



The Supreme Court Further Clarifies the Law Constructive Dismissal

At the beginning of March, the Supreme Court of Canada released its decision in *Potter v. New Brunswick Legal Aid Services Commission* which is its first decision on constructive dismissal in 18 years.

During the first half of a seven year fixed term contract as the Executive Director of the New Brunswick Legal Aid Services Commission, the relationship between Mr. Potter and the Commission deteriorated. As a result, they entered into negotiations regarding the buyout of Mr. Potter's contract however Mr. Potter went on sick leave before the negotiations were concluded. Shortly before he was due to return, the Commission recommended that Mr. Potter's employment be terminated for cause and instructed their lawyer to write to his lawyer to tell him not to return to work until otherwise advised. Although Mr. Potter was paid during the indefinite suspension, his duties were assigned to someone else. Mr. Potter claimed that he had been constructively dismissed, a view that the trial judge and Court of Appeal disagreed with. However, the Supreme Court of Canada agreed with Mr. Potter that he had been constructively dismissed and accordingly awarded him damages.

The Court held: "In light of the indefinite duration of his suspension, of the fact that the Commission failed to act in good faith insofar as it withheld reasons from him, and of the Commission's concealed intention to have him terminated, the suspension was not authorized by his employment contract. Nor did the Commission have the authority, whether express or implied, to suspend [Mr. Potter] indefinitely with pay and that suspension was a substantial change to the contract, which amounted to constructive dismissal."

The Court also articulated the two branch test for constructive dismissal:

1. Identify an express or implied term of the contract that has been unilaterally changed by the employer and constitutes a breach. If there has been a breach of the contract, it must be determined that the breach substantially alters an essential term of the contract.
2. Assess whether the breach was serious enough to rise to the level of constructive dismissal. It is important to note that an employer's conduct can constitute constructive dismissal if it generally shows that they did not intend to be bound by the contract.

Typically speaking, the burden rests with the employee to prove that he or she has been constructively dismissed. However, in cases where it is alleged that an administrative suspension has resulted in a constructive dismissal, the burden shifts to the employer to demonstrate that the suspension was reasonable or justified. If the employer is unable to meet the burden, a breach is established and the burden shifts back to the employee to demonstrate that the breach was serious enough to constitute constructive dismissal.

Practically speaking, the decision in *Potter* means that, unless there is an express right to do so that is properly articulated in an employment contract, an employer must not place an employee on an administrative suspension, whether paid or not, unless it is reasonable and justified in doing so. Further, an employee must be dealt with honestly and in good faith. An administrative suspension will not be seen to be justified unless the employee has been provided with reasons for the suspension.

Constructive dismissal remains an area of the law that can be tricky and is very case dependent, especially with the recent clarifications in the state of the law. Employers are well advised to seek legal advice when dealing with a potential constructive dismissal situation.

