

# GUIDE TO THE OPERATIONS OF THE EMPLOYMENT EQUITY REVIEW TRIBUNAL

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## EMPLOYMENT EQUITY REVIEW TRIBUNAL

### Introduction

The purpose of this Guide is to provide general information on the structure, role and functions of the *Employment Equity Review Tribunal* and to set forth the basic steps to bring a matter before the Tribunal. This Guide is not an authoritative reference or complete in every detail and does not have legislative authority. Reference should be made to the *Employment Equity Act* for the official text.

Questions regarding any aspect of this document or requests for additional information concerning the operation of the Tribunal, should be directed to the Registrar.

### Definitions

In this Guide,

"Act" means the *Employment Equity Act*;

"application" means an application by the Commission for a confirming order under s. 27(2) of the *Act* or an application to contest an assessment of monetary penalty under s. 38(1) of the *Act*.

"Chairperson" means the Chairperson of the Canadian Human Rights Tribunal;

"Commission" means the Canadian Human Rights Commission;

"hearing" means a proceeding by a Tribunal to consider (i) a request or application under s. 27 of the *Act* or (ii) an application under s. 38 of the *Act*;

"member" means a member of the Canadian Human Rights Tribunal;

"Minister" means the Minister of Labour, as designated by P.C. 1996-1589, SI/96-94;

"party" means the Commission, an employer or the Minister;

"Registrar" means the Registrar of the Canadian Human Rights Tribunal;

"Registry" means the principal office of the Canadian Human Rights Tribunal, 473 Albert Street, Suite 900, Ottawa, Ontario, K1A 1J4;

"Registry Officer" means an officer of the Canadian Human Rights Tribunal Registry;

"request" means a request by an employer under s. 27(1) of the *Act* for a review of a direction issued to the employer by the Commission;

"Tribunal" means an *Employment Equity Review Tribunal*.

## **WHO DOES THE ACT APPLY TO**

The *Act* applies to:

- a. Private Sector Employers; "Private sector employer" is defined as any person employing 100 or more employees on or in connection with a federal work, undertaking or business as defined in s. 2 of the *Canada Labour Code* (eg. air, marine and rail transportation; interprovincial buslines; broadcasting; banking). A private sector employer also includes any corporation established by the government of Canada that employs 100 or more employees. A private sector employer does not include an employer of a work or undertaking or business of a local or private nature in the Yukon Territory, the Northwest Territories or Nunavut, or a departmental corporation as defined in s. 2 of the *Financial Administration Act* (ss. 3, 4(1)(a));
- b. Part I, Schedule I, *Public Service Staff Relations Act* employers. These are the Departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer (s. 4(1)(b));
- c. Part II, Schedule I, *Public Service Staff Relations Act* employers that employ 100 or more employees. These are portions of the public service of Canada that are separate employers (s. 4(1)(c));
- d. such other public sector employers employing 100 or more employees as specified by order of the Governor-in-Council on recommendation of the Treasury Board (s. 4(1)(d)).

## **HOW TO MAKE A REQUEST OR APPLICATION**

*(i) If the Commission believes that an employer has not complied with its obligations under the Act, the Commission may issue a direction to an employer to remedy the non-compliance (ss. 25, 26). If an employer does not comply, the Commission may apply to the Chairperson for a confirming order (s. 27). There is no time limit for such an application.*

(ii) If the employer does not agree with the direction, it may make a request to the Chairperson for a review of the direction (s. 27). The request must be made within 60 days from the day the direction is issued,

but in the case of a direction issued under s. 26 of the *Act* (failure to provide assistance/information to compliance officers), the request must be made within 30 days from the day the direction was issued.

*(iii) If the employer has made a request, the Commission can not apply for a confirming order.*

(iv) A request or an application should be made in writing to the Chairperson at the Registry Offices and may be made in either official language. There is no specific form for a request or an application, but the party making the request or application should indicate briefly:

- the nature and the grounds for the request or application, the names and addresses of the parties involved, and
- enclose a copy of the direction.

(v) In order to comply with the time periods mentioned in (ii), the request must be delivered to the Tribunal Offices personally, by courier, by facsimile or by mail before the close of business on the last day of the time period. If sent by ordinary mail or registered mail it must arrive at the Tribunal Offices postmarked the last day of the time period or earlier.

## **PRE-HEARING PROCEDURES**

Upon receiving a request for review or an application, the Chairperson will appoint a Tribunal consisting of one or three members, depending on the complexity or precedential significance of the case (s. 28).

Once a Tribunal has been appointed, the Registry will request in writing that each party advise whether it will be represented by counsel or will appear before the Tribunal on its own behalf. The name, address, telephone number and facsimile number of counsel or the party's contact person should be provided to the Registry.

The Tribunal may schedule an informal case planning meeting. A member of the Tribunal will preside at the case planning conference and a case planning agenda listing the items for discussion will be provided to all parties prior to the conference.

Items for discussion at the case planning meeting may include:

- establishment of reasonable time lines for conduct of the proceedings, including establishing dates for the hearing;
- disclosure issues;
- procedural issues;
- jurisdictional issues;
- venue of proceedings;
- language of proceedings;
- parties' statements of position;
- security requirements, pursuant to s. 28(10);
- in-camera proceedings, pursuant to s. 29(4);
- remedies sought, pursuant to s. 30(1);

- any other matters which the Tribunal and the parties consider necessary for the efficient hearing of the matter.

## **THE HEARING**

The hearing is to be as informal and expeditious as the case permits (s. 29(2)). It is to be conducted in public unless an employer establishes to the satisfaction of the Tribunal that it should be "*in camera*". That is, only the Tribunal and the parties are present in the hearing room (s. 29(4)).

The Tribunal may receive and accept evidence and other information whether or not such evidence would be admissible in Court (s. 29(1)).

On the completion of the hearing, the Tribunal may confirm, vary or rescind the Commission's direction or the Tribunal may make any other order it considers appropriate and useful in the circumstances (s. 30). It must give written reasons for its decision (s. 29(5)).

The order of the Tribunal is final and not subject to appeal or review by any Court except for judicial review under the *Federal Court Act* (s. 30(3)). There are some limitations on what the Commission can require in a direction or what the Tribunal can order. More particularly, a direction or order cannot (s. 33):

- cause undue hardship on an employer;
- require an employer to hire or promote unqualified persons;
- with respect to the public sector, require an employer to hire or promote persons without basing the hiring or promotion on selection according to merit in cases where the *Public Service Employment Act* requires that hiring or promotion be based on selection according to merit, or impose on the Public Service Commission an obligation to exercise its discretion regarding exclusion orders or regulations;
- require an employer to create new positions in its workforce;
- impose a quota on an employer;
- in the case of short term numerical goals, fail to take into account (a) the degree of underrepresentation in the employer's workforce (b) the availability of qualified persons within the employer's workforce and the Canadian workforce (c) the anticipated growth or reduction of the employer's workforce (d) the anticipated turnover within the employer's workforce (e) any other factor that may be prescribed (s. 10(2)).

An order of the Tribunal may be registered in the Federal Court by filing a certified copy of the order with the registrar of that Court. Once this has been done, the Tribunal Order can be enforced in the same manner as a Federal Court Order (s. 31).

## **OTHER REVIEW FUNCTIONS OF THE TRIBUNAL**

The Tribunal also has the authority under the *Act* to review a monetary penalty assessed against the employer by the Minister of Labour. Such assessment can be made only against a private sector employer in two situations:

- i. where the employer, without reasonable excuse, fails to file an employment equity report or files an incomplete report (ss. 35(1)(a), 35(1)(b));
- ii. where the employer knowingly provides false or misleading information in an employment equity report (s. 35(1)(c)).

In either case, the Minister may, within two years of learning of the violation, assess a monetary penalty, not exceeding \$10,000 for a single violation and \$50,000 for repeated or continued violations ( s. 36(2)).

An employer who receives a notice of assessment may contest the penalty by application in writing to the Minister for a review by the Tribunal not later than 30 days after receiving the notice (s. 38(1)). The Minister is required to send a copy of the written application to the Chairperson who then appoints a one member Tribunal to review the assessment (s. 39). The Tribunal may schedule an informal case planning meeting for the same purpose as for an application or review.

The Tribunal shall provide a full opportunity for both the Minister and the employer to present evidence and make representations consistent with procedural fairness and natural justice. The burden is on the Minister to prove, on the balance of probabilities, that the employer has committed the alleged violation (s. 39(6)).

If the Tribunal determines that the employer has not committed the alleged violation, no further proceedings shall be taken against the employer in respect of that alleged violation (s. 39(4)(a)).

If the Tribunal finds that the employer has committed the alleged violation, the Tribunal will determine the appropriate amount of the penalty, which in its opinion, is payable in respect of the violation. The amount of the penalty cannot exceed \$10,000 for a single violation. It cannot exceed \$50,000 for repeated or continued violations (ss. 36(2), 39(4)(b)(i)).

In determining the amount of the penalty the Tribunal will take into account:

- the nature, circumstances, extent and gravity of the violation;
- the wilfulness or intent of the private sector employer; and
- the employer's history of prior violations.

(ss. 36(3) and 39(5))

In the event a penalty is levied by the Tribunal, it will issue a certificate to the Minister setting out the amount payable and send a copy of the certificate to the employer by registered mail (ss. 39(4)(b)(i) and 39(4)(b)(ii); *Employment Equity Regulations* SOR/96-470, s. 13, Schedule V).

The decision of the Tribunal is final and not subject to appeal or review by any Court except by way of judicial review under the *Federal Court Act* (s. 39(8)). The certificate can be enforced as a judgment of the Federal Court (s. 40).

**FOR FURTHER INFORMATION**

Please contact:

Greg Smith, Registrar  
Canadian Human Rights Tribunal  
160 Elgin Street, 11<sup>th</sup> Floor  
Ottawa, ON K1A 1J4

Tel. (613) 995-1707  
Fax. (613) 995-3484

E-mail: [registrar@chrt-tcdp.gc.ca](mailto:registrar@chrt-tcdp.gc.ca)

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