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EMPLOYMENT TRIBUNALS

Claimant: **Mr Robert Bialas**

Respondent: **Vaultex UK Ltd**

Heard at: **East London Hearing Centre**

On: **5 October 2022**

Before: **Employment Judge S Knight**

Representation

Claimant: In person, unrepresented

Respondent: Andrew Graham, solicitor

JUDGMENT having been sent to the parties on 19 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent between 13 September 2011 and 13 October 2021 as a Super Operator / Coin Processor. The Respondent is a large firm which conducts cash processing.

The claims

2. The Claimant claims for unfair dismissal, arising out of his dismissal without notice on 13 October 2021. The Respondent claims the dismissal was for reasons of misconduct. The alleged misconduct related to the Claimant posting a racist

joke on a company intranet.

3. On 21 December 2021 ACAS was notified under the early conciliation procedure. On 23 December 2021 ACAS issued the early conciliation certificate. On 28 December 2021 the ET1 Claim Form was presented in time. On 25 February 2022 the ET3 Response Form was sent to the Tribunal.

The issues

4. At the start of the hearing the Respondent provided a list of issues, which was used for determining questions of liability.

Procedure, documents, and evidence heard

Procedure

5. This has been an in-person hearing. The documents that I was referred to are in a bundle, the contents of which I have recorded.

6. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

7. I was provided with an agreed Hearing Bundle. A further document was handed out at the hearing and added to the bundle.

8. Witness statements from the Claimant and Mr Babbage (the dismissing officer) were provided separately.

Evidence

9. At the hearing I heard evidence under affirmation from Mr Babbage, and under oath from the Claimant. Each of the witnesses adopted their witness statements and added to them appropriately in answer to questions.

Closing submissions

10. Both the Claimant and the Respondent made brief oral closing submissions.

Relevant law

11. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

12. Section 98 of the ERA 1996 provides insofar as is relevant:

    "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

    (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it— […]

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (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. […]"

13. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303; 20 July 1978 the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

(1) The employer must show that it believed the employee to be guilty of misconduct.

(2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

14. This means that the Respondent does not need to have conclusive direct proof of the employee's misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the Respondent's disapproval.

15. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

16. In *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399; 18 February 2015 Lord Justice Richards noted at ¶ 23:

"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

17. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251; 1 January 1976:

    "It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. 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."

18. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was reasonable. The question is also not whether the Claimant committed misconduct, but whether the Respondent had a reasonable belief that the Claimant had committed misconduct.

19. The reasonableness of a dismissal for sending offensive images or jokes may depend in part on the employee's attitude to their conduct, i.e. whether the employee recognises that they have acted inappropriately, and whether the employer can trust them not to repeat that conduct. In *Henderson v LB Hackney* [2011] EWCA Civ 1518 in which the Claimant's attitude was considered at ¶¶ 36-39, it was held at ¶ 38 that "*the attitude of an employee, where trust and confidence is an important part of the work and the relationship between her and the employer*[…] *is an important factor.*"

20. A zero-tolerance policy does not mean that a dismissal is automatically reasonable because the policy has been breached. By way of example only, in the first-instance case of *Wild v Sky In-Home Services Ltd* ET Case No.2300636/16 an employment judge found that SIHS Ltd's "zero tolerance" approach to health and safety breaches did not justify the dismissal of W, a satellite dish installer, for one incident of working on the fifth rung of a ladder without the harness and full arrest equipment mandated by the policy. The judge accepted that SIHS Ltd quite rightly placed a very significant emphasis on health and safety but observed that it should not necessarily follow that any breach will result in the employee's dismissal. It was not reasonable of SIHS Ltd to apply its "zero tolerance" approach to W without considering the possibility of applying a lesser sanction.

21. By way of further example, a similar decision was reached in *Ashton v Network Rail Infrastructure* ET Case No.1800103/16. There, the claimant, a railway worker, had 39 years of unblemished service until he tested positive in a drugs test for cannabis. Following an investigation and disciplinary process, he was dismissed for gross misconduct on the basis that he had breached NRI's strict drug and alcohol policy. At a tribunal hearing, NRI led evidence that, once breach of the drugs policy was confirmed by a failed drugs test, dismissal without notice would automatically follow. The employment tribunal concluded that such a narrow, rule-bound approach was not consistent with the reference to the need to consider 'all the circumstances of the particular case' in paragraph 3 of the ACAS Code of Practice on Disciplinary and Grievance Procedures. In the tribunal's view, this case "crie[d] out for an exception to be made to the zero-tolerance policy", irrespective of the fact that a strict policy was imperative for health and safety reasons in the railway industry.

Findings of fact

The Respondent's policies

22. The Respondent takes equality, diversity, and inclusion ("**EDI**") work extremely seriously. Its approach has been to roll out campaigns nationally throughout its business, to open forums for its workers to discuss EDI issues, and to embed EDI into its processes.

23. The Respondent's Equality Diversity and Inclusion Policy states that "A person may be harassed even if they were not the intended "target". For example, a person may be harassed by overhearing insensitive jokes that they find offensive." The Policy goes on to say, "If the investigation concludes that the complaint is well founded, the harasser will be subject to disciplinary action in accordance with our disciplinary procedure".

24. The Respondent's Disciplinary Policy and Procedure provides examples of gross misconduct which includes "breach of Vaultex's Anti-harassment and Bullying and Equality and Diversity Policies". It further states that "Cases of Gross Misconduct may, irrespective of any previous warnings, result in dismissal without notice *where it is sufficiently serious*" (my emphasis).

25. In pursuit of its policies the Respondent requires its staff to undertake regular EDI training. The Claimant's unchallenged evidence, which I accept, was that before the coronavirus pandemic the Respondent operated in-person sessions which involve mentoring and the ability to ask questions. From the coronavirus pandemic onwards, those sessions were delivered digitally and were more of a tick-box exercise.

26. The Respondent also made the Claimant attend general training on his responsibilities towards others.

27. The Respondent operates a "zero tolerance" policy in respect of discriminatory language. However, the meaning of "zero tolerance" is left to be decided in individual cases. Zero tolerance is not the same as saying that an offence will always amount to gross misconduct and justify, or necessarily result in, dismissal.

The policies do not say this. They do not mean this, and the Respondent did not understand them to mean this.

28. The Respondent operated a policy prohibiting the posting of any discriminatory language on its online systems. Before he first accessed the system the Claimant had to tick a box to confirm that he had read that policy. However, the Claimant was rushed when ticking that box and did not in fact read the policy. This is similar to what most people experience when ticking to confirm the terms and conditions for accessing websites, software, and digital services generally. He ticked that box 28 days before the post which would ultimately lead to his dismissal.

The post

29. The Respondent in 2021 began operating a new internal intranet system that acted similarly to a social network. It was called Workvivo.

30. The Claimant had been interested in what people posted on the Respondent's Workvivo system. He saw that the system was bringing staff together from around the country. Staff were sharing things that were not directly connected to work, and they were not having action taken against them for that.

31. The Claimant posted on Workvivo media relating to his DJ set. He thought that this would be nice for people to see. He received no negative feedback about this. The Claimant felt emboldened by this.

32. On 28 September 2021 the Claimant's work was slow. He did not have a great deal to do. He decided to search Google for a "clean" joke that he could share with his colleagues. He specifically found a website which had a section of jokes which were described as appropriate for the workplace and to share with family. The Respondent says that the joke he eventually posted came from a different section of that joke website. However, the Claimant had from the outset of the investigation into his conduct urged the Respondent to specifically look at the clean section of the website. The Respondent researched the joke and found it under the "tech" section of the website. The Respondent did not continue the search to the "clean" section of the website. However, it is from the clean section of the website that the Claimant did in fact find the job (albeit that the Respondent had not found it there itself at the time of dismissal and did not know at the time of the dismissal that this is where it was found). The Respondent has always had the ability to prove where the joke was found by checking its internet records. However, it but chose not to conduct such a check.

33. The Claimant decided to post the joke that he had found on Workvivo. His post read as follows:

"Something for 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!

:)"

34. The first line, and the smile, were added by the Claimant. The rest was copied and pasted from the joke website.

35. Plainly, the joke is racist. Although the references to Italian, Japanese, and English are not racist, the reference to Mexican is based on stereotypes, as is the reference to Black men. 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, which in turn was based on the racialised exclusion of Jewish people from European society, and from the limitation of work that they could undertake to a small number of fields including moneylending. That exclusion of Jews and their association with money, and particularly practices around money which were prohibited for Christians, led to pogroms, wholesale deportation, and widespread social exclusion. The joke equally plays on a trope of Jewish people being miserly. The association of Jewish people with money was a theme of anti-Semitic propagandists in the leadup to the Holocaust. It remains to this day a vile expression of hatred against the Jewish people which is repeated both in this country and globally.

The dismissal

36. The Claimant's post was reported for racism a few minutes after it was created. The Respondent's IT department removed the post.

37. As a result of the post and the report, a disciplinary investigation was opened into the Claimant. The Claimant cooperated with the disciplinary investigation. The investigation resulted in the Respondent deciding to convene a disciplinary meeting.

38. Mr Babbage chaired the disciplinary meeting. It was his decision whether to dismiss the Claimant. He reviewed all the materials given to him but did not commission the IT department to check the Claimant's internet records as he had been asked to by the Claimant.

39. The Claimant has at every opportunity during the investigation and disciplinary process produced detailed and profuse apologies, orally and in writing. He asked for retraining. At the disciplinary meeting Mr Babbage had the apologies available and read them.

40. Mr Babbage felt constrained by the Respondent's zero-tolerance policy in respect of discriminatory language. He considered that the post was racist and breached the Respondent's policies. He took account of the Claimant's long service, his exemplary record, and his apologies. However, he felt that if he gave a written warning, when viewed in the context of the EDI campaign, that it would appear that the Respondent was not taking the campaign seriously.

41. Mr Babbage accepted and said to the Claimant when giving his decision to dismiss the Claimant that the basis for his decision was that the Claimant ran the risk in posting the post "without giving it proper thought". He did not say at the time that the Claimant could have read the joke, in part or whole, and not

concluded that it was offensive before posting it on WorkVivo. If he had *thought* that, then he would have *said* it in his reasons. He did not say it because it did not contribute to his reasons for dismissal.

42. At no stage in the process was the Claimant made aware of why the post was racist, and in particular of the problematic racist assumptions about Black people and Jewish people that it included.

Restructuring

43. The Claimant contends that he might have been dismissed because the Respondent needed to reduce headcount. However, the Respondent was operating at below the number of staff it needed, and was in fact recruiting to increase its headcount. It did not need to dismiss the Claimant to reduce headcount.

Findings relevant to contribution

44. I move on to findings of fact relevant to contribution. These findings of fact play no role in determining the actual beliefs of the Respondent at the time of the dismissal or the band of reasonable responses.

45. As I have noted, the “joke” posted by the Claimant was racist. The Claimant did not at the time realise it was racist. The Claimant did not understand that the associations of Jewish people with “grabbing coins” was racist. He had not thought of this before. He had associated it with Jewish people being good at business. Whether the automatic association of Jewish people with being good at business is itself anti-Semitic is a matter of debate which would appear to veer into the political. It is certainly capable of being viewed as anti-Semitic, given that the ascription of any specific characteristic to a whole people is necessarily based on prejudice.

Conclusions

Liability

46. The principal reason for dismissal was the Claimant’s misconduct. He had posted a racist joke on a company platform, which had offended at least one fellow member of staff. This was misconduct which violated the Respondent’s policies, in particular its zero-tolerance approach to racism.

47. The Respondent, and in particular Mr Babbage, genuinely believed that the Claimant had committed misconduct. This came against the background of the Respondent’s EDI policies and in particular its zero-tolerance policy in respect of discriminatory language.

48. There were reasonable grounds for the Respondent’s belief that the Claimant had committed misconduct. The misconduct itself was admitted. The Claimant sought to explain the misconduct, but accepted that it was a breach of the Respondent’s procedures for which he and he alone was responsible.

49. The Respondent failed in a significant respect in the investigation. The

Respondent concluded that the joke in the Claimant's post was taken from a "tech" section of the joke website. In fact, it had failed to consider the Claimant's forceful proposal that the Respondent should investigate his internet history to prove that it in fact came from the "clean" section of the website. This was relevant because the source of the joke had an impact on how Mr Babbage viewed the Claimant's credibility, and on how seriously it viewed the misconduct. If the joke had come from the "clean" section of the website then this would have materially affected how bad the Claimant's conduct would have seemed, because it would mean he had taken steps to avoid posting something inappropriate in the workplace. In the disciplinary hearing the Claimant could have shown the joke in the "clean" section of the website, if he had wanted to.

50. The Respondent's procedure was generally procedurally fair though. No realistic challenge is made to the procedure.

51. This brings me to the ultimate question of whether the dismissal was within the band of reasonable responses. In considering this I do not substitute my judgment for that of Mr Babbage. Equally, I do not ask whether the Respondent merely *could* have imposed a lesser sanction, or whether another sanction was more appropriate. I also do not consider the findings of fact that I have made which are relevant to the question of contributory fault. Nor do I need to consider facts outside Mr Babbage's knowledge, in particular which section of the website the "joke" came from.

52. I find that the dismissal was outside the band of reasonable responses. This is for the following reasons.

53. Firstly, it is important to note the racist nature of the post and the impact that this had on the Respondent: a member of staff complained about the post and the misconduct itself had the potential to undermine the appearance of the Respondent's commitment to EDI. In this regard, the Respondent also operated a zero-tolerance policy. But that did not mean that there was a choice between on the one hand simply doing nothing (which would involve undermining the Respondent's campaign and reputation), and on the other hand dismissing the Claimant. There was a middle ground open to the Respondent: a lesser sanction. The Respondent did not *have to* dismiss. Of course, that does not alone mean that the Respondent was not *entitled* to dismiss as a reasonable response.

54. Secondly, the Respondent, and Mr Babbage in particular, was aware that the Claimant had offered full apologies and offered to undertake retraining. Whilst he may not have had the fundamental knowledge to understand *why* the joke was racist, he did understand, having been told, that it was, and as such was taking actions not to repeat his behaviour. It could not have escaped Mr Babbage's attention that the apology letters were heartfelt and that the Claimant showed insight into the impact of his actions.

55. Thirdly, the Claimant had a previously unblemished record and long service. In this regard I reject any suggestion, intimated by the Respondent, that the Claimant not having read a policy and ticking a box on Workvivo to say he had done so was a blemish on his record at all. In any event, it cannot have been taken into account when the Claimant was dismissed as it is a matter that came

out in evidence for the first time at the hearing.

56. Fourthly, it was obvious to Mr Babbage, which is why he said it in the meeting, that the Claimant did not give proper thought to the actions. That is equally evident from the introduction to the joke: the Claimant was putting it in the context of the EDI campaign. It would be sheer stupidity to put the “joke” in the context of the EDI campaign, and publish the joke to the whole company, knowing or believing it was racist. It cannot and did not escape Mr Babbage’s attention that some level of misunderstanding, rather than malice was involved.

57. 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.

Remedy

58. In this case the Claimant is plainly partly at fault for his dismissal. His contributory conduct makes it just and equitable to reduce the Basic Award he receives by 25%. Further, his dismissal was in part caused or contributed to by his action. His contributory conduct makes it just and equitable to also reduce the Compensatory Award he receives by 25%.

59. The parties were agreed on the size of any remedy, subject to consideration of contributory conduct. In light of the reduction set out above, the Basic Award will be £3,796.40. The Compensatory Award will be is £2,343.52. The total award for unfair dismissal will be £6,139.92.

Employment Judge Stephen Knight

19 October 2022