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Labour & Employment

COVID-19-related employment law decision explores doctrine of frustration

By **Boris Alexander**

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(February 7, 2023, 9:31 AM EST) -- As a result of the COVID-19 pandemic, many businesses were forced to close down either temporarily or permanently. For some of these businesses, the decision to close down was a result of provincial mandates intended to address the spread of the virus.

In all cases, however, employees suddenly found themselves without a job and without any form of severance pay. To support this decision, employers adopted the legal doctrine of "frustration." The determination of whether this legal doctrine was applicable in these circumstances was addressed in the recent case of *Fanzone v. 516400 BC Ltd.* 2022 BCSC 2089.

Summary

Marco Fanzone was employed by 516400 BC Ltd., operating as the Shady Tree Neighbourhood Pub for over 23 years. At the outset of the pandemic, the pub was ordered to close by the provincial health officer as a result of the COVID-19 pandemic. In doing so, the pub did not make any severance payments to either Fanzone or the other 31 employees. In accordance with s. 65(1)(d) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, the pub took the position that it was exempt from severance payment obligations due to the fact that the pandemic made the employment contracts "impossible to perform." The court reviewed the circumstances and found that the doctrine of frustration was inapplicable and Fanzone was entitled to wrongful dismissal damages.

Applicability of doctrine of frustration

To assist in reaching the appropriate conclusion, the court made reference to the only other reported B.C. Supreme Court case addressing the doctrine of frustration (*Verigen v. Ensemble Travel Ltd*., 2021 BCSC 1934). In *Verigen*, the court held that the performance of the plaintiff's employment contract had not been rendered impossible by the pandemic, which made the defence of frustration invalid.

The applicability of frustration would require that, without the fault of either party, the circumstances of the contract were radically different than when it was first created. More specifically, the court held that hardship, inconvenience, or material loss would not in and of themselves trigger the doctrine of frustration. The contract had to become totally different from what the parties intended and could not be self-induced. The disruption to the contract had to be permanent, not temporary.

In the case at hand, the pub made the active choice to keep its business closed, rather than to reopen it for the provincially permitted takeout or delivery services, or for the standing and seated services later in the year. In other words, the operation of the pub was not impossible. Therefore, the doctrine of frustration as a defence was found to be inapplicable.

Assessing wrongful dismissal damages

The appropriate methodology to assess wrongful dismissal damages is well established. Namely, it is

using the *Bardal* factors (*Bardal v. Globe & Mail Ltd*. [1960] O.J. No. 149). These factors are not exhaustive, and no single factor is determinative, but it is commonly the case that the most frequent factors relied upon are: age, position, tenure and compensation. In reviewing these factors, the courts hope to reach a fair assessment as to how long it would reasonably take for an individual to find comparable employment once more.

In this case, Fanzone was 56 years old, general manager for the pub, and employed for 23 years. Taking also into consideration Fanzone's efforts to find re-employment, the court held that he was entitled to 20 months' reasonable notice.

Conclusion

For both employees and employers, this case carries several key takeaways.

For employers, this case shows that the defence of frustration will not mitigate the liability for severance pay to employees. Regardless of comfort, convenience, or cost, if it is possible to continue operations, then frustration will not apply. It will of course be your choice as to whether you remain operational or not. However, if you choose to lay off employees temporarily or permanently under the guise of frustration, significant liability for severance pay can arise.

As an employee, the foregoing case serves as confirmation that you could be entitled to significant wrongful dismissal damages, over and above your minimum statutory entitlements, if you are either laid off or terminated by an employer relying on the doctrine of frustration.

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