COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aldergrove Duty Free Shop Ltd. v. MacCallum,* 2024 BCCA 28

Date: 20240126
Docket: CA48717

Between:

Aldergrove Duty Free Shop Ltd.

Appellant
(Defendant)

And

Barbara May MacCallum

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 2, 2022 (*MacCallum v. Aldergrove Duty Free Shop Ltd.*, Vancouver Docket S2110081).

Counsel for the Appellant:	A.L. Burchart
Counsel for the Respondent:	L. Moody A. Wensel
Place and Date of Hearing:	Vancouver, British Columbia December 12, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2024

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Justice Skolrood

Summary:

The appellant employer appealed a finding of wrongful dismissal involving a failure to pay severance. The appellant runs a duty-free shop in Aldergrove and argued that its employment contract with the respondent had been frustrated by the federal government's decision to close the Canada–USA border for non-essential travel during the COVID-19 pandemic. This argument was rejected by a summary trial judge. On appeal, the appellant alleges the judge failed to appreciate the fundamental purpose of the employment contract. It also says the judge failed to give meaningful effect to evidence showing that the border closure frustrated the contract within the meaning of the common law.

Held: Appeal dismissed. While the changed circumstances substantially reduced the appellant's customer base, it did not radically alter the nature of the parties' obligations under the employment bargain, such that continued performance of the contract would have forced them to do something they did not promise to do. In the circumstances of this case, the appellant failed to establish reversible error in the judge's determination that the defence of frustration was not available.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] In March 2020, the land border between Canada and the United States was closed to all non-essential travellers because of the COVID-19 pandemic. The appellant, Aldergrove Duty Free Shop Ltd., operates a duty-free shop on the Canadian side of the border.

[2] The shop is a small, family-owned business that relies on border travel for its business. Ninety-nine percent of the shop's customers are holiday and vacation travelers.

[3] On receiving word of the border closure, the appellant temporarily closed its doors and laid off its employees. The respondent, Barbara MacCallum, was one of those employees. She was then 78 years old and had worked for the appellant as a retail sales clerk since 2010. She also assisted with janitorial work as needed. The respondent was paid an hourly wage.

[4] According to the appellant's president, the shop was closed because "there was essentially no work for employees to do". The appellant notified the Canadian Border Services Agency of the closure. The shop remained closed until November 2021, at which point the land border re-opened to fully vaccinated Canadians travelling to the United States for non-essential purposes.

[5] By operation of s. 63(5) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and s. 45.01 of the *Employment Standards Regulation*, B.C. Reg. 396/95, the respondent's layoff became permanent effective August 30, 2020. It was statutorily deemed to have taken effect on March 17, 2020, the date of the original layoff.

[6] The appellant declined to pay the respondent severance. In November 2021, the respondent filed a notice of civil claim seeking damages for wrongful dismissal. In response, the appellant alleged that the employment contract had been frustrated by the border closure and the appellant was thereby relieved of any obligation to provide the respondent with reasonable notice of termination or payment in lieu.

[7] After a summary trial, a Supreme Court judge rejected the appellant's position. He found that the defence of frustration was not available. The respondent was held to be wrongfully dismissed and the judge awarded her the equivalent of ten months' salary.

[8] The appellant seeks to overturn the wrongful dismissal ruling.

Summary Trial Judgment

[9] The judge found as a fact that the respondent was unilaterally laid off effective March 17, 2020, with no right of recall. This finding is not challenged on appeal.

[10] The judge also found that the employment contract was not frustrated by the border closure. His reasons on this issue were brief:

> [15] Nor do I find that the employment contract was frustrated. In *Verigen v. Ensemble Travel Ltd*., 2021 BCSC 1934, on substantially similar facts, Justice Milman considered and rejected an argument that the contract was frustrated. The critical paragraph is para. 60:
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> > … the collapse in the travel market goes to ETL's "ability to perform", rather than "the nature of the obligation itself." This case is unlike the CRT decisions relied upon by ETL, where the very subject matter of the contract had been lost due to discrete, pandemic-related events. Although much of the consumer demand driving the business on which ETL and its members depend has abated, at least for the time being, not all of it has, and then not permanently. Moreover, although ETL chose to terminate a large part of its work force in the summer of 2020, at least some positions have been preserved and a recently-opened vacancy has been filled. ETL chose to relinquish Ms. Verigen's branch of the business with a view to cutting operating costs so that it could better weather an ongoing storm. The fact that the pandemic had admittedly not brought about a frustration of the contract as of July 2020 makes it implausible for ETL to maintain that the contract had become frustrated only a few weeks later.
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> [16] I agree that there are some factual dissimilarities noted there, but legally they are not significant. It is true that the pandemic had a greater impact on this defendant's business than that of the defendant in *Verigen*, a travel agency. Equally, it appears that the defendant in that case had more varied options than this defendant.
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> [17] However, the fundamental point that the collapse of the travel business goes more to the defendant's ability to perform than to the nature of the contractual obligation itself is applicable here. For that reason, I do not find that the employment contract was frustrated.

[11] Given the refusal to pay severance, the judge concluded that the respondent had been wrongfully dismissed. As noted, he held that the appellant owed the respondent the equivalent of ten months' salary. The quantification of damages is not challenged on appeal.

[12] The judge also ordered that the damages be reduced by any benefits received under the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8 ["*CERB*"].

Issues on Appeal

[13] The appellant alleges two errors on appeal. It says:

a) the judge erred in principle by not analyzing the purpose of the employment contract before determining the availability of the defence of frustration; and,

b) because of this error, the judge failed to give effect to evidence showing that performance of the contract during the border closure would have radically changed the parties' obligations.

[14] There is a cross-appeal. The respondent alleges the judge erred in deducting *CERB* benefits from the damages award.

Standard of Review

[15] The first ground of appeal, as framed by the appellant, raises a question of law. The appellant says the judge's analysis of the frustration defence was fundamentally flawed because he failed to ask a question mandated of him and as a result, he applied an incorrect legal test. The standard of review for a question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[16] The second ground of appeal attracts a different and more stringent standard of review. A failure to give effect to evidence can amount to a misapprehension of the record. However, it will only justify appellate intervention if the misapprehension was central to the judge's reasoning process: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 218, 221, 1995 CanLII 3498 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at paras. 1–2; *Bayford v. Boese*, 2021 ONCA 442 at para. 28.

[17] The cross-appeal involves a pure question of law. Consequently, a correctness standard applies.

Discussion

A. Appeal from the finding of wrongful dismissal

[18] The appellant says the judge's frustration analysis was irreparably tainted by a failure to determine the fundamental purpose of the parties' employment contract. He was duty-bound to make this inquiry as a first step to the analysis. Only once

he decided this issue could he then properly assess whether closing the border rendered performance of the contract something radically different from what the parties had contemplated. The reasons for judgment reveal no inquiry into purpose.

[19] The appellant contends that had the judge properly turned his mind to purpose, he would have appreciated that the employment bargain involved the payment of a wage for a particular kind of work in a particular context, namely: retail sales in a tightly regulated duty-free shop exclusive to non-essential travellers and highly dependent on the ability of those travellers to cross the land border.

[20] The appellant says appreciating this feature of the contract was essential to the judge's assessment of the evidence and to his ability to properly determine the impact of the border closure on the contract. With a properly informed appreciation of purpose, he would have understood from the evidence that the unprecedented and unanticipated border closure radically changed the nature of the work performed under the contract and the obligations underpinning the parties' relationship. With the border closure, the unique type of work the respondent agreed to provide in exchange for a wage—retail sales exclusive to a specific segment of international travellers who met the regulated criteria for duty-free shopping—had become impossible to perform. Plus, the strict regulation of duty-free shopping, which formed an integral part of the context in which the contract was performed, left the appellant with limited business options after the border closed and no realistic ability to provide an alternative form of work for its employees.

[21] The respondent disagrees that the judge applied an incorrect legal test, or that he failed to give proper effect to the evidence.

[22] Instead, she says this appeal is more appropriately framed as a challenge to the judge's application of the frustration defence to his factual findings. This is a question of mixed fact and law and the judge's ruling should not be set aside in the absence of palpable and overriding error: *Housen* at para. 26; *Kong v. Song*, 2019 BCCA 84 at para. 50; *Simpson v. Zaste*, 2022 BCCA 208 at para. 67. No palpable and overriding error has been established.

[23] The respondent argues there was a sound basis for the frustration ruling. The duty-free shop was not permanently shut down. The closure was intended to be temporary and in fact, the shop re-opened 20 months later. Furthermore, even at the height of the border restrictions, essential travellers were permitted to cross. In other words, there was some traffic moving from Canada into the United States and *vice versa.* The respondent accepts that because of the border closure, it was more difficult or expensive for the appellant to keep the respondent working; however, it was not impossible for the parties to perform their obligations under the employment bargain as contemplated by them when they entered into their agreement. Employer difficulty, hardship, or reduced profitability arising from a supervening event do not, standing alone, frustrate a contract.

Defence of frustration – legal principles

[24] Simply stated, a contract will be frustrated at common law when a situation arises through no fault of the parties that is not provided for in the contract and renders performance of the parties' obligations under the contract something "radically different" from what they undertook: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 53 [*Ellis-Don*], internal references omitted.

[25] When this occurs, a court may relieve the parties of their bargain because to compel performance in the new and changed circumstances would require that they do something "radically different" from what they agreed to: *Ellis-Don* at para. 55, internal references omitted.

[26] Over time, the frustration defence has been articulated in different ways, although, as will be seen, the essential elements of the defence have remained fundamentally the same.

[27] For example, in *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, 1960 CanLII 37 [*Kiewit*], the defence was stated to apply when "… without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the

contract": at 368, quoting from *Davis Contractors Ltd. v. Fareham Urban District Council,* [1956] A.C. 696 at 729 [*Fareham*].

[28] In *KBK No. 138 Ventures Ltd. v. Canada Safeway Ltd.,* 2000 BCCA 295 [*KBK*], this Court held that a contract will be frustrated when changed circumstances have the effect of "… transform[ing] the contract into something totally different than what the parties intended": at para. 28.

[29] Specific to the employment context, it was held in *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424, that the frustration defence requires a court to ask "… whether the contract is broad enough to apply to the changed circumstances or whether the change is such that performance of the contractual obligations in the new circumstances would be something radically different from what the parties had agreed upon": at para. 26.

[30] The defence was framed this way by the Ontario Court of Appeal in *Perkins v. Sheikhtavi,* 2019 ONCA 925*:*

> [15] Frustration applies to contracts … when a supervening event alters the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agree to under their contract …
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> [Internal references omitted.]

See also *Nagpal v. IBM Canada Ltd.*, 2021 ONCA 274 at para. 33.

[31] Despite differences in articulation, there is a consistent theme: it is the impact of the change on the nature of the contractual obligations themselves that matters.

[32] The frustration defence is only available where new and changed circumstances caused by a supervening event that was neither contemplated by the parties, nor induced by one of them, would require that one or more of the parties do something fundamentally ("radically") different from what was originally intended in order to perform their contractual obligations. It is for this

reason that the legal test for frustration is often referred to as a "radical change in the obligation test": *KBK* at para. 13, citing *Fareham* at 728–29, emphasis added.

[33] Consequently, it is not enough for a party claiming frustration to show that complying with their contractual obligations will result in "… hardship, onerousness, inconvenience, or material loss …": *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 60. Instead, to avail themselves of this defence, the claimant must prove that "… the thing undertaken would, if performed [in the new and changed circumstances], be a different thing from that contracted for": *Kiewit* at 368, quoting from *Fareham* at 729. The alleged frustration "… must go to the root of the agreement and be entirely beyond what was contemplated by the parties …": *Blackmore Management Inc.* at para. 60, citing *KBK* at para. 21.

[34] In *Folia v. Trelinski* (1997), 14 R.P.R. (3d) 5, 1997 CanLII 469 (B.C.S.C.), the court noted that in assessing whether performance under a contract would require something radically different, a judge must account for:

> [18] … the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties.
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> [Emphasis added.]

[35] This approach to the defence was cited with approval in *KBK* at para. 14. It is also consistent with Professor Fridman's discussion of the issue in *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 619–620:

> … The distinction is made and drawn between complete fruitlessness and mere inconvenience, hardship, loss of advantage, or the like. It is also necessary to differentiate a disruption that is permanent, *vis-à-vis* the contract (albeit that it may not be permanent in other respects) and one that is temporary or transient. The latter might add to the difficulties of performance. It might make performance less desirable, economically valuable, or more expensive to undertake. But it will not constitute frustration. The courts require an utter and complete transformation of the contractual circumstances. Change, in itself, is insufficient. It must be change that totally alters the nature, meaning, purpose, effect, and consequences of the contract so far as concerns either or both parties.

[Internal references omitted; emphasis added.]

[36] In light of the above-cited authorities, this Court has held that to prove frustration, a party must establish each of the following elements:

a) a qualifying supervening event that was not contemplated by the parties when they entered into the contract;

b) the supervening event is not the fault of either party; and,

c) the supervening event rendered performance of the contract something radically different from that which was undertaken.

See, for example, *Blackmore Management Inc.* at para. 59; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at paras. 65–66; *Rickards (Estate of) v. Diebold Election Systems Inc.*, 2007 BCCA 246 at paras. 37–38; and *Wightman Estate* at paras. 21–26.

[37] The party that asserts frustration bears the onus of proof: *Perkins* at para. 17. Determining whether the defence has been made out is fact dependent and requires an individualized assessment: *Blackmore Management Inc.* at para. 65.

Application of the defence during the COVID-19 pandemic

[38] To my understanding, there have been two other trial-level decisions in the British Columbia Supreme Court that have considered the defence of frustration in the employment context, specific to the COVID-19 pandemic. This is, of course, the factual context of the appeal before us.

[39] The parties referred us to *Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934 and *Fanzone v. 516400 B.C. Ltd.*, 2022 BCSC 2089. In both cases, the frustration defence was held not to apply. The judge cited the first of these cases in his reasons.

[40] In *Verigen*, the plaintiff employee sought damages for an alleged failure to provide reasonable notice of termination or payment in lieu. The defendant employer

asked that the claim be dismissed on the basis that the employment contract had been frustrated by the COVID-19 pandemic. The employer operated an international travel agency cooperative. In support of the frustration defence, it relied on "… the global collapse in consumer demand for travel and the associated loss of the market for the kind of work [the plaintiff] was hired to do": at para. 53. The employer also adduced evidence that at the height of the pandemic in 2020, it held no retained earnings and "its survival was in question": at para. 54.

[41] The judge in *Verigen* rejected the frustration defence. He found that the collapse of the travel market detrimentally impacted the employer's ability to meet its obligations under the contract, but it did not change the nature of those obligations: *Verigen* at para. 60. Consumer demand for the employer's services had significantly reduced. However, it was not completely diminished and the reduction was not permanent: at para. 60. This was borne out by the fact that the employer did not lay off or terminate all of its employees. There was also evidence that the specific branch of the employer's business in which the plaintiff worked had been relinquished "… with a view to cutting operating costs so that [the employer] could better weather an ongoing storm": at para. 60. In other words, the plaintiff's work was eliminated by choice for the company's overall benefit during the pandemic.

[42] As I read *Verigen*, the judge found that the employer was able to perform its obligations under the employment contract in the new and changed circumstances without having to do something radically different from what it had promised to do. In other words, the supervening event, collapse of the travel market, did not transform the nature of the employer's obligations as originally contemplated by the parties into something else. Instead, it was the need to preserve economic viability during a market collapse that drove the termination of the plaintiff's employment.

[43] *Fanzone* also involved a claim for wrongful dismissal. The plaintiff worked in a Squamish pub. In March 2020, British Columbia's Provincial Health Officer ordered that all pubs and restaurants close in response to the COVID-19 pandemic, unless

able to offer take-out or delivery service. The plaintiff was told he was being laid off. He was paid his outstanding wages and accumulated vacation pay. However, the pub did not pay severance.

[44] In May 2020, the Provincial Health Officer issued two replacement orders for pubs and restaurants which permitted inside standing and sit-down service, subject to various requirements. At least 14 pubs and restaurants re-opened in Squamish on the basis of the replacement orders. The pub that employed Mr. Fanzone was not one of them. It took the position that re-opening was impossible because the physical dimensions of the kitchen prevented staff from maintaining a safe distance from each other.

[45] Mr. Fanzone sued the pub for wrongful dismissal. In response, the pub advanced a frustration defence. Similar to *Verigen*, the defence was rejected and the pub was held liable for wrongful dismissal: *Fanzone* at para. 29. The judge found that the owner of the pub "chose" to close the business and not re-open, rather than attempt to work within provincial requirements: at para. 26. This was a "personal choice" made by the owner because he thought it was the "… most prudent thing for him and his wife in difficult circumstances": at para. 28.

[46] As I read *Fanzone*, the judge found that the pub was able to perform its obligations under the employment contract in the new and changed circumstances without having to do something radically different from what it had promised to do. In other words, the supervening event, restrictions imposed by the Provincial Health Officer, did not transform the nature of the pub's obligations as originally contemplated by the parties into something else. Instead, it was the owner's personal choice to close the pub that drove the plaintiff's termination.

Application of legal principles to the facts of the case

[47] The appellant says this case is distinguishable from *Verigen* and *Fanzone* and warrants a different outcome. I turn now to that issue.

[48] The first two elements of the frustration defence are not in dispute here. The respondent has not suggested in her factum that closure of the land border to non-essential travel was an event or risk contemplated by the parties when they entered into their employment contract. Instead, she accepts that the closure was unanticipated.

[49] It is also obvious that neither party is at fault for the supervening event. The border closure was a government response to the COVID-19 pandemic that had nothing to do with the parties.

[50] As such, this appeal turns on the third element of the defence and whether the appellant has established reversible error in the judge's conclusion that the border closure did not render one or both parties' performance under the employment contract "… a thing radically different from that which was undertaken …": *Ellis-Don* at para. 53.

[51] As I interpret paras. 15–17 of the reasons for judgment, this is the effect of the judge's ruling. Similar to the approach in *Verigen*, the judge accepted that the collapse of the travel business serviced by the duty-free shop detrimentally impacted the appellant's ability to meet its responsibilities under the employment contract; however, the new and changed circumstances resulting from the border closure did not radically alter the nature of the contractual obligations between the parties, such that performance of the contract after the closure would require them to do something they had not promised to do.

[52] I appreciate that para. 17, in particular, could have been more clearly stated. However, "[w]here ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error …": *R. v. G.F.*, 2021 SCC 20 at para. 79, citing *R. v. C.L.Y.*, 2008 SCC 2 at paras. 10–12.

[53] It is clear that in deciding the frustration claim, the judge reviewed and relied upon *Verigen.* The latter decision contained a lengthy excerpt from *Wilkie v. Jeong*, 2017 BCSC 2131, which, in turn, canvassed the leading Canadian authorities on the availability of the defence. This included *Ellis-Don* and *KBK*, both of which emphasize that to successfully advance the defence, a party must establish that after the supervening event, performing the contract would require something radically different from what was contemplated when the parties entered into their agreement.

[54] It is also readily apparent from para. 15 of the judge's reasons that he considered para. 60 of *Verigen* to be the "critical paragraph" for the purpose of his analysis. In that paragraph, impact to the nature of the contractual obligation was recognized to lie at the centre of the frustration analysis, rather than hardship to a party in meeting its obligations because of new and changed circumstances. The judge recognized there were "some factual dissimilarities" between *Verigen* and the case at bar; however, he did not consider those distinctions to be legally significant: at para. 16. I take this to mean that similar to the judge in *Verigen*, he was not persuaded that the border closure rendered it impossible for the appellant or respondent to perform their obligations under the contract as originally contemplated. Instead, it was the economic viability of the appellant doing so that drove the layoff and termination of employees at the duty-free shop, including the respondent.

[55] It would have been preferable for the judge to provide greater explanation on this point. However, I am satisfied that on a fair reading of paras. 15–17 of his reasons, in the context of the record, the judge did ask the right questions in his consideration of the defence and properly focused his attention on whether the border closure transformed the nature of the parties' contractual obligations, such that compelling performance of the contract post-closure would require that they do something radically different from what they undertook.

[56] The appellant says there is no indication that in reaching this conclusion, the judge considered the unique context in which the appellant operated its duty-free shop and the extent to which that context appropriately informed the true purpose or object of the employment bargain. From the appellant's perspective, this was an error in principle that not only tainted the frustration analysis, but the judge's consideration of the evidence and his factual findings.

[57] I disagree. I am satisfied the judge did apply the correct legal framework to his analysis of the frustration defence. Moreover, it is evident that he was alive to the evidentiary features of the case the appellant says were integral to a proper application of that defence.

[58] The judge was conscious of the fact that the appellant operates a duty-free shop and that its customers are "predominantly" Canadians crossing into the United States: at para. 4. He understood that the border was closed to "all but essential travellers" (at para. 5), and that this rendered the appellant's business "virtually non-existent" between March 2020 and November 2021: at para. 6, emphasis added. He understood that because of the nature of its business, the appellant had limited options in responding to the impacts of the border closure: at para. 16.

[59] Ultimately, however, the judge found that while these factual features affected the appellant's ability to live up to the contractual obligations contemplated by its employment agreement with the respondent, they did not affect the nature of those obligations.

[60] In my view, this conclusion was open to the judge on the record.

[61] To compel performance of the parties' contractual obligations between March 2020 and November 2021 would have no doubt placed significant financial pressure on the appellant because of the extraordinary reduction in its customer base. Indeed, the appellant's president deposed at the summary trial that the shop "suffered and continues to suffer significant loss" because of the border closure.

This evidence was not challenged. The respondent acknowledged in her examination for discovery that without traffic moving across the land border, there were no customers to serve.

[62] Nonetheless, the border closure did not alter the nature of the obligations under the contract and render those obligations radically different from what the parties contemplated when the respondent was hired as an employee. The appellant's primary obligation under the employment contract was to provide an hourly wage in exchange for the respondent attending the duty-free shop and performing retail sales and janitorial work, as required. That is how the appellant's president described the employment relationship:

> Ms. MacCallum started her employment with the Company on March 24, 2010, as a Buyer for the Duty Free Shop. However, her skills set was better suited for the position of Retail Salesclerk and she was employed in that capacity and performed duties and responsibilities consistent with that position for about the last 8 years of her employment, and she also provided janitorial services.
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> …
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> Ms. MacCallum was paid an hourly wage for the hours she worked as a retail salesclerk and providing janitorial services at the Duty Free Shop.

[63] As I understand it, neither party tendered an employment contract for review at the summary trial. There was no evidence the parties structured their employment agreement in a manner explicitly dependent upon the existence of certain market conditions, a specific level of customers accessing the duty-free shop, a particular volume of sales, or the appellant's profitability. Unique features of the appellant's business context, as canvassed in the evidence, were not built into the employment contract such that the parties' obligations under their agreement could not reasonably be said to be "… broad enough to apply to the changed circumstances …": *Wightman Estate* at para. 26.

[64] In this sense, I consider the case to be profoundly different from *KBK*, a decision cited by the parties in which the terms and conditions of the contract laid the groundwork for a successful argument that compelling performance under new

and changed circumstances resulting from a supervening event would require the parties to do something radically different from what they had promised.

[65] In *KBK*, the parties contracted to sell a piece of land in Vancouver. When they entered into the contract, they were both aware that KBK, the purchaser, intended to use the property to develop a mixed commercial and residential project. The property carried a particular zoning designation. The form of development that "both parties expected" under the contract was "dependent" on the maximum allowable floor space specific to that zoning designation: at para. 3. Indeed, the contract's purchase price was calculated with explicit reference to allowable floor space.

[66] Between a first installment payment under the contract and the closing date, the City of Vancouver rezoned the land, significantly reducing the allowable floor space. The evidence established that with the rezoning, it would be impossible for KBK to develop its project as contemplated by the parties. The "… allowable buildable square footage [had gone] from 231,800 square feet to 30,230 square feet …": *KBK* at para. 28. This represented an 87% reduction in room to build.

[67] KBK informed the vendor that it viewed the contract as having been frustrated by the rezoning and demanded return of the first installment. The vendor refused and the matter went to court.

[68] The trial judge found in favour of frustration. That finding was upheld on appeal. The parties' contract had been structured "… with an eye on KBK's … goal of redeveloping the property as a condominium development for mixed commercial and/or residential use": *KBK* at para. 24. The purchase price was calculated "on the basis" of the allowable floor space associated with the original zoning designation: at para. 24. The contract contained a non-competition clause that placed restrictions on the build and limited KBK's development options: at para. 25.

[69] Given the terms of the contract and importantly, the extent to which the mutually anticipated use of the property was bound up with allowable floor space, the rezoning resulted in a change of circumstances that was "so fundamental", it "radically altered" the agreement between the parties: *KBK* at para. 28. The mixed commercial and residential development that the agreement was intended to facilitate was no longer possible and the now-available use of the property was "… entirely beyond what was contemplated by the parties when they entered into the agreement": at para. 28.

[70] The appellant says that similar to *KBK*, its contract with the respondent was also radically altered by the border closure. The appellant articulates it this way in its factum: "… to continue to bind the appellant to [the] employment contract, when there could be no productive work to be performed … would be to impose something radically different from what the parties originally agreed to". It would modify the employment contract to one in which the appellant continued to pay a wage for the respondent to report to work, but with nothing to do.

[71] Respectfully, this argument erroneously presupposes that it was a term of the employment contract that the shop would maintain a certain level of customers, or that the respondent would perform a certain volume of work or maintain a certain level of busyness. It is also an argument that, taken to its logical conclusion, would arguably render the frustration defence available each time a retail operation experiences a substantial, non-fleeting reduction in its customer base due to an event beyond its control, on the basis that its employees had been left with less or, at times, nothing to do.

[72] This is not a proper application of the frustration defence, which, for good reason, entails a stringent standard. This is especially so in the employment context. The Supreme Court of Canada has recognized that:

> … [w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of [their] sense of identity, self-worth and emotional well-being.
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> [Reference re *Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368.]

[73] A generous application of the frustration defence in the employment context has significant implications for employees, potentially depriving them of critical entitlements through no fault of their own.

[74] The appellant's president deposed that "it made absolutely no sense" to pay wages or apply for a wage subsidy, only to have employees of the shop "sit around … and do nothing".

[75] I appreciate the perspective and have sympathy for the difficult circumstances small business owners found themselves in during the COVID-19 pandemic. However, this is an economic rationale for non-performance of the appellant's contractual obligations, not evidence of a radical change to the contract itself that would have forced the parties to do something they had not promised to do.

[76] Presumably, before the pandemic, there would have been ebbs and flows in customer traffic at the duty-free shop. As a matter of logic and common sense, some days would have been busier than others. The respondent would have reported to work, available to serve whatever number of customers may have entered the store on a given day, and to clean the store as required. The appellant paid a wage in exchange for the respondent's availability and work at the shop. Practically, I do not see how the border closure radically altered these obligations.

[77] In my view, consistent with the results in *Verigen* and *Fanzone*, it was open to the judge in the circumstances of this case to hold that the appellant did not prove the defence.

[78] As I interpret his reasons, the judge found that the appellant was able to perform its obligations under the employment contract after the border closure without having to do something radically different from what it had promised to do. The supervening event did not transform the nature of the contractual obligations as originally contemplated by the parties. Instead, it was the reduction in non-essential travelers and associated business that drove the appellant's decision to temporarily close the duty-free shop, the respondent's lay off, and her termination.

[79] As explained, I do not consider the judge to have erred in principle. As such, I agree with the respondent that the judge's conclusion on the defence of frustration is properly characterized as a matter of mixed fact and law. To justify intervention with that conclusion, the appellant bore the onus of establishing palpable and overriding error: *Gustafson v. Future Four Agro Inc.*, 2019 SKCA 68 at para. 15. It has not done so.

B. Cross-appeal from the deduction of *CERB* benefits

[80] This means the cross-appeal remains a live issue. The appellant has taken no position on the issue raised by the respondent.

[81] In light of *Yates v. Langley Motor Sport Centre Ltd.,* 2023 BCCA 281, a decision of this Court that was released after the summary trial, the cross-appeal must succeed.

[82] The law is clear that in this jurisdiction, *CERB* benefits are not deductible from a damages award for wrongful dismissal.

Disposition

[83] For the aforementioned reasons, I would dismiss the appeal.

[84] I would allow the cross-appeal and order that the damages award be paid in full, without reduction for the respondent's *CERB* benefits.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Justice Skolrood"