The EAT provides some important guidance on the procedure required for conduct dismissals

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The EAT has given some important guidance on the procedure required for conduct dismissals in ***London Borough of Hammersmith and Fulham v Keable EA-2019-000733-DA / EA-2020-000129-DA.***

The facts

Mr Keable worked for the local authority, LBHF, as a Public Protection and Safety Officer within the Environmental Health Department, until his dismissal after 17 years' employment. He was dismissed for serious misconduct arising out of comments he made in a conversation with another individual when they attended different rallies outside Parliament. The case was relatively unusual, because, although Mr Keable's comments were made public, and came to the attention of LBHF, through social media, this was not due to Mr Keable's posting of his own comments, but rather a short video of his comments being published online without his knowledge or consent. Mr Keable did not do anything to link his comments to his employment, but, as a result of the video being widely retweeted, he was publicly identified as a LBHF employee.

Mr Keable described himself as an anti-Zionist and is a member of the Labour party and a Momentum organiser. He attended the rally in his own time. The conversation, which was video-recorded outside Parliament, included the following comments by him:

> "…*I'm saying the Nazis were anti-Semitic. The problem I have got is that the Zionist movement at that time* (of the Havaara Agreement of 1933 prior to WWII) *collaborated with them…*
>
> *…the Zionist movement from the beginning was saying that they accepted that Jews were not acceptable here…"*

The tribunal found that Mr Keable's demeanour throughout the video clip was "*calm, reasonable, non-threatening and conversational".* Mr Keable said, in the later disciplinary investigation, that he did not intend to offend anyone, as this was a private conversation involving the exchange of political opinions, carried out willingly between two people.

After a local Councillor wrote to LBHF calling for action against Mr Keable, Mr Keable was suspended and subjected to the disciplinary procedure which ultimately lead to his dismissal. LBHF conceded that he had freedom of assembly and expression including a qualified "right to offend", particularly because Mr Keable was not in a politically-restricted post. It nevertheless found his comments were likely to be perceived as unlawfully hostile on religious grounds and so brought LBHF into disrepute.

The dismissing officer did not conclude that Mr Keable had been guilty of discrimination or anti-Semitism, but did find that "*a reasonable person would conclude that the Claimant had said that Zionists had colluded [or collaborated] with the Holocaust".* Mr Keable was dismissed and his appeal was not upheld.

The tribunal's decision

The tribunal found that the dismissal was for a potentially fair reason related to conduct, but was unfair because there were relevant and significant errors in the procedure adopted by LBHF, including that Mr Keable was not informed of the specific allegation which led to his dismissal and the fact that the possibility of a lesser sanction, a warning, was not discussed with him. The tribunal also found that Mr Keable should be reinstated.

In the tribunal's consideration of the classic ***BHS v Burchell*** formulation, it found that LBHF did have a genuine belief that Mr Keable had committed misconduct and the investigation adopted was within the range of reasonable investigations. It also found, however, that the precise basis for the dismissal was different to that which Mr Keable had been informed he would be required to meet during the disciplinary process. Mr Keable asked which of his comments recorded were felt to be offensive, but the alleged interpretation of an average person, being that Mr Keable was suggesting that Zionists collaborated with the Nazis in the Holocaust, was not put to Mr Keable. The tribunal found that it was outside the range of reasonable responses to decide the claimant was guilty of misconduct which had not been put to him as part of the investigation or disciplinary process. It also determined that there were no reasonable grounds on which to base the conclusion that the average person would interpret the comments as suggesting that Zionists collaborated with the Nazis in the Holocaust.

In any event, the tribunal found that it was outside of the range of reasonable responses to dismiss in all the circumstances.

As for remedy, the tribunal found that there should be no Polkey reduction but a 10% reduction in compensation was considered appropriate, due to Mr Keable's culpable conduct in making critical and pejorative comments about the investigation report. The tribunal also found that reinstatement was practicable in Mr Keable's case because trust and confidence had not been undermined. He had maintained good relations with his colleagues and it was not asserted that all trust and confidence had been lost.

The appeal

The appeal was based on four grounds.

The first was the well-trodden appeal path of suggesting that the tribunal had trespassed into the substitution mindset, instead of applying "the range of reasonable responses" test. As part of this, the appellant, LBHF, stated that Mr Keable had been informed of the nature of the misconduct alleged because he was told his comments had brought LBHF into disrepute; and it was not a procedural error not to raise with the claimant whether a warning was appropriate as it was within the dismissing officer's discretion to decide whether a warning would have been an appropriate sanction.

The second ground of appeal was that the authority of ***Smith v Trafford Housing*** [2013] IRLR 86 was not brought to the attention of the parties and yet appeared to be considered binding authority by the tribunal.

The third ground was that it was wrong to say that LBHF had not lost trust and confidence in Mr Keable, when determining that reinstatement was appropriate.

Finally, it was suggested that the tribunal had erred by failing to follow the guidance relating to reinstatement being impracticable where the employer genuinely believes the employee to be guilty of misconduct.

The EAT decision

The first ground of appeal failed because the EAT rejected the assertion that the tribunal had substituted its own view for that of the employer on the question of whether the dismissal was fair. It found, relying on **Spink v Express Foods Ltd** [1990] IRLR 320, that:

> *"one (of several) of the reasons why the dismissal was unfair was that the Claimant had not been told clearly why it was said by his employer that the relevant comments would bring the Council into disrepute; alternatively how the employer considered they would be interpreted… (T)he judge did no more than to apply… the well-established principle that an individual should know the case against them."*

In relation to the finding that it was procedurally unfair not to have consulted the Claimant about whether a warning was appropriate rather than a dismissal, the EAT simply stated that had this matter been raised with Mr Keable, that "*may not only have given the Claimant the opportunity to think about that matter and respond, but also an opportunity for Mr Austin to reflect upon, and even challenge, his own initial view about this matter".*

The EAT relied upon ***Stanley Cole (Wainfleet) Ltd v Sheridan*** [2003] IRLR 885 in rejecting the second ground of appeal. Although it would have been good practice for the judge to have drawn the parties' attention to the ***Smith v Trafford*** authority before considering it, the Court of Appeal in ***Stanley Cole*** made it clear that an appeal would only succeed on this point if the appellant can show that the authority was central to the decision, and in failing to cite the decision substantial prejudice was caused. LBHF had not proved either of these.

In relation to the third and fourth grounds, the EAT found that the order of reinstatement was one the tribunal was entitled to make. LBHF's own witnesses did not assert that trust and confidence was lost. Self-evidently, it does not follow that because an employer decides to dismiss for conduct, that decision later being found to have been unfair, that reinstatement is impracticable. If that were the case, the primary remedy of reinstatement would very rarely be able to be made.

The significance of the decision

Of course, the decisions made in this case were made on the basis of Mr Keable's specific factual circumstances, but there are a number of interesting aspects of the EAT's decision which might affect other cases going forward.

This case may well encourage employers to be cautious in differentiating between an employee's own action, even where the employee posts his/her own comments on-line, and the sometimes voluminous and histrionic commentary which can be generated on-line about the alleged significance of the employee's original words. There is obviously a line to be drawn between an employee bringing his/her employer into disrepute, and the uninvited commentary

from elsewhere being the problem. Dismissing due to a fear of what the general public might think of some objectively inoffensive comments, is not likely to be fair.

A novel facet of the decision on conduct dismissal procedure, is the upheld determination that failing to put to Mr Keable that a warning was not an appropriate sanction rendered the dismissal procedure unfair. This goes beyond the requirements of the ACAS Code of Practice. So far as I am aware, although it is fairly settled law that the employer should consider the appropriateness of a lesser sanction as an alternative to dismissal, it has not previously been considered a prerequisite to a fair dismissal that the employee should be consulted on whether a warning would be appropriate in the circumstances. Surely any employee, if asked, would say a warning would be preferable and therefore an appropriate alternative to a dismissal? The tribunal in the present case clearly thought that Mr Keable should have had the opportunity to persuade the dismissing officer that he would have heeded a warning and not been a risk to LBHF in the future if retained in employment. I would be surprised if there was a future case involving a substantively fair decision to dismiss and an otherwise fair procedure, where the failure to consult on a lesser sanction rendered the dismissal unfair in the circumstances. The cautious advice to respondent clients, nevertheless, is now to include in disciplinary hearings a discussion of whether a warning would be an appropriate alternative to dismissal.

The EAT's judgment on reinstatement also provides a useful reminder to practitioners on how tribunals should deal with questions of whether reinstatement is practicable under **s.116 Employment Rights Act 1996**. At a remedy hearing, the focus is on the employer's view of trust and confidence, appropriately tested by the tribunal (see ***Oasis Community Learning v Wolff*** (UKEAT/0365/12); ***Wood Group Heavy Industrial Turbines v Crossman*** [1998] IRLR 680; ***United Lincolnshire Hospitals v Farren*** (UKEAT/0198/16)) so it is very important for the employer's witnesses to express a view on the trust and confidence they have (or do not have) in a potentially returning employee. The level of contributory fault on the part of the claimant is also likely to be relevant.

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