What's New in HR Law

Employee's *Desire* to Return to Work Insufficient to Cure Frustration of Contract

October 30, 2019

Bottom Line

In *Katz et al v Clark*, 2019 ONSC 2188, the Ontario Divisional Court unanimously held that the motion judge erred in denying summary judgement in a case where the Plaintiff's contract of employment became frustrated as a result of a permanent disability. This decision reinforces core legal principles that underpin the disability accommodation process in the workplace. Specifically, the Divisional Court reiterated that the doctrine of frustration applies where the performance of an employment contract is rendered impossible because of an employee's disability. The Divisional Court also clarified that an employee's desire to return to work alone will not cure frustration of contract. Rather, an employer's duty to accommodate is only triggered where an employee expresses both: (i) a *desire* to return to work, and (ii) evidence of the *ability* to do so.

The Facts

The Plaintiff was a storefront manager, hired in 2000. He went off work on a medical leave of absence in 2008 as a result of issues relating to his mental health. During his medical leave, the Plaintiff suffered a slip and fall and was approved for both short-term and long-term disability

benefits thereafter. In early 2013, the long-term disability provider prepared a medical update advising the Plaintiff was unable to perform the essential duties of his position and that there was no reasonable prospect he would be capable of performing them in the foreseeable future.

On July 1, 2013, the employer wrote to the Plaintiff explaining that effective December 13, 2013, the Plaintiff's employment would terminate as the contract had become frustrated. The Plaintiff responded, through his lawyer, indicating he was working very hard to return to work and perform his essential job duties. Despite multiple follow-up attempts thereafter by the employer to obtain more detailed information regarding the Plaintiff's prognosis and estimated return to work date, the Plaintiff did not respond. The employer then proceeded to terminate the Plaintiff's employment on the basis of frustration of contract as previously advised, and provided the Plaintiff with his entitlements under the *Employment Standards Act, 2000* ("*ESA*").

Plaintiff Alleges Termination was Wrongful and in Violation of the *Human Rights Code*

Following notification of the cessation of his employment, the Plaintiff commenced a civil action against the employer claiming wrongful dismissal damages as well as damages under the *Human Rights Code*. In response, the employer moved for summary judgement on the basis that the employment contract was frustrated by the employee's prolonged absence and his inability to return to work, as evidenced by the available medical information.

The Motion Judge's Decision

The motion judge concluded – in error – that there was a triable issue as to whether the duty to accommodate was triggered and refused to grant summary judgment on this basis. The motion judge based his decision to deny summary judgment on the fact that, in his view, the employer failed to consider its duty to accommodate. In coming to this conclusion, the motion judge placed significant weight on the lack of personal contact between the employer and the Plaintiff.

The Divisional Court's Decision

The Divisional Court set aside the motion judge's decision and granted summary judgement in favour of the employer, stating the motion judge misapprehended the evidence and, in particular, failed to account for the evidence demonstrating the Plaintiff was permanently disabled and unlikely to return to work in the foreseeable future.

The Divisional Court found that the available evidence established the contract had been frustrated and held that:

> The doctrine of frustration of contract applies where there is evidence that the employee's disabling condition is permanent. The principle applies in these circumstances because the employee's permanent disability renders performance of the employment contract impossible "such that the obligations of the parties are discharged without penalty."

Based on the uncontroverted evidence that the Plaintiff was afflicted by a permanent disability, the Divisional Court concluded the employer was entitled to treat the employment relationship as at an end. The Divisional Court further ruled that no further payments were owing to the Plaintiff as he had already been provided with his entitlements under the *ESA*.

In addition to overturning the motion judge's decision on the issue of summary judgment, the Divisional Court also provided helpful guidance around the duty to accommodate and when this duty is triggered:

> the law is clear that an employer's duty to accommodate is only triggered when an employee informs an employer not only of his wish to return to work but also provides evidence of his or her ability to return to work including any disability-related needs that would allow him or her to do so. … In this case, the Respondent never provided any such information to the Appellant.
>
> Further, an employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future. … It is "inherently impossible" to accommodate an employee who is unable to work

The Divisional Court further commented that in the specific circumstances that arose in this case, any further communications by the employer regarding possible workplace accommodation would have been "entirely futile on the evidence" and "arguably, inappropriate."

Check the Box

This Divisional Court's ruling in this case provides further clarity for employers regarding when the duty to accommodate arises. This case makes clear that an employee's desire to return to work (even if genuinely held) will, on its own, not be enough to trigger the duty to accommodate. Rather, the duty arises only where the employee's *interest* is supported by evidence demonstrating a corresponding *ability* to return to work.

In addition to providing helpful guidance on the construction of the duty to accommodate, the decision also confirms that, procedurally, summary judgement may be appropriate where frustration of contract is at issue and the underlying facts are undisputed.

Employers should take note that while the doctrine of frustration of contract may apply in appropriate circumstances to bring an employment relationship to an end, in some jurisdictions, an employer will still be obligated to provide the affected employee with their minimum termination entitlements under applicable employment standards legislation. This is the case in Ontario, for instance, where the *ESA* and its regulations make clear that frustration of contract that arises as a result of a medical disability will not relieve an employer of its termination and severance obligations under the statute.

Need more information?

In the event you require more information about workplace accommodation or the doctrine of frustration of contract, please contact Laura Karabulut at 416.408.5522 or your regular lawyer at the firm.

**We thank Stephanie Nicholson, one of FWTA's dedicated and hard-working law students, for her assistance in preparing this article.*

Filion Wakely Thorup Angeletti LLP
management labour and employment law

Proud member of L&E GLOBAL
an alliance of employers' counsel worldwide

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
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
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