

# Don't fear 'administrative' leave

*When used properly, administrative leave can be an important tool for employers when dealing with problem employees*

| BY TOM GORSKY AND LEAH SIMON |

**REQUIRING** an employee to take an "administrative" leave can place an employer in a dicey situation. On the one hand, an administrative leave may be necessary where the alternative — allowing the employee to remain in the workplace — would be disruptive or even risky for the business. On the other hand, an administrative leave of indefinite duration can expose an employer to the potential for a constructive dismissal claim.

The truth is, a properly planned administrative leave can be an invaluable tool for an employer. It can provide precious time to conduct a workplace investigation or complete ongoing negotiations while the employee is out of the workplace. To

illustrate this point, consider the recent case of *Potter v. New Brunswick Legal Aid Services Commission*.

David Potter was the executive director of the New Brunswick Legal Aid Services Commission. The commission had significant performance issues with Potter, which became more serious when harassment complaints were

**Company negotiated for a voluntary departure in exchange for a severance package while it prepared to conduct an investigation into harassment complaints.**

laid against him. Ultimately, the commission decided to terminate Potter's employment, which led to negotia-

tions aimed at securing his voluntary departure in exchange for a severance package.

At the same time negotiations were taking place, the commission began preparations to conduct a formal investigation into the harassment complaints against Potter. However, prior to the investigation beginning, Potter went on a disability leave. During his leave, negotiations continued on the terms of his departure in the hope an agreement would be reached prior to Potter's return.

Unfortunately, negotiations did not conclude as quickly as hoped, and shortly before Potter's scheduled return to work, the commission directed him to remain at home, with full pay and benefits, until further notice — he was placed on administra-

## DISCRIMINATION

## Important to keep paying employee on administrative leave

tive leave). The commission intended to use this additional time to conclude the ongoing negotiations.

Two months later, while settlement discussions continued, Potter commenced an action against the commission claiming he had been constructively dismissed by virtue of his forced administrative leave. Potter relied on a body of case law in which it had been found that, at least in some circumstances, an employee assigned no employment duties can claim constructive dismissal, even if paid full salary and benefits.

Both the trial judge and New Brunswick Court of Appeal held that Potter's indefinite administrative leave did not result in his constructive dismissal. In reaching its decision, the Court of Appeal identified and applied the following six factors:

- The duration of the suspension.
- Whether another individual had been appointed to replace the suspended employee.
- Whether the employee had been asked for his keys to the workplace.
- Whether the employee continued to be paid and receive benefits.
- Whether there was evidence the employer intended to terminate the employee at the time of the administrative leave/suspension.
- Whether the employer had suspended the employee in good faith — that is, for bona fide business reasons.

Considering the first factor, the Court of Appeal found the indefinite duration of the leave did support a finding of constructive dismissal. However, this factor alone was not sufficient to trigger a constructive dismissal. The court emphasized the following: First, Potter never expressed concern about the indefinite nature of his administrative leave, nor did he seek clarification about its duration. Second, the suspension did not reflect an intention on the part of the commission to unilaterally remove Potter's employment duties on a permanent

basis. The administrative leave was implemented for sound business reasons — to allow the parties a period of reprieve during which they could continue to negotiate an amicable settlement to govern Potter's departure.

### Bottom line for employers

If used properly, an administrative leave can be an important tool because it can provide an employer with the time necessary to follow legally recommended procedures which can reduce the risk of liability. When contemplating the use of an administrative leave, employers should consider the following:


### The suspension did not reflect an intention on the part of the employer to unilaterally remove the employee's employment duties on a permanent basis.

**Necessity.** Place an employee on administrative leave only if it is necessary to protect the health and safety of other employees or the integrity of the business. Otherwise, an employer may have difficulty defending the bona fides of its decision.

**Pay the employee.** Whenever possible, continue all forms of the employee's remuneration throughout the leave period so the employee is kept "whole." While it may be unpalatable, a failure to compensate an employee during an imposed leave of absence is likely to be viewed as disciplinary in nature and will weigh strongly in favour of a finding of constructive dismissal.

**Reserve judgment.** During the leave, avoid pre-judging the ultimate outcome, and taking steps that suggest termination is a foregone conclusion. This includes advertising to fill the employee's position, issuing a record of employment or any other step suggesting the employer has already decided to terminate the employment relationship.

**Maintain confidentiality.** During the period of leave, avoid discussing publicly, or suggesting to others in the workplace, the employee has been or will be terminated. Share information with discretion and only on a "need-to-know" basis.

**Timeliness.** While rushing to judgment is imprudent, moving too slowly gives rise to other concerns. The longer an individual remains on an indefinite administrative leave, the more likely the leave could be found to be a constructive dismissal. Take the time necessary to make a reasoned decision, but once the decision is made, act in a timely fashion. 

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