CITATION: Katz et al. v. Clarke, 2019 ONSC 2188
DIVISIONAL COURT FILE NO.: 11-18
DATE: 2019/04/04

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WILTON-SIEGEL, FREGEAU and RYAN BELL, JJ.

BETWEEN:	
Katz Group Canada Ltd. C.O.B. as Pharma Plus and/or Rexall Appellant	F.J. Cesario and E. O'Dwyer, for the Appellant
– and –	
Eugene Clark Respondent	P. Morrissey and I. Wadhwa, for the Respondent
	HEARD at London, Ontario April 4, 2019

Delivered Orally

[1] The appellant Katz Group Canada Ltd. C.O.B as Pharma Plus and/or Rexall (the "Appellant") appeals, with leave of this Court, an order dated November 20, 2017 of Carey J. which dismissed the Appellant's motion for summary judgment.

Factual Background

[2] The respondent Eugene Clarke (the "Respondent") is a former employee of the Appellant. He was hired in March 2000 and most recently was a front store manager for the Respondent. He has been off work since July 2008 due to a disability. Initially, the Respondent left work due to depression. Subsequently, in December 2008, he had a slip and fall in which he broke his kneecap. In January 2011, the Respondent had a further fall in which he injured the same leg. Since then, the Respondent requires a crutch and a brace for mobility.

[3] Short-term and, subsequently, long-term disability benefits were approved by the Appellant's disability carrier, Great-West Life ("GWL").

[4] In early 2013, GWL advised the Appellant that, on the basis of the medical information available to it, the Respondent 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.

[5] On July 1, 2013, the Appellant wrote to the Respondent informing him that:

(a) based on the information received to date and his prolonged absence from work, the Appellant believed he was incapable of performing the essential duties of his position due to his illness, and there was no reasonable expectation that he would become able to return to his position in the foreseeable future;

(b) the Respondent's employment had therefore been frustrated;

(c) the Respondent's employment would cease on December 31, 2013 and he would be provided with 22 weeks of pay as required under the *Employment Standards Act* (the "ESA") (i.e. 8 weeks' pay in lieu of notice plus 14 weeks' severance pay); and

(d) the Respondent's benefits would cease effective December 31, 2013 and his statutory entitlements under the ESA would be paid to him on January 9, 2014.

[6] On September 24, 2013, the Respondent's current counsel wrote to the Appellant that the Respondent "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."

[7] In response, the Appellant's counsel wrote to request updated medical information outlining the Respondent's estimated date for return to work and his prognoses for recovery. The Respondent did not respond to that letter, nor did he provide updated medical information.

[8] On December 10, 2013, the Appellant's counsel again wrote to the Respondent's counsel and reiterated that, unless updated medical information was received, the Appellant would deem the Respondent's employment to be frustrated effective December 31, 2013, on the basis that there was no reasonable prospect that he would be able to perform the essential duties of his position in the foreseeable future.

[9] The Appellant did not receive a response to this letter. Consequently, the Appellant terminated the Respondent's employment effective December 31, 2013 on the basis of the frustration of his contract of employment and, on January 9, 2014, paid the Respondent his statutory entitlements in accordance with the ESA.

The Respondent's Medical Condition as of the Date of Termination

[10] There is no dispute between the parties that the Respondent's medical and benefit claims documentation available to GWL and the Appellant during 2013 indicated that the Respondent was totally disabled and unable to work in any occupation with no reasonable prospect of returning to work in any capacity in the foreseeable future.

[11] In particular, on June 11, 2013, Dr. Wainwright, his family physician, completed a GWL Supplementary Attending Physician's Statement, in which she wrote, among other things: "Pt is totally disabled...There is no job he would be able to perform."

[12] In addition, on June 26, 2013, the Respondent completed GWL's Employee Supplementary Statement Disability Information Questionnaire, stating that: (a) his mobility was limited due to pain; (b) any tasks completed are at a snails pace and typically require rest in doing things and long rests after; (c) he was house confined; (d) he was not capable of performing any work due to the limited length of time that he is able to stand, walk or sit; and (e) no treatment was available for his medical condition as per Dr. Wainwright.

[13] In addition, the Respondent acknowledged on discovery that as of June 26, 2013 his view was that he could not perform any work.

This Proceeding

[14] The Respondent commenced an action against the Appellant seeking a declaration that he was terminated as a result of his disability in breach of s. 5(1) of the *Ontario Human Rights Code* ("the Code"). The Respondent seeks damages under s. 46.1 of the Code for lost wages from January 1, 2014 until the date of judgment and the amount of $25,000 for injury to dignity, feelings, and self-respect. In addition, the Respondent seeks a declaration that he was wrongfully dismissed and, in the alternative to the damages set out above, damages in the amount of $75,000 as compensation in lieu of reasonable notice. The Respondent also seeks moral damages in the amount of $25,000 on the basis of alleged bad faith conduct by the Appellant in the manner of his dismissal.

[15] The Appellant defended the action on the basis that the Respondent's contract of employment was frustrated due to his absence from work for five years and the absence of any reasonable prospect of his returning to work.

[16] The Appellant moved for summary judgment. In a short endorsement dated November 20, 2017, the motion judge determined that there was a genuine issue for trial and dismissed the request for summary judgment. The following are the relevant passages of the endorsement of the motion judge:

> It is clear from the Statement of Defence that the defendant was aware of the plaintiff's wish to return to full employment. Their response was to request further medical reports and his plans for return. He did not provide further reports or make proposals for how he might be accommodated. I disagree with the defendant that the state of law would require more from the plaintiff. His stated desire to return to work is certainly capable of being interpreted as a request to be integrated back into the workforce. The medical reports were indicating some degree of mobility and no present psychological impairments to work. It is relevant, here, that his original absence from work was stress-related and it was two falls, while on leave, that turned his absence into a long term one.

> The law is clear that employers have substantive duties and need to have procedures in place to accommodate employees with disabilities up to the point of undue hardship to the employer. A failure to even consider the issue of accommodation and what steps could be taken has been held to constitute a failure to satisfy the procedural obligation. It is arguable here that the defendant's failure to spend the time and effort to explore with the plaintiff how his desire to return to work could be accommodated resulted in a "rush to judgment" that breached s. 5(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19.
>
> The record before me indicated an almost complete lack of personal contact between the defendant employer and their long term managerial employee. There appears to be no offer of rehabilitation help or any discussion with the employee plaintiff as to what his goals were. The employer is the one in the best position to know how an employee can best be accommodated in their operation. Use of crutches, walker or even a wheelchair all would seem reasonable areas of discussion that could have been initiated by this employer who in their statement of defence states that their business mandate is to deliver pharmacy care through its integrated network of more than 420 corporately-owned pharmacies.
>
> There is, on the record before me, a genuine issue for trial as to whether: a) the plaintiff was terminated as he states because of his disability or b) his contract of employment was frustrated by his inability to work as the defendant argues. The plaintiff argues that the defendant breached its obligations to accommodate him in violation of the Ontario Human Rights Code. There is a genuine triable issue as to whether the defendant fulfilled its duty to accommodate the plaintiff, given his express desire to return to work.

The Court's Jurisdiction and the Standard of Review

[17] This is an appeal pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The standard of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 in paras. 6-10 and 36-37. On a pure question of law, the standard of review is correctness. The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error". Questions of mixed fact and law are subject to the "palpable and overriding error" standard, unless it is clear that the trial judge made an error of law or principle that can be identified independently in the judge's application of the law to the facts of the case.

The Legal Principles Pertaining to a Summary Judgment Motion

[18] The Supreme Court addressed the principles to be applied in the consideration of a summary judgment motion in *Hryniak v Mauldin*, [2014] 1 SCR 87. In that decision, Karakatsanis J. speaking for the court stated the following at paras. 49 and 50:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Analysis and Conclusions Regarding the Appellant's Grounds of Appeal

[19] The Appellant raises the following grounds of appeal:

(1) the motion judge erred with respect to his application of the legal principles applicable to a summary judgment motion. In particular, the Appellant says that the motions judge erred in applying a test of whether there was "a genuine issue for trial" and erred in failing to consider or decide whether the powers under Rule 20.04(2.1) should be exercised;

(2) the motion judge erred in his application of the law of frustration of contract to the factual record; and

(3) the motion judge erred in assessing the legal requirements and evidentiary record on accommodation by finding that the Respondent's simple stated desire to return to work without more was enough to give rise to a genuine issue requiring a trial regarding the Appellant's obligation to accommodate the Respondent's disability.

[20] Given the determinations below regarding the second and third issues, it is not necessary to address the first ground of appeal. We will confine our comments to the fact that where, as here, there is no dispute regarding the material facts and the only issue is the application of the law to those facts, a summary judgment motion serves the goals of timeliness, affordability and proportionality without any adverse effect on the interests of justice.

[21] The central issue on this appeal is whether the motions judge erred in his application of the law of frustration of contract and of the duty to accommodate in the circumstances of this case. These issues engage the second and third grounds of appeal and will be addressed together in the following analysis.

[22] As mentioned, the motion judge held that there is a genuine issue for trial as to whether the plaintiff was terminated because of his disability or was validly terminated on the basis of frustration of his contract of employment. The motion judge also held that there was a "genuine triable issue" as to whether the defendant fulfilled its duty to accommodate the plaintiff, given his express desire to return to work. Both of these issues are based on the motion judge's conclusion that the law did not require more of the Respondent than an

expression to his employer of his wish to return to full employment to trigger the employer's duty to accommodate.

[23] The motion judge provided no case law or other authority for this conclusion. Nor did the Respondent on the hearing of this appeal. In our view, the motion judge erred in his expression of the law regarding an employer's duty to accommodate an employee's disability and therefore in his denial of the Appellant's motion for dismissal of the action on the basis that the Respondent's contract of employment had been frustrated.

[24] The doctrine of frustration of contract applies where there is evidence that the employee's disabling condition is permanent. The principle applies in these circumstances because the employee's permanent disability renders performance of the employment contract impossible "such that the obligations of the parties are discharged without penalty": see *Fraser v. UBS*, 2011 ONSC 5448 at paras. 14-15.

[25] Summary judgment is clearly appropriate to determine an issue of frustration of contract where, as here, there is no dispute as to the underlying facts: see *Fraser* at para. 3. Courts have granted summary judgment on the basis of frustration of contract on a number of occasions: see *Fraser; Duong v. Linamar*, 2010 ONSC 3159, upheld 2011 ONCA 38; *Lemasani v. Lowerys Inc.*, 2017 ONSC, 1801 upheld 2018 ONCA 270.

[26] In this case, the evidence was undisputed that the Respondent's medical documentation available to the Appellant and GWL indicated that he was totally disabled and unable to work in any occupation at the time or for the foreseeable future. As such the test for frustration of contract was clearly met.

[27] Insofar as the motion judge considered that the evidence indicated some degree of mobility and no present psychological impairments to work, he misapprehended the evidence, in particular the most recent documentation provided in June 2013 described above. We also fail to see the relevance of the fact that the Respondent's original absence from work was stress-related and that it was two falls, while on leave, that turned his absence into a long term one. These circumstances have no bearing on the medical evidence regarding his medical condition and the prospects for his return to employment as of the date of his termination.

[28] The motion judge held, however, that there was a "genuine issue for trial" on the basis that the Respondent's stated desire to return to work without more was sufficient to create the possibility of an issue of the employer's duty to accommodate notwithstanding the state of the documentation before the Respondent. However, 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.

[29] 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: see *Hydro-Quebec v. Syndicat des employées de technique professionelles et de bureau d'Hydro-Quebec, section locale 2000*, 2008 S.C.C. 43 at para. 19; *Nason* at para. 143. It is "inherently impossible" to accommodate an employee who is unable to work: see *Mathews v. Chrysler Canada*, HRTO 2053 at para. 54.

[30] In this case, the evidence was undisputed that the Respondent was unable to fulfil the basic obligations associated with the employment relationship for the foreseeable future. In these circumstances, the Appellant's duty to accommodate the Respondent in the workplace had ended. Essentially, the Respondent's position is that the employer failed to satisfy a duty to accommodate him by failing to contact him while he was off work. However, the Appellant had no such duty so long as the medical documentation provided to it indicated that the Respondent was unable to return to work. Any such communications regarding possible accommodation would have been entirely futile on the evidence before the Court and, arguably, inappropriate. In any event, the Appellant did contact the Respondent through his counsel on two occasions in 2013 prior to terminating the Respondent's employment and requested documentation or information that, if delivered, could have triggered a duty to accommodate. The Respondent did not reply to either of these letters and never did provide any such documentation or information.

[31] In these circumstances, the Appellant was entitled to treat the employment relationship as ended.

[32] Accordingly, the motion judge erred in law in the application of the legal principles regarding frustration of contract, and an employer's duty to accommodate, to the undisputed facts of this case. The order of the motion judge must therefore be set aside and the Appellant's summary judgment motion be granted dismissing the Respondent's action.

"Justice J. Wilton-Siegel"
Wilton-Siegel J.

I agree ***"Justice J. Fregeau"***
Fregeau J.

I agree ***"Justice R. Ryan Bell"***
Ryan Bell J.

Released: Orally – April 4, 201

CITATION: Katz et al. v. Clarke, 2019 ONSC 2188
DIVISIONAL COURT FILE NO.: 11-18
DATE: 2019/04/04

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Wilton-Siegel, Fregeau, Ryan Bell JJ.

BETWEEN:

Katz Group Canada Ltd. C.O.B. as Pharma Plus and/or Rexall

-and-

Eugene Clark

REASONS FOR JUDGMENT

Released: Orally – April 4, 2019