


Keeping the employment contract alive: the role of the injunction

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Employment lawyers are typically asked to advise whether a dismissal is lawful and as to the consequences if it is not. Is the reason a permissible one? Has a fair process been followed? What remedies are available? Sometimes, however, the employee's interests need to be protected in advance of a threatened dismissal.

In a straightforward case, the employee seeks to remain employed until a given date because they will lose out financially if not employed on that date. For example:

- termination before gaining qualifying service may preclude an unfair dismissal claim or a redundancy payment;
- termination may prevent an employee acquiring contractual rights, which are dependent on a particular length of service;
- an employee's entitlement to particular benefits may depend on the date on which termination occurs. Recent vivid illustrations include *Woodcock*, in which the entitlement to take early retirement on enhanced terms required Mr Woodcock to remain in employment on his 50th birthday, and *Geys,* in which several million euros turned on whether Mr Geys had been dismissed before a certain date because of the applicable bonus scheme rules.

Alternatively, the employee's objective may be to prevent dismissal before a particular contractual process has been followed. The reluctance of tribunals to order reinstatement or re-engagement in unfair dismissal claims, coupled with the statutory cap on compensation, means that an employee may suffer substantial financial loss in the wake of dismissal. Beyond immediate loss, the mere fact of dismissal, particularly for an offence of misconduct or incapability, may well have a stigmatising impact on future employment prospects.

What steps can employees faced with imminent dismissal take to protect their position? Is the dismissed employee's redress confined to an unfair dismissal claim?

Objecting to dismissal?

For statutory purposes, it is trite law that employment ends when the employee is informed of the employer's decision to dismiss (or has a reasonable opportunity of being so informed) or resigns in response to the employer's repudiatory breach.

The situation at common law is different. The Supreme Court's recent ruling in *Geys* authoritatively endorses the principle in *Gunton* that an employee, faced with an employer's repudiatory conduct (in that case, termination without notice), may elect either to treat the contract as at an end or demand its continued performance.

The facts in *Geys* were, however, unusual in that the employer, when informing him that his services were being dispensed with immediately, had not sought to make payment in lieu of Mr Geys' entitlement to notice, although it could have done so. The prevalence of Pilon clauses in contracts of employment, particularly for senior level employees, suggests that it is unlikely in most cases that dismissal will be effected in breach of the requirement to give notice with the attendant right to object to that breach.

The decision in *Geys* throws up a number of difficult questions that are not the primary focus of this article. In particular, the Supreme Court left unresolved the possibility of divergent dates of dismissal for statutory purposes and at common law. The decision also calls into question whether *Hogg* remains good law so that an employee who objects to a breach of contract but does not resign can nevertheless be treated as having been dismissed, as in the recent case of *Trafford Housing*.

Preventing termination

Of broader practical significance is the role that other terms of the contract may play in fettering the employer's power to terminate. In *Gunton*, the employee had been given the required notice of termination. The court held, however, that termination was in breach of contract because the Council was not entitled to terminate on disciplinary grounds without

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first going through the relevant disciplinary procedure. The express term of his contract entitling Mr Gunton to have any disciplinary case against him dealt with in accordance with that procedure meant that following it was a 'condition precedent' to lawful termination.

Litigation over proposed disciplinary action in the public sector is common, particularly in doctor cases, because the relevant disciplinary schemes are generally expressly contractual. In the private sector, employers typically declare their disciplinary codes to be non-contractual, or may assume that they are non-contractual in the absence of a positive statement to the contrary.

This assumption must be approached cautiously, not only as regards disciplinary procedures but employment policies more generally. In *Deadman*, the Court of Appeal held that the employer was required to give contractual effect, as a facet of the trust and confidence term, to employment policies that had been publicised and agreed with the recognised trade union. It was thus bound, in investigating a complaint of sexual harassment against Mr Deadman, to follow those parts of its harassment investigation procedure that were apt for incorporation. This decision points up the potential for a wide range of employer policies; for example, those covering grievance or redundancy, to have contractual effect.

The implied term of trust and confidence may also have a role in governing the exercise by the employer of discretionary procedural powers leading up to the dismissal. In *Gogay*, the Court of Appeal held that the employer was in breach of that term in suspending an employee in connection with an allegation of child abuse when the evidence did not warrant such a step. The observations of the Court of Appeal in *Crawford* highlight the significant damage that can be caused by an excessive or unwarranted use of the power to suspend and act as a salutary reminder of the need for caution.

It may be that disciplinary procedures derive contractual force by another route. In *Edwards*, Lord Dyson JSC held that ss.1 and 3 ERA gave expression to legislative intent that 'at least in most cases' contractual effect should be given to disciplinary rules and procedures. No guidance is given as to the cases in which that will not be so, but the ruling lends weight to the argument that a mere declaration that the procedure is non-contractual may not be sufficient to contain its effect. The safest course may be to assume that the procedure overall is contractual but to consider carefully whether particular provisions within it are apt for incorporation: see the useful guidance on 'aptness' in *Hussain*.

The role of the injunction

Why then do these contractual terms matter? It is because of the potential to seek an injunction to restrain termination in breach of contract. This may be simply an application to prevent a purported dismissal in breach of the notice term of the contract, as might have been sought in *Geys*. Alternatively, the employee may seek to restrain dismissal until the relevant procedure has been followed.

In *Edwards*, the court held that dismissal effected in breach of the requirements of a contractual disciplinary procedure cannot attract damages at large. Lord Dyson JSC noted, however, that the absence of a claim in damages did not prevent an employee from seeking an injunction to restrain an anticipatory breach of the contract of employment.

Indeed, Lord Wilson JSC in *Geys* emphasised the 'precious' status of the injunctive remedy precisely because of the strictly limited extent of any claim for damages flowing from dismissal. Seeking to put matters right after the event is fraught with risk. The court's jurisdiction to restrain an employer from breaching its procedures ahead of a threatened dismissal may provide the only meaningful form of redress.

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In the light of recent guidance that contractual effect should be given to disciplinary and other employment procedures, whether pursuant to an express term or as part of the trust and confidence obligation, there is therefore clear potential for an expansion of the court's pre-emptive jurisdiction beyond traditional public sector employment into other spheres. This may include both the employee whose objective is merely to remain in employment for financial reasons and the employee who has a real interest in disciplinary or other internal procedures being followed because of the potentially grave consequences of adverse findings; for example, the withdrawal by the FSA of approval as a fit and proper person to perform controlled functions.

It should also not be assumed that injunctive proceedings are limited to ensuring compliance with purely procedural steps. In *Chhabra*, the High Court granted a permanent injunction restraining the employer from putting forward incidents of breach of patient confidentiality before a disciplinary panel as a case of potential gross misconduct on the basis that the findings in the investigation report, fairly viewed, were incapable as a matter of law of sustaining such a charge.

Lord Hope JSC noted in *Geys* that there may be grounds for considering that the courts are less reluctant than they have been to give injunctive relief. Recent notable examples include *Gryf-Lowczowski*, in which an injunction was granted to restrain dismissal without going through the disciplinary procedure even though trust and confidence had broken down, and *Kircher*, in which (albeit on an interim basis), the court was prepared to restrain the employer from giving effect to a purported dismissal when that decision had been taken in breach of the applicable disciplinary procedure.

The Court of Appeal has heard an appeal against the decision in *Chhabra* and the judgment may well provide important guidance as to the permissible scope of the court's power to intervene in the management of internal employment processes.

Conclusion

It will be interesting to see whether the renewed focus on common law remedies in the employment sphere will lead to an increase in the number and scope of injunction applications, particularly as BIS has now announced that it intends to introduce a maximum unfair dismissal compensatory award of 12 months' pay. Indeed, that change, if effected, may also lead to more employees seeking reinstatement or re-engagement as a remedy for unfair dismissal in ET proceedings.

It is a common refrain of employers that ex-employees pursue unmeritorious discrimination and whistleblowing claims because of the statutory cap on unfair dismissal claims. Whether that is right or not, it may well be of greater benefit to employees to remain in employment – even if solely for the purposes of negotiating an exit – than in seeking to enforce their rights after the event. Whether advising employees or employers, the potential for an injunction application should not be overlooked.

KEY:

Woodcock	*Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126
Geys	*Société Générale v Geys* [2012] UKSC 63
Gunton	*Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448
Hogg	*Hogg v Dover College* [1990] ICR 39
Trafford Housing	*Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch)
Deadman	*Bristol City Council v Deadman* [2007] IRLR 888
Gogay	*Gogay v Hertfordshire County Council* [2000] IRLR 703
Crawford	*Crawford & anor v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402
Edwards	*Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22
ERA	Employment Rights Act 1996
Hussain	*Hussain v Surrey & Sussex Healthcare NHS Trust* [2012] Med L.R. 163
Chhabra	*Chhabra v West London Mental Health NHS Trust* [2012] Med L.R. 489
Gryf-Lowczowski	*Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust* [2006] ICR 425
Kircher	*Kircher v Hillingdon Primary Care Trust* [2006] Lloyd's Rep Med 215