**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE**

**SHELDON W. JOHNSTON**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADIAN ARMED FORCES**

**Respondent**

**RULING**

MEMBER: Athanasios D. Hadjis

2007 CHRT 42
2007/10/17

[1] The Respondent has filed a Notion of Motion dated June 28, 2007, seeking an order dismissing the complaint initiated by the Complainant, Sheldon W. Johnston, for want of prosecution. The Respondent alleges that since the complaint was referred to the Tribunal, the Complainant has shown "blatant disregard for the Tribunal's timelines", while at the same time, the Respondent and the Tribunal have made "all reasonable efforts" to move the complaint forward. The motion was supported by a sworn affidavit signed by Cindy Komodowski, a legal assistant with the Federal Department of Justice in the Saskatoon Office.

[2] The Respondent also filed with the Tribunal an Affidavit of Personal Service signed by a process server in Alberta, stating that the Complainant had been personally served with the Notice of Motion on July 9, 2007, at his address in Taber, Alberta. On July 16, 2007, the Tribunal sent a letter to the Complainant notifying him that his deadline for filing submissions in reply to the motion was August 1, 2007. This letter was left at the main entry door at the Complainant's address by process server on July 26, 2007. The

Complainant has not as yet filed any reply submissions nor has he since communicated in any manner with the Tribunal.

[3] For the reasons given below, I am granting the Respondent's motion and dismissing the complaint.

## I. FACTUAL BACKGROUND

[4] The facts recited below are derived from the Tribunal's file regarding this complaint and from the evidence in Ms. Komodowski's affidavit, which is uncontroverted given the Complainant's failure to reply to the motion.

[5] The Complainant filed his complaint with the Canadian Human Rights Commission on January 25, 2002. He alleged that from June 1999 onwards, the Respondent discriminated against him, contrary to s. 7 of the *Canadian Human Rights Act*, by refusing to employ him as a Military Chaplain and a Reserve Entry Scheme Officer on the basis of his religion. He also alleged that the Respondent pursues a policy or practice that discriminates against him and others like him on the basis of his religion (Christian and Missionary Alliance/Church of God in Canada), contrary to s. 10 of the *Act*.

[6] On June 11, 2003, the Commission notified the Tribunal Chairperson that it was only referring the s. 10 aspect of the complaint to the Tribunal for inquiry, having decided that the s. 7 component of the complaint should be dismissed. On June 27, 2003, the Commission informed the Tribunal that it would not be participating at the hearing into the merits of the complaint.

[7] On July 7, 2003, the Complainant filed a judicial review application before the Federal Court regarding the Commission's decision to dismiss the s. 7 portion of the complaint. At the request of both the Complainant and the Respondent, the Tribunal directed that the hearing process regarding the referred complaint not proceed pending the outcome of this judicial review.

[8] The initial documentation that had accompanied the complaint when it was referred to the Tribunal indicated that the Complainant's postal address was in Castlegar, British Columbia. However, at some point thereafter, the Complainant moved to Swift Current, Saskatchewan. He did not notify the Tribunal Registry of this change. Instead, the Tribunal only came to learn of the move from the new address that appeared on the Complainant's judicial review application, a copy of which the Respondent had forwarded to the Tribunal.

[9] The Complainant apparently discontinued his judicial review application in February 2004. On May 6, 2004, he advised the Tribunal of the discontinuance, adding that he was "awaiting a ruling from the Tribunal" about the "conclusion" of his case against the Respondent. In keeping with the Tribunal's practice with regard to all complaints, the Tribunal offered the parties the opportunity to voluntarily attend a mediation session organized by the Tribunal. A "mediation questionnaire" in this regard was sent to the parties by the Tribunal on May 28, 2004. The parties were asked to reply by June 18, 2004. At the request of the Respondent, this deadline was later extended to July 26, 2004. The Respondent replied that it was interested in participating in the mediation and provided its dates of availability.

[10] Unfortunately, the Complainant did not respond to the Tribunal's letter, even by the extended July $26^{th}$ deadline. On August 5, 2004, the Tribunal sent the Complainant a message by email reminding him of the matter and explaining to him that he could reply either in writing or by telephone. He responded by email on August 10, 2004 indicating

his willingness to attend a mediation session. He claimed that he had responded earlier but that his email message "must not have gone through".

[11] On November 30, 2004, the Tribunal conducted a case management conference call with the parties, during which the parties were directed to file written summaries of the issues in the case and the remedies being sought. The summaries were intended to assist the parties in determining the scope of the mediation discussions. Respondent counsel informed the Tribunal in a follow-up letter dated December 23, 2004, that he was attempting to contact the Complainant to try to resolve the case in advance of a mediation, but that the Complainant's telephone number was no longer in service. Neither the Respondent nor the Tribunal had been provided with any new contact information from the Complainant.

[12] On January 17, 2005, the Complainant filed his written summary with the Tribunal. He also advised the Tribunal that his new address was now in Surrey, British Columbia. On February 21, 2005, the Respondent filed its reply summary.

[13] On February 25, 2005, the Complainant wrote to the Tribunal that he was now residing at an address in Swift Current, Saskatchewan. He also notified the Tribunal that a lawyer from Vancouver, David Mossop, was now representing him with regard to the complaint. At Mr. Mossop's request, the Tribunal granted him until April 21, 2005, to apprise himself of the file and to expand upon the Complainant's summary if he found it necessary.

[14] On May 4, 2005, the Tribunal conducted another case management conference call, during which the parties undertook to hold discussions and advise the Tribunal if they still wished to proceed with the mediation. A schedule for disclosure was also established. The Complainant was to file his statement of particulars and complete his documentary disclosure by July 29, 2005, and the Respondent, by August 26, 2005. As of May 13, 2005, both parties had advised the Tribunal that they wished to participate in a mediation session organized by the Tribunal.

[15] On May 17, 2005, however, the Complainant sent an email message to the Tribunal indicating that his lawyer had "withdrawn from the case". The Complainant indicated that he was nonetheless still interested in mediating the complaint. The Tribunal therefore canvassed the parties for a date and venue for the mediation. The parties agreed that it be conducted in Vancouver (as the Complainant had apparently moved back to British Columbia) on July 22, 2005. The Tribunal advised the Complainant of the date, time and address where the meeting would take place by a letter that was sent by courier service as well as by email to the Complainant's email address.

[16] On Friday, July 22, 2005, the Chairperson of the Tribunal, who was to preside over the mediation, as well as the Respondent's counsel and four of its representatives attended at the designated location and time for the mediation. The Complainant did not appear. It was therefore decided by those present to conclude the mediation. According to Ms. Komodowski's affidavit, the Complainant contacted Respondent counsel later that day and indicated that he was now available to attend the mediation. However, the Tribunal Chairperson as well as a number of the Respondent representatives had already left for the airport to return home. The Respondent's counsel and some of its representatives, who had not yet boarded their flights, agreed to change their travel plans and stay until the next day to meet with the Complainant, "in the interests of moving this matter forward". The parties did in fact meet on Saturday, July 23, 2005, but a resolution was not reached.

[17] Given that the case did not settle, the Tribunal advised the Complainant on July 26, 2005, that the hearing into the complaint would commence on October 24, 2005. In addition, another case management conference call was set down for September 1, 2005. The Complainant replied by email requesting that an earlier conference call be scheduled for a date falling between August 1 to 5, 2005, and a time between the hours of 8 am and 12 noon "Ottawa time". He also indicated that he would not be available in October for the hearing. Accordingly, the Tribunal organized a conference call on August 4 at 11 a.m., Eastern Time. However, at the designated time, the Complainant did not dial into the conference call even though the Tribunal had provided him with detailed instructions shortly before the call.

[18] On August 10, 2005, the Tribunal sent a letter to the Complainant advising him that the deadline for him to submit his statement of particulars and documentary disclosure, pursuant to Rule 6 of the Tribunal's Rules of Procedure, was extended to September 16, 2005. In light of the Complainant's unavailability in October, the Tribunal requested that the Complainant provide his dates of availability by August 26, 2005.

[19] On September 1, 2005, the Complainant sent an email message to the Tribunal stating that he "would like to know the status of the hearing process". He indicated his preferred venue for the hearing. He did not, however, make any mention of dates of availability.

[20] In addition, the Complainant did not file his statement of particulars and other disclosure documents by September 16, 2005, as the Tribunal had required of him in its letter of August 10, 2005.

[21] In fact, following the email of September 1, 2005, the Tribunal did not hear a word again from the Complainant until October 16, 2006, over 14 months later, when he sent a short email to the Tribunal Registry Officer assigned to his file. He stated in his message that he had "never received any follow-up" to his last communication with the Tribunal. He made no mention of his failure to provide, over the course of more than a year, his statement of particulars, his disclosure materials, and his dates of availability.

[22] In response to the Complainant's email message, the Tribunal contacted all of the parties to organize a conference call. On November 2, 2006, the Tribunal wrote by email to the Complainant to request that he select from a list of proposed dates for the call. The Complainant replied by email on November 13, 2006. He indicated a date when he was available and advised the Tribunal of his new telephone number and address in Taber, Alberta. The Tribunal responded by email on the same day, informing the Complainant that the Respondent was not available on the date he had selected. A set of new dates was therefore proposed. The Complainant was asked to confirm his availability by November 14, 2006.

[23] The Complainant did not respond by this deadline. On November 19, 2006, the Tribunal sent an email to the Complainant reminding him that his response had yet to be received. He did not reply. On November 21, the Tribunal's Manager, Operations called the telephone number that the Complainant had recently provided. There was no answer. The Tribunal called again on November 22. A woman answered and explained that the Complainant would call back later that day. The Complainant never returned the call.

[24] On December 20, 2006, the Tribunal sent an email message to the Complainant reminding him that he had yet to reply regarding his availability for a conference call. He

was asked to contact the Tribunal by email or by collect telephone call, to confirm his availability. There was still no response.

[25] On January 9, 2007, a Tribunal Registry Officer called the Complainant's telephone number and his spouse answered. He was not available, so the Officer asked her to tell the Complainant that he should respond to the Tribunal's email of December 20, 2006. He never responded. The Registry Officer therefore called his residence again, on April 4, 2007. His spouse answered. She said that she had passed the previous message on to the Complainant. The Tribunal asked her to relay the message again to the Complainant. He still did not reply.

[26] Consequently, on May 15, 2007, the Tribunal sent a letter to the Complainant, which was delivered by process server to his residence and served on his wife, on May 19, 2007. The letter highlighted the attempts that the Tribunal had made to contact the Complainant, to which he had not responded. He was accordingly asked to confirm, by May 31, 2007, the dates when he would be available for a one-week hearing during the months of September to December 2007. He was also advised that failing confirmation of his availability, the Tribunal would fix dates in the fall of 2007 for the hearing that would take place in Lethbridge, Alberta.

[27] The Complainant has yet to reply to the Tribunal's letter.

[28] On June 28, 2007, the Respondent filed the present motion requesting that the complaint be dismissed. As I already mentioned, the Complainant was served with the motion on July 16, 2007, and was instructed to file his submissions by August 1, 2007. The Tribunal has not received any submissions or other documentation from the Complainant to this date, nor has he made any other contact with the Tribunal.

## II. ANALYSIS

[29] As was pointed out in *Seitz v. Canada*, 2002 FCT 456, at para. 10, two approaches have developed with respect to dismissal for delay, or as it is also called, dismissal for want of prosecution. The first approach, which is sometimes referred to as the "classic" test, was set out in *Nichols v. Canada*, [1990] F.C.J. No. 567 (F.C.T.D)(Q.L.). It is a threefold test consisting, first, of determining whether there has been an inordinate delay; second, whether the delay is inexcusable; and third, whether the defendants are likely to be seriously prejudiced by the delay.

[30] The second approach is set out in paragraphs 16 to 18 of the *Seitz* decision. This approach is described as being apt in cases where the litigant engages in a "wholesale disregard" for time limits provided in the rules of court, which is how the Complainant has, in my view, conducted himself in the present case. *Seitz* points out that such breaches are not to be looked at only from the viewpoint of the litigants, but also in light of the abuse of and prejudice to the due administration of justice. Where an action has remained static for an unreasonable length of time, there is an abuse of the administration of justice, which is separate and apart from any prejudice caused by inordinate and inexcusable delay, elements that must be established under the "classic" test. *Seitz* notes that these sorts of breaches will give rise to an abuse of process and will constitute grounds for dismissal. The decision adopts the House of Lords' findings in *Grovit and Others v. Doctor and Others*, [1997]1 W.L.R. 640, to the effect that:

The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is

brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action.

*Grovit* has also been followed in *Trusthouse Forte California Inc. v. Gateway Soap and Chemical Co.*, 1998 CanLII 8897 at para. 9 (F.C).

[31] Like the courts, the Canadian Human Rights Tribunal is also entitled to prevent an abuse of its process. The Federal Court noted, in *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81 at para. 15, aff'd *Canadian Human Rights Commission v. Canada Post Corp.*, 2004 FCA 363, that it is "evident that one cannot maintain that the [Canadian Human Rights] Tribunal is the `master in its own house' if it cannot protect its own process from abuse".

[32] There have been numerous instances where the Complainant has failed to comply with the time limits and dates that were set by the Tribunal in this case, even when the Tribunal has accorded extensions thereto. I note, in passing, that Rule 1(5) of the Tribunal's Rules of Procedure states that all dates and time limits set by the Tribunal are peremptory, unless the Tribunal orders otherwise. The Complainant's breaches in this case have included:

His late reply to the Tribunal's first offer to mediate, which was received on August 5, 2004, one week beyond the date that had been extended to him for his reply;

His failure to appear at the date and time set for the mediation, in British Columbia;

His failure to dial into the case management conference call that had been re-scheduled to August 4, 2005, at his request;

His inexplicable failure to file his statement of particulars and documentary disclosure, which have been due since September 16, 2005, i.e. over two years ago;

His failure to advise the Tribunal of his dates of availability for the hearing, which he had been directed to provide by August 26, 2005, i.e. over two years ago;

His failure to confirm, by November 14, 2006, his availability for a conference call to address what I would qualify as his offhand request by email for a "follow-up" from the Tribunal, coming some 14 months after his last contact with the Tribunal, and after having repeatedly ignored the Tribunal's previous orders;

His failure to respond by May 31, 2007, to the Tribunal's May 15, 2007, letter regarding his dates of availability for the hearing;

His failure to respond to the Tribunal's instructions that he file his reply submissions to this motion by August 1, 2007.

[33] The Complainant has thus ignored or failed to comply with numerous time limits set by the Tribunal in the present case. Based on the evidence before me, there is no reasonable excuse to explain the Complainant's late or non-existent compliance with all of these Tribunal directions. I cannot but infer that the Complainant has no interest in following through with his complaint.

[34] The Tribunal is entitled to protect its process from abuse brought on by this sort of wholesale disregard of time limits, which in this instance has rendered the case completely static for at least two years, an unreasonably long time. I therefore grant the Respondent's motion. The complaint is dismissed.

*"Signed by"*

Athanasios D. Hadjis

OTTAWA, Ontario

October 17, 2007

PARTIES OF RECORD

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| TRIBUNAL FILE: | T831/8103 |
| STYLE OF CAUSE: | Sheldon W. Johnston v. Canadian Armed Forces |
| MOTION IN WRITING, WITHOUT PERSONAL APPEARANCE | |
| DECISION OF THE TRIBUNAL DATED: | October 17, 2007 |
| APPEARANCES: | |
| No one appearing | For Sheldon W. Johnston |
| No one appearing | For the Canadian Human Rights Commission |
| Chris Bernier | For the Respondent |