



14 December 2011

## PRESS SUMMARY

**Edwards (Respondent) v Chesterfield Royal Hospital NHS Foundation Trust (Appellant)**  
**Botham (FC) (Respondent) v Ministry of Defence (Appellant)**  
[2011] UKSC 58

*On appeal from [2010] EWCA Civ 571; [2010] EWHC 646 (QB)*

**JUSTICES:** Lord Phillips (President), Lord Walker, Lady Hale, Lord Mance, Lord Kerr, Lord Dyson and Lord Wilson.

### BACKGROUND TO THE APPEALS

The central issue in these appeals is whether at common law an employee can recover damages for loss arising from the unfair manner of his dismissal in breach of an express term of an employment contract.

Each of Mr Edwards's and Mr Botham's employment contracts contained express terms governing the procedure for dismissal in cases of misconduct and each were summarily dismissed from their employment as, respectively, consultant orthopaedic surgeon and youth community worker [3], [15]. In Mr Edwards' case, disciplinary proceedings were instituted against him in December 2005. He was alleged to have undertaken an inappropriate internal examination of a female patient and then denied that the examination had taken place [4]. In February 2006, a disciplinary hearing was held and the panel decided that he should be summarily dismissed for gross personal and professional misconduct [5]. By a claim issued in the High Court in August 2008, Mr Edwards claimed damages for breach of his employment contract and its wrongful termination. Among other procedural breaches, he alleged that the disciplinary panel had not been constituted in line with the applicable policy, which formed a term of his contract. His case was that, if the panel had included a clinician of the same discipline as him, his contract would not have been terminated. His preliminary schedule of loss alleged that he lost earnings (past and future) of over £3.8 million [9].

Mr Botham was suspended from work in December 2002 and was charged with gross misconduct for behaving inappropriately in relation to two teenage girls. Following disciplinary proceedings, in September 2003 he was summarily dismissed for gross misconduct. Because his misconduct was in relation to young people, he was placed on the list of persons deemed unsuitable to work with children under the Protection of Children Act 1999 ("the POCA list") [14]. Mr Botham brought proceedings in respect of his dismissal in the employment tribunal. In May 2007, it held he had been unfairly dismissed and his summary dismissal was a breach of contract. In relation to the unfair dismissal, it found that the Ministry of Defence ("MoD") had breached express terms of his contract set out in the Discipline Code found in the MoD's Personnel Manual [15]. The tribunal awarded him £7,000 loss of salary and benefits for his notice period, a basic award of £1,989 and a compensatory award of £53,500. His name was removed from the POCA list [16]. Mr Botham then issued proceedings in the High Court seeking damages for breach of the express terms of his contract. Relying on the findings of the tribunal, he alleged that the MoD, in conducting the disciplinary process, failed to comply with provisions of the Disciplinary Code, by reason of which he suffered a loss of reputation, was put on the POCA list and prevented from obtaining further employment in his chosen field.

## JUDGMENT

The Supreme Court by a majority allows the appeal. Employees may not recover damages for loss suffered as a result of a breach of a term in their employment contract as to the manner of their dismissal unless the loss can be said to precede and be independent of the dismissal. Compensation for the manner of dismissal is limited to what they may recover pursuant to the Employment Rights Act 1996 (“the 1996 Act”).

Lord Dyson gives the leading judgment with which Lord Mance (adding further comments) and Lord Walker agree. Lord Phillips agrees that the appeals should be allowed, but for different reasons. Lady Hale and Lords Kerr and Wilson dissent.

## REASONS FOR THE JUDGMENT

In *Johnson v Unisys Ltd* [2001] UKHL 13, the House of Lords held that loss arising from the unfair manner of dismissal is not recoverable as damages for breach of the implied term of trust and confidence in employment contracts: it falls within what has been called the “*Johnson* exclusion area” [1]. By the time of the report of the Royal Commission on Trade Unions and Employers’ Associations 1965-1968 (“the Donovan report”) it was settled law that an employee was not entitled to recover damages in respect of the manner of his dismissal. The Donovan report recommended that the law should be changed and that statute should establish machinery to safeguard against unfair dismissal [21]. Parliament gave effect to this recommendation in the Industrial Relations Act 1971. The relevant provisions are now contained in the 1996 Act. But Parliament placed significant limitations on the ability of an employee to complain of unfair dismissal, such as the three-month time limit for bringing a claim, and on the remedies available: there is a cap on the level of the compensatory award (now £68,400). Therefore, Parliament decided to give a remedy which was less generous than that which the common law would give for breach of contract in the ordinary way [19]-[23]. In each legislative modification to the unfair dismissal scheme, Parliament linked failure to comply with disciplinary procedures with the outcome of unfair dismissal proceedings; the provisions about disciplinary procedure were intended to operate within the scope of the law of unfair (not wrongful) dismissal [30]-[37]. It follows that, if provisions about disciplinary procedures are incorporated as express terms of an employment contract, they are not ordinary contractual terms. Parliament intended such provisions to apply to employment contracts to protect employees from unfair dismissal. It has specified the consequences of a failure to comply in unfair dismissal proceedings. It could not have intended that they would also give rise to a common law claim for damages. Unless the parties express otherwise, they are taken not to intend that a failure to comply with contractual disciplinary procedures will give rise to a common law claim for damages [37]-[39],[94]. This is regardless of whether the term is express or implied. A dismissal may be unfair for a variety of reasons and any such complaint was intended by Parliament to be adjudicated on by the specialist employment tribunal, not that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament [40]. However, other remedies, such as injunction, which do not cut across the statutory scheme, are not excluded [44].

Whether individual cases fall within the *Johnson* exclusion area is a matter of fact and depends on whether the procedural breach forms part of the dismissal process: [51]. Mr Edwards’ dismissal flowed from the panel’s ‘erroneous’ findings, which flowed from its improper constitution. Likewise, Mr Botham alleges that the loss of reputation was caused by the dismissal itself. Both cases therefore fall within the *Johnson* exclusion area [55]-[59], [99].

## NOTE

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)