

ELBA - 15th June 2010

Discipline and Injunctions

Notes by John Hendy QC for a talk with John Bowers QC

(John Bowers QC dealt with Article 6 ECHR and judicial review which is the reason why this paper does not.)

1. Contractual remedies for breach of C of E remain important, not least because of the manifest inadequacy of unfair dismissal (these inadequacies lay behind the rejection of U/D as a remedy satisfying Article 6 ECHR in *Kulkarni* (below).
 - a) no proper review of fairness: *Iceland Frozen Foods v Jones* [1982] IRLR EAT approx in *Post Office v Foley* [2000] IRLR 827 CA and *Whitbread plc v Hall* [2001] ICR 699 CA;
 - b) inadequacy of remedies; according to the 2008 –2009 Employment Tribunal and EAT Statistics:
 - i) Of the 52,711 U/D claims lodged 39,427 were disposed of, of these 3,935 were successful, i.e. 10%.
 - ii) Amongst these, the median award was £4,269, 4.5% resulted in awards greater than £30,000 and 12.3% in awards of less than £1,000. Indeed, 39.4% had awards of less than £3,000.
 - iii) Reinstatement or re-engagement was ordered in 7 cases, i.e. 0.1% of cases proceeding to a hearing, 0.017% of cases disposed of.
 - iv) From 1st Feb 2010 the maximum U/D comp and basic award combined is £70,000.
2. Classical thesis that no injunction to enforce contract of employment is defunct. (I leave relief by JR to JBQC).
3. Injunctions to restrain dismissal are now common. Indeed have been possible for a century:

Crisp v Holden (1910) Sol J and Wkly Rep 784 interim injunction granted to restrain dismissal of teacher in breach of contractual term that no dismissal without reasonable cause and on grounds connected with the giving of religious instruction.

Smith v McNally 1912 1 Ch D 816 notice of dismissal which had expired held to be invalid both by breach of contract and of statutory provisions, interim injunction granted: see esp. 826-827.

Hill v CA Parsons [1972] Ch 305 notice of 1 month held invalid since contract required 6 months; injunction granted in exceptional circumstances that unfair dismissal provisions would come into effect before any fresh notice would expire and damages not an adequate remedy: 313D-315B, 316CD, 319E-320G, esp. E-G, and (dissenting) 323AC.

Chappell v times Newspapers Ltd [1975] ICR 145: *Hill v Parsons* distinguished where workers refused to give undertaking they would not join strike called by their union but sought injunction to stop dismissal of them and strikers: 173H-174D; 176AE, 177AB

Jones v Lee and Guilding [1980] ICR 310 CA summary dismissal held to be invalid and injunction upheld for failure to honour contractual procedural prerequisites: 314C315D, 316E-317A, 318A, 318EF, 319A-D, 322BD, H.

Irani v Southampton etc HA [1985] ICR 590 interim injunction to restrain implementation of proposed dismissal unless contractual procedure exhausted: 603A-605A; otherwise employer would be “entitled to snap its fingers at the rights of its employees under the “contractual procedure 604F

Jones v Gwent CC [1992] IRLR 521 final declaration that letter giving notice of dismissal was invalid; together with final injunction to restrain dismissal in breach of contractual procedure.

Anderson v Pringle of Scotland Ltd [1998] IRLR 64 Ct of Session interim injunction to restrain dismissal in breach of a contractually incorporated redundancy procedure; whether injunction granted to restrain dismissal was ‘a matter of circumstances rather than of law’ [paragraph 12]. The Courts will intervene where it seemed ‘a fair and practical course’ [paragraph 11].

Peace v City and Edinburgh Council [1999] IRLR 417, Ct of Sess (OH), injunction granted to restrain employer from applying unagreed disciplinary procedure in place of contractual procedure; employee suspended. Body of authorities recognised in which contractual procedures enforced by injunction: paras.11-12.

Gryf-Lowczoski v Hinchingsbrooke Healthcare NHS Trust [2006] ICR 425; [2006] IRLR 100; [2006] Lloyd's Rep Med 199; [2006] 87 BMLR 46 –a

purported termination by frustration was held to be ineffective and an injunction would have been granted to continue the employment (in fact an undertaking in the same terms was accepted).

Palmer v East & North Hertfordshire NHS Trust [2006] Lloyd's Rep Med 472 - Injunction to restrain purported termination by frustration

Kircher v Hillingdon PCT [2006] Lloyds Rep Med 215 - Injunction to restrain purported dismissal by letter: disciplinary procedure not exhausted

McLaughlin v Governor of Cayman Islands (2007) 1 WLR 2839 dismissal of office holder set aside

Lauffer v Barking, Havering & Redbridge etc NHS Trust [2009] EWHC 2360 (QB) inj to restrain purported dismissal on notice for loss of trust and confidence, since the real complaint was capability and the C of E specified a procedure for such allegations.

4. Injunctions to restrain breach other than by dismissal are yet more frequent:

Powell v Brent London Borough Council [1988] ICR 176 (CA) Inj to restrain demotion

Hughes v LB Southwark [1988] IRLR 55 interim injunction granted to restrain change of duties in breach of contract

Barros D'Sa v University Hospital Coventry and Warwickshire NHS Trust [2001] IRLR 691 CA; ***Mattu v University Hospitals Coventry and Warwickshire NHS Trust*** [2006] EWHC 1774 (QB); LTL 21/7/2006 - Injs to restrain reliance on unproved charges in disciplinary penalty hearing

Mezey v SW London & St George's Mental Health NHS Trust (No.1) [2007] IRLR 237 (QB) and (CA), recently affirmed in ***Watson v Durham University*** [2008] EWCA Civ 1266 - Injunction to restrict scope of suspension from employment (see also ***Malik v Waltham Forest PCT and S of S for Health*** [2006] EWHC 487 (Admin).

Lakshmi v Mid Cheshire Hospitals NHS Trust [2008] IRLR 956 (QB) - Contract of employment, duty of mutual trust and confidence, doctor - breaches of procedure including internal appeal

Mezey v South West London & St George's etc NHS Trust (No.2) [2008] EWHC B9 (QB); LTL 9/4/2009 Injunction to restrain employer from conducting disciplinary hearing since conditions not met

Kulkarni v Milton Keynes NHS Foundation Trust [2009] IRLR 829 – Inj to compel employing Trust to permit legal representation of doctor in disciplinary hearing; discipl proced effectively rewritten and enforced (Art.6 ECHR argument established, obiter).

5. Lack of continuing trust and confidence is sometimes raised as a defence to an injunction (*Ali v Southwark LBC* [1987] IRLR 567):

Powell v Brent LBC [1988] ICR 176 CA injunction to restrain breach of contract by moving claimant from the post to which she had just been contractually promoted. There was “no rational ground” for the assertion of lack of trust and confidence in the light of evidence that immediate superiors had confidence: 195 DG. Damages were not an adequate remedy: 196BC.

Wadcock v LB Brent [1990] IRLR 223 interim injunction to restrain dismissal in breach of disciplinary procedure(para.21), trust and confidence point overcome by Claimant’s undertaking to work in accordance with instructions (para.31).

Robb v Hammersmith [1991] ICR 514 employer’s genuine lack of trust and confidence irrelevant where plaintiff seeking injunction to enforce contractual disciplinary procedures were adhered to and was suspended from work. Held: no rule of law or practice preventing relief sought. Without the benefit of the procedure, the plaintiff would lose the opportunity to ventilate his case and justify himself at the hearings and enquiries required by the procedure. See 520B-523D.

Barros D’Sa v University Hospital Coventry and Warwickshire NHS Trust [2001] IRLR 691 CA employer sought to rely on a breakdown in trust and confidence to justify dismissal after HC(90)9 Inquiry in which the Panel had found minor misconduct which did not justify dismissal. Submission “that an employee can be dismissed if trust and confidence has broken down under a disciplinary procedure when that has not been determined either as fact or, more importantly, adversely to the employee” rejected. See paras26-28, 35 and terse analysis of Simon Brown LJ at paras36-37.

Lauffer v Barking, Havering & Redbridge etc NHS Trust [2009] EWHC 2360 (QB) inj granted: exhaustion of capability procedure would establish whether alleged loss of trust and confidence was warranted.

Mezey v SW London & St George's Mental Health NHS Trust (No.1) [2007] IRLR 237 (QB) and (CA) inj could be granted to confine scope of suspension to only those activities which were the subject of allegations.

6. The essential peg to hang such claims is a full and formalised procedure which the contract (either expressly or by reason of the implied duty to maintain trust and confidence) requires to be exhausted prior to the challenged sanction is imposed. Hence most cases are in the public sector where procedures are more formal and more extensive. In particular much litigation has been generated by the removal (in England but not in Wales) of the HC(90)9 procedure for NHS medical staff (described in *Skidmore v Dartford etc NHS Trust* [2003] ICR 721 HL) which significantly downgraded the protection of doctors from spurious allegations (see J Hendy, “*Does the new Disciplinary Procedure improve on HC(90)9?*” in [2009] 15 Clinical Risk 11). In particular the new procedure for doctors is not Art.6 compliant because there is no ‘independent and impartial’ panel, so that further strategic litigation is being pursued. JBQC will deal with Art.6.
7. Whilst in the past mere “policies” have not been regarded as incorporated into the contract (*Dryden v Greater Glasgow Health Board* [1992] IRLR 469, EAT; *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193, CA; *Grant v South-West Trains Ltd* [1998] IRLR 188, QBD), with the advent of the implied term of trust and confidence employees are now likely to be able to rely on the latter in order to enforce compliance with a disciplinary ‘policy’: Moore-Bick L.J in *Deadman Bristol City Council* [2007] IRLR 888 at paras.17-18; *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] IRLR 596 .
8. But in absence of formal procedure to enforce, common law requirements of fairness in an employment disciplinary case remain as weak as ever; e.g. *Ali v Southwark LBC* [1987] 567 injunction sought to restrain disciplinary panel continuing where employer elected to rely only on an inquiry report and not on live evidence. Held that it was for the employer to decide what evidence to call and for the panel to make its decision: injunction therefore refused; *R(Thompson) v Law Society* [2004] EWCA Civ 167 (no right to oral hearing).

9. However, loss of right to fair appeal and fair hearing at first instance is still runnable: *Calvin v Carr* [1980] AC 574 PC (per Lord Wilberforce) still leaves ‘intermediate cases in which *Leary v National Union of Vehicle Builders* [1971] Ch 34 (per Megarry J) applies.
10. The “*Johnson exclusion zone*” for the implied term of trust and confidence is now absolutely confined to actions based on (i) the implied term and in respect of (ii) dismissal itself: *Edwards v Chesterfield Royal Hospital NHS Fdn Trust* [2010] EWCA Civ 571, clarifying scope of *Johnson v Unisys Ltd* [2001] 1 AC 518 and *Eastwood v Magnox Electric plc* [2004] 1 AC 503.
11. The ground breaking *Edwards v Chesterfield* now enables actions for unlimited damages for breach of contractual disciplinary procedures (an apparent return to *Barber v Manchester Regional Hospital Board* [1958] 1 All ER 322), so bypassing the constraints of *Addis v Gramophone Co Ltd* [1909] AC 488, as extended in *Gunton v Richmond BC* [1980] ICR 755 which are confined to damages for wrongful dismissal only; *Botham v MoD* [2010] EWHC 646 (QB) rejected. But no damages for injury to feelings: *Bliss v SE Thames RHA* [1987] ICR 700; though damages for injury to reputation: *Mahmud v BCCI* [1998] AC 20.
12. Damages are also available for physical injury arising from breach of disciplinary procedure: *Gogay v Hertfordshire CC* [2000] IRLR 703 (CA) (suspension on unfounded charge cause psychiatric harm) (and *Eastwood v Magnox*).
13. The dramatic result of *Edwards v Chesterfield* may mean that injunctive relief may be more difficult to secure since damages may be now an adequate remedy. However, deprivation of the right to clear the employee’s name may still be a potent argument.

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