

Supreme Court Clarifies Constructive Dismissal Rules

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Lawyers You Should Know: [Mark Geiger](#)

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The Supreme Court of Canada issued a decision on March 6, 2015, in *Potter v. New Brunswick Legal Aid Services Commission*, which further clarifies the rules concerning when an employee has been constructively dismissed.

The case involved the Director of Legal Aid for New Brunswick. Mr. Potter took a medical leave after almost four years of a seven year appointment. The Board responsible for his employment had commenced negotiations with him several months before this leave in an attempt to buy him out of the contract for less than the remaining time. When he was ready to return to work the Board told him he was not to return 'until further direction,' although he remained on full pay and benefits. Seven weeks later, having not been instructed to return to work, he commenced an action alleging constructive dismissal. The courts below found him to have quit when he commenced the action, as alleged by the employer.

The Supreme Court dealt with this case by reinforcing and applying a two stage analysis which it has indicated will be required in all constructive dismissal cases:

Step One: Determine if the employer has unilaterally changed the contract in a manner detrimental to the employee. If the employer has the express or implied right in the contract to do whatever they have done, or if the employee consents or 'acquiesces' to the change, there is no breach and therefore there can be no constructive dismissal. If, however, the employer does not have the express or implied right to do what they have done, and there has been no consent or acquiescence, the analysis goes to step two.

Step Two: Determine if a reasonable person in the same situation as the employee would have felt that the essential terms of the contract were being substantially changed. A minor change could not be so perceived and could therefore not amount to constructive dismissal.

The court indicated that this analysis is a 'highly fact-driven exercise.' The breach can be one significant action or a number of actions that cumulatively add up to a significant change. In

such case, the series of acts are examined, in the light of a 'reasonable person' analysis, to determine whether or not, taken together, they would be seen to show that the employer no longer intended to be bound by the contract. Whether the employer actually intended to not be so bound is not the question.

The onus is on the employee to establish both elements of the test.

In this case, the Supreme Court found that the ability to work is a fundamental aspect of any employee's life from which they derive not only remuneration, but also a sense of identity and self-worth. The Supreme Court relied on its decision from late 2014, *Bhasin v. Hrynew*, in which it established a duty to act in good faith in contractual dealings. Not surprisingly, the Supreme Court found that this duty applied in an employment contract relationship where the employer is often, if not almost always, seen as the more dominant party. The Supreme Court overturned both the trial court and the Court of Appeal decision and found Mr. Potter to have been constructively dismissed. It awarded damages for the remainder of the seven year contract with no deduction for pension benefits received by Mr. Potter following his constructive dismissal.

The Take Away

The Supreme Court, in our view, is making it increasingly clear that employers must treat employees honestly and in good faith - and not necessarily only at the time of termination. In this case, the Commission provided Mr. Potter with no reason for the suspension, but in the context of the negotiations that had been going on before his medical leave, it can be inferred that their reasons for the suspension were related to these negotiations.

While the Supreme Court finds that administrative suspensions may be justified in certain circumstances, such was not the case here, and the Commission's failure to act honestly and in a *bona fide* fashion appeared to be a conclusive element in the Supreme Court's decision to grant significant damages.

Employers who may consider unilateral actions to 'encourage' an employee to leave or negotiate a severance package should take note: your failure to act honestly and in good faith could justify significant damages.