Once more unto the breach?

Post Edwards, Stewart Duffy & Alex Leslie address the tensions between breach of contract & unfair dismissal

IN BRIEF

- Edwards v Chesterfield Royal Hospital NHS Foundation Trust: employers may dismiss on notice in a way that may cause substantial prejudice & loss to the employee because it will be known that he has been dismissed for cause.
- Curious outcome: employer has tried to comply with the express contractual provisions relating to the disciplinary process but then on dismissal, seeks to rely on another contractual provision, to avoid financial consequences of failure to comply.

The consequences of the interaction between the common law action for breach of contract and its associated remedies and the newer statutory claim for unfair dismissal and the remedies available from the tribunal have been described by various law lords as “awkward”, “unfortunate” and “anomalous” and in need of “urgent attention by the legislature”. In the Supreme Court decision of Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58, [2011] All ER (D) 101 (Dec), Lord Phillips described it as a difficult area of law and acknowledged that it may need to be fundamentally reviewed.

Edwards: the facts

Edwards was employed as a consultant surgeon. His contract of employment included an express term entitling his employer to dismiss him on three months’ notice. For the appeal it was accepted that there were express terms relating to the disciplinary process and that the contract incorporated the relevant trust disciplinary process, derived from a Department of Health Circular HC (90) 9, and by virtue of the incorporation of that process Edwards was entitled both to have disciplinary allegations considered by an independent three-person panel with a legally qualified chair and one panelist from the same clinical discipline and legal representation at the hearing.

Following a disciplinary hearing before a panel, the trust summarily dismissed Edwards on the ground of gross personal and professional misconduct. The disciplinary proceedings arose from an allegation that Edwards conducted an inappropriate internal examination of a female patient, which he denied. It is worth noting that the General Medical Council (GMC) considered the allegations and took no action on Edwards’s registration. The case was closed without a fitness to practise hearing. It appears implicit in the GMC’s decision that it concluded there was no realistic prospect of showing that Edwards had acted as the trust panel had found.

Formidable challenges

The appeal arose from proceedings in the High Court for breach of contract and wrongful dismissal. Edwards sought damages for losses arising from reputational harm caused by the panel’s adverse findings. The essence of his claim was that a disciplinary panel constituted in accordance with his contract would not have made the erroneous factual findings made against him and that in consequence his contract would not have been terminated. Edwards undoubtedly faced formidable challenges in relation to causation and remoteness at a trial but before the claim reached that stage the trust sought to have the claim struck out insofar as it exceeded the amount of his pay for the contractual notice period and the Gunton extension, that is the period it would have taken the trust to conduct the contractually prescribed disciplinary process prior to dismissal.

The preliminary issue for the Supreme Court was whether Edwards could, as a matter of law, recover for economic losses flowing from the damage to his reputation consequent upon the findings made by the trust disciplinary panel. The appeal was decided in the trust’s favour by a 4:3 majority, with five separate judgments. It was heard with the appeal in Botham (FC) v Ministry of Defence which raised the same issue of principle.

Johnson

In Johnson v Unisys Ltd [2001] UKHL 13, [2001] 2 All ER 801, the House of Lords held that the implied term of trust and confidence was of no application to the manner in which an employer dismissed an employee and that the court should not develop a novel implied term controlling the manner of dismissal as to do so would be inconsistent with Parliament’s intention in creating the statutory remedy for unfair dismissal, now found in Pt X of the Employment Rights Act 1996 (ERA 1996).

In Edwards the majority held that, in the absence of a contrary intention between the parties, the reasoning in Johnson and Eastwood and another v Magnox Electric plc [2004] UKHL 35, [2004] 3 All ER 991 bars a dismissed employee from recovering damages at common law for losses arising from a breach of his contractually prescribed disciplinary process in the steps leading to dismissal. For a money claim the employee is limited to his statutory remedy, if any, under Pt X of ERA 1996.
Lords Dyson, Wilson and Mance held that all of the losses for which Edwards sought to recover arose from the dismissal process and were therefore within the Johnson exclusion area. They held that the parties to the employment contract did not intend that common law damages would be available for a breach of the contractually prescribed disciplinary process where that breach occurred during the steps leading to dismissal and, applying Johnson, the common law claims were barred. Further, that in light of the existence of the statutory remedy for unfair dismissal, parties to an employment contract are presumed to have intended that remedy would apply to claims within the Johnson exclusion area precluding the common law remedy for breach of contract.

Chink in the armour?
A chink appears in their lordships otherwise robust rejection of the damages claim because they also held the presumption to be rebuttable by express contrary agreement. Furthermore, Lord Phillips said that imputing an intention to the parties in that manner was “artificial” while it appears that Lords Kerr and Walker and Lady Hale viewed the approach of the majority to discerning the parties’ intention as unsound. Thus, a majority were of the view that the existence of the statutory scheme would not foreclose a common law claim for breach of contract. The premise of the discussion in both Johnson and Edwards appears to have been that the disciplinary process was introduced by employers in response to the statutory provisions. It is notable that in dealing with the question of the parties intention Lord Mance said: “Employers and employees when contracting, in particular when introducing prescribed disciplinary procedures, must be taken to have in mind the statutory scheme relating to unfair dismissal.” But is that always the case?

Relevant DoH literature
The disciplinary procedure applicable in Edwards was derived from a DoH circular. The DoH has, since 1961, promulgated disciplinary procedures for doctors in the NHS. The present process is found in Maintaining High Professional Standards in the Modern NHS, which was the product of collective negotiations between representatives of the medical profession and the DoH. Like its predecessors, it provides far greater safeguards than the ACAS code. Yet, following Edwards, it appears that a breach of that more elaborate process will amount to nothing more than a factor to be considered by the employment tribunal in judging the fairness of a dismissal.

In future cases the question of the intention of the parties will be worthy of examination as an issue of fact to be determined at trial. While the division of views in the Supreme Court in Edwards might create difficulty in addressing the question of how that intention is to be divined the soundness of introducing a requirement in dismissal cases for an express contractual agreement permitting common law damages, as envisaged by Lords Dyson, Wilson and Mance was, at the very least doubted by Lords Phillips, Kerr and Walker and Lady Hale. One might anticipate from the terms of the judgments that employers will respond by introducing express terms to exclude claims for common law damages for breach of the disciplinary process.

Granting injunctions
Although damages are not available, Lord Phillips pointed out that the court is able to grant injunctions to prevent an actual or threatened breach of contract. Indeed, the court has been prepared to grant injunctions and/or declarations that an employee’s contract was not frustrated (see Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust [2005] EWHC 2407 (QB), [2005] All ER (D) 21 (Nov)) and setting aside a dismissal (Kircher v Hillingdon PCT [2006] EWHC 21 (QB), [2006] All ER (D) 35 (Jan)) and Lauffer v Barking, Havering & Redbridge
University Hospitals NHS Trust [2009] EWHC 2360). Lord Phillips responded to Miss O’Rourke’s (counsel for Edwards) observation that there was an inconsistency between the availability of injunctive relief from the court and the inability to recover compensation from the court for the same wrong saying: “An injunction to prevent a threatened unfair dismissal does not cut across the statutory scheme for compensation for unfair dismissal.” Lady Hale (dissenting) said that she was puzzled by that inconsistency. Although the tribunal has the statutory power to make re-instatement and re-engagement orders they are not enforceable.

In granting injunctions the court has not apparently been troubled by the absence of an express provision in the contract providing that a court could grant an injunction to restrain a breach. Of course, injunctions are a discretionary remedy with the consequence that the court has to be persuaded that they should be granted. Edwards appears to have reinforced the argument for an injunction since damages are even less likely to be an adequate remedy now.

Kulkarni
In Kulkarni v Milton Keynes Hospital NHS Trust [2009] EWCA Civ 789, [2009] All ER (D) 248 (Jul), Smith LJ observed that an employer who refused legal representation to a doctor might be acting in breach of his Art 6 rights after the event. But the doctor’s remedies appear then to be limited to seeking an injunction to undo the dismissal decision, a declaration that the dismissal was unlawful on procedural grounds, and damages for the Art 6 breach but not (absent the express term postulated above) damages for the real harm caused. Lord Dyson’s approach in Edwards would require an express contractual term preserving his common law remedy in order to rebut the presumption that he intended to be limited to the provisions of the statutory unfair dismissal scheme. Had Dr Kulkarni been dismissed at the disciplinary hearing his employers proposed he would have had no statutory remedy as he had only been employed for a few months. Could it really have been his intention to leave himself without a remedy?

Mind the gap
The decision in Edwards potentially leaves a significant group of employees with an inadequate remedy or no remedy at all once the dismissal has taken effect.

No doubt Edwards would be feeling better if he could recover damages for the true loss he could show he had suffered

First, many employees will not have worked for the employer for a sufficiently long period to make a claim for unfair dismissal. This group may be especially vulnerable to damage caused by an adverse disciplinary findings because they will not have had time to build up the relationships that might otherwise support applications for a new job following dismissal.

Second, as has been seen an employer can dismiss an employee for some other substantial reason (see Ezzias v North Glamorgan NHS Trust [2011] IRLR 550) and leave the former employee without any remedy.

Third, an employer will defeat an unfair dismissal claim if they can show that the dismissal was within the band of reasonable responses even though the tribunal might have thought the dismissal was wrong.

Fourth, an employee seeking to restore his reputation by a finding of unfairness in the tribunal can effectively be denied that remedy by an employer’s offer equivalent to the maximum compensation that the tribunal can award.

Last, for a high earning employee, such as Edwards, adverse disciplinary findings are likely to cause losses far in excess of the compensation cap in the tribunal, currently £68,400 plus any supplement for breach of a re-instatement or re-engagement order.

European claim?
It will be interesting to see if Edwards or some future claimant employee contemplates a claim in the European Court of Human Rights on the ground that there is no adequate domestic remedy for an established wrong.

As Lady Hale observed, few contracts of employment provide only for dismissal on cause. It appears that the notice provision in the contract is given primacy over the disciplinary provisions. But the consequence of the decision in Edwards, and that in Johnson before it, is that employers may dismiss on notice in a way that is likely to cause substantial prejudice and loss to the employee because it will be known that he has, in truth, been dismissed for cause. The reason may be discoverable without legal recourse for the employee. The curious outcome is that the employer has tried to comply with the express contractual provisions relating to the disciplinary process (presumably partly in order to avoid a contractual challenge) but then on dismissal, seeks to rely on another contractual provision, that relating to dismissal without cause, to avoid the financial consequences of his failure to comply.

Lost opportunity?
Was an opportunity lost by the Supreme Court? In Addis v Gramaphone [1909] AC 488, [1908-10] All ER Rep 1 the House of Lords formulated the employee’s entitlement as being for: “that which he would have received had his contract been kept and no more”, a quite unexceptional statement of standard contract law principles. Edwards may have believed that that was all he was seeking. He was probably surprised by the conclusion of Lords Dyson, Wilson and Mance that he had not intended that outcome. He may be consoled to know that an employee can have that which he would have received had his contract disciplinary process been honoured but only if an injunction is granted restoring him to employment and restraining dismissal absent a proper process. No doubt he would be feeling better if he could recover damages for the true loss he could show he had suffered.

The law remains difficult, inconsistent and inadequate.

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