

Guide to Developing a Mediation Brief

This guide is intended to assist a complainant prepare for a mediation. A mediation brief helps you by setting out the facts that are important to you to raise at mediation and what you are hoping to get out of the mediation. This guide provides examples of details to include. You should use language you are comfortable with in preparing your mediation brief.

Mediation Brief

Date of Mediation: June 1, 2022

Note who is involved in the mediation:

People involved in case/title of case/case number:

Complainant v. The Restaurant and Dean Smith, BCHRT Case XXXX

Mediator: [note the name of the mediator]

For the Respondent(s): [note of the names of the lawyer or person who is helping the organization and person(s) the complaint is against (the Respondents)]

I. OPENING STATEMENT

The opening statement is an opportunity for you to introduce yourself, the main issues in your complaint, and express that you are there in hopes of coming to an agreement with the Respondent(s). Even though you are not in a court room or hearing, mediation is still an opportunity to persuade the Respondent(s), and their lawyer, that your complaint likely to succeed if it were to proceed to a hearing, and that it is in their best interests to settle the complaint today.

What to say:

1. Introduce yourself
2. Explain what the Complaint is about

e.g. “This claim is about sexual harassment and discrimination on the basis of sexual orientation I experienced while working at The Restaurant.”)

Background and Events:

In this section, describe the background details of the discrimination. It's helpful to set out the events in chronological order and to provide relevant context about your employment, relationship with the person(s) who harassed you, relationships with coworkers, or demographic background that is relevant to your claim.

Tips for describing the background:

- **List what happened in chronological order.**
- **Stick to the facts you know are true and have direct knowledge about.** Instead of “he fired me because I refused his advances,” say “I refused his advances. The next day he fired me.”
- **Avoid making strong negative statements about the Respondent(s) character.** It's important to talk about what happened and how the behaviour affected you, but it could make negotiations challenging if you use derogatory remarks or call the Respondent(s) names.
- **Don't give every detail.** You don't need to give say every detail about events surrounding the discrimination/harassment. Give details that are important to proving that the discrimination happened, how it happened, and the effect it had on you, but try to keep it on topic.
- **Give some context.** There may be some places you will need to give some background information. For instance, if the people in the room don't know who someone is that you mention, tell them who that person is so they know how fit into the story.

What to say:

1. Background information:
 - a. Information about yourself
 - e.g. “I am a lesbian woman and was 19 years old at the time I was hired.”
 - b. Information about your employment:
 - i. your job title/position
 - ii. How long you worked there
 - e.g. “In April 2021, I was hired as a server at The Restaurant. I worked there until October 29, 2021.
 - iii. your salary/wage
 - c. Information about the other people involved

e.g. “Dean Smith, the Manager, was approximately 35 years old and had the power to hire and fire staff members, and to change the shift schedule as he liked.”

d. Other important background

e.g. “The Restaurant was my only source of income, and I needed to a job earning high tips or a high wage to support myself.”

2. What happened to you and when
3. Name events that made you feel uncomfortable
4. The people involved in the behaviour/discrimination
5. Any witnesses to the events
6. Whether you still work there. If you quit or were fired, explain what happened.

Why you have a claim (the basis in law)

In order to prove discrimination under the *Human Rights Code*, you must establish that you have a [protected personal characteristic](#), such as sex, sexual orientation, gender identity or expression, that you experienced a negative impact, and that the impact was connected to your protected characteristic. In this section describe how each of these factors are met.

In sexual harassment cases, the protected characteristics are usually sex, sexual orientation, gender identity, or gender expression. However, if you experienced discrimination on the basis of another characteristic, like race, disability, age, etc., you should also include those too.

What to say:

1. What law or legal obligation is involved?

e.g. “What the Respondent did is a violation of the BC Human Rights Code.”

2. What was the violation of the law or failure to meet the legal obligation?

e.g. “The Respondents’ conduct was discrimination on the basis of a protected characteristic. I am a lesbian woman and the Respondents’ conduct targeted me because of my sex, gender, and sexual orientation.”
“My employer did not investigate the discrimination or do anything to protect me from it.”

Impact Statement

This is an opportunity to explain how the discrimination affected you. Describe what impacts the discrimination had on your mental health, emotional wellbeing, physical health, career and employment, financial wellbeing, relationships with family, friends, or partners, or other aspects of your life.

Describe how the discrimination impacted the following areas:

1. Your employment:
 - a. Were you fired, couldn't work, or were your hours reduced or shifts changed?
 - b. Were you not given opportunities or a promotion?
 - c. Did you quit your job or avoid certain tasks at work?
2. Physical, mental health and emotional effects:
 - a. Physical changes
e.g. trouble sleeping, headaches, eating less/more, losing/gaining weight, difficulty breathing, stomach upset
 - b. Mental and emotional changes
e.g. unable to concentrate, crying more, irritable, repeating events over in your mind
 - c. Changes in behaviour
e.g. loss of confidence, isolating yourself, experiencing problems with your family and friends
 - d. Diagnosed with a mental health issue
e.g. anxiety, depression, post-traumatic stress disorder
 - e. Changes in how you feel about yourself
e.g. loss of self-respect or self-esteem
 - f. Worsening of any existing medical or mental health conditions
3. Loss of income for:
 - a. missed work
e.g. what days/hours you missed and why
 - b. period of unemployment before finding other work
 - c. Difference in salary between new and previous employment
4. Out of pocket expenses
e.g. counselling if paid personally

II. RESPONDENT(S)' OPENING STATEMENT

You may wish to leave this space in your Mediation Brief to take notes about the Respondent(s) opening statement(s).

You may be given an opportunity to respond to what the Respondent(s) have said. Try to focus on the main points of disagreement or correct essential facts.

III. OFFER AND NEGOTIATION

After each party has made their opening statement, the mediator will separate the parties into different rooms. If the mediation is held virtually, it usually means the mediator will end the conference call and then call each party individually to ask them what they want out of negotiations.

The Complainant is expected to make the first offer in negotiations. If the other party accepts your first offer, your complaint can be resolved that same day. However, it's common for parties to exchange a few offers before there is one that everyone is willing to commit to. Therefore, you should ask for more in your first offer than you expect to get in the end.

a) Types of remedies

These are some of the things you can ask for in negotiations:

- **The Respondent(s) take steps to address the discrimination.** This could include stopping the discriminatory behaviour or taking other actions, like requiring the Respondent(s) take training about discrimination, the employer develop a policy on sexual harassment, or improve and provide training on the policy.
- **Getting something you were denied.** This could be getting your job back, a benefit that was denied, or the chance to compete for job without discrimination.
- **Compensation for lost wages.** This can include your usual wages or other remuneration like tips, commissions, or bonuses, and benefits such as health, pension, or other employment benefits. See section below for more information.
- **Compensation for expenses.** This could include expenses for counselling you needed, medical treatments, expenses to attend the hearing or to prove your complaint, like the cost of a medical report. Generally, you will need receipts to support any expenses being claimed.
- **Compensation for injury to dignity, feelings, and self respect.** This is a monetary award for how the discrimination affected your dignity, feelings, and self-respect (see below for more details).
- **Costs.** Costs are an amount of money paid to the winning party by the losing party to cover the cost of taking the claim to the Human Rights Tribunal. The

Tribunal rarely awards costs. The Tribunal only awards costs in rare circumstances where the losing party behaved improperly.

What you and the Respondent are willing to settle for is usually based on:

- How likely your Complaint is to succeed if it goes to a hearing; and
- What the Tribunal could award you if you succeed at a hearing.

Therefore, you will want to show that your complaint is likely to succeed at a hearing (which you did in your opening statement), and what you think the Tribunal could award you.

b) Lost earnings

The Tribunal will calculate the amount of lost earnings as the amount the complainant would have earned minus the amount they did earn.

You can claim earnings you lost because of missed shifts, being fired or losing shifts, being denied a pay raise, not being given a job or promotion, or quitting a job because of sexual harassment.

If the complainant quit their job or was fired, the Tribunal will consider whether they tried to find other work to reduce the amount of wages they lost. The Tribunal calls this “mitigation” and it means that a complainant has the obligation to try to minimize the amount of financial loss by making reasonable efforts to look for another job. The Tribunal can subtract money from the Complainant’s lost earnings award if the Complainant did not try to mitigate their loss.

The following things can be claimed as lost earnings:

- Salary or wage (gross), including:
 - reduced work hours or missed shifts because of discrimination
 - time unemployed or off work if you were fired or quite because of the discrimination
 - difference in salary/wages if now earning less money at a new job
- Extended health and dental benefits
- Pension contributions, by your employer or by both you and your employer
- Periodic payments or bonuses
- Sales commission or tips
- Vacation pay

- Allowances such as car allowances, expense allowances, or home office allowances
- Employer contributions for EI and CPP
- Future wage loss (you can claim for future lost earnings if the discriminate damaged your ability to earn as much as you would have otherwise)

See the BC Human Rights Tribunal website for more information about compensation for lost wages: <http://www.bchrt.bc.ca/human-rights-duties/remedies/lost-wages.htm>

c) Injury to Dignity, Feelings, and Self-Respect

How much money the Tribunal could award for injury to dignity, feelings, and self-respect will depend on:

- How the discrimination affected the Complainant, including:¹
 - What happened (what the conduct was, how long it occurred, and how often);
 - How vulnerable the Complainant is (how old they are, if they have disabilities, if they were a recent immigrant with little support in Canada, if they were a single parent, etc.);
 - The effect on the complainant (feelings, physical and mental health, medical information, details like crying, losing confidence, losing appetite, losing sleep, etc.)
- The Employer's conduct (whether the employer investigated the complaint or if the employer changed their working conditions after they reported discrimination).²
- How much the Tribunal awarded in similar cases. To learn about cases similar to yours, see the BC Human Rights Clinic's 2021 awards chart, which tracks past Tribunal awards: <https://bchrc.net/legal-information/remedies/> . Workplace sexual harassment cases start at page 75.
- Keep in mind that you can adjust awards from older cases for inflation. Additionally, injury to dignity awards have been increasing in recent years.

If the Respondent does not make a reasonable effort to negotiate, raise this with the mediator as there is an obligation to be attempting to negotiate in "good faith" when agreeing to attend mediation.

You may also wish to leave space to record what offers you and the Respondent(s) made, and any other important information the mediator provided you.

¹ *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 (Ont. Trib.).

² *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 (CanLII) and *The Sales Associate v. Aurora Biomed Inc. and others* (No. 3), 2021 BCHRT 5 (CanLII).

d) Remedies Checklist

The following is a checklist of remedies you could ask for in mediation. This is for you to use to help you identify what you can ask for.

Remedy	Check all that apply
Lost earnings	
<ul style="list-style-type: none"> • Wages for reduced work hours or missed shifts (because of the discrimination) 	
<ul style="list-style-type: none"> • Wages/salary lost while unemployed (if terminated or quit because of discrimination) 	
<ul style="list-style-type: none"> • Difference in wages/salary (if earning less money at a new job) 	
<ul style="list-style-type: none"> • Extended health and medical benefits 	
<ul style="list-style-type: none"> • Pension contributions 	
<ul style="list-style-type: none"> • Periodic payments or bonus 	
<ul style="list-style-type: none"> • Commissions or tips 	
<ul style="list-style-type: none"> • Vacation pay 	
<ul style="list-style-type: none"> • Allowances 	
<ul style="list-style-type: none"> • Employer contributions to EI and CPP 	
Out-of-pocket Expenses, like counselling or other treatments.	
Injury to Dignity	
Costs, which is compensation only awarded in some circumstances for the cost of bringing the claim to the Tribunal.	
Getting something you were denied, such as a promotion or other benefit you were denied, or getting your job back if you were terminated.	
Respondent takes steps to address discrimination, like changing policies, undergoing training programs, or creating safety measures to prevent the harassment.	
Future wage loss	

f) Negotiation Statement

After each party makes their opening statement, the mediator will talk to you both separately. You will be expected to make the first offer.

What to say

1. Injury to dignity award:

- a. Note any *Torres*³ factors that the Tribunal might consider in determining the injury to dignity award:
 - i. What was the conduct: physical and/or verbal;
 - ii. How aggressive was the conduct;
 - iii. How long it occurred;
 - iv. How often/frequency;
 - v. Your age;
 - vi. How vulnerable you are (if you have disabilities, are a recent immigrant with little support in Canada, if you are a single parent, in an isolated workplace, etc.);
 - vii. The psychological impact it had on you (feelings, physical and mental health, medical diagnosis.).
- b. Employer conduct: if the employer didn't investigate your claim or changed your working conditions after you reported this might also increase your award.⁴
- c. Case law support: it may be helpful to cite past Tribunal decisions with similar facts to yours to support your claim. See: <https://bchrc.net/legal-information/remedies/> for a list of past Tribunal awards.
 - i. For older cases with lower awards, you can note the Tribunal has been increasing injury to dignity in recent years, and the award would be adjusted for inflation.

2. Summarize financial losses:

- a. Wage loss (see chart above for list of what types of loss to include in wage loss).
- b. Out-of-pocket expenses

3. Specific remedies: details if you are asking for something specific

e.g. return to your employment, a promotion you were denied, or an apology from the harasser.

³ *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 (Ont. Trib.).

⁴ *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 (CanLII) and *The Sales Associate v. Aurora Biomed Inc. and others* (No. 3), 2021 BCHRT 5 (CanLII).

4. Mitigation: If you were off work, you may want to talk about how you looked for work
e.g. "I mitigated my damages by trying to find employment as soon as possible. During the period I was unemployed, I applied to numerous jobs without success until I was hired at the café."
5. Future losses: If you are continuing to experience financial loss because you are not working yet you may want to mention this.
6. Total offer: what you are willing to settle for.