PALLANT

CHAMBERS

Wrongful Dismissal

When defending a claim for unfair dismissal there are usually three key witnesses: investigator; decisionmaker; appeal decisionmaker. However when an employer has summarily dismissed an employee there is invariably a claim for wrongful dismissal. None of the above witnesses are likely to be able to provide direct evidence in respect of the act(s) of gross misconduct which led the employer to dismiss the employee.

A claim of wrongful dismissal is a species of breach of contract. It can be heard either in an Employment Tribunal or in a County/High Court. As a cause of action, it does not arise from any statute, but arises from the common law (although the Tribunals jurisdiction to hear such claims comes from the Employment Tribunals Act 1996 & the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623).

There is no place for the "range of reasonable responses" test which is applied to a claim for unfair dismissal. Facts must be alleged and proved (on a balance of probabilities) by evidence led by the party bearing the burden of proving them. Whether or not somebody may or may not have acted reasonably in believing something to be a fact is wholly irrelevant to that exercise.

Hovis Limited v Louton EA-2020-000973 was a case where an employee brought a claim both for unfair dismissal and wrongful dismissal.

What was it about?

The claimant worked for the respondent as a delivery lorry driver. A manager, Mr Sittre, reported that, when driving his car on the motorway, accompanied by his wife, both of them had seen the claimant driving his van on the same stretch of motorway and smoking at the wheel.

Following an internal disciplinary investigation and process the claimant was found to have been smoking whilst driving, which was a serious breach of the respondent's procedures, and he was dismissed without notice.

At the hearing in the employment tribunal the claimant gave evidence in person and denied that he had been smoking. Neither Mr Sittre nor Mrs Sittre gave evidence to the tribunal.

What did the Employment Tribunal think?

The Employment Tribunal found that Mr Louton was not unfairly dismissed however the Employment Judge upheld Mr Louton's claim for wrongful dismissal.

The Employment Judge's reasoning was on the face of it fairly straight forwards. The employer had not called anyone who was an actual witness to the events of 27th December 2019. There were only three people present on 27th December 2019 when the incident occurred Mr Louton, Mr Sittre and Mrs Sittre. Mr Louton had given evidence and had been cross examined. However, the Employment Judge did not hear from either Mr or Mrs Sittre who were the only other individuals who would be able to provide a first-hand account of the incident.

On this basis the Employment Judge felt that because she was unable to evaluate the evidence of the only other first-hand witnesses to the matter,

she could make no finding of fact that Mr Louton was smoking as alleged by his employer.

What did the Employment Appeal Tribunal think?

HHJ Auerbach undertook a review of authorities on the burden of proof paragraphs 14 - 22. He then went on to highlight rule 41 Employment Tribunals Rules of Procedure 2013 which provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. HHJ Auerbach explained the effect of this at paragraph 24 as follows (my underlining):

"*What this means in practice is that hearsay or documentary evidence, or other types of evidence, of whatever nature, are not, as such, inadmissible, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. <u>But the assessment of the evidence, and what weight to attach to it, is, of course, a matter for the tribunal.</u>*"

HHJ Auerbach allowed the appeal and remitted the matter to a different Employment Tribunal. He reached this decision because the Employment Judge had concluded that she could not make a finding of fact as to whether Mr Louton was smoking without hearing the first-hand evidence of Mr Sittre and Mrs Sittre which was an error of law.

What can we take away?

It should not be thought that this judgment promotes the use of hearsay evidence in wrongful dismissal claims before an Employment Tribunal. This decision simply makes it clear that an Employment Judge can consider such evidence and having done so give the evidence its appropriate weight in the context of all the evidence in the case when considering whether the alleged act(s) of gross misconduct occurred.

So where there is a claim for wrongful dismissal every effort should be made to lead first-hand evidence from those who witnessed the act(s) of gross misconduct. However in cases where this is simply not possible it is clear that an employer can & should lead and rely on hearsay evidence. It is then up to the Employment Tribunal to decide whether that evidence along with all the other evidence in the case is sufficient to prove on a balance of probabilities that the dismissal was not wrongful.

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