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CONSTRUCTIVE DISMISSAL REVISITED BY THE SUPREME COURT OF CANADA

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FOLLOWING THE KEY JUDGMENTS IN *FARBER*[1] AND *CABIAKMAN*,[2] THE *POTTER*[3] JUDGMENT RENDERED ON MARCH 6, 2015 BY THE SUPREME COURT OF CANADA (THE "COURT") EMERGES AS ANOTHER INDISPENSABLE JUDGMENT IN EMPLOYMENT LAW.

IN THIS JUDGMENT, THE COURT DECIDED THAT THE ADMINISTRATIVE SUSPENSION WITH PAY OF AN EMPLOYEE MUST BE JUSTIFIED AND REASONABLE, OR OTHERWISE IT WILL, IN MOST CASES, CONSTITUTE A CONSTRUCTIVE DISMISSAL.

THE CONTEXT

Mr. Potter had been appointed to the position of Executive Director of the New Brunswick Legal Aid Services Commission (the "Commission") for a 7-year term. Over the course of his term, his relationships at the Commission deteriorated to the point where the parties began to negotiate his departure. However, before an agreement could be reached, Mr. Potter took leave from his employment for health reasons. When he was about to return to work, the Commission suspended him with pay for an indefinite period and, without his knowledge, made a recommendation to the Minister of Justice that Mr. Potter's employment be terminated for cause.

Two months after the beginning of his suspension with pay, Mr. Potter, who was still unaware of the reasons for his suspension despite a written request for information on this subject, brought an action for constructive dismissal.

The trial judge concluded that the Commission was under no obligation to provide Mr. Potter with work and, as a result, he had not been constructively dismissed. The Court of Appeal of New Brunswick confirmed the judgment.

THE SUPREME COURT'S JUDGMENT

The judgment of the Supreme Court of Canada was unanimous and the reasons, spanning over one hundred pages, were written by Justice Wagner, with the support of Justices Abella, Rothstein, Muldaver and Karakatsanis concurring. Justice Cromwell and Chief Justice McLachlin agreed with the judgment, but for different reasons.

1. UNJUST DISMISSAL: THE APPLICABLE GENERAL PRINCIPLES ARE REVIEWED

Justice Wagner recognizes that the employment contract has a dynamic character and as a result, the Courts have adopted a flexible approach to deciding whether an employer has either manifested an intention to no longer be bound by the contract or to repudiate it all together.

Justice Wagner recalls that a constructive dismissal can take two forms, namely (i) a dismissal resulting from a sole unilateral act which results in the substantial breach of an explicit or tacit essential condition of the employment contract or (ii) a dismissal which results from a series of acts which, taken together, demonstrate the employer's intention to no longer be bound by the contract and which render the situation intolerable for the employee. These two forms of constructive dismissal each require distinct analytical processes.

[1] *Farber* v. *Cie Trust Royal*, [1997] 1 S.C.R. 846.

[2] *Cabiakman* v. *Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 SCR 195 (hereinafter, "Cabiakman").

[3] *Potter* v. *New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (hereinafter, "Potter").

Where constructive dismissal results from a breach of an essential condition of the employment contract, two conditions must be satisfied: first, the employee must prove that a unilateral change was made by the employer which constitutes a violation of the employment contract and second, the Court must determine whether, at the time of the violation, a reasonable person in the same circumstances as the employee would have considered that there had been a substantial modification of an essential condition of the contract.

However, where dismissal results from the conduct of the employer, the goal is to determine whether the employer's actions, in light of all the circumstances, would cause a reasonable person to conclude that employer no longer wanted to be bound by the contract. It is not necessary to determine that there was any modification of the employment contract. This approach requires retrospective evidence of the overall attitude of the employer.

2. THE RIGHT TO SUSPEND FOR ADMINISTRATIVE REASONS IS NOT ABSOLUTE

Justice Wagner holds that an employer does not have the absolute discretionary authority to refuse to provide an employee with work and adds that even if such absolute discretion did at one time exist, recent developments in employment law have resulted in the rejection of the existence of such discretion.

With this position, the Court departs from the traditional rule at common law according to which "the obligation to keep an employee retained and employed did not necessarily import an obligation on the part of the employer to supply work."[4] For Justice Wagner, this traditional approach fails to take into account the importance of work in today's society, and in the life of an individual:

> "Work is now considered to be "one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). Thus, it is clear that the benefits derived from performing work are not limited to monetary and reputational benefits. [...]"[5]

Justice Wagner recognizes the residual right of the employer to suspend with pay, but imposes an obligation on the employer to establish that such a measure is justified by legitimate business reasons and that the judgment to suspend is both reasonable and justified in the circumstances, citing with approval the following passage from the *Cabiakman* judgment:

> "This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay. [para. 62]"[6]

Justice Wagner adds that a rigid framework is not necessary to determine whether an administrative suspension is justified given that the accepted approach and the factors taken into consideration can vary according to the nature of the suspension and the circumstances. However, some factors will always be relevant, including but not limited to, the duration of the suspension, the fact that the suspension is with or without pay and the good faith of the employer, which includes the existence of legitimate business reasons.

On this subject, Justice Wagner adds that one of these factors is, according to him, unavoidable, namely the existence of legitimate business reasons.

4 *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653 (C.A.).

5 *Potter*, at. para. 83.

6 *Potter*, at. para. 87.

Finally, Justice Wagner specifies that where the suspension is not reasonable and justified and, consequently, amounts to a breach of the employment contract, the Court must be satisfied that a reasonable person in the same circumstances would consider that it constituted a substantial modification of one of the essential conditions of the employment contract. Justice Wagner adds that in his view, this test will generally be satisfied in case of an administrative suspension:

> " I would suggest that in most cases in which a breach of an employment contract results from an unauthorized administrative suspension, a finding that the suspension amounted to a substantial change is inevitable. If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract. Any exception to this rule would likely arise only if the unauthorized suspension was of particularly short duration."[7]

Finally, note that Justice Wagner was of the view that the employer was not being forthright when it failed to provide the reasons justifying the administrative suspension. Such an omission can constitute a failure to act in good faith and an intention to conceal a dismissal.

3. THE REASONS OF JUSTICE CROMWELL

It is interesting to note that for Justice Cromwell, it was not necessary to decide whether the contract of employment permitted the indefinite suspension of Mr. Potter.

He is of the view that an employer can repudiate a contract other than by way of the breach of an important clause of said contract. The repudiation of a contract may also consist of "conduct which, when viewed in light of all the circumstances, shows that, in the mind of a reasonable person viewing the matter objectively, the employer did not intend to be bound in the future by the terms of the contract."[8]

In light of all the facts considered as a whole, he concludes that the Commission no longer wanted to be bound by the employment contract with Mr. Potter and as a result, there was constructive dismissal.

4. CONCLUSION

This judgment sheds new light on the notion of constructive dismissal and on the right of the employer to proceed with the suspension of an employee without pay for administrative reasons.

We should first note that, while Justice Wagner does recognize a right to administratively suspend, it is a residual right under the employment contract and the exercise of this right is constrained.

The unjustified or unreasonable exercise of the right to suspend an employee for administrative reasons can constitute a constructive dismissal regardless of whether we adopt the framework proposed by either Justice Wagner or Justice Cromwell. Their approaches and their analyses are different, but they arrive at the same conclusion regarding the ways in which a constructive dismissal can arise.

It is important to note as well that almost without exception, the employer must inform the employee of the reasons for the administrative suspension, failing which the suspension will be considered to be unjustified and unreasonable and, consequently, would result in constructive dismissal.

Finally, we note that a suspension for an indefinite period of time also seems to be problematic and, consequently, any administrative suspension should be for a determinate or determinable period of time.

On the other hand, this judgment also raises a number of other questions:

- What happens if the contract provides explicitly that the employer has the right to suspend for administrative reasons or that it is under no obligation to provide work?
- What constitute "legitimate business reasons"?
- What happens to the employee who considers himself to have been dismissed while an investigation conducted during an administrative suspension ultimately absolves him of any responsibility: should he be considered to have resigned? Can we still consider that the employer had "legitimate business reasons"?
- At what moment can an employee who has been suspended for administrative reasons claim that he has been dismissed?

[7] *Potter*, at. para. 106.

[8] *Potter*, at. para. 139.

This judgment of the Supreme Court of Canada illustrates the complexity of the question of constructive dismissal and confirms that the facts of each situation must be considered on a case-by-case basis. As a result, we are of the view that this judgment was rendered in a very specific situation where the Commission attempted to gain an advantage from a suspension with pay in hopes of putting pressure on its director to put an end to the negotiations regarding the termination of his employment. In fact, this suspension placed Mr. Potter in an unequal position vis-à-vis his employer whose primary intention was to terminate his employment, as mentioned by Justice Cromwell in his reasons.

Finally, while this judgment comes out of the New Brunswick courts, it will be applicable in Quebec given the similarity of the common law principles and those applicable in Quebec both in matters of constructive dismissal and in suspension for administrative reasons, as was specifically mentioned by the Supreme Court of Canada.

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