

# **Abandonment And Frustration Of Employment In Ontario**

October 27, 2023

If your employer takes the position that you have abandoned your job and/or that the employment relationship has been frustrated, employees are well advised to seek legal advice immediately. In many cases the Court may disagree that your position has been abandoned, or that the employment relationship has been frustrated and, as a result, the employer may be required to pay significant compensation to the employee.

While job ‘abandonment’ and ‘frustration’ are different concepts, they both involve a scenario in which the employer is claiming that the employment relationship is at an end.

## **Job Abandonment**

Under the law, job abandonment occurs where an employee clearly and unequivocally indicates an intention to no longer be bound by the employment contract. This may occur, for example, where the employee stops coming to work for the employer and instead begins working their usual hours for a different company. In such circumstances, the employee could be deemed to have abandoned their position with the original employer – and that employer may not be required to provide the employee with any termination pay (or other similar amounts) as a result of the cessation of employment.

However, not all job abandonment cases will be this straightforward. In many cases, the employee can contest the employer’s assertion of job abandonment. This occurred in the 2020 Ontario ruling of *Hettrick v. Triple F Paving Co. Ltd.* The employee had commenced a medical leave of absence in September 2015. Two years later, she contacted the employer to try to return to work. In response, the employer advised the employee that she had abandoned her position, particularly because the employee had failed to provide the employer with medical documentation to support the leave of absence. The employer therefore denied her request to return to work.

Nevertheless, the Court ruled in favour of the employee in the subsequent wrongful dismissal lawsuit. Despite the employee’s failure to keep the employer updated regarding her medical status, the Court still rejected the employer’s argument that the employment had been abandoned. It noted that where there is confusion or uncertainty over whether an employee abandoned his/her employment, the onus is on the employer to clarify with the employee whether he/she quit.

The Court determined that employer had not met this onus on the facts of the case. Since the employee had not abandoned her employment at law, the employer’s actions (of denying her request to return to work) amounted to a termination of her employment without proper notice. The Court ultimately ordered the employer to provide the employee with 18 months of pay as a result of the wrongful dismissal.

## **Frustration of an Employment Contract**

An employment contract may be frustrated when: (i) circumstances (beyond the control of either party) arise which prevent the employee from fulfilling their employment obligations; and (ii) there is no reasonable likelihood of the employee being able to return to work within a reasonable time. The employment relationship is accordingly deemed to be over. Frustration of an

employment contract most often occurs with employees who are suffering from a serious injury or illness.

In practice, it can be difficult for an employer to successfully establish frustration. This is partly because the occurrence of the illness/injury does not automatically qualify as frustration. Instead, the Court will consider (among other things) the duration of the ailment and the extent to which the absence can be tolerated by the employer. As such, every case will be decided on its own facts. For example, in one ruling, the Ontario Superior Court of Justice found that a 3.5-year absence was sufficient to frustrate the employment contract, as the medical evidence indicated that the employee was “permanently disabled”. In another case, however, the same Court determined that a 5-year absence was only temporary and, as such, the employment contract was not frustrated.

Even where the Court agrees that an employment relationship has been frustrated, the employer is still required to provide the employee with the minimum amount of termination pay and severance pay (as required/calculated by the Ontario Employment Standards Act) if the frustration occurred due to an illness or injury.

Conversely, if the Court disagrees with the employer’s assertion that the employment relationship was frustrated, the employee could be entitled to significantly more compensation than just the minimum amounts prescribed by the legislation. Instead, the employee can be awarded pay-in-lieu of reasonable notice of the termination of their employment at common law.

## **Conclusion**

Particularly when there has been a lengthy leave of absence, an employer may take the position that the employment relationship has been abandoned and/or frustrated. The issue often only arises when the employee seeks to return to work. However, it can also happen earlier, such as in cases where the employer wishes to formally end the employment relationship in order to avoid having to continue paying for the employee’s health benefits as the leave of absence continues.

In either case, the employer’s assertion that the employment relationship has been abandoned and/or frustrated is not itself legally binding. If the employee were to commence a wrongful dismissal lawsuit, the Court would consider the facts of that specific case to determine whether, in its view, the employment relationship was frustrated and/or abandoned according to law.

As outlined above, it can be difficult for employers to successfully demonstrate frustration/abandonment. Further, if the Court sides with the employee, then the employer can be ordered to pay significant compensation to that employee.

As a result, if your employer does take the position that your employment has been abandoned and/or frustrated, you should seek legal advice immediately.

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