

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2023 CHRT 7  
**Date:** February 27, 2023  
**File No.:** T2538/9520

**Between:**

**Ginger Nienhuis**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Correctional Service Canada**

**Respondent**

**Ruling**

**Member:** Edward P. Lustig

## I. CONTEXT

[1] This is a ruling on a motion brought by the Respondent on November 17, 2022, for an order dismissing the complaint in this matter for delay, pursuant to rules 9 and 26 of the *Canadian Human Rights Tribunal Rules of Procedure* (the "Rules"). The sole issue in this case is whether the complaint should be dismissed for delay by the Complainant.

[2] The Complainant identifies as a transgender Indigenous woman. Her complaint was filed on August 9, 2017, and alleges that the Respondent discriminated against her under sections 5 and 14.1 of the *Canadian Human Rights Act* (the "Act"). She alleges she experienced adverse differential treatment based on her race, gender identity or expression and retaliation for a previous human rights complaint filed with the Commission in 2014 and settled in January of 2017. In particular, she alleges that she was the subject on May 26, 2017, of an incident involving the excessive use of force against her and being forced to shower naked in front of several men and two women.

[3] She is incarcerated at La Macaza Institution and has not been represented by counsel, but rather, acts with the assistance of her partner Noel McCallum who is also incarcerated there.

[4] A Statement of Particulars ("SOP") was filed by the Complainant on June 28, 2021, as directed by the Tribunal. In her SOP the Complainant stated that her SOP was incomplete and requested to enter further lists of documents in her possession that she claimed were arguably relevant and not privileged. The SOP included allegations of a continuum of harassing and retaliatory incidents subsequent to the May 26, 2017, incident and to the filing of the complaint, including alleged incidents involving abusive actions taken against both the Complainant and Mr. McCallum by officers. Some of these incidents are described in the SOP as "tortuous and criminal".

[5] In response to her request, the Tribunal on June 22, 2021, agreed to an extended time limit of August 16, 2021, to file her further SOP information. Thereafter on 5 additional subsequent occasions the Tribunal extended the time limit for filing an amended SOP in response to requests from the Complainant as follows: on August 10, 2021 until November

15, 2021; on November 29, 2021 until January 10, 2022; on March 28, 2022 until July 28, 2022; on August 2, 2022 until September 30, 2022 noting that "a further extension might not be allowed". None of these extensions resulted in the amended SOP being filed by the Complainant despite the Tribunal explaining to the parties that until the SOP was complete the case could not proceed as the Respondent needed to have a complete SOP to respond to and to determine whether to seek an order to strike allegations beyond the scope of the complaint.

[6] Throughout this period of time, while not opposing the extensions mentioned above, the Respondent complained about the potential increased scope of the complaint being sought and of the negative impact of the delay to the case caused by the Complainant by not filing on time. It has taken issue with Mr. McCallum's proposed role as a representative as well as a witness for the Complainant. It has disputed the claims made by the Complainant that her delay in obtaining the information requested and filing on time was due to lack of access to and time on the institution's computers. It has provided information showing ample time available to the Complainant but unused by her to access and use the computers for these purposes and has provided additional opportunities unused by the Complainant for access to and use of the computers over the normal procedure. The Respondent has also complained that on numerous occasions the Complainant has not copied or advised the Respondent of her requests for extensions of time limits for filing and of not responding to correspondence from the Respondent including offers to assist the Complainant to obtain documents she allegedly needed to complete her SOP.

[7] A further verbal request from Mr. McCallum was received by the Tribunal on September 22, 2022, for another extension until January 2023 again citing lack of available computer time as the reason for the request. This request was opposed by the Respondent. The Commission wrote that an extension "for two weeks was reasonable". The Tribunal granted an extension until October 14, 2022, and advised that the Tribunal "expects that no further extensions will be granted". On October 14, 2022, Mr. McCallum contacted the Tribunal's Registry to advise that the October 14<sup>th</sup> date would not be complied with and that further time into 2023 was required. He was instructed to provide a request in writing stating reasons for the request but to date has failed to do so.

[8] Following the Respondent's commencement of this motion, the Tribunal issued directions on November 25, 2022, to the parties respecting a schedule for the Complainant and the Commission to respond to the motion by January 16, 2023. By correspondence dated December 20 and 29, 2022 the Complainant wrote to the Tribunal acknowledging the January 16, 2023, date for filing a response to the motion and stated that "there will be no delay of us developing the January 16th/2023 Statement of Position that has been call upon us". (*sic*) To date the Complainant has not responded to the motion or filed an amended SOP or been in touch with the Tribunal since her last correspondence. The Commission filed responding submissions to the motion on January 13, 2023.

## **II. DECISION**

[9] As the Complainant has shown a wholesale disregard for the Tribunal's time limits, the complaint should be dismissed.

### **RESPONDENT'S SUBMISSIONS**

[10] The Respondent submits that it is in the interests of justice, after more than 18 months of extensions without the Complainant complying with time limits for filing her amended SOP, that the complaint be dismissed by the Tribunal for delay. The Tribunal has the authority to control its process and must guard against abuse and ensure that parties to its proceedings respect its deadlines (see *Chisholm v. Halifax Employers Association*, 2019 CHRT 38 at para. 15 ("*Chisholm*").

[11] The Respondent cites section 48.9(1) of the Act that says that Tribunal proceedings should be conducted as expeditiously as the requirements of natural justice and the rules of procedure allow. It also cites Rules 9 and 10 of the Rules that say that the Tribunal may dismiss a complaint for non-compliance with a time limit under the Rules or make any order it considers necessary against abuse of process, on its own initiative or on the motion of a party.

[12] The Respondent argues that it has met the two applicable legal tests (the "classic test" and the "*Seitz* test") for succeeding with its motion to dismiss the complaint for delay,

even though it only needs to meet one of the tests to succeed. In this regard it cites *Chisholm, supra* at paragraphs 17, 18 and 19.

[13] Under the "classic test" the Respondent argues that a) 18 months is an inordinate delay; b) the delay is inexcusable as the Complainant had more than sufficient time to prepare and file its amended SOP with the computer time provided and has not provided reasonable explanations for her delay in doing so; and c) the Respondent is likely to be prejudiced in presenting the best available evidence at a hearing before the Tribunal as the delay of now over 6 years since the incident that gave rise to the complaint will deprive the Tribunal of the opportunity to hear witnesses while their memories are still fresh, thereby compromising trial fairness.

[14] Under the approach set out in *Seitz v. Canada*, 2002 FCT 456 (CanLII) at paras. 16-18 the Respondent argues that a) the Complainant has shown "wholesale disregard" for the Tribunal's time limits over 18 months including 6 extensions without an explanation; b) the Complainant does not appear to have any real intent to bring the case to a conclusion, but rather, has drawn-out the proceedings indefinitely; and c) the impact of the delay creates an abuse to the administration of justice for the reasons mentioned above.

[15] The Respondent argues that this case is comparable to *Labelle v. Rogers Communications Inc.*, 2012 CHRT 4 at paras. 81-83, in which the Tribunal dismissed a complaint for delay on the basis that it had already granted the complainant numerous extensions of time and she failed to provide a reasonable explanation for her failure to comply with disclosure and filing obligations.

## **COMMISSION'S SUBMISSIONS**

[16] The Commission submits that it is not in the public interest to dismiss the whole complaint for the delay by the Complainant in filing an amended SOP since the Complainant filed an SOP on time and the amended SOP is of limited purpose involving events after the incident in May 26, 2017 that gave rise to the complaint; because it would be prejudicial to the Complainant to dismiss the whole complaint leaving her without remedy for her

complaint; and because it is unlikely that the Respondent will be prejudiced by the delay at this stage.

[17] The Commission argues that dismissing complaints is a severe remedy that must be exercised with caution as an abuse of process due to administrative delay is a question of procedural fairness that must be assessed as part of the three-part test (see *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 38 and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 115 and 122).

[18] In applying the 2 applicable legal tests referred to in *Chisholm* to the present case of delay, the Commission submits that neither test is met when all factors are assessed, weighed and balanced given the severity of the remedy and the need to be cautious especially in a case involving an unrepresented complainant. Among the factors to be weighed in favor of not dismissing the complaint are the status of the Complainant as an unrepresented incarcerated inmate subject to various restrictions; the fact that she filed a SOP and the extension requests involved additional points about events after the event giving rise to her complaint; the prejudice that the Complainant would face by dismissing the whole complaint leaving her without remedy compared to the lack of evidence of prejudice to the Respondent; and the fact that the Respondent did not object to the first 5 extensions.

[19] Instead of dismissing the whole complaint, the Commission suggests the Tribunal could set dates for the Respondent to file its statement of particulars in response to the Complainant's SOP and proceed to a hearing without the Complainant being permitted to raise any issue which was not clearly stipulated in her SOP.

### **III. ANALYSIS**

[20] I agree that the Tribunal is the "master of its own process" and that it has the discretion to manage its resources as it considers appropriate. I also agree that I have to be cautious in dismissing the complaint for the reasons cited by Commission and only after fully assessing the relevant factors and considering fairness together with expeditiousness.

[21] In doing so, I am mindful of the fact that the Tribunal and the parties have been extremely accommodative to the requests for extensions of the Complainant for over 18

months despite the fact that, in my view, there was ample opportunity to file the amended SOP within the time limits allowed and the excuses given about computer time are not reasonable or credible. In this regard, I accept the Respondent's uncontradicted evidence about the Complainant's ample, available but unused access to use the computers to prepare her amended SOP as referred to in paragraph 6 above.

[22] The Commission suggested the last extension date of October 14, 2022 was reasonable as opposed to the Complainant's request to extend the time limit into 2023. Despite 6 extensions granted together with warnings on the last 2 extensions that they would be the last, the Complainant has shown a wholesale disregard for the Tribunal's time limits and rules and caused the case to remain static for an unreasonable period of time with no apparent intent to bring the case to a conclusion. This is borne out by the fact that to date not only has the Complainant failed to file the amended SOP, despite 6 extensions for over 18 months, but she didn't even file a response to the motion as she had promised she would. We have no idea of whether she even agrees with the Commission's suggestion in paragraph 19 above.

[23] This demonstrates a lack of respect by the Complainant for the Tribunal, the other parties and the process amounting to an abuse to the administration of justice and of the process, separate and apart from any prejudice caused by the inordinate and inexcusable delay.

[24] As such, in assessing the facts in this case, I am of the view that it fits within the *Seitz* approach and that the motion should be allowed and the complaint dismissed.

#### **IV. ORDER**

[25] The motion is allowed and the complaint is dismissed.

*Signed by*

Edward P. Lustig  
Tribunal Member

Ottawa, Ontario  
February 27, 2023

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2538/9520

**Style of Cause:** Ginger Nienhuis v. Correctional Service Canada

**Ruling of the Tribunal Dated:** February 27, 2023

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

None for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Erin Morgan and Émilie Tremblay, for the Respondent