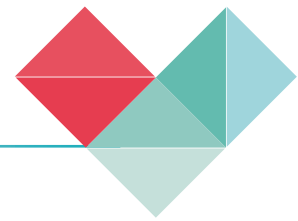




Information on **Labour Standards**

11A **WAGE RECOVERY** Guide to an Appeal Hearing



INTRODUCTION

This publication is a step-by-step guide to a wage recovery appeal proceeding. It is intended to help you prepare for your appeal and to understand how the appeal hearing process will take place.

As you read this publication, you will find words in **bold** print which are commonly used legal terms in an appeal process. These terms are explained at the end of this document so you can understand what they mean as you prepare for, and participate in, an appeal hearing.

This publication does not contain legal advice. If you have any legal questions or concerns, it is recommended that you contact a lawyer.

1 **General**

Part III of the *Canada Labour Code* allows for a wage recovery appeal hearing to be offered to an employee or an employer who:

- is involved in a dispute about the non-payment of wages or other amounts;
- disagrees with the findings of the reviewer in their case; and
- believes there is a question of law or jurisdiction in their case.

In some cases, the Minister of Labour may also refer a non-payment of wages dispute about an inspector's findings directly to a referee, rather than using the Labour Program's administrative review process.

2 Who hears and decides on an appeal hearing

The Minister of Labour will appoint a **referee** to hear a wage recovery appeal. Referees are appointed from an inventory of persons who have experience hearing wage recovery matters.

A referee is an independent person who is not connected to, or associated with, the **parties** involved in an appeal. The referee will make an objective decision about the appeal based on:

- the information contained in the inspector and/or reviewer's report(s); and
- the facts and evidence presented by the parties at the hearing.

3 Who pays for a hearing

The cost of the hearing room, as well as the referee's fees and expenses, are paid by Employment and Social Development Canada. Any cost to prepare for the hearing, such as making photocopies or arranging for witnesses to appear, is at your expense.

4 Legal representation during a hearing

You can represent yourself or be represented by an agent, which refers to a person who is authorized to act on your behalf, or a lawyer at your appeal hearing. If you choose to be represented by a lawyer or an agent, you are responsible for paying their fees.

5 Location of the hearing

The appointed referee will contact you and the other involved party to schedule a hearing date, time and location. The referee will try to set a hearing date that is acceptable to everyone involved.

A hearing generally takes place in the city or town where the employee reported for work.

If, however, the referee feels that this location may be unfair to one or both parties (because, for example, the location may prevent a party from presenting their case), the referee has the power to choose another location.

The referee will advise you by letter of the date, time, and location of the hearing once it is set. The letter may also have further instruction about procedures for you to follow before and during the hearing.

6 Duration of a hearing

Hearings typically last one full day. However, the referee may schedule two or more days if the case is particularly complex or it involves many witnesses.

7 Requesting a different hearing date

If you are unable to attend the appeal hearing date, you must contact the referee as soon as possible to:

- explain why you are no longer able to attend; and
- request that a new hearing date be set. The referee will then decide whether or not to reschedule the hearing.

8 Preparing and presenting a case

Before the hearing, you should prepare and organize all of the evidence that supports your case. The order in which you offer your evidence is important. It should be presented in a well-organized, logical way to make it easy for the referee to understand. Often the best way is to simply explain the facts in the order in which they happened.

9 Evidence to support your case

You may use a number of things:

- Documents, such as pay stubs, employment contracts, employee records or receipts;
- The testimony of one or more witnesses; and/or
- Photographs, drawings or diagrams.

If possible, have the person who prepared the document **testify** at the hearing that the document is authentic and speak about its contents. This person would be a witness in your case.

The best witnesses have personal and first-hand knowledge about a document or event to which they will refer when they testify. If you or your witness tell the referee what someone else has said or did, it is considered **hearsay**. Hearsay evidence may not be allowed by the referee or, if it is allowed, the referee may give it less consideration when making their decision.

10 Getting witnesses to attend a hearing

When you receive the letter from the referee with your hearing date, time, and location, be sure to tell your witnesses. It is also recommended that you ask your witnesses to be prepared to spend the whole day at the hearing since they may be asked to testify at any time during the day.

If someone does not want to testify on your behalf, you can ask the referee to issue a **subpoena** which requires them by law to attend and testify at the hearing. If you want this person to bring documents with them, you should also ask the referee to specify these documents in the subpoena.

A subpoena can also be useful if a witness needs to provide an explanation for missing work to their employer.

If you do obtain one or more subpoenas from the referee, it is your responsibility to deliver them to the witnesses, before the hearing and at your expense.

11 Preparing a witness

- what questions you plan to ask them at the hearing; and
- what information you need them to share with the referee to support your case. It is illegal to ask your witnesses to be untruthful or to lie on your behalf.

12 Other pre-hearing preparations

Before the hearing date, the referee may request that you and the other party provide copies of documents you plan to use 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** and it must be provided to both the referee and the other involved party. If the referee gives this **order**, you must follow it.

You must also prepare and organize your documents prior to the hearing. It is recommended that you use a binder and tabs to separate each document, as well as page numbers. You are required to bring several copies of this binder to the hearing: one for you; one for the referee; and one for each of your witness. You must also bring a copy for the opposing party if you have not already done so in the pre-hearing disclosure.

If you have any questions or concerns about the pre-hearing disclosure or the arrangement of your documents, you should contact the referee.

13 What to expect during a hearing

Typically, a hearing happens in three stages:

- 1) opening statements;
- 2) presentation of evidence; and
- 3) closing arguments.

Each of these stages is explained below. However, as referees may set their own hearing procedures, it is recommended that you contact your referee before the hearing to find out if any specific procedures and rules will apply in your case.

Opening Statements

You and the other party will each have the opportunity to make a short opening statement. The party who filed the appeal (the **appellant**) usually goes first, followed by the person responding to the appeal (the **respondent**).

Your opening statement is a short summary of your case. It should include:

- an outline of the dispute;
- a summary of the evidence you will present; and
- a brief statement of what remedy or order you want the referee to give (see the “Closing Arguments” section below).

It is recommended that your opening statement be clear and concise. It should allow the referee to understand your case and what you want the referee to decide.

Presentation of Evidence

After the opening statements, each party will get to present their evidence and call witnesses. The appellant will go first.

After taking an oath or affirmation to tell the truth, the appellant will give their testimony.

If the appellant calls witnesses, the first witness will give their testimony by answering questions asked by the appellant. This is called **direct examination**.

The respondent will then have the opportunity to question the appellant or the witness. This is called **cross-examination**. Its purpose is to point out any factual mistakes or inconsistencies in the information provided by the appellant or the witness.

After cross-examination, the appellant may choose to ask the witness additional questions relating to any of the questions asked during cross-examination. This is called **re-direct**. Its purpose is to clarify evidence.

The cross-examination and re-direct process will be repeated for each of the appellant’s witnesses.

Once the appellant has presented all of their evidence, the respondent will have their opportunity to present evidence and call witnesses. The appellant will have the chance to cross-examine the respondent's witnesses, after which the respondent will have the opportunity to ask questions to clarify any of the witnesses' answers.

When the respondent is finished, the appellant has the right to present **rebuttal evidence** to challenge or discredit the respondent's evidence. This is not a mandatory action.

Closing Arguments

After all the evidence is presented, you and the other party will each have the opportunity to make a closing statement. It should:

- briefly summarize the evidence that supports your case;
- make arguments why you should win; and
- indicate the **remedy** you want the referee to give.

A remedy is what you want the referee to give you to right the wrong you believe has been done. For example, an employee typically asks that the Payment Order issued by the inspector (which may or may not have been confirmed by the reviewer) be confirmed and that the money deposited with the Labour Program by the employer be paid to you, or that the employer be ordered to pay you directly the sum of money to which you are entitled. An employer typically asks the referee to order that no money is owed to the employee and that any money deposited with the Labour Program be returned.

You should be advised that a referee will not normally award a specific remedy unless it has been requested during the hearing.

14 Giving evidence

The best way to give evidence is to be clear and direct. Start at the beginning of your story and tell the referee what happened in the order in which it happened. Avoid adding details or facts that are not important to your case. If you have documents to support your case, present them to the referee while you are giving your evidence or through your witnesses while they testify.

The referee may ask you or your witnesses to clarify a testimony to get a better idea of what happened. You and your witnesses should answer these questions clearly, directly, and truthfully.

15 After the hearing

After hearing all of the evidence and arguments, the referee will make their decision. The referee has the power to confirm (uphold), rescind (cancel) or vary (alter or change) the decision of the inspector and/or the reviewer.

It is possible that the referee will not make a decision on the day of the hearing. Rather, the referee may **reserve judgment** because they want more time to review the facts, evidence, and law before making a decision. If this is the case, the referee will mail or fax a copy of their written decision to both parties and the Minister of Labour, once it is made.

16 Appealing a decision

No. The decision of a referee is considered final and binding on both parties. In limited circumstances, a process called **judicial review** (which is a review of the referee's decision by a court) may be available if the referee has made an **error of jurisdiction** or failed to observe a principle of **administrative fairness**. You should consult a lawyer if you want a judicial review because there are short time frames and complex procedures that must be followed.

17 Recovering expenses related to presenting a case

If you win your case, the referee has the power to order the losing party to pay some or all of your costs to prepare for the hearing, such as making photocopies or arranging for witnesses to appear. But note that this is at the referee's discretion. You may wish to ask the referee during your closing statements to order that some or all of your costs be paid if you win your case.

18 After a decision

Once a referee's decision is issued, the money deposited with the Labour Program by the employer will be paid out, with interest, as soon as possible. If a Letter of Credit was deposited in lieu of a monetary payment, payment will be drawn from the issuing financial institution or returned to the employer or director as required. Depending on the referee's decision, this payment could be made to the employee or returned to the employer.

If the referee's decision orders the employer to pay additional sums to the employee, the employer must comply with the order as soon as possible, or within the time period ordered by the referee.

If the employer refuses to comply with the referee's order, the employee can ask the Labour Program inspector in their case to file the referee's decision in the Federal Court of Canada. This may be done 15 days after the date of the referee's decision or after the date by which the employer is required to comply with the order (whichever is the latest).

Once a decision is filed with the Court, the Labour Program has no statutory authority to proceed beyond this point. The party may now seek enforcement of the order through other avenues as with any judgment of the Federal Court.

Commonly Used Terms

Administrative Fairness	These are principles of fairness, such as: having an unbiased referee; being given an opportunity to present evidence and arguments; receiving a referee's decision in a timely manner; and having the reasons for a decision be clearly explained.
Appellant	The person who filed the appeal against the decision of the inspector and/or the reviewer.
Costs	The charges or expenses paid when preparing your case. The referee may, at their discretion, order that the losing party pay some or all of the winning party's costs.
Cross-Examination	The questioning by the opposing party of a witness who has 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 their behalf.
Employer	Any person who employs one or more employees. Director(s) of a corporation may also be liable for employee wages and other amounts to which an employee is entitled.
Error of jurisdiction	An error of jurisdiction occurs where the referee makes a decision or a finding outside of the area of law that they have 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 an appeal hearing. If it is allowed, the referee may give it less consideration when making their decision.
Judicial Review	A review of the referee's decision by a court of law.
Order	A direction given by the referee. An order is legally binding on the party or parties to whom it is given, which means that the party or parties must follow it.
Party / Parties	The appellant and the respondent.

Pre-Hearing Disclosure	The sharing of documents and/or names of witnesses with the referee and the other party before the hearing. This must be done if the referee orders it.
Rebuttal Evidence	Evidence presented by the appellant to challenge or discredit the respondent's evidence.
Re-Direct	The questioning of a witness for a second time by the party calling the witness to testify on their behalf, after cross-examination. Its purpose is to clarify evidence.
Referee	A person appointed by the Minister of Labour to hear the evidence and decide the case on appeal. A referee is an independent, neutral person who is not connected to, or associated with, either party to the appeal.
Remedy	What you want the referee to give you to right the wrong you believe has been done.
Reserve Judgment	Where the referee postpones making the decision to a later date, to allow more time to review the facts, evidence and law.
Respondent	The person responding to the appeal that has been filed. Typically, the respondent agrees with the order of the inspector and/or the reviewer and argues that it should not be changed or overturned.
Subpoena	A legal document, issued by the referee, which requires someone to attend and testify at the hearing. A subpoena may also specify documents that the witness must bring to the hearing.
Testify	To provide facts or information, under oath or affirmation, during a hearing.

This document was prepared by the Federal Mediation and Conciliation Service in consultation with the Workplace Directorate (April 1, 2014).

This document is provided for information purposes only. For interpretation and application purposes, please refer to Part III of the *Canada Labour Code* (Labour Standards), the *Canada Labour Standards Regulations*, and relevant amendments.

*Information about these provisions may be obtained from the Labour Program by calling toll free at 1-800-641-4049, by visiting the website at http://www.esdc.gc.ca/en/jobs/workplace/employment_standards/labour/index.page or by submitting your questions or comments through the Labour Program **Contact Us** form.*

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Wage Recovery – Guide to an Appeal Hearing**

This publication is available for download at canada.ca/publiccentre-ESDC.

It is also available upon request in multiple formats (large print, MP3, Braille, audio CD, e-text CD, or DAISY), by contacting 1 800 O-Canada (1-800-622-6232). By teletypewriter (TTY), call 1-800-926-9105.

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