Bad manners

Damages for dismissed employees: Oliver Hyams reports on the House of Lords' ruling in *Eastwood* and *McCabe*

Can dismissed employees claim damages for personal injuries caused by stress resulting from the circumstances leading to the dismissal?

In *Eastwood v Magnox Electric plc* and *McCabe v Cornwall CC* [2004] UKHL 35, *The Times*, 16 July 2004, (2004) 148 SJ 909 the House of Lords ruled that claims of damages for personal injury caused by stress at work are not precluded merely because the employee suffered the injury as a result of the circumstances which led to his/her dismissal.

To a reader who is unfamiliar with the question, it might appear strange that the House should have been asked to decide this question. Why should the fact that the employee was dismissed make any difference to whether or not he can make a claim for damages for personal injury?

Johnson

The answer lies in the earlier decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 518. There, the House ruled that the claim of a dismissed employee for damages for personal injury arising from the fact and manner of his dismissal, could not be made to a county court because Parliament had entered into the legal arena and provided the employee with a right to claim unfair dismissal to an employment tribunal. The employee had previously suffered mental illness as a result of stress at work, and he claimed that this meant that personal injury (in the form of mental injury) was a reasonably foreseeable consequence of dismissing him without taking reasonable care for his health. However, his claim was focused more on the implied contractual term of trust and confidence than on negligence. He claimed that his summary dismissal (preceded, as it was, by no, or at least minimal, warning of the impending dismissal) was a breach of the implied term of trust and confidence as well as negligent. In addition to deciding that the existence of the right to claim unfair dismissal precluded the common law from conferring a remedy, the House of Lords decided that the implied term of trust and confidence could not be relied upon in relation to the termination of the contract of employment. In Lord Millett's view, this was because "the implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration" (para 78). The question whether the law of negligence was engaged was the subject of almost no discussion. Their lordships merely said that the damage was too remote, or (as stated by Lord Hoffmann at para 58) that "the grounds upon which ... it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care", with the result that the claim in negligence was bound to fail. They therefore struck out the employee's claim.

Facts of *Eastwood* and *McCabe*

In *Eastwood*, in contrast, two dismissed employees claimed that they had suffered personal injury from a course of conduct carried on by their managers which began about four months before the dismissal of one of them and a year before the dismissal of the other. They claimed to have been subjected to a deliberate, malicious campaign to undermine and then dismiss them as a result of allegations made against them which the managers knew to be false. They claimed that their former employer was liable for this conduct on the basis that it constituted (1) a breach of the implied term of trust and confidence and (2) negligence.

In *McCabe*, the employee, a teacher, claimed that he had suffered personal injury as a result of (1) breaches of the implied term of trust and confidence and (2) negligence, arising partly from his suspension for a period of several months, during which he was told only in general terms of allegations of inappropriate conduct towards pupils whom he taught at a maintained school. He claimed also that the failure properly to investigate the allegations – and the showing of an intention never to investigate those allegations properly – was both a breach of the implied term of trust and confidence and negligent.

Earlier hearings

One of the employees in *Eastwood* successfully claimed that he had been unfairly dismissed. The other also claimed unfair dismissal, but compromised the claim after his former colleague's claim had succeeded. Both at first instance and on appeal ([2003] ICR 520), it was held that the employees' claims were precluded by the House of Lords' decision in *Johnson*. They were therefore struck out. At first instance in *McCabe*, the judge followed the Court of Appeal's decision in *Eastwood*, and held that the claim should be struck out. On appeal, however ([2003] ICR 501), the Court of Appeal was persuaded that the claim was not precluded by *Johnson* and therefore should not be struck out.

House of Lords

The employees in *Eastwood*, and the employer in *McCabe*, appealed to the House of Lords. The House allowed the appeal in *Eastwood* and dismissed the appeal in *McCabe*. In doing so, their lordships in some respects affirmed their earlier decision in *Johnson*. However, they also indicated that the anomalies in the situation meant that it should be re-examined by Parliament. Lord Nicholls gave the leading speech (Lords Brown, Hoffmann and Rodger agreeing with

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him), and his reasons for such indication were less expansive than those of Lord Steyn, who gave the only other reasoned speech.

It is, however, at least arguable that the anomalies result from the decision of their lordships in *Johnson*, and that the House could have removed them by departing from its earlier ruling in that case. However, as Lord Steyn commented (para 36): "Although the printed cases lodged on behalf of the employees invited the House to depart from *Johnson* if necessary, the House did not in the event hear oral argument from counsel for the employees calling in question the correctness of *Johnson*." This was because the House of Lords held that the employees' cases were not precluded by *Johnson*, with the result that it was not necessary for the House to consider whether to depart from *Johnson*.

Effect of *Johnson*

In implicit support of *Johnson*, Lord Nicholls commented (para 12):

"A common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be much more than a major development of the common law of this country. Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly, and it would do so in a manner inconsistent with the statutory provisions."

Nevertheless, as he acknowledged, there may be considerable practical difficulties in knowing when, or to what extent, a claim is precluded by *Johnson*. In para 27, Lord Nicholls set out the core of the ruling in *Eastwood/McCabe*:

"Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal."

However, as he then commented:

"30. If identifying the boundary between the common law rights and remedies and the statutory rights and remedies is comparatively straightforward, the same cannot be said of the practical consequences of this unusual boundary. Particularly in cases concerning financial loss flowing from psychiatric illnesses, some of the practical consequences are far from straightforward or desirable. The first and most obvious drawback is that in such cases the division of remedial jurisdiction between the court and an employment tribunal will lead to duplication of proceedings. In practice there will be cases where the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs.

"31. Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed.

A possible way forward

There may be a satisfactory solution which is both pragmatic and principled. The implied term of trust and confidence could sensibly be said (pace Lord Steyn and the many academic commentators referred to in his speech at para 44) not to apply to the termination of the employment contract. This is because its concern is the continuation rather than the termination of the employment relationship.

However, there is no very good reason why an employer should not be liable for a failure to take reasonable care in relation to the manner in which an employee is dismissed. Why, one might ask, should an employer be potentially liable for the manner in which it suspends an employee, but not for the manner in which it dismisses the employee?

The effect of a determination that an employer could be liable for the manner of dismissing an employee would not by itself mean that the employer would be liable to compensate the employee for the loss of the employment. Even if an employee has, before the dismissal, to the knowledge of the employer, suffered from psychiatric injury as a result of stress at work, and even if the employer knows that the employee is likely to suffer further psychiatric injury merely because of the loss of his job, the employer will not be liable to pay damages to the employee in respect of that injury if the employer takes reasonable care in relation to the termination of the contract. One can compare this scenario with the situation in which an employee is killed during the course of his employment. If there has been no failure to exercise reasonable care, then there will be no liability at common law. An employer is not obliged by the common law to act as the insurer of its employees' lives or health.

There would also be no conflict with the existence of the right to claim unfair dismissal. Section 123 of ERA confers a right to compensation for losses 'sustained by the complainant in consequence of the dismissal' Given (1) the ruling in *Dunnachie*, and (2) the definition of the word 'dismissal' in s 95(1) of ERA, it can be seen that the compensation for an unfair dismissal and damages for the manner of the dismissal could never be in conflict in terms of principle. Further, there would be no risk of double recovery, as the court or tribunal would be entitled (if not obliged) to avoid it (see *O'Laoire v Jackel International Ltd* [1991] ICR 718, at 731-2).

"32. The existence of this boundary line produces other strange results. An employer may be better off dismissing an employee than suspending him."

Lord Steyn's comment (in para 39) that "the present appeals illustrated the type of difficulties and uncertainties inherent in the legalism which prevailed in *Johnson*" appears to be apt. As he also said: "the way in which a rule or principle operates in the real world is one of the surest tests of its soundness."

Is *Johnson* sustainable in principle?

The right not to be unfairly dismissed is a right not to be dismissed unreasonably – ie in a manner which is outside the range of reasonable responses of a reasonable employer (*Sainsbury plc v Hitt* [2003] ICR 111).

The question of reasonableness is adjudged primarily against the background of the employer's economic interests: Employment Rights Act 1996 (ERA), s 98(4). The employee's health is normally thought to be irrelevant to the question of the reasonableness of the dismissal. Although in *Edwards v Governors of Hanson School* [2001] IRLR 733 it was held that the employer's fault in causing the ill-health which was the reason for the employee's dismissal was relevant when determining whether or not the dismissal was fair, it seems clear that the fact that an employee suffers personal injury as a result of the manner or fact of the dismissal is not normally a matter which an employment tribunal can properly take into account when deciding whether the dismissal was fair. It would be relevant only if the injury manifested during the dismissal process and the failure to take it into account made the procedure unfair. In any event, speaking conceptually, the right not to be unfairly dismissed is not a right not to be negligently dismissed. Indeed, an employment tribunal is expressly precluded from considering a claim of damages for personal injury, as a result of s 3(3) of the Employment Tribunals Act 1996.

Moreover, the right not to be dismissed unfairly is not a right not to be dismissed in breach of the implied term of trust and confidence (although it is true that if an employee successfully claims that he has been dismissed because he has resigned in response to a breach of that term, then the resulting 'constructive' dismissal will only rarely be fair).

Looking at the matter from the opposite point of view, a claim of damages for negligently-caused personal injury, or for personal injury arising from a breach of the implied term of trust and confidence, in relation to a dismissal, is not a claim of damages for the unfair manner or fact of the dismissal: it is not a claim that the dismissal was outside the range of reasonable responses of a reasonable employer.

Further, the House of Lords' decision in *Dunnachie v Kingston Upon Hull City Council* [2004] UKHL 36; (2004) 148 SJ 909 (judgment handed down on the same day as *Eastwood*) was to the effect that an employment tribunal cannot award an unfairly dismissed employee compensation for non-pecuniary loss, including compensation for the manner of the employee's dismissal.

Accordingly, there is no apparent conflict – at least in terms of principle – between (1) allowing an employee to make a claim of damages for negligently-caused personal injury arising from the manner of the dismissal, and (2) the right to claim unfair dismissal. In order to avoid liability in negligence, all that the employer would need to do would be to take reasonable care in relation to (for example) the breaking of the news to the employee that he was to be dismissed.

However, the matter is not so simple. This is, it would seem, primarily because of the economic need for a limit on the costs of employment. Parliament having recognised this by limiting the amount of compensation for an 'ordinary' unfair dismissal (the limit on the compensation payable under s 123 of ERA being currently £55,000), it could be said that it would be odd if the employee could circumvent this limit by claiming damages for personal injury where the injury arose from the manner and/or fact of the employee's dismissal.

Conclusion

Of one thing we can be sure. The decision of the House of Lords in *Eastwood* will not be the last word on the subject.