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Claire Mummé

*University of Windsor, Faculty of Law*

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# *Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?

Claire MUMMÉ\*

In *Commonwealth Bank of Australia v. Barker* the High Court of Australia refused to impose an implied duty of mutual trust and confidence into the employment contract, reasoning that doing so would take the Court beyond its legitimate authority.<sup>1</sup> Issued two months later, the Supreme Court of Canada went in a different direction. In *Bhasin v. Hrynew*, the Court crafted a new substantive doctrine of honest contractual performance, based on a newly-recognized central organizing principle of good faith in contract law. A few months later the Court applied the organizing principle of good faith to circumscribe the exercise of an employer's discretion in *Potter v. New Brunswick Legal Aid Services Commission*.<sup>2</sup> This article offers an assessment of the potential impact of *Bhasin* and *Potter* on the future direction of Canadian employment law.

## 1 INTRODUCTION

In November 2014, some few months after the Australian High Court's decision in *Commonwealth Bank of Australia v. Barker*, the Canadian Supreme Court also waded into the question of good faith in contract law. In *Bhasin v. Hrynew* the Court for the first time recognized that good faith is a general organizing principle of contract law, and crafted a new duty of honesty in contractual performance. This new duty, it held, is not an implied term, but rather a substantive stand-alone contract law doctrine. Amongst Canadian labour lawyers the decision provoked immediate speculation, as the existence of an employer duty of good faith has long been the subject of controversy.

Prior to *Bhasin*, employers held an express obligation of good faith only in the manner of dismissal. The Canadian courts have generally been reluctant to place legal obligations on employers other than at the point of dismissal, shying

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\* Assistant Professor, University of Windsor, Canada, cmumme@uwindsor.ca.

<sup>1</sup> *Commonwealth Bank of Australia v. Barker* [2014] HCA 32 (10 Sep. 2014) [*Barker*].

<sup>2</sup> *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*]; *Potter v. Legal Aid Services Commission*, 2015 SCC 10 [*Potter*].

away from expressly regulating the day-to-day operation of the employment relationship. The Court first used *Bhasin* in an employment case only a few months later in *Potter v. New Brunswick Legal Aid Commission*, a case concerning constructive dismissal. Surprisingly, the Court did not wait to apply *Bhasin* to an employment case involving the narrower stand-alone doctrine of honest contractual performance. Rather it applied the organizing principle of good faith to analyze employers' discretion to administratively suspend with pay.

Because innovation in the field of employment law in Canada has largely been left to the courts, these two decisions potentially portend important changes to the common law of employment contract. This article thus offers some first thoughts on *Bhasin* and *Potter's* implications for the future shape of Canadian employment law.

## 2 THE LEGAL CONTEXT

Outside of Quebec, where employment is governed by civil law, a mixture of common and statutory law regulates non-unionized workers in Canada. The substantive framework of the relationship is provided by common law principles, which are then supplemented by statutory obligations provided by minimum employment standards legislation, human rights codes, occupational health and safety acts, and others. Only three Canadian jurisdictions have unjust dismissal legislation.<sup>3</sup> In the other provinces, employees may be dismissed at any time without cause, so long as they are provided with reasonable notice of dismissal, which is calculated based on a series of judicially crafted factors.<sup>4</sup> Although employment standards statutes are frequently amended, they have not been a dynamic or progressive force for shaping the regulation of employment in Canada.<sup>5</sup> Other than human rights legislation, the common law has been the primary site of jurisprudential innovation in Canadian employment law.

In this context the Canadian Supreme Court has been left in charge of adjudicating broad issues of employment policy at common law. The Court has struggled with this role. On the one hand, since the late 1980s the Court has introduced procedural protections concerning dismissal, both with regard to what

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<sup>3</sup> These are the federal jurisdiction, Quebec, and Nova Scotia.

<sup>4</sup> *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (ON HCJ). The *Bardal* factors include 'the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant'. The reasonable notice assessment also includes an examination of whether the employee was induced to leave previous secure employment, and whether there was a promise of job security in the offer of current employment. See *Wallace v. United Grain Growers*, [1997] 3 SCR 701 [Wallace].

<sup>5</sup> See J. Fudge, *Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour*, 7 J.L. & Pol'y 73 (1991).

constitutes cause for dismissal, and to the manner in which dismissal is carried out.<sup>6</sup> The Court has also regularly made grand declarations regarding the centrality of work to individual dignity and identity.<sup>7</sup> It has sought to chart a middle ground as regards mental distress damages and employer obligations of good faith. Damages for the general emotive consequences of dismissal are not available, and a general employer obligation of good faith has not, other than *Bhasin*, been imposed. However, employers do hold an obligation to dismiss in a good faith manner, and damages suffered from bad faith in the manner of dismissal are compensable so long as particular injury is demonstrable.<sup>8</sup>

As Kevin Banks argues, over the years the Canadian lower courts have also, in ad hoc fashion, sometimes imposed limitations on the exercise of employer discretion during the employment relationship.<sup>9</sup> Lower courts have sometimes read through the lens of reasonableness or good faith contract terms allowing employers the discretion to grant or withhold economic benefits, or to impose certain forms of review and discipline.<sup>10</sup> In addition, tort law principles have been used to compensate for defamatory comments made during and after the employment relationship, and to compensate for intentional infliction of mental distress.<sup>11</sup>

As this explanation suggests, a patchwork of lower court decisions have developed ad hoc mechanisms to control the exercise of employer discretion in specific situations during the employment contract. But prior to *Bhasin* and *Potter*, these mechanisms were subject to contradictory jurisprudence, and had not crystallized into a general framework of employer good faith during the relationship. Indeed, the Supreme Court has assiduously avoided intervening in the day-to-day operations of the workplace, and has vigilantly protected the

<sup>6</sup> *McKinley v. BC Tel*, 2001 SCC 38 [McKinley]; *Wallace supra n. 4*.

<sup>7</sup> *Potter, supra n. 2* at para. 83; *Wallace, supra n. 4* at paras 90–95; *Machtiger v. Hoj*, [1992] 1 SCR 986 [Machtiger]; *Slaight Communications*, [1989] 1 SCR 1038 at 1051; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, Justice Dickson's dissent at 368.

<sup>8</sup> *Wallace supra n. 4*; *Honda Canada Inc. v. Keays*, 2008 SCC 39 [Keays].

<sup>9</sup> K. Banks, *Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law*, 32 Comp. Lab. L. & Pol'y J. 547 (2010–2011). Banks argues that the combination of the implied duty of good faith in dismissal, the use of constructive dismissal law to allow compensation for mistreatment prior to dismissal, and the variety of tort law duties in place provided relatively generalized protection from mistreatment in employment prior to the decision in *Bhasin v. Hrynew*. With this picture in place, he argued in 2011 that it should be only a short step for appellate courts to recognize a general duty of employer good faith during employment. Banks' analysis was thus quite prescient, though my own sense is that the case law prior to *Bhasin* was perhaps not so generally accepted or extensive as suggested. Many strands of case law existed, but many were also not generally known and not fully accepted by courts across the country.

<sup>10</sup> *Ibid.*, 578–580.

<sup>11</sup> Pre-contractual negligent or fraudulent misstatements are also actionable (*ibid.*, 581–582) but as of 2010 negligent infliction of mental distress appeared increasingly unavailable prior to *Bhasin*. See sources *infra n. 31*.

employers' ability to dismiss without cause.<sup>12</sup> Good faith obligations in commercial contractual relations have also developed in a piecemeal fashion in Canada, leaving a collection of duties imposed only in specific types of relationships and to specific factual circumstances.<sup>13</sup>

Given the Court's track record on the question of contractual good faith, the November 2014 decision in *Bhasin v. Hrynew* took many in the Canadian legal community by surprise. *Bhasin* is a commercial contract case, concerning the non-renewal of an agency contract. Much like employment law, commercial contract jurisprudence regarding good faith had stalled since the mid-2000s. Yet in *Bhasin* a unanimous Supreme Court held that it was now time to recognize that good faith is an organizing principle of contract law, and that there is a duty to honestly perform one's contractual obligations.

### 3 *BHASIN V. HRYNEW*: THE FACTS

Bhasin owned and operated an enrolment agency that sold education savings plans on behalf of Can-Am. Hrynew owned a rival agency, and was the largest of Can-Am's dealers in central Canada. Hrynew repeatedly sought to purchase Bhasin's agency, but was rebuffed. In 1999 the Alberta Securities Commission developed concerns regarding Can-Am's agents' compliance with provincial securities regulation, and mandated that the company conduct an audit of its enrolment agents. Around this time Can-Am decided that it would be in their best interest if Hrynew took over Bhasin's company and contracts. It thus appointed Hrynew as the officer to conduct the securities audit, which gave him access to the books of all of Can-Am's agents in Alberta, including Bhasin. Bhasin refused to allow Hrynew access to his business records, and complained that Hrynew's appointment was inappropriate in the circumstance. Can-Am incorrectly told Bhasin that it was the Securities Commission's decision to appoint Hrynew (it was not), and assured him that Hrynew was contractually bound to confidentiality in his auditor function (he was not). Can-Am failed to disclose to Bhasin that it wished Hrynew to take over his agency, and that it had decided not to renew his contract. Can-Am instead used Bhasin's refusal to give Hrynew access to his records as a reason not to renew his contract. Bhasin sued Hrynew for the tort of inducing breach of contract, Can-Am for breach of a

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<sup>12</sup> *Wallace ibid.* For an in-depth analysis of the Supreme Court of Canada's approach to good faith over the twentieth century, see C. Mummé, *A Comparative Reflection from Canada – A Good Faith Perspective* Ch. 14a (M. Freedland et al. eds, Oxford University Press: forthcoming 2016).

<sup>13</sup> See J. McCamus, *The Law of Contracts* (2d ed., Irwin Law 2012) at Ch. 21. The courts have recognized a pre-contractual duty to negotiate in good faith in limited circumstances. See for instance *Empress Towers Ltd v. Bank of Nova Scotia*, [1991] 1 WWR 537 (CA); *Mannpar Enterprises v. Canada* (1999), 173 DLR (4th) 243 (CA).

contractual duty of good faith, and both parties for civil conspiracy. The trial judge chose to recognize a general duty of good faith in contract, and the issue made its way up to the Supreme Court.

The Court began by noting that as compared to the United States and Europe, the Canadian common law is incoherent as regards good faith, imposing only a patchwork series of ad hoc legal principles. This incoherence not only places Canada behind other countries, but also contradicts the reasonable expectations of contracting parties.<sup>14</sup> For these reasons, the Court declared, it is now appropriate to take two incremental steps in the development of the common law. The first is to recognize that good faith operates as a general organizing principle of the common law of contracts, a principle that ‘underpins and informs the various rules that recognize obligations of good faith in particular situations and relationships’.<sup>15</sup> The second step is to articulate a more concrete duty of honesty in contractual performance.

These two steps are related but distinct. The general organizing principle of good faith does not ground an independent cause of action, but rather informs the development of existing (and future) contract law doctrines. The second step, the duty of honest performance, is an emanation of the general obligation of good faith. Of particular interest to other common law jurisdictions, the Court chose not to frame the duty of honest performance as an implied contractual term. Instead the Court explained that it is an independent contract doctrine, the breach of which gives rise to damages. Rather than an implied term, the duty of honest performance is analogous to other equitable doctrines, like unconscionability, that place limits on freedom of contract.<sup>16</sup> The obligation thus applies regardless of party intention, although the parties may contract to provide a minimum scope for its content. Finally, the Court specified that the duty of honest performance does not rise to the level of a fiduciary duty. The duty does not require subordinating one party’s interest to that of the other and does not require proactive disclosure of material facts, absent misrepresentation. What the duty of honest performance does require is for the parties not to lie or knowingly mislead one another with regard to the performance of their contractual obligations. Although the Court hastened to add that the duty does not invite judicial assessment of party intent, it is unclear how that can be avoided.

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<sup>14</sup> *Bhasin supra* n. 2 at para. 32.

<sup>15</sup> *Ibid.*, at para. 33.

<sup>16</sup> *Ibid.*, at para. 74.



#### 4 BHASIN'S SIGNIFICANCE FOR EMPLOYMENT LAW

What impact will *Bhasin's* two principles have on Canadian employment law? As mentioned, the Canadian Supreme Court has historically shied away from regulating the exercise of employers' managerial prerogative at common law during the life of the employment relationship. In Canada employers have held an express duty of good faith only in two circumstances. The first is in the manner of dismissal.<sup>17</sup> Good faith in the manner of dismissal requires employers to refrain from being untruthful, misleading or unduly insensitive, and at minimum requires them to be candid, reasonable, honest and forthright in the manner of dismissal.<sup>18</sup> Demonstrable emotional injury resulting from a breach of this duty gives rise to compensation.<sup>19</sup> The second is where an employer acts in a bad faith manner calculated to cause an employee to withdraw from employment, which gives rise to a claim for constructive dismissal by the employee.<sup>20</sup> An additional employer duty of civility, decency, respect, and dignity has been developed by the lower courts, but to date it has only been used with regard to claims for constructive dismissal, rather than as a freestanding obligation that gives rise to independent assessment loss separate from dismissal.<sup>21</sup> At the same time, however, piecemeal jurisprudence had also developed over the last decades sometimes using concepts of good faith to regulate the employers' exercise of discretion. As this description thus suggests, prior to *Bhasin* the good faith obligations in Canadian employment law were primarily concerned with regulating the manner of dismissal, and with ad hoc limitations on the administration of employer discretion during the life of the relationship. The question then is whether *Bhasin* amplifies, or generalizes, employers' good faith obligations in new ways.

##### 4.1 THE DUTY OF HONESTY IN CONTRACTUAL PERFORMANCE

*Bhasin* articulates two different types of good faith obligations, one a general interpretive principle, the other a narrower behavioural prohibition. Compared to the English duty of mutual trust and confidence, the latter duty of honest performance is thin in formulation. Nonetheless, it is likely to affect a number of current doctrines and employment practices. One obvious area of its relevance is to constructive dismissal claims.

<sup>17</sup> *Wallace supra* n. 4; *Keays supra* n. 8.

<sup>18</sup> See *Banks, supra* n. 9 at 563–569.

<sup>19</sup> *Keays ibid.*

<sup>20</sup> *Shah v. Xerox Canada Ltd.*, [2000] 49 CCEL (2d) 166 [*Shah*].

<sup>21</sup> *Lloyd v. Imperial Park*, [1997] 3 W.W.R. 697 [*Imperial Park*].

#### 4.1[a] *Independent Actionable Wrongs and Punitive Damages*

As mentioned, employers are already obliged to treat their employees with decency, civility and respect, the breach of which gives rise to a constructive dismissal claim.<sup>22</sup> Employer dishonesty, if sufficiently significant, may now also constitute a repudiatory breach. It may in some cases also entitle the employee to punitive damages arising from the constructive dismissal. Currently, punitive damages for employer misconduct in the manner of dismissal are not available in wrongful dismissal claims, except where mistreatment constitutes an independent actionable wrong so egregious as to deserve court sanction.<sup>23</sup> Severe dishonesty in contractual performance may thus now offer such an independent actionable wrong.

#### 4.1[b] *Compensation for Losses Arising from Lying or Knowingly Misleading in the Performance of a Contract Obligation*

The more interesting question is whether employer dishonesty or misleading conduct can now give rise to a claim for breach of contract independent of dismissal. Employees have sometimes been able to argue that employer promises formed contractual terms, the breach of which gave rise to compensable loss.<sup>24</sup> But employees may now also bring claims for losses arising from lying or knowingly misleading actions by employers in the performance of an existing contractual obligation. Cases surrounding pre-contractual negligent and fraudulent misrepresentations may be useful in giving content to the new duty. In some instances the courts have held that half-truths that create a misleading impression constitute misrepresentation.<sup>25</sup>

Misrepresentation has also been found where a change in circumstance affects the truth of an earlier statement, but is not disclosed or the impression is not correct.<sup>26</sup> If the duty of honest performance is similarly construed, employers may find themselves to have run afoul of the duty where they present only a half-truth to an employee as regards the performance of a contractual term, if they do not act to correct a statement previously made, or if a change in circumstance later affects its truth or likelihood.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 SCR 1085 [*Vorvis*], as upheld on this point in *Wallace*, *supra* n. 4, and *Keays*, *supra* n. 8.

<sup>24</sup> See, for instance, *Ford v. Laidlaw Carriers Inc.*, [1993] 50 C.C.E.L. 165.

<sup>25</sup> *Xerex Exploration v. Petro-Canada*, 2005 ABCA 224 [*Xerex*].

<sup>26</sup> *With v. O'Flanagan*, [1936] Ch 575 (CA); *Hogar Estates in Trust v. Shebron Holdings Ltd.* (1979), 10 DLR (3d) 509 (ON HCJ).

While misrepresentation case law concerns inaccurate or misleading statements of fact, untruthful or misleading promises may now also be binding even where unsupported by consideration.<sup>27</sup> Canadian law does not currently permit promissory estoppel to be used as a sword.<sup>28</sup> Nor does it, in theory at least, enforce promises to vary a contract without the exchange of fresh consideration.<sup>29</sup> *Bhasin* now raises the question of whether losses arising from untruthful or misleading promises will now be compensable. If so, it could impact on employer promises relating to pay increases, promotions, scheduling changes, and so on, and thus have a significant impact on interactions between the parties in the workplace.

An open question is whether the new duty of honest performance will also allow for claims for non-economic losses arising from dishonesty in the performance of contractual duties. As mentioned, since the mid-1990s employers have been subject to an implied duty to treat their employees with civility, decency, respect, and dignity. David Doorey has argued that this duty could be used to ground a claim for breach of contract, separate from a wrongful dismissal claim.<sup>30</sup> Writing in the mid-2000s, he advocated for the development of the duty of civility and respect as a way to allow for compensation for employer mistreatment during the life of the relationship independent of the losses flowing from dismissal. Despite his persuasive argument, the duty of civility and respect has remained bound to constructive dismissal claims, and has never been used to ground a separate claim for contract breach. Although tort claims for intentional infliction of mental distress in employment are available, claims for negligent infliction of mental distress have been increasingly circumscribed of late.<sup>31</sup> For this reason, employer mistreatment during employment that does not rise to the level of flagrant and outrageous conduct, and/or does not involve the requisite degree of intention, is not compensable. It may be, however, that violation of the duty of honest performance will now fill this lacuna, and allow employees to seek redress for employer mistreatment that imposes a demonstrable loss in terms of psychological and dignity harm, even if unrelated to dismissal.<sup>32</sup>

<sup>27</sup> This argument was first elaborated by my colleague Jeffrey Berryman in his general reflections on *Bhasin*'s potential impact on contract law. J. Berryman, *Some Implications of Bhasin v. Hrynew, Good Gracious! Good Faith in Contract Law*, CLE seminar, University of Windsor Faculty of Law, 22 Jan. 2015.

<sup>28</sup> *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215; *M(N) v. A(AT)* (2003), 12 BCLR (4th) 73 (CA).

<sup>29</sup> *Gilbert Steel Ltd v. University Construction Ltd* (1976), 12 OR (2d) 19 (CA).

<sup>30</sup> D. Doorey, *Employer 'Bullying': Implied Duties of Fair Dealing in Canadian Employment Contracts*, 30 Queen's L.J. 500 (2005).

<sup>31</sup> *Piresferreira v. Ayotte* 2010 ONCA 384; *Sanford v. Carleton Road Industries Association* 2014 NSSC 187.

<sup>32</sup> It may also suggest that the decision in *Ayotte*, *ibid.*, will be revisited.

4.1[c] *What Constitutes a Contract Term for the Purposes of the Duty of Honest Performance?*

The employment relationship provokes a particular issue, which may not arise with the same frequency with other types of contracts. *Bhasin* requires honesty in the performance of a contractual obligation. But employment contracts often contain few express terms and many terms change over time, evolving as the relationship progresses. As Freedland argues, they are often treated as ‘exchange transactions wrapped up in relational contracts’, a hybrid of discrete express contractual terms of exchange within a relationship that is ongoing and changes over time.<sup>33</sup> Given the incomplete nature of the employment contract, it may not be a simple matter to determine what constitutes ‘in the performance’ of a contractual obligation. What would be the effect of lying or misleading in relation to workplace policies and practices that are not contractually binding? For instance, would lying to an employee about the reason for changing their schedule constitute ‘in the performance of a contract term’, if the scheduling process was not contractually regulated? In other words, will employers’ residual authority to direct the workplace be sufficiently linked to contract terms to fall within the scope of the duty, or will it apply only to express contractual obligations? This then is the large question arising from *Bhasin*: does it now open the door to some form of judicial supervision over the day-to-day administration of the employment relationship? Does it now create a generalized check on the exercise of employer discretion during the course of the contract?

For employee counsel, one way to address this question is to argue that the managerial prerogative is a term of the contract. The contractual status of management rights invokes historical arguments from the 1950s and 1960s concerning the content of collective bargaining agreements and the scope of labour arbitrators’ jurisdiction. In those decades active disagreement was waged in the United States and Canada as to whether management held unilateral discretion over all rights not explicitly ceded in collective bargaining agreements (the ‘reserved rights’ theory), or whether managerial rights stemmed only from collective bargaining and from the governance process it set in place for the administration of the workplace (the ‘joint sovereignty’, industrial pluralist approach).<sup>34</sup> Although the reserved rights theory won the day in the labour

<sup>33</sup> M. Freedland, *The Personal Employment Contract* 88–89 (Oxford University Press 2003).

<sup>34</sup> J. Phelps, *Management’s Reserved Rights: An Industry View*, in *Management’s Rights and the Arbitration Process* (J. McKelvey ed., B.N.A. Incorporated 1956); H. Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1954–1955); A. Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959); L. Fuller, *Collective Bargaining and the Arbitrator* Wis. L.R. 3 (1963); P. Weiler, *The Role of the Labour Arbitrator: Alternative versions*, 19 U. Toronto L. J. 16 (1969); and D. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cali. L. Rev. 663 (1975); A. Goldsmith, *The Management-Control Collective Bargaining Relationship: Three Models*, 24 Osgoode Hall L. J. 775 (1986); P. Girard, *B. Laskin: Bringing Law to Life* Ch. 10 (University of Toronto Press 2005). For an overview

context, it may now be an easier argument to make in the non-unionized employment context. The argument here would be that an employer's right to manage the workplace is an implicit term of all employment contracts, the correlative of an employee's duty to obey, and thus its performance must be exercised honestly and without knowingly misleading. In the context of constructive dismissal law, the Supreme Court has already acknowledged that employers' managerial prerogative emerges from the employment contract, recognizing that 'an employer can make any changes to an employee's position that are allowed by the contract, *inter alia* as part of the employer's managerial authority'.<sup>35</sup> The Court explained that unilateral alterations within that zone are permissible as legitimate exercises of the managerial prerogative because they are 'not [...] changes to the employment contract, but rather applications thereof'.<sup>36</sup> The Supreme Court has thus already cast the managerial prerogative as an implied contractual term, an argument that could then be deployed to bring managerial discretion within the scope of the duty of honest contractual performance.

#### 4.2 THE ORGANIZING PRINCIPLE OF GOOD FAITH: CIRCUMSCRIBING THE MANAGERIAL PREROGATIVE IN *POTTER V. NEW BRUNSWICK LEGAL AID SERVICES COMMISSION*

Another approach to regulating employer discretion may be to ground legal limitations in the second part of the *Bhasin* decision, the general organizing principle of good faith.

Joellen Riley recently examined the relationship between the concept of mutual trust and confidence and that of good faith.<sup>37</sup> She argues that the two duties are related but analytically distinct. Mutual trust recognizes an obligation not to act in a manner that destroys the trust necessary to the operation of the relationship. By contrast, good faith is an interpretive principle that 'assumes that parties intend to perform their contractual obligations in a manner which permits each party to enjoy the mutually intended benefits of the contract'.<sup>38</sup> Applying Riley's typography to *Bhasin*, we might say that the Canadian 'general

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of this debate in the US and Canada, see E. Shilton, *Industrial Pluralism, Reserve Rights and Weber* presented at the Queen's University Centre for Law in the Contemporary Workplace conference 'One Law for All': *Has Weber v. Ontario Hydro Transformed Collective Agreement Administration and Arbitration in Canada? In Honour of the Late Bernie Adel*, October 2015, publication forthcoming.

<sup>35</sup> *Farber v. Royal Trust Co* (1997) 1 SCR 846 at para. 25 [*Farber*].

<sup>36</sup> *Ibid.*

<sup>37</sup> J. Riley, *Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts*, 36 *Melb. L. Rev.* 521 (2012).

<sup>38</sup> *Ibid.*, 536.

organizing principle of good faith' is akin to good faith as interpretive principle. The Canadian duty of honest performance is narrower than the English duty of mutual trust and fair dealing, and may therefore be considered as a sort of subset of that duty. Given the limited scope of the duty of honest performance, it may be that the organizing principle of good faith will be of greater significance to the development of employment law. In addition to directing the interpretation of contract terms, the organizing principle of good faith may also be used to guide the exercise of employers' discretion. Indeed, this is the course the Supreme Court appears to have adopted in the recent *Potter* decision.

A few months after *Bhasin*, the Court drew on the new organizing principle of good faith in considering constructive dismissal and administrative suspensions with pay.<sup>39</sup> In *Potter* the Court explained that there are two types of constructive dismissal scenarios: the first is a unilateral alteration to an essential term of the contract, and the second is a series of acts which together evince the employer's intent to no longer be bound by the contract, even in the absence of a particular contract breach. For cases falling into the first scenario, a two-step test is used. The first step is to identify which express or implied term was breached, and the second step is to determine whether a reasonable person in the employee's position would understand the employer to have made an alteration to an essential term of the contract.

In the context of administrative suspensions, the first step requires identifying whether the employer held an express or implied authority to administratively suspend, and thus whether an alteration has occurred.<sup>40</sup> The Court went on to hold, relying on its 2004 decision in *Cabiakman* concerning Quebec civil law, that an employer cannot hold an implied right to suspend unless the suspension is justified, and it cannot be justified unless it was imposed in good faith and in furtherance of a legitimate business reason.<sup>41</sup> Applying the test to the facts before it, the Court concluded that acting in good faith required the employer to communicate the reasons for the suspension to the employee. In doing so the Court cited *Bhasin* and the organizing principle of good faith, noting that 'acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright', and that failing to give an employee reasons for suspension is not being forthright.<sup>42</sup> Because the suspension was not undertaken in good faith, it did not fall within the employer's residual authority to administratively suspend, and because there was no such express contractual

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<sup>39</sup> *Potter supra* n. 2.

<sup>40</sup> *Potter, ibid.*, at paras 59–68.

<sup>41</sup> *Cabiakman v. Industrial Alliance Life Insurance Co* 2004 SCC 55.

<sup>42</sup> *Ibid.*, at para. 99.

right to suspend, the Court held that Potter was constructively dismissed and entitled to damages.

The Court moreover took the opportunity to revisit the question of where employers are obligated to provide work. The Court held that the 'employer may not withhold work in bad faith or without justification'. Withholding work is not an unfettered employer right, because to so permit would 'undermine the non-monetary benefit all workers may in fact derive from the performance of their work'. Drawing once again on principles of good faith, the Court went on to explain that an unfettered right to withhold work 'would also be inconsistent with the employer's duty of good faith and fair dealing that has been gaining acceptance at common law'.<sup>43</sup>

In *Potter* the Supreme Court used existing case law as well as the new organizing principle of good faith to regulate the manner in which an employer exercised its discretion, beyond any particular term of the contract. The duty of honest contractual performance was not argued here. Rather, the Court was willing to take a good faith lens to determining the scope of an employer's residual discretion to suspend. As noted, different strands of case law already imposed good faith requirements on the exercise of employer discretion in particular circumstances, including as regards administrative suspension. Thus arguably *Potter* simply represents the application of existing principles elaborated in *Cabiakman*. However, one can also see *Potter* as indicating the Court's growing willingness to adopt and generalize those existing ad hoc principles, and as suggesting an increasing desire to frame and circumscribe employer discretion through a good faith lens.

## 5 CONCLUSION

Whether the new organizing principle of good faith, and new duty of honest performance, are broad enough to impose generalized good faith requirements on employer action remains to be seen. The duty of honest performance will undoubtedly affect existing doctrines, some of which I have touched on here, and may open up new ones for use. But framed as a relatively narrow negative prohibition, it imposes only a minimum behavioural standard on employers'

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<sup>43</sup> *Potter*, *supra* n. 2 at para. 68. The analysis suggests, but does not expressly state, that the Court considers the right to administratively suspend and the right to withhold work as effectively the same. The Court holds that neither right is unfettered, and can only be exercised in a good faith manner in pursuance of a legitimate business interest. The Court also holds that the right to administratively suspend must emerge from an express or implied contractual right. The relationship between these two holdings is somewhat opaque. It is not clear whether there is a residual right to suspend/withhold, but one that must be exercised in good faith, or whether there is no right to withhold/suspend unless there is contractual authority to do so, which must then be exercised in good faith.

actions. It is the general organizing principle of good faith, I would suggest, that provides the greatest opportunity for suffusing employer action with good faith obligations. If it is robustly deployed as an aspirational and interpretive tool, as *Potter* would suggest, it may serve to give content and guidance to the parties' ongoing obligations towards one another, to provide shape to the fluid and changing nature of employment contracts.

Over the last twenty years the Supreme Court of Canada has repeatedly recognized the structural inequality of the employment relationship. It has repeatedly held that employment is one of the most important relationships in our lives, central both to our economic survival and to our sense of self. But while employees have for centuries held a duty of good faith towards their employers, the Court has consistently refused to require a similar obligation by employers to their employees. This refusal belied the Court's commitment to protecting employee vulnerability by maintaining an asymmetry of rights between the parties, and further entrenching the power differential between them. Whether *Bhasin* and *Potter* portend substantive advances or symbolic change, the Court now seems poised to at least recognize that good faith is not a one-way street. In Canadian employment law, that alone may be significant.



