Psychiatric injury claims and a fair disciplinary process

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This article examines the boundaries of the 'Johnson exclusion area' and the challenges it poses for employers in the light of recent case law developments focusing on the employer's duty of care when instigating and conducting disciplinary proceedings. It also assesses the growing importance of the implied contractual right of an employee to a fair disciplinary process.

All of us inevitably experience adverse life events. Nevertheless, the impact of such events is not likely to cause psychiatric illness unless the events are particularly distressing. Being subjected to an unwarranted and/or unfair disciplinary process is one such event, particularly where an employee's livelihood, reputation and future employment prospects could be at risk, as is often the case.

The Johnson exclusion area

In *Johnson*, the House of Lords determined that a common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing statutory limits on compensation payable in respect of unfair dismissal. Accordingly, it imposed a line of demarcation segregating the act of dismissal as being one in respect of which an employer owes no duty of care to avoid causing harm to an employee by dismissing them unfairly or wrongfully, commonly referred to as the '*Johnson* exclusion area'.

Coventry University case

A lecturer contended that the university negligently caused her psychiatric injury by commencing disciplinary proceedings without undertaking further enquiries in breach of its duty of care. She sustained psychiatric injury even though the disciplinary process did not result in any sanction being imposed.

The High Court upheld her claim, because if further enquiries had been undertaken the disciplinary proceedings would not have been instigated 'as it would have been established that there was an insufficient basis for them'. The university appealed.

Duty of care test

The Court of Appeal reversed the High Court's decision and held that the correct test to apply was 'whether in all the circumstances the decision to instigate disciplinary proceedings was "unreasonable" in the sense of being one which no reasonable employer would take'.

The Court of Appeal went on to clarify that 'this required an objective assessment, and one that was not to be made with the benefit of hindsight'. The circumstances to be taken into account included the evidence that was available at the time the decision was made and other evidence 'as would or should have been available as a result of a (non-negligently) conducted investigation'.

If the onset of an employee's psychiatric illness can be traced back to the original decision to instigate the disciplinary proceedings, in circumstances which fall outside of what a reasonable employer would do, it may be open to the employee to pursue a claim in negligence and it is an interesting question as to whether an employer may be precluded from relying on subsequently discovered allegations when applying the test.

No improper motives alleged

It was not alleged that the disciplinary proceedings had been commenced and pursued 'otherwise than with proper motives and in good faith'. However, if a claim of this nature is to succeed, it would be surprising if it was not accompanied by such an allegation.

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Dealing with mentally ill employees

The overall test for duty of care remains the conduct of a reasonable and prudent employer 'taking positive thought for the safety of his workers in the light of what he knows or ought to know' (Swanwick J in *Stokes*). However, the effect of the *Johnson* exclusion area is that the duty of care is not owed to an employee, including those who are psychiatrically vulnerable, in relation to their dismissal.

There will be instances where an employer has to conduct a disciplinary process in connection with an individual known to have a prior psychiatric vulnerability and the potential duty to make reasonable adjustments under s.20 of the Equality Act 2010 may therefore be engaged. However, there is little detailed guidance indicating what extra precautions an employer should put in place when dealing with such a situation. The temptation to bypass a formal process should be avoided. However, an employer may wish to obtain occupational health input and provide more advance notice of an investigation meeting and of the substance of the matters to be discussed. In addition, employees should be given the option to be accompanied to all meetings and be given more frequent rest breaks. Clearly, the longer the duration of the disciplinary process, the greater the risk of psychiatric injury and the greater the chance that a cause of action may exist independently of the dismissal.

Lord Nicholls observed in *Eastwood* that 'an employer may be better off dismissing an employee than suspending him' as an unfair dismissal claim is subject to a statutory cap whereas a common law claim would not be. However, it is important to remember that an employer would still be left exposed to a potentially uncapped claim for disability discrimination in respect of which the tortious principle of remoteness of loss would not ordinarily apply. The injury would not need to be reasonably foreseeable for damages to be recoverable – it would only need to be causally linked, as made clear by Lord Justice Pill in *Essa*.

Identifying the boundary line

A key difficulty for an employer is that while it is, in theory, easy to identify the boundary line of the *Johnson* exclusion area, it can be difficult to determine whether a claim may exist independently of the dismissal and therefore fall within what may best be described as the 'personal injury inclusion zone'. The problem for an employer is that if a common law cause of action has accrued during the events *leading up to* dismissal, the claim may still be pursued. This was the conclusion in the cases of *Eastwood* and *McCabe*. In both cases, the employees became ill in the course of a long, drawn out disciplinary process during which they were suspended. The issue was also revisited recently in *Monk*.

Decision in Monk

Mrs Monk, a primary school administrative assistant, received notice that her post was going to be made redundant. However, eight days before the end of the school term she was denied access to the school premises. She was not informed of the reasons for this, other than that it was in the best interests of the school. She was required to clear her desk before being publicly escorted from the premises. Unsurprisingly, Mrs Monk said that she felt humiliated by this treatment. She brought legal proceedings for personal injury and appealed to the Court of Appeal after the High Court accepted the Council's contention that any injury suffered had resulted from the manner of her dismissal and was therefore within the Johnson exclusion area.

The Court of Appeal allowed her appeal and gave permission for the particulars of claim to be amended to contend that the manner in which she had been treated had been independent of her dismissal: 'although the decision in *Johnson* v *Unisys* establishes that the employer owes no duty at common law to take reasonable care to avoid causing harm to the employee by dismissing him unfairly or wrongly, it does not follow that the employer is entirely free of any duty of care arising in relation to dismissal.'

Suspension, foreseeability and the implied contractual right to a fair disciplinary process

Personal injury may arise as a consequence of a disciplinary process that does not lead to dismissal and therefore the employer would not be able to rely on the Johnson exclusion area to avoid liability at common law. In practice, an employer may not know until the conclusion of the disciplinary process whether it will result in a dismissal. It is therefore important that employers take note of their employees' implied contractual right to a fair disciplinary process.

The Supreme Court, in its judgment in *West London Mental Health NHS Trust*, recognised this implied contractual right. The confirmation of the existence of this key contractual

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protection is an important development. The duty to act fairly was also referred to by Lord Nicholls in *Eastwood* and by the Court of Appeal in its decision in Gogay. In this case, the decision to suspend was found to have been a 'knee-jerk' reaction and the council was criticised for not considering alternatives to suspension.

Where an employer is investigating an allegation of serious misconduct, a 'knee-jerk' decision to suspend is by no means uncommon. If the allegations in question are disputed by an employee, a suspension imposed with little prior warning or discussion can have a dramatic impact on mental health.

There remains a live issue as to whether, in circumstances where the injury was caused by the suspension of an employee with no prior history of mental ill health, the injury will be regarded as being reasonably foreseeable. Is an employer not entitled to expect ordinary robustness on the part of employees, including when facing disciplinary proceedings? In Gogay the judge made a clear finding that the claimant's depression was brought on by her suspension, which was reasonably foreseeable and the Court of Appeal treated this as being a finding of fact with which it did not wish to interfere.

Yapp

In the High Court case of *Yapp*, Mr Justice Cranston recognised the right to 'fair treatment' arising from the implied term of trust and confidence: 'Fair treatment as a requirement is fact sensitive and its requirements turn very much on context.' The FCO was obliged to conduct a preliminary investigation into the allegations of bullying and inappropriate behaviour before deciding to withdraw Mr Yapp from his post. As a result of the sudden withdrawal from his post, he began to suffer from depression. The FCO acted in breach by withdrawing him without affording him fair treatment. Mr Justice Cranston concluded that Mr Yapp's injury was reasonably foreseeable and he was therefore entitled to damages to compensate him for the injury he suffered – a finding which has been raised on appeal to the Court of Appeal, whose judgment is awaited.

Mr Justice Cranston further held that fair treatment demands (among other things):

- a requirement to conduct some preliminary investigation of allegations before taking a decision to withdraw, including the employer engaging in some discussion with the employee and informing him of the allegations and taking into account his critique of them before a judgment is made; and
- that allegations are disclosed to the employee even if they had been made in confidence.

Conclusion

The recognition of this right to 'fair treatment', particularly in the context of decisions taken by an employer to commence a preliminary investigation or suspend an employee, is a key issue, the importance of which is frequently underestimated by employers. Despite the existence of the *Johnson* exclusion area, there now appears to be greater scope for a personal injury claim to be independently pursued. However, the Court of Appeal's judgment in *Yapp* is awaited and it is hoped that it may provide some much needed guidance when evaluating evidence to determine whether an employer could have reasonably foreseen that an employee may suffer psychiatric harm in the context of disciplinary proceedings.

KEY:

Johnson	*Johnson v Unisys Ltd [2001] IRLR 279*
Coventry University	*Coventry University v Mian* [2014] EWCA Civ 1275
Stokes	*Stokes v Guest, Keen & Nettlefold (Bolts & Nuts) Ltd* [1968] 1WLR 1776
Eastwood	*Eastwood v Magnox Electric plc* [2004] IRLR 733
McCabe	*McCabe v Cornwall County Council* [2003] IRLR 87
Essa	*Essa v Laing* [2004] IRLR 313
Monk	*Monk v Can Hall Primary School & anor* [2013] IRLR 732
West London Health Health NHS Trust	*Chhabra v West London Mental Mental NHS Trust* [2014] IRLR 227
Gogay	*Gogay v Hertfordshire County Council* [2000] IRLR 703
Yapp	*Yapp v Foreign and Commonwealth Office* [2013] IRLR 616