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March 05, 2024 05 mars 2024		
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Court File No.

FEDERAL COURT

B E T W E E N :

CANADIAN NUCLEAR LABORATORIES LTD.

Applicant

- and -

LEAH ADAMS

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED 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 Ottawa.

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.

March 5, 2024

Issued by: _____

Address of local office: Thomas D'Arcy McGee Building
90 Sparks Street, 5th Floor
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TO: Leah Adams

c/o Kris Saxberg and Katherine Olson
Cochrane Saxberg
Barristers & Solicitors
201-211 Bannatyne Avenue
Winnipeg, MB R3B 3P2

AND TO: Canadian Human Rights Commission
344 Slater Street
Ottawa, ON K1A 1E1

AND TO: Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

AND TO: Canadian Human Rights Tribunal
6th Floor W
240 Sparks Street
Ottawa, ON K1A 1J4

APPLICATION

Canadian Nuclear Laboratories Ltd. (**Applicant** or **CNL**) applies for Judicial Review in respect of the referral by the Canadian Human Rights Commission (**Commission**) dated February 6, 2023 (**Referral**) of a human rights complaint (**Complaint**) filed by Leah Adams (**Ms. Adams** or **Complainant**) on or around May 25, 2020 against the Applicant to the Canadian Human Rights Tribunal (**Tribunal**).

The Referral was based on reasons issued by the Commission on September 18, 2023. This is also an application for judicial review in respect of the September 18, 2023 decision (**Decision**).

The Applicant makes application for:

- 1 An Order quashing and setting aside the Decision and the Referral;

- 2 An Order substituting the Decision and Referral with a determination that the Complaint falls within the enumerated grounds in section 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (**CHRA**) such that it should be dismissed;

- 3 In the alternative, an Order substituting the Decision and Referral with a determination that having regard to all the circumstances of the Complaint, an inquiry into the Complaint is not warranted and therefore it should be dismissed;

- 4 In the further alternative, an Order referring the Decision back to the Commission for re-determination in accordance with directions as the Court considers appropriate;

- 5 An interim Order staying any inquiry by the Tribunal until the final disposition of this Application;

- 6 If necessary, an Order under subsection 18.1(2) of the *Federal Courts Act* extending the Applicant's time to issue this application.

7 The costs of this Application; and,

8 Such further and other relief as counsel may request and this Honourable Court may permit.

The grounds for the Application are:

1 The Applicant is Canada's premier nuclear science and technology organization, and a world leader in developing nuclear technology for peaceful and innovative applications. Atomic Energy of Canada Limited (**AECL**), a federal Crown corporation, has contracted CNL to manage and operate AECL's sites and facilities across the country, and to carry out AECL's mandate to enable nuclear science and technology and protect the environment by fulfilling the government of Canada's radioactive waste and decommissioning responsibilities.

2 Ms. Adams is a former employee of the Applicant who worked at the Applicant's Whiteshell laboratory campus located in Pinawa, Manitoba (**Whiteshell**).

3 In the context of the decommissioning of Whiteshell, on or about April 29, 2019, CNL gave to Ms. Adams eight (8) weeks written notice of the termination of her employment, during which time Ms. Adams was to continue working and would continue to receive her full regular remuneration (**Working Notice**). At the end of the Working Notice, Ms. Adams' employment would terminate. Ms. Adams was also given a further forty-three (43) weeks of termination and severance pay, in addition to the Working Notice that had been given.

4 Ms. Adams' termination from employment was part of a broader and bona fide restructuring in which 16 other employees also lost their employment (**Restructuring**).

5 The next day, on April 30, 2019, Ms. Adams commenced medical leave and sought disability benefits.

6 CNL advised Ms. Adams that it would not require her to work during the period of Working Notice and instead it would pay her out the remuneration that she would have earned had she worked through the period of Working Notice (**Pay in Lieu of Notice**).

7 Following the end of the period of Working Notice, during which Ms Adams was fully paid but not required to work, her employment terminated on June 22, 2019.

8 On or about May 25, 2020, Ms. Adams filed her Complaint against CNL at the Commission, pursuant to the CHRA, alleging discrimination in employment on the basis of an alleged disability.

9 The essence of the Complaint was to the effect that CNL ought to have suspended the period of Working Notice, that is, not proceeded with her termination of employment, during an indefinite period of time that Ms. Adams was allegedly too ill to look for alternative work.

10 Following CNL's response to the Complaint, the Commission investigated the Complaint, which culminated in a Report issued by the Commission on June 23, 2023 (**Report**).

11 The Report concluded that the decision to terminate Ms. Adams' employment was not based on her alleged disability. Moreover, it concluded that the decision not to suspend the period of Working Notice was not based on Ms. Adams' alleged disability.

12 However, directly contradicting these findings, the Report concluded that CNL's decision not to suspend the Working Notice "appears to have had an adverse effect on [Ms. Adams] because she could not search for alternate employment, because of her disability, during her working notice period."

13 As a result, the Report recommended further to sections 47 and 44(3)(a) of the CHRA that this specific issue be referred to the Tribunal for further inquiry, but only if the matter could not first be settled through conciliation.

14 The Commission subsequently issued a Decision on September 18, 2023, stating that it had reviewed the Complaint and the Report (but not stating that it had reviewed CNL's response) and that, for the reasons stated in the Report, a conciliation would first be held and that, if that failed to settle the matter, it would be referred to the Tribunal.

15 Conciliation took place on January 29, 2024 and was unsuccessful.

16 On February 6, 2024 the Commission referred the matter to the Tribunal.

17 It is settled under the principles of the common law that an employer may lawfully terminate an employee's individual contract of employment without just cause by providing to the employee (i) reasonable advance notice of the termination, (ii) pay in lieu of that notice, or (iii) a combination of the two. The choice is entirely the employer's.

18 Moreover, determination as to what amounts to reasonable notice of termination and what the proper law is in that regard is within the jurisdiction of the civil courts, not the Commission or the Tribunal.

19 CNL accepts that the Commission and the Tribunal have jurisdiction to determine if an employer's exercise of its contractual rights may constitute prohibited discrimination under the CHRA. However, on the face of the record here, what CNL did was to give Ms. Adams preferential treatment vis-à-vis the able bodied employees who were terminated as part of the Restructuring. Whereas able bodied employees had to work out their working notice, Ms. Adams did not have to do so, and instead was given pay in lieu of notice.

20 In other words, Ms. Adams patently did not suffer any adverse effect as a result of her disability when CNL refused to suspend the period of Working Notice and instead exercised its common law right to provide to Ms. Adams pay in lieu of notice.

21 The Commission's Decision is unfair on the face of the record because it does not indicate that it considered the contents of CNL's response.

22 Moreover, the Commission's Decision incorrectly or unreasonably found that CNL's exercising its lawful right to terminate with pay in lieu of notice could possibly be found to constitute unlawful discrimination under the CHRA.

23 As a result of the above noted defects, the Referral is likewise unfair, incorrect or unreasonable.

24 This case involves the jurisdictional boundaries between, on the one hand, the civil courts who are masters of the common law of dismissal and, on the other hand, the Commission, who has clearly crossed into the territory of the courts.

25 It was premature to bring the present Application prior to the actual Referral to the Tribunal. If necessary, CNL seeks leave to now file this Application. There is no prejudice to Ms. Adams or anyone else in this Application now proceeding.

26 *Federal Courts Act*, RSC 1985, c F-7, sections 18.1 and 18.2.

27 Such further and other grounds as the applicant may advise and this Honourable Court may permit.

This Application will be supported by the following material:

1 The affidavit(s) to be filed by the Applicant's representative(s) in this proceeding;

2 The full record before the Commission that led to the Decision and Referral; and,

3 Such further and other material as the Applicant may advise and this Honourable Court
may permit.

The Applicant requests that the Commission send a certified copy of the full record before the
Commission that led to the Decision and Referral that is not in the possession of the Applicant
but is in the possession of the Commission to the Applicant and to the Registry.



March 5, 2024

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