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• APPELLATE COURT UPHOLDS TERMINATION FOR FRUSTRATION, DUTY TO ACCOMMODATE NOT TRIGGERED •

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In its recent decision, *Katz et al. v. Clarke*, 2019 ONSC 2188, the Ontario Divisional Court set aside an order of a motion judge, granted the defendant's summary judgment motion and dismissed the plaintiff's action. The decision involves important principles relating to frustration of contract and the duty to accommodate a disabled employee. The Court found that the employee's contract of employment was frustrated and the duty to accommodate had not been triggered.

The plaintiff had been hired by the defendant in 2000. He had not worked since 2008, at which time he booked off work due to a disability. While off work, he suffered a debilitating fall, damaging his knee. He received both short-term disability (STD) and long-term disability (LTD) benefits.

Early in 2013 the defendant's LTD insurer advised that the plaintiff was "unable to perform the essential duties of his position and there was no reasonable expectation that he would be capable of performing them in the foreseeable future." On July 1, 2013, the defendant notified the plaintiff that his employment would terminate effective December 31, 2013, at which time his *Employment Standards Act, 2000* (ESA) entitlements would be provided.

Through counsel, the plaintiff indicated that he was working hard to get back to work. The defendant (through counsel) requested medical information with respect to the plaintiff's ability to return to work on two different occasions but none was forthcoming and the plaintiff's employment was terminated.

There was no dispute on the record before the motion judge that as of the date of termination, the plaintiff was totally disabled and unable to work.

The plaintiff commenced an action claiming wrongful dismissal damages and damages under the *Human Rights Code*. The defendant unsuccessfully moved for summary judgment as the motion judge found, among things, that the issue of whether the defendant fulfilled its duty to accommodate (given the plaintiff's stated desire to return to work) required a trial.

The defendant appealed. The Divisional Court set aside the motion judge's decision, granted summary judgment in favour of the defendant, and dismissed the plaintiff's action. Among other things, it made the following findings:

- where there is no dispute regarding material facts, summary judgment "serves the goals of timeliness, affordability and proportionality without any adverse effect on the interests of

justice” and its use is appropriate in cases of frustration of contract.

- the motion judge erred when he found that there was a genuine issue for trial based on his view that the law “did not require more” of the plaintiff than an expression of desire to return to work to trigger the duty to accommodate.
- 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 to do so ... ‘the employee must communicate the ability, not just the desire, to return to work’.”
- an “employer’s duty to accommodate ends where the employee is no longer able to fulfill 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 motion judge misapprehended the medical evidence, which clearly indicated that the plaintiff was totally disabled and unable to work “in any occupation at the time or for the foreseeable future” at which point the employer’s duty to accommodate ended and the employer was entitled to treat the employment contract as at an end.
- the plaintiff’s argument that the employer should have contacted him while he was off work was rejected; the Court stated that “Any such communication regarding possible accommodation would have been entirely futile on the evidence before the Court and, arguably, inappropriate.”

The Divisional Court’s ruling provides helpful guidance to employers on when frustration will apply to end their employment relationship with an employee who has been off work due to a disability for an extended period of time. The Court confirmed that:

1. the doctrine of frustration of contract applies where there is evidence that the employee’s disabling condition is permanent. In these circumstances, because the employee’s permanent disability renders the performance of the employment contract impossible, the employer can end the employment relationship “without penalty”, subject only to providing the employee with their entitlements under the ESA;
2. an employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future; and
3. the mere stated desire to return to work on the part of the employee (without more) is not sufficient to trigger the duty to accommodate. Rather, in order for the duty to accommodate to be triggered, employees must not only inform the employer of their wish to return to work, but also provide evidence of their ability to return to work including any disability-related needs that would allow them to do so.

This reasoning supports the ability of an employer to declare the end of the employment relationship on the basis of frustration of contract without triggering (or breaching) its duty to accommodate when the evidence indicates an employee cannot return to work in the reasonably foreseeable future.

The Divisional Court’s ruling is also further confirmation that a motion for summary judgment is an appropriate, efficient, and cost-effective avenue for resolving actions where frustration of contract is at issue.

The defendant in this case was represented by Frank Cesario and Ed O’Dwyer of Hicks Morley.

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