Employment

A changing landscape?

How will the case of Edwards influence the future of wrongful dismissal claims? **Spencer Keen** & **Jennifer Lee** report

IN BRIEF

- *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* represents a significant milestone in an employee's ability to seek redress for a contractual breach in the county court.

The law of unfair dismissal provides a remedy to employees whose termination has breached the generally accepted norms of industrial fairness set out in the Employment Rights Act 1996. On the other hand an action for wrongful dismissal provides a remedy based squarely on the law of contract. Practitioners have been advising clients about the practical effects of choosing between a wrongful dismissal case in the county court and an unfair dismissal case in the tribunal for many years. Most practitioners learn, at an early stage of their careers, the difference between the rules governing the award of compensation in both jurisdictions.

While the statutory cap on compensation for unfair dismissal has crept upwards (it is now £63,500) the rules governing the award of damages for wrongful dismissal have remained, for the most part, not only stable but also consistent with the general principles of contract law. In *Gunton v Richmond Upon Thames London Borough Council* [1980] 3 WLR 714 Buckley J expressed, at p.730F, what most of us understood the position to be: "Where a servant is wrongfully dismissed he is entitled…to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say , that he would have determined the contract at the earliest date which he could properly do so."

The law of minimum obligation

This principle is a re-iteration of a well established principle of contract law called the law of minimum obligation. In *Cockburn & Anor v Alexander* (1848) 6 CB 791 Maule J gave what has become the classic statement of the law of minimum obligation at paragraphs 814-815: "Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted [for the purposes of calculating damages] which is the least profitable to the plaintiff, and the least burdensome to the defendant."

Employment lawyers will recognise this principle expressed in the rule governing the award of damages in wrongful dismissal cases set out in *Gunton*. One can only claim loss of earnings equivalent to the contractual notice period because giving contractual notice is the least burdensome method by which the respondent/defendant can perform the contract.

Botham overruled

A recent High Court case, *Botham v Ministry of Defence* [2010] EWHC 646 (QB), [2010] All ER (D) 264 (Mar) confirmed that the employer's conduct of a disciplinary procedure could not give rise to a free-standing cause of action for breach of contract at common law. However, on 26 July 2010 the Court of Appeal, in the case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2010] EWCA Civ 571, [2010] All ER (D) 247 (May) overruled *Botham*.

Edwards is a complex decision which disposes of the notion first that no claim for damages can be made in the civil courts for a breach of a contractual disciplinary procedure, and second that the damages in any such claim are limited, as a matter of law, to a claim equivalent to the notice period.

The facts in *Edwards*

Mr Edwards was a consultant surgeon working for the NHS Trust who was dismissed for gross professional and personal misconduct. He alleged that the trust had failed to follow the contractual disciplinary procedure correctly and that, if the procedure had been followed properly, no finding of misconduct would have been made against him. He was, in fact, later exonerated by his professional body. Although Mr Edwards had found work as a locum after his dismissal he alleged that, as a result of the dismissal, he could not continue working for the trust and would not be able pursue his medical career in the manner he would have wished. He claimed damages for £478,474 in respect of past loss of earnings and future loss of earnings in excess of £3.8m.

The trust, however, argued that the most he was entitled to recover was loss of earnings for the three months' period of notice to which he was entitled under his contract of employment. At a preliminary hearing a district judge accepted the trust's arguments and limited Mr Edwards's claim to the contractual period of three months' notice.

In the High Court, Nicol J held that Mr Edwards was only entitled to recover loss of earnings in respect of his contractual notice period and in respect of the period during which he would have remained employed while a disciplinary procedure which complied with the terms

of his contract ran its course. He based his conclusions on the decision in *Gunton v Richmond-upon-Thames London Borough Council* [1980] ICR 755.

Nicol J held that the decision in *Gunton* did not allow an employee to claim damages in excess of his notice period if he was able to show that properly conducted disciplinary proceedings would have dismissed the allegations of misconduct. Damages would therefore be calculated on the basis that the trust would have lawfully dismissed Mr Edwards on notice once it had completed its contractual disciplinary procedure.

Mr Edwards appealed to the Court of Appeal. The Court of Appeal proceeded on the basis that Mr Edwards would succeed in establishing all the allegations made in his claim, which were summarised by the Court as follows:

"(i) that in matters of personal conduct he would be subject to the hospital's general procedures and that in matters of professional conduct he would be subject to a procedure agreed by the Local Negotiating Committee in respect of medical practitioners;

(ii) that he was accused by the Trust of personal and professional misconduct;

(iii) that because of the nature of the allegations made against him he was contractually entitled to a formal disciplinary hearing by a panel which included a clinician of the same discipline as himself and a legally qualified chairman, before which he would have the benefit of legal representation, if he so wished;

(iv) that the disciplinary hearing which resulted in the findings of misconduct was not conducted in accordance with the terms of his contract of employment because the panel did not include a clinician of the same discipline as himself, nor a legally qualified chairman and because his request to be allowed legal representation was refused;

(iv) that following the panel's findings he was dismissed for personal and professional misconduct;

(v) that if the proceedings had been carried out in accordance with his contract of employment the panel would not have found that he was guilty of personal and professional misconduct and he would not have been dismissed;

(vii) that because he was dismissed on the grounds of personal and professional misconduct (including dishonesty) he has been unable to find comparable alternative employment"[at para 10]:

The above assumptions were made to enable the Court of Appeal to determine the limited questions raised in the appeal. It is worth drawing attention to the assumption at paragraph (v) since the *factual* assumption in that paragraph runs contrary to the normal situation which is that the employer will terminate the contract in the manner most favourable to himself by giving notice.

Moore-Bick LJ, giving the leading judgment identified the primary issue as being "whether a person who suffers damage as a result of findings of personal or professional misconduct leading to dismissal and loss of professional status that were made against him in disciplinary proceedings conducted in breach of contract, but which would not otherwise have been made, can recover damages at large".

Johnson v Unisys Ltd

The trust argued that Mr. Edwards could not claim damages beyond his notice period and that the only remedy he had was a claim for unfair dismissal under Part X of the Employment Rights Act 1996. The trust relied principally on the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13. In that case the claimant alleged that he had suffered a mental breakdown as a result of the manner in which he had been dismissed which prevented him from finding another job. He sought to recover damages for breach of the implied term of trust and confidence. The House of Lords held that since Parliament had provided a limited remedy for the conduct of which he complained in the form of a claim for unfair dismissal pursuant to the Employment Rights Act 1996, it would not be appropriate to develop the common law in a way that would accommodate his claim.

In *Edwards*, Moore-Bick LJ held that *Johnson v Unisys* was irrelevant to Mr Edwards's claim as he was relying upon a breach of an *express* term of the contract. While *Johnson* prohibited the implication of any term into a contract that required an employer to operate their disciplinary procedures fairly, that did not mean that an employee could not claim damages for breach of an express term. If that express term required the employer to operate a disciplinary procedure in a particular way, then a breach of that term would entitle the employee to pursue damages subject only to the ordinary rules on causation and remoteness.

Of course, for the purposes of determining *Edwards*, the Court of Appeal had accepted the factual assumption that "if the proceedings had been carried out in accordance with his contract of employment … he would not have been dismissed." It is vital to remember this, when considering the Court of Appeal's judgment, because this assumption effectively prevented the trust from arguing that the employer would have given contractual notice in accordance with the doctrine of minimum obligation. Although the Court of Appeal's approach to the principle of minimum obligation is unclear, both Lords Justices Moore-Bick and Lloyd endorse the minimum obligation approach as set out in *Gunton v Richmond Upon Thames Borough Council* to the extent that they confirm that claimants cannot use an implied term of fairness to circumvent the rule that damages will be calculated in accordance with the earliest date that the employer could terminate the contract.

A new departure?

While the decision in *Edwards* may not mark a departure from the law of minimum obligation it represents a significant milestone in an employee's ability to seek redress for a contractual breach in the county court. While an employer can still argue that damages from the loss of employment of itself should be limited to the contractual notice period this will not protect the employee from claiming that a contractual breach has harmed his ability to get a new job with another employer.

The decision in *Edwards* is being appealed to the Supreme Court. The determination of that appeal certainly has the potential to significantly change the legal landscape for wrongful dismissal claims. High earning employees may finally be afforded a more adequate remedy where a breach of contract has resulted in their termination and a loss of professional standing. As in *Edwards,* the claim for damages in such cases, can be significant. Practitioners will no doubt be hoping not just for greater clarity from the Supreme Court but also for a definitive judgment that can be relied upon. NLJ

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