

IFW NEWSLETTER

May 2024

WHAT'S NEW

- Our annual Breakfast Seminar was held on May 2, 2024. Click [HERE](#) to watch the recording if you've missed it. Thank you to those who attended and your insightful feedback is much appreciated!
- **REMINDER:** Businesses that come under the federal *Fighting Against Forced Labour and Child Labour in Supply Chains Act's* definition of "entity" must submit their annual report by **May 31, 2024**. Please promptly contact us if you need assistance in completing your report or if you are unsure whether you are required to complete one.

WHAT'S NEW IN THE LAW

Ontario Court of Appeal confirms employee's refusal to vaccinate against COVID-19 in accordance with customer's vaccination policy constitutes frustration of contract, not wrongful dismissal

In the very recent decision of *Croke v. VuPoint Systems Ltd.*, 2024 ONCA 354 [**"Croke"**], the Ontario Court of Appeal (the "**ONCA**") considered whether the doctrine of frustration applied to an employment contract that was terminated because the employee refused to vaccinate against COVID-19 in accordance with a vaccination policy implemented by his employer's central customer.

Facts

Mr. Croke was employed by VuPoint as a technician. VuPoint dispatched technicians to install home satellite TV and "smart home" internet services on behalf of its customers. VuPoint's main customer was Bell, who accounted for more than 99% of VuPoint's income. All of Mr. Croke's work was for Bell and there was no other work VuPoint could provide him should he no longer be able to work for Bell.

In 2021, Bell implemented a mandatory COVID-19 vaccination policy. There was no suggestion that the policy would expire or that it was a temporary measure. As a result, VuPoint implemented its own policy that required employees to provide proof of vaccination to ensure compliance with Bell's policy. Mr. Croke refused to disclose his vaccination status. Under Bell's vaccination policy, he was no longer able to enter the homes of Bell customers and could not continue providing services for Bell. Having no other work for Mr. Croke, VuPoint terminated his employment and he brought a wrongful dismissal action.

At the summary judgment motion, the motion judge dismissed Mr. Croke's action, finding that his employment contract was frustrated by the implementation of Bell's vaccination policy. The motion judge found that: Mr. Croke had no intention of becoming vaccinated; he understood Bell's vaccination policy; he only provided services to Bell; and, without proof of vaccination, he could not continue providing services to Bell. Mr. Croke appealed the motion judge's decision to the ONCA.

The Doctrine of Frustration

Frustration of contract occurs when a situation has arisen for which the parties did not contemplate or address in the contract, and performance of the contract becomes “a thing radically different from that which was undertaken by the contract.” The test for frustration is to establish there was a “supervening event” that: (i) radically altered the contractual obligations; (ii) was not foreseeable and for which the contract did not contemplate; and (iii) had not been caused by the parties.

Where frustration is met, the contract comes to an end. If Mr. Croke’s employment contract had been frustrated, he would not be entitled to reasonable notice under common law.

The ONCA Upholds Application of Frustration Doctrine

On appeal, Mr. Croke argued that the third branch of the test for frustration had not been met because his refusal to be vaccinated was “voluntary.” The ONCA rejected this argument, finding that the “supervening event” that frustrated the contract was caused by Bell’s implementation of the vaccination policy, rather than Mr. Croke’s refusal to be vaccinated. In other words, it is not the employee’s choice or conduct that renders them unable to work – it is the introduction of the new requirement that they do not satisfy.

The ONCA found Bell’s vaccination 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. As a result of the policy, Mr. Croke was completely unable to perform his essential duties for the foreseeable future. This constituted a radical change that struck at the root of the employment contract, resulting in frustration of the contract. The ONCA dismissed Mr. Croke’s appeal.

Key Takeaways

The *Croke* decision confirms that an employee’s refusal to comply with a vaccination policy can amount to frustration of contract that ends the employment relationship without the employee being entitled to common law reasonable notice. However, refusal to vaccinate may not always result in frustration. In *Croke*, VuPoint had little control over Bell’s vaccination requirement. We have yet to see whether *Croke* will be followed in cases in which the employer has full control over whether to implement or enforce its own vaccination policy.

If you think you may be facing a frustration of contract scenario or are dealing with non-compliance of mandatory vaccination policies, contact us to explore whether you have a strong foundation for taking a position of frustration and to strategize how to best move forward.

LET’S TALK

Israel Foulon Wong LLP is one of Canada’s leading employment and labour law firms. The firm’s partners, Peter Israel, Chris Foulon, Carita Wong, Alex Van Kralingen, Krista Kais-Prial, Behzad Hassibi, Katherine Chau, Mark Repath and their associates, Vibhu Gairola and Domenica Moran, have over 125 years of collective experience in assisting clients with employment and labour law issues.

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