Dismissing an employee on long term sick leave when in receipt of PHI benefits

It has not been clear when an employer can dismiss an employee on long term sick leave and receiving permanent health insurance benefit (“PHI”). Until now, we had thought that employers could only dismiss such employees for gross misconduct and possibly redundancy. However, the case of *Lloyd v BCQ Ltd* suggests that, where there is a clear contract term which states that the employer can dismiss for ill health, then, despite PHI being in place, it may be possible to dismiss without being liable for damages for ongoing PHI payments. Employers are, nevertheless, advised to exercise extreme caution since getting it wrong will expose them to potentially very large liabilities.

What happened in this case?

In this case, the Claimant (Mr Lloyd) had been on long term sick leave for four years before being dismissed due to ill health. There was no foreseeable prospect that Mr Lloyd would be able to return to work in a reasonable timeframe and he had said to his employer, BCQ, that he wanted “just to remain on PHI”. Relying on the case of *Aspden*¹, Mr Lloyd argued that there was an implied term that he should not have been dismissed while he was receiving PHI, unless the dismissal was for gross misconduct.

Mr Lloyd was informed that his PHI benefit would continue until his 60th birthday, which was imminent and which was when the policy expired. He was paid a lump sum at the end of his notice period to reflect this and therefore though Mr Lloyd argued he had not received all of his benefits under the PHI policy, the Court Appeal disagreed and said that he had suffered no loss.

In relation to whether there was an implied term that Mr Lloyd should not have been dismissed while he was on PHI, unless it was for gross misconduct, the Court of Appeal

¹ *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521
disagreed with Mr Lloyd. It could not imply a term into his contract that prevented his employer from dismissing him when he was on PHI as this would not be consistent with the express terms of his contract. This was because the contract did not give Mr Lloyd an express contractual right to PHI coverage but did:

- expressly state that the employer could terminate Mr Lloyd’s employment on notice if he was incapacitated from work for a specified period
- contain an “entire agreement clause” which made it clear that the written contract contained the entire understanding between the parties

As well as this, the Court of Appeal went even further and suggested that even if there is an implied term in the employment contract that an employer should not dismiss an employee on PHI (except for gross misconduct), it may still be able to do so if it has “reasonable and proper cause” to dismiss. “Reasonable and proper cause” the Court of Appeal has suggested, would include where an employee is on ill health absence and there is no reasonable prospect of them returning to work, as was the case here. There was therefore no suggestion that the dismissal was for the sole purpose of bringing the PHI benefit to an end, which would not have been lawful.

What this decision means for employers
The Aspden case created a dangerous risk for employers of a claim to 65 / 75% of salary until retirement. The Lloyd v BCQ case has now indicated one method by which it may be possible for employers to avoid this risk. However, this is not a panacea and employers should exercise caution before relying on this case, as:

- Future Tribunals may not be so willing to exclude the implied term in Aspden. The fact that Mr Lloyd was near retirement age and had suffered no loss is likely to have swayed the Court of Appeal to BCQ’s interpretation of the contract. So whilst we consider this was the right decision based on its particular facts, we suspect that Tribunals may not be so open to excluding the implied term where, for example, the claimant has a substantial period to run under the PHI policy
- There will be a number of hurdles to overcome before an employer can be confident in dismissing an employee in these circumstances. This will include consideration of whether the dismissal (which will deprive the employee of PHI) may constitute disability discrimination, and whether the employer has established a fair reason and fair process for the dismissal

While the comments suggesting that employers can dismiss with “reasonable and proper cause” even where the implied term does arise are potentially very helpful for employers, these comments are not necessarily binding on future cases of this kind. We will therefore need to wait until there is a case directly on this point. In the meantime, unless there is a clause in an employee’s contract which expressly states that the employer can dismiss for ill health whether or not the employee is deprived of PHI as a result, it will be prudent to seek legal advice before taking precipitate steps to terminate employment

Employers should therefore:

- Check, where they have a PHI benefit, that employment contracts do expressly address the relationship between PHI and the right to terminate. That is to say that they expressly allow for employees to be dismissed due to ill health, irrespective of whether this disentitles the employees from receiving PHI, and that there are no other terms in the contract that are inconsistent with this
Consider, if it is possible, to agree with the PHI insurer that employees in receipt of PHI need not remain on the employer’s books to remain entitled to PHI benefit. Please note that there are a number of other considerations to bear in mind when taking out PHI for the first time or reviewing your policy, which can have a significant impact on your risk profile. Clydes have a £1,000 fixed fee product where we will advise you on all of the relevant issues relating to your provision of PHI. Please contact Nick Dent or your usual contact at Clyde and Co for more details.