

## Frustrated by Employee's Prolonged Medical Absence? Useful Decision on Proving Frustration of an Employment Contract

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As employers are likely aware, terminating the employment of an employee who is absent from work for a prolonged period due to disability is a thorny issue. The recent Ontario Superior Court decision in *Roskaft v. RONA Inc.*, 2018 ONSC 2934 (CanLII) (*Roskaft*) is useful in highlighting the evidence that is required to prove frustration of an employment contract where an employee's permanent disability makes his or her performance of the contract impossible.

### Background

In *Roskaft*, the Plaintiff, a clerical worker, commenced a leave of absence for a medical condition on September 28, 2012. Thereafter, Sun Life, Rona's insurer approved him for LTD benefits.

On December 5, 2014, Sun Life informed Rona that the Plaintiff was totally disabled in relation to his own occupation and any occupation. When Rona did not receive any new medical information from the Plaintiff or Sun Life to indicate otherwise in the following months, Rona determined that the employment contract had become frustrated and terminated the Plaintiff's employment on September 15, 2015. Rona provided the Plaintiff with his minimum entitlements under the *Employment Standards Act, 2000* (ESA).

### Position of the Parties

The Plaintiff commenced an action against Rona for wrongful dismissal claiming that his lengthy absence had not frustrated his employment contract. Rona brought a motion for summary judgment to dismiss the action.

On the motion, Rona asserted that, at the time of the Plaintiff's termination of employment, there was no reasonable likelihood of the Plaintiff returning to work within a reasonable period of time. In support of this argument, Rona relied on a lack of medical information from both the Plaintiff and Sun Life to indicate that the Plaintiff would be able to return to work. Rona also submitted that it was not required to contact the Plaintiff for any further information.

The Plaintiff asserted that Rona had not considered the possibility of him returning to work. Specifically, the Plaintiff claimed that he was starting to feel better prior to his dismissal, but Rona failed to make any

inquiries about his medical condition. The Plaintiff asserted that he did not provide any additional information because he was not asked to do so. Interestingly, the Plaintiff also abandoned his human rights claims prior to the motion and did not raise Rona's duty to accommodate.

To refute the Plaintiff's argument that his medical condition was improving, Rona relied on a post-termination form obtained from Sun Life that was completed by the Plaintiff on January 4, 2016. In the form, the Plaintiff confirmed that his medical condition was not improving.

## **Decision**

The Court found on Rona's behalf and granted the motion for summary judgment. In doing so, it relied on the post-termination evidence to conclude that the employment contract had become frustrated because there was no reasonable likelihood that the Plaintiff would be able to return to work within a reasonable period of time. The Court also relied on the Plaintiff being sufficiently disabled to qualify for LTD benefits, the lack of improvement in his medical condition, and that he was totally disabled from performing the duties of any occupation.

## **Takeaway for Employers**

*Roskaft* is a useful decision because it demonstrates that, absent any human rights or accommodation issues, and if the ESA minimum entitlements are provided, an employer can be justified in terminating an employment relationship where the medical information indicates there is no reasonable likelihood of the employee returning to work within a reasonable period of time. Although Rona did not request updated medical information prior to proceeding with the termination of the Plaintiff's employment based on frustration, it is a best practice to do so to eliminate the argument that there is any prospect of improvement in the employee's condition.

For further information, please contact Nathaniel Marshall or any member of the Employment & Labour Group.

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