

e-document		T-133-22-ID 1	
F	FEDERAL COURT	D	
I		É	
L	COUR FÉDÉRALE	P	
E		O	
D		S	
		É	
	January 25, 2022		
	25 janvier 2022		
Melissa Bikowski			
TOR			1

FEDERAL COURT

CHELSEA GIFFEN

Court File No.

Applicant

- and -
-

TELUS MOBILITY

Respondent

Notice of Application

**(Pursuant to Section 18.1 of the *Federal Courts Act, R.S.C. 1985, c. F-7, s.18.1*
And Rule 300 of the *Federal Court Rules, SOR/98-106*)**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a Notice of Appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the Applicant's solicitors or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 25, 2022

Issued by: _____

Local Registrar

Address of local office:

Suite 200
180 Queen Street West
Toronto, ON M5V 3L6

TO: Telus Mobility
c/o Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Toronto, ON M5H 2T6
Attention: Bonny Mak
Email: bmak@fasken.com

AND TO: Mr. Michael Horan, Adjudicator
198 Cottingham Street
Toronto, ON M4V 1C5

AND TO: Attorney General of Canada
Department of Justice
Toronto Regional Office
3400 Exchange Tower
130 King Street West
Toronto, ON M5X 1K6

APPLICATION

This is an application for judicial review in respect of a decision of Michael Horan (the “**Adjudicator**”) dated December 29, 2021 (the “Decision”). In the Decision, the Adjudicator, who was appointed by the Honourable Minister of Labour pursuant to part III of the *Canada Labour Code* (the “Code”), ruled that he did not have jurisdiction to hear the Complaint. The Complaint had been filed by the Complainant, Chelsea Giffen (“Giffen” or the “Complainant”) pursuant to section 240(1). Giffen had worked for the Respondent for more than 10 years before going off on a maternity and parental leave on June 22, 2017. Before starting her leave, Giffen trained her replacement, Ms Becky Decksheimer, an employee of the Respondent, who had been working in a lower-level position. Prior to Giffen’s return from her leave, the Respondent took steps to arrange for Decksheimer to become a permanent full-time employee in the backfill role she was performing. Giffen returned to work on September 11, 2018. Days later, Decksheimer was formally hired as a full-time employee in Giffen’s group. Less than two months later, Giffen was dismissed by Telus pursuant to an alleged restructuring while Giffen’s replacement, Decksheimer, was retained by Telus. Giffen filed a Complaint pursuant to the *Canada Labour Code* on January 21, 2019, alleging that she had been unjustly dismissed and seeking reinstatement to her position with full back pay. The Adjudicator ruled that there was a discontinuance of function performed by Giffen and that the Adjudicator therefore did not have jurisdiction to find that there had been an unjust dismissal. The Adjudicator relied on section 242(3.1)(a).

The Complainant and the Respondent submitted sworn will-stay statements in September and October 2021. Cross examinations were held on October 1, 2021, and October 5, 2021, and one witness, Ms Becky Decksheimer, gave oral evidence pursuant to a summons on October 5, 2021. Decksheimer was not cross-examined. The Complainant and the Respondent submitted detailed written submissions following the hearing.

In the proceedings, Giffen maintained that she had lost her position, directly or indirectly, as a result of a *Code*-protected maternity and parental leave, in violation of sections 209.1(1), 209.2(1) and 209.3(1) and (2). The replacement that she had trained was hired full-time to take over her position. She maintained that the Respondent had incorrectly calculated her length of time in the position without regard to her protected maternity and parental leave when comparing her service in the specific role, to that of her replacement, Decksheimer. However, the Adjudicator found that Giffen’s boss, David Martin, “believed that Decksheimer had greater seniority and job experience” and that therefore there was no bad faith and there was a “discontinuance of a function” even though Martin’s “belief” was not supported by facts or the evidence.

The Decision was communicated to the Applicant on December 29, 2021.

The applicant makes application for:

1. An order quashing and setting aside the decision of the Adjudicator and ordering that the matter be referred to another adjudicator in accordance with this Honourable Court's direction to hear the Complaint;
2. In the alternative, an order quashing and setting aside the decision of the Adjudicator and ordering that the matter be referred to another adjudicator for a re-hearing with full oral evidence and cross-examination on the issue of jurisdiction;
3. Costs of this Application on a substantial indemnity basis; and
4. Such further and other relief as counsel may advise and this Honourable Court permits.

The grounds for the application are:

1. Giffen submits that the outcome of the decision and the analysis leading to that outcome are incorrect and unreasonable. Giffen states that the decision by the Adjudicator to refuse taking jurisdiction of this matter was incorrect, unreasonable, unfair and a breach of the adjudicator's jurisdiction under section 242 (3.1)(a).
2. In determining that the respondent laid off Giffen as a result of the discontinuance of a function, the Adjudicator recounted the reasons that had been provided by the primary witness for the Respondent, David Martin. In paragraph 32 of the Adjudicator's decision, the adjudicator noted that the determination to eliminate the complainant's position rested on two factors. One factor was seniority, whereby the witness correctly stated that Decksheimer had longer overall service with the respondent. However, for the second factor, the respondent's witness incorrectly calculated the time that the complainant had performed in her role, which was more than 24 months, according to the evidence presented by Giffen and by the respondent, compared to Decksheimer who only had 19 months in the role. According to the Respondent's witness, this was the decisive factor, yet it was calculated incorrectly.
3. The Adjudicator appears to have realized this error by the Respondent's witness. In paragraph 33, he states that "Martin *believed* that she also had greater time in the position." [Emphasis added] In paragraph 35, the Adjudicator finds that Martin "in good faith, *believed* that Decksheimer had greater seniority and job experience." [Emphasis added] In paragraph 17, the Adjudicator states that [Martin] "calculated that [Decksheimer] had spent slightly longer time performing the affected role." However, this is a factual matter and the evidence before the Adjudicator showed that that Martin's calculations were incorrect. In choosing Giffen for dismissal over Decksheimer, Martin relied on an incorrect statement of

Giffen's service in the role and the Adjudicator relied on Martin's incorrect calculation as his "belief." This error led to the respondent terminating the complainant's employment instead of terminating Decksheimer's employment. The respondent did not meet the requirements of the test for the discontinuance of a function by relying on an incorrect "belief." The Adjudicator incorrectly and unreasonably relied on this belief to support a finding of a "discontinuance of a function."

4. The Adjudicator further erred by failing to find that the selection of Ms Giffen for dismissal was discriminatory. Ms Giffen argued before the Adjudicator that, by discounting her service for the period of time she was on maternity and parental leave, the Respondent discriminated against her and violated sections 209.(1), 209.2(1) and 209.3(1) and 209.3(2). Importantly, Ms Giffen noted that it is unnecessary to show that this discrimination was intentional, and thus the Respondent's intention or belief is irrelevant—it is the discriminatory effect that is significant. The Adjudicator not only failed to find the exclusion of Ms Giffen's service on maternity and parental leave to be discriminatory and in violation of the above mentioned sections of the *Code*, but he failed to even consider or address this argument, thereby rendering his decision unreasonable.
5. The Adjudicator made an incorrect and unreasonable decision in refusing to permit Giffen to adduce evidence of the history of accommodations on the basis of disability. On March 11, 2020, in a production order decision, the Adjudicator refused to order the Respondent to provide "all documentation relating to the accommodation of Ms Giffen," finding that it was not "arguably relevant to the preliminary issue. Ms Giffen had sought production of documentation relating to her efforts to obtain accommodation from the Respondent following a serious car accident that she had years earlier. Giffen wanted to argue that the dispute that she had with the Respondent over her accommodation issues may have played a role in the decision to terminate her employment. By not agreeing to order the Respondent to produce this correspondence and information, the Adjudicator unreasonably prevented Giffen from making arguments tying her accommodation to her eventual dismissal.
6. In an Order on March 28, 2021, the Adjudicator removed certain paragraphs of Giffen's proposed Affidavit that was to have been used as evidence at the hearing. These paragraphs dealt, in part, with the issue of accommodation. By removing these paragraphs, the Adjudicator erroneously and incorrectly prevented Giffen from being able to argue that her accommodation played a role in the decision to terminate her employment. At paragraph 20 of the Adjudicator's decision, the Adjudicator states that "Martin testified he was unaware that any accommodation respecting job performance had been given to Giffen." However, since the Adjudicator had not ordered the respondent to provide its records, there was no way for Giffen to challenge and disprove this evidence. This was a breach of the rules of natural justice since Giffen was prevented from being able to demonstrate an important aspect of her case.

7. The Adjudicator acknowledged that, according to the case law under section 242(3.1)(a), it is not a discontinuance of a function if “a particular set of activities is merely handed over in its entirety to another person” at paragraph 23. In applying the case law to his decision at paragraph 25, the Adjudicator incorrectly and unreasonably:
 - a. Failed to refer to the evidence of the subpoenaed witness, Becky Decksheimer, who testified that she was performing the Complainant’s job and was told by her supervisor not to give back the work to the Complainant after the Complainant’s return from leave;
 - b. Failed to compare Martin’s evidence to Decksheimer’s and to state any basis, if that is what he did, for accepting Martin’s evidence where it contradicted Decksheimer’s if it did not these key points;
 - c. Failed to address, refer to or distinguish Martin’s cross-examination in which he acknowledged that the anticipated work referred to in August 2018, in paragraph 27, had not materialized by the time that Giffen returned from her leave and there was no new work at this time to justify hiring Giffen’s replacement on a full-time basis just days after Giffen returned from her protected leave;

8. The Adjudicator unreasonably and incorrectly failed to consider the leave provisions of the *Canada Labour Code* in sections 209.1(1), 209.2(1) and 209.3 (1) and (2) and the interaction of those provisions with section 240-243 of the *Code*. The Adjudicator unreasonably and incorrectly found that it could be a discontinuance of a function where:
 - a. The Complainant performed the actual role for a longer period of time than her replacement, even without her maternity and parental leave time counted.
 - b. The Respondent failed to count or consider the Complainant’s protected leave time as time on the job and thus penalized her for having taken her leave;
 - c. The Complainant trained her replacement before commencing her leave;
 - d. There were three people in the department at the time the Complainant went off on her leave.
 - e. Just before the Complainant returned, the Respondent sought and received approval to add one more person on the basis of “anticipated” future work.
 - f. Just days after the Complainant returned to work, the replacement was hired by the Respondent on a full-time permanent basis, in the same position, even though none of the “anticipated work” had yet materialized;
 - g. The replacement testified that she was told by her supervisor not to give work to the complainant; She was not cross-examined on this evidence.

- h. Just two months later, the Complainant was dismissed, the replacement was retained, and the department went back down from 4 to 3. The “anticipated” work still hadn’t materialized.

The complainant submits that this chain of events does not meet the test for a “discontinuance of a function” and that the Adjudicator incorrectly and unreasonably refused to find that he had jurisdiction to adjudicate this complaint.

- 9. The Adjudicator breached the rules of natural justice in failing to provide proper reasons for the Decision and, in particular
 - a. Failed to acknowledge, review, differentiate, consider or even refer to the evidence of Becky Decksheimer, the maternity and parental leave replacement for Giffen, even though Decksheimer testified pursuant to a subpoena and was not cross-examined, in particular about the fact that Decksheimer was instructed by her superior not to provide Giffen with any work other than menial jobs on Giffen’s return;
 - b. Failed to mention, discuss, explain or differentiate any of the evidence that David Martin provided in his cross-examination and failed to explain why he may have chosen Martin’s evidence over Giffen’s where the evidence conflicted on some key points including Giffen’s length of service in the position before leaving on mat leave, the lack of work for Giffen on her return to work after her leave, the fact that the new work that Martin was using to justify hiring Decksheimer full-time was only “anticipated work” and had not materialized at the time Decksheimer was hired full-time and other key points;
 - c. Failed to explain why he concluded that there was a “discontinuance of a function” where this was not even clearly submitted by the Respondent in its submissions;
 - d. Failed to explain how David Martin calculated time in the role for each of Decksheimer and Giffen and failed to consider whether or not David Martin was correct in his method, instead relying on David Martin’s “belief” even though such believe was, on its face, incorrect;

These breaches cited in points 8(a) to 8(d) left Giffen without the ability to understand how the Adjudicator reached the conclusions that her reached.

This application will be supported by the following material:

- 1. Affidavit evidence to be filed on behalf of Chelsea Giffen.
- 2. The unjust dismissal complaint dated January 24, 2019
- 3. Telus’ response to the complaint dated May 29, 2019

4. The letter written on behalf of the Honourable Minister of Labour appointing the Adjudicator
5. Various exhibits and pleadings entered during the adjudication proceeding.
6. The Decision; and
7. Such further and other material as counsel may advise and this Honourable Court may permit.
8. The applicant requests the Adjudicator to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the to the applicant and to the Registry:
 - a. A list of the Exhibits as recorded by the Adjudicator with the accompanying Exhibits;
 - b. The Adjudicator's notes form the Cross-examinations of the witnesses and from the testimony in chief of the subpoenaed witness, Becky Decksheimer

January 25, 2022



Kenneth A. Krupat, Barrister
393 University Avenue, Suite 2000
Toronto, ON M5G 1E6

Kenneth A. Krupat (LSUC 35581E)
Tel: (416) 593-0400
Fax: (416) 593-0668
Email: kkrupat@joblaw.ca

Lawyer for the Applicant

Court File No.

FEDERAL COURT

B E T W E E N :

CHELSEA GIFFEN

Applicant

•

- and -

TELUS MOBILITY

Respondent

NOTICE OF APPLICATION

KENNETH A. KRUPAT

Barrister and Solicitor
393 University Avenue
Suite 2000

Toronto, ON M5G 1E6

Tel: 416.593-0400

Fax: 416.593-0668

E-mail: kkrupat@joblaw.ca

Lawyer for the Applicant