

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2019 CHRT 38

Date: August 30, 2019

File No.: T2291/4618

Between:

Graham Chisholm

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Halifax Employers Association

Respondent

Ruling

Member: Jennifer Khurana

Overview

[1] The Tribunal granted the complainant, Grant Chisholm, two extensions to provide his disclosure and witness statements in preparation of the hearing of this complaint. He missed the last two deadlines without communicating with the Tribunal to explain why. The respondent, the Halifax Employers Association (HEA), filed a motion asking the Tribunal to dismiss the complaint for want of prosecution.

Decision

[2] This ruling explains why I am denying HEA's motion to dismiss. It is a high bar to meet to dismiss a complaint because of delay, particularly in the case of an unrepresented complainant who has had significant medical issues. That time may well come in a file but we are not there yet.

Issue

[3] There is one issue to decide in this ruling: does Mr. Chisholm's failure to provide his disclosure and to meet the Tribunal's deadlines warrant the dismissal of his complaint now?

Factual context – the missed deadlines

[4] I have to review some of the dates in this case to provide the context for my reasons for denying HEA's motion. I will not review every date and detail, but only where they matter to my ruling. The parties also do not dispute the timeline of deadlines.

[5] The Tribunal first set a deadline of April 10, 2019 for Mr. Chisholm to file his Statement of Particulars, a list of any documents he wants to rely on at the hearing and a list of his witnesses. Mr. Chisholm asked for two extensions of time for health reasons. The Tribunal granted both extensions on consent of the parties, first to May 15, 2019 and then to June 10, 2019. Mr. Chisholm did not meet the June 10, 2019 deadline and did not communicate in any way with the Tribunal.

[6] The Tribunal contacted Mr. Chisholm on June 17, 2019 about the missed deadline, and gave him until June 21, 2019 to fulfill his disclosure obligations. Mr. Chisholm did not meet the June 21, 2019 date and again did not communicate with the Tribunal.

[7] HEA filed its motion to dismiss on June 28, 2019. The Tribunal set deadlines for Mr. Chisholm and the Commission to respond to HEA's motion and for any reply.

[8] On July 2, 2019, Mr. Chisholm requested another time extension. He wrote that he has found it difficult to focus while struggling with his illness. He also indicated that he is trying to find a lawyer.

[9] The Tribunal scheduled a case management conference call to clarify the nature of Mr. Chisholm's July 2, 2019 email, among other things.

[10] On July 5, 2019, Mr. Chisholm wrote to the Tribunal and the other parties indicating that he is confused about sending documents that he has already submitted, and referred to some details of his complaint and the remedies he is seeking.

[11] The parties all participated in the case management conference call on July 12, 2019 during which I explained the hearing process and the importance of complying with disclosure obligations. Mr. Chisholm did not request a further extension or ask for any specific accommodation. He could not confirm when he would submit his witness list and summaries. He also could not say when he would provide all arguably relevant documents to the other parties, including any medical records on which he would hope to rely at the hearing.

[12] Mr. Chisholm does not want his complaint to be dismissed but he did not file a formal response opposing HEA's motion other than the communications he sent on July 2 and 5, 2019.

[13] The Commission was given the opportunity to file a response to HEA's request to dismiss Mr. Chisholm's complaint. The indicated that it takes no position on the motion. Instead, it provided some relevant legal principles to consider in requests to dismiss for delay.

Reasons

Does Mr. Chisholm's failure to provide his disclosure and to meet the Tribunal's deadlines warrant the dismissal of his complaint?

[14] No. Mr. Chisholm's failure to meet these deadlines does not amount to an abuse of process or to an abuse of the administration of justice. The delays caused by Mr. Chisholm's non-compliance are neither inordinate nor unjustified. I also do not find that HEA is likely to be seriously prejudiced by the delays at this stage.

[15] Tribunal proceedings should be conducted as expeditiously as the requirements of natural justice allow (s. 48.9(1) of the *Canadian Human Rights Act* ("CHRA") and Rule 1(1)(c) of the Tribunal Rules of Procedure). The Tribunal has the discretion to control its process and must guard against abuse and ensure that parties to its proceedings respect its rules and deadlines. See, for example, *Labelle v. Rogers Communications Inc.*, 2012 CHRT 4 at para 83 ("*Labelle*") and *Johnston v. Canadian Armed Forces*, 2007 CHRT 42 at para 31 ("*Johnston*").

[16] Deadlines are peremptory or absolute but the Tribunal has the discretion to grant an extension (Rule 1(5)). The Tribunal must be accessible to complainants, including unrepresented ones. All parties have the full and ample opportunity to be heard (Rule 1(1)(a)), but this is not to be to the detriment of the other parties or the Tribunal. The Tribunal owes a duty of fairness to all parties. See *Mattice Westower Communications Ltd.*, 2014 CHRT 32 at para.51 ("*Mattice*").

The two tests for delay

[17] Both HEA and the Commission refer to two approaches that have developed for dismissal for delay. See *Johnston*, supra at paras. 29-31 which reviews both tests. Only one of these two tests has to be met to dismiss a matter for delay. In my view, however, the circumstances of Mr. Chisholm's missed deadlines do not meet the threshold for dismissal for delay under either approach at this time. Further, the facts set out in the cases relied on by HEA in support of its motion are distinguishable from Mr. Chisholm's situation.

[18] Under what has been referred to as the “classic test” for dismissal of a matter for delay, the adjudicator must determine 1) whether there has been an inordinate delay; 2) whether the delay is inexcusable; and 3) whether the defendants are likely to be seriously prejudiced by the delay. See *Nichols v. Canada*, [1990] F.C.J. No. 567 (F.C.T.D) (Q.L.).

[19] The second approach is set out in *Seitz v. Canada*, 2002 FCT 456 (CanLII) at paras. 16-18. To apply this approach, the Tribunal has to consider whether the litigant has shown a “wholesale disregard” for the Tribunal’s time limits and rules where cases have remained static for an unreasonable length of time and where the litigant appears to have no intent to bring the case to a conclusion. The impact of these breaches is not only to be considered from the viewpoint of the litigants, but also in terms of an abuse to the administration of justice, separate and apart from any prejudice caused by inordinate and inexcusable delay. These sorts of cases can give rise to a finding of an abuse of process. See *Mattice, supra*, at para. 41.

[20] HEA argues that both tests are met. First, HEA submits that in keeping with the *Seitz* test, Mr. Chisholm has completely disregarded the Tribunal’s process. HEA argues that his failure to follow the Tribunal’s rules and directions is a blatant abuse of process and an abuse to the due administration of justice. HEA further submits that Mr. Chisholm has not provided any compelling reasons for missing the last two deadlines, has not complied with his disclosure obligations and has no plan for moving his complaint forward.

[21] Under the “classic test”, HEA submits that the delay is inordinate and inexcusable. It argues that looking for counsel three years after filing the complaint with the Commission and a year after the matter was referred to the Tribunal is inexcusable. HEA further submits that it has been seriously prejudiced by the time and resources it has expended since the matter was referred to the Tribunal in June 2018.

[22] I disagree with HEA. In my view, this is not a situation of a blatant abuse of process or of a wholesale disregard for the Tribunal’s rules and procedures as in *Seitz*. *Seitz* involved an unrepresented plaintiff suffering from what was described as a terminal illness. The case had been ongoing for 8 years and nothing substantive had happened for 5 years. The Court

found that the plaintiff's failure to take any concrete steps for close to 5 years without a reasonable plan to move the matter to a close constituted an abuse.

[23] The circumstances of Mr. Chisholm's failures to meet the Tribunal's deadlines are far from the situation in *Seitz*, to say the least. The very first deadline set by the Tribunal for Mr. Chisholm to follow his disclosure obligations was April 10, 2019. The Tribunal granted Mr. Chisholm two extensions of this initial date *on consent of the parties*. By the time HEA filed its motion to dismiss, it had been 2 weeks since Mr. Chisholm missed the June 10, 2019 deadline and just a week since the extended deadline. Even if I take April 10, 2019 as the very first date set by the Tribunal and disregard the fact that the Tribunal granted two extensions with the agreement of the parties, HEA filed its motion to dismiss roughly 11 weeks after the initial April 10, 2019 deadline.

[24] While Mr. Chisholm did not communicate with the Tribunal when he missed the June deadlines, this is not a case where he has been completely unresponsive or where he has left the file static for a significant amount of time. Since his complaint was referred to the Tribunal roughly a year ago, Mr. Chisholm has participated in attempts to mediate his complaint. He has had significant health issues, which the other parties have not yet disputed. He requested the first two extensions and responded to the Tribunal's communications after missing the last two deadlines, albeit after HEA filed its motion to dismiss. He participated in the case management call on July 12, 2019. He remains unrepresented.

[25] These circumstances also persuade me that the elements of the "classic" test are not met.

[26] As the Commission explains in its overview of the relevant legal principles, the determination of whether a delay is inordinate also depends on the nature of the case and its complexity, the facts and issues, and other circumstances of the case. See *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 122. In other words, context matters, and it is not only the length of time of the delay that counts.

[27] I do not find that missing two deadlines in the month of June, particularly given Mr. Chisholm's circumstances, amounts to either an inordinate or inexcusable delay. Even

on the measure of the length of the delay alone, I would not dismiss Mr. Chisholm's complaint at this stage. It had only been a matter of weeks when HEA filed its motion to dismiss. While there was no communication provided by Mr. Chisholm when he missed the two June deadlines, he has been struggling with a serious illness, had surgery in April 2019 and is not represented.

[28] HEA refers to the fact that the complaint was filed more than three years ago. The length of time this matter has been ongoing is an undeniable source of frustration for the parties. But the fact that this complaint spent two years with the Commission before it was referred to the Tribunal is not a delay that can be visited upon the complainant. In the year since the Commission referred the complaint to the Tribunal, the parties and the Tribunal also spent time attempting to resolve the complaint in mediation. When those attempts failed, the complaint moved on to case management for a hearing.

[29] While I acknowledge that Mr. Chisholm has not complied with his disclosure obligations and that HEA is entitled to know the case it has to meet, I am not persuaded that HEA is likely to be seriously prejudiced at this stage. It filed its motion two weeks after the last missed deadline, and roughly 11 weeks since the first disclosure deadline, for which Mr. Chisholm was granted an extension following his request.

[30] The facts of the cases that HEA relies on in support of its motion are very different from Mr. Chisholm's delays in several ways. In *Mattice, supra*, the complaint was dismissed three years after it was referred to the Tribunal. The complainant missed his deadline for filing a mediation brief five times, did not take part in a case management call, and did not request an extension of any of his deadlines. In *Johnston*, the complainant had disregarded time limits which rendered the case completely static for at least two years. In *Labelle c. Rogers Communications Inc.*, 2012 CHRT 4, the Tribunal dismissed the complaint where the complainant failed to advance her case, did not comply with any time limits, did not seek any extensions of time, did not participate fully in a case management call and did not collect Tribunal correspondence.

[31] While I am not dismissing Mr. Chisholm's complaint, the hearing process must move forward. The Tribunal has a duty to ensure that it deals with complaints referred to it fairly and expeditiously. HEA is entitled to have the matter dealt with in a timely way.

[32] I have set out what is expected of the parties in my order below. If Mr. Chisholm does not comply with the Tribunal's directions, his complaint may be dismissed as abandoned.

Next steps

[33] If Mr. Chisholm requires accommodation going forward due to his health conditions, he will have to provide more specific information so that the Tribunal can consider how he can participate in the hearing process. It is not enough to state: "I need more time".

[34] Mr. Chisholm is not obligated to call any witnesses or to rely on any written materials at the hearing. But if he is not going to do so, he must confirm this to the parties and the Tribunal. If he wishes to testify only about what is already included in his initial complaint form or wants to rely on the Commission's Statement of Particulars, he may do so but he must confirm this as well. As the party that has brought the complaint, Mr. Chisholm bears the onus of proving that it is more likely than not that HEA discriminated against him. If Mr. Chisholm does not meet this burden, his complaint will be dismissed.

[35] I agree with HEA that for every delay, every missed deadline, every time the parties and the Tribunal must address a matter a second, third and fourth time, there is a real financial cost to the party. See *Mattice, supra* at para. 52. I would add that there is also a cost to the Tribunal and to other complainants and respondents who are waiting for the Tribunal to hear their cases. Delays are not free. They impact the parties to the complaint, the Tribunal, taxpayers, and other litigants.

Mediation/adjudication

[36] At a recent case management conference call, I asked the parties about their interest in participating in some form of Tribunal-assisted mediation or mediation/adjudication. This process is voluntary and requires all parties to agree. At this stage, they do not all agree.

[37] If the parties wish to participate in a Tribunal-assisted mediation, they should advise the Registrar as soon as possible. They are of course free to resolve the matter amongst themselves at any time.

ORDER

[38] HEA's motion to dismiss is denied. Mr. Chisholm's complaint will move forward before the Tribunal, subject to the following directions.

[39] By no later than **September 20, 2019**, Mr. Chisholm is directed to file with the Tribunal and to provide to HEA and to the Commission the following things:

- a. a Statement of Particulars (SOP) setting out the facts that he seeks to prove, his position on the legal issues in this case and the remedies he is seeking. If Mr. Chisholm intends only to rely on what is in his complaint form (what he sent to the Commission in 2016), and/or to rely on the Commission's SOP he must confirm this in writing by the same date.
- b. a list of all documents Mr. Chisholm intends to rely on at the hearing.
- c. a list of witnesses and a summary setting out what these witnesses will say at the hearing. If Mr. Chisholm does not intend to call any witnesses at the hearing but will only testify himself about the facts that are in his original complaint form, he must also confirm this by **September 20, 2019**.

[40] HEA's revised deadline for filing and serving its SOP, list of arguably relevant documents, and witness list and will says is **October 11, 2019**.

[41] There are resources available on the Tribunal's website explaining its process, pre-hearing preparations and what to expect at a hearing (see <https://www.chrt-tcdp.gc.ca/procedures/guide-en.html>). There are also videos that may assist the parties in preparing for the hearing (see <https://www.chrt-tcdp.gc.ca/resources/videos-en.html>).

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
August 30, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2291/4618

Style of Cause: Graham Chisholm v. Halifax Employers Association

Ruling of the Tribunal Dated: August 30, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Sheila Osborne-Brown, for the Canadian Human Rights Commission

Brian Johnston and Michelle Black, for the Respondent