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DUTY TO ACCOMMODATE ENDS WHEN EMPLOYMENT CONTRACT IS FRUSTRATED

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A. INTRODUCTION

On April 4, 2019, the Ontario Superior Court of Justice (Divisional Court) (the "Court") released its decision in *Katz et al v Clarke*,[1] clarifying the extent to which an employer must fulfil its duty to accommodate and reaffirming that such duty ends when an employee with a disability is unable to work for the foreseeable future. An employee who is on disability leave is protected under provincial human rights legislation, in that an employer cannot terminate the employment relationship on the basis of the employee's disability.[2] Accordingly, if an employer fails to reasonably accommodate an employee with a disability or cannot demonstrate that such treatment or dismissal was unrelated to the employee's disability, it may be held liable for claims with respect to discrimination and wrongful termination. In this case, the plaintiff employee made a claim of wrongful dismissal against his employer on grounds of discrimination with respect to his disability. The Court found in favor of the employer, holding that the employer had no duty to accommodate an employee who could not return to work. This Bulletin will review the *Katz* decision, which principles would be applicable to Ontario charities and not-for-profits.

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[1] *Katz et al v Clarke*, 2019 ONSC 2188 [*Katz*].
[2] In Ontario, the provision prohibiting an employer from discriminating against an employee on certain enumerated grounds, including disability, is found in section 5(1) of the *Human Rights Code* (Ontario), RSO 1990, c H.19 [*Code*].

B. BACKGROUND

The respondent, Eugene Clarke, was a former employee of the employer, Pharma Plus and/or Rexall, and had been off work since July 2008. Initially, Mr. Clarke went on disability leave in July 2008 due to depression. However, in December 2008, and again in January 2011, Mr. Clarke sustained injuries that required him to use a crutch and brace for mobility. In early 2013, the employer's disability carrier, Great-West Life ("GWL") informed the employer that, based on the medical information that it had received, Mr. Clarke "was unable to perform the essential duties of his position and there was no reasonable expectation that he would be capable of performing them in the foreseeable future."

Consequently, the employer wrote to Mr. Clarke on July 1, 2013, informing him that his employment would be terminated as of December 31, 2013, because the employer believed that Mr. Clarke was not able to perform the "essential duties" of his position due to his disability and "there was no reasonable expectation that he would be capable of performing them in the foreseeable future." As such, the employer believed that Mr. Clarke's employment had been frustrated. Mr. Clarke would be provided with 22 weeks of pay, as required under the *Employment Standards Act, 2000*[3] (consisting of 8 weeks' pay in lieu of notice along with 14 weeks' severance pay), as well as statutory entitlements, and his benefits would cease as of December 31, 2013.

Although Mr. Clarke's counsel wrote to the employer in September 2013 stating that Mr. Clarke "has been working very hard to get well so that he can return to his former employment and perform the essential duties of his position," Mr. Clarke did not respond to the employer's request for updated medical information outlining when Mr. Clarke would be able to return to work. The employer later again requested updated medical information, informing Mr. Clarke that without such information, Mr. Clarke's employment would be deemed frustrated as of December 31, 2013. Since no response was provided to the employer, Mr. Clarke's employment was terminated as scheduled.

Mr. Clarke commenced an action against the employer for terminating him as a result of his disability in violation of subsection 5(1) of the Ontario *Human Rights Code* ("Code").[4] Further, under the civil remedy

[3] *Employment Standards Act, 2000,* SO 2000, c 41. See O Reg 288/01, *Termination and Severance of Employment,* s 2(3).
[4] *Code, supra* note 2.

available under section 46.1 of the Code, Mr. Clarke sought damages for lost wages and damages in the amount of $25,000 "for injury to dignity, feelings, and self-respect." In the alternative, he sought damages in the amount of $75,000 "as compensation in lieu of reasonable notice." Additionally, Mr. Clarke sought a declaration that he had been wrongfully dismissed, as well as moral damages amounting to $25,000 "on the basis of alleged bad faith conduct" by the employer.

The employer moved for dismissal by way of summary judgment on the basis that the employment contract was frustrated and the employee would not be able to return to work in the foreseeable future. However, the motions judge dismissed the request, holding that there was a genuine issue for trial as to whether the employer had fulfilled its duty to accommodate Mr. Clarke given that Mr. Clarke had expressed his desire to return to work.

C. ANALYSIS

The Court held that the motion judge had "erred in his expression of the law regarding an employer's duty to accommodate an employee's disability" as well as in his denial to dismiss the motion on the basis that the Respondent's contract of employment had been frustrated.

With respect to the doctrine of frustration, the Court stated that such doctrine applied "where there is evidence that the employee's disabling condition is permanent," and that summary judgment is "clearly appropriate to determine an issue of frustration of contract." Since the medical documentation available to the employer and GWL indicated that Mr. Clarke was "totally disabled and unable to work in any occupation at the time or for the foreseeable future," the Court held that this evidence clearly met the test for frustration of contract. Accordingly, the Court held that the motion judge had erred in dismissing the employer's request for summary judgment on the basis of frustration of contract.

Specifically, the Court found that the motion judge incorrectly assumed that the employer's duty to accommodate can be triggered solely by an employee's expression of his wish to return to full employment, "notwithstanding the state of the documentation" indicating that the employee is incapable of returning to work. The Court accordingly clarified the two-part requirement that triggers an employer's

duty to accommodate in this case: 1) an employee's desire to return to work; and 2) evidence demonstrating that the employee will be able to return to work:[5]

> …the law is clear that an employer's duty to accommodate is only triggered when an employee informs an employer not only of his wish to return to work but also provides evidence of his or her ability to return to work including any disability-related needs that would allow him or her to do so: see *Lemasani* at para. 187. As was succinctly put by Fregeau J. in *Nason v Thunder Bay Orthopaedic Inc.,* 2015 ONSC 8097 at para. 144, "the employee must communicate the ability, not just the desire, to return to work". In this case, the Respondent never provided any such information to the Appellant.

The Court also made clear that an employer is no longer under a duty to accommodate where it is reasonably expected that the disabled employee will be incapable of returning to work for the foreseeable future:[6]

> Further, an employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future … It is "inherently impossible" to accommodate an employee who is unable to work …"

Applying the principles above, the Court held that the employer was entitled to terminate the employment relationship, as the evidence clearly confirmed Mr. Clarke's inability to "fulfil the basic obligations associated with the employment relationship for the foreseeable future," which meant that the employer's duty to accommodate had ended. The Court further clarified that the employer did not have an obligation to contact Mr. Clarke to discuss possible accommodation once it had received the medical documentation because, based on the medical information, any accommodation would have been "entirely futile" and "arguably inappropriate."[7] The Court also noted that the employer had reached out to Mr. Clarke twice prior to the termination, but that Mr. Clarke did not respond either time. As such, the Court held that the motion judge had erred in applying the legal principles with respect to frustration of contract and an employer's duty to accommodate "to the undisputed facts of this case," and set aside the motion judge's order, granting the employer's summary judgment motion to dismiss the action.

[5] *Katz, supra* note 1 at para 28
[6] *Ibid,* at para 29.
[7] *Ibid,* at para 30.

D. CONCLUSION

It is not uncommon for employees to take a leave of absence as a result of a disability. As such, employers are faced with the task of determining whether they have sufficiently fulfilled their duty to accommodate an employee with a disability as mandated under their provincial human rights legislation, and terminating the employment relationship prematurely may result in a wrongful dismissal claim or human rights proceeding against the employer. While this case is a reminder that an employer's duty to accommodate has clear limits in the case of frustration, employers need to handle these matters prudently.