The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 10

The Six-Minute Employment Lawyer 2015

10

Tweaking the Test for Constructive Dismissal: *Potter v. New Brunswick Legal Aid Services*

Rishi Bandhu, ***Bandhu Law Professional Corporation***

June 5, 2015

cpd Continuing Professional Development

THE SIX-MINUTE EMPLOYMENT LAWYER 2015

JUNE 5, 2015

Tweaking the Test for Constructive Dismissal: Potter v. New Brunswick Legal Aid Services

RISHI BANDHU

bandhulaw
PROFESSIONAL CORPORATION

233 Robinson Street, Oakville, ON L6J 1G5
e: rbandhu@bandhulaw.com; ph: 1-800-462-1770; f: 905-247-0558
www.workplaceadvocacy.ca

I. Introduction

The Supreme Court of Canada's recent decision in *Potter v. New Brunswick Legal Aid Services* 2015 SCC 10 (CanLII) addressed a rather unique constructive dismissal scenario.

Potter concerned whether or not an indefinite administrative suspension, with pay, constituted a constructive dismissal, in circumstances where it was clear that the employer did not wish to continue the remaining term of a fixed term contract of employment.

The Supreme Court, with Wagner J. writing for it, overturned the lower courts' rulings that there was no constructive dismissal. In the process of doing so, the Court clarified the analytical framework for assessing constructive dismissals and established that an employer does not have an unfettered discretion to withhold or suspend work absent express contractual authority or a reasonable, good faith business justification. In addition, the Court clarified the admissibility of after-acquired evidence in the context of constructive dismissal allegations. Finally, in *obiter*, the Court addressed the interesting and complex issue relating to whether or not the commencement of a constructive dismissal action during the currency of an employment relationship repudiates that relationship.

This paper examines *Potter* and its implications.

II. The Decision

A. Facts

David Potter was appointed Executive Director of the New Brunswick Legal Aid Services Commission ("Commission") on March 16, 2006. The appointment was governed by the *New Brunswick Legal Aid Services Act* (the "Act"), which included a number of terms including, *inter alia*, a 7-year term of employment and the ability of the Lieutenant-

Governor in Council to revoke the appointment "with cause". Mr. Potter was accountable to the Commission's Board of Directors ("Board").

The employment relationship became strained and, in the spring of 2009, Mr. Potter and the Board began negotiating a buy-out of the contract.

In October 2009, Mr. Potter commenced a medical leave of absence. He expected to return to work on January 18th, 2010.

On January 5, 2010, while Mr. Potter remained off work, the Board passed a resolution that if the buy-out negotiations were not resolved before January 11th, it would request that Mr. Potter be dismissed for cause.

On January 11th, and without Mr. Potter's knowledge, the Board sent a letter to the Minister of Justice recommending that Mr. Potter be dismissed for cause.

On the same day, counsel for the Commission advised Mr. Potter that he "*ought not to return to the work place until further direction*", providing no reasons for suspending his work.

Mr. Potter's counsel sought confirmation that Mr. Potter had been suspended and the Commission simply responded: "*he is not to return to work until further notice*".

In March 2010, Mr. Potter had still not returned to work and, without expressly resigning, elected to commence an action for wrongful dismissal alleging, *inter alia*, that the suspension of his employment, with pay, constituted a constructive dismissal. In response, the Board took the position that Mr. Potter resigned and terminated the relationship.

B. Trial and Appeal Decisions

The trial judge rejected Mr. Potter's claim that he was constructively dismissed. Grant J. held that the Board had the statutory authority to administratively suspend Mr. Potter with pay, as part of its broad discretion to supervise Mr. Potter pursuant to the Act. The fact that the Commission had recommended Mr. Potter's dismissal was not a relevant factor to take into account because Mr. Potter was not aware of it at the time that he commenced his constructive dismissal action. That step, in fact, repudiated the employment relationship.

The Court of Appeal agreed, after weighing a number of factors, for, and against, a finding of constructive dismissal[1]. Although the indefinite duration of the suspension weighed in favor of a constructive dismissal, it did not outweigh the fact that Mr. Potter had not been formally replaced, was not asked to return Commission property and continued to be eligible for benefits. Finally, the Board could not have intended to terminate Mr. Potter as it was operating on the honest belief that only the Lieutenant-Governor in Council could do so.

The Court of Appeal held that while the trial judge may have erred in limiting his assessment to the facts known by Mr. Potter at the time of the alleged constructive dismissal, the error was harmless. Had the judge considered the Board's recommendation to dismiss for cause, this would have only confirmed that the Board had no intention to terminate the relationship because it knew it lacked the authority to do so.

The Court of Appeal confirmed the finding that by suing for constructive dismissal, Mr. Potter repudiated the contract of employment.

---

[1] The Court applied the factors outlined in *Devlin v. NEMI Northern Energy & Mining Inc.,* 2010 BCSC 1822.

C. Supreme Court Decision

On appeal, the key issue for the Court was whether or not the suspension of Mr. Potter's employment was a constructive dismissal. A secondary issue, in the event that Mr. Potter was not constructively dismissed, was whether or not the commencement of an action for constructive dismissal constituted a resignation.[2] Wagner J. provided the majority reasons for judgment, with Cromwell J. providing concurring reasons.

i) Whether Suspension with Pay was a Constructive Dismissal

The Test for Constructive Dismissal

The Court began its analysis by recognizing that the overriding test for constructive dismissal is whether or not the employer's conduct evinces an intention to no longer be bound by the contract of employment.

Case law recognizes two (2) branches of the constructive dismissal test:

1) Where the employer breaches an express or implied term or condition of employment and the breach is sufficiently serious to justify damages for wrongful dismissal (the "First Branch"); and

2) Where the employer's conduct generally demonstrates that the employer no longer intends to be bound by the contract of employment (the "Second Branch").

Under the First Branch, a two-step test must be applied to ascertain a constructive dismissal:

---

[2] A third issue addressed by the Court was whether or not Mr. Potter's pension benefits should be deducted from wrongful dismissal damages. The Court applied its decision in *IBM Canada Limited v. Waterman* 2013 SCC 70 to find that the pension benefits were not deductible.

First, it must be determined if the employer's change to the contract was unilateral and, therefore, a breach of the contract of employment. If the contractual change in question was expressly or implicitly authorized by the contract, or consented to by the employee, the change was not unilateral and there was no breach. Parenthetically, if the change represents no detriment to the employee, there is no breach.

Second, a court must be satisfied that the breach in question was a "substantial breach", from the perspective of a reasonable person, in the same situation as the employee, at the time that the breach occurred.

While the employee typically bears the burden of proving a constructive dismissal, where the issue concerns an administrative suspension, the burden will shift to the employer to show that the suspension was justified.

The Supreme Court was unanimous in finding that Mr. Potter was wrongfully dismissed. For Wagner J., and four other justices, the form of constructive dismissal related to the Commission's unilateral action in suspending employment, which constituted a substantial breach. For Cromwell J. and McLachlin CJ., the constructive dismissal resulted from the Commission's course of conduct constituting a repudiation of the contract of employment.

Absence of Contractual Authority to Suspend

The Court was satisfied that there was no express contractual right to administratively suspend Mr. Potter.

In determining whether or not the Commission had an implied right to administratively suspend Mr. Potter's employment, the Court made the following three (3) key findings of law:

1. *Employers do not have an unfettered discretion to withhold work*

The traditional common law rule is that an employer does not have an obligation to supply work. There are, however, exceptions. In *Park v. Parsons Brown & Co.* (1989 CanLII 2801), the Court recognized that there may be a duty to supply work to employees who derive a benefit from the work itself (such as actors or radio or television performers) and employees who earn commission remuneration.

In *Park*, the suspension of work following the provision of notice of termination to a CEO was found to be wrongful where the CEO's bonus remuneration was tied to the performance of work and where his professional reputation was inextricably tied to the performance of the company.

Similarly, in Mr. Potter's circumstances, he derived a reputational benefit from his work. As a result, the Commission had a duty to provide him with work.

In *obiter*, the Supreme Court cautioned against applying the duty to provide work to narrow categories of employees. The duty will apply on a case-by-case basis, depending on the nature of the employment relationship in issue and taking into account the fundamental importance of work to an individual.

2. *Administrative suspensions must be reasonable and justified*

The Court examined a number common law and civil law cases[3] to formulate a flexible framework for determining whether or not a suspension was reasonable and justified. While the approach will depend on the nature and circumstances of the suspension, certain factors will always be present, such as the duration of the suspension, whether

---

[3] *Cabiakman v. Industrial Alliance Life Insurance Co.,* 2004 SCC 55; *Devlin v. NEMI Northern Energy & Mining Inc.,* 2010 BCSC 1822; *Reninger v. Unique Personnel Canada Inc.* (2002), 21 C.C.E.L. (3d) 278; and *Carscallen v. FRI Corp.* (2005), 42 C.C.E.L. (3d) 196

the suspension is with pay, good faith on the employer's part and the demonstration of legitimate business reasons.

3. Facts not known at the time of constructive dismissal can be relevant

Wagner J. held that in constructive dismissal cases involving a substantial breach of a term or condition of employment, it may be appropriate to adduce evidence of facts not known to the employee at the time an election to sue for wrongful dismissal is made.

In particular, such evidence, to the extent that it sheds light on whether or not a term or condition of the contract was breached, is admissible.

Wagner J. was careful to point out that consideration of after-acquired evidence at the second step of the First Branch of the test for constructive dismissal is not relevant or appropriate. At that stage, and consistent with the Court's earlier decision in *Farber v. Royal Trust Co.* [1997 1 S.C.R. 985], the Court considers whether or not a reasonable person in the same circumstances as the employee would have viewed the breach of contract as substantial in nature. It would not be appropriate at that stage to consider facts not actually known to the employee at the time of the constructive dismissal.

The trial judge's failure to consider after-acquired evidence of the Commission's resolution and recommendation to dismiss Mr. Potter was a significant error because it foreclosed consideration of the reasons for suspension during the first step of the test. This error was itself a result of his failure to separate the two steps of the First Branch.

Against this framework, Wagner J. held that the Commission had no implied right to suspend Mr. Potter. The suspension with pay was not reasonable and justified in the circumstances for the following reasons:

- The Commission gave no reason for the suspension. When Mr. Potter sought clarification of the apparent suspension, the Commission maintained its silence. This was not honest, reasonable, candid or forthright conduct in accordance with

the obligation of good faith in contractual dealings set out in *Bhasin v. Hyrnew* 2014 SCC 71;

- There was evidence of the Commission's intention to terminate at the time that the administrative suspension was imposed. In particular, the Board passed a resolution to recommend Mr. Potter's dismissal and subsequently made that recommendation. The Commission then concealed that intention from Mr. Potter. The trial judge's failure to consider this evidence was a significant error, and not harmless as the Court of Appeal had determined;

- Mr. Potter was replaced during the suspension;

- The period of the suspension was indefinite.

Given the above circumstances, the Commission did not have the implied authority to administratively suspend with pay.

Substantial Breach

Wagner J. found that the Commission's unilateral act of suspending Mr. Potter indefinitely with pay did constitute a substantial change, viewed objectively. The factors included the indefinite nature of the suspension and the absence of reasons for the suspension, notwithstanding that Mr. Potter sought clarification.

According to the Court, in most cases where a breach of contract results from an unauthorized administrative suspension, a finding that the suspension was a substantial change is inevitable.

In determining whether or not the suspension was a substantial breach, evidence of the Commission's resolution and recommendation to terminate with cause was excluded from consideration. In this respect, the Court relied upon its decision in *Farber* to exclude

facts that were not available or reasonably foreseeable at the time of the constructive dismissal.

ii) Concurring Reasons

For Cromwell J., the constructive dismissal issue was more appropriately addressed under the Second Branch. According to him, administratively suspending Mr. Potter's employment was consistent with the Commission's course of conduct to have Mr. Potter's employment terminated. Viewed objectively, the Commission's conduct, including its resolution and recommendation for dismissal, evinced a clear intention to not be bound by the contract of employment.

According to Cromwell J., even if the trial judge found that the suspension did not constitute a breach of the employment contract, it was an error not to consider if the Commission's overall course of conduct constituted a constructive dismissal. However, if the Commission was authorized under the contract to administratively suspend Mr. Potter's employment, it is hard to understand how that same suspension could serve to underpin a course of conduct constituting a constructive dismissal. Wagner J. recognizes the apparent flaw in Cromwell's J. reasoning in his own reasons.

iii) Resignation by Commencement of Proceedings

Although Mr. Potter did not expressly resign from his position, the Commission's position was that the commencement of an action for constructive dismissal was tantamount to a resignation. The trial judge and Court of Appeal agreed with this position.

It was not necessary for the Supreme Court to determine this issue given its finding that Mr. Potter was constructively dismissed. However, the Court observed that while in most failed actions for constructive dismissal it will be clear that the employee resigned, there may be instances where the commencement of a constructive dismissal suit does not mean that the employee resigned. For instance, where the employee works under protest

in mitigation of his claimed damages, it may not be appropriate to conclude that the commencement of proceedings was tantamount to a resignation.

III. Discussion

Potter is a significant decision in a number of respects.

First, the decision outlines with clarity the analytical framework for assessing constructive dismissal cases. Where the constructive dismissal concerns the breach of a term or condition of employment, *Potter* informs that the first step of determining a breach is separate and distinct from the second step of assessing whether the breach is substantial in the eyes of an objective third party. While *Potter* does not change the law of constructive dismissal, the analytical framework that it establishes will become the new standard applied to all constructive dismissal cases.

Second, the decision confirms that employers do not have an unfettered discretion to withhold work for any reason, with or without pay. The circumstances in which an employer may withhold work is to be determined on a case-by-case basis, having regard to the terms and character of employment. However, it should not be assumed that only highly specialized or executive level employees are more deserving of an implied term and condition of employment that promises a continuous supply of work.

In addition, the employer's right to impose an administrative suspension with pay must be reasonable and justified. The employer must demonstrate that it imposed the suspension for valid business reasons and in good faith. In this respect, *Potter* confirms the application and relevance of the duty of good faith and fair dealing in contractual relations, in the context of employment relationships.

Administrative suspensions with pay are frequently utilized in the context of workplace investigations. In these circumstances, the temporary suspension of a respondent employee is often necessary to protect the integrity of the investigation and avoid

disruption in the workplace. Such reasons would appear to be reasonable and justified, pursuant to *Potter*. Nevertheless, prudent counsel will likely advise employers to clearly explain the necessity of the suspension to a respondent, in writing, and provide estimated timelines for the resolution of the investigation.

Wise employers may also update their investigation policies and employment agreements to reserve the express right to administratively suspend the employment relationship. Notably, it will be interesting to see if, in the face of an express right to suspend employment, courts will still require employers to demonstrate that the suspension was reasonable and justified. Broadly worded clauses giving an employer the unfettered right to suspend employment will more likely be subjected to scrutiny.

Third, evidence of facts not available to an employee at the time of the constructive dismissal, but later discovered, may be relevant where it is necessary to ascertain the employer's intentions in relation to the breach of a term or condition of employment or, more generally, to continue to be bound by the contract of employment. Such evidence is not admissible in determining if the breach was substantial, from the perspective of a reasonable person.

Fourth, In light of the Court's recognition that circumstances may warrant an employee commencing legal proceedings during the currency of an employment relationship, it seems reasonable to expect that employees will commence constructive dismissal actions while remaining employed, with greater frequency.

Indeed, plaintiff counsel may perceive strategic value in doing so.

Notably, the issue was recently addressed by the Supreme Court of Nova Scotia in *Garner v. Bank of Nova Scotia* 2015 NSSC 122. In *Garner*, the Court rejected the plaintiff's constructive dismissal action. However, relying upon the *obiter* comments in *Potter*, the Court applied a contextual analysis to find that the plaintiff's commencement of civil proceedings alleging, *inter alia,* constructive dismissal, did not repudiate the employment

relationship. As a result, though the Plaintiff's constructive dismissal action failed, he was wrongfully dismissed when the defendant terminated the relationship after taking the position that the civil action was an act of repudiation.

Overall, while *Potter* does not substantially break new ground in the area of constructive dismissal, it certainly refreshes the test for constructive dismissal and builds the foundation for new and developing issues to expand over time.