

Divisional Court Confirms That Employee's Desire to Return to Work, Without More, Does Not Trigger the Duty to Accommodate

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The Divisional Court's recent decision in *Katz Group Canada Ltd. v. Clarke*¹ provides helpful guidance to employers on the scope of the duty to accommodate and an employee's obligation to participate in the accommodation process.

Background

Eugene Clarke was a store manager at a pharmacy operated by Katz Group Canada Ltd. (the employer). In July 2008, he began a leave of absence due to depression. While on leave, Mr. Clarke suffered serious knee injuries in two separate slip-and-fall accidents. His injuries significantly reduced his mobility, such that he remained unable to work for a prolonged period.

Mr. Clarke received short-term and long-term disability benefits while on leave through his employer's group insurance plan with Great West Life (GWL).

In June 2013, Mr. Clarke provided GWL and the employer a note from his family physician indicating that he was "totally disabled" and that there was "no job he would be able to perform." He also completed a medical questionnaire, stating that he was not capable of performing any work due to the limited length of time that he was able to stand, walk or sit.

GWL then wrote to the employer to advise that, on the basis of the medical information available to it, they determined Mr. Clarke was unable to perform the essential duties of his position and there was no reasonable expectation he would be capable of performing them in the foreseeable future.

In July 2013, the employer notified Mr. Clarke that his employment had been frustrated and would terminate on December 31, 2013. The employer confirmed that it would pay Mr. Clarke his statutory entitlement to eight weeks of pay in lieu of notice and 14 weeks of severance pay upon termination of his employment.

In September 2013, Mr. Clarke's legal counsel wrote to the employer to advise that Mr. Clarke had been "working very hard to get well" so that he could return to his employment. The employer responded by requesting, on two separate occasions, updated medical information outlining Mr. Clarke's prognosis for

recovery and estimated return-to-work date. Mr. Clarke did not respond to these inquiries or provide updated medical information. The employer proceeded to terminate his employment, as planned.

Mr. Clarke commenced an action against the employer claiming damages under the Ontario *Human Rights Code* as well as damages for wrongful dismissal.

The employer brought a motion for summary judgment. The motion judge dismissed the motion on the grounds that there was a genuine triable issue as to whether the employer had met its duty to accommodate Mr. Clarke, given Mr. Clarke's stated desire to return to work. The employer appealed.

Divisional Court Decision

The Divisional Court set aside the motion judge's order and granted the employer's summary judgment motion.

Frustration of Contract

The Court confirmed that the doctrine of frustration applies when there is evidence that the employee's disabling condition is permanent. In this case, it was undisputed that the medical documents available to the employer indicated that Mr. Clarke was totally disabled and unable to work in any occupation for the foreseeable future. Although Mr. Clarke had indicated that he wished to return to work, he failed to produce any medical documents suggesting that he would be able to do so at any time in the future. Accordingly, the Court concluded that the test for frustration of contract was "clearly met."

Accommodation

On the issue of accommodation, the Divisional Court held that an employee's stated desire to return to work, without more, does not trigger the duty to accommodate. The employee must provide evidence of their ability to return to work and any disability-related accommodations that would allow them to do so.

In this case, the evidence before the employer confirmed that Mr. Clarke was unable to fulfill the basic obligations of the employment relationship and would remain unable to do so for the foreseeable future. Accordingly, the duty to accommodate had ended. Although the employer was under no obligation to contact Mr. Clarke requesting updated medical information (given that all available medical evidence indicated that he was unable to return to work), it nevertheless made two requests for updated medical documents before proceeding with the termination. Mr. Clarke did not respond to those requests, and the employer was entitled to conclude that the employment contract had been frustrated.

Takeaways

The Divisional Court's decision in *Katz* confirms that an employee on a leave of absence has a duty to participate in the accommodation process. An employer cannot consider accommodation options without medical evidence outlining the employee's restrictions and the accommodations the employee would require in order to return to work. If the employee has been on leave for an extended period of time, all available medical evidence suggests the employee will be unable to perform any job for the foreseeable future, and the employee fails to produce medical documents suggesting otherwise, an employer may justifiably conclude that the employment contract has been frustrated.

For more information, please contact Maria Constantine or any other member of the Employment & Labour Group.

¹ 2019 ONSC 188 [“*Katz*”]