The importance of witness evidence

By Andrew MacPhail
3PB Barristers

Hovis Limited v Mr W Louton EA-2020-000973-LA

Facts

C was employed as a lorry delivery driver. It was alleged that he had been smoking at the wheel. Doing so would be a serious breach of R's smoking policy, for which dismissal was a potential sanction. The matter was reported by one of R's managers who claimed to have witnessed the incident whilst driving with his wife.

An investigation ensued, the result of which was a decision to instigate disciplinary proceedings. C was, accordingly, invited to a disciplinary hearing. C denied the allegation. However, the disciplinary officer concluded that C was guilty of the conduct alleged and summarily dismissed him. An appeal process followed thereafter, in which C was not successful.

ET

C complained of unfair dismissal and wrongful dismissal. The unfair dismissal claim was dismissed. However, the wrongful dismissal claim was upheld.

The relevant section of the written reasons dealing with the wrongful dismissal claim read as follows:

"136. I turn then to the wrongful dismissal complaint. I must firstly be satisfied in this regard that on the basis of the evidence before me the Claimant acted as the Respondent contends he did on 27th December 2019 – that is that he was smoking in his company vehicle.

137. This aspect of the claim is not parasitic on my findings and conclusions on the unfair dismissal claim because rather than the test of reasonableness and reasonable belief, the burden is on the Respondent to satisfy me on the balance of probabilities that the Claimant

was guilty of the misconduct alleged. I am required to make my own findings in that regard as to what happened.

138. The problem here for the Respondent is that which I observed to Mr. White at the outset of the hearing – the Respondent has 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 – the Claimant; Mr. Sittre and Mrs. Sittre. The Claimant has given evidence and been cross examined. However, I have not heard on behalf of the Respondent from either Mr. or Mrs. Sittre who are the only individuals who would be able to provide a first-hand account of what they saw on 27th December 2019. I was therefore unable to evaluate their credibility against that of the Claimant.

139. Whilst it is true to say that there was supporting evidence that the Claimant had been smoking such as the footage corroborating the manoeuvre that Mr. Sittre took in his own vehicle, that falls far short of my being able to find as a fact that the Claimant was, on the balance of probabilities, smoking on 27th December 2019. Particularly, there is evidence that mitigates against that position such as the statements of Messrs. Flinton and Smith and, without being able to evaluate the evidence of the only first-hand witnesses to the matter for myself, I can make no finding of fact that the Claimant was smoking as alleged by the Respondent.

140. I should remark that had I been satisfied that the Claimant had been smoking on 27th December 2019 in a company vehicle then I would have concluded that that amounted to conduct which was so serious that it entitled the Respondent to summarily dismiss him. That is because what was alleged would have been a criminal offence; it could have resulted in the Respondent being prosecuted and fined and the Smoking Policy was clear on how the Respondent viewed such conduct and the seriousness of breach of that policy.

141. However, I have not and cannot find on the facts based on the evidence before me that the Claimant was guilty of smoking in a company vehicle on 27th December 2019 and it follows that the wrongful dismissal complaint is well founded and it succeeds."

The reader will note from the above that R had failed to call any witness at the ET hearing who could give direct evidence on the matter, such as the manager who witnessed the incident and reported the matter. C denied the allegation and gave sworn evidence to that effect. The EJ clearly viewed the lack of direct witness evidence from R on the matter as significant.

The ET awarded damages in the sum of just under £6000.

EAT

R appealed against the ET's decision upholding the wrongful dismissal claim. Two grounds were pursued at the final hearing.

The first pertained to a matter concerning the burden of proof. This ground failed. However, the EAT's judgment makes for useful reading as regards the purpose/relevance of the burden of proof. Para 14 of the EAT's judgment provides a useful summary:

"15. Where, in a given case, the alleged fact asserted by one party is not agreed or admitted by the other, and the judge, having assessed the relevant evidence, considers that the evidence pointing in either direction is evenly matched, and there is no way to choose or decide, then the burden of proof is, as it were, the tie breaker. The party asserting the factual proposition in question will not have shown it probably to be the case, and so the party who bore the burden in respect of the matter will lose……."

Such a scenario, i.e. the need for a tie-breaker, is not so very common. Arguably the burden of proof is perhaps not as relevant as it is often made out to be in ET proceedings.

The second ground pertained to an assertion that the EJ had allegedly "discounted, improperly, documentary and hearsay evidence".

The EAT upheld the second ground. The EAT took the view that the ET had approached the matter on the basis that, without direct witness evidence in support of R's position (i.e. that C had been smoking at the wheel) it was unable to make a finding to that effect, given that in those circumstances the only direct evidence it had heard on the matter was that of C, i.e. that he had not acted as alleged.

It seems that there was further evidence on the matter in front of the ET other than the live witness evidence from C, e.g. documentary evidence of the account of the manager who had witnessed the incident (which presumably featured as part of the investigation records).

Clearly it would have been open to the ET to give differing levels of weight to different types of evidence (live sworn evidence, hearsay evidence, documentary evidence etc). However, the EAT took the view that the EJ had not adopted that approach, but had instead gone further and decided that, having heard only from one live witness to the matter, i.e. C (who denied the allegation), she was "unable" to make a finding that he had in fact been smoking at the wheel.

In those circumstances, the EAT concluded that the ET had fallen into error.

The matter was remitted to another ET to hear the wrongful dismissal claim afresh.

Comment

There is nothing in the EAT's decision which suggests a view on the part of the EAT that the EJ should have found in favour of R on the wrongful dismissal claim. R was successful at the EAT simply because the approach adopted by the EJ in considering, or evaluating, the evidence was incorrect.

If the ET had reached the same conclusion on the basis of having given more weight to C's account (due to it being live sworn evidence) and less weight to the evidence supporting R's position (due to it being documentary and/or hearsay evidence), it seems likely that the appeal would have failed.

Indeed one wonders whether R's victory at the EAT may turn out to be pyrrhic in nature. The matter will be considered afresh by a different EJ. R is presumably going to be faced with the same problem, i.e. having to persuade the EJ that C did indeed smoke at the wheel, despite the only direct witness evidence on the matter at ET being that of C, who denies the allegation.

Regardless of the outcome of this appeal, employers (and claimants) should always give careful thought to whether they are in a position to call witnesses who can give direct evidence on any disputed factual findings which the ET is going to be required to rule on. If a party is able to call a witness who can give direct evidence on a disputed matter, but that party chooses not to do so (e.g. with a view to seeking to rely solely on documentary or hearsay evidence instead), that party should consider carefully the risk it takes in doing so.

7 January 2022

Andrew MacPhail

Barrister
3PB
Telephone: 01865 793 736
andrew.macphail@3pb.co.uk

3pb.co.uk