Registry No.

FEDERAL COURT

B E T W E EN:

PRECIOUS KASEKE

Applicant

- and -

TORONTO DOMINION BANK

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the applicant appears in the following page.

THIS APPLICATION will be heard by the Court at a time and place 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 the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any document in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the application 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 (Tel 1-613-992-4238) 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:
Issued By:_____

Address of Local Office _____

TO**:** **REGISTRAR OF THE FEDERAL COURT**

AND TO: **FASKEN MARTINEAU DUMOULIN LLP**
Per: **Tala Khoury**
333 Bay Street, Suite 2400,
Toronto, Ontario M5H 2T6
T. +1 416 865 4498
F. 1 416 364 7813
tkhoury@fasken.com

Solicitor for the Respondent

APPLICATION

This is an application for judicial review in respect of a decision of the Mr. Jesse Kugler, External Adjudicator, of the Canada Industrial Relations Board "CIRB", dated October 3, 2023, and received by legal counsel on October 26, 2023. The decision refused to deal with the Applicant's complaint on the ground of lack of jurisdiction.

The Tribunal is the CIRB, File No 034975, Doc No: 0646804-D. Its address is CD Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ontario K1A 0X8, phone 1-613-293-8520; Email Address: Awada, Rania Rania.Awada@tribunal.gc.ca .

The Applicant makes this application for:

1. An Order quashing the decision to deny jurisdiction to deal with the applicant's complaint and remitting the matter back to the CIRB with appropriate directions accordingly;

2. Cost of the application; and

3. Such other relief as the Court to determine and Counsel may advise.

THE GROUNDS FOR THE APPLICATION:

1. The Applicant was an employee of Toronto Dominion Bank for more than a year;

2. Her years of employment were punctuated by denigrative and discriminative behaviors by her direct report and others. Consequently, she accepted the employer's failure to abide by the implicit terms of the employment contract, which afforded her a safe environment in which to work, as constituting constructive dismissal. She then brought a complaint under Part III of the *Canada Labor Code*, as she was entitled to do;

3. The CIRB sought submissions from the parties regarding its jurisdiction to adjudicate the complaint. Of note, the Applicant did not initiate a human rights complaint under the Canadian Human Rights Code. Her choice of forum was the avenue set out in Part III of the *Canada Labor Code;*

4. The parties made the submissions as requested. The result was that the CIRB declined jurisdiction. Its decision is at about seven (7) pages long and in that decision, the CIRB analysis gloss over the extensive submissions of the applicant wherein she cited cases from the Supreme Court of Canada, which introduced a fresh element of the jurisdictional analysis. The thrust of the CIRB Reasons for decision was the continued reliance on the cases of *MacFarlane v Day & Ross Inc, 2010 FC 556* and *Byers Transport Ltd v Kasanovich [1995] 3 FC 354;*

5. In this application, the Applicant states that the decision is unreasonable for the following reasons:

(i) The decision does not accord with the jurisprudence which makes it clear that a matter that is contractual in nature does not change it into a human rights matter, because of an allegation of a breach of one's human rights (See *Canada (House of Commons) v. Vaid,[2005] 1 SCR 667*, referred to in *Northern Regional Health Authority v Horrocks [2021] SCJ No 42);*

(ii) The decision maker ignored relevant submissions of the applicant such that the decision breached procedural fairness. In this regard, at pgs. 6-7, the decision maker conducted an analysis which completely ignored the case law discussed in the fifteen pages of submissions of the Applicant. Indeed, the decision maker was unusually dismissive of the underlying jurisprudential authority which supports the applicant's position and stuck with what seems to be slavish adherence to its years of jurisprudence which relied on a concept which has created barriers to access justice, rather than efficiency in the process of dealing with Federal employee complaints as intended by Parliament;

(iii) The decision maker not only did not show any appreciation of the underlying legal principles taken from the various cases, he completely ignored what the Applicant submitted was the significant relevance of the Supreme Court of Canada dicta in the case of *Wilson v Atomic Energy of Canada Ltd [2016] 1 SCR 770*, where the Supreme Court of Canada re-emphasized the purpose of Part III of the Code and that is to give "*unorganized workers protection against unjust dismissal somewhat comparable to that enjoyed by unionized workers under collective agreements".* This clarification offered by the SCC commanded that the intention of Parliament should be a critical consideration by decision makers called upon to determine the issue of jurisdiction. Adhering to themes which are dated, failed to capture the true interpretation of 242(3.1) of the *Canada Labor Code;*

(iv) The decision ignores the human toll and the unnecessary delay inherent in an interpretation which relies on principles which do not enhance one's access to justice. It is not that this issue of jurisdiction offers a bright red line which prevents the complaint to be adjudicated by the CIRB. Here there is no efficiency achieved and of course justice delayed is denied. As the Applicant submitted to the CIRB, there is no clear mandate set out in the *Canadian Human Rights Code* that specifically says that employees who have been constructively dismissed on the grounds of human rights violations must lodge a complaint under that regime. Thus, the reference to some other Act of Parliament must be Acts which deal with labor issues and not necessarily in the nature of the violation of human rights. As noted in the case of *Vaid,* a case on point, relying on human rights violations in the claim of constructive dismissal does not make it a human rights matter; and

(v) The Human Rights Commission range of damages are simply too restrictive. The applicant will not be made whole by such a process given what is clearly aggravating features which would demand common law aggravated damages and as well punitive damages given the persistence of the racial denigration within the employment environment which is expected to be safe and nurturing. In this advent of racial justice,

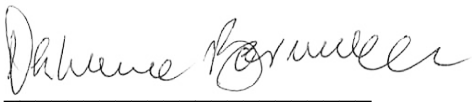
(post George Floyd era) the CIRB should have considered the issue of "real redress" as an important one given the modern day (current) climate to collectively fight against anti-Black racism and other isms.

(5) Sections 17 & 18 of the *Federal Courts Act* and Rule 300 of *Federal Courts Rules*.

THE APPLICANT REQUESTS that CIRB send a certified copy of the following material to the applicant, which is not in the possession of the applicant, but is in the possession of the tribunal, to the applicant and to the Court Registry.

The materials must include the entire file in this particular matter, including all submissions of the parties and other relevant decisions made in this matter

Date: November 23, 2023.



OSBORNE G. BARNWEL
Barrister and Solicitor
515 Consumers Road, Ste. 202
North York, Ontario M2J 4 W9

Osborne G. Barnwell

obarnwell@ogblaw.com
(cc: nbarabash@ogblaw.com)
Tel: 416-773-0309
Fax: 416-773-0909

Solicitor for the Applicant

TO: **REGISTRAR OF THE FEDERAL COURT**

AND TO: FASKEN MARTINEAU DUMOULIN LLP
Per: **Tala Khoury**
333 Bay Street, Suite 2400,
Toronto, Ontario M5H 2T6
T. +1 416 865 4498
F. 1 416 364 7813
tkhoury@fasken.com

Solicitor for the Respondent

Registry No. IMM-

FEDERAL COURT

B E T W E EN:

PRECIOUS KASEKE

Applicant

- and -

TORONTO DOMINION BANK

Respondent

APPLICATION FOR JUDICIAL REVIEW

The address for service upon the Applicant is:

OSBORNE G. BARNWEL
Barrister and Solicitor
515 Consumers Road, Ste. 202
North York, Ontario M2J 4 W9

Osborne G. Barnwell

obarnwell@ogblaw.com
(cc: nbarabash@ogblaw.com)
Tel: 416-773-0309
Fax: 416-773-0909

Solicitor for the Applicants