



What's New in HR Law

Court of Appeal Confirms Employment Contract Frustrated by Employee's Failure to Comply with Client Company's Mandatory Vaccination Policy

May 9, 2024 | By Catherine Phelps

Bottom Line

The Ontario Court of Appeal agreed with a motion judge that an employment contract was frustrated due to an employee's failure to comply with a mandatory vaccination requirement imposed by the employer's client. The frustration of contract doctrine may be invoked to terminate an employment contract on a "no fault" basis where an unforeseeable event renders the employer and employee unable to fulfill the terms of the employment contract. If an employment contract is frustrated, the employee is not entitled to notice of termination or pay in lieu. This decision, released on May 7, 2024, is significant for Ontario employers as it confirms that the doctrine of frustration can apply in the context of vaccine mandates. The employer in this case was successfully represented at the Ontario Court of Appeal by Filion Wakely Thorup Angeletti LLP lawyers, [Evan Campbell](#) and [Catherine Phelps](#).

Background Facts

In [Croke v. VuPoint System Ltd.](#), 2024 ONCA 354 ("VuPoint"), the Appellant was employed as a systems technician by VuPoint Systems Ltd. ("VuPoint"), a federally regulated employer that provides residential satellite and smart home installation services almost exclusively for Bell Canada and Bell Express Vu ("Bell"). VuPoint's employees, including the Appellant, completed installation work for Bell customers in their homes. VuPoint's work for Bell comprised more than 99% of the company's annual revenue.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

On September 8, 2021, Bell announced that it was imposing a COVID-19 vaccination policy on all of its vendors and contractors (“Bell’s Policy”). Bell’s Policy required all subcontractors or other agents who visited any Bell location or interacted in-person with Bell’s customers to be fully vaccinated against COVID-19. Non-compliance with Bell’s Policy would effectively terminate the contract with the supplier.

On September 10, 2021, VuPoint implemented its own COVID-19 vaccination policy (“VuPoint’s Policy”), aligned with Bell’s Policy. VuPoint’s Policy required all employees to submit proof of vaccination to VuPoint as soon as possible. VuPoint’s Policy also stated that if an employee did not submit proof of vaccination, the company would presume the employee to be unvaccinated and the employee would be prohibited from performing work for Bell.

The Appellant failed to disclose his vaccination status to VuPoint, making him unable to work for Bell. Since VuPoint had no other work to provide the Appellant and had no control over Bell’s Policy, VuPoint considered the Appellant’s employment contract to be frustrated.

On September 28, 2021, VuPoint advised the Appellant that his employment would terminate effective October 12, 2021. On the Appellant’s last day of employment, VuPoint provided the Appellant with two weeks’ pay in accordance with his minimum termination entitlements under the *Canada Labour Code*.

The Motion Judge’s Decision

On January 11, 2022, the Appellant commenced an action for wrongful dismissal and aggravated, punitive, and moral damages. He subsequently brought a motion for summary judgment. On February 21, 2023, the motion judge dismissed the Appellant’s wrongful dismissal action. The motion judge agreed with VuPoint: Bell’s Policy was an unforeseeable event beyond the parties’ control that gave rise to a radical change in the employment relationship, frustrating the contract. Therefore, the Appellant was not entitled to any payments in respect of his termination beyond his minimum statutory entitlements, which VuPoint had already paid.

For a more detailed analysis of the lower court decision, please see our firm’s case summary [here](#).

The Court of Appeal’s Decision

The Appellant appealed to the Ontario Court of Appeal. The Court of Appeal upheld the motion judge’s ruling that the Appellant was not wrongfully dismissed as his employment contract had been frustrated.

In its reasons for decision, the Court of Appeal made the following important observations regarding the application of the doctrine of frustration to employment contracts:

- The Court of Appeal rejected the Appellant’s argument that his voluntary choice to remain unvaccinated prevented the doctrine of frustration from applying. The Court of Appeal accepted the motion judge’s finding that Bell’s Policy was the unforeseeable event which frustrated the contract and held that the conduct of employees was not relevant to the application of Bell’s Policy. The Court of Appeal observed that it did not matter whether an employee conducting installations for Bell chose not to get vaccinated, could not obtain the vaccination in their region, or could not get vaccinated due to medical or religious factors. The Court of Appeal compared the effect of Bell’s Policy to that of a new regulatory requirement, effectively rendering unvaccinated employees unqualified to perform the vast majority of VuPoint’s work. The Court of Appeal held that whether an employee affected by the unforeseeable event can or will seek once again to

become qualified – in this case, through vaccination – is not relevant to determining whether the doctrine of frustration applies.

- Similarly, the Court of Appeal rejected the Appellant’s argument that the unforeseeable event was not Bell’s Policy but rather VuPoint’s decision to respond to Bell’s Policy by terminating the Appellant’s employment. The Court of Appeal held that Bell’s Policy was the unforeseen event that gave rise to the frustration as there was no evidence that VuPoint had any control over Bell’s decision to implement the mandatory vaccination requirement. The Court held that in these circumstances VuPoint was entitled to treat the contract as at an end on a “no fault” basis.
- The Court of Appeal also rejected the Appellant’s argument that the doctrine of frustration did not apply because it was foreseeable to both VuPoint and the Appellant that Bell could impose a new health and safety requirement that could impact the parties’ employment relationship. The Court of Appeal held that the onset of the COVID-19 pandemic, and the extraordinary response from Bell, was an exceptional event that VuPoint and the Appellant could not reasonably have anticipated when entering into the employment contract years earlier.
- Finally, the Court of Appeal confirmed that frustration results in the immediate end of the obligations under an employment contract. There is no legal requirement that an employee be given advance notice that the employment relationship has been frustrated, nor is there any requirement that any employee be given an opportunity to rectify their non-eligibility to work before the employment contract is terminated on the basis of frustration.

For these reasons, the Court of Appeal dismissed the Appellant’s appeal and awarded VuPoint costs in connection with the appeal.

Takeaway

VuPoint is the first Court of Appeal decision to confirm that an employee’s refusal to comply with a COVID-19 vaccination policy may give rise to a frustration of contract. Significantly, the Court of Appeal also confirmed that the doctrine of frustration may apply in a variety of circumstances where an unforeseen third-party requirement is imposed on the employer that prevents the parties from fulfilling the terms of the employment contract. Further, the Court of Appeal reiterated that frustration gives rise to a “no fault” termination that entitles the employer to immediately end the employment contract. Ontario employers should keep the doctrine of frustration of contract in mind when considering the possible end of an employment relationship.

The author wishes to thank Emily Elder and Adele Zhang for their contributions to this article.

Need More Information?

For more information or assistance with employee terminations, contact [Evan Campbell](mailto:ecampbell@filion.on.ca) at ecampbell@filion.on.ca, [Catherine Phelps](mailto:cphelps@filion.on.ca) at cphelps@filion.on.ca, or your [regular lawyer](#) at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London

252 Pall Mall Street, Suite 100
London, Ontario N6A 5P6
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca

Kitchener-Waterloo

137 Glasgow Street
Suite 210, Office 165
Kitchener, Ontario N2G 4X8
tel: 519.433.7270
fax: 519.433.4453
kitchener-waterloo@filion.on.ca