

Employment: Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58: Extending the Johnson 'exclusion zone'

I mentioned Mr Edwards' case in an earlier edition of this newsletter shortly after the Court of Appeal had delivered its judgment. Now the Supreme Court has had their say, an update is required.

Mr Edwards was a Consultant Trauma and Orthopaedic Surgeon dismissed for misconduct by his employer following a flawed disciplinary procedure. When the Court of Appeal considered Mr Edwards' claim for damages for loss of reputation they tantalisingly suggested that a breach of disciplinary procedures might sound in damages at common law and might, for example, include damages for non-pecuniary loss. However the Supreme Court has now allowed the employer's appeal, finding that Mr Edwards was not entitled to bring a breach of contract claim for damages for loss of reputation.

In Johnson v Unisys [2001] UKHL 13 a claim for loss of reputation and distress damages was disallowed on the basis that a breach of the implied term of mutual trust and confidence leading to dismissal, whether constructive or direct, could not give rise to a common law claim for nonpecuniary loss. This was in part because to allow such a claim would be to undermine the statutory scheme for unfair dismissal claims. In Edwards the Supreme Court reiterated the importance of maintaining the boundaries of the statutory scheme, but this time with particular emphasis upon the references within the scheme to disciplinary procedures. Even after the demise of the statutory disciplinary procedures the ACAS Code of Conduct was given a peculiar statutory authority, in that Tribunals are required to consider it, it can determine whether or not a dismissal has been unfair, and it can affect the level of damages in that a Tribunal can adjust awards by 25% as a result of a failure on the part of either party to follow the relevant procedure.

Moreover the failure to follow the correct disciplinary procedure was inseparable from the dismissal to which it led and could not form the basis of a breach of contract claim independent of any unfair or wrongful dismissal claim. Once again the Courts have resisted as a matter of principle the recovery of damages arising from the unfair manner of a dismissal, but this time where the dismissal is in breach of an express term of the employment contract.

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