

# TUPE and long-term sickness benefits

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## Employment Law News

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**TUPE and long-term sickness benefits: employee had contractual entitlement to receive benefits until he could return to original job**

A long-term sick employee transferred under TUPE but was denied long-term sickness benefits by both the old and new employers' PHI insurers. After he was dismissed, he brought claims against the new employer. The Court had to consider

**whether the new employer was liable to compensate the employee for the lost benefits until he was able to return to work and, if so, what that meant.**

### **What does the law say?**

The right to benefit from an insurance scheme, such as permanent health insurance (**PHI**) will automatically transfer under TUPE. What is not clear is whether the old employer's right to be indemnified by their PHI insurer transfers to the new employer. As a result, this is a high-risk area for the new employer. If an employee who is receiving (or waiting to receive) PHI benefits transfers and is unable to claim under the old employer's PHI scheme, then the new employer may be on the hook to make those payments itself.

Further, where an employee is entitled to receive PHI benefits the courts may imply a term preventing dismissal where such dismissal would deprive them of those benefits. If an employer dismisses in those circumstances it will be in breach of contract and may have to pay compensation equivalent to the lost PHI benefits, potentially up to the earlier of retirement or death.

### **What happened in this case?**

Mr Visram was employed by American Airlines as an International Security Co-ordinator at Heathrow airport. His employment contract provided for a long-term disability benefits plan. Under the plan, he was entitled to be paid after 26 weeks' sickness absence until the earlier of the return to work, death or retirement. The plan was funded by a PHI policy that American Airlines held with Legal & General. That policy provided that Mr Visram would be entitled to benefits provided that he remained employed and was too sick to perform the essential duties of the role he performed immediately before going off sick.

In October 2012, Mr Visram went off sick. Several weeks later

his employment transferred from American Airlines to ICTS (UK) Ltd (**ICTS**). He remained off sick after the transfer. When he had been off sick for 26 weeks, he expected to receive the long-term disability benefits. However, ICTS' own PHI insurer, Canada Life, refused to pay because Mr Visram was already on sick leave when the policy commenced. Legal & General also refused to pay because Mr Visram was no longer employed by American Airlines. After some discussion with ICTS, Legal & General agreed to make 18 months' worth of payments. At the end of that period, ICTS dismissed Mr Visram on the grounds of capability and he brought claims for unfair dismissal and disability discrimination.

### **What was decided?**

Mr Visram succeeded in his claims and the Employment Tribunal decided that he had a contractual entitlement to the long-term disability benefits until he was able to return to work. This meant that ICTS had been liable to make the payments, regardless of the PHI insurers' position.

The question was then how long such payments should have been made for. If return to work meant the original role, then Mr Visram should be compensated for lost benefits until the earlier of death or retirement. If return to work meant any suitable full-time work, then, in the Tribunal's view, compensation should be limited to 4 years' worth of lost benefits. The Tribunal decided that "return to work" meant returning to his original role, not an alternative role.

Therefore, ICTS had to pay compensation based upon the lost long-term disability benefits until the earlier of death or retirement. ICTS appealed to the EAT and then the Court of Appeal.

The Court of Appeal rejected the appeal. The Court decided that the way the contract was drafted made it clear that Mr Visram was entitled to receive the benefits until he was able to return to his previous work as an International Security

Co-ordinator, not just any work. If the intention had been to provide benefits until the point that the employee could return to any work, then this should have been made clear.

## What are the learning points?

This decision highlights two key points for employers:

- **Very careful drafting around the entitlement to long-term disability/PHI benefits is needed.** Here, the drafting ultimately obliged the employer to pay these benefits to a qualifying employee. Although the benefit was funded by insurance, the contract did not stipulate that the employee's entitlement was contingent upon the insurer accepting the claim and making the payment to the employer. Further, the employer's hands were tied by the requirement to pay the benefits until the employee returned to their original role. Had the wording been extended to cover return to an alternative role, the employer may have avoided liability.
- **Incoming employers in TUPE transfers must conduct careful due diligence on the precise nature of such entitlements.** In this case, both the old and new insurers refused to fund the claim, meaning the new employer was on the hook for the payments. Incoming employers in this situation should seek to agree an adjustment to the sale price and/or seek an indemnity from the seller to cover the risk.

## ICTS (UK) Ltd v Visram

If you would like to discuss any of the issues raised in this article, please contact [Amanda Steadman](#) ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual [BDBF](#) contact.

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