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## PAID ADMINISTRATIVE SUSPENSIONS CAN AMOUNT TO CONSTRUCTIVE DISMISSAL

Constructive dismissal is the legal term used when an employee, who has not been formally terminated, claims the employer's actions amount to a termination. This requires a fundamental and adverse change to an employee's working conditions or terms of the job. If this is established, the employee will be entitled to damages as if he or she was terminated without cause (i.e. a severance package). Successful constructive dismissal claims typically involve changes to an employee's compensation, duties, place of work or as a result of intolerable working conditions.

In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 ("Potter"), the Supreme Court of Canada ("SCC") confirmed that a paid administrative (non-disciplinary) suspension of an employee may also constitute a constructive dismissal. This decision has important implications for employers across Canada.

### Background

David Potter was appointed as the Executive Director of the New Brunswick Legal Aid Services Commission (the "Commission") for a seven-year term. Half-way through his term, the Commission began to negotiate an early end to his contract. Before negotiations were concluded, Mr. Potter went on a sick leave. During his absence, the Commission recommended to the Ministry of Justice that his employment be terminated for cause. The Commission instructed Mr. Potter to not return to work until further direction and suspended him indefinitely without pay. In the meantime, his powers and duties were delegated to another worker. Mr. Potter claimed he was constructively dismissed and commenced litigation. The Commission argued he had voluntarily resigned.

### Decision

According to the SCC, a constructive dismissal can occur in two ways. The first is where an employer, through a single act, unilaterally breaches the employment contract. To successfully make out such a claim, the employee must prove that:

- a. The employer breached an express or implied term of the contract; and
- b. The breach was sufficiently serious to constitute a constructive dismissal. The court will consider whether a reasonable person, in the employee's circumstances, would have felt that the essential terms of the contract were being substantially changed.

The second way in which a constructive dismissal can occur is where an employer, through a series of acts, demonstrates that it intends to no longer honour the employment contract.

The first scenario applied to Mr. Potter's case. The SCC noted that the test for constructive dismissal applies differently in cases where administrative suspensions are in issue. In such cases, the burden shifts to the employer, under part (a) of the test, to prove that it had the authority to suspend the employee. In Mr. Potter's case, the court reviewed his employment contract and concluded that the Commission did

### OUR LAWYERS

[DANIEL LUBLIN](#)  
[DAVID WHITTEN](#)  
[ELLEN LOW](#)  
[AARON ROUSSEAU](#)  
[DANIEL CHODOS](#)  
[JONQUILLE PAK](#)  
[MARK YAZDANI](#)  
[OZLEM YUCEL](#)  
[PAUL MACCHIONE](#)

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not have the express or implied authority to suspend him for administrative reasons. Rather, the Commission had an implied obligation to provide him with work.

Even if it did have the authority to suspend Mr. Potter, the SCC noted that an employer's use of such authority is not unfettered - it must be both reasonable and justified. The Commission did not have sound business reasons for suspending Mr. Potter. Furthermore, by withholding an explanation for why he was suspended, the Commission had failed to act in good faith. Mr. Potter's suspension was, therefore, unauthorized and amounted to a breach of contract under part (a) of the test.

Under part (b), the court found that it was reasonable for Mr. Potter to perceive his indefinite and unexplained suspension as a substantial change to his employment contract. The suspension was, therefore, sufficiently serious to constitute constructive dismissal. Mr. Potter was awarded compensation for his wrongful dismissal.

### **Lessons for Employers**

The *Potter* decision serves as a warning for employers when imposing administrative suspensions. Before suspending an employee, employers are well-advised to:

1. Ensure that they have the express or implied authority to do so and that there are legitimate and reasonable business reasons for imposing the suspension;
2. Honestly, candidly and forthrightly communicate the reasons for suspending the employee;
3. Consider including express language in their employment contracts, offer letters, or employee handbooks to reserve their power to withhold work and suspend employees indefinitely for administrative reasons.

Ultimately, understanding whether an administrative suspension will amount to a constructive dismissal demands careful consideration of the particular circumstances in each case. Consult with an employment lawyer to assess the merits of a constructive dismissal claim in your specific situation.

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Coming up on May 5<sup>th</sup>, [David](#) will be hosting a presentation on social media risks in relation to employment law for the [Federated Press](#) entitled 6<sup>th</sup> Social Media Risks. [Sign up here](#).

[Daniel Chodos](#) will be hosting a webinar for the [HR Reporter](#) regarding Mitigation: How to Keep the Damage to a Minimum on May 6<sup>th</sup>. Register [here](#).

On May 12<sup>th</sup>, [David](#) will be leading a presentation for [HAPPEN](#) members regarding Employment Agreements: Advanced Negotiating Strategies. To get your membership, find the [details here](#).


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WHITTEN & LUBLIN  
141 ADELAIDE STREET WEST, SUITE 600, TORONTO, ON, M5H 3L5  
WWW.TORONTO-EMPLOYMENTLAWYER.COM

BLOG.TORONTO-EMPLOYMENTLAWYER.COM