

Suspension held to Constitute Constructive Dismissal:



Employers frequently ask us whether they are allowed to suspend an employee, and, if they do so, whether there is a risk that the employee may sue for constructive dismissal. In a Supreme Court of Canada judgment released on Friday, the main issue was, in what circumstances may a non-unionized employee who is suspended indefinitely with pay claim to have been constructively dismissed? This article will focus on the majority reasons of the Court.

In the case, *Potter v. New Brunswick Legal Aid Services Commission*, the employee was appointed under the *Legal Aid Act* as the Executive Director of the New Brunswick Legal Aid Services Commission (the “employer”) for a seven-year term. Halfway through the term, the employment relationship started to deteriorate and discussions began between the employee and employer regarding buying out the remainder of the employee’s fixed term contract. The employee went on sick leave.

During his sick leave, the employee was advised that the employer was suspending him indefinitely, with pay, and delegating his duties to another person. Unbeknownst to the employee at the time, the employer wrote to the Lieutenant-Governor in Council recommending the revocation of the employee’s appointment for cause, which was possible under the *Legal Aid Act*. Eight weeks into the suspension, the employee commenced a claim for constructive dismissal. The employer argued that in suing his employer, the employee had resigned. The trial judge found in favour of the employer, as did the Court of Appeal.

The Supreme Court of Canada allowed the appeal and held that the employee had been constructively dismissed. The Court clarified that there are two types of constructive dismissal:

Serious Unilateral Change (two-part test): (1) A breach of an essential term of the contract by the employer (2) that was sufficiently serious to cause a reasonable person in the employee’s position to feel that the employer had substantially changed an essential term of the employment contract.

Cumulative Acts: A series of acts that, taken together, show that the employer no longer intended to be bound by the contract. This means that an employee can prove constructive dismissal without identifying a specific term that was breached if the employer's treatment of the employee, viewed objectively, made continued employment intolerable.

The Court held that the facts of this case met the test for the first type of constructive dismissal. Other than in the context of a disciplinary suspension, an employer does not, as a matter of law, have an implied authority to suspend an employee without legitimate business reasons. The employer did not have legitimate business reasons for the suspension, it was not acting in good faith, and it failed to minimize the duration of the suspension. The Court said "in most cases in which a breach of an employment contract results from an unauthorized [non-disciplinary] suspension, a finding that the suspension amounted to a substantial change is inevitable". Overall, the suspension amounted to a constructive dismissal of the employee.

This case provides a cautionary example to employers that suspensions, even suspensions with full pay and benefits, may amount to constructive dismissal. Prior to suspending an employee, be sure to consider any terms of the employee's contract including, if applicable, any discipline policy. If you are going to suspend an employee, inform them of the reasons for the suspension, which did not occur in this case and was a factor weighing against the employer.

This case will likely have a significant impact on current constructive dismissal cases before the courts. For instance, for our clients in the North, while the trial decision of *Kucera v. Qulliq Energy Corporation*, 2014 NUCJ 2, was favourable to the employer as it held there was no constructive dismissal, this Supreme Court of Canada case may have an impact on the impending decision of the Court of Appeal, which is currently reserved.

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