

PAY EQUITY HEARINGS TRIBUNAL INFORMATION BULLETIN NO. 4

The Pre-Hearing Conference

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.

The *Pay Equity Act* gives the Tribunal the authority to hold Pre-Hearing Conferences. The Tribunal's Rules apply to Pre-Hearing Conferences.

This Information Bulletin explains what happens at a Pre-Hearing Conference and will help you to prepare if a Pre-Hearing Conference is scheduled in your case.

WHAT IS A PRE-HEARING CONFERENCE?

The Pre-Hearing Conference is a meeting of all the parties with the Chair or a Vice-Chair of the Tribunal. The Chair/Vice-Chair assists the parties to get the Application "hearing ready" in an efficient manner. This may include:

- helping parties to estimate hearing time;
- getting parties to work out a timetable for exchanging lists of witnesses and witness statements;
- helping parties to resolve production or disclosure questions;
- identifying preliminary motions or objections; and,
- agreeing on procedural matters.

The Tribunal can require parties to attend a Pre-Hearing Conference. You may also request a Pre-Hearing Conference. The Tribunal decides whether a Pre-Hearing Conference will be helpful or appropriate.

If the parties are unable to agree, or if, in the Chair/Vice-Chair's view, the agreements do not fulfill the purposes of the Act, the Chair/Vice-Chair may make any orders necessary to ensure that the parties are "hearing ready" in an efficient manner.

Case-Management and Dispute Resolution

The Pre-Hearing Conference is used for case management. The object is to make the hearing more efficient, eliminate surprise, and ensure that all parties understand the case they need to make or meet and the Tribunal's expectations of them.

In addition, discussing the Application with the Pre-Hearing Chair/Vice-Chair can assist the parties to resolve some or all of the issues in dispute.

Additional Pre-Hearings

After the hearing on the merits has begun you may request, or the Tribunal may require, a further Pre-Hearing Conference. Ordinarily this occurs when something unexpected happens which presents new evidentiary or procedural issues.

You may also request the opportunity to mediate at anytime. However, while the Tribunal encourages mediation, requests to adjourn hearing dates for purposes of settlement discussions may be refused.

Your Responsibilities

The Pre-Hearing Conference is most effective when everyone is prepared. Your representative at the Pre-Hearing Conference must know your case well and be able to make agreements on your behalf. If mediation is attempted your representative must have the authority to settle on your behalf. Where several individuals are parties, agreements must be signed by each individual or their representative.

The Role of the Pre-Hearing Chair/Vice-Chair

The Pre-Hearing Conference is less formal than a hearing before a full panel of the Tribunal. In all cases, however, the actual format will reflect the style of the Chair/Vice-Chair and the issues presented. The Chair/Vice-Chair may contact you, or your representative, in advance to discuss issues. You should not be surprised if, at points during the Pre-Hearing Conference, the Chair/Vice-Chair asks to talk to you or another party separately.

The Pre-Hearing Chair/Vice-Chair may not communicate about what you discussed during your "off the record" discussions with the panel deciding the Application. This prohibition protects the confidentiality of your discussions and encourages frank communication between the parties and the Pre-Hearing Chair/Vice-Chair. The Pre-Hearing Chair/Vice-Chair cannot be

compelled to testify about the Pre-Hearing or produce notes or records of the Pre-Hearing before the Tribunal or in any other civil proceeding.

Discussions are "Off-the-Record"

A successful Pre-Hearing requires you to speak freely. Therefore, unless it is included in the Pre-Hearing Conference Memo or an Agreed Statement of Fact, anything said at the Pre-Hearing Conference is "off the record" and cannot be referred to in the hearing. This means you are free to take a position or make a proposal without fear it will be used against you at the hearing.

The Pre-Hearing Conference Memo/Agreed Statement of Fact

You are expected to come to the Pre-Hearing Conference with a good appreciation of your case and of the documentary evidence. Consequently, you may be in the position to consider using the Pre-Hearing Conference to draft an Agreed Statement of Fact with the other parties. The Agreed Statement of Fact is a document containing those facts about the Application which everyone accepts as true or uncontroversial. An Agreed Statement of Fact reduces, and sometime eliminates, the need for witnesses at the hearing. As a result, the hearing can be shorter and less costly.

Agreements about procedural matters are recorded in a Pre-Hearing Conference Memo. This document is signed by all parties. A copy is given to you at the end of the Pre-Hearing Conference . The Pre-Hearing Conference Memo becomes part of the Tribunal file and is given to the panel hearing the Application.

HOW TO PREPARE FOR THE PRE-HEARING CONFERENCE

Making Disclosure

Materials provided to a Review Officer are not necessarily shared with the other party and the Review Officer's file is never provided to the Tribunal. Making disclosure prior to the Pre-Hearing Conference assists parties to better understand each other's cases, identify areas of agreement, and make fully informed choices about settlement. The Tribunal's Rules require parties to make a list of all documents, or other things, which are in their possession and which are arguably relevant to the issues in dispute. Arguable relevance means that the document *may* be relevant to an issue in dispute in the Application. This list must be served on the other parties 30 days before the Pre-Hearing Conference or the start of the hearing, whichever is earlier. A party may make a written request for a copy of a document or thing from the list. Unless privilege is claimed, a copy must be provided within 10 days.

Know Your Case. Know Their Case.

Carefully review all the pleadings (Application, Response(s) and Reply(ies)), the Act, and any important documents. You may want to study the Tribunal's decisions (available on our website, www.peht.gov.on.ca, or www.canlii.org) to see how the Tribunal has previously dealt with the issues raised in your Application. Consider the following questions while you prepare:

1. What are the issues in the Application?
2. What are the strengths and weaknesses of your case? Their case?
3. Do you want to mediate? What is necessary to resolve the dispute? What is your bottom line?
4. Is there any chance of an agreement or compromise on a particular issue or series of issues?
5. What are the relevant facts to your case? To their case? What's missing?
6. Can you agree on any of the facts?
7. How many witnesses do you expect to call? Will the hearing need to be scheduled to accommodate the availability of an important witness who will be out of the country, hospitalized, or is otherwise unavailable?
8. Will you call an expert witness? What will he/she testify about? Will you be filing an expert's report?
9. What documents do you plan to rely on?
10. Do you object to producing any document requested by the other side? Why? Did they object to producing any documents you require?
11. Do you have any preliminary objections? Do you anticipate objections from the other side? For example: Are all the issues properly before the Tribunal? Is there a *prima facie* case? Do you want to challenge the Tribunal's jurisdiction? Is there a Charter or natural justice issue? How many days do you expect the preliminary matters to take? Is it possible to argue any of these by written submissions?
12. How many days of hearing in total do you require?

WHAT TO BRING TO THE PRE-HEARING CONFERENCE

Bring a copy of the *Act*, the Tribunal's Rules, the pleadings, and any documents you feel will be of assistance to the Pre-Hearing Chair/Vice-Chair. In addition, you should bring:

- A list of the issues to be addressed in the hearing;
- A proposed Statement of Agreed Facts or at least a statement of the facts to which *you* can agree;
- A list of expert witnesses you intend to call, if any, and why;
- A statement of any preliminary objections; and,
- Your calendar. If the Application is not settled the Chair/Vice-Chair will attempt to set mutually agreeable hearing dates at the end of the Pre-Hearing Conference.