



Human Rights Tribunal of Ontario

Guide to Section 53(5) Applications

INTRODUCTION

After December 31, 2008, the Ontario Human Rights Commission (the Commission) will no longer be able to deal with the merits of an active complaint that was filed with the Commission prior to June 30, 2008 (unless the Commission has already referred the complaint to the Human Rights Tribunal for a hearing). According to the transition provisions of the Ontario *Human Rights Code* (the *Code*), such complaints are discontinued as of January 1, 2009.

After December 31, 2008 the subject-matter of a complaint that the Commission did not deal with on the merits, and was not withdrawn or settled may be brought to the Tribunal as an application made under section 53(5) of the *Code*.

The Tribunal may accept s. 53(5) applications between **January 1, 2009 and June 30, 2009**.

If you already abandoned your complaint before the Commission to file an application under s. 53(3) of the *Code* before December 31, 2008 then you must continue the process under section 53(3).

WHO CAN FILE AN APPLICATION UNDER SECTION 53(5) OF THE CODE?

Who can choose to make an application to the Human Rights Tribunal under section 53(5) of the Code?

Any individual who filed a complaint at the Commission prior to June 30, 2008, and whose complaint has not been finally dealt with by the Commission, withdrawn, or settled, may file an application under section 53(5).

When can an individual who had a continued complaint at the Commission as of December 31, 2008 choose to file an application directly to the Human Rights Tribunal under section 53(5)?

From January 1, 2009 until June 30, 2009 an individual can choose to file an application to the Tribunal under s. 53(5) of the Code with respect to the subject matter of their complaint that was discontinued before the Commission.

What happens if I do not make an application under section 53(5) by June 30, 2009?

You will not be permitted to raise the subject matter of your complaint before the Tribunal under any circumstances.

What if I already abandoned my complaint at the Commission between June 30, 2008 and December 31, 2008 and filed an application under section 53(3) of the Code? Can I choose to abandon my section 53(3) application and file a section 53(5) application instead?

No. If you have commenced an application under section 53(3) of the Code you cannot “switch” to a section 53(5) application. If you choose to abandon your section 53(3) application the Tribunal may consider your matter to have been finally dealt with and in no circumstance will you be able to commence a new application under section 53(5).

What if I would rather filed an application under the section 53(3) process rather than the section 53(5) process?

You cannot file a section 53(3) application after December 31, 2008.

MAKING A SECTION 53(5) APPLICATION

What does a person have to do to make an application to the Tribunal under section 53(5) of the Code?

An applicant must complete a short application form (Form TR-1) and attach their Commission complaint and any amended complaint to the Form TR-1. The completed Form TR-1 with the attachments must be delivered to the same respondent(s) that were named in the complaint before the Commission.

If you do not wish to continue against some of the respondents you named at the Commission, you can “drop” them from the proceedings by not naming and serving them with your Section 53(5) Application.

Remember that you must separately deliver the Form and complaint to every person you name as a respondent in your Section 53(5) Application and file a Statement of Delivery (Form C) explaining how you delivered these material to each named respondent.

You should not assume that an employer or owner will deliver your materials to employees on your behalf.

If any respondent has a lawyer or representative that they have authorized to accept delivery, you may deliver the materials to that representative.

After these documents have been delivered to the respondents, the completed Form TR-1 and attachments and a Statement of Delivery (Form C) must be filed with the Tribunal.

Once an application has been commenced, it will be processed in accordance with the Tribunal's *Rules of Procedure for Transitional Applications under section 53(3) and 53(5) of the Human Rights Code (Transition Rules)*. All the parties to a transitional application are obliged to know and follow these Rules. These Rules provide more details on the application process and the steps that follow.

The forms mentioned above and the *Transition Rules* are available on the Tribunal's website or by contacting the Tribunal using the contact information provided at the end of this document.

Will the Commission be involved in my application before the Tribunal?

The Commission is a separate legal entity from the Tribunal and will not automatically be involved in your Application. It is possible that the Commission may wish to intervene in your Application as a separate party.

What does a respondent have to do when the section 53(5) application is delivered?

A respondent must complete a response form (Form TR-2) and attach the response to the complaint they filed with the Commission. If a respondent did not file a response to the complaint at the Commission, the respondent must give their position on the allegations and remedy sought by the applicant. Once a respondent completes the Form TR-2, they must deliver it, along with all attachments, to the applicant and any other respondents. After the completed Form TR-2 (and any attachments) has been delivered to the applicant it must be filed with the Tribunal along with a Statement of Delivery (Form C) no later than 35 days after the application was first delivered to the respondent.

Once an application has been commenced, it will be processed in accordance with the Tribunal's *Rules of Procedure for Transitional Applications under section 53(3) and 53(5) of the Human Rights Code (Transition Rules)*. All the parties to a transitional application are obliged to know and follow these Rules. These Rules provide more details on the application process and the steps that follow.

The forms mentioned above and the *Transition Rules* are available on the Tribunal's website or by contacting the Tribunal using the contact information provided at the end of this document.

What happens if the respondent does not respond at all?

If the respondent does not send the Tribunal a completed response form, the Tribunal may issue a decision against the respondent based on the information in the application.

The respondent can ask the Tribunal to set aside that decision if it can be proved he or she did not receive the application, through no fault of his or her own, or that there were compelling reasons for not responding. The respondent also has to show that he or she has a defence to the application.

THE TRIBUNAL'S PROCESS FOR RESOLVING THE SUBSTANCE OF THE APPLICATION

What is the first step after the application and response have been filed?

The Tribunal will schedule mediation in every section 53(5) application, if the applicant indicates a willingness to attend mediation. However, if the respondents are not also willing, mediation will be cancelled.

Mediations will normally occur between three and five months after the application is filed. However, if the Tribunal receives a higher than anticipated number of 53(5) applications it may take longer to schedule the mediation.

Will the parties be consulted on the date for mediation?

No, in most cases the Tribunal will set the date for mediation immediately upon receiving the application.

What happens if a party is not available on the date scheduled for mediation?

You are expected to be available on the date scheduled for mediation. In extraordinary cases, you may ask to change the date. Examples of extraordinary circumstances include: previously scheduled medical appointments that cannot be changed or previously scheduled absence from the country that cannot be changed. Advise the Tribunal and the other parties immediately if you are not available on the scheduled date and indicate when you will be available for mediation. If all parties are in agreement, the Tribunal will reschedule the mediation.

What does a party need to do to prepare for the mediation?

Each party to the mediation should consider carefully how they would like the application resolved. Think about your position: what are its strengths and weaknesses and how will you prove your claims? If you have documents which

support your claims bring them to the mediation. What do you think would be a reasonable offer to settle and why is it reasonable? Be prepared to explain your position to the mediator.

What will happen at the mediation?

A member of the Tribunal, with expertise in human rights law, will meet with you. The mediation is confidential. Statements made and positions taken cannot be used in any later part of the process without everyone's consent.

The person who attends the mediation should have authority to settle the application. For example, if the respondent is a company, a person who has authority to sign an agreement on behalf of the company should be at the meeting. Similarly the applicant should be prepared to sign a settlement that day, if the terms are agreeable.

Generally, the mediator will ask each party to explain briefly what happened and what they would like to see done about it. The mediator will consider what the applicant and respondent have said and the information in the documents provided, if any. The mediator will not decide for the applicant or respondent, but will discuss options with the parties and try to assist the parties to come to an agreement.

What happens if the parties agree to a settlement of the application?

When the parties reach a resolution of all issues through mediation, they will be encouraged to reduce their agreement, if any, to writing and sign it on the day of the mediation. A settlement of an application agreed to in writing and signed by the parties is binding on the parties.

What happens if a party breaches the terms of a settlement?

A party who believes that another party has contravened the settlement may make an application to the Tribunal under section 45.9(3) of the *Code*.

What if mediation does not lead to a resolution of the matter?

If there is no agreement the mediator will assist you to complete a case management checklist. The checklist will help you prepare for the next stage of the process: the hearing.

The Tribunal will schedule a hearing before another member of the Tribunal who has expertise in human rights law.

What happens if either the applicant or the respondent declines mediation?

The Application will move to the next step, which is a hearing.

Will parties be consulted on the date of the hearing?

Yes, generally the Tribunal will consult with the parties and schedule a date for the hearing. However, if either party does not respond in a timely fashion with their available dates, or if either party does not make himself/herself reasonably available for a hearing within four to six months, the Tribunal will select a date for the hearing without the agreement of the parties. The Tribunal will issue a Notice of Hearing and Required Preparation which will advise the parties of the date of the hearing and steps they must take to prepare for the hearing.

What does a party have to do to prepare for the hearing?

30 days after the Notice of Hearing and Required Preparation the applicant must deliver a statement of facts on which the applicant intends to rely and a description of the remedies sought on the respondent and file these documents, and a completed Statement of Delivery (Form C), with the Tribunal. At the same time the applicant must also produce to the respondent all documents arguably relevant to the application in the applicant's possession and which are not privileged.

The respondent has 45 days after the Notice of Hearing and Required Preparation to deliver a statement of facts and provide their response to the remedies sought to the applicant and file these documents, and a completed Statement of Delivery (Form C), with the Tribunal. At the same time the respondent must produce to the applicant all documents arguably relevant to the application in the respondent's possession and which are not privileged.

No later than 20 days before the Hearing the parties must deliver to each other and file with the Tribunal a copy of all documents on which they intend to rely at the Hearing, a list of their witnesses, and a brief statement of what the witness is expected to say. At the same time the parties must file their documents along with a Statement of Delivery (Form C) with the Tribunal.

What does a party bring to the Hearing?

The parties should bring their witnesses, the statement of facts and additional facts, if filed, and all documents on which they intend to rely which were filed with the Tribunal.

If a party is concerned that a witness may not attend to give his or her evidence at the hearing, it can summon the witness. It must do so by contacting the Tribunal to get a Summons to Witness (Form D).

What happens at a Hearing?

The Hearing is the stage of the Tribunal's process where a neutral adjudicator (a Tribunal member) hears from the parties to the application and then issues a decision. The member may take an active role in directing the Hearing.

The member is in charge of conducting the Hearing and determining how it will proceed. After hearing from the parties, the member may decide which witnesses need to give evidence and in what order, may take the lead in questioning of the witnesses, and may ask the parties to focus their evidence or submissions on certain issues.

What happens if I need a document in the possession of another party and they refuse to provide me with a copy?

In most circumstances, parties are obliged to provide all arguably relevant documents to the other parties under either Rule 18.2 or Rule 18.4. If you believe you have not received a document that should have been provided under these Rules you may ask the Tribunal to make an "Order During Proceedings" to have the party provide the document to you. You must follow the procedure set out under Rule 19 (Request for an Order During Proceedings) and use a Form TR-4. You must make your request to the Tribunal well in advance of the Hearing, so that the other party can deliver the required document to you in time for you to file the document with the Tribunal 20 days in advance of the Hearing.

What does the Hearing decide?

The member will hear the relevant information and arguments and decide whether the applicant experienced discrimination or harassment. The decision will be based on the evidence and arguments presented at the Hearing.

The member may tell the parties the decision immediately after the Hearing. More often, the member will end the Hearing without making a decision but will indicate that the decision is "reserved". This means that the member will consider the information and arguments and will send the parties a decision later. In either case the member will give written reasons for the decision.

The member can decide that the *Code* has been violated if the member is convinced that it is more likely than not that discrimination or harassment has occurred. If the member finds that there has been discrimination or harassment, he or she must also decide what damages the applicant suffered as a result and what may be needed to prevent future discrimination.

For example, the member may order the respondent to pay money to compensate the applicant for financial losses or order the respondent to rehire the applicant. The respondent may also be ordered to hold training sessions for staff.

The member may decide that no discrimination or harassment took place and that the *Code* was not breached. The application will then be closed and nothing else will happen.

If the adjudicator decides in my favour, can I get “costs” from the other side?

The Tribunal’s rules do not authorize the Tribunal to order the losing side to pay the winner’s legal costs.

What can an applicant or respondent do if they disagree with the decision?

Tribunal decisions are final and are not subject to appeal.

In certain limited circumstances you may ask the Tribunal to reconsider its decision. See the Tribunal’s Practice Direction on Reconsideration for information about making a request for reconsideration:

http://www.hrto.ca/NEW/law_policies/reconsideration.asp

The Tribunal’s decision may be judicially reviewed by making an application to the Divisional Court. The application for judicial review is governed by the *Rules of Civil Procedure*. More information about the judicial review process can be found by visiting the Divisional Court website:

<http://www.ontariocourts.on.ca/scj/en/divct/>

OTHER IMPORTANT INFORMATION

What do I do if I have other questions about the Tribunal’s process?

The Tribunal has published various documents on its website that provide more details about how applications get resolved at the Tribunal.

As mentioned above, all parties should be familiar with the Tribunal’s *Rules of Procedure for Transitional Applications under section 53(3) and 53(5) of the Human Rights Code*, which can be found here:

<http://www.hrto.ca/NEW/application/transition.asp>

In addition to these *Transition Rules* and the *Code* itself, the Tribunal has published various Practice Directions and Policies on its website, which can be accessed here:

http://www.hrto.ca/NEW/law_policies/law.asp

Some of the Tribunal's practice directions that you will find on our website are:

- [Practice Direction on Requests for Language Interpretation](#)
- [Practice Direction on Recording Hearings](#)
- [Practice Direction on Hearings in Regional Centres](#)
- [Practice Direction on Reconsideration](#)

Some of the Tribunal's policies that you will find on our website are:

- Policy on Accessibility and Accommodation [\(word\)](#) [\(pdf\)](#)
- Policy on Representation before the HRTO [\(word\)](#) [\(pdf\)](#)
- Policy on Public Complaints [\(word\)](#) [\(pdf\)](#)

Can I ask the Tribunal for advice about how to proceed with my application or my response?

The Tribunal is a neutral, adjudicative agency and cannot provide legal advice to members of the public. An independent lawyer or other qualified legal representative would be in the best position to advise you of your rights and options.

How do I contact the Tribunal?

For information about Transitional Applications, contact the Registrar for transition matters at:

Patricia M. Grenier
Registrar - Transition
Human Rights Tribunal of Ontario
180 Dundas Street West, 22nd Floor
Toronto, ON
M7A 2G5

Tel (Toronto): (416) 326-1312
Tel (Toll Free): 1-866-598-0322
TTY: (416) 314-2379
TTY (Toll Free): 1-800-424-1168
Fax: (416) 314-8743
Email: HRTO.Registrar-Transition@ontario.ca

Website: <http://www.hrto.ca>