Statement on Mediation and Settlement Conferences

Public Servants Disclosure Protection Tribunal Canada

October 2013

This statement outlines the policy of the Public Servants Disclosure Protection Tribunal with regard to the availability of a voluntary mediation process, which may be used in appropriate circumstances to attempt to resolve a complaint of reprisal without a hearing.

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Introduction

The Public Servants Disclosure Protection Tribunal (the Tribunal) has the power to rule on whether or not reprisal has taken place when an application is referred to it by the Public Sector Integrity Commissioner (the Commissioner).

The Tribunal may decide this issue through a hearing. In addition, as master of its own proceedings, it may use alternative dispute resolution (ADR) as a means to resolve an application that comes before it.[1]

Models of ADR range in form but have a similar objective: to allow the parties to reach a mutually agreeable resolution that is voluntary and consensual, through the assistance of a neutral third party. A key advantage of ADR is that it allows the parties to come to their own determination as to how to resolve the dispute. This contrasts with a hearing, where a Tribunal member makes a decision and brings a dispute to a close. Generally, ADR is less time consuming, less costly and less adversarial than a traditional hearing. It can also be useful in narrowing the issues of fact and law, in exploring interests and options and in reaching realistic and workable solutions.

[1] See also section 21 of the Public Servants Disclosure Protection Act, SC 2005, c 46 and sections 2 and 3 of the Public Servants Disclosure Protection Rules of Procedure, SOR/2011-170 which allow for flexibility in the manner in which the Tribunal conducts its proceedings.

Facilitative Mediation and Settlement Conferences

There are, in general, two models of ADR that may be employed by this Tribunal in an effort to resolve proceedings, prior to a formal hearing: facilitative mediation and settlement conferences. What follows is a brief description of each model, their distinct qualities and their differences.

Facilitative Mediation

After the application has been referred to the Tribunal and after the parties have exchanged their information through the discovery process, the Tribunal may choose to offer facilitative mediation. Facilitative mediation is voluntary: it cannot be imposed on the parties. It is up to the parties to decide whether or not they want to proceed with mediation.

The mediator may be a Tribunal member, or in some cases a person appointed to conduct the session, drawn from a roster of external mediators. The mediator facilitates discussion toward a mutually workable solution, rather than determining which party is "right" and which party is "wrong". This is done by examining the parties' interests. The parties may also brainstorm possible options with the assistance of the mediator. The mediator does not "solve" the issues or evaluate the dispute. He contributes to the process by facilitating constructive dialogue toward a resolution of the dispute.[2]

In some cases, one of the parties may discontinue the voluntary process of mediation. If this happens, a hearing will be scheduled. In some situations, the mediator will decide to

[2] The use of the masculine in this document is aimed solely at making it more readable and applies without discrimination to persons of both sexes.

discontinue the process if he is of the opinion that it will not be fruitful or if a participant demonstrates a lack of good faith.

While the Tribunal will normally offer mediation once the parties have exchanged information through the discovery process, the parties may also request mediation at any stage of the proceedings. In this case, the Tribunal will provide mediation services if it finds that the request is appropriate in the circumstances.

See Annex A: What Parties should expect in a facilitated mediation process

Settlement Conferences

Settlement conferences take place closer to the time of the hearing and are more directive or evaluative in nature. The member of the Tribunal who conducts the settlement conference will evaluate the strengths and weaknesses of the case, assess the likelihood of success at a hearing and identify the remedies most likely to be fashioned.

The Tribunal will not conduct a settlement conference in every case, but may exercise its discretion to do so in some situations, even if there has been an unsuccessful mediation. The Tribunal may require the parties to attend a settlement conference if it believes that it would assist in the resolution of the application. Generally, a member of the Tribunal will conduct a settlement conference. The member cannot impose a settlement. If the settlement conference does not result in an agreement between the parties, the Tribunal member who conducted the settlement conference will not be able to be on a panel for the hearing of the application.

In some situations, the member conducting a settlement conference will decide to discontinue the process if he is of the opinion that it will not be fruitful or if a participant demonstrates a lack of good faith.

See Annex B. What parties can expect in a settlement conference

Common requirements of both facilitative mediation and settlement conferences

Facilitated mediation and settlement conferences are different models of ADR. There are, however, some common requirements in both these models and these are described below.

Neutrality and impartiality of the process

The mediator or the member who is conducting the settlement conference must be neutral and impartial, and establish ground rules for the process. He will help the parties better understand their respective positions, which in turn can assist them in resolving their dispute without proceeding to a hearing. He assists the parties to stay focussed, listen and communicate. The parties' respective interests are explored, as well as possible settlement options.

Time frames are not suspended

As a general rule, timelines set out in the *Public Servants Disclosure Protection Rules of Procedure* will not be suspended for the purposes of a settlement conference or mediation session. In other words, the use of a settlement conference or mediation will not operate to delay the scheduling of a hearing or to postpone a hearing that has already been scheduled.

A release form must be signed prior to participating in a settlement conference or mediation

Prior to mediation and prior to a settlement conference, the parties are required to sign a release form that indicates that they will indemnify and hold harmless the Tribunal from any liability for loss, damage, injury (physical and psychological) or expense incurred in connection with their participation.

Parties present

Disputes before the Tribunal involve many parties: the public servant who filed a complaint with the Office of the Public Sector Integrity Commissioner; the Commissioner who has referred the application to the Tribunal; and the employer. In applications where individual respondents have been named, the respondent(s) may be parties as well. In addition, other individuals could be added as parties. In the context of mediation or a settlement conference, all of the parties may be required to participate.

The parties to an ADR session must have full decision-making authority

When participating in mediation or a settlement conference, the parties must ensure that they have immediate access to people who have final decision-making authority in reaching an agreement and arriving at possible terms of settlement. Preferably, these individuals should be in the room. If these people are not in the room, they should be easy to reach by telephone.

Information exchanged during mediation or a settlement conference is "without prejudice"

Information that is exchanged before a settlement conference or a mediation session is "without prejudice". In most cases, the parties will be asked to provide a "brief" that outlines issues relating to the application. The information is to be treated as confidential and cannot be later used as evidence in a hearing, unless it can be independently obtained elsewhere.

Mediator or member not compellable as a witness in another proceeding

Neither the member conducting the settlement conference, nor the mediator facilitating a mediation session is compellable as a witness in another proceeding.

ADR may not always be face-to-face

Usually, settlement conferences and mediation sessions are conducted with the member (conducting the settlement conference) or the mediator (facilitating the mediation) in the room and with the parties present. It is also possible that the mediator or Tribunal member will suggest that it is more appropriate that he meet separately or caucus with each party, for part of, or all of the session. Videoconferencing or teleconferencing may also be used from time to time.

Concluding an ADR session

If the parties are successful in reaching an agreement through a mediation session or a settlement conference, then certain steps must be taken. With the help of the mediator (or the member of the Tribunal, if the settlement is reached in a settlement conference), the parties

should ensure that the areas of agreement are achievable and realistic. They should also identify the steps required in order to ensure the settlement has been reached. The parties will also formalize the terms of settlement in a written document, which they will then sign.

In some cases, negotiation of the settlement may involve a request that the Tribunal member presiding over the application endorse the settlement.

Generally speaking, the terms of the settlement are confidential. They cannot be disclosed without all of the parties consent. However, the Act recognizes the public interest in maintaining and enhancing public confidence in the integrity of public servants, as well as in public institutions. Therefore, in certain situations, the parties could agree that certain terms of the settlement should be made public. Also, both the Tribunal and the Commissioner have a duty to report that a complaint has been concluded by way of mediation.

Where there has been a settlement reached through a facilitated mediation process and one of the parties is not represented, the terms of settlement do not become final until seven days following the date they are signed in order for that party to seek legal advice. The seven day waiting period does not automatically apply to those situations where an agreement has been reached through a settlement conference, and one or more of the parties is not represented.

If the parties are not successful in reaching an agreement through ADR, the application will continue to the hearing stage.

Annexes A and B describe in greater detail what the parties should expect in a facilitated mediation process (Annex A) and in a settlement conference (Annex B).

Annex A: What Parties should expect in a facilitated mediation process

Review of the Process and Ground Rules

- The parties will have signed an agreement to mediation and may be required to submit a "brief" on the issues in the dispute.
- Mediation will normally begin with a review of the ground rules and the nature of the process.
- The ground rules include the requirement that the parties act in good faith and communicate in an open, honest and respectful manner.
- The parties will be asked to confirm that the people in attendance have authority to settle the complaint or have ready access to a person with such authority.
- The parties will be reminded that the process is confidential.

Identify Issues

- The parties may be invited to make opening remarks.
- The parties will explain the issues from their respective points of view.
- The parties will ask questions and respond to one another.
- The mediator and the parties will examine the positions of the parties.
- The mediator and parties will clarify issues to be discussed.
- Common ground of the parties will be identified and highlighted.

Explore Interests, Options and Solutions

- The parties' underlying interests will be considered.
- The parties may brainstorm creatively to come up with possible options.
- The parties will assess options to identify acceptable solutions.

Conclusion of the Mediation and Possible Settlement

When a settlement has been reached

- The parties should ensure a settlement is achievable and workable.
- The parties will identify the steps required to implement the settlement.
- The parties will formalize any settlement by drafting and signing terms of settlement.
- The terms of settlement are confidential and cannot be disclosed without all the parties' consent. (In some cases however, the terms of settlement might include the requirement to produce a document that will later become public.)
- The Tribunal may be requested to endorse the terms of settlement. In such a case however, the confidentiality of the terms may not be protected.
- If a party is not represented , the terms of settlement do not become final until seven days following the date they are signed in order for that party to seek legal advice.
- Once the terms of settlement are finalized, the Tribunal will close the file.

When a settlement has not been reached

- A settlement might not be reached between all parties. In such cases, the matter proceeds to a hearing.

Annex B. What parties should expect in a settlement conference

Review of the process and ground rules

- Prior to the settlement conference, the parties will need to review and fill out documentation relating to the settlement conference and return it to the Tribunal.
- There is an agreement pertaining to participation in a settlement conference. All the parties and the parties' representatives must sign it and send it back to the Tribunal.
- The member assigned to chair the settlement conference will contact the parties' representatives a few days before the settlement conference to discuss issues and options.
- The settlement conference will normally begin with a review of the ground rules and the nature of the process.
- The parties will be asked to confirm that the people in attendance have authority to settle the complaint or have ready access to a person with such authority.
- The parties will be reminded that the process is confidential.

Identify issues of fact and law

- The parties will identify their positions.
- The parties will identify issues of fact and law for discussion.
- The member chairing the settlement conference will identify the legislation, policies, directives, and case law.
- The member chairing the settlement conference will clarify the issues of fact and law to be discussed.

Exploring Interests, Options and Solutions

- The member chairing the settlement conference and the parties will explore interests.
- The parties will assess options to identify acceptable solutions.
- The member chairing the settlement conference will evaluate the factual and legal basis on which the parties rely (in caucus).

- The member chairing the settlement conference will also identify the strengths and weaknesses of each party's position (in caucus).

Conclusion of the Settlement Conference and Possible Settlement

When a settlement has been reached

- The parties must ensure that the settlement is achievable and sustainable.
- The parties must identify procedural steps to implement the settlement.
- If in agreement, the parties will formalize the settlement by drafting and signing terms of settlement.
- The terms of settlement are confidential and cannot be disclosed without all the parties' consent. In some cases however, the terms of settlement will require disclosure of a public document.
- The Tribunal may be requested to endorse the terms of settlement. In such a case however, the confidentiality of the terms may not be protected.
- Once the terms of the settlement are finalized, the Tribunal will close the file.

When a settlement has not been reached

- A settlement might not be reached between all parties. In such cases, the matter proceeds to a hearing.