

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Diane Kuhlmann

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Westcan Bulk Transport Ltd.

Respondent

Decision

Member: Athanasios D. Hadjis

Date: October 29, 2007

Citation: 2007 CHRT 50

[1] I wanted to review all the material and I've written up my decision on the points raised by you this morning, if you'll just give me a moment.

[2] On September 5, 2007, the Respondent made a motion to have the present complaint dismissed, principally because the complainant, Ms. Kuhlmann, failed to comply with her disclosure obligations. The Respondent has reiterated the request today, at the opening of the hearing into the complaint. Ms. Kuhlmann, in reply, has asked for leave to proceed to lead her evidence notwithstanding her failure to disclose, or in the alternative, that an adjournment be granted to enable her to complete her disclosure.

[3] Ms. Kuhlmann filed her complaint on August 1, 2003. The complaint was referred by the Canadian Human Rights Commission to the Tribunal on July 20, 2006. On April 25, 2007, the Commission advised the Tribunal and the parties that it would not be appearing or calling evidence at the hearing into the complaint. At a case management teleconference conducted by the Tribunal on May 10, 2007, the hearing into this complaint was set down for September 17 to the 21st, 2007.

[4] The parties were informed during the conference call of the dates for their respective disclosure, pursuant to Rule 6 of the Tribunal's Rules of Procedure. In a follow up letter from the Tribunal, the information that is to be exchanged as part of the disclosure was spelled out, including a statement of particulars, remedies sought, the lists of documents, witness lists and summaries of their evidence, including experts. Ms. Kuhlmann was to provide her disclosure by June 21, 2007, the Respondent by July 5, 2007.

[5] On June 19, 2007, Ms. Kuhlmann wrote an email to the Tribunal requesting information on how to obtain and serve subpoenas and how to request additional disclosure from the other party. The information requested was provided to her by the Tribunal Registry, via an email message sent the same day.

[6] On June 25, 2007, Ms. Kuhlmann wrote an email to the Tribunal requesting an extension for the disclosure of her documents, statement of particulars and witness list. She claimed to be having difficulty locating one of her potential witnesses. She also indicated that she had had her documents “reviewed” and was informed that case law would have to be provided. She was unfamiliar with case law research. She therefore requested that her deadline be extended to July 16, 2007. The Tribunal wrote back granting her extension but only until July 6, 2007.

[7] On July 10, 2007, the Tribunal Registry sent an email message to Ms. Kuhlmann reminding her that four days had passed since the extended disclosure deadline had passed and she had still not filed her disclosure documents with the Tribunal. The message reminded her that no further extension had been granted and it was “incumbent on her to send this material to the Tribunal and to the Respondent”.

[8] On July 16, 2007, the Tribunal Registry sent a letter by mail - by email, sorry - to Ms. Kuhlmann reminding her that she had still not filed her disclosure documents. The Tribunal asked that she respond and submit her disclosure immediately. The Tribunal reiterated the point that had been made when her disclosure date was extended, to the effect that the hearing dates set down would not be affected by the extension. The case would still proceed on September 17, 2007.

[9] On July 17, 2007, Ms. Kuhlmann sent an email message to the Tribunal in which she stated that she had been in touch with the Commission “for direction” but had no reply from them as of yet. She attached a letter that she had sent to the Commission expressing her displeasure at their decision to not appear at the hearing.

[10] The following day, on July 18, 2007, the Tribunal Registry wrote back to Ms. Kuhlmann by email, pointing out to her that the Commission is a separate and distinct entity from the Tribunal and that the Tribunal was not in a position to comment on the issues she had been raising with the Commission. The Tribunal reminded her that she had yet to complete her disclosure and included with the correspondence that was sent to her, a copy of the Tribunal’s

Rules of Procedure with the pertinent provisions highlighted. The Tribunal reiterated that hearing dates for the complaint were not affected by the granting of an extension to July 6th for her disclosure. The Tribunal also pointed out to her that Rule 9(3) states that a party who does not comply with Rule 6(1) regarding disclosure shall not raise an issue, call witnesses, introduce documents or seek remedies at the hearing.

[11] This morning when the hearing opened and the present issues were being debated, Ms. Kuhlmann indicated that she had telephoned and spoken to Mr. Guy Grégoire, Manager of Registry Operations at the Tribunal, on July 30, 2007. She confirmed that he had indicated to her that she should provide the Tribunal with any documents she had on hand at that time and request that the Tribunal accept these documents as her disclosure. Nonetheless, Ms. Kuhlmann did not provide any disclosure documents whatsoever to the Tribunal or the Respondent thereafter.

[12] On August 27, 2007, the Tribunal sent email messages to all the parties requesting their availability for a conference call to discuss the hearing process. Ms. Kuhlmann did not reply to this email. On September 5, 2007, the Tribunal attempted to telephone Ms. Kuhlmann. There was no answer so a message was left on her answering machine or voice mail, asking her to call back. It is my understanding that Ms. Kuhlmann never called back in this regard, and a conference call was not conducted. I would note here that this is information I just obtained looking at the Tribunal's file. But that is my understanding that a message was left at that time.

[13] On Friday, September 14, 2007, at 2:30 p.m., that is to say, three days ago, Ms. Kuhlmann wrote an email message to the Tribunal in which she stated that upon returning from her vacation, she had “managed to catch up on the numerous emails with regard to this matter”. She added that she could not find in her emails any information regarding the time and place for the hearing and asked for the information to be forwarded to her. The information was forwarded to her by the Tribunal within five minutes, although I note from the case file that the Tribunal had emailed a notice of venue to all the parties on August 10, 2007.

[14] In her submissions today on the issues at hand, Ms. Kuhlmann confirmed that she had been away from her home on and off for a number of weeks in August and early September. She claimed that she did not have access to a computer in this period and did not check her voice mail. There is no indication, however, of her having advised the Tribunal of her absence and of a forwarding address where she could be reached.

[15] More importantly, during the month of July she was apparently available, and did receive the correspondence sent to her by the Tribunal. She herself contacted the Tribunal a number of times. There is, of course, no doubt that she knew that her disclosure was due by July 6, 2007. Yet despite the repeated notices from the Tribunal of her failure to comply with the Tribunal's directions, she did not fulfill her disclosure obligations.

[16] In the Tribunal's correspondence with Ms. Kuhlmann, there was explicit mention made of the consequences of failing to disclose, as set out in Rule 9(3). These consequences are also set out in the booklet entitled "What happens next? A guide to the Tribunal process", which the Tribunal sends to all parties and which Ms. Kuhlmann acknowledged having received in this case. At page 18 of the guide, the paragraph is boldfaced and a symbol reflecting that this is a "point to remember" is added in the margin in the form of a magnifying glass. The paragraph states:

If you fail to disclose a document you may not be allowed to introduce it into evidence at the hearing. Similarly, you may not be permitted to examine witnesses or raise legal issues, including remedies sought that you have failed to identify in advance. The Tribunal will allow a party to rely on evidence not disclosed before the hearing only in exceptional circumstances.

[17] And then it continues about the ongoing duty to disclose.

[18] Ms. Kuhlmann arrives today at the hearing without having disclosed a single document or complied with any of her other disclosure obligations. Are there any "exceptional circumstances" in this case to justify allowing her to proceed without complying with her disclosure obligations? I do not see any. On the contrary, as the Respondent points out, it finds

itself in a “most untenable position”. It must retain experts and expend time and money to fully prepare for the hearing, without knowledge of the case it must rebut. And in fact, it has not been able to prepare itself for today’s hearing. In addition, there is no evidence of the Respondent having failed to comply with its duties in this process. For instance, given the Complainant’s failure to disclose, it sought the Tribunal’s authorization to be dispensed from disclosing at the dates that were stipulated for its disclosure.

[19] The only justification that Ms. Kuhlmann appears to be providing for her failure to meet her disclosure obligations is her inability to get a response to her satisfaction from the Commission on the matters she has raised with them. This is not a relevant matter for the case at hand. Ms. Kuhlmann knows since at least April 2007 that the Commission will not be appearing. If she still wanted to pursue her complaint, it was incumbent upon her to focus her attention on the Tribunal process. She has failed to do so. I therefore see no reason to grant her leave from her disclosure obligations. Pursuant to Rule 9(3), and given her entire failure to disclose, she is foreclosed from leading any evidence in support of her complaint, raising any issue arising there from, calling any witness, or claiming any relief.

[20] I also see no reason to adjourn this case to enable Ms. Kuhlmann to comply with her disclosure obligations. She has had ample opportunity to comply over the last two months, she has been repeatedly reminded of what she has to do to satisfy these requirements, and has opted not to do so. The Rules of Procedure are put in place to enable a fair and expeditious Tribunal hearing process. They are not there to be ignored and cast aside cavalierly, simply because a party opted to not comply with them. All parties have a duty to respect the Rules and Tribunal directives, be they Respondents or Complainants.

[21] I would also add, in my view, that it would be unfair to the Respondent to extend this matter, one that dates back to August 2003, for what would surely be many months more and would probably take us well into 2008.

[22] Ms. Kuhlmann’s motion to adjourn is therefore denied.

[23] Given, therefore, that the Complainant is foreclosed from leading evidence or raising any issue before me to support the complaint, as I indicated earlier, I find that her complaint is not substantiated and is therefore dismissed. Thank you. I don't think I have anything else to add so thank you very much.

I hereby certify that the foregoing is a true and accurate representation of my decision given to the parties on September 17, 2007.

Signed by

Athanasios D. Hadjis
Tribunal Member

Ottawa, Ontario
October 29, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1155/3706

Style of Cause: Diane Kuhlmann v. Westcan Bulk Transport Ltd.

Decision of the Tribunal Dated: October 29, 2007
(Oral decision given to the parties on September 17, 2007)

Date and Place of Hearing: September 17, 2007

Edmonton, Alberta

Appearances:

Diane Kuhlmann, for herself

No one appearing, for the Canadian Human Rights Commission

Wendy Bridges, for the Respondent