



Employment Update

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“... Potter v. New Brunswick Legal Aid Services Commission ... further clarifies the rules concerning when an employee has been constructively dismissed.”

SUPREME COURT CLARIFIES CONSTRUCTIVE DISMISSAL RULES

Mark E. Geiger

The Supreme Court of Canada issued a decision on March 6, 2015, in *Potter v. New Brunswick Legal Aid Services Commission*, which further clarifies the rules concerning when an employee has been constructively dismissed.

The case involved the Director of Legal Aid for New Brunswick. Mr. Potter took a medical leave after almost four years of a seven year appointment. The Board responsible for his employment had commenced negotiations with him several months before this leave in an attempt to buy him out of the contract for less than the remaining time. When he was ready to return to work the Board told him he was not to return ‘until further direction,’ although he remained on full pay and benefits. Seven weeks later, having not been instructed to return to work, he commenced an action alleging constructive dismissal. The courts below found him to have quit when he commenced the action, as alleged by the employer.

The Supreme Court dealt with this case by reinforcing and applying a two stage analysis which it has indicated will be required in all constructive dismissal cases:

Step One: Determine if the employer has unilaterally changed the contract in a manner detrimental to the employee. If the employer has the

express or implied right in the contract to do whatever they have done, or if the employee consents or ‘acquiesces’ to the change, there is no breach and therefore there can be no constructive dismissal. If, however, the employer does not have the express or implied right to do what they have done, and there has been no consent or acquiescence, the analysis goes to step two.

Step Two: Determine if a reasonable person in the same situation as the employee would have felt that the essential terms of the contract were being substantially changed. A minor change could not be so perceived and could therefore not amount to constructive dismissal.

The court indicated that this analysis is a ‘highly fact-driven exercise.’ The breach can be one significant action or a number of actions that cumulatively add up to a significant change. In such case, the series of acts are examined, in the light of a ‘reasonable person’ analysis, to determine whether or not, taken together, they would be seen to show that the employer no longer intended to be bound by the contract. Whether the employer actually intended to not be so bound is not the question.

The onus is on the employee to establish both elements of the test.

In this case, the Supreme Court found that the ability to work is a fundamental aspect of any employee’s life from which they derive not only

“Timely detection and handling of employee fraud is crucial.”



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remuneration, but also a sense of identity and self-worth. The Supreme Court relied on its decision from late 2014, *Bhasin v. Hrynew*, in which it established a duty to act in good faith in contractual dealings. Not surprisingly, the Supreme Court found that this duty applied in an employment contract relationship where the employer is often, if not almost always, seen as the more dominant party.

The Supreme Court overturned both the trial court and the Court of Appeal decision and found Mr. Potter to have been constructively dismissed. It awarded damages for the remainder of the seven year contract with no deduction for pension benefits received by Mr. Potter following his constructive dismissal.

The Take Away

The Supreme Court, in our view, is making it increasingly clear that employers must treat employees honestly and in good faith - and not necessarily only at the time of termination. In this case, the Commission provided Mr. Potter with no reason for the suspension, but in the context of the negotiations that had been going on before his medical leave, it can be inferred that their reasons for the suspension were related to these negotiations.

While the Supreme Court finds that administrative suspensions may be justified in certain circumstances, such was not the case here, and the Commission's failure to act honestly and in a *bona fide* fashion appeared to be a conclusive element in the Supreme Court's decision to grant significant damages.

Employers who may consider unilateral actions to 'encourage' an employee to leave or negotiate a severance package should take note: your failure to

act honestly and in good faith could justify significant damages. ■

TELL TALE SIGNS: THE RED FLAGS OF EMPLOYEE FRAUD

Christopher McKibbin

Employee embezzlement and fraud cost Canadian employers hundreds of millions of dollars in losses every year. BBCG Claim Services, the leading fidelity insurance claims adjusting firm in Canada, receives an average of one new claim each day, with an average loss of approximately \$500,000. At least 20% of the claims involve under-insured employers.

Timely detection and handling of employee fraud is crucial. It can make the difference between a manageable loss with decent prospects for recovery, and a loss of hundreds of thousands (or even millions) of dollars with little or no prospects for any recovery.

This article canvasses some of the warning signs of employee embezzlement and fraud. We also examine some of the factors relating to payment processes and internal controls which either enhance the risk of employee fraud or - worse - indicate that it may already be happening.

Factors Relating to the Employee

There are several behaviours which may be suggestive of an employee's involvement in embezzlement or other fraudulent activity:

Personal Risk Factors

Does the employee have debt or family pressures? Is the employee going through a divorce or separation? Is the employee a known gambler or "speculative" investor? Does the employee have any

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history of drug abuse? Is the employee, or his or her spouse, involved with an outside private business which could represent a drain on family finances?

Refusal to Take Vacation/Sick Days or Refusal to Share Duties

Does the employee refuse to take his or her allotted share of vacation time (or any at all)? Does the employee refuse to share certain duties? Does the employee work outside of normal business hours, when there seems to be no need to do so? Where an employee (i) is in a position to make or to receive cheques or other payments; (ii) is in an internal controls position; or, (iii) has financial or inventory record-keeping responsibilities, a refusal to take vacation or to share duties may indicate that the employee does not want anyone else to have access to records.

An employee’s refusal to accept a promotion or transfer which would involve his or her losing primary access to payables/receivables processes, or to accounting records, may also be an indication of fraudulent activity.

Recent Changes in Employee’s Lifestyle

Has the employee recently purchased a new property, vehicle or luxury good, or has he or she taken an expensive vacation? Does the purchase seem inconsistent with the employee’s income, family income or other means? Such a development may merit discreet inquiries as to the source of the purchase funds.

The “Gambling,” “Lottery” or “Inheritance” Preemption

Some dishonest employees, anticipating questions surrounding questionable spending, seek to proactively deflect suspicion by announcing that they

have won a large sum of money in a lottery, or through other forms of gambling, or that they have recently come into an inheritance. Significant lottery jackpots are typically publicized, with the winner’s identity being made public through websites such as Ontario Lottery and Gaming Corporation’s “Major Winners” page [http://media.olg.ca/?p=nmm_major_winners] or other press releases. This affords an employer some limited scope for verification of such claims.

Unusually Close Relationship with Purported Vendor

Does the employee act as the primary (or exclusive) contact for a particular vendor, while not doing so for other vendors? Does the employee seem to have an unusual degree of contact with the vendor? These may indicate that there is more to the relationship than meets the eye, and may merit further investigation with respect to the vendor’s background or the goods or services which the vendor purportedly provides.

Unusually Close Relationship with Auditor

As strange as it sounds, a dishonest employee can seek to build a relationship with the employer’s external auditor in order to gain the confidence of the auditor or colour the auditor’s objectivity. This is seen more often with smaller employers and smaller accounting firms. In one case, the manager of a credit union worked assiduously to build a relationship with the accountant who had handled the credit union’s audits for several years. Although the accountant was in no way dishonest, it was arguable that the accountant had lost objectivity as a result of the relationship, and did not pick up on evidence of malfeasance.

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Factors Relating to Payment Processes and Internal Controls

There are several circumstances which either increase the risk of embezzlement or other fraud, or which indicate that such activities may already be occurring:

Multiple Roles/Lack of Segregation of Duties

Does the employee occupy multiple key positions with access to the company’s funds, banking records or accounting records? Is the same employee responsible for both preparing or drawing cheques for signature, and for signing them? Is the same person responsible for both payables and bank reconciliations?

Payees on Cheques Do Not Match General Ledger Entries

This may be indicative of inappropriate payments, and merits further investigation with respect to the entity that received the cheque.

“Mirror” Payments

Where there are two or more identical cheque payments or wire payments in relative proximity, but to different vendors, this may indicate that one of the payments is fraudulent, but has been authorized on the strength of the supporting documentation for the other, legitimate payment. In one case, a bookkeeper showed the same supporting documentation to multiple signing officers, but covered the “payee” field on the cheque, thereby obtaining authorized signatures on multiple cheques in identical amounts. One cheque was directed to pay the legitimate expense, whereas the others were deposited into the bookkeeper’s personal account.

Missing Vendor Contracts or Vendor File Materials

Employers should properly maintain vendor files, which should incorporate vendor contracts, current contact information and invoicing/payment history.

Questionable Invoices

Where invoices do not appear to have been prepared or printed professionally, or where they lack detailed information (i.e., missing contact information, or details regarding the goods or services provided), further inquiry may be appropriate. Also, if the invoices are serial-numbered, do the serial numbers “make sense” from the point of view of how often invoices are submitted, and with the known facts of the vendor’s other customers or business activities?

Purported Vendors Lack Legitimate Web Presence or Contact Information

Where there is no independent corroborating evidence of a vendor’s existence, such as a website, Canada411 search or other web presence, fraud may be occurring. Keep these points in mind:

- Most vendors of any substance use the Internet for promotional purposes. Even if a company does not maintain its own website, it may still be the subject of online reviews on sites such as Yelp [www.yelp.ca].
- A prudent spot-check would be to google a vendor’s address, either as contained in the vendor contract or, more importantly, as used for cheque processing. Concerns arise where the address is: (i) non-existent; (ii) a residence, in circumstances where this does not make sense; or (iii) inconsistent with the address provided by the vendor’s web presence.

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- Other prudent spot-checks include verifying registration with the Better Business Bureau [<http://www.bbb.org/BBB-Locator/>]. In the case of corporations, federally-registered corporations are listed in Corporations Canada’s online database [<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html>]. Some provinces maintain online databases as well. In other provinces, a corporate search is necessary.
- Almost all Canadian vendors are obligated to maintain HST numbers, and to include these numbers on invoices for goods or services. Where a purported Canadian vendor’s invoice lacks a HST number (or where a Canadian vendor does not charge HST for goods or services sold domestically), further inquiry may be appropriate. The Canada Revenue Agency maintains a database of active HST numbers, searchable by number and transaction date: <http://www.cra-arc.gc.ca/gsthstregistry/>

Cheques Physically Taken “Out of Queue”

If an employee states that (i) he will take a cheque out of the payment queue and provide it to the vendor directly; or, (ii) the vendor will come in to personally pick up the cheque, this may be an indication that fraud is occurring. In some cases of fraud, the address on the cheque is non-existent. In other cases, it is an address belonging to the employee’s relative or other associate, or it is a post office box. Where cheques are taken “out of queue,” it may be prudent to investigate the payee address on file for that vendor.

Unusual Number of Adjusting Entries or Write-Offs

An unusual number of adjusting entries can be a sign of concealment of shortfalls. Unverified write-offs of accounts receivable can be a sign that

the receivables are being paid, but stolen by the employee. In one case, an accounts receivable clerk stole incoming cheques and added his name as second payee. The employee then proceeded to deposit the cheques into his own personal account, resulting in a significant loss to the employer.

A Note of Caution

Caution must be taken in dealing with suspected employee fraud. None of the red flags discussed in this article *necessarily* mean that an employee is defrauding the employer; they simply indicate that further investigation may be warranted. There may be an innocent explanation, and an unwarranted allegation of fraud against an employee can create numerous problems for an employer, including the possibility of civil liability.

Before confronting an employee, it is advisable to bring in counsel with experience in employee fraud investigation and litigation to assist in gathering and assessing evidence. Counsel can enlist other professionals, such as forensic accountants and, where warranted, private investigators. Where there is strong evidence of fraud, counsel can also assist in taking the appropriate steps to secure available assets as part of a civil litigation recovery effort. ■

ONTARIO’S ACTION PLAN TO STOP SEXUAL VIOLENCE AND HARASSMENT

Maria Kotsopoulos

Ontario’s government released its Action Plan, “It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment” this month. The Action Plan outlines the government’s proposals to raise public awareness and strengthen laws combatting sexual violence and harassment.

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The Action Plan outlines the following goals:

1. Raising public awareness;
2. Providing more training for professionals;
3. Developing better outcomes for survivors through the justice system;
4. Creating generational change;
5. Creating safer workplaces; and,
6. Creating safer school campuses.

With respect to Ontario's workplaces, the Action Plan indicates that the government's goals include:

- Introducing legislation to strengthen the *Occupational Health and Safety Act* ("OHSA"). This will include a definition of sexual harassment and will set out requirements for employers to investigate and address workplace harassment, including sexual harassment, complaints in the workplace.
- Creating a new Code of Practice under the OHSA to describe steps employers can take to comply with the legislation and to assist employers to make their workplace safer for all employees.
- Establishing a special enforcement team of inspectors trained to specifically address complaints of workplace harassment, including sexual harassment, and to enforce the OHSA's harassment provisions in the province.

- Developing educational materials to help employers create a safer workplace, free from harassment.

A copy of the Action Plan can be found here: <http://www.ontario.ca/document/action-plan-stop-sexual-violence-and-harassment>

We will keep you updated as this Action Plan evolves into legislation. ■

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New podcasts continue to be posted so check back regularly for the latest topic. Podcasts are also available for download on [iTunes](#). ■

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