

## **NOTES FOR THE APPELLANT AT AN EMPLOYMENT STANDARDS BOARD HEARING**

This package has been designed to assist persons who have appealed either a certificate for wages or a decision of the Director issued or made under the *Employment Standards Act*. Its purpose is to provide a background on the mandate of the Employment Standards Board with respect to hearings; and also to explain administrative procedures that will occur both prior to and during the hearing. After reviewing this document, appellants should be better prepared to present their case to the Employment Standards Board. They will enter into the hearing with some knowledge of the procedures that must be followed during the hearing itself. If you have any questions after reading this document, you should contact an Employment Standards Officer at (867) 667-5944 or toll free in the Yukon at 1-800-661-0408 extension 5944.

### **THE EMPLOYMENT STANDARDS BOARD**

#### **a) Background and Mandate**

The Yukon's *Employment Standards Act* came into effect on January 1, 1985, and replaced the *Labour Standards Ordinance*, which had been in effect since 1965. The *Employment Standards Act* (the *Act*) is legislation which sets out the minimum terms and conditions of employment that must be adhered to by employers and employees.

Among other changes the *Act* introduced were provisions for an administrative means of enforcing wage claims against employers. These provisions were quicker, less cumbersome, and less expensive than prosecuting all employers who refused to pay wages. The Director of Employment Standards was given the power to issue certificates for wages that could ultimately be filed in Yukon Supreme Court and enforced as judgements of the court. Parties who disputed the amounts of wages set out as owing on certificates were given the right to appeal to the Employment Standards Board. In addition to hearing appeals of certificates, the Board also hears appeals of decisions of the Director of Employment Standards, which are not set out in certificates. Lastly, the Director can also refer matters to the Board when he or she is unable to resolve a dispute.

#### **b) Membership on the Employment Standards Board**

Part 12 of the *Employment Standards Act* sets out the composition and powers of the Board as well as some basic rules of procedure. The Board is composed of five members who are appointed by the Executive Council Member (Minister of Justice); usually for a

three-year term. The Board consists of two members who are representative of employers, two who are representative of employees and a neutral chairperson. The *Act* provides that a quorum of the Board consists of the majority in attendance. Generally, there are anywhere from two to five members in attendance at a hearing.

c) **Reporting Relationships and Conflict of Interest**

The Employment Standards Board members **are not** employees of the Government of Yukon. The Board reports to the Minister of Justice on issues that require it to make recommendations to Cabinet. The Board maintains an arm's length relationship with Labour Services which assists the Board in a number of ways; such as setting up a date and a location for a hearing, as well as other administrative functions.

Board members have, as a practice, removed themselves from hearing appeals into matters in which one or both parties to a dispute are connected to them through business or personal relationships. This ensures that there is no bias or an appearance of bias on the part of the Board when it makes its decisions.

d) **Powers of the Board**

Again, the powers of the Board are set out in Part 12 of the *Act*. It is a quasi-judicial body and has all the powers of a board appointed under the *Public Inquiries Act*. Such boards can summon witnesses, require they give evidence on oath, and produce documents as required.

When reviewing certificates, the Board can also impose penalties on the employer if it feels the conduct of the employer merits a penalty. If an employer fails to keep accurate records of the hours worked by the employee, the Board may determine that the employee either worked up to 10 hours each day and 60 hours each week, or the number of hours claimed by the employee who would then be entitled to full wages in accordance with its finding. The Board also has the power to order pre-judgement interest on certificates.

e) **Finality of Board Decisions**

All decisions of the Employment Standards Board are final and binding except those made in the case of certificates which can be appealed to the Yukon Supreme Court. The Court will hear appeals and it exercises its supervisory role over the Board. The Court will correct errors of law, determine whether the Board has exceeded its jurisdiction and ensure that the Board's decision is supported by the facts which were presented to it.

## ADMINISTRATIVE PROCEDURES WITH REGARD TO HEARINGS

### a) Setting up a Hearing

Once an appeal or a referral to the Board is made, the Labour Services' Administrative Assistant will contact the employer, employee, and Chair or Vice Chair of the Board to set up a hearing date. The *Act* requires the Board to hear an appeal of a certificate within 14 days of receipt of the appeal. In most cases, it is not possible to actually convene a hearing within 14 days. The Board and later the Yukon Supreme Court, considers that this 14-day requirement is met as long as the hearing date is set within 14 days of receipt of an appeal.

Once the time and location of the hearing are set, the Chair will sign a Notice of Board Hearing. All parties, including the appellant, will be sent a copy of the Notice. The Notice sets out the time and place of the Hearing

The Employment Standards Officer, presenting the case on behalf of the Director, will prepare a **Review of Administrative Procedures** and a **Statement of Issues** for distribution to all parties prior to the hearing. The former document sets out the steps that were taken to ensure compliance with the *Act's* administrative requirements. It also explains the time limits for appeals as might pertain to the case. The latter document contains a summary of the issues that will be presented to the Board during the hearing. You should receive these documents along with copies of the certificate or decision being appealed, the appeal form, and the Notice of Board Hearing approximately two weeks prior to the hearing. If you do not receive this package two weeks prior to the hearing date, you should contact Labour Services to inquire as to its status.

It is important to keep in mind that any information that is sent to the Employment Standards Board prior to the hearing must also be sent to all other parties to the hearing. This is to ensure that everyone who is party to the hearing has an opportunity to review, and perhaps, respond to the issues or facts raised in the information.

### b) Late Appeals

The *Employment Standards Act* contains strict time limits for appeals; however, if an appeal is delivered to the Director after the statutory time period has lapsed, the Director, or the Employment Standards Officer handling the case will forward the appeal to the Chair of the Board with details about the timing of the appeal and the reasons given for the delay. The Chair will then decide whether there are any extenuating circumstances that would justify a hearing of the board to consider the late appeal. If the Chair declines to refer the matter to a board hearing, a written decision to that effect will be issued.

c) **Adjournments**

If there is a need to adjourn and perhaps re-schedule a hearing, a written request must be submitted to the Chair of the Employment Standards Board and delivered to Labour Services. If the request is received in sufficient time before the scheduled hearing, Labour Services will forward it to the Chair; who will decide whether or not to grant the adjournment. If so, Labour Services will arrange for a new hearing date and will notify all the parties.

If the request cannot be considered in advance, the Board will rule on the request at the scheduled hearing. If the Chair refuses to grant an adjournment, he/she will present the reasons in writing to all parties. The hearing of the matter would then proceed.

## **GENERAL HEARING PROCEDURE**

In tribunal proceedings, such as a hearing in front of the Employment Standards Board, the standard of proof is on the balance of probabilities. This standard is less stringent than the standard imposed in criminal cases where the case must be proven “beyond a reasonable doubt”. If at the end of the hearing, it has been proven that the events alleged to have occurred probably did occur, then the case has been proven.

All parties are expected to conduct themselves in a polite and courteous manner during the hearing. Swearing, shouting, or other such forms of emotional outbursts will not be allowed by the Board and will do little to help one’s case.

The Board will make a tape recording of the hearing. The tape is for the Board’s use only and will not be used for purposes of preparing a transcript of the proceedings.

a) **Introductions**

While Board hearings are less formal than court proceedings, most hearings generally follow court procedure. Prior to the start of a hearing, the Board members and all the parties to a dispute, including witnesses, are introduced. The Employment Standards Officer will check to see that all parties have been provided with the information package which is mailed out prior to the hearing.

b) **Jurisdiction**

Before details of the case are presented to the Board, the Chair will establish its jurisdiction to hear the case. Either side will be asked to bring any preliminary motions at

this time. Usually, one or the other party will bring a motion to exclude witnesses. If the Chair grants the request, anyone who is not a “party to the proceedings” will have to leave the room and sit in the corridor waiting to be called. Parties to the proceeding are the employer, the employee, the Director of Employment Standards’ representative, and any other person so designated by the Board. The whole purpose of an exclusion order is so witnesses will not hear the evidence that has been given prior to giving their own evidence.

c) **Opening Statements**

The Employment Standards Officer and the appellant will normally give the Board a short overview of the issues before the Board and the evidence that will be presented in support of their case.

d) **Examination/Cross-Examination**

The basic criterion for the admissibility of evidence is relevance. Relevant evidence is admissible and irrelevant evidence is not. Normally, the party that has appealed will proceed first and bears the onus of proof; traditionally however, in the case of the issuance of a certificate, the Employment Standards Officer or Counsel will enter in all of his/her evidence first. Once this is complete, the opposite side will enter in their evidence, but both parties must follow the basic procedure and principles set out below.

All witnesses are sworn in or affirmed. Evidence is entered by asking questions of witnesses and by entering documentary evidence either through witnesses by having them identify it. If documents are to be entered into evidence through a witness, the party introducing the evidence must supply one copy of the document to the Board and one to the other party, usually the Director’s representative. **It is a good practice to have three (3) copies of each document.** When a witness gives evidence, the person who is calling the witness asks questions first. This is called the **examination in chief**. During the course of the examination in chief, the person questioning the witness is not permitted to ask leading questions on contentious matters. A leading question is one that suggests an answer. Any question that can be answered by a simple “yes” or “no”, is a leading question. For example, “Did you see your co-worker take money from the drawer?” would certainly be leading. A more proper question would be, “What, if anything, did you see your co-worker doing?”

When the examination in chief is complete, the opposite side always has the right to **cross-examine** the witness. This is done by asking him or her questions. The purpose of cross-examination is to attack the credibility of the witness and to see if it can be shown that the witness lied, exaggerated, was prejudiced, or mistaken. If so, the weight of his/her evidence in chief is greatly lessened or nullified. During cross-examination, evidence the witness may have that wasn’t brought out during examination in chief may

be canvassed. Contrary to the examination in chief, a good cross-examination will consist of nothing but leading questions.

When the cross-examination is finished, the side that originally called the witness may obtain the Board's permission to re-examine that witness. This **re-examination** can only be on new points brought forward in the cross-examination and again, no leading questions. Of course, re-cross is also possible to clarify evidence brought out in the re-examination.

The Board members may also have questions for the witnesses; and will usually ask them once the re-examination is completed. After this, the witness is excused but may be recalled.

e) **Summary or Summation**

Both sides are given the opportunity to summarize their evidence and to present legal arguments to substantiate their cases. This is the stage at which reference will be made to specific sections of the *Employment Standards Act*. Case law in the form of Employment Standards Board and court decisions from Yukon and other jurisdictions may also be introduced. As with documentary evidence, **three (3) copies** of any authorities or case law relied upon should be available.

f) **Employment Standards Board's Deliberations**

Once all the evidence and arguments have been presented, the parties (including the Employment Standards Officer) will vacate the room to allow the Board to make a decision. The Board will then issue a written decision. The decision usually takes several days or weeks before it is completed. Once the decision is received by the Director of Employment Standards, it is sent to the employer and employee by certified mail.