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# Frustrated? Probably Not

Employers often refer to a contract of employment being "*frustrated*". Frequently this term is used in circumstances where an employee is on extended sick leave and the employer considers that the fact that the employee can't attend work has frustrated the employment contract and therefore it should be terminated. However, the concept (or doctrine) of frustration of contract is much more complicated than that.

In a recent case ***Whanau Tahi Ltd v. Kiran Dasari*** [2016] NZEmpC 120 dated 20 September 2016, the Employment Court examined the alleged frustration of contract of an employee who had difficulties with a work visa.

Briefly, the facts were as follows:

1. After some time working in New Zealand, Mr Dasari had obtained a two year work visa which was employer-specific, allowing him to work for Pizza Hut as a Trainee Manager. If he changed his employment, he had to apply to Immigration New Zealand for a variation of conditions, and any application for variation needed to be supported with a letter of offer and an employment agreement from a prospective employer.
2. Mr Dasari applied for a job as a Business Analyst with Whanau Tahi Ltd. During the interview he advised of the employer-specific nature of his visa, and was assured that there would be no issues with supporting his visa variation.
3. An employment agreement was agreed and signed, and Mr Dasari commenced work on 21 August 2013. On 27 August 2013 Mr Dasari was offered full time employment by the CEO of Whanau Tahi, conditional upon Mr Dasari being legally entitled to work in New Zealand. Both parties signed the offer of employment and this was forwarded to the CEO, Mr Tamihere, for his signature, although this was not necessary to complete the contract. On 28 August, an immigration supplementary form was completed by Whanau Tahi in order to allow for Mr Dasari's visa to be varied.
4. Mr Dasari resigned his position at Pizza Hut at Mr Tamihere's request.
5. Mr Dasari remained in the employment of Whanau Tahi from 28 August until 3 October, and although the contract specified he was to receive $30 per hour, he received no income for the period.
6. Despite a valid employment agreement Whanau Tahi took the view that there were compliance issues with Mr Dasari's employment and that there was a risk of prosecution, and subsequently wrote to Immigration New Zealand indicating that it might not proceed with the job offer, unbeknown to Mr Dasari.
7. Whanau Tahi then told Mr Dasari to work from home and effectively terminated the employment. It also advised Immigration that the employment offer was withdrawn, without alerting Mr Dasari to this fact.
8. Mr Dasari was left in a very difficult position, both financially and emotionally, and was unable to obtain alternative employment for some 6 months.

Whanau Tahi claimed that the employment contract was frustrated because it became impossible to employ Mr Dasari due to an Immigration New Zealand requirement. It alleged that the Immigration Act prevented it from employing him, (claiming it would have been an illegal contract) and that the employment was "*frustrated*" by the Immigration Act requirements.

The Employment Court examined whether the contract was illegal or whether the employment was "*frustrated*". The Court referred to various cases and quoted from a publication by John Burrows (ex-Canterbury University):


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## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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*"[42] According to John Burrows, the doctrine of frustration has three salient features:*

*"(a) The threshold for frustration is very high: performance must have become impossible, or 'totally different'; the contract must have been 'fundamentally altered'.*

*(b) With a few exceptions, which are difficult to reconcile, frustration operates in an all-or-nothing fashion. If the contract is not frustrated it remains on foot and both parties remain liable for its non-performance; if it is frustrated it fails completely and both parties are excused. The Frustrated Contracts Act 1944 then allows some restitutionary relief.*

*(c) Frustration is not dependent on the election of either of the parties. It operates automatically."*

The Court also considered a number of English cases, including the following:

*"[43] The classic and most widely cited formulation of the doctrine of frustration is by Lord Radcliffe in* ***Davis Contractors Ltd v Fareham Urban District Council****:*

*" … frustration occurs whenever the law recognises that 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. Non haec in foedera veni. It was not this that I promised to do … It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must as well be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."*

The Court of Appeal was also referred to:

*"[50] The New Zealand Court of Appeal confirmed in* ***Karelrybflot AO v Udovenko*** *that the doctrine of frustration is available in employment cases, but should not be easily invoked with respect to vulnerable employees: " … the doctrine of frustration is applicable to contracts of employment … it is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees — the present respondents being an example."*

The Employment Court had little difficulty deciding that the employment contract was neither illegal nor frustrated:

*"[63] Applying these principles to the dual pleadings in the present case, the tests for holding that the employment agreement was frustrated or void for illegality are simply not met. Whanau Tahi in this particular case fails to meet the high threshold required to prove that performance had become impossible. There is nothing contained in the Immigration Act expressly providing that a breach of its terms renders an employment agreement illegal. Nor is there anything contained in that Act from which such an implication could be made."*

*[64] The facts of the matter disclose that even after Whanau Tahi became aware of the potential difficulties under the Immigration Act it continued to keep Mr Dasari in employment. The indications that its employees received from Immigration New Zealand were to the effect that no difficulty was anticipated in having Mr Dasari's visa changed. If it was necessary for Whanau Tahi to comply with further requirements of Immigration New Zealand, and there was no evidence that it was so required, then it could easily have carried out those compliance requirements. This is not a case where the performance of the employment agreement was either frustrated or was or became illegal.*

*[65] As indicated earlier in this judgment, there was no requirement for Mr Tamihere to sign off the employment agreement for it to come into effect. The agreement had been signed by Mr Dasari and a director of Whanau Tahi. Mr Dasari had initially commenced employment on a temporary basis and his position was confirmed in correspondence offering him full-time permanent employment which he accepted. Employees of Whanau Tahi were actively involved in assisting him to have his visa amended and the only evidence before the Court is that Immigration New Zealand would have granted his request. If the contrary was to be asserted then it was incumbent upon Whanau Tahi to call evidence from Immigration New Zealand, which it failed to do."*

In the result, Mr Dasari received 3 months lost wages and $10,000 compensation.

This case demonstrates that the threshold for declaring a contract of employment frustrated is very high. It is restricted to such situations as imprisonment or death of an employee (or employer) or the results of natural disasters such as the Canterbury earthquakes (or the more recent Kaikoura quakes), where businesses may have been destroyed and simply unable to fulfil the employment obligations. No termination action is required by either party because the contract simply can no longer be performed.