Neutral Citation Number: [2024] EAT 19

Case No: EA-2022-001258-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 January 2024

Before:

HIS HONOUR JUDGE AUERBACH
CHARLES EDWARD LORD OBE
MS G MILLS CBE

- -

Between:

VAULTEX UK LTD

Appellant

- and -

MR ROBERT BIALAS

Respondent

- -
- -

Ms Sarah Clarke (instructed by **Shoosmiths Solicitors**) for the **Appellant**
Mr Bialas, the Respondent, appeared in person

Hearing date: 25 January 2024

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant in the employment tribunal was dismissed for having posted a racist "joke" on the respondent's intranet, which was used by all of its employees.

The employment tribunal found that the sanction of dismissal was outside of the band of reasonable responses and so that the dismissal was unfair.

The respondent appealed on the grounds that, notwithstanding a correct self-direction as to the law, the tribunal had not applied the band of reasonable responses approach to the sanction, but had substituted its own view of the appropriate sanction for that of the employer; and/or it had reached a decision that was perverse.

The appeal was upheld, and a decision substituted that the dismissal was fair.

Brent LBC v Fuller [2011] ICR 806 (CA) considered.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal. The respondent is a large firm which conducts cash processing. The claimant was employed by it as a Super Operator/Coin Processor. He was dismissed in October 2021 for the given reason of his conduct in respect of a posting which he put on the company intranet. The claimant's claim of unfair dismissal was heard by Employment Judge Knight sitting at East London. The tribunal upheld the claim, but directed that the basic and compensatory awards be reduced by 25% on account of the same conduct for which the claimant had been dismissed.

2. This is the respondent's appeal against the decision upholding the claim of unfair dismissal. In the tribunal, the claimant represented himself and the respondent was represented by a solicitor. At the appeal hearing today, Ms Clarke of counsel has represented the respondent and the claimant has again represented himself.

3. In its written reasons, after some preliminaries in which the tribunal identified that it heard evidence from the claimant and the manager who dismissed him, Mr Babbage, the tribunal set out its self-direction as to the law. This included the relevant parts of section 98 **Employment Rights Act 1996** and a summary of the guidance relating to cases in which the reason or principal reason for dismissal has been found to be conduct in **British Home Stores v Burchell** [1980] ICR 303. The tribunal also directed itself, citing pertinent authority, that, in relation to sanction, a band of reasonable responses approach should be applied, and that the tribunal "must not simply substitute its judgment for that of the employer in this case".

4. In this case, as we will describe, the tribunal found that the claimant was dismissed for his conduct in relation to the intranet post, but it ultimately concluded that the sanction of dismissal was outside the band of reasonable responses and for that reason found the dismissal to be unfair.

However, ground 1 of the appeal asserts that the tribunal nevertheless committed the error of substituting its own opinion of the appropriate sanction for that of the respondent. Ground 2 asserts that, on the question of whether the sanction of dismissal was within the band of reasonable responses, the tribunal reached a conclusion which was perverse or not within the range of reasonable decisions open to it.

5. These grounds were directed to proceed to this full hearing by the President, Eady J, who also directed that the appeal should be heard by a judge and two lay members. This is the unanimous decision of the three of us.

The Tribunal's Findings of Fact and Decision

6. After the section of the tribunal's reasons relating to the law, and under the heading "Findings of fact", the first subsection was headed "The Respondent's Policies". It began:

> **"22. The Respondent takes equality, diversity, and inclusion ('EDI') work 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 Diversion 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)."**

7. The tribunal went on to find that the respondent requires staff to undertake regular EDI training. The tribunal accepted from the claimant that prior to the pandemic the respondent operated in-person sessions which involved mentoring and the ability to ask questions. From the pandemic onwards, this was delivered digitally and was more of a tick-box exercise.

8. The tribunal continued as follows:

> **"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 the 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."**

9. The next subsection of the reasons is headed "The Post". The tribunal found that in 2021 the respondent began operating a new intranet system similar to a social network, which it called "Workvivo". We will set out the next few paragraphs in full:

> **"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."

10. The next subsection of the tribunal's fact finding is headed "The dismissal". The tribunal found that the claimant's post was reported for racism a few minutes after it was created and then removed by the respondent's IT department. There was a disciplinary investigation with which the claimant co-operated, which led to a disciplinary meeting. The tribunal continued:

"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. 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."**

11. The claimant contended that he might have been dismissed in order to reduce headcount, but the tribunal found that the respondent was, in fact, recruiting to increase headcount at the time.

12. The next sub-heading is "Findings relevant to contribution". The tribunal observed at [44] that these findings of fact played no role in determining the actual beliefs of the Respondent at the time of dismissal or the band of reasonable responses. The tribunal then said this at [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."**

13. The tribunal opened its conclusions on liability with a finding that the principal reason for dismissal was the claimant's conduct in that he had "posted a racist joke on the 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". Mr Babbage genuinely believed that the claimant had committed misconduct: "against the background of the respondent's EDI policies and, in particular, its zero tolerance policy in respect of discriminatory language". There were reasonable grounds for the belief. The conduct was admitted. The claimant sought to explain the conduct, but accepted that it was a breach of the respondent's procedures.

14. The tribunal continued:

> **"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."**

15. In the final section the tribunal stated that the claimant was partly at fault for his dismissal by his conduct, which, in part, caused or contributed to it. It was just and equitable to reduce both the basic and compensatory awards by 25%. The tribunal went on to calculate those awards, applying that reduction to figures that had otherwise been agreed by the parties.

The Law

16. Section 98 **Employment Rights Act 1996** provides (omitting irrelevant parts) as follows:

> **"98 General.**
>
> **(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."**

17. In this case, the dismissal was found to be by reason of conduct, and, at the section 98(4) stage, was ultimately found to be unfair because of the conclusion that the tribunal reached in relation to the decision to impose the sanction of dismissal for that conduct.

18. As the present tribunal correctly identified, when considering the reasonableness of the sanction of dismissal for the purposes of section 98(4), the tribunal should apply a band of reasonable responses test. The tribunal cited the formulation of this test by Phillips J in the EAT in **Trust Houses Forte Leisure Ltd v Aquilar** [1976] IRLR 251. Ms Clarke, in submissions, cited the following passage from the speech of Lord Denning MR, in the Court of Appeal a few years later in **British Leyland UK Ltd v Swift** [1981] IRLR 91:

> **"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: '…a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate.' I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."**

19. So, the tribunal should not find the dismissal to be unfair on the basis that it would have been a reasonable decision to impose a lesser sanction for the dismissal; that this is what some employers would have done; or that this is what the tribunal itself would have done. If the tribunal concludes that the dismissal was unfair because the tribunal would not itself have dismissed, then it commits the so-called substitution error of substituting its own view of the appropriate sanction for that of the employer, rather than taking a band of reasonable responses approach.

20. Next we turn to the role of the EAT. 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. Further, 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, 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.

21. Challenges to the tribunal's approach to the employer's decision on sanction periodically come before the appellate courts. Of the several Court of Appeal authorities which have discussed the correct approach to such challenges, we were referred, in particular, to **Fuller v London Borough of Brent** [2011] EWCA Civ 267; [2011] ICR 806. In that case, the tribunal upheld the complaint of unfair dismissal. On appeal to the EAT, it was contended for the employer that, while the tribunal had given itself a correct self-direction as to the law, nevertheless the language used in the substantive part of its decision showed that it had, in reaching its conclusion, committed the substitution error. The EAT upheld that appeal. It also substituted a decision that the dismissal was fair. The employee appealed to the Court of Appeal. Mummery LJ said this at [12]:

> **"A summary of the allocation of powers and responsibilities in unfair dismissal disputes bears repetition: it is for the employer to take decision whether or not to dismiss an employee; for the tribunal to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the Employment Appeal Tribunal (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the tribunal. As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the tribunal's role as an "industrial jury" with a fund of relevant and diverse specialist expertise."**

22. Further on, he said this:

> **"26.This is not an easy case. Tribunals with wide legal and practical experience of work situations and of the operation of unfair dismissal law have reached opposite conclusions. The appeal tribunal set aside the tribunal's order, which the council says was wrong. This court is asked to set aside the appeal tribunal's order, which Mrs Fuller says was wrong. Perhaps it would not be out of place to make a few general comments about these differences, which lawyers and non-lawyers sometimes find unsatisfactory, even inexplicable.**
>
> **27. Unfair dismissal appeals to this court on the ground that the tribunal has not correctly applied section 98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst appeal tribunal members and the members in the constitutions of this court.**

> **28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employees' conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.**
>
> **29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self – direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

23. Mummery LJ's overall conclusion, reading the decision of the tribunal in that case as a whole, was that, whilst asking itself the correct question, the tribunal had initially set off on the wrong foot by setting out what the tribunal itself felt about the conduct. But ultimately it had answered the correct question when it had concluded that no reasonable employer would have dismissed for the one- off conduct in that case. The EAT was, he said, therefore, wrong to set aside the tribunal's decision. Further, even if, contrary to his view, the EAT had been right to allow the appeal on the basis that the tribunal had applied the wrong test, it should have remitted the matter to a different employment tribunal for rehearing.

24. Moore-Bick LJ came to a different conclusion, as his reading was that the tribunal had come to its conclusion by reference to the facts as it found them to be rather than as the employer understood them to be. This led it to take a far less serious view of the conduct than had been taken by the employer. He considered the EAT was right to uphold the appeal, though wrong to dismiss the claim altogether, as it should have remitted the matter to a differently constituted tribunal.

25. The third member of the Court of Appeal in **Fuller**, Jackson LJ, concurred with Mummery LJ, and so the appeal from the EAT was allowed and the tribunal's decision stood.

26. As the discussion in **Fuller** contemplates, where the EAT or Court of Appeal does conclude that a tribunal which has found a dismissal to be unfair has committed the substitution error, it must then decide whether to remit the matter for re-hearing. In some cases, it may consider that any employment tribunal properly applying the law to the facts will be bound to conclude that dismissal was within the band of reasonable responses, so that there is no need to remit, and a decision that the dismissal was fair can and should be substituted. **Tayeh v Barchester Healthcare Ltd** [2013] EWCA Civ 29; [2013] IRLR 387 was an example of such a case. In other cases, the appeal body may conclude that this would not be an inevitable outcome of applying the law correctly, and so the matter is remitted to the tribunal. **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220; [2009] IRLR 563 is an example of a case of that type. Every case must be considered carefully by reference to its particular facts and a fair consideration of the particular reasons of the employment tribunal and how they have been expressed.

Arguments, Discussion, Conclusions

27. We had skeleton arguments on both sides and heard oral argument this morning. We will highlight in what follows what seem to us in summary to have been the main points on each side.

28. As we have noted, ground 1 of the appeal contends that, despite stating that it had applied a band of reasonable responses test in relation to the sanction, the tribunal in its substantive reasoning did not do so and committed the substitution error. Ground 2 is put in the alternative as being that the decision on this point was perverse, or as being outside the band of reasonable decisions that the tribunal could have reached. We do not think that anything turns on the doctrinal difference between these two ways of putting the substantive point of the ground 2 challenge. Either of them would have the consequence, if well-founded, that the EAT would be bound to

allow this appeal and to substitute a finding that the dismissal was fair, on the basis that any tribunal correctly applying the band of reasonable responses test to the facts found, would be bound to conclude that the decision to dismiss was within that band.

29. In summary, Ms Clarke's principal strands of argument in support of either or both grounds were as follows.

30. First, she noted that, even on the tribunal's own view, a final written warning would have been a reasonable sanction. The question then arose, she postulated, as to why the tribunal considered that the conduct could be viewed as serious enough to warrant a final written warning, the sanction just below dismissal, but yet that no reasonable employer could have dismissed for it.

31. Secondly, she noted that the tribunal had said at [57] that no reasonable employer would have taken the decision to dismiss and that any reasonable employer would have imposed a lesser sanction. That, she argued, showed that it had wrongly failed to consider what a reasonable employer could do. As Lord Denning MR said in **Swift**, stating that a reasonable employer "would" have considered a lesser penalty to be appropriate was an error, a point which had been made again by the Court of Session in **Gair v Bevan Harris Ltd** [1983] IRLR 368.

32. Ms Clarke then submitted that the four specific reasons set out by the tribunal for its conclusion that dismissal was outside the band of reasonable responses did not, on consideration, in fact properly support that conclusion. At most, it had canvassed considerations that might reasonably be considered relevant to the choice of sanction but not as putting dismissal outside the range of reasonable options. Further, they betrayed that the tribunal had in substance made the error of relying on its own view of how serious the claimant's conduct was, rather than considering the view of the dismissing manager and whether that was reasonably open to him. We will consider that passage and the arguments in relation to it more closely shortly.

33. Ms Clarke's submissions particularly relied upon the findings of fact made by the tribunal in the opening section of its decision, referring to the respondent's policies. It was, she submitted, in principle open to this employer to decide how seriously it treated particular types of conduct in this area. The tribunal had found that this employer had, through its EDI campaigns and forums, its EDI policy, its disciplinary procedure and its anti-harassment and bullying policy, made it very clear how seriously it regarded conduct of the type at issue in this case; and that an employee who engaged in such conduct could be dismissed for a first offence. The tribunal had found that the claimant's conduct was properly found by the respondent to have been in breach of those policies. The tribunal had also found as a fact that Mr Babbage had taken into account the claimant's long service and prior clean record and expressions of apology and remorse, but he had also taken into account the impact which he considered that not dismissing the claimant would have in terms of the signal it would send regarding the respondent's commitment to those policies.

34. All of that being so, she submitted, not only had the tribunal taken the wrong approach by substituting its own view of the seriousness of the claimant's conduct for that of the respondent itself. But, further, no reasonable tribunal could conclude that to apply the sanction of dismissal was outside the band of reasonable responses. So the appeal should be allowed and a decision that the dismissal was fair substituted.

35. The claimant, resisting this appeal, reminds us in his skeleton that we can only intervene if there is an error of law. He submits that the tribunal correctly stated the law and restated it in its conclusions, in particular, in relation to the band of reasonable responses and not substituting its own view. It reached a conclusion that it was entitled to reach on all the facts of the case, that the sanction of dismissal was outside the band of reasonable responses for the reasons that it gave.

36. In particular, the claimant argues that his attitude, in the course of the disciplinary process, was properly regarded by the tribunal as a relevant consideration when considering that question.

He notes the tribunal's citation of **Henderson v London Borough of Hackney** [2011] EWCA Civ 1518 in that regard. He refers to the tribunal's findings that the respondent accepted that he had co-operated with the process, apologised, shown remorse and offered to undertake retraining. He submits that the tribunal was entitled to find that in all those circumstances dismissal was beyond the bounds of the band of reasonable responses. Its decision could not be said by the EAT to be perverse. In his skeleton, the claimant also advances a further particular argument, a premise of which is that the tribunal found, or also found, the dismissal to be procedurally unfair and was entitled to do so, so that its decision should, in any event, stand for that reason.

37. At the hearing today, the claimant sought to introduce a *Wikipedia* article and to show us a figurine. Neither of these, he confirmed, were introduced in the internal disciplinary process or before the employment tribunal. However, Ms Clarke did not object to their introduction at our hearing as such, which we permitted.

38. The *Wikipedia* article is headed "*Jew with a coin*". It states that the Jew with a coin is a good-luck charm in Poland, where images, or the figurine, of such a character are said to bring good fortune, particularly financially. The claimant showed us what he said is an example of such a figurine. It was a small figurine of a person in plainly traditional orthodox Jewish dress bearing a coin. The claimant told us that this is a figure with which he is familiar which he said forms part of his cultural heritage, and that he had introduced this material today in order to emphasise and explain to us why he formed a positive view of the contents of this particular post. He told us also of the positive associations which each of the references to different races and nationalities in the post had for him when he read it, or as he saw it for the respondent's business, and why he believed posting this material to be a positive contribution to the respondent's campaign.

39. We turn to our conclusions.

40. It is convenient to address first, the claimant's argument premised on the tribunal having criticised the investigation process carried out by the respondent in one particular respect. He relied upon the discussion at [49] where the tribunal referred to the fact that the claimant had said that he had found the posting on a jokes website, and specifically on what he referred to as the "clean section" of that website. The respondent had accepted that the claimant had found this material on a jokes website, and then topped and tailed it, but the respondent had not at the time carried out further investigations, as requested by him, to ascertain whether the clean section was the particular part of the website where he had found it.

41. However, we note that the tribunal went on to say, at [50], that the procedure was "generally procedurally fair" and that "[n]o realistic challenge was made to the procedure." It then turned to what it said was the ultimate question of whether the sanction of dismissal was within the band of reasonable responses. We note also that, in its self-direction as to the law, the tribunal referred to an authority to the effect that the **Burchell** requirement for a reasonable investigation does not mean that an employer is necessarily always bound to pursue every line of enquiry that the employee asks it to take up.

42. It appears to us, therefore, that, indeed properly taking that approach, the tribunal's ultimate conclusion was that the respondent's investigation *was* reasonably sufficient and the dismissal was *not* unfair in that regard. It was ultimately found to be unfair solely by reference to the matter of sanction. The tribunal's decision cannot, therefore, be defended on the basis that the dismissal was found by it, in any event, to be unfair because of an inadequate investigation.

43. The claimant in discussion this morning did accept that reading of the decision as correct, but maintained that the tribunal *ought* to have found that the dismissal was procedurally unfair. Ms Clarke pointed out that there was no cross-appeal to that effect, but in any event we do not think that the tribunal erred by failing to find that there was procedural unfairness in this regard.

Issues of this type must also be considered taking a band of reasonable responses approach. The respondent, it appears from the tribunal's decision, understood and accepted that the claimant had found the post on a jokes website, and that it was his case that there was nothing to alert him to the fact that it might be unsuitable or offensive, in particular because he said he found it in the clean section. The tribunal was entitled, despite apparently having some misgivings, ultimately to take the view that it was not unfair for the respondent to have failed to independently verify this particular element of the claimant's case.

44. As we have discussed, the fact that the tribunal gave itself a correct self-direction as to the band of reasonable responses approach, and to beware of the substitution error, and asserted that it had taken that approach in its conclusions, does not render its decision immune from challenge. We have to decide whether, on a fair reading of the decision as a whole, it did, nevertheless, fall into error in that way and/or reached a decision that was perverse.

45. The *Wikipedia* post and figurine were not put before the employer in the internal process or before the tribunal at its hearing; and therefore we do not need to say much about them. The employer had to take its decision based on the material that was before it at the time; and the tribunal had to do the same thing, including, in relation to substantive fairness, to decide the matter by reference to the evidence it had about what material was before the employer itself.

46. We therefore need express no view on this *Wikipedia* entry, though we should note that Ms Clarke drew attention to the fact that it also states that the figurines have been criticised by some as antisemitic and refers to a Polish city having recently banned them. Further, Mr Babbage plainly regarded the claimant's post as racist, and the tribunal was plainly entitled to regard that as a reasonable view, as such, by virtue of the content being antisemitic and in its references to black men and to Mexicans, all for the reasons that the tribunal explained in its decision.

47. We will come presently to the tribunal's approach to the matter of the mitigation which the claimant put forward, including as to his own understanding or appreciation of such matters.

48. We turn then to our conclusions with respect to Ms Clarke's critique of the tribunal's reasons.

49. As to her criticism of what the tribunal said at [57], the final sentence does not say that a reasonable employer "would" have imposed a lesser sanction than dismissal. It was another tribunal's reference to what a reasonable employer "would" have done, that was said in both **Swift** and in **Gahir** to betray an erroneous approach. At [57] of the decision in this case, however, the tribunal referred to "any" reasonable employer, following on from a reference to the band of reasonable responses and a statement that no reasonable employer would have decided to dismiss. Overall, this reads as a closing restatement by a tribunal keen to emphasise that it has not forgotten the correct test; and this paragraph does not, as such, betray an error on its part.

50. However, the substance of the tribunal's reasoning, said to be in support of that conclusion, is to be found, in terms, in the four paragraphs [53] to [56] where the tribunal expressly sets out the four reasons why it says it has reached the conclusion that dismissal was outside the band of reasonable responses. These paragraphs should, of course, be read fairly, as a whole, and against the backdrop of the earlier findings of fact in the context of the decision as a whole.

51. In the first of these paragraphs, [53], the tribunal makes the point that the respondent's choices were not limited to either dismissing or doing nothing at all. It had the option of imposing some lesser sanction. As Ms Clarke fairly submits, however, this observation by itself does not entail that the option of dismissing was beyond the band of reasonable responses; and, indeed, the tribunal itself acknowledged that point in the final sentence of that same paragraph.

52. That said, the tribunal's real point in this paragraph, it appears to us, appears to have related to Mr Babbage's concern about undermining the respondent's EDI campaign and policies. The

tribunal says that *doing nothing* would involve undermining the respondent's campaign and reputation. This suggests that the *tribunal* was of the view that, so long as *some* sanction was imposed, this would *not* undermine the respondent's policies or campaign. This does support the contention that the tribunal did not consider whether *Mr Babbage* was reasonably entitled to take the view, as it had expressly found he did (at [40]), that to give only a warning for this particular conduct would send a wrong signal in relation to the respondent's commitment to these policies.

53. Turning to the second reason, paragraph [54], this relates to the claimant having offered apologies and to undertake new training. Again, the wording of this paragraph is troubling. 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 Mr Babbage's attention. This reads like the tribunal reflecting on what it made of what went through the claimant's mind and/or what it considered that Mr Babbage *ought* to have made of that. What the tribunal does not discuss in this particular passage is in terms what Mr Babbage *did* make of the apology and/or whether his view was one that it was reasonably open to him to take.

54. The claimant points to the tribunal's citation, in its self-direction as to the law at [19], of the Court of Appeal's observation in **Henderson**, that the attitude of an employee where trust and confidence is an important part of the work is an important factor. We note that the tribunal relied on that citation in support of the proposition that the reasonableness of a dismissal for sending offensive images or jokes may depend in part on the employee's attitude to their conduct and whether the employer can trust them not to repeat it.

55. As to that, we observe that, in a case where the conduct is something for which a reasonable employer *could*, in principle, dismiss, but the employee has relied in the disciplinary process upon his apology, expression of remorse and/or willingness to retrain in support of his plea for a lesser sanction, then it may be open to a tribunal to find that, if these things were not fairly considered

by the employer, then that affects the fairness of the dismissal. But that does not mean that an employer which *is* found has considered such matters will *necessarily* act unfairly if, having taken them into account, it nevertheless decides to dismiss.

56. As Ms Clarke pointed out, the tribunal in the present case found that these features *were* specifically considered and taken into account by Mr Babbage. If the tribunal considered that these features in this case also pointed towards the conclusion that dismissal was beyond the band of reasonable responses, the tribunal did not, in this particular passage, explain why. However, this is an aspect to which we will return when we come to the tribunal's fourth and final reason.

57. But turning next to the third reason, at [55], this relates to the claimant's long service and clean prior record. The tribunal appeared here to be addressing a suggestion made during the hearing that there was a blemish on the claimant's record, for the reason there described. But the tribunal immediately identified that this could not have been a view affecting the decision to dismiss, as the matter referred to only came out in evidence at the tribunal hearing. The burden of this paragraph appears to be, therefore, to *rule out* something that the respondent could *not* rely upon in support of its case that dismissal was within the band of reasonable responses. But the substantive question for the tribunal still remained, as to whether the fact of the claimant's long and unblemished service – around ten years or more at the time of dismissal – itself meant that it was not reasonably open to the respondent to dismiss for this conduct.

58. As to that, we make two points. First, once again, this is *not* a case where the tribunal found that there was unfairness because a relevant circumstance was not considered by the employer at all. To the contrary, the tribunal specifically found that the claimant's long service and the fact that this was a first offence *were* taken into account by the respondent.

59. Secondly, given that the tribunal found – see [24] – that the respondent's policies and procedures made it clear that conduct of this sort was considered to be potentially so serious that

it could result in dismissal for a first offence, and, indeed, that they explained that, even if not directed at another employee, such conduct might amount to discriminatory harassment of colleagues exposed to it, and that this post was placed on an intranet used by the entire workforce, we do not think that it was reasonably open to the tribunal to conclude, if it did, that the claimant's prior clean record of long service meant that dismissal was outside of the reasonable band.

60. We turn to the fourth and final reason given by the tribunal at [56]. This relates, again, to the question of the claimant's state of mind when he put up the post. The correct starting point, we reiterate, was what the tribunal found as fact that Mr Babbage thought about the claimant's state of mind, and how what Mr Babbage thought about that influenced the decision to dismiss. The tribunal again gave itself a correct self-direction in its summary of the law on this point, referring to the formulation in **Beatt v Croydon Health Services NHS Trust** [2017] EWCA Civ 401; [2017] ICR 1240. It also did earlier make findings of fact about what Mr Babbage thought, including what he thought about the claimant's mental processes, at [40] and [41]. We read [56] as, for the most part, addressing this and referring back to those findings.

61. Reading these paragraphs fairly and as a whole, the sense is that this was not a case where the tribunal found that the employer believed that the claimant, for example because of a language difficulty, misunderstood the meaning of the words in the post, or something of that sort. Rather, the claimant put his case in the internal process as to why he said he genuinely thought that the content of this post was a positive contribution to the anti-racist campaign. The tribunal's conclusion appears to have been that this was not a case where the dismissing officer had concluded that the employee, fully appreciating that this material was overtly racist and why, had decided for some malicious or malign reason to post it on the intranet.

62. But the tribunal needed then to consider whether, taking that into account, Mr Babbage was nevertheless entitled, within the band of reasonable responses, to take the view that this was still

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.

63. We have stood back and reviewed this passage in the context of the tribunal's decision as a whole. It does appear to us that, notwithstanding its careful and correct self-direction, the tribunal did allow 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. Certainly, the tribunal has, we are bound to conclude, failed to give sufficient or proper consideration to whether it was reasonably open to the deciding manager, having taken account of all those same mitigating matters that the claimant relied upon before him, and what he, the deciding manager, made of them, nevertheless to dismiss the claimant for this conduct.

64. We have considered the overall factual findings of the tribunal as to all the relevant circumstances of this case. These include, as we have described: the content of the post itself; the respondent's extensive policies and campaign, with all the features described by the tribunal, including reference to the impact of offensive material on fellow employees and that a first offence could result in dismissal; that the claimant plainly accepted that he was aware of this campaign (indeed, the post was put forward as a contribution to it); the factual findings that the claimant's attitude of apology and remorse, long service and prior clean record had all been taken into account; and about what Mr Babbage considered to have been the claimant's state of mind; and its factual findings as to the view that Mr Babbage also formed and took into account as to the impact on the campaign which imposing a lesser sanction than dismissal would be liable to have.

65. Having considered all of the facts found by the tribunal in the round, but particularly having regard to the findings as to the contents of the post, where it was posted and the nature and content of the respondent's policies and campaigns, we conclude that any tribunal properly applying the law could not have concluded other than that dismissal, however harsh the tribunal might think the decision, was within the band of reasonable responses open to the employer in this case.

66. For all of these reasons, we uphold both grounds of appeal. We will, therefore, allow the appeal and, in light of our overall conclusion, we will substitute a decision — the only one that the tribunal could properly have reached applying the law to these facts — that dismissal was within the band of reasonable responses open to the respondent, and so it was not unfair.