



## Administrative Leave or Constructive Dismissal?

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On March 6th, the Supreme Court of Canada **held** that an Executive Director of the New Brunswick Legal Aid Services Commission (the Commission) indefinitely suspended with pay had in fact been constructively dismissed, and was entitled to damages equivalent to his salary for the remaining term of his employment contract, (approximately 33 months), namely an amount of \$485,100.

Although the decision concerns a New Brunswick employee, the findings of the Supreme Court in this case appear relevant and transferable to employers in Quebec and other Canadian provinces.

### FACTS

At mid-term of Mr. Potter's employment, in spring 2009, the relationship between the parties deteriorated and the Commission and Mr. Potter began negotiating a buyout of Mr. Potter's contract of employment. Later, in October 2009, Mr. Potter took time off from work for medical reasons. His leave was extended until January 18, 2010. While the negotiations were ongoing, the Commission's Board of Directors (the Board) decided internally, without advising Mr. Potter, that if the buyout negotiations were not resolved before January 11, 2010, the Board would request that the Lieutenant-Governor in Council revoke Mr. Potter's appointment for cause.

In fact, on January 11, 2010, unbeknownst to Mr. Potter, the Chairperson of the Board sent a letter to the Minister of Justice recommending that Mr. Potter be dismissed for cause. The same day, counsel for the Commission advised Mr. Potter not to return to work until he was provided with further direction. In his response, counsel for Mr. Potter requested clarification, but received none. At that moment, Mr. Potter was still unaware of the Board's letter recommending that he be dismissed for cause.

Finally, on March 9, 2010, eight weeks after the Board's decision to place Mr. Potter on leave and seven weeks after Mr. Potter had been scheduled to return from sick leave, Mr. Potter commenced an action for constructive dismissal. In response, the Commission considered that Mr. Potter had resigned and ceased payment of his salary and benefits coverage as of March 9, 2010. Counsel for Mr. Potter replied that same day, indicating that Mr. Potter had not resigned from any position or office whatsoever.

The trial judge and the Court of Appeal both ruled in favor of the Commission and ruled that Mr. Potter had not been constructively dismissed.

### DECISION

The Supreme Court ultimately overturned the decision rendered by the lower courts.

In the Supreme Court's opinion, Mr. Potter was constructively dismissed 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 in the review of the minority by reason of the Commission's concealed intention to have him terminated.

The Supreme Court explains that where an administrative suspension is at issue, the burden to establish constructive dismissal, which usually lies on the employee, initially shifts to the employer, who must that the suspension was reasonable and justified. If the employer does not meet that burden, a the burden shifts back to the employee who must then demonstrate that a reasonable person in his situation would have concluded that the suspension was sufficiently serious to constitute a repudiation of contract, or, in other words, that the essential terms of the employment contract were being substantially changed. (Farber case)

Certain factors assist in determining whether an administrative suspension is reasonable and justified, these include:

1. protecting a legitimate business interest;
2. the employer acting in good faith and fairly;
3. the duration of the suspension; and
4. whether the suspension is with pay.

In the majority reasons rendered by Justice Wagner, the Supreme Court reaffirms that a constructive dismissal can take two forms: that of a single unilateral act that contravenes an essential term of the contract, or that of a series of acts that, taken together, show that the employer intended to no longer be bound by the contract of employment.

In this case, the Supreme Court held that the suspension was not reasonable and justified. Here, the issue was whether the administrative suspension was based on factors intrinsic to the employee, as opposed to extrinsic factors such as financial difficulties, a shortage of work, technological change or reorganization of the business. The decision was clear to point out that this was not a decision in regard to a disciplinary suspension, suggesting that a different calculation may be required in such a context.

The Supreme Court noted that the Commission could not claim that it had the authority, express or implied, under the contract, to suspend Mr. Potter for the administrative reasons it gave, which were "to facilitate the negotiation of a buyout". Further, as noted above, there are certain factors that help to justify an employee's suspension. In this case, the Supreme Court highlighted the Board's lack of legitimate business reasons and good faith. Notably, Mr. Potter was not given reasons for his suspension. In most circumstances, an administrative suspension cannot be found to be justified in the absence of a basic level of communication with the employee. The Supreme Court cited the recent decision of [Bhasin v. Hrynew](#) and held that at a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright. Failing to give Mr. Potter any reasons for his suspension was fatal to the Board's approach.

Since the Commission was not successful in proving that the suspension was reasonable and justified, Mr. Potter therefore had to satisfy the second requirement, which is to demonstrate that, at the time of the suspension, a reasonable person in his situation would have concluded that the essential terms of the employment contract were being substantially changed.

In light of the particular circumstances of this case, the Supreme Court concluded that it was reasonable for Mr. Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract in that:

- he was being indefinitely suspended and had been given no reasons for the suspension;
- the suspension was to continue until further direction from the Commission;

- when Mr. Potter's counsel requested clarification with respect to the Commission's instructions, it persisted in its silence.

In the Supreme Court's opinion, these facts taken together were sufficient to discharge Mr. Potter's burden of proof.

Another interesting point of this decision lies in the minority reasons given by Justice Cromwell (in which Chief Justice McLachlin concurred). While the opinion of the majority was that the facts that emerged at trial, but which were unknown at the time of the suspension, should not be relied on, Justice Cromwell believes that these facts are utterly relevant. In this case, the fact that the Commission was planning to have Mr. Potter terminated before the expiry of his employment contract was unknown to him at the time of his suspension. In that respect, Justice Cromwell considers that a non breaching party (in this case, Mr. Potter) claiming repudiation is entitled to rely on grounds in existence at the time of the alleged repudiation but which were unknown to him at the time. Therefore, according to Justice Cromwell, Mr. Potter was entitled to rely on the Commission's conduct up to the time he accepted the repudiation and sued for constructive dismissal, even if he was unaware of it at that time. The Commission's letter to the Minister of Justice in which it recommended that Mr. Potter be terminated makes it clear that the Commission did not intend to be bound in the future by Mr. Potter's contract of employment, and such evidence is relevant since it is one of the circumstantial elements that the judge was obliged to consider in deciding whether the suspension, viewed in light of all of the circumstances, amounted to a constructive dismissal.

## CONCLUSION

This decision is particularly interesting because it reminds employers of the importance of carefully managing administrative measures, in order to avoid such measures being deemed unreasonable and thereby causing unwanted consequences for the employer.

The Supreme Court recognizes that the employer's power to suspend an employee for administrative reasons because of acts allegedly committed by such employee is an integral part of any contract of employment. The Supreme Court, however, finds that this implied power is limited and must be exercised in accordance with caution and:

1. the action taken must be necessary to protect legitimate business interests;
2. the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension;
3. the temporary interruption of the employee's performance of the work must be imposed for a relatively short period or a fixed term; and
4. the suspension must, other than in exceptional circumstances that do not apply here, be with pay.

To the extent that it is appropriate, employers should consider including terms in their employment agreements explicitly permitting administrative suspensions. As was evident in this case, where an employer's breach of an employment contract is a result of an unreasonable, unjustified, and unauthorized administrative suspension, an employer will have a tough time suggesting that it did not demonstrate an intention to no longer be bound by the contract.

The application of the Bhasin decision in the employment context is a potentially significant development as both the employer and employee must be honest, reasonable, candid and forthright throughout the employment relationship. The full extent to which these duties apply is not yet known, but an employer should be wary of possible damages that can result from providing misinformation or concealing relevant information.

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