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TAB 2

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Frustration of Contract in Employment Due to Employee Disability or Illness

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Introduction

Frustration of contract is a long-standing principle of contract law. It applies equally to employment contracts as to other types of contracts. In this paper, we will be looking at the doctrine of frustration of contract in the context of employment contracts where an employee is absent and cannot work because of disability or illness.

What is frustration of contract? What is the current state of the law in Ontario? What test and factors do the courts apply when assessing if an employment contract has been frustrated by an employee's disability or illness? Is there a fixed time limit after which an employer is safe to deem the contract at an end? Are there any relevant statutory considerations? What role, if any, does long-term disability benefits play? What about the duty to accommodate employees with disabilities in accordance with the Ontario *Human Rights Code*? These are the questions we seek to answer in the following paper.

Finally, we will set out some tips and suggestions for both employer and employee counsel to better navigate this interesting area of employment law.

The Doctrine of Frustration of Contract

Frustration of contract refers to a supervening event that occurs after contract formation, which prevents the further performance of the contract. Neither party to the contract is at fault, but the contract can no longer be performed. The employee cannot work, and the employer is thereby no longer required to pay. Where the supervening event is not addressed within the contract itself, the doctrine may relieve the parties from any further obligation to one another.

Employment contracts are a unique type of contract that requires a specific person, the employee, to personally perform the job in exchange for remuneration. If the employee cannot

personally perform their job due to disability or illness, they may be relieved of further performance and the employer may be entitled to deem the contract at an end and may be excused from any further obligation to keep the employee employed or provide notice of termination and/or severance.

A standard, contemporary formulation of the doctrine was articulated by Justice Swinton in *Antonacci v Great Atlantic & Pacific Co. of Canada*, 1998 CanLII 14734 (ON SC) at paragraph 37:

> The doctrine of frustration applies when a contract becomes incapable of performance because, in the circumstances, performance would be radically different from that contemplated by the parties at the time they made the contract. Many cases have emphasized that the frustrating event must be beyond the contemplation of the parties. With respect to employee illness or incapacity, modern courts have not treated illness *per se* as a frustrating event; rather, they have looked at the length of the illness in relation to both the terms and duration of the employment contract. In the words of *Marshall v. Harland & Wolff Ltd.,* [1972] 2 All E.R. 715 (N.I.R.C.), at 718-19, quoted with approval in *Yeager v. R.J. Hastings Agencies Ltd.* (1984), 1984 CanLII 533 (BC SC), 5 C.C.E.L. 266 (B.C. S.C.) at 289-90, one should ask:
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> > …was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the terms of the agreement?

In another oft cited case, *Skopitz v Intercorp Excelle Foods Inc.*, 1999 CanLII 14852 (ON SC), Justice Sachs described the doctrine and its essential features as follows, at paragraph 21:

> Whether a contract of employment has been frustrated by an employee's illness or incapacity depends on whether or not the illness or incapacity was of such a nature or likely to continue for such a period of time that either the employee would never be able to perform the duties contemplated by the original employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover. To determine if a contract has been frustrated, regard must be had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed (*Lafrenière v. Leduc* (1990), 1990 CanLII 6832 (ON SC), 66 D.L.R. (4th) 577 (Ont. H.C.); *Yeager v. R.J. Hastings Agencies Ltd.* (1984), 1984 CanLII 533 (BC SC), 5 C.C.E.L. 266 (B.C. S.C.)).

A Brief Foray into the History of Frustration of Contract in Canada

One of the earliest cases in Canada addressing the doctrine of frustration of contract in the employment setting was the 1904 case of *Dartmouth Ferry Commission v Marks*, 24 SCR 366. The employee was a captain on one of the defendant's ferry steamers. The employee fell ill after the commencement of his employment and thereafter was no longer able to perform his duties, eventually succumbing to his illness. The employee's estate commenced an action for outstanding wages during the period of illness.

The majority decision (Killam J. dissenting) found that the employee's permanent illness made it impossible for him to discharge his employment duties, permitting the employer to treat the contract as at an end and relieved the employer of having to pay any further wages. In the words of Davis J. at page. 371:

> In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract. The consideration which moved the Commission to promise wages was gone.
>
> …
>
> But while releasing the permanently disabled workman from damages for the non-performance of his contract, it does not permit him to recover wages without doing work. No case can be found so deciding.

In 2001, the Supreme Court of Canada again had an opportunity to address the issue of frustration of contract in the context of an employee's disability or illness. Justice Binnie for the Court set out a useful summary of the relevant history and how modern courts have adopted a different approach from their historical counterparts. The case was *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58, at paragraphs 53-56:

> Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, 1960 CanLII 37 (SCC), [1960] S.C.R. 361, *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.

> Earlier cases of "frustration" proceeded on an "implied term" theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The implied term theory is now largely rejected because of its reliance on fiction and imputation.
>
> More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, 1988 CanLII 37 (SCC), [1988] 1 S.C.R. 1087; *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 1980 CanLII 1076 (AB QB), 14 Alta. L.R. (2d) 300 (Q.B.); *O'Connell v. Harkema Express Lines Ltd.* (1982), 1982 CanLII 3198 (ON SC), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 1988 CanLII 3462 (AB QB), 59 Alta. L.R. (2d) 118 (Q.B.); *Victoria Wood Development Corp. v. Ondrey* (1978), 1978 CanLII 1447 (ON CA), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at pp. 677-78.

The Modern Approach

As noted above in the quote from Justice Binnie, the modern approach to frustration of contract is the "radical change in obligation" approach. Does the supervening event render continued performance of work impossible or radically change the relationship between the parties from what they originally contracted for?

Frustration of contract is typically pleaded by a defendant-employer in response to a plaintiff-employee suing for wrongful dismissal. Where frustration is pleaded on the basis of the employee's disability or illness that allegedly rendered continued employment impossible or would have radically changed the obligations between the parties, the Court will consider a number of relevant factors, including the following, to determine if the contract was frustrated:

- Was the employee's disability or illness temporary or permanent? What was the prospect for recovery and return to work, and when? The Court will turn to the available medical and other evidence to assess this question.

- What was the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed? The Court will assess the length of the absence due to incapacity as compared to the length of employment.

- What was the nature of the position of the employee within the company? Was it senior and integral to the business, or was it a lesser role? Some courts have suggested a shorter period of time before incapacity would render a contract frustrated for more senior and integral employees, and a lengthier period of time for employees with lesser roles in a business. For example: *Dragone v Riva Plumbing Limited*, 2007 CanLII 40543 (ON SC) at para. 21. See also: *Naccarato v Costco Wholesale Canada Ltd.*, 2010 ONSC 2651.

The Courts have also developed and established further principles that govern and guide the burden of proof and assessment of a frustration of contract defence in a wrongful dismissal lawsuit:

- It is the employer's onus to prove frustration of contract: *Lemesani v Lowerys Inc.*, 2017 ONSC 1808 at para. 137.

- Frustration of contract is established at the time of termination: *Naccarato v Costco Wholesale Canada Ltd.*, 2010 ONSC 2651 and *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73.

- An employer cannot rely on post-termination evidence to prove frustration of contract unless that evidence was not in its possession at the time of termination and the evidence relates to the nature and extent of incapacity at the time of dismissal: *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73 and *Naccarato v Costco Wholesale Canada Ltd.*, 2010 ONSC 2651.

Application of the Test and Factors: Some Case Examples

Skopitz v Intercorp Excelle Foods Inc., 1999 CanLII 14852 (ON SC) was a wrongful dismissal case where the defendant pleaded frustration of contract. The plaintiff was a 10-year employee who went on medical leave due to a back problem and attempted a return to work with accommodation 15 months later. The employer maintained that it could not accommodate the plaintiff by returning her on a part-time basis, as she requested, which the employee deemed to be a refusal to accommodate and effectively a termination of employment. Justice Sachs decided that the plaintiff had been wrongfully terminated and rejected the defendant's frustration defence, stating the following at paragraph 21:

> Given the length of time Ms. Skopitz had worked for the Defendant; the fact that the Defendant had been able to manage during Ms. Skopitz's absence without having to replace her with another full time employee; the nature of the duties performed by Ms. Skopitz and the fact that Ms. Skopitz did recover I find that the defence of frustration fails.

This example illustrates the Court's application of the above-enumerated factors in assessing a frustration of contract defence; namely, the comparison between a 10-year employee who was on medical leave for 15 months; the nature of the employee's role within the company; and the fact that the incapacity was temporary rather than permanent.

Altman v Steve's Music, 2011 ONSC 1480 is another useful example of the factors applied in a wrongful dismissal / frustration of contract case. In this case, Ms. Altman was a 59-year-old employee who had worked for the employer for approximately 30 years. At the time of termination, she worked as a Store Manager. Approximately 16 months before she was terminated, Ms. Altman was diagnosed with cancer. During the period after her diagnosis and before her termination, Ms. Altman had periods of absence for surgery and on-going treatments, as well as reduced hours working at the store. The employer terminated her employment citing frustration of contract on the basis that she had a permanent condition and was no longer able to perform her duties and responsibilities at work.

Ms. Altman sued for wrongful dismissal, among other things, and the employer raised a frustration of contract defence. Justice Corrick found that the contract of employment was not

frustrated and that Ms. Altman was indeed wrongfully dismissed. This case is also notable because the Court awarded the plaintiff $35,000 in damages for mental distress and $20,000 in punitive damages.

In deciding that the employment contract had not been frustrated due to incapacity, Justice Corrick assessed a number of relevant factors. These factors were used to assess whether the plaintiff's illness as compared to her employment contact was such to render the contract frustrated. These factors were:

- terms of the contract: whether it was annually based or other; whether there was provision for sick pay;
- nature of the employment: whether it was temporary or permanent, and what expectations there were with respect to the duration of employment in the absence of illness;
- nature of the job within the company;
- nature of the illness: whether it was temporary or permanent, prospects for full recovery; length of illness; degree of incapacity; and
- length of past employment.

Ms. Altman was a full-time, permanent employee paid on the basis of an annual salary. Despite the provision of long-term disability benefits, the employer did not pay Ms. Altman while she was on medical leave. Ms. Altman had worked for the company for 30 years and expected to retire from the company. She was one of three managers in the Toronto store and the employer did not replace her with another employee during her absence. Leading up to her termination, Ms. Altman had been on medical leave for 6 months, and had worked reduced hours for 8 months prior to her medical leave. The medical evidence showed that Ms. Altman was able to work at the time of her termination and she informed the employer that she was ready and able to return to work. In these circumstances, the Court found that the contract was not frustrated.

The Role of Long-Term Disability Benefits

The standard formulation of the doctrine of frustration states that frustration occurs when a supervening event occurs that makes it impossible to perform the contract or would render it something radically different, *where no provision for the supervening event was contemplated by the parties*. This raises the legitimate question about the role that long-term disability benefits play in frustration cases. If an employer provides LTD benefits to an employee as a contractual benefit, does that mean the parties contemplated the possibility of a long-term absence due to disability that would foreclose reliance on frustration of contract?

The short answer is no – the mere availability of LTD benefits does not in and of itself rule out frustration of contract. However, the more nuanced answer is that Ontario courts will typically consider LTD benefits and the specific terms of the contract in deciding whether they are a relevant factor in the frustration analysis and decide each case on its own facts.

In *Antonacci v Great Atlantic & Pacific Co. of Canada*, 1998 CanLII 14734 (ON SC), Justice Swinton alluded to this idea that the provision of disability benefits may prolong a period of absence before frustration arises: "… a contract which provides for sick pay cannot be frustrated if the employee returns to work, or appears likely to do so, within the period in which sick pay is available."

In *Dragone v Riva Plumbing Limited*, 2007 CanLII 40543 (ON SC), Justice Perell stated, at paragraph 22, that:

> The presence of long-term sick leave and disability benefits indicates a greater tolerance for the duration of an employee's absence before frustration occurs. Indeed, it has been suggested that contracting for these benefits may postpone the time of frustration because it may be inferred that the contracting parties anticipated that the employee might take leave for illness. See: *Antonacci v. Great Atlantic & Pacific Co. of Canada*, 1998 CanLII 14734 (ON SC), [1998] O.J. No. 876 (Gen. Div.), affd. in part [2000] O.J. No. 280 (C.A.); E.E. Mole and M.J. Stendon, *Wrongful Dismissal Handbook* (3rd ed.) (Markham: LexisNexis Canada Ltd., 2004), chapter B-4.

However, some subsequent decisions have pulled back from this type of analysis. In *Duong v. Linamar*, 2010 ONSC 3159, Justice Newbould dismissed an action for wrongful dismissal agreeing with the defendant-employer that the contract had been frustrated due to

disability. Justice Newbould addressed the plaintiff's argument that the provision of LTD benefits in the employment contract was a relevant factor to consider in the frustration assessment. Justice Newbould stated at paragraph 41:

> Mr. Wright contended that if an employee is permanently disabled, the fact that there was an LTD policy available as part of the employment terms means the employer cannot rely on frustration. I do not accept such a broad statement. In this case, the parties did not provide that the contractual relationship would continue in spite of permanent disability. The fact that there is long term disability coverage made available to the employees of Eston, and paid for by them, does not mean that Eston agreed to employ someone with long term disability indefinitely in spite of the employee's inability to work. The policy itself contemplated LTD benefits after severance. It certainly did not provide that employment would continue throughout long term disability, nor could it as it was a policy between employees and Co-operators and Eston was not a party to it.

Similarly, in *Fraser v. UBS Global Asset Management*, 2011 ONSC 5448, Justice Wein dismissed an action for wrongful dismissal on the basis of frustration of contract due to permanent disability. On the issue of LTD benefits, Justice Wein referenced and relied on the *Duong* case, *above*, stating at paragraph 27:

> There is nothing in the policy or employment contract here to indicate that there was an agreement to employ someone indefinitely in spite of inability to work. In this case in fact, the insurance policy clearly contemplates termination of employment in the event of permanent disabilities, in referring to "the contract of employment is terminated" and "employment options" and "retraining for a new occupation." The granting of unusual benefits such as the absolute preclusion of termination of employment, (which might occur in rare circumstances such as those involving a small family held business or a unique individual) would have to be stated in precise language to be effective.

However, in *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73, Justice Archibald rejected the employer's frustration of contract defence and found that the plaintiff had been wrongfully dismissed. With respect to the issue of LTD benefits, Justice Archibald noted the following at paragraph 159:

> Finally, I am of the opinion that Perell J.'s reasoning in *Dragone* may apply to the present situation. The Plaintiff received LTD benefits up to and following May 29, 2008. Long-term disability was therefore contemplated by the parties, and Manulife rather than Canac bore the costs of the Plaintiff's LTD benefits. The contracting for and reception of these benefits may well postpone the time of frustration past May 29, 2008. This point, too, is made in *obiter*, since my conclusion on the inapplicability of the

doctrine of frustration is founded on the Plaintiff's constructive dismissal upon his return to work in 2005.

While the availability of LTD benefits in an employment contract does not foreclose the possibility of an employer relying on frustration of contract, it may be a relevant factor in determining if and when frustration arises in a particular case.

Human Rights and the Duty to Accommodate Employees with a Disability

The Ontario *Human Rights Code* ("Code") provides protections from discrimination for disabled employees, prohibiting discrimination in employment on the ground of disability and, where a disabled employee can perform the essential duties of his or her job, imposing a duty on the employer to accommodate a disabled employee short of undue hardship.

"Disability" is defined at section 10(1) of the *Code* and includes physical and mental conditions as well as workplace injuries defined under the *WSIA*. Section 5 of the *Code*, prohibits discrimination and harassment in employment on the basis of disability. The test for discrimination on the ground of disability requires an applicant to demonstrate (1) they are a person with a disability as defined by the *Code*, (2) they were subjected to differential or adverse treatment in employment; and (3) their disability was at least one factor in their treatment.

Section 17 of the *Code* is an interpretive provision which effectively creates a duty on an employer to accommodate to the point of undue hardship a disabled employee who can still perform the essential duties of their job. Section 17 (2) specifies the factors relevant to undue hardship, being cost, outside sources of funding, if any, and health and safety requirements, if any. Business inconvenience is not a factor in the analysis.

In *Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, Justice Deschamps, for the Court, explained the duty to accommodate as follows:

> [14] As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> [15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. …
>
> [16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

Frustration of contract involving employee disability will now often involve the intersection of employment and human rights law. The duty to accommodate a disabled employee to the point of undue hardship is a relevant factor in the frustration of contract analysis. For example, Justice Swinton referred to human rights protections and the duty to accommodate in the *Antonacci* case relating to frustration of contract. However, the duty to accommodate under the *Code* does not mean necessarily that an employer cannot claim frustration of contract as the reason for ending an employment relationship.

In *Gahagan v. James Campbell Inc.*, 2014 HRTO 14, for example, the Human Rights Tribunal dismissed two consolidated applications on the basis that there was no failure to accommodate since the evidence showed that the applicant was incapable of performing the essential duties of the job; and that the applicant's termination was not a reprisal for having filed her first application, but rather a result of the contract being frustrated due to her lengthy absence without any prospect for return to work with or without accommodation.

Other Statutory Considerations

Employment Standards Act, 2000, SO 2000, c. 41

Ontario employees are entitled to a minimum amount of termination notice and, in some cases, severance pay in accordance with Part XV of the Act. Ontario Regulation 288/01 –

Termination and Severance of Employment (made pursuant to the Act) qualifies part XV of the Act by disentitling some employees from termination notice.

Section 2 (1) 4 disentitles "An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance," but section 2 (3) specifically carves out a protection for employees "…if the impossibility or frustration is the result of an illness or injury suffered by the employee." The same protection applies for statutory severance per section 9 (2) of the Regulation.

Therefore, even in a frustration of contract case, an employer is responsible for providing the dismissed employee with their minimum statutory termination notice, or pay in lieu thereof, and severance pay, if applicable.

Workplace Safety and Insurance Act, 1997, SO 1997 s 16, Sch A

Section 41 of the *WSIA* creates a statutory obligation on an employer to re-employ an injured worker who is medically able to perform the essential duties of his or her pre-injury employment. This section further establishes a duty to accommodate an injured worker. Finally, this section defines the duration of this obligation on an employer to re-employ an injured worker, being until the earliest of: (a) two years from the date of injury, (b) one year after the worker is medically able to perform the essential duties of his or her pre-injury employment; and (3) the date on which the worker reaches 65.

The "2-Year" Rule?

There is a persistent myth that after two years of incapacity or absence due to disability or illness, an employer is entitled to end the employment relationship on the basis of claiming frustration of contract. However, there is no such legal basis for this assertion. As the above discussion has illustrated, there is no statutory provision for a fixed time limit to absence, and the Courts take a much more nuanced approach to deciding whether frustration has occurred on the particular facts of each case.

Why does this myth persist? What might be the source of the so-called "2-Year Rule"? One place to look is the *WSIA*. As noted above, section 41 creates a statutory requirement on an employer to re-employ an injured worker who can perform the essential duties of their job until the earliest of two years from the date of injury – as one measure in the section. This would suggest that after two years, as one measure, the employer no longer has an obligation to re-employ an injured worker. This may be one source for the so-called 2 Year Rule.

Another possible source is the typical distinction between "own occupation" and "any occupation" commonly found in long-term disability contracts. These policies typically provide income replacement for an employee who is totally disabled and unable to perform the essential duties of their "own occupation" for two years from the date of disability. Thereafter – known as the "change of definition date" – an employee must show that they continue to be totally disabled and unable to perform the duties of "*any* occupation" for which they are qualified. The two-year mark, then, is an important threshold in LTD benefit policies and may give rise to an employer's belief that if an employee continues to be totally disabled and in receipt of LTD benefits beyond the change of definition date, the contract of employment has become frustrated.

However, despite the above two sources, there is no statutory or jurisprudential authority confirming any such 2-Year Rule for frustration of employment contracts. Each case is assessed on its particular facts taking into account the modern approach and factors detailed above.

Some Recent Cases

Nason v Thunder Bay Orthopaedic Inc., 2015 ONSC 8097 was an action for wrongful dismissal, discrimination and failure to accommodate, and aggravated damages. The plaintiff was a 45-year old Registered Orthotic Technician employed for approximately 20 years before he was terminated purportedly for frustration of contract. The plaintiff developed carpal tunnel syndrome, among other workplace injuries, and was approved for WSIB benefits. In August 2010, the employer said it could no longer accommodate the employee and put him on

a leave of absence. In June 2012, the plaintiff sought a return to work, but was ultimately terminated in January 2013.

Justice Fregeau decided that the plaintiff had been terminated and that the employer had not established frustration of contract due to the plaintiff's disability. Specifically, the employer failed to show that there was no reasonable likelihood of the plaintiff being able to return to work within a reasonable timeframe around the time of termination. Justice Fregeau stated:

> [180] I also reject the defendant's submission that Mr. Nason's contract of employment with TBO was frustrated as of the date TBO purported to terminate Mr. Nason. The issue of whether the termination of the employment contract of a disabled employee is a wrongful dismissal or the frustration of the employment contract depends on the facts of the case. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of contract applies because the permanent disability renders performance of the employment contract impossible, such that the obligations of the parties are discharged without penalty. Frustration of contract is established if at the time of termination there is no reasonable likelihood of the employee being able to return to work within a reasonable time. (*Fraser v. UBS*, 2011 ONSC 5448 (CanLII), paragraphs 15 and 32) The onus is on the employer to prove that the contract was frustrated. (*Naccarato v. Costco*, 2010 ONSC 2651 (CanLII) at para. 13)

Boucher v Black & McDonald Ltd., 2016 ONSC 7220 (Div Ct) was an appeal by the employer from a decision of the Ontario Small Claims Court, which found that the employer had subjected the plaintiff to discrimination contrary to the *Code*, and wrongfully dismissed the plaintiff. The Deputy Judge did not accept the defendant's frustration of contract defence.

The plaintiff was a 46-year-old employee who, in an unrelated incident, was assaulted while on maternity leave and developed depression and anxiety. She went on long-term disability benefits in October 2011 and later advised the employer that she could return to work by the end of 2013. The insurer agreed she was no longer disabled and they proposed a graduated return to work by November 11, 2013. However, on October 31, 2013, the employer terminated her employment due to "absence of several months." The plaintiff argued wrongful dismissal and discrimination; and the defendant argued frustration of contract, among other defences.

The Small Claims Court denied the employer's frustration argument, noting that the medical evidence showed the plaintiff could return to work on a graduated basis; rejected the argument that the employer could not wait any longer; dismissed the argument that human rights obligations cease upon frustration of contract; and found that disability was a factor in the termination, contrary to the *Code*.

Justice Gorman of the Divisional Court found there was no palpable and overriding error made by the Small Claims Court, and dismissed the appeal. Justice Gorman reviewed and nicely set out many of the relevant principles in frustration of contract cases, which we have reviewed above, concluding, at paragraph 36, that:

> In the present case, there was a plan to return to work. Indeed, BML had been advised by October 13, 2013 that Boucher intended to return to work November 11, 2013. However, following the submission of the return to work plan, Boucher was terminated.

Lemesani v Lowerys Inc., 2017 ONSC 1808 was a wrongful/constructive dismissal case where the defendant raised abandonment or, in the alternative, frustration of contract. The plaintiff worked as a salesman for more than 15 years and claimed constructive dismissal due to workplace harassment and discrimination on the ground of disability through failure to accommodate. The plaintiff had developed acute stress, depression, and anxiety. The trial judge dismissed the plaintiff's claims for wrongful/constructive dismissal and discrimination. The trial judge decided while the plaintiff had not abandoned his employment, the contract had become frustrated due to the plaintiff's incapacity and inability to return to work:

> [183] As recently as the trial, Mr. Lemesani confirmed that he was incapable of returning to Lowerys. His statement exemplifies the definition of frustration of contract: Mr. Lemesani cannot return to work because his condition makes it impossible for him to perform the contract. Even his psychologist opined that, should he return to work, it would not have been "productive or long-lived" because of the plaintiff's personality factors. At the time of termination, there was no reasonable likelihood that Mr. Lemesani would return to work within a reasonable time.

Finally, *Milloy v Complex Services Inc.*, 2017 ONSC 2923, is an interesting frustration of contract case where the court relied on the principle that "the doctrine of frustration cannot be

applied where the party relying on the doctrine caused the event or occurrence upon which it is claimed that the contract has been terminated." (para. 50)

In this case, the plaintiff had worked for more than 10 years with the defendant primarily as a table games dealer for a casino, although the plaintiff had worked other positions with the employer including as a host for a restaurant at the casino. There was no dispute in the case that the plaintiff developed a permanent disability to her right shoulder as a result of a repetitive work-related injury and could no longer work as a table games dealer. The plaintiff went on short-term disability following shoulder surgery, thereafter returned to work on modified duties, but eventually went on long-term disability for approximately 1.5 years. Notably, the plaintiff applied for numerous alternate positions within the company, but was not hired for any despite being qualified. The defendant ultimately ended the relationship citing frustration of contract.

Justice Maddalena rejected the employer's position that this was a straight forward frustration of contract case. Rather, the judge found that although the plaintiff had an undisputed permanent injury to her shoulder and could not work as a table games dealer, there were many other positions within the company that she applied for and was qualified to work. The employer failed to give any convincing reason as to why the plaintiff was not hired for any of the numerous other jobs she applied for. Justice Maddalena reviewed the relevant frustration principles, including the principle that frustration cannot be relied on by an employer where the employer is found to have caused the incident or occurrence leading to the frustrating event. In this case, the frustrating event was seen as the employer's failure and/or refusal to hire the plaintiff in an alternate position, rather than the plaintiff's permanent shoulder disability preventing her from working as a table games dealer. Justice Maddalena stated:

> 47 I find that her disability need not have ended the employee/employer relationship in this instance and based on these facts. The court is permitted to consider the conduct of the employer. I do not agree that this is a straight forward case of frustration of contract.

48 Ultimately, I find Milloy could perform other jobs that were advertised within the organization. She was not given the opportunity for reasons unknown to her or the court other than "there must have been someone more qualified".

49 I find this conduct on behalf of Complex Services to be a type of "self-induced frustration" on the part of the employer. Complex Services cannot rely on its own default or its own conduct to now justify and plead frustration of contract in law.

50 In the case of *Chilagan v. Island Lake Band No. 161*, (1994), 3 C.C.E.L. (2d) 35 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench held that the doctrine of frustration cannot be applied where the party relying on the doctrine caused the event or occurrence upon which it is claimed that the contract has been terminated.

53 During this trial, there was some clear evidence of alternate employment available to Milloy within the organization.

54 Based on the evidence, I find, after her shoulder disability, she applied for other employment with Complex Services for which she was well-qualified, had performed in the past with this employer, and had an exemplary record, but the employer chose not to consider her.

Tips & Conclusion

Invoking frustration of contract as a basis to terminate an employee with a disability or illness should be a measured and considered decision – not one taken lightly. An employer should ask itself whether there is a need to terminate the employment relationship of an employee who is away on an extended medical leave, rather than hire a temporary replacement or reshuffle existing staff responsibilities.

Where an employer may want to end the relationship on the basis of frustration of contract, it should first have a medical basis to conclude that the employee's condition is permanent, rather than temporary; that the prospects for recovery and return to work are unlikely or not likely in the reasonably foreseeable future as compared to the period of illness and absence to date; and that the employee cannot perform the essential duties of their job and there is no other form of workplace accommodation that the employer can provide.

Often these situations arise in the context of a workplace injury involving the WSIB, a request for human rights accommodation, or the provision of long-term disability benefits. In

these situations, medical evidence is usually available or can be requested by the employer in order to confirm the abilities and limitations of an employee, as well as the prognosis for recovery, before taking the step to end the employment relationship due to frustration.

The following questions are a useful reminder of the relevant legal principles at play in a frustration of contract case and may assist employer and employee counsel when analyzing and advising a client on a potential frustration of contract situation:

- Is the employee temporarily or permanently disabled and unable to work?
- What are the prospects for medical recovery and return to work? What do the medical reports say?
- Does the contract of employment contemplate a lengthy period of absence by an employee?
- Does the contract of employment provide sick leave and/or long-term disability benefits?
- How long has the employee been off work or unable to work for medical reasons?
- Is the disability related to a workplace injury, and what statutory considerations flow?
- Can the employee perform the essential duties of their job? Can the employee be accommodated short of undue hardship?
- Is continued employment impossible or would it radically alter the employment relationship?
- Is there a need to terminate the employment relationship? Can a temporary replacement be hired, or can existing staff resources be utilized?
- What are the particular facts of each case? There is no fixed or arbitrary length of time after which an employer is safe to end the employment based on frustration.
- What position did the employee have in the business? How senior and integral was the employee to the business?

- What evidence does the employer have at the time of termination establishing a permanent incapacity? The onus is on the employer to prove frustration of contract and cannot rely on post-termination evidence that is unrelated to pre-termination incapacity.
- Has the employer itself induced or caused the frustrating event?

While the basic concept of the doctrine of frustration is fairly straightforward, each case turns on its particular facts and involves the assessment of a number of factors before determining if and when an employee can no longer perform their job due to long-term disability or illness. Employment plays a crucial role in a person's life and should not be ended by an employer on the basis of frustration of contract unless and until a clear case can be made out.

Appendix A – Case Law Citations

Altman v Steve's Music, 2011 ONSC 1480

Antonacci v Great Atlantic & Pacific Co. of Canada, 1998 CanLII 14734 (ON SC)

Boucher v Black & McDonald Ltd., 2016 ONSC 7220 (Div Ct)

Ciszkowski v. Canac Kitchens, 2015 ONSC 73

Dartmouth Ferry Commission v Marks, 24 SCR 366

Dragone v Riva Plumbing Limited, 2007 CanLII 40543 (ON SC)

Duong v. Linamar, 2010 ONSC 3159

Fraser v. UBS Global Asset Management, 2011 ONSC 5448

Gahagan v. James Campbell Inc., 2014 HRTO 14

Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ), 2008 SCC 43

Lemesani v Lowerys Inc., 2017 ONSC 1808

Milloy v Complex Services Inc., 2017 ONSC 2923

Naccarato v Costco Wholesale Canada Ltd., 2010 ONSC 2651

Nason v Thunder Bay Orthopaedic Inc., 2015 ONSC 8097

Naylor Group Inc. v Ellis-Don Construction Ltd., 2001 SCC 58

Skopitz v Intercorp Excelle Foods Inc., 1999 CanLII 14852 (ON SC)