EAT considers range of reasonable responses test and the correct role of the tribunal when considering whether a dismissal was fair

By Sarah Clarke
3PB

Vaultex v Bialas EA-2022- 001258-AT

Summary

1. In an appeal in which I acted for the successful Appellant, HHJ Auerbach set aside a finding of unfair dismissal on the basis that the tribunal judge had substituted his own view and erred in law in respect of the range of reasonable responses test.

The Facts

2. Vaultex UK Ltd is the UK's leading cash management company. As an organisation, they placed a great deal of emphasis on equality, diversity and inclusivity, and strived to provide a workplace free from discrimination. For example, in October 2020, a Racial Inclusivity Campaign was commenced, which was focussed on educating staff on racism and how to influence change in the workplace, and it was made clear that they had a zero-tolerance approach to racism. In February 2021 they produced an Equality, Diversity & Inclusion Policy [EDI policy] which provided that the company had a '*zero-tolerance approach to discrimination of any kind…Vaultex is committed to providing relevant training for all staff on their responsibilities and duties under this policy and will not tolerate any discriminatory practices or behaviour.'*

3. Vaultex also had in place an Intranet Acceptable Use Policy which provided that any comments of a discriminatory nature were strictly prohibited and would not be tolerated. Their Disciplinary Policy provided a list of examples of behaviour that was considered to constitute misconduct as well as gross misconduct. A breach of the Anti-harassment and

Bullying and Equality and Diversity policies was stated to be an act which would normally be regarded as gross misconduct.

4. On 01/09/21 Vaultex began operating a new internal intranet portal called Workvivo system which enabled staff to set up their own profile and interact with each other in a social-media style setting. For instance, it allowed staff to post updates, tag their colleagues and make posts, such as photographs or links to websites.

5. On 28/09/21 the Claimant posted the following joke on Workvivo, which was viewable by all staff:

   Something for the Anti-Racist campaign from Dagenham Coin:

   Do not be racist; be like Mario. He's an Italian plumber, who was made by the Japanese, speaks English, looks like a Mexican, jumps like a black man, and grabs coins like a Jew! :)

6. The Claimant explained that he was having a slow workday, and decided to look online for a 'clean' joke that he would post on Workvivo. He found a website which had a section of jokes which were described as appropriate for the workplace and to share with family. One of the Claimant's colleagues reported the joke as being racist shortly after it had been posted. Following an investigation, the Claimant was summarily dismissed on 13/10/21 for gross misconduct. The dismissing officer took account of the Claimant's long service (over 20 years), clean record and his apologies/remorse, but in the circumstances considered that dismissal was the proper course of action, and there was a concern that failing to dismiss could undermine the anti-racist campaign.

The ET decision

7. The Claimant brought a claim for unfair dismissal. Following a one-day hearing before EJ Knight on 05/10/22, a reserved judgment was sent to the parties on 21/10/22 in which it was found that the dismissal was unfair. EJ Knight found in respect of the joke that:

   "Plainly, the joke is racist. The stereotype in relation to Black men relates to an assumption of physical strength which has historically been used, and continues to be used to justify persecution of Black people. The reference to Jewish people is anti-Semitic. It relies on a centuries long association of Jewish people with moneylenders and usury…It remains to this day a vile expression of hatred against the Jewish people which is repeated both in this country and globally."

8. Whilst it was found that Vaultex did have a genuine belief that the Claimant had committed an act of misconduct and that the procedure was generally fair, it was found that the decision to dismiss fell outside the band of reasonable responses. Much emphasis was placed on the Claimant's lengthy and unblemished service history, and the fact that it was considered that he had not intended any malice, and had always maintained that he in fact believed that the joke was anti-racist. It was concluded that:

   Against this background, any sanction more serious than a final written warning was outside the band of reasonable responses. No reasonable employer would have taken the decision to dismiss. Rather, any reasonable employer, possessed of the facts available to Mr Babbage, would have imposed a lesser sanction such as a final written warning.

The EAT decision

9. Vaultex appealed on the basis that, whilst the judge had correctly identified the law, he had fallen into the substitution trap, namely he had substituted his view for that of the employer. Further, it was argued that his conclusion that the decision was outside the range of reasonable responses was perverse. It was not in dispute that the dismissing officer had in fact taken into account the Claimant's lengthy, unblemished service and remorse, but it was nonetheless considered that, in light of Vaultex's anti-discrimination stance, dismissal was appropriate. It was argued that in these circumstances, no properly directed tribunal could have found that the decision to dismiss was outside the range of reasonable responses.

10. The matter came before HHJ Auerbach. He firstly set out the function of the EAT, namely that an appeal lies to the EAT on the basis that the tribunal has made an error of law. Its role is limited to that. It does not conduct a retrial or find facts. As regards the situation where an employment tribunal has given itself a correct self-direction as to the law, and ostensibly answered the correct legal question in its conclusions, it was noted that the EAT should be circumspect when invited to conclude that nevertheless the tribunal did not, in fact, take the right approach in substance. However, the making of such statements as to the law by the tribunal does not make its decision immune from such a challenge.

11. It was argued by Vaultex that the reasons provided by the tribunal as to why the decision fell outside the range of reasonable responses (i) did not actually support that conclusion, and merely canvassed considerations that might be considered relevant to the choice of sanction and (ii) betrayed that the tribunal had in substance made the error of substituting its own view of how serious the conduct was, rather than considering the view of the

dismissing officer and whether that was reasonably open to him. It was submitted that it was open to an employer to determine how seriously it treated certain types of conduct, and here it was not in dispute that Vaultex had a zero-tolerance approach to discrimination.

12. Conversely, the Claimant argued that his apologies, remorse and offer to undertake retraining were such that it was open to the tribunal to consider that dismissal was outside the band of reasonable responses.

13. HHJ Auerbach agreed with Vaultex's argument in respect of the reasoning provided for the conclusion that the decision was outside the range of reasonable responses. The first reason relied upon related to the fact that the tribunal noted that it was open to Vaultex to have imposed a lesser sanction, and suggested that their view was that imposing *some* sanction would not undermine the EDI policies in place. However, this indicated that the tribunal were not considering whether it was reasonable for the dismissing officer to take the view that not dismissing would send out the wrong signal, and that the tribunal were imposing their own view that so long as *some* sanction was imposed, this would not undermine the policies.

14. The second reason relied upon was the fact that the Claimant had shown remorse and offered his apologies. The tribunal states that the Claimant may not have had the fundamental knowledge to understand why the "joke" was racist, and comments on what it considers could not have escaped the dismissing officer's attention. This was found to be troubling, as it suggested that the tribunal themselves were considering what had gone through the Claimant's mind, and what the dismissing officer *ought* to have made of that, instead of focusing on what the dismissing officer *did* make of the apology, and whether this view was one which was reasonably open to him. HHJ Auerbach pointed out that whilst the failure to take into account such matters might impact on the fairness of the dismissal, it does not follow that where an employer *has* taken these matters into account but nonetheless dismissed, that they will have necessarily acted unfairly.

15. The next factor relied upon was the Claimant's long service and unblemished record. The tribunal had specifically found that these matters *had* been taken into account. Insofar as the tribunal were suggesting that these factors meant that the decision fell outside the range of reasonable responses [which was not entirely clear from the judgment], HHJ Auerbach rejected such an argument, noting that this was a case in which Vaultex had made it clear that this type of behaviour could lead to dismissal for a first offence.

16. The last point relied upon by the tribunal related to the state of mind of the Claimant at the time of posting the joke. The Claimant had argued that he genuinely believed that the post was in fact a positive contribution to the anti-racist campaign. The tribunal had appeared to conclude that the dismissing officer had not formed the view that the Claimant had appreciated that the post was overtly racist and had decided for some malign reason to post it anyway. This was relied upon as a reason as to why dismissal was outside the range of reasonable responses. However HHJ Auerbach pointed out that "*the tribunal needed then to consider whether, taking that into account, Mr Babbage* [dismissing officer] *was nevertheless entitled, within the band of reasonable responses, to take the view that this was conduct which warranted the sanction of dismissal. What the employer concludes was the employee's state of mind in relation to the conduct will obviously usually be highly relevant to whether dismissal was within the band of reasonable responses.* ***But it may still be open to an employer within the band of reasonable responses to dismiss for conduct which, though it is not believed to be malicious, is still reasonably considered to be seriously thoughtless or lacking in insight, negligent or reckless, in view of what is considered to be its serious impact or implications****."*

17. Overall, the EAT concluded that the tribunal had allowed its decision to be "*influenced by the judge's own view of the gravity of this conduct having regard to the various mitigating factors that the claimant had relied upon"*, when they should have considered whether it was open to the employer, having taken into account the mitigating factors, to nonetheless dismiss. As such, it was found that they had erred in law in falling into the substitution trap and that the decision was perverse.

Commentary

18. Whilst matters such as length of service and remorse are important factors which should be taken into account when deciding whether or not to dismiss, this case makes it clear that the presence of these factors alone will not necessarily render a dismissal unfair. The overall context is crucial, and employers are entitled to set out the standards which they expect their employees to adhere to. Where employers clearly set out what type of conduct they consider will open up an employee to dismissal, it will be difficult for employees to argue that their dismissal was unfair.

19. It can be very easy for judges to slip into the substitution trap, and to simply consider what they think would have been reasonable in the same circumstances, but that is not the role of the tribunal. This is a helpful reminder to parties to properly analyse judgments they

receive, as even where the judge perfectly recites the relevant law and test/s to be applied, certain comments and phrases may betray that they are simply paying lip service to the correct test, and are in fact erring in their approach.

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Sarah Clarke

Barrister
3PB Barristers

01179 281520
Sarah.clarke@3pb.co.uk

3pb.co.uk