Ill health dismissals & PHI

In the recent case of *Lloyd v BCQ Ltd*, the EAT considered the question of whether an employer can dismiss an employee for a reason relating to ill health (capability) when the employee is entitled to Permanent Health Insurance (PHI)?

The EAT concluded an employee can be dismissed in such circumstances as long as there is an express clause in their employment contract entitling the employer to dismiss them for incapacity, and in such circumstances they can dismiss even if to do so would mean that the employee ceases to be entitled to PHI benefits.

The Facts

Mr Lloyd was employed by BCQ Ltd as a Works Director. In 2007, he suffered a back injury and was subsequently on long term sick leave until his dismissal for ill health in May 2011. From 1988, BCQ had provided Mr Lloyd with Permanent Health Insurance (PHI) although his contract made no reference to this. An employment contract signed by Mr Lloyd in 1992 (which also made no reference to PHI) stated that the contract contained the entire agreement between the parties and superseded all previous agreements and arrangements relating to his employment. The contract also contained an express right for BCQ to terminate Mr Lloyd’s employment in circumstances of incapacity.

In August 2010, BCQ submitted a PHI claim on behalf of Mr Lloyd and negotiated a cash settlement cancellation of PHI cover for him totalling £38,000. This negotiation took place without Mr Lloyd’s knowledge.

In November 2010, the HR Director met with Mr Lloyd to establish when he might be able to return to work. Mr Lloyd could give no clear indication that he might be able to return to work in the near future, which was consistent with the fact that he was signed off work until April 2011. Mr Lloyd was therefore dismissed for ill health (with 6 months’ notice). He was informed that although his PHI payments would in effect continue until his 60th birthday, what was due to him might be paid as a lump sum at the end of his notice period in May 2011.

Mr Lloyd unsuccessfully appealed against his dismissal. He subsequently brought several claims in the Employment Tribunal, including a claim for breach of contract in relation to the PHI. He argued there was an implied term in his contract that his employment would not be terminated while he was in receipt of PHI benefits, where the effect of such termination would be to disqualify him from such benefits.

In making this claim, Mr Lloyd relied on a decision in the case of *Aspden v Webbs Poultry & Meat Group*. This has been a case which has caused employment lawyers to advise extreme caution when dealing with employees in receipt of PHI pursuant to a contractual right. In *Aspden*, the court decided that it was necessary to imply a term into the employee’s contract that he would not be dismissed for a reason relating to ill health whilst in receipt of a contractual PHI benefit.
The Tribunal held that Mr Lloyd had no contractual right to the PHI benefits because his 1992 employment contract had an entire agreement clause and made no reference to PHI. In any case, Mr Lloyd had received the benefits under the PHI policy as expected (albeit in a lump sum) and therefore he had suffered no loss. The Tribunal held that BCQ had been entitled to accept a lump sum settlement of PHI cover without Mr Lloyd’s knowledge.

Mr Lloyd appealed against the decision that there was no implied term in his contract.

The EAT’s Decision

The EAT held that a term could not be implied into Mr Lloyd’s contract and agreed with the Tribunal in respect of the entire agreement clause in his 1992 employment contract. Mr Lloyd therefore had no contractual right to the continuation of PHI cover. In addition, the existence of an express term in the contract entitling BCQ to terminate his employment in circumstances of incapacity meant there could be no implied term to the contrary. There was therefore no breach of contract and the EAT dismissed Mr Lloyd’s claim.

The EAT took the opportunity to clarify the case of Aspden v Webbs Poultry & Meat Group which had held in similar circumstances that, despite an express term allowing the employer to terminate for incapacity, there could be an implied term that the employer could not dismiss (unless there was gross misconduct) where to do so would frustrate the entitlement of the employee to benefit from PHI.

The EAT clarified that the Aspden case was a rare example of a term being implied into a contract to qualify an express term and this was only justified on the facts of the case to reconcile two express terms that conflicted with one another. In light of the conflicting terms, and the circumstances in which the contract was entered into, the court in Aspen concluded that the contractual terms did not accurately reflect the intentions of the parties, and in particular that it could not have been the intention of the parties that the employer could dismiss in circumstances where to do so would frustrate the employee’s entitlement to benefits under the PHI policy. This was not the case in Mr Lloyd’s situation.

It is surprising that the EAT so readily accepted that the entire agreement clause in Mr Lloyd’s 1992 employment contract operated to negate his right to PHI benefits given that he continued to receive PHI benefits, arguably creating a contractual entitlement to PHI (particularly given that the employer intimated that PHI benefits would continue until Mr Lloyd’s 60th birthday). It may be that the result was influenced by the fact that Mr Lloyd had suffered no loss having received his PHI benefits in a lump sum on his dismissal in May 2011.

Guidance for Businesses

This case emphasises the importance of ensuring that the correct contractual terms are in place. If an employer has a PHI scheme, they should include an express contractual term that they can dismiss an employee on long term sick leave, notwithstanding the fact that this may mean that the employee ceases to be entitled to PHI benefits.

However many contracts do not contain the above provision, and simply contain the right to dismiss without expressly referring to the impact that this may have on PHI benefits. The situation then becomes more difficult, and Aspen suggested that an employer couldn’t then dismiss the employee on the grounds of their long term sick leave if to do so would deny the employee the benefit of PHI.
Whilst surprising in terms of a number of its findings, this case is useful for setting out the limits of the Aspden case. In light of the Lloyd case it is arguable that the Aspden decision is largely confined to the facts of that case.

The Lloyd case confirmed that terms will rarely be implied where there is an express term governing the situation. If a contract contains the express right to dismiss for ill health, but does not expressly mention PHI, employers will now arguably be able to rely on the Lloyd case to support the validity of such a clause and to dismiss employees on long term sick leave even if they are receiving PHI benefits.

In saying the above, the Lloyd case is rather unsatisfactory in that it involved a technical claim by an employee who thought Aspden would give him relief, even though there was no loss. Courts will often strive to find the just result, even if the decision might appear unusual in places. Care still needs to be taken if you are considering terminating the employment of an employee who is receiving PHI, especially if he or she has a good number of years to go before the benefit is due to expire.

In addition, an employer in this situation also needs to consider unfair dismissal law and the disability discrimination aspects of the Equality Act 2010 to ensure that any dismissal is fair and non-discriminatory. We would therefore recommend that advice is taken on the individual circumstances of each case.

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