

Case In Point

Indefinite Suspensions with Pay: The SCC Clarifies the Test for Constructive Dismissal

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The Supreme Court of Canada recently considered the common law doctrine of constructive dismissal in [Potter v. New Brunswick Legal Aid Services](#), where a majority of the Court (with two justices concurring in the result) concluded that placing an employee on an indefinite administrative suspension with pay constituted constructive dismissal. It found that even where pay is provided, employers do not “have an unfettered discretion to withhold work” and that no employer may withhold work from an employee “either in bad faith or without business justification.” Of note, the Court applied its reasoning in *Bhasin v. Hrynew*, which extended the duty of good faith to the performance of contractual obligations, in finding that the employer failed to act in an honest and forthright manner.

Midway through Mr. Potter’s statutory appointment (a seven-year Executive Director term), relations deteriorated and the parties began negotiating a buyout of his employment contract. He went on sick leave before the matter was resolved. Unbeknownst to Mr. Potter, the Commission wrote a letter to the Minister of Justice recommending his termination for cause. He was advised not to return to work, and subsequently he was suspended indefinitely with pay. Mr. Potter commenced an action for constructive dismissal, which the Commission took as a voluntary resignation.

The Commission prevailed before the lower courts but Mr. Potter was successful before the Supreme Court. In allowing the appeal, the Court clarified the two-branch test for constructive dismissal in *Farber*:

- Under the first branch, the determination of a “substantial breach” involves two distinct steps: (1) whether there is a unilateral breach of an express or implied term of the contract; (2) “if it does constitute such a breach, it must be found to substantially alter an essential term of the contract.” The Court noted that the trial judge erred (in part) by conflating the two steps of the analysis.
- Under the second branch, an employer’s conduct will constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract: “[t]his approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.”

The Court noted the evidentiary shift in burden in cases involving administrative suspensions with pay. It stated that “[i]n all cases, the primary burden will be on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer, which must show that the suspension is justified.” The absence of such a justification will signal the existence of a breach and the burden will then revert to the employee to prove that the suspension is a substantial alteration to the essential terms of the contract.

The Court found that in the absence of express authorization, an employer’s implied authority to invoke a suspension with pay is subject to a basic requirement of business justification undertaken in good faith, which necessarily involves a factual inquiry. Without such a justification, the suspension is unauthorized and therefore a unilateral change to the employment contract.

Applying the two-branch test for constructive dismissal, the Court noted that it is unlikely an employer could establish there was implied authority for the unilateral change to the employment contract in the absence of demonstrated legitimate business reasons for the suspension with pay, unless the unauthorized suspension was of a particularly short duration. It held that any reasonable person, faced with the employer’s unreasonable and unjustified decision to invoke a paid suspension (i.e. without a legitimate business justification), may permissibly infer that the employer’s conduct evinced an intention to no



longer be bound by the contract.

In this case, the Court found, among other things, that a constructive dismissal had occurred because of the indefinite duration of the employee's suspension, the employer's failure to act in good faith by its failure to be forthright and by withholding valid business reasons from the employee, and the employer's decision to conceal its intention to dismiss the employee for cause. In sum, the employee's awareness of his circumstances was limited to his knowledge that he was being indefinitely suspended when he had been given no reason for the suspension. Referring to *Bhasin v. Hrynew*, the Court stated that "At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright."

This case presents a cautionary tale for employers and demands careful consideration of the circumstances in which a paid suspension may be imposed on employees. An employer should ensure that such decisions are capable of being defended by reference to the employer's legitimate business interests and demonstrable good faith. Further, employers should be sure to communicate the reasons for the paid suspension with a scrupulous forthrightness to ensure that the employee cannot claim to have been left in the dark.