INJUNCTING DISMISSALS IN THE CONTEXT OF PHI[1]

INTRODUCTION

1. It is not an uncommon phenomenon for larger corporations to enter into an insurance policy which provides cover to an employee on long term sick leave. It is common practice that such an employer will pay sick pay to an employee for a specified period such as 26 weeks. Thereafter, if the employee remains out of work on certified sick leave, the insurance company will assess the employee's fitness to work. The terms of the scheme will of course vary but provided the insurance company's medical assessor is of the view that the individual's illness etc is covered by the scheme then that employee is paid a percentage of his/her salary under the scheme. Depending on the nature of the scheme and the nature of the illness the employee may be regularly assessed by the insurance company to ensure that theses payments should continue and/or the employee may be granted permanent health insurance until the date of retirement. These schemes are commonly referred to as PHI.

2. The vast majority of PHI schemes require the employee to remain in the employment of the employer for payments to be made. If the employment relationship ceases the payments cease.

3. There is no obligation on any employer to provide income continuance and the vast majority of employers take the view that the provision of same illustrates how they are generous employers who provide significant additional benefits to their employees. Consequently, it can come as some surprise to them that the provision of same can create its own unique legal difficulties.

4. This paper attempts to consider one of the issues that can arise i.e. what is the legal position where an employer seeks to terminate the employment relationship when an

[1] I would like to thank Mr Mark Connaughton S.C. and Ms Cathy Maguire B.L. for the help they provided while I was preparing this paper.

employee is either in receipt of income continuance payments and/or is a possible candidate to be in receipt of same.

UK CASE LAW

5. There is a significant body of UK caselaw concerning PHI. While some cases deal with circumstances where an insurance company refuses to make or continue to make payments many deal with the fact of dismissal and whether same is wrongful or unfair when the Plaintiff is relying on PHI. While this paper only attempts to consider the issue of dismissal the entirety of the UK caselaw reflects the importance in each case of examining the employment documents from the statement of terms to the employee handbook. This was also the view of one leading commentator[2] who said that the main task of the courts was to *"ascertain the terms of the employment contract"*.

6. The High Court in ***Aspden v Webbs Poultry & Meat Group (Holdings) Limited***[3] considered a situation where the written contract of employment contained an express provision allowing termination of the employment relationship due to prolonged incapacity. However, a term was implied to give effect to the undoubted mutual intention of the parties when the contract was signed that this term would not be operated so as to remove an employee's entitlement to the benefit of the PHI scheme already in force. The obvious inconsistencies in the contractual documents were considered. However, it was held that the mutual intent did not impinge upon the ability of the employers to accept the employee's repudiatory conduct as putting an end to the contract and with it the entitlement to insurance benefit.

7. ***Hill v General Accident Fire & Life Assurance Corporation plc***[4] concerned an employee who was made redundant. He was in receipt of sick pay and was some 4 months away from qualifying for the long term sickness provision. It was assumed in that case that the redundancy was genuine and with cause. Lord Hamilton in that case held:

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[2] See Paragraph 11.73 of Redmond on Dismissal Law; 3rd edition by Desmond Ryan
[3] [1996] IRLR 521
[4] [1998] IRLR 641

"I accept that the defender's powers to dismiss is subject to limitation. Where the provision is, as here, made in the contract for payment of salary or other benefit during sickness, the employer cannot, solely with a view to relieving himself of the obligation to make such payment, by dismissal bring that sick employee's contract to an end. To do so would be, without reasonable and proper cause, to subvert the employee's entitlement to payment while sick. The same unwarranted subversion may occur if a sick employee were to be dismissed for a specious or arbitrary reason or for no cause at all."

8. Lord Hamilton considered the ***Aspden*** case. He held:

"In so far as Sedley J's conclusion is to be understood as a general proposition that gross misconduct is the only circumstance in which an employer could lawfully dismiss and employee in receipt of sick pay and with the prospect of permanent sickness provision, I must respectfully disagree. No question of a redundancy situation, however, arose in that case and, although redundancy is mentioned in paragraph 24 in the context of the computation of damages, the possibility of a genuine dismissal by reason of redundancy was not, it appears, considered by Sedley J in the context interpretation of the power or dismissal. I do not accept that the particular implied term sought to be drawn by the present pursuer from Aspden is well founded in law"

9. The Court of Appeal in the UK[5] considered inter alia the ***Aspden*** and ***Hill*** cases. Lord Justice Ward held, after considering the jurisprudence, that:

"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."

10. It seems a number of principles can be taken from the UK caselaw. It appears that it is permissible to dismiss an employee who is in receipt of PHI benefits for good cause

[5] Briscoe v Lubrizol Ltd [2002] IRLR 607

such as gross misconduct, repudiatory breach or a genuine redundancy. A dismissal that is inconsistent with the mutual intention of the parties where the contractual documentation is inconsistent will give rise to significant problems for an employer. The UK caselaw would also call into question to the lawfulness of a "no cause" dismissal where the employee is in receipt of PHI.

MCGRATH V TRINTECH TECHNOLOGIES LIMITED

11. Ms Justice Laffoy in the High Court considered the issue in **McGrath v. Trintech Technologies Limited**[6] **.** The Plaintiff's contract of employment contained an express clause that his contract could be terminated on one month's notice. The Plaintiff suffered ill health. He claimed inter alia that there was an implied contractual term that the Defendant would not dismiss him while he was on certified sick leave and reliant on the provision of permanent health insurance. He was informed that his employment was going to be terminated by reason of redundancy. The Plaintiff had a number of other claims against the company but for the purposes of this paper same are not relevant.

12. During the Plaintiff's employment the Defendant put in place a scheme for long term disability. The employees were notified of same and attached to the notification was an explanatory handbook. This booklet indicated inter alia that that the Defendant would pay the full cost of the scheme. If eligible the benefit was a particular percentage of salary less certain payments. The booklet went on to state:

    "The payment, once granted will continue while disability lasts or until one of the following occurs:-

    (i) attainment of age 65
    (ii) death
    (iii) recovery
    (iv) termination of employment"

[6] [2005} 4 I.R. 382

It also provided that the scheme could be amended or discontinued by the Defendant at any time.

13. The Plaintiff contended that it was an implied term of his contract of employment that the Defendant would not make him redundant in circumstances that would deprive him of the benefit of permanent health insurance. The Plaintiff relied on a number of UK authorities to support this argument.

14. After considering the UK authorities[7] Ms Justice Laffoy held:

> *"…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 benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally for some other repudiatory breach by the employee.*
>
> *I am not persuaded by the authorities cited that there should be implied into the plaintiff's contract of employment a term on the lines pleaded. What is suggested is that it was an implied term of the contractual relationship that the first defendant would not terminate the plaintiff's contract of employment by notice if two conditions existed: that he was on certified sick leave; and that he was reliant on the prospect of permanent health insurance cover. To imply such a term would be inconsistent with the express terms of the contract that the plaintiff's employment could be terminated on one months notice and that, even where the payment had commenced under the permanent health insurance scheme, it would cease on termination of the employment"*

15. Judge Laffoy noted that to imply the term would require him to be excluded from the pool of employees who might be selected for redundancy and as stated by Lord Hamilton in ***Hill*** *"that would be grossly disadvantageous to fellow employees who were well at the material time."*

16. Judge Laffoy noted that the Plaintiff alleged his redundancy was not genuine and his selection was a device to get rid of him due to the fact he was likely to be on sick leave in the future. Judge Laffoy noted that this led to the question as to whether the

[7] Including ***Aspden*** and ***Hill***

Plaintiff could challenge the genuineness of the redundancy in the proceedings. The Court had earlier held that such a challenge was not permissible as same was a matter for another forum such as the E.A.T.

17. Where there is an express contractual term providing for termination on notice it appears that the Courts will not be willing to imply a term that in essence has the effect of preventing said termination when someone is in receipt of PHI or has the prospect of receiving same due to ill health. This is undoubtedly the case where the dismissal is for "good cause".

18. The judgement in ***McGrath*** does however illustrate the difficulty an employee could find themselves in where there is a sham redundancy. The caselaw would suggest the only appropriate forum for an employee to challenge a sham redundancy is in the WRC under the Unfair Dismissals Acts. While it is open to the WRC to reinstate or re-engage an employee these remedies are rarely ordered. An employee in receipt of PHI may be the victim of a sham redundancy and it appears that he/she would be at significant risk in attempting to restrain the dismissal by way of interlocutory injunction. Therefore, the only safe course of action would be to bring a claim before the WRC. At that stage the employee is dismissed; his employment has ceased resulting in PHI payments stopping and the maximum compensation that can be awarded in 104 weeks remuneration. Depending on the nature of the illness and the age of the Claimant this could be significant in terms of his losses had the PHI payments continued. There is also a further difficulty for such a claimant- they are unfit to work and therefore have no actual loss. On the basis of Section 7(1)(c)(i) of the Unfair Dismissals Acts as amended this would suggest that such a Claimant is only entitled to a maximum of 4 weeks remuneration as compensation.

19. Hogan J. in the High Court in ***Holland v. Athlone Institute of Technology***[8] considered in a different context the question of interlocutory relief and the decisions of administrative tribunals. He stated:

> *" Perhaps a better way of looking at the problem is as follows: let us assume that the Labour Court were ultimately to find for the plaintiff and that the practical effect of such a ruling was that his employment could not be*

[8] [2011] IEHC 254

terminated at will. If that were indeed the situation, then it would follow that as the Labour Court has no jurisdiction to grant him interim relief, there might be a risk that a favourable decision with the consequence of precluding termination in the manner presently proposed would come too late to be of any practical benefit to the plaintiff, given that the termination is imminent. The real question is whether this Court would enjoy a jurisdiction to grant an injunction in aid of the Labour Court in circumstances where the plaintiff's right to secure the benefit of that decision would otherwise have been wholly undermined.

In my judgment, in that situation this Court would enjoy such a jurisdiction, not least by reason of the inherent full original jurisdiction which this Court enjoys to determine all questions of law and fact by virtue of Article 34.3.1 of the Constitution. It may be recalled that in Pierse v. Dublin Cemeteries Committee (No.1) [2009] IESC 47, [2010] 1 I.L.R.M. 349 the Supreme Court held that a plaintiff had standing to pursue a claim for damages for alleged breaches of constitutional rights in respect of the operation of a private Act of the Oireachtas by a statutory body in circumstances where that was the only real remedy open to him. It is (at least) necessarily implicit in the judgment of Macken J. that such a plaintiff must be afforded such a right, as otherwise he would have been left without an effective remedy.

I reached the same conclusion with my own judgment in Albion Properties Ltd. v. Moonblast Ltd. [2011] IEHC 107, albeit in a very different context. Here the question was whether this Court had the jurisdiction to grant a mandatory interlocutory injunction to require a commercial tenant - who was manifestly and persistently in default with regard to rental payments - to yield up possession. I rejected the argument that there could be any such jurisdictional bar, saying:-

> *"Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with duty*

imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff landlord are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective: see, e.g., the comments of Kingsmill Moore J. in The State (Vozza) v. O'Floinn[1957] I.R. 227 at 250; those of Murray C.J. in Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3 and the authorities set out in my own judgment in S v. Minister for Justice, Equality and Law Reform [2011] IEHC 31."

It must be acknowledged that those cases concerned issues of standing and the jurisdiction to grant relief in respect of substantive civil actions which obviously raised justiciable issues. If, nevertheless, the plaintiff were to be left with the decision of an administrative agency whose efficacy was otherwise wholly undermined if no interim relief could be given by this Court, then in such exceptional cases, this Court must be deemed to enjoy such a jurisdiction, not least by reason of the obligation placed on the judicial organ of the State by the terms of Article 40.3.1 of the Constitution to ensure that legal rights can be appropriately vindicated: see, e.g., the decision of the Supreme Court in Grant v. Roche Products Ltd. [2008] IESC 35, [2008] 4 I.R. 679"

20. The judgement in ***Holland*** might give some comfort to an employee in receipt of PHI whose employment is about to be terminated by way of a sham redundancy. Would the High Court in light of the ***Holland*** judgement be willing to grant interim or interlocutory relief restraining such a dismissal if the argument was made that the WRC would be asked to re-instate the employee? The fundamental difficulty that I see with such a course of action is in fact not to do with the jurisdiction of the High Court but is the jurisdiction of the WRC in Unfair Dismissal claims. If a dismissal has

being restrained by the High Court how can an employee possibly proceed with a claim challenging that dismissal. To bring an unfair dismissal claim there must be dismissal.

21. Anecdotal evidence would suggest that there is an increase in "no cause"/ "no fault" dismissals where an employee is dismissed with their contractual notice. In light of recent caselaw[9] this has resulted in employers who adopt this cause of action potentially avoiding applications for injunctions restraining the dismissal. One must query whether a "no cause" dismissal of an employee in receipt of PHI is at greater risk of challenge by way of injunctive proceedings. The UK caselaw (particularly ***Hill***) would suggest that there is a greater possibility of success in an injunction in such circumstances. However, if there is an express termination clause (in light of ***McGrath***) then it would seem unlikely that an injunction would be successful. If it could be argued that the no fault termination is being done to in some way deny the employee his rights to continuing sick leave/income continuance the application may have a better chance of success.

22. It is interesting to note that in advance of the termination date in the ***McGrath*** case the Plaintiff sought and obtained an interlocutory injunction restraining the termination of his employment pending the trial of the action. Mr Justice O'Donovan granted same. There is no written judgement setting out the reasons for granting same and it is therefore impossible to ascertain whether the "PHI argument" had any bearing on the Court's decision to grant the interlocutory relief.

INJUNCTIONING DISCIPLINARY PROCESS PRIOR TO DISMISSAL

[9] Bradshaw v Murphy and Others [2014] IEHC 146; judgement of Ms Finlay Geoghan in the High Court and Hughes v MongoDBLimited [2014] IEHC; judgement of Mr Justice Keane

23. In ***Gallagher v Certus***[10] an interlocutory injunction was sought restraining the Defendant employer from proceeding with an investigation and/or disciplinary action against the Plaintiff. The Plaintiff was diagnosed with multiple sclerosis and it was agreed by both parties that she was not fit to work in her role. The Plaintiff was in receipt of a portion of her salary under a PHI type scheme.

24. The Defendant contended that it was a conditional clause of her employment, dependant at all times on insurance being in place to discharge the sum. The Plaintiff contended it was part of her contract of employment. In relation to the employment documents there was a dispute between the parties in relation to certain documents applicability.

25. An issue arose that the Plaintiff was potentially engaged in other work. Ultimately the insurance company notified the employer that it was suspending payments to the Plaintiff and noted that the employer was planning to investigate the matter. The employer sought to carry out a fact-finding investigation to determine whether the Plaintiff had been engaged in any other occupation while an employee of the Defendant in circumstances where she was certified unfit to work and was in receipt of income protection benefit.

26. The Defendant contended that the Plaintiff had no right to continue to receive the benefit once suspended by the insurance company. It also argued that the fact-finding investigation did not prejudice the Plaintiff as at present there was no allegation of misconduct.

27. The Court considered the fundamental principles in interlocutory injunction proceedings. Limited injunctive relief was granted in that pending the trial the Defendant was restrained from making any findings of fact about whether the Plaintiff was engaged in another occupation for profit *"in advance of a full disciplinary hearing, which does not preclude the defendant from gathering evidence and information, including evidence and information from the Plaintiff."*

[10]Unreported judgement of Mr Justice White; [2013] IEHC 621

28. White J. went on to hold:

> *"It would not be appropriate to restrain the defendant from proceeding with an investigation and/or disciplinary action on the grounds of lack of clarity in the contractual relationship, between the plaintiff, the defendant and Aviva. This does not preclude the plaintiff from raising the issue at any disciplinary hearing. The defendant, separate from any issue of indemnity by Aviva, is entitled to conduct an investigation and/or disciplinary hearing into the alleged breaches by the plaintiff of her terms of employment, provided it is carried out in accordance with the injunctive relief granted by the Court and with the safeguards already offered in place. The issue of any continuance of payment by the defendant has not been considered by this Court."*

29. An individual who is not working but in receipt of PHI is afforded no more protection than a colleague who is not in receipt of same in terms of an investigation and disciplinary processes. The usual principles apply. However, this interlocutory injunction also highlights the potential issues an employer may face when an insurance company decides to suspend and/or terminate payments to an employee. While that is undoubtedly the subject of a separate paper it is important to note that this yet another area where the provision of PHI can cause legal difficulties for an employer who pays into such a scheme.

CONCLUSION

30. An employer who pays into a PHI scheme for its employees may not appreciate the myriad of legal problems that the utilisation of such a scheme can raise. If an employer is minded to dismiss an employee who is in receipt of benefits under such a scheme then extreme caution should be exercised. For an employee who is in receipt of such benefits it would appear that the continuation of the employment relationship is no more guaranteed than their colleagues who are fit to work. Indeed, if such an employee is dismissed one would have to query what causes of action are open to them that in anyway compensate them for the loss of the PHI.

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