# In The Supreme Court of Bermuda

**APPELLATE JURISDICTION**
**2016: CIVIL APPEAL NO: 25**

**BRANDON J THOMPSON**

**Appellant**

**-v-**

**HAROLD J DARRELL**

**Respondent**

## JUDGMENT
(In Court)

Date of Hearing: June 22, 2016
Date of Judgment: July 15, 2016

The Appellant appeared in person
Mr. Jaymo Durham, Amicus Law Chambers, for the Respondent

**Background**

1. By an Ordinary Summons issued by the Magistrates' Court on June 14, 2015, the Appellant sued the Respondent for $10,321, the bulk of which he claimed represented monies deducted from his pay in respect of health insurance and pension benefits which his employer had not provided.

2. The trial spanned four days in August 2015. On September 4, 2015, the Magistrates' Court (Wor. Shade Subair Williams, Acting) granted the Appellant judgment in the amount of $617.75 plus costs. This was based on a legal finding that the Appellant had no right to sue to recover any pension deductions made and was limited to seeking compensation in respect of actual medical expenses he had incurred during the period when his employer ought to have provided health insurance coverage. This was because the Health Insurance Council had the exclusive right to pursue such recoveries on the employee's behalf.

3. The Appellant, who appeared in person at the trial below, appeared in person at his appeal which he filed by Notice of Appeal dated October 9, 2015. The relief sought was the sum of $7,914 in respect of monies deducted from his pay in respect of health insurance premiums which were not in fact applied to a health insurance policy. A representative of the Pension Commission attended the hearing and confirmed that the Commission had obtained a judgment in respect of the pension deductions originally claimed by the Appellant in the Magistrates' Court. This explained why the Appellant had not expressly appealed the finding of the Learned Magistrate that he had no right to seek recovery of the pension deductions himself as the Pension Commission was pursuing recovery of the same sums.

4. Accordingly, the only issue which arose for determination on the appeal was whether or not the Learned Acting Magistrate was correct to rule that the Health Insurance Act 1970 (the "Act") barred an employee from seeking to recover more than his or her actual medical expenses incurred during a period of employment when no health insurance was in place. While the Appellant was unable to engage with the technical legal analysis, he had no difficulty in forcefully contending that in terms of a sense of justice as understood by ordinary persons, the rejection of his claim seemed to be simply wrong.

5. It was common ground that sums totalling $7,914 had been deducted from his pay and not applied towards health insurance premiums.

**The Decision of the Magistrates' Court**

6. The Learned Acting Magistrate found so far as is material as follows:

> "*It was agreed between the Parties that the Employer in this case failed to make good payments owed for the upkeep of health insurance coverage for his employees during a specified period. (Criminal Information 13CR00440 refers).*
>
> *The Plaintiff bears the burden of proving on a balance of probabilities an actual loss suffered. An Employer has a statutory duty* [to] *have a health insurance contract with a licensed insurer in respect of himself and his employees (subject to statutory exceptions which do not arise in this case). This is pursuant to section 20 of the 1970 Act. Section 21 allows for the Employer to deduct half of the cost of the premium from the Employee's salary. In this case, such deductions were in fact made.*
>
> *Where an Employer fails to make his own portion of payments on the costs of the premium; his failure to do so gives rise to a statutory breach of duty which is actionable by the relevant statutory body (ie. The Bermuda Health Council).*

*A civil claim may nonetheless be brought by the Employee in respect of any actual loss suffered under a claim for breach of contract. Such losses are recoverable and judgment is therefore granted in respect of those balances.*"

**Findings: Legal Terms and Effect of the Health Insurance Act 1970**

7. Three provisions in the Act formed the basis of the Magistrates' Court Judgment. The first was section 20 which provides as follows:

> "***Compulsory health insurance***
> *20(1) Subject to this section, section 26 and regulations under section 40(1)(d), every employer shall effect and continue in force a contract of health insurance with a licensed insurer providing not less than standard health benefit in respect of himself, every employee and the non-employed spouse of every employee:*
>
> *Provided that if an employee is, at the date of commencement of his employment with an employer, already insured for standard health benefit, it shall be sufficient for the employer to continue in force the policy of insurance in respect of such employee.*
>
> *(2) [repealed by 2015 : 42]*
>
> *(3) If a spouse ceases to be the non-employed spouse of an employee within the meaning of section 19, the obligation imposed on the employer by this section shall cease to have effect.*
>
> *(4) An employer who fails to comply with subsection (1) commits an offence: Punishment on summary conviction: a fine of $500*
>
> *(5) Subsection (1) shall apply to every self-employed person; and every partner in a partnership shall be regarded as a self-employed person.*"

8. Section 20 essentially creates a statutory obligation on an employer to take out a health insurance policy for his employees. An employee is defined by section 19 as being a person for whom the employer is liable to pay contributions under the Contributory Pensions Act 1970, which means persons employed for more than four hours a week who are not self-employed persons. The next provision referred to in the Magistrates' Court Judgment was the following:

> "***Employer may deduct half cost of premium from salary of employee***
>
> *21. An employer shall be liable to pay the total cost of the premium payable under any contract of health insurance effected in respect of an employee under section 20 but shall be entitled to deduct from the salary, wages or other remuneration payable to that employee for the period in respect of*

*which the deduction is to be made, an amount not exceeding one half of the premium so paid in respect of that employee:*

*Provided that an employer shall not, in the case of any employee, be entitled to deduct, in respect of any period, more than one half of the amount of the standard premium payable in respect of that period.*"

9. Section 21 permits the employer to deduct no more than 50% of the costs of the insurance premiums payable in respect of a health policy taken out under section 20 of the Act. This justifies the deductions but does not deal with the right of recovery issue at all. Mr Durham relied in the Court below and in response to the present appeal upon the following third provision in the Act to directly support the Magisterial decision in his client's favour:

"***Recovery of damages from employer in default***
*25. (1) Where an employer to whom this Act applies has failed or neglected—*

*(a) to effect any contract of health insurance which he is required to effect by section 20;*

*(b) to pay any premium payable under a contract of health insurance which under this Part he is liable to pay; or*

*(c) to comply with the requirements of this Act or any regulations made thereunder relating to the payment of premiums and submission of records,*

*and by reason thereof any person has lost any benefit to which he would have been entitled if such failure or neglect had not occurred, that person shall be entitled to recover from the employer before a court of summary jurisdiction as a civil debt a sum equal to the amount of benefit so lost.*

*(2) The Board may institute proceedings under subsection (1) on behalf of any person to whom that subsection applies and in that event the Board shall be subrogated to the rights of that person.*

*(3) In any proceedings brought under subsection (1), a certificate purporting to be issued by the Council specifying the amount of any benefit which would, in the absence of any failure or neglect by an employer, have been payable for hospital treatment under the contract of health insurance shall be prima facie evidence of the facts stated therein.*

*(4) Without prejudice to subsection (1) an employer who fails or neglects—*

*(a) to effect any contract of health insurance which he is required to effect under section 20; or*

*(b) to pay any premium payable under a contract of health insurance which under this Part he is liable to pay,*

*commits an offence:*
*Punishment on summary conviction : imprisonment for 12 months or a fine of $500 or both such imprisonment and fine.*

*Provided that in any proceedings under this subsection relating to the failure or neglect of an employer to comply with this subsection in respect of the non-employed spouse of an employee it shall be a defence for the employer to prove than he did not know, and could not reasonably be expected to have known, that the employee in question had a spouse, or that such spouse was a person in respect of whom he was required to effect a contract of health insurance under this Part.*

*(4A) Without prejudice to subsection (4), where the Council considers there may be a failure or neglect by an employer in respect of the matters set out in paragraphs (a) and (b) of that subsection, or where a licensed insurer reports such failure or neglect to the Council, the Council may publish a statement to that effect on its website, www.bhec.bm, or in such other manner as it may determine.*

*(4B) Section 17 (Immunity) of the Bermuda Health Council Act 2004 applies with respect to the publication of a statement by the Council under subsection (4A) as it applies to the functions of the Council under that Act.*

*(5) Where subsection (4)(b) applies to an employer, then, without prejudice to any other provision of this Act the insurer shall be entitled to recover from the employer before a court of summary jurisdiction the amount of the premium or premiums payable under the contract of insurance.*

*(6) Without prejudice to any other provision of this Act, where an employer fails or neglects—*

*(a) to effect any contract of health insurance which he is required to effect by this Act; or*

*(b) to pay any premium payable under a contract of health insurance which under this Part he is liable to pay and such failure or neglect causes the contract of health insurance to lapse,*

*then, the Council is entitled to institute proceedings to recover from the employer before the Supreme Court or a court of summary jurisdiction as a civil debt a sum equal to the amount of the unpaid premium.*

*(7) In any proceedings instituted under subsection (6), a certificate purporting to be issued by the Council specifying the amount of the unpaid premium which would, in the absence of the employer's failure or neglect, would [sic] have been payable as premium under a contract of health insurance shall be prima facie evidence of the facts stated therein.*" [Emphasis added]

10. According to its terms, section 25(6) gives the Council a statutory right (a debt action) which it would not otherwise possess to sue an employer to recover premiums which have not been paid from the delinquent employer. Section 25(6) does not expressly deprive the employee of any recovery rights the employee would have at common law or in equity to recover monies deducted from his or her pay but which have not been forwarded to the relevant health insurer in circumstances where the conditions of section 25(6) (a) and/or (b) are met. Any such action would not be to recover a debt. It would be, most obviously, either (a) an action for damages, or (b) an action for money had and received based on the doctrine of unjust enrichment.

11. To be contrasted with subsection (6) are subsections (1) and (2). These provisions create a statutory debt claim for an employee to recover any loss suffered by virtue of being uninsured. This was correctly analysed as applying to medical expenses which had to be paid during a period when the employee ought to have been insured and was deprived of the benefit of the compulsory insurance cover. This element of the Appellant's claim was allowed. It is noteworthy that the Board is empowered by subsection (2) to pursue a corresponding claim on behalf of the employee. The employee's statutory debt claim is obviously more straightforward than a breach of contract claim, and is clearly designed to ensure that an employee is not out of pocket for actual medical expenses incurred.

12. The Appellant's claim was not advanced as a statutory debt claim. Its legal basis was somewhat unclear. It is easy to understand, as the Appellant was not legally represented, that the Learned Acting Magistrate would have been persuaded by the Respondent's counsel to view his claim solely through a statutory lens. She was right to conclude that the Council alone had a statutory right to recover premiums. But the question of whether section 25(6) not only conferred a statutory right of action on the Council, but also abolished an employee's common law and/or equitable rights of action, was left unasked and unanswered. Two rules of statutory construction are engaged by this question of statutory interpretation[1].

13. Firstly, there is strong presumption that Parliament does not intend to interfere with fundamental rights. '*Bennion on Statutory Interpretation*', Sixth Edition (at pages 772, 774), states:

> "*The right of a person to bring, defend, conduct and compromise legal proceedings without unwarranted obstruction is a basic right of citizenship… The purported removal or abridgment of remedies is to be strictly construed*".

[1] These rules of construction may not have been explicitly referred to in the course of argument. However, the Respondent's counsel was given an opportunity to deal with the broad thrust of the interpretation they are relied upon in the present Judgment to support. Nevertheless the Respondent's counsel was given an opportunity which was not taken up to file supplementary written submissions on the below- quoted extracts from *Bennion*.

14. This rule of construction favours construing section 25(6)(a) as designed to assist employees who cannot sue themselves by conferring on the Council the optional power to recover premium payments without depriving employees of the right to sue altogether in circumstances where the Council does not have proceedings on foot in respect of the same claim. The position contended for by the Respondent, and accepted by the Magistrates' Court, also favours a construction which is inconsistent with the related right not to be deprived of one's property without compensation: Bermuda Constitution, section 13.

15. Applying these fundamental rules of statutory construction, I find that section 25(6) cannot be read as expressly depriving employees of the right to sue personally to recover monies which have been deducted from their pay for insurance premiums which were never applied to a policy at all. The language does not clearly manifest the improbable legislative intent to interfere with fundamental litigation and property rights.

16. The second rule of statutory construction which is engaged is the test for implying language which is not expressed in a statutory provision. Is one required to read into the provision, a legislative intention to exclude the employee's individual right of access to the Court in respect of common law claims? Mr Durham persuaded the Learned Acting Magistrate (with no persuasive opposition from an opponent who was a litigant in person) that section 25(6) should be construed as impliedly abolishing the employee's independent right of action in the circumstances to which the subsection applies. Depending on the legislative context, it must be conceded that such an implication may be possible. According to *Bennion* (at 469):

> "*An existing right will by implication be abolished by an Act, even though no compensation is paid, where its continuance is inconsistent with the exercise of the powers conferred by the Act.*"

17. It is difficult, if not impossible, to construct a coherent basis for contending that the existence of a right of action enjoyed by the Health Council under section 25(6) of the Act is inconsistent with the employee retaining the right to pursue his own common law remedies in the circumstances to which the statute applies. The only obvious potential inconsistency which arises is in particular factual scenarios where, for instance, the Council has commenced proceedings and it would be unjust to permit a double recovery. The Contributory Pensions Act 1970 both confers a statutory right of recovery in respect of pension contributions due from an employer on the Director of Social Insurance as a civil debt (section 32) and confers a corresponding statutory civil debt recovery right on employees subject to a one year limitation period (section 32 ). The section expressly provides:

> "*(2) Proceedings may be taken under this section notwithstanding that proceedings have been taken under any other section of this Act in respect of the same failure or neglect.*"

18. The 1970 Act (like subsections (1) and (2) of section 25 of the Health Insurance Act) creates two parallel statutory rights of action and implicitly leaves it to the courts to

resolve conflicts between overlapping statutory claims. This approach in a similar statutory context illustrates that there is nothing inherently inconsistent with the notion of the Council having a statutory right of action under section 25(6) of the Act and the Appellant having an overlapping common law right in respect of the same claim. It is true that the Health Insurance Act itself does not create a statutory right of action for employees in respect of premiums, but that is a very weak basis for inferring a legislative intention so draconian as to abolish a private right of action and potentially confiscating private property rights altogether (should the Council not decide to sue on an employee's behalf).

19. For completeness, reference should be made to the Bermuda Health Council Act 2004 (not referred to in the course of argument) which establishes the body empowered by section 25(6) of the Act. The general purpose and functions are described in the following sections of the 2004 Act:

> "***General purpose of the Council***
> *4(1) The general purpose of the Council is to regulate, coordinate and enhance the delivery of health services.*
>
> *(2) In pursuance of subsection (1) where there is any inconsistency between this Act and any Act dealing with health professionals or health service providers, this Act shall to the extent of the inconsistency prevail over that Act.*
>
> ***Functions of the Council***
>
> *5 The functions of the Council are—*
>
> *(a) to ensure the provision of essential health services and to promote and maintain the good health of the residents of Bermuda;*
>
> *(b) to exercise regulatory responsibilities with respect to health services and to ensure that health services are provided to the highest standards;*
>
> *(c) to regulate health service providers by monitoring licensing and certification, and establishing fees, standards and codes of practice;*
>
> *(d) to regulate health professionals by monitoring licensing, certification, standards and codes of practice;*
>
> *(e) to licence health insurers;*
>
> *(f) to identify and publish goals for the health care system, to coordinate and integrate the provision of health services, and make recommendations to the Minister on the prioritisation of initiatives with respect to health services;*
>
> *(g) to licence health service providers;*

*(h) to regulate the price at which drugs are sold to the public;*

*(i) to establish and promote wellness programmes;*

*(j) to conduct research, collect, evaluate and disseminate to the public information on the incidence of illness and other relevant information necessary to support objective decision making with respect to public health and the optimal use of resources; and*

(k) *to advise the Minister on any matter related to health services that may be referred to the Council by the Minister.*"

20. There is nothing in the statutory mandate of the Council under its incorporating Act which, when read with section 25(6) of the Health Insurance Act, supports construing the latter provision as conferring an exclusive power on the Council to recover from employers premium payments deducted from employees' wages in circumstances where (a) no policy ever existed, or (b) any policy which was taken out has lapsed. It seems improbable that the Council would have any obvious motive for taking such recovery action unless either:

(a) there was a reasonable prospect that the premiums recovered might be applied to fund a policy which would at some future date be put into place; or

(b) there was a reasonable prospect that the deducted premiums could be applied to restore an existing policy which has lapsed.

21. The scheme of the Act is designed to ensure compulsory health insurance coverage so that as long as there is any prospect of such coverage being obtained for current employees, it would subvert that broad statutory objective if employees were encouraged to sue for the return of premiums deducted but not paid over through a statutory debt claim. That in my judgment explains why no statutory right of action is created in favour of employees by section 25(6) of the Act. The position of a former employee is entirely different when:

(a) he has no prospect of receiving any benefit whatsoever from the premiums deducted from his pay during a period when no policy was ever in place and/or had lapsed; and

(b) the Council has not evinced an intention of exercising its recovery rights in respect of the same sums.

22. As I put to Mr Durham in the course of argument, it is difficult to see why Parliament should be deemed to have intended to give delinquent employers a windfall and

deprive the employee altogether of the ability to prevent the employer from being unjustly enriched. I find that section 25(6) cannot be properly read as having this effect.

**Merits of Appellant's claims for deducted premiums**

23. It was unarguably an express term of the Appellant's contract of employment with the Respondent that the monies claimed would be applied towards insurance premiums conferring on the Appellant a corresponding insurance coverage benefit. His employment terms were that he would be paid an agreed wage from which would be deducted 50% of the cost of health insurance premiums. It was admitted that the deductions were made but that no insurance cover was obtained. The Respondent admittedly breached his contractual obligations. Was there a related implied term that any monies deducted would be repayable in the event that it was clear that the relevant sums had not been and would never be applied for the contractually agreed purpose and that the employee would never receive the benefit he 'paid' for? According to '*Chitty on Contracts*':

> "*A term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract.' Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"*"[2].

24. I find that the right of recovery asserted by the Appellant is so obvious that it must be regarded as an implied term in his contract of employment. It is obvious as the following hypothetical examples to my mind are:

(a) a hotel guest pays a Wi Fi fee for his stay under a contract which is silent on the position if no service is delivered. If no service is delivered at all, there would be an implied term that the fee paid is refundable;

(b) an employer deducts a monthly amount from an employee's pay for the benefit of staying in staff accommodation. The premises are damaged due to a hurricane and the employer provides no alternative accommodation but continues to deduct the accommodation charge for the last six months of the employee's contract. If the contract were silent on the issue, there would be an implied term that the monies deducted from the employee's pay for a benefit which was not delivered by the employer is recoverable.

[2] 31st edition, paragraph 13-009.

25. The precise nature of the right to repayment need not be comprehensively analysed. The sums deducted are perhaps repayable at common law as a debt. Or the sums may be viewed as reflecting a contractual loss recoverable by way of special damages representing the total amount which was deducted from the Appellant's pay for a benefit which was not received. Because of the contractual relationship, nor is there any need to consider the alternative position of restitutionary remedies (which probably lie outside the jurisdiction of the Magistrates' Court in any event).

**Adjudication**

26. The appeal is allowed and that part of the Judgment of the Magistrates' Court dismissing the Appellant's claim for $7,914 is set aside and judgment awarded to the Appellant in that additional amount.

27. Unless either party applies within 28 days by letter to the Registrar to be heard as to costs, the Respondent shall pay the Respondent's costs of the appeal which I summarily assess in the amount of $50, being the stamp duty paid on the Notice of Appeal.

Dated this 15th day of July, 2016 _____
IAN RC KAWALEY