

SUPREME COURT CLARIFIES TEST FOR CONSTRUCTIVE DISMISSAL

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In a recent decision, *Potter v. New Brunswick (Legal Aid Services)*, the Supreme Court of Canada clarified the test for constructive dismissal offering important lessons for employers about the significance of open communication with employees, and the propriety of a workplace suspension.

What Happened?

David Potter (“Potter”) was the Executive Director of the Legal Aid Services Commission of New Brunswick (the “Commission”). Four years into his seven-year appointment, Potter commenced a leave for medical reasons. Prior to his leave, the employment relationship had deteriorated resulting in negotiations for a buyout of the balance of his contract. Unbeknownst to Potter, the Commission had also sent a letter to the Minister of Justice recommending Potter be dismissed for cause.

As he was about to return to work Potter was told not to do so “until further direction”, although he continued to be paid his regular wages. Eight weeks later, Potter commenced an action for constructive dismissal.

Trial Decision

The New Brunswick Court of Queen’s Bench held against Potter, concluding he had not been constructively dismissed but rather resigned by virtue of having launched the constructive dismissal lawsuit. According to the trial judge, the Commission had not done anything that could have led an objective observer to conclude Potter had been removed from his position permanently, so as to constitute a constructive dismissal.

Critical to this finding was the trial judge’s conclusion the Commission had the discretion to supervise Potter in his role as Executive Director, including the power to suspend in order to allow the Commission to continue buyout negotiations. On the other hand, by taking the “dramatic move” to sue for constructive dismissal, Potter essentially destroyed any chance of a productive working relationship between the parties, amounting to a resignation.

Court of Appeal

The New Brunswick Court of Appeal found that Potter had not been constructively dismissed as there had not been a “fundamental or substantial change to [his] contract of employment”. While his suspension was indefinite, there were no other *indicia* of constructive dismissal: no one was appointed to replace Potter; he was not asked to return his cellphone, laptop or other belongings; and he continued to be paid his regular salary.

Supreme Court of Canada

Overtaking the decisions of the lower courts, the majority of the Supreme Court laid out a two-part test for constructive dismissal:

Part 1: An express or implied term of the employment contract has been breached.

Part 2: The breach is sufficiently serious to constitute constructive dismissal.

In the case of an administrative suspension, the burden of proof rests with the employer to demonstrate the authority to suspend is an implied term of the employment contract and reasonable in the circumstances. If not, the employment contract has been breached.

Once a breach has taken place, the question becomes this: At the time of the breach, would a reasonable person have believed an essential term of the employment contract had been substantially

changed? This is a highly fact specific analysis involving an assessment of whether the change is within the reasonable scope of the employee's job. To this end, a substantial change can take the form of a single unilateral act by an employer, or a series of acts which, taken together, demonstrates the employer no longer intends to be bound by the contract.

Turning to Potter, the Supreme Court found: (i) His suspension breached the employment contract because the Commission lacked authority under the *Legal Aid Act* to suspend him with pay (Part 1 of the test); and (ii) Because the Commission had not been forthright with Potter about the reasons for his suspension this led him to *reasonably conclude* he had been constructively dismissed (Part 2 of the test).

Lessons for Employers

The Supreme Court's decision offers the following important lessons for employers:

- Absent express or implied authority to do so, an employer may not have unfettered discretion to withhold work from an employee, even if the employee continues to be paid.
- Absent reasonable justification, a suspension, particularly one of indefinite duration, could amount to a constructive dismissal of employment.
- When drafting an employment agreement, consider including a provision which expressly permits an employee to be suspended for an administrative reason.
- An employer should be forthright with an employee about the reasons for a suspension.
- Prior to changing any term or condition of employment, an employer should carefully consider whether the change could be viewed as "substantial", so as to trigger constructive dismissal liability.
- The recently stated "duty of honest performance" (see Sherrard Kuzz LLP News blast dated January 2015: "***New legal duty of honest performance: What it could mean for employers***") has now been applied in the employment context, reinforcing the importance of maintaining lines of communication with employees and providing honest reasons for decisions made.

To learn more and for assistance preparing employment contracts tailored to your workplace, contact a member of Sherrard Kuzz LLP.



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