Covid 19 Employment Law Series
IV: Frustration: (largely) unprecedented measures for unprecedented times?

Sophie Firth, 1.4.20

PARKLANE PLOWDEN CHAMBERS

Introduction

1. A contract may come to an end by operation of the doctrine of frustration when an unforeseen event makes performance impossible or radically different to what the parties originally intended. The doctrine applies to employment contracts as it does to other types of contract. However, it is an issue rarely encountered by employment lawyers. Tribunals are generally reluctant to find that an employment contract has been frustrated, largely because the doctrine allows employers to sidestep statutory protections afforded to employees. However, unprecedented times call for unprecedented measures, and frustration may become a useful tool in certain employers' fight against the disruption caused by the Covid 19 pandemic.

The doctrine of frustration in employment law

2. To succeed in an argument that the employment contract has been frustrated, the employer needs to prove two matters (the test is objective):

    a. There has been an unforeseen event which fell outside of the contemplation of the parties when they entered the contract.

    b. This has made performance of the contract impossible or radically different to what the parties originally intended.

3. If the unforeseen event or its consequences occurred because of the fault or default of the employer, the doctrine of frustration will not succeed.

4. When a contract is frustrated, it ends automatically, by operation of law and is rendered a nullity, thus discharging the parties from further obligations under it. The parties cannot elect to keep it alive. There is neither a dismissal on the part of the employer or a resignation on the part of the employee. Accordingly, the employee:

    a. Cannot claim unfair dismissal.

    b. Is not entitled to any notice or payment in lieu.

c. Would not be entitled to benefit from the provisions of the newly incepted Coronavirus Job Retention Scheme as a "furloughed" worker.

5. Employment contracts have been held to have been frustrated in three scenarios:

   a. Employee illness.

   b. Employee imprisonment.

   c. Employee or individual employer's death.

6. However, the question is fact sensitive, the bar is generally very high, and sickness absence and disciplinary policies etc. mean the doctrine is of decreasing relevance. As was stated in ***Warner v Armfield & Retail Leisure Ltd*** UKEAT0376/12, where frustration was successfully argued in the case of an employee who had suffered a stroke, been absent for a number of months, and then lost contact with his employer:

   > *"As a matter of everyday practical reality, employers and employees alike expect to deal with issues of disability, sickness - and absence for other reasons - including imprisonment - within the framework of the employment relationship."*

7. In sickness absence cases, in ***Egg Stores (Stamford Hill) Ltd v Leibovici*** [1976] IRLR 376, the EAT stated that:

   > *"there will have been frustration of the contract, even though at the time of the event the outcome was uncertain, if the time arrives when, looking back, one can say that at some point (even if it is not possible to say precisely when) matters had gone on so long, and the prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting"*

   It then approved a non-exhaustive list of factors relevant to the question of whether a contract has been frustrated:

   a. The length of the previous employment.

   b. How long it had been expected that the employment would continue.

   c. The nature of the job.

   d. The nature, length and effect of the illness or disabling event.

   e. The need of the employer for the work to be done, and the need for a replacement to do it.

   f. The risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee.

   g. Whether wages have continued to be paid.

   h. The acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee

i. Whether in all the circumstances a reasonable employer could be expected to wait any longer.

8. ***Warner*** added that in the case of a disabled employee, there is a tenth question, namely whether the employer was in breach of the duty to make reasonable adjustments.

9. Similarly, ***in F C Shepherd and Co Ltd v Jerrom*** [1986] ICR 802, the Court of Appeal held that whether the imprisonment of an employee frustrates an employment contract is a question of fact. In that case, the contract was frustrated where the employee received a likely six to nine month sentence midway through a four year plumbing apprenticeship, which meant he would not be trained by the end of that period as envisaged. In ***Chakki v United Yeast Co Ltd*** [1982] ICR 140 the EAT held that the following questions were relevant to deciding the fact-sensitive question of whether the contract had been frustrated:

   a. When had it become commercially necessary for the employer to decide whether or not to employ a replacement?

   b. At the time when the decision had to be taken, what would a reasonable employer have considered to be the likely length of the employee's absence over the next few months?

   c. If in the light of his likely absence it appeared necessary to engage a replacement, was it reasonable to engage a permanent replacement rather than a temporary one?

10. Furthermore, s136(5) of the Employment Rights Act 1996 deems there to have been a dismissal by way of redundancy for the purposes of the statutory redundancy scheme where a frustrating event affecting the employer (including an individual employer's death) operates to terminate the contract. This entitles an employee with 2 years' service to claim a redundancy payment, but not unfair dismissal, nor – as per the EAT in ***GF Sharp & Co Ltd v McMillan*** [1998] IRLR 632 – statutory minimum notice under s86 ERA 1996 or payment in lieu.

Potential use in relation to Covid 19

11. If it can be seen as an an unforeseen event falling outside of the contemplation of the parties when they entered the contract, the Covid 19 epidemic may render the performance of certain employment contracts either impossible or radically different, thus entitling employers to rely on the doctrine of frustration, escape paying notice pay and shield themselves from a claim of unfair dismissal.

12. In one sense it plainly is. However, given the doctrine is generally narrowly construed, it might be said that the inability to attend work because of medical advice, even in circumstances related to Covid 19, is not just foreseeable but generally provided for in contracts through sickness and health insurance schemes. However, the position might be different if the pandemic had caused a previously viable business to collapse. It is anticipated that we may well see employers or perhaps more likely insolvency practitioners or the government on behalf of the National Insurance Fund running such "frustration" arguments in the future.

13. Perhaps the doctrine's most obvious potential application is to short, fixed-term contracts, for example to employ staff for an event or programme which has been cancelled as a

consequence of the coronavirus outbreak. This could be of considerable value to an employer who has engaged a large number of staff on such contracts, even if the only benefit is to avoid paying notice pay. Such staff would be unlikely to have the requisite 2 years' service to claim a redundancy payment or, if held to have been dismissed, ordinary unfair dismissal (although, a claim of automatic unfair dismissal would potentially be open to them). There may also be significant benefit to an employer who has failed to include a notice clause in a fixed-term contract and would be liable to pay the employee for the full length of the contract upon dismissal. However, caution needs to be exercised, given that the Fixed-Term Employees Regulations 2002 can give rise to claims for both detriment and automatic unfair dismissal where fixed-term employees are treated less favourably than their permanent counterparts.

14. Establishing a contract has been frustrated is not an easy task. Alternative 'defences' to a Covid 19-related unfair dismissal claim would be to argue that such employees were fairly dismissed by way of capability, redundancy or SOSR, depending on the circumstances. Accordingly, it would still be advisable to follow a fair process before ending an employee's contract. Hopes should not be pinned on the doctrine of frustration.

Conclusions

15. Before asserting that a contract has been frustrated, careful consideration needs to be given to the precise circumstances of the case and advice ought to be taken, as the law is complex and nuanced.

SOPHIE FIRTH

1.4.20

https://www.parklaneplowden.co.uk/barristers/sophie-firth