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Frustration in Employment Law and the effects of Covid-19

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What is frustration?

Frustration is where a contract (of employment or otherwise) is treated as discharged by operation of law where an event has occurred which renders further performance impossible, illegal or radically different from that contemplated by the parties when they entered into the contract.

The doctrine was established in the case of *Taylor v Caldwell (1863) 3 B&S 826*. This was a case where the Claimant had hired a music hall in order to hold concerts. Prior to the performances the hall burnt down in an accidental fire. The Claimant sought damages for breach of contract in not providing the hall. The Court held that the contract had been frustrated as the fire meant that the contract was impossible to perform. This was the starting point of a string of case law which allowed parties to be discharged from their obligations under a contract when a frustrating event occurred. This prevented a party to a contract claiming damages for breach of contract in circumstances where it was impossible to perform it.

The application has been extended throughout case law due to the fact specific nature of each case. As an example, the cancellation of an expected event such as in the 'Coronation Cases". In *Krell v Henry [1903] 2 K.B. 740*) the Defendant hired a flat on Pall Mall to view King Edward VII's coronation but this was cancelled due to the King's illness. The Claimant sought to recover the outstanding fees for the flat but the Court held that the contract had been frustrated and therefore his claim for breach of contract was unsuccessful.

In general, where parties have made express provision within the contract for the consequences of a particular event such as a force majeure provision the contract is unlikely to be frustrated. These clauses are within the contract and alter the parties' obligations and/or liabilities should an extraordinary event or circumstance beyond

their control occur preventing one or all of them from fulfilling these obligations. Other examples where frustration is unlikely to be found include where an alternative method of performance is possible, the contract is more expensive to perform and where there are changes in economic conditions.

Frustration in Employment Law

The doctrine of frustration is applicable to contracts in general and more specifically to employment contracts. Frustration in employment law has until recently been a rarity. Tribunals have been reluctant to permit an employer to rely upon frustration of the contract as if a contract is frustrated there has been no dismissal and both parties are discharged from their duties under the contract without further consequences. Both parties are released from the contract thus preventing a claim for unfair dismissal nor statutory notice pay by an employee under Section 86 Employment Rights Act 1996 (*GF Sharp & Co Ltd v McMillan [1998] IRLR 632*). Although any rights accrued beforehand under the contract will remain.

In *Warner v Armfield & Retail Leisure Ltd UKEAT0376/12*, the Employment Appeal Tribunal recognised that employment contracts and detailed policies would cover what may once have been construed as frustration. Some examples of frustration within employment law are:

1. Illness;
2. Death; and
3. Imprisonment

Other than the case of an employee death, the above examples are extremely fact specific. In relation to illness it will take consideration of whether a recovery will be

made, whether reasonable adjustments can be put in place and the conduct of the parties themselves. In contrast, imprisonment will depend upon the length of the sentence. A longer sentence is more likely to frustrate a contract. In *Mecca Ltd v Shepherd UKEAT/379/78* a 20-day sentence was not held to frustrate a contract. Foreseeability is another issue that may impact upon whether imprisonment is classified as frustration. If an employer's disciplinary procedure considers such events then it is less likely to be frustration (*Four Seasons Healthcare Ltd (formerly Cotswold Spa Retirement Hotels Ltd) v Maughan UKEAT/0274/04*).

Whilst frustration itself is not going to be found to be an unfair dismissal, qualifying the end of a contract as frustration is a high bar for an Employer. If a Tribunal were to find that it does fall short then a claim for unfair dismissal is likely to succeed unless a fair procedure has been followed. Employers should be careful when relying upon frustration in the Employment Tribunal. For example, whilst a term of imprisonment may not be considered to frustrate the contract, it could be a dismissal for some other substantial reason.

Frustration and Covid-19

Whilst a global pandemic is an unforeseen event which may render further performance of some employment contracts impossible, illegal or radically different from that contemplated by the parties when they entered into the contract, it is also likely that sick policies and health insurance schemes will foresee time off for illness and other effects of Covid-19.

There may well be applicability in the case of events that have been cancelled due to the pandemic. An example of this may be those employed on fixed term contracts for music festivals which have now been cancelled due to Covid-19. Those with less than two years' service would not be entitled to notice pay if the contract was frustrated.

This would then be beneficial to Employers in that they would be released from the contract without financial penalty. Caution should be exercised by Employers wishing to claim that the contract has been frustrated and legal advice ought to be sought.

As in the case law, there will be a fine line between whether a contract has been frustrated or not. It should be born in mind that the bargaining power of the parties in an employment contract as opposed to a commercial contract is weighted towards the Employer and therefore Tribunals are going to be reluctant to classify employment contracts as being frustrated.

Conclusion

The doctrine of frustration is a long-held concept within contract law. It is important to remember that Employment law is regulated contract law and thus the doctrine is applicable in the Employment law arena. Despite this, frustration is a high hurdle for an employer to prove and careful consideration ought to be given before asserting a contract has been frustrated. The contract may fall short of frustration and be a dismissal due to capability, redundancy or SOSR depending upon the circumstances. Legal advice ought to be sought before any action is taken, due to the complexity of this area of the law.

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