



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A El Kalash

v

Alaraby Television Network Ltd

Heard at: Watford

On: 28 to 31 March 2022

Before: Employment Judge Allott

Appearances

For the Claimant: In person

For the Respondent: Ms Sarah Clarke (Counsel)

JUDGMENT

1. The claimant's claim of unfair dismissal is well founded.
2. The claimant's claim of automatically unfair dismissal for Trade Union membership and/or activities is dismissed.

REASONS

Introduction

1. The claimant is a TV Senior Producer/Director with 21 years' experience in working in the Arabic media. He was employed by the respondent on 7 October 2014 as a Senior Programme Producer. From 26 January 2018 he held the position of Senior Broadcast Journalist. He was summarily dismissed on 4 September 2019.
2. By a claim form presented on 7 January 2020, following a period of early conciliation from 7 November to 7 December 2019, the claimant brings complaints of unfair dismissal (s.98 Employment Rights Act 1996) and/or automatically unfair dismissal (s.152 TULRCA 1992).

The issues

Unfair dismissal

3. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserts that it was gross misconduct.
4. In particular, did the respondent genuinely believe in the reason for dismissal and was that belief based on reasonable grounds following a reasonable investigation?
5. If so, was the dismissal fair or unfair in accordance with ERA s.98(4), and, in particular, did the respondent in all respects act within the so called “band of reasonable responses”?
6. Was the reason (or if more than one the principal reason) for the claimant’s dismissal that he:
 - 6.1 Was a member of an independent trade union,And/or
 - 6.2 Had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time?

Remedy

7. If the claimant succeeds in whole or part the tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages will decide how much should be awarded.

The law

8. In her opening submissions Ms Clarke helpfully advanced the following propositions which I adopt:-

Ordinary unfair dismissal s.98(4) ERA

9. S.98(4) provides that:
 - “(4) Where the employer has fulfilled the requirements of ss.(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”
10. In a misconduct case, the correct test to apply is that set out in Burchell v British Homes Stores [1978] IRLR 379:

“First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.”

11. In Iceland Frozen Foods Limited v Jones [1982] IRLR 439 it was held that:

- “(2) in applying the section an industrial tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer’s conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- (4) in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: If the dismissal falls outside the band it is unfair.”

12. It is not for the tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather, its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even though the tribunal, left to itself, would have acted differently British Leyland UK v Swift [1981] IRLR 91. The position was stated clearly by Philips J in the case of Houses Forte Leisure Limited v Aquilar [1976] IRLR 251:

“It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: To dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.”

13. In a misconduct case, the range test applies to the reasonableness of the employer’s investigations as well as final decision to dismiss Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23.

14. In Gwynned Council v Barratt [2021] IRLR 1028 It was held that the lack of an appeal does not necessarily render a dismissal unfair – an appeal is one of the many factors to be considered in determining fairness.

15. The Acas Code of Practice on Disciplinary and Grievance matters provides that:

“The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.”

16. However, it was made clear in Adeshina v St George’s University Hospitals NHS Trust [2015] IRLR 704 that minor previous involvement in the case by the appeal manager was not sufficient, without more, to render the process unfair.

17. Further, I have taken into account the following extracts from the IDS Employment Law Handbook “Unfair Dismissal”:

18. At 4.11:-

“Overlap with misconduct. Some cases of incapability may really be cases of misconduct. This was recognised by the EAT in Sutton and Gates (Luton) Limited v Boxall [1979] ICR 67, EAT, when it said that “Capability” should be treated as applying to those cases in which the incapability is due to inherent incapacity. Where someone fails to come up to standard through his or her own carelessness, negligence or idleness, this is not incapability but misconduct. The main significance of the distinction is in respect of assessment of the employee’s contribution to the dismissal, but it is also relevant in determining the steps that a reasonable employer ought to take before dismissing the employee...”

19. At 4.12:-

“Cases where the employee’s acts or omissions amount to extreme negligence could be characterised as either capability or conduct. In Philander v Leonard Cheshire Disability EAT 0275/17 the EAT held that in such cases either label would be proper, as the dividing line between conduct and capability “can be paper thin and even porous”.

20. And quoting from the case of Burdis v Dorset County Council EAT 0084/18 the EAT held:

“The tribunal had not erred in finding that the misconduct does not require some wilful act on the part of the employee but can embrace serious neglect, omission or carelessness, and, on that basis, the tribunal had not been bound to find that the dismissal was, in reality, by reason of capability or some other substantial reason of a kind that justified dismissal.”

21. Further, at 4.39:-

“Single acts of negligence or incompetence

Incapability is usually established over a period of time, during which the employee’s incompetence or inability to meet reasonable standards has become apparent. However, in rare cases, a one-off act can sometimes be relied upon by employers to establish incapability, particularly if the act so undermines confidence in the employee that the employer is justified in dismissing for it.

In Alidair v Taylor [1978] ICR 445, CA, for example, a pilot put the lives of many passengers at risk when he landed his aircraft negligently. This amounted to a sufficient reason for dismissal in view of his gross incompetence and the potentially calamitous consequences of his actions. And in Clark v Airflow Streamlines Plc ET Case No. 29621/83 an experienced car mechanic negligently left an old oil seal in place during a pre-sale service. As a result, the purchaser of the car drove only 11 miles before the engine seized up and the rear wheels locked. The majority of the tribunal, while sympathising with the mechanic, found the dismissal fair in view of the potential danger and the damage to the employer's reputation.

In general, however, tribunals are unlikely to be sympathetic to an employer who dismisses an employee - particularly a long serving employee - on account of a single error of judgment in circumstances where that error, although perhaps costly, is not potentially calamitous."

Trade Union dismissal

22. Was the reason (or if more than one the principal reason) for the claimant's dismissal that he:
 - 22.1 Was a member of an independent trade union,

And/or

 - 22.2 Had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time?

The evidence

23. I was provided with a liability bundle running to 958 pages.
24. In addition, I had witness statements and heard evidence from the following:
 - 24.1 Mr Abdulrahman Elshayyal, Head of Support Function and Director at the respondent, who held the disciplinary hearing and decided to dismiss the claimant.
 - 24.2 Mr Abbas Nasser, Channel Director at the respondent, who heard the appeal.
 - 24.3 Ms Ritu Parihar, Resources Unit Manager at the respondent.
 - 24.4 The claimant.
 - 24.5 Mr Belal Fadl, a freelance Presenter and Editor contracted by the respondent (via CVP from the USA, with the necessary consent).
25. In addition, I had a witness statement from Mr Andy Smith, Organiser and Trade Union Representative for the National Union of Journalists, who was not called as his statement was not controversial.

26. In advance of the hearing Ms Clarke provided me with a cast list, a chronology and her opening note on liability. Lastly, the claimant provided a document in closing submissions that he spoke to.
27. On day 4 of this hearing the respondent provided further numbered pages 959-969 consisting of a part transcript of a television programme and an internal document dealing with reorganisation of various departments in 2017. More will be said of these later.

The facts

28. The claimant is a TV Senior Producer/Director with 21 years' experience in working for Arabic media. He describes his expertise as being in the area of variety shows.
29. In September 2014 the claimant was approached to relocate to the UK to work for the respondent. He began employment with the respondent on 7 October 2014 as a Senior Programme Producer.
30. The claimant's contract of employment provides a non-exhaustive list of examples of conduct that could constitute gross misconduct. This includes:
 - 30.1 Unreasonable failure to follow instructions;
 - 30.2 Bringing us into serious disrepute;
 - 30.3 Serious negligence which causes or might cause unacceptable loss, damage or injury;
 - 30.4 Serious failure to follow policies or procedures;
31. In January 2018 the claimant changed posts to the position of Senior Broadcast Journalist. On 29 January 2018 his revised job description was sent to him. It is eight pages long and comprehensive. The particular parts highlighted on behalf of the respondent are as follows:-

“Main purpose/job summary: To take responsibility and accountability as a senior member of the team by providing an exemplary high standard of editorial output and managing deadlines and resources.

Main duties & responsibilities:

- Research, write, translate and adapt items, news stories or programme material and to voice and edit packages at the desktop.
- To be up to date with the main stories, fact checking; undertaking background research as required.
- To undertake pre and post-production and studio work, live and pre-recorded. After appropriate training, use a range of video, audio & digital equipment and information technology to research, write, assemble, edit and deliver programmes in the appropriate medium to the highest professional standards.

- To carry out the above duties and responsibilities in accordance with applicable broadcast regulations, specifically in accordance with the Ofcom Code.”

32. In addition, under essential skillset the following is set out:

- “• Sound editorial knowledge and able to identify trends and potential issues.”

33. The respondent has provided its Editorial Guide document and the Ofcom Code. The claimant sought to distance his knowledge of these documents by suggesting he had never had Ofcom Code training and stated that he only became aware of the Editorial Guidelines after he left the respondent’s employment. I found the claimant’s evidence on these issues to be troubling. The respondent has produced emails that demonstrate that the claimant was sent Ofcom training slides on 25 January 2016 and on 18 October 2016. Further, he received a full copy of the Ofcom Code in October 2016. Further, the respondent has provided an email indicating that the Editorial Guidelines were sent to him on 15 June 2017. This appears to have been both in Arabic and English. I find that the claimant clearly was sent those documents and had access to them. Further, as a Senior Broadcast Journalist, I would expect the claimant to be familiar with those documents even if he had not read them from cover to cover.

34. The Editorial Guide sets out the ethos of the respondent’s operation. It is a long document, running to 26 pages. Its opening statement is as follows:-

“We are an Arab media network with a globally orientated identity, combining pride in our Arabic civilization with openness to other human civilizations.

We operate through television and electronic platforms addressing Arab audiences and share their political, social and cultural interests and concerns.

We interact with the struggles and complexities of the current affairs in the Arab world, from the premise of contributing to the dissemination of the culture of rights and freedoms and, the realization of pluralism and justice values.

We aspire to play a progressive and enlightening role, since we believe in the crucial role which meaningful media plays in shaping public opinion and building the future.”

35. Under “Our values”

“2.1 Alaraby Television is a modern media network producing diverse content. It addresses the worldwide Arab audiences.

...

2.5 “The Network” strives to provide a platform for the public, within the limits of professional controls of balance, integrity, transparency and independence.”

36. Under “Our objectives”

“3.1 To provide media platforms that envisage professionalism, seek integrity and honesty, while aligning with the values of pluralism, diversity, culture of rights and freedoms recognised in modern societies.”

37. Under “Objectivity, accuracy and impartiality”

“6.7 Neutrality does not necessarily mean equal distribution of the time given to each opinion, nor does it mean that all viewpoints must be presented. Rather, editorial decisions, in this regard, depend on the nature of the topic, the type of content, the audience’s potential expectations, and the context that amalgamates all these elements.”

38. Under “Equity”

“7.2 Producers and broadcasters must be fair in their dealings with present or potential guests hosted in their programmes and the news bulletins.

7.3 In the event that any guest is invited to participate in a programme... responsible team must:

...

- Inform the guest of any changes that were not originally expected, if the change is likely to affect their initial approval of contribution.

7.4 The purpose of adherence to the obligations in article 7.3 is to ensure that the guests are fully aware when giving their consent. Some of this information may be withheld if there is a reasonable justification.”

39. Under “Religions and cultures”

“12.1 Religious opinions and beliefs of members of any faith or religious doctrine should not be approached abusively.

12.2 It is prohibited to broadcast or publish any material that promotes any religion or sect, or engage in religious controversies, unless there is a valid editorial reason related to a current event of interest to the public. Any statements or comments that may indicate the network’s bias towards any religion or sect should be avoided.

12.4 All groups and minorities in different societies must be respected. It is forbidden to use expressions that may show disregard, hatred, incitement, or derogation to present, display, or introduce such groups.”

40. The extracts from the Editorial Guide cited above represent a selection of what appear to me to be the more relevant parts of it. It demonstrates the necessarily wide range of considerations to be taken into account by the television network and its producers and editors. I find that the respondent prides itself on its liberal and pluralist ethos and clause 12.2 illustrates that material which is religiously controversial may be broadcast if editorially justified.

41. The Ofcom Broadcasting Code defines a religious programme as follows:-

“A religious programme is a programme which deals with matters of religion as the central subject, or as a significant part, of the programme.”

42. Rule 4.2 provides:

The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.”

43. This case involves the broadcast of an episode of a programme called “Asir Elkotoob” (translated as “Books Juice”). In his claim form the claimant estimates that he had worked on about 40 programmes and 140 episodes of this programme. In addition, the claimant estimates that he had produced about 150 episodes of another programme called “Almawhbon Fi Ard”. In his five years of employment with the respondent the claimant estimates that he had produced more than a 1,000 hours of broadcast material. It is common ground and the respondent accepts that no previous complaints about the claimant’s editorial control or the content of programmes that he was responsible for had been made.

44. The production of the Books Juice programme was made in collaboration with Mr Belal Fadl. Mr Fadl was a Freelance Presenter and Editor with whom the respondent had a contract. Proposing guests, preparing the content, devising the interview questions and presenting the show was largely Mr Fadl’s responsibility. It is clear to me that the claimant nevertheless had overall responsibility. In his witness statement the claimant says as follows:-

“As Senior Producer, I would deal with the technical and the production side of the show for use on the respondent’s channel. This included things such as preparing the budget, getting the management’s approval on the proposed guest from the presenter, contacting the guests and arranging for their transportation, accommodation, taking care of the expenses on location, supervising the post production with the video editor as I was the Director.”

45. In one sense, the primary responsibility for the content of the programme lay with Mr Fadl as he researched the guests and prepared the questions to be asked in the interview. However, it is clear to me and I find that the claimant had a managerial role above that of Mr Fadl when it came to determining what content should be broadcast. In his witness statement the claimant says as follows:-

“From previous experience, whenever there were any concerns about the show contents, I would discuss it with the presenter and he would edit the content in order to make sure that it would be ready to go on air within the timeframe.”

46. In my judgment important issues in this case are:

46.1 What content could the claimant allow to be broadcast? and

46.2 In what circumstances should the claimant refer content to senior management for a decision as to whether or not it should be broadcast?

47. As per the opening statement on behalf of the respondent, the respondent puts its case as follows:-

“Respondent’s position is that if an episode contained potentially controversial, problematic or sensitive material, or anything which C may be in doubt about, he was required to raise this with either his line manager, Abdul Rahman Elshayyal [“AE”] [**In fact this should be Mr Mohammed Aboulenein**] (my observation) or the Duty Editor Fadi Azzam [“FA”]. This process is described as the workflow [AE para 9]. This is an industry norm. Further, it is respondent’s position that staff were informed to be especially cautious when dealing with sensitive issues such as ethnicity, religion or sectarianism.”

This position is drawn directly from paragraph 9 of the witness statement of Mr Abdul Rahman Elshayyal.

48. In his witness statement Mr Abbas Nasser effectively makes the same point where he refers to the claimant “failing to follow the workflow, which he was aware of” and that it was the claimant’s “responsibility to pick up any possible problematic clips from programmes that he was producing and refer them to management as per the practice followed by all producers in his department.”
49. Accordingly, I have looked at the evidence placed before me against these assertions. The first point to make is that there is no written instruction or protocol dealing with these issues. The job description and editorial guide are in too general terms. The second point is that no evidence of industry standard conduct has been placed before me.
50. Equally, it is clear that the claimant knew that there were circumstances that could require him to refer content to senior management for a decision. He knew that if he needed to refer anything, he could do so to the Duty Editor, Mr Fadi Azzam, or his Line Manager, Mr Mohammed Aboulenein. In the record of the investigation meeting held on 27 June 2019 the claimant stated that when he checked the interview he could not see anything sensitive to report to his manager. In his disciplinary hearing on 27 August 2019 the following exchange is recorded:-

“Mr Elshayyal

“This is clearly a workflow for choosing the guest. How about the content? When you have something that is controversial. You surely go to your manager as well and flag it?”

Claimant:

Part of this show is that we go through controversial matters. It is not bad or wrong. As Mohammed [Aboulenein] always says we have to be careful with issues that are problematic and not just controversial and only then we have to avoid them.”

51. In determining what the claimant’s duties were as Senior Broadcast Journalist concerning the content of his programmes, I have relied significantly on the investigation meeting report of the interview held with the

claimant's line manager Mr Mohammed Aboulenein. Mr Aboulenein was not only the claimant's Line Manager but Head of Political Programmes /Head of Variety programmes/ Head of Planning and Development. The interview was with Mr Hamzah Almustafa [HA]. The following exchanges are recorded:-

51.1 "HA also said we had a meeting with Ahmed El-Kalash [AE] where he said the content of the episode was not controversial. HA asked MA we want to know your opinion as a senior person of the department. MA said if what is meant is the clip on social media so to give an editorial judgment the whole episode and context needs to be seen and considered to see if there was a challenge from the presenter or if he took distance from the guest's view.

MA said "As for the specific clip shared yes it has sensitive content and if it was him in the position of the producer he would have referred it up to the editorial management."

51.2 "MA said if the episode was referred up to him by duty editor or producer he would have advised accordingly. MA further said there are two things that have AE listened to the episode during the editing or not? MA said if he did not listen, this is negligence but, if he listened and kept it so it becomes an editorial judgment issue"

51.3 "EB asked MA what the producers do in the programmes if they find something doubtful.

MA said if they are in doubt, in that case, they will send it to duty editor and if duty editor also has doubt in the content then they send it to him. MA said with this programme we had near 200 episodes without problems so it was low risk and that is why he depends on the producer and duty editor in watching the episodes and on the QC report to see if there were any problems. The producer and duty editor should refer up anything they are in doubt about to him."

51.4 "HA said did you give the instruction to your team that careful while dealing with sensitive information.

MA said he instructs his team in general in different meetings about sensitive issues and on specific incidents when it appears however he cannot specify about certain religious issues as it is a case by case issue."

51.5 "HA asked MA what his overall assessment from the episode.

51.6 MA said in his view if AE didn't listen to the recording this is negligence but if he listened then it becomes an issue of editorial judgment. MA also said that he also checks the daily QC report done by the team in Tunisia and he did not see any point regarding the programme beforehand. MA further stated that there are different layers to check the content and it starts with a Producer first."

52. I find that the so-called workflow was not as defined or certain as Mr Elshayyal, Mr Nasser or the respondent may contend. I find that there was a general instruction that sensitive content should be referred up to the editorial management if there was any doubt. However, I find that there was no definition, direction or understanding as to what constituted sensitive content or indeed potentially controversial, problematic or sensitive material

a producer may have doubt about. I find that, as expressed by Mr Aboulenein, it is a matter of editorial judgment at first instance. To answer the 2 questions I posed myself in paragraph 46. I find that the claimant was allowed to broadcast religiously controversial material and that this was a matter for his editorial judgment. I find that the claimant was required to refer content to senior management if it was potentially problematic if there was any doubt but that this was a matter for his editorial judgment.

53. Once the claimant had completed post-production with the Video Editor and the programme was ready to be broadcast, it was placed in an electronic folder. Prior to 2017 there was a UK based Quality Control Team that would view all material to be broadcast and screen it for its content. Ms Parihar gave evidence that in 2017 the Quality Control Unit was restructured to reduce its manpower to one, largely on costs grounds, and its function was merely to monitor technical quality and not content. It was thus suggested by the respondent that Quality Control no longer routinely viewed all broadcast material before it was broadcast for content. Nevertheless, the interview with Mr Aboulenein clearly has him referring to daily QC reports from a team in Tunisia and states that no issue concerning the programme beforehand had been raised and that is clearly in the context of content. The investigation with the claimant also records him referring to not receiving any QC reports. I do not consider that Mr Aboulenein's specific comments about a team in Tunisia and daily QC reports can be in error or mistake and I find it unsatisfactory that any such reports have not been disclosed by the respondent in these proceedings. If such reports were only of a technical nature, nevertheless I would expect that to have been disclosed for verification. I find that QC probably did monitor programmes in advance for content and did not raise any issues with the episode in question.
54. Guests to appear on the Juice Books programme had to be approved by senior management. In December 2018 the claimant was involved in making some more episodes of the Juice Books Show. The show was filmed in New York with Mr Belal Fadl as presenter. Initially, one of the guests proposed was an Iraqi poet but Mr Fadl stated that if the respondent declined the Iraqi poet then he would recommend interviewing an alternative guest speaker by the name of Dr Ahmed Subhy Mansour. Mr Fadi Azzam declined the Iraqi poet in December 2018 and consequently Dr Mansour was put forward as a guest speaker. On 29 January 2019 the claimant was seeking approval for the hotel booking for Dr Mansour and this was referred to Mr Abbas Nasser. On 29 January 2019 Mr Nasser sent an email stating, "Who is Ahmad Mansour???". In response the claimant forwarded a paragraph about Dr Mansour that had been sent to him by Mr Fadl. This states:-

"In regards to the guest of Aseer Alkotob Ahmed Sobhi Mansour

He is an Islamic thinker and a founder of the Quranic Trend and the President of the International Centre for the Noble Quran. He advocates for democracy, human rights and freedom of the religion. He worked as a tutor then became an assistant teacher in Alazhar University (1973-1987). Due to his opinions

(exercises of judgment), he faced prosecution in the Alazhar University until he left it on 1987 and worked as an independent thinker in Egypt. He entered the prison twice in Egypt. The believers in the Quranic Trend faced campaigns of imprisonment in Egypt. He went to America as a political refugee and got the American Citizenship in 2013. On his website (Ahel Alquran- The people of Quran) thousands of his articles, research, books, fatwas, and comments published in Arabic and English. He also has a channel (Ahel Alquran – Ahmad Subhi Mansour) and there are in it tens of recordings. Including (Scandals of Alsalafiya), (Khotab Aljuma), and (Lahathat Quraniya). He worked as a visiting lecturer in the Human Rights programme in Harvard University and in the Centre of Religious Freedom and in the American Endowment for Democracy and in the Woodrow Wilson Centre.”

55. That was sent at 14.34 on 29 January 2019. At 15.16 on 29 January 2019 Mr Nasser emailed that he approved presumably both the expenses and the guest.
56. I have to say that when I first read that CV it struck me that the claimant may have some interesting or indeed controversial views given that he founded something called the Quranic Trend and had been placed in prison in Egypt twice for it. Mr Nasser’s evidence was that he said there was nothing in that CV that made him think that Dr Mansour may have controversial views and that “Being in jail in Egypt is no big deal”. Nevertheless, the point remains that had Mr Nasser wanted to check him out he could have looked at his website or ‘Googled’ him. The claimant was later accused of misleading management in general, and Mr Nasser in particular, with this background note. I do not find that this was misleading, either actively or by omission. Notwithstanding the rather blasé attitude to Egyptian justice, there is sufficient content within it to alert the reader to the fact that Dr Mansour was an academic Islamic thinker who had offended some in Egypt causing him to go to prison and seek political asylum in the USA.
57. On 3 February 2019 the interview between Mr Fadl and Dr Mansour was filmed in New York. The claimant was present during the filming. During the investigation meeting on 27 June 2019 the claimant is recorded as stating:

“AEK replied that during the shoot he had a few concerns about the presenter as he thought he should challenge the guest more but that the presenter took on board the concerns and did challenge the guest in many parts. AEK explained that the presenter mentioned many times during the programme, including in the introduction, after the break out and at the end that this was not the point of view of the channel and that they were not trying to spread ideas to convince the audience of anything, but that it was up to the audience to decide what they like or do not like. AEK reiterated that the presenter made this clear several times as this had been a concern as a director and producer so AEK had told the presenter to please put this onto the guest.”
58. The claimant returned to the UK with the footage and it was incorporated in three episodes of Juice Books. Each episode was 52 minutes long and each episode contained approximately 20 minutes of the interview with Dr

Mansour. Consequently, approximately 60 minutes of the interview with Dr Mansour was broadcast.

59. The three episodes were broadcast on 20 and 27 April and 4 May 2019 and rerun on 21, 24 and 28 April and 1 May 2019. In addition, all three episodes were placed on YouTube.
60. No one could tell me which episode contained the clip subsequently complained about. There was no complaint or audience reaction about the episodes until 15 June 2019, between 57 and 44 days later.
61. Surprisingly, at the outset of this hearing I did not have a transcript of the contentious part of the programme. In the response form at paragraph 4 the matter was pleaded as follows:-

“During one of the episodes, the guest speaker (chosen by the claimant) stated “It is known that the Caliphs who came after the Prophet Muhammad are hypocrites, spies, and enemies of Islam”.”

62. It is referred to as a controversial quote. The inverted commas and reference to a quote clearly represent that it is a verbatim quote.
63. The letter of suspension on 17 June 2019 and the invitation to the investigation meeting both merely refer to “very controversial views” being aired. The pleaded quote appears to have been lifted from the investigation report prepared by a Mr Hamzah Al Mustafa dated 10 August 2019. From there it appears to have made its way into the witness statement of Mr Elshayyal who also quotes it in inverted commas as being what Dr Mansour said. Mr Elshayyal was the dismissing officer.
64. Towards the end of the hearing I was provided with a transcript of the relevant part of the programme. In fact the pleaded quote does not accurately reflect what Dr Mansour said. The transcript provided to me reads as follows:-

“Host at 40/55

Everyone agrees there was a prevention of the documentation of the Hadith. And prevention of the collection of the Hadith. And what appears at the beginning of the first book collection of the Hadith, how were Muslims living before the Sunnah?

41-09

Guest

Politics hasn't gone into anything except with corrupting it.

I mean, pay attention, the group of people known for their hypocrisy, our Lord (God) said: on the day there will be people from those of Medina (a city) who are hypocrites, you do not know them, but we know them, we will torture them twice and then they will be given a great punishment.

Those are the ones who became Caliphs. They were, well I have a book and those are the people called the righteously guided Caliphs.

Those are spies sent by Quraish (an Arab tribe) with the Prophet and they hid what was in their hearts and were a circle around the Prophet. And after the issue finished, they became the Caliphs.

They used the new religion to invade neighbouring nations.

Our Lord said fight in the path of Allah those who fight you and do not transgress for he does not love the transgressors.

And then afterwards in verse 194 and said whoever attacks you, attack them in the same way. If you send an army to Azerbaijan or in the lands of the Kurdish people or Egypt, did these people attack Medina before?

You besiege them and kidnap their women and rape their women and children and take their money and kill their heroic defending men, and also pray? Ha ha ha

After that, the people differed.

Host at 42:42

Not even as a justification for spreading the religion or to establish a state or establish a civilisation.

Guest: no... “

65. I have assumed that the parts in brackets have been inserted by the transcriber by way of explanation and are not what Dr Mansour said.

66. Later from the transcript the following is recorded as being said by Dr Mansour:-

“These Arab were tricked by Quraysh into giving their idols to be put next to the Kaa’ba in return for protection of their commercial missions in summer and winter.”

67. I have no great knowledge of the Islamic faith. I understand that the first four caliphs who led the Muslim community following the death of the Prophet are referred to as the rightly guided caliphs. They came from the Quraish tribe. I understand that the Sunni revere all four caliphs whereas the Shia do not consider the first three caliphs to be legitimate and revere the fourth as being of the bloodline of the Prophet. Thus, I understand that the early stages of the nascent Muslim state are controversial as to the legitimacy, actions and motivations of the leadership. It seems to me that the extract from the Books Juice programme contains Dr Mansour questioning the motivation and actions of all four initial caliphs and how the new religion was spread. I accept that his views would be considered controversial and, indeed, offensive by a great many within the Islamic world.

68. That said, I also find as follows:-

- 68.1 Nowhere in the extract are the express words that the caliphs are "the enemies of Islam".
- 68.2 Whilst the views expressed are controversial and potentially offensive to many, in my judgment, the content and the tone do not amount to abusive treatment of particular religious views and beliefs and the issues have not been approached abusively. As such, I find that the extract does not constitute a breach of the Ofcom Broadcasting Code or the Editorial Guide.
69. As of 15 June 2019, it would appear that there was a Twitter campaign in existence relating to another programme broadcast by the respondent, namely "Second Reading". Apparently, on 15 June 2019 someone took a video clip from an episode from Juice Books relating to Dr Mansour's comments, posted it on Twitter and very rapidly a large number of adverse comments were being Tweeted.
70. At 10.54 on Saturday 15 June 2019 Mr Fadi Azzam wrote an email as follows:-

"Dear Ahmad Alhourani

Please remove immediately the episode of the Aseer Alkotob based on a recommendation by the Channel Director

Dear Ahmed [the claimant]

Please ensure that the next episodes are not with the same guest.

Regards"

71. At 11.12 on 15 June 201 the claimant replied as follows:-

Dear Fadi

Greetings to you and all others.

I think you are talking about Dr Hamed Sobhi Mansour whose episodes were broadcast a month ago in Ramadan and they will not be repeated in the next grid.

In regard to the editorial content, as you know it is 100% in the responsibility of Bilal and he is responsible for that.

Regards

Ahmed"

72. At 11.23 on 15 June 2019 Mr Abas Nasser wrote to Mr Aboulenein as follows:-

"Dear Mohammed,

What has been mentioned by Ahmed Kalash is totally unacceptable.

The editorial content is the responsibility of the channel.

If the producer of the programme has this understanding (convinced of this) then this is a grave professional derailment and shouldn't be taken easily.

Please do the following:

- Retract the matter soon by ensuring that the decision that have been taken have been applied.
- Ensuring that there are no similar cases.
- Correcting the professional mistakes of some of the team members.
- Taking the procedures that you think suitable against who caused this violation which doesn't follow the professionalism of the channel.

Regards

Abbas.”

73. Mr Nasser also referred the matter to HR.
74. Hence, Mr Nasser approved Dr Mansour as a guest, initiated the disciplinary proceedings against the claimant expressing trenchant views as to what had gone on and ultimately heard the appeal. I find that Mr Nasser's involvement in the case was not minor but in fact very significant. Right at the outset he has indicated that he considers the actions of the claimant to be totally unacceptable and wanted procedures taken against the person who caused the violation which he asserted did not follow the professionalism of the channel. I find that in expressing these views right at the outset it was clearly inappropriate for Mr Nasser to hear the appeal.
75. The respondent issued a public apology.
76. In 2018 the claimant was elected by his colleagues as an employee representative. The claimant was also a member of the NUJ. The claimant began to organise meetings between the NUJ General Secretary and the respondent in order to negotiate trade union recognition. I have seen email exchanges whereby the claimant was arranging meetings to that end in February, March and June 2019.
77. Acting as an employee representative and active trade union member, the claimant represented a colleague at a grievance meeting against a channel director on 13 June 2019. In due course, at his appeal hearing, the claimant alleged that he was targeted for being an active trade union representative and that it was no coincidence that he was suspended two days after representing the employee.
78. On 17 June 2019 the claimant was suspended. The letter states as follows:-

“As you might be aware, a significant amount of criticism from viewers was directed at the channel for presenting a programme you produced that aired very controversial views. There were a number of very serious issues related to this broadcast and we would like to investigate them all as there might potentially be issues of gross misconduct.

In order to allow these allegations to be investigated effectively and thoroughly, you are suspended from work within immediate effect. The suspension is a neutral act and not in itself a disciplinary sanction and does not assume guilt.”

79. Nevertheless, the letter ends:-

“Once the investigation process has been concluded you will be invited to a formal disciplinary hearing where the allegations will be put to you for a formal response.”

80. The conclusion to that letter does rather suggest that prior to the investigation a decision had already been made to take disciplinary action against the claimant.

81. On 20 June 201 the claimant was invited to an investigation meeting. The purpose of the investigation meeting was put to the claimant as follows:-

“The purpose of the investigation meeting is to put to you for a response the following allegations:

- A programme produced by you aired very controversial views, which received a significant amount of criticism, which was directed at the channel for presenting the programme.
- There were a number of very serious issues relating to this broadcast”.

82. On 27 June 2019 the claimant attended the investigation meeting. The investigating officer was Hamza Al Mustafa (“HA”). The following exchanges are recorded in the notes:-

“9. HA asked in relation to the sensitive content during the episodes which aired in April, whether these were referred to FA [Duty Editor, Fadi Azzam] and then MA [Mohammed Aboulenein] AEK said that he had been talking generally, and not about this programme specifically. HA asked that in this show, if there was sensitive content, who AEK would refer this to. AEK replied that from his point of view, it was not sensitive content, but if it was, he would go to FA first but if FA was off work, he would go to MA. EB asked what AEK’s interpretation of sensitive was. AEK responded that it would be something that was not in line with the Ofcom guidance or something he felt was against regulations or in the laws and so on.”

And

“11. HA queried what happened in the episodes and asked AEK to confirm that he attended the filming in the US. AEK confirmed he attended the filming. HA questioned whether AEK watched all of the episodes and realised what the content of these episodes was and whether he noticed anything was particularly sensitive. AEK replied that during the shoot he had a few concerns about the

presenter as he thought he should challenge the guest more but that the presenter took on board the concerns and did challenge the guest in many parts. AEK explained that the presenter mentioned many times during the programme, including in the introduction, after the breakout and at the end that this was not the point of view of the channel and that they were not trying to spread ideas to convince the audience of anything, but that it was up to the audience to decide what they like or do not like. AEK reiterated that the presenter made this clear several times as this had been a concern as a director and producer so AEK had told the presenter to please put this on to the guest.”

And

“13. HA asked whether AEK noticed anything sensitive that should be referred to his manager. AEK said he did not think it was sensitive, but could say it was new or different content. It was not what is seen every day on the media, but it is seen and heard and it is acceptable from his point of view. AEK reiterated that this point of view could be agreed with or disagreed with and he highlighted this to the presenter and told him he should make this clear, which he did.”

83. Elsewhere in the interview the claimant expressed the view that the 15-20 second clip should be seen in the context of the whole interview, that the channel had started to promote the episodes a week prior to transmission and so could have raised concerns at that stage and that when it was broadcast no one from QC, the claimant’s Line Manager, Head of Programmes or the channel Director raised any concerns.
84. In his evidence Mr Nasser agreed that there were 90 journalists within the respondent’s premises and there were screens everywhere showing broadcast material all the time. I found it significant that he referred to colleagues seeing the episode in question and it not being an issue because “colleagues thought we did it on purpose”. I find that this demonstrates the pluralist and liberal approach that the respondent had to its broadcast material in that it did not shy away from airing potentially controversial, or indeed offensive, content.
85. During the course of the investigation a number of other individuals were interviewed.
86. In due course an investigation report was produced by Mr Al Mustafa and Ms Elaine Bailey dated 10 August 2019. As previously set out, the inaccurate quote by Mr Mansour appears to have first appeared in this report. In the overview and conclusions section reference is made to the claimant’s email when it is said that he tried to evade the editorial responsibility at first in the email dated 15 June 2019 stating that, “Bilal Fadel holds 100% editorial responsibility”. In contrast, the claimant accepted in his testimony that he held full editorial responsibility and that his decision was an editorial judgment.
87. The investigation report concludes as follows:-

“Further details on recommendation:

Due to the serious negligence and unreasonable actions of the concerned colleague combined with contradicting statements, as well as poor editorial judgment; moreover, not alerting superiors of the controversial content which caused grave damages to Alaraby reputation,

That brought Alaraby to serious disrepute and forcing the channel management to issue unreserved public apology, I submit this report to a higher committee to decide on the appropriate penalties.

Additionally, to prevent the recurrence of such an incident I strongly recommend that the Head of Programmes to address this issue by defining the duties and responsibilities of each colleague within this programme.”

88. In my judgment, that conclusion to an investigation report goes further than presenting facts and represents a decision that the claimant has committed serious negligence and unreasonable actions, ie is tantamount to a decision that he has committed misconduct and should be subject to penalties. Further, it identifies the fact that the duties and responsibilities of colleagues exercising editorial control is not adequately defined.
89. On 15 August 2019 the claimant was required to attend a disciplinary hearing. The investigation overview and conclusions were set out and the claimant was sent the documentary evidence to be relied upon. In due course, the disciplinary hearing was rescheduled for 27 August 2019.
90. On 22 August 2019 Mr Andy Smith of the NUJ wrote expressing serious concerns about the investigation process. Mr Smith highlighted that the investigation report appeared to go further than it should have done, queried whether Mr Al Mustafa had watched the episodes to assess the extract in context, highlighted that there was no transcript and various other concerns about the investigation. I find that the concerns expressed were justified.
91. Nevertheless, the disciplinary hearing went ahead on 27 August 2019. It was held by Mr Abdul Rahman Elshayyal. Once again, the claimant was asked about the workflow. The following exchanges recorded:

“Abdu – This is clearly a workflow for choosing the guest. How about the content? When you have something that is controversial. You surely go to your manager as well and flag it?”

Ahmed – Part of this show is that we go through controversial matters. It is not bad or wrong. As Mohammed always says we have to be careful with issues that are problematic not just controversial and only then we have to avoid them.

Abdu – You need to clarify what is controversial and what is problematic. Can you please give us a clear example and definition of what is problematic? What are issues that you might feel you should talk to your line manager about them?

Ahmed – Problematic are the issues that could lead to a problem. Controversial are the things we say on TV and which I see on other TV channels daily in the Arab world. Not necessary bad and needs to be avoided.

Abdu – I don’t have a dictionary here and we really need to establish what is problematic. You see what the issue is here? How do you define controversial?

Remember the cartoons about prophet Mohammed and the problems they caused including the killing of a person. If you were the producer of that content would you have highlighted those images to the line manager?

Ahmed – It depends on how it is treated in the programme and if there is a context that makes the treatment proper and whether we gave the other side enough time to discuss the situation. So it depends on how we deal with it.

Abdu – The guest who came to the recorded show said things that are controversial and problematic. They are very problematic and when similar things have been said before they did lead to the harm and damage and even killing of people. Why didn't you refer the matter to the line manager? Why didn't you edited it out and remove the clip? Tell me what happened when you saw it?

Ahmed – It is a small clip of few seconds. They were taken out of context and then circulated. The clip was a small one from a 60 min episode..."

92. Further the following exchange took place:

"Ahmed... We tried to show his views so if there were few people who were not happy with this episode I think we should still broadcast it.

Abdu – So you did make a call of judgment as a producer to keep the clip and not remove it? We are not in favour of censoring opinions but the clip was very damaging.

Ahmed – I saw it and decided not to mention it to my line manager. However I discussed it with the presenter. We are a team and he is the one who will be facing the camera and the guest."

93. And later:

"Abdu – As an Arab media producer you didn't see the backlash on the social media?

Ahmed – Let me be honest about this. As a producer I make an editorial call of judgment and sometimes we make mistakes. But even the investigation report itself said that there are certain countries who oppose Qatar like Saudi Arabia, UAE, Bahrain, and Egypt abuse this tweet and took the opportunity to attack us. I understand how the clip impacted us. I know that such clips can cause damage."

94. An outcome meeting was held on 4 September 2019. Mr Elshayyal's decision was to dismiss the claimant summarily. The claimant was sent an outcome letter dated 5 September 2019. The letter repeats the "matters of concern" from the 20 August 2019 letter inviting him to the disciplinary hearing. The reasoning for the dismissal was as follows:-

"I considered your explanation to be unsatisfactory because this incident caused the company to be in breach of the Ofcom Regulations 4.2: "The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment". Given that you are a senior producer and it is your responsibility for being aware of such guidelines, and the authority in editing and reviewing a programme lies with you. It would have been expected from you, and colleagues have confirmed that such practices were the

norm at the station and were repeated many times at editorial meetings, that you should raise any such controversial clips to management so that this could be looked at. Sensitive issues such as this should be referred up, even to double check and be cautious about its content and yet this did not happen. This action did result in tweets, other social media outlets and various complaints and some also call for the business to be shut down bringing it into serious disrepute which meant an apology had to be issued.

Having carefully reviewed the circumstances and considered your responses I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. I have referred to our standard disciplinary procedure and ACAS Code of Practice when making this decision, which does not permit recourse to a lesser disciplinary sanction.

You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.”

95. It is noted that the claimant’s initial denial of editorial responsibility is not expressly referenced as a reason for dismissal.
96. The claimant appealed on 12 September 2019. Mr Abbas Nasser was appointed to hear the appeal. On 17 September 2019 Mr Andy Smith wrote as follows:

“I am contacting you on behalf of Ahmed El Kalash to object to the choice of Abbas Nasser as the senior manager who hears the appeal scheduled for 20 September. Abbas is well aware of Ahmed’s actions in support of the NUJ’s bid for recognition, his involvement as an employee representative, and his work supporting other union members. As such, it would not be appropriate for him to make a decision on a case which may be motivated by, and constitute victimisation for, Ahmed’s Trade Union activity within the company.

For the appeal process to be fair we request that another senior manager not previously involved in the case, or an independent person from outside the organisation, be appointed to hear the appeal.”

97. The objection was dismissed by Ms Ritu Parihar. Nevertheless, for the reasons already given I find that Mr Nasser was an inappropriate individual to hear the appeal.
98. The appeal hearing was held on 20 September 2019 by Mr Nasser. The notes of the hearing are 12 pages long. All issues were discussed, including whether the claimant had misled the channel director, ie Mr Nasser, about Dr Mansur by simply forwarding the information about him that had been sent to the claimant by Mr Fadl. It is hard not to conclude that Mr Nasser was shifting responsibility as it was he who had approved Dr Mansur as a guest and was now claiming to have been misled.
99. The claimant advanced a number of points on appeal. I do not summarise them all here but they can be referred to if necessary. They include:-

That the decision to discipline him and dismiss him was disproportionate.

That the investigation report was flawed, pre-judged the issue and failed to interview Mr Fadl.

That the problems only began long after the programme had first aired and appeared to be raised in the context of an existing “Twitter” campaign against the channel.

That he had no intention to deceive or be dishonest and that he took an editorial decision.

That he accepted main responsibility.

That there was a lack of guidelines.

That he understood now that he had made a mistake.

100. It is fair to say that he was somewhat equivocal over the question of whether he accepted he had made a mistake or not but that appears to have been regarding whether he had breached guidelines.

101. In his witness statement and oral evidence Mr Nasser emphasised that the claimant’s attitude towards whether or not he had made a mistake meant that he could not be trusted in the future and that he concluded that the employment relationship had broken down.

102. The claimant was sent an appeal outcome letter dated 27 September 2019 which concluded, dealing with the appeal points:-

“

- You did not provide enough information to me as Channel Director about the guest.
- You did not accept responsibility despite me asking about eight times about your responsibilities.
- I am not convinced you would not make the same mistake again in the future particularly as you feel you did not do anything wrong yet by simply understand why the TV management has the position it has.
- I cannot trust you as a result of your actions and am convinced that the employment relationship has broken down irretrievably.
- The fact the company had to make an unreserved public apology shows how seriously the company took this matter.”

Conclusions

103. I find that the reason for dismissal was gross misconduct.

104. I do not find that the reason for the claimant’s dismissal was due to his membership of a Trade Union or for taking part in Trade Union activities. I find it is clear that the disciplinary action was motivated by the extract being

“tweeted” and the significant amount of adverse comment it generated. The timing of the suspension was coincidental to the claimant’s Trade Union activity as a representative.

105. I find that Mr Elshayyal genuinely believed that the claimant had committed gross misconduct and that his decision was not influenced by the claimant’s Trade Union activities.
106. I find that the investigation was not reasonably conducted and fell outside the range of reasonable procedures. The initiation of the investigatory process indicates that a decision had already been made to subject the claimant to disciplinary action. The investigation report misquoted what Dr Mansur had said and included a comment he did not make. It did not appear to take into context the whole programme and, in particular, the many disclaimers made before, during and after the programme. It pre-judged the disciplinary hearing in effectively finding misconduct. It failed to take into account its own conclusion that the duties and the responsibilities of editors were inadequately defined. It, wrongly in my judgment, found that the claimant had misled the Channel Director.
107. I find that Mr Elshayyal did not have reasonable grounds to believe that the claimant had committed an act of gross misconduct. The primary reason advanced in the dismissal letter was breach of the Ofcom Code 4.2 relating to abusive treatment. I have found it was not abusive. Mr Elshayyal had not seen the whole programme but suggested that this was not necessary as the clip in isolation stood alone as offensive. Given that the claimant repeatedly stressed that the clip had to be seen in context, and that this was Mr Aboulenein’s view, I consider this approach to have been unreasonable. Another reason for dismissal given was the failure to refer up sensitive content which, given the findings that the “workflow” was inadequately defined, in my judgment was unfair.
108. I find that the claimant had committed a single error of editorial judgment. The lack of reaction from QC, other journalists and management both prior to and after the initial broadcast and from the viewing public suggests that this was not a serious error per se. It only became serious and of concern when a “Twitter” campaign isolated a 15-20 second clip and provoked a significant backlash of commentary in the context of an existing campaign against the channel.
109. I find that the backlash was serious and reflected on the respondent’s reputation but could equally have enhanced its reputation for a pluralist, liberal and tolerant attitude towards controversial and, indeed, offensive to some, views.
110. Further, I find that the decision to dismiss was well outside the range of reasonable responses of a reasonable employer. The claimant made one error of editorial judgment on one occasion covering a clip of 15-20 seconds having produced in excess of 1,000 hours of broadcast material. His initial denial of editorial responsibility was superseded by an acknowledgement of responsibility and the making of an error. Whilst the consequences for the

respondent were undoubtedly serious, I find that they were not so serious as to be potentially calamitous. I find that a single error of judgment such as this was not sufficient to so undermine the respondent's confidence in the claimant that it justified his summary dismissal. I find that the range of reasonable responses would have covered an informal or formal warning and would not have reached dismissal, let alone summary dismissal.

111. I find that Mr Nasser holding the appeal hearing rendered the dismissal procedurally unfair. The size and administrative resources of the respondent were such that a truly independent manager could have held the appeal.
112. Taking into account all the circumstances I find that in accordance with equity and the substantial merits of the case the claimant's dismissal was substantively unfair.
113. The claimant's claim for automatically unfair dismissal for Trade Union activity is dismissed.
114. Submissions on issues relating to contributory conduct and compliance of the ACAS Code will be dealt with at the remedy hearing.
115. Lastly, I apologise for the delay in finalising this judgment and sending it out.

Employment Judge Alliot

Date: 13 July 2022

Sent to the parties on: 19 July 2022

N Gotecha

For the Tribunal Office