EMPLOYMENT TRIBUNALS

Claimant: Mr H Awan

Respondent: ICTS UK Ltd

Heard at: London Central

On: 25, 26 July 2017,
5 Oct 2017 and
17 Nov (in chambers)

Before: Employment Judge H Grewal
Mrs H Bond and Mr D Pugh

Representation

Claimant: Ms N Cunningham, Counsel

Respondent: Mr J Davies, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaint of disability discrimination is not well-founded.

3 The Claimant's application for costs is refused.

REASONS

1 In a clam form presented on 10 March 2015 the Claimant complained of unfair dismissal and disability discrimination.

The Issues

2 It was agreed at the outset of the hearing that the issues that we had to determine were as follows.

Unfair Dismissal

2.1 It was not in dispute that the reason for the dismissal related to the Claimant's incapability to perform the work that he was employed to do.

2.2 Whether the Claimant was contractually entitled to Long Term Disability Benefit ("LTDB") at the time of his dismissal;

2.3 Whether his entitlement to LTDB would be assessed on the "own occupation test" or some other test;

2.4 Whether it was an implied term of his contract that he would not be dismissed for incapability while he was entitled to LTDB;

2.5 Whether in all the circumstances the Respondent acted reasonably or unreasonably in treating the Claimant's incapability as a sufficient reason for dismissing him.

Disability discrimination

2.6 It was not in dispute that the Claimant was disabled at the material time by reason of depression;

2.7 It was not in dispute that the Claimant was treated unfavourably (dismissed) because of his long-term sickness absence, which was something that arose in consequence of his disability;

2.8 Whether the Respondent had shown that dismissal was a proportionate means of achieving a legitimate aim.

The Law

3 The effect of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996") is that the onus is on the employer to establish a potentially fair reason for dismissal and a reason relating to the capability of the employee to perform the job that he was employed to do is a potentially fair reason. Section 98(4) ERA 1996 provides,

> "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

4 The fact that a dismissal is in breach of the contract of employment (for example, because no notice or inadequate notice was given) does not of itself make the dismissal unfair under section 98(1) ERA 1996. It could, however, be a relevant factor in determining whether the dismissal was fair or not – **Treganowan v Robert Knee & Co Ltd [1975] ICR 406** and **BSC Sports & Social Club v Morgan [1987] IRLR 391**.

5 In **Nelson v BBC [1977] IRLR 148,** where it was sought to imply a restriction of location into a contract which contained an unqualified mobility clause, Roskill LJ said at page 151,

> "*… it is a basic principle of contract law that if a contract makes express provision … in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction of the kind that the industrial tribunal sought to do."*

That principle was reiterated in **Reda v Flag Ltd [2002] IRLR 747**. In that case the Privy Council accepted that the contracts contained an implied term that the employer would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. Lord Millet, giving judgment, continued,

> "*But in common with other terms, it must yield to the express provisions of the contract … it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause."*

6 In **United Bank Ltd v Akhtar [1989] IRLR 507** the EAT held that there was a distinction between implying a term which negatives a provision which is expressly stated in the contract and implying a term which controls the exercise of a discretion which is expressly conferred in a contract. The former was clearly impermissible but the latter was not because there might well be circumstances where discretions were conferred but they were not unfettered discretions, which could be exercised in a capricious way.

7 In **Apsden v Webbs Poultry and Meat Group (Holdings) Ltd [1996] IRLR 521** Sedley J in the High Court held that there was an implied term in the contract of employment that the provisions for dismissal in the contract would not be operated so as to remove the employee's accruing or accrued entitlement to income replacement insurance unless there was a fundamental breach of the contract by the employee (i.e. gross misconduct). There were express provisions in the contract which entitled the employer to terminate the contract by giving notice (clause 12B) or if the employee's sickness absence or inability to discharge his duties exceeded a certain specified period (clause 11(c)). Sedley J recognised that there was a conundrum because implying that term would be to turn clause 11(c) into its opposite, forbidding,

where at present it permitted, the employer to terminate by reason of prolonged incapacity alone, and correspondingly limiting the operation of clause 12(B). However, he concluded that on the facts of that case such a term could be implied. The facts upon which he relied to reach that conclusion were that (a) the written contract that had been used had not been drafted with the income insurance in mind and its aptness in light of the scheme had not been considered or negotiated; (b) there were internal inconsistencies in the contact in the provisions for sick pay and termination; and (c) Both parties had known when they entered into the contract that there was an income insurance scheme which could only work if the employees whom it covered were remained in employment for the duration of their incapacity or until some other terminating event specified in the policy took place and it had been the unambiguous mutual intention of the parties that this should be so.

8 There have since then been a number of breach of contract claims which have relied, inter alia, upon the breach of the term implied in **Apsden**. In **Brompton v AOC International Ltd [1997] IRLR 639** the Court of Appeal did not have to decide the issue of whether there was an implied term that the employer would not, after the employee became entitled to receive benefit under the terms of a permanent health insurance, terminate the contract or otherwise cause the employee to cease to be a member of the scheme because the employee succeeded on other grounds. Having referred to the need not to decide that issue, Staughton LJ said obiter

> "*There is much to be said for such a term, which has the support of Sedley J in Apsden v Webbs Poultry & Meat Group (Holdings) Ltd …"*

9 In **Hill v General Accident Fire and Life Assurance Corporation plc [1998] IRLR 641** the issue was whether the dismissal of the employee by reason of redundancy was, having regard to his then status of as a person absent from work and in receipt of a sick pay benefit, a breach of his contract of employment. The Court of Session held that it was not. Lord Hamilton said that the employer's power to dismiss was subject to limitation which he defined as follows,

> "*Where 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 a payment,* (my emphasis) *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."*

The employee had claimed that there was an implied term that an employee in such a situation could only be dismissed for gross misconduct and had relied on **Apsden** to argue for the existence of such a term. Lord Hamilton's view was that **Apsden** turned largely on its own facts. He said,

> "*In so far as Sedley J's conclusion is to be understood as laying down as a general proposition that gross misconduct is the only circumstance in which the employer could lawfully dismiss an employee in receipt of sick pay and with the prospect of permanent sickness provision, I must respectfully disagree."*

10 In **Villella v MFI Furniture Centres Ltd [1999] IRLR 468** the employee's breach of contact claim succeeded on his primary argument (and would have succeeded on his first alternative argument) and it was not, therefore, strictly necessary for the High Court to deal with his second alternative argument. That argument was that termination of the employment was a breach of an implied term that the employer would not terminate his contract save for cause other than ill health in circumstances where termination would deprive him of the continuing entitlement to long-term disability benefit. Judge Green QC stated that he agreed with what Lord Hamilton had said in **Hill** and that he would have found that the dismissal had been a breach of that implied term.

11 In **Earl v Cantor Fitzgerald International [16 May 2000]** the employer conceded that the dismissal of an employee for his continuing inability to return to work due to sickness in circumstances where he was entitled to receive benefits under a permanent health insurance scheme was a breach of contract. Moore-Bick J said, at paragraph 41,

> "*… since the only ground upon which his contract was terminated was his continuing inability to return to work due to sickness, Mr. Foskett accepted that that constituted a breach of contract on the part of Cantor Fitzgerald and I think he was right to do so. There is a growing body of authority to the effect that when an employee's contract of employment incorporates a permanent health scheme the employer will not dismiss him simply on the grounds of his continuing incapacity to work."*

The "growing body of authority" referred to was **Apsden, Brompton, Hill,** and **Villella**.

12 In **Briscoe v Lubrizol Ltd [2002] IRLR 607** Ward LJ agreed with the two passages quoted from Lord Hamilton's judgment in **Hill** (at paragraph 9 above) and went on to say,

> "*To limit dismissal to gross misconduct is to circumscribe the right to dismissal too narrowly. I do not believe Sedley J had that in mind.*
> *…*
> *In my judgment, the principle to emerge from those cases* (**Apsden** and **Hill**) *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."*

13 In **Reda** (see paragraph 5 above) Lord Millett in the Privy Council said, at paragraph 51, that in **Apsden**,

> "*The question was whether the employer's express right of dismissal could be limited by implication arising from the unusual circumstances in which the contract had been entered into and the inherently contradictory terms which resulted. The better course might have been to rectify the contract to include the term contended for as an express term, an unusual course but one which would appear to have been justified by the evidence. But even if the case is taken as a rare example of a term being implied into a contract to qualify an express right, the justification for this course lay in the need to reconcile*

express terms of the contract which were mutually inconsistent."

14 In **Lloyd v BCQ Ltd [12 November 2012]** Silber J in the EAT held that on the facts of that case (where the contract of employment did not refer to his right or entitlement to PHI cover and there was a clause in the contract that it contained the entire understanding between the parties and superseded all previous agreements and arrangements relating to his employment) there could not be implied into the contract a term that the employer would not (save on the grounds of the employee's misconduct) terminate the employment where the effect of it would be to deprive him of sickness benefits under the PHI policy which he was receiving. The EAT also held that such a term could not be implied because it was at variance with an express term in the employee's contract which permitted the employer to terminate the employment after 26 weeks' sickness absence by giving notice in accordance with that clause. Silber J said obiter, at paragraph 58,

> "*We should add that even if there was to be an implied term of the kind contended for by the claimant, then our provisional view was that it would be subject to the exception suggested by Ward LJ in Briscoe v Lubrizol Ltd … which was that any similar term would only be implied where the dismissal was "without reasonable and proper cause.". In this case, the dismissal was for good cause because of the claimant's absence from work and the absence of any prospect of his return…"*

He stressed that those were provisional views as they had not heard any submissions on the point.

15 **ICTS(UK) Ltd v Visram (EAT/0344/15)** was a case involving the Respondent in the case before us and an employee, whose circumstances were very similar to those of the Claimant in this case. An employment tribunal had held in that case that the claimant's dismissal was unfair and disability discrimination under section 15 of the Equality Act 2010.The Respondent's appeal against the finding of unfair dismissal was based on two grounds – (i) the tribunal had erred in concluding that because the dismissal was in breach of contract it was unfair and (ii) it had erred in concluding that that there was an implied term that the Respondent could not dismiss the Claimant for medical incapacity. The argument in support of the latter ground was not that such a term could not have been implied because it contradicted an express term but that the correct term to imply was that an employer would not dismiss an employee in receipt of long term disability benefit without reasonable and proper cause (and that a dismissal for ill health absence and an inability to return was a reasonable and proper cause) or that that the term implied should be that the employer could not dismiss the employee for the purpose of avoiding the payment of the benefit.

16 In respect of the first ground, the EAT (HHJ Eady) held that the tribunal had not allowed its conclusion on the breach of contract to dictate its conclusion on the unfair dismissal. It accepted that the fact that there was a breach of contract did not mean that the dismissal had been unfair. It was, however, a relevant factor and one that the tribunal as entitled to take into account when assessing whether the dismissal fell within the band of reasonable response. In that case the tribunal had concluded that the dismissal was unfair because it had been in reach of the contract and the employer had not conducted a reasonable investigation. In respect of the second ground (i.e. the nature of the term to be implied) HHJ Eady said that she was bound

by the approach laid down in **Aspden.**

17 The legal principles that we draw from the above authorities are as follows. Generally, one cannot imply a term in a contract that contradicts the provision of an express term. There is no general principle that in every case where an employee is entitled to payments under a permanent health insurance there will be implied into the contract a term that he cannot be dismissed for medical incapacity while he is in receipt of such benefits. **Aspden** is not authority for such a principle. Whether such a term can be implied will depend of the facts of each case, including what the express terms are and the circumstances in which they were entered into.

18 Section 15(1) of the Equality Act 2010 provides,

> " *A person (A) discriminates against a disabled person (B) if –*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

19 In **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704** the Supreme Court considered, in the context of an indirect discrimination claim, what is required to establish that a particular measure is a proportionate means of achieving a legitimate aim. Baroness Hale, with whom the other Justices of the Supreme Court agreed, said at paragraphs 22-25,

> "*To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question… A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate… Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer… To some extent the answer depends upon whether there were non-discriminatory alternatives available."*

The Evidence

20 The Claimant gave evidence in support of his case. The following witnesses gave evidence on behalf of the Respondent – Paul Hunter (Head of Legal and Corporate Services), Faye Davidson (HR Manager) and Hilary Curtis (Standards and Compliance Officer). We also had before us an agreed bundle running into 567 pages. Having considered all the oral and documentary evidence, the Tribunal makes the following findings of fact.

Findings of Fact

21 The Claimant commenced employment with American Airlines as a Security Agent at Heathrow Airport on 11 April 1992. Neither party had been able to retrieve the Claimant's contract of employment but it was agreed that the terms of his contract were identical to those of the contract of Mr Visram.

22 The contract of employment contained the following terms –

"5. Absence through Sickness/Injury

…

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"*

"6. Pension

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."

"11. Notice

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 employee with twelve (12) or more years continuous service. Notice to terminate employment may be given from any date."

23 The booklet on the Retirement, Death and Disability Plans ("the booklet") stated that there were two plans – the Pension and Life Assurance Plan and the Long Term Disability Plan. The former was set up under a Trust Deed and was administered by Trustees appointed by the Company. The Long Term Disability benefits were provided by an Insurance Policy. It stated that all employees of the Company under the age of 65 were covered for the lump sum life assurance (the payment of a lump

sum of twice the base annual salary if the employee died while in service) and long term disability benefits from the date of their hire.

In respect of 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 than the State Invalidity Pension.*
>
> *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.*
>
> *The disability income is treated as normal pay and is subject to the necessary P.A.Y.E. 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 U.K. Pension Plan, and your own and the Company's contributions will be based on your disability income."*

24 On 1 June 2005 the Claimant was promoted to the position of International Security Co-Ordinator ("ISC"). There always had to be one ISC on every shift and he had overall responsibility for security on that shift. In addition, he was also responsible for conducting audits and appraisals.

25 American Airlines had a Group Income Protection policy with Legal &General ("L&G") for the provision of the long term disability benefits to its employees. The policy provided that the Insured Member would be entitled to benefit under the policy only so long as he was "*a Disabled Member"* as defined by Appendix A to the policy. Appendix A provided,

> "*Disabled Member" means an Insured Member who at any time,*
> *(i) In the opinion of Legal & General, 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",*

The policy also provided that the 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.

26 In about July 2012 American Airlines was engaged in discussions with Unite to reach agreement about how it could implement employee cost savings of 17%. At the same time it was considering the outsourcing of some of its functions at London Heathrow. On 23 July 2012 Tanya Watkins (UK HR Manager) sent a letter to all employees about these two matters. In that letter she said,

> "*Should a decision be taken to outsource any one of our LHR departments, we can assure employees in that department they will not be affected by any of the internal changes you are being asked to ballot on. Their current terms and conditions of employment would transfer to the new employer in line with the TUPE (transfer of undertaking) regulations."*

27 At some date, it would appear in August 2012, Unite sent informed its members of what they had achieved in the Cost Savings and Pay negotiations, and advised their members to accept the agreement. In terms of Permanent Health Insurance, it said that it had been saved with minor adjustments to the policy. It then referred to the potential outsource and said,

> "*If this Agreement is accepted by the majority of the Unite Members at American Airlines and your Department, or sections of Departments are Outsourced, Employee will be offered a TUPE transfer on their Present AA Terms and Conditions, and all the above reductions and Fees will not apply to those Employees."*

28 The draft Cost Savings Agreement said that all the changes set out in that agreement would be effective from 1 September 2012 unless otherwise specified. In respect of PHI it stated,

> "*- Protect the benefit and the level of payment*
> *Redesign the terms of the Policy."*

29 On 28 August 2012 the Managing Director of LHR informed the employees that it intended to outsource the Security Department to the Respondent. They were told that their employment would transfer under the TUPE Regulations and that, therefore, their existing terms and conditions of employment and continuity of employment would remain protected by the Regulations.

30 There was communication between American Airlines and the Respondent about changes that were to be made to the payment for a car park pass at London Heathrow as a result of the Cost Savings Agreement. American Airlines did not supply a copy of the Agreement but its response was that part of its agreement with Unite was that staff who were transferred under TUPE would not be affected by the new agreement and that, in any event, the car park contributions by the employees were only due to come into force in January 2013, after the transfer.

31 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. At that time there were four ISCs (including the Claimant) working at Heathrow. There were four Lead Security Agents and about one hundred Security Agents. A number of the Lead Security Agents had been trained to acts up as ISCs.

32 On 8 November 2012 L&G sent American Airlines the changes to the Group Income Protection policy. An endorsement was added to the Group Income Policy which provided that with effect from 1 September 2012 the definition of "Disability" in Appendix A would be changed. The original "own occupation" would apply for 24 months after the Benefit Accrual Date. After that it would be changed to someone who in the opinion of L&G was incapacitated by illness or injury so that he was unable to undertake any occupation which L&G considered to be appropriate to his experience, training or education. An occupation would not be considered inappropriate because the remuneration was lower than what was paid to the member before the deferred period or because it lacked the status or seniority of the member's own occupation. That definition would cease to apply 48 months after the Benefit Accrual Date and the member would have to meet more stringent specified criteria of incapacity to classify as "disabled" after that.

33 On 9 November 2012 Tanya Watkins queried the rate it was paying for the Group Income Policy and the basis on which it had been calculated. Glen Laming from L&G replied on 18 December that the rate had been calculated on the basis that the new progressive definition of disability applied to all categories of employees. However, he could not find anything in writing to confirm that that was what had been agreed. He offered American Airlines three options. They could revert to the "own occupation" definition for all categories, apply the progressive definition to all categories or implement the progressive definition for non-managerial categories only. If AA felt that the third option was what they had wanted, he would maintain the same rate until the next review. Ms Watkins confirmed on the same date that they would go with the third option. The Claimant fell into the non-managerial category.

34 On 1 December 2012 the employment of eighteen Lead Security Agents/International Security Co-Ordinators (including the Claimant) transferred to the Respondent under the Transfer of Undertakings (Protection of Employment etc) Regulations 2006.

35 The Respondent entered into discussion with L&G to see whether L&G would transfer the existing cover to it or provide it with new cover, but these discussions provide fruitless. The Respondent, therefore, attempted to find cover from other insurance companies.

36 The Respondent's view was that those who were sick prior to the date of the transfer would be covered by the L&G policy. On 10 December 2012 Paul Hunter wrote to American Airlines in respect of the Claimant and Mr Visram, both of whom were on sick leave at the time of the transfer. He said that they might be eligible in due course for the payment of benefits under the Airline's policy with L&G and that in the event of that happening the Respondent would acts as paying agent for L&G and would receive the payments from L&G and pay them to the employees concerned.

37 By 20 December 2016 the Respondent had set up a policy with Canada Life to cover payment of the long term disability benefit. The policy was backdated to 1 December 2012. However, Canada Life would not cover any employee who was sick on 1 December unless the employee returned to work and completed seven

consecutive days' service.

38 On 10 December Hilary Curtis conducted a welfare meeting with the Claimant. He said that he had not suffered from depression before, he was on medication for depression and that he was in "*a very fragile state."*

39 On 6 February 2013 the Claimant's doctor provided a medical report which set out the seven occasions on which he had consulted a doctor between September 2012 and 10 January 2013 for his depression. His medication had been increased on 18 December and on 10 January he had been given a further medical certificate that he was unfit to work. In response to questions from the Respondent, the doctor said that there had not been any referrals to a specialist and that it was very likely that he would be able to return at some point although he could not say at that stage when that would be.

40 On 25 March 2013 Matt Allan from L&G informed American Airlines that the information which he had given them earlier that L&G would transfer payments to the Respondent when employees who had been sick at the time of the transfer had completed their deferred period was incorrect. He said that as those employees had left American Airlines before the end of the deferred period, L&G would not make any payments in respect of them. That meant that L&G would not make any payments under the policy to the Claimant and Mr Visram. They would, however, continue to pay for the CBT that they were receiving through L&G until it had concluded.

41 On the same day Mr Allan also informed the Respondent of the position. He said that under the terms of the policy L&G could not consider the claims of three employees who had transferred to the Respondent as they had not been employed by American Airlines at the end of the deferred period. However, they were prepared to make an exception for one of the employees due to the severity of his condition and would make payments to the Respondent in respect of him. As far as the Claimant and Mr Visram were concerned no payments would be made and the Respondent would need to make separate arrangements to ensure that cover was continued.

42 Mr Hunter inquired again of Canada Life whether they would cover those two employees and they confirmed that they would not. Mr Hunter also asked for and was provided with the relevant terms of the policy on which L&G relied to claim that they were not obliged to make any payments in respect of those employees.

43 The Claimant became entitled to be paid long term disability benefit under his contract from the middle of April 2013. On 29 April Ms Davidson wrote to him that he did not qualify for cover under the policy that the Respondent had taken out and that L&G had advised them that it was not obliged to pay him as he was not employed by American Airlines at the end of the deferred period. As he was not entitled to be paid under either of the schemes he would not be receiving any benefit.

44 The Claimant responded that he was surprised by that as L&G had authorised and paid for twelve CBT sessions that had commenced in January 2013. He said that from a legal perspective, due to the TUPE transfer, his contractual terms and conditions had been breached. He asked her to look into it as a matter of urgency as his pay had ceased as of 15 April 2013.

45 Ms Curtis had a further welfare meeting with the Claimant on 15 May 2013. The Claimant was accompanied by his trade union representative. He had produced medical certificates that he was unfit to work at monthly intervals and the last one was due to expire on 18 May. The Claimant said that had completed twelve sessions of CBT and that further counselling had been recommended. He was still on medication. He said that his sick pay had run out and he had not received anything from the Respondent. He had tried to contact L&G but they were not prepared to speak to him. His trade union representative said there appeared to be no PHI in place and that it was a contractual term which had transferred over under TUPE. Ms Curtis agreed to inform HR of the matters raised by them.

46 On 29 May 2013 Ms Davidson responded to the claimant's letter to her. She reiterated that due to terms of the PHI policies the Claimant was ineligible for payment under either policy. She said that the Respondent did not agree that by failing to pay him long term disability benefit it was in breach of his contract. The Respondent's obligation under TUPE legislation was to provide a comparable scheme to transferring staff, which it had done. She recommended that he addressed matters directly with L&G. By this stage the Respondent had taken legal advice. It believed that the Claimant's entitlement to payments under the policy with L&G had come to an end and that its duty under the TUPE legislation was as set in Ms Davidson's letter.

47 On 26 June 2013 the Claimant raised a formal grievance about breach of the TUPE Regulations 2006 and unlawful deductions from wages. He said that under his contract of employment with American Airlines he was entitled to a disability payment amounting to two-thirds of his salary after 26 weeks' sickness absence. The fact that he might no longer be covered by the L&G policy or that he did not qualify under a new policy was irrelevant. His contract was clear that after 26 weeks he was entitled to the payment. If the insurers were not willing to pay him that amount, then it fell upon the Respondent to do so.

48 The Respondent and the Claimant's trade union representative agreed that the grievance would not be pursued while the Respondent tried to resolve the issue with L&G via American Airlines. In August 2013 Tanya Watkins of American Airlines entered into communications with L&G about their failure to pay the long-term disability benefits to the Claimant and Mr Visram. She questioned their rationale for claiming that they were not liable to pay it and sought to argue that there was a difference between an employee leaving an employer and a TUPE transfer. She also pointed out that as most insurers would not provide cover for someone who was already on sickness absence that put the transferee in a very difficult position. L&G, however, maintained that the terms of its policy were clear that benefit was only payable in respect of an employee if that employee was employed at the end of the deferred period by the company which had the policy with them.

49 In the meantime the Respondent sough information from L&G about the benefits payable and offered to make the payments to the Claimant and Mr Visram on a "goodwill basis" until the issue was resolved.

50 On 6 September 2013 Tanya Watkins made a formal complaint to L&G. One of her grounds of complaint was as follows –

> "*The original advice and the error made by L&G led us to take a course of*

action we would not have taken had we been aware of L&G position prior to the transfer date. Had we been aware of L&G's position, we could have passed this information to the incoming employer (ICTS), who could have then used the pre transfer consultation period to consider introducing "measures" to remove or change the terms of the contractual benefit."

51 On 9 September Mr Hunter informed the Claimant of the formal complaint that had been lodged with L&G.

52 L&G responded to the formal complaint on 12 September 2013. They said that their view remained that under the terms of the policy there was no entitlement to any benefit. However, they had been asked to consider their stance in in light of the fact that they had originally informed AA that benefit payments would be made. They agreed that incorrect information had been supplied at the outset. In view of that they were prepared to provide a level of support as a goodwill gesture. They agreed to pay the benefit backdated to when the employees would have been paid it if they had remained employees of American Airlines (which, in the case of the Claimant, was 14 April 2013). They also agreed to restore the full assessment and rehabilitation services and to work with the employees to find, if appropriate, a return to work plan. They would provide the service and benefit payments until the end of September 2014 or until such time as the member ceased to meet the definition of disability, whichever was the sooner.

53 Mr Hunter informed the Claimant of this decision on 26 September 2013 but he did not tell him that L&G had agreed to pay the benefit only until the end of September 2014.

54 The Claimant was seen by the Respondent's Occupational Health doctor on 2 January 2014. In his report of the same date he said that it was concerning that the Claimant's clinical scenario had not improved considerably given the length of time that had passed since his diagnosis. He had asked him to see his GP so that his treatment could be reviewed. He thought that his antidepressant medication might need to increased or altered and that consideration should be given to a psychiatric referral. He advised that the Claimant was not fit to return to work at that stage and said that he would review him in 8-12 weeks' time.

55 Ms Curtis had another welfare meeting with the Claimant on 15 January 2014. The Claimant had not been back to see his GP as recommended by the Occupational Health doctor. By this stage the Claimant appeared to be aware that the payment of the benefit might stop in September 2014. He said that it had been stopped, then started again and he did not know what would happen in September.

56On 11 February 2014 Ms Curtis informed the Claimant that L&G had referred him to CBT Services to undertake a psychiatric assessment and that they would contact him to arrange an appointment. She had also arranged a follow up appointment with Occupational Health to take place on 4 March 2014.

57 The psychiatric assessment was carried out by Dr Rowlands, Consultant Psychiatrist, at the Priory Hospital on 24 February 2014. His opinion was that the Claimant was suffering from Mixed Anxiety and Depression. He had had a very good work ethic and felt undermined and let down by the transfer of his contract in December 2012. He felt that he had not dealt emotionally very well with what had

happened to him and that he remained angry and resentful and that was associated with low mood and high levels of anxiety with some phobic avoidance of everyday activities. He recommended increasing the dosage of his anti-depressant medication if the current dose did not improve his mood in the next 2-3 weeks, medication to reduce his anxiety, day care at the Priory Hospital and schema therapy and a graded return to work but not to his usual job. His opinion was that the prognosis was excellent with the treatment that he had advised and that it would lead to full recovery.

58 The Occupational Health doctor reviewed the Claimant on 4 March 2014. He noted that although there was no evidence of unstable mental health issue the Claimant was still anxious and tearful recounting his current position. The doctor's view was that he was not ready to return to work at that stage. He said that he would like to see the Claimant again after he had started the treatment recommended by Dr Rowlands. He highlighted that redeployment to an alternative role might need to be considered if the stresses and strains of the Claimant's substantive role proved to be too much for him in the long term.

59 He reviewed the Claimant again on 22 April 2014. He asked the Claimant to see his GP as soon as possible to get his medication changed as recommended by Dr Rowlands. He also asked that the day care and schema therapy be expedited with L&G's approval as soon as possible. He noted that the Claimant was keen to return to work in an alternative capacity. He said that once the treatment had been completed he would be in a position to discuss a phased return to work in an alternative capacity.

60 On 21 May 2014 the Claimant was invited to a meeting to discuss the medical reports and his continuing absence due to ill health. The letter that he was sent was a standard letter and contained the following paragraphs,

> "*At the meeting, we will be considering your future employment with the Company, whether we can offer any further assistance or support or whether we can make any reasonable adjustments to your job/workstation to enable you to return to work.*
>
> *We would advise you that your continued absence from work is casing the Company operational difficulties and if we are unable to do anything to assist in your return to work, we may consider terminating your employment."*

61 Those paragraphs were contained in all subsequent letters inviting the Claimant to meetings to discuss his absence, including the final letter that led to his dismissal.

62 The meeting eventually took place on 17 June 2014. It was conducted by Hilary Curtis. The Claimant was accompanied by his trade union representative. The Claimant said that he could not make any decision about whether he could return to work until he had had the treatment recommended by Dr Rowlands. By this stage the Claimant had discussed his medication with the GP. He did not want to increase his anti-depressant medication and agreed to try the anxiety medication on 16 June 2014. He said that at that stage he felt anxious just coming to the airport.

63 The Occupational Health doctor reviewed the Claimant on 10 July 2014. The Claimant told him that he had not taken the medication for anxiety for fear of side

effects. The doctor noted that the schema therapy had been difficult to arrange but his view was that even if it had been available it would not guarantee that the Claimant would be able to return to work for the company. The doctor's opinion was that as the Claimant had been off sick since October 2012 without any real improvement in his mental health he could not be certain that the Claimant would return to work for the Respondent in any capacity.

64 Faye Davidson met with the Claimant on 18 September 2014 to discuss his absence and the possibility of return to work. She advised the Claimant that day sessions at the Priory were not covered under the insurance and, therefore, L&G would not provide them. She asked the Claimant whether he had discussed with his GP what Dr Rowlands had recommended and the Claimant said that he had not because he had not known that L&G would not provide it. The Claimant said that his condition had not changed since he saw the Occupational Health doctor on 10 July. He said that the anxiety medication had been prescribed by his doctor but then another GP had told him not to take it. That is not supported by the Claimant's GP notes. The GP in question had simply recorded that the Claimant was not taking Pregabalin (the anxiety medication). The Claimant and his representative said that they had been led to believe that L&G would provide the day sessions (including the schema therapy) and they were now being told for the first time that it would not be provided. Ms Davidson said that she would look into that and arranged to meet again on 30 September.

65 On 25 September Ms Davidson wrote to the Claimant. She said that she had spoken to Hilary Curtis who had told her that at no stage had she confirmed that L&G or the Respondent would be funding any additional treatment to which the Claimant had no contractual entitlement. She said that she had considered whether the Respondent should agree to fund any additional treatment to which the Claimant had no contractual entitlement and had decided not to as the medial information available offered no guarantee of any success if she did.

66 The meeting arranged for 30 September did not take place on that date.

67 On 6 October 2014 Mr Hunter wrote to the Claimant that that the reinstatement of the long term disability benefit by L&G had been limited to the end of September 2014. He said that they were pursuing the matter with L&G 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 any admission of liability, make equivalent monthly payments to him until the situation was clarified.

68 The L&G benefit payable to the Claimant was £1436.10 per month gross. Tax and employee National Insurance contributions were deducted from that. The Respondent paid employer NI contribution and pension contributions. While he was an employee the Claimant remained entitled to death in service benefits.

69 On 24 October 2014 the Claimant was invited to a further meeting to consider his future employment with the Respondent. He was warned that the meeting might lead to the termination of his employment and was advised of his right to be accompanied.

70 The meeting took place on 5 November 2014. Ms Davidson 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 L&G or the Respondent. Ms Davidson reiterated that neither L&G nor the company was contractually obliged to provide that treatment. She asked the Claimant whether they could do anything else 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 had further treatment.

71 On 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 that the Claimant take certain medication for Anxiety. The Claimant had been prescribed the medication but had not taken it. He had been told that the Respondent and L&G would not fund the Schema Therapy but he 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 conclusion to terminate his employment on the grounds of medical capability.

72 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. 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.

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

74 On 1 December 2014 the Claimant appealed against his dismissal on the grounds that the Respondent had not provided him with treatment which had been recommended and had not offered him alternative work.

75 The appeal was heard by Paul Hunter on 20 January 2015. The Claimant said that he could not at that stage return to work in any capacity due to his anxiety. He felt that he had done all that he could to get well enough to return to work.

76 Mr Hunter sent the Claimant his decision on 2 February 2015. The appeal was not upheld.

77 The Respondent continued making monthly payments equivalent to the long term disability benefit to the Claimant until 12 June 2017.

Conclusions

Unfair Dismissal

78 As set out in paragraph 2.1 (above) it was not in dispute that the reason for the dismissal was the Claimant's incapability to perform the work that he was employed to do. That is a potentially fair reason for dismissal. The sole issue for us to consider under section 98 of the Employment Rights Act 1996 was whether the Respondent had acted reasonably in all the circumstances of this case in treating that as a sufficient reason for dismissing the Claimant.

79 We did not have before us a breach of contract claim. However, one of the factors that would be relevant in determining whether the Respondent had acted reasonably would be whether it had acted in breach of the contract of employment by dismissing the Claimant. That factor in itself would not be determinative of the issue but it would be a relevant factor to take into account. Hence, we considered what the express terms of the contract of employment were and whether there was an implied term to the effect set out in paragraph 2.4 (above)

80 The Claimant's contract of employment contained the following three express terms:

(a) If he was unable to work because of illness or injury he would be paid his basic salary for a period of time which would be determined according to his length of service. The maximum period for which he would be paid that was six months and he would be paid that it he had more than three years' service (clause 5);

(b) If he was unable to work because of illness or injury for more than six months (26 weeks) he would be paid two-thirds his basic salary less any disability benefits he received from the state. These would continue until he returned to work, retired or died (clause 6).

(c) His employer could terminate his contract at any time by giving him a certain amount of notice. The notice to which was entitled depended upon the length of his service (clause 11).

81 It was not in dispute before us that the benefits payable under clauses 5 and 6 were only payable while the Claimant was employed by the Respondent and that his entitlement to them ceased when the employment terminated. It was also clear that clause 11 gave the Respondent an unrestricted express power to dismiss the Claimant whenever it chose without cause.

82 Those three express terms are clear and unambiguous and are not inherently inconsistent or contradictory. What they say is that that the Claimant is entitled to certain benefits while he is employed and that the Respondent has the right to terminate his employment at any time without cause notwithstanding that the effect of that will be to deprive him of the benefits to which he is only entitled while employed. That is clearly what the parties understood and agreed at the time when they signed the contract.

83 If what the parties had meant and intended to say was that the Respondent could

terminate the Claimant's contract at any time except for incapacity to work at a time when he was in receipt of sick pay or the long-term disability benefit, they would have ensured that that was what clause 11 said.

84 In circumstances where the provisions of the contract and are clear and unambiguous and consistent, there is no need to imply any term to give business efficacy to the contract.

85 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 expressly conferred upon by the Respondent by clause 11. It would be contrary to the basic principles of contract law to imply a term that contradicted and restricted a clear and ambiguous express term of the contract. An implied term cannot overrule an express term that give the employer a right to dismiss the employee without cause.

86 We, therefore, concluded that there was no implied term in the Claimant's contact that he would not be dismissed for incapability while entitled to long term disability benefit. We recognise that that is different to the conclusion which the Tribunal reached in the case of Visram and that the EAT rejected the Respondent's appeal in that case on the ground that the Tribunal had been wrong to imply such a term. The Tribunal in that case, however, did not address the issue (presumably because the point was not raised before it) that the term which the Claimant was arguing was an implied term contradicted and restricted an express term of the contract. Nor was the matter argued before the EAT on that basis. The argument in the EAT was about what the implied term should be, not whether any term which restricted the express power of the employer to dismiss without cause could be implied. There was again no analysis of the express terms in this case and whether the implied term contended for by the Claimant was seeking to overrule those express terms. Had the Employment Tribunal and the EAT in that case engaged in that exercise it might have come to a different conclusion.

87 We note in passing some of the difficulties and anomalies that might be caused by the implied term suggested by the Claimant. If the rationale for the term is correct, it would apply equally to contractual sick pay and the effect of it would be that an employee could not be dismissed for incapacity while entitled to contractual sick pay because dismissal would deprive him of that benefit. Would the prohibition on termination contended for by the Claimant apply only when he was being paid long term disability benefit or from the time when it became known that he might be entitled to it? If it was the former, there would be no breach of contract if the employee was dismissed in the first six months of his sickness absence and an employer could deprive the employee of the benefit by dismissing him earlier. If the latter, it would mean that no employee who could become entitled to long term disability benefit could ever be dismissed for incapacity. If an employee became unable to work because of illness or injury when he was 30 or 40 years old, and remained unable to return to work for the rest of his life, would the employer have to keep him on as an employee for the next 20-40 years? Would that apply even if the employee had only worked for the Respondent for only two years? It is not, as is often believed, just a case of keeping the employee on the books but can have other operational and financial consequences' as it did in this case (see paragraph 89 below). If the Tribunal were to find that an employer dismissed an employee just

before or as soon as he became entitled to a benefit solely to avoid paying him that benefit, it would always be open to the Tribunal to conclude that the dismissal as unfair.

88 In considering whether the Respondent in this case acted reasonably in dismissing the Claimant for incapacity on 28 November 2014 we took into account the following matters. By the time the Respondent dismissed the Claimant he had been absent sick for over two years. During that period the Respondent had (either directly or through L&G) obtained a number of reports from the Claimant's GP, had referred him to the Occupational Health Service and sought its advice on four occasions, had referred him to a Consultant Psychiatrist, had provided him with twelve sessions of CBT and had met with him on six occasions with his trade union representative to discuss what adjustments they could make to facilitate his return to work. Throughout this period the Claimant had been on medication. As there had been no improvement in his condition, certain changes were recommended to his medication. The Claimant was not prepared to follow those recommendations. At the time of the Claimant's dismissal there had been no improvement in his condition and there was no indication that he would be able to return to work in the foreseeable future in any role, let alone his role.

89 We accepted that the continued employment of the Claimant would cause operational difficulties. While the Claimant was absent sick and there remained the possibility that he could at any stage return to work, the Respondent could not recruit a permanent replacement for him. Recruiting a temporary cover was not viable because of the training and security vetting that it involved. The only option was for his existing colleagues to cover his duties. Whilst the Claimant remained an employee the Respondent had a duty to monitor his sickness absence, maintain contact with him, seek medical advice and take whatever steps it could to facilitate his return to work. Managing his sickness absence would require time and resources. The Claimant's pay would have to be processed through Payroll. There were other consequences too. While he remained an employee the Respondent had to pay National Insurance contributions for the Claimant, under his contract he remained a member of the pension plan and the Respondent had to pay the employer's contribution to the pension, he continued to accrue service for pension purposes and the Respondent was required under the contract to pay a lump sum death benefit if he died while still an employee.

90 It was submitted in behalf of the Claimant that, regardless of any other reason, the dismissal was unfair because the Respondent had not investigated the Claimant's entitlement to the long term disability benefit and had regarded it as irrelevant. We do not accept that the Respondent did not investigate the Claimant's entitlement to the benefit. At the time of the transfer and until shortly before the Claimant became entitled to the benefit L&G had informed both American Airlines and the Respondent that it would pay the benefit to the Claimant and Mr Visram as and when they became entitled to it. On 23 March 2013 L&G informed the Respondent that that information had been incorrect. The Respondent then obtained the relevant policy documents from L&G so that it could consider them further. It made further inquiries of Canada Life. It sought legal advice and on the basis of that it believed that L&G was not legally obliged to make the payments and that its duty under the TUPE legislation was to provide a comparable scheme to transferring employees which it had done. The Respondent then tried to resolve the matter with L&G via America Airlines and achieved a temporary solution.

91 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.

92 Having taken into account all the above matters, we concluded that that the Respondent acted reasonably in all the circumstances in dismissing the Claimant for incapability and that the dismissal was fair.

Disability Discrimination

93 It was not in dispute that by dismissing the Claimant because of incapability the Respondent treated him unfavourably because of something arising in consequence of his disability. The sole issue for us was whether the Respondent had shown that dismissal of the Claimant was a proportionate means of achieving a legitimate aim.

94 The Respondent argued that the aim that it was pursuing was to ensure that employees attended work and did the job that they were employed to do. We accept that that was a legitimate aim. The real issue for us was whether dismissal of the Claimant in the circumstances of this case was a proportionate means of achieving that legitimate aim.

95 On the one hand the Claimant's inability to attend was due to his disability and he had a contractual right to a long term disability benefit which his dismissal would extinguish. On the other hand, by the time that he was dismissed, he had been absent sick for over two years, there had been no improvement in his condition, there was no indication that he could return to work with some adjustments, and his continuing absence was causing and would continue to cause operational difficulties for the Respondent. 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.

96 We were also asked to determine whether the Claimant's entitlement to long term disability benefit was on the "own occupation test" or some other test. That issue relates to remedy and liability and as we have not found the Claimant's claims to be well-founded it is not strictly necessary for us to determine it. However, in case we are wrong in the conclusions that we have reached, we set out briefly what our conclusion on that issue would have been. We would have concluded that his entitlement to it was on the "own occupation" test for two reasons. Firstly, both American Airlines and Unite made it clear to the employees that any changes being made by the costs savings agreement would not apply to those whose employment was about to be transferred under a TUPE transfer. Secondly, there was some uncertainty as to which category of employees were covered by the changed test

which was not finally resolved until after the transfer.

Costs

97 We were surprised at the outset of the hearing that neither side had put before us the reasoned decision of the EAT in Visram. It was particularly surprising as the Respondent had sought the postponement of the hearing listed for 7 to 9 October 2015 on the grounds that ""*regardless of the outcome the EAT decision will need to be taken into account and a saving of costs may well be the result."* The Claimant's solicitors supported that application on the grounds that it would be in the interests of justice and would save time and costs of both parties. As a result this case had been stayed pending the outcome of EAT sift in the case of Visram.

98 We decided to adjourn this case part-heard because we considered that it was important for us to know what the grounds of appeal had been and what the EAT had decided on those grounds. The EAT judgment had to be typed up as neither party had requested it in writing. The Tribunal asked the EAT to provide the transcript.

99 The Claimant applied for the costs that had been incurred as a result of that adjournment on the grounds that the Respondent had acted unreasonably in not obtaining a transcript, especially since it had previously sought an adjournment on the basis that the outcome would need to be taken into account. It was submitted that The Respondent had not obtained the transcript because it did not assist it.

100 The Claimant had supported the application for a postponement/stay on the same grounds as put forward by the Respondent. Although the Claimant was not a party to the EAT proceedings, his solicitors could have obtained a transcript from the EAT. If there had been any difficulty in obtaining it, they could have applied to the Tribunal well in advance of the hearing for us to obtain it. We considered that both parties had acted unreasonably in not obtaining the written decision. We, therefore, refused the Claimant's application for costs.

Employment Judge Grewal on 17 November 2017