

## **PAY EQUITY HEARINGS TRIBUNAL INFORMATION BULLETIN NO. 3**

### **Remaining Anonymous**

#### **GENERAL**

The Pay Equity Hearings Tribunal is a quasi-judicial administrative tribunal with final and exclusive responsibility for hearing and determining all disputes arising under the *Pay Equity Act*. The Tribunal's processes and decisions are completely independent of the Pay Equity Office which is the Commission's investigative and educational branch.

Subsection 32(4) of the *Pay Equity Act* permits an employee or group of employees to remain anonymous in a proceeding before the Pay Equity Hearings Tribunal or the Pay Equity Office. This Information Bulletin describes what is required where an employee wishes to remain anonymous before the Tribunal.

#### **BALANCING INTERESTS**

Being anonymous in a quasi-judicial proceeding is very unusual. It appears to contradict the legal rule protecting the right of a party, in this case the employer or trade union, to know and "confront" the witnesses against it. On the other hand, employees may fear reprisal for making pay equity complaints against their employer or union. The *Pay Equity Act* attempts to balance these competing interests by requiring anonymous employees to name an Agent. The Agent does not merely represent the employee. Rather, the Agent replaces the employee as the party to the proceeding before the Tribunal.

Building on this, the Tribunal has created Rules which, while protecting identities, ensure that the Agent is authorised to be an Agent and that the consequences of remaining anonymous are understood by both the employee and the Agent.

#### **WHAT HAPPENED AT REVIEW SERVICES?**

You may have already named an Agent during the Review Services investigation. If so, the Agent proceeds to the Tribunal from Review Services in the same way any party would, subject to the obligation to complete and file the Certificate of Appointment as Agent on Behalf of Anonymous Employee(s) (Form 5).

If the Review Officer did not ask you to name an Agent or failed to identify the Agent in the Order, referring instead to a Group of Employees or a Group of Unidentified Employees, you must designate an Agent before you can continue before the Tribunal.

### **NAMING AN AGENT: APPLICANTS**

If you wish to make an anonymous Application your Agent must:

- name themselves as the Applicant on the Application (Form 1) and provide all necessary contact information;
- provide a copy of the completed Application and this Information Bulletin #3 to you and, where applicable, to the other employees in your group;
- complete the Certificate of Appointment as Agent on Behalf of Anonymous Employee(s) (Form 5);
- complete Appendix "A" to the Certificate providing the name, address and telephone number of anonymous employee(s) for whom they are the Agent;
- serve the Application together with a copy of the Certificate of Appointment as Agent on Behalf of Anonymous Employee(s) (Form 5) on all Respondents. **Appendix A to the Certificate must NOT be served on the Respondents;**
- file the Application, the Certificate and Appendix A, together with Certificate of Delivery (Form 3) with the Tribunal. (See Information Bulletin #1 "Making An Application to the Pay Equity Hearings Tribunal" to learn more about the role and responsibilities of an Applicant before the Tribunal)

### **NAMING AN AGENT: RESPONDENTS**

The process is more complicated if you are a Respondent and did not name an Agent at Review Services. Obviously the Applicant does not know who or where to serve the Application. The Tribunal has no access to that information. As a result, every step in processing the Application, including setting Pre-Hearing and hearing dates, must wait until service on you can be effected and either an Agent responds on your behalf or your time to respond expires.

In the past, the Pay Equity Office has acted as a "go between" in these circumstances. As the Office is the only one with knowledge of your identity the Tribunal forwards the Application to it. The Office consults the Review

Services file and, based on the information contained in that file, serves the Application on the employee(s) with a letter from the Tribunal giving a date by which the Response must be served and filed. The Office then files a Certificate of Delivery with the Tribunal. The Tribunal expects that the Office will continue to assist Applicants and anonymous Respondents in this way.

Once served with the Application your Agent must:

- provide a copy of the completed Application and this Information Bulletin #3 to you;
- complete the Certificate of Appointment as Agent on Behalf of Anonymous Employee(s) (Form 5);
- serve the Certificate of Appointment as Agent on Behalf of Anonymous Employee(s) (Form 5) on the Applicant and any other Respondents as soon as possible and, in any event, no later than five days after you appoint the Agent. **Appendix A to the Certificate must NOT be served on the Applicant or other Respondents;**
- complete Appendix "A" to the Certificate providing the name, address and telephone number of the anonymous employee(s) for whom he/she is the Agent;
- file the Certificate and Appendix A, together with Certificate of Delivery (Form 3) with the Tribunal as soon as possible and, in any event, no later than five days after being named as Agent.
- name themselves as the Respondent on the Response (Form 2) and provide all the necessary contact information; .
- serve and file the Response, together with the Certificate of Delivery (Form 3), within the time directed by the Tribunal. (See Information Bulletin #2 "*Responding to an Application to the Pay Equity Hearings Tribunal*" to learn more about the role and responsibilities of a Respondent before the Tribunal.)

## **THE AGENT AND THE TRIBUNAL**

To the Tribunal and the other parties in the proceeding the Agent has the rights and responsibilities of any party. This includes the right to retain counsel, the obligation to file pleadings, attend, and participate fully in the Pre-Hearing and hearing. If the Agent fails to attend the hearing the Tribunal may proceed without him/her. The Agent is able to enter into binding agreements including the settlement of all or part of the Application.

The Agent's actions and agreements are binding on you. The Tribunal and the other parties will expect the Agent to be able to take positions, particularly during settlement discussions, without protracted consultation with you.

### **THE AGENT AND YOU**

The Agent's responsibilities to you are like those owed by a lawyer to a client **BUT** there is no complaint system if anything goes wrong. The Tribunal strongly recommends that, from the start, you and the Agent have a very clear understanding of what you each expect from the hearing and each other. The Tribunal has no authority to assist you if a problem occurs.

Here are some suggestions about what to discuss with the Agent:

- how will you communicate;
- on what issues must the Agent consult the employee(s). For example the Tribunal would expect the Agent to be able to agree to an adjournment or make disclosure without consultation but might allow more time for consultation about a significant procedural issue;
- how much latitude does the Agent have to make a deal;
- who speaks to the Agent for the group if it is large or in diverse locations?

### **A WARNING**

The Tribunal decides matters based on the evidence introduced at the hearing. This includes testimony from witnesses who have direct knowledge of relevant facts. If an employee wishing to remain anonymous possesses relevant information, their testimony may be critical to the success or failure of the case. An agent cannot testify on their behalf.

### **PROTECTION FROM REPRISAL**

If the desire to remain anonymous comes from a fear that you will be punished for being involved in the pay equity proceeding, consider subsection 9(2) of the *Act*. It provides extremely wide protection for pay equity related activities:

No employer, employee, or bargaining agent and no one acting on behalf of an employer, employee or bargaining agent shall intimidate, coerce, or penalize, or discriminate against, a person

- (a) because the person may participate, or is participating, in a proceeding under this Act;
- (b) because the person has made, or may make, a disclosure required in a proceeding under this Act;
- (c) because the person is exercising, or may exercise, any right under this Act;
- (d) because the person has acted or may act in compliance with this Act, the regulations or an order made under this Act or has sought or may seek the enforcement of this Act, the regulations or an order made under this Act.

Subsection 25(7) requires the employer or trade union to prove that it did not breach section 9(2) of the Act. Where even a part of the employer's (or union's, as the case may be) decision is motivated by anti-pay equity reasons, a breach of ss.9(2) is established.

## **CONCLUSION**

Given the strength of the reprisal protections in the *Act* and the procedural complexities that follow from the decision to remain anonymous, seriously consider whether retaining your anonymity is truly necessary in all the circumstances.