Appeal No. UKEAT/0087/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 November 2018
Handed down
On 23 November 2018

Before

MRS JUSTICE SIMLER DBE

PRESIDENT

MR H AWAN — APPELLANT

ICTS UK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms Naomi Cunningham (of Counsel) Instructed by: OH Parsons LLP 3rd Floor Churchill House Chalvey Road East Slough, Berks SL1 2LS
For the Respondent	Mr Rad Kohanzad (of Counsel) Instructed by: Moorepay Compliance Ltd, Warwick House, Hollins Brook Way, Pilsworth Bury, Lancashire, BL9 8RR

SUMMARY

Implied term/variation/construction of term

Unfair Dismissal

Disability Discrimination

1. This appeal raises the question whether it is fair and/or a proportionate means of achieving a legitimate aim for an employer to dismiss an employee by reason of permanent incapability at a time when an entitlement to long-term disability benefits (whether or not underpinned by an insurance policy) has accrued or is accruing. The Employment Tribunal held that it was both fair and proportionate to do so, having rejected the Claimant's case that there was an implied term in his contract of employment restricting his employer's power to dismiss in those circumstances.

2. In particular, it held:

(i) the Respondent was contractually obliged to pay the Claimant long-term disability benefits while he remained employed;
(ii) there was no implied term in his contract preventing the Respondent from dismissing him for incapability while he was entitled to receive such benefits;
(iii) the continued employment of the Claimant would have caused the Respondent operational difficulties;
(iv) the Respondent acted reasonably in dismissing the Claimant for incapacity so that his dismissal was fair;
(v) the Claimant's dismissal was a proportionate means of achieving a legitimate aim so that there was no unlawful disability discrimination under s.15 Equality Act 2010.

3. The Claimant appealed those conclusions, contending (among other things) that the Employment Tribunal misconstrued the contract of employment by finding that no term was to be implied. The Employment Appeal Tribunal allowed the appeal. It held:

(i) On a proper construction of the contract, it is contrary to the functioning of the long-term disability plan, and to its purpose, to permit the Respondent to exercise the contractual power to dismiss so as to deny the Claimant the very benefits which the plan envisages will be paid. A term can be implied whether on the officious bystander or the business efficacy tests of implied contractual incorporation that "once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work." That term is capable of clear expression, reasonable in the particular circumstances and operates to limit (rather than contradict) the express contractual right to terminate on notice by preventing the exercise of that right in circumstances where it would frustrate altogether the entitlement to long term disability benefits expressly provided for by the contract.

(ii) Dismissal in breach of contract is not necessarily unfair but the contractual position is relevant as part of the circumstances against which the reasonableness of the Respondent's actions fall to be judged. An implied term that there will be no dismissal for incapacity in the circumstances identified falls at the "very relevant indeed" end of the spectrum of relevance. The Tribunal's conclusion that there was no such implied term means that both the conclusion

that the Claimant's dismissal was fair and that it was a proportionate means of achieving a legitimate aim cannot stand, as the Respondent conceded. These conclusions are set aside and the question of fair/unfair dismissal and whether it was justified will have to be remitted.

(iii) The Employment Tribunal concluded that the Respondent would have dismissed in any event for the same reasons. The mere fact that the dismissal was not to avoid making payments does not entail that the Respondent would have dismissed in any event had it correctly appreciated its contractual obligations. Although this question involved a degree of speculation or prediction about what would have occurred in the counterfactual scenario posited, it was for the Respondent to adduce any relevant evidence relied on as to what it would have done (in terms of dismissal) if it thought the contract obliged it to continue making long-term disability benefit payments while the Claimant was employed. It adduced no such evidence and the Tribunal's finding was accordingly unsupported by any evidence and must be set aside.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This appeal raises the question whether it is fair and/or a proportionate means of achieving a legitimate aim for an employer to dismiss an employee by reason of permanent incapability at a time when an entitlement to long-term disability benefits (whether or not underpinned by an insurance policy) has accrued or is accruing. The Employment Tribunal held that it was both fair and proportionate to do so, having rejected Mr Awan's case that there was an implied term in his contract of employment restricting his employer's power to dismiss in those circumstances. He appeals those conclusions, contending (among other things) that the Employment Tribunal misconstrued the contract of employment in his case.

2. I refer to the parties as they were before the Employment Tribunal. Ms Naomi Cunningham appears on behalf of the Claimant as she did below. For the Respondent who resists the appeal, Mr Rad Kohanzad appears but did not appear below. I am grateful to both counsel for their submissions.

The factual background

3. Given the relatively narrow issues raised by this appeal, it is unnecessary to recite the detailed facts found by the Employment Tribunal. In short, the Claimant commenced employment with American Airlines as a Security Agent at Heathrow Airport on 11 April 1992. His contract of employment entitled him to both contractual sick pay and the benefit of a long-term disability benefit plan as set out in further detail below. The Claimant was subsequently promoted on 1 June 2005 to the position of International Security Coordinator. American airlines required one International Security Coordinator to be available on every shift, and that person had overall responsibility for security on that shift (and for conducting audits and appraisals).

4. American Airlines had an insurance policy with Legal & General referred to by the Employment Tribunal as a Group Income Protection policy for the provision of the long-term disability benefits to its employees. There is no evidence or finding that a copy of the policy was provided to employees; or the terms drawn to their attention. The policy provided that the Insured Member would be entitled to benefits under the policy only so long as that person was "a Disabled Member" as defined by Appendix A to the policy. The Employment Appeal Tribunal was not provided with a copy of the Group Income Protection policy or its appendices, but the Employment Tribunal found that Appendix A provided:

> "Disabled Member" means an Insured Member who at any time,
>
> (i) In the opinion of L&G, is incapacitated by an illness or injury which prevents him from performing his own occupation, and
> (ii) Continues to be in Employment, and
> (iii) Is not engaged in any other occupation, other than one which gives rise to payment of a partial benefit."
>
> "Own occupation" was defined as "the essential duties required of the Insured Member in his occupation immediately prior to the commencement of the Deferred Period".

5. The policy also provided that insurance under the policy of an insured member would terminate "immediately in the event of the insured member ceasing to be in Employment". 'Employment' was defined as being in the employment of an employer participating in the scheme.

6. In July 2012 American Airlines became engaged in discussions about employee cost savings, and by a letter dated 28 August 2012 from the Managing Director, affected employees were informed of American Airlines's intention to outsource its Security department to the Respondent. The employees were told that their employment would transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and that accordingly, their existing terms and conditions of employment would remain protected by TUPE.

7. On 14 October 2012 the Claimant was certified as unfit to work because of depression. He remained absent sick until the termination of his employment on 26 November 2014. By the date of termination, there were four International Security Coordinators (including the Claimant) working at Heathrow. There were four Lead Security Agents and about 100 members of staff working as Security Agents. A number of the Lead Security Agents had been trained to act up as International Security Coordinators.

8. On 8 November 2012 Legal & General sent American Airlines changes to the Group Income Protection policy. An endorsement was added which made changes to the definition of 'disability' with effect from 1 September 2012. From that date, the definition of "Disabled Member" in Appendix A changed, though the original definition of "own occupation" would continue to apply for 24 months after the benefit accrual date.

9. The changes were subsequently queried with Legal & General and American Airlines was offered the option of reverting to the "own occupation" definition for all categories of employees. It chose not to do so (as the Employment Tribunal found at paragraph 33).

10. The Claimant's employment (and that of 17 other Lead Security Agents/International Security Coordinators) transferred to the Respondent under TUPE with effect from 1 December 2012. It was common ground before the Employment Tribunal that the obligations associated with the Claimant's entitlement to income protection benefits transferred to the Respondent under TUPE.

11. Accordingly, at the time that the Claimant became ill he was an employee of American Airlines. He was entitled to 26 weeks' full contractual sick pay. By the time he had exhausted that in April 2013, he had been employed by the Respondent for some months. A colleague, Anthony Visram, who had fallen sick on 9 October 2013, was in a similar position and had precisely the same contractual entitlements as the Claimant.

12. The Employment Tribunal found that the Respondent believed those who were sick prior to the date of the transfer would be covered by the Legal & General policy (see paragraph 36). However, although the Respondent sought to agree with Legal & General the transfer to it of American Airline's existing cover or the provision of new cover, these discussions proved fruitless. Accordingly, the Respondent sourced a new insurance provider, Canada Life, to meet its obligations in relation to the long-term disability benefits. However, Canada Life refused to accept liability for those who were already on sick leave at the commencement of the policy. In other words, Canada Life refused to provide cover for the Claimant and Mr Visram. It was also the case that Legal & General initially refused to provide benefits to them, because their

insurance contract was with American Airlines and by the time the Claimant and Mr Visram became eligible for long-term disability benefits, they were no longer employed by American Airlines.

13. The Claimant and Mr Visram both raised grievances. American Airlines made a formal complaint to Legal & General about the failure to provide cover, stating that incorrect information had been provided by Legal & General about cover that would be provided. Following some correspondence, Legal & General agreed to pay their benefits as a goodwill gesture until September 2014.

14. By letter dated 6 October, Mr Hunter (on behalf of the Respondent) wrote to the Claimant to tell him that the reinstatement of the long-term disability benefit by Legal & General had been limited to the end of September 2014. He said they were pursuing the matter with Legal & General as they believed that it had an obligation to continue making the payments. In the interim as a gesture of goodwill they would, on a without prejudice basis and without admission of liability, make equivalent monthly payments to him until the situation was clarified.

15. The Claimant was invited to and attended a meeting on 5 November 2014 to discuss his future employment. Ms Faye Davidson (on behalf of the Respondent) conducted the meeting. The Claimant was accompanied by his trade union representative. The Claimant said there was no change in his condition and that he had not seen his GP since the last meeting on 18 September. The Claimant and his trade union representative maintained that the Claimant should have been provided with Schema Therapy by either Legal & General or the Respondent. Ms Davidson said neither Legal & General nor the Respondent was contractually obliged to provide that treatment. She asked the Claimant whether anything else could be done to facilitate his return to work, such as reduced hours or a different role. The Claimant's position was that he could not say anything about returning to work until he had further treatment.

16. By letter dated 26 November 2014 Ms Davidson sent the Claimant her decision. She said that the Claimant had been absent sick since October 2012. He had had twelve sessions of CBT, a psychiatric evaluation by Dr Rowlands and had been on anti-depressant medication. Dr Rowlands had recommended certain treatment, including Schema Therapy, and medication for anxiety. The Claimant had been prescribed some medication but had not taken it. He had been told that the Respondent and Legal & General would not fund the Schema Therapy but had not tried to get it through his GP. His symptoms had not improved and they had not been able to agree on any adjustments that might facilitate his return to work. After a period of over two years' sickness absence they were not able to start looking at a return to work within a defined or a reasonable period of time. She had, therefore, come to the decision to terminate his employment on grounds of medical capability.

17. The Claimant's employment terminated on 28 November 2014. He was paid in lieu of the twelve weeks' notice to which he was entitled.

18. The Claimant brought proceedings in the Employment Tribunal complaining that dismissal while he was entitled to long-term disability benefits was unfair and was also an act of unlawful discrimination because of something arising from his disability. It was common ground that at all material times he was a disabled person for the purposes of the Equality Act 2010. Further, it was common ground that the Claimant was dismissed for a reason relating to capability and that his dismissal was because of something arising from his disability. The questions for the Employment Tribunal were accordingly, whether the Respondent acted

reasonably or unreasonably in all the circumstances in dismissing him for a reason relating to his capability; and whether dismissal was a proportionate means of achieving a legitimate aim.

The Employment Tribunal's judgment

19. By its judgment promulgated on 22 November 2017, the Employment Tribunal (comprised of Employment Judge Grewal and members, Mrs Bond and Mr Pugh) held:

> (i) the Respondent was contractually obliged to pay the Claimant long-term disability benefits while he remained employed;
> (ii) there was no implied term in his contract preventing the Respondent from dismissing him for incapability while he was entitled to receive such benefits;
> (iii) the continued employment of the Claimant would have caused the Respondent operational difficulties;
> (iv) the Respondent acted reasonably in dismissing the Claimant for incapacity so that his dismissal was fair;
> (v) the Claimant's dismissal was a proportionate means of achieving a legitimate aim so that there was no unlawful disability discrimination under s.15 Equality Act 2010.

20. Mr Visram also pursued proceedings in the Employment Tribunal on a similar basis having been dismissed by letter dated 13 August 2014. His claim was heard by a different Employment Tribunal in August 2015. As in the Claimant's case, the Respondent conceded disability and that dismissal was unfavourable treatment because of something arising from his disability but contended that it was justified. Moreover the Respondent accepted in his case, as with the Claimant's case, that the rights and obligations associated with long-term disability benefit entitlement had transferred under TUPE. Mr Visram's claim for unfair dismissal and unlawful disability discrimination claim succeeded. The Tribunal held that he was entitled under his contract of employment to long-term disability benefit payments so long as he satisfied the condition of being "absent from and unable to work due to sickness or injury for a continuous period of 26 weeks or more". The manner in which those payments were funded by the employer (whether by itself or by way of an insurance policy) did not affect that contractual entitlement. It followed that any variation in the terms of the policy was irrelevant to the extent of his entitlement. Further, there was an implied term in Mr Visram's contract of employment that he would not be dismissed save for a cause other than ill-health while entitled to long-term disability benefits. The Tribunal found that it was unfair for the Respondent to dismiss him in circumstances where he had a contractual right to such payments and the defence of justification to the s.15 discrimination claim was rejected by the Employment Tribunal. This decision was upheld by the Employment Appeal Tribunal (HHJ Eady QC) on appeal (EAT 0344/15).

21. The Employment Tribunal's reasoning in the Claimant's case can be summarised as follows in relation to unfair dismissal:

> (a) The three express terms of the Claimant's contract of employment (clause 5 relating to sick pay, clause 6 dealing with disability benefits that would continue until return to work, retirement or death, and the employer's right to terminate the contract at any time on notice in clause 11) were clear and unambiguous and were not inherently inconsistent or contradictory. They entitled the Claimant to benefits while employed but left the Respondent free to terminate the employment at any time without cause

notwithstanding that the effect of dismissal would be to deprive him of benefits to which he was only entitled while employed. Had the parties intended something different, clause 11 would have been differently worded.

(b) There was therefore no need to imply and term to give business efficacy to the contract. In any event, the term contended for by the Claimant (that he would not be dismissed for incapability while he was entitled to long-term disability benefit) could not be implied because it would contradict and restrict the unrestricted power to dismiss provided by clause 11. There was therefore no implied term restricting dismissal for incapability while the Claimant was entitled to long-term disability benefits.

(c) That conclusion differed from the conclusion of the Employment Tribunal in Mr Visram's case. However in that case the principle that an implied term cannot contradict or restrict an express term of the contract was not apparently argued. Further, the Tribunal considered that difficulties and anomalies might arise if the Claimant was correct in the implied term be sought to rely on.

(d) The Tribunal considered the submission made on behalf of the Claimant, that regardless of any other reason, the dismissal was unfair because the Respondent did not investigate the Claimant's entitlement to long-term disability plan benefits and regarded these as irrelevant. The Tribunal did not accept that the Respondent did not investigate the Claimant's entitlement to these benefits. Moreover the Tribunal found that by the time the Respondent came to consider the Claimant's dismissal it had investigated the matter and sought to find a resolution. The Tribunal found that the Respondent believed erroneously that there was no contractual obligation on it to pay the benefits to the Claimant for so long as he continued in employment so that it was not a matter taken into account in deciding whether or not to dismiss him. The Tribunal concluded that had it appreciated the relevance, the Respondent would have reached the same decision for the same reasons. The Tribunal did not explain the basis for that conclusion.

22. So far as the s.15 disability discrimination claim was concerned, the Employment Tribunal reasoned:

(a) There was no dispute that the Claimant's dismissal for incapacity was unfavourable treatment because of something arising in consequence of his disability (pursuant to s.15 EA 2010).

(b) The only issue for the Tribunal was whether the Respondent had shown that dismissal of the Claimant was a proportionate means of achieving a legitimate aim.

(c) The Tribunal accepted that there was a legitimate aim in ensuring employees attended work and did the job they were employed to do. As for proportionality, the Tribunal recognised on the one hand that the Claimant's inability to attend was due to his disability and that he had a contractual right to benefits which his dismissal would extinguish. On the other hand, by the time he was dismissed, he had been absent for two years without any improvement in his condition. There was no indication that he could return to work with adjustments.

(d) The Tribunal accepted that his continuing absence was causing and would continue to cause operational difficulties to the Respondent. It held, "In order to have a

workforce that attends and carries out the work that needs to be done, it is both appropriate and necessary to cease the employment of those who have been unable to do so for a long time, are still unable and are likely to be unable to do so for the foreseeable future. We were satisfied that the dismissal of the Claimant in the circumstances of this case was a proportionate means of achieving a legitimate aim."

The relevant contractual provisions

23. Although his contract of employment was no longer available by the time of the Employment Tribunal hearing in his case, it was common ground that the Claimant's terms and conditions of employment were identical to those contained in Mr Visram's contract of employment, which was available.

24. It was therefore common ground that the Claimant's contract of employment with the Respondent following the TUPE transfer, contained the following relevant express terms:

(i) Clause 5 which dealt with "Absence through sickness/injury" provided:

"…
Subject to the above, if you are unable to work because of non-job-related illness or injury, you will be paid the equivalent of basic salary, which is deemed to be inclusive of SSP, as follows:

Length of Service	Sickness Payments in any one year (inclusive of SSP)
Up to 3 months	SSP
From 3 to 6 months	30 working days
From 6 to 9 months	35 working days
From 9 to 24 months	40 working days
From 24 to 36 months	65 working days
From 36 months and thereafter	130 working days"

(ii) Clause 6, headed "Pension" provided:

"The company has established a Pension and Death and Disability Benefits plan for all eligible employees on the payroll in the United Kingdom.

The Death and Disability Benefits provided are:

(a) An in-service lump sum death benefit equal to twice base annual salary at the time of death,
(b) A spouse's pension of 25% of base salary at the time of death,
(c) A long-term disability plan that, when integrated with public disability benefits,
Will pay an annual payment of two thirds of salary at the time of disability.
…
Information on this Benefit plan, including eligibility requirements, benefit levels and administrative procedures are to be found in the Company's booklet, "Employee Retirement, Death and Disability Plans."

(iii) Clause 11 headed "Notice" provided:

A

> "Either you or the Company may terminate your employment at any time by giving the other notice in writing.
>
> …The Company will give one month's written notice to employees with less than five (5) years continuous service, one week's notice for each full year of continuous service to employees with five (5) or more years but less than twelve (12) years continuous service and twelve (12) weeks' notice to employees with twelve (12) or more years' continuous service. Notice to terminate employment may be given from any date."

B

25. The booklet expressly referred to in clause 6 of the contract and thereby incorporated into the Claimant's contract by express reference (as was common ground), the American Airlines Employee Retirement, Death and Disability Plans Members Explanatory Booklet ("the Booklet"), explained in the Introduction that there were two plans – the UK Pension & Life Assurance Plan and the Long Term Disability Plan. The former was set up under a Trust Deed, administered by Trustees appointed by American Airlines (referred to as 'the Company' in the Booklet). As for the latter, the Booklet said, "the Long Term Disability benefits are provided by an Insurance Policy". The Policy is not attached to the Booklet (nor are its terms set out in the Booklet or any attached document), and there is nothing to suggest that it was provided to employees, or its terms notified to them.

C

D

26. Eligibility as provided for at section (B) of the Booklet, for life assurance and disability benefits, was as follows:

> "as an employee of the Company under 65 you will be covered for the lump sum life assurance and long-term disability insurance benefit from your date of hire, irrespective of being a Pension Plan member".

E

27. At (C) certain definitions are provided, including the normal retirement date of 65 for men and 60 for women. At (D) the Booklet made clear that the Company would meet all administrative costs inherent in running the Pension Plan and "will also bear the costs of the …… long term disability insurance."

F

28. At (G) headed "Long Term Disability Benefits" the Booklet said:

> "Should you be absent from, and unable to, work due to sickness or injury for a continuous period of twenty six weeks or more, you will receive a Disability income of 2/3rds of your Base Annual Salary less the State Invalidity Pension.

G

> The disability income will commence twenty six weeks after the start of your absence. It will continue until the earlier date of your return to work, death or retirement.

H

> The disability income is treated as normal pay and is subject to the necessary PAYE deductions. Any long-term benefits that you receive from the State will be payable directly to you, and not via the Company.

All Employees

During the period that you receive disability income you will remain a member of the UK Life Assurance Plan and will be covered for the appropriate death-in-service benefits

Pension Plan Members

During the period that you receive disability income you will remain a member of the UK Pension Plan, and your own and the Company's contributions will be based on your disability income."

29. At (H) the Booklet said:

> "You will normally retire from the Company's service on your Normal Retirement Date".

Provision was also made for early retirement and late retirement.

30. At (L) headed "Leaving the Company", the Booklet said:

> "If you leave the Company before your Normal Retirement Date for any reason other than retirement, cover for your death-in-service, and long-term disability benefits will cease immediately."

The Appeal

31. There are five grounds of appeal pursued by the Claimant which together give rise to the following three issues:

> (i) whether on a correct construction of the Claimant's employment contract, the Respondent was prevented (by a term to be implied as necessary to give business efficacy and/or to reflect the mutual intention of the parties) from dismissing him for incapability while he was entitled to long-term disability benefits. If so, it is (correctly) conceded by the Respondent that such a contractual restriction is a relevant consideration when determining whether the Claimant's dismissal was fair and/or proportionate, so that the findings that the dismissal was fair and not unlawful could not stand and would have to be remitted;
>
> (ii) whether there was no evidence to support the Employment Tribunal's conclusion that the Respondent would have come to the same decision to dismiss the Claimant even if it took account of its own obligation to pay him long-term disability benefits, so that this conclusion is perverse;
>
> (iii) whether there was no meaningful evidence that the Claimant's absence from work was causing (or would cause) operational difficulties for the Respondent so that the Employment Tribunal's finding that it did cause operational difficulties was perverse.

Issue 1: the proper construction of the Claimant's contract

32. The Employment Tribunal found, by reference to clause 6 of the Claimant's contract, that the Claimant had an express contractual right, in the event of a relevant incapacity from work, to be paid two-thirds of his basic salary (less any disability benefits received from the State) and that this would continue until he returned to work, retired or died. The benefit payable under clause 6 was only payable while the Claimant was employed by the Respondent and his entitlement would cease as and when his employment terminated.

33. Although the Respondent has not sought to appeal that finding, (nor is there a Respondent's Notice seeking to uphold the Employment Tribunal's judgment on different grounds), Mr Kohanzad submits (without objection from Ms Cunningham) that as a matter of correct contractual construction, the Claimant's only contractual entitlement was to his employer obtaining cover under an insurance policy for employee incapacity and passing over to him any benefits payable under it. The Employment Tribunal was therefore wrong to conclude that the Claimant had an express contractual right to receive two-thirds of his basic salary from the Respondent. Mr Kohanzad contends that if the only right is to have benefits payable under an insurance policy set up by his employer transferred to him, the Respondent could not be under any obligation to make payments to the Claimant once the insurer declined to provide cover or make payments itself. There was accordingly no breach of contract by the Respondent.

34. In support of that argument Mr Kohanzad relies on references in the Booklet to the insurance policy as providing long-term disability benefits (see the Introduction); and the fact that employees would be covered for long-term disability insurance benefit (see section B). He submits these tell the employee that his right is to an insurance policy (and not merely to benefits funded by an insurance policy) and to have benefits payable under such a policy transferred to him; the references are not merely conveying the fact that the benefits are funded by an insurance policy. Rather, they convey the fact that such benefits as will accrue to the employee are benefits provided by the insurance policy. Moreover, if clause 6 provides a right to payments from the Respondent it is analogous to clause 5 dealing with contractual sick pay; this benefit would therefore more appropriately have been included in clause 5 rather than dealt with separately in clause 6. The use of the word "plan" in clause 6 (c) makes plain that the clause is referring to something distinct from pay or wages; and that is further supported by virtue of the long-term disability plan being listed alongside lump sum death benefits and spousal pension, suggesting they are similar types of benefit provided by third parties and distinct from pay or wages. Mr Kohanzad submits in summary that all of the evidence suggests that the wording of clause 6 (c) of the contract is a reference to something other than pay or wages, and is in fact a reference to the Retirement, Death and Disability plans which include insurance cover for long-term disability absence. The Claimant's only contractual right was to benefit from the insurance policy and not to be paid by the Respondent.

35. I do not accept this argument which flies in the face of the contractual documentation in this case. I start with the Claimant's contract itself, which is clear. Clause 6 represents that the employer has established (among other schemes) a disability benefits plan for all eligible employees. The word plan simply signifies an arrangement or scheme. Clause 6(c) sets out precisely the benefits that "will" be provided under the plan as "an annual payment of two thirds of salary". In other words, the benefit provided under the plan is expressed in clear and unambiguous terms as payment of salary. That this benefit is grouped with other benefits is

simply a function of the fact that they are benefits provided under schemes set up by the employer to make provision for disability, retirement or death. There is no reference to third party providers or funders of these benefits and no reference to any insurance policy in this clause.

36. Mr Kohanzad did not contend that the insurance policy itself was incorporated into the Claimant's contract (and I can see no arguable basis for such a contention on the material provided to me – there is simply no evidence that the insurance policy was ever provided to employees, although its existence was referred to in the Booklet). The employment contract could have stated that eligibility for disability benefits was subject to the provisions of a relevant insurance policy or the rules of a particular insurance provider. It could have said that the obligation to make payments to the employee would only arise if and when payments were paid out by the insurer. However none of this was said.

37. Nor is there any substance in the contention that clause 6 would have been expressed as part of clause 5 if it conferred benefits payable as salary by the employer. The two entitlements are different and differently expressed. There is no compelling reason why they should have been dealt with together.

38. Nor in my judgment does the Booklet offer any support for Mr Kohanzad's argument. Section G of the Booklet, set out in full above, is consistent with clause 6 of the Claimant's contract, in providing, in the event of absence from and inability to work for a continuous period of 26 weeks or more, for the receipt of "disability income" of two thirds of base annual salary, less relevant benefits. Moreover the benefit described as "disability income" is expressly treated as "normal pay". To that end, it explains that PAYE deductions will be made. Since PAYE deductions are made by the employer, it is inherent in this section of the Booklet that the income paid as disability benefit, and treated as normal pay, is paid by the employer. It seems to me that the contract and Booklet could not have been clearer in providing for the right to payment by the employer of a benefit broadly calculated as two-thirds annual, and treated as pay.

39. The other references in the Booklet relied on by Mr Kohanzad do not alter this conclusion. It was plainly sensible for the employer to obtain insurance cover for any liability under the disability scheme. However, the statements that the benefits are provided by an insurance policy, and that the cost of the insurance is borne by the employer do not begin to convert the express contractual right set out in clause 6(c) and section G of the Booklet into a right to the provision of insurance cover only, or to the payment of benefits contingent on the availability of insurance cover. That is simply not stated or communicated to employees anywhere in the contract or Booklet. The statements merely convey limited information to the reader that there is an insurance policy, and that it is paid for by the employer. The obligation on the employer to pay benefits under the disability plan is regardless of whether the insurer pays under the policy or not.

40. For all these reasons, I agree with the Employment Tribunal's characterisation of the Claimant's contractual right under clause 6 (c) and section G.

The implied term contended for by the Claimant

41. In a number of cases the courts have held that an employer's power to terminate an employee's contract is restricted if termination will deprive the employee of certain rights conferred under a long-term disability scheme. In Aspden v Webbs Poultry Meat Group (Holdings) Ltd [1996] IRLR 251 the defendant adopted a generous PHI scheme for directors and senior managers including Mr Aspden. Under the scheme, any eligible employee who was wholly incapacitated by sickness or injury from continuing to work was contractually entitled to receive an amount equivalent to three quarters of his salary, beginning 26 weeks after the start of incapacity and continuing while the employment relationship continued. The contract also contained both a general power (clause 12B) and a specific power in the event of prolonged illness (clause 11C) to dismiss an employee for prolonged incapacity. Mr Aspden was dismissed while incapacitated and brought proceedings for wrongful dismissal contending that it was an implied term of his contract of employment, that save for summary dismissal, the defendant would not terminate the contract while he was incapacitated for work in circumstances where that would frustrate his accruing or accrued entitlement to income replacement insurance. Sedley J (as he then was) was satisfied on the evidence in the case that:

> "It was, I find, the mutual intention of the defendant … and the plaintiff that the provisions for dismissal in the contract of employment which they entered in March 1986 would not be operated so as to remove the employee's accruing or accrued entitlement to income replacement insurance at the sole instance of the defendant (that is to say, otherwise than by reason of the employee's own fundamental breach)."

42. He described the "conundrum" in the case as being that to imply the term undoubtedly intended by both parties to govern the power of dismissal at the time when the contract was signed would flatly contradict clause 11C, forbidding the defendant from terminating by reason of prolonged incapacity alone and also limiting the operation of clause 12B. In the result, Sedley J held that the implied term overrode the express term of the contract primarily because the contract was internally inconsistent in its provisions of PHI and dismissal; it was the unambiguous mutual intention of the parties that the dismissal power would not be operated so as to remove accruing or accrued entitlement under the income insurance scheme, save in the case of summary dismissal; and that would not prevent the employer from dismissing by reason of the employee's own fundamental breach, putting an end to the contract and with it the entitlement to insurance benefit. He described these considerations as placing the case towards the limits of the range of the canons of construction that there is a presumption against the implication of terms into written contracts and that terms will not be implied which are inconsistent with the express terms or overall purpose of the contract.

43. A similar approach was adopted in Adin v Sedco Forex International Resources Ltd [1997] IRLR 280; and Hill v General Accident and Fire [1998] IRLR 641 (both Scottish cases). In Hill the Court of Session adopted a similar approach to that set out in Aspden, accepting that it would not be open to the employer to dismiss the employee for a specious or arbitrary reason or no reason at all, or for the specific purpose of defeating his sick pay entitlement. To permit such dismissals would be to subvert the PHI scheme. However, it held that gross misconduct was not the only circumstance in which the employer could lawfully dismiss an employee where the practical effect would be to bring an end to the employee's entitlement to long-term sickness benefits. It might also be lawful to dismiss by reason of redundancy in those circumstances.

44. In Brompton v AOC International Ltd and UNUM Ltd [1997] IRLR 639 Staughton LJ expressed the view, obiter, that there was a "good deal to be said" for the view that the employee could not be dismissed save for cause after becoming entitled to receive benefits under a long term sick scheme.

45. In Briscoe v Lubrizol Ltd [2002] IRLR 607, there was no dispute that a term was to be implied into the claimant's contract of employment that the defendant would not terminate his employment save for a cause other than ill-health so as to deprive the claimant of continuing entitlement to the very disability benefit which it was the primary purpose of the defendant's scheme to provide for him until age 65 (should such disability last until that date). Ward LJ considered the defendant's concession to have been correctly made and to be well in line with the implied term found by Sedley J in Aspden, as clarified by Lord Hamilton in Hill. He concluded, on this issue:

> "In my judgment, the principle to emerge from those cases is that the employer ought not to terminate the employment as a means to remove the employee's entitlement to benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally, for some repudiatory breach by the employee."

46. These cases support the argument advanced by Ms Cunningham that where the employer has made a contractual promise to cater for long term incapacity for work by conferring valuable disability (or PHI) benefits on employees according to an established scheme, the whole purpose of the scheme would be defeated if the employer could bring an end to such entitlements by dismissing employees when they become unfit for work and have accrued or are accruing benefits. Employers who wish to retain such a right would need to use particularly clear words in their contracts to do so, and even then, may not succeed (as Aspden makes clear).

47. Mr Kohanzad submits that there is no general principle of law that wherever an employee has a right to benefits under a PHI scheme, a term must be implied into the contract preventing dismissal. The circumstances of each case will be case specific and it will require particularly strong reasoning to imply such a term. Although he does not submit that Aspden should be restricted solely to its facts, he emphasises the particularly unusual circumstances of that case: the evidence of mutual intention to which I have already referred and the inherently contradictory terms which resulted from the circumstances in which the contract had been entered into and are not present in this case. He relies on observations of Lord Millet in Reda v Flag Ltd [2002] IRLR 747 (Privy Council) at paragraphs 48 to 51 which also serve to emphasise these features.

48. Mr Kohanzad submits that just as it is not unfair for an employer to dismiss an employee who remains entitled to receive pay under a sick pay scheme, the same is true where benefits are payable under a disability insurance scheme but no insurance cover is available. A direct contractual right against the Respondent for pay under the disability plan is much more analogous with sick pay and there is no basis for implying a term in direct contradiction to the express right to dismiss. Further, in this case there are no findings about the mutual intention of the parties. Mr Kohanzad submits that the availability of insurance cover makes all the difference and would make it more palatable to imply the term contended for.

49. I prefer the arguments advanced by Ms Cunningham in this case. The whole purpose of permanent health insurance or other disability schemes would be defeated if an employer could

end entitlements under such a scheme by dismissing employees when they become unfit for work. Whether an employer has a right to do so is of course a matter of construction of the particular contract in question. Before seeking to answer that question in this case, I note the inequality of bargaining power between the parties to employment contracts; and the fact that although the scheme in this case looks both unusual and particularly generous to a reader in 2018, clauses of this kind were commonplace in the 1980s and 1990s, providing potentially vulnerable employees with very valuable benefits in the event of long-term incapacity.

50. As the Employment Tribunal correctly held, the Claimant's employment contract contained three express terms:

> (i) if he was unable to work because of illness or injury he would be paid his basis salary for a period of time determined by reference to his length of service up to a maximum of six months once he had accrued more than three years' service (clause 5);
>
> (ii) if he was unable to work because of illness or injury for more than six months (26 weeks) he would be paid two thirds of his basic salary (less state benefits). These would continue until he returned to work, retired or died (clause 6 and section G);
>
> (iii) his employer could terminate his contract at any time by giving him requisite notice depending on his length of service (clause 11).

Those terms are clear but I do not accept (as the Employment Tribunal did) that they are not inherently contradictory.

51. The express power to terminate is in general terms. It does not expressly deal with incapacity (as the clause in Aspden did) and it does not expressly reserve a right to dismiss without cause (as the clause in Reda did). But the contract also includes an express term that disability benefits once payable will continue until death, retirement or a return to work. There is no reference to dismissal for incapacity in clause 6 or section G of the booklet. If as the Employment Tribunal concluded and the Respondent contends, the Respondent was free as a consequence of clause 11 to terminate the contract on notice while entitlement to disability benefits was ongoing, the unequivocal entitlement in clause 6 would be deprived of its content. In effect clause 6 would read as follows:

> Should you be absent from, and unable to work due to sickness or injury for a continuous period of 26 weeks or more, you will receive a disability income of two thirds of your base annual salary less the state invalidity pension.
>
> The disability income will commence 26 weeks after the start of your absence. It will continue until the earlier date of your return to work, death, retirement or dismissal for incapacity.

52. So rewritten the entitlement ceases to be an entitlement at all. There are no circumstances in which the Respondent would be contractually obliged to pay disability benefits in the long term if it preferred not to do so and no reason to think that it would ever do so. The terms are inherently contradictory. Either the Claimant had a meaningful entitlement to disability benefits until his return to work, death or retirement; or the Respondent had an unfettered right to terminate his contract on notice at any time, even for incapacity; but not

both. The contract has the effect, on this reading, of giving with one hand and taking away with the other.

53. The Employment Tribunal made no findings about the actual intention of the parties, but suggested at paragraph 83 that if there was any intention to restrict the dismissal power in clause 11, the contract would and could have said so. That seems to me to ignore the clear words that provide for a continuation of benefits until return to work, death or retirement. It would have been equally possible to make clear that clause 11 applied even in circumstances of incapacity and/or to limit ongoing entitlement to disability benefits in clause 6 by reference to dismissal for incapacity.

54. Nor do I accept the argument advanced by Mr Kohanzad that the absence of insurance cover means no such term ought to be implied through the officious bystander or business efficacy t. The contract in the Claimant's case is clear: entitlement to benefits is expressly provided for and is regardless of how it is funded. It was open to the employer to contract with the insurer on terms that ensured continuing cover once benefits were accruing even if the employee was no longer on the employer's books. Alternatively the employment contract could have made clear that refusal of cover by the insurer would discharge the employer's duty to pay under the scheme. Equally it was open to the Respondent to seek to protect its position by obtaining warranties from American Airlines. The Claimant was not in the same position when it comes to determining the terms of the contract of employment and/or any relevant insurance policy.

55. I fully accept that terms should not be implied too readily, and that courts should tread warily in this area. However, this is a case where the contract was known by both employer and employee to include a disability insurance plan which could only work if the employees eligible to receive such benefits remained in employment for the duration of their incapacity. The contract of employment is inherently contradictory. It seems to me that, on a proper construction of the contract, it is contrary to the functioning of the long-term disability plan, and to its purpose, to permit the Respondent to exercise the contractual power to dismiss so as to deny the Claimant the very benefits which the scheme envisages will be paid. In my judgment a term can be implied whether on the officious bystander or the business efficacy tests of implied contractual incorporation that "once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work." That term is capable of clear expression, reasonable in the particular circumstances and operates to limit (rather than contradict) the express contractual right to terminate on notice by preventing the exercise of that right in circumstances where it would frustrate altogether the entitlement to long term disability benefits expressly provided for by the contract.

56. For all these reasons the appeal on ground one is accordingly allowed. A finding that there was the implied term contended for by the Claimant, as set out above, will be substituted. The Claimant's dismissal was accordingly in breach of contract.

57. Dismissal in breach of contract is not necessarily unfair but the contractual position is relevant as part of the circumstances against which the reasonableness of the Respondent's actions fall to be judged. I agree with Ms Cunningham that an implied term that there will be no dismissal for incapacity in the circumstances identified falls at the "very relevant indeed" end of the spectrum of relevance: see Westminster City Council v Cabaj [1996] ICR 960. The Tribunal's conclusion that there was no such implied term means that both the conclusion that

the Claimant's dismissal was fair and that it was a proportionate means of achieving a legitimate aim cannot stand, as the Respondent concedes. These conclusions are set aside and the question of fair/unfair dismissal and whether it was justified will have to be remitted.

Issue 2: Whether, there was no evidence to support the Employment Tribunal's conclusion that the Respondent would have come to the same decision to dismiss the Claimant even if it took account of its own obligation to pay him long term disability benefits, so that this conclusion is perverse.

58. This ground of appeal concerns the Employment Tribunal's finding at paragraph 91 as follows:

> "By the time the Respondent came to consider the termination of the Claimant's employment it had investigated the matter and tried to find a resolution. It believed, we think erroneously, that it was not contractually obliged to pay the Claimant the benefit if he continued to be an employee. Hence it was not a matter that it took into account in deciding whether or not to dismiss the Claimant. Had it done so, we are satisfied that it would have reached the same decision for the same reasons. It must follow that if the Respondent did not consider that it was legally obliged to pay the Claimant the benefit, it could not have dismissed the Claimant to avoid making that payment."

59. Ms Cunningham submits that the finding that the Respondent would have dismissed even if it had a correct understanding about its own contractual obligation to maintain the disability benefit payments is unsupported by any evidence. She relies on the Employment Tribunal's notes of evidence where Ms Davidson was asked whether she would have taken account of an ongoing obligation to pay disability benefits until retirement or death in dealing with dismissal if she thought the Respondent had such an ongoing obligation. The notes indicate that she avoided answering the question or gave ambiguous answers. She did not say words to the effect that if she thought there was a continuing obligation to pay disability benefits she would have come to the same conclusion on dismissal.

60. Against that Mr Kohanzad submits that this ground is misconceived. The question addressed at paragraph 91 is whether the Respondent dismissed the Claimant to avoid paying the disability benefit. The Employment Tribunal's reasoning proceeds as follows. First it found that the Respondent erroneously believed that it was not contractually obliged to pay the Claimant the benefit if he continued to be an employee. Secondly as a consequence of that finding, it concluded that since the Respondent did not consider it was legally obliged to pay the Claimant the benefit, it could not have dismissed the Claimant to avoid making that payment.

61. Although I agree with Mr Kohanzad that paragraph 91 includes the deductive reasoning he has identified, the question the Tribunal answered was a different one and is the subject of this challenge. The Employment Tribunal concluded that the Respondent would have dismissed in any event for the same reasons. The mere fact that the dismissal was not to avoid making payments does not entail that the Respondent would have dismissed in any event had it correctly appreciated its contractual obligations. Although this question involved a degree of speculation or prediction about what would have occurred in the counterfactual scenario posited, it was for the Respondent to adduce any relevant evidence relied on as to what it would

have done (in terms of dismissal) if it thought the contract obliged it to continue making long-term disability benefit payments while the Claimant was employed. It adduced no such evidence and the Tribunal's finding was accordingly unsupported by any evidence and must be set aside.

Issue 3: Whether there was no meaningful evidence that the Claimant's absence from work was causing (or would cause) operational difficulties for the Respondent so that the Employment Tribunal's finding that it did cause operational difficulties was perverse.

62. The Notice of Appeal addressed this ground by reference to an argument that the Employment Tribunal's finding at paragraph 89 that the Claimant's continued employment would cause the Respondent operational difficulties was "against the overwhelming weight of evidence". During the hearing Ms Cunningham submitted that there was in fact no meaningful evidence to support this finding.

63. As is well established, perversity is a high threshold and questions of weight are questions for the first instance tribunal. Here it seems to me that there was evidence to support the Employment Tribunal's conclusion at paragraph 89 as Mr Kohanzad submits. First, the Tribunal found that the letters sent to the Claimant advised him that his absence from work was causing the company operational difficulties: see for example paragraph 60. Secondly and more importantly, the Employment Tribunal found that although Ms Davidson did not specifically mention operational difficulties caused by the Claimant's absence in her dismissal letter, they were a part of her reasoning process. It found:

> "72. …As she said in her evidence, it stands to reason that if someone is unable to do the job which he is employed to do for two years it causes operational difficulties. She gave some details of the kind of difficulties caused. They had to find someone to cover the Claimant's duties. They could not recruit a permanent replacement for him as he might be well enough at any stage to return to his job. Recruiting someone temporarily for his role was difficult because of the training it required and the expense of that training and the security vetting required for the role. The Respondent would have had to manage his absence which would have required time and resources."

64. While another Tribunal might have reached a different conclusion, it seems to me that the Employment Tribunal was entitled to have regard to all of the evidence in the case, both Ms Davidson's oral evidence and any documentary evidence, and to draw such factual inferences or conclusions from that evidence as it thought justified. It heard the evidence and it was for the Tribunal to accord that evidence appropriate weight. In my judgment its finding at paragraph 89 is not perverse. This ground accordingly fails.

Conclusion

65. For all the reasons set out above, the appeal succeeds on all grounds save for ground three which was not pursued and ground six which failed. The following questions are remitted for re-hearing:

(i) Was the Claimant's dismissal fair or unfair in circumstances that include the fact that there was an implied term of his contract that the Respondent would not dismiss him for incapacity while he was contractually entitled to the payment of benefits under the long-term disability plan?

(ii) Was the Claimant's dismissal a proportionate means of achieving a legitimate aim in circumstances that include the fact that there was an implied term of his contract that the Respondent would not dismiss him for incapacity while he was contractually entitled to the payment of benefits under the long-term disability plan?

(iii) Would the Respondent have dismissed in any event had the Respondent appreciated correctly its own contractual obligation to pay the Claimant disability benefits if he continued to be employed as an employee?

66. The parties do not agree which tribunal ought to re-hear this remitted claim. Ms Cunningham contends that it ought to be remitted to a fresh tribunal whereas Mr Kohanzad contends that the errors are limited and the Employment Tribunal can be expected to deal professionally with these questions in light of the Employment Appeal Tribunal's judgment.

67. Applying the factors identified in Sinclair Roche and Temperley v Heard [2004] IRLR 763, I consider that the question whether to remit to the same tribunal or a different one is finely balanced in terms of the practical consequences: there is a limited factual dispute and the additional coast of a fresh hearing is unlikely to be substantially different from the cost of a hearing by the same tribunal. On balance I have concluded that it would be preferable to remit to a fresh tribunal in circumstances where the Employment Tribunal made a finding of 'no difference' in the teeth of no evidence and misconstrued the Claimant's contract. Although the Employment Tribunal's professionalism can be assumed, it would be preferable, in order to preserve confidence in the circumstances, for a fresh tribunal to consider these matters at a re-hearing.