The awkward legacy of *Johnson*

The law concerning damages for dismissed employees is still causing headaches and the Lords have asked Parliament to re-examine it. Oliver Hyams of **Devereux Chambers** analyses the latest developments

In *Johnson v Unisys Ltd* [2003] the House of Lords 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 at an employment tribunal.

The facts in *Johnson*

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'. The question of whether the law of negligence was engaged was barely touched upon. Their Lordships merely said that the damage was too remote or, in Lord Hoffmann's words:

> ... 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...

> '*Johnson* left room for much doubt about its practical effect, in particular where an employee suffered personal injury as a result of the stress caused by the dismissal process.'

The result was that the claim in negligence was bound to fail. They therefore struck out the employee's claim.

That ruling was widely criticised by commentators. It certainly left room for much doubt about its practical effect, in particular where an employee suffered personal injury as a result of the stress caused by the dismissal process. In *Eastwood & anr v Magnox Electric Plc and McCabe v Cornwall County Council* [2004], the House of Lords considered two cases in which such doubts needed to be resolved.

The facts in *Eastwood* and *McCabe*

In *Eastwood* 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.

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 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, the Court of Appeal was persuaded that the claim was not precluded by *Johnson* and therefore should not be struck out.

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.

It is, however, at least arguable that 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:

> '... 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 it.

The effect of *Johnson*

In implicit support of *Johnson*, Lord Nicholls commented:

> 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*. Lord Nicholls set out the core of the ruling in *Eastwood/McCabe*:

> 'There may be considerable practical difficulties in knowing when, or to what extent, a claim is precluded by *Johnson*.'

> 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:

> 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.

He then referred to some of the difficulties arising from this dividing line, and pointed out that one of its strange results is that an employer 'may be better off dismissing an employee than suspending him'.

Lord Steyn's comment 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?

So, is the *Johnson* principle sound? The situation is complex.

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 (see *Sainsbury Plc v Hitt* [2003]). The question of reasonableness is adjudged primarily against the background of the employer's economic circumstances including size and administrative resources (see s98(4) Employment Rights Act 1996 (ERA)). 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] 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 for damages for personal injury, as a result of s3(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 they have been dismissed because they have resigned in response to a breach of that term, then the resulting 'constructive' dismissal will only rarely be fair).

> 'The way in which a rule or principle operates in the real world is one of the surest tests of its soundness.'
> Lord Steyn

Looking at the matter from the opposite point of view, a claim for 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 for 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] (judgment in which was handed down on the same day as that in *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 for 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 they were 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. With Parliament having recognised this by limiting the amount of compensation for an 'ordinary' unfair dismissal (the limit on the compensation payable under s123 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 of the employee's dismissal.

In conclusion

Of one thing it is possible to be sure: the decision of the House of Lords in *Eastwood* will not be the last word on the subject.

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Case references

Dunnachie v Kingston-upon-Hull City Council
[2004] UKHL 36

Eastwood & anr v Magnox Electric Plc and McCabe v Cornwall County Council
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Edwards v Governors of Hanson School
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