Employers should exercise caution when dismissing employees awaiting or in receipt of long-term disability benefits

Before deciding to dismiss an employee on the grounds of medical incapability, an employer will have its obligation to reasonably accommodate the employee under the Employment Equality Acts 1998 to 2015 to the forefront of its mind.

However, a recent UK Employment Appeal Tribunal ("EAT") case warns of a potentially far more costly financial risk – the risk that, in dismissing an employee on long-term sick leave, an employer may be in breach of the employee’s contractual entitlement to a benefit under a long-term disability scheme.

The UK EAT in Awan v ICTS UK Limited implied a term into an employment contract that once an employee becomes entitled to payment of disability benefits due under an employer’s long-term disability scheme, the employer cannot exercise a power to give notice of termination to dismiss the employee by reason of incapacity.

BACKGROUND

Mr Awan was originally employed by American Airlines in a security role. His contract provided for both contractual sick pay and the benefit of a long-term disability scheme. In October 2012, Mr Awan was certified as unfit to work due to depression and remained absent on sick leave until his dismissal in November 2014.

In December 2012, Mr Awan’s employment transferred to the Respondent, ICTS UK Limited, under UK transfer of undertakings ("TUPE") legislation. While it was accepted that Mr Awan’s entitlement to income protection benefits transferred to ICTS UK Limited under TUPE, the Respondent was unable to agree with American Airlines’ insurance provider the transfer of the existing cover or the provision of new cover for employees who were sick prior to the transfer.

Mr Awan issued proceedings, arguing that his dismissal, while entitled to long-term disability benefits under the employer’s scheme, was unfair and discriminatory.

DECISION OF THE UK EAT

The UK EAT considered previous case law which held that an employer's power to terminate an employee's contract is restricted if termination will
deprive the employee of certain rights under a long-term disability scheme.

The leading decision is that of the High Court of England and Wales in Aspen v Webb Poultry and Meat Group (Holdings) Limited, in which the Court was willing to imply a term into the employment contract that, except for summary dismissal, the employer would not terminate the contract while the employee was incapacitated for work.

The Scottish Court of Session in Hill v General Accident and Fire followed Aspen in accepting that an employer could not dismiss such an employee for an arbitrary reason or no reason at all, nor for the specific purpose of defeating his sick pay entitlement. The Court qualified Aspen by holding that an employer could dismiss an employee on the grounds of redundancy, as well as summary dismissal, where the dismissal would disentitle an employee to long-term disability benefits. It is worth noting that, in Hill, the employee was in receipt of company sick pay at the time of his dismissal and was four months away from qualifying for long-term disability benefits.

GIVING WITH ONE HAND AND TAKING AWAY WITH THE OTHER

In considering Mr Awan’s case, the UK EAT noted that the purpose of disability schemes would be defeated if an employer could end entitlements under a scheme by dismissing employees when they become unfit for work. Mr Awan’s contract expressly provided for the following:

1. An entitlement to be paid his basic salary if he was unable to work because of illness or injury for up to a maximum of six months.
2. An entitlement to be paid two thirds of his basic salary (less State benefits) if unable to work because of illness or injury for more than six months. This would continue until he returned to work, retired or died.
3. His employer could terminate his contract at any time by giving him his requisite notice.

The UK EAT held that the express terms were inherently contradictory.

“Either [Mr Awan] had a meaningful entitlement to disability benefits until his return to work, death or retirement; or [his employer] 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.”

The UK EAT was satisfied that a term could be implied into Mr Awan’s contract 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”. The implied term:

1. was capable of clear expression;
2. was reasonable in the particular circumstances; and
3. limited (rather than contradicted) the employer’s right to terminate on notice as it prevented the employer dismissing an employee where to do so would frustrate the express contractual entitlement to long-term disability benefits.

As a result of implying the term into Mr Awan’s contract of employment, his dismissal was found to be in breach of contract and the matter was remitted to a fresh Employment Tribunal for reconsideration.

CONCLUSION

In following the decisions in Aspen and Hill, the EAT demonstrated a willingness to imply a term into an employment contract prohibiting dismissal on the grounds of incapacity where an employee is entitled to benefits under a long-term disability scheme. All three decisions are clear that each case will turn on the construction of the employment contract in question.

The decisions in Aspen and Hill were positively cited in the leading Irish High Court decision in McGrath v Trintech Technologies Limited and Trintech Group plc and the Awan decision would also be expected to be considered by any Irish court or tribunal in an appropriate case.

An employer considering the dismissal of an employee on the grounds of medical incapability should not only consider its obligations under the Employment Equality Acts, but also whether the employee has an express or implied contractual entitlement to benefits under a long-term disability scheme or is in the waiting/qualification period for same. In considering whether an employee has such an entitlement, an employer should carefully review an employee’s contract of employment and any other documentation that may form part of the employee’s terms and conditions, including promotion letters, employee handbooks, and leave and benefit policies.

Where a long-term disability scheme is in place, an employer should:

1. review provisions of the scheme to determine if the employee must remain an employee of the company to receive benefits;
2. advise the employee of its entitlement to apply for benefits; and
3. keep up to date on the progress of the employee’s application to the scheme until its conclusion.

Employers should exercise caution in terminating an employee’s employment while her/his eligibility for acceptance to a long-term disability scheme is being assessed by the insurance company or while he or she is absent during the waiting/qualification period. If the employee is accepted onto the scheme, the employer should consider the potential implications of dismissing the employee on the grounds of medical incapability. Similarly, where an employer wishes to dismiss an employee on long-term sick leave on the grounds of gross misconduct or redundancy, an employer should proceed with caution and take legal advice. Failure to do so could expose the employer to significant damages in a breach of contract claim.

Note that these cases are not engaged where the long term disability scheme is the employee’s own policy, as distinct from that of the employer.
EMPLOYMENT

EMPLOYERS SHOULD EXERCISE CAUTION WHEN DISMISSING EMPLOYEES AWAITING OR IN RECEIPT OF LONG-TERM DISABILITY BENEFITS

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