

FIRED ?

HOW TO SUE YOUR EMPLOYER IN SMALL CLAIMS COURT



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I N T R O D U C T I O N

This is a booklet for employees who have been fired from their jobs. It is a step-by-step guide to preparing your claim, serving it, filing it with the court and arguing your case in the Small Claims Court.

The guide contains basic information for people who have been fired. It also has samples of the way you write your claim for presentation to the court.

If you are living on a low income, **COMMUNITY ADVOCACY & LEGAL CENTRE** may be able to represent you. You can contact the Clinic to make an appointment to see a lawyer or a community legal worker to discuss your claim. The Clinic contact information is:

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Monday to Friday: 9:00 a.m. - 5:00 p.m.



Table of Contents

SMALL CLAIMS COURT	4
COSTS OF SMALL CLAIMS COURT	4
WHO CAN SUE?	4
ALTERNATIVE TO SUING	5
WHAT DOES SUING GET YOU?	6
WHAT DO YOU NEED TO PROVE YOUR CASE?	7
EMPLOYER DEFENCES	8
HOW TO CALCULATE THE DAMAGE AWARD YOU ARE SEEKING IN COURT	8
WHEN IS THE AWARD REDUCED?	8
HOW DOES YOUR DAMAGE AWARD AFFECT EMPLOYMENT INSURANCE, ONTARIO WORKS OR ONTARIO DISABILITY BENEFITS?	9
HOW TO START A CLAIM IN SMALL CLAIMS COURT	10
FILING A CLAIM FORM	10
SERVICE	11
PRE-TRIAL	11
GOING TO COURT	11
SET UP OF THE COURTROOM	11
THE TRIAL	12
GIVING EVIDENCE	12
THE JUDGMENT	13
COLLECTING YOUR JUDGMENT	13
SETTLING YOUR SMALL CLAIMS COURT ACTION WITHOUT GOING TO TRIAL	14
SAMPLE CLAIM	14

SMALL CLAIMS COURT

- The Small Claims Court holds TRIALS in:

Belleville
Bancroft
Napanee
Picton

- You can FILE your claims in the Court offices in:

Belleville Small Claims Court
235 Pinnacle Street
Belleville, Ontario

Bancroft Small Claims Court
5 Fairway Street
Bancroft, Ontario

Napanee Small Claims Court
41 Dundas Street East
Napanee, Ontario

Picton Small Claims Court
44 Union Street
Picton, Ontario

- The maximum claim you can sue for in Small Claims Court is \$25,000;
- You must file your claim in Small Claims Court within two years of being fired.

Small Claims Court represents a simple method by which people who have felt they have been dealt with unfairly by their employers can take their cases to court.

COSTS OF SMALL CLAIMS COURT

- The COST of filing a claim (see note below) is \$75.00;
- The COST of fixing a date for trial is \$100.00;

As of January 28, 2005, you do not have to pay these fees if your household income and assets are below certain levels. Information about these "fee waiver" requests, as well as the forms you need to fill out, are available at any of the court offices listed on page 2 or on the government website at www.attorneygeneral.jus.gov.on.ca/english/courts/.

WHO CAN SUE?

- Any employee can sue their employer for WRONGFUL DISMISSAL, which includes:
 - full-time
 - part-time
 - employees on probation

Wrongful dismissal is what it is called when you are fired UNFAIRLY.

- What is meant by UNFAIRLY?
 - fired without notice
 - fired without just cause (proper reasons)
 - fired without warning that work was wrong or substandard
 - fired because you are not prepared to accept a big change in your job. For example:
 - ❖ lower wages,
 - ❖ reduced or significantly different working hours
 - ❖ different duties.
- You **cannot** sue if you are a worker on a contract for a fixed period or if you are a member of a union. For example,
 - if you are hired to work for 8 weeks and at the end of the 8 weeks, your employment is not continued, you do not have a claim.
 - if you are a seasonal worker and you are not taken back by the employer in another season, you do not have a claim.
 - if you are a unionized worker, you cannot sue. Contact your union for advice and assistance as soon as possible if you have been terminated.

ALTERNATIVE TO SUING

- If you do not wish to sue, you can instead file a complaint with the Ministry of Labour and argue that you are entitled to termination pay pursuant to the *Employment Standards Act*. The *Employment Standards Act* sets out a minimum notice period for employees in Ontario. The notice periods are:
 - Employment more than three months but less than 1 year = 1 week *notice* OR 1 week *wages*
 - Employment 1 year to less than 3 years = 2 weeks *notice* OR 2 weeks *wages*
 - Employment 3 years to more than 7 but less than 8 years = 1 weeks *notice* for each full year OR 1 weeks *wages* for each full year
 - Employment of 8 years and over = 8 weeks *notice* OR 8 weeks *wages*

The only exception to this is if you lost your job because of your own wilful misconduct. Your employer will have to prove this. If this is the case, your employer does not have to pay termination pay.

- An employee who is terminated because she has taken pregnancy or parental leave may be entitled to an award under the *Employment Standards Act, 2000* much greater than this.
- If your employer has an annual payroll of over \$2.5 million, and if you have worked there more than five years, you may be entitled to "severance pay," in addition to termination pay. Severance pay is one week of pay for every year worked up to a maximum of 26.
- You cannot both make a complaint to get termination pay under the *Employment Standards Act, 2000* and bring a claim in Small Claims Court for wrongful dismissal. You must do one OR the other.
- If you are a federally-regulated employee, the *Employment Standards Act*, does not apply. The *Canada Labour Code* applies to you instead. If you are uncertain whether you are a provincially-regulated or federally-regulated employee, you can call us for assistance or check with either the Ontario Ministry of Labour or the Human Resources Skills Development Canada-Labour Program.
- If you have been fired because of your race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, sex, sexual orientation, age, marital status, family status, pardoned record of offence, or disability, you can file a complaint to the Human Rights Tribunal. You can make this complaint in addition to a Small Claims Court claim or an Employment Standards complaint, but sometimes it is disadvantageous to file for both.
- Deciding whether to sue your former employer, file a complaint with the Ministry of Labour, or to file a Human Rights complaint to the Human Rights Tribunal can be very complicated. There are pros and cons to each option. We encourage you to seek legal advice before choosing an option.

WHAT DOES SUING GET YOU?

- In a court case in Small Claims Court the only thing that you can get is a damage award which means money. You *cannot* get your job back. The amount of damages is normally based on the amount of time you have been with the employer, your age, and the type of work you performed. A rough rule of thumb is that you should sue for 1 month's wages for every year you have worked there. You should also include your vacation pay for the notice period. It is quite possible that the judge will actually give you less or more than one month's wages for each year you were employed.
- In addition to wages, you can also get the cost of benefits for the same period of time. If you had a medical/dental plan and you are claiming for 4 months of pay, you could also claim the cost of your medical/dental plan for a 4-month period.
- You are also entitled to claim expenses for the cost of job searching for other work.

WHAT DO YOU NEED TO PROVE YOUR CASE?

- The first thing you have to prove is that you are an employee. That can normally be done by:
 - your letter of termination;
 - your Employment Insurance record of employment;
 - pay stubs.
- You must show that you were terminated without proper notice. Your employer will then have to prove that you were fired for "just cause."

The categories of JUST CAUSE that the Courts say allows an employer to fire a worker are:

- serious misconduct:
 - theft
 - fraud and dishonesty
 - serious and insubordination (that means disobeying your supervisor in a serious matter)
 - breach of employer's rules that are reasonable and consistently enforced by the employer
 - persistent absences and lateness from work without medical or other good reason
 - sexual harassment
- incapacity to perform work:
 - serious incompetence
 - permanent illness or injury that cannot be accommodated by the employer without undue hardship, and is likely to continue indefinitely
- Your employer is not entitled to fire a worker without proper notice because:
 - he feels like it
 - he has no reason
 - he has not given the worker an opportunity to improve
 - he has a personality conflict
 - times are bad or there's not enough work
- An employer cannot lay you off for an indefinite period without notice or paying your wages.
- In the experience of Community Advocacy & Legal Centre, *most* employees are let go because the employer develops a dislike for the employee. He may feel the employee doesn't try hard

enough, or has the wrong attitude. An employer **cannot do this** without notifying the employee about what he doesn't like, and giving the employee a reasonable chance to improve. The employer fails to do this in almost all cases.

EMPLOYER DEFENCES

- An employer cannot be successfully sued if you are guilty of serious misconduct or incapacity to perform work as set out in the previous section
- An employer cannot be sued successfully if the employer has made you aware of problems in your job performance, has given you a reasonable opportunity to correct it, and has told you that you will be terminated if you don't improve.

HOW TO CALCULATE THE DAMAGE AWARD YOU ARE SEEKING IN COURT

- As noted earlier, a court can only award you money for damages for loss of your job. It cannot order that you get your job back. As a general rule, you should sue for one month's wages for each year you have worked. As a practical matter, a judge may not give you this much, however, it is a useful standard. In certain circumstances, you may be able to get more than one month's wages for each year you worked. We encourage you to get legal advice about what is an appropriate amount to claim
- Therefore, if you were employed for six years and then fired without notice, you should sue for six months worth of wages and benefits.

WHEN IS THE AWARD REDUCED?

- FAILURE TO MITIGATE

This means that you *must*, when you are fired, start looking for other work. You *have* to keep a record of your job search activities. If you find a job, you are entitled to:

- payment for the amount of time you received no wages
- payment for the amount of time you received wages at less than your old job--you will get the difference between your new wages and your old wages
- any costs associated with finding your new job.

If you do nothing, your employer can say that your damage award should be reduced because you are not looking for work to cut your losses.

- PROBATIONARY EMPLOYEES

These are usually employees who have just started with a company and are probationary employees for a period of time, usually three to six months. Generally, probationary employees will find it difficult to sue for wrongful dismissal, if they have been dismissed because the employer has decided, in good faith, that they are not suitable for the job. A court may award damages in the judge believes that the employee was not given a fair chance to prove that he or she can do the job satisfactorily.. A Court will likely look at the term of probation and how much of the term is left.

- PART-TIME EMPLOYEES

Part-time employees are entitled to the same damages the same as a full-time employee. If you were working 20 hours per week and had done so for three years, you should sue for three months wages based on the amount of hours you would normally have worked in that three month period. If you are reduced from full- time to part-time hours shortly before you are fired, you are entitled to be treated as a full-time employee for the purposes of suing your employer.

HOW DOES YOUR DAMAGE AWARD AFFECT EMPLOYMENT INSURANCE, ONTARIO WORKS OR ONTARIO DISABILITY BENEFITS?

- Employment Insurance

If you receive money from a Small Claims Court wrongful dismissal claim, you have an obligation to report this to the Human Resources and Skills Development Canada (HRSDC) if you were on a claim after your employment ended. You must then repay the EI benefits for the weeks that you would not have received those benefits if you had been paid your wages in the first place. Your benefit period will be extended by the same number of weeks.

- Ontario Works or Ontario Disability Support Program

If you are on Ontario Works or Ontario Disability Support Program and you receive money from a Small Claims Court wrongful dismissal claim, either as a judgment or as a settlement, you must report this as income the month that you receive it. This money will become an asset the following month which will be used to determine whether you continue to be eligible for benefits. You may want to get legal advice on this point. It may be that the money you receive is for a period of time after you were terminated from your job and when you were not on Ontario Works or Ontario Disability. If that is the case, you should request that this income be averaged and applied as income for the months that it was intended for. The Ontario Works Department can exercise its discretion to do this. If they do not, an appeal may be possible. An internal review must be filed within 30 days, and an appeal form must be filed within 30 days after that. Contact the legal clinic for further advice and assistance.

HOW TO START A CLAIM IN SMALL CLAIMS COURT

FILING A CLAIM FORM

- To start your claim, the FIRST STEP is to fill out a Plaintiff's Claim form. You can find the form at www.attorneygeneral.jus.gov.on.ca/english/courts/scc/, the website of the Ministry of the Attorney General.

On the Claim form

- you are the plaintiff
 - you must include your full name, address, postal code, telephone number
 - your employer is the defendant
 - you must sue your employer in its correct name or the name that it carries on business under and provide the full address
 - you must set out the amount of money you are claiming
 - you must set out a short summary of why you are suing.
- You may wish to follow the example that is contained in this booklet. You would write on the "Reasons for Claim and Details" section of the claim form, "see attached", and write out a summary like the example in this booklet.
 - You would also include a copy of your notice of termination, if you received one.
 - You should have three copies of the summary of your claim and all the documents you are including with the claim (one for the Court, one for the defendant, and one for you).
 - The Small Claims Court limit is \$25,000. In calculating your damages, you cannot exceed \$25,000. If you do, you must put a statement in your claim that says you are reducing your claim to \$25,000 to bring it within the limit of the Small Claims Court. If you want to pursue a claim for more than \$25,000, you must use the Superior Court of Justice. You should see a private bar lawyer about this.
 - Once you have completed the Claim form you must
 - take it to the Small Claims Court Office
 - pay the fee or apply for a fee waiver if you are living on a low income.

You will then receive a file number on your Claim form and it will be ready to serve on the defendant, your former employer.

SERVICE

- Your Claim and the papers attached to it have to be served either by mail or personally on your employer. If you use the mail, it is a good idea to send it "Registered." If you serve the papers personally, you must hand deliver the documents to the defendant. If your employer is a corporation, it has to be served at the corporation's place of business on a person who is a manager or supervisor. You must have the full name of the person who you give the documents to.
- Once you have served the documents, you have to complete an Affidavit of Service. The Court staff can swear this Affidavit for you.
- After the Affidavit of Service is filled in and sworn, it has to be filed with the Court office.

PRE-TRIAL

- The purpose of a pre-trial meeting is to bring both sides together to see if, before trial, the matter can be settled. You can request a pre-trial in your claim form, or you can use a special court form for this purpose. There is no charge.
- You do not have to agree to anything at the pre-trial. If you have questions, contact the legal clinic for help. The judge at the pre-trial will not be the judge at the actual trial.
- You *must* attend at the pre-trial. If you do not, the Judge can order that you pay costs to the defendant. Bring all your documents with you, but do not bring any witnesses.

GOING TO COURT

- If your claim was not settled at the pre-trial, you will have to request that the court set a date for your trial. You will have to pay the fee, unless you have qualified for a fee waiver.
- Most people think that going to court is a frightening experience. It is not. Many people in Small Claims Court represent themselves. The Judges are used to unrepresented people.
- If you have never been to Small Claims Court, it is a good idea to watch a trial on a day before your trial date so that you become familiar with the process. The Court office will tell you when trials are scheduled.

SET UP OF THE COURTROOM

- In the Court room, there is the Judge and the Court Clerk. The Judge is addressed as "Your Honour" or "Sir" or "Madam"
- Remember: be on time, and dress neatly.

THE TRIAL

- When you go to the Court House, find what number your case is on the list. The Judge will, at some point, read the list and find out who is ready to proceed to trial. The cases are normally done in order of the list.
- When your case is called, walk to the front of the Court room, tell the Judge your name and take a seat at the table in front of the Judge's bench. You are the plaintiff and you sit on the right side. The witness stand is beside the Judge.

GIVING EVIDENCE

- When you give evidence, you enter the witness box and take an oath that what you are about to say is true. Speak in a direct manner. Start at the beginning of your employment and tell the Judge the facts of your employment in the order that they occurred.
 - When you were employed
 - Who your employer was
 - Who was your supervisor
 - What were the facts that led to your being terminated?
 - Were you given any notice?
 - What were the reasons for termination?
 - Were you given an opportunity to correct the reasons for termination at an earlier date?
- You can bring notes if you need to help you but you can not read these notes as you are testifying.
- When you have finished giving your evidence, the defendant, or your employer, will be able to question you. The Judge will control the questioning if it is improper. You should *not* get into an argument with your employer. You should simply answer the questions as briefly and as accurately as you can. The judge may also have questions for you.
- If you have witnesses, you should ask the Judge for permission to call your next witness. The Judge will only want to hear the witness' direct knowledge of facts relating to what you are claiming. After the witness takes an oath, you can ask questions of your witness. It is best to write your questions out beforehand. When your witness has answered your questions, your employer can ask questions of the witness. You can then call your next witness.
- When you are done presenting your evidence, it is the employer's turn. What the employer must show is that he had JUST CAUSE. Your employer will have to prove that you, as an employee, either committed serious misconduct or had an incapacity to perform the work. The employer must prove that he had just cause. Your employer can also call witnesses.

- Listen carefully to your employer's evidence. When it is your turn to cross-examine the employer, you should only ask questions on points that you disagree with. As an example, you might ask:
 - what were your job duties?
 - what job duties were you not able to fulfil?
 - when were you first advised that there were problems in fulfilling your job duties
 - Is there a written record of that?
 - what opportunity was given to you as the employee to improve?
 - did you receive a warning? Is there a written record of that?
 - did the warning indicate that if you continued not to meet your job duties that you may be terminated?
- After the evidence is given, both you and your employer can make a final statement to the Judge. It is helpful if you keep the statement simple.
- For example, if you were not given a chance to change what you were doing to meet your employer's requirements, you say, "I was not given a reasonable chance once I was advised of the difficulties I was having in doing the job." That is all you have to say.

THE JUDGMENT

- After the evidence is given and the statements are made by the parties, the Judge will make his or her judgment. The judgment will say whether you as the employee are entitled to receive a sum of money from your employer. A Judge may postpone the decision. You will then receive a written notification.
- The Judge can also order that you recover the money that you paid to file your claim and set it down for trial.

COLLECTING YOUR JUDGMENT

- Once you are successful in your action, you should write a letter to the employer asking them to pay the judgment to you within a certain period of time. If you do not receive payment from them voluntarily you can garnish their bank account or have a debtor examination.
- You can obtain assistance from the Court office as how to do that. It would be useful if you knew, as a result of your pay cheques, what bank your employer used. If the Court office does not assist you and you are unsure as to the next step, contact the legal clinic.

SETTLING YOUR SMALL CLAIMS COURT ACTION WITHOUT GOING TO TRIAL

Frequently the employer may offer to settle your claim without having the claim go to a trial. It will be up to you to decide whether to accept the employer's offer. Here are some matters to consider:

- ◆ The settlement amount will usually be less than what you were suing for. In return for taking a lesser amount, you will not risk losing your claim and getting nothing.
- ◆ Any settlement agreement should be recorded in writing and signed by you and by your employer
- ◆ Your employer will require, as part of the settlement, that you sign a "release" which will say that you will not take any further legal action against your employer for any matter arising out of your employment.

If you settle your action, you must still report the amount that you received to the Human Resources and Skills Development Centre, Ontario Works, or Ontario Disability Support Program.

SAMPLE CLAIM

EXAMPLE

The following example is the fact situation on which the sample claim is based. You should change your claim to your own fact situation but this will give you a broad outline.

Donna, who is 40 years old, commenced work as a receptionist in a dental office in 2004. She was paid \$11.00 per hour and always worked 40 hours a week. Her job was to answer the telephone, make appointments, to telephone dental patients about reminders. In addition to Donna there were the dentist who was the operator of the business, a dental hygienist and a dental nurse. In October of 2009 the dentist advised Donna that he had received complaints from the other workers that they were not getting along and he thought that maybe Donna should look for other employment, that she would have up to a year to do that, and she could take time off whenever necessary for interviews for other positions. Donna neither agreed nor disagreed with this approach but she did indicate that she did not think that any of the problems were problems that she initiated.

During the course of her employment, Donna had not received any formal job evaluations. She had, over the course of the five years employment, undertaken other duties that were more extensive than those which she had first trained for, although she had not received any increase in salary for so doing. She would assist in developing x-rays, and other related duties if she had time.

Approximately one month after this discussion, Donna was advised by the dentist that he was terminating her without any further notice because the situation had worsened and that Donna was the odd person in this relationship and he felt, as a result, he owed her nothing

further. Donna received, on her termination, her record of employment that showed "dismissed" and it was signed by Jones Dental Corporation.

Donna commenced looking for other work, initially as a medical receptionist but soon found that there were no openings. She increased her area of job search to include any type of job that paid a similar amount of remuneration and that did not entail shift work. She was successful approximately eight months later in obtaining employment.

Donna's claim would be against not the dentist but the dental corporation because that was her employer and she would have to then show Jones Dental Corporation as defendant and it would have to be served upon an officer, the dentist, of that corporation.

When you write your claim, you should number each paragraph. The claim for Donna would read as follows:

Reasons for Claim and Details:

1. I am the plaintiff in this claim.
2. I am a 40 year-old female who was employed as a dental receptionist from February 2004 until my termination in November 2009. At the time of my termination, I earned \$11.00 per hour and worked 40 hours a week.
3. The defendant dental corporation was my employer. To the best of my knowledge, Earl Jones is the sole shareholder and director of the dental corporation. Earl Jones was also my direct supervisor.
4. During the course of my employment I received no regular assessments of my employment although I did perform duties other than those which had initially been given to me in the start of my employment.
5. In the first week of October 2009, I was advised by Earl Jones that there were some problems in the office and that perhaps it was a personality thing and that it may be best that I look for other employment.
6. After receiving this information from my employer, I neither agreed nor disagreed. I did however start to look for work in the medical dental reception or office field.

7. On November 5, 2009, I was advised by the dentist, Earl Jones, that I was to be dismissed. He said there had been further problems and that I was the odd one out, he was dismissing me effective immediately without any notice or wages. In my Record of Employment he indicated "dismissed". He would not reveal to me precisely what the complaints were against me or who had made them.

8. Since I was advised I should seek other employment, I have spent approximately 20 to 30 hours per week searching for other employment. I have utilized applications, Human Resources and Skills Development Canada Centre, newspaper want ads in an attempt to find alternate employment, and increased the area of my job search, and sought other types of work at a comparable rate of pay.

9. I believe that I have been wrongfully dismissed.

10. Therefore, my claim is for 6.5 months wages in lieu of notice. I further seek the sum of 6.5 months' worth of benefits. We had a dental/medical benefits package provided extended health care services at a cost of approximately \$57.00 per month for a total of \$370.50. I also claim for the costs of this action and any interests.