A–Z OF EMPLOYING

Frustration

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

Frustration

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Contents

This is only a guide.

It should not be a substitute for professional advice.

Please seek advice from our AdviceLine Team if you require specific assistance.

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Overview

Frustration of contract occurs only when a supervening event renders the performance of that contract impossible or radically different from what the parties had intended.

The doctrine of frustration can apply to contracts of employment; however frustration has been upheld in only a few circumstances.

Where a contract of employment governed by New Zealand law has been frustrated the Contract and Commercial Law Act 2017 will apply.

Where an employee is frequently absent due to illness or injury, the employer should seek specialist medical advice about the employee's prognosis and level of incapacity.

Employers should seek advice before considering dismissing an employee on the basis of unfitness or unavailability; the employment contract may not have been frustrated but there are other avenues that employers can pursue to terminate the employment relationship.

Introduction

The doctrine of frustration is rarely used to end employment contracts because the employment agreement itself usually provides direction on how to terminate an employee's employment.

Employers often incorrectly assume that the employment contract has been frustrated when an employee will be or has been unable to attend the workplace for a prolonged period of time. Using the doctrine incorrectly may render an employer's decision to terminate the employment of an employee an unjustified dismissal.

The information in provided in this A-Z Guide should be supplemented with the information provided in the A-Z Guides on Incapacity and Abandonment.

Doctrine of Frustration

The doctrine of frustration applies to all contracts, not just employment agreements. The doctrine applies if, before the parties to a contract have been able to complete the performance of that contract, *a supervening event beyond the control of either of the parties* occurs, rendering further performance and completion impossible, or substantially impossible.

Where the doctrine applies, and the contract is said to be frustrated, then the parties are released from their obligations under that contract to complete it. There is no allocation or apportionment of fault under this doctrine.

Frustration and Employment

The law in relation to frustration of contract can be complex and is rarely used in relation to employment contracts. Professional advice should be sought before you decided to end an employment relationship on the grounds of frustration.

The Court of Appeal addressed the application of the doctrine of frustration to employment contracts in *A worker v A Farmer* [2010] NZCA 547, [2010] ERNZ 407. The Court made it clear that the doctrine of frustration should only be used, in relation to employment agreements, if the employment agreement "*did not make sufficient provision for what occurred*". The Court noted that just because an allegation may be of serious nature and place the employer in a terrible position, this does not remove the employer's obligation to address the situation under the employment agreement (if possible) and also in good faith.

When considering the application of the doctrine, the first question is whether what happened was capable in law of frustrating the contract. The second question is whether the occurrence did frustrate the contract; this is a question of fact: Lawton LJ *in F C Shepherd & Co Ltd v Jerrom* [1986] 3 All ER 589.

The doctrine of frustration is applicable to contracts of employment; however whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, and in view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees: *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24.

Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended, Bingham LJ in: *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd's Rep 1 at p 8.

Most often the question of whether or not an employment agreement has been frustrated will be asked because either an employee is incapacitated to some extent by injury or illness, or, the employee is facing a prison sentence or has been sentenced to imprisonment.

In *Smith v Air New Zealand* [2000] 2 ERNZ 376, the Employment Court considered the airline's defence of frustration in a claim for breach of contract. Mr Smith, a Boeing 747-400 captain, was placed on leave without pay by the airline after reaching 60 years of age. The airline argued that the contract of employment contract was frustrated when Mr Smith turned 60, owing to international flight standards.

The Court found first, that Mr Smith had been employed as pilot and not as a Boeing 747-400 captain as the airline contended. It found second, that Mr Smith's attainment of 60 years of age was not an event that frustrated the contract:

[79] …At worst, it made performance of the contract inconvenient or difficult for both parties. The destinations to which Mr Smith could then operate as pilot in command were more limited. However, given my conclusion that Mr Smith's employment was as a pilot and not as a B744 captain, there remained both numerous services on which he could continue to fly as a pilot in command, and as the evidence shows, the opportunity to bid for a position as first officer [second in command, and not affected by international flight standards in respect of age] that, had it been validated, could have enabled Mr Smith to continue to fly as a first officer on B744 services.

[83] Frustration, when it occurs, operates automatically in the sense that the contract is frustrated and not frustratable depending upon subsequent events. I do not accept the defendant's position that, in pursuance of its obligations of fair and reasonable treatment, it was obliged to suspend Mr Smith's employment in order to prevent the contract being frustrated. To accept such an argument would be to alter substantially the common law doctrine of frustration in an employment context.

Frustration and triangular employment relationship

An employee's inability to perform work because they are banned from their place of work, for example a client's site, does not automatically trigger the doctrine of frustration.

In this situation, although an employer may not have control over whether the employee can return to the client's site, it is still important to ensure that you act in good faith. The employer has an obligation to consider how the removal from the client's site impacts the employee's employment and whether there are redeployment opportunities.

In *Hill v Workforce Development Ltd* [2013] NZERA Wellington 65, Ms Hill was employed to work at Workforce Development Limited's client's site, a Department of Corrections Prison. Ms Hill was banned from the prison site after breaching a prison policy. Ms Hill was subsequently dismissed by her employer on the grounds of frustration. The Authority concluded that the frustration did not preclude Ms Hill's employer from acting in good faith and the employer's failure to conduct a disciplinary process before terminating Ms Hill's employment rendered the decision to dismiss unjustified.

This case was appealed to the Employment Court, which overturned the Authority's decision and upheld the termination of the employee. The Court did not deal with the allegation that the contract was frustrated in detail because the termination was held to be justifiable. However, the Court did note, at paragraph 57:

> *Because of the findings I have reached I do not need to deal with WDL's additional argument that because the employment agreement was effectively frustrated, there was no dismissal and, accordingly, no personal grievance. On this analysis, the statutory requirements set out in s 103A have no application. I would, however, have had difficulty accepting these propositions. Parties to an employment relationship are not permitted to contract out of their statutory obligations, including the procedural requirements relating to fair process and their mutual obligations.*

Clients need to also be aware that in the event that an employee raises a personal grievance against his or her employer, the Act sets out a process whereby the employee and/or the employer may apply to the Authority or the Court to join the controlling third party to the proceedings to resolve the personal grievance.

Refer to the A-Z Guide on **Triangular Employment** for more information.

Conclusion

The doctrine of frustration may apply in a situation where the employment agreement cannot be performed, and there are no alternative steps that can be taken to alter the situation, and the circumstances mean provisions in the employment agreement cannot apply. There is neither anything for you to do that may facilitate the agreement's performance, nor is there anything for you to do that may prevent its performance.

At the time when it first comes to your attention that one of your employees will be unable to attend work or fulfil their usual duties for some time, it is recommended that you begin a dialogue (if possible) with that employee to ascertain:

- How long they will be either unavailable or unfit
- Formal advice that supports the employee's unavailability or unfitness:

  - Medical specialists
  - Legal advisor
- How the employee's unfitness or unavailability destroys the root of the contract

Once this information has been obtained you should seek specialist advice on your particular situation. That advice should be sought before you make and/or implement any decisions. While you may not have a situation that indicates that your employment contract has been frustrated, you may nevertheless have justification to terminate it.

The importance of following a fair process in terminating an employee's employment was emphasised in *Motor Machinists v Craig* [1996] 2 ERNZ 585 (EC):

> *Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair.*

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362;** or email the Business Central AdviceLine at advice@businesscentral.org.nz

Remember:

- Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.
- Visit our website www.businesscentral.org.nz regularly.
- Attend our member briefings to keep up to date with all changes.
- Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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