Federal Court  Cour fédérale

Date: 20170419

Docket: T-1722-14

Citation: 2017 FC 380

St. John's, Newfoundland and Labrador, April 19, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GARY CURTIS

Applicant

And

BANK OF NOVA SCOTIA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Gary Curtis (The "Applicant") seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, of the decision of Mr. George Monteith, acting as an adjudicator (the "Adjudicator") appointed under Part III of the *Canada Labour Code*, R.S.C., 1985, c. L-2, (the "Code"). In that decision, dated July 11, 2014, the Adjudicator determined that he did not have jurisdiction to hear the Applicant's complaint of constructive dismissal against

his employer, the Bank of Nova Scotia (the "Respondent") and refused to re-open the hearing of the complaint.

II. PROCEDURAL HISTORY

[2] The Applicant commenced this application for judicial review on August 8, 2014. In support, he filed his affidavit sworn on October 14, 2014. The application for judicial was filed by Mr. Osborne Barnwell.

[3] On November 10, 2014, the Applicant filed a Notice of Intention to Act in Person.

[4] By Notice of Motion filed on January 20, 2015, the Respondent sought an Order striking out the affidavit sworn on October 14, 2014, in its entirety, on the basis that it contained evidence that was not before the Adjudicator and in the alternative, an Order allowing the Respondent to examine Mr. Andrew Pinto, the lawyer who represented the Applicant before the Adjudicator.

[5] In response, the Applicant filed a Notice of Motion seeking an Order to strike out the Respondent's Notice of Motion.

[6] The Applicant filed his first Application Record on January 21, 2015.

[7] By Order dated March 6, 2015, Prothonotary Milczynski dismissed the motion, without prejudice to the Respondent to advance the Motion before the Applications Judge.

[8] On March 12, 2015, Prothonotary Lafrenière conducted a mediation pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"). The Mediation was not successful and at its conclusion, Prothonotary Lafrenière ordered that the application continue as a specially managed proceeding.

[9] By further Order made on March 19, 2015, Prothonotary Milczynski ordered costs in the amount of $600.00 to be paid by the Respondent to the Applicant in any event of the cause.

[10] By Order dated April 8, 2015, Prothonotary Lafrenière was appointed Case Management Judge. The Applicant objected to this appointment, on the grounds of possible prejudice due to Prothonotary Lafrenière's participation in the mediation, and asked that another Case Management Judge be appointed. By Order dated April 22, 2015, Prothonotary Milczynski was appointed as Case Management Judge.

[11] By Notice of Motion filed on July 27, 2015, Mr. Andrew Pinto, the former Solicitor for the Applicant, sought leave to intervene in this application as a party, with leave to cross-examine the Applicant and to make oral and written submissions. This Motion was dismissed by Justice Zinn by Order made on August 17, 2015**,** with costs to the Applicant.

[12] On August 26, 2015, the Applicant filed a Notice of Motion seeking leave to cross-examine Ms. Meighan Ferris-Miles, Counsel for the Respondent in the proceedings before the Adjudicator and Ms. Shirley Roberts, Employee Relations Manager with the Respondent. By Order of Prothonotary Aalto, this Motion was dismissed on September 9, 2015.

[13] By Oral Direction dated September 21, 2015, Prothonotary Milczynski directed that the Applicant was permitted to file a reply affidavit, as part of his Application Record, in respect of the affidavit of Mr. Pinto to be filed on behalf of the Respondent. The Respondent filed the affidavit of Mr. Pinto, as part of its Application Record, on October 26, 2015.

[14] The Applicant filed his second Application Record on October 16, 2015.

[15] On November 17, 2015 a Notice of Appointment of Solicitor was filed on behalf of the Applicant, appointing Mr. Anser Farooq as his solicitor.

[16] By Oral Direction dated December 7, 2015, Prothonotary Milczynski directed that the Applicant file his amended Application Record by February 19, 2016 and that the Respondent file its amended Memorandum of Fact and Law by March 14, 2016. The Applicant filed a third Application Record on February 19, 2016.

[17] The Applicant filed another Motion of Intention to Act in Person on February 15, 2016 and he argued the application for judicial review on his own behalf.

III. THE EVIDENCE

[18] The information below is taken from the Certified Tribunal Record, the Applicant's affidavits, sworn October 14, 2014, July 27, 2015 and August 31, 2015, the affidavit of Mr. Pinto, sworn August 10, 2015 filed on behalf of the Respondent, as well as from the transcripts of the cross-examinations that were conducted of the Applicant and Mr. Pinto, and from the Decision of the Adjudicator.

IV. BACKGROUND

[19] The Applicant worked for the Respondent from August 19, 1991 to October 17, 1997. He was rehired by the Respondent on August 8, 2000 to April 30, 2012 as a Mortgage Development Manager. In April 2012, he was paid solely on a commission basis. During that time, he received positive performance evaluations and his delinquency rate was very low.

[20] In February 2012, in the course of an unrelated investigation, the Respondent's Security and Investigation Department identified a number of fraudulent documents used to support mortgages submitted by the Applicant. This triggered an investigation which showed that 11 of 16 mortgage files contained fraudulent documents.

[21] On April 3, 2012, the Applicant received an email from National Director, Mr. Barry Ray, requesting an urgent meeting. That meeting was scheduled for April 10, 2012.

[22] Later on April 3, 2012, the Applicant met with his supervisor, Ms. Sue Pimento, to discuss two of his client files. The Applicant asked if there were any discrepancies with any of his files was told there were no issues. He further asked if Ms. Pimento knew why Mr. Ray wanted to meet with him. Ms. Pimento told the Applicant that his input on market conditions was needed.

[23] At the meeting on April 10, 2012, Mr. Ray told the Applicant he was concerned with the poor performance of Ms. Pimento's team, particularly the decline in the 2012 fiscal year. The Applicant asked if there were any issues with his performance, specifically in relation to the two files discussed with Ms. Pimento on April 3, 2012. Mr. Ray said there were no issues and that the Applicant was exceeding his expected targets in mortgage sales.

[24] On April 24, 2012, Mr. Ray called the Applicant and asked that he attend a meeting with Ms. Shirley Roberts, Employee Relations Manager, the following day. Mr. Ray stated he did not know the nature of that meeting.

[25] The Applicant attended the meeting the following day. Ms. Roberts, Mr. Christopher Hucalak, Corporate Security and a third woman, later identified as Ms. Jessica Feiereisen, an investigator, were present at the meeting. The meeting was recorded, with the Applicant's consent upon the condition that he receive a copy of the recording at the conclusion of the meeting. Notes of that meeting are included in the Certified Tribunal Record at Tab 25.

[26] During the meeting, Ms. Feieresien questioned the Applicant regarding six or seven of his files which she claimed had discrepancies.

[27] At the conclusion of the meeting, Ms. Roberts gave the Applicant a suspension letter dated April 25, 2012 which was signed by her on behalf of Mr. Kevin Conroy, Vice President, National Mortgage Sales. The letter stated that effective immediately, the Applicant was suspended with pay, pending the conclusion of the ongoing investigation.

[28] Ms. Roberts said that this matter was private and not to be discussed with anyone. Ms. Roberts also advised she would update the Applicant by the beginning of the following week.

[29] The following day, the Applicant received calls from several associates inquiring why he was suspended.

[30] On April 27, 2012, the Applicant's workplace email was terminated. The following day, emails from the Applicant's phone were downloaded and copied by the Respondent's IT Security Department.

[31] The Applicant claims he attempted to contact Ms. Roberts and Mr. Conroy on April 30, 2012, but was unsuccessful in doing so.

[32] According to the transcript of his cross-examination, the Applicant contacted Paulette Hayes, an employment lawyer, on April 27, 2012 to discuss his situation. An email from Ms.

Hayes to the Applicant dated April 30, 2012 indicates that the Applicant spoke on the telephone and met with her on April 27, 2012. The email says that Ms. Hayes discussed the consequences of resignation with the Applicant and reviewed a draft resignation letter.

[33] On April 30, 2012, the Applicant submitted a letter of resignation. That letter provides as follows:

> April 30, 2012
>
> Dear Mr. Conroy,
>
> This letter is to inform you of my resignation from my current position as Mortgage Development Manager at Scotiabank, effective immediately.
>
> I appreciate the opportunity to have been employed with Scotiabank and wish you and Scotiabank all the best.
>
> Should you require any additional notice, please feel free to discuss that with me.
>
> Sincerely,
>
> Gary Curtis

[34] By letter dated May 2, 2012, the Respondent accepted the resignation effective April 30, 2012. The Respondent coded the Applicant as “non re-hireable”.

V. THE COMPLAINT

[35] On June 11, 2012, the Applicant filed a complaint under section 240 of the Code. He alleged that he had been constructively dismissed by the Respondent. He claimed an estimated $25,000 in unpaid commissions.

[36] The Respondent objected to the unjust dismissal complaint in August, 2012 submitting that the Applicant had resigned and as such the Adjudicator did not have jurisdiction pursuant to section 240 of the Code. At this time the Respondent proposed that the Adjudicator determine, as a preliminary issue, whether the Applicant had resigned or had been constructively dismissed.

[37] On October 12, 2012, Human Resources Service and Development Canada ("HSRDC") determined that the Respondent violated Part III of the Canada Labour Code in failing to pay the Applicant $37,028.70 in wages. This preliminary determination was reconsidered and the amount owing by the Respondent was reduced to $12,876.50 on November 16, 2012.

[38] The Applicant was initially represented by Mr. Osborne Barnwell, the lawyer who signed the Application for Judicial Review.

[39] In April 2013, the Applicant filed a complaint with the Human Rights Commission of Canada (the "Commission"). He alleged that he had been discriminated against on the basis of race.

[40] The first day scheduled for hearing of the Applicant's Code complaint was July 10, 2013. The proceeding was adjourned pending a determination by the Commission under section 41(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, about the Applicant's complaint to the Commission.

[41] On July 29, 2013, the Applicant retained Mr. Andrew Pinto to represent him in the adjudication of his Code complaint.

[42] On October 9, 2013, the Commission decided not to deal with the Human Rights Complaint as it could more appropriately be dealt with by the Adjudicator.

[43] By letter dated October 29, 2013, Counsel for the Applicant submitted that the Adjudicator should decline bifurcation of the issues and require the Respondent to proceed with its case first.

[44] The Respondent, by letter dated November 6, 2013, sought a determination from the Adjudicator about bifurcation of the hearing and the order of the proceeding. The Respondent proposed that the hearing be split into two stages and that the preliminary issue of jurisdiction be heard first. It also submitted that the Applicant should present his case first. The Respondent requested that the parties address the issue of bifurcation on a conference call with the Adjudicator scheduled for November 8, 2013.

[45] Counsel for the Applicant replied by letter dated November 7, 2013 opposed making submissions on bifurcation in that telephone conference. The letter also says that bifurcation and the order of proceedings are critical to the Applicant and that he insisted on being present during any argument on these issues.

[46] On November 8, 2013, Counsel for the parties and the Adjudicator participated in a conference call to deal with the procedural issues. Counsel for both parties advised the Adjudicator that the parties had reached an agreement as to the proceeding. They agreed that the proceeding would be split into two phases. During the first phase, the parties would address the Adjudicator's jurisdiction, specifically whether the Applicant had been constructively dismissed. The second phase would address whether there was just cause for the dismissal of the Applicant, including whether the Respondent had violated the Applicant's human rights.

[47] The hearing before the Adjudicator took place on November 13 and 14, 2013. At the commencement of the hearing on November 13, the parties, through Counsel, confirmed the agreement to bifurcate the hearing.

[48] On the first day of the hearing, the Applicant and Ms. Roberts gave evidence. During the course of cross-examination of the Applicant, portions of the audio tape of the investigation meeting, which took place on April 25, 2012, were played. A draft transcript, prepared by a legal assistant at Mr. Pinto's firm, was entered into evidence.

[49] On November 14, 2013, before the second day of hearing commenced, the Applicant gave Mr. Pinto a note terminating his services. According to the Applicant, Mr. Pinto told him he could not discharge him in the middle of a hearing. Mr. Pinto then took the note and went to speak with the Adjudicator. He returned and told the Applicant the Adjudicator had said the hearing would continue.

[50] The Applicant was not satisfied that his case had been heard. On November 15, 2013, the Applicant emailed Mr. Pinto and requested that he contact the Adjudicator to re-open the hearing. The Adjudicator was copied on this email.

[51] Mr. Pinto did not comply with this request. The Applicant ended his retainer agreement with Mr. Pinto on November 19, 2013.

[52] By letter dated November 22, 2013, the Applicant, acting on his own behalf, asked the Adjudicator to re-open the hearing to consider his human rights issues. He went on to submit that the letter of resignation dated April 30, 2012 was a "resign for cause". He argued that the Respondent's reckless conduct denied him the opportunity to carry on his business.

[53] The Respondent filed submissions on November 25, 2013. It opposed re-opening the hearing on two grounds: first, the Applicant had the benefit of legal counsel and second, he had ample opportunity to present his evidence at the November 13 and 14 hearing. It submitted that the burden of proof, in a request to re-open the hearing, lay on the Applicant to show that a miscarriage of justice would probably occur if the issue was not re-opened.

[54] The Respondent argued that the Applicant, through his Counsel, consented to splitting the case into two stages. Furthermore, it submitted that the Applicant's Counsel, in concluding his submissions before the Adjudicator, argued that the suspension without pay amounted to constructive dismissal.

[55] The Respondent also submitted that the Applicant's submissions went beyond the narrow issue of whether his suspension without pay was constructive dismissal. In its opinion, the Applicant was now arguing that he was constructively dismissed due to other circumstances.

[56] The Applicant made reply submissions on December 4, 2013.

[57] On January 15, 2014, Counsel for the Respondent submitted a copy of the decision in *Fazal Choudhry v. Bank of Nova Scotia*, [2014] C.L.A.D. No. 10 which he claimed was relevant to the question of the Adjudicator's jurisdiction.

[58] On January 21, 2014, the Applicant requested an extension of time to provide responding submissions on *Choudhry, supra*. An extension to January 29, 2014 was granted.

[59] The Applicant hired Mr. Osborne Barnwell to act as counsel to supplement his submissions on the issue of re-opening the hearing.

[60] In the submissions dated January 29, 2014, the Applicant requested leave to make additional submissions on his request to re-open the hearing. Those submissions were attached to the request.

[61] The Applicant argued that the hearing should be re-opened on the grounds that he was not properly represented. He argued that Mr. Pinto consented to bifurcation contrary to his instructions. He also submitted that the issue of constructive dismissal could not be determined in the absence of assessing the allegation of discrimination.

[62] On February 10, 2014, the Respondent objected to the request for leave to file additional submissions, and made reply submissions on the relevance of *Choudhry, supra*.

[63] In reply submissions dated February 13, 2014, the Applicant submitted that, contrary to the Respondent's position, Mr. Pinto was ineffective.

VI. DECISION UNDER REVIEW

[64] In his decision dated July 11, 2014, the Adjudicator first outlined the procedural history of this proceeding. He said that at the conference call on November 8, 2013, Counsel advised that agreement had been reached as to the bifurcation of the proceeding. Phase 1 would deal with the jurisdictional issue and Phase 2 with the merits of the complaint. He noted that he had asked how the discrimination issue would be addressed and was told it would be addressed in the

second phase. He observed that this agreement was confirmed at the hearing on November 13, 2013, in the presence of the Applicant.

[65] The Adjudicator went on to outline the Applicant's request to re-open the proceeding and the submissions made to support that request.

[66] The first question the Adjudicator considered was whether to grant the Applicant's request, made on January 29, 2014, to make further submissions. The Adjudicator decided to exercise his decision to allow the filing of the additional submissions since the granting of such leave would not unduly prejudice the Respondent.

[67] Next the Adjudicator outlined the position of the Applicant on the issue of re-opening the proceeding. He said that the Applicant argued his right to procedural fairness was breached because his former counsel provided ineffective assistance and breached his duty to the Applicant by failing to follow reasonable and sound instructions.

[68] The Adjudicator summarized the Respondent's position, noting the Respondent argues the Applicant's request does not meet the criteria established by the Courts for the re-opening of a proceeding and amounts to an abuse of process.

[69] The Adjudicator determined that he should only exercise his discretion to re-open a hearing where the applicant demonstrates a miscarriage of justice would likely occur unless the hearing was re-opened; see *Vance v. Vance* (1981), 34 B.C.L.R. 209 (B.C.S.C.). He said that the

Applicant needed to meet the criteria set out in *R. v. B. (W.E.)* (2012), 366 D.L.R. (4th) 690 (O.N.C.A.), to establish incompetency of counsel. He noted that there was a strong presumption against finding counsel incompetent.

[70] The Adjudicator was not satisfied that the Applicant had established the necessary factual basis for his complaint, or that his counsel was ineffective or that any miscarriage of justice would occur if the hearing was not re-opened. He gave no weight to the unsworn and untested allegations made by the Applicant against his former counsel. He said that the Applicant could not complain now since he consented through Counsel to bifurcation and actively participated in the hearing.

[71] The Adjudicator found that there was no basis for the allegation of ineffective representation as the agreement to bifurcate the proceeding was well within the range of reasonable decisions concerning the conduct of the hearing. He questioned whether, on an objective basis, if Mr. Pinto's actions "fall below the range of representation expected of reasonable counsel?" The Adjudicator found that "the answer is clearly no."

[72] Finally, in the Adjudicator's opinion, the strong presumption of competency was not rebutted by the Applicant. He found that the suggestion by the Applicant's current counsel, Mr. Barnwell, that Mr. Pinto "egregiously breached" his duty to be completely without merit and highly improper. The Adjudicator stated that his decision would not have been different had he heard evidence of the alleged discriminatory conduct of the Respondent.

[73] The Adjudicator refused the Applicant's request to re-open the hearing of the complaint.

[74] The Adjudicator next outlined the evidence and submissions of the parties relative to the issue of constructive dismissal.

[75] The Adjudicator said that the issue to be determined was whether the Applicant had voluntarily resigned or was constructively dismissed, that is, whether the Applicant had cause to resign because his suspension was in reality a suspension without pay and a fundamental breach of the terms of his employment. He noted that pursuant to section 240 of the Code, any person may make a complaint if that person was dismissed and considers that dismissal to be unjust.

[76] The Adjudicator adopted the definition of "dismissal" set out in the decision of the Federal Court of Appeal in *Eskasoni School Bd. v. MacIsaac* (1986), 69 N.R. 315 (F.C.A.). He noted the onus lies on the Applicant to establish, on a balance of probabilities, that he was dismissed.

[77] Upon consideration of the evidence, the Adjudicator was not satisfied that the Applicant was constructively dismissed. Relying upon the decision in *Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195 (S.C.C.), he found that the Applicant was placed on administrative suspension with pay.

[78] The Adjudicator found that the Applicant was aware from the letter given to him on April 25, 2012 that he was suspended with pay, and that no decision about his employment had been made.

[79] The Adjudicator did not accept the Applicant's evidence that he protested the suspension at the end of the April 25 meeting because the transcript of that meeting did not reflect this.

[80] The Adjudicator said that the Applicant's belief he had cause to resign was based upon his own perceptions, not on any actions by the Respondent. There were no grounds for the Applicant to conclude he would not be paid. The Respondent did not treat the Applicant's position as vacant. The transfer of his files to another employee was consistent with the right of an employer to place an employee on administrative leave.

[81] The Adjudicator also determined that the Applicant's failure to state that he was resigning for cause in his resignation letter suggests he did not resign because he believed he would not be paid.

[82] The Adjudicator found that there was no ambiguity in the suspension letter and had the Applicant contacted Ms. Roberts, she would have advised him of the policy concerning pay for suspended employees. He concluded that the alternate pay scheme supported the conclusion that the Respondent intended to pay the Applicant while on suspension.

[83] The Adjudicator, while accepting that post resignation evidence was relevant to the issue of whether the Applicant voluntarily resigned, expressed doubt over whether that evidence could be used to buttress the Applicant's belief that he had to resign on April 30, 2012. He went on to say that the fact that the Applicant did not object to Ms. Roberts' findings, that he breached policy, suggested that the Applicant intended to resign voluntarily.

[84] Likewise, the Adjudicator found that because the issue over the payment of commissions did not arise until after the Applicant resigned it could not be a reason for his resignation. The Adjudicator concluded from the Applicant's complaint**,** that he had not been paid for the period of his suspension, confirms that he knew he was suspended with pay at the time he resigned.

[85] Finally, the Adjudicator concluded that the Respondent did not engage in any conduct that had the effect of terminating the contract of employment and as such**,** the Applicant was not constructively dismissed. Since he found that the Applicant had voluntarily resigned, the Adjudicator concluded that he did not have jurisdiction to hear and determine the complaint under section 240 of the Canada Labour Code because there was no dismissal to adjudicate. The complaint was dismissed.

VII. ISSUES

[86] The following issues were addressed by the parties in this Application:

1. What is the applicable standard of review?
2. Should the Applicant's additional affidavits be struck?

3. Should the Court exercise its discretion to not hear this application?
4. Did the Adjudicator err in his decision to bifurcate the hearing?
5. Was the decision not to re-open the hearing reasonable?
6. Was the Adjudicator's finding that the Applicant voluntarily resigned reasonable?
7. Was there reasonable apprehension of bias on the part of the Adjudicator?
8. Did the Adjudicator breach procedural fairness by taking 8 months to render his decision?

VIII. SUBMISSIONS

A. *Applicant's Submissions*

[87] Although the Applicant did not make written submissions on the standard of review, he addressed that issue in the course of the hearing and argued that two standards of review apply, that is correctness and reasonableness.

[88] The Applicant has not made written submissions on the Respondent's motion to strike out his affidavits. He argued, at the hearing, that his affidavits should remain on the record in order to permit him to address the fairness of the proceeding before the Adjudicator.

[89] The Applicant submits that the Adjudicator had a legal obligation to hear the entire complaint because it was evident that the bifurcation would severely prejudice his position. He

also argued that the Adjudicator could only bifurcate the hearing with the consent of both parties and it was clear that he did not consent.

[90] The Applicant further argues that the Adjudicator prevented him from receiving a fair hearing because he was unable to present his complaint regarding discrimination. He submits that the Adjudicator had jurisdiction to hear the Human Rights Complaint and he had instructed the Adjudicator to deal with that issue in his submissions of July 10, 2013, December 4, 2013 and January 29, 2014.

[91] The Applicant submits that the Adjudicator had the discretion to re-open the hearing if the failure to do so would prejudice a party. He argues that he was prejudiced because he was prevented from presenting the full merits of his case.

[92] The Applicant submits that the Adjudicator did not consider all the evidence about Mr. Pinto's incompetence. He argues that Mr. Pinto was incompetent because he did not follow the Applicant's instructions regarding bifurcation; he was not prepared to argue the motion on November 8, 2013 or the merits of the case on November 13, 2013; he produced a transcript of the audio tape against the Applicant's instructions and provided the transcript to the Respondent; and he did not comply with sections 31.1, 5.1 or 5.2 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[93] The Applicant submits that the Adjudicator erred in concluding that he was suspended with pay. He says that the Respondent did not have any evidence of a written policy to pay suspended employees who were compensated solely on commission.

[94] The Applicant argues he had no way of knowing what practice was followed to compensate suspended employees. Further, he submits that the Adjudicator ignored the Respondent's policies surrounding suspension, as discussed in *Choudhry, supra*.

[95] The Applicant also argues that the Adjudicator erred in finding that he had resigned, rather than finding a constructive dismissal. He considered denial of access to his computer system and suspension of his short term benefits to constitute constructive dismissal. He relies upon the decision of *Cabiakman, supra* at paragraph 51 to argue that these two factors show that he had been constructively dismissed.

[96] The Applicant submits that once he was suspended without pay for an indefinite period he was constructively dismissed and entitled to resign for cause; see *Faber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 (S.C.C.) at paragraph 34.

[97] The Applicant also argues that the Adjudicator improperly relied upon the investigation and its allegations in determining whether he was constructively dismissed. He submits the Adjudicator did not consider the Respondent's failure to tell him he would be coded as non re-hireable.

[98] The Applicant submits that the Adjudicator improperly relied upon an audiotape that was not authenticated or adopted into evidence, and upon a transcript that was illegal.

[99] The Applicant argues that the Adjudicator showed bias by not hearing his evidence and ruling in favour of the Respondent. He argues that the Adjudicator's statement that the Respondent had a clear policy of paying suspended employees is false and shows bias.

[100] The Applicant also submits that the Adjudicator improperly defended the actions of Mr. Pinto and that this shows bias.

[101] Finally, the Applicant argues that Adjudicator deliberately delayed issuing his decision to after the expiry of the limitation period to prevent the Applicant from abandoning this proceeding and bringing a claim in civil court.

B. *Respondent's Submissions*

[102] The Respondent argues that two standard of review apply in this proceeding.

[103] For questions of procedural fairness, the Respondent relies on the decision in *Maritime Broadcasting System Ltd. v. Canadian Media Guild* (2014), 373 D.L.R. (4th) 167 (F.C.A.) at paragraphs 47-48, to argue that the reasonableness standard applies.

[104] The Respondent argues that the decision to re-open the hearing is discretionary and should be reviewed on a standard of reasonableness; see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (S.C.C.) at paragraph 53.

[105] The Respondent submits that the question whether there was a dismissal which would give rise to the Adjudicator's jurisdiction under the Code requires an interpretation of the Code and is based upon findings of fact. This decision should also be reviewed on a standard of reasonableness; see *Dunsmuir, supra* at paragraph 54.

[106] The Respondent argues that a court in a judicial review should only consider the evidence before the administrative decision maker; see the decision in *Association of Universities and Colleges Canada et al. v. Canadian Copyright Licensing Agency* (2012), 428 N.R. 297 (F.C.A.) at paragraphs 17-19.

[107] The Respondent submits the limited exceptions to the general rule, including the provision of necessary general background information, evidence which establishes procedural defects, and evidence which shows an absence of evidence before the decision maker, do not apply here, relying on the decision in *International Relief Fund for the Afflicted and Needy (Canada) v. Minister of National Revenue* (2013), 449 N.R. 95 (F.C.A.) at paragraph 10.

[108] The Respondent argues that the affidavits of the Applicant sworn on July 27, 2015 and August 31, 2015 respectively, present new evidence concerning Mr. Pinto's alleged incompetence and that evidence was not before the Adjudicator.

[109] The Respondent argues that the evidence in the two additional affidavits is the very evidence which the Adjudicator noted was absent before him when considering the request to re-open the hearing.

[110] The Respondent also submits that if this Court determines that it is inappropriate to adduce evidence of Mr. Pinto's conduct that was not before the Adjudicator, that is the evidence sent out in the Applicant's affidavits of July 27, 2015 and August 31, 2015, the evidence set out in the affidavit of Mr. Pinto should also be struck or disregarded.

[111] The Respondent submits that judicial review is discretionary and the reviewing court has discretion to deny relief even where a case is made out; see *Strickland v. Canada (Attorney General)*, [2015] 2 S.C.R. 713 (S.C.C.) at paragraphs 37-38.

[112] The Respondent argues that the Applicant sought to re-open the hearing because he did not appreciate the consequences of his decision to resign. It submits that the Applicant failed to provide the Adjudicator with material evidence relating to the issue as to whether he was misinformed as to the potential consequences of resigning, specifically that he had received legal advice prior to his resignation.

[113] The Respondent requests that, on the basis of the Applicant's failure to disclose all material facts to the Adjudicator including the fact that he had sought legal advice before submitting his resignation letter, that this Court should decline to review the decision of the Adjudicator.

[114] The Respondent submits the only two issues in the present proceeding are whether the Adjudicator erred in deciding the Applicant voluntarily resigned and as such he did not have jurisdiction, and whether the Adjudicator erred in refusing to re-open the hearing.

[115] The Respondent submits that the Adjudicator did not err in determining that there was insufficient evidence to establish that the Applicant's former counsel was incompetent and that a miscarriage of justice would occur.

[116] The Respondent argues that the Adjudicator found that the Applicant had failed to establish a factual basis of incompetency of counsel or that the outcome would be different if the hearing were re-opened. It also argues that the Adjudicator concluded that the Applicant must have agreed with the decision to bifurcate the hearing because he acknowledged through counsel the agreement to do so and participated in the hearing for two days, without objection.

[117] The Respondent submits that the Adjudicator's decision not to re-open the hearing was reasonable in light of the lack of evidence in the record about incompetence of counsel.

[118] The Respondent also argues that the Adjudicator reasonably determined that the Applicant was not constructively dismissed.

[119] The Respondent says that the Adjudicator found that there was no basis for the Applicant's alleged belief that he was being suspended without pay. Furthermore, it also notes

that the Adjudicator found that there was nothing in the Applicant's resignation letter to indicate he was resigning because he believed he would not be paid.

[120] The Respondent submits the Adjudicator correctly identified the legal principles applicable to this case. The Adjudicator said that the onus was on the Applicant to establish that he was dismissed within the meaning of the Code. The Adjudicator went on to set out the factors for determining whether a constructive dismissal occurred in the context of an administrative suspension.

[121] The Respondent argues that the Adjudicator applied the legal principles to his findings of fact in a transparent, intelligible and justifiable manner.

[122] The Respondent submits that the Applicant has not presented any evidence to substantiate allegations of bias. It submits that the fact that the Adjudicator did not accept the Applicant's arguments is not evidence of bias or a flaw in the process followed by the Adjudicator.

[123] Finally, the Respondent argues that the Applicant has not presented any evidence to substantiate the allegation that the Adjudicator deliberately delayed making a decision on his application to re-open the hearing.

IX. DISCUSSION

[124] I have set out above the issues that the parties raised and addressed in this application. However, in my opinion, the real matters in issue can be restated as follows :

A. Preliminary Issues

i. Should the affidavits of the Applicant, or any of them, be struck out as argued by the Respondent?

ii. Depending on the disposition of that issue, should the affidavit of Mr. Andrew Pinto be struck out or not considered?

iii. Should the Court hear this application for judicial review?

B. What are the applicable standards of review?

C. Did the Applicant suffer a breach of procedural fairness?

i. Did the alleged incompetence of Mr. Pinto breach procedural fairness?

ii. Did the decision of the Adjudicator in proceeding to bifurcate the jurisdictional issue from the merits of the Applicant's complaint breach procedural fairness?

iii. Did the Adjudicator's refusal to re-open the hearing breach the procedural fairness owed to the Applicant?

iv. Has the Applicant established bias on the part of the Adjudicator?

D. Was the ultimate decision of the Adjudicator, to dismiss the complaint, reasonable?

A. *Preliminary Issues*

i. *Should the affidavits of the Applicant, or any of them, be struck out as argued by the Respondent?*

[125] The Respondent brought a Notice of Motion on January 20, 2015, seeking an order to strike out the original affidavit of the Applicant, that is the affidavit sworn on October 14, 2014, included in the first Application Record filed by the Applicant on January 21, 2015.

[126] By Order made on March 6, 2015, Prothonotary Milczynski dismissed the motion without prejudice to the right of the Respondent to raise the motion again before the Applications Judge.

[127] At the hearing of this application, which began on March 30, 2016, Counsel for the Respondent was given the opportunity to address the motion about the Applicant's affidavit, as a preliminary matter, soon after the Applicant commenced his submissions.

[128] In its Amended Memorandum of Fact and Law, filed on March 4, the Respondent made arguments seeking to strike all of the Applicant's affidavits, that is including the two affidavits sworn on July 27, 2015 and August 31, 2015, included in the further application records filed by the Applicant.

[129] The Respondent, through Counsel, made submissions on March 30, 2016. The Applicant responded on that date and again in October, 2016, when the matter was continued.

[130] The Applicant argued that his affidavits were necessary in order for him to have a full and fair hearing on his application for judicial review.

[131] In the course of the hearing, I outlined the options available to me upon the Respondent's Motion: the Motion could be granted and the affidavits struck out; the Motion could be denied and the affidavits allowed to stand and be considered as the evidence of the Applicant; or the Motion could be dismissed, with no weight being assigned to the objectionable parts of the affidavits.

[132] In her Reasons for Order, Prothonotary Milczynski reviewed the various grounds upon which the Respondent sought the Order to strike the Applicant's original affidavit.

[133] In those Reasons, she said the following:

> [8] Applications for judicial review are summary proceedings. Absent exceptional circumstances (where the impugned evidence is clearly inadmissible, argumentative, abusive and/or prejudicial), and where the Court is satisfied that early resolution of the evidentiary challenge is appropriate (for example so as to relieve the prejudice arising to a party of the expense and time required to respond to the impugned evidence or to ensure a more orderly and expeditious hearing) , challenges to the relevance or admissibility of evidence ought not to be made by way of interlocutory motion (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22*; Canadian Tire Corp. v. PS Partsource Inc.*, 2001 FCA 8). The issue on the within motion is thus whether the Respondent has established sufficient grounds to warrant early intervention. For the reasons below, I am not satisfied that the Respondent has made out these grounds.

> [9] First, it appears that most if not all the material the Respondent challenges is the basis upon which the Applicant made his submissions to the adjudicator in respect of his request to re-open the hearing. Some of it may have been received by the adjudicator (submissions to the adjudicator). Most was not "in evidence" and as the Court was advised on this motion, this material does not form part of the Tribunal Record. The adjudicator described the material he did receive as follows:
>
> > "The Complainant's request to re-open the hearing is based upon unsworn, unproven and unsubstantiated allegations….the assertion of unsworn and untested allegations is not evidence or proof of anything and cannot be relied upon or given any weight in the resolution of the re-opening question." (para. 18 of the decision)
>
> [10] It appears from the notice of the application that the Applicant regards this to be a reviewable error and part of the grounds for judicial review of the adjudicator's decision. While the Respondent urges that the admissibility of this material should be determined now because it essentially seeks to supplement what was before the adjudicator, the effect of determining admissibility may include some consideration of the merits of the application as framed in the notice of application, namely whether the adjudicator's ruling that the Applicant's Counsel was not ineffective or incompetent was fundamentally flawed and constituted an error of law and whether in the circumstances, the refusal to reopen the hearing constituted a reviewable error.
>
> [11] Second, <u>given that the Respondent does not now take issue with the Applicant's affidavit in its entirety, granting the relief sought in the notice of motion that it be struck in its entirety is not appropriate.</u> […]
>
> [Emphasis added]

[134] At paragraph 13, Prothonotary Milczynski found that the Respondent would not be "significantly prejudiced" by raising the motion to strike at the hearing of the application.

[135] At paragraph 15, the Prothonotary observed as follows:

> [15] Accordingly, and having regard to the above, I am not satisfied that there is any good reason to exercise my discretion to determine the merits of the Respondent's motion to strike the Applicant's affidavit or grant leave to examine the Applicant's former counsel in advance of the hearing.

[136] In my opinion, the Respondent's efforts to strike out the further affidavits of the Applicant rely on the same foundation as the original challenge, that the Applicant is improperly trying to introduce evidence about the alleged incompetence of Mr. Pinto into the record that was not before the Adjudicator.

[137] The second affidavit of the Applicant was sworn on July 27, 2015. The third affidavit, sworn on August 31, 2015, is in Reply to the affidavit of Mr. Pinto, the affidavit filed on behalf of the Respondents.

[138] Taken as a whole, the further affidavits seek to expand upon the allegations of the Applicant that he made in his first affidavit. As such, in my opinion the views of Prothonotary Milczynski, expressed at paragraph 6 of her Reasons, remain applicable:

> [6] At about the same time, the within motion was filed to strike the Applicant's affidavit in its entirety, stating that the affidavit contains facts and documents to support the Applicant's allegations that his counsel at the hearing was incompetent and did not follow instructions and that the adjudicator should reopen the hearing. The Respondent states in its notice of motion that "virtually all of the facts and documents in the affidavit were not in evidence before the adjudicator" when he made his decision not to reopen the hearing. At the hearing of the motion, counsel for the Respondent

> acknowledged that some portions of the Applicant's affidavit were proper and could be salvaged, but the objection to most of the affidavit and documentary exhibits was maintained. A proposal was thus made at the hearing of the motion to excise whatever portions the Court found improper and permit the remainder to stand, or allow the Applicant to serve a new affidavit.

[139] Mindful of the relevant jurisprudence, I agree with the submissions of the Respondent that generally, only evidence that was before the decision-maker should be presented to the Court in an application for judicial review; see the decision in *Association of Universities and Colleges Canada, supra* at paragraphs 17-19.

[140] I note that in disposing of the Respondent's original motion against the admissibility of the Applicant's first affidavit, Prothonotary Milczynski noted there was some interplay between the procedural issues and the merits of the Applicant's claim. She noted the lack of "significant prejudice" to the Respondent if the affidavit were allowed to stay on the record. She noted that the Respondent acknowledged that not all of the affidavit was objectionable and that some "portions" of it "could be salvaged".

[141] In the exercise of my discretion, I adopt the reasoning of Prothonotary Milczynski.

[142] I decline to strike out the second and third affidavits filed by the Applicant. The submissions made by Mr. Barnwell to the Adjudicator, upon the request to re-open the hearing, are not strictly speaking "evidence". They are not included in the Certified Tribunal Record but they were before the Adjudicator and there is no prejudice to the Respondent to let that material stay on the record. They are attached to the affidavit of July 27, 2015, as an exhibit.

[143] In the result, I decline to strike any of the Applicant's affidavits and will consider only those paragraphs that are not clearly inadmissible and objectionable.

ii. *Should the Affidavit of Mr. Pinto be struck out or not considered?*

[144] The "new evidence" relating to the conduct of Mr. Pinto comes from his affidavit and cross-examination. The Respondent filed the affidavit of Mr. Pinto in response to the Applicant's affidavits of October 14, 2014 and July 27, 2015. Since the affidavit of Mr. Pinto was introduced by the Respondent, as its evidence, no objection can be taken to that.

[145] Since I have declined to strike any of the Applicant's affidavits, I see no basis to strike Mr. Pinto's affidavit or the transcript of his cross-examination.

iii. *Should the Court hear this application for judicial review?*

[146] The Respondent submits that the Court should exercise its discretion not to hear this application for judicial review because the Applicant did not disclose to the Adjudicator the fact that he received legal advice prior to writing his letter of April 30, 2012.

[147] In my opinion, this argument is without merit.

[148] In the first place, this information only came to Counsel of the Respondent during cross-examination of the Applicant. The Applicant was not represented during that cross-examination.

It is likely that any lawyer acting for the Applicant would have objected to the questions. The Applicant did not object, possibly because he did not realize he could do so.

[149] I am not satisfied that the Applicant was required to disclose his conversations with Ms. Hayes to the Adjudicator. I am far from satisfied that this non-disclosure amounts to bad faith or improper conduct. I decline to accept the Respondent's submissions on this point and decline to exercise my discretion not to hear this application for judicial review.

B. *Standard of Review*

[150] I turn now to the applicable standards of review.

[151] Questions of procedural fairness are reviewable on the standard of correctness; see the decision in *Mission Institution v. Khela*, [2014] 1 S.C.R. 502 (S.C.C.) at paragraph 79.

[152] The allegation of bias is an aspect of procedural fairness for which no deference is owing; see the decision in *Dang v. Canada (Minister of Citizenship and Immigration)* (2014), 470 F.T.R. 117 (F.C.) at paragraph 32.

[153] The Adjudicator's choice of procedure, involving his discretion, is reviewable on the standard of reasonableness; see *Dunsmuir, supra* at paragraph 51.

[154] According to the decision in *Dunsmuir*, *supra* at paragraph 47, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, and fall within a range of acceptable outcomes.

[155] The decision about incompetence of a solicitor is reviewable on the standard of reasonableness since it involves the assessment of evidence, that is the conduct of the solicitor in question. In this regard, I refer to *R. v. G.D.B.*, [2000] 1 S.C.R. 520 (S.C.C.) at paragraph 27.

[156] The impact of incompetence upon the conduct of a hearing is a question of procedural fairness that is reviewable on the standard of correctness, as discussed above.

C. *Did the Applicant suffer a breach of procedural fairness?*

i. *Did the alleged incompetence of Mr. Pinto breach procedural fairness?*

[157] The test to be met when a party alleges incompetence of counsel amounting to a breach of procedural fairness is discussed by the Supreme Court of Canada in *G.D.B.*, *supra* which held as follows at paragraph 26:

> [...] For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

[158] The Applicant argues that Mr. Pinto did not follow his instructions in opposing the Respondent's request for bifurcation. He objects that neither did Mr. Pinto follow his instructions

to request the Adjudicator to re-open the hearing. Consequently, he discharged Mr. Pinto and engaged Mr. Barnwell to act for him on that request.

[159] In his affidavit, Mr. Pinto deposes that he explained the proposed bifurcation to the Applicant. He advised the Applicant that the Adjudicator could decide in favour of the Respondent and focus exclusively on the letter of April 30, 2012. He outlined to the Applicant a strategy of proceeding with a "mini hearing" that would consist of two phases. In the first phase, the Applicant would proceed first with his evidence to address whether he had resigned or had been constructively dismissed.

[160] In the second phase, the Respondent would present its evidence first, and deal with the discrimination complaint and whether the Respondent had cause to dismiss the Applicant.

[161] According to his affidavit and cross-examination, Mr. Pinto made a strategic choice, on the basis of his professional opinion, that this manner of proceeding would best serve the interests of the Applicant and avoid the risk that the Adjudicator would limit his deliberation to the letter of April 30, 2012, rather than consider the broader context including the Applicant's discrimination complaint to the Commission.

[162] I refer to paragraphs 22 and 23 of Mr. Pinto's affidavit as follow:

> I advised the applicant that there was a material risk that the adjudicator would rule in favour of the Band and order bifurcation, focussing exclusively on the resignation letter. The question of whether there had been a dismissal was a threshold jurisdictional issue, and accordingly could properly be raised as a preliminary

> objection to proceeding with the balance of the case. We had extensive discussions with the applicant on this issue.
>
> To mitigate the risks, with the applicant's written and verbal approval, I proposed to proceed on the basis of a "mini-hearing process" (that was different from the Bank's bifurcation proposal) which would be structured as follows: (i) Phase I would involve evidence and submissions regarding whether the applicant had established that he had resigned "with cause" from his employment, including an expansion of the proposed scope of evidence, taking into account events before and after the applicant's resignation letter for the purpose of establishing that the applicant was constructively dismissed, rendering the resignation irrelevant, and the applicant would proceed first, and (ii) Phase II would involve evidence and submissions on the merits of the applicant's discrimination complaint and whether the Bank had just cause to dismiss the applicant, and the Bank would proceed first.

[163] In my opinion, the evidence of the Applicant about the bifurcation issue does not show a failure by Mr. Pinto to follow instructions. I conclude that the Applicant has not shown professional incompetency of Mr. Pinto in this regard.

[164] The overriding consideration is the Adjudicator's authority to control the process. While neither Mr. Pinto nor counsel for the Respondent could definitively predict how the Adjudicator would rule on the Respondent's request to first address the jurisdiction issue, the fact remains that such a decision was clearly in the mandate of the Adjudicator.

[165] On the basis of the evidence in the Certified Tribunal Record and in Mr. Pinto's affidavit, I am not persuaded that Mr. Pinto acted incompetently in his response to the Applicant's instructions to seek re-opening of the hearing.

[166] In my opinion, the Applicant has failed to meet the first part of the test set out in *G.D.B., supra* and it is not necessary for me to consider the second part of that test.

ii. *Did the decision of the Adjudicator in proceeding to bifurcate the jurisdictional issue from the merits of the Applicant's complaint breach procedural fairness?*

[167] The Applicant filed his complaint pursuant to section 240 of the Code which provides, in part, as follows:

> 240 (1) Subject to subsections (2) and 242(3.1), any person
>
> (a) who has completed twelve consecutive months of continuous employment by an employer, and
>
> (b) who is not a member of a group of employees subject to a collective agreement,
>
> may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.
>
> […]

[168] The Adjudicator's choice of procedure involves some discretion, a discretion that comes from the Code at paragraph 242(2)(b) which provides, in part, as follows:

> An adjudicator to whom a complaint has been referred under subsection (1)
>
> […]
>
> (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present

> evidence and make submissions to the adjudicator and shall consider the information relating to the complaint;
>
> […]

[169] There is a presumption that the Adjudicator acted properly in the discharge of his duties. This presumption is captured in the latin maxim *omnia praesumuntur rite et solemniter esse donec probetur in contrarium*. In the absence of proof to the contrary, actions of a public officer are presumed to be performed correctly; see the decision in *J.R. Moodie Co. v. Minister of National Revenue*, [1950] 2 D.L.R. 145 at 158 (S.C.C.).

[170] The Respondent was at liberty to raise the question of jurisdiction. There was nothing improper about doing so.

[171] It is apparent that the Applicant was unhappy with the prospect but I have no evidence to contradict the conclusion of the Adjudicator, that the Applicant had agreed to the process, though his lawyer, and that he was present when that agreement was communicated to the Adjudicator.

[172] In any event, the Adjudicator was master of the process. He was entitled to look first at the question of jurisdiction if he chose to do so.

[173] The critical feature of the chosen process is that a party has the opportunity to make its case; see the decision in *Ontario Provincial Police Commissioner v. Mosher et al.* (2015), 340 O.A.C. 311 (Ont. C.A.) paragraphs 61-63:

> The principle is an amalgam of two components. Each is a right accorded to a party in a proceeding.
>
> First, a right of audience. Said in another way, the right to be heard by the decision-maker. This right compels the decision-maker to allow the party to be heard so that the party has the opportunity to present his or her point of view: *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.), at pp. 234-35.
>
> Second, and this arises out of the right to be heard, notice of the hearing sufficient in time and substance to enable the party to present his or her case on the issues to be decided: *T.W.U. v. Canadian Radio-Television & Telecommunications Commission*, [1995] 2 S.C.R. 781 (S.C.C.), at para. 29; *Supermarchés Jean Labrecque*, at p. 235.

[174] Although this decision was in the context of criminal law, the general principle applies here. The question is whether the Applicant received a fair hearing.

[175] There was no breach of procedural fairness by the Adjudicator in choosing to proceed first with the question of jurisdiction.

[176] Since there was no breach of procedural fairness, the procedural choice of the Adjudicator is to be reviewed on the standard of reasonableness.

[177] The Adjudicator addressed the issue of bifurcation in his decision at paragraphs 5 and 6. His reasons meet the standard of reasonableness; they are transparent, justifiable and intelligible.

iii. *Did the Adjudicator's refusal to re-open the hearing breach the procedural fairness owed to the Applicant?*

[178] The Applicant pleads that the refusal of the Adjudicator to re-open the hearing, to allow him to present the full merits of his case, was prejudicial. He argues that the refusal to re-open shows that the Adjudicator did not consider all of the evidence of Mr. Pinto's incompetence.

[179] In my opinion, the Applicant has mischaracterized the issue. A decision to re-open a hearing lies within the discretion of the decision maker. As noted above, professional incompetence can give rise to a breach of procedural fairness but the determination of professional incompetence is subject to review on the standard of reasonableness.

[180] Mr. Pinto's evidence and the Adjudicator's decision show that the Applicant participated in both the preparation for the hearing and the hearing itself. In my opinion, the Applicant knew that the hearing had been bifurcated and had instructed Mr. Pinto to proceed in that manner.

[181] The Adjudicator found that the Applicant was aware that the hearing would proceed upon bifurcation of the issues. The Adjudicator noted that the Applicant was in attendance at the hearing. In his decision he clearly said he was satisfied that there was no basis for allegations of incompetency against Mr. Pinto, in respect of this issue.

[182] The Adjudicator determined there was no basis for re-opening the hearing and referred to the relevant jurisprudence upon an re-opening application, including *Vance, supra* and *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (B.C.C.A.).

[183] Although the Applicant raises this issue as one of procedural fairness subject to review on the standard of correctness, the real issue is the manner in which the Adjudicator exercised his discretion, in disposing of the request to re-open.

[184] Insofar as any procedural fairness argument arises, I am satisfied that denial of the re-opening request did not breach the procedural fairness due to the Applicant.

[185] It is apparent from his decision, that the Adjudicator considered the request to be one involving discretion. A discretionary decision is reviewable on the standard of reasonableness. I am satisfied that the Adjudicator's decision, on this issue, meets that standard.

[186] I am also satisfied that the Adjudicator reasonably assessed the allegations of incompetence and considered the relevant jurisprudence, including *B.* (*W.E.), supra*.

iv. *Has the Applicant established bias on the part of the Adjudicator?*

[187] The Applicant alleges that the Adjudicator demonstrated bias by refusing to hear his complaint on its merits, by defending the actions of Mr. Pinto and by delaying his decision, which interfered with his right to commence a civil proceeding.

[188] The test for bias is addressed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), where the Supreme Court of Canada said the following at paragraph 46:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[189] The Respondent argues that there is no evidence to support the Applicant's allegations.

[190] I agree.

[191] The decision of the Adjudicator to dispose of the Applicant's complaint on the basis of jurisdiction, rather than after a full hearing on the merits, does not, *per se*, establish bias.

[192] The fact that the Adjudicator did not find the actions of Mr. Pinto to amount to incompetence does not inevitably lead to the conclusion that he was biased. The Applicant does not agree with the Adjudicator's conclusion but that does not establish bias.

[193] It is true that there was a long time between the hearing and delivery of the Adjudicator's decision. However, there is no evidence that this delay was motivated by any improper motives.

[194] Again, I agree with the position of the Respondent that there is no evidence to support the allegation that the Adjudicator delayed making his decision, with the aim of limiting the Applicant's ability to pursue a remedy in other forums.

[195] I see no basis for a finding of bias against the Adjudicator on any of the grounds advanced by the Applicant.

D. *Was the Adjudicator's finding that the Applicant voluntarily resigned reasonable?*

[196] In his decision, the Adjudicator set out the background to the Applicant's complaint and then proceeded to deal with the application to reopen and the respondent's preliminary objection to jurisdiction. These issues are intertwined since the Applicant's request to re-open was based upon his view that bifurcation of the issues, for the purpose of addressing jurisdiction, compromised his right to a fair hearing.

[197] The Adjudicator denied the request to re-open and gave reasons for his decision.

[198] He noted in particular the Applicant's allegations about the incompetence of Mr. Pinto and the alleged failure of Mr. Pinto to follow instructions. The Adjudicator rejected these submissions, on the basis of lack of evidence. It is apparent that he assessed the conduct of Mr. Pinto in the hearing before him and found nothing lacking.

[199] The Adjudicator then proceeded to deal with the substance of the issue before him about the "threshold issue", that is whether the Applicant had been constructively dismissed or had resigned from his employment with the Respondent.

[200] The Adjudicator reviewed the evidence submitted by the respondent concerning the Applicant's employment and the files which gave rise to the investigation, subsequently leading to the letter of April 25, 2012. The Adjudicator characterized the actions of the Respondent as an "administrative suspension" and not a dismissal. He rejected the Applicant's characterization that he was suspended without pay and found as well that there was nothing in the Applicant's letter of April 30, 2012 to show that he was resigning because he believed that he would not be paid.

[201] The Adjudicator reviewed the submissions of the Applicant in support of his argument about constructive dismissal. The Adjudicator rejected those submissions and determined that the Applicant had resigned his employment, following a period of reflection, that is over the weekend between receipt of the letter of April 25, 2012 and delivery of his letter dated April 30, 2012. The Adjudicator reviewed relevant jurisprudence relating to the decision of the Federal Court of Appeal in *Eskasoni School Board*, *supra* and the decision of the British Columbia Supreme Court in *Osachoff v. Interpac Packaging Systems Inc.* (1992) 44 C.C.E.L. 156 (B.C.S.C.).

[202] In paragraph 48 of his decision, the Adjudicator referred to the factors for consideration in finding constructive dismissal, as follows:

> The employer must make a unilateral and fundamental change to one or more of terms or conditions of an employment contract.
>
> 1. The employee must treat the unilateral change as a repudiation of the contract of employment by the employer and resign.
>
> 2. The employee must respond promptly to the unilateral action of the employer. If he or she continues in employment under the changed

> terms of employment a risk is run that the employee will be deemed to have accepted the altered terms.
>
> 3. The test as to whether the employer substantially changed the essential terms of an employee's employment contract is an objective one. Would a reasonable person in the same situation as the employee have considered that the employer was changing the essential terms of employment in a substantial way? The determination is based on the facts that are known at the time that the employer announces the proposed change.

[203] At paragraph 50 of his decision, the Adjudicator said the following:

> Further, where an employee claims constructive dismissal, Finlayson J.A. in *Smith*, above at paragraph 8, opined that constructive dismissal "must be founded on conduct by the employer and not simply on the perception of that conduct by the employee. The employer must be responsible for some objective conduct which constitutes a fundamental change in employment of a unilateral change of a significant term of that employment." With respect to whether a change in terms amounts to a fundamental breach of contract, Jenkins J. in *McKay*, above at paragraph 26 stated that it depends upon the following considerations.
>
> (i) the breach and its degree
>
> (ii) the intention of the parties, and
>
> (iii) the prevailing circumstances.

[204] In paragraph 53, the Adjudicator observed that the jurisprudence requires evidence of both the subjective and objective intention in assessing whether an employee voluntarily resigned his or her position.

[205] At paragraph 54, the Adjudicator said that the issue before him was whether the evidence showed that the Applicant was constructively dismissed by the Respondent on April 25, 2012, thereby "negating and rendering his resignation on April 30, 2012 irrelevant".

[206] At paragraph 55, the Adjudicator set out his conclusion as follows:

> Upon review of the evidence, I am not satisfied that the evidence supports the conclusion that the Complainant was constructively dismissed by the Respondent. Rather, the evidence supports the conclusion that the Complainant was placed on an administrative suspension with pay consistent with the conditions respecting the Respondent's right to do so set out in *Cabiakman*, above, when he voluntarily resigned on April 30, 2012. […]

[207] In the succeeding paragraphs, the Adjudicator referred in detail to the evidence before him and reached a further conclusion, that the Applicant had resigned voluntarily and in order to protect his "future career opportunities".

[208] Following review of the evidence and the applicable legal principles, the Adjudicator set out his ultimate conclusion as follows:

> Accordingly, on the facts before me and for the above reasons, I must conclude that the Complainant was not constructively dismissed but rather voluntarily resigned his position. The preliminary objection of the Respondent is allowed and, as a result, I have no jurisdiction to hear and determine the complaint because there is no dismissal to adjudicate. The complaint is, therefore, dismissed.

[209] At issue before me is whether the Adjudicator's conclusion is reasonable, within the meaning of "reasonableness" set out in *Dunsmuir, supra,* referred to above.

[210] It is not the role of a court upon judicial review to re-weigh the evidence; see the decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[211] However, in assessing the reasonableness of the Adjudicator's decision, I can look at the evidence that was before him. The evidence before the Adjudicator related to events pre-dating and following the Applicant's resignation.

[212] Having considered that evidence, as well as the relevant parts of the affidavits and cross-examinations filed in this application for judicial review, and the submissions of the parties, I am satisfied that the Adjudicator's decision is reasonable.

[213] The Adjudicator set out the relevant legal principles. He identified the legal burden upon the Applicant to show that he was dismissed, within the meaning of the Code. He identified the factors to be considered in determining whether a constructive dismissal took place in the context of an administrative suspension.

[214] The Adjudicator applied the relevant legal principles to his factual findings, in a transparent, intelligible and justifiable manner.

[215] The Adjudicator's conclusion, that the Respondent had not fundamentally changed the terms of the Applicant's employment so as to give rise to a constructive dismissal, was reasonable.

[216] The Adjudicator's consideration of the resignation letter and his review of the Applicant's actions following submission of that letter was reasonable. The Adjudicator noticed that the Applicant did not question the notation on his Record of Employment, that he had quit. He noted that the Applicant did not seek to withdraw his letter of resignation or assert that he had resigned for cause. He rejected the Applicant's plea that he had been suspended without pay and noted that the Applicant did not immediately protest non-payment of his commission but waited until June, when he filed his complaint under the Code.

[217] In my opinion, considering the evidence that was before the Adjudicator, the Adjudicator reasonably considered the actions of the Applicant following delivery of his letter of April 30, 2012. The Adjudicator was required to consider the evidence before him. He was required to assess that evidence in light of the relevant legal principles. The standard of reasonableness means that a decision maker can choose from a range of options in making a decision.

[218] Considering the evidence and submissions that were before the Adjudicator, and considering the standard of review which I must apply, I am not persuaded that the decision of the Adjudicator was unreasonable.

X. CONCLUSION

[219] In the result, this application for judicial review is dismissed. In its Memorandum of Fact and Law, the Respondent sought costs if successful. Pursuant to Rule 400(1) of the Rules, the Court enjoys full discretion over costs. In the exercise of that discretion, there will be no Order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. In the exercise of my discretion pursuant to the *Federal Courts Rules,* SOR/98-106, there is no Order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1722-14
STYLE OF CAUSE:	GARY CURTIS v. BANK OF NOVA SCOTIA
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	MARCH 30, 2016; OCTOBER 11 2016 AND OCTOBER 12, 2016.
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DATED:	APRIL 19, 2017

APPEARANCES:

Gary Curtis Glenyss Curtis	FOR THE APPLICANT (ON HIS OWN BEHALF)
Ian Dick Jennifer Maurer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT