COURT OF APPEAL FOR ONTARIO

CITATION: Croke v. VuPoint System Ltd., 2024 ONCA 354
DATE: 20240507
DOCKET: COA-23-CV-0310

Pepall, Sossin and Dawe JJ.A.

BETWEEN

Alan Croke

Plaintiff (Appellant)

and

VuPoint System Ltd.

Defendant (Respondent)

David Share and Nick Goldhawk, for the appellant

Evan Campbell and Catherine Phelps, for the respondent

Heard: March 13, 2024

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated February 21, 2023, with reasons at 2023 ONSC 1234.

Sossin J.A.:

[1] This case considers the applicability of the doctrine of frustration to an employment contract that was terminated on the basis of the employee's COVID-19 vaccination status and the mandatory vaccination policy implemented by the respondent's dominant client.

[2] The appellant, Mr. Croke, was employed by the respondent, VuPoint Systems Ltd. ("VuPoint"), as a technician. VuPoint is in the business of installing residential satellite TV and "smart home" internet services. Its main customers are Bell Canada and Bell ExpressVu (collectively, "Bell"), which provide more than 99% of VuPoint's income. All of the appellant's work was for Bell and it was undisputed that there was no other work VuPoint could provide to the appellant.

[3] In 2021, Bell implemented a mandatory vaccination policy, following which VuPoint adopted its own vaccination policy.[1] The appellant refused to comply with the VuPoint Policy by disclosing his vaccination status, which was deemed to mean that he was unvaccinated. Consequently, pursuant to the Bell Policy, he was not eligible to continue working as a technician providing services for Bell customers. VuPoint terminated the appellant's employment and he brought a wrongful dismissal action.

[4] On a summary judgment motion, the motion judge dismissed the action, finding that the appellant's employment contract was frustrated by the implementation of the Bell Policy. The appellant appeals that finding, arguing that the motion judge should not have applied the doctrine of frustration and, in the alternative, that the application of frustration in this case was incorrect.

---

[1] Where necessary, these policies are referred to individually as the "Bell Policy" and the "VuPoint Policy", respectively. However, when referring generally to the requirement to be vaccinated in both policies, I will use the "Policy".

FACTS

[5] VuPoint, a federally regulated employer, provides satellite television and smart home installation services on behalf of Bell. Bell provides more than 99% of VuPoint's annual income. The appellant was employed by VuPoint and only did work as a technician for Bell. The parties agreed that being able to work for Bell and enter the home of Bell customers was a fundamental part of the appellant's employment and that his failure to become vaccinated resulted in his complete inability to perform the duties of his position.

[6] On or around September 8, 2021, Bell sent a letter informing VuPoint that its technicians working on Bell projects had to be vaccinated against COVID-19:

> Bell has implemented a COVID-19 Vaccination Policy that includes a mandatory requirement for all vendor personnel (including any of your subcontractors or other agents) and other contractors who work at or visit any Bell location or interact in-person with Bell customers to be fully vaccinated against COVID-19.
>
> Accordingly, Bell requires that all personnel who work at or visit any Bell location or interact in-person with Bell customers be fully vaccinated by September 20, 2021. Bell's policy follows and is consistent with public health guidance and the government's vaccine expectations for communications providers, banks and other federally regulated companies.

[7] This letter, explaining the Bell Policy, did not include any alternative options to vaccination, such as rapid testing, and reserved to Bell the right to audit compliance with the Bell Policy, including by proof of vaccination. The Bell Policy

provided that failure to comply would constitute a material breach of the agreement between Bell and VuPoint. As a result, VuPoint implemented the VuPoint Policy, which required all of its installers to be vaccinated against COVID-19 and to provide VuPoint with proof of vaccination. Under the VuPoint Policy, non-compliant employees were “prohibited from performing work for certain customers (including Bell)” and “may not receive the assignment of any jobs”. Neither Policy addressed termination of employment.

[8] VuPoint sent a copy of Bell’s September 8th notice letter to all technicians, including the appellant. The appellant was clearly aware of the need to get vaccinated. His evidence was that in September, he knew he was required to be vaccinated and that he applied for a new job on September 12, in particular a position that did not require a vaccine.

[9] On September 28, 2021, VuPoint gave two weeks’ notice to the appellant that his employment would be terminated effective October 12, 2021, due to his failure to comply with the VuPoint Policy. He was paid $2,393.02 in severance in addition to the two weeks’ notice. On October 9, 2021, during this notice period, the appellant sent a letter to VuPoint refusing to comply with the VuPoint Policy and claiming that the termination was discriminatory. His superior’s evidence was that VuPoint had work for the appellant had he complied with the Policy.

[10] The appellant was able to find new employment effective March 19, 2022, but with lower pay.

[11] The appellant brought an action for wrongful dismissal. VuPoint defended the action, arguing that the appellant's employment contract was frustrated as a result of the Bell Policy, over which VuPoint had no control. The Bell Policy required the appellant to be vaccinated, and without proof of vaccination, he lacked the necessary qualification to perform his duties and was ineligible to work for the foreseeable future.

DECISION BELOW

[12] On a motion for summary judgment, the motion judge accepted VuPoint's frustration argument and dismissed the action.

[13] The motion judge found that the appellant was aware of the Bell Policy, that he only provided services to Bell, and that, without proof of vaccination, he could not continue providing services to Bell. She found that the appellant was clear in his evidence that he had no intention of becoming vaccinated, and that he was not in compliance with the Policy when his employment was terminated. It appears that the evidence she relied on included the contents of the appellant's October 9th letter.

[14] The motion judge also found that the appellant was given two weeks' working notice on September 28, 2021, and that he "was aware of the

consequence of non-compliance with the new vaccine qualification for at least [this] two-week period." The motion judge found that the appellant had received a "clear and unambiguous" warning of the repercussions of non-compliance with the Policy.

[15] The motion judge considered the requirements of frustration set out by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at paras. 53 and 55. She then compared this case to *Fraser Health Authority v. Hospital Employees' Union (Tracy London Termination)*, 2022 CanLII 91089 (B.C.L.A.), in which an employment contract was found by an arbitrator to have been frustrated because of the employee's non-compliance with a COVID-19 vaccination policy her employer was required to enforce. Like the arbitrator in *Fraser Health Authority*, the motion judge also compared the appellant's situation to cases where an employee's contract is frustrated because of a statutory or legal change that renders them unqualified for their job and therefore unable to work: see e.g., *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357 (Div. Ct.).

[16] The motion judge found that the implementation of the Bell Policy was a supervening event, not contemplated by the parties, that neither VuPoint nor the appellant could have foreseen when his employment contract was signed. The motion judge found that the implementation of the Bell Policy meant that the appellant lacked the necessary qualification to perform his employment duties, and

that his complete inability to perform the duties of his position for the foreseeable future constituted a radical change that struck at the root of the employment contract resulting in frustration of the contract.

[17] The motion judge further held that VuPoint was not required to modify the appellant's contract so that he could continue working, because such a contract "would be totally different from what the parties intended were it performed after the change that [had] occurred," using language from *Cowie*, at para. 23. There was similarly no requirement for VuPoint to impose a lesser disciplinary measure, such as a suspension, until the appellant complied with the Policy, since he had clearly stated his intention not to become vaccinated. His intention made it clear to the motion judge that his inability to work was not temporary.

[18] The motion judge therefore denied the appellant's motion for summary judgment, finding he was not entitled to any damages for wrongful dismissal, and dismissed his action, thereby effectively granting summary judgment in favour of VuPoint.

ISSUES

[19] The appellant raises four grounds of appeal:

1. Did the motion judge err in law in holding that the employment contract was frustrated by the appellant's voluntary conduct?

2. Did the motion judge err in fact or in law in holding that the "supervening event" was not contemplated at the time of contracting?

3. Did the motion judge err in law in finding that the "supervening event" was outside of VuPoint's control?

4. Did the motion judge err in in finding that the appellant received a "clear and unambiguous" warning that his vaccination status would result in termination?

[20] Each ground is addressed below.

ANALYSIS

(1) The motion judge did not err in law in holding that the employment contract was frustrated notwithstanding the appellant's conduct

[21] The test for frustration in contract law is well settled. As the Supreme Court of Canada stated in *Naylor*, at para. 53, "[f]rustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract.'"

[22] A party alleging frustration must therefore establish that there was a "supervening event" that: (i) radically altered the contractual obligations; (ii) was not foreseeable and for which the contract does not contemplate; and (iii) has not been caused by the parties.

[23] The appellant argues that the frustration in this case stems from his voluntary decision not to comply with the Policy, and therefore the third criteria above is not met. He relies on *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201, 32 R.P.R. (6th) 1, at para. 230, leave to appeal refused, [2021] S.C.C.A. No. 176, where this court held that, "a contract is not frustrated if the supervening event results from a voluntary act of one of the parties."

[24] On this view, according to the appellant, an employee's voluntary conduct should be dealt with through the law of just cause, whereby termination of employment is considered an extreme measure.

[25] Further, the appellant asserts that applying frustration to his voluntary choice not to comply with the Policy would allow parties to tailor their behaviour, in effect, to induce frustration. He submits that VuPoint, for example, is now incentivized to terminate employees immediately upon their expression of an objection to becoming vaccinated, without giving them a chance to change their minds.

[26] According to the respondent, while the appellant is correct that a contract is not frustrated if the supervening event results from one of the voluntary acts of the parties, that is not what transpired in this case. The respondent argues that the implementation of the Policy by Bell was the supervening event that frustrated the contract, not the conduct of the appellant.

[27] The motion judge relied on *Fraser Health Authority*, which she found to be analogous to this case. In *Fraser Health Authority*, an employee was terminated after she refused to become vaccinated to comply with a government order requiring all health care workers to be fully vaccinated in order to continue working. The Union filed a grievance maintaining there was no just and reasonable cause for the termination.

[28] The arbitrator applied the doctrine of frustration to find that the termination was justified. However, the arbitrator's analysis focused on the reasonable foreseeability that there would be a change in circumstance, either through the removal of the vaccination requirement or a change in the employee's position on vaccination. She did not consider the voluntariness of the employee's conduct in the context of the frustration analysis.

[29] The motion judge, in applying *Fraser Health Authority*, similarly did not specifically address whether the appellant's voluntary choice to remain unvaccinated prevented the doctrine of frustration from being brought into play. However, in my view, it did not.

[30] This is not a case where the conduct of the appellant in fact frustrated the employment contract. Rather, I accept, as did the motion judge, that the Bell Policy was the supervening event which frustrated the contract.

[31] The letter informing VuPoint of the Bell Policy, dated September 8, 2021, reproduced above, stated: “Bell requires that all personnel who work at or visit any Bell location or interact in-person with Bell customers be fully vaccinated by September 20, 2021.”

[32] The Bell letter regarding this Policy made no reference to the conduct of employees, nor was the conduct of individual employees relevant for the application of the Bell Policy. Under the Bell Policy, it did not matter whether a person conducting field service work for Bell chose not to get vaccinated, could not obtain vaccinations in their region or could not get vaccinated due to medical or religious factors. The effect of the Bell Policy, from VuPoint’s position, was akin to that of a new regulatory requirement: absent vaccination, VuPoint’s employees were ineligible to work on Bell projects, which was nearly all of VuPoint’s work.

[33] By analogy, consider the situation that would arise if an employee who is required to drive a truck suddenly had to obtain a new class of driver’s license due to a change in the licensing scheme, or if a technician working in law enforcement settings had to obtain a new form of security clearance in the wake of national security threats. As a result of these changes, the truck driver or law enforcement officer would no longer be eligible to continue the work for which they were hired unless they obtained the new licence or clearance.

[34] Whether an employee affected by such a supervening event can or will seek once again to become qualified (or, in this case, vaccinated), is not relevant to a threshold determination of whether the doctrine of frustration is applicable, although, as discussed below, it may be relevant to the other branches of the legal test. This is because it is not the employee's choice or conduct that renders them unable to work but, rather, the introduction of the new requirement that they do not satisfy. In other words, it is the new requirement that is the supervening event. The analysis therefore proceeds to determine whether that requirement was foreseeable or contemplated in the contract, and whether it radically alters the contractual obligations.

[35] In oral submissions, counsel for VuPoint conceded the appellant may not have been terminated if he had indicated he wished to become vaccinated, but needed more time. The evidence before the motion judge also indicated that the appellant's termination may have been revoked had he responded that he intended to become vaccinated. VuPoint's openness to allowing the appellant to rectify his ineligibility to continue to perform services for Bell does not lead to a finding that the frustration of the employment contract in this case was self-induced.

[36] Rather, the possibility or likelihood that an employee could rectify the disruption to an employment contract caused by a supervening event is relevant to the requirement that, in order for frustration to apply, the supervening event must result in "a radical change to the fundamental obligations of the contract." This

may, in turn, be affected by either the duration of the supervening event or the duration of the effect that event has on the specific employment relationship.

[37] In other words, if there was evidence that the Bell Policy was a temporary, emergency measure to be of short duration, or if there was evidence that the appellant intended to become vaccinated but could not do so before the Bell Policy came into effect, the fundamental obligations in the employment contract may not have been found to have been "radically altered" by the Bell Policy.

[38] However, that was clearly not the case here. The motion judge found that the appellant had not advised VuPoint that he intended to become vaccinated, despite his awareness that termination could result from non-compliance with the Policy, as discussed below. Furthermore, VuPoint had no knowledge of the timeline of the Bell Policy and there was no evidence in the record that the vaccination requirement would be simply a temporary or short-lived measure. Moreover, in the circumstances here, I do not think it is realistic to have expected VuPoint to have "bargained with Bell Canada for more discretion over matters of health and safety", as the appellant argues. The Bell Policy was plainly motivated by a reasonable concern relating to the COVID-19 pandemic and that its customers may not want unvaccinated installation technicians entering their homes.

[39] In short, the key point is that the reason for the appellant's termination was not any choice he made with respect to his vaccination status, nor could the conduct of the appellant or the respondent alter the Bell Policy. As the motion judge stated:

> I find that there was no default in the employment agreement by either Mr. Croke or VuPoint. VuPoint was required, by contract, to comply with Bell's policies. The fact that the Plaintiff could have chosen to be vaccinated does not mean that he was in default as the circumstance which caused the frustration was the result of a decision by Bell, not the Plaintiff or the Defendant. VuPoint also had no control or knowledge over the timeline of Bell's Policy and was given no indication that the policy was implemented as a temporary measure. [Emphasis added.]

[40] Once the Bell Policy is recognized as the supervening event, the applicability of the doctrine of frustration turns on (i) whether, in light of Bell's Policy, performance of the employment contract had become something radically different than what the parties had contracted for, given that the appellant was no longer qualified to undertake the work for which he was hired, and (ii) whether that change was foreseeable when the contract was formed. I turn to these questions below.

[41] As for the first ground of appeal, based on the analysis above, I would conclude frustration was available to the motion judge, irrespective of the appellant's conduct.

(2) The motion judge did not err in fact or in law in holding that the "supervening event" was a radical change to the terms of employment that was not contemplated at the time of contracting

[42] Having concluded that the supervening event was Bell's implementation of a mandatory vaccination condition on all subcontractors in order for those subcontractors to be eligible to perform installation services for Bell, the motion judge first found that, "Mr. Croke's complete inability to perform the duties of his position for the foreseeable future [constituted] a radical change that struck at the root of the employment contract."

[43] Second, the motion judge found that the Bell Policy was unforeseen and not contemplated by either party when they entered into the appellant's employment contract in 2014:

> The supervening event is Bell's implementation of a mandatory vaccination condition on all subcontractors in order for those subcontractors to be eligible to perform installation services for Bell. VuPoint submits that neither party could have possibly foreseen in 2014, when the parties entered into the employment contract, that an unprecedented global pandemic would occur that would cause Bell, to implement a policy requiring all VuPoint's installers to become vaccinated against said disease, failing which they would not be able to work for Bell.
>
> I agree that Bell's mandatory vaccination policy was an unforeseen circumstance which was not contemplated by either party, when the Plaintiff and the Defendant entered into the employment relationship in 2014. [Emphasis added.]

[44] The appellant argues the motion judge erred in reaching this second conclusion. Frustration cannot arise if the parties contemplated the supervening event at the time of contracting. In the appellant's view, business exigencies are not normally considered unforeseen events giving rise to frustration, and the Bell Policy constituted such a business exigency brought about by Bell's rights set out in the Supply Agreement between Bell and VuPoint. He cites *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651; and *Munoz v. Sierra Systems Group Inc.*, 2016 BCCA 140, 397 D.L.R. (4th) 460.

[45] Furthermore, the appellant argues that the Supply Agreement, signed prior to the announcement of the Bell Policy in 2021, contemplated that Bell could implement new "health and safety requirements." As the supervening event in this case was Bell's decision to change its health and safety requirements by requiring COVID-19 vaccination on the part of VuPoint employees conducting work for Bell, he argues that this was a foreseeable exercise of contractual power. As a result, according to the appellant, the doctrine of frustration does not apply.

[46] The respondent contends that Bell's introduction of the Bell Policy was an extraordinary response to the extraordinary circumstances accompanying the COVID-19 pandemic.

[47] Further, the respondent argues that there was no business exigency in this case.

[48] In my view, the motion judge's finding that the Bell Policy was an unforeseen circumstance is entitled to deference. The cases relied on by the appellant, *Flieger* and *Munoz*, do not support the broad exception for business exigencies claimed by the appellant. In neither case was frustration raised by the parties nor did the court in either case perform an analysis of the doctrine of frustration. Neither case has been relied on for this proposition, nor has either case been referred to in other authorities where the doctrine of frustration was raised and analysed.

[49] Furthermore, the 2021 Supply Agreement is not relevant to the analysis of foreseeability. The focal point of the foreseeability analysis is 2014, when the employment contract was signed. The 2021 Supply Agreement was not in place at this time and there is nothing in the record establishing what agreement was in place between Bell and VuPoint in 2014.

[50] The motion judge accepted VuPoint's argument that in 2014 neither the appellant nor the respondent could have foreseen that there would be "an unprecedented global pandemic" that would cause Bell to implement a new requirement that its installers become vaccinated to prevent the transmission of a new and previously unknown disease. I agree that the onset of the COVID-19 pandemic, and the extraordinary response from Bell, was an exceptional event that the parties could not reasonably have anticipated years earlier.

[51] For these reasons, I would reject the appellant's argument with respect to the foreseeability of the Bell Policy and whether it was contemplated by the parties.

(3) The motion judge did not err in law in finding that the "supervening event" was outside of VuPoint's control

[52] The appellant next argues that the supervening event actually was not the Bell Policy but rather VuPoint's choice to respond to the Bell Policy by terminating his employment. The Bell Policy required those performing work for Bell to be vaccinated, but it did not require the appellant to be terminated. The appellant argues that this situation is analogous to that where an employee is banned from a worksite by a third party. Where the employer's response is a dismissal, it should be subject to a just cause analysis.

[53] The appellant emphasizes that VuPoint could have taken other non-disciplinary action, such as suspension without pay. It also could have given him notice of termination without cause and offered him an opportunity to mitigate his damages by becoming fully vaccinated, which would have enabled him to continue to work. The appellant claims that he viewed the termination as final and did not know there would still be work for him if he ultimately complied with the Policy.

[54] The appellant's argument is that, in effect, his termination was framed as frustration of contract after the fact but, in reality, was a termination for just cause. Further, according to the appellant, if the motion judge's reasoning in this case is

affirmed, employers would be able to use frustration as an alternative ground for any termination for cause related to ongoing misconduct, such as absences, tardiness, or negligence.

[55] The respondent submits that the implementation of the Bell Policy was outside of VuPoint's control, and therefore, the alternative steps VuPoint could have taken have no bearing on the frustration analysis. The motion judge only had to consider if there was a "radical change" to the contractual obligation.

[56] I would reject the appellant's argument.

[57] It is important to reiterate that frustration and just cause dismissals are fundamentally distinct. While the record reveals that, at an earlier point in the dispute, VuPoint viewed just cause dismissal and frustration of contract as parallel grounds for the termination of the appellant, by the time the summary judgment motion reached the motion judge, VuPoint's only basis for the termination was frustration of contract.

[58] Frustration of contract is a "no fault" termination of the contract. Where frustration is established, it has the effect of discharging the agreement, thereby releasing the parties from any further obligation to perform: John D. McCamus, *The Law of Contracts*, 3rd ed. (Toronto: Irwin Books, 2020), at p. 656. It follows that remedies applicable to misconduct, such as progressive discipline, suspension or warnings, have no application in the context of frustration.

[59] That said, as I have already discussed, the possibility or likelihood that an employee might be able to rectify the disruption to an employment contract caused by a supervening event is relevant to the analysis of whether the supervening event results in "a radical change to the fundamental obligations of the contract." Similarly, determining how information about a disruption should be conveyed to an employee in the context of a particular supervening event, or how an employee should inform an employer of an intent to rectify their ineligibility to continue employment, if possible, also would relate to a determination of whether there has been a radical change. In the case at bar, however, these questions do not arise, as the appellant clearly was aware of the Bell Policy, refused to comply, knew that termination could result (as discussed below) and never signalled any intent to become vaccinated.

[60] For the reasons set out above, the motion judge correctly identified the Bell Policy as the supervening event and concluded that the Policy was not foreseeable and radically altered the contractual obligations of the parties. There was no evidence in the motion record that VuPoint had any control over Bell's decision to implement the Policy. The termination of the appellant's employment was simply the inevitable result of this finding and of VuPoint's corresponding entitlement to treat the contract as at an end.

[61] I see no error with the motion judge's conclusion that the Bell Policy, as the supervening event, was outside the control of VuPoint, and that VuPoint had no obligation to take other non-disciplinary measures before resorting to termination.

(4) The motion judge did not err in finding that the appellant was aware that his vaccination status would result in termination

[62] As set out above, VuPoint terminated the appellant's employment by notice dated September 28, 2021, to be effective October 12, 2021. The motion judge found that the appellant was provided with two weeks' working notice and that he was therefore aware of the consequences of non-compliance with the Policy for at least that two-week period.

[63] In coming to this finding, the motion judge considered a letter from the appellant to his supervisor at VuPoint, dated October 9, 2021, stating that the appellant would not disclose his vaccination status due to privacy laws and claiming that VuPoint was discriminating against him by terminating his employment for his decision to not become vaccinated. His evidence before the motion judge was that he was "caught off-guard" by the termination notice, panicked, and acted without legal advice. The motion judge found that this letter was a "clear and unequivocal" statement that the appellant would not comply with the Policy in the future.

[64] The appellant argues that he did not receive an adequate warning that non-compliance with the Policy would result in termination. The September 28th letter informing him of his termination did not provide the appellant with an opportunity to “mend his ways” – it clearly and unequivocally ended his employment, and the appellant was unaware that termination would be revoked if he complied with the Policy. He understood the termination to be final.

[65] The appellant argues that the October 9th letter was written from this perspective – he believed his employment to be over, so he stood to lose little by committing to his position of non-compliance with respect to the Policy. In other words, according to the appellant, the letter is post-termination evidence that cannot be used to determine whether there has been frustration.

[66] The respondent submits that the issue of notice was argued fully before the motion judge, and that the October 9th letter supports an inference that the appellant considered whether he would comply with the Policy in order to keep his job but chose not to and reaffirmed his position.

[67] In my view, the motion judge ascribed more significance than needed to the appellant’s October 9th letter in response to the notice of termination. Whether the appellant’s communication with VuPoint was clear or ambiguous, and indeed whether or not he communicated with VuPoint at all on this date, would have no bearing on the frustration analysis, which is to be conducted based on the

information known at the point of termination: in this case, when the notice of termination letter was sent on September 28, 2021.

[68] In any event, there was other evidence supporting that the appellant knew termination could result from non-compliance, such as the evidence that he was aware of the Policy and the need to be vaccinated, he knew there was no work he could perform without the vaccination, he began looking for other work after being advised of the Policy, and he specifically looked for a position that did not require a vaccine.

[69] However, to reiterate the point made above, frustration results in the immediate discharge of the obligations in the contract. There is no fixed legal requirement that an employee must necessarily be given advance notice that the employment relationship has been frustrated. There is similarly no invariable requirement that an employee must be given an opportunity to rectify their non-eligibility to work before terminating that employee based on frustration of contract. That said, as set out above, depending on the particular circumstances, an employer who chooses not to do these things may be unable to establish that the supervening event radically altered the fundamental obligations of the contract.

[70] The case of *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357 (Div. Ct.) is instructive in this regard. The trial judge in *Cowie* found that Mr. Cowie's contract of employment had not been frustrated as a result of his not having a

required licence. Instead, she found that Mr. Cowie had been wrongfully dismissed. She awarded him damages on this basis, and also held that suspension would have been a more appropriate response to the supervening event than termination, as it would have provided him with an opportunity to rectify the situation (which included obtaining a pardon for a prior criminal infraction as a precondition for obtaining the license). The Divisional Court disagreed, finding that the frustration caused by Mr. Cowie not possessing a license required to perform his work resulted in the immediate termination of the contract. The court added that "[t]he focus is not on when, if ever, the provision of those services will once again be legal" but rather on "whether the performance of the contract [has become] a thing radically different from that which was undertaken by the contract": paras. 32 and 34. The Divisional Court emphasized that in that case, based on what was known to the parties at the time of termination, it was uncertain whether Mr. Cowie would ever be able to obtain a licence or, if he could, how long this would take (see para. 33). The Divisional Court concluded, at para. 34:

> To continue to bind [the employer] to an employment contract, when the employee by law is prohibited from performing any services under the contract for what appears to be a lengthy and open-ended period of time, is imposing something radically different from what the parties originally agreed to.

[71] In my view, a similar analysis applies here. The focus of the analysis was on whether the appellant was eligible to continue to provide the services for which

VuPoint had hired him, once the Bell Policy was in effect, and whether his ineligibility to provide those services due to his vaccination status constituted a thing radically different from that which was contemplated by the employment contract.

[72] I am satisfied that in the circumstances here, when VuPoint sent its termination letter on September 28, 2021, it was entitled to conclude that there had been a radical alteration of its employment contract with the appellant. VuPoint's Policy, which it implemented on September 10, 2021, required employees to advise VuPoint of their "vaccination status". There was no evidence that the appellant ever told VuPoint that he was either fully or partially vaccinated, despite the fact that he was aware of the Policy.[2] In short, this was not a situation where VuPoint knew that the appellant's inability to work on Bell installation projects because he could not or would not provide proof of vaccination would be only temporary and relatively brief, and that the employment relationship would accordingly not be radically altered. As I have already mentioned, VuPoint's counsel acknowledged that the situation would have been different if the appellant had indicated that he wished to become vaccinated, but that he needed more time. However, there was no evidence that he ever made such a request.

[2] When the appellant was cross-examined on his affidavit, he maintained that he had, in fact, received his first COVID-19 vaccine dose in mid-September 2021. However, there is no evidence that he communicated to VuPoint that he had done so.

[73] For these reasons, I would reject the appellant's argument with respect to notice.

DISPOSITION

[74] Based on the analysis above, I would dismiss the appeal.

[75] The respondent is entitled to costs from the appellants in the amount of $16,000 all-inclusive.

Released: May 7, 2024 "S.E.P."

"L. Sossin J.A."
"I agree. S.E. Pepall J.A."
"I agree. J. Dawe J.A."