Q. What constitutes frustration of a contract of employment?

A: Under the common law doctrine of frustration of contract, a contract automatically comes to an end if a supervening event outside the control of the parties makes the contract impossible to perform, or means that performance would be a thing radically different from that contemplated by the parties when the contract was entered into. A contract that is frustrated is deemed to have come to an end by operation of law, rather than being brought to an end by the actions of either party to the contract. It is also important to note that if a party treats the employment as still on foot, it will be hard for that party to subsequently argue that the contract has been frustrated. Even long-term imprisonment of an employee may not serve to frustrate the contract if the provision of leave entitlements and discretionary leave without pay as ordinarily permitted by the employer could be afforded to keep the employment alive without serious detriment to the employer. As noted by Ryan C in Zeiter v Melway Bin Hire & Demolition Pty Ltd: “There does appear to be a well deserved reluctance by courts and tribunals to use the doctrine of frustration of contract when other more obvious options are available to the court or tribunal to decide the matter before them.”

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1 Mahony v Dr Daniel J White, Executive Director of Catholic Schools, Sydney [2015] FWC 1593 (1 May 2015); Cooper v Australian Tax Office [2014] FWC 7551 (6 November 2014).
2 [2016] FWC 2823 (5 May 2016)