

Supreme Court of Canada weighs in on constructive dismissal

Suspension can lead to constructive dismissal, even if it's paid

BY RONALD MINKEN

THE LAW surrounding constructive dismissal has changed considerably over the past few years, sometimes making it difficult for employees to successfully prove an entitlement to damages based on constructive dismissal. On March 6, 2015, the Supreme Court of Canada weighed in on the issue of constructive dismissal in *Potter v. New Brunswick (Legal Aid Services Commission)*. In *Potter*, Canada's top court determined that the employee had been constructively dismissed when his employer suspended him with pay indefinitely and awarded the employee damages representing the balance of the seven-year fixed-term contract.

The employee, David Potter, was hired for a seven-year contract and held the position of Executive Director of Legal Aid of New Brunswick. The terms of the Potter's appointment as Executive Director were governed by s. 39 of the province's Legal Aid Act. After completing almost four years of the seven-year contract, Potter and the employer entered into negotiations whereby Potter would buy out the balance of the contract and, in exchange for the compensation package, Potter would resign. The employer wished to expedite negotiations and, without informing Potter, decided that if an agreement was not reached by a specified date, it would request that the Lieutenant-Governor in Council revoke Potter's appointment for cause pursuant to s. 39 of the Legal Aid Act.

When the deadline passed without an agreement being reached, the employer sent a letter to the Minister of Justice recommending Potter be dismissed for cause and without first informing him. The employer then sent a letter to Potter informing him that his employment was being suspended with pay. About eight weeks later, Potter commenced an action against the employer for constructive dismissal. In response, the employer discontinued Potter's pay and benefits, taking the position that Potter had resigned his position due to the commencement of legal action.

The action was heard by the New Brunswick Court of Queen's Bench, which determined the employer had the statutory authority to place the employee on an administrative suspension with pay and dismissed the action. Potter appealed to the New Brunswick Court of Appeal, which dismissed the appeal. Potter appealed again to the Supreme Court of Canada.

The top court reviewed the conduct of the parties along with the Legal Aid Act and

concluded that Potter had been constructively dismissed due to the fact that the employer lacked the authority to suspend him indefinitely with pay and this indefinite suspension resulted in constructive dismissal.

The top court examined the two-step test to establish constructive dismissal. With respect to the first step, the court stated that it must "determine objectively whether a breach has occurred. To do so, it must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, to qualify as a breach, the change must be detrimental to the employee."

If a breach has occurred, the second step involves the court determining 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. A breach that is minor in nature in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal."

The Supreme Court found that as the employer did not have the authority to suspend Potter indefinitely and since the suspension was administrative in nature (rather than disciplinary), the burden shifted to the employer to establish that the suspension was reasonable. As the purpose of the administrative suspension was to facilitate the negotiation of the buyout, the employer was unable to establish that the administrative suspension was reasonable. The court also determined it was reasonable for Potter to perceive the unilateral suspension as being a substantial change to his contract of employment. The court awarded Potter

damages representing the balance of the contract and did not make any deduction due to Potter's receipt of pension benefits in accordance with the principles established by the Supreme Court of Canada in *IBM Canada Limited v. Waterman*.

While this case is very fact and legislation specific, it does provide greater understanding of the two-step test to evaluate claims of constructive dismissal.

Lessons for employers

This decision demonstrates that some administrative suspensions, even if they are with pay, may trigger a claim of constructive dismissal and result in considerable liability for employers. While establishing an entitlement to damages based on constructive dismissal is a multi-step and sometimes a challenging process, employee claims can be successful and employers should take precautions to minimize their vulnerability to such claims.

Lessons for employees

Employees should be aware that while not all unilateral changes implemented by an employer will be detrimental enough to trigger a constructive dismissal, some changes result in an entitlement to damages. When informed of upcoming changes to the terms of employment, whether small or large, prior to agreeing to these changes they should investigate to determine whether the changes are likely to support a claim of constructive dismissal.

For more information see:

- *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 CarswellNB 87 (S.C.C.).
- *Waterman v. IBM Canada Limited v.*, 2013 CarswellBC 3726 (S.C.C.).

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