WRONGFUL DISMISSAL (I) TERMINATION OF THE CONTRACT OF EMPLOYMENT

Preparation

This is the first 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 books listed below. You should then look at and consider the four questions that will be discussed. For each question you should read any specific material cited and undertake any specific tasks set.

General Reading:
Deakin & Morris pp. 360-395*
Selwyn chapters 15 & 16*
Honeyball & Bowers chapter 4*
Painter and Holmes pp. 398-461*
Pitt, pp. 247-255*
Smith & Wood, chapter 6*

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

Journal Reading:
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*

Question 1:

In what circumstances will an employment tribunal or court hold that an employee has been wrongfully dismissed? Give examples of ‘gross misconduct’.
Question 2:

Has the decision in Malik "opened the floodgates" for similar claims?

Question 3:

Is a dismissal which is unfair in terms of Part X of the ERA automatically a wrongful dismissal?

Question 4:

In the context of a claim for damages based on a wrongful dismissal action, is compensation available for (1) notice pay which has not been paid to the employee by the employer, (2) 'stigma' damages, (3) pecuniary or non-pecuniary loss attributable the act of, or the manner of the dismissal, (4) pecuniary or non-pecuniary loss attributable to distressing events leading up to the dismissal, (5) pecuniary or non-pecuniary loss attributable to the act of, or the manner of a suspension from employment, (6) the loss of an opportunity to bring a claim for unfair dismissal, (7) injury to feelings or mental distress, (8) loss occasioned by an employer’s failure to pay a discretionary bonus payment and/or (9) loss occasioned by an employer’s failure to comply with a contractual agreed disciplinary process?

Specific Reading:

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*

Addis v Gramophone Co Ltd [1909] AC 488*
Dedman v British Building and Engineering Appliances Ltd. [1973] IRLR 379
Gunton v Richmond Upon Thames [1980] ICR 755*
Boyo v LB of Lambeth [1995] IRLR 50*
Malik v BCCI SA [1997] IRLR 462*
Gogay v Hertfordshire County Council [2000] IRLR 703 (CA)*
Johnson v Unisys Ltd [2001] 2 WLR 1076 (HL)*
Eastwood v Magnox Electric plc [2004] IRLR 733*
Horkulak v Cantor Fitzgerald International [2004] IRLR 942*
King v University Court of the University of St. Andrews 2006 S.C.L.R. 46
Commerzbank AG v Keen [2007] IRLR 132*
Honda Canada Inc. v Keays (2008) 294 DLR (4th) 577
Dunn v AAH Ltd. [2010] IRLR 709*
Lonmar Global Risks v West [2011] IRLR 138*
INTRO

The common law claim of wrongful dismissal may be more advantageous in the following circumstances:

(a) the maximum compensation award for unfair dismissal is currently £72,300 plus an appropriate basic award. A highly paid employee who is entitled to a long period of notice may be able to obtain substantially higher damages at common law (sec O’Laoire v jacket International Ltd, para 16.29);

(b) an employee who lacks the relevant period of continuous employment to qualify for unfair dismissal rights may nonetheless sue for wrongful dismissal either at common law or in the employment tribunal under the provisions of ETEJO. However, if an employee is summarily dismissed, or given less than the contractual notice, with the result that he lacks the necessary qualifying period of continuous employment to pursue a claim for unfair dismissal, he cannot claim damages for the loss of the opportunity to claim unfair dismissal. (Johnson v Unisys Ltd, para 16.26);

(c) an employee who is past the normal retiring age, or who is over the age of 65, or who worked abroad, may be able to bring a claim for breach of contract based on wrongful dismissal (Age Concern Scotland v Mines);

(d) a fair dismissal may nonetheless be a wrongful dismissal if proper notice has not been given (Treganowan v Robert Knee & Co Ltd*);

(e) an application for unfair dismissal is likely to be time barred if it is not brought within three months from the effective date of termination, whereas a common law action for wrongful dismissal may be brought within six years of the breach;

(f) the rules relating to damages are different. In particular, a common law action does not permit a reduction for contributory conduct, and the mitigation rules are not the same;

(g) the dispute may contain a public law element, and not be concerned with strict contractual rights (R v Secretary of State for the Home Department, exp Benwelt*);

(h) a dismissal which is in breach of a contractual dismissal procedure may enable an employee to bring a common law action for breach of contract (Shook v London Borough of Ealing) or to seek an injunction to restrain the breach (Irani v Southampton and South West Hampshire Health Authority, see para 10.4), or seek a declaration as to his legal rights. But the employee's remedies in such circumstances maybe limited to damages for the period up to which he would have been employed had the correct procedure been followed (Gunton v London Borough of Richmond, see paras 3.96 and 12.13 and see Edwards v Chesterfield Royal Hospital NHS Foundation Trust, para 16.22).

Since the jurisdiction of the employment tribunals is concurrent in many respects with that possessed by the ordinary courts, an employee will thus opt for whichever cause of action will produce the most advantageous results (see para 1.40).

If, before his dismissal, an employee acquires a cause of action at common law (whether for breach of contract or breach of the duty to take reasonable care for the employee's health and safety) that cause of action remains unimpaired by the fact that the employee has brought a statutory unfair dismissal claim. Thus a claim for damages for psychiatric injury caused, for
example, by a wrongful application for the contractual disciplinary procedure may succeed (Eastwood Magnox Electric plc), even though there can be no award for psychiatric illness (or injury to feelings) caused by the manner of actual dismissal (Dunnachie v Kingston upon Hull City Council, see para 11.112). Damages for injury to feelings, aggravated and exemplary damages may be awarded in detriment cases, as well as race, sex; and disability cases, but not in unfair dismissal cases.

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- Indications of the reassessment of the traditional notice rule:
  - Recently, the courts have granted more extensive damages in cases where employers have failed to observe contractual disciplinary procedures; (Gunton v Richmond-upon-Thames LBC [1981] Ch 448 –
  - Where an employee is dismissed under an improperly applied disciplinary procedure and accepts the wrongful termination, he is only entitled to damages for the period for which he would have been entitled if the procedure had been correctly carried out.)
  - In the second, they have shown themselves to be prepared to grant specific relief in equity in order to restrain certain breaches of contract by the employer. (Powell v Brent LBC [1987] IRLR 466)
  - In both instances, the normal 'notice rule' is effectively undermined: as a result of the court's intervention, the employer can no longer rely on the power of the notice term to dispense with the need for procedural fairness or for adequate substantive grounds for an act of discipline or dismissal.
  - At the same time, these new lines of authority are somewhat fragile: they have not received the clear endorsement of the House of Lords (Johnson and Eastwood) and a number of doctrinal issues concerning the relationship between the notice term and other terms of the contract, and the remedies available to the employee, remain unresolved.
  - It is also doubtful whether these rights and remedies will be available to more than a minority of high-status employees. (as these would be inadequately compensated under the unfair dismissal legislation)

Statutory minimum notice periods
- Minimum periods of notice are now inserted into the contracts of employment of all employees with continuity of employment of at least one month. Section 86 of ERA 1996.
- The employee is entitled, after one month's continuous employment, to receive a minimum of one week's notice of dismissal; after two years this rises to two weeks, and goes on rising by one week for each additional year of continuous employment up to a limit of twelve weeks' minimum notice.

- In the event of breach by the employer, the employee has available the common law action for damages for breach of contract.

- For this purpose the Act provides that its provisions prevail over any shorter period of notice in the contract and that the employer's failure to comply with these provisions is to be taken into account in assessing its liability for breach of contract. The effect is that damages will be based, at least, on the minimum notice period provided for by statute.
Question 1
In what circumstances will an employment tribunal or court hold that an employee has been wrongfully dismissed?

(a) the employer terminates the employment without notice, or with less notice than the employee is entitled to receive under the terms of his contract or the statutory provisions (see Chapter 15);
(b) an employee has not received payment in lieu of notice
   - employer dismisses employee without permitting them i)to work out their notice period of four weeks ii)paying them four weeks pay in lieu of notice, that employee will have a claim
   for 4 weeks’ notice pay in respect of the 4-week period of notice to which they are entitled
(c) a fixed-term contract is terminated by the employer before the date it was due to expire;
(d) a contract for the completion of a specific task is terminated by the employer before the task has ended;
(e) the employer terminates the employment without carrying out the disciplinary procedure which has been incorporated into the employees contract (Gunton v London Borough of Richmond);
(f) the employee is selected for redundancy in breach of a selection procedure which has been incorporated into his contract (Alexander v Standard Telephones and Cables plc. see paras 3.59, 3.63, and 10.2);
(g) the employer wrongfully repudiates the contract, his actions indicating that he no longer intends to be bound by the contract (General Billposting Co Ltd v Atkinson).
   - The employee 'accepts' the repudiation by resigning, or, if appropriate, keeps the contract alive and sues for whatever remedy is available (Rigby v Ferodo. see para 3.102). For example, if the employer has unilaterally reduced the employee's wages, a claim may be made under the appropriate provisions of the Employment Rights Act (see Chapter 8).
   - On the other hand, if the employee delays action, he may be taken to have affirmed the contract, unless the employer has given him time to make a decision (Bliss v South East Thames Regional Health Authority).
   - Whether the employer has in fact repudiated the contract is a matter to be determined in the particular circumstances of the case (General Billposting Co Ltd v Atkinson). Thus, if the employer fails or refuses to provide work for the employee (see para 10.16) or makes it impossible for the employee to do his work (Collier v Sunday Referee Publishing Co Ltd, see para 10.17), or unilaterally attempts to vary the Contract of employment, such actions can amount to a breach of contract by the employer which enables the employee to accept by resigning, and claiming wrongful dismissal. This is the common law counterpart of the statutory concept of 'constructive' dismissal, which will be dealt with in;
(h) the contract specifies that a dismissal may only take place in certain specified circumstances, or on specified grounds, and the employer dismisses for some other reason not stated in the contract (McClelland v Northern Ireland General Health Services Board).
NB: However, if the contract expressly permits the employer to terminate the employment without notice on the payment of a sum of money in lieu of notice, and the employer summarily dismisses the employee, the dismissal is not wrongful, whether or not the employer pays the money in lieu of notice, because he is acting within the strict terms of the contract.