WRONGFUL DISMISSAL (II): REMEDIES AT COMMON LAW

Preparation

This is the second seminar covering dismissal of an employee in breach of contract. In order to prepare for this seminar you should read from one or two of the textbooks from the general reading listed below. You should then look at and consider the two questions that will be discussed. For each question you should read any specific material cited and undertake any specific tasks set.

General Reading:
Deakin and Morris, pp 375-403
Selwyn chapters 15 & 16*
Honeyball & Bowers chapter 4*
Painter and Holmes pp. 461-467*
Pitt, pp. 255-259*
Smith & Wood chapter 6*

Advanced Reading:
Collins (2nd ed. 2010) chapter 8

Journal Reading
McMullen, “Extending Remedies for Breach of the Contract of Employment” (1997) 26 ILJ 245*
Mark Freedland, “Claim for Unfair Dismissal” (2001) 30 ILJ 305
Douglas Brodie, “Mutual Trust and the values of the Employment Contract” (2001) 30 ILJ 84*
Catherine Barnard, “Cherries: One Bite or Two?” (2006) CLJ 27*

Question 1:

Does the elective or automatic theory of termination of the contract of employment apply? Why is this relevant?

Sanders v Ernest A Neale Ltd. [1974] IRLR 236
Guntov v Richmond Upon Thames [1980] ICR 755*
Rigby v Ferodo Ltd. [1987] IRLR 516*
Question 2:

Critically evaluate the circumstances in which the employment tribunals and courts will be willing to grant a decree/order for specific implement/performance of the contract of employment and an injunction/interdict in respect of a threatened breach of the contract of employment.

S. 236 TULR(C)A 1992

Powell v L B of Brent [1988] 1 Ch 176*
Robb v LB of Hammersmith [1991] ICR 514*
Peace v City of Edinburgh Council 1999 SLT 712*
Anderson v Pringle [1998] IRLR 64*
Skidmore v Dartford & Gravesham NHS Trust [2003] ICR 721
The fears of extending an action of wrongful dismissal to make an award of substantial damages is arguably not well founded. There is no reason in principle why an award of damages should not go beyond salary for the notice period and the envisaged period of the disciplinary procedure – this has been applied in other jurisdictions such as UK and Australia and also in other UK cases in respect of discrimination law. This would not result in the employee receiving damages in the form of salary for the rest of his life, rather the court would shorten this by the change that the employees working life could be shortened by injury etc.

Another major obstacle to furthering employment protection by enforcing the employment right of an employee through such a remedy of substantial damages, was ironically created by the Unfair Dismissal legislation. Which Johnson – Lord Hoffmann – pointed out stood in the way of an expansion of a remedy of wrongful dismissal. It was thought that parliament had already provided a remedy where the manner of an employee’s dismissal was unfair but that this should remain subject to the pecuniary limits. However Lord Steyn in Eastwood note that removing the compensation would vindicate corrective justice.

The coherence if employment law is greatly diminished by Johnson, as confirmed by Eastwood, excluding the implied term of MTC from the manner of termination of the employment contract, while it has been so readily accepted to apply in all other aspects of the employment relationship.

SPECIFIC REMEDIES IN PUBLIC LAW

- Order by the court to prevent dismissal most effective remedy to prevent dismissal
- JR may be brought by public law employees
- To challenge a decision on the grounds of illegality – Wednesbury reasonableness or procedural improp
- This can lead to the decision being quashed and hence reinstatement with the effect that dismissal is deemed never to have occurred
- Hence the employee is deemed to remain in office if he remains ready and willing to work, until he resigns or employment is lawfully terminated. Accordingly he will receive the salary for this period
- Could also now give rise to an action short of dismissal where a quantifiable loss can be shown – at common law such an action would only be framed as one of breach of contract
- While in private law there lay remedies of declaration and injunction to enforce an employee contractual right, these are by no means generally available and are subject to the limits of the jbc within which the contractual rights are held
- JR may be more effective to private law rights, in particular, it can overturn a decision on a Group if employees; private law only binds one party

JR – When can a public law employee seek this?

It is not as of right –
It depends on a series of tests developed by the courts in relation to: i) contract ii) subject matter of the claim iii) alternative remedies

i) Contract - *Walsh: Purchase LJ* held that only where the employment relationship is not expressed in contractual terms (as in case of the police) OR where, in spite of contractual terms, the matter in dispute does not concern the exercise of contractual rights

Hence there should normally be an absence of a contractual nexus btwn the party and the exercise of power of the employer should not be contractual but rather statutory – *Benwell*

In *Benwell*, an important factor was that the claimant, being a prison officer, had not remedy under the unfair D leg. However, since they have not been included into the scope of statute, courts will be reluctant to grant a remedy of judicial review on the grounds of (iii) availability of alternative remedies

Furthermore *Nangle* has had the effect of denying civil servants their public law status; holding that their relationship with the crown is purely contractual in nature

However arguable JR and UD not even close to analogous and hence, to deny judicial review on the grounds of the availability of an alternative remedy for the individual is to ignore the fact that the remedy of Indu ml review is concerned with the exercise of public power, scrutiny of which should not be obstructed by a co-existent remedy concerned only with private right

**ADDITIONAL HURDLE**

Whether the employee is performing a public law duty owed to the claimant in a particular circumstance under considerations
Question 1
Does the elective or automatic theory of termination of the contract of employment apply?
Why is this relevant?

There has been a long-running judicial debate as to whether the breach automatically ends the contract, or whether it is only effective once the innocent party elects to accept the breach.
The view that ‘an unaccepted repudiation is a thing writ in water and no value to anybody’ (per Asquith LJ in Howard v Pickford Tool Co. Ltd [1951] 1 KB 417) has now been accepted by the HoL as applicable to contracts of employment just as it applies to the law of contract generally (see Rigby v Ferodo Ltd [1988] ICR 29).
If it were otherwise the guilty party could, by his default, ‘call the tune’.
Note, however, the recent judicial support for the ‘AUTOMATIC theory’ by Ralph Gibson LJ in Boyo v LB of Lambeth [1995] IRLR.

White & Carter is primary theory for REPUDIATORY breach.

ELECTIVE v. AUTOMATIC
Employment contract is NOT like a normal contract.

Distinction between WRONGFUL DISMISSAL v. ORDINARY BREACH
e.g. when an employer unilaterally alters a term of the contract.

Breach ≠ dismissal – ELECTIVE theory (Rigby v Ferodo Ltd).

Elective Theory
Doesn't make sense to offer employEE choice to repudiate contract or affirm contract.
EmploYER must pay when employEE is prepared to work.
THEREFORE
If employEE affirms contract and is prepared to work then it is possible that he can claim wages.

Sanders v Ernest A Neale Ltd. [1974] IRLR 236
“Two employees were dismissed by reason of redundancy and other members of the workforce went on strike in protest.
They were dismissed and the factory eventually closed down.
The dismissed strikers then claimed redundancy payments.
Held: Their claims were rejected since their dismissal was by reason of misconduct (i.e. the strike) and not redundancy.” (Cases & Materials, p.557)
What action is necessary to amount to an acceptance of a repudiatory breach of contract?

ELECTIVE theory should apply.

BUT

In absence of special circumstances.

Acceptance of repudiation would be ‘readily inferred’

"Held (CoA): ELECTIVE theory

Not only approved the elective theory of termination but also held (per Buckley LJ) that:

acceptance of a repudiatory breach will be ‘readily inferred’.

HOWEVER

To infer acceptance ‘readily’ is to blur the distinction between the elective and automatic theories of termination.

Both aspects of Gunton were doubted by all three members of the CoA in Boyo v LB of Lambeth (Cases & Materials, p.411).

Dietman v Brent London BC [1987] IRLR 259

"Held: If the employer is in breach because he has failed to follow a disciplinary procedure which has been incorporated into the contract, damages will be limited to the period of time it would have taken the employer to put the contractual procedure into effect.” (Selwyn, 16.21)

Boyo v LB of Lambeth [1995] IRLR 50*

Applied Gunton

HOWEVER

Court did so reluctantly.

Felt restricted by Gunton

Criticised artificiality of ‘readily inferring’ repudiation.

“B was employed by L as an accountant.

His contract entitled him to four weeks’ notice of termination unless he was guilty of gross misconduct, in which case he could be dismissed summarily.

He was accused of offences of fraud (of which he was ultimately acquitted) and in August 1991 he was suspended on full pay.

His bail conditions prevented him having any contact with his employers, and on 28 October he was charged with the separate offence of conspiracy to pervert the course of justice.

On 29 October, L purported to terminate his contract of employment on the ground that it had been frustrated.
B rejected that termination and turned up for work on 3 November but was barred. He continued to insist that he was available for work. He issued unfair dismissal proceedings in late November 1991 and county court proceedings for wrongful dismissal in May 1992 after his acquittal of all criminal charges. At the county court hearing in December 1992, the employers conceded that the contract had not been frustrated; neither had B been guilty of gross misconduct to warrant summary dismissal. The issues for the court, therefore, was when the contract ended so as to be able to calculate the amount of damages.

**Held (CC):**

- The letter of 29 October 1991 was an effective termination of the contract of employment.
- B’s refusal to accept such termination was ‘contrary to reality’ (i.e. supporting the automatic theory of termination).
- In any event, B could not obtain salary for periods during which he did not work.
- B was entitled to damages covering one month’s loss of notice plus five months, being the period he assessed for the employer to carry out proper disciplinary procedures.

**Held (CoA):**

- But for *Gunton* it would have held that an unaccepted wrongful dismissal did bring the contract to an end.
- It could NOT accept that acceptance of repudiation should readily be inferred.
- It would not interfere with the damages awarded by the county judge. *(Cases & Materials, p.411)*

**Soares v Beazer Investments Ltd. [2004] EWCA Civ 482 at para. [17] per Kay LJ**

**Automatic**
Presumption that employEE will NOT affirm contract

**ARTIFICIAL**
EmployEE has a choice but the court is essentially saying that the employEE does NOT have a choice.

**Rigby v Ferodo Ltd. [1987] IRLR 516**

Redudictory breach of contract.
Unilaterally altering terms of contract.
Judicial disquiet.

“The employEE, a lathe operator with a 12-week notice entitlement, had a 5% wage reduction imposed by his employERS who were in financial difficulties. The trade union was approached but no decision was taken as to whether to accept the reduction;