Federal Court of Appeal | Cour d'appel fédérale

Date: 20241217

Docket: A-8-24

Citation: 2024 FCA 213

CORAM: **GLEASON J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

CHELSEA GIFFEN

Appellant

and

TM MOBILITY INC.

Respondent

Heard at Toronto, Ontario, on September 24, 2024.

Judgment delivered at Ottawa, Ontario, on December 17, 2024.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the decision of the Federal Court in *Giffen v. TM Mobile Inc.*, 2023 FC 1666 (*per* Go, J.) in which the Federal Court dismissed a judicial review application that sought to set aside the unreported December 29, 2021 decision of Adjudicator Michael Horan. In that decision, the adjudicator determined that he had no jurisdiction to consider the appellant's complaint that she had been unjustly dismissed following her return from maternity leave due to the limitation set out in paragraph 242(3.1)(a) of the *Canada Labour Code*, R.S.C.

1985, c. L-2 [the *Code*]. That paragraph of the *Code* precluded an adjudicator from hearing an unjust dismissal complaint where a complainant was laid off because of a lack of work or discontinuance of a function.

[2] For the reasons that follow, I would grant this appeal, set aside the decision of the Federal Court, and remit the appellant's complaint of unjust dismissal to another adjudicator for redetermination in accordance with these reasons. I would also grant the appellant her costs before this Court and the Federal Court.

I. Relevant Statutory Provisions

[3] It is useful to commence by outlining the statutory provisions relevant to this appeal.

[4] Division XIV of Part III of the *Code* creates an unjust dismissal remedy for non-unionized non-managerial employees, working in federally-regulated works, undertakings or businesses, who have one year of service with their employer. Unless one of the exceptions in Division XIV applies, such employees possess protection from unjust dismissal. At the times relevant to this appeal, complaints of unjust dismissal were decided by individual adjudicators, appointed by the federal Minister of Labour. These complaints are now heard by the Canada Industrial Relations Board (the CIRB).

[5] The transitional provisions applicable to the amendments to the *Code* transferring responsibility for hearing unjust dismissal complaints from individual adjudicators to the CIRB

provide that the previous version of the *Code* applies to all complaints filed before July 29, 2019: see *Budget Implementation Act, 2017, No. 1*, S.C. 2017, c. 20, ss. 354, 383, 402(1); *Order Fixing July 29, 2019 as the Day on which Certain Provisions of that Act Come into Force*, SI-2019-76, (2019) C. Gaz. II, 5555 [SI/2019-76]. The appellant's complaint was filed on January 24, 2019, so the previous version of the *Code* applies to it.

[6] Two limits on adjudicators' jurisdiction in the *Code* are relevant to this appeal. The first was contained in paragraph 242(3.1)(a) of the *Code*, which, as noted, prohibited an adjudicator from hearing an unjust dismissal complaint if a complainant was laid off due to a lack of work or the discontinuance of a function. The second was contained in paragraph 242(3.1)(b) of the *Code*, which provided that an adjudicator could not consider a complaint of unjust dismissal where an alternate procedure for redress was provided elsewhere in the *Code* or under another Act of Parliament. Section 242(3.1) read as follows at the times relevant to this appeal:

Limitation on complaints	**Restriction**
242 (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	**242 (3.1)** Le Conseil ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or	**a)** le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;
(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	**b)** la présente loi ou une autre loi fédérale prévoit un autre recours.

[7] An amended version of paragraph 242(3.1)(b) came into effect on July 29, 2019: *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, ss. 491, 534(9); SI/2019-76.

[8] The provisions governing maternity and parental leaves, the right to reinstatement at the end of a protected leave, and the protection of certain benefits accrued during leaves, such as seniority, are also relevant. Subsection 206(1) provides for maternity leave while section 206.1 provides for parental leave. Section 206.2 terms this combined period "aggregate leave", but I have generally referred to Ms. Giffen's leave as "maternity leave" throughout these Reasons for simplicity and for consistency with how it has been referred to throughout these proceedings.

[9] At the time Ms. Giffen started her maternity leave on June 22, 2017, section 206.2 provided for an aggregate leave of up to 52 weeks. On December 3, 2017, the *Code* was amended to provide for up to 78 weeks of aggregate leave: see *Budget Implementation Act, 2017, No. 1*, ss. 259–261, 269; *Order Fixing December 3, 2017 as the Day on which Division 11 of Part 4 of the Act Comes into Force*, SI/2017-68, (2017) C. Gaz. II, 3228. Ms. Giffen returned from her leave on September 11, 2018. The parties made no submissions on the length of the leave in light of the statutory change.

[10] The protections afforded to those on maternity and other types of leave were at the relevant times and still are contained in sections 209.1, 209.2 and 209.3 of the *Code*. The provisions in force at the times relevant to this appeal provided as follows:

Resumption of employment in same position

209.1 (1) Every employee who takes or is required to take a leave of absence from employment under this Division is entitled to be reinstated in the position that the employee occupied when the leave of absence from employment commenced, and every employer of such an employee shall, on the expiration of any such leave, reinstate the employee in that position.

Reprise de l'emploi

209.1 (1) Les employés ont le droit de reprendre l'emploi qu'ils ont quitté pour prendre leur congé, l'employeur étant tenu de les y réintégrer à la fin du congé.

Comparable position

(2) Where for any valid reason an employer cannot reinstate an employee in the position referred to in subsection (1), the employer shall reinstate the employee in a comparable position with the same wages and benefits and in the same location.

Emploi comparable

(2) Faute — pour un motif valable — de pouvoir réintégrer l'employé dans son poste antérieur, l'employeur lui fournit un emploi comparable, au même endroit, au même salaire et avec les mêmes avantages.

Wages and benefits affected by reorganization

(3) Where an employee takes leave under this Division and, during the period of that leave, the wages and benefits of the group of employees of which that employee is a member are changed as part of a plan to reorganize the industrial establishment in which that group is employed, that employee is entitled, on being reinstated in employment under this section, to receive the wages and benefits in respect of that employment that that employee would have been entitled to receive had that employee been working when the reorganization took place.

Modifications consécutives à une réorganisation

(3) Si, pendant sa période de congé, le salaire et les avantages du groupe dont il fait partie sont modifiés dans le cadre de la réorganisation de l'établissement où ce groupe travaille, l'employé, à sa reprise du travail, a droit au salaire et aux avantages afférents à l'emploi qu'il réoccupe comme s'il avait travaillé au moment de la réorganisation.

Notice of changes in wages and benefits

(4) The employer of every employee who is on a leave of absence from employment under this Division and whose wages and benefits would be changed as a result of a reorganization referred to in subsection (3) shall notify the employee in writing of that change as soon as possible.

Avis de modification

(4) Dans le cas visé au paragraphe (3), l'employeur avise par écrit l'employé en congé de la modification du salaire et des avantages de son poste et ce dans les meilleurs délais.

Right to benefits

209.2 (1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from employment under this Division shall accumulate during the entire period of the leave.

Calcul des prestations

209.2 (1) Les périodes pendant lesquelles l'employé se trouve être en congé sous le régime de la présente section sont prises en compte pour le calcul des prestations de retraite, de maladie et d'invalidité et pour la détermination de l'ancienneté.

Contributions by employee

(2) Where contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (1), the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any leave of absence under this Division unless, before taking leave or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period.

Versement des cotisations de l'employé

(2) Il incombe à l'employé, quand il est normalement responsable du versement des cotisations ouvrant droit à ces prestations, de les payer dans un délai raisonnable sauf si, avant de prendre le congé ou dans un délai raisonnable, il avise son employeur de son intention de cesser les versements pendant le congé.

Contributions by employer

(2.1) An employer who pays contributions in respect of a benefit referred to in subsection (1) shall continue to pay those contributions during an employee's leave of

Versement des cotisations de l'employeur

(2.1) L'employeur qui verse des cotisations pour que l'employé ait droit aux prestations doit, pendant le congé, poursuivre ses versements dans au moins la même proportion

absence under this Division in at least the same proportion as if the employee were not on leave unless the employee does not pay the employee's contributions, if any, within a reasonable time.

que si l'employé n'était pas en congé, sauf si ce dernier ne verse pas dans un délai raisonnable les cotisations qui lui incombent.

Failure to pay contributions

(3) For the purposes of calculating the pension, health and disability benefits of an employee in respect of whom contributions have not been paid as required by subsections (2) and (2.1), the benefits shall not accumulate during the leave of absence and employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

Défaut de versement

(3) Pour le calcul des prestations, en cas de défaut de versement des cotisations visées aux paragraphes (2) et (2.1), la durée de l'emploi est réputée ne pas avoir été interrompue, la période de congé n'étant toutefois pas prise en compte.

Deemed continuous employment

(4) For the purposes of calculating benefits of an employee who takes or is required to take a leave of absence from employment under this Division, other than benefits referred to in subsection (1), employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

Continuité d'emploi

(4) Pour le calcul des avantages — autres que les prestations citées au paragraphe (1) — de l'employé en situation de congé sous le régime de la présente section, la durée de l'emploi est réputée ne pas avoir été interrompue, la période de congé n'étant toutefois pas prise en compte.

…

[…]

Prohibition

209.3 (1) No employer shall dismiss, suspend, lay off, demote or discipline an employee because the employee is pregnant or has applied for leave of absence in accordance with this Division or take into account the pregnancy of an employee or the intention of an employee to take

Interdiction

209.3 (1) L'employeur ne peut invoquer la grossesse d'une employée pour la congédier, la suspendre, la mettre à pied, la rétrograder ou prendre des mesures disciplinaires contre elle, ni en tenir compte dans ses décisions en matière d'avancement ou de formation. Cette

leave of absence from employment under this Division in any decision to promote or train the employee.	interdiction vaut également dans le cas des employés de l'un ou l'autre sexe qui ont présenté une demande de congé aux termes de la présente section ou qui ont l'intention de prendre un tel congé.
Prohibition	**Interdiction**
(2) The prohibitions set out in subsection (1) also apply in respect of an employee who has taken a leave of absence under any of sections 206.3 to 206.5.	**(2)** L'interdiction visée au paragraphe (1) vaut également dans le cas d'un employé qui a pris un congé au titre de l'un des articles 206.3 à 206.5.

[11] At the times relevant to this appeal, an employee could make a complaint under paragraph 251.01(1)(a) of the *Code* to an inspector if they believed their employer had contravened any provision of Part III. Subsection 251.01(4) clarified that the complaint could not be for unjust dismissal. An inspector had investigatory powers under subsection 249(2) of the *Code*, including the ability to examine documents and obtain statements from the implicated parties. However, in accordance with sections 251 and 251.1, the inspector function was aimed at making findings of unpaid wages and facilitating payment, including by way of an order if required.

[12] The *Code* has since been amended, effective January 1, 2021 to allow for, among other things, the issuance of compliance orders: *Budget Implementation Act, 2017, No. 1*, ss. 360, 402(3); *Budget Implementation Act, 2018, No. 2*, ss. 509, 532, 596, 625; *Order Fixing January 1, 2021 as the Day on Which Certain Provisions of those Acts Come into Force*, SI/2020-74, (2020) C. Gaz. II, 4086 [*Compliance Order Explanatory Note*]. Under the current version of subsection 251.06(1) of the *Code*, a compliance order can require an employer to terminate a contravention

of Part III and to take certain steps to ensure the contravention does not continue or reoccur. Subsection 251.06(2) clarifies that a compliance order cannot be used as a substitute for a payment order for unpaid wages or to remedy an unjust dismissal. This tool was "expected to provide inspectors with an effective tool for handling instances of systemic non-compliance" (*Compliance Order Explanatory Note* at 4089). In general, it was part of an effort to improve workplaces, particularly for more vulnerable employees and women: see *Compliance Order Explanatory Note* at 4088. These provisions were not in force at the times relevant to this appeal.

[13] At the time of the appellant's complaint, a penal prosecution was the only remedy under the *Code* available to address a violation of the maternity leave provisions in Part III of the *Code* that did not give rise to unjust dismissal or non-payment of wages. Paragraph 256(1)(a) of the *Code* created a statutory offence for contraventions of any provision in Part III with the exception of listed provisions that are not at play here. Pursuant to subsection 256(1.1), upon conviction, a party was subject to a fine. Subsection 258(2) also allowed a convicting court to order an employee's reinstatement or otherwise compensate them for their loss of employment. The parties made no submissions on the ability to pursue a breach of the maternity leave provisions under the penal offence framework.

[14] The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [the *CHRA*] is also relevant to this appeal. The provisions in effect at the times relevant to this appeal have not been amended.

[15] The first set of relevant provisions in the *CHRA* prohibit discrimination in employment on any of the prohibited grounds listed in that Act. These include discrimination on the basis of

sex, which is defined as including discrimination on the basis of child-birth or pregnancy.

Subsections 3(1) and (2) and section 7 of the *CHRA* provide as follows:

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.
Idem	**Idem**
(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.	**(2)** Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.
…	[…]
Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	**a)** de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	**b)** de le défavoriser en cours d'emploi.

[16] Secondly, the *CHRA* contains several provisions establishing enforcement mechanisms. More specifically, individuals who believe they have been the victim of discrimination may file a complaint with the Canadian Human Rights Commission (the Commission) by virtue of subsection 40(1) of the *CHRA*. Subsection 41(1) of the *CHRA* provides the Commission, prior to the conduct of an investigation, with the discretion to decline to deal with a complaint if alternate procedures for redress are available. It reads as follows:

Commission to deal with complaint	**Irrecevabilité**
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41 (1)** Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	**a)** la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	**b)** la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
…	[…]

[17] The Commission may also decline to deal with a complaint after an investigation and receipt of a report from one of its investigators if it is of the view that the complaint would be more appropriately dealt with under a different procedure. Subsection 44(2) of the *CHRA* provides in relevant part as follows:

Action on receipt of report	**Suite à donner au rapport**
44 (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	**44 (2)** La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	**a)** que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	**b)** que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
it shall refer the complainant to the appropriate authority.	

[18] Where the Commission determines after an investigation, having regard to all the circumstances, that an inquiry into a complaint is warranted, subsection 44(3) of the *CHRA* provides that the Commission may refer the complaint to the Canadian Human Rights Tribunal (the Tribunal) for an inquiry. By virtue of subsection 49(1) of the *CHRA*, the Commission also possesses the authority to refer a complaint to the Tribunal for inquiry at any stage after the receipt of a complaint if it is satisfied, having regard to all of the circumstances, that an inquiry is warranted.

[19] The Tribunal possesses broad remedial authority and, among other things, may require employers to reinstate employees who have been dismissed in violation of the prohibitions against discrimination set out in the *CHRA.* The Tribunal may also award damages, including

compensation for lost wages and benefits between the date of termination and reinstatement.

Section 53 of the *CHRA* provides as follows:

Complaint dismissed	**Rejet de la plainte**
53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	**53 (1)** À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
Complaint substantiated	**Plainte jugée fondée**
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	**(2)** À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including	**a)** de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :
(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or	**(i)** d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),
(ii) making an application for approval and implementing a plan under section 17;	**(ii)** de présenter une demande d'approbation et de mettre en

oeuvre un programme prévus à l'article 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

the discriminatory practice wilfully or recklessly.	
Interest	**Intérêts**
(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	**(4)** Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

II. The Factual Background and the Adjudicator's Decision

[20] I turn next to review the factual background to this appeal and the adjudicator's decision.

[21] The appellant commenced employment with the respondent in February 2007 and last held the position of business systems analyst. She took two maternity leaves during her employment with the respondent. The appellant's second maternity leave ran from June 22, 2017 to September 11, 2018. Another employee, who was then working for the respondent in another department, backfilled for the appellant during this period. About a month before the appellant's return to work, the respondent added another business systems analyst position to the department where the appellant worked. The employee who replaced the appellant during her maternity leave was awarded this new position on September 14, 2018.

[22] On the heels of the appellant's return to work after the end of her second maternity leave, the respondent decided to cut one of the business analyst positions in the department where the appellant worked as part of a corporate downsizing. The appellant's manager testified that he learned of the requirement to cut a position from his department only in November 2018. The

respondent terminated the appellant's employment in December 2018. The respondent chose to lay off the appellant instead of the employee who had filled in for her during her maternity leave. The adjudicator found that the respondent undertook a *bona fide* restructuring of the appellant's department by cutting one position from it.

[23] The adjudicator further found that the respondent decided to retain the employee who replaced the appellant during her maternity leave, as opposed to the appellant, because the other employee had greater overall seniority with the respondent and the appellant's manager believed the replacement had more experience working in the business analyst position. However, in calculating the length of that experience, the respondent discounted the time that the appellant spent on maternity leave and also appears to have incorrectly accounted for the period of time the appellant had been acting in the business analyst role before she was placed in it on a permanent basis. Nothing ultimately turns on this potential factual error, because the appellant would have spent longer in the business analyst role than her replacement if she had been credited with the time she was on maternity leave. Thus, if this time had been counted, one of the criteria the respondent relied on in its decision to retain the replacement as opposed to the appellant would have favoured the retention of the appellant over the replacement.

[24] The adjudicator found that there was no bad faith on the part of the respondent in deciding to retain the appellant's replacement instead of the appellant and that the decision was not tainted by an improper motive. The adjudicator stated that the decision to retain the appellant's replacement, as opposed to the appellant, was based on her manager's "…assessment

of traditional and objective criteria in respect of factors to be utilized by an employer in the layoff of an employee" (adjudicator's decision at para. 33).

[25] The adjudicator further noted that in order to rely on the exception in subsection 243(3.1) of the *Code*, where there is a downsizing, an employer must provide a reasonable explanation for the choice of the employee to be terminated, as was held in *Williams v. Bank of Nova Scotia*, 2018 CarswellNat 4178 (Can. Lab. Adj.). The adjudicator determined that the appellant's manager, in good faith, believed that the replacement had greater seniority and job experience than the appellant and thus concluded that the respondent offered a reasonable explanation for selecting the appellant for lay off.

[26] The adjudicator also determined that the appellant was reinstated at the end of her maternity leave and laid off only after she returned to work. He further held that there was no evidence that the maternity leave was a factor in the decision to terminate the appellant's employment. The adjudicator therefore rejected the submission that there was a violation of the maternity leave provisions in the *Code*.

[27] As a result, the adjudicator dismissed the appellant's complaint of unjust dismissal.

[28] In reaching this conclusion, the adjudicator failed to consider an alternative argument the appellant made, namely, that even if the respondent's decision was not tainted by an improper motive or made in bad faith, it was nonetheless discriminatory because the selection criteria adversely impacted the appellant by reason of her maternity leave and her termination was

therefore unjust. The adjudicator also failed to fully consider the appellant's assertion that the respondent's actions violated the maternity leave provisions contained in the *Code*.

[29] More specifically, as concerns discrimination, the appellant argued that paragraph 242(3.1)(a) of the *Code* must be interpreted in accordance with the *CHRA*. The appellant submitted that discounting the time she spent on maternity leave from the experience criterion was discriminatory because this adversely impacted her and those who take maternity leaves. The appellant adds that this is especially so if their replacements are entitled to count the time spent replacing a co-worker on maternity leave as part of their relevant experience but those who take maternity leaves cannot do so. In support of this argument, the appellant relied on decisions from labour arbitrators and human rights tribunals, including *Lugonia v. Arista Homes*, 2014 HRTO 1531, *Abreu v. Transport Fortuna*, 2020 CHRT 35, and *Parry v. Vanwest College*, 2005 BCHRT 310, 53 C.H.R.R. 178.

[30] As concerns the maternity leave provisions in the *Code*, the appellant submitted that an employer cannot successfully argue that it laid off an employee who took maternity leave due to a shortage of work or discontinuance of a function if the lay off violates the maternity leave protections enshrined in the *Code*. As noted, these required, among other things, that an employee's employment be deemed to be continuous during the period of a maternity leave for purposes of benefit entitlements by virtue of subsection 209.2(4) of the *Code*. In addition, by virtue of subsection 209.2(1) of the *Code*, the seniority of any employee who took a maternity leave was required to continue to accumulate during the entire period of the leave.

III. The Decision of the Federal Court

[31] I turn next to the reasons of the Federal Court, which dismissed the appellant's application for judicial review. In reviewing the reasons, I mention only those portions that are relevant to this appeal.

[32] In this regard, even though the adjudicator did not consider the above alternate arguments, the Federal Court chose to rule on them. It held that there was nothing discriminatory or in violation of the maternity leave provisions in the *Code* in discounting the period of the maternity leave in determining the appellant's experience yet allowing her replacement to count the experience replacing the appellant during the appellant's maternity leave.

[33] More specifically, as concerns the claimed violation of the maternity leave provisions in the *Code*, the Federal Court noted that subsection 209.2(1) of the *Code* requires that an employee continue to accumulate seniority during a maternity leave. The Federal Court held that the appellant incorrectly conflated seniority with years of experience in the position of business systems analyst. The Federal Court also held that the adjudicator rejected the balance of the appellant's "section 209 argument" in determining that the appellant was reinstated at the end of her maternity leave, even though this was not explicitly stated in the adjudicator's decision.

[34] As concerns the claimed discriminatory impact of the respondent's selection criteria, the Federal Court noted that "…while the *Code* specifically allows an employee to accumulate seniority (i.e., length of service) while on leave, nothing in the *Code* extends that to the

calculation of actual experiences in any given role" (at para. 71). The Court went on to rely on the decision in *Rogers Cablesystems Ltd. v. Roe* (2000), 193 F.T.R. 240, 2000 CanLII 16158 (FC) [*Rogers Cablesystems*] for the proposition that there is "…nothing inappropriate for an employer to consider experience in the role, as time actually spent on the role, as a measure of skills, when considering who to retain or dismiss, as the case may be…" (at para. 72). I note that the issue of discriminatory selection criteria or violation of the *Code*'s maternity leave provisions was not at issue in *Rogers Cablesystems*.

[35] The Federal Court also held that as the respondent considered both seniority and job experience, its decision was allowable. It stated at paragraph 74 that it would agree "…that if an employer were to consider only experience in the role without considering seniority, it could put an employee who has been on leave at a disadvantage, not to mention being in violation of the *Code*. This did not happen in this case."

[36] The Federal Court concluded its discussion of the issue with a comment, that it qualified as *obiter*, to the effect that granting preference in the accumulation of job experience to those who replace for maternity leaves as opposed to those who take maternity leaves "…would disadvantage all casual or temporary employees – many of whom are women, including many who are racialized…" (at para. 75).

[37] The Federal Court thus considered and dismissed the alternate arguments that the adjudicator failed to consider.

IV. Analysis

[38] In this appeal, this Court is called upon to determine whether the Federal Court identified the proper standard of review to be applied to the adjudicator's decision and whether it properly applied that standard. This essentially requires this Court to step into the shoes of the Federal Court and to focus on the adjudicator's decision: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107 at paras. 10–12 [*Horrocks*]; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[39] Here, the Federal Court correctly selected reasonableness as the appropriate standard of review, it being firmly settled that this standard applies to the review of adjudicators' (and the CIRB's) decisions under Division XIV of the *Code*: see *Northern Inter-Tribal Health Authority Inc. v. Yang*, 2023 FCA 47 at para. 49; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, 399 D.L.R. (4th) 193 at paras. 15–18.

[40] However, the Federal Court erred in how it applied the reasonableness standard and wrongfully decided the issues that the adjudicator failed to consider. In short, it "coopered up" the adjudicator's reasons in an unacceptable fashion. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] at paragraph 96, the Supreme Court underscored that, absent exceptional circumstances, a reviewing court should not step in and decide issues of significance that are relevant to the outcome that were argued before

the administrative decision maker that the decision maker neglected to consider. The majority stated as follows at paragraph 97 of *Vavilov*:

> We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[41] Rather than proceeding as it did, the Federal Court should instead have focused on the reasons given by the adjudicator and determined whether the adjudicator reasonably considered the appellant's arguments. Had the Federal Court done so, it would have been apparent that the adjudicator's decision was unreasonable for its failure to address important arguments advanced by the appellant.

[42] Where reasons are given by an administrative decision maker, reasonableness requires that they must address significant arguments made to the decision maker. The Supreme Court of Canada underscored in both *Vavilov* at paragraph 127 and its subsequent decision in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583 [*Mason*] at paragraph 74 that administrative decision makers' reasons must be responsive to what the parties

argued and must address their central concerns and arguments. As the majority of the Supreme Court stated at paragraph 74 of *Mason*:

> An administrative decision maker's reasons must "meaningfully account for the central issues and concerns raised by the parties" ([*Vavilov* at] para. 127). Reasons must be "responsive" to the parties' submissions, because reasons are the "primary mechanism by which decision makers demonstrate that they have actually listened to the parties" ([*Vavilov* at] para. 127 (emphasis in original)). Although an administrative decision does not have to "respond to every argument or line of possible analysis" raised by the parties, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" ([*Vavilov* at] para. 128).

[43] The appellant's arguments on discrimination and the violation of the maternity leave provisions in the *Code* are far from frivolous and were an important part of her case before the adjudicator.

[44] In this regard, human rights law recognizes that discrimination on the basis of sex includes discrimination on the basis of pregnancy: *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1989 CanLII 96 at 1242. This recognition is now enshrined in subsection 3(2) of the *CHRA*.

[45] Further, it is firmly settled that the *CHRA* prohibits both intentional or direct discrimination as well as adverse effect discrimination, which exists when a practice or decision gives rise to discrimination on a prohibited ground in the absence of any intent to discriminate: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, [1985] 2 S.C.R. 536, 1985 CanLII 18 at 551; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221 at para. 89; *Canada (Human Rights Commission) v. Toronto-Dominion*

Bank, [1998] 4 F.C. 205, 1998 CanLII 8112 (C.A.) at paras. 82 (Isaac C.J., dissenting but not on this point), 136–137 (Robertson J.A., majority reasons), 182 (McDonald J.A., concurring reasons). It is also well established that a decision is discriminatory if one of the factors it rested on was discriminatory even if there were many other non-discriminatory factors that also led to the decision: *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591 at para. 46; *Canada (Attorney General) v. Rahmani*, 2016 FCA 249 at para. 4. These are foundational principles of human rights law.

[46] As concerns the interpretation of maternity leave provisions in minimum employment standards legislation, there is support in the case law for the view that proceeding in the fashion the respondent did in this case violates the statutory protections in minimum standards legislation, like the *Code*, afforded to women who take maternity leaves because allowing others to accumulate experience that those who take maternity leaves cannot accumulate renders the right to reinstatement a hollow one.

[47] For example, in *Re Barrie (City) and C.U.P.E. Loc., 23801* (1994), 40 L.A.C. (4th) 168, 1994 CanLII 18700 (Ont. Lab. Arb.), Arbitrator Michel Picher considered a collective agreement provision that reduced an employee's vacation credits for the period of an employee's pregnancy leave. The arbitrator concluded that the prorating of vacation entitlements for employees on pregnancy leave did not constitute discrimination on the basis of sex: at 182. He noted that the provision did not intend to isolate a particular group but rather identified a variety of circumstances where the extended absence of an employee justified the reduction of vacation credits: at 181. Nevertheless, the provision was found to have violated the statutory protection of

the seniority of an employee who exercises their right to pregnancy leave as its effect was to diminish the rights and privileges enjoyed by employees by virtue of their seniority: at 186. The arbitrator held that the concept of seniority in the Ontario minimum standards legislation, similar to the *Code*, was "…sufficiently broad to include 'service'" (at 186). The arbitrator provided as an example an employee "who has been absent for three months on pregnancy leave returns to work and is told that she is now considered three months junior to another employee originally hired on the same day, whether for the purposes of a job competition, lay-off or any other right that relates to seniority or service" (at 185–186). The arbitrator also held that the proration was effectively a penalty as "what was otherwise an accrued right is taken away from the employee by reason only of the fact that she has taken pregnancy leave" (at 189).

[48] Turning now to the case law interpreting Division XIV of the *Code*, the test applied by adjudicators and the CIRB to ascertain whether an employee was laid off due to a lack of work or discontinuance of a function requires an employer to establish that there was an economic justification for the lay off and that it had a reasonable explanation for the selection of the employee to be laid off: *Enoch Cree Nation Band v. Thomas*, 2004 FCA 2, 247 F.T.R. 158 at para. 5; *Kassab v. Bell Canada*, 2008 FC 1181, 337 F.T.R. 152 at para. 24. It is arguable that reliance on discriminatory reasons for selection of the employee to be laid off or making the selection in violation of the maternity leave provisions in the *Code* cannot constitute a reasonable explanation. Thus, the issues the adjudicator failed to address were central to the ability of the respondent to rely on paragraph 242(3.1)(a) of the *Code*.

[49] The appellant submits that this Court should decide these issues and find in her favour on them. We cannot do so, as we would fall into the same error as the Federal Court were we to proceed in this fashion.

[50] The respondent, for its part, would have us dismiss the appeal because it says that it is of no moment that the adjudicator failed to consider the alternate arguments of the appellant because paragraph 242(3.1)(b) of the *Code* would have prevented the adjudicator from considering these issues in any event as there are provisions in the *CHRA* to remedy the alleged discrimination the appellant submits occurred.

[51] However, the respondent did not raise this argument before the adjudicator, and makes it for the first time before this Court. I also note that the respondent's argument is premised solely on the existence of an alternative procedure for redress in the *CHRA* and does not allege that the *Code* elsewhere provided an alternate means of redress available to the appellant for the alleged violation of the maternity leave provisions in the *Code*. As explained above, at the relevant time, paragraph 251.01(1)(a) allowed an employee to complain of a violation of the maternity leave provisions in Part III of the *Code*, except for unjust dismissal, to an inspector. However, the inspector's ability to remedy a complaint unrelated to unpaid wages was limited prior to the introduction of compliance orders in later versions of the *Code*. Although conviction for an offence would have allowed for reinstatement or payment of lost remuneration under subsection 258(2), we received no submissions on how that provision may have remedied the appellant's alleged violation of maternity leave protections.

[52] In my view, it is not certain that paragraph 242(3.1)(b) of the *Code* would operate in the fashion the respondent alleges. The cases that the respondent relies on did not involve paragraph 242(3.1)(a) of the *Code* or consideration of whether the exception in paragraph 242(3.1)(b) of the *Code* applies where the decision to select the employee who is laid off is based on criteria that violate the *CHRA* or other provisions in the *Code*.

[53] *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354, 1995 CanLII 3515 (C.A.) involved an unjust dismissal complaint that raised the same issues as had been settled in the context of an unfair labour practice complaint filed under Part I of the *Code*. The Canada Labour Relations Board (or the CLRB, the predecessor name for the CIRB) possessed exclusive jurisdiction over unfair labour practice complaints, with broad remedial authority to remedy unfair labour practices. By reason of the CLRB's jurisdiction over the unfair labour practice complaints, this Court found that paragraph 242(3.1)(b) of the *Code* meant that an adjudicator has no jurisdiction to consider an unjust dismissal complaint that is in essence identical to an unfair labour practice complaint.

[54] *MacFarlane v. Day & Ross Inc.*, 2010 FC 556, [2011] 4 F.C.R. 117 [*MacFarlane*] involved a situation where the complainant filed both an unjust dismissal complaint and a complaint with the Commission, following her dismissal. The adjudicator found that both complaints were essentially the same and held that paragraph 242(3.1)(b) of the *Code* deprived him of jurisdiction to hear the unjust dismissal complaint. The Federal Court applied the reasonableness standard to the adjudicator's characterization of the nature of the two complaints

and found that the adjudicator's determination that the two complaints were the same was reasonable.

[55] It would appear that the application of the reasonableness standard to a tribunal's characterization of the nature of complaints is no longer appropriate. In *Horrocks* at paragraph 9, the Supreme Court of Canada applied correctness to review an administrative decision maker's characterization of the essential character of the dispute where there was a contest between the jurisdiction of a labour arbitrator and a human rights tribunal. The Supreme Court of Canada also applied correctness to the review of the determination of which tribunal should hear the dispute, finding that the division of jurisdiction between two competing tribunals is one of the categories of questions to which correctness review applies: *Horrocks* at paras. 7 and 12.

[56] Returning to the result in *MacFarlane*, the Federal Court upheld the adjudicator's decision only in part, finding that the adjudicator should have retained jurisdiction to hear the complaint if the Commission declined to hear Ms. MacFarlane's discrimination complaint. In reaching this conclusion, the Federal Court relied on *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, where the Supreme Court of Canada held that statutory tribunals empowered to decide questions of law are required to apply the whole law (including, notably, human rights statutes) to the issues before them.

[57] That said, the Federal Court also concluded that even where no complaint is filed with the Commission, an adjudicator sitting under Division XIV of Part III of the *Code* lacks jurisdiction to hear a complaint if it is in essence a complaint that alleges that a complainant was terminated

for discriminatory reasons in violation of the *CHRA*. Thus, according to *MacFarlane*, as between the two procedures, the primary procedure to remedy a claim that an employee was terminated for discriminatory reasons is under the *CHRA*; redress is available under Division XIV of Part III of the *Code* only where the Commission decides the complaint would be more appropriately dealt with under the *Code*.

[58] Similar to *MacFarlane*, in *Joshi v. Canadian Imperial Bank of Commerce*, 2014 FC 722, aff'd 2015 FCA 105, 474 N.R. 215, leave to appeal to SCC refused, 36440 (24 September 2015), the complainant was dismissed for performance issues and filed complaints of both unjust dismissal and discrimination that were found to be substantially similar. Likewise, in *Geetha Kumari Kommepalli v. BMO Financial Group*, 2020 CIRB 938 [*Geetha*], *Ronald Brown v. Warren Gibson Limited*, 2020 CIRB 948 [*Brown*], and *Bryan Hayes v. The Royal Bank of Canada*, 2021 CIRB 961 [*Hayes*], the CIRB declined jurisdiction in accordance with paragraph 242(3.1)(b) of the *Code*. In *Geetha*, the alternative remedy was found in Part II of the *Code*, while *Brown* and *Hayes* were situations where the complainants alleged that they had been terminated for discriminatory reasons in violation of the *CHRA* and thus were found to have a procedure for redress through the Commission.

[59] On the other hand, in the instant case, it is arguable that the appellant made a somewhat different alternate argument and was not alleging she was terminated for discriminatory reasons as opposed to arguing what sorts of reasons cannot be considered as reasonable by an employer under paragraph 242(3.1)(a) of the *Code* and thus how this provision is to be interpreted. In addition, other aspects of the appellant's complaint (on which she was unsuccessful) alleged

there was no actual lack of work and unquestionably fell squarely within the adjudicator's jurisdiction. Thus, if the respondent's argument were to be accepted, a bifurcation of the complaint would have been required, with some issues proceeding before the adjudicator and others, at least in first instance, proceeding under the *CHRA*. There are real access to justice concerns associated with this sort of bifurcation.

[60] I believe that it would be useful if the issues that Adjudicator Horan failed to consider as well as the applicability of paragraph 242(3.1)(b) of the *Code* to them were first considered by an adjudicator and were not decided in the first instance by this Court. The Court will benefit from an adjudicator's views on these issues and an adjudicator's appreciation of the impact of bifurcation. I would therefore remit these issues to an adjudicator for consideration.

[61] The appellant submits that if the complaint is to be returned to an adjudicator, it should be to a different adjudicator. I agree that this is appropriate in part because the passage of time and lack of a transcript mean that there is little advantage to be gained in remitting the matter to Adjudicator Horan, especially where the issues that were not examined are largely legal ones.

V. Proposed Disposition

[62] I would accordingly grant this appeal, set aside the decision of the Federal Court and allow the appellant's application for judicial review, with costs before both this Court and the Federal Court. I would also set aside Adjudicator Horan's disposition of the appellant's complaint but not the balance of his reasons and findings. I would further remit the appellant's

complaint to another adjudicator to be named by the Minister of Labour for determination of the two alternate arguments discussed in these Reasons that were not considered or fully considered by Adjudicator Horan as well as for consideration of the respondent's argument regarding the application of paragraph 242(3.1)(b) of the *Code* to them.

"Mary J.L. Gleason"
J.A.

"I agree.

Judith Woods J.A."

"I agree.

Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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