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MARSON, James

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Dismiss, Upset and Breach - Just Don't Suspend: The False Dawn of Damages for Future Losses. A Case Note on *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22

JAMES MARSON B.A. (HONS); LL.M; PH.D.

Senior Lecturer in Law, Sheffield Hallam University

J.Marson@shu.ac.uk

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ABSTRACT

On 14 December 2011 the Supreme Court handed down its judgment regarding the extent to which damages awards in instances of dismissal can take into account future losses, see *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22. The Court of Appeal ([2010] EWCA Civ 571) had held there was no principle of law why damages could not include future losses where an employer had breached the contract by not following contractual disciplinary and dismissal procedures. The question considered by the Court of Appeal was whether the status quo of restricting such awards to a statutory maximum (following the ACAS Code) and/or to the contractual notice period plus reasonable period of time for the procedures to be completed, was applicable. Alternatively, the Court of Appeal could move away from this traditional purely-contractual approach and enable damages to take into account those future losses associated with an unfair / wrongful dismissal. This was the approach taken. The Supreme Court, reversing the Court of Appeal, decided to follow the former, traditional approach. As such, its decision has broad implications for employers who flout contractual disciplinary and dismissal procedures, and it has further implications for employers who choose to suspend individuals rather than to dismiss them. Indeed, the case confirms that it may likely be more certain and financially beneficial for employers to choose to dismiss an individual rather than to potentially invoke greater costs and damages awards by choosing to suspend.

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1. BACKGROUND

To begin, it is important to clarify some preliminary key points. First, since 1971 and the Industrial Relations Act, every qualifying employee has the right not to be unfairly dismissed. However, the employment relationship will be terminated at some point, and it has become commonplace for the notice period required by the parties to be incorporated into the contract itself, or through some other means such as a works handbook. There are greater restrictions to terminating a contract of employment for a qualifying employee who has protection against unfair dismissal, (1) but insofar as the employer holds a reasonable belief (2) of, for example, misconduct; he/she has conducted a reasonable investigation into the matter, (3) and the decision to discipline or dismiss the individual falls in what is known as the 'band of reasonable responses', (4) the dismissal will be fair. Where an employer adheres to the relevant notice period, there is a lawful dismissal at common law. If the employer can justify a decision to terminate a qualifying employee's contract with correct notice through compliance with the relevant statutory requirements (identified largely in the Employment Rights Act 1996), the dismissal will also be fair. However, an employer will not have to provide the notice period (or payment in lieu) where the individual has committed some fundamental breach which will allow the employer to accept the repudiation and terminate the relationship. Due to the significance of terminating a contract of employment without notice (known as a summary dismissal), and to protect both parties from claims of wrongful / unfair dismissal, employment contracts began to expressly identify the applicable disciplinary and dismissal procedures. These aided the parties in understanding the mechanisms through which disputes would be handled before the employer took a decision to dismiss. In the absence of a justifiable reason to end the contract, an employer who terminated the contract without notice would have committed a wrongful dismissal. The *Edwards* case came to prominence because of the arguments presented by the Court of Appeal, subsequently reversed by the Supreme Court, as to the extent of damages payable. There are two routes to seek a remedy when an individual's contract of employment is terminated without notice - the common law wrongful dismissal route, and the statutory (but more heavily regulated) unfair dismissal route. Remedies in wrongful dismissal have been based on the classic contract law basis of damages, and the possibility of the equitable remedy of injunctions to prevent the application of a dismissal in breach of contract. (5) The statutory remedy of unfair dismissal provides the remedies of re-instatement, reengagement and compensation in the form of damages. Here

compensation comprises of a basic award, compensatory award and a discretionary additional award. The current maximum (1st February 2012) is £85,200 and tribunals are unable to exceed this figure.

2. NON-COMPLIANCE WITH DISCIPLINARY PROCEDURES

To substantiate a lawful and a fair dismissal the employer is required to follow the required procedure before the decision to dismiss. This will be identified in the contract itself and/or the employer will adhere to the procedures identified in the Code of Practice 1 - Disciplinary and Grievance Procedures established by the Advisory, Conciliation and Arbitration Service (ACAS). The ACAS Code provides that where an employer has not (without good reason) followed the procedure before the decision to discipline or dismiss, the tribunal is entitled to raise the compensation payable to the employee by up to 25%. Where an employer has not followed the contractual disciplinary procedures, previous case law identified the extent of damages available to the employee. *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 sought to restrict damages to the pay that the individual would have received had the notice period been worked. Johnson had sought rely on a breach of the implied term of trust and confidence as a foundation of a claim, at common law, in damages for the manner, not substance, of his dismissal. Johnson argued that a consequence of his dismissal included him suffering a mental breakdown and that he was unable to work again. The House of Lords refused to extend the implied term to enable damages to be awarded on this basis and struck out the claim as disclosing no reasonable cause of action. Each member of the Lords, apart from Lord Steyn, agreed that to enable such an extension of the law in this respect would be contrary to the intention of Parliament which had already established rules regarding maximums in the calculation of damages awards in relation to unfair dismissals. Despite academic and judicial disquiet with this judgment, *Johnson* gave rise to the term '*Johnson* exclusion area.' The *Johnson* exclusion area relates to the denial of damages being recoverable for a breach of contract relating to the manner (not substance) of the dismissal. *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448 was a second significant case which extended the availability of compensation to include payment of wages for the period of time of a reasonable investigation (had the employer conducted one) before the decision to dismiss. However, the case law made certain that these were the extent to the damages available to an individual dismissed in the breach of disciplinary and dismissal procedures. This restriction of the damages available gains significance when considering Mr. Edwards' dismissal.

3. EDWARDS' DISMISSAL

The Chesterfield Royal Hospital NHS Foundation Trust was established on 1 January 2005 (it was formally the Chesterfield and North Derbyshire Royal Hospital NHS Trust). Mr. Edwards was employed as a consultant trauma and orthopaedic surgeon at the Trust under a contract incorporating, pertinent to his claim, paragraph 8, which provided that the employment contract was subject to three months' notice on either side. Further, paragraph 13 stated that in matters of alleged professional misconduct, Mr. Edwards would be subject to a separate procedure negotiated and agreed by the Local Negotiating Committee. Mr. Edwards was notified on 22 December 2005 that disciplinary proceedings were

being instituted against him regarding allegations from a female patient that he had performed an inappropriate internal examination. Mr. Edwards denied that such an examination had taken place. The nature of such an allegation necessitated the use of the procedures which were established in the 'Disciplinary Procedures for Hospital and Community Medical and Dental Staff.' A disciplinary hearing was held on 9 April 2006, and on 10 February the disciplinary panel concluded that Mr. Edwards should be summarily dismissed for both his gross personal and professional misconduct. On 16 February Mr. Edwards received by letter the detail of the panel's findings and reasons for its decision. Following Mr. Edwards' dismissal on 10 February 2006, an internal appeal was sort but was dismissed on 24 April and on 12 May 2006 Mr. Edwards began unfair dismissal proceedings. One of the bases on which his claim was made was that his dismissal was unfair due to the 'inappropriately constituted' disciplinary panel. Mr. Edwards argued that a properly constituted panel would not have made incorrect findings and consequently he would not have been dismissed. However, prior to the pre-hearing review, Mr. Edwards withdrew his application for unfair dismissal. On 15 August 2008 Mr. Edwards began proceedings in the High Court for wrongful dismissal, again on the basis of the breach of procedural rules regarding his dismissal. Mr. Edwards' claim essentially had two strands. The first was his dismissal in breach of contract. The second, and perhaps much more significant and of the wider importance, was the damage to his reputation. Whilst there was no action taken by the General Medical Council to strike Mr. Edwards from the register, his dismissal by the Trust for the alleged offence meant he would be unable to work in the NHS again, and his opportunities for earnings would have been significantly reduced had he sought employment in the private sector. It is this second issue which was fundamental to the case as Mr. Edwards considered his wrongful dismissal was going to cause him ongoing financial loss. As the law currently stood, Mr. Edwards was entitled, if he successfully argued wrongful dismissal, to damages consisting of the three months' wages he would have received under the contractual notice period (plus the *Gunton* extension for wages whilst the Trust complied with the disciplinary procedures). Mr. Edwards argued that had he not been wrongfully dismissed, he would have continued to work in his role as a consultant orthopaedic surgeon until his retirement in 2022. Consequently he had suffered a loss of earnings, including future earnings, in excess of £3.8 million. To be able to claim future losses in excess of the *Johnson* and *Gunton* exclusion and extension areas (the existing case law restrictions), Mr. Edwards had to demonstrate that his future losses were separate and not subsumed in an unfair dismissal claim.

4. THE FIRST CASE

The Trust, in its defence to Mr. Edwards' claim, applied to the court on 17 February 2009, for an order that Mr. Edwards' claimed damages for losses be restricted to the three months' contractual notice period as required in his contract. District Judge Jones acceded to the application. This led to an appeal in the High Court ([2009] EWHC 2011 (QB), [2009] I.R.L.R. 822) but only allowed on the basis that were breach of contract established, that compensation be extended to the period of time it would have taken to conduct the disciplinary procedure correctly (applying the '*Gunton* extension').

4. THE COURT OF APPEAL

The Court of Appeal considered the causes of action available to Mr. Edwards and identified, in the first instance, that an action for breach of contract would be applicable. Having established a breach of contract had taken place by the Trust wrongly constituting the disciplinary panel, the next issue was which remedies would be available. It identified that an injunction to restrain the threatened breach of contract in addition to damages, and a claim of unfair dismissal, were all available to Mr. Edwards. Significantly, the Court of Appeal did not follow *Gunton* in its reasoning and provided that there was nothing in principle which would restrict an individual's claim of damages for just wages during the notice period and the completion of a disciplinary procedure. Future losses were available. This was a very controversial decision and caused widespread disquiet amongst commentators, and naturally, employers. By making possible claims which went far beyond contractual loss of earnings and breach of procedure, employers would have been exposed to significantly greater damages actions. Presumably, the ruling would have ensured more effective adherence to statutory and contractual disciplinary and dismissal procedures than could possibly have been achieved through the (ineffective, widely criticised, and now repealed - see Gibbons, 2007) Employment Act 2002 (Dispute Resolution) Regulations 2004, or the ACAS code.

6. THE SUPREME COURT

The basis of the appeal in *Edwards* required the Supreme Court to consider two questions; No. 1: whether the reasoning in *Johnson* precluded recovery of damages for the manner of an unfair dismissal which arose due to a breach of an express term of the employment contract (unlike in *Johnson* with breach of an implied term - trust and confidence); and if so, No. 2: whether the claim by Mr. Edwards subsequently fell into the *Johnson* exclusion area. In the Supreme Court, Lord Dyson began by considering the requirement of the implied term of maintaining trust and confidence between the parties (*Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20) and how this may relate to an employer causing an individual loss as a result of a wrongful or unfair dismissal. However, despite adverse effects on the individual, those effects which are related to the dismissal, not independent of it, are not recoverable. As put by Lord Mance, at paragraph 92, '... a dismissal is wrongful where there is... no basis for summary dismissal. Other circumstances (such as the reasons for the failure, the employer's state of mind or the impact on the employee) are simply irrelevant to the breach or the loss recoverable for it.' The Employment Rights Act 1996 provides for a strict method of calculating the award of damages, and by necessity it precludes any award taking into account distress or upset which the employee suffers in relation to the unfair dismissal (see *Eastwood and Another v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503). Presumably (but erroneously), the fact that an employee has been unfairly dismissed will naturally involve some element of distress and upset which Parliament must have included or at the very least considered when identifying the award of damages. The majority of the Supreme Court held that the first question was answered in the affirmative and consequently the *Johnson* exclusion area continues. With regards to the second question, Lord Dyson identified that the employer's failure to act fairly in determining a decision to dismiss does not, of itself, cause an employee financial loss. It is when the employee is dismissed that the loss arises and as such it is related to the dismissal, not the steps leading to the dismissal. What is of interest

is Lord Dyson's consideration of the decision provided by Lord Nichols in *Eastwood* where Nichols identified that this second issue regarding losses sustained in the steps leading to a dismissal *could* cause an employee financial loss. The example he provides is where an employee is suspended rather than dismissed. Indeed in his summing up, at paragraph 60 Lord Dyson, in allowing the appeal of the employer, stated that the position of the claimant would have been completely different had he been suspended not dismissed. Mr. Edwards' loss was, held the Supreme Court, as a consequence of the dismissal, not independent of it, and therefore within the *Johnson* exclusion area - hence damages were restricted to the notice period and would not extend to future losses.

7. GUNTON EXTENSION V FUTURE LOSSES

Lord Dyson considered, beginning at para. 19, the *Johnson* exclusion area explaining that this series of settled case law (*Addis v Gramophone Co Ltd* [1909] AC 488 onwards) had established the limitation for an employee to recover damages in respect of the manner of his/her dismissal. A concern in *Johnson* was that there existed an express term, in the same way as applied to the contract of Edwards, which identified the manner and form in which disciplinary and dismissal procedures should take place. As such this went beyond merely an implied term to maintain trust and confidence between the parties. However, it appears one of the major influences of the decision of the majority of the Supreme Court was of the Employment Rights Act 1996 Part X, and the ACAS Code which identifies specifically that where the relevant contractual disciplinary and dismissal procedure is not complied with, a tribunal is entitled to raise or lower, as appropriate, any award (to the relevant maximum) by no more than 25%. As such, Parliament had clearly intended to cover situations where a dismissal had taken place contrary to the contractual terms and conditions. This, felt the majority of the Supreme Court, bound them to reject the Court of Appeal's ruling and to return instead to the common law restriction on the award of damages in respect of breach of terms and conditions. Further, at paragraph 44, Lord Dyson identified that whilst a breach of the disciplinary process will amount of breach of contract, the remedy lies in obtaining an injunction to prevent the effect of any subsequent dismissal, pending the correct administration of the procedures rather than extending the common law principle of damages for future losses. Therefore, and on that basis, Mr. Edwards already had a cause of action at that stage and in following Lord Nicholls' analysis in *Eastwood*, Mr. Edwards had a cause of action before his dismissal which must consequently be unimpaired by his subsequent dismissal. Lord Dyson's judgment was a rather depressing retreat to the status quo and failed to provide a remedy which would have provided greater prominence to the contractual terms and conditions relating to disciplinary procedures. As it currently stands, the law unnecessarily burdens and restricts itself due to a seemingly misreading of the ratio of *Johnson*. The more protective and enlightened approach was offered by Lady Hale, who in the minority, took the opposite view to Lord Dyson and would have rejected the employer's appeal. The main argument presented by Lady Hale was that the rights created by Parliament in 1971 (the Industrial Relations Act) for an employee not to be unfairly dismissed, and the subsequent protection provided through statute and the ACAS Code regarding the computation of damages, were established after the common law and were, according to Lady Hale, to complement those common

law rights not to replace or to supersede them. Parliament's action was taken because most employees had very few rights under the contract of employment. Lady Hale presents a compelling argument as to why protection should have been provided to Mr. Edwards. She identified in comparison with *Addis* that whilst in *Addis* there was no contractually agreed process for his dismissal, there was such a contractually agreed process evident in the relationship between Mr. Edwards and the Trust. This led to discussion of the *Johnson* exclusion area. But Lady Hale did not agree with the other Lords of the ratio in their interpretation of *Johnson*. In relation to this was particularly the potential for the common law providing a remedy which was expressly not provided for by Parliament. However Lady Hale argued that Parliament acted to require employers to act fairly when they dismissed their employees and there was nothing to suggest that Parliament intended to limit the entitlement of those employees who had a contractual right to a job, not to be dismissed without cause. Therefore Lady Hale could not agree with any distinction between the consequences of dismissal and the consequences of other breaches of the contract in access to, or the calculation of, damages. Lady Hale concluded her arguments by identifying that she could not see how it might be possible for an employee with a contractual right to a particular disciplinary process to enforce the right in advance through use of an injunction but to be precluded from claiming damages for its breach after the event. A limiting factor to the reasoning of *Addis* when applied in a modern context, and viewing employment law in a relational contract theory context, is that it clearly misses the personal dimension underpinning such agreements. To apply 'pure' contractual principles and limitations to them appears antiquated and ill-conceived. For example, to exclude damages for the distress and unpleasantness involved in being wrongfully or unfairly dismissed quite clearly attempts to force a commercial contractual understanding to a personal relationship. Indeed, in *Autoclenz v Belcher* [2009] EWCA Civ 1046, [2010] IRLR 70, the Court of Appeal had already explained the application of contractual principles relating to employment status. The general rules outlining that a party who signs a contract is bound by it, a term will not be implied if its effect is to contradict an express term, and the equitable remedy of rectification is available to the parties where the written contract constitutes a mistake from that which the parties had agreed orally. That is to say, the courts will not, nor should they, attempt to re-write the rules of contract law simply for the purposes of employment relationships. However, what is of interest is the judgment of Aikens LJ and how the inequality of the bargaining powers of the parties has a significant effect on the contracting between those parties, and how contracts of employment, compared with general commercial agreements, should be viewed differently:

"The circumstances in which contracts relating to work or services are concluded are very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that frequently organizations which are offering work or requiring services are in a position to dictate the written terms which the other party is bound to accept." (para 92).

Employment is frequently a defining feature of an individual (per Lord Millett in *Johnson*) and the development and judicial acknowledgement of the implied terms

shared between the parties would surely convince the judiciary to adopt a more proactive stance when faced with the appropriate enforcement of the contract and computation of damages for breach.

9. IMPLICATIONS OF THE JUDGMENT

The decision of the Court of Appeal had caused concern for employers due to the possibility of damages awards consisting of future losses flowing from the dismissal. Where employers dismissed an employee in contravention of contractual terms and conditions relating to disciplinary and dismissal procedures, employers faced the invidious position of paying substantial damages due to their failure. As such, the Supreme Court has provided greater certainty and protection for employers by restricting the award of damages in unfair dismissal cases to the relevant statutory-imposed maximum and, in relation to claims under the common law, to the contractual notice period due, along with a calculation of the length of time a reasonably conducted disciplinary / dismissal hearing would have taken. However, it is worthy of note that the majority decision by the Supreme Court was four to three. It may be possible that future losses could be recoverable if the persuasive arguments presented by Lady Hale are considered in detail in the future. Indeed Brodie (2011), in a critical analysis of relational contract theory and its (mis)application to employment relationships, states 'It would not be at all surprising if, in time, damages for upset becomes available for breach of the employment contract but not in respect of other types of relational contracts' (p. 248).

10. CONCLUSIONS

The decision in *Edwards*, whilst somewhat predictable and maintaining the status quo, is nonetheless unfortunate—certainly for employees. The result of this case is simply that employers have guidance from the Supreme Court that failure to follow contractual disciplinary and dismissal procedures which have led to the decision to dismiss will merely result in either a *Gunton* claim for damages or a maximum 25% uplift in line with the ACAS Code for unfair dismissal. Regardless of the consequences for the individual, damages will be limited unless independent of the dismissal. Neither the contractual or statutory approach is particularly onerous for employers, the only concern would be where an employer chooses to suspend an individual in breach of the contract, this, according to the *Edwards* case, would enable a claim for damages on the basis of future losses. The advice for employers who are unsure of, or unwilling to follow, disciplinary procedures is clear - dismiss, don't suspend.

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(1) See Earnshaw, J., Marchington, M., and Goodman, J. 'Unfair to Whom? Discipline and Dismissal in Small Establishments' (2003) 31 *Industrial Relations Journal* 62-73 for an interesting discussion of unfair dismissal and potential unfairness for employers who seek to defend claims.

(2) Per *British Home Stores v Burchell* [1978] IRLR 379.

(3) See Parrott, G. and Potbury, T. 'Unfair Dismissal: The Polkey Principle Laid Bare' (2007) 79 *Employment Law Journal* 5 for a discussion of reasonableness.

(4) *Iceland Frozen Foods Ltd v Jones*, [1983] ICR 17.

(5) See Carty, H. 'Dismissed Employees: The Search for a More Effective Range of Remedies' (1989) 52 *Modern Law Review* 449.