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CAN AN EMPLOYEE RELY UPON FACTS UNKNOWN AT THE TIME OF TERMINATION TO PROVE CONSTRUCTIVE DISMISSAL?

Richards Buell Sutton Employment Newsletter

Sometimes the law permits a person to rely on facts unknown to him or her at a material point in time. Employment law is no exception. It is well established (and perhaps counter-intuitive) that an employer, who bears the burden of proving "just cause" for dismissal, may rely on facts unknown to the employer at the time of termination. This applies even where, to the employer's knowledge, there exist zero facts in support of a "cause" argument at the time of termination.

The British Columbia Court of Appeal recently affirmed this doctrine, known as "after acquired cause", in a case called *Van den Boogaard v. Vancouver Pile Driving Ltd*., 2014 BCCA 168, where the employee had been expressly terminated without cause. The employer learned after the termination that the employee, a supervisor in a safety sensitive industry, had sent text messages to another employee under his supervision seeking to purchase illegal drugs. The court applied this doctrine of "after acquired cause" and ruled the employee was fired with good cause.

Turning to constructive dismissal cases, where the employee generally has the onus of proof, what use can the employee make of unknown facts? ("Constructive dismissal" arises where the employer breaches the employment agreement in some significant way, thereby permitting the employee to treat the employment agreement as terminated, and triggering a notice entitlement for the employee as if the employee had been wrongfully dismissed.) Can the employee later rely on facts that were unknown to him or her at the time the employee takes the position that a constructive dismissal has occurred? According to the Supreme Court of Canada's (SCC's) decision in *Potter v. New Brunswick Legal Aid*, 2015 SCC 10, the answer is not straight forward. The answer is "yes, and no".

The Facts In *Potter*

The dispute in *Potter* arose from the suspension of the Executive Director of New Brunswick's Legal Aid Society. Potter had been appointed for a seven year term, but the relationship soured after four years and the parties began discussing a buy-out of his contract. Potter then went on sick leave and, during that leave, he was suspended with pay. Subsequently, and unbeknownst to Potter, the employer wrote to the Minister of Justice recommending that Potter be terminated with cause. Potter claimed the actions of the

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employer amounted to constructive dismissal, and commenced a legal proceeding. When he took the position he had been constructively dismissed, he was unaware of the letter to the Minister recommending he be terminated with cause.

The Trial and Court of Appeal Decisions in *Potter*

Both the Trial Court and Court of Appeal for New Brunswick found no constructive dismissal. The Trial Judge concluded that Potter, by taking the "precipitous course" of commencing a legal proceeding, rather than giving the employer opportunity to lift the suspension, had effectively precluded a productive working relationship and had thereby repudiated the employment relationship. On whether the employee could rely on the letter to the Minister recommending termination with cause, the Trial Judge stated "he could hardly allege he was constructively dismissed based on something the employer did unbeknownst to him."

Although the Court of Appeal agreed with the Trial Court in the result, it suggested the Trial Judge may have erred in ruling the employee could not rely on the letter to the Minister. But the Court of Appeal saw the error as "wholly harmless". The Court of Appeal agreed with the lower court that Potter's commencement of legal proceedings in these circumstances amounted to a repudiation of the employment contract by Potter.

The Decision of the SCC

The SCC overturned the lower courts, finding Potter had been constructively dismissed. The panel of seven judges, however, disagreed on the extent of the employee's right to rely on facts of which he was unaware at the time he took the position he was constructively dismissed.

To understand how the unknown letter to the Ministry was dealt with by the SCC, one must first look to the SCC's reiteration of the test for constructive dismissal. In summary, according to the SCC, proving constructive dismissal involves a two-step analysis. The employee must prove (1) the employer's breach of the contract, and (2) that the breach is substantial enough to demonstrate a repudiation of the contract by the employer. A central question in the case was: at which stage of the analysis might the employee be entitled to rely on unknown facts?

Turning to step one (whether there is a breach by the employer), the SCC did find the letter relevant and admissible. At this preliminary stage, the letter to the Minister was relevant and could be relied upon because the focus here was on whether the suspension was "authorized", and this question was not dependent on the employee's state of knowledge.

But the SCC split on whether the employee can rely on unknown facts at the second step of the test, where the issue is whether the breach by the employer amounts to repudiation. The minority of two judges

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decided firmly that the employee may indeed rely upon unknown facts at this stage. The minority noted this was the "mirror image" of the "after acquired cause" doctrine (addressed in the *Van den Boogaard* decision), where facts unknown operate in the employer's favour. The minority wrote:

> ... the trial judge excluded from consideration the fact, unknown to Mr. Potter at the time, that the Commission on the very day that it suspended him, sought as well to put in motion the steps to have him dismissed for cause. To exclude this evidence from consideration, as I see it, would be to make the employee's right to claim constructive dismissal depend on whether the employer has succeeded in concealing his or her true state of mind... Happily, the authorities do not support that unattractive position.

Disagreeing with this, the five judge majority ruled that the letter should not be admissible at the second stage of the test. The majority wrote:

> Accordingly, the perspective at the second step ... at which the issue is whether the breach was substantial...is that of a reasonable person in the same circumstances as the employee... The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it. However...the perspective here cannot be stretched so far as to allow the employee to rely on grounds that, although real, were unknown to him or her at the relevant time. Such an approach would risk encouraging disgruntled employees who have quit their jobs to allege constructive dismissal and engage in fishing expeditions against their employers in the hope of identifying evidence in support of their claims.

The policy rationale invoked by the majority is noteworthy. They suggest the law must protect employers from disgruntled employees tempted to engage in "fishing expeditions" for evidence to support a constructive dismissal. Is there not an equally compelling policy rationale that might be raised against the doctrine of "after acquired cause"; that is, to protect employees from unfair post-termination fishing expeditions by mean-spirited employers? One is left wondering whether the minority decision, that would have allowed the employee a broader reliance on the unknown facts, would have been the more fair result. Shouldn't that which is good for the goose be good for the gander?

With a split decision at the SCC on these issues, we can expect that the question of facts unknown to the employee will be a future battleground in constructive dismissal cases. This is particularly so in cases like *Potter*, which involve administrative decision-making to which the employee is not privy until litigation is underway.

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