

Ontario Court of Appeal upholds constructive dismissal – without pay suspensions must be justified

Date : January 2, 2019

In its decision *Filice v. Complex Services Inc.*, the Ontario Court of Appeal provides useful guidance on the question of when an administrative suspension of a non-union employee will amount to constructive dismissal. Mr. Filice, the plaintiff employee, worked as a supervisor for a security contractor to casinos in southern Ontario, beginning in 1999. In 2007, Mr. Filice came under suspicion of theft, after an audit by the Alcohol and Gaming Commission of Ontario (“AGCO”). The AGCO, the Ontario Provincial Police, and the employer initiated separate investigations into the matter. The employer suspended Mr. Filice without pay while its investigation was ongoing, pursuant to its Employee Handbook.

Although Mr. Filice was later charged with a number of offences, the charges were all eventually dropped. Shortly thereafter, Mr. Filice’s employment was terminated, after he surrendered his valid gaming registration, which is a statutory requirement for all casino security employees.

Mr. Filice brought an action claiming, among other things, that the unpaid suspension constituted constructive dismissal. Mr. Filice was successful at trial, and was awarded compensatory damages of \$75,723.64, based on the trial judge’s conclusion that the 17-month unpaid suspension was the appropriate notice period. The trial judge also awarded Mr. Filice punitive damages in the amount of \$100,000 and costs of \$82,600. The employer appealed the judgment.

The first issue for the Court of Appeal was whether the without pay suspension constituted constructive dismissal. The Court first cited the two-branch test set out by the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission* (2015):

The first branch of the test applies where there has been a single act by the employer that may constitute a breach of the contract of employment. The second branch applies where there has been a continuing course of conduct by the employer that may, collectively, give rise to a finding that the contract of employment has been breached.

The Court found that the facts of the case engaged the first branch of the test. The Court then considered whether the suspension constituted a breach of an express or implied term of the contract of employment, and whether that breach was sufficiently serious to constitute constructive dismissal.

The Court found that although the employer’s policy gave it the discretion to suspend employees without pay, this discretion must nonetheless be exercised reasonably. In the Court’s view,

although the suspension itself was justified in the circumstances, at the time of the suspension, the employer lacked sufficient justification to withhold Mr. Filice's pay. As such, the employer's decision to withhold pay during the period of suspension was unreasonable. Given the serious impact on Mr. Filice, the Court concluded that the without pay suspension constituted constructive dismissal.

In assessing Mr. Filice's damages, the Court began by noting that damages for constructive dismissal are the same as damages for wrongful dismissal. After applying the well-known *Bardal* factors, the Court awarded Mr. Filice seven months salary in lieu of notice; considerably less than the 17 months awarded at trial. In the Court's view, the trial judge had not conducted a proper damages assessment and instead simply assumed that the duration of the suspension was the appropriate notice period.

As to the trial judge's award of \$100,000 in punitive damages, the first Court noted that punitive damages are awarded only in circumstances where compensatory damages do not accomplish the objectives of retribution, deterrence, and condemnation. Since the trial judge had failed to engage in any analysis as to why the compensatory award was inadequate to achieve those objectives, the Court set aside the award of punitive damages in its entirety.

In our view

The decision in *Filice v. Complex Services Inc.* provides a number of valuable takeaways for employers. First, employers must ensure that they have the explicit right in the employment contract to impose suspensions. In the *Filice* case, the employer had policies providing for without pay suspensions, and those policies were seen to form part of the employment contract. Second, even if an employer has an explicit right to suspend an employee, it must ensure that doing so is reasonable and justified in the circumstances. If an employer is considering a without pay suspension, additional caution should be exercised. The Court of Appeal stated in *Filice* that situations where an employer is entitled to impose a without pay suspension "must be viewed as exceptional". As such, in addition to ensuring there exists an explicit right to impose a without pay suspension, employers should also ensure that withholding pay is reasonable and justified in the circumstances. Where the circumstances do not justify the withholding of pay during the suspension, doing so may amount to constructive dismissal.

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