

Workplace Law Bulletin

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Recent Developments in the Law of Constructive Dismissal: The Supreme Court of Canada's Decision in *Potter v. New Brunswick Legal Aid Services Commission*

By: Meghan Cowan

The concept of “constructive dismissal” has been around for some time. We know that it can occur when an employer makes a significant change to a fundamental term or condition of an employee’s employment without their consent. Examples can include changes (which could be deemed “fundamental”) to the employee’s work location or to the employee’s position. Where there is a constructive dismissal, the employee either has the choice of accepting the change, or treating the conduct of the employer as a repudiation of the employment contract and commencing legal action.

In the recent case of *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court of Canada reviewed the test for determining a constructive dismissal and, in doing so, highlighted the importance of dealing with change to the terms of an employees’ employment properly.

Mr. Potter's Employment

Mr. Potter was employed by the New Brunswick Legal Aid Services Commission (the “**Commission**”) as its Executive Director for a fixed term of seven years. About four years into his mandate, the relationship between Mr. Potter and the Commission deteriorated due to a number of unsubstantiated complaints against Mr. Potter. The parties began to discuss how to find a mutually agreeable means to bring Mr. Potter’s contract to an end by way of a buy-out.

Before the negotiations concluded, Mr. Potter took time off for medical reasons. Approximately one week before

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he was scheduled to return to work from his medical leave, the Commission wrote to him and directed him to stay at home until further notice. He was advised that his salary would be continued in the meantime. However, by letter of the same date (and unknown to Mr. Potter) the Commission wrote to the Lieutenant Governor in Council (as Mr. Potter’s appointment was made under New Brunswick’s *Legal Aid Act*) recommending that Mr. Potter’s employment be terminated for cause.

Mr. Potter commenced an action for constructive dismissal eight weeks later. On receiving the lawsuit, the Commission took the position that Mr. Potter had effectively resigned his position. The Commission therefore stopped Mr. Potter’s salary and benefits.

The Litigation

The Court of Queen's Bench of New Brunswick and the New Brunswick Court of Appeal (the "lower courts") found that Mr. Potter *had not* been constructively dismissed. The trial judge found that the Commission's direction to Mr. Potter not to come to work merely reflected what he knew at the time, namely, that the Commission was willing to buy him out of his contract. The trial judge agreed with the Commission and found that Mr. Potter had effectively resigned his position when he commenced his lawsuit.

The Supreme Court's Decision

The Supreme Court disagreed and found that Mr. Potter had in fact been constructively dismissed. In reaching this conclusion, the Supreme Court articulated a two-part test to determine whether an employer's unilateral act breaches the employment contract:

1. Whether the unilateral act (in this case, placing Mr. Potter on administrative paid leave) breached a term of the employment contract; and
2. Whether the breach substantially alters an essential term of employment (whereby a reasonable person in the same situation would perceive that the breach was substantial).

In examining whether the suspension of Mr. Potter amounted to a breach, the Supreme Court reviewed factors considered by other cases that dealt with suspensions:

- **How long was the suspension?** (Mr. Potter was not given a date of return and had been on leave for eight weeks before he brought his claim);
- **Had someone been appointed to replace him?** (Mr. Potter's temporary replacement appointed during his medical leave had been assigned his duties during his suspension);
- **Did the employee receive his salary and benefits?** (as highlighted by the lower courts, Mr. Potter was still in receipt of his salary and benefits up until the time he commenced his lawsuit);
- **Whether there is evidence that the employer intended to terminate the employee?** (unlike both lower courts, the Supreme Court placed emphasis on the Commission's letter to the Lieutenant Council in Governor recommending the termination of Mr. Potter's employment); and
- **Whether the employer intended to suspend the employee in good faith for *bona fide* business**

reasons? (the Supreme Court noted that Mr. Potter had a statutory obligation under the *Legal Aid Act* to carry out his job duties).

As well, the Supreme Court focused on whether Mr. Potter had been told of the reasons for his suspension, which it determined he had not. By failing to give any basic reason for the suspension, the Supreme Court concluded that the Commission was not forthright with Mr. Potter and cited its earlier decision in *Bhasin v. Hrynew* in support of the conclusion that parties have a duty to be honest, reasonable, candid and forthright in contractual relations.

The Award

While recognizing that an analysis of whether a suspension can amount to a breach of the employment agreement requires careful consideration, the Supreme Court reached the conclusion that it did amount to a breach in this case and therefore held that Mr. Potter's employment had been constructively dismissed. Mr. Potter was awarded the remaining 33 months of his employment contract, or approximately \$485,000.00, plus his pension and his legal costs throughout the legal proceedings. These are significant damages in the circumstances.

Lessons for Employers

While the decision deals with an administrative suspension, it highlights the need for employers to be very careful when dealing with those situations where there could be a "fundamental" change to the terms and conditions of an employees' employment. Coupled with the application of the principle of "good faith," employers should consider the following "best practices":

- Look to the employment agreement (if one exists). Does it provide the right to suspend/lay-off? If not, consider including this right in future agreements.
- Be clear, be confidential and exercise discretion and good faith. A change in employment terms can be traumatic to an employee. Recognize there might be push back or perhaps even "sick time" as a result.
- Consider giving notice of any change to the terms and conditions of employment. Provide consistent salary and benefits during this period, which could include a leave, and explain the reason for any change or suspension, especially if it is for legitimate business reasons.
- If there is a change to the job function, or the employee is being asked to change his/her job, provide full details of the new/changed position, including duties, reporting structure and compensation.

- Address any issues of stress or work environment immediately. Offer to meet or immediately deal with any such issues. Employees will not be expected to accept a change to their job when doing so can be deemed humiliating or they are being asked to work in a difficult/stressful or even poisoned work environment.
- Provide notice that the employee is expected (particularly where compensation remains the same) to accept the job in order to mitigate any damages they might suffer from an alleged constructive dismissal.

Are you Ready for Your New and Young Workers Inspection Blitz - Summer 2015

By: David Reiter and Cynthia Sefton

Every year, the Ontario Ministry of Labour (“MOL”) conducts inspections of industry segments as part of sector-specific enforcement initiatives. These *Inspection Blitzes* involve unannounced attendances at construction sites and industrial facilities, including retail outlets and offices. MOL inspectors check to ensure there is compliance with the *Occupational Health & Safety Act* (the “Act”) and its regulations. If deficiencies are identified, Orders can be issued and charges can be laid. There is a zero tolerance standard for any contraventions that the inspectors identify.

Between May and August 2014, the MOL conducted an enforcement blitz in the industrial sector with respect to new and young workers. This was timed to coincide with the start of summer employment because statistics indicate that new workers, including young workers under the age of 25, are three times more likely to be injured during the first three months at work than experienced workers.

The 2014 blitz focused on the following sectors: service; manufacturing; farming operations; tourism/hospitality; logging; municipalities (parks and recreation facilities, camps, etc); transportation; and landscaping. Over 2500 visits were made to 2049 workplaces and 7941 Orders were issued. The top most frequently issued Orders included (i) employers’ failure to assess their workplace for violence and have a workplace violence and harassment policy in place; (ii) their failure to post a copy of the Act in the workplace; (iii) their failure to maintain equipment in good condition; and (iv) their failure to perform mandatory basic awareness training.

With the upcoming summer work season, the MOL has announced that it again will be conducting enforcement blitzes at Industrial Establishments with a focus on young and new workers. The 2015/2016 Blitz schedule can be found on the [MOL website](#).

To help your business prepare, we set out below a general overview of the obligations of employers and supervisors, as well as some practical tips.

Employers’ Obligations

Employers are those who directly hire others to perform work, as well as those who engage the services of a subcontractor. Generally speaking, employers must ensure that:

- Workers have completed basic Occupational Health & Safety awareness training;
- Equipment, materials and protective devices are provided, maintained in good condition, and used as required by law;
- Workplace health and safety policies, programs, measures and procedures are kept current and followed;
- Workers are provided with ongoing up-to-date information, instruction and supervision;
- Hazards in the workplace are identified and workers and their supervisors are made aware of them;
- They assist, respond to and cooperate with health and safety committees or representatives as required by law;
- They prepare and implement a workplace violence and harassment policy if there are more than five workers regularly employed at the workplace; and
- They comply with sector-specific minimum age requirements.

Supervisors' Obligations

Supervisors include those who have charge of a workplace or authority over a worker. Supervisors can include direct front line supervisors all the way up to executives with operational control over an important aspect of the business. As a general rule, supervisors must ensure that:

- Workers perform their work in compliance with the Act and its regulations;
- Equipment, protective devices or clothing required by the employer or by the Act is used and/or worn by workers;
- Workers are advised of any potential or actual health or safety dangers at the workplace; and
- Workers are provided with written measures and procedures where required by the regulations.

In addition, both employers and supervisors are obligated to take all reasonable precautions to ensure the protection of workers.

Keeping your Business Compliant

You can help prepare your business for the arrival of new and summer workers by taking the five following steps.

1. Prepare an introduction package for new workers that sets out prescribed basic occupational health and safety awareness training, as well as the company's policies, procedures and practices. Follow up by ensuring that the new worker has actually reviewed the policy and understood it (e.g. a test).
2. Assign each new worker to a more experienced senior worker/mentor who works in the same area. Arrange an introductory meeting between them and mandate they have further regular meetings throughout the summer.
3. Introduce new workers to the company's Health and Safety Manager, Joint Health and Safety Committee members or Health and Safety Representative, and outline the role of each.
4. Require supervisors to periodically take young workers on health and safety inspections to check for hazards and unsafe work practices.
5. Monitor the young workers' compliance with the company's policies and procedures, and take appropriate steps as and where warranted.

In addition, make sure that proper records are kept of each of these steps so that when an inspector knocks on the door during a blitz, you can show him or her that your business has taken real and concrete steps to protect the health and safety of your new and young workers.

The New Statutory Leaves of Absence in Ontario

By: Fiona Brown

In the fall of 2014, the *Employment Standards Amendment Act (Leaves to Help Families), 2013*, also known as Bill 21, significantly expanded the statutory leaves available to employees. Bill 21 created three new unpaid leaves of absence: (i) family caregiver leave, (ii) critically ill child care leave and (iii) crime-related death and child disappearance leave.

These three new leaves are in addition to the family medical leave and personal emergency leave which were introduced in September 2001 by way of the *Employment Standards Act, 2000* (the "ESA").

Employers should be aware of their relatively new obligations which are described below.

Overview of the Three New Leaves

i. Section 49.3: Family Caregiver Leave

Immediately upon starting employment, employees that choose to provide care and support to a family member with a serious medical condition are entitled to up to eight weeks of unpaid leave. A "family member" is defined very broadly and includes all members of a nuclear family, step-relations and any "relative of the employee who is dependent on the employee for care or assistance."

The ESA does not provide a substantive definition of "serious medical condition," but notes that this term includes "chronic" and "episodic" conditions.

ii. Section 49.4: Critically Ill Child Care Leave

Employees that have been employed for at least six consecutive months are entitled to up to 37 weeks of unpaid leave to provide care or support to a critically ill child. A “child” is likewise broadly defined and includes “child, step-child, foster child or child who is under legal guardianship and who is under 18 years of age.”

iii. Section 49.5: Crime-Related Child Death and Disappearance Leave

Employees that have been employed for at least six consecutive months and are parents to a child who disappeared as a result of a crime are entitled to up to 52 weeks of unpaid leave and where it is probable that the employee’s child died as a result of a crime, the employee will be entitled to 104 weeks of unpaid leave.

In circumstances of all three of the above-noted leaves, employees are required to advise their employer in writing of the need for the leave. However, where an employee is unable to provide advance notice, an employee would only be required to provide notice “as soon as possible.”

In managing leaves of absence generally and particularly given the legislative changes, employers should consider the following:

- Employers should reexamine policies providing for automatic termination where an employee is absent from employment without notice;
- Employers may be able to count paid leaves which they provide to employees against an employees’ use of their statutory leaves;
- Employers can request a medical certificate in the circumstances of a family caregiver leave and critically ill child care leave or reasonable evidence of entitlement in circumstances of a crime-related child death or disappearance leave; and
- Employers should establish a protocol to ensure that managers understand whether an employee’s absence falls within the broad scope of the statutory leaves, even where an employee does not specifically indicate that their absence relates to a statutory leave.

Employer Tips:

Leaves of absence can cause significant challenges in managing the workplace. When an employee takes an unpaid leave of absence, an employer is required to arrange for coverage, rearrange service deadlines and, depending on the length of the leave, even recruit and hire a replacement.

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AIRD & BERLIS LLP

Barristers and Solicitors

Lawyers:

Eldon Bennett	416.865.7704	ebennett@airdberlis.com
Lorenzo Lisi	416.865.7722	llisi@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
Cynthia R.C. Sefton	416.865.4730	csefton@airdberlis.com
David S. Reiter	416.865.4734	dreiter@airdberlis.com
Fiona Brown	416.865.3078	fbrown@airdberlis.com
Meghan Cowan	416.865.4722	mcowan@airdberlis.com

Brookfield Place
 181 Bay Street, Suite 1800
 Toronto, Ontario, Canada
 M5J 2T9
 T 416.863.1500 F 416.863.1515
www.airdberlis.com

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