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Supreme Court Clarifies the Test for Constructive Dismissal

In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, the Supreme Court clarified and reformulated the law on constructive dismissal.

The plaintiff, Potter, was a lawyer employed as Executive Director of the defendant Legal Aid Services Commission. After the relationship between them deteriorated, the Commission placed Potter on an indefinite administrative leave with pay, without providing any reasons for doing so. Potter sued for damages for constructive dismissal – and lost.

However, Potter succeeded at the Supreme Court, with a unanimous result, although split 5-2 on the reasons for it. Wagner J., who wrote the main judgment, held that constructive dismissal of a non-unionized employee occurs if one of the following two branches (or tests) is satisfied:

1. *The employer makes a single unilateral change, thereby breaching an express or implied term of the employment , and this breach substantially alters an essential term of the contract*. For the purposes of the first part of this test, the employee is entitled to rely on matters known to the employer but unknown to the employee at the relevant time. Under the second part of the test, the court must determine whether the change made by the employer is reasonable from the standpoint of a reasonable person in the same circumstances as the employee. At this stage, only those facts which the employee actually knew or could reasonably have foreseen may be considered.
2. *A course of conduct engaged in by the employer, viewed in the light of all of the circumstances, would lead a reasonable person to conclude that the employer no longer intends to be bound by the contract*. Under this test, the employee is not required to point to any specific substantial change to an essential contractual term.

Wagner J. further held that, where an administrative suspension is at issue, the burden is on the employer to establish that the suspension was reasonable and justified.

Potter met the first branch of the test. First, the Commission made a unilateral change constituting breach of the employment contract by suspending him. The Commission failed to meet the basic requirement of good faith by withholding from Potter the reason for the suspension, and, as such, could not argue that it was acting under an implied contractual authority. The suspension was therefore not justified. Second, it was reasonable in the circumstances for Potter to perceive the unauthorized unilateral suspension to be a substantial change to the contract.

Potter also illustrates the importance of honesty and good faith in an employer's dealings with its employees. It establishes that an employer cannot avoid a finding of constructive dismissal merely by continuing to pay the employee. The suspending employer must ensure that it can show that the suspension has a legitimate business reason.