

Members Quarterly

Summer 2014 Edition

Feature

Frustration of the Employment Contract: Proceed with Caution

What does the employer have to do?

How can long-term illness end an employment contract?

When an employer terminates an employee without “just cause”, the dismissal typically amounts to a breach of contract entitling the employee to a period of reasonable notice or pay in lieu. However, under the legal doctrine of frustration, a contract may come to an end not by the action of either party, but by a supervening event.

If an employment contract is frustrated – typically by illness or disability – the employer is not liable for common law damages. For this reason, frustration is often considered a “defence” to an action for wrongful dismissal. So how does an employer know if it can rely on this defence?

In this article we highlight certain issues to which employers seeking to rely on frustration should be particularly attentive – especially in light of recent tribunal and judicial decisions.

1. Duration of the Illness

How long does an employee have to be off work before the contract can be treated as frustrated?

The question is a bit misleading. It is not simply a matter of counting down the months. The real question is whether the illness is of such a nature or is likely to continue for such a period of time that either (i) the employee will never be able to perform the duties contemplated by the original employment contract or (ii) it would be unreasonable for the employer to wait any longer for the employee to recover.

It is usually difficult to predict whether an employee’s illness today means he or she will not be able to perform his or her essential duties in the reasonably foreseeable future. So the courts and tribunals look to a number of factors:

- i. **Type of Illness.** The greater the incapacity, the longer the impairment and the weaker the prospect of recovery, the more likely the contract has been frustrated.
- ii. **Period of Past Employment.** The longer the pre-absence employment relationship, the longer it will take to frustrate the contract by illness.
- iii. **Term.** Fixed-term contracts are more easily frustrated than indefinite term contracts.
- iv. **Nature of Employment.**

The more central the employee’s position to the employer’s business, the sooner a contract will be frustrated. In *Naccarato v. Costco Wholesale Canada Ltd.*, 2010 ONSC 2651, the employee was absent for five years for depression with no clear return date. The contract was not frustrated because his position was clerical and easily covered. *Naccarato* is likely an outlier, but it makes the point.



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In any case, it is unlikely that a court or tribunal would find frustration for an absence less than a year. In cases where the contract was held to have been effectively frustrated, the period of absence by reason of illness has typically ranged between 1.5 years for certain unskilled labourers to 3.5 years for skilled, long-term employees: see *MacLellan v. H.B. Contracting Limited*, [1990] B.C.J. No. 935, and *Fraser v. UBS Global Asset Management*, 2011 ONSC 5448, respectively. One case has suggested that frustration will require between 18 months to two years for indefinite term contracts: *White v. Woolworth Canada Inc.*, [1996] N.J. No. 113.

2. Short-term and long-term disability benefits

If an employee is entitled to short term sick-pay, the contract is not frustrated so long as the employee returns to work, or appears able to return, within the period during which sick pay is payable. A period of paid short-term disability (STD) or unpaid statutory leave is generally insufficient to show frustration.

What is the effect of long-term disability (LTD) benefits? In *Dragone v. Riva Plumbing*, 2007 CanLII 40543, the Ontario Superior Court held that the presence of long-term sick leave and disability benefits indicated a greater tolerance for the duration of an employee's absence before frustration. Since the parties anticipated that the employee might take a leave for illness, a period "much longer" than the absence in that case, which was 14 months, would be required for frustration to occur, if it could occur at all.

This is an extreme and -unprincipled view. Consider a particularly tragic example, where a labourer is rendered permanently quadriplegic by a car accident. His or her entitlement to LTD insurance benefits has no bearing on the fundamental question: is there a reasonable likelihood that the employee will be able to perform the essential obligations of his or her job in the reasonably foreseeable future? Thankfully, the approach in *Dragone* has been tempered.

The court in *Duong v. Linamar*, 2010 ONSC 3159, considered whether a contract can be frustrated where it contemplated LTD benefits at the time of hiring and made provisions for those circumstances. The court held that the LTD policy did not bar frustration because the policy expressly provided that benefits could continue even if employment ended.

The Superior Court followed this proposition in *Fraser v. UBS Global Asset Management*. That case also involved a benefits policy that contemplated the end of employment, so *Fraser* failed to clarify directly whether frustration can occur if the LTD policy does not allow for benefits to continue after termination. However, the court arguably implies that it can, as it held that (i) the insurance policy is really a contract between employees and the insurer, and not between employee and employer, and (ii) an LTD provision precluding termination for permanent disability "would have to be stated in precise language to be effective."

Finally, note that it is possible that an employee may be denied LTD benefits but his or her employment contract may nevertheless be held to have been frustrated due to permanent illness. This is because an employee may be disqualified from receiving LTD benefits for a number of reasons, including the failure to provide adequate medical information at the time of application or failing to adhere to a course of treatment in accordance with the policy.

3. Post-Termination Evidence of Permanent Illness

In the best case, employers deciding to terminate on the basis of frustration will have first:

- communicated with the employee throughout his or her absence to determine the prospects for a return-to-work or accommodation (discussed below); and

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- obtained sufficient, up-to-date, *pre-termination* medical documentation showing that there is no reasonable likelihood that the employee will be able to return to work in the foreseeable future.

This is because the onus is on the employer to show frustration and, although case law is divided on this point, a recent Ontario decision casts doubt on the employer's ability to rely on medical evidence obtained after dismissal to show frustration: *Altman v. Steve's Music Store*, 2011 ONSC 2886.

We believe the better view is that post-termination evidence on how the illness actually "turned out" should be relevant. This is because frustration occurs as a matter of law, independent of the intentions or knowledge of the parties. Alternatively, the employer should at least be able to rely on evidence obtained after termination which bears on the employee's condition at the time of dismissal. However, given the uncertainty in the law, the more information the employer has before terminating, the better.

4. The Duty to Accommodate

Ontario has adopted human rights legislation imposing a duty to accommodate an employee's disability to the point of undue hardship. The doctrine of frustration is therefore tempered by this obligation – that is, an attempt at reasonable accommodation is a prerequisite to establishing that a permanent illness has frustrated the contract: see *Antonacci v. Great Atlantic & Pacific Co. of Canada*, [1998] O.J. No. 876.

In *Gahagan v. James Campbell Inc.*, 2014 HRTO 14, the Human Rights Tribunal considered whether the employer, who operated a McDonald's, failed to accommodate an injured worker before treating her employment as frustrated. The employee staffed the grill, but hurt her back while working. The Workplace Safety and Insurance Board granted the employee loss of earnings benefits. She also qualified for LTD benefits and, ultimately, a CPP disability pension.

Given the nature of her physical restrictions, the employer maintained that reasonable accommodation was not possible. The Tribunal agreed. To obtain the benefits she received, the employee professed both an inability to perform her job and a severe and prolonged disability. The employer was not required to provide a chair in the crowded kitchen area, offer "make work", or create a unproductive job. An employee's human rights are not infringed where he or she is simply incapable of performing the essential duties of a job even with reasonable accommodation.

Conclusion

Understanding how the doctrine of frustration is interpreted by courts and tribunals will improve the likelihood that it can be successfully invoked by an employer. Again, the employer should seek legal advice if it thinks it can rely on frustration to end employment.

As a final point, it should be noted that frustration, which is often considered a "defence" to a common law action for wrongful dismissal, does not affect statutory termination obligations. Employees whose contract of employment has been frustrated by unforeseen circumstances are still entitled to statutory severance and termination pay under Part XV of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c 41, as long as the frustration is the result of illness or disability.

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