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The employment of an employee may cease when, through no fault of either the employer or employee, the contract has become incapable of being performed. Typically, this issue arises when an employee is away from his or her job for so long that the employer decides that the employment contract has become “incapable of being performed.”

The question to be asked is whether the incapacity of the employee is of such a nature (or whether it appears likely to continue for such a period) that any further performance of the employee’s future obligations would be impossible (or so different from that which the employee and employer bargained for) under the agreed terms of employment.

### FACTS

*McLean v. City of Miramichi*, 2011 NBCA 80: McLean was employed by the City of Miramichi (the “Employer”) as a police officer. In 2006, while on duty and driving a police cruiser, McLean struck and killed a pedestrian. He subsequently went on a leave of absence due to “acute stress disorder”. After being off work for approximately 2 years, Officer McLean was to begin retraining as part of his return to work plan. However, Officer McLean sought to return to active duty and provided new expert opinions regarding his fitness and capability to return to the police force.

The Employer took the position that his employment had been continued for the sake of his benefits only, and would be terminated upon the completion of his job search program.

In late December of 2009, the Employer wrote to McLean to inform him that as of March 2008 (the date where it learned that he would not be returning to the force), it considered his contract of employment to have been “frustrated”.

### THE COURT OF APPEAL DECISION

The Court was asked to determine whether the termination of a police officer for “frustration of contract” should be governed by the *New Brunswick Police Act*. As a result, the Court affirmed many principles that an employer must consider when dealing with a potential case of frustration of contract. The Court of Appeal provided clarity as follows:

- 1) as a general proposition, frustration of contract has the effect of automatically relieving both parties to the contract of their obligations to perform where:
  - a. there is an unforeseen or unexpected change in circumstances;
  - b. it is brought about without the fault of either party and for which the contract does not make sufficient provision; and,
  - c. it makes further performance of their contract impossible, impracticable or radically different from what the parties had or might have intended had they thought about the matter;
- 2) the death of the employee terminates the employment contract;

- 3) absence from work due to a “temporary” illness does not frustrate an employment contract, but a permanent disabling illness can;
- 4) the length of time an employee must be off work to frustrate an employment contract depends on a number of factors:
  - a. the terms of the contract regarding sick leave and pay;
  - b. how long the sickness is likely to last;
  - c. the nature of the employment;
  - d. the nature of the illness;
  - e. the period of past employment; and,
  - f. whether the employee’s incapacity, looked at before the dismissal, is of such a nature, or did it appear likely at the time of dismissal, that further performance of the contract obligations in the future would be impossible or radically different from those undertaken.

The Court was not required to rule on whether Officer McLean’s employment contract was actually frustrated, so it did not have to resolve that issue.

Furthermore, it noted that the following areas of law are not settled:

1. the date that the permanency of the employee’s illness is to be assessed (date of termination or date of trial);
2. the role of modern human rights legislation in the dichotomy between accommodation and employer’s reliance on the terms and conditions of employment; and
3. whether the receipt of disability benefits (contractual or workers’ compensation) impacts the frustration of contract argument.

With regard to the third issue, The Court of Appeal noted that frustration of contract cannot trump the obligation placed on employers by New Brunswick’s workers compensation legislation to allow the employee to return to work up to two years after the accident. However, it left the issue open as to whether the same provision meant that an employer could claim that an employment contract was deemed frustrated after two years.

### WHAT THIS MEANS TO EMPLOYERS

The McLean decision is the most recent statement of law, in New Brunswick, on the issue of frustration of the employment contract and it confirms the factors normally considered by a Court in determining whether a contract has been frustrated. For example, the illness or incapacity of the employee must be of a permanent nature as to make any further performance of the employment contract impossible, impracticable or radically different from what the parties bargained for.

### RECOMMENDED STEPS

1. Ensure that you request and receive comprehensive and up to date medical information with respect to an employee who is absent from work, including a prognosis;
2. Provide the job description of the employee to the treating physician, in order for you to obtain accurate medical information;
3. Temporarily fill the vacancy caused by the absent employee;

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4. Perform an operational analysis of the position to examine whether the position of the employee can be modified to facilitate a return to work or whether such a modification is impossible, improbable or radically different;
5. Perform an analysis to determine if there are alternate jobs that the employee can perform; and,
6. Assess the medical information, in conjunction with the operational analysis and the alternate job analysis, to determine if the employment contract is frustrated.

#### LEGISLATION UPDATE

*Minimum Wage Regulation*, NB Reg 2011-54, under the *Employment Standards Act*, SNB 1982, c E-7.2, is now in force.

As a result, minimum wage from April 1, 2011, to March 31, 2012, inclusive, is \$9.50 per hour; and on and after April 1, 2012, is \$10.00 per hour.

The minimum wage for employees whose hours of work per week are unverifiable and who are not strictly employed on a commission basis is from April 1, 2011, to March 31, 2012, inclusive, \$418 per week; and on and after April 1, 2012, is \$440 per week.

The minimum wage payable for time worked in excess of 44 hours of work is from April 1, 2011, to March 31, 2012, inclusive, \$14.25 per hour; and on and after April 1, 2012, is \$15.00 per hour.

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