

# WINNERS & LOSERS: Does Long Illness ‘Frustrate’ a Worker’s Contract?



Long, debilitating illnesses that keep workers away from work for extended periods of time are a nightmare. A rule called “frustration of contract” lets you terminate workers when an illness (or injury) makes it impossible for them to do their jobs. The problem is that it’s unclear how long you have to wait before the frustration rule applies. Each contract has a different frustration point, depending on the type of employment involved, the nature of the illness and the parties’ expectations. The employer bears the burden of proving that such point has been reached. And that’s one reason employers lose more frustration cases than they win. Here are two cases showing how courts decide if a long illness frustrates a worker’s contract.

## CONTRACT NOT FRUSTRATED

### FACTS

A 59-year-old manager of a family-owned music store got lung cancer and took six months’ medical leave. She tried to return after surgery but chemotherapy wore her down and made it impossible for her to work even a reduced schedule. The store had its lawyer write the manager a letter warning that she’d be fired unless she got back to full-time work. Six months later, the store fired her, claiming that the illness had frustrated her contract. The manager claimed that she could still work and sued for damages.

### DECISION

The Ontario Superior Court found the store liable for wrongful dismissal and awarded the manager 22 months’ notice, \$35,000 in *Wallace* damages and \$20,000 in punitive damages.

### EXPLANATION

The court explained that illness frustrates a contract only if it’s permanent, that is, of such a nature as to make it impossible for a worker to do the job she was hired to do. The medical evidence suggested that it would not only be possible but also therapeutic for the manager to keep performing her job. The fact that the manager had worked at the store for 30 years and considered the

owners like family also weighed against the frustration argument. An employment relationship “of long standing is not so easily destroyed as one with a short history,” the court reasoned in rejecting the store’s claim.

*Altman v. Steve’s Music Store Inc.*, [2011] O.J. No. 1136, March 8, 2011

## **CONTRACT FRUSTRATED**

### **FACTS**

A physiotherapist came down with a mysterious disabling illness, which was later diagnosed as fibromyalgia and chronic fatigue syndrome. After three failed attempts to return to modified work, an evaluation concluded that she lacked the “functional ability” to carry out her physiotherapist duties on a full-time basis. With no improvement and no prospect for recovery in sight, the employer claimed frustration and terminated her employment. The physiotherapist sued for wrongful dismissal.

### **DECISION**

The Alberta arbitrator threw out the grievance.

### **EXPLANATION**

The employer had just cause to dismiss the physiotherapist for excessive absenteeism. It had been *seven years* since she’d worked, other than her three brief attempts to return. And unlike in *Altman* where the medical evidence suggested a return was possible, none of the medical information in this case offered grounds to believe that she could make enough improvement to work as a physiotherapist. And the employer couldn’t make any accommodations that would change that medical reality. So the employer was justified in treating the physiotherapist’s contract as frustrated.

*Health Sciences Assn. of Alberta v. David Thompson Health Region*, [2007] A.G.A.A. No. 35, May 10, 2007