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Community Legal Assistance Society

BC Human Rights Clinic

Clinic FAQ

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BC Human Rights Clinic FAQ

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1. Human Rights Law in British Columbia

1.1 Areas and Grounds of Discrimination

Not every protected ground is relevant to each area of discrimination. The table below demonstrates how each area interfaces with each ground:

	Protected Areas			
Protected Grounds	*Employment*	*Public Services & Accommodation*	*Purchase of Property*	*Tenancy*
Race	✔	✔	✔	✔
Colour	✔	✔	✔	✔
Ancestry	✔	✔	✔	✔
Place of Origin	✔	✔	✔	✔
Political Belief (as long as it does not cause harm to others)	✔	✘	✘	✘
Religion	✔	✔	✔	✔
Marital Status (includes protection for those married, single, widowed, divorced, separated, or living common law)	✔	✔	✔	✔
Family Status (includes having children or not having children)	✔	✔	✘	✔
Physical or Mental Disability	✔	✔	✔	✔
Sex (includes protection for males & females, sexual harassment, pregnancy discrimination & transgendered discrimination)	✔	✔	✔	✔
Sexual Orientation (includes protection for heterosexual, bi-sexual, gay men & lesbian women)	✔	✔	✔	✔
Age (between 19 & over)	✔	✔	✘	✔
Gender identity or expression	✔	✔	✔	✔
Criminal or summary conviction	✔	✘	✘	✘
Source of Income	✘	✘	✘	✔

1.2 Areas of Discrimination

The following areas are protected by the *BC Human Rights Code*:

Discriminatory publications (*s.7*)

A person must not "publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation" that discriminates against a person or class of persons.

The Code also protects against communication which is likely to expose a person to hatred or contempt. The threshold to determine this is very high.

This provision does not extend to private communication.

Example 1: *Mr. D is a recent immigrant from Jamaica. Mr. H sends a number of text messages to Mr. D's personal cell phone, using racial slurs and telling Mr. D to "go back where you came from".*

In this first example, Mr. H's actions are **not** likely to have breached *s.7* of the *Code*. Although Mr. H has appeared to discriminate against Mr. D on the basis of his place of origin, his comments were sent privately to Mr. H's personal cell phone. His comments are also unlikely to be considered sufficiently severe to contravene s.7.

Example 2: *Mr D is a recent immigrant from Jamaica. Mr. H, his neighbour, puts posters up around the neighbourhood which liken Jamaican immigrants to "horrible creatures who should not be allowed to live" and describe them as "genetically inferior".*

In this second example, Mr. H's actions have more likely contravened *s.7*. Mr. H's posters could be considered a publication for the purposes of *s.7*. The posters need not target Mr. D specifically if the discrimination is against a group or class of persons. The comments are also more severe in nature, and therefore might meet the high threshold.

Discrimination in accommodation, service and facility (*s.8*)

A person must not, without a *bona fide* and reasonable justification (see box below), deny or discriminate in relation to any accommodation, service or facility "customarily available to the public" on the basis of a relevant protected characteristic.

S.8 includes where a person has been discriminated against in relation to services provided by their strata organization.

***Bona fide* and reasonable justification (BFRJ):**

BFRJ is a defence for respondents in *s.8* complaints. If a complainant proves their case, a respondent must prove 3 things:

- They acted for a reason related to their business;
- They acted honestly and did not mean to discriminate; and
- They took all reasonable steps to avoid any harmful effect on the complainant. This is also called the duty to accommodate to the point of undue hardship (see **1.4** at page 8).

Example: *A housing co-op only rents two bedroom units to low income families with children. It refused to rent a two bedroom unit to a couple without children.*

The co-op may prove that:

- *the purpose of the rule is to give housing to as many low income people as possible*
- *it did not intend to discriminate when it made the rule*
- *it could not change the rule and meet its purpose at the same time*

Discrimination in purchase of property (*s.9*)

A person must not deny another the opportunity to purchase a unit for sale, or acquire land or an interest in land, on the basis of a relevant protected characteristic. Nor may they discriminate against a person or class of persons in relation to the above.

Sellers and others have a duty not to discriminate regarding the purchase of property. This includes a duty to take all reasonable steps to avoid a negative effect based on a personal characteristic. This is called the "duty to accommodate" (see **1.4** at page 8).

Discrimination in tenancy premises (*s.10*)

A person must not deny the right to occupy a rental property, or discriminate regarding a term or condition of a tenancy, on the basis of a protected characteristic.

This includes a duty to take all reasonable steps to avoid a negative effect based on a personal characteristic - this is called the "duty to accommodate" (see **1.4** at page 8).

Exclusions apply:

- *S.10* does not apply where the sleeping, bathroom, or cooking facilities are shared with the landlord
- Apartment buildings for people ages 55 or over, or designed for people with disabilities, are allowed to prefer people who belong to these groups

Example 1: *Ms B, aged 36, applies for a one bedroom rental unit in an apartment building. Her application is rejected for the reason that the building is dedicated accommodation for seniors.*

In this scenario, assuming that the landlord is telling the truth, it is unlikely that *s.10* has been breached. Under the exclusions to *s.10*, a landlord can operate a building for the sole use of people aged over 55.

Example 2: *Ms B cannot find work and receives her primary income via EI. She applies for a one bedroom rental unit in an apartment building. Her application is rejected, with the property manager stating that he does not accept EI cheques for rent payments.*

S.10 appears to have been breached in this example. A landlord cannot discriminate against a tenant applicant on the basis of their lawful source of income. They can, however, request that the tenant proves their ability to pay their rent.

Discrimination in employment advertisements (*s.11*)

A person must not publish an employment advertisement which expresses a limitation, specification, or preference relating to a protected characteristic.

s.41 of *the Code* contains an exemption to this provision for "charitable, philanthropic, educational, fraternal, religious or social organization[s] or corporation[s]… not operated for profit". These types of organizations can grant a preference to members of an identifiable group or class of persons where the organization's primary purpose is the promotion of the interests and welfare of the group or class.

In addition, any organization can make a distinction on the basis of age where permitted or required by any Act or regulation.

Discrimination in wages (*s.12*)

An employer must not discriminate by paying employees of one sex a different wage to those of another sex for similar or substantially similar work.

- Concepts of skill, effort, and responsibility must be considered when measuring what is similar or substantially similar work.
- The above may be subject to factors in respect of pay rates such as seniority systems, merit systems, and systems that measure earnings by quantity or quality of production.

As such, a complainant must demonstrate that:

1. They and another person have the same employer.
2. Their rate of pay is lower than the other person's rate of pay.
3. Their work is similar or substantially similar to the other person's work.
4. The other employee is a different sex.

Discrimination in employment (*s.13*)

An employer must not discriminate on the basis of a protected ground in relation to any term of employment. Resulting negative effects can include:

- Refusing to hire
- Denying a promotion
- Discipline
- Denying benefits
- Refusing to return someone to work
- Harassment based on a personal characteristic that negatively affects the work environment or leads to negative job-related consequences
- Ending employment

The complainant should name the employer as the primary respondent. One or more individual respondent can be named if they:

- made the decision to fire the complainant based on a personal characteristic;
- influenced a decision that discriminated against the complainant; or
- harassed the complainant.

A person who applied a discriminatory policy as part of their job, or who delivered a letter firing the complainant would not normally be named.

Example 1: *Ms. X works for ABC Sales Ltd. as a Senior Sales Representative. On returning to work from short term disability leave, her line manager, Mr. R, informs her that he has made the decision to demote her as a result of her absence.*

In this example, it would be appropriate to name Mr. R, the manager, as an individually named respondent. It appears Mr. R has made the decision to demote Ms. X on the basis of her disability.

Example 2: *Ms. X works for ABC Sales Ltd. as a Senior Sales Representative. She returns to work from a month's short term disability leave. Her line manager, Mr. R, informs her that the company has a policy of terminating employees who take more than 1 week of sick leave per pay period - no exceptions. He hands her a letter of termination and insists he had no role in making the decision.*

In this example, assuming Mr. R is telling the truth, it may not be appropriate to name him as a respondent. Mr. R has delivered Ms. X's letter of termination in his role as her manager, but had no role in making the decision to terminate her, nor enacting the discriminatory policy.

In both examples, the complainant would likely be able to show that they experienced discrimination. It would then be up to the respondent to justify its conduct as a *bona fide* occupational requirement (see box below).

A number of defences may apply to discrimination in employment:

- *Bona fide* occupational requirement (see box below);
- Defence if criminal charge or conviction is related to the employment;
- Defence for *bona fide* seniority scheme;
- Defence for *bona fide* retirement, superannuation, pension plans, or group or employee insurance plans.
- Some non-profit organizations and employment equity programs may also claim an exemption from *s.13* discrimination.

Protection under *s.13* also includes a duty to take all reasonable steps to avoid a negative effect based on a personal characteristic. This is called the "duty to accommodate" (see **1.4** at page 8).

***Bona Fide* Occupational Requirements (BFORs):**

A respondent to an employment complaint may argue that there is no discrimination because its conduct was justified based on a BFOR. To rely on this defence, the respondent must demonstrate three things:

1. That there is a legitimate job-related purpose for the respondent's conduct. The respondent must identify the non-discriminatory purpose for the standard or conduct in question.
2. That the respondent adopted the standard or acted in good faith.
3. That the respondent's standard or conduct is reasonably necessary to the purpose (1), such that the respondent could not accommodate the complainant without undue hardship (see **1.4** at page 8

Discrimination by unions and associations (*s.14*)

Unions and associations have a duty not to discriminate regarding membership, which includes a "duty to accommodate" (see **1.4** at page 8).

A union is not required to support its members on all grievances against employers. If a union decides, for reasons unrelated to the personal characteristics, that it will not support an employee's grievance, then the member does not have a basis for a complaint under the Human Rights Code. A complainant may, however, have a complaint under *s.12* of the *BC Labour Relations Code*.

1.3 Grounds of Discrimination

The protected grounds are:

- Race
- Colour
- Ancestry
- Place of Origin
- Political Belief
- Religion
- Marital Status
- Family Status
- Physical disability
- Mental Disability
- Sex
- Sexual Orientation
- Age (19 & over)
- Gender Identity or Expression
- Criminal or Summary Conviction
- Source of Income

Not every protected ground applies to each area of discrimination, as the table at page 2 demonstrates.

1.4 The Duty to Accommodate

What is the duty to accommodate?

Where a barrier exists, or a policy or practice has adverse consequences on an individual in a protected group, the law says that an employer, landlord, service provider, or union should reasonably accommodate that individual's difference provided they can do so, without incurring undue hardship, or without sacrificing a *bona fide* or good faith requirement.

There is no obligation to provide the perfect solution - complainants should be prepared to accept a reasonable accommodation even if it does not give them everything they want.

What does undue hardship mean?

Courts have determined that accommodation efforts must go to the point of undue hardship. If a respondent is considered to have reached that point, their legal duty to accommodate may be discharged.

Factors that are used by courts to assess the threshold include:

- Financial costs;
- Health and safety risks; and
- Size and flexibility of the workplace.

The successful resolution to an accommodation request may therefore vary between one respondent to another. In any case respondents may have to experience *some* hardship or inconvenience in fulfilling their duty to accommodate.

How do I seek an accommodation?

The courts have provided some guidelines for people seeking an accommodation. A person seeking an accommodation should:

- Inform the decision maker of the need for an accommodation;
- Offer support and assistance in facilitating the process by providing sufficient information as to why the accommodation is required, and what modifications should be made;
- Allow a reasonable amount of time for the decision maker to consider the request and offer solutions;
- Take a flexible approach to considering solutions offered by the decision maker;
- Keep the decision maker apprised of any changes to accommodation requirements;
- Take some responsibility for keeping the process moving - for example by following up in writing if no response has been received after a reasonable period of time;
- If the decision maker refuses the request, or offers an unsuitable solution, request written details to explain the decision.

1.5 Jurisdiction of the BC Human Rights Tribunal

Does my issue fall under provincial or federal jurisdiction?

The BC Human Rights Tribunal has jurisdiction (authority) over areas that are within BC's provincial jurisdiction. The majority of workplaces and services in BC are within provincial jurisdiction.

However, if a complainant has experienced discrimination in a federally-regulated workplace or service, they must take their case to the Canadian Human Rights Commission, and not the BC Human Rights Tribunal. Federally-regulated workplaces and services include:

- Federal government departments, agencies and Crown corporations;
- The RCMP;
- Chartered banks;
- Airlines;
- Interprovincial transportation companies;
- Television and radio stations;
- Interprovincial communications, telephone and transportation companies;
- First Nations governments and some other First Nations organizations.

These organizations are governed by the Canadian Human Rights Act. To learn more about discrimination in federally-regulated environments, visit the Canadian Human Rights Commission's website: http://www.chrc-ccdp.gc.ca/index.html.

2. FAQ - Tribunal Process & Procedure

2.1 Filing a Complaint

How do I file a human rights complaint?

To file a complaint you should file the appropriate form with the Tribunal. All forms are available on the Tribunal's website, or can be requested in person on the 11th floor. Complaint forms are numbered as follows:

- *Form 1.1 – Individual Complaint*
- *Form 1.2 – Complaint for Another Person*
- *Form 1.3 – Complaint for Group or Class*
- *Form 1.4 – Retaliation Complaint* (see page 25 for more information on retaliation)

Should I provide evidence of my complaint at the time of filing?

No - the Tribunal does not accept evidence at the time of filing and will likely return any such documents without keeping copies.

At this early stage, the Tribunal is assessing whether a complaint appears to fall under its jurisdiction on the basis of the facts alleged in the complaint form.

Evidence will be required at a later stage, so complainants are advised to hold onto any relevant documents.

What happens after I file a complaint?

The Tribunal will send a letter or email to the complainant confirming that their complaint has been received and is being screened to determine whether the issue falls within the Tribunal's jurisdiction.

If the complaint is accepted by the Tribunal, within usually 3 - 5 weeks the Tribunal will send a *Notice of Complaint Proceeding* letter, which explains the next steps and provides the first deadlines.

What is the Tribunal looking for when screening a complaint?

A complainant must demonstrate that:

1. They have a characteristic covered by the Code as a protected ground (see above and *Appendix A*);
2. They suffered an adverse impact; and
3. There is a nexus between the protected characteristic and the adverse impact.

Point 3 can be the most difficult to articulate. The complainant needs to explain why they feel the protected characteristic was a factor in the adverse impact.

It is not enough for 1 and 2 to be present without 3. In other words - discrimination has not necessarily occurred just because a person was treated badly by their employer. The complainant must be able to convincingly allege a link between the poor treatment and a protected characteristic.

Discrimination does not need to be the only reason for the adverse impact - it is enough for the complainant to demonstrate that the protected characteristic was at least a part of the reason for the adverse impact.

What if the Tribunal does not accept my complaint?

The Tribunal rarely rejects a complaint outright - the complainant will usually be given an opportunity to provide additional information to clarify their original complaint.

Usually the Tribunal will ask specific questions about the information provided in the original complaint form. Most commonly these questions relate to establishing the nexus between ground and adverse impact.

If the Tribunal ultimately decides not to accept a complaint for filing, this decision can be subject to a JR. If a complainant has reached this point they can be referred to CLP.

2.2 Time Limits

What are the time limits for filing a Human Rights Complaint?

A complaint is considered filed "on time" if:

- All the conduct happened in the 12 months before the complaint was filed; or
- Some conduct happened in the 12 months before the complaint was filed and is part of a "continuing contravention" with earlier conduct.

What is a "continuing contravention"?

A continuing contravention is where some conduct took place outside of the 12 month limit, but forms a part of a pattern of behavior which is related to the more recent conduct.

Some of the conduct I allege took place more than 12 months ago - what should I do?

The complainant should explain the reasons for the delay at *Step 4* of the complaint form.

If there has been no continuing contravention and the complaint is simply out of time, *Step 4: Part B* gives complainants an opportunity to explain why the complaint should still be accepted. The Tribunal will need persuading that:

1. It is in the public interest to accept the complaint; and
2. Nobody will be substantially prejudiced by the delay in filing.

For public interest, the Tribunal may be persuaded if the complaint relates to an issue it has not previously considered.

For substantial prejudice, the Tribunal will consider the length of the delay and whether it may be seriously unfair to the respondent to allow the complaint.

Example: *Mr. A, an Indo-Canadian who works as a sales representative, thinks that he has been discriminated against at work in relation to his race. Over the past 18 months he has been subjected to bullying from his manager, who regularly uses racial slurs against him. Mr. A felt able to withstand the bullying and continued working, however last week he was terminated by his manager.*

In his letter of termination the manager stated that Mr. A has been underperforming, however Mr. A knows that he has the best sales figures in the company. Mr. A is the only Indo-Canadian employee working at the company.

In this example, Mr. A does appear to have grounds to file a human rights complaint on the basis of race, and perhaps colour and ancestry. However his allegations of bullying span 18 months and many significant incidents fall outside the Tribunal's 12 month limitation period.

Mr. A could argue at *Step 4* of the complaint form that the Respondents' conduct amounted to a continuing contravention of the *Code*. This is because the months of racialized bullying are part of a pattern of discriminatory behavior, which Mr. A alleges culminated in his termination.

2.3 Disclosure

What are a complainant's disclosure obligations?

Where a complaint is proceeding to hearing, both parties have an obligation to disclose documents using a *Form 9.1* (complainant) or *9.2* (respondent). The documents listed in the disclosure form should be served on the respondents by the given deadline.

The *Form 9.1*, but not the documents themselves, should also be filed with the Tribunal by the deadline.

The complainant is required to disclose anything that is in their possession or control.

Two particularly important notes in relation to disclosure:

1. That it is an ongoing, continuing obligation. Any documents which later come into the complainant's possession or control must be disclosed; and
2. The parties must disclose any documents that are relevant to any issue raised in the complaint, or the response, whether they help or harm their argument.

When do I have to disclose documents?

The complainant's initial disclosure deadline is usually 35 days after a response has been filed. The respondent's is 70 days from the response.

Later on in the process, usually 21 days after the *Notice of Hearing* is issued, the complainant must file a witness list, remedy sought, and remedy disclosure list.

What if I believe that the respondent is withholding relevant documents?

Where the complainant believes there are particular documents that the respondent is able to disclose but hasn't, they can file a *Form 7.1* to request these documents are disclosed.

2.4 Miscellaneous

What is the effect of a union grievance on the Tribunal process?

An ongoing union grievance will typically lead the Tribunal to defer the complaint until after the grievance is resolved.

This is because:

1. The Tribunal will want to avoid using its resources to hear allegations which have already been resolved through the grievance procedure; and
2. An agreement reached through the grievance process may include a provision to withdraw any other legal action, which would include a human rights complaint.

Once the union grievance is resolved, the complainant can request that the Tribunal allows the complaint to proceed. In deciding whether to proceed with the complaint, the Tribunal will consider whether there are any outstanding issues within its jurisdiction. The Tribunal may therefore decide to dismiss parts of the complaint or the complaint in its entirety.

Do I need a lawyer? Can I proceed unrepresented?

You do not need to be represented by a lawyer to pursue a complaint in the HRT. The Tribunal provides resources on its website to assist people with self-representing.

Will the Tribunal protect my identity if requested?

A complainant can file to request anonymization by filing a *Form 7.1* and checking box *GA1.*

They will need to persuade the Tribunal that their privacy interests outweigh the public interest in access to full facts of the proceedings. This can be a high bar to clear.

Using the form, the complainant should explain what information they want limited, why they want it protected, and why they feel their privacy outweighs the public interest.

3. Early Settlement Meetings (Mediation)

3.1 What is a Settlement Meeting?

What is a settlement meeting?

An early settlement meeting (ESM) is a voluntary meeting where a Tribunal mediator helps the parties to agree about how to resolve the complaint. Voluntary settlement is one way that the purposes of the Human Rights Code are fulfilled. A settlement meeting is sometimes called mediation.

Is there any cost?

No - there is no charge for attending a settlement meeting.

Is participation voluntary?

Yes. Parties are expected to attend once they agree to participate. Participating does not affect a party's right to proceed to hearing or to make an application.

Who attends?

An ESM is private. The participants in a settlement meeting are the mediator, the parties to the complaint, their representatives and interpreters.

In some cases, affected third parties may attend. The parties may also agree to have other persons attend, such as support persons.

What are the benefits of participating?

Early Settlement Meetings (ESMs) can be scheduled far in advance of a hearing - a few months vs. 1-2 years if the complaint does proceed to hearing.

Details of the parties, the meeting, and any agreement made are confidential (although this can be a drawback for those complainants hoping for "their day in court").

The parties can decide remedies between themselves, providing more certainty than if the complaint proceeds to a hearing.

A complainant is more likely (though not guaranteed) to receive assistance from CLAS, due to the reduced burden on resources as compared to preparing for and representing at hearing.

How is a settlement meeting scheduled?

The Tribunal may offer to schedule a settlement meeting or a party can phone or write the case manager to request one at any time.

3.2 What to Expect

When is a settlement meeting held?

The parties may agree to attend a settlement meeting at any time, including before the respondent must respond to the complaint.

Where is a settlement meeting held?

The Tribunal decides whether a mediation will be in person or by phone. In-person meetings are usually held in a neutral setting in locations convenient for the parties. Generally, the Tribunal may hold an in-person meeting if:

- the parties are in Vancouver or Victoria
- a party makes a written request for an in-person meeting that sets out the reasons why the meeting needs to be in-person
- the mediator recommends an in-person meeting and/or
- the parties have attended a telephone mediation that did not resolve the complaint

Can I attend by phone?

Yes, that may be possible. Complainant should discuss this with the Scheduling Clerk.

How long will it take? Will there be breaks?

A mediation usually starts at 9:30 am. It may be finished before lunch time, or it may go to 4:30. Sometimes, everyone agrees to schedule more time.

There are breaks to eat, rest, or use the washroom. If you need a break, tell the mediator. Complainants can feel free to bring snacks.

What is the role of the mediator?

The Tribunal appoints a mediator who may be a Tribunal Member, a Tribunal lawyer, or an outside mediator. In all cases, the mediator is neutral. Mediators may use different approaches, including:

- Interest-based mediation where the aim is to move the parties away from conflict, to focus on interests rather than positions, and to generate solutions to the issues raised. The parties themselves generate solutions.

- Early evaluation, also called rights-based mediation, where the mediator reviews the facts with the parties and provides the parties with an assessment of the strengths and weaknesses of the complaint, and may advise the parties of remedies that might be expected should the matter proceed to hearing and the complainant is successful.

The mediator may contact the parties before the settlement meeting to prepare for the settlement meeting and to answer the parties' questions.

The mediator may encourage the parties to explore public policy issues and to formulate remedies that address them, but will not require the parties to do so.

The mediator has discretion to withdraw the Tribunal's mediation services at any time, including if the mediator determines that:

- A participant is not abiding by the terms of the Agreement to Participate in Mediation;
- A participant is not following the mediator's directions; and/or
- The mediation process is unfair, unproductive, or abusive.

Can a Tribunal Member act as mediator?

Yes. When acting as a mediator, a Tribunal Member has no power to decide the complaint.

Can I request a specific mediator?

No, the Tribunal decides who the mediator is. However, if you believe that a certain style of mediation would be best, you may contact the Registrar to request a mediator with that style or approach.

Can a party refer to statements made by the other side during a settlement meeting as evidence at a hearing?

No. If mediation fails and the complaint proceeds to a hearing, one party cannot make use of information about the other side's position that came to light through the mediation process.

Similarly, neither party is bound by any particular settlement amount proposed during without prejudice negotiations. These offers cannot be relied upon by the parties when discussing remedies.

3.3 After the mediation

What happens if the complaint is not resolved?

The complaint will continue in the Tribunal's process. That may include filing a response to the complaint, filing an application to dismiss the complaint without a hearing, or preparing for a formal hearing before a Tribunal Member.

What happens if the complaint is resolved?

Usually, the parties will sign a settlement agreement setting out the terms of their agreement. If all or some of the complaint is resolved the complainant will sign a *Form 6 – Complaint Withdrawa*l. After it is filed, the Tribunal will dismiss the complaint (or the part of it that was resolved).

What if the other side breaches the settlement agreement?

After the complainant withdraws the complaint, the Tribunal process is over. The Tribunal does not enforce settlement agreements.

Section 30 of the Code governs the enforcement of settlement agreements. In summary, the aggrieved party may apply to the Supreme Court to enforce a settlement agreement.

3.4 ESM Miscellaneous

Does the Tribunal provide interpretation services?

Yes, if they are needed. Parties are asked to bring their own interpreter to settlement meetings. If a party is unable to provide an interpreter, and is not able to participate meaningfully without one, they may request the Tribunal to provide interpretation services. A request must be made at least three weeks before the meeting.

If a complainant is represented by the Clinic, we will arrange an interpretation service if required.

Do I need a lawyer?

No. Although the Tribunal does not require parties to be represented by lawyers, it is strongly recommended that self-represented parties obtain independent legal advice. Time will be provided to allow parties to obtain independent legal advice before agreeing to settle. Complainants may contact the Clinic for independent legal advice during settlement negotiations.

What if the complainant is a minor?

The Tribunal may accept complaints filed by mature minors (people under 19). The Infants Act governs contracting by minors. A contract with a minor is unenforceable against them except in limited circumstances. If the Tribunal is aware that the complainant is a minor, it will refer the respondent to the Infants Act.

The respondent may agree to participate in the mediation with the minor, or may request that the legal guardian attend. If the parties are unable to agree on the mediation participants, the mediation will not proceed.

4. FAQ - Applications to Dismiss

4.1 What is an Application to Dismiss?

What is an application to dismiss?

An application to dismiss (A2D) is an application made by a respondent to have the complaint dismissed without a hearing. If the application is successful, the complaint will cease to continue beyond the A2D decision. The respondent can make an application on the basis of 1 or more of 13 grounds, shown in the table below.

An A2D is initiated by the respondent filing a *Form 7.2*.

When can an A2D be filed?

In theory, an A2D can be filed at any time after the complaint has been accepted by the Tribunal. In practice, an A2D is not usually made until after the response has been filed.

Time limits apply - an application must be made:

- Within 70 days from the filing of the response to the complaint;
- Within 35 days from the date new information or circumstances that forms the basis of the application comes to the respondent's attention;
- At least 4 months before the date set for the hearing if the basis for the application is the complainant's refusal to accept a reasonable settlement offer.

Does the respondent have to provide evidence in support of an A2D?

Before or at the time that an A2D is filed, the respondent must disclose all documents that may be relevant to the complaint or response to the complaint.

4.2 Responding to an application to dismiss

How do I respond to an A2D?

When responding to an application to dismiss the complaint, the complainant must address and engage with the respondent's arguments and information and explain why they think the complaint should continue. The complainant should attach information to support what they say in their response to the A2D.

Once the complainant has responded, the respondent is given an opportunity to reply to the response. They can reply to the complainant's information and arguments, but should not repeat its initial argument or raise new issues in its reply.

The Tribunal will then make its decision as to whether to dismiss the complaint. A copy of the decision will be sent to all parties.

What happens if the A2D is successful? Can I challenge this decision?

If the Tribunal agrees to dismiss the complaint then it will not continue.

An A2D decision can be subject to Judicial Review. Complainants can apply to CLP if they would like to JR an A2D decision.

What happens if the A2D is unsuccessful?

If the Tribunal does not agree to dismiss the complaint, the process will proceed as normal.

4.3 Grounds for Filing an Application to Dismiss

What are the grounds for filing an application to dismiss?

There are a number of grounds on which a respondent can apply to dismiss a complaint:

DA1 - Complaint involves a federally-regulated matter	The Tribunal may dismiss a complaint because it involves a federally regulated, rather than a provincially regulated, matter. More information at **1.5** on page 9.
DA2 - Complaint about conduct outside BC	The Tribunal has jurisdiction over complaints of discrimination that took place in BC, whether or not the respondent is located in BC. A complaint may be dismissed if the Tribunal finds that the conduct took place outside of BC.
DA3 - Complaint does not allege a contravention of the Human Rights Code	The Tribunal can dismiss a complaint if the respondent demonstrates that, even if everything the complainant alleges is true, it could not be discrimination under *the Code.* The Tribunal will only consider the complainant's version of the facts. As such, the Tribunal will not consider any alternate version of the facts presented by the respondent in its A2D.
DA4 - Complaint has no reasonable prospect of success	Here, the Tribunal is not deciding the complaint or any defence, but whether a hearing is not warranted because there is no reasonable chance that the complaint will be successful at hearing. The respondent must convince the Tribunal that there is no reasonable prospect of success. In response, the complainant should: 1. Say whether the respondent accepts or disputes each of the four elements of discrimination (see **2.1** at page 9); 2. State any disagreement with the respondent's argument; and 3. Explain why the respondent has failed to demonstrate that there is no reasonable prospect of success.

DA5 - Proceeding will not benefit the complainant	Applications made on this basis are rarely successful. Generally, if a complainant may receive a remedy upon proving discrimination, the Tribunal will decide that proceeding will benefit them.
DA6 - Complaint already remedied	The Tribunal may determine that the purposes of the *Code* have been fulfilled by a remedy agreed outside of the Tribunal process. The remedy need not be exactly what the complainant wanted, but must demonstrate that the respondent took the issue seriously and addressed its impact on the complainant.
DA7 - Respondent has made a reasonable settlement offer	For the Tribunal to dismiss a complaint on the basis of a reasonable settlement offer, the respondent must show: 1. That they have made a reasonable "with prejudice" settlement offer, which the complainant has refused; 2. The offer remains open to the complainant to accept, even if the complaint is dismissed; and 3. It would not further the purposes of the *Code* to proceed with the complaint. It is not necessarily the case that the respondent must admit fault.
DA8 - Parties settled the complaint	If there is a valid settlement, the Tribunal will presume that it would not further the purposes of the Code to proceed to a hearing of the complaint. Therefore, the complainant must show why the complaint should proceed, despite the settlement. The Tribunal will consider: • Whether the words of the settlement agreement show that the parties intended the settlement to cover the issues in the complaint; • Whether the complainant received independent legal advice; • Whether there was unequal bargaining power and a substantially unfair settlement; • Whether a party improperly used any kind of coercion, oppression, abuse of power or authority, or compulsion to make the other party consent to the agreement; • Duress (not mere stress or unhappiness); and • Other issues such as whether a party lacked mental capacity to make an agreement, or whether a party engaged in forgery, or fraud.

DA9 - Complaint against individual should not proceed	An A2D can be made to remove an individually named complainant as respondent. To succeed, the respondent must show: 1. That the complaint is also against the institutional or corporate respondent who is responsible for the individual's conduct; 2. The institutional respondent can fulfil any remedies that the Tribunal might order; and 3. Proceeding against the individual would not further the purposes of the *Code*.
DA10 - Proceeding would not further the purposes of the Code (Other)	An A2D on this basis may be appropriate where, for example, the complainant has engaged in misconduct by repeatedly failing to comply with rules and orders. It may also be used to dismiss a complaint which duplicates the substance of an existing human rights complaint by the same complainant.
DA11 - Complaint made for improper purposes or in bad faith	It is difficult to prove a complaint was filed for improper motives or made in bad faith. These applications are rarely successful - a respondent must meet a high standard to persuade the Tribunal to dismiss a complaint on this basis. It is not enough for a respondent to present a different version of the facts and argue that the complainant is lying or is in error, or to show that the complainant has a negative attitude towards the respondent. A respondent must provide enough information to satisfy the Tribunal that: • The complaint was not prompted by an honest belief that a contravention of the *Code* has occurred, but by some ulterior, deceitful, vindictive, or improper motive; or • The complainant's overriding purpose in filing the complaint is improper (inconsistent with the purposes of the *Code*).
DA12 - Complaint appropriately dealt with in another proceeding	A respondent must show: 1. That there was another proceeding with authority to decide human rights issues. This can include a union grievance; 2. That the issue in the other proceeding is essentially the same as the issue in the complaint; and 3. That the issues were appropriately dealt with. This can be via a decision or a settlement.

DA13 - Complaint filed after the time limit	A respondent must show: 1. That the complaint was filed after the time limit (i.e. some of the conduct alleged happened more than 6 months before the complaint was filed); and 2. The complainant has not shown that it is in the public interest to accept the late filed complaint and that no one would be substantially prejudiced because of the delay.

5. Remedies

5.1 Types of Remedies

What are the different types of remedies available?

If a complainant wins their case at hearing, the Tribunal will order a remedy. Remedies are not punitive but restorative - they aim to put the complainant back where they would have been had the discrimination not taken place.

The complainant must make a request for the remedies sought prior to the hearing, with supporting evidence.

Cease and refrain order	Where discrimination is found, the Tribunal will typically order that the respondent ceases the discriminatory conduct.
Declaratory order	Declares that the conduct complained of or similar conduct is discrimination.
Steps or programs to address discrimination	Tribunal can order the respondent to take action or adopt a program to fix a pattern or practice of discrimination.
Getting what was denied	For example, a complainant can ask for their job back, for a licence or benefit that was denied, or for the chance to compete for a job without discrimination.
Compensation for wage loss	Where wage loss has occurred as a result of the discrimination, the Tribunal can order compensation to cover lost wages. This can include lost benefits where the complainant: 1. Can prove that they would have been entitled to the benefits had discrimination not happened; and 2. Can prove a dollar value of the lost benefits.
Compensation for expenses	A complainant can provide receipts or other evidence to prove expenses because of the discrimination. This could be expenses to attend the hearing, or expenses to prove the complaint, like the cost of a medical report.
Compensation for injury to dignity, feelings, and self-respect	A complainant gives evidence about how the discrimination affected their dignity, feelings and self-respect. The Tribunal considers the circumstances of the case such as: • The nature of the discrimination; • The vulnerability of the complainant; and • The effect of the discrimination on the complainant.
Interest	A complainant can ask for interest on the amounts ordered.

5.2 Calculating remedies

How are lost wages calculated?

The Tribunal will calculate a wage loss award based on the amount the complainant would have earned, minus the amount they did in fact earn.

It is not necessary for a complainant to have been terminated to qualify for a wage loss award. Any work lost as a result of discrimination can give rise to compensation.

Example: *Ms. B works full-time as a bartender at Bar XYZ. 2 months into her employment she informs her manager that she is 6 months pregnant and would like to continue working full-time until closer to the due date. Her manager tells Ms. B that he is moving her to part-time as a result of her pregnancy, stating that he is concerned for her health and that of her child. Despite trying, Ms. B is unable to find another job to make up the hours.*

Ms. B's complaint proceeds to hearing, where the Tribunal finds discrimination on the grounds of sex.

It is not necessary for a complainant to be terminated to be eligible for a wage loss award. As such, Ms. B's award for wage loss will be the difference between her full-time and her part-time wage.

What does it mean for a complainant to mitigate damages?

A complainant has a duty where possible to seek other employment to reduce their wage loss. This is called "mitigation" and is a factor in the Tribunal's calculation of a lost wages award.

Can I only be awarded wage loss in relation to my notice period?

No - unlike the *Employment Standards Act*, the *BC Human Rights Code* allows a complainant to claim all wages lost as a result of discrimination.

How much compensation should I ask for if I try to settle?

The Tribunal provides a helpful categorized list of awards on its website (http://www.bchrt.bc.ca/human-rights-duties/remedies/compensation/index.htm)

HRC also keeps an awards chart, excerpts of which can be sent to complainants on request. Contact the Case Manager.

6. Retaliation Complaints

How can retaliation happen?

S.43 of the *Human Rights Code* protects people from retaliation for being involved in a complaint. It protects people in situations where they:

- Have made a complaint or might make a complaint;
- Are named in a complaint or might be named in a complaint; or
- Give evidence or help in some other way in a complaint, or might do so.

What conduct is retaliation?

To successfully file a retaliation complaint, a complainant must provide information showing that:

1. The respondent was aware that the complainant made or might make a complaint; was named or might be named in a complaint; gave evidence or might give evidence in a complaint; or otherwise assisted or might otherwise assist in a complaint.
2. The respondent evicted, discharged, suspended, expelled, intimidated, coerced, imposed a penalty on, denied a right or benefit to, or otherwise adversely treated the complainant.
3. There is sufficient connection between the respondent's conduct and the complainant's involvement in a complaint or possible complaint.

Similar to filing an individual complaint, the complainant must describe the conduct that they consider retaliation, and connect that conduct to the respondent's knowledge of the original human rights complaint.

Example: Mr. X filed a human rights complaint against his former employer, Bar Z, where he worked as a bartender. Shortly after his complaint was accepted by the Tribunal, Mr. X interviewed for a bartender position at Abacus, a restaurant managed by a friend of the manager of Bar Z. The two friends had discussed the human rights complaint filed against Bar Z at length the previous week.

After the interview, Mr. X was told that he would not be eligible for the position because they "could do without the hassle of being taken to the Human Rights Tribunal." He was told that he would likely find it difficult to get work in the industry.

Mr. X could consider filing a retaliation complaint against Abacus and the manager who interviewed him, even though they were not parties to the original human rights complaint.

Can a third party to the original complaint be named in a retaliation complaint?

Yes - retaliation complaints are not solely reserved for the respondent of the original complaint. Anybody can be subject to a retaliation complaint if they have acted against a person for filing a human rights complaint (see example above).

How do I file a retaliation complaint?

A retaliation complaint is filed by completing a *Form 1.4 - Retaliation Complaint* form and sending it to the BC Human Rights Tribunal.

7. Flow Chart - The Life of a Complaint