

Litigation & Employment Law

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Supreme Court of Canada: Paid “Administrative” Employee Suspension Amounts to Constructive Dismissal

In a recent ruling, the Supreme Court of Canada (SCC) has clarified whether and in what circumstances a non-unionized employee who is suspended with pay may claim constructive dismissal.

In *Potter v. New Brunswick Legal Aid Services*, the SCC held that: (i) courts must take a flexible approach in determining whether a constructive dismissal has occurred; (ii) the imposition of an administrative suspension must be authorized by the contract of employment or be based upon legitimate business reasons; and (iii) the implied duty of good faith in contractual dealings requires that an employer be honest, reasonable, candid and forthright with its employees.

Background

The plaintiff, David Potter, was appointed Executive Director of the New Brunswick Legal Aid Services Commission (the “**Commission**”) for a seven-year term in 2006. However, Mr. Potter’s relationship with the Commission deteriorated after only a few years and both parties began negotiating a buyout of his employment contract. The negotiations were ongoing when Mr. Potter went on sick leave. Unbeknownst to Mr. Potter, during this sick leave, the Commission decided to terminate his employment for just cause and recommended this course of action to the province’s Minister of Justice. With a view to facilitating a buy-out of the balance of Mr. Potter’s employment contract, the Commission placed Mr. Potter on indefinite suspension with pay and temporarily delegated his responsibilities to another employee. Mr. Potter did not return to work,

and commenced litigation against the Commission claiming he had been constructively dismissed. In response, the Commission stopped Mr. Potter’s salary and benefits, alleging that the litigation effectively constituted a resignation.

The Commission was successful at trial before the New Brunswick Court of Queen’s Bench and at the Court of Appeal. Both courts held that the Commission had legal authority to suspend Mr. Potter with pay and that the appointment of an interim replacement did not constitute a repudiation of the employment contract between them. Both courts agreed with the Commission that, by commencing litigation against his employer, Mr. Potter had effectively resigned from his position by making untenable the continuation of the employment relationship.

Supreme Court of Canada Decision

The SCC reversed the lower courts’ decisions.

In ruling in favour of Mr. Potter, the SCC held that, as the Commission lacked the authority to suspend the plaintiff for the reasons it gave, he had been constructively dismissed and was entitled to damages for wrongful dismissal. In arriving at this decision, the SCC provided the following commentary on the law of constructive dismissal and the implied duty of good faith in employment contracts:

1. Constructive dismissal is a legal construct arising when actions of the employer evince an intention no longer to be bound by the employment contract. The burden of establishing constructive dismissal rests on the employee. If successful, the employee is entitled to damages in lieu of reasonable notice of termination.
2. Courts must take a flexible approach in making findings of constructive dismissal. Unilateral action by the employer breaching an express or implied term of the employment contract, such as

changes to the employee's compensation, work assignments or place of work, may constitute constructive dismissal. The test is whether the breach substantially alters an essential term of employment. The court must ask whether "at the time the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed." This test also applies to a series of actions if the cumulative effect over time results in continued employment becoming intolerable and demonstrates that the employer no longer intends to be bound by the employment contract.

3. In cases involving administrative suspension, the employee must first demonstrate that the suspension constitutes a fundamental or substantial change to the employment contract. The burden will then necessarily shift to the employer, who must show that the suspension is both reasonable and justified based on either an express or implied grant of authority in the employment contract. There is no rigid framework for determining whether a particular administrative suspension is wrongful. The factors to be considered will vary and depend on the nature and circumstances of the suspension.
4. An administrative suspension not authorized explicitly within the employment contract will amount to constructive dismissal - even if paid - unless it is based on "good faith business justifications" and "legitimate business reasons". According to the implied duty of good faith in contractual dealings, recently established by the SCC in *Bhasin v. Hrynew*, an employer must be honest, reasonable, candid and forthright with its employees. In most circumstances, a suspension will not be reasonable or justified without a basic level of communication with the employee.
5. Commencing litigation against one's employer will not necessarily amount to resignation or other repudiation by the employee as long as the employment relationship has not become untenable or if the employee continues to work under protest. Employees have a duty to mitigate their damages by remaining in the workplace if doing so would not be objectively unreasonable.

Key Points for Employers

The SCC stated, "No employer is at liberty to withhold work from an employee either in bad faith or without justification." In so doing and in ruling that administrative suspensions even with pay of non-unionized employees may amount to constructive dismissal, the SCC has effectively restricted the unqualified use of such an approach by employers.

Employers should carefully consider the terms of the relevant employment contract before suspending a particular employee and may wish to mitigate exposure to constructive dismissal by adding explicit authorization for suspensions into future employment contracts. If administrative suspension is not expressly provided for within the employment contract, an employer should only proceed with the suspension if it is clearly reasonable and justifiable based legitimate business reasons.

While the full ramifications of the SCC applying the implied duty of good faith to employment contracts are as yet unknown, employers must be honest, reasonable, candid and forthright. This means maintaining open communication with employees and, in the context of administrative suspension, providing the suspended employee with clear justification for its actions. This may, depending on the circumstances, require investigation before the employer takes any steps.

For further information on the *Potter* decision, contact any member of our Litigation or Employment Law Groups.