

THE MOST IMPORTANT QUESTION IS WHY: THE SCC REVISITS CONSTRUCTIVE DISMISSAL

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The Supreme Court of Canada recently handed down *Potter v New Brunswick Legal Aid Services Commission*,^[1] ruling that an employer had constructively dismissed an employee when it suspended him without justification, while he was on sick leave. This decision, which overruled both judgments from the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal, clarifies the common law test for constructive dismissal and has important implications for employers. This article will focus on Justice Wagner's majority decision.^[2]

Background

Mr. Potter was appointed to his position for a seven-year term as Executive Director of Legal Aid in New Brunswick. Halfway through the term, he and the employer began negotiating a buyout. The negotiations were ongoing when Mr. Potter went on sick leave. A week before Mr. Potter was due to return to work and unbeknownst to him, the employer had recommended his dismissal for cause. The employer then wrote to Mr. Potter's lawyer, advising that Mr. Potter was suspended with pay. This was apparently done to facilitate a buyout of Mr. Potter's employment contract. Eight weeks into the administrative suspension, Mr. Potter commenced the action for constructive dismissal. In response, the employer stopped Mr. Potter's salary and benefits, claiming that Mr. Potter had, by launching the legal action, effectively resigned from his position.

Clarifying Constructive Dismissal

The Court sets out a two-branch test for constructive dismissal, which, broadly speaking, occurs when an employer indicates an intention to no longer be bound by the employment contract. Constructive dismissal often takes the form of fundamental and unilateral changes to the nature of a person's employment. Since the employee has not been formally dismissed, the act is called "constructive dismissal."

The First Branch

The first branch requires a court to determine the form of the constructive dismissal, of which there are two:

1. **Single unilateral act**, which has its own two-part test:

- a. Did the employer breach of an express or implied term of the employment contract?
- b. If yes, does the breach substantially alter an essential term of the employment contract?

2. **Series of acts**, the cumulative effect of which shows that the employer no longer intended to be bound by the employment contract. Courts are asked to take a flexible approach here.

In *Potter*, the Court determined that Mr. Potter's administrative suspension was a single unilateral act that breached and substantially changed the employment contract. The determinative factor was that the employer did not have authority, either express or implied, to suspend Mr. Potter in the first place. The Court went so far as to say that where suspensions are found to be unauthorized, "a finding that the suspension amounted to a substantial change is inevitable."^[3]

The lack of authority aside, the employer in this case was also unable to show that the administrative suspension was reasonable and justified for the following reasons:

- Although administrative (non-disciplinary) suspensions must be justified, no reasons were provided to Mr. Potter for the suspension. The Court found this to show a lack of good faith on the employer's part;
- There was no evidence of a legitimate business reason for denying Mr. Potter work; and
- The suspension was indefinite, which exacerbated the uncertainty created by the failure to provide reasons for the suspension.

The Second Branch

The second branch of the test for constructive dismissal asks the question: Would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract were being substantially changed when the breach occurred?

The Court found that on the facts of the case in *Potter*, this second branch was easily met, stating that:

"If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract."^[4]

The Supreme Court did, however, note that an exception is often made if the suspension period was short. In *Potter*, however, the suspension was indefinite.

What This Means for Employers

This case should serve as a caution for employers when suspending an employee, even when the employee is

suspended with pay.

Before suspending the employee, an employer should consider the terms of the employment contract and applicable workplace policies, such as policies regarding employee conduct and discipline. Potter also suggests that, wherever possible, reasons for a suspension should be provided. The lack of reasons provided to the employee in Potter allowed the Court to make a key distinction from other and often more justifiable employer actions, such as economic layoffs, disciplinary suspensions and suspensions for administrative reasons that are unrelated to conduct (i.e. due to a work shortage or technological changeover).

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1 [2015 SCC 10](#).^[ps2id id='1' target='']

2 Justice Cromwell wrote additional reasons on his own and Chief Justice McLachlin's behalf but concurred in the result.^[ps2id id='2' target='']

3 2015 SCC 10 ¶ 106.^[ps2id id='3' target='']

4 Ibid.^[ps2id id='4' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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