

ILLEGALITY RESULTS IN FRUSTRATION OF EMPLOYMENT CONTRACT

The Ontario Divisional Court recently considered the issue of illegality of employment and frustration of an employment contract in *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357. The Divisional Court set out the test for frustration of an employment contract arising from an employee's illegal employment.

Background

In Ontario, the *Private Security and Investigative Services Act, 2005*, SO 2005, c 34 ("PSISA"), which affects the casino industry, came into effect in August 2007. The legislation imposed additional licensing requirements for security guards that no person is to hold a license under PSISA unless they have a clean criminal record. PSISA also stipulates that no business shall employ a security guard unless he or she has the requisite license. To employ a non-licensed security guard is an offence under PSISA, punishable by a fine, imprisonment, or both. Employees working as security guards when PSISA came into effect were granted a one-year grace period, which ended in August 2008, to acquire the appropriate PSISA license.

Facts

The Plaintiff, George Cowie ("Mr. Cowie"), was a member of the security team at the Great Blue Heron Charity Casino (the "Casino") in Ontario when PSISA came into effect. Mr. Cowie was convicted of a break and enter offence (a listed prescribed offence under the PSISA), for which he had not received a pardon. Mr. Cowie could not be licensed under PSISA until he had obtained a pardon, which would then result in a clean criminal record. Despite the grace period, Mr. Cowie did not obtain a pardon, and as of August 23, 2008 was unable to be licensed as required under PSISA. Mr. Cowie was terminated on August 25, 2008, and he commenced an action against the Casino for wrongful dismissal in May 2009.

Trial Decision

The trial judge found that the Plaintiff's lack of a PSISA license by the requisite time did not amount to frustration of the employment contract. The trial judge focused on the events that transpired *after* August 2008, finding that the lack of a license was only a temporary inconvenience, not a permanent state that would frustrate the contract. Finding that the Plaintiff had been wrongfully dismissed, the trial judge awarded him damages of eight months' pay in lieu of notice, plus benefits.

Appeal Decision

The Court dismissed the action against the Casino and allowed the appeal. The Court found that the trial judge erred in emphasizing the events that occurred after August 23, 2008. Mr. Cowie did not meet the licensing requirements under the new legislation at the relevant time, which rendered his employment illegal, and therefore frustrated the employment relationship. The Court found that whether or not the contract was frustrated was a question to be assessed *at the time of termination*, and not based on events which transpired after termination.

Analysis

This case confirms that the principle of frustration of contract exists in the employment law context. The Court was careful in this case to differentiate between frustration of contract in the context of disability and illness, as opposed to frustration of contract due to illegality. Frustration of contract due to illegality in an employment relationship arises where there is a breach in the implicit understanding that both employers and employees will comply with the laws relating to their employment requirements. Frustration caused by illness or injury comes up more frequently in the employment law context, and occurs when a disability or illness prevents the performance of the essential functions of the employee's

job for a period of time such that it frustrates the object of employment. Frustration caused by illness or injury is also more likely to attract a complaint under human rights legislation.

What does this mean for employers?

- Employers may terminate employees where a change in the law makes the performance of personal services illegal, and the services contemplated under the employment contract become impossible to perform legally for a lengthy or an indefinite period of time.
- As with all terminations, it is important to consider the entire context of the situation. For example, the Court did not comment in this case on whether termination was appropriate where the illegality may be only temporary or for a short period, so proceed cautiously when considering whether termination is appropriate in the case of illegality.

If you have questions or would like further information on this or on other related topics, please contact any member of the Spectrum HR Law LLP Labour and Employment practice group:

Will Cascadden	403.444.8107	wcascadden@spectrumhrlaw.com
Janet Nystedt	403.444.8108	jnystedt@spectrumhrlaw.com
Jamie Taylor	403.444.8114	jtaylor@spectrumhrlaw.com
Stephen Torscher	403.444.8113	storscher@spectrumhrlaw.com
Shana Wolch	403.444.8106	swolch@spectrumhrlaw.com