Federal Court Cour fédérale

**Date: 20241024**

**Docket: T-469-24**

**Citation: 2024 FC 1697**

**Ottawa, Ontario, October 24, 2024**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**CANADIAN NUCLEAR LABORATORIES LTD.**

**Applicant**

**and**

**LEAH ADAMS**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Leah Adams began working for Canadian Nuclear Laboratories Ltd [CNL] at the Whiteshell Laboratory Campus [Whiteshell] on December 1, 2008. CNL is a private company that operates and manages nuclear sites, facilities and assets owned by Atomic Energy of Canada Limited. Whiteshell is a former nuclear research and test establishment located near the town of

Pinawa, Manitoba. Whiteshell operated for approximately 40 years before decommissioning of the site began in 2003.

[2] On April 29, 2019, CNL gave Ms. Adams eight weeks' written notice of the termination of her employment due to the ongoing decommissioning of Whiteshell. The expectation was that she would continue to work and receive her salary and benefits during that period. The working notice period was to end on June 21, 2019, at which time Ms. Adams' employment would be terminated [Termination Date].

[3] On April 30, 2019, Ms. Adams took medical leave and sought disability benefits. On May 2, 2019, her physician advised that she was clinically unable to work in any capacity. An Attending Physician's Statement dated May 13, 2019 confirmed that Ms. Adams was undergoing active treatment and did not have an estimated return to work date.

[4] On May 30, 2019, CNL's third party disability management program administrator, Morneau Shepell, determined that Ms. Adams was not eligible for medical leave benefits based on the documentation she had submitted. Ms. Adams appealed the decision.

[5] On June 3, 2019, CNL sent Ms. Adams a letter stating that:

(a) in light of Morneau Shepell's decision, CNL's normal course of action would be to discuss a return to work and change the time charged from sick leave to personal leave or leave without pay;

(b) in the present circumstances, CNL would not require Ms. Adams to work, and would consider her absence on sick leave as part of the working notice period – CNL would remunerate Ms. Adams as if she had continued to work; and

(c) given the above, Ms. Adams was asked to advise whether she intended to continue her appeal of Morneau Sheppell's decision.

[6] In response to questions from Ms. Adams, CNL clarified on June 6, 2019 that:

(a) CNL was open to accepting her sick note "as is";

(b) Ms. Adams' sick leave would continue until the Termination Date; and

(c) if Ms. Adams agreed to the above, CNL would advise Morneau Sheppel that she had discontinued her appeal.

[7] Ms. Adams agreed to CNL's proposal on June 6, 2019.

[8] On May 25, 2020, approximately one year after the Termination Date, Ms. Adams filed a human rights complaint against CNL with the Canadian Human Rights Commission [Commission] alleging discrimination in employment [Complaint].

[9] A Human Rights Officer [Officer] with the Commission conducted a preliminary investigation of the Complaint and prepared a Report for Decision [Report]. Following its review of the Report, and a failed attempt at conciliation, the Commission referred the Complaint to the Canadian Human Rights Tribunal [Tribunal] on February 6, 2024.

[10] CNL seeks judicial review of the Commission's decision to refer the Complaint to the Tribunal.

[11] The Report, which forms a part of the Commission's decision, misstated the common law governing the employment relationship between CNL and Ms. Adams, and lacked the requisite degree of justification, intelligibility and transparency. The Commission's decision was therefore unreasonable.

[12] The application for judicial review is allowed, and the matter is remitted to the Commission for redetermination.

## II. Background

[13] Under CNL's Standard for the Termination of Employment for Non-Bargaining Unit Employees [Standard], CNL had the option of terminating Ms. Adams' employment without working notice. This would have required CNL to immediately pay Ms. Adams the entire value of her termination entitlements.

[14] In lieu of receiving compensation for the working notice period and severance as a lump sum payment, Ms. Adams chose to receive bi-weekly payments and continue her participation in CNL's benefits plans (excluding long-term disability) and pension plan.

[15] Ms. Adams' employment ended on the Termination Date of June 21, 2019. Her physician subsequently advised that she was able to return to work part-time as of February 3, 2020, with full-time hours commencing on March 2, 2020.

[16] Ms. Adams submitted the Complaint on May 25, 2020. The parties scheduled a mediation in December 2020, but this was postponed indefinitely. CNL filed its response to the Complaint on February 4, 2021. Ms. Adams filed her reply on December 1, 2022. The parties received the Report at the end of June 2023.

[17] The Officer made the following findings in her Report:

(a) CNL did not know that Ms. Adams had a disability when it laid her off, and Ms. Adams was not off work on disability at the time she received the working notice;

(b) The Standard sets the termination date: (i) where an employee is on disability leave, as the last day of the leave (s 6.1(c)); and (ii) in the case of a layoff, based on a date set by the manager in consultation with Human Resources (s 6.1(e));

(c) As Ms. Adams was not on disability leave when she was given the working notice, the Termination Date was determined under s 6.1(e) of the Standard, rather than under 6.1(c). Accordingly, CNL did not breach the Standard in setting the Termination Date;

(d) If CNL had suspended the period of working notice period so that Ms. Adams could receive disability related leave/benefits beyond the Termination Date, CNL would have been treating Ms. Adams more favourably than other employees without disabilities who were laid off.

[18] The Officer concluded there was no reasonable basis in the evidence to find that: (a) CNL's decision to lay off Ms. Adams was linked, directly or indirectly, to her disability; and (b) CNL's decision to deny Ms. Adams access to disability leave beyond the period of working notice was linked, directly or indirectly, to her disability.

[19] However, the Officer did find a reasonable basis in the evidence to conclude that Ms. Adams' ability to search for new employment during the working notice was adversely affected by her disability. This preliminary finding was based on the following:

(a) The Standard states that termination compensation on layoff is a combination of a notice period (working notice in this case) and severance payable; and the intent of termination compensation is to provide monetary support to employees during their search for new employment; and

(b) Ms. Adams may have been adversely treated when compared to non-disabled employees who were also laid off – while those employees could search for alternate employment during their period of working notice, Ms. Adams could not do the same because of her disability.

[20] The Officer considered the jurisprudence referenced in Ms. Adams' written submissions to the Commission. Paragraph 76 of the Report states:

> Based on the case law above, there appears to be two different perspectives regarding whether an employer needs to suspend a notice period when a disabled employee cannot search for alternate employment during that period because of their disability:
>
> - the first perspective suggests that an employer should suspend the notice period until such time as the employee recovers sufficiently to conduct a job search; and,
> - the second perspective suggests that there should be a "balancing of interests" of both parties, "by weighing what is fair and reasonable according to the contractual terms and the prevailing circumstances."

[21] The Officer concluded that the question of whether CNL had an obligation to suspend the period of working notice was "a legally complex issue that requires further inquiry by a Tribunal". She recommended that the Commission appoint a conciliator to help the parties settle the complaint and, barring a successful settlement, the Commission refer the Complaint to the Tribunal to conduct an inquiry.

[22] The Commission accepted the Report's findings and recommendations in its Record of Decision dated September 18, 2023. The parties attempted to resolve the Complaint through

conciliation, but were unsuccessful. The Commission referred the Complaint to the Tribunal on February 6, 2024.

## III. Issues

[23] This application for judicial review raises the following issues:

A. Is CNL's application timely?

B. What is the standard of review?

C. Was the Commission's decision reasonable?

D. If not, what is the appropriate remedy?

## IV. Analysis

### A. *Is CNL's application timely?*

[24] The Commission's Record of Decision stated:

> For the reasons discussed in the report, the Commission decides, pursuant to section 47 of the *Canadian Human Rights Act ("CHRA")*, to appoint a conciliator to attempt to bring about a settlement of the complaint and pursuant to paragraph 44(3)(a) of the *CHRA* to request that the Chairperson of the [Tribunal] institute

> an inquiry into the complaint, because having regard to all the circumstances of the complaint, further inquiry is warranted.

[25] The Record of Decision specified that the complaint would be dealt with as follows:

> i. Should the parties fail to reach a settlement within one hundred and twenty (120) days of the date of receipt of the decision letter, or within such reasonable time thereafter provided negotiations are ongoing, the Commission requests the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint pursuant to paragraph 44(3)(a) of the CHRA.
>
> ii. The Commission can dismiss this Complaint if the Respondent makes an offer to settle that addresses the human rights issues and damages raised by the complaint such that it would not be in the public interest to proceed to an inquiry.

[26] The Record of Decision also included directions regarding the presentation of a formal offer to settle, if CNL wished to make one in the course of the conciliation. But the parties were unable to settle the Complaint through conciliation or otherwise.

[27] The Commission therefore referred the Complaint to the Tribunal by letter dated February 6, 2024. CNL commenced this application for judicial review on March 5, 2024. The Notice of Application specified that CNL was applying 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**) [emphasis original].

[28] CNL's Notice of Application stated that the relief sought included, "if necessary, an Order under subsection 18.1(2) of the *Federal Courts Act* extending the Applicant's time to issue this application".

[29] Neither CNL nor Ms. Adams mentioned the possible need for an extension of time in their respective Memoranda of Fact and Law. However, the day before the application for judicial review was to be heard, counsel for Ms. Adams informed counsel for CNL that she intended to raise the timeliness of CNL's application as an issue to be determined by the Court.

[30] Pursuant to Rule 70(1) of the *Federal Courts Rules*, SOR/98-106, a memorandum of fact and law shall contain a statement of the points in issue and a concise statement of submissions. The Court should not entertain new arguments at the hearing unless the situation is exceptional. To do so would prejudice the responding party and could deprive the Court of the ability to fully assess the merits of the new argument (*Singh v Canada (Attorney* General), 2022 FC 302 at para 22).

[31] This is not an exceptional situation. Ms. Adams received the Notice of Application in March 2024, and had ample opportunity to address the timeliness of CNL's application in her Memorandum of Fact and Law. She could also have sought to amend the Memorandum in

advance of the hearing, provided that CNL was given a reasonable opportunity to respond. She did neither.

[32] In any event, I am not persuaded that CNL required an extension of time in which to commence the application for judicial review. The application is directed first and foremost towards the Commission's decision to refer the Complaint to the Tribunal on February 6, 2024. The Commission's Record of Decision dated September 18, 2023 indicated that the referral would be made only if the parties could not resolve the Complaint through conciliation.

[33] The Commission's decision of September 18, 2023 required the parties to engage in conciliation. If that process had been successful, then the Complaint would have been dismissed and any proceeding in this Court would have been premature.

[34] As the Federal Court of Appeal held in *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 (at para 31):

> […] absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. […]

[35] The Commission did not refer the Complaint to the Tribunal until the parties' attempts to resolve the matter through conciliation had failed. It was appropriate for CNL to refrain from seeking judicial review until the Commission formally referred the Complaint to the Tribunal on February 6, 2024. CNL's application is timely.

B. *What is the standard of review?*

[36] In *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, the Supreme Court of Canada held that a human rights commission's discretionary decision that an inquiry is warranted should be assessed against the standard of reasonableness (at para 17). Given a commission's broad discretion and the preliminary nature of the decision, a reviewing court should intervene only if there is no reasonable basis in law or evidence to support the decision (at paras 3, 51).

[37] Courts have continued to apply the reasonableness standard to referral decisions of the Commission following the Supreme Court of Canada's ruling in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (see *Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 46; *Asghar v Rogers Communications Inc*, 2020 FC 951 at para 15).

[38] CNL says that, in the particular circumstances of this case, the Commission's decision should be reviewed against the standard of correctness. According to CNL, the Commission interpreted and applied the common law of dismissal in finding there was a reasonable basis to refer the Complaint to the Tribunal. Since the common law of employment falls within the inherent jurisdiction of the superior courts, CNL argues that there is concurrent first instance jurisdiction over a legal issue in a statute, and this falls within the exception to reasonableness review recognized by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*SOCAN*] (at para 28).

[39] There is no merit to this argument. In deciding to refer the Complaint to the Tribunal, the Commission applied the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], not the common law of dismissal. While the Officer's consideration of the common law of dismissal figured prominently in the Report, the Commission's decision concerned human rights law, not employment law.

[40] Furthermore, the Commission has "no appreciative adjudicative role" in deciding whether to refer a complaint to the Tribunal (*Miller v Canada (Attorney General)*, 2024 FC 781 at para 9). Its purpose is to assess the sufficiency of the evidence. In the absence of an agreement between the parties, only the Tribunal can determine whether or not a human rights complaint is well-founded. The risk of conflicting legal interpretations identified in *SOCAN* does not arise here.

[41] In conducting reasonableness review, the Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The criteria of justification, intelligibility and transparency are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

C. *Was the Commission's decision reasonable?*

[42] CNL challenges the reasonableness of the Commission's decision on numerous grounds. One of these is decisive. The application for judicial review must be allowed because the Officer, and in turn the Commission, misapprehended the common law governing the employment relationship between CNL and Ms. Adams, and rendered a decision that lacked the requisite degree of justification, intelligibility and transparency.

[43] The Commission accepted the finding in the Report that the Complaint gave rise to a legally complex issue that required further inquiry by the Tribunal. The basis for the Report's conclusion was the Officer's consideration of jurisprudence cited by Ms. Adams in her written submissions: *Marinis v Third Generation Realty Ltd*, 1991 CarswellOnt 965 [*Marinis*] and *McKay v Camco, Inc*, 24 DLR (4th) 90, 1986 CanLII 2544 [*McKay*].

[44] In *McKay*, the Ontario Court of Appeal held (at pp 101-102) that:

> […] The appellant's rights under the contract of employment to disability payments and to proper notice of dismissal are not only different in kind but also serve different purposes. The right to disability payments is intended to provide income to the appellant when he is unable to work. The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment […]
>
> While the appellant was receiving payments under the short-term disability plan, he was prevented by disability from seeking or accepting employment. […] His rights to disability payments and to damages for breach of contract arose at different times, served different purposes and were based on different legal rights. They cannot be set off against each other. If disability payments were deductible from damages for the wrongful dismissal, the right of the appellant to reasonable notice would be completely frustrated

> because he could not have exercised it to search for employment while he was disabled.

[45] In *Marinis*, this principle was interpreted by the Ontario Court of Justice as follows (at pp 19-20):

> […] When a person who claims damages for wrongful dismissal is unable to take steps to obtain other employment because of some intervening physical or other incapacity, the passage of the appropriate notice period is suspended during the period of disability and is revived at the end of that period. See *McKay v. Camco Inc*. (1986[)] 53 O.R. (2d) 257 at p. 268 […]

[46] The Report also considered *White v Woolworth (FW) Co*, 1996 CanLII 11076 (NL CA) [*White*]. In *White*, the Newfoundland Court of Appeal observed (at para 64):

> […] *McKay* was addressing the effect of the disability benefits on the disabled employee's right to recover damages for wrongful dismissal, and whether the employee's receipt of the former absolved the employer from paying the latter. It was, therefore, dealing with compensation and appropriately discussed the notice period in the context of the measure of damages. It was neither called upon to, nor did it, decide that disability postpones the operation of a notice of dismissal […]

[47] The Newfoundland Court of Appeal continued in *White* (at paras 66-70):

> […] Therefore, the case law, as represented by both *McKay* and the appellate treatment of *Datardina*, does not support counsel's claim that the notice should be regarded as suspended during the disability period and until the employee had sufficiently recovered to conduct a reasonable job search.
>
> Indeed, such a proposition would be unreasonable. […]
>
> […] counsel's premise that disability postpones the operation of the notice of termination would have the effect of according

> absolute priority to the interest of the employee and of subsuming the employer's right during the period of suspension. It could conceivably result in employment contracts of indefinite duration where the obligation of one of the parties to work had become incapable of performance, but in which the other was, nonetheless, required to fully respond to its bargain and pay the disabled party. Such a consequence is patently unreasonable and underscores why counsel's argument for suspension of the notice period ought not be sustained.
>
> For the foregoing reasons, counsel's proposition that disability postpones operation of the notice period finds no support in law or reason […]

[48] In *White v Viceroy Fluid Power International Inc*, 1997 CanLII 3448 (ON CA), the Ontario Court of Appeal expressly repudiated *McKay*, holding that the reasoning in that case had been overtaken by subsequent decisions:

> We respectfully agree with the conclusion reached in the *Salmi* and *White* cases. The *obiter* suggestion in the decision of this court in *McKay v. Camco Inc.* (1986), 53 O.R. (2d) 257 at p. 269, 24 D.L.R. (4th) 90, on which counsel for the appellant relied, appears to have been overtaken by the analysis of the relevant principles in the subsequent decisions of *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, and *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1. 1997 CanLII 3448 (ON CA) While those cases, unlike the present case, involved the assessment of damages for negligence against a tortfeasor, the application of the principles which they enunciate is consistent with the conclusion reached in the *Salmi* and *White* cases and with the result in *Sylvester*.
>
> We reject the justification, suggested by counsel for the respondents, for the refusal to deduct workers' compensation benefits from damages for wrongful dismissal on the basis that the period of reasonable notice should not, as a matter of law, commence until the expiration of the period of payment of those benefits and the employee's ability to return to employment. While that submission would benefit the appellant in the present case, it is unsupported by any authority and would occasion serious prejudice

> in other cases to injured and wrongfully dismissed employees who are never capable of returning to employment.

[49] Ms. Adams says that the matter before the Commission involved contract law and human rights law, rather than the common law She relies on the decision of the Tribunal to refuse CNL's motion for a stay of proceedings pending this Court's decision in the present application for judicial review (*Adams v Canadian Nuclear Laboratories*, 2024 CHRT 87 [Tribunal Stay Decision]).

[50] The Tribunal Stay Decision acknowledged the jurisprudence cited by CNL in support of its position that a notice period should not be suspended to accommodate an employee's disability. The Tribunal then remarked: "[w]hile instructive, this case law emanates from various provincial employment contexts. None of these cases undertake a human rights analysis of the question, and none are binding on this Tribunal" (at para 17).

[51] The Tribunal Stay Decision continued (at para 18):

> […] The fact that something might be allowed under employment law does not mean that it cannot constitute discrimination under the Act: *Canada (Attorney General) v. Morgan* (C.A.), 1991 CanLII 13184 (FCA), per Marceau J.A. (concurring) at p 416. The Tribunal is not tasked here with interpreting the common law of dismissal and reasonable notice, though the relevant case law may be helpful in its work. Rather, the Tribunal will be examining, based on the evidence that the parties provided, whether the Complainant proves the *prima facie* elements of discrimination on a balance of probabilities within the meaning of section 7 of the Act and, if so, whether the Respondent justified the discrimination pursuant to section 15 of the Act. […] None of the cases on which the Respondent relies undertake such an analysis. Moreover, even if they had, the factual nature of this assessment supports the need

> for the Tribunal to determine if the same conclusions ought to be applied to the case of this Complainant.

[52] CNL objects to Ms. Adams' reliance on the Tribunal Stay Decision, noting that the Tribunal was concerned with a different legal question – whether to grant a temporary stay of proceedings – and did not have the benefit of full argument on the merits. Furthermore, judicial review is concerned with the reasons offered in support of the decision under review, not the reasons of a subsequent decision maker, albeit in a related proceeding.

[53] The reasoning of the Tribunal Stay Decision differs markedly from that contained in the Report and adopted by the Commission. The Officer who prepared the Report based her recommendation primarily on her interpretation of the common law of dismissal, which was derived from the outdated jurisprudence cited in Ms. Adams' written submissions.

[54] The Officer found there was no reasonable basis to conclude that CNL's decision to terminate Ms. Adams' employment was discriminatory. The Officer also found that CNL's decision to deny Ms. Adams access to disability leave beyond the period of working notice was not linked, directly or indirectly, to her disability. The Officer acknowledged that, if CNL had suspended the period of working notice so that Ms. Adams could continue to receive disability related leave and benefits beyond the Termination Date, then CNL would have been treating Ms. Adams more favourably than other employees without disabilities who were also laid off.

[55] The Officer's conclusion that CNL did not discriminate against Ms. Adams when it refused to extend her disability benefits beyond her Termination Date cannot be reconciled with

the finding that CNL's failure to suspend her working notice period may have been discriminatory. It would not have been possible for CNL to suspend Ms. Adams' working notice period while she remained disabled and still end her employment on the Termination Date.

[56] The Commission's referral of the Complaint to the Tribunal was premised on the Officer's misapprehension of the common law of dismissal. The Officer was unsure whether CNL was obliged under employment law to suspend Ms. Adams' period of working notice while she remained disabled. The Officer considered this to be a legally complex issue that required further inquiry by the Tribunal. Given developments in the common law of dismissal subsequent to *McKay* and *Marinis*, this conclusion was not supported by the applicable jurisprudence.

[57] As the Supreme Court of Canada held in *Vavilov* (at paras 111-112):

> It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: […] Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.
>
> Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to

> interpret or apply the provision without regard to that precedent.
> […]

[58] While the task of the Commission was to consider the Complaint through the lens of human rights law rather than employment law, the Officer's misapprehension of the common law of dismissal formed an integral part of the Report. The focus of reasonableness review must be on "the decision actually made" (*Vavilov* at para 83). The Commission's adoption of the Report and its subsequent referral of the Complaint to the Tribunal were unreasonable.

D. *What is the appropriate remedy?*

[59] Where a decision has been reviewed on the reasonableness standard and cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome (*Vavilov* at para 141).

[60] CNL says the outcome of the Complaint is inevitable, and remitting the case would serve no useful purpose (citing *Vavilov* at para 142). I disagree. I am unable to say whether redetermination of this matter in light of the current jurisprudence governing the common law of dismissal will lead to a different outcome or not. In these circumstances, the Court must respect the legislature's intention to entrust the matter to the Commission.

## V. Conclusion

[61] The application for judicial review is allowed, and the matter is remitted to the Commission for redetermination.

## VI. Costs

[62] CNL says that, were it not for the late notification by Ms. Adams' counsel of her intention to raise the issue of timeliness, it would have requested costs in the all-inclusive lump sum of $1,000. Given the additional expenditure of resources required to respond to the timeliness argument, CNL seeks costs in the all-inclusive lump sum of $5,000.

[63] Ms. Adams notes that complainants in human rights complaints are not ordinarily subject to costs awards. The Complaint is advanced by the Commission, and Ms. Adams has had no control over the process. She did not choose to be involved in this application for judicial review, and she would have preferred that the Commission be the responding party (but see *Canada (Human Rights Commission) v Canada (Attorney General)(CA)*, 1994 CanLII 3450 (FCA) at p 456).

[64] While the Commission is advancing the Complaint on her behalf, Ms. Adams stands to benefit if it is ultimately settled or upheld. In any event, proceedings before this Court are distinct from those before the Commission or Tribunal, and the awarding of costs is governed by

the *Federal Courts Rules*. The first enumerated consideration in Rule 400(3) is the result of the proceeding.

[65] Having regard to all of the considerations listed in Rule 400(3), I exercise my discretion to award costs in favour of CNL in the all-inclusive amount of $1,000.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed and the matter is remitted to the Canadian Human Rights Commission for redetermination.

2. Costs are awarded to the Applicant Canadian Nuclear Laboratories Ltd in the all-inclusive amount of $1,000.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-469-24 |
| **STYLE OF CAUSE:** | CANADIAN NUCLEAR LABORATORIES LTD. v LEAH ADAMS |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE |
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| **DATED:** | OCTOBER 24, 2024 |

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