

PAY EQUITY HEARINGS TRIBUNAL INFORMATION BULLETIN NO. 5

What to Expect at the Hearing

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 "Act"). The Tribunal's processes and decisions are completely independent of the Pay Equity Office.

This Information Bulletin gives general information about conducting a hearing before the Pay Equity Hearings Tribunal. (See also Information Bulletin #1 "*Making an Application to the Pay Equity Hearings Tribunal*" and Information Bulletin #2 "*Responding to an Application to the Pay Equity Hearings Tribunal*".)

Prepare and Plan

Think about how to present your case: what are the facts that you need to prove to win and which witness should present those facts. Think about the order of your presentation. What is the most compelling way to tell your story?

By this point you should have all the documents you need. If you require additional documents, request production from the other party. No later than ten days before the start of the hearing on the merits you must prepare a list of all documents on which you intend to rely and provide it to the other parties. It is very helpful to file these documents as a Book of Documents with the Tribunal electronically no less than 10 days before the first hearing date.

If your hearing is in person, remember to make four copies of all documents you intend to "introduce" or put into evidence at the hearing (one for each member of the panel and one for the witness).

In most cases, you will have to file signed witness statements in advance of the hearing date. The timeline for filing these witness statements will be set out in either the Pre-Hearing Conference Memorandum, or a Tribunal Decision. When preparing your witnesses, interview your witnesses, explain your case to the witness and why their testimony is necessary. Review any documents that you want to introduce through the witness (these will be documents which the witness either prepared or received) with the witness. Have the witness tell you what happened in her own words. Listen carefully, is anything missing? Do you know things that contradict what the witness has said? Give

the witness an idea of what the opposing side may ask in cross-examination. *While it is proper to question your witness about inconsistencies and missing points you cannot suggest answers or ask a witness to lie for you.*

If you need to summons a witness, review the Tribunal's Rules and the procedure for obtaining and serving a Summons to Witness described in Information Bulletins #1 and #2.

Think about your cross-examination of the opposing side. What information do you need from the opposing witnesses? Identify these points in advance so they are not forgotten if you get caught up in the emotion of the evidence.

The Hearing

Hearings will normally be conducted electronically by video conference, such as on the Zoom platform. Ensure that you log into the hearing at least 10 minutes early to ensure that you have a chance to resolve any connection issues. The link to the electronic hearing is provided to you in advance by the Registrar.

If you are attending an in-person hearing, the hearing room is usually set up as a square. There is a table for the panel at the top and tables for the parties along the sides and bottom. The Chair of the panel sits between the Member representative of employers and the Member representative of employees.

Hearings are open to the public except in the rare circumstance where the panel decides that matters of public security are involved or if it believes that the open discussion of intimate personal or financial matters would be damaging to any of the parties. Hearings are not recorded and no transcript is produced.

Order of Proceeding

Usually the Applicant presents its evidence first followed by the Respondents. Sometimes parties agree to a different order of proceeding in advance of the hearing. In Applications alleging a breach of subsection 9(2) of the Act (an allegation that an employer has intimidated, coerced, penalized, or discriminated against someone because they exercised a right under the Act) the Respondent typically proceeds first because, in those cases, the is in the best position to adduce evidence about the reasons why it took the actions it did, to try and persuade the Tribunal that those actions were not related, in any way, to a person exercising a right under the Act.

Opening Statements

A good opening gives the panel a roadmap to your case. You need enough detail to let the panel know where you are going, what you want when the hearing ends and why, and to describe the significant points of interest on the way. BUT too much detail, especially about facts, can be dangerous. For example, if you say that X will testify that Y said Z would be fired because she'd made a pay equity complaint and then X fails to say precisely that, or worse, says the opposite, the advantage to your opponent is obvious. Better to assert that Z was fired for making a pay equity complaint and use your closing argument to tie all the facts supporting that argument together from the testimony that was actually given.

Dealing with Witnesses

Make sure your witnesses understand that they must give their evidence on affirmation. That means that they must promise before the panel to tell the truth.

Before the hearing the witness should be cautioned about being argumentative or evasive. If the witness knows the answer to a question, it should be given. If the witness does not understand the question, she should say so. If the witness doesn't know the answer, she should not guess or offer an opinion although opposing counsel may encourage it. If an objection is made during testimony the witness should be instructed to remain silent until the panel rules (the witness may be asked to leave the room while this happens). Finally, the witness should speak slowly. The panel takes notes of the evidence and the witness needs to speak slowly enough to allow them to record everything.

Examination-in-Chief/Direct Examination

This is where your witnesses tell your story. It's important to make the evidence flow clearly and logically and you should plan your questions to assist the witness to do this. Have a checklist to make sure all the essential points are covered.

Witness statements are prepared in advance and help organize the witness's testimony. In most cases, the witness will be asked to confirm what they said in the witness statement is true and it will be adopted as their direct evidence. You will be permitted some opportunity to ask clarifying questions or respond to information or anticipated evidence from the other party's witness that was not anticipated at the time the witness statement was signed.

When preparing the witness statement or a witness for direct examination, it is important to remember that you may not ask questions that suggest an

answer or assume a fact in dispute. The witness has to give the evidence, not you. So, rather than saying "Please identify the gender bias in the questionnaire" ask "Did you have objections or concerns about the questionnaire?" Your questions should be short and the answers should be long. If the witness has forgotten a particular incident (and this happens in the stress of giving evidence) you can ask, for example, if the witness recalls a meeting with the pay equity committee on a particular date. If this type of open ended inquiry doesn't help jog the witness' memory it is best to move on.

You may want to introduce documents through the witness. Make sure you have confirmed that the witness is able to identify the document before you introduce it at the hearing. Show the witness the document and briefly describe it. "I'm showing you a memo from X to you dated Y discussing skill shortages in the mechanic job class. Do you recall receiving this document?" If the witness agrees and there are no objections from the opposing party, ask the Chair to mark the document as an exhibit. Write the exhibit number on your copy. You will use the number to refer the panel to the exhibit throughout the hearing.

Make notes of the witness' answers. You will want to refer to them when you prepare your closing statement. You may want to ask someone else to take notes for you.

Once you think you are finished ask the panel for a couple of minutes to review your notes and checklist. Make sure you have covered everything because you will not be allowed to recall the witness once you conclude.

Now the opposing party begins its cross-examination. Your job is to object to improper questions or questions which mischaracterize the evidence given. *You may not speak to the witness about the case until cross-examination is completed.* Be careful not to put yourself or the witness in the position of having to respond to an allegation that you broke this rule.

Re-Examination

Once cross-examination is complete you have the opportunity to ask the witness questions about any new issues raised in the cross-examination. You may not ask questions about matters you already dealt with in chief. The purpose of re-exam is to give the witness the chance to say everything she wants to say about a new issue (to put it into context or add facts she was not permitted to discuss in cross) not to rehabilitate the witness after an effective cross-examination. In general, re-examination should be brief and to the point.

Questions from the Panel

At the end of the re-exam the Chair will ask the Members if they have any questions for the witness. If these questions raise new issues, which is extremely unlikely, the parties will have the opportunity to question the witness about the new issue. Once all questions have been answered the Chair will advise the witness that he is excused and, if he was summonsed, that he is released from the obligation to attend before the Tribunal.

Closing Your Case

When all your witnesses have testified, advise the panel that you have completed or "closed your case" subject, if your case was presented first, to the right to call reply evidence.

Cross-Examination

Listen carefully to the opposing side's opening statement and cross-examinations of your witnesses. They provide you with clues about what your opponent sees as the strengths and weaknesses of its case and are useful to preparing your cross-examination. Then focus on the witness as the evidence is given in chief. You need to think about what the witness says and how it is said. Make notes to yourself of the points in the testimony where you need to ask follow up questions or where you need to challenge the witness. Try to read the witness: is she neutral toward both sides or committed to the position of your opponent; is he uncomfortable in the situation or very self-possessed? These signals will help you decide on the tone of your questions.

In general, try to ask questions which suggest the answer and where that answer is a "yes" or a "no". The rules for questions on cross are the exact opposite of the rules for chief. Avoid asking "why" or "what do you mean" unless you are very certain what the answer will be. Do not ask questions within a question or you won't be sure which question the witness answered. On critical points devise a series of questions to lead up to a key admission.

Finally, before you finish take a few minutes to check your notes and the checklist of important points you made earlier. If you have covered everything advise the Chair that you have no further questions.

Reply Evidence

Where an opposing party raises issues that you were unable to anticipate and address in your case you may call evidence in reply. However, you may not use reply to "split your case" and call evidence which you should have

presented in the first place. Because of this rule reply evidence is rarely allowed.

Closing Argument

Start your submissions by giving the panel an outline of what you plan to say. You will want review the issues in dispute, the evidence, the applicable provisions of the *Pay Equity Act*, any relevant Tribunal decisions or other legal decisions and the remedies you are requesting. You can decide on the appropriate order. If the panel asks you a question, do your best to answer it.

Some people feel more confident if they write out their entire argument. Others prefer to work from an outline or points. Whichever your preference, try to remain flexible and ready to respond to the panel.

When you go through the evidence you need to highlight the points which support your position and explain the points which don't. Be fair to the evidence. Your arguments will be undermined if you misstate or ignore critical pieces of evidence that do not assist you. Where testimony is conflicting give reasons why the panel should prefer the version that supports your position.

When discussing the legal authorities look for decisions which are closest to your facts or issue. Have copies of the decisions you will rely on ready for the panel and the other side. It is helpful if you highlight any parts of the decision you want the panel to consider. Try to distill the essential principle from the case. For example, say "the Tribunal has repeatedly ruled that the employer has breached subsection 9(2) where anti-pay equity animus is even part of a decision to terminate an employee" and then apply that principle to your case. Be very careful not to overstate the legal principle. Where there is any ambiguity about what a decision stands for address that in your argument and suggest to the panel why your reading of the decision is preferable. Decisions which don't support you but are directly "on point" must be distinguished or you must explain why the panel should not decide your case the same way.

Once you complete your closing invite questions from the panel.

Reply/Rebuttal

If you made your submissions first you will have an opportunity to reply to any new arguments made by your opponent. As with reply on the evidence, this is not an opportunity to shore up your case or repeat yourself.

Common Objections and Evidence Problems

1. Relevance

Evidence which is not relevant to the issues in dispute will not be "admitted" or considered by the panel. The test is applied to all evidence: oral testimony, documents, expert's reports.

2. Hearsay

Hearsay occurs where witness X testifies that "Y told me the work of the job class would be re-evaluated because its point score was unusually low" and you want to rely on X's testimony to prove the truth of Y's statement. While relevant, X's testimony is suspect because Y can provide more reliable evidence about what he actually said. However, if the statement is offered to prove some other relevant fact - for example that X had notice that the job class would be re-evaluated and what X understood to be the reason for the re-evaluation - the hearsay exclusion does not apply.

3. Privilege

A witness has the right to refuse to answer questions that touch on matters subject to a statutory or common law privilege. This includes any communications between a lawyer and client, doctor and patient, spouses, and information about settlement discussions.

4. Business Records

Business records are inherently hearsay unless the maker of the document is available to prove them. However the *Ontario Evidence Act* allows their admission without proof if seven days' notice of the intention to rely on them is given to the other party. Usually parties are able to agree on the admission of these documents.

5. Rule in *Browne v. Dunn*

If you intend to introduce evidence through a witness that contradicts the testimony of an opposing witness and questions their credibility, those contradictions should be put to the opposing witness during cross-examination. If you fail to do so, the panel may not allow you to call the contradictory evidence through your witness.

6. Opinion/Speculation

Unless qualified as an expert, questions soliciting a witness' opinion or asking about what a witness might do in a certain situation are rarely relevant.

7. Expert Evidence

The Tribunal has considerable experience with expert or opinion evidence. The panel will qualify an expert to testify before it on a particular matter or range of matters. The expert's testimony must then stay within those parameters. If the panel determines that the proffered testimony is not helpful to it or goes entirely to a matter within the expertise of the Tribunal it will decline to qualify the expert.

8. Evidence of Review Officer/Review Services Proceeding

A Review Officer cannot be summoned to testify before the Tribunal without the Tribunal's consent. That consent is only granted in extraordinary circumstances. The Tribunal has ruled that evidence about the Review Services process is rarely, if ever, relevant to the determination of the workplace disputes before it.