

When Will A Suspension From Employment Amount To A Constructive Dismissal?



In the recent case of *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court of Canada provided some interesting clarifications on the law of constructive dismissal.

In this case, Potter was appointed by the defendant as its executive director for a seven-year term.

During the first half of the term the relationship between the parties deteriorated and they began to negotiate a buy-out. Potter became ill before the negotiation was completed. Just before he returned to work, the Commission suspended him indefinitely with pay and delegated his powers and duties to another person. At the same time, it wrote to the Minister of Justice recommending that his employment be terminated for cause. It refused to give Potter any clear reason for the suspension.

Potter claimed that he had been constructively dismissed and sued. He lost at trial and at the Court of Appeal.

The Supreme Court of Canada had a completely different view and allowed the appeal.

The Supreme Court of Canada pointed out that in order to find that a constructive dismissal has taken place, the court must first identify an express or implied term of the contract that has been breached. The court will then determine whether or not that breach was sufficiently serious to constitute a constructive dismissal. The point of the exercise is to determine whether the employer's conduct shows that it does not intend to be bound by the employment contract any longer.

The primary burden is on the employee to establish constructive dismissal but where an administrative suspension is at issue, as in this case, the burden will

shift to the employer to show that the suspension was reasonable or justified. If the employer cannot do so, a breach will have been established and the employee will then have to satisfy the court that the breach substantially altered an essential term of the contract.

In this case, the contract had no express provision for a suspension. The Commission did have an implied authority to relieve Potter from his duties provided that it could show a business justification for doing so. The Commission could not show a business justification, for at least two reasons. Firstly, Potter was never given any reason for his suspension. To the court, an administrative suspension cannot be justified without basic level of communication with the employee. Secondly, the Commission's claim that the suspension was simply to facilitate a buy-out was undercut by its own conduct, namely its letter to the Minister recommending a termination, the fact that Potter was replaced during a suspension period, and the fact that the suspension was indefinite.

As a result, the unilateral suspension constituted a breach and it was reasonable for Potter to perceive the breach as a substantial change to his contract. There had been a constructive dismissal and Potter was entitled to damages.

This case is a useful reminder to employers who are under the impression that suspensions are a viable alternative to outright terminations. If a suspension is merely a preliminary step towards a termination, which an employer chooses to take in the hope that the employee will simply get the message that is intended to be sent and resign, the employer is taking a risk that might not be worthwhile.

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