PAY EQUITY HEARINGS TRIBUNAL
INFORMATION BULLETIN NO. 2

Responding to an Application to the Pay Equity Hearings Tribunal

GENERAL

The Pay Equity Hearings Tribunal 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.

This Information Bulletin describes how an employee, employer, or bargaining agent responds to an Application to the Pay Equity Hearings Tribunal.

RESPONDING TO AN APPLICATION

Read this Information Bulletin together with the Tribunal's Rules of Practice. Decisions of the Tribunal are available on the Tribunal's website.

If you are an employee or group of employees who wish to remain anonymous in the proceeding before the Tribunal please refer to Information Bulletin #3 *"Remaining Anonymous"* before completing your Response.

ANSWER THESE QUESTIONS FIRST

Have the Issues in the Application Been at Review Services?

Resolving pay equity disputes has two steps: investigative and adjudicative. As the first step, a Review Officer of the Pay Equity Office investigates a complaint and, where possible, assists the parties to settle it. The Review Services process is very important to the *Pay Equity Act*. Consequently, it must be completed before the Tribunal will adjudicate the dispute.

In responding to the Application first ask whether the Application fits into one of the following categories:

- seeks to confirm, vary or revoke an order of a Review Officer;
- the Review Officer has issued a ss.23(2) notice;
- the Review Officer has refused to deal with a complaint for the reasons contained in ss.23(3) of the *Act*;

- there is a complaint that a party has breached a settlement made in accordance with the provisions of s.25.1 of the *Act*;

- seeks the Tribunal's consent to prosecute in accordance with s. 26 of the *Act*; or,

- the Review Services process is exhausted and no Order has issued.

If not, you may be able to argue that the Application is not properly before the Tribunal.

Second, ask whether all the issues in the Application were considered by the Review Officer (either because they were the issues the parties took to Review Services or because the Review Officer raised them in the course of the investigation) and whether there has been a reasonable opportunity for settlement. If some or all of the issues do not meet this test you may be able to argue that those issues are not properly before the Tribunal.

COMPLETING THE RESPONSE

What Goes in the Response?

The Tribunal acknowledges the filing of the Application, usually within 2 working days, by a letter sent to all parties. The Tribunal's letter contains the File Number assigned to the Application. Use this number on your Response and on any other correspondence with the Tribunal.

When completing the Response, identify any other parties not named in the Application whose rights and interests may be affected by it. Provide contact information for them and their representatives.

Part B of the Response is where you tell the Tribunal your version of the dispute. Make sure you include all the following information in consecutively numbered paragraphs:

1. identify any facts contained in the Application with which you agree. Including the paragraph numbers where these facts are contained in the Application is very helpful. (For example: I agree with the facts in paragraphs 2 and 3 of the Application);

2. do the same thing for the facts with which you don't agree or don't know enough about to take a position. (For example: I dispute the facts in paragraphs 4 -20 and have no knowledge of the facts in paragraphs 1 and 21.)

3. set out your version of the disputed facts and provide any additional facts or events which you believe are relevant and important. Tell us what did or did not happen, when and where it happened or should have happened, and who was involved. Remember, any issues you raise must meet the *prima facie* test and have been considered at Review Services; and

4. identify the provisions of the *Pay Equity Act* which you say support your position or which you believe have been violated.

Complaints about the conduct of the Review Officer or the process at Review Services are rarely relevant to the workplace pay equity dispute and should not be included in your Response.

Except with the Tribunal's permission, you may not rely on any issue, fact, or event not contained in your Response.

Part B of the Response is also where you tell the Tribunal what you want it to do with the Application. If you want the Tribunal to do something more than dismiss the Application (for example vary the Order in a way not requested by the Applicant) you may need to make your own Application.

Finally, indicate whether you require French language or accommodation services, and identify the regional centre (London, Ottawa, North Bay, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins, Toronto, Windsor) in which you wish the hearing to be held.

What is Service and Filing?

The completed Response (Form 2) must be served on the Applicant and any other Respondents within 10 days of the effective date of service of the Application on you. "Effective date of service" is defined in the Tribunal's Rules. You may serve your Response by hand, regular mail, facsimile transmission, courier, or any other way agreed upon by the parties.

If you believe you are not able to complete and serve your Response within the 10 day period you may ask the other parties and the Registrar for an extension of time. Requests for extension of time are usually allowed provided you have a good reason and the amount of time needed will not seriously delay the Pre-Hearing Conference or the hearing.

Where a Respondent or Respondents have elected to remain anonymous and failed to name an Agent at Review Services you may not be able to serve your Response on them. In those circumstances the Registrar forwards the

Response to those Respondent(s) on your behalf when an Agent comes forward.

The Response and a Certificate of Delivery (Form 3) must be filed with the Tribunal no later than 5 days after the date of effective service on the Applicant and any other Respondents. The Response and Certificate of Delivery may be filed by hand, regular mail, facsimile transmission, courier, or e-filed.

Failure to complete, serve, and file the Response in accordance with the Rules will delay its processing and, ultimately, the scheduling of the hearing.

What Happens Next?

The Applicant and any other Respondents may file a Reply to your Response. This permits them to give their views on any new issues raised in your Response. You may also reply to any new issues raised by other respondents. The Reply must be in writing but you are not required to use a specific form. The Reply must be served and filed within five days of the effective date of service of the Response.

Once any Replies are served and filed, or the time for filing passes, the pleadings period is considered closed. At this point the Registrar sets a date for the Pre-Hearing Conference. If the Tribunal concludes that a Pre-Hearing is not useful in the circumstances, a hearing date is set. The Registrar may set these dates without consulting you.

All correspondence and telephone contact with the Tribunal must be carried out through the Registrar or her office. Anything sent to or filed with the Tribunal must be copied to all the other parties in the Application.

NEXT STEPS: PREPARING FOR THE HEARING

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. At the Pre-Hearing the Chair or Vice-Chair assists the parties to get the Application "hearing ready". This may include:

- helping parties to estimate hearing time;
- getting parties to work out a timetable for exchanging lists of witnesses;
- helping parties to resolve production or disclosure questions;

- identifying preliminary motions or objections; and,
- agreeing on procedural matters.

In addition, the Rules require parties to disclose all arguably relevant documents before the Pre-Hearing. Given this, the parties are expected to have a good appreciation of the relevant documentary evidence when they attend the Pre-Hearing and may consider drafting an Agreed Statement of Fact. This document sets out all the facts the parties agree upon and any uncontroversial facts. 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.

Finally, where the parties agree, the Chair or Vice-Chair may assist the parties to settle some or all the issues in dispute.

The Pre-Hearing Conference is most effective if everyone is prepared. Your representative or spokesperson must know your case and have the authority to enter into binding agreements. Agreements reached at the Pre-Hearing are recorded in a Pre-Hearing Conference Memo. The Pre-Hearing Conference Memo is given to the panel of the Tribunal hearing the Application.

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.

Where all parties consent, the Tribunal may also conduct mediation sessions. Their only purpose is to resolve the dispute. Parties can request an opportunity to mediate at any point in the Tribunal's process - even after the hearing on the merits has begun.

For additional information please see Information Bulletin #4 *"The Pre-Hearing Conference"*.

What is Disclosure and Production?

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. 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. 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 over the document, a copy must be provided within

10 days. By having this information prior to the Pre-Hearing Conference the Tribunal hopes to reduce the need for adjournments, to enable parties to better understand each other's case, to identify areas of agreement, and to make fully informed choices about settlement.

Ten days before the hearing on the merits begins the parties must exchange lists of all the documents they intend to rely on before the Tribunal. Having this information prior to the hearing focuses your hearing preparation and will enable you to conduct the hearing quickly and efficiently.

If you want to rely on an expert witness or expert's report at the hearing please review the Tribunal's Rules concerning this special kind of evidence.

What Happens Next?

The Registrar sends you a Notice of Hearing giving the date, time and location of the hearing. The Tribunal may also direct that Notice of Hearing to be given to other persons or organizations whose rights or interests might be affected by the outcome of the hearing.

The hearing is a legal proceeding. The decision of the Tribunal determines your rights and obligations under the *Act*. *You must attend the hearing when it is scheduled. If you fail to attend, the hearing may proceed without you.*

You are entitled, but not required, to be represented by a lawyer or other representative at the hearing. The Tribunal will not provide a lawyer or representative for you.

Can You Adjourn the Hearing?

Sometimes it is impossible to attend the hearing on the date it is scheduled. In that case, you may ask the Tribunal to adjourn the hearing to a different date.

Except in extremely urgent situations, you must ask the other parties for their consent to the adjournment before you contact the Tribunal. Then write to the Registrar setting out the reasons for your request and the parties' positions. Your letter must be copied to the other parties. Any party objecting to the adjournment must provide reasons, in writing, to the Tribunal as soon as possible. The Tribunal will issue a decision refusing, allowing, or putting conditions on the adjournment.

In urgent situations (for example serious illness, a death in the family, or extreme weather conditions which prevent travel) you should telephone the Registrar as soon as possible.

How Do You Get Witnesses to Come to the Hearing?

You are responsible for the attendance of your witnesses. If you want a witness to testify before the Tribunal you must arrange to have the witness present. If a witness fails to attend, the hearing may proceed without that evidence.

If you are not sure the witness will show up, serve him or her with a Summons to Witness. The Summons to Witness is a Tribunal document ordering the witness to attend the hearing and to bring whatever documents you describe in the summons to the hearing.

Contact the Tribunal to request Summons to Witness forms. Make sure you allow sufficient time before the hearing to obtain and serve the summons.

The Summons to Witness and the Tribunal's Rules explain the requirements for service of the summons. It must be served on the witness in person with the required payment for travel and attendance. The person who serves the summons must complete an Affidavit of Personal Service which can be found on the Tribunal's website. The Affidavit may be required at the hearing.

Note that the Tribunal must give its consent to summons a Review Officer. Consent is only given when there are exceptional circumstances.

WHAT TO EXPECT AT THE HEARING

Who Hears the Application?

The hearing takes place before a three person panel of the Tribunal. The panel members are the Chair or Vice-Chair (who sits in the middle), and two "sides members": a Member representative of employers and a Member representative of employees. The sides members ensure that the Tribunal considers the perspectives of both employers and employees but are not advocates for the specific parties appearing before them.

People are appointed to the Tribunal because they have special expertise and understanding of pay equity, labour and employment relations, human rights and compensation systems. Some, but not all, are lawyers.

What Do You Do at the Hearing?

At the hearing, parties will be asked to make a brief opening statement explaining what you want the Tribunal to do and why. You can chose to provide this statement at the beginning of the hearing before any evidence is led or before you begin to introduce your evidence.

Unless everyone agrees about the facts, you will need to present evidence. This involves witnesses giving testimony and the introduction of documents. Administrative tribunals such as the Pay Equity Hearings Tribunal are not obliged to apply the rules of evidence as strictly as a court. But all evidence must be relevant to the issues in dispute before the Tribunal.

Usually, but not always, the Applicant gives its evidence first. If the Application alleges a breach of ss.9(2) (the reprisal protections) the Respondent will be required to proceed first.

The Tribunal holds a hearing "*de novo*". This means testimony is given under oath or on affirmation, tested by cross-examination, and weighed by the Tribunal. It is not an appeal of the Review Officer's Order and the Review Officer's findings or conclusions are not binding on the Tribunal. For that reason, arguments about the Review Officer's conduct or the process at Review Services are rarely relevant to the decision the Tribunal is required to make.

Once your witnesses give their evidence they may be cross-examined by the Applicant. You will have the opportunity to cross-examine the Applicant's witnesses. Panel members may also ask a witness questions.

When the evidence is complete all parties make final submissions. This is your chance to give your view of all the evidence, discuss any decisions of the Tribunal, other tribunals, or the courts which you believe are helpful to your position, and explain why the Tribunal can, and should, provide you with the result you are seeking. The panel may take this opportunity to ask you questions.

The Tribunal may also hold all or part of a hearing 'in writing'. That means the Applicant makes its arguments in writing, you file a written answer to those arguments, and the Applicant makes a written reply to your position. Written hearings are most often held were the issues in dispute are legal rather than evidentiary.

THE TRIBUNAL'S DECISION

The Tribunal will decide the Application based only on information, evidence, and arguments presented at the hearing. You cannot make additional arguments or provide additional evidence after the hearing ends unless the Tribunal specifically permits you to do so. You may not communicate privately with the Tribunal about the case before, during, or after the hearing.

The Tribunal's decision is final and binding on the parties. There is no appeal from the decision except by a process called judicial review. Applications for judicial review are filed in the Superior Court of Justice, Divisional Court.

In exceptional circumstances you may ask the Tribunal to reconsider its decision. Please see Information Bulletin #7 *"Requests for Reconsideration"* for more information.

The Tribunal is not responsible for enforcing its decision. You may ask the Registrar for a certified copy of the decision which can be filed in the Superior Court of Justice and, once filed, is enforceable as an order of that court.