

# After the Axe Falls: Should You Intervene in an Employee's EI Appeal?



## SITUATION

Employees whose claims for EI benefits are denied have the right to appeal to the EI Commission Board of Referees. Employers also have the right to participate in those hearings.

## QUESTION

Should you exercise that right and actually get involved in employee appeals of EI denials?

## ANSWER

You should probably stay out of EI appeals unless your lawyer advises you otherwise.

## EXPLANATION

Employers generally have little to gain and much to lose by intervening in employee EI denial appeals, lawyers tell the *Insider*. "The employer seldom has any direct legal or financial interest in the outcome of the appeal," according to one Ontario employment lawyer.

Appealing a *grant* of EI benefits may seem to make more sense, especially if the basis of the decision is the finding that the employee was wrongfully terminated. The assumption: The Board of Referees' determination that the termination was wrongful will be binding on a court or arbitrator in a subsequent wrongful dismissal lawsuit.

But this assumption is faulty. While courts may be influenced, they're not necessarily bound by the Board's ruling on whether the terminated employee engaged in misconduct. To require a court in a wrongful dismissal suit to follow the Board's ruling on employee misconduct in the EI appeal would be "unconscionable and contrary to all principles of fairness, natural justice and common sense," according to one court [*D'Aoust v. 1374202 Ontario Inc.*].

So by seeking to reverse the appeal, you accomplish little other than tipping your legal hand and making it easier for the employee's lawyer to anticipate, prepare for and defeat your defence in the wrongful dismissal lawsuit.

#### **THE EI CLAIMS PROCESS**

**Step 1:** The employee applies for EI benefits.

**Step 2:** The EI Commission decides if the employee qualifies for EI by determining, among other things, whether the employee was fired as a result of misconduct or voluntarily left without just cause.

**Step 3:** Both sides have the right to appeal the decision to the Board of Referees.

**Step 4:** The appeal is heard—generally no later than 60 days after the date of the initial application for benefits.

**Step 5:** Once the EI claim is adjudicated, the employee may bring a wrongful dismissal or other lawsuit against the employer.