

APPLICATION

Court File No. T-2207-22

FEDERAL COURT

BETWEEN:

ROSANA LOPEZ

Applicant

and

THE BANK OF NOVA SCOTIA

Respondent

APPLICATION UNDER S.18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

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 solicitor 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.

DATE: OCT 25 2022

ISSUED BY: NICOLE HRADSKY
REGISTRY OFFICER REGISTRY OFFICER
AGENT DU GREFFE

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APPLICATION

1. This is an application for Judicial Review of a decision dated September 28, 2022, which was delivered to the parties on September 29, 2022 (“the Decision”), made by Mr. Michael Bendel (“Mr. Bendel”) in his capacity as Adjudicator of Unjust Dismissal complaint File No. YM2727-11550 (“the Complaint”) made under Section 240 of the *Canada Labour Code* (“the Code”), wherein he dismissed the Complaint without awarding any remedy, while remaining seized with a parallel complaint made by the Applicant under the *Canadian Human Rights Act* (“CHRA”) File No. 20180831.
2. The Applicant also seeks Judicial Review of the following Interim Decisions, which were integral to the Adjudicator’s reasons as set out in the Decision and the disposition of this matter more generally:
 - a. Interim Decision dated November 19, 2020 (“Interim Decision #1”), in which the Adjudicator declined to recuse himself from hearing the matter;
 - b. Interim Decision dated July 21, 2021 (“Interim Decision #2”), in which the Adjudicator ruled that certain settlement correspondence dated September 21, 2018 (“the Settlement Offer”), was admissible into evidence and that he would rely upon same in his ruling on the merits; and
 - c. Interim Decision dated May 30, 2022 (“Interim Decision #3”), in which the Adjudicator again declined to recuse himself from hearing the matter.

The Applicant makes application for:

3. A Declaration that the Settlement Offer is settlement privileged and is not otherwise admissible into evidence;
4. A Declaration that the Applicant's service credit and service related entitlements following her reinstatement to work on or about July 19, 2021, will be restored to her original start date of employment on October 2, 2006, for all purposes;
5. An Order quashing the Decision and remitting it to a new adjudicator or, alternatively, to the Canadian Industrial Relations Board ("CIRB"), with such directions as this Honourable Court considers just;
6. An Order that the outstanding complaint under the CHRA be remitted to a new adjudicator with such directions as this Honourable Court considers just, or alternatively, to the Canadian Human Rights Commission ("CHRC") for further determination;
7. Costs of this application; and
8. Such further and other relief as counsel may advise and as this Honourable Court may permit.

The grounds for the application are:

Background

9. The Applicant commenced employment with the Respondent on or about October 2, 2006.
10. The Applicant was terminated from employment on or about January 16, 2018.
11. The Applicant filed a claim for Unjust Dismissal under Section 240 of the Code on or about February 12, 2018.
12. Mr. Michael Bendel was appointed as adjudicator on March 1, 2019 by Employment Social Development Canada.
13. The Applicant also filed a claim of discrimination under the CHRA on or about March 22, 2018 ("the CHRA Complaint"), which was referred to the Adjudicator for adjudication by the CHRC.
14. The Respondent has acknowledged that the Applicant's dismissal was unjust within the meaning of the Code.
15. The Applicant was reinstated to work with the Respondent on July 19, 2021, which reinstatement was on a provisional basis pending resolution of her final status through adjudication.
16. The parties agreed that the Complaint would be heard in advance of the CHRA Complaint and that the matter would proceed on a bifurcated basis.

17. The parties further agreed that the Complaint could be heard by way of written submissions as liability was not in dispute. The issues to be determined were *inter alia* what remedies were owing on account of the Applicant's Unjust Dismissal, if any, and the terms and conditions of her reinstatement to work, specifically as relating to her prior service credit and related entitlements.
18. On July 3, 2020, the parties convened a teleconference with the Adjudicator to discuss procedure for the disposition of the matter. It was agreed that the parties would attend at a mediation with the Adjudicator in advance of proceeding with a hearing on remedy.
19. The mediation was held on August 26, 2020, via Zoom. The matter did not resolve at that time and the parties proceeded thereafter to present their arguments on remedy via written submissions as agreed.
20. Following the mediation, the Adjudicator repeatedly intervened in the proceeding and in the presentation of the parties' cases to raise issues that were not properly before him and/or were otherwise not argued by the parties themselves ("the Interventions"), which include but are not limited to:
 - a. On August 27, 2020, the Adjudicator advised the parties that he wished to address the issue of whether settlement privilege attached to the Settlement Offer, which was made during without prejudice discussions between the parties, and which

was brought to his attention during the course of the mediation at which he presided;

- b. On March 23, 2021, following receipt of submissions on the issue of whether settlement privilege attached to the Settlement Offer, the Adjudicator advised the parties that they had not considered his authority under Section 16(c) of the Code to accept documents into evidence that would not otherwise be acceptable by a Court of law;
- c. On March 11, 2022, following receipt of final submissions on remedy, the Adjudicator advised the parties that they did not consider the impact of Section 168 of the Code on the Settlement Offer, and specifically, whether the Applicant's refusal to accept the Settlement Offer constituted a failure to mitigate damages.

21. In all instances, the Interventions were not limited to the Adjudicator raising issues that were not previously argued by the parties, but involved his actively conceiving and presenting legal arguments in connection with same.

22. In all instances, the Adjudicator provided case law citations in support of the arguments delivered to the parties as part of the Interventions, which were the product of his own, independent legal research.

23. In all instances, the Adjudicator provided his commentary on the case law he furnished to the parties, as well as his opinion and conclusions

on the issues raised in the Interventions, prior to and notwithstanding his invitation to the parties to provide submissions on same.

24. In all instances, the Adjudicator's eventual decisions on the issues raised in the Interventions were consistent with the opinion and conclusions as presented to the parties prior to receipt of their submissions.

25. On September 29, 2022, the Adjudicator issued the Decision, wherein he held that the Applicant failed to mitigate her damages by refusing to accept the Settlement Offer, and thereby dismissed the Complaint without awarding any remedy. The Adjudicator further advised that he remained seized of the CHRA matter.

26. On September 30, 2022, counsel for the Applicant wrote to the Adjudicator to advise that the Decision did not rule on one of the key issues in dispute between the parties, being the terms and conditions of the Applicant's reinstatement, and namely, whether her service credit and related entitlements were restored to her original hire date for all purposes, in response to which the Adjudicator advised that he was "functus officio" in respect to the Complaint.

27. The Adjudicator violated the principles of procedural fairness and natural justice, which conduct included but was not limited to:

- a) Intervening in the proceeding in a manner that was excessive, inappropriate and otherwise usurped the role of counsel in the adjudicative process;

- b) Intervening in the proceeding in a manner that suggests pre-judgement or otherwise places his impartiality at issue and raises a reasonable apprehension of bias; and
- c) Failing to rule on the issue of the terms of the Applicant's reinstatement in the Decision, and then declaring himself "functus officio" after counsel requested confirmation as to whether supplemental or amended reasons would be issued.

28. The Adjudicator further committed various errors of law, including but not limited to:

- a) Refusing to recuse himself from hearing the matter on account of the Interventions, which was the subject of Interim Decisions 1 and 2, as noted above;
- b) Interpreting Section 16(c) of the Code in an unreasonable manner or in a manner that otherwise exceeded his jurisdiction;
- c) Interpreting Section 168(1) of the Code in a manner that was unreasonable;
- d) Accepting into evidence the Settlement Offer, which was settlement privileged and otherwise inadmissible;
- e) Concluding that the Applicant failed to mitigate her damages by rejecting the Settlement Offer, which conclusion was unreasonable and not in accordance with legal precedent.

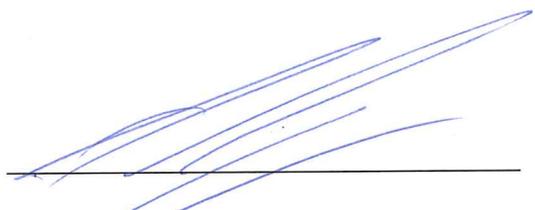
29. The Adjudicator further interpreted the provisions of the Code and exercised authority thereunder in a manner that was a) in excess of his jurisdiction; b) capricious; c) for improper purpose; and d) in bad faith and contrary to public policy.
30. The Applicant relies upon Section 18.1(3) and 18.1(4) of the Federal Courts Act, R.S.C., 1985, c. F-7.

The application will be supported by the following material:

31. The Interim Decisions dated November 19, 2020, July 21, 2021 and May 30, 2022, and written submissions made by counsel in connection therewith.
32. The Decision dated September 28, 2022, and written submissions made by counsel in connection therewith.
33. The Affidavit of Rosana Lopez, together with exhibits attached thereto, to be sworn and filed in this Honourable Court.
34. A Book of Authorities.

35. Such further and other material as counsel may advise and this Honourable Court Permits.

DATE: October 24, 2022



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ROSANA LOPEZ
Applicant

- and -

Court File No.

THE BANK OF NOVA SCOTIA
Respondent

FEDERAL COURT
PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION

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Lawyers for the Applicant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

day of OCT 25 2022 A.D. 20 OCT 25 2022

Dated this _____ day of _____ 20____

