



The implied term of fairness: a new role for the injunction?

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Common law damages for irregularities in an employer's handling of disciplinary proceedings in breach of an employee's contractual rights are limited, and capped compensation for unfair dismissal will often give inadequate redress. Pre-emptive relief in the High Court is therefore becoming a more important remedy for employees.

Injunctions: enforcing procedural obligations

The focus of injunction applications to date has been on securing compliance with express procedural obligations set out in disciplinary procedures that are agreed to be of express contractual effect. In *Gryf-Lowczowski*, for example, the High Court granted an injunction to prevent an NHS Trust from contending that a surgeon's contract of employment had been frustrated, holding that it would be wrong to deprive the practitioner of the benefit of the contractual disciplinary procedure which provided a prospect of persuading his employer not to terminate his contract. Compliance with that procedure was, in effect, a condition precedent of lawful termination of the contract.

Widening the scope: Chhabra

The Supreme Court in its recent decision in *Chhabra* has widened the scope for challenges to internal disciplinary procedures, with its recognition of an implied obligation of procedural fairness. The far-reaching nature of the injunctive relief granted provides a robust endorsement of the court's pre-emptive powers in such cases.

In *Chhabra*, the court was concerned with a challenge to the lawfulness of a decision to convene a disciplinary hearing to consider charges of potential gross misconduct in relation to alleged breaches of patient confidentiality by the practitioner. The report upon which those charges was based had been produced by a case investigator, but the conclusions of her draft report had subsequently been altered and made more serious by an HR adviser. While Lord Hodge JSC, giving the judgment of the court, stated that he would not consider it illegitimate for an employer, via HR or a similar function, to assist a case investigation in the presentation of a report, for example

to ensure that all necessary matters have been addressed and to achieve clarity, the involvement of the HR adviser in this case went beyond clarification. It was held that in these circumstances, an injunction should be granted to restrain the employer from proceeding to a disciplinary hearing.

Of particular interest is the basis upon which the court intervened. The court held that the involvement of the HR adviser, among other things, breached (i) an express term of the disciplinary procedure to the effect that the employer would operate its disciplinary procedure in a way that the objective observer would consider reasonable, and (ii) an implied contractual right to fairness. The court also held that the decision to charge Dr Chhabra with potential gross misconduct amounted to a breach of contract on the basis that the facts and evidence set out in the investigation report did not support such a charge. As a matter of law, there was no evidence of conduct amounting to a repudiatory breach of contract. Lord Hodge JSC held that the latter issue alone would have justified the grant of an injunction.

While there was no dispute in *Chhabra* that the relevant disciplinary procedure was of contractual effect, it is clear that the decision has potentially significant ramifications for disciplinary procedures which are declared to be non-contractual. The court recognised an implied contractual right to fairness in the operation of a disciplinary procedure as distinct from regarding a failure to comply with the requirements of such a procedure as giving rise to a breach of the implied term of trust and confidence. It follows from the observations by Baroness Hale JSC in *Geys* that the existence and scope of standardised implied terms 'raise questions of reasonableness, fairness and the balancing of competing

policy considerations'. One of the policy considerations that may inform the development of an implied term of procedural fairness lies in the limited nature of the post-dismissal financial redress, confirmed in cases following *Edwards*.

The court's decision that the grading of the complaints as matters of potential gross misconduct involved a breach of contract is no less significant. The obligation on the employer to set out its stall in advance of a disciplinary hearing as to the possible consequences of the hearing – which in turn flows from the degree of seriousness of the misconduct involved – is, of course, derived from the Acas Code of Practice on Disciplinary and Grievance Procedures. It seems likely that, regardless of the express terms of the contract, an employer's purported compliance with a proper procedure which follows the guidance of the Acas code could in itself give rise to a breach of an employee's contract.

Looking to the future

What are the implications for the future? The court was clear that intervention in such cases was only justified where the procedural breach was of a substantial character. In so holding, the court approved the statement of principle in the Court of Appeal's decision in *Kulkarni* that the courts should not become embroiled in the micro-management of internal disciplinary procedures and held that, as a general rule, they should not be called upon to intervene to remedy minor irregularities. It may well be argued, however, that if there has been a breach of the implied contractual right to fairness, one is necessarily concerned with something more than a minor irregularity.

What will be interesting to see is the extent to which this decision gives rise to challenges to disciplinary proceedings by way of injunction applications that are, in essence, unfair dismissal complaints before the event. Given the necessary overlap between the territory of the implied term of fairness and the statutory obligation not to dismiss unfairly, this would appear to be inevitable. The difference in the test to be applied is significant – a court must decide whether, objectively, a breach of contract has been established whereas in the employment tribunal in an unfair dismissal case the question is whether the conduct of the employer falls within the band of reasonable responses. An injunction application may therefore allow an employee to obtain a determination by an outside judicial body as to the lawfulness of his or her employer's conduct, which has time and again been firmly

resisted as falling outside the scope of the employment tribunal's jurisdiction in an unfair dismissal complaint.

It must be borne in mind, though, that a fundamental part of the test for an injunction is whether damages would be an adequate remedy. To date the cases in which injunctions have been successful have been where reputational damage would be significant (for example, *Lew*). In doctors' cases the NHS has been described as a 'near monopolistic employer' such that dismissal by one entity can make employment elsewhere within the NHS difficult if not impossible. It seems doubtful that injunctive relief will be available to many non-professional employees where any reputational damage is not so irreparable and the potential market for their services is not so limited.

It remains to be seen what approach the courts will take to challenges to the fairness of a disciplinary process. It is plain there will be many cases that are unsuitable for injunctive relief, not only if damages could be an adequate remedy, but, for example, if there is a dispute over the relevant facts or the seriousness of the misconduct in question turns on the interpretation to be given to the facts. The fact that the granting of an injunction may have the effect of preventing a disciplinary hearing from taking place at all may also lead the courts to adopt a cautious approach.

In short, it seems likely that in order to obtain an injunction, an employee must show that there has been a significant departure from the requirements of fairness which, if not restrained, could well lead to dismissal and the professional and financial losses that follow.

KEY:

<i>Chhabra</i>	<i>West London Mental Health NHS Trust v Chhabra</i> [2013] UKSC 80
<i>Edwards</i>	<i>Edwards v Chesterfield Royal Hospital NHS Foundation Trust</i> [2011] UKSC 58
<i>Geys</i>	<i>Geys v Société Générale</i> [2013] 1 AC 523
<i>Gryf-Lowczowski</i>	<i>Gryf-Lowczowski v Hinchingsbrooke Healthcare NHS Trust</i> [2006] IRLR 100
<i>Kulkarni</i>	<i>Kulkarni v Milton Keynes Hospital NHS Foundation Trust</i> [2010] ICR 101
<i>Lew</i>	<i>Lew v Board of Trustees of United Synagogue</i> [2011] IRLR 664