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FEDERAL COURT

TINA SHIH

-and-

**GLOBAL AFFAIRS CANADA
ATTORNEY GENERAL OF CANADA**

Applicant

Respondents

APPLICATION UNDER SECTION 18.1 OF THE FEDERAL COURTS ACT NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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.

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 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 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: February 26, 2024

Address of local office: 180 Queen St W, Suite 200, Toronto, ON M5V 1Z4

TO: Attorney General of Canada
284 Wellington St. Ottawa, ON IUA 0H8

TO: Canadian Human Rights Commission
344 Slater Street, 8th Floor Ottawa, Ontario K1A 1E1

AND TO: Minister of Foreign Affairs of Canada
125 Sussex Drive,
Ottawa, ON IUA 0G2

APPLICATION

This is an application for Judicial Review in respect of:

The Canadian Human Rights Commission (“**Commission**”) who erred in law when it dismissed the Applicant’s Complaint against Global Affairs Canada (GAC) for discrimination in her employment on the grounds of sex, color, race and national or ethnic origin by treating her in an adverse differential manner, contrary to section 7 of the Canadian Human Rights Act (the Act). This decision (“**Decision**”) was dated January 26, communicated to the Applicant by email on January 30, 2024. The Commission decided to dismiss the Applicant’s application without considering the merits of her complaint after a preliminary finding that she was “not diligent” in contacting her union representative. The Commission further in its decision committed an error of law on the face of the record by introducing the test that the Applicant must meet as “immediately”.

The Applicant makes application for:

1. A declaration that the Decision is contrary to principles of natural justice and procedurally unfair;
2. A declaration that the Commission reached an unreasonable decision;
3. A declaration that the Commission abused its authority;
4. Cost of the proceedings; and
5. Such further and other reliefs as may be sought, and this Honorable Court may permit.

The grounds for the application are:

1. The Applicant, Ms. Tina Shih (“Ms. Shih”), was employed as a full-time indeterminate employee of the Department of Foreign Affairs, Trade and Development (Global Affairs Canada) since January 2003.
2. The Applicant was hired at the CO-02 level as Trade Commissioner and went on to serve Global Affairs Canada (GAC) in its China and Mongolia Division at Headquarters in Ottawa. From September 2004 to July 2006, she successfully served her first assignment abroad as Trade Commissioner at the Consulate General of Canada in Shanghai, China, and subsequently served at the Consulate General of Canada in San Francisco, the High Commission of Canada in India, as well as the Consulate General of Canada in Los Angeles.
3. In July 2019, the Applicant returned to Ottawa after serving ten (10) consecutive years abroad to report to her next confirmed assignment as Senior Advisor for the Director General of Innovation, Investment and Education at GAC Headquarters. The Applicant was supposed to take this position for a period of one year at acting FS-03 level.
4. On August 2019, the applicant met with the Assistant Deputy Minister (ADM), Chief Trade Commissioner and the Director General for Trade Commissioners’ Operations at the request of the ADM, Chief Trade Commissioner to discuss a **new assignment as Head of Innovation and Partnerships at GAC Headquarters**. Following the meeting, the ADM, Chief Trade Commissioner announced her new assignment via Twitter with a photo.

5. During her tenure as Head of Innovation and Partnerships, between August 2019, and July 2020 the Applicant experienced various incidents of both subtle and overt discrimination at the hands of her Director and the Director General.
6. The Applicant respectfully submits that Global Affairs Canada never issued a formal confirmation of this new assignment to the Applicant until September 29, 2020. As a result, the applicant was working as Head of Innovation and Partnerships at GAC Headquarters without knowing her acting assignment's classification, pay and/or union. These facts are important as they impacted on the timeframe in which the Applicant was able to seek a remedy outside of her management.
7. On February 19, 2020, the Applicant communicated with the Professional Institute of the Public Service of Canada (PIPSC) her substantive union to seek clarification as to which union would represent her on her grievance. This fact is again a result of the Manner in which she was assigned to her new position while the actions raised in her complaint relate to her previous position. The totality of assessing the Applicant's diligence require recognition by the Commission that the Applicant since February 2020 had begun to seek help from the Union.
8. The Applicant raises significant issues not only as to the treatment she received but also the endemic nature of Systemic racism and discrimination at GAC. Some examples of her allegations include that GAC:
 - a. Made culturally insensitive comments to the Applicant that China/ Chinese being the sources of the global pandemic.
 - b. Exclusion through daily microaggressions.
 - c. Failure to provide the Applicant with equitable resources and underpaid her compared to her white male predecessor and successor; and
 - d. Arbitrarily applied policy changes which had an impact on her career progression
9. Around March 2020 Covid 19 became a Global challenge. The Applicant had a significant role of repatriating Canadians abroad, and her sole focus was to repatriate Canadians abroad and help to save lives.
10. Unfortunately, in June 2020, the applicant was informed by GAC management that she would be replaced in her current assignment by a white male. She was ordered that she could proceed with her transition to a new assignment in July (earlier than the one-year term) Throughout her assignment since August 2019, the applicant has never received a formal confirmation letter. This failure of GAC to provide a formal confirmation letter contributed to the uncertainties and delays by the Applicant.
11. Feeling frustrated and needing guidance as to what can be done, the Applicant, on July 02, 2020, contacted the Canadian Human Rights Commission about her experience at Global Affairs Canada. The purpose of the Applicant's communication was to seek directions as to how her concerns could be addressed. This again demonstrates diligence on the part of the Applicant which the Commission in its decision failed to consider. The Applicant was informed by the Commission that based on the fact she was Unionized she was required to file a grievance. The call to the Commission was based on the diligence of the Applicant in finding a solution to the challenges she faced. The Commission did not inform her of any potential time issues.

12. Days after contacting the CHRC, the Commission sent a letter to the Applicant informing her that the Commission itself would inform GAC about the Applicant's intention to submit a complaint with the Commission. Verbatim the Commission stated: *"We are therefore sending a copy of this letter to your employer to let it know that you intend to pursue allegations of discrimination, as follows:"* The complainant alleges that the respondent discriminated against them on the grounds of sex and race by treating them in an adverse differential manner, contrary to section 7 of the Canadian Human Rights Act. This fact further demonstrates that the Applicant always intended to submit a complaint and to address her issues timely and diligently. Further her employer was made aware of the impending complaint and thus suffered no Prejudice.
13. The Applicant also respectfully submits that between June 2020 and September 2020, Canada, and the whole world was in the middle of a pandemic. The world had to some extent come to a standstill. The Applicant threw herself into emergency response by trying to contribute to Government of Canada's efforts to save the lives of her colleagues overseas.
14. On September 29, 2020, the Applicant communicated by email with the Professional Institute of the Public Service of Canada (PIPSC) union and notified the Union about her inquiry with the Commission and requested to file a grievance. The PIPSC's representative recommended to the Applicant by email that she should communicate with the Canadian Association of Professional Employees (CAPE) and the Professional Association of Foreign Service Officers (PAFSO) because there was some uncertainty about which union she belonged to at the time when the discriminatory events took place.
15. Thereafter, the Applicant contacted CAPE Union by telephone and communicated with Anita Bangiricenge, her Union Representative. She continued these communications with Anita providing details of the issues and challenges that she faced and her desire to file a formal grievance. She continued to seek guidance from her union representative. At this time and throughout the process the Applicant's sole intention was to have her union representative begin the grievance process. This was made clear in all telephone communications and a clear indication of the Applicant's diligence.
16. As stated above, these events happened in the middle of the Global Covid-19 pandemic. The Applicant diligently communicated by phone with her Union representative, however, her Union representative was also impacted by Covid-19.
17. On March 31, 2021, the Applicant communicated by email with CAPE about her intention to file a grievance against GAC for discrimination. On May 06, 2021, the CAPE representative informed the Applicant that the union would not file a grievance because according to the CAPE Collective Bargaining Agreement, the grievance should be filed 25 days after the date of the alleged discrimination.
18. On June 02, 2021, the Applicant filed a Complaint with the Canadian Human Rights Commission to address the discriminatory and adverse treatment that she suffered at the hands of Global Affairs Canada.
19. In that Complaint, the Applicant pleaded that she is a female of Chinese ethnicity and was a victim of significant discrimination by GAC. Specifically, she alleged that GAC discriminated against her in her employment on the grounds of sex, color, race and national or ethnic origin by treating her in an adverse differential manner, contrary to section 7 of the Canadian Human Rights Act (the Act).
20. On December 12, 2023, the Commission delivered reasons recommending the Commission not deal with the complaint. The reasons that the Commission delivered was that *"the*

Complainant failed to exhaust a grievance process that was otherwise available.”

21. On January 12, 2024, the Applicant submitted a response to the “recommendation” of the Canadian Human Rights Commission. She submitted that she was diligent in seeking to file her grievance, but the confusion about her proper Union and the global pandemic impacted the timeframe. Furthermore, in its submissions, the Applicant clearly mentioned that she communicated repeatedly with her union representative by phone. The failure of the Union representative to properly guide the Applicant should not be held against her.
22. On January 26, 2024, the Commission decided to “not to deal with the complaint” (the decision). It is respectfully submitted that all the facts before the Commission demonstrate that the Applicant acted diligently and at all times intended to pursue her claim for discrimination. The Commission erroneously, unreasonably, and unfairly decided that the Complaint is dismissed because the Applicant was not diligent in contacting her respective unions “immediately” for her to advance her discriminatory claims.

The Decision Under Review

23. The Commission’s Decision to dismiss the Applicant’s complaint was an unreasonable decision, the “rationale” of the decision is not supported by any Jurisprudence. The issue before the Commission was whether the Applicant was diligent in contacting her unions to advance her grievance for discrimination against GAC.
24. The Commission held that the Applicant was not diligent in contacting the unions and filing a grievance after September 29, 2020. Furthermore, the Commission held that the Applicant failed to explain in her submissions why she did not get in touch immediately after her conversation with PIPSC with both CAPE and PAFSO.
25. In accordance with Section 18.1 (4) (a), (b), (c), (d) of the Federal Courts Act, the decision is reviewable on the following grounds:
 - a. The Commission failed to observe principles of procedural fairness by failing to consider the materials, evidence and reports provided by the Applicant. The Commission failed to consider that the Applicant submitted in her submissions, that she communicated several times by phone with her CAPE union representative. The Decision-maker fail to mention this fact in its final decision. It is Respectfully submitted that the decision-maker should have taken into account the phone calls that the Applicant had with her Union representative after September 29, 2020, in assessing her diligence.
 - b. The Commission erred in law in making the Decision by failing to properly interpret the Canadian Human Rights Code. The Applicant respectfully submits that the Commission failed to properly interpret subsection 42(2) of the *Canadian Human Rights Act* which states “*Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.*” The decision-maker attributed the failure to exhaust the grievance procedure to the complainant by holding that *she failed to explain in her submissions why she did not get in touch immediately after her conversation with PIPSC with both CAPE and PAFSO.*” The Applicant respectfully submits that holding that an Applicant should communicate “immediately” is an extremely high standard that is undefined by the

legislative framework or case law. The Applicant respectfully submits that the use of the test “immediately” constitutes an error on the face of the record.

- c. The word “immediately” is understood as “Instantly” or “at once.” There is no relevant case-law by the Canadian Human Rights Tribunal, or by the Ontario Courts where due diligence equates to “immediately.” The Applicant has demonstrated due diligence by contacting her unions in a timely and repeatedly manner since February 2020. It would be unfair to attribute any lack of diligence to the Applicant when her intentions and actions clearly demonstrate her intent to initiate the grievance process.
- d. The Commission based its Decision on an erroneous finding of fact regarding whether the Applicant acted diligently in her pursuit of advancing her case. The Applicant respectfully submits that the decision-maker failed to consider the fact that the Applicant had several phone conversations with her Union representative whereby she intended to inquire about initiating her grievance against GAC on September 29, 2020.

This application will be supported by the following material:

1. Affidavit of the Applicant.
2. Such further and other material as counsel advise and this Honorable Court my permit.

The Applicant requests that the Respondents provide certified copies of all material that is in possession of the GAC to the Applicant and to the Registry:

All documents for this and all items below, see definition of “documents” in Rule 222(1) of the Federal Court Rules, constituting the records available to the Commission for consideration in making the Decision.

1. All documents relating to the Decision and discussions or deliberations of the Commission leading thereto;
2. All instructions or searches made by the Commission in relation to the Complaint and Decision; and
3. All correspondence or other documents shared by members of the Commission in relation to the Complaint and Decision.

Date: 26 February 2024

Courtney Betty

(Signature of solicitor or applicant)

BETTY'S LAW OFFICE

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TINA SHIH
Applicant

-and-

**CANADIAN HUMAN RIGHTS
COMMISSION MINISTER OF
FOREIGN AFFAIRS ATTORNEY
GENERAL OF CANADA**
Respondent

Court File No.:

FEDERAL COURT

Application under Section 18.1 of the Federal Court Act

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

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