

THE CALL-OVER AND PRE-HEARING DISCOVERY AND INSPECTION

WHAT IS A CALL-OVER HEARING?

The call-over hearing is held to set a timetable for actions that must be taken by the parties before the full hearing. At the call-over hearing, the Commissioner issues a DIRECTIONS ORDER which contains the instructions for the actions which must be taken by both the applicant and the respondent.

These instructions are all aimed at making the parties exchange documents which are relevant to the case. The reason behind this is the important legal principle that justice is not achieved if there is "trial by ambush". Each case should be decided on the merits. Neither party should be surprised by the other party's evidence on the day of the trial. This ensures that the system is fair to all and prevents delays caused by one party having to ask for the hearing to be adjourned to gather further evidence to respond to something new. Civil proceedings in the District and Supreme Courts are conducted on this basis.

THE DIRECTIONS ORDER

The directions order issued at the call-over contains a number of instructions to both the applicant and the respondent:

- ◆ the applicant and the respondent may be ordered to provide each other with a list of documents by a specified time;
- ◆ each party may be ordered to provide copies of documents on the list if the other party requests it;
- ◆ each party may be ordered to provide the other party with statements of evidence from any witnesses they intend to call;
- ◆ the order may state that a party would have to get the permission of the Commissioner hearing the case to lead evidence not mentioned in the witness statements or to lead evidence from witnesses other than those whose statements were provided.

THE LIST OF DOCUMENTS AND DISCOVERY

Each party lists all documents that are relevant to a matter in issue between the parties where the party has the document in their possession or under their control. A DOCUMENT is not just a paper document, but includes audio tapes, computer and electronic records and videos.

A document is RELEVANT if it relates to an issue which is in dispute between the parties and which has the potential to advance one party's case or damage the other party's case.

IN THEIR POSSESSION refers to ownership of the document. A document a party possesses is one they own. UNDER THE CONTROL OF THE PERSON includes documents the party has the power or authority to retrieve. Thus relevant documents held at the office of a party's accountant or solicitor, or relevant documents held by the head office of the employer would have to be listed.

The order for each party to exchange lists of relevant documents is part of the process called DISCOVERY. Once the list is provided to the other party, the other party can request copies of any document on the list. This part of the

process is called INSPECTION. A copy of the document MUST be provided unless the party who listed it claims that it is subject to PRIVILEGE.

One kind of privilege that might be claimed is the privilege against self-incrimination. A person is not obliged to answer a question or produce a document that has the tendency to expose that person to a criminal conviction or civil penalty. Another kind of privilege that might be claimed is client legal privilege. A document does not have to be produced if the dominant purpose for which it was brought into existence was the obtaining or giving of confidential legal advice.

WITNESS STATEMENTS

In the hearing, both parties can call witnesses to give evidence about the applicant's employment and the circumstances of the dismissal. The applicant can give evidence, that is, the applicant can be a witness for him or her self. Often this is the only way the applicant can put forward his or her story.

The applicant can also call other witnesses whose evidence supports the applicant's versions of events. Similarly the respondent employer can call witnesses such as the applicant's former supervisor or manager. Witnesses are used to give evidence about the issues in dispute between the parties.

The Directions Order issued at the call-over may instruct each party to provide the other party with STATEMENT(S) OF EVIDENCE or WITNESS STATEMENTS. These are statements from each intended witness which provide the name, address and occupation of the witness and a summary of the key points of the evidence the witness will give at the hearing.

TIME LIMITS

The time limits in the Direction Order must be complied with. They are to ensure that the matter is ready for hearing by the dates set for hearing. Under Rule 42 of the *Industrial Relations (Tribunals) Rules 2000*, if a party fails to comply with the directions order, the Commission may dismiss the application or make other orders that may not be in the best interests of the defaulting party.