# Frustrations, Frustrations! Ontario Court Of Appeal Confirms That Employee's Failure To Comply With Vaccination Policy Results In Frustration Of Employment Contract


Frustration of contract is a well-established legal doctrine. However, many employers and employees are unfamiliar with the concept or its powerful legal ramifications in the workplace. In the employment context, frustration occurs when an employment contract, as originally agreed, becomes impossible to perform due to an unforeseen change in circumstances beyond the control of either party. When an employment contract is frustrated, generally, the employer is not required to provide notice of termination or any compensation in lieu thereof.[1]

The Ontario Court of Appeal recently released its decision in *Croke v. VuPoint System Ltd.* (*Croke*),[2] which considered whether an employment contract was frustrated after an employee refused to disclose his vaccination status. The Court found that it was. We discussed the lower court's ruling in a previous Insight here.

## Background

The employer in *Croke* was in the business of installing residential TV and internet services. The employer had one main customer: Bell Canada and Bell ExpressVu (collectively, Bell). The employee was a systems technician and performed work only for Bell.

In September 2021, Bell implemented a mandatory COVID-19 vaccination policy. As a result, the employer adopted its own mandatory vaccination policy requiring all installers, including the employee in this case, to be vaccinated against COVID-19 and to provide proof of vaccination.

The employee refused to disclose his vaccination status to the employer, which meant he could no longer perform work for Bell. The employer terminated his employment as a result, and the employee sued for wrongful dismissal.

On a summary judgment motion, the judge found that the employment contract was frustrated by the implementation of Bell's vaccination policy (meaning that the employee had no entitlement to damages for wrongful dismissal) and dismissed the action. The employee appealed.

## Ontario Court of Appeal Upholds Motion Judge's Ruling on Frustration

The Court of Appeal upheld the motion judge's ruling. The Court found that the employee's failure to comply with the employer's vaccination policy rendered him ineligible to perform his job. As a result, the employment contract was frustrated, and the employee was not entitled to wrongful dismissal damages.

The Court noted that "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". Accordingly, the party alleging frustration must establish:

i. there was a "supervening event" that event radically altered the contractual obligations;

ii. it was not foreseeable and the contract does not contemplate; and

iii. the supervening event was not caused by the parties.

The Court found that Bell's mandatory vaccination policy was the supervening event that frustrated the contract. The effect of Bell's policy was akin to that of a new regulatory requirement: unless employees were vaccinated, they were ineligible to work on Bell projects, which was nearly all of the employer's work.

When assessing whether the supervening event resulted in a "radical change" to the fundamental obligations of the contract, the Court noted that the possibility or likelihood that the employee could rectify the disruption to the employment contract caused by a supervening event was a relevant consideration. As a result, the duration of the supervening event or the duration of its effect on the employment relationship should be considered.

In this case, the employee had given no indication that he intended to get vaccinated, despite being aware that termination could result from his non-compliance. In addition, there was no specified timeline for the Bell policy or any evidence it was a temporary or short-lived measure.

On the second branch of the test, the Court found that the onset of the COVID-19 pandemic, and the extraordinary response from Bell, was an exceptional event that the parties could not reasonably have anticipated when they entered into the employment relationship in 2014. Therefore, the Bell policy was unforeseen.

Lastly, the employee argued that the supervening event was not the Bell policy but rather the employer's choice to respond to the Bell Policy by terminating his employment. The employee argued his termination was framed as frustration of contract after the fact but, in reality, was a termination for just cause and the employer could have taken other steps like suspension without pay.

The Court rejected this argument, noting frustration and just cause dismissals are fundamentally distinct. Frustration is a "no fault" termination of the contract. Where frustration is established, it has the effect of discharging the agreement, thereby releasing the parties from any further obligation to perform. Conversely, remedies applicable to misconduct, such as progressive discipline, suspension or warnings, have no application in the context of frustration. In this case, the employer had no control over Bell's decision to implement its policy.

The Court concluded that the employee's termination was simply the inevitable result of the Bell policy: a supervening event, not foreseeable, which radically altered the contractual obligations of the parties.

## Key Takeaway for Employers

While the *Croke* decision did not establish new law, it considered the application of the frustration doctrine to a novel and arguably widening set of facts. In this case, the employer policy that the employee failed to comply with was instituted in direct response to the new policy of a third party. It was critical in this case that the third party policy effectively precluded the employee from performing the job for which he was hired.

In the right set of circumstances, these concepts may be applied in future cases where third party or governmental rules and regulations have a significant impact on the

performance of an employment contract. For example, consider new educational requirements or certifications being imposed for certain professions, or new customs and immigration requirements being implemented that impact employees who regularly cross international borders as a fundamental part of their role. Such new requirements could render an employee ineligible to perform their role if they fail to comply. If an employer (or employee) opts to treat the contract as frustrated in similar circumstances, the employment relationship may come to a sudden end, much to the surprise and frustration of the other party.

**Footnotes**

1. In Ontario, however, Regulation 288/01 under the *Employment Standards Act, 2000* provides that where a contract of employment is frustrated due to an illness or injury suffered by the employee, the employer remains obligated to provide the employee with their statutory minimum termination pay, benefits continuation, and severance pay.

2. *Croke v. VuPoint System Ltd.*, 2024 ONCA 354.



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