

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2023 CHRT 47

**Date:** October 19, 2023

**File No.:** T2492/4920

**Between:**

**Jonathan William Joseph Foley**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**HSBC Bank Canada**

**Respondent**

**Ruling**

**Member:** Jennifer Khurana

## **I. OVERVIEW**

[1] The Tribunal closed Jonathan William Joseph Foley's complaint in October 2020 because he failed to respond to the Tribunal's communications. Starting in August 2021, Mr. Foley began to contact the Tribunal and inquire about the status of his case, explaining that he was outside the country and could not communicate with the Tribunal during that period. Mr. Foley wants the Tribunal to reopen his case so that it can move forward to a hearing. HSBC Bank Canada (HSBC), the Respondent, opposes the request because it says that Mr. Foley was able to continue with his complaint but chose not to do so.

## **II. DECISION**

[2] Mr. Foley's request is allowed. His complaint is reopened, and it will move forward in the Tribunal's process. I am persuaded that Mr. Foley either did not receive notice of the Tribunal's communications or sincerely believed he could not respond. He resumed contact with the Tribunal in a timely manner when he returned to Canada and has consistently requested the reopening of his file since then.

## **III. BACKGROUND**

### **The Tribunal's communications with Mr. Foley and the closing of the Tribunal file**

[3] On May 29, 2020, the Canadian Human Rights Commission (the "Commission") referred Mr. Foley's complaint to the Tribunal.

[4] On June 15, 2020, and June 22, 2020, Mr. Foley communicated with the Commission and advised that he was outside of the country.

[5] From June 16, 2020, to August 2020, the Tribunal attempted to contact Mr. Foley about his complaint. It sent a letter by mail and an email to all the addresses the Commission or Mr. Foley had provided. The Tribunal also tried to contact Mr. Foley by telephone, but the numbers that had been provided were not in service. In its later communications, the

Tribunal warned Mr. Foley that a failure to respond could result in the complaint being dismissed as abandoned and the file being closed. These communications were not returned as undeliverable. The last of these letters, dated August 21, 2020, appears to have been successfully delivered at the reception of the mailing address the Tribunal had on file for Mr. Foley.

[6] On October 28, 2020, the Tribunal wrote a letter to the parties closing Mr. Foley's file as abandoned. That letter was sent by courier and was returned as undeliverable.

### **Communications from Mr. Foley and his request to reopen his Tribunal file**

[7] In August 2021, Mr. Foley filled out an inquiry through the Tribunal's website, asking when his hearing was. Mr. Foley has since sent several communications, some of which are not related to his complaint. He has also provided updated contact information and appears to have changed addresses.

[8] In general terms, Mr. Foley asks that his complaint be reopened because he says that he was in Spain from March 2020 until September 2021 and that he was a protected individual in the International Protection Program for asylum seekers from August 2020 until June 2021. Due to the COVID-19 pandemic, his initial asylum interview was delayed, and he was not granted temporary asylum until August 5, 2020, when Mr. Foley says he was provided with a document with his photo and fingerprints.

[9] According to Mr. Foley, he was not able to respond to the Tribunal's communications because it was forbidden to communicate with any Canadian authorities while his application for asylum was pending. Mr. Foley also says that, as of the end of March 2021, he was advised that his request to remain in Spain permanently would likely be rejected, such that he would have to return to Canada.

[10] HSBC opposes Mr. Foley's request. It disputes Mr. Foley's claim that he was unable to respond to the Tribunal's communications prior to the closing of his file. HSBC also disputes that Mr. Foley could not contact the Tribunal from August 5, 2020, to June 1, 2021, as Mr. Foley emailed the Commission in June 2020 to advise it that he was outside of the country. He also emailed some HSBC employees starting in April 2021. According to HSBC,

Mr. Foley's file was closed because he chose not to proceed with his complaint despite repeated warnings from the Tribunal about the consequences of his failure to respond. HSBC further argues that Mr. Foley did not request the reopening of his complaint in a timely manner as he did not make the request until November 15, 2021.

[11] The Commission takes no position on Mr. Foley's request. It participated in a recent case management conference call, however, and prepared an overview of legal principles related to the possible reopening of a Tribunal file.

#### IV. ANALYSIS

[12] There are no express rules in the Tribunal's Rules of Procedure regarding the reopening of a Tribunal complaint. Generally speaking, however, once the Tribunal has disposed of a complaint and closed its file, it no longer has jurisdiction to proceed (*K.L. v. Canada Post Corporation*, 2023 CHRT 29 at paras 87-89). There is also a strong interest in the finality of proceedings which should not easily be displaced (*Zutter v. British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BC CA)).

[13] There are circumstances, however, where the Tribunal may exercise its discretion to reopen a complaint, including when natural justice or procedural fairness requires it, or where the Tribunal has made an error (*Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848). The B.C. Human Rights Tribunal has considered the following factors in deciding whether to reopen complaints, which assist in considering Mr. Foley's request:

- What is the complainant's explanation for their default, and is it reasonable;
- How quickly after learning of [these circumstances] did the complainant act to seek to re-open the application;
- Whether the respondent has suffered any prejudice as a result of the complainant's default; and
- Any other relevant factors arising in the circumstances of the particular case.

(*Rashead v. Vereschagin*, 2005 BCHRT 426 at para 66).

[14] While I accept that Mr. Foley has an active duty to pursue his complaint, I am persuaded that it was not his intention to abandon his case before the Tribunal. Mr. Foley

has consistently communicated with the Tribunal since he believed he was able to do so and maintained that he wants to move forward with his Tribunal proceeding. His first contact through the Tribunal website in August 2021 asking when his hearing was going to be supports the finding that it was not his intention to abandon his Tribunal complaint.

[15] I also accept that Mr. Foley did not receive notice of some of the Tribunal communications during the period he was outside Canada and was under the sincerely held belief that he was not allowed to contact the Tribunal or Canadian authorities from August 2020 to June 2021 while he was awaiting a decision on his asylum application.

[16] In my view, the evidence supports Mr. Foley's claim that he was outside of Canada for a period that included June 2020 to October 2020 despite not all of the mail being returned as undeliverable. The one piece of registered mail that was sent during that period was marked as received at the reception of Mr. Foley's address at the time; however, this does not mean Mr. Foley personally received it, and the evidence is sufficient to support his claim that he was outside of Canada at the time. Further, the parties do not dispute that Mr. Foley advised the Commission in June 2020 that he would be out of the country and "could not testify." The dates of the Tribunal communications sent to Mr. Foley to which he did not respond in the summer of 2020 also align with the time he was in Spain. In addition, Mr. Foley provided some documentation to the other parties and the Tribunal to support his claim that he was in Spain during that period, including boarding passes confirming his travel dates, as well as copies of his passport. The phone numbers the Tribunal used to contact Mr. Foley during that period were out of service, and the Tribunal's October 2020 closing letter was returned as undeliverable.

[17] I am also persuaded that Mr. Foley genuinely believed that he could not contact the Tribunal during the period he was outside of Canada. He made an application for asylum, and the circumstances of the case suggest that this was a genuine application on Mr. Foley's part. Mr. Foley was regularly communicating with the Commission until around the time that he left for Spain. Upon his return, he resumed communication with the Tribunal about the status of his case. In my view, this consistency of communication, other than the gap during the period he was in Spain, supports Mr. Foley's version of what transpired, namely that he did not want to abandon his claim but left Canada and believed he could not communicate

about his Tribunal case or with Canadian authorities. Further, Mr. Foley's contact with the Commission in June 2020 advising that he was "unable to testify" supports his belief that he could not participate in his complaint process because he was awaiting the determination of his asylum application.

[18] While HSBC maintains that Mr. Foley could have responded during the period that he was outside of Canada and in fact contacted its employees during that time, the complainant has explained that he consulted lawyers who told him not to contact Canadian authorities while awaiting a determination on his asylum application. While Mr. Foley started writing to HSBC in 2021, this was not until April 2021, by which time Mr. Foley says he was advised in Spain that his application would likely be denied and that he should prepare his return to Canada.

[19] I also find that Mr. Foley's resumption of contact with the Tribunal was timely, whether I consider the August 2021 period when he first made an inquiry through the Tribunal website or his formal request in November 2021. Although HSBC argues that Mr. Foley's request was not timely, in my view, this timeframe was reasonable given the dates of Mr. Foley's absence from Canada and his belief that he could not contact Canadian "authorities" prior to his return to Canada in September 2021.

[20] There is a strong public interest in the finality of Tribunal orders and decisions, and while the Tribunal can reopen a file, it is not obliged to exercise this discretion and must not do so lightly. In the circumstances of this case, however, HSBC has not argued that it would suffer any additional prejudice were the file to be reopened. The parties had not prepared for a hearing yet, and the Tribunal closed Mr. Foley's file very early on in the process before Statements of Particulars (SOPs) had been filed and documents disclosed. As set out below, I will provide direction to the parties so that this matter can be heard in a proportionate way, without delay and with a view to effectively using all parties' resources.

[21] In my view, the exceptional circumstances of this case, whereby Mr. Foley either did not receive notice of all the steps in the Tribunal process and sincerely believed that he could not respond to the Tribunal, create a breach of procedural fairness that justifies reopening the complaint. It is not a mere error in the Tribunal's decision-making that justifies

this reopening but Mr. Foley's inability to participate in the process that resulted in the Tribunal closing his file in October 2020.

## **V. NEXT STEPS**

### **Mediation**

[22] If all the parties consent, the Tribunal can appoint a mediator to assist them in trying to resolve this matter. If the parties do not resolve the dispute in mediation, it will move forward in the Tribunal's process to a hearing. In other words, trying to resolve the complaint in mediation does not extinguish the right to proceed to a hearing should the parties not resolve the complaint in its entirety.

[23] Should the parties be interested in mediation, they are asked to advise the Tribunal Registry. The Chairperson can appoint a mediator at short notice, and mediations can be conducted via videoconference, by telephone or in person. Alternatively, the Member hearing this case can mediate with the parties and then carry on to hear the case if it does not settle. For more information about mediation, please see the Tribunal's [website](#).

### **Options for proceeding fairly and expeditiously**

[24] The Tribunal is an administrative tribunal. It can and should be flexible in its processes with a view to ensuring it proceed fairly and expeditiously, in proportion to the issues raised in each proceeding.

[25] Although the parties have not filed SOPs, I have reviewed the complaint form that the Commission sent with its referral, and the issues in Mr. Foley's complaint are discrete and limited in scope. The length of the hearing in this matter should reflect that and be proportionate to the issues in dispute.

[26] Given the delays thus far, I will work with the parties to find the most efficient way forward. Normally, the next step in the Tribunal's process if the parties do not agree to mediation or do not settle the complaint is to require the parties to file SOPs and to exchange a list and copies of any documents that are arguably relevant to the issues in this case, as well as a list of witnesses they intend to call and a brief summary of what they will testify

about (see section 4.5 of the Tribunal's [Guide to Understanding the Canadian Human Rights Tribunal](#)) and Rules 18-21 of the Tribunal's [Rules of Procedure](#).

[27] To expedite matters, Mr. Foley could choose to rely on his complaint form and simply add an outline of the remedies and any legal principles he wishes to rely on and send the other parties any arguably relevant documents and his witness list. Alternatively, as this case involves a complaint of discrimination against an employer, HSBC could file its SOPs first with its disclosure and witnesses and then allow Mr. Foley to file his SOP and disclosure thereafter. The Respondent would have a full right of reply to address anything set out in Mr. Foley's SOPs.

[28] The Commission is also directed to confirm whether it intends to participate in this complaint going forward. If so, I will set a deadline for its SOP and disclosure and will ask the Commission to file its SOP first, before Mr. Foley, who is self-represented. The Commission will also have the opportunity to file a reply.

### **Tribunal record**

[29] Mr. Foley has sent a number of communications to the Tribunal and to the parties, some of which are not relevant to this complaint.

[30] The Tribunal Registry will review the communications received in this matter and will send the parties a list of what it has included in its official record. It will also provide a list of all other documents it has received that are not included in the Tribunal's official record because they do not appear to be related to this complaint. Those documents will not be considered by the adjudicator in deciding this case, unless the parties seek to introduce them as evidence and the Tribunal finds they are relevant and admits them after hearing from the parties.

[31] As counsel of record have also changed for HSBC and Mr. Foley has advised the Tribunal that he did not receive or may no longer have copies of all materials he submitted, the Tribunal Registry can provide a copy of any of these documents to ensure the record is clear to all and that all parties are in possession of the documents included therein.



**VI. ORDER**

[32] Mr. Foley's complaint is reopened and will move forward in the Tribunal's process.

[33] By no later than October 22, 2023, the Commission is asked to confirm whether it is participating in this complaint.

[34] By no later than October 27, the parties may provide their submissions on possible options for proceeding expeditiously in this proceeding, as set out in paras [24] to [28] above.

[35] Following receipt of the Commission's confirmation of its level of participation and any submissions from the parties on an efficient and fair way forward, the Tribunal will provide direction, including setting deadlines for the filing of SOPs and next steps, as appropriate.

[36] The Tribunal Registry will send the parties a list of all the documents that are included in its official record in this matter. It will also provide a list of all other materials that were submitted to the Tribunal but that are not in the Tribunal's record for their review. It will work with the parties to ensure they have copies of all documents and provide any missing materials as soon as possible.

*Signed by*

Jennifer Khurana  
Tribunal Member

Ottawa, Ontario  
October 19, 2023

# **Canadian Human Rights Tribunal**

## **Parties of Record**

**File No.:** T2492/4920

**Style of Cause:** Jonathan William Joseph Foley v. HSBC Bank Canada

**Ruling of the Tribunal Dated:** October 19, 2023

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

**Written representations by:**

Jonathan William Joseph Foley, Self-represented

Philippe Giguère, for the Canadian Human Rights Commission

Donovan Plomp, for the Respondent