Was it unfair to dismiss an employee for remarks about Zionism broadcast on social media?

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In the recent case of London Borough of Hammersmith and Fulham v Keable the Employment Appeal Tribunal has upheld a decision that an employee was unfairly dismissed after a video of him expressing controversial views on Zionism went viral on social media.

What happened in this case?

Mr Keable was employed by the London Borough of Hammersmith and Fulham Council (**the Council**) from 19 March 2001 until his dismissal for serious misconduct on 21 May 2018. He was good at his job and had a clean disciplinary record before the matters that led to his dismissal.

The Council had a Code of Conduct which set out the standards of behaviour expected from employees, including provisions regarding politically restricted posts. However, Mr Keable’s role was not one of them, meaning that he was free to be politically active and do things such as attending political demonstrations and voicing his political views.

Mr Keable is a member of the Labour Party and a “Momentum” activist. On 26 March 2018 he attended a rally outside Parliament organised by “Jewish Voice for Labour” (a small pro-Corbyn, anti-Zionist grouping within the Labour Party formed to act as a counter to the mainstream Jewish Labour Movement). Mr Keable attended this rally in his own time, in his personal capacity and wore nothing identifying him as a Council employee. At the same time, another rally was taking place organised by the Jewish group “Enough is Enough”. During the Jewish Voice for Labour rally, Mr Keable found himself speaking to an individual attending the Enough is

Enough rally. This exchange was filmed without Mr Keable's consent by a third party and was subsequently put on social media.

In the following hours and days, the video of Mr Keable went viral and he was identified as an employee of the Council. Many of the comments on social media were shared by MPs and Councillors who accused Mr Keable of bringing the Council into disrepute and called upon the Council to look into the incident. The Council ended up suspending Mr Keable while an investigation took place. The suspension letter to Mr Keable set out that he had made inappropriate comments which were insensitive, offensive and had the potential to bring the Council into disrepute.

During the course of the investigation Mr Keable asked to be told precisely which comments were relevant to the allegations against him so that he could prepare for any resulting disciplinary. The investigating officer confirmed that two comments that were likely to cause offence were: "the Zionist movement collaborated with the Nazis" and "the Zionist movement accepted that Jews are not acceptable here".

In the following disciplinary, Mr Keable made representations that he was not anti-Semitic, noting that he was previously married to a Jewish woman and that his daughter was Jewish. He also argued that while his comments could be perceived as being offensive, he had the right of free speech and the right to offend. His representations at the disciplinary were backed up by a statement that he had signed off on from his trade union representative which suggested that the investigations had been "indigestible gobbledegook", "pitiful verbiage" and "spurious nonsense".

The Council dismissed Mr Keable for serious misconduct on the grounds that he had brought the Council into disrepute. The video had been viewed over 79,000 times at the time of checking and most of the comments on it had interpreted Mr

Keable's words negatively. In addition, the Council had received a written complaint from a local MP and Mr Keable's words had been linked in the media to his employment. Specifically, the Council concluded that the average person would interpret his comments as suggesting that Zionists had collaborated with the Nazis in the Holocaust.

Mr Keable appealed against his dismissal but was unsuccessful. He then made a complaint of unfair dismissal to the Employment Tribunal.

What was decided?

The Tribunal's decision – liability

The Tribunal found that Mr Keable's dismissal was unfair on both substantive and procedural grounds.

In particular, it decided that the culpability of Mr Keable had been limited and that it was not within the range of reasonable responses to dismiss him for exercising his right to freedom of expression and freedom of assembly when he was acting in his personal capacity and not connected to the workplace.

Additionally, the reason given for the dismissal was different to the charges raised in the investigation and disciplinary process. It had never been put to him that the average person would interpret his comments as suggesting that Zionists had collaborated with the Nazis in the Holocaust and that this, in turn, would bring the Council into disrepute. As this allegation had not been put to him, he had not been given an opportunity to respond.

It was also found that the Council had not actually proactively consulted with Mr Keable on whether a warning would have been enough to prevent a recurrence, and this also led to his dismissal being unfair.

The Tribunal’s decision – remedy

Mr Keable claimed reinstatement and was granted it. Unusually in this case, the Council did not plead that there had been a breakdown in trust and confidence and the disciplining manager admitted that Mr Keable had not fallen out with any of his colleagues and, indeed, some had been actively supportive of him. He had also conducted himself in a respectable manner throughout the process.

It was, however, found that the union representative’s written statement had contributed to the disciplining manager’s decision to dismiss and, therefore, compensation was cut by 10%.

The appeal

The Council appealed against the Tribunal’s decision on both liability and remedy.

The EAT upheld the Tribunal’s decision confirming that Mr Keable had been unfairly dismissed as the full allegations against him had not been put to him and the Council had failed to give him an opportunity to comment on whether a warning would have been an appropriate sanction.

The EAT said that a fair procedure required the Council to have put to Mr Keable what he would do if a warning was imposed and whether he would heed it. It went on to say that a fair procedure is not a tick box exercise; it should seek to give the individual the opportunity to convey relevant information to the decision- maker and, in this case, this would have been relevant.

The EAT upheld the decision to reinstate Mr Keable confirming that the Council had not lost trust and confidence in him.

What does this mean for employers?

Employers should take care when communicating to employees the

charges being put to them that may lead to their dismissal. In particular, they should explain as much as possible of their rationale for a decision to dismiss or give a warning so that an employee has as much detail as possible.

Employers should be careful when adopting a 'one size fits all' approach for a disciplinary procedure. While employers are encouraged to have written procedures, these are generally set out as the key steps in the procedure and the potential warnings that could be imposed. Every case is different, on the facts, and every investigation/disciplinary should be carried out with this in mind.

A third take away for employers from this case is that reinstatement is possible, even when, on the face of it, the dismissal concerns an individual voicing their potentially offensive opinion in a public space.

If you would like to discuss any issues arising out of this decision please contact, Hannah Lynn (hannahlynn@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

London Borough of Hammersmith and Fulham v Keable

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