The implied term of trust and confidence & the Coronavirus Job Retention Scheme – Stuart Brittenden

The Coronavirus Job Retention Scheme ("the Scheme") is a grant that, for those eligible, covers 80% of the usual monthly wage costs up to a ceiling of £2,500 per month plus associated employer NICs and employer pension contributions paid on the furlough pay up to the level of the minimum automatic enrolment employer contribution. Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts. Foreign nationals are also eligible to be furloughed.

There are three central features of the Scheme. First, it requires agreement to any necessary variations to contracts of employment. Second, to be eligible for the grant employers must confirm in writing to their employee that they have been furloughed. A record of this communication must be kept for five years. Third, the employer submits a claim to the Scheme for the benefit of the individual. The employee has no active involvement in the claims process. Entitlement is contingent upon the employer seeking their agreement to necessary variations and then submitting the claim.

The purpose of this piece is not to examine gaps in coverage of the Scheme: for a compelling analysis, see Lord Hendy QC, The gaps in the government’s coronavirus income protection plans. Neither is it intended to explain the detailed mechanics of the Scheme, for that see the inspiring collaborative work of four QCs Reade, Ford, Jones and Glyn, A collaborative view on the Coronavirus Job Retention Scheme.

Rather, this paper examines a potential solution to the structural defect identified by Professors Michael Ford QC & Alan Bogg in respect of agency workers and those engaged on zero hours contracts ("ZHCs"): Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2, UK Labour Law Blog (31.3.20). As they correctly observe, the ability of otherwise eligible individuals to access remuneration from the Scheme is entirely contingent upon the employer submitting the application to the Scheme of their behalf. They identify a potential flaw in all of this particularly in relation to agency workers and those employed on ZHCs. In respect of both categories, the ‘employer’ is invariably under no contractual duty to provide work, and typically will have no corresponding obligation to pay between assignments. They postulate, “... once the assignment has been ended, why should the agency bother to write to the workers and confirm they have been ‘furloughed’, as the Scheme requires? Unless it happens to be motivated by altruism, it is easier for it to rely on its existing contractual provisions and do nothing at all.” Similarly, for those on ZHCs, the employer is not legally required to take
any formal decision to dismiss or make them redundant where there is no work to be done; they can simply stop offering work, eliminating any correlative duty to pay.

There is a way to navigate around this by drawing inspiration from the judicial willingness to imply terms in the permanent health insurance context ("PHI"). The species of the implied term perhaps doesn’t matter, but the implied term of mutual trust and confidence provides a broad peg upon which to hang an argument that there should be implied into every contract an obligation upon an employer to take all steps as are reasonably practicable to facilitate access to the Scheme in respect of individuals who are otherwise eligible, and are in agreement to being furloughed.

For the avoidance of doubt, if correct, this solution is not confined to agency workers or those on ZHCs, but should apply across the board, at least where the contractual relationship subsists and the eligibility criteria are satisfied. By way of example, as a result of further welcomed clarification issued on 9 April 2020, the Government has now confirmed that if employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee. Likewise, employees who are absent “shielding” in accordance with Public Health guidance, those with caring responsibilities, and those placed on unpaid leave after 28 February 2020 can also be furloughed. There is a compelling case that where an employer does not take sufficient steps to facilitate access to remuneration under the Scheme, they could be exposed to a claim for damages for breach of the implied term of trust and confidence. Indeed, it is difficult to envisage any circumstances where they can establish that they possess any real or proper cause in not taking steps to do the same: *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606. The need for an implied term of this ilk is all the more pressing given that it is those who are left vulnerable and in a financially precarious situation that the Government sought to cushion the effects of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350.

**The PHI cases**

PHI schemes provide an analogy, of sorts, with the Scheme. Both involve tripartite relationships, but as with PHI arrangements, the employer is responsible for submitting the claim and receives the income.

However, in a similar way to the Scheme, those cases have thrown up potential problems. First, the process for submitting a claim for PHI benefit is usually contingent upon the employer notifying the employee that this benefit exists, and submitting a claim to the insurer within specified timescales. However, there is no privity of contract between employee and insurer, and the employee does not have standing to bring a claim for breach of contract against the insurer in the event of alleged breach of the terms of the insurance scheme. Second, it was theoretically possible for an employer to circumvent an
employee’s ability to receive PHI benefit by reliance upon express terms or capability procedures. Most employment contracts contain express terms preserving the employer’s right to terminate upon notice (or a payment in lieu). Larger employers also have capability procedures which can result in termination of employment in the event of long-term incapacity or sickness absence. The express power to dismiss for long-term absence therefore sat awkwardly where the employee would otherwise qualify for PHI benefit.

Although it is well established that a term cannot be implied to contradict or undermine an express term, the Courts have been willing to resolve such tensions in favour of employees. This has been achieved by means of the implication of terms which control the manner in which the employer is able to exercise its express power of dismissal. The result is that a term will be implied to preclude an employer from terminating the contract upon notice, or after exhausting its capability procedure, unless and until it has first sought to exhaust the process of establishing whether the employee is eligible for PHI benefit. Where the employee is in receipt of PHI benefit, Courts will imply a term to restrain dismissal for long-term absence.

Aspden v Webbs Poultry and Meat Group (Holdings) Ltd [1996] IRLR 521 concerned an employee who qualified for PHI benefit who was dismissed while incapacitated. He brought proceedings for wrongful dismissal contending that it was an implied term of his contract of employment, that save for summary dismissal, his employment would not be terminated where that would frustrate his accruing or accrued entitlement to income replacement insurance. Sedley J agreed, with the effect that the employer’s otherwise unrestricted power to terminate the contract of employment was qualified by an implied term.

Subsequently, in Brompton v AOC International Ltd [1997] IRLR 639 Staughton LJ, albeit obiter, commented that “there is a good deal to be said for such a term, which has the support of Sedley J in Aspden...” at [32]. See too Hill v General Accident Fire & Life Assurance Co plc [1998] IRLR 641 at [24].

Subsequently, in Villella v MFI Furniture Centres Ltd [1999] IRLR 468, the High Court considered the issue of whether the termination of employment was in breach of an implied term that the employer would not dismiss in circumstances which deprived the employee of a long-term disability benefit otherwise due. Following Aspden and Brompton, Judge Green QC concluded that “this implied limitation on the express power to dismiss was necessary to give business efficacy to the contract to provide disability benefit ...” at [49-50].

The Court of Appeal revisited the issue in Briscoe v Lubrizol [2002] IRLR 607. There was no dispute that there was an implied term that the employer would not terminate employment save for cause (other than ill health) so as to deprive the employee of the continuing entitlement to disability benefit: at [21]. There was good cause for dismissal because the employee committed a repudiatory breach of contract which the employer...
was entitled to accept. Reviewing the earlier authorities, Ward LJ succinctly stated at [107]:

... the principle to emerge from those cases is that the employer ought not to terminate the employment as a means to remove the employee’s entitlement to benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally, for some repudiatory breach by the employee.

For other cases on point see First West Yorkshire Ltd v Haigh [2008] IRLR 182 at [46]; and Awan v ICTS Ltd [2019] IRLR 212 at [42]–[46].

But the point of fundamental importance is this: there is no reason why the species of implied term should necessarily be confined to the application of the officious bystander or business efficacy tests. Such is the breadth of the trust and confidence term, that arguably, it could have been deployed to achieve the same result. Indeed, a trilogy of cases establish that where eligibility to receive PHI benefits is contingent upon the employer receiving payment from a third party insurer, because the employee has no standing to bring a claim against the insurer, an employer may need to take legal action against the insurer as a facet of the implied term of trust and confidence. See Earl v Cantor Fitzgerald (at [29-30]); Briscoe (at [135]); and Marlow v East Thames Housing Group Ltd [2002] IRLR 798. In Briscoe Ward LJ stated at [135]:

Quite clearly the company holds any benefits received to the use of the employee. There is a duty of trust and confidence between employer and employee. There is no doubt an implied duty on the employer to take all reasonable steps to obtain the benefits but, in my judgment, only if action has been requested by the employee. In my judgment the company would not be obliged to take the initiative. It must front an attack against the insurer but the declaration of war must be made by the employee. On the facts of this case no more could have been expected from a good employer.

Later, in Marlow v East Thames Housing Group Ltd [2002] IRLR 798 Cooke J provided the most exhaustive analysis of the extent of the implied obligation at [55-59(v)]:

... if there is agreement as part of the terms of employment, for an employer to make available to an employee, the benefits of a PHI policy and the employee cannot sue the insurer direct because he or she is not a party to the insurance contract, and cannot sue the employer directly for PHI benefits because the employer is, by the terms of the contract between it and its employee, only obliged to pay over such sums as it receives from the insurer, then the employer has a duty as part of its general duty of trust and confidence, or good faith, to take all reasonable steps to secure that the insurance benefits are paid and the employee thus benefits from the payment. This includes perhaps, if necessary, the pursuit of litigation...
... It is not possible for me to form a view as to whether or not it would be reasonable for the defendant to pursue Norwich Union in litigation to seek to procure the payment of benefits, because I have not seen evidence relating to the medical condition of the claimant. If an indemnity against costs were offered by the claimant or her union, then it would be hard to see that the pursuit of litigation would not be a reasonable step to take, unless the prospects of success were very poor indeed. In circumstances where it seems that the defendant considers that the claimant’s position is correct, or may well be correct, an indemnity against costs would, it seems to me, make the refusal to pursue litigation against the Norwich Union unreasonable. In the absence of an indemnity however I am unable to form a view on this.

Analogy - PHI cases and the Scheme

Upon close analysis, there are a number of similarities between PHI schemes and entitlement under the Job Retention Scheme. They both involve tripartite relationships. As is the case in respect of PHI schemes, the employer has standing to submit the application to the Scheme on behalf of the individual, and holds any monies received on trust for that specified purpose. It is worth noting that in Carluccios Ltd (In Administration) [2020] EWHC 886 (Ch) Snowden J expressed doubt as to whether monies paid out by the Scheme were held on trust because there was no mention of the word “trust” in the guidance, and the grant monies are simply to be paid into the employer’s UK bank account without any requirement for segregation from its general funds (at [33]). However, it seems clear that this was the intent underlying the Scheme which was, after all, crafted at break-neck speed. An employer would be acting unlawfully if it used the grant for an ulterior purpose.

In circumstances where the Government guidance reflects the clearest intent that those individuals eligible under the Scheme who perform no work as a consequence of Covid-19 should receive some income, the parallel interplay between express and implied terms seen in the PHI cases comes into plain view.

Just as the employer cannot rely upon the express power to give notice in respect of an employee on long-term sickness absence who is otherwise eligible for PHI benefit, with a small pivot, the principles established in those cases could apply in this situation. In circumstances where an individual would otherwise be entitled to receive remuneration in accordance with the terms of the Scheme, it would be nonsensical for an employer to shrug its shoulders and suggest that they are relying upon the express terms of the contract which afford it the right not to provide work (and hence are relieved of an obligation to pay) in respect of an individual engaged on a ZHC, or for an agency to say that it is under no obligation to provide work (and therefore pay) as just cause for not submitting an application on behalf of the employee That would frustrate the inherent purpose of the Scheme. This would potentially amount to a breach of the implied term of
trust and confidence. In those cases, it remains arguable that where the contract has not been formally terminated, a residual contractual relationship subsists within which to imply such a term. It is very difficult to conceive that an employer would have any objective reasonable or proper cause in sitting back and doing nothing to the financial disadvantage of the individual left stranded in a precarious financial position which the Government has sought to avoid or lessen. In this situation, the employer is able to receive some remuneration via a third party – here in accordance with the terms of the Scheme. In that sense it is no different to the PHI scenario where “There is no doubt an implied duty on the employer to take all reasonable steps to obtain the benefits”: Briscoe. The position is, in one sense, more favourable than in the PHI context - there is no question of the employee providing an indemnity in respect of legal costs – an application to the Scheme is merely an administrative exercise.

Although this is very much embryonic in terms of analysis, the manifestation of the implied term of trust and confidence in this situation has four strands. First that the employer has to take all such steps as are reasonably practicable to see whether the individual would be eligible for remuneration under the Scheme. Second, to seek their agreement to necessary variations. Third, consequently, to submit an application on their behalf; and fourth, to pay out the money received for the specified purpose. The effect of the implied term would be to modify the wage/work bargain, the employer is not relieved of the obligation to pay in circumstances where no work is performed where some pay is guaranteed by the Scheme. To adopt Lord Justice Ward’s words in Briscoe in relation to the trust and confidence term, this is far from onerous – rather, it is “… no more [than] could have been expected from a good employer…” As applications can be made retrospectively, there can be no rational excuse for an employer not to avail itself of the benefits of the Scheme to the benefit of its workforce.

This analysis extends beyond individuals engaged by an agency or employed on ZHCs. It applies to anyone who would be eligible under the Scheme. It would also have the benefit of ensuring that those who are likely to be most in need of income are not subject to disadvantage out of kilter with the clear intent expressed by the architects of the Scheme.

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