frustration of the employment contract

a. what is frustration of contract?

The doctrine of frustration holds that where the occurrence of an event or the alteration of a circumstance renders a contract fundamentally different in character from what the parties originally intended, the contract may be terminated without liability. Frustration will only apply where the event or circumstance was unforeseeable and where it occurred through no fault of either party.

As with any contract, the employment contract may be frustrated. The burden of proof to establish frustration rests with the employer. In such circumstances, both parties are discharged from further performance and neither party will be entitled to damages as a result of the termination. The employer is not obliged to give the employee common law notice or pay in lieu of notice. The employer's only obligation, if any, is to pay the employee his or her minimum entitlements under applicable employment standards legislation.

b. events and circumstances leading to frustration of an employment contract

Frustration is a fact-specific determination that will be made on a case-by-case basis. Given the potentially harsh consequences for employees, courts will closely scrutinize whether or not a fundamental breach has occurred. For the principles of frustration to operate, it is not sufficient that performance of the employment contract is more onerous or unreasonably harsh. Instead, there must have been a radical transformation in the circumstances governing performance. Generally speaking, an employment contract may be frustrated by illness, death, statute or unforeseen circumstances such as a pandemic or catastrophic event. Economic difficulties and lack of profit, even where not foreseeable, do not constitute frustration.

The most common cause for frustration of an employment contract is an employee who is unable to work because of a disabling illness. Where a permanent disability renders performance of the employment contract impossible, the doctrine of frustration may apply.

Where an illness or disability is of a temporary nature, however, employees who are absent from work may not be dismissed without notice or other obligation. Further, where an employee has a disability that prevents them from performing their regular duties, but does not render them altogether unable to work, human rights legislation may give rise to a duty to accommodate the individual in question.

The difficulty often lies in determining whether an employee's illness constitutes a permanent as opposed to a temporary disability and at what date this should be determined to have occurred. Some key factors include: the nature and expected length of the illness; the prospect of recovery; and, to a lesser extent, the length of service. The greater the degree of incapacity, the longer the period of illness and the greater likelihood of persistence, the more likely it is that the employee absent due to illness has frustrated the contract.

c. recent decision on frustration of employment contract due to disability

The Ontario Superior Court's recent decision in *Fraser v. UBS Global Asset Management* (2011 ONSC 5448) ("*Fraser*") considered the issue of whether and when a contract of employment becomes frustrated because of an employee's disability. The Court concluded that on the facts the contract had been frustrated and, as such, the employer was not required to provide notice or pay in lieu of notice.

Fraser was a long-term employee with UBS Global Asset Management. In 2005, following over 20 years of service with UBS, Fraser became ill and was off work six months on short-term disability leave. She returned to work on a trial basis then went off work again for 6 months. At the conclusion of the second period Fraser applied for long-term disability benefits. The insurer paid Fraser LTD benefits for nearly two years, but terminated payments on the grounds that "the plaintiff did not follow medically recommended treatment to assist in her recovery or at least did not provide proof of such as required under the policy".

The plaintiff did not advise UBS of any change in her medical prognosis or of the fact that she had ceased receiving medical treatment for her disability. The plaintiff also did not return to work. Five months later, UBS sent a letter to the plaintiff advising her that her employment had terminated.

The issue before the Court was whether the termination of the plaintiff's employment contract was the product of a wrongful dismissal or frustration of contract. If the dismissal was wrongful the plaintiff would be entitled to damages whereas a frustration of contract would discharge the employer from any liability.

The Court acknowledged that the only medical information that UBS had at the time of termination was a physician's report from two years earlier. Counsel for Fraser termed this report "very optimistic" and suggested that the subsequent reports could not be taken into account in assessing the decision to terminate. The Court disagreed. The additional information known to the employer at the time of dismissal included the reality that the plaintiff had not worked for over 3 years, that she had taken no further steps to provide information to her employer to substantiate her illness and that, according to the insurer, she had not participated in or at least reported on her ongoing medical treatment.

Fraser was found to be “permanently disabled” and the Court held that the facts of this case amounted to frustration of the employment contract. As such, there was no obligation on the part of the employer to provide notice or pay in lieu of notice.

d. conclusions

Despite an array of case law on the doctrine of frustration of contract, complicated issues remain. As the reasons in *Fraser* illustrate, whether an employer can raise the defence of frustration to justify termination of an employment contract will depend on a variety of factors. In the context of an employee with a disabling illness, employers must be reasonably certain that the employee is unable to return to work for the foreseeable future.

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a cautionary note

The foregoing does not constitute legal advice and the specific laws applicable to particular work or in a specific jurisdiction may be different. Any member of our Employment and Labour Relations Group would be pleased to discuss the impact of this law.

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