Employment

Overstepping the mark

Tribunals should not stray beyond their core remit. **Chris Bryden** & **Michael Salter** explain why

IN BRIEF

- To avoid falling into error and opening up a judgment to appeal, a tribunal must confine itself, when considering the fairness of a dismissal under s 98(4) of the Employment Rights Act 1996, focusing entirely upon the fundamental issues of the reasonableness of the investigation, whether there was a genuine belief at the time of the dismissal which was held on reasonable grounds, and whether the dismissal was within the band of reasonable responses.

It is a well-established and longstanding principle of employment law that, when faced with a misconduct dismissal, an employment tribunal must not substitute its own view of the claimant's alleged conduct for that taken by the employer's disciplinary panel.

This is because it is not the tribunal's role to decide what it would have done had its members been sitting in the disciplinary hearing. Rather, it is the function of the tribunal to determine whether or not in coming to its decision the employer acted reasonably. As Mr Justice Pugsley stated in *London Borough of Sutton v Kester* UKEAT/0187/06/MAA (2006): "The substitution by a tribunal of its view of the matter, as opposed to looking at whether the Respondent's actions were within the range of reasonable responses, is not an empty legalistic forma. It goes to the very heart of the function of a Tribunal. Tribunals have neither the experience or the expertise nor the information before them to assume the role of castigating employers, because the Tribunal would not necessarily have acted in that way. If Tribunals are to maintain their credibility with both employee and employer, they must show a suitable modesty about their role."

A matter of principle

This principle has been a clear element of employment law for some 30 years, following an early enunciation in the well-known decision of *British Home Stores v Burchell* [1978] IRLR 379, and more recently has been approved and re-stated in *Post office v Foley* [2000] ICR 1283, [2001] 1 All ER 550.

Yet despite the vintage of this fairly straightforward principle, tribunals, and, often, those appearing before them regularly miss the point. To a degree it is understandable that a lay claimant (particularly if representing himself) may see the Employment Tribunal Service as a tribunal of vindication, a forum for him to "clear my name". This may be particularly so where there is an element of condemnation involved in the misconduct allegation, such as theft or incompetence.

> **"The problem of tribunals involving themselves with substantive fact finding remains a perennial one"**

Indeed, the very designation of a claim for unfair dismissal may engender the hope in claimants that the tribunal is there forensically to investigate the allegations made against him by his former employer in a way the disciplinary panel did not when determining whether his dismissal was "unfair" or not.

Tribunals have shown themselves at times to adopt the opprobrium of the claimant. "Reading the decision one cannot avoid the impression that the Tribunal saw the disciplinary process by the Local Authority as a sort of conviction by a magistrate's court and they, as a crown court, were re-hearing all the evidence and free to substitute their view for that of the lower court. The decision is peppered with occasions when the Tribunal makes judgments about their view of the matter and, although…the Tribunal specifically states that they have not substituted their own opinions for that of the evidence, we are bound to say that that direction is more honoured in the breach than the observance" (per Pugsley J, *London Borough of Sutton v Kester*).

Falling into error

The above quotation demonstrates clearly an aspect of employment tribunal judgments that the appellate courts are troubled with time and again. Despite correctly directing itself that its role is to consider whether the view taken or opinion formed by the employer's disciplinary tribunal, and expressly is not to substitute its own view or opinion based on the evidence it reads and hears, employment tribunals regularly then go on to do just that. In doing so the tribunal falls into error and opens up the judgment to appeal.

To avoid this great heresy obviously requires a tribunal to confine itself, when considering the fairness of the dismissal under s 98(4) of the Employment Rights Act 1996, to focus entirely upon the three fundamental issues of:

- the reasonableness of the investigation;
- whether the there was a genuine belief at the time of the dismissal which was held on reasonable grounds; and
- whether the dismissal was within the band of reasonable responses.

However, despite clear direction over the course of the development of employment law higher courts still have to correct errors made by the lower courts.

The substitution mindset

Last month the Court of Appeal handed down a judgment clearly demonstrating that the problem of tribunals involving themselves with substantive fact finding remains a perennial one. In the case of *London Ambulance Service NHS Trust v Simon Small* [2009] EWCA Civ 220, [2009] All ER (D) 179 (Mar) Lord Justice Mummery stated: "It is all too easy, even for an experienced [Employment Tribunal], to slip into the substitution mindset….[The claimant] may well gain the sympathy of the [Employment Tribunal] so that it is carried along the acquittal route and away from the real question—whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

It is clear that the tribunal is not to substitute its own evaluation of a witness or of the evidence of that witness, or its own take on written documents forming part of the trial bundle.

A thin dividing line

There is likely in reality in many cases to be a thin dividing line between, on the one hand, the tribunal confining itself to a consideration of the facts relating to the handling of the claimant's dismissal, and on the other, the (impermissible) evaluation of a witness to come to a conclusion. Suppose for a moment that an allegation of abuse of a service user is made against a care home worker by another care home worker. The respondent calls as a witness the worker who made the allegations at the tribunal hearing, and through cross examination, that witness is discredited.

In such circumstances the tribunal is required to walk the tightrope, making an assessment of what impact the evidence of this witness at the time of the misconduct dismissal was likely to have had on the genuine and reasonably held belief of the disciplinary panel, which is entirely proper and permissible, while at the same time being careful not to substitute its own view of what should have happened based on that evidence.

Additional complications

Matters get more complicated when allegations of discrimination, victimisation and constructive dismissal are before the tribunal, due to the positive requirement to make findings of fact.

In doing so those findings have to be made based on the evidence before the tribunal and it can be all to easy for the tribunal to go on to substitute its own view for that of the disciplinary panel.

> "The tribunal is required to walk the tightrope"

Similarly, when assessing contributory conduct, the tribunal is being asked to make findings of fact in relation to the alleged misconduct.

They are, however, forbidden when deciding if there was an unfair dismissal in the first place, to apply their assessment of the evidence to come to their own conclusion.

As Mummery LJ pointed out in *London Ambulance Service NHS Trust v Simon Small* [2009] EWCA Civ 220, [2009] All ER (D) 179 (Mar): "The contributory fault decision was one for the [Employment Tribunal] to make on the evidence it had heard. It was never a decision for the [Respondent] to make. That makes it different from the decision to dismiss, which was for the [Respondent] to make. It is not the role of the [Employment Tribunal] to conduct a re-hearing of the facts which formed the basis of the [Respondent's] decision to dismiss".

Some guidance

The Court of Appeal, while noting it is not its function to tell employment tribunals how to formulate their judgments did still see fit to posit some guidance.

It thus considered that it will be better for a tribunal to keep its findings on the particular issue before it when it is assessing liability separate from its findings on the underlying factual allegations.

The latter, in a case where only a claim of unfair dismissal has been presented, can only go to contributory conduct if that has been pleaded.

Avoiding pitfalls

In order to avoid the still-common pitfall of the tribunal substituting its own view, careful analysis of the facts and a clear understanding by both the tribunal and the parties themselves of the role of the tribunal is necessary.

Equally, where there is no allegation of contributory conduct ensure that the tribunal does not become distracted by issues relating to the underlying factual basis of the case, which may lead it to fall into this error.

It is essential for advisers, particularly in light of the recent reminder by the Court of Appeal, to ensure insofar as is possible that when coming to its decision the tribunal does not fall into this error. The consequence of failing to do so is likely to be a successful appeal to the Employment Appeal Tribunal and a remittal of the matter to a differently constituted tribunal to rehear the entire matter.

Likewise practitioners should always scrutinise the reasons given by a tribunal to ensure that if the error identified by the Court of Appeal has been committed in the instant case, advice may be given to appeal. NLJ

Chris Bryden, 4 King's Bench Walk Website: *www.4kbw.co.uk*. **Michael Salter**, Ely Place Chambers. Website: *www.elyplace.com*