Dismissing employees with PHI benefits: a step too far?

Permanent health insurance is an important employee benefit. Alison Padfield and Sophie Belgrove explore the potential restrictions on the right of employers to dismiss employees who are unable to work and are in receipt of payments under a group PHI policy of insurance taken out by the employer

Group PHI policy benefits

Broadly speaking, group PHI policies work in the following way:

- payments, usually termed 'benefit', are calculated as a percentage of the employee's gross salary
- the entitlement to benefit arises where an employee is unable to carry out his or her usual or normal occupation
- the entitlement arises only after a deferred period of at least 13 or more weeks, often dovetailing with the employee's entitlement to sick pay
- the benefit may be funded by the employer directly or (more usually) indirectly through an insurance policy taken out by the employer
- benefit ceases to be payable if the employee's contract of employment is terminated even if the employee continues to be unable to work.

Restrictions on the right to dismiss

There are at least three potential sources of restrictions on the employer's right to dismiss an employee who is unable to work and is in receipt of payments under a group PHI policy: implication of a term into the contract of employment; statutory unfair dismissal provisions; and duty to make reasonable adjustments under the Equality Act 2010.

Implication of a term into the contract of employment

Contractual entitlement to PHI benefits

In practice, the circumstances in which an employee in receipt of contractual PHI benefits can be dismissed are not dealt with expressly. Whether there are any restrictions therefore depends on the construction of the terms of the contract of employment. The courts will have particular regard to the termination clause and the provision entitling the employee to PHI benefits, and will consider whether a term should be implied which restricts the express right to terminate in certain circumstances.

The courts have been ready in appropriate cases to imply a term that the employer will not terminate the contract of employment of an employee who is in receipt of PHI benefits unless the termination is on the grounds of the employee's gross misconduct (see *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd)*.

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In *Aspden*, notwithstanding an express provision in the contract of employment allowing the employers to terminate by reason of prolonged incapacity alone, the court implied a term in order to give effect to the mutual intention of the parties when the contract was signed that the provisions for dismissal would not be operated so as to remove the employee's entitlement to benefit under the permanent health insurance scheme which was already in force. Both parties knew, or would have realised had they considered it, that the written terms were not comprehensive and that they required qualification. Among other matters, the court took into account the fact that the written contract had not been drafted with the income insurance scheme in mind, that the written contract was internally inconsistent in its provisions for sick pay and termination and that it was known that the scheme could only work if the employees whom it covered remained in employment for the duration of their incapacity or until some terminating event specified by the policy took place. That mutual intent did not impinge upon the ability of the employers at any time to accept the employee's repudiatory conduct (for example, gross misconduct) as putting an end to the contract and with it the entitlement to insurance benefit.

The courts have been less ready to imply an equivalent term in relation to redundancy. Sedley J expressed the view in *Aspden* that the restriction on the employer's right to dismiss should extend to redundancy, but in *Hill v General Accident Fire & Life Assurance Corporation plc*, the Court of Session (Outer House) declined to imply such a term. The court's reasoning was that the parties cannot reasonably be supposed to have intended that 'an employee who, when a redundancy situation arose, happened to have been recently invalided with some minor illness from which there would good prospects of a fairly early return to work would for that reason require to be excluded from the pool of employees from whom persons might be selected for dismissal on the ground of redundancy', because, the court said, this would be 'grossly disadvantageous' to employees who happened to be well.

An employee who is unable to work and receiving PHI benefits may be disabled within the meaning of the Equality Act 2010

This is fine as far as it goes, but it does not take into account the position of an employee who is on long-term sick leave, is not expected ever to return to work and is being paid PHI benefits for which the employer is being reimbursed by the PHI insurer. In this situation, the parties can, arguably, reasonably be supposed to have intended the employee not to be dismissed for redundancy, whatever might happen in the future to the post occupied by the employee before he or she ceased work, particularly where the payment of benefits under a PHI policy is a contractual entitlement. The ongoing notional employment is not dependent upon the continued existence of the employee's former post. Obviously, if an employer ceases to exist or moves the whole of its operations overseas, different considerations arise, and whether a term should be implied in any particular case will depend on the terms of the particular contract of employment and on all the relevant facts. As a matter of principle, however, and depending on all the circumstances, the courts are likely to be prepared to imply a term which imposes some restrictions on the employer's right to terminate for redundancy.

Discretionary or extra-contractual PHI benefits

It would be more difficult to reach the same result in the case of an employee whose PHI benefit was discretionary or extra-contractual and therefore subject to removal at any time before the benefit started to be paid. In these circumstances, the only possible basis for implication of a term would be obviousness (the 'officious bystander'); a term could not be said to be necessary for the business efficacy of the contract of employment in circumstances where there was no contractual right to PHI benefits.

Remedies

A threatened breach of the implied term may in an appropriate case be restrained by injunctive relief, and damages are recoverable for breach. As was made clear by the Court of Appeal recently in *Edwards v Chesterfield*, this is a separate cause of action from wrongful dismissal. Notably, the implied term may be relied on even before the right to claim benefits arises (see *Adin v Sedco Forex International Resources Ltd,* where the employer terminated without good cause when the employee had been absent on grounds of ill health for four months and had been in receipt of contractual sick pay during that time). Accordingly, employees who have not yet qualified for permanent ill-health insurance may nonetheless be able to seek an injunction, albeit initially on an interim basis only, if it seems likely that the employee may be incapacitated for longer than the qualifying period under the policy.

Statutory unfair dismissal provisions

Questions of statutory fairness may also arise. In *First West Yorkshire Ltd v Haigh*, the employer's sickness policy expressly stated that it would consider retirement along with termination on medical grounds. The EAT said:

> *'If an employer could proceed to dismiss a sick employee who might be entitled to an enhanced retirement pension without considering that question, substantial injustice might occur. An employer who had conferred a valuable benefit on an employee might hinder his ability to claim it carelessly, arbitrarily or even deliberately. It may be that the employee would have a common law claim against the employer; but that is no substitute for proper consideration of the matter by the employer before dismissal.'*

The same approach might be expected of an employer whose employee is entitled to PHI benefit for as long as, and provided only that, he remains an employee.

Duty to make reasonable adjustments

An employee who is unable to work and receiving PHI benefits may be disabled within the meaning of the Equality Act 2010. There may be no obligation on the employee, either under the terms of the contract of employment or under a non-contractual PHI scheme, to undertake an alternative occupation. This does not mean that the employer is not under a duty to make reasonable adjustments to allow the employee to continue working in his or her normal occupation, or to undertake an alternative occupation with the employer, perhaps on lighter duties or part time rather than full time.

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Cases referred to:

- *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521, QBD
- *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2010] EWCA Civ 571
- *Adin v Sedco Forex International Resources Ltd* [1997] IRLR 280
- *First West Yorkshire Ltd (t/a First Leeds) v Haigh* UKEAT/0246/07
- *Hill v General Accident Fire & Life Assurance Corporation plc* [1998] IRLR 641
- *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 CA