

## What happens at a formal hearing?

Last edit: August 19, 2019

### **General Information**

The goal of the hearing process is to resolve disputes between parties in a way that:

- is accessible, quick, inexpensive, informal and flexible
- is procedurally fair
- applies human rights law and principles
- is proportional to the circumstances of each complaint
- is supportive of the parties involved in the hearing process
- realizes that there are other ways to resolve disputes

These considerations should guide the actions and decisions of all people involved in the hearing process.

Hearings can either be informal or formal. This guideline deals with the formal human rights hearing process.

The biggest difference between an informal and formal hearing is the role of the Adjudicator and the use of cross-examination. In an informal hearing the Adjudicator takes the lead and asks the questions. In a formal hearing the parties are responsible for presenting their own case by using evidence – either by consent or by calling witnesses. Witnesses are cross-examined by the opposing party and there can be objections on procedural grounds.

Formal hearings generally take longer and are best used where there are complicated legal questions and/or many witnesses with credibility at issue. Another example is where not all the evidence is in the Commission Record. However, the formal hearing process should remain flexible and proportional to the circumstances of the complaint. Not all aspects of the formal hearing has to be in person. Formal hearings can also use other ways to get the evidence. For example, the parties can file written briefs on specific legal or preliminary questions and/or use affidavit evidence instead of calling witnesses.

Formal hearings are usually done in person, but witnesses can testify by phone or by video conferencing. Some aspects of the hearing can be done in writing.

Hearings are recorded by the Adjudicator for their own information and/or where necessary to accommodate the needs of one of the parties. The sound recording does not form part of the official record of the proceedings. The Commission does not transcribe (or print) any of the sound recordings. A party can request a copy of the sound recordings. Any transcription will be at the party's own cost. The sound recording shall not be publicized or used for any purpose other than in the complaint proceeding.

At the start of a formal hearing a party may request that the written decision be anonymized. This means using initials instead of names to protect a person's privacy. An adjudicator can grant this request in order to protect the interests of children or in certain exceptional circumstances (personal or sensitive information or a threat to personal safety). The general approach is to balance the public interest in freedom of expression and the principle of an open justice system with the negative consequences of disclosing personal information.

Formal hearings are open to the public. In reality, members of the public rarely attend. The Adjudicator's written decision is put on the Commission's website and may be published on other legal sites to meet our public education mandate.

## **Preparing for the Hearing**

The best way to prepare for an informal hearing is to make a plan.

Start by reading the Commission Record and any other documents exchanged between the parties.

Write down your story in point form. It might be helpful to write it down in the order the events actually happened. List the facts you need to prove and the information and/or documents (evidence) you have to prove those facts.

Think about how you would explain your story to another person who does not know what happened.

## **What do you need to prove?**

If you are the Complainant you need to prove:

- that you were discriminated against or harassed
- that there is a connection between the discriminatory treatment and one of the prohibited grounds (disability, race, gender, religion etc.)
- that you suffered a loss or a disadvantage as a result of the discrimination or harassment

For example:

I was fired by ABC Company after I told them I was pregnant. I am asking for money for lost income and general damages for pain and suffering.

	FACTS	EVIDENCE
1	I was fired because I am pregnant	<ul style="list-style-type: none"> <li>• I told my manager I was pregnant on September 27</li> <li>• We had a meeting on September 29<sup>th</sup> to discuss possible accommodations at work</li> <li>• My manager told me that they had safety concerns about me working while pregnant and they did not want me taking too much time off work in the future</li> <li>• The meeting got heated and I was fired</li> </ul>
2	I lost \$5,000 in income	<ul style="list-style-type: none"> <li>• My pay stubs show that I earned \$2,500 per month</li> <li>• I tried to find another job, but it took me two months (I have copies of all the applications I sent and notes of the interviews I had)</li> </ul>
3	I suffered injury to my dignity, feelings and self-respect	<ul style="list-style-type: none"> <li>• I was very upset about getting fired and that ABC Company</li> </ul>

		<p>didn't think I could do a good job while pregnant</p> <ul style="list-style-type: none"> <li>• My husband and friends saw me upset</li> <li>• I wrote about my feelings in a journal</li> </ul>
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If you are the Respondent:

You get a chance to show the Complainant's version of what happened is not correct. List the parts of the Complainant's case that you want to challenge. Then list the information and/or documents (evidence) you have to prove it.

If you have a defence to the complaint, you will need to prove it at the hearing. List the facts you need to prove and the evidence you have to prove those facts.

For example:

I own ABC Company and am responding to a complaint that alleges I discriminated against an employee on the ground of sex (pregnancy). She says that she was fired as soon as we found out she was pregnant and that we did not try to accommodate her.

	Allegation	Challenge/Defence	Evidence
1	Employee was fired because of her pregnancy	She quit	<ul style="list-style-type: none"> <li>• We had a meeting on September 29<sup>th</sup> to discuss possible accommodations at work</li> <li>• Our employees have physically demanding jobs and are exposed to noxious chemicals</li> <li>• We got into an argument at the meeting and the employee told me she</li> </ul>

			<p>was “leaving and never coming back” and then she walked out</p> <ul style="list-style-type: none"> <li>• Another employee who works in the next office will say that he heard the entire argument</li> </ul>
2		<p>A large part of the job is to handle noxious chemicals. I run a small company and there was no one else who could do the work. I tried to accommodate the employee but had no other work to give her.</p>	<ul style="list-style-type: none"> <li>• I only have one other employee in this area, and handling noxious chemicals is half the job. I think the employee would agree with this.</li> <li>• I will say that I suggested she take a leave until she could get a medical note to say she can work with noxious chemicals</li> <li>• I will say that I couldn't think of any other option that would work, and then she quit during our argument</li> </ul>

## Hearing Procedure

Formal hearings usually take place in the Human Rights Commission Boardroom. We are located on the 5<sup>th</sup> Floor of the Natural Resources Building on Elizabeth Avenue, St. John's.



The general procedure of a formal hearing is as follows:

	<b>Who is responsible?</b>	<b>What happens?</b>
1	Adjudicator	<ul style="list-style-type: none"> <li>• records the proceedings</li> <li>• calls the hearing to order, confirms the names of the parties and reviews the formal hearing process</li> <li>• may address members of the public in attendance</li> </ul>
2	Parties	<ul style="list-style-type: none"> <li>• confirm that they consent to and understand the formal hearing process</li> </ul>
3	Adjudicator	<ul style="list-style-type: none"> <li>• confirms that the Commission Record is accepted by the parties and can be relied upon as evidence</li> <li>• asks if there are any preliminary matters to be dealt with</li> </ul>
4	Parties	<ul style="list-style-type: none"> <li>• opening statements made by the Complainant, the Respondent and the Commission's lawyer (if in attendance)</li> </ul> <p>The opening statement should contain:</p> <ul style="list-style-type: none"> <li>• a brief summary of what happened and the evidence being relied upon (approx. 3-5 minutes)</li> </ul>

		<ul style="list-style-type: none"> <li>• the remedy, decision, or outcome being sought (see sections on remedies)</li> </ul>
5	Complainant	<ul style="list-style-type: none"> <li>• the Complainant is “sworn in” (swears or promises to tell the truth)</li> <li>• the Complainant takes the stand to give their evidence</li> <li>• the Complainant is asked questions (direct examination) by their own lawyer, the Commission’s lawyer (if in attendance) or is asked by the Adjudicator to tell their own story</li> <li>• the Complainant is asked questions (cross-examination) by the Respondent</li> <li>• the Adjudicator may ask the Complainant questions</li> <li>• the Complainant is asked questions (re-direct examination) by their own lawyer or the Commission’s lawyer (if in attendance)</li> </ul>
6.	Complainant’s witnesses	<ul style="list-style-type: none"> <li>• the witness is “sworn in” (swears or promises to tell the truth)</li> <li>• the witness takes the stand to give their evidence</li> <li>• the witness is asked questions (direct examination) by the Complainant or their lawyer</li> <li>• the witness is asked questions (cross-examination) by the Commission’s lawyer (if in attendance)</li> <li>• the witness is asked questions (cross-examination) by the Respondent</li> <li>• the Adjudicator may ask the witness questions</li> <li>• the witness is asked questions (re-direct examination) by the Complainant or their lawyer if new information comes up in cross-examination</li> </ul>

7.	Commission's witnesses (if in attendance)	<ul style="list-style-type: none"> <li>• the witness is "sworn in" (swears or promises to tell the truth)</li> <li>• the witness takes the stand to give their evidence</li> <li>• the witness is asked questions (direct examination) by the Commission's lawyer</li> <li>• the witness is asked questions (cross-examination) by the Complainant or their lawyer</li> <li>• the witness is asked questions (cross-examination) by the Respondent</li> <li>• the Adjudicator may ask the witness questions</li> <li>• the witness is asked questions (re-direct examination) by the Commission's lawyer if new information comes up in cross-examination</li> </ul>
	<b>Complainant's case is closed</b>	
8.	Respondent	<ul style="list-style-type: none"> <li>• the Respondent is "sworn in" (swears or promises to tell the truth)</li> <li>• the Respondent takes the stand to give their evidence</li> <li>• the Respondent is asked questions (direct examination) by their own lawyer or is asked by the Adjudicator to tell their own story</li> <li>• the Respondent is asked questions (cross-examination) by the Complainant, their lawyer or the Commission's lawyer (if in attendance)</li> <li>• the Adjudicator may ask the Respondent questions</li> <li>• the Respondent is asked questions (re-direct examination) by their own lawyer</li> </ul>
9.	Respondent's witnesses	<ul style="list-style-type: none"> <li>• the witness is "sworn in" (swears or promises to tell the truth)</li> <li>• the witness takes the stand to give their evidence</li> </ul>

		<ul style="list-style-type: none"> <li>• the witness is asked questions (direct examination) by the Respondent or their lawyer</li> <li>• the witness is asked questions (cross-examination) by the Commission’s lawyer (if in attendance)</li> <li>• the witness is asked questions (cross-examination) by the Complainant</li> <li>• the Adjudicator may ask the witness more questions</li> <li>• the witness is asked questions (re-direct examination) by the Respondent or their lawyer if new information comes up in cross-examination</li> </ul>
10.	Parties	<ul style="list-style-type: none"> <li>• closing statements made by the Complainant, the Respondent and the Commission’s lawyer (if in attendance)</li> </ul> <p>The closing statement should contain:</p> <ul style="list-style-type: none"> <li>• a brief summary of the evidence presented in the hearing</li> <li>• a brief summary of human rights case law or principals</li> <li>• the remedy, decision, or outcome being sought (see sections on remedies)</li> </ul>
11.	Adjudicator	<ul style="list-style-type: none"> <li>• asks the parties if there is anything else they want to say</li> <li>• tells the parties what happens next</li> <li>• ends the formal hearing</li> </ul>

### **Failure to Attend a Formal Hearing**

The parties must attend and be prepared for the formal hearing. It is the parties’ obligation to keep their contact information current and advise the Commission if they move or change phone numbers or email addresses.

A party can request an extension of time for filing written briefs or a postponement of the formal hearing, but will need to give a good reason for re-scheduling. The request should be made to the Commission’s lawyer who

will send it to the Adjudicator. The parties are notified about the Adjudicator's decision.

A Complainant may withdraw part or all of their complaint at any time by completing a Withdrawal of Complaint Form.

If a party does not participate and/or an extension of time or postponement is not granted, the hearing will go ahead without their participation. The complaint may be dismissed if the Complainant does not participate. A finding of discrimination or harassment may be found if the Respondent does not participate.

### **What Types of Remedies are Available in Human Rights Law?**

Think about why resolving this complaint is important to you.

Remedies in human rights law try to put the Complainant in the position they would have been in if the alleged discriminatory action had not occurred. It is not intended to punish the Respondent.

Some examples of remedies include:

- I need a specific accommodation, such as a new desk at work, a ramp in my apartment building or time off work for a religious reason.
- I don't want this to happen to other people. I want the person I'm complaining about to introduce an anti-discrimination/harassment policy and do human rights training.
- I want to find another job and move on. I need an apology or a letter of reference.
- I lost money or had to spend money on certain items, such as lost income, increased rent or moving expenses (special damages).
- I am looking for money to compensate me for injury to my dignity, feelings and self-respect (general damages).

### **What are general damages?**

General damages are typically awarded for injury to dignity, feelings and self-respect caused by the discrimination or harassment. In Newfoundland and Labrador general damages are generally not high:

- a Complainant who experienced harassment in the workplace: \$5,000.00
- a Complainant who was denied a job because of their gender: \$7,000.00
- a Complainant who was denied the use of a taxi service because of their service animal: \$5,000.00

Some of the factors that may be considered when determining general damages are:

- the impact the discrimination had on you
- how badly you were treated
- the vulnerability of the Complainant
- whether the discrimination happened on one occasion or over a long period of time

### **What are special damages?**

Special damages are intended to compensate you for money that you have lost or been forced to spend because of the discrimination. This type of financial remedy is meant to put you back in the financial position you would have been in if the discrimination had not occurred in the first place.

For example:

If you lost your job because of discrimination, you should calculate the amount of earned income that you lost each week that you were unemployed. For example, if you earned \$10 per hour and you were off work for 10 weeks, you would ask for:

$$\text{\$10 per hour} \times \text{35 hours per week} \times \text{10 weeks} = \text{\$3,500}$$

If a landlord refused to rent an apartment to you for a discriminatory reason, and as a result, you had to rent a more expensive apartment, you can ask for the difference in rent for a reasonable period of time. If you were evicted for a discriminatory reason, you could also claim your moving costs.

*If the difference in rent is \$200 per month, you could ask for:*

$\$200 \times 4 \text{ months} = \$800$   
*Moving truck costs = \$840.00*

### **What are non-financial remedies?**

For example, in an employment situation, an Adjudicator could order:

- reinstatement to your job
- a promotion
- an offer of employment
- the removal of a harasser from your immediate work environment
- letters of assurance of future compliance with the Human Rights Act
- a letter of reference

### **What are public interest remedies?**

Public interest remedies are meant to have an impact on the broader community, including other people who could have been affected by the discrimination.

Public interest remedies can have an educational impact, giving other potential respondents and the general public a greater understanding of discrimination. Public interest remedies are often intended to prevent similar discrimination from happening in the future. Some possible public interest remedies include:

- new hiring practices
- non-discriminatory policies and procedures
- internal human rights complaint procedures
- pro-active measures (such as a recruitment policy aimed at eliminating barriers for racial minorities)
- education and training programs (such as having all staff receive training on a human rights policy)
- publishing an extract of the decision in the corporate newsletter
- posting the Human Rights Act in the workplace
- requiring a property management company to send a memo to all superintendents/agents
- making a donation to charity

### **What is the duty to mitigate?**

The duty to mitigate means that you have try to limit the harm of discrimination and/or harassment. For example, if you get fired, you have to make reasonable efforts to try to find another job so that you reduce your financial losses. This may mean taking lesser-paid work or expanding the job search area. You will need to prove this by providing income tax returns and information about the efforts you made to find other work.

## What happens after the Formal Hearing?

The Adjudicator must give written reasons for their decision. This process is often time-consuming, as the Adjudicator needs to review each piece of evidence to determine its relevance and what weight or “probative value” it should be given.

Once the Adjudicator has finished reviewing all the evidence, they will make their decision on the allegations contained in the complaint. An adjudicator can either dismiss the complaint (no discrimination or harassment) or make one of the following orders:

- to stop the behaviour complained of
- to refrain in the future from committing the same or similar behaviour that violated the Human Rights Act
- to make available to the Complainant the rights, opportunities or privileges they were denied contrary to the Human Rights Act
- to provide compensation to the Complainant, including compensation for all lost wages, lost income, or expenses incurred due to the violation of the Human Rights Act; and
- any other order the Board of Inquiry may consider appropriate in the circumstances.

Depending upon how complicated the case is, the parties should be prepared to wait several months to receive a written decision. The following table sets out an estimate of how long it will take an Adjudicator to make their decision:

<b>Length of Hearing</b>	<b>Estimated Timeline</b>
Written hearing	2-3 months
2 days or less	4-6 months
More than 2 days	6 months or longer

The Commission's lawyer will send the parties a copy of the Adjudicator's written decision.

## **How do you Appeal the Decision of a Board of Inquiry?**

If either of the parties disagrees with the decision of the Adjudicator, they may appeal the decision to the Supreme Court of Newfoundland and Labrador (General Division). Section 42 of the Human Rights Act states that an appeal must be filed within 30 days of receiving the Board of Inquiry's written decision. Contact the Supreme Court (General Division) [Court's website](#) for more information on how to file an appeal.

### **Evidence at the Hearing**

The normal rules of evidence do not apply in a formal hearing. The Adjudicator can accept into evidence any document or testimony that is relevant, material, and reliable. The Adjudicator can also ask the parties to provide them with other documents they think are relevant. The Adjudicator's job is to look at each piece of evidence and determine its relevance and what weight or "probative value" it should be given.

Evidence can be:

- **Oral Testimony:** A witness answers questions in person, by phone or by video conferencing
- **Affidavits or Other Statements:** A witness writes down their evidence. The statement may be informal (letter or email) or formal (made under oath or solemn affirmation called an Affidavit). The witness can be cross-examined on their evidence
- **Documents:** Any documents (pay stubs, medical records, emails or letters) a witness talks about while testifying
- **Items or Objects:** Specific items or objects that might be relevant (photographs, tools, equipment etc.)
- **Expert Evidence:** Evidence from an expert may be admitted as oral testimony, an affidavit, or a written report. The party relying on expert evidence must be prepared to demonstrate that the witness is qualified as an expert in the subject matter due to their past

training or experience. An expert witness may be cross-examined on their evidence

## **Questioning a Witness**

Parties should prepare a list of questions they want to ask each witness. In doing so, it is important for the parties to understand the difference between direct examination of a witness and cross-examination of a witness.

### **Direct Examination**

You examine or question your own witnesses. This means that the witness must answer questions based on what they saw or heard first-hand. The witness cannot be “lead” to the answer. For example, you should not say, “You saw me provide my boss with a medical note on September 30th, didn’t you?” because it leads the witness the “correct answer”. Rather, you should ask:

- “Did you ever see me provide any documentation to my boss?”
- if yes, “Do you know what that document was?”
- if yes, “Do you know the date this happened?”

### **Cross-Examination**

If another party to the hearing calls a witness to testify, you will also be given the opportunity to question the witness. This is called cross-examination. There are two main purposes of cross-examination:

- to get testimony from the other party’s witness that supports your own case
- to discredit the witness, making their evidence seem less believable and unreliable.

Unlike direct examination, there are no limits on the type of questions asked during cross-examination. This mean that leading questions will be permitted on cross-examination. However, you cannot harass the witness during cross-examination

In preparing for cross-examination, a party may wish to focus on the following areas:

- showing that the witness favours the other party (i.e. that they are biased)
- showing that the witness has contradicted themselves in previous statements
- challenging the witness' memory on certain facts or points and/or
- challenging the witness' version of events

### **Objecting to a Question**

A party may object to certain evidence or a question being asked of them or one of their witnesses. A party can tell the Adjudicator they object by politely interrupting the hearing and saying "I object". The most common objection is that evidence is not relevant or is inappropriate (eg. a leading question on direct examination). After the party has had a chance to explain their reasons, the other party will get a chance to comment. After listening to what the parties say, the Adjudicator will "rule" on the objection – that is – decide whether to accept or keep out the evidence.

### **Introducing Documents as Exhibits**

A party may wish to introduce a document as part of their evidence to support their position. When considering which documents to enter as evidence, the party should also consider who would be the best witness to introduce and discuss the document. Often times, this person will be the one who wrote, sent, or signed the document. For example, if a party wishes to have a "Letter of Dismissal" entered as evidence, the person who wrote the letter would most likely be the best option; that person will be able to identify the letter and discuss its contents.

Once a document has been accepted by the Adjudicator as part of the evidence, it will be marked as an exhibit. Exhibits are labeled using the initials of the witness by whom the document was entered. For example, documents entered through a witness named Jane Doe would be labeled JD#1, JD#2, JD#3, etc.

As with oral evidence, a party can object to a document being entered as

an exhibit. The party will have to explain to the Adjudicator their reasoning as to why the document should not be entered as an exhibit. If the Adjudicator agrees with the party, the document will not be accepted into evidence. If the Adjudicator disagrees, the document will be accepted into evidence and marked as an exhibit.