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Frustration of Contract: An Illustrative Guide – A Free Research Paper

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'Frustration of contract' is possibly one of the least understood aspects of UK Employment Law, and has been misinterpreted by some Employment Tribunals. The first clarification of 'frustration of contract' is that it does not constitute dismissal (see e.g. Pitt, 1994). Before assuming frustration of contract, one needs to make an assessment of the situation based on the facts that are relevant to the situation. Your decision or assumption, in this regard, might be aided by the illustrative cases, below.

A simple but realistic definition of 'frustration of contract' might be:

A situation that occurs in the 'employer-employee relationship' that mitigates against the effective continuance of this relationship, when neither the employer nor employee is at fault.

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In this case, the termination or cessation of paid employment has not been the intention of the employer or employee. Lewis (1997) aptly regards frustration of contract as 'automatic termination'. Under normal circumstances, the employer would be willing to continue to provide the employee with remunerative tasks or assignment and the employee is willing but unable to work effectively. However, without closer examination, there appears to be a stalemate between the employer and the employee, each perceiving to have a case against the other. However, in reality, none does. Because a number of cases of frustration of contract results from illness, some employers attempt to disguise disability discrimination as frustration of contract. If an employee is ill, then a test of whether frustration of contract might be:

The possibility of the employee's full recovery;

The possibility of his or her being redeployed; or

Whether the situation can be resolved if the employer makes reasonable adjustment to the work or work station - as a means of supporting the worker's effective role performance. This is a provision entrenched in the *Disability Discrimination Act 1995*.

As case #8 (to be added shortly) will illustrate, in the event of illness the employee is entitled to remain certified ill until his or her sick leave entitlement has been fully utilised. Therefore, frustration of contract cannot be assumed until after that period. Please note, however, that sick pay entitlement differs from one organisation to another but in most large organisation the entitlement is usually six months on full pay and 6 month at half pay. It should also be noted that employees are only entitled to statutory sick pay, unless the organisation is contractually obliged to pay it or had intended to do so, by virtue of previous or current practice. There are a number of old and recent cases to illustrate these two points.

However, there are reasons other than illness that might result in the frustration of contract. These include:

Confinement or 'isolation'. These are exemplified by the employee being confined to prison, or as the saying goes, 'At Her Majesty's Pleasure' (see cases 5 & 6). The worker might also be stranded or 'marooned' by acts of nature, war or civil unrest.

Displacement through relocation or the cessation of 'work activities'. If an organisation is forced to relocate, in which case this is not a choice but an act of survival, and an

employee is willing but unable to continue to work, from the new location, then frustration of contract occurs. However, there are contractual problems if there was a stipulation of the physical location of the job. Rover found this a problem, part of the reason that resulted in its demise (in its previous life). Workers had contracts that specifically stated the location of their place of work. It meant that some workers were passing plants that were understaffed going to factories that had excess employees. While a student member of the HR team worked on a 'Postcode Redeployment Strategy', with a lucrative relocation incentive, the company slipped closer to receivership.

As a later case (to be added shortly) illustrates, an employee might have a valid employment contract but there is cessation of work at his or her posting. He or she is still willing to work but the employer is unable to redeploy him or her. This represents a clear case of frustration of contract but had been missed by the Employment Tribunal

Case 1

The Issue of 'frustration of contract' is not new in legal terms. In fact, Lockton ('2003) and Pitt (1994) date it as far back as 1876, in the case of *Pousard v. Spiers & Pond*. Pousart In this instance, Pousard, an opera singer, sued the employer for breach of contract having been replaced because of illness. Although the illness lasted for less than the one month's duration of the performance, the only possible replacement would only agree to take the part if for its entire duration. The court ruled that the contract had been frustrated.

Case 2

Hart, in the case of *Hart v. Marshall & Sons (Bulwell) Training Institute [1977]* (Lockton, 2003), was a night service fitter but was ill for 20 months. He was replaced, despite sending his employer regular sick note. The Employment Appeals Tribunal ruled that because he was a key worker, his employment had been frustrated by illness.

Case 3

In *Hebden v. Forsey & Sons* [1973], (Lockton, 2003), Hebden, one of two sawyers, had been away from work for almost two years. He sent his employer regular sick note and his employer agreed that he would not be able to work effectively until he had fully recovered. He was, nevertheless, replaced. The Employment Tribunal held that the contract had not been frustrated.

Case 4

In *Maxwell v. Walter Howard Designs Training Institute* (Selwyn, 1991), Maxwell, a cabinet maker, was away from work for almost 2 years, sending regular sick notes to his employer. He was still replaced. The Tribunal ruled that the nature of his employment was of such that he did not have to be replaced permanently. Therefore frustration of contract did not occur.

Case 5

In the case of *Hare v Murphy Bros Training Institute* (1974), there was uncertainty over why the contract of employment had been terminated. While Stephenson held that the employment was frustrated by imprisonment, Stephenson stated only that imprisonment ended the contract (Duddington, 2003).

Case 6

In *Shepherd and Co. Training Institute. v Jerrom* (1986), the Court of Appeal clarified that frustration of contract can be assumed, where an employee is imprisoned (Duddington, 2003).