

Number 26

## Termination of employment of suspended staff

With healthcare facing increasing regulation, occasions where staff are suspended while investigations or prosecutions are underway are increasing. However this raises the question of whether the employee's employment contract comes to an end or can be ended because they are unable to work (legally called 'frustration'). This article deals with the frustration of such a contract.

Frustration of any contract (including a contract of employment) occurs when some reasonably unforeseeable event occurs, which radically alters the contract or which makes the contract impossible to perform. This may arise in a variety of circumstances, but the effect is always the same, namely that the contract of employment no longer applies, without dismissal on the part of the employer or resignation on the part of the employee.

The issue of frustration is important and usually arises where an employee is absent for a long period due to illness or injury. If a contract is frustrated in these circumstances, the employee will not be able to claim unfair dismissal, breach of contract for failure to pay salary for the period of notice, redundancy or a make claim under the Disability Discrimination Act 1995 because there is deemed to be no dismissal.

The recent case of *Four Seasons Healthcare Limited –v- Maughan* has provided some guidance regarding the frustration of contracts of employment where an employee is unable to attend work because of criminal proceedings pending. This case is particularly relevant to the healthcare industry where employers face the dilemma of what to do if an employee is unable to attend work due to criminal investigations.

In order for an employer to allege and establish frustration of a contract, it requires some outside, intervening event that is not the fault of either party. The most common reasons for frustration of contract are long or permanent illness or long-term imprisonment. The burden of proof is on the party seeking to establish frustration, and usually this is the employer, who must show that there is no repudiation of the contract by either party and that there is no possibility of the employee returning to work.

Accordingly, if the employee is subject to a term of imprisonment, and if this term is short, it may not operate to frustrate the contract.

In the *Maughan* case, Mr Maughan was employed as a registered mental nurse by a care provider, which operated 300 care homes throughout the UK. In January 2003, he was suspended for allegations which concerned the abuse of a patient.

The employers' disciplinary procedure provided for the suspension without pay for up to 7 days to allow investigations. Mr Maughan was arrested and charged with a number of serious offences. He was granted bail on condition that he should not communicate with witnesses, who included staff at the care home, nor enter the care home.

The employers suspended Mr Maughan without pay until his trial and subsequent conviction in October 2003. He was sentenced to 2 years' imprisonment.

Mr Maughan made a claim for unauthorised deduction from wages for the period of his suspension. The Employment Tribunal awarded him over £15,000. The Tribunal found no frustration of the

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contract of employment because there was no unforeseen outside event or change to the situation that rendered it impossible to perform the contract. Allegations of gross misconduct did not amount to a frustrating event. The employer has to decide whether, in light of the allegations and an investigation, they would continue to employ the employee or dismiss him.

The employer appealed to the Employment Appeal Tribunal on the grounds that the contract of employment had been frustrated, either by the first offence or by the bail conditions and therefore no arrears of wages were payable.

The employer argued that the contract had been frustrated by two possible unforeseen events. The first was the assault on the patient which made it unlawful under Regulation 19 of the Care Homes Regulations 2001 to continue to employ Mr Maughan as he was no longer fit. The second one was that the bail conditions made it impossible for him to enter the care home at which he normally worked, and he was also unable to work at any of the employer's other establishments.

The employee argued that Regulation 19 could not operate so as to frustrate the contract until it was proved that he was not fit to work at a care home. This conduct was fully provided for in the disciplinary procedure and it was therefore open to the employer, acting reasonably within the meaning of Section 98 of the Employment Rights Act 1996, to dismiss him.

Section 98(2)(d) Employment Rights Act 1996 clearly contemplated the situation where working in contravention of the statute or other enactment was a potentially fair reason to dismiss, rather than frustration. It had been the employee's own conduct that rendered the contract unlawful, and not an outside event.

The Employment Appeal Tribunal accepted the employee's arguments. The Employment Appeal Tribunal pointed out that the employer did have the opportunity, if it so wished, of dismissing the employee.

### Comment

Accordingly, in situations where employees' own conduct causes them to not be available for work, then clearly the options open to the employer is dismissal proceedings pursuant to the disciplinary procedure. It is only where there is some outside, intervening event that is not the fault of either party that will cause the contract of employment to be frustrated.

Alternatively, such situations can be covered by an express clause in the contract of employment providing a right of termination or suspension without pay, however, whilst this may prevent a claim for breach of contract, it may not prevent the employee from successfully making a claim for unfair dismissal.

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### Correction

In Briefing No 24 we referred to patients voting in the forthcoming election with Section 17 leave. In fact it is arguable that the Representation of the People Act permits only postal or proxy voting by detained patients.

### New Legislation

**Mental Capacity Act 2005** has received Royal Assent. The Act will come into force on a date to be fixed.

For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: [andrew.parsons@rlb-law.com](mailto:andrew.parsons@rlb-law.com).

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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