

# Ontario Court Of Appeal Confirms That Refusal To Comply With Vaccination Policy Amounts To Frustration Of Contract



In *Croke v. VuPoint System Ltd.*, [2024 ONCA 354](#), the Ontario Court of Appeal upheld a Superior Court decision that the appellant's employment contract had been frustrated due to his failure to comply with a mandatory vaccination policy.

## Background

The appellant, Mr. Croke, was employed by VuPoint Systems Ltd. ("VuPoint") as a technician. VuPoint's main customers are Bell Canada and Bell ExpressVu ("Bell"). VuPoint provides residential satellite TV installations and smart home internet services on behalf of Bell. All of Mr. Croke's work was essentially for Bell.

In 2021, in the midst of the COVID-19 pandemic, Bell implemented a mandatory vaccination policy and Bell's policy provided that failure to comply would constitute a material breach of the agreement between Bell and VuPoint. As a result, VuPoint adopted its own vaccination policy, which required all of its installers to be vaccinated against COVID-19 and to provide proof of vaccination. Mr. Croke refused to comply with

VuPoint's policy by disclosing his vaccination status, which meant that he was considered to be unvaccinated. Under VuPoint's policy, non-compliant employees were prohibited from performing work for certain customers including Bell and were not to receive the assignment of any jobs.

VuPoint gave two weeks' notice to the appellant that his employment would be terminated due to his failure to comply with the vaccination policy. The appellant brought an action for wrongful dismissal. VuPoint argued that Mr. Croke's employment contract was frustrated as a result of Bell's policy, a policy over which VuPoint had no control.

## **The Superior Court of Justice**

On the motion for summary judgment, the judge accepted VuPoint's argument that the employment contract had been frustrated and dismissed the action. The motion judge found that Mr. Croke was aware of Bell's policy and that, without proof of vaccination, he could not continue providing services to Bell. The motion judge found that the implementation of Bell's policy was a supervening event, not contemplated by the parties, that neither VuPoint nor Mr. Croke could have foreseen when his employment contract was signed.

Further, the implementation of Bell's policy meant that the appellant lacked the necessary qualification to perform his duties. His inability to perform his duties for the foreseeable future constituted a radical change that struck at the root of the employment contract resulting in frustration. The appellant was not entitled to any damages for wrongful dismissal. The appellant appealed this decision to the Ontario Court of Appeal.

## **The Court of Appeal**

The Court of Appeal upheld the motion judge's decision that Mr. Croke was not wrongfully dismissed due to the frustration

of his employment contract.

The appellant argued that the frustration in this case stemmed from his voluntary decision not to comply with the policy and therefore frustration did not apply. The Court of Appeal rejected this argument, stating that this is not a case where the conduct of the appellant frustrated the employment contract, rather Bell's policy was the supervening event which frustrated the contract.

The appellant further argued that the supply agreement between Bell and VuPoint contemplated that Bell could implement new health and safety requirements, which meant that this was a foreseeable exercise of contractual power where frustration did not apply. The Court of Appeal rejected this argument, finding that the supply agreement was not relevant to the analysis of foreseeability.

The Court of Appeal held that VuPoint had no obligation to take other non-disciplinary measures before resorting to termination. There was no fixed legal requirement that an employee be given advance notice that the employment relationship had been frustrated. The appeal was dismissed.

## **Takeaway**

Although the Court of Appeal decision provides that an employee's failure to comply with a vaccination policy may result in frustration of contract, this case dealt with a third party's policy mandating vaccination. In other words, the Court Appeal confirmed that an employment contract may be frustrated when an unforeseen third-party mandate is imposed on an employer. Whether a court would find frustration of an employment contract where an employer's vaccination policy is at issue is yet to be seen.

The Court of Appeal also considered that if Bell's policy was a temporary emergency measure of short duration, the

fundamental obligations in the employment contract may not have been radically altered by the policy. Thus, the doctrine of frustration may not apply where a policy related to an emergency measure is for a short duration.

This decision is crucial for both employers and employees as it may influence how the doctrine of frustration affects the employment relationship.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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