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A Review of the Options for an Employee Seeking Redress for Personal Injury



Legal Framework and Case Law



Objective

- To consider, the various ways in which an employee may litigate for redress for personal injury suffered while at work, with particular reference to work-related stress

PART I



The Legal Framework



The Legal Framework

- Distinguish
 - tort and contract
 - common law and statute
 - fault and strict liability
 - compensation and damages



Tort and contract

- The traditional position
 - Employer's liability based on implied contractual duty to take reasonable care
BUT
 - Personal injury litigation normally set down in tort



Problems with tortious liability

- Litigation in common law courts is
 - expensive
 - slow
- Claimant usually has to show defendant's conduct negligent
- Outcome uncertain
 - See *Sutherland v Hatton* [2002] CA
 - Contrast *Barber v Somerset CC* [2004] HL
 - Cf *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005]



More problems with tort

- Defendant's liability
 - reduced for claimant's contributory negligence
 - personal (subject to rules on vicarious liability)
 - limited to what reasonably foreseeable



Can personal injury claims be brought in contract?

- Little historical authority
 - E.g.
 - *Matthews v Kuwait Bechtel Corp* [1959]
 - Claimant working overseas
 - *Johnson v Bloomsbury HA* [1992]
 - Claimant arguing express contractual terms unlawful
 - Both cases on interlocutory matters



Common law and statute

- Focus so far on common law and common law courts
- NB statutory provisions may feature **within** common law claims e.g.
 - Unfair Contract Terms Act 1977
- Statutory provisions not necessarily subject to rules of either contract or tort
 - Civil liability for breach of statutory duties
- Statutes may **create different fora for** litigation



Fault and strict liability

- Where liability is for fault burden of proof on claimant is heavier
- Concept of “fault liability” a creation of common law
 - Tortious liability for negligence is fault liability
- Strict liability frequent in –
 - Breach of statutory duty
 - Contract (unless term “to take reasonable care”)



Damages v Compensation

- **Common law courts** dealing with common law claims, in tort and contract, award **damages**: unliquidated and unlimited
- **Tribunals** with statutory jurisdiction award **compensation**: can only hear claims within their jurisdiction and maximum awards usually governed by statute.

PART II

Common law litigation





Recent employer's liability litigation

- Raises three questions:
 - Can common law courts award damages for personal injuries in contract claims?
 - Do employment tribunals have power to award compensation for personal injury?
 - The extent of employer's liability for breach of statutory duty?
- These controversial issues have arisen in psychiatric injury cases but are not necessarily so confined.



Can claims be brought in contract?

- *Matthews v Kuwait Bechtel Corpn.*
 - ... if it suits his purpose, he may sue in contract. It may be that that will have a somewhat limiting effect on his rights against the employer as compared with his more extensive right at common law if he sues in tort, but I make no further comment on that (Sellers LJ)



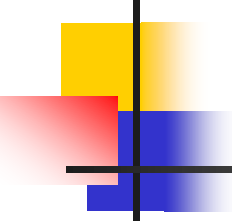
But ...

- *Lister v Romford Ice and Cold Storage Co. Ltd* [1957] AC 555 per Lord Radcliffe
 - It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen **may produce certain incidental consequences which would not have followed had the other course been adopted**, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.



Common law contractual claims

- Contractual claims for damages for work related personal injury may be:
 - Claims for wrongful termination of contract
 - Claims for breach of contract



Claims for wrongful termination of contract

- *Johnson v Unisys Ltd* [2001] UKHL 13
 - Damages for personal injury not recoverable
 - The head note in *Addis v Gramophone Co Ltd* [1909] AC 488 wrong BUT too late to change understanding that only salary in lieu of notice recoverable
 - Not policy to overrule *Addis* given ET statutory jurisdiction



Reasoning in *Johnson v Unisys*

- Is duty of trust and confidence relevant?
 - *Mahmud (Malik) v BCCI* [1998] AC 20 not relevant
 - *Duty* developed in constructive dismissal cases
BUT
 - *Addis* deals with consequences of wrongful dismissal, “whereas *Mahmud’s* case concerned a breach of the obligation of mutual trust and confidence during the subsistence of a contract”? (Lord Nicholls disagreed)
- In contract damages for *fact of not manner of termination*



Policy in *Johnson v Unisys*

- Per Lord Hoffman:
 - For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.
 - The same reason is in my opinion fatal to the claim based upon a duty of care.



Reasoning in *Johnson v Unisys*

- Per Hoffmann not necessary for HL to change common law:
 - In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the ET. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject-matter of a compensatory award



The true distinction?

- Per Lord Woolf in CA in *Unisys*
 - The true distinction between *Addis* and *Malik* is that the breach of contract in *Addis* was confined to the manner of dismissal while the breach in *Malik*, although it was repudiatory, was a breach ... during the period they were employed. The breach in *Malik* was of a gravity which entitled the employees to regard themselves as dismissed wrongfully but ... Their complaint related to anterior conduct.
- Is termination irrelevant if not relied on?



Personal injury as a breach of contract

- The question is: Can fundamental breach of contract be distinguished from termination of contract?
- This is a problem in contract generally
 - Does breach merely give right to terminate or
 - Does breach inevitably terminate?
- Is action for breach possible if termination occurred?



Does it depend on what term broken?

- Is there a difference between express and implied terms?
- Is there a difference between implied
 - Duty of reasonable care
(only limited historic authority on this)
and
 - Duty of trust and confidence
(recent case law)?



Breach of trust and confidence

- *Gogay v Herts CC* [2000] IRLR 703 (CA)
 - G suspended during child abuse enquiry. When exonerated too depressed to return to work. HC held H in breach of duty of trust and confidence and awarded damages. H appealed denying breach AND saying general damages could not be awarded for personal injury. CA dismissed appeal



Facts and ratio of *Gogay*

- Facts

- G exonerated August 1996; moved to day centre for elderly in Sept. but ceased work entirely in Oct 1998, due to depression caused by suspension

- Ratio:

- Distinguish *Addis*:
 - Illness not injury to feelings
 - Suspension not dismissal



Is distinction between breach and termination justified?

- Per Hale LJ in *Gogay*:

Malik means that damages for loss of reputation can be recovered where caused by a dismissal which is summary, unfair or without proper notice. If damages for reputation can be recovered why not damages for psychiatric illness? There would be no breach of the general principle that damages for upset feelings cannot be recovered.



Justifiable criticism per Hale LJ

- I recognise that this produces the strange result that, according to *Johnson*, the defendant authority would have done better had they dismissed rather than suspended the claimant. That simply reinforces my view that the sooner these matters are comprehensively resolved by higher authority or by Parliament, the better.



After *Gogay*

- *Eastwood and Anor v Magnox* [2002] IRLR 447
 - E in disagreement with superior: led to trumped up allegations; colleague. Final written warnings; then charged with sexual harassment; disciplinary hearing unfair and dismissed at end of 12 month campaign against him. By this time E suffering from stress. (W also dismissed after refused evidence against E. W made successful unfair dismissal claim.) E did not go to ET



Could E and W succeed at common law?

- CA upheld CC judge ruling that no reasonable grounds for bringing claim
- Events complained of related to dismissal proceedings and within remit of ET.
- As allegations related to manner of dismissal *Addis* and *Unisys* barred contract remedy.



Contrast *McCabe v Cornwall* CC [2002] EWCA Civ 1887

- M, a teacher, suspended in May 1993 following sexual allegations. M given no detail of allegations till September by when he had stress illness. Sept. disciplinary hearing: ultimately dismissed in March 1994. ET upheld complaint of unfair dismissal and made maximum award



Could *McCabe* make common law claim?

- M claimed only for breach of trust and confidence in respect of initial suspension.
- HC struck out C's claim – events all part of dismissal
- CA found HC had erred in holding that eventual dismissal was automatic bar to action for breach prior to dismissal



Per Auld LJ

- ... the facts of *Johnson* did not require consideration of how and in what circumstances the *Gogay* approach might have to be applied, say, to an extended period of investigation and suspension, leaving the manner of dismissal as a separate matter for an ET.
- *Eastwood* allowed claims might lie for events preceding dismissal



A point of principle (per Auld LJ)

- A common law claim ... should not depend on the chance that an employer chooses not to terminate the contract by dismissal or that an employee chooses not to treat his employer's improper conduct as amounting to constructive dismissal.



Eastwood and McCabe in HL

[2004] UKHL 35

- Held cases could be tried: *Addis/Johnson* did not apply if breach and termination could be distinguished
- Problems:
 - Duplication of proceedings
 - Determining whether breach independent
 - Dismissal cheaper than suspension
- Leaves unclear whether damages for pi recoverable in contract!



Recap

- *Matthews v Kuwait Bechtel Corpn.*
 - ... if it suits his purpose, he may sue in contract. It may be that that will have a somewhat limiting effect on his rights against the employer as compared with his more extensive right at common law if he sues in tort, but I make no further comment on that (Sellers LJ)



Breach of which implied term?

- *Johnson* etc concerned with breach of trust and confidence
- *Matthews* etc concerned with duty of care?
- Is duty of care now part of overarching trust? See Cabrelli (2005) *34 ILJ* at 284



Problems with implied duty of care

- It is *reasonable care* i.e. back to proof of employer's fault (negligence)
- Different contractual rules of causation
- No recognition of contributory negligence



Quinn v Burch [1966] 2 QB 370

Employer's breach was failure to provide ladder: P used and fell from trestle

Plaintiff labour being independent contractor sued in contract

- CA held
 - Injury not caused by breach
 - Contributory negligence not relevant to contract

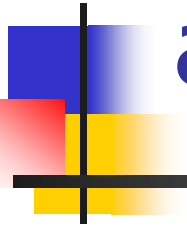


Should employer's liability claims be brought in contract?

- *Davie v New Merton Board Mills Ltd* [1959]2 WLR 331
 - The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment, but **it can only lead to confusion**, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms (Lord Simonds)

Part III

Can Employment Tribunals assist?





Irrelevant considerations

- Different
 - limitation period
 - cost provisions
 - Court procedure more suitable for personal injury claims?
 - rules about interim payments/provisional damages
 - fields of expertise of judges (ET no experience of psychiatric injury)



Can ET award compensation for personal injury?

- *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 482
 - S suffered nervous breakdown due to racial harassment from ship's master. Complaint to ET (assisted by CRE) settled out of court. S claimed in CC for damages for personal injury. Recorder struck out claim as abuse of process. CA dismissed appeal



Ratio of Court of Appeal

- ET has jurisdiction to award compensation for personal injury (as well as injury to feelings) caused by **statutory tort** of unlawful discrimination.
- The action fell foul of public policy principle that claims that have/could be litigated in one tribunal should not be allowed to be litigated in another.



Compensation for Unfair dismissal

- NB Not a statutory tort
- *Dunnachie v Kingston* [2004] IRLR 287 (CA)
 - D, an EHO, resigned following prolonged campaign of harassment. No professional evidence of psychiatric condition but reduced to “overt despair”. D succeeded in ET claim for constructive dismissal (breach of trust and confidence) and given maximum award (actual £123k, reduced to £51k). K appealed against award because was calculated using personal injury tables. Then further appeal to CA claimed for “injury to feelings”



Grounds for appeal to CA

- In *Johnson* Lord Hoffmann's comments on jurisdiction of ETs was *obiter*
- *Norton Tool Co.Ltd v Tewson* [1972]
ICR 501 had rightly held legislation only empowered award of compensation for "quantifiable pecuniary losses"



Dunnachie won in CA on head count!

- Hoffmann was not ratio 2 (Evans-Lombe + Brooke)

- *Norton Tools* wrong 2 (Sedley + Evans-Lombe)



Dunnachie in HL [2004] UKHL 36

- All Lords agreed with Lord Steyn
- *Norton Tools* good law
- Under s.123(1) of ERA 1996 ET can only compensate for economic loss
- Lord Hoffmann statement in *Johnson* was obiter (Hoffmann agreed!)

Part IV

Breach of statutory duty



New causes of action

- Failure to carry out adequate risk assessment (MHSW Regulations)
- Employer's liability under Protection from Harassment at Work Act



Risk assessment

- Reg.3 of Management of Health and Safety at Work Regs absolute duty to assess
- To achieve compliance with law
- General duties to do “what reasonably practicable”
- Civil liability for breach
- Employer only liable for “foreseeable”?
- No case law



Prevention of Harassment Act 1997

- See *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34
- S.3 imposes civil liability for harassment
- Employer may be liable for employee's breach of employee's statutory duty in course of employment



Impact of *Majrowski*

- Floodgates?
 - Liability strict – foresight not needed
 - Compensation for “anxiety”
 - 3 year limitation not applicable
 - Public as well as employer liability
 - Not covered by EL (Compulsory) Insurance
- Restraints
 - Harassment connected to employment
 - Objective evaluation – OK for manager to chase lazy employee?
- An add on to stress claims?
 - See *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898



Where are we now?

- Can CC award damages for pi in contract (See *Lister* etc)?
- Can ET award compensation for pi where discrimination? (statutory tort + uncapped awards)
- Will Harassment Act “take off”?
- Will risk assessment improve workplace safety?



Was Professor Hugh Collins right?

- A phoenix of truly just and equitable compensation might now rise from the ashes of the hoped-for evolution of the common law of wrongful dismissal

(2001) 30 ILJ 305