



Neutral Citation Number: [2020] EWCA Civ 202

Case No: A2/2019/1410/EATRF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**THE HON MRS JUSTICE SLADE**  
**UKEAT/0133/18/BA**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/02/2020

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE PHILLIPS**

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**Between :**

**ICTS (UK) LIMITED**  
**- and -**  
**ANTHONY VISRAM**

**Appellant**

**Respondent**  
**(Claimant)**

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**Michael Duggan QC** (instructed by **Jones Chase Employment Lawyers**) for the **Appellant**  
**Oliver Isaacs** (instructed by **O H Parsons LLP**) for the **Respondent (Claimant)**

Hearing date: 12 February 2020  
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**Approved Judgment**

**Lord Justice Bean :**

1. This is an appeal from a judgment of the Employment Appeal Tribunal (Slade J sitting alone), affirming the remedy decision of an employment tribunal (Employment Judge Vowles and two lay members). It turns on the proper interpretation of a provision about long term disability benefit (“LTDB”) which formed part of the Claimant’s contract of employment.
2. Anthony Visram commenced employment on 4 May 1992 with American Airlines as an International Security Coordinator at Heathrow Airport. The terms of his contract with American Airlines were transferred to the Appellants, ICTS (UK) Ltd, in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), at which time Mr Visram was responsible for security operations at Heathrow.

*The Booklet*

3. The Claimant’s “Statement of Terms and Conditions of Employment” with American Airlines included a “Pension and Death and Disability Benefits Plan”. The Death and Disability Benefits provided included:

“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”.”

4. Section G of the Members Explanatory Booklet (“the Booklet”) set out the details of the Long Term Disability Benefits (“LTDB”) [emphasis added]:

“(G) LONG TERM DISABILITY BENEFITS

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 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 PAYE 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 UK Pension Plan and your own and the Company's Contributions will be based on your disability income."

*The Insurance Policy*

5. American Airlines had insured their liability to pay LTDB by an insurance policy ("the Insurance Policy") with Legal and General Assurance Society Ltd ("L&G"). Employees of American Airlines were not parties to the Insurance Policy. The Insurance Policy was the L&G Group Income Policy. It was referred to in the introduction to the Booklet:

"The Long Term Disability benefits are provided by an Insurance Policy."

6. The Insurance Policy defined a "Disabled Member" as 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."

For the purposes of (i) above

(a) "own occupation" means the essential duties required of the Insured Member in his occupation immediately prior to the commencement of the Deferred Period, and

(b) The Insured Member's capacity to perform the essential duties of his own occupation will be determined whether or not that occupation remains available to him."

7. The Insurance Policy set out the following in relation to the duration of the Benefit:

"Duration of Benefit

Subject to production to Legal & General of evidence of the Insured Member's entitlement to benefit, in such form and at such times as Legal & General may reasonably require, and to

the remaining provisions of this Section, payment of Member's Benefit will continue so long as the Insured Member is a Disabled Member but not in any event after Benefit Termination Date or, if earlier, the death of the Insured Member."

8. Part 4, Clause 1 of the Insurance Policy provided:

"Regardless of anything in these provisions to the contrary the insurance under this Policy of an Insured Member will terminate: immediately in the event of an Insured Member ceasing to be in Employment..."

*The Claimant's absence from work and dismissal*

9. Save for a brief period between 18 March and 19 April 2013, Mr Visram was off work from October 2012 with depression and work-related stress until his dismissal on 14 August 2014. While he was on sick leave, his employment was transferred to ICTS under TUPE (on 1 December 2012). The new employer arranged for the LTDB scheme to be insured with Canada Life rather than L&G. The Claimant's contractual sick pay expired in April 2013 and he made a claim for LTDB.
10. L&G refused to indemnify the Respondent for LTDB payments on the basis that the Claimant's employment had transferred to the Respondent before the completion of a "deferred period" under the terms of the Insurance Policy. Canada Life refused to indemnify the Respondent on the basis that the illness occurred before the inception of its policy. After a dispute about the Claimant's entitlement to LTDB, L&G agreed on 16 September 2013 to pay the Claimant LTDB until 30 September 2014 (backdated so that payments started in April 2013).
11. The Claimant had raised a grievance about ICTS' non-payment of LTDB on 14 February 2014. The company dismissed his grievance on appeal on 11 June 2014. The Claimant attended a medical capability hearing on 17 July 2014 and was dismissed on 13 August 2014. An internal appeal was dismissed on 18 September 2014. L&G continued to pay the claimant LTDB until 30 September 2014. ICTS paid the Claimant LTDB on a "without any admission of liability" basis for a period of time after that but such payments have ceased.

*The proceedings*

12. Mr Visram issued a claim for unfair dismissal and unlawful disability discrimination. On 24 August 2015, the ET upheld these claims (the "liability judgment"). The tribunal found that there was a primary obligation on the Respondent to make LTDB payments as long as the Claimant satisfied the condition of "being absent from and unable to work due to sickness or injury for a continuous period of 26 weeks or more". ICTS appealed to the EAT against the liability judgment but the appeal was dismissed on 26 July 2016.

13. The ET then heard a remedy hearing on 15 to 17 March 2017. The remedy judgment was sent to the parties on 12 October 2017 and varied in minor respects after reconsideration on 12 January 2018.

*The ET remedy judgment (12 January 2018)*

14. The ET had to decide (among other issues, which do not arise on this appeal) the basis and amount of compensation to be awarded to the claimant for loss of LTDB caused by the disability discrimination and unfair dismissal which had been established by the liability judgment. To do so, it had to decide “whether or not the LTDB entitlement... is dependent upon a return to work with the Respondent to the role being performed immediately before absence on sick leave, or to any role”.
15. ICTS submitted that “return to work” should be interpreted as a return to any full-time suitable work. The Claimant submitted that “return to work” should be interpreted as a return to his work for the Respondent as an International Security Coordinator. The ET agreed with the Claimant’s interpretation, holding that he was contractually entitled to LTDB until he returned to his original job, died or attained retirement age. LTDB payments would not cease at the point at which the Claimant became fit enough to carry out suitable alternative full-time work.
16. The ET went on to consider what it would have decided if it had accepted the Respondent’s interpretation of “return to work” (its “alternative interpretation”). In the light of expert evidence, the ET considered that after a period of four years, there was a reasonable prospect of the Claimant returning to employment yielding an income similar to the amount of LTDB to which the Claimant had been entitled. The ET held that on the alternative interpretation it “would have decided, therefore, that the future loss of earnings should be limited to two thirds salary for four years from the date of the remedy hearing”.

*The EAT decision (18 April 2019)*

17. In the EAT Slade J held that simply on a construction of the Booklet “return to work” meant return to work for ICTS, though it was unclear without recourse to the Insurance Policy whether this had to be as an International Security Coordinator. To the extent that the clause in the Booklet was ambiguous, Slade J found that the ET did not err in construing the term by reference to the Insurance Policy, since the Booklet referred to the Insurance Policy. Accordingly she upheld the finding of the ET and dismissed ICTS’ appeal.
18. Slade J herself granted ICTS permission to appeal to this court.

*The appeal to this court*

19. Mr Michael Duggan QC, for ICTS, submits that the ET and EAT wrongly construed the contractual documentation as meaning that the Claimant was entitled to the payment of LTDB so long as he was unable to return to his old occupation. According to Mr Duggan, entitlement to LTDB instead ended when the Claimant could “return to work”. We asked Mr Duggan how that phrase was to be interpreted on his clients’ case; he replied that it meant a return to any suitable, full-time paid work that the Claimant was able to carry out.

20. In giving that answer Mr Duggan relied heavily on the decision of this court in *Jowitt v Pioneer Technology UK Ltd* [2003] ICR 1120. Mr Jowitt had suffered a cervical disc lesion which left him permanently unable to continue in his job. His contract of employment incorporated the company handbook, which provided:

"5.3 Long Term Disability

The Company runs a scheme that is designed to provide an income during lengthy periods of absence due to prolonged sickness or injury. Permanent and Established members of staff are entitled to two thirds of normal pay (inclusive of State benefits) after 26 weeks continuous absence through illness or disability, for as long as they are *unable to work* up to date of retirement, as certified by a medical practitioner and, if necessary, confirmed by the Company's doctor." [emphasis added]

21. At paragraph 17 Sedley LJ noted that the handbook contained different wording where it dealt with partial incapacity. Clause 5.4, under the heading "Members restricted by ill-health or injury", provided for employees who were unable to pursue their "normal job" but were capable of alternative work within the organisation. Sedley LJ said that there would have been no difficulty in using a similar phrase in Clause 5.3 if this had been what was intended. He contrasted Mr Jowitt's case with *Sargent v GRE (UK) Ltd* [1997] PIQR Q128 where the context satisfied this court that "permanent total disablement from attending to any occupation" meant disablement from the occupation being followed at the time when disability supervened.
22. It was against this background that Sedley LJ came at paragraph 19 to the passage on which Mr Duggan relies:-

"In my judgment ... "unable to work", in the present context cannot mean incapacitated from any and every purposeful activity. In my judgment, an employee is "unable to work" for the purposes of clause 5.3 if there is no continuous remunerative full-time work which he can realistically be expected to do: compare *Walton v Airtours* [2003] IRLR 161. The scheme set out in clause 5.3 in the context of the handbook and the employment relationship is there, in other words, to cushion the earnings of employees who become so disabled that they can neither be found other work within the organisation nor realistically be expected to find employment elsewhere."

23. I do not accept Mr Duggan's submission that this case is binding authority for the proposition that in any contractual provision for LTDB where the employee is "unable to work", those three words mean that there is no continuous remunerative full-time work which the employee concerned can realistically be expected to do. It all depends on the wording of the contract. In the *Jowitt* case the phrase "return to work" was not used in the critical paragraph; and clause 5.3 was contrasted with the next clause which dealt with employees who were unable to pursue their pre-accident or pre-illness job but were capable of alternative work within the organisation.

24. In the present case the section of the LTDB document which we have to interpret begins by providing that disability income is payable “should you be absent from, and unable to, work due to sickness or injury for a continuous period of 26 weeks or more”. It is common ground between Mr Duggan and Mr Oliver Isaacs for the Claimant that this “trigger” provision comes into effect when the employee has for 26 weeks been absent from, and unable to perform, his previous work: in Mr Visram’s case, his work for ICTS as their International Security Co-ordinator at Heathrow. So in that sentence “work” clearly refers to the specific occupation. It seems to me to follow clearly that “your return to work” in the next sub-paragraph must likewise mean “your return to your previous work” that is, as an International Security Co-ordinator. That is in any event a natural construction of the phrase “return to work”. If the drafters of the LTDB Plan had wished to say that the benefit would only be payable for so long as the individual was unable to perform any full time remunerative employment it would have been easy enough so to provide.
25. On the view I take of the interpretation of the Booklet it is unnecessary to consider whether the wording of the insurance policy (defining a Disabled Member as one incapacitated by an illness or injury which “prevents him from performing his own occupation”) is admissible as an aid to construction.
26. In the present case the meaning of the clause is clear and was correctly interpreted by the ET. I would therefore dismiss this appeal.

**Lord Justice Baker:**

27. I agree.

**Lord Justice Phillips**

28. I also agree.

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**ORDER**  
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**UPON hearing Michael Duggan QC for the Appellant company and Oliver Isaacs of counsel for the Respondent Claimant:**

**IT IS ORDERED THAT**

- 1. The appeal be dismissed with costs summarily assessed at £18,828.72.**