10,000, the proper, most efficient, and least expensive court to bring your claim in is Small Claims Court. Even if your claim is for over \$10,000, you may still wish to bring your claim in Small Claims Court because the proceedings are simpler and the judges are used to working with people who are not necessarily familiar or comfortable with legal proceedings. Keep in mind, however, that even if you are successful, the maximum amount that a Small Claims Court judge can award you is \$10,000

plus interest. There is also a limited amount of money you may receive to compensate you for the costs that you may have incurred to pursue your case. Note that as of January 1, 2010, the Small Claims Court's jurisdiction for monetary awards will increase from \$10,000 to \$25,000.

How to Initiate Your Claim

As the person suing, you are the plaintiff. The first step in suing someone for wrongful dismissal in Small Claims Court is to file a form called 'Form 7A: Plaintiff's Claim,' at the Small Claims Court office. There is a filing fee (currently \$75) that is charged when you file your claim.

Form 7A must be filled out in full and essentially provides the court with details about you, your former employer, and the nature of your claim against your former employer. If there are any documents relevant to your case (such as your contract, performance reviews, paystubs, any returned bad cheques, or letters between you and your former employer), you should attach a copy of these to the form. Bring the originals to the trial. The court keeps the original claim form and copies of any supporting documents. Make sure you keep a copy of every form for yourself. You will also need an extra copy for your former employer.

'Serving' Your Former Employer

After you have filed Form 7A with the Court, the next step is informing your former employer of the lawsuit. You inform your former employer by "serving" him or her with Form 7A and any supporting documents. *You must do this within six months of having filed your claim at the Court.* Serving is a formal way of providing your former employer with the details of the lawsuit. In order to serve the forms, someone (either you or someone acting on your behalf) must personally deliver the forms to the person being sued. If you are suing a corporation (and not any person in particular), you can deliver a copy of the document to an officer, director, or manager of the corporation. After the claim has been served on your former employer, whoever did the serving must complete *Form 8A: Affidavit of Service*. This affidavit will act as proof that your former employer has been informed of your claim.

Service of documents is a very important step in the Small Claims process. In order to ensure that you meet all the requirements, obtain the small claims guide from the court office.

Your Employer's Response

If your former employer decides to defend against your claim, it must file at the Court a *Statement of Defence* within 20 days of having been served with your claim. If your former employer does that, the Court will send you a copy of the Statement of Defence and inform you of what the next steps are.

If no statement of defence is filed within the 20 days, you may return to the Court to seek a default judgment. If that is the case, an officer of the Court will review your file. If your claim is in order and

the defendant has not filed the necessary forms in time, a judge may assess a monetary value for the damages and enter judgment against the defendant in the defendant's absence.

If the Statement of Defence is filed on time, the Court will inform you of whether you will have a trial or whether you should attend at a Pre-Trial Conference. The purpose of a pre-trial meeting is to bring both sides together in an informal setting. The judge, referee or other person appointed by the court tries to define or narrow the disagreement and resolve the problem before the trial begins. He or she helps the parties understand the factual and legal problems and makes sure that each side will know what the other side will bring to or say at the trial through witnesses or documents. The pre-trial official will also try to see if there is any way the dispute can be settled without going to a formal trial.

If no agreement can be reached at this time, a trial date will generally be set by the court. A Notice of Trial setting out the trial date, time and location will be mailed to you.

Trials at the Small Claims Court

You will receive a notice with the time and date that you are to appear for your case. You may appear on your own, hire a lawyer or ask a law student to appear with you. If you are appearing on your own, once you arrive at the Court on the appropriate date, check the list and wait until your case is called. When your name is called, walk to the front of the courtroom, state your name and take a seat at the table in front of the judge's bench.

The plaintiff (the person claiming that he or she was unlawfully dismissed) is usually entitled to present his or her evidence first, followed by the defendant. You may be the only person speaking for your side or you may also call witnesses. Whether you have witnesses or not, you will still want to present your own evidence. The following advice about giving evidence is drawn from the Small Claims Court website:

- When you give evidence, you enter the witness box and take an oath or affirmation that what you are about to say is true.
- Speak in a direct manner. Start at the beginning and tell the judge the facts in the order they occurred. Try to avoid repeating yourself or adding details that don't matter to your case. The judge may ask questions to help clarify your testimony or to get a further explanation of what happened. You can bring notes to refer to, but you cannot read these notes as your evidence.
- If you have any documents such as contracts, receipts or cancelled cheques you want to use as evidence, present them while you are giving your evidence on the witness stand. They will then be taken from you and marked as exhibits. You can refer to exhibits as you present your case. At your request, this evidence may be returned to you 45 days after the trial unless an appeal has been filed.
- When you are finished presenting your evidence, your opponent or their representative will be given the chance to question you. This person will also be able to question any witnesses who have given evidence on your behalf. This questioning is called cross-examination. Its purpose is to point out any factual errors or inconsistencies in your evidence or the evidence of your witnesses.

-
- Once your opponent has introduced their evidence, you will be permitted to cross-examine the other side and any witnesses. The judge will control any cross-examination to make sure a witness is not being treated unfairly. The judge won't allow you to argue with a witness or use this opportunity to tell your side of the story.
 - You will also have the chance to make a closing statement. However, this is not an opportunity to repeat all of the evidence.

Witnesses

When your trial date is set, you will want to arrange for your witnesses to attend the trial as soon as possible. If someone does not want to testify on your behalf, you will have to request the clerk to issue a notice (summons to witness) requiring them to attend. This will also be proof to an employer, who must allow an employee to attend court during work hours.

You will have to pay a fee to the court office for the summonses and you will also have to pay a witness fee and traveling expenses to anyone you want to attend. You may be able to recover these fees from the other party if you win your case. *You must serve the summons on the witness you wish to have testify.*

Before the trial, it is wise for you to discuss with your witnesses the evidence they will be presenting. After you talk over the facts, you will be able to prepare your questions and decide on the best order for your witnesses to appear before the court. Talking to the witnesses is smart, and necessary. However, any attempt to influence them to say anything but the whole truth is illegal. You should prepare written questions to ask your witnesses. The questions should be as brief as possible.

Judgment

The judgment, or order, is the decision of the judge who heard your case, which usually states that one side in the case is entitled to receive a certain sum of money or personal property from the other. This amount may include interest, court costs, or both. Usually a judge in a Small Claims Court will give an oral judgment right after both sides have finished presenting their cases. The judgment is the final decision in a court case but it is not a guarantee of payment.

Sometimes when you win a judgment in Small Claims Court, the person who owes you money will pay it promptly, or make arrangements for payment with you which are then followed. At other times, the person who has been ordered to pay ignores the order – they will not or cannot pay. It is then up to you to take the steps needed to enforce an unpaid judgment. The court staff will help you proceed once you give clear written directions, complete the necessary forms, and pay the necessary court fees. These fees are recoverable when you collect on the judgment. If you reach this stage, it is advisable that you contact the Small Claims office to receive detailed explanations of your options.

Legal Costs and Interest on Your Claim

As you prepared your case, you had to pay a fee to the court office before many of the necessary steps were carried out. If you win your case, you may be entitled to a judgment to allow you to recover much of this money from the losing party. The money you can get back generally covers court costs and certain witness fees.

If you used a lawyer and won a case for more than \$500, the court may award up to 15 per cent of the amount claimed to go towards your lawyer's fee. If you were represented by a law student or agent, the maximum you can receive is half of that. If you were not represented by anyone else and you were successful in a claim over \$500, the court may award you up to \$500 as compensation for inconvenience and expenses if the judge feels the losing party made the case more complicated or time-consuming than was necessary. The court may also allow you up to \$50 for preparation and filing of the necessary documents.

You may also be entitled to interest on the amount of money that is owed to you as a result of your successful claim. If you want interest, you must ask for the interest in your claim (Form 7A – see above). This interest is called pre-judgment interest because it begins to accumulate on the date the claim arose and ends on the date of judgment. If it looks like the defendant may have difficulty paying your claim immediately after the date of judgment, you may also be entitled to post-judgment interest that begins to run from the date of judgment onward.

Damages

IF YOU SUE IN COURT, your employer cannot be ordered to give you your job back. What you can get is a damage award – which means a sum of money, normally based on the amount of time you worked with your employer, your position, your age, compensation and other factors.

Under the *Employment Standards Act* a wrongfully dismissed employee is entitled to certain minimum statutory entitlements. A suit for wrongful dismissal can provide more substantial damages. Various types of damages can be awarded in wrongful dismissal cases: general damages, *Wallace* damages, special damages, damages for mental distress, aggravated damages and punitive damages. Note that it is far more likely that a court will award *Wallace* Damages than damages for mental distress, aggravated damages or punitive damages.

General Damages relate to the salary and benefits the employee would have received if there had been adequate notice. In addition to the loss of salary which an employee would have earned during a reasonable notice period, courts have awarded damages for benefits, including: bonuses, club dues, stock options, pension, insurance, vacation pay, etc.

Wallace Damages will be awarded where an employer breaches his or her duty to be honest and forthright with his or her employee. Before awarding *Wallace* Damages, courts will generally look for callous and insensitive behaviour on the part of the employer. Courts will extend the reasonable notice period to reflect this breach.

Special Damages are awarded to compensate employees for out-of-pocket expenses such as automobile expenses, the loss of disability insurance, or the expenses you incurred looking for other work.

Damages for Mental Distress are only granted where the following is proven:

- there was flagrant and extreme conduct by the employer inflicting mental suffering;
- the employer's conduct was reckless or intended to cause mental distress; and
- the employer's conduct caused actual harm.

The courts award **Punitive Damages** where the employer's behaviour is so outrageous that it warrants punishment and condemnation, such as where the employer's actions are malicious, high-handed and where the acts are independently actionable.

A dismissed employee has a duty to mitigate his or her damages, which means you *must* look for another comparable job. If you do get another job, any income you receive will be deducted from a damage award. In other words, if you are awarded damages equal to six months of pay, but obtained similar employment a month after dismissal, you will likely only receive one month of pay in damages.

The amount of potential damages is something to consider in deciding whether to pursue a claim. In a wrongful dismissal suit, the burden is on the employer to prove that the employee has not taken reasonable steps to mitigate his or her damages.

Keep in mind that any money you receive can affect your eligibility for social assistance or disability benefits.

Alternatives to Small Claims Court

A. Simplified Procedure in the Superior Court

If you are seeking more than \$10,000 in damages (or, commencing January 1, 2010, more than \$25,000), the proper method to bring your case forward is in the Superior Court of Justice. So long as your claim is for less than \$50,000, there is a simplified procedure that applies (this amount is increasing to \$100,000 on January 1, 2010). This simplified procedure is more complex than small claims litigation but is substantially quicker and less complicated than traditional litigation. For more information regarding simplified procedure and how to start a case in the Superior Court, contact the court office at 416-327-5440 or refer to the Simplified Procedure Fact Sheet at:

- <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/srfactsheet.pdf>

B. Claims Under the *Employment Standards Act*

There is a separate claim that you may pursue if there was a violation of the *Employment Standards Act*. The *Employment Standards Act* covers the minimum standards for issues such as pregnancy leave, hours of work and overtime, vacation, and severance pay.

Employment standards officers from the Ministry of Labour have the right to look into possible violations of the *Employment Standards Act*. They can also inspect workplaces.

WHO CAN FILE A CLAIM

Most employees covered by the *Employment Standards Act* may file a claim. In two situations, an employee who is covered by the *Employment Standards Act* cannot file a claim:

1. Generally speaking, employees represented by a union cannot file a claim. These employees should consult their union representative.
2. Employees who have already started a *court action* against an employer for the failure to pay wages, discrimination in benefit plans, or severance/termination pay for wrongful dismissal, cannot file a claim for the same matter. An employee with questions about whether it is best to file a claim or to sue the employer in court may wish to consult a lawyer *before* filing a claim.

Employees who believe that their employer or former employer has not followed the *Employment Standards Act* are encouraged, when appropriate, to discuss the matter with the employer or with their

union representative. Sometimes it might be better to contact the Ministry of Labour directly. After hearing an employee's complaint, an employment standards officer might make the recommendation that they file a claim with the Ministry.

HOW TO FILE A CLAIM

To file a claim, an employee must complete a claim form. The claim form can be obtained from a Ministry of Labour office (see the Blue Pages or the web site), or a Government Information Centre. If you visit the office, staff will be able to help you fill out the claim form. The form can also either be printed from, or completed electronically at, the Ministry of Labour's website:

- <http://www.labour.gov.on.ca/english/es/claim/index.html>

You will need some personal information to file your claim. You should check with the Ministry of Labour office to find out what documents to bring with you. The claim form contains a written statement of the employee's concerns, as well as other information about the employer and details about the employee's complaint.

TIME LIMITS

An employee must file a written claim with the Ministry of Labour within six months of the date the wages should have been paid to you. There are two exceptions to this time limit: one for vacation pay and the other for multiple violations of the *Employment Standards Act*. In both cases, you will receive a longer time limit.

In some cases, the employee has up to two years after a violation to file a claim with the Ministry. These cases include situations where an employer has violated a non-monetary section of the *Employment Standards Act* – for example, if the employer didn't give proper meal breaks – or where the employee is seeking compensation or reinstatement.

You should contact the Ministry of Labour to find out how long the time limit is for filing your claim. In certain circumstances, you may be able to extend the time limits.

Once you file your claim, it will be investigated to see whether there has been a violation of the law.

POSSIBLE RESULTS OF YOUR CLAIM

As a result of your claim, the employer may be required to pay the wages owing to you (up to a maximum of \$10,000 per employee). Another possibility is that the employer could be required to reinstate you in your job. Other penalties include requiring the employer to pay an administrative fee, comply with the *Employment Standards Act*, pay compensation or even pay a penalty. Employers can also be prosecuted and, upon conviction, ordered to pay a fine or serve jail time.

However, you should be aware that if you pursue a claim under the *Employment Standards Act* for wrongful dismissal and then apply for Employment Insurance, there is a potential problem. If your Employment Insurance claim is denied and you appeal, you may face the problem of having already dealt with the same issues in your claim under the *Employment Standards Act*. Courts will not allow

you to litigate the same issues twice. Be sure to ask someone at the Ministry of Labour about this possibility.

FOR MORE INFORMATION

Call the Employment Standards Information Centre at 416-326-7160 or toll-free at 1-800-531-5551.

C. Human Rights Complaint

If you believe that your employer or former employer has violated your rights under the Ontario *Human Rights Code*, you can bring a complaint directly to the Human Rights Tribunal of Ontario.

THE HUMAN RIGHTS CODE

The *Human Rights Code* protects employees, independent contractors and even volunteers. You can file a complaint not only against your employer, but also against a contractor, a union, or a board of directors.

Under the *Human Rights Code*, you have the right to “equal treatment with respect to employment.” This covers all aspects of employment – from applying for a job, being recruited, training, transfers, promotions, dismissal and layoffs. The *Human Rights Code* also covers rates of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

The *Human Rights Code* protects you from certain kinds of discrimination based on the following grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (includes pregnancy), sexual orientation, age, record of offences, marital status, family status, handicap/disability and record of offences. The *Human Rights Code* protects from discrimination only in certain areas, called “social areas.” You are protected in the following situations: services, goods and facilities; housing; contracts; employment; and membership in vocational associations and trade unions.

THE HUMAN RIGHTS COMMISSION

The Commission’s role has changed significantly in recent years. It is no longer responsible for receiving or investigating individual complaints and taking those complaints to the Tribunal. Rather, complaints are now made directly by individuals to the Human Rights Tribunal.

THE HUMAN RIGHTS TRIBUNAL

The Human Rights Tribunal is an independent body, separate from the Commission. It is responsible for making a decision about the complaint.

HUMAN RIGHTS LEGAL SUPPORT CENTRE

The Human Rights Legal Support Centre is a new body that provides human rights legal services for those who believe they have experienced discrimination. The Centre provides a number of services. They can help you file your application with the Tribunal, provide you with limited legal advice, and in certain circumstances, even provide legal representation on human rights applications.

For more information about the Human Rights Legal Support Centre see their website at:

- <http://www.hrlsc.on.ca/en/index.htm>

HOW TO FILE A COMPLAINT

In order to file a complaint with the Tribunal, you must have a ground protected under the Human Rights Code and a social area. In other words, you must have been discriminated against based on one of the protected grounds when you are in one of the five protected situations.

Copies of application forms are available online at the Tribunal's website:

- <http://www.hrto.ca/NEW/application/newappforms.asp>

The forms can be completed online, or delivered by fax or hard copy to the Tribunal. You can send your application:

- **by mail to:** Richard Hennessy, Registrar, Human Rights Tribunal of Ontario, 655 Bay Street, 14th Floor, Toronto, ON M7A 2A3, Tel (Toronto): (416) 326-1519, Tel (Toll Free): 1-866-598-0322, TTY: (416) 326-2027, TTY (Toll Free): 1-866-607-1240
- **by email to:** HRTO.Registrar@ontario.ca
- **by fax to:** (416) 326-2199 or (Toll Free) 1-866-355-6099

Note that you can only submit your application once. If multiple applications regarding the same issues are submitted, only the first application will be considered.

It is also your responsibility to serve your employer with a copy of the application you have filed as well as any other materials you have filed at the Tribunal. See the Tribunal's Rules of Procedure for more information about what must be served and how it can be delivered at:

- [http://www.hrto.ca/NEW/word/S.53\(3\)Opt-out%20Rules.doc](http://www.hrto.ca/NEW/word/S.53(3)Opt-out%20Rules.doc)

You must complete a Statement of Delivery (Form 23) indicating that copies have been delivered on all parties as required.

- <http://www.hrto.ca/NEW/application/newappforms.asp>

Much like the procedure in Small Claims Court, after your employer receives your application, it will have the opportunity to respond.

D. Mediation

Mediation is a process of trying to resolve the dispute with the help of another, impartial person. That person hears both sides of the story and attempts to reach a compromise or settlement between the two sides. Generally, both parties have to at least agree on who you should hire to mediate your dispute and who should pay the mediator's fees. Mediation is one form of alternative dispute resolution (ADR). For more information about mediation, or to locate a mediator, you may wish to contact the ADR Institute of Ontario, Inc. at (416) 487-4447 or visit their website at:

- <http://www.adrontario.ca/>

E. Unionized Workers

If you are a member of a union and you believe you have been unlawfully dismissed, contact your union first to explore the possibility of filing a grievance. If they are unable to help you grieve your case, they may be able to inform you of other avenues that are open to you.

Resources and Services

Further Reading

In addition to statutes, courts rely on prior case law to help guide their decision making. The following are cases that frequently arise in employment disputes and elaborate on some of the points made in this manual. A reference librarian at any law library can help you obtain copies of these cases if you wish to read them.

- For more information on the distinction between **independent contractors and employees**, see *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (P.C.).
- For more information on **reasonable notice**, see *Bardal v. Globe and Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).
- For more information on **constructive dismissal**, see *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846.
 - <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii387/1997canlii387.html>
- For more information on **just cause for dismissal**, see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161.
 - <http://www.canlii.org/ca/cas/scc/2001/2001scc38.html>
- For more information on **damages**, see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and *Keays v. Honda*
 - <http://www.canlii.org/en/ca/scc/doc/2008/2008scc39/2008scc39.html>

Websites

Canada Revenue Agency pamphlet on determining whether a worker is an employee or an independent contractor:

- <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/README.html>

Ontario Ministry of Labour website: information on employment standards and health and safety standards in Ontario:

- <http://www.labour.gov.on.ca/english/hs/>

Employment Standards Legislation:

- http://www.labour.gov.on.ca/english/about/leg/es_leg.html

Ontario Ministry of Labour website: short fact sheets that provide a general introduction to the *Employment Standards Act*:

- <http://www.labour.gov.on.ca/english/es/guide/index.html>

Human Resources and Skills Development Canada Labour Program website: information on federal employment standards and federal health and safety standards:

- http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/program/labour.shtml

Small Claims Court website:

- <http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/>

The Ontario Human Rights Commission's website: information on Ontario human rights legislation:

- <http://www.ohrc.on.ca>

The Canadian Human Rights Commission's website: information on federal human rights legislation:

- <http://www.chrc-ccdp.ca>

PRO BONO LAW
ONTARIO



www.pblo.org

866-466-PBLO

416-977-4448

*Prepared as a pro bono project by the Clerks for
the Court of Appeal for Ontario, 2003-2004*

DESIGN: WRITEDESIGN.CA