

**Date: 20080423**

**Docket: A-285-07**

**Citation: 2008 FCA 154**

**CORAM: RICHARD C.J.  
SEXTON J.A.  
EVANS J.A.**

**BETWEEN:**

**JOHN COLISTRO**

**Appellant**

**and**

**BMO BANK OF MONTREAL**

**Respondent**

Heard at Edmonton, Alberta, on April 23, 2008.

Judgment delivered from the Bench at Edmonton, Alberta, on April 23, 2008.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**EVANS J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Edmonton, Alberta, on April 23, 2008)**

**EVANS J.A.:**

[1] This is an appeal by John Colistro from a decision of the Federal Court (2007 FC 540), in which Justice Martineau dismissed his application for judicial review to set aside a decision of an Adjudicator appointed under section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. In his decision, dated August 16, 2006, the Adjudicator rejected the complaint of unjust dismissal that Mr Colistro had made under section 240 of the Code. Mr Colistro had argued that his resignation from

his employment with the Bank of Montreal, after 30 years of service, was not voluntary, because the humiliating and hostile environment at the Bank constituted constructive dismissal.

[2] Mr Colistro bases his appeal on three grounds. First, the Adjudicator's decision should be set aside because his conduct at the hearing gave rise to a reasonable apprehension of bias, in that the Adjudicator shook hands with a witness for the Bank and interrupted the cross-examination by Mr Colistro's counsel of one of the Bank's witnesses.

[3] We do not agree. A party must make an allegation of bias as soon as reasonably possible in the circumstances, and is not entitled to wait until informed of the decision. Mr Colistro was represented by counsel at the hearing, who did not at that time allege bias. Mr Colistro first raised the issue of bias in his notice of application for judicial review. This was too late. In any event, we agree with the Applications Judge that, on the evidence before him, the allegation of bias is without merit.

[4] Second, Mr Colistro says that the absence of a transcript of the hearing before the Adjudicator constituted a breach of the duty of fairness. Neither Mr Colistro nor his counsel requested that the hearing be recorded. The absence of a transcript was not a ground relied on before the Applications Judge, and should not be raised, for the first time, on appeal. Further, there is no general duty to record administrative proceedings, and we are not persuaded that the absence of a transcript prevents us from fairly determining the substantive grounds on which Mr Colistro challenges the Adjudicator's decision. Both parties were permitted to file affidavit evidence with

regard to particular oral evidence given at the hearing, and otherwise to supplement the record for review. There was also a substantial amount of documentary evidence in the record.

[5] Third, Mr Colistro argues that the Adjudicator erred in making some of the findings of fact on which he based his conclusion that the working environment at the Bank was not so hostile that Mr Colistro was effectively forced to resign.

[6] The standard of review of the Adjudicator's findings of fact is set out in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C.1970, c.F-7, namely that the decision was based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him. This standard connotes a high degree of deference. The Adjudicator's application of the legal test for constructive dismissal is a question of mixed fact and law and, as such, is presumptively reviewable for unreasonableness. The presence of a strong preclusive clause in section 243 of the Code also clearly indicates the applicability of the unreasonableness standard. See *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 52 and 53.

[7] The Adjudicator dealt with each of the incidents relied on by Mr Colistro to support his allegation that he was constructively dismissed. The Adjudicator reviewed in his reasons the principal items of evidence, explaining why he accepted the testimony of some witnesses over that of others, and set out his conclusions, finding that neither individually nor collectively did they constitute constructive dismissal.

[8] The Adjudicator may not have mentioned in his reasons all the evidence presented to him, and was under no obligation to do so, and may possibly have made some mistakes. However, like the Applications Judge, who carefully reviewed the evidence and the Adjudicator's findings, we are not persuaded on the basis of Mr Colistro's submissions that, if there were defects in the Adjudicator's factual findings, they were sufficiently important or serious as to warrant our intervention under paragraph 18.1(4)(d), or that the Adjudicator's conclusion that Mr Colistro had not established constructive dismissal was unreasonable. We would only emphasize that it is not the role of the Court on an application for judicial review to re-determine the facts, but merely to ensure that they have some rational support in the evidence.

[9] Finally, there is no basis on which this Court may interfere with the exercise of discretion by the Applications Judge to award costs to the Bank.

[10] For these reasons, the appeal will be dismissed.

“John M. Evans”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-285-07

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MARTINEAU  
DATED MAY 23, 2007, DOCKET NO. T-1596-06)**

**STYLE OF CAUSE:** John Colistro v.  
BMO Bank of Montreal

**PLACE OF HEARING:** Edmonton, AB

**DATE OF HEARING:** April 23, 2008

**REASONS FOR JUDGMENT OF THE COURT BY:** RICHARD C.J., SEXTON, EVANS,  
J.J.A.

**DELIVERED FROM THE BENCH BY:** EVANS, J.A.

**APPEARANCES:**

Mr. John Colistro ON HIS OWN BEHALF

Mr. Daniel Hagg FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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