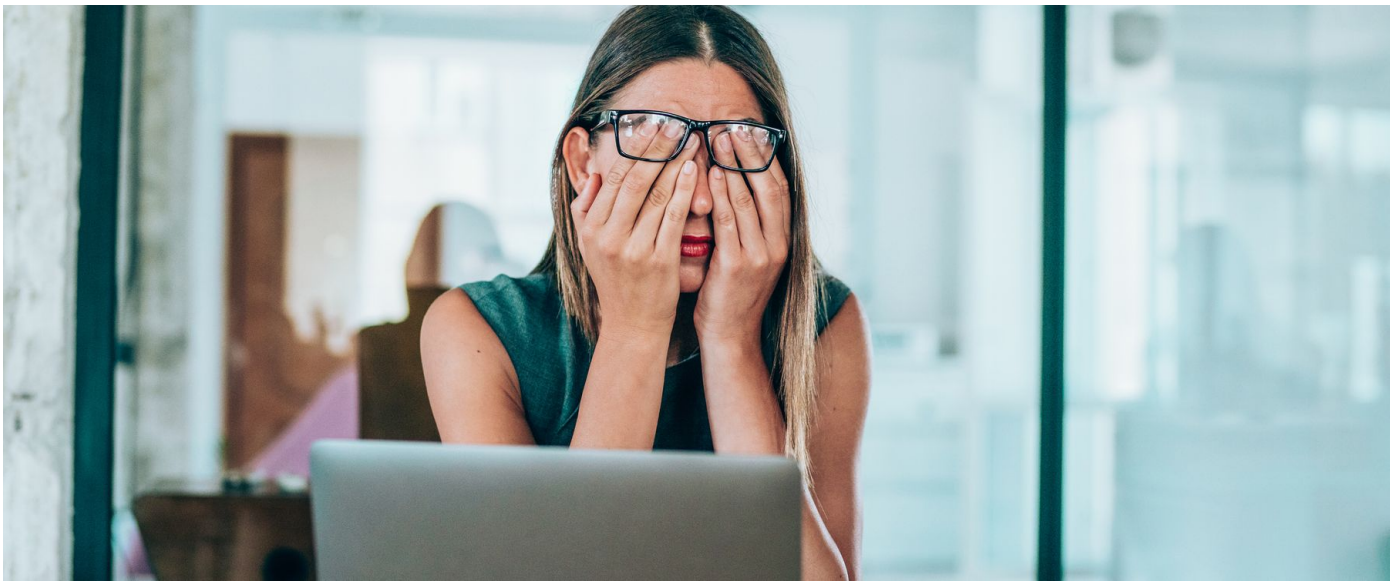
A-Z Guide

FRUSTRATION



Contents

Overview

Frustration of contract is when a supervening event renders the contract's performance impossible or radically different from what the parties had intended.

The doctrine of frustration can apply to employment contracts, but frustration has been found in only a few circumstances. The Contract and Commercial Law Act 2017 is what applies to contracts governed by New Zealand law.

Where an employee is frequently absent due to illness or injury, the employer should seek specialist medical advice about the employee's prognosis and level of incapacity.

Employers should seek external advice before considering dismissing an employee on the basis of unfitness or unavailability. The employment contract may not have been frustrated. There are other avenues employers can pursue to terminate employment.

Introduction

The doctrine of frustration is rarely used to end employment contracts - the employment agreement itself usually provides direction on how to terminate an employee's employment.

Employers often incorrectly assume that the employment contract has been frustrated when an employee will be, or has been, unable to attend the workplace for a prolonged period of time. This is not the right application. Using the doctrine incorrectly may make a termination an unjustified dismissal.

This **A-Z Guide** should be supplemented with the information provided in the **A-Z Guides** on **Incapacity** and **Abandonment.**

Meaning of Frustration

The doctrine of frustration applies to all contracts, not just employment agreements. Before the parties to a contract have been able to complete its performance, a *supervening event beyond the control of either of the parties* occurs, rendering further performance and completion impossible (or substantially so). The effect is the parties are released from their obligations under that contract to complete it. Under this doctrine there is no suggestion of fault.

Frustration and Employment

The law on frustration of contract can be complex and is rarely used for employment contracts. You should seek professional advice before you decide to end an employment relationship on the grounds of frustration.

The application of frustration to employment contracts was addressed in *A Worker v A Farmer* 2010 NZCA 547, 2010 ERNZ 407. The Court of Appeal ruled frustration only applied to employment agreements which "did not make sufficient provision for what occurred". Just because an situation may be serious and place the employer in a terrible position, does not remove the employer's obligation to address the situation using the employment agreement (if possible) and in good faith.

The first question in the applicability of frustration, is whether what happened can be legally categorisable as frustrating the contract. The facts determine if frustration occurred: *Lawton L Jin F C Shepherd & Co Ltd v Jerrom* 1986 3 All ER 589.

Invoking frustration is quite difficult for an employer because of the drastic effect on the rights of vulnerable employees: *Karelry bflot AO v Udovenko* 2000 2 NZLR 24. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, it is not lightly invoked, must be kept within very narrow limits and not extended past its basic definition: *J Lauritzen AS v Wijsmuller BV1990* 1 Lloyd's Rep 1.

Most often frustration will be considered where an employee is incapacitated by injury or illness or facing a prison sentence.

In *Smith v Air New Zealand2000* 2 ERNZ 376, the Employment Court considered the airline's defence of frustration in a claim for breach of contract. Mr Smith, a Boeing 747-400 captain, was placed on leave without pay by the airline after reaching 60 years of age. The airline argued that international flight standards frustrated the employment contract when Mr Smith turned 60.

The Court found first, that Mr Smith had been employed as a pilot and not as a Boeing 747-400 captain. Second, his age was not an event that frustrated the contract:

> *At worst, it made performance of the contract inconvenient or difficult for both parties. The destinations to which Mr Smith could then operate as pilot in command were more limited. However, given my conclusion that Mr Smith's employment was as a pilot and not as a B744 captain, there remained both numerous services on which he could continue to fly as a pilot in command... [including potentially]... first officer.*
> *Frustration, when it occurs, operates automatically in the sense that the contract is frustrated and not frustratable depending upon subsequent events. I do not accept the defendant's position that, in pursuance of its obligations of fair and reasonable treatment, it was obliged to suspend Mr Smith's employment in order to prevent the contract being frustrated. To accept such an argument would be to alter substantially the common law doctrine of frustration in an employment context.*

Frustration and triangular employment relationship

An employee's inability to perform work because they are banned from their place of work, for example a client's site, does not automatically trigger frustration.

Although an employer may not have control over whether the employee can return to the client's site, it is still important to ensure that you act in good faith. The employer has an obligation to consider how the removal from the client's site impacts the employee's employment, and whether there are redeployment opportunities.

In *Hill v Workforce Development Ltd2013* NZERA Wellington 65, Ms Hill was employed to work at a client's site, a Department of Corrections Prison. Ms Hill was banned from the prison site after breaching a prison policy. Ms Hill was subsequently dismissed by Workforce Development on the grounds of frustration. The Authority concluded that the frustration did not preclude Workforce Development from acting in good faith. Workforce Development failed to conduct a disciplinary process before terminating Ms Hill's employment, rendering the dismissal unjustified.

The Employment Court in the case's appeal noted:

> *[In] WDL's additional argument that because the employment agreement was effectively frustrated, there was no dismissal and, accordingly, no personal grievance... [in this argument] the statutory requirements set out in a s 103A [the Employment Relations Act 2000 test on the justifiability of a dismissal/action] have no application. I would, however, have difficulty accepting these propositions. Parties to an employment relationship are not permitted to contract out of their statutory obligations, including the procedural requirements relating to fair process and their mutual obligations.*

In personal grievances, the Act allows an employee/employer to apply to the Authority or the Court to add in a controlling third party, such as clients who may have caused frustration of the contract. Refer to the **A-Z Guide** on **Triangular Employment** for more information.

Conclusion

The doctrine of frustration may apply in a situation that features all of the following:

- The employment agreement cannot be performed.
- There are no alternative steps that can be taken to alter the situation.
- The circumstances mean existing provisions in the employment agreement cannot apply.
- You cannot do anything to both facilitate or prevent the agreement's performance.

When you first learn that one of your employees will be unable to attend work or fulfil their usual duties for some time, we recommended you begin a dialogue (if possible) with that employee to ascertain:

- How long they will be unavailable or unfit.
- Formal advice that supports the employee's unavailability or unfitness, from:
  - Medical specialists
  - Legal advisor
- How the employee's unfitness or unavailability destroys the essentials of the contract.

Once this information has been obtained, you should seek specialist advice on your particular situation before you make or implement any decisions. While you may not have a situation of frustration, you may nevertheless have justification to terminate the employment relationship.

The importance of following a fair process in terminating employment was emphasised in *Motor Machinists v Craig* 1996 2 ERNZ 585 (EC):

> *Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair.*

Remember

- **Always call AdviceLine on 0800 300 362 to check you have the latest guide.**
- **Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.**
- **Use our AdviceLine employment advisors as a sounding board to test your views.**
- **Get one of our consultants to draft an agreement template that's tailor-made for your business.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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