**CITATION:** Croke v. VuPoint Systems Ltd., 2023 ONSC 1234
**COURT FILE NO.:** CV-22-675005
**DATE:** 20230221

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Alan Croke

Plaintiff/Moving Party

**AND:**

VuPoint Systems Ltd.

Defendant/Responding Party

**BEFORE:** Pollak J.

**COUNSEL:** *David Share & Nick Goldhawk*, for the Plaintiff

*Evan Campbell*, for the Defendant

**HEARD:** September 26, 2022

## ENDORSEMENT

[1] The Plaintiff Mr. Alan Croke ("Mr. Croke") was employed as a systems technician by the Defendant/Responding Party, VuPoint Systems Ltd ("VuPoint").

[2] VuPoint, a federally regulated employer, provides satellite television and smart home installation services on behalf of Bell Canada and Bell ExpressVu (collectively referred to as "Bell"). It is subject to the provisions of the *Canada Labour Code*, R.S.C., 1985 c. L-2 ("*CLC*").

[3] Bell provides more than 99% of VuPoint's annual income. Mr. Croke performed work for Bell. He brings this motion for summary judgment against VuPoint for damages for wrongful dismissal, and for aggravated, punitive, and/or moral damages.

[4] Mr. Croke was employed with VuPoint from May 29, 2014 to October 12, 2021, as a Systems Technician or Satellite Technician and paid on a variable piecework basis earning base pay of approximately $65,000 per annum plus group benefits. He worked only for Bell. On or around September 8, 2021, Bell informed VuPoint that its installers would be required to receive two doses of an approved COVID-19 vaccine. As a result, VuPoint adopted a mandatory vaccination policy requiring all installers to be vaccinated against COVID-19 and to provide proof of vaccination to VuPoint (the "Policy"). The Policy indicated that non-compliant installers would be "prohibited from performing work for certain customers (including Bell)" and "may not receive the assignment of any jobs." It did not address termination of employment.

[5] VuPoint terminated Mr. Croke's employment by notice dated September 28, 2021, to be effective October 12, 2021, with his group benefits also terminated on October 12, 2021.

[6] On October 9, 2021, Mr. Croke sent a letter to his supervisor, stating he would not disclose his vaccination status due to privacy laws and claiming that VuPoint was discriminating against him by terminating his employment for his decision to not become vaccinated. His evidence is that he was "caught off-guard" by the termination notice, panicked, and acted without legal advice.

[7] Mr. Croke's supervisor's evidence was that VuPoint had work for Mr. Croke to perform following his termination if he had complied with the Policy. However, Mr. Croke's evidence is that he took VuPoint's decision to terminate his employment as final.

**[8]** Mr. Croke was able to find new employment effective March 19, 2022, earning a lower pay of $18.50 an hour for 40 hours a week.

**[9]** In this Action, Mr. Croke's position is that VuPoint cannot be allowed to ignore its duty to warn him of the consequences of non-compliance with the Policy by characterizing this termination as a "frustration of contract". He argues that, if VuPoint's argument is accepted, employers would be able to use frustration as an alternative ground for any termination for cause related to ongoing misconduct, such as absences, tardiness, or negligence.

**[10]** Mr. Croke submits that this dispute really arises out of his conduct and submits that it was his right to refuse to be vaccinated.

[11] VuPoint's defence is that neither it nor the Plaintiff was responsible for the implementation of this Policy. The parties agree that being able to work for Bell and enter the home of Bell's customers was a fundamental part of the Plaintiff's employment and that his failure to become vaccinated resulted in his complete inability to perform the duties of his position. It is also undisputed that there was no other work that VuPoint could have provided to him. The evidence is that VuPoint had no work for the Plaintiff to do other than assignments for Bell which would require him to be fully vaccinated. The Plaintiff's evidence is that he had not performed work for any customer, other than Bell, for at least the previous two years of his employment. VuPoint argues that Mr. Croke's employment with VuPoint ceased as a result of frustration of the employment contract. Bell's Policy required the Plaintiff to be fully vaccinated in order to be eligible to interact in-person with Bell customers, which was a fundamental duty in his employment with VuPoint. Bell's Policy was completely out of VuPoint's control and was not foreseen or contemplated by the parties. As a result of the Plaintiff's non-compliance, he lacked a necessary qualification to perform his duties and was ineligible to work for the foreseeable future. It is therefore submitted that the Plaintiff's employment was frustrated as of October 12, 2022 (his last day of employment with VuPoint) and he, therefore, has no entitlement to reasonable notice at common law. Mr. Croke was paid $2,393.02 in severance pay in addition to his two weeks of working notice.

**[12]** Mr. Croke submits that VuPoint cannot satisfy its evidentiary onus to establish that the contract of employment was impossible to perform at the time Mr. Croke's employment was terminated.

[13] VuPoint consented to the matter proceeding via summary judgment even though the Plaintiff commenced the action under simplified procedure in order to have the wrongful dismissal "heard in an efficient and expeditious manner". VuPoint agrees that the issue of whether the Plaintiff's employment contract was frustrated is appropriate for summary judgment.

[14] I do not agree that such procedure was the most efficient use of the court's resources, as on a motion for summary judgment, there is always the possibility that the court finds that the Action is unable to be decided without a trial of an issue. In this case, however, I do agree with the parties that the dispute can be resolved by this court on a motion for summary judgment.

[15] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada provided a roadmap to follow on a summary judgment motion. At para. 66, the court states:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers**. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).**
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> If there appears to be a genuine issue requiring a trial, **she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2)**. She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness. [Italics in original; bold added.]

[16] The Supreme Court of Canada in *Hryniak* attempted to create a procedure designed to be expeditious and affordable. However, the process must also ensure that the dispute is resolved fairly and justly.

[17] The Ontario Court of Appeal stated in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at paras. 35 and 37, that the advisability of a staged summary judgment process must be assessed in the context of the litigation as a whole. The Court noted that in a staged summary judgment process there was a risk that a trial judge would develop a fuller appreciation of the relationships and the transactional context than the motion judge. This difference in appreciation could lead to a trial decision that would be implicitly inconsistent with the motion judge's finding, even though the parties would be bound by the motion judge's finding. This difference in appreciation could lead to inconsistent findings and substantive injustice. At paras. 44-45 the court stated:

> Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context**. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters,**

> **in a way that would not likely occur in a full trial where the trial judge sees and hears it all.**
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> **Judges are aware that the process of preparing summary judgment motion materials and cross-examinations, with or without a mini-trial, will not necessarily provide savings over an ordinary discovery and trial process, and might not "serve the goals of timeliness, affordability and proportionality"** ( *Hryniak* at para. 66). Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly. [Emphasis added.]

[18] I am satisfied that all of the requirements set out by the Supreme Court of Canada and Court of Appeal have been satisfied, with none of the concerns referenced being present in this Action.

[19] The evidence is that Bell's Policy did not include any alternative options, such as rapid testing. Bell also reserved the right to audit compliance with the policy, which included proof of vaccination with the provision that a failure to comply with the policy would constitute a material breach of the Supply Agreement between Bell and VuPoint.

[20] The evidence is that the Plaintiff was aware of Bell's vaccination policy and his requirement to become fully vaccinated in order to work and that he only provided services to Bell in his employment with VuPoint. Further, if the Plaintiff could not perform work for Bell then VuPoint had no installation work to assign to him. The Plaintiff did not advise VuPoint that he intended to become fully vaccinated so that he would be in compliance with the Policy. The Plaintiff confirmed that he had no intention of being vaccinated and that he was not fully vaccinated at the time of his dismissal.

[21] The Plaintiff was given two weeks' working notice on September 28, 2021, with his last date of employment being October 12, 2021. During this working notice the Plaintiff advised VuPoint that he would never be vaccinated. The Plaintiff was aware of the consequence of non-compliance with the new vaccine qualification for at least the two-week period during which he continued to work for VuPoint following the notice of termination on September 28, 2021. The Plaintiff advised VuPoint that he was "not going to consent to any type of COVID-19 vaccine that [Bell] is mandating" and that he had made a decision "not to take ANY vaccine including the COVID-19 experimental injection". These statements were clear, and they excluded any possibility that there might be compliance with the Policy in the future.

[22] I, therefore, do not accept that Mr. Croke did not receive "clear and unambiguous" warnings that his failure to comply with the Policy could lead to the termination of his employment. He was advised that his employment would be terminated on September 21, 2021.

[23] The Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd*., 2001 SCC 58, [2001] 2 S.C.R. 943, at paras. 53 and 55, held that:

> [53] 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" ...
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> …
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> [55] [When frustration of contract is argued] [t]he 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 ... has occurred without the fault of either party.

[24] In *Naylor*, at para. 55, the Supreme Court relied in part on the following explanation of "radical change of obligation" provided in G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at p. 677:

> (a) The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party. What would appear essential is that the party claiming that a contract has been frustrated should establish that performance of the contract, as originally agreed, would be impossible.

[25] The legal effect of a frustrated contract entitles the parties to treat the contract as being at an end, with no obligation to continue the contract and no entitlement to either party as a result of the end of the contract. In such a case, an employer has no obligation to provide any notice of termination at common law.

[26] I am of the view that the analysis in the decision of *Fraser Health Authority v. Hospital Employees' Union (Tracy London Termination),* 2022 CanLII 91089 (B.C. L.A.) is of assistance. In that case, an employee's employment contract was found to have been frustrated by her refusal to obtain a COVID-19 vaccination under a mandatory vaccination policy that a public health organization was required to enforce for its employees. The arbitrator compared the requirement to have the employees be fully vaccinated to cases where employees were barred from working as a result of security clearance failures, stating, at para. 19, that he was "persuaded that the principles of frustration of the employment contract can apply in the context of this case".

[27] I find that this case is analogous to the frustration of Mr. Croke's employment. Bell's implementation of its mandatory COVID-19 vaccination policy meant that the Plaintiff could not perform any work for VuPoint unless he was vaccinated. Bell's Policy resulted in the Plaintiff lacking a necessary qualification to perform any of his duties.

[28] The supervening event is Bell's implementation of a mandatory vaccination condition on all subcontractors in order for those subcontractors to be eligible to perform installation services for Bell. VuPoint submits that neither party could have possibly foreseen in 2014, when the parties entered into the employment contract, that an unprecedented global pandemic would occur that would cause Bell, to implement a policy requiring all VuPoint's installers to become vaccinated against said disease, failing which they would not be able to work for Bell.

[29] I agree that Bells' mandatory vaccination policy was an unforeseen circumstance which was not contemplated by either party, when the Plaintiff and the Defendant entered into the employment relationship in 2014.

[30] I find that there was no default in the employment agreement by either Mr. Croke or VuPoint. VuPoint was required, by contract, to comply with Bell's policies. The fact that the Plaintiff could have chosen to be vaccinated does not mean that he was in default as the circumstance which caused the frustration was the result of a decision by Bell, not the Plaintiff or the Defendant. VuPoint also had no control or knowledge over the timeline of Bell's Policy and was given no indication that the policy was implemented as a temporary measure.

[31] I agree that VuPoint's lack of control over Bell's Policy makes this case analogous to those where employees are unable to work due to a statutory or legal change that resulted in the employee being unqualified to perform their job. In *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357 (Div. Ct.), the Divisional Court held that a new licensing requirement for security guards had the effect of frustrating an employment contract.

[32] I find that Mr. Croke's complete inability to perform the duties of his position for the foreseeable future constitutes a radical change that struck at the root of the employment contract, resulting in the frustration of the contract.

[33] In *Cowie*, at para. 23, our Divisional Court held that the concept of frustration can also apply to situations where the contract may be capable of being performed "but would be totally different from what the parties intended were it performed after the change that has occurred". Although the Plaintiff's job as a technician still existed at VuPoint, he could not perform any of the duties required of the position as his duties were radically different from what the parties had ever intended when the employment relationship commenced.

**[34]** Notwithstanding Mr. Croke's evidence about how receiving this notice of termination influenced his conduct, I find that, as I have stated above, his communication with VuPoint was clear and unequivocal.

[35] Further, I agree that VuPoint is not required to modify Mr. Croke's contract to ensure that he can continue working. In the case of *Thomas v. Lafleche Union Hospital Board*, 82 Sask. R. 70, aff'd 93 Sask. R. 150 (C.A.), an employee lost his registered nurse status (required for approximately 69% of his employment duties) and was terminated from his employment as a result of frustration of contract. The employee argued that even after losing his status, performance was still possible under his contract of employment for the other 31% of his job. The trial judge disagreed, stating:

> [15] I cannot accede to this argument; the plaintiff held one position with the defendant and the major portion of the duties of the position related to director of nursing duties, which he could no longer perform. **To modify the contract of employment to afford continued employment to the plaintiff restricted to the duties of administrator and secretary-treasurer of the hospital would change the nature of the contract of employment to the point where "the thing undertaken would, if performed, be a different thing for that contracted for**". [Emphasis added.]

[36] I am of the view that the court's reasoning in *Cowie* applies. The concept of frustration can also apply to situations where the contract may be capable of being performed **"but would be totally different from what the parties intended were it performed after the change that has occurred":** *Cowie*, at para. 23 (emphasis added). Mr. Croke's employment as a systems technician where he is unable to perform his employment duties is radically different from what the parties had ever intended when the employment relationship commenced.

[37] In the *Cowie* case, the trial judge found that the employee's job should have been suspended instead of terminated, as the employee's failure to have a licence was a temporary convenience. The Divisional Court held that the legislation made it impossible for him to continue to be employed and no one knew whether the employee would qualify for a pardon or a licence. The granting of the pardon or the licence was not within the employer's control, and it was a matter of "pure speculation" whether either would be granted. The Divisional Court stated that:

> [I]n considering the doctrine of frustration, **the Trial Judge erred in placing too much emphasis on the notion that the disruption of the contract must be permanent in the sense of never being possible to resume in the future. The real question is whether the performance of the contract becomes a thing radically different from that which was undertaken by the contract** … To continue to bind [the employer] to an employment contract, when the employee by law is prohibited from performing any services under the contract for what appears to be a lengthy and open-ended period of time – is imposing something radically different from what the parties originally agreed to. [Emphasis added.]

**[38]** In this case, what Mr. Croke *might* have done is not in evidence, but his clear and unequivocal statements regarding his intentions to his employer are.

[39] To conclude, I find that VuPoint's vaccination policy was a supervening event that was beyond the parties' control and was not contemplated by the parties when they entered into the employment contract. Over 99% of VuPoint's business came from Bell, and it was required to comply with and enforce Bell's policies pursuant to the supply agreement. This resulted in a radical change to the Plaintiff's employment contract, as he was unable to perform any duties of his employment while he remained unvaccinated and he advised his employer in very clear terms

that he would not become vaccinated. This supervening event and radical change to the employment contract was in place for the foreseeable future as there was no indication that the Bell vaccination policy would be lifted. As a result, I find that Bell's vaccination policy frustrated the Plaintiff's employment with VuPoint. The Plaintiff was provided with two weeks' working notice and received all amounts owing to him, including severance, under the *CLC*. As Mr. Croke's employment was frustrated, he is not entitled to any additional damages for wrongful termination related to reasonable notice.

[40] For all of the above noted reasons, Mr. Croke's motion for summary judgment is denied as he is not entitled to any damages for wrongful dismissal. The Action is dismissed.

**Costs**

[41] As the Respondent is the successful party in this Application, it is entitled to its costs on a partial indemnity basis. If the parties are unable to agree on costs by reason of the operation of the Rules **as a result of offers to settle,** they may make submissions of no more than two pages, double spaced sent to the Plaintiff, uploaded to CaseLines with a copy sent to my assistant Roxanne Johnson at Roxanne.johnson@ontario.ca by 12 p.m. on March 1, 2023. The Plaintiff may make submissions of no more than two pages, double spaced sent to the Respondent, uploaded to CaseLines with a copy sent to my assistant by 12 p.m. on March 8, 2023. No reply submissions will be accepted.

Pollak J.

**Date:** February 21, 2023