Employment Law Brief

with

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Words are powerful things. Some are so laden with history that even repeating them in a neutral context can cause distress and offence. The 'N word', for example, is generally considered to be about the most offensive word in the English language. It has such power to offend that even spelling it out in full in this article would feel wrong.

But is the use of that word always and in all contexts a matter that the employer is entitled to treat as gross misconduct? In the recent Tribunal case of Stevenson v London Borough of Redbridge an employee was dismissed for using the word when asking a question about racism during a training course. He was describing an incident when someone else used the word – he was not directing it at anyone in the room, nor using it to describe someone. Nor was there any suggestion that he used the word with the intention of offending anyone – indeed he apologised straight after using it. He had also been told by the trainer that the course was a 'safe space' where he was encouraged to ask questions. When questioned the trainer herself thought that the question he asked was a reasonable one, but two of the other delegates (who were also council employees) raised complaints – although one of them at least said that they did not want the employee to lose his job.

The dismissal was held to be unfair and the catalogue of things that the employer got wrong in dismissing the employee is quite impressive. The dismissal was based on him showing no remorse despite the fact that he had apologised at the time and brought a written statement to the disciplinary hearing – which he was not allowed to read out – in which he said to the employees who had complained "I wholeheartedly offer you my sincerest apologies for using the word and causing you offence". The decision was also heavily influenced by the fact that for many years he had worked in HR, with the employer believing that he therefore advised others on the council's policies on equality and dignity at work. In fact, he was employed in IT support and had worked on the payroll system so could not be assumed to have any special insight or expertise on the subject of equality. The employer had also assumed that if an investigation showed that he had used a racially offensive term it was bound to take disciplinary action, when its own polices envisaged that such matters could when appropriate be resolved informally.

Having found that the dismissal was, in view of these errors, unfair the Tribunal went on to find that the employee had deliberately used the N word in full when he could have simply referred – as in this article - to the 'N-word'. Finding that 'the N word is an offensive and racially loaded term and is not appropriate for use in the workplace' the Tribunal rejected the employee's application for reinstatement or reengagement and held that his compensation should be reduced

by 90 percent to reflect his 'contributory fault'.

So what to make of this? I'm left with mixed feelings. On the face of it the employee has won – but the 90 percent reduction in compensation makes it a rather hollow victory. An employee with more than 30 years unblemished service has lost his job – probably with very little compensation – as a result of a word that he used when asking a sincere question about the use of that word. I think that that is disproportionate. That is not to say that the employee was blameless, he must have known that the use of the word, even in the context he used it, was controversial – that's why he apologised at the time. There were complaints from two employees, so what he said did cause offence. But having been told by the trainer that he was in a 'safe space' he surely could not have realised that his comment was enough to get him dismissed. My general rule of thumb is that an employee should only be dismissed for misconduct when the employer has made it quite clear that that will be the likely outcome of the conduct in question. I don't think this incident passes that test.

The case certainly highlights the danger of throwing vague terms like 'safe space' around. The question that needs to be answered of course is 'safe for who?'. If you are going to licence behaviour that would not normally be allowed then you surely need to get permission from those who will experience that behaviour. Part of the problem in this case was that the course the employee was taking part in was part of the Prevent programme – relating to radicalisation. He brought up the issue of race discrimination and so the trainer had not expected that the use of the N word would be under discussion. Had it been a discrimination and equality course it would have been easier to anticipate that racial slurs would be discussed, and clearer ground rules could have been set.

Not that you can take it for granted that employers would get this right. I was reminded of another Tribunal decision from 2019 – Georges v Pobl Group Ltd – when a trainer wrote racially offensive terms on a flip chart (including the fully spelled out version of the N word) which she then invited delegates to discuss. Describing this approach as 'crude and unnecessary' the Tribunal quite rightly upheld the harassment claim brought by one of the delegates.

In a wider sense, the Redbridge case highlights the limits of an unfair dismissal claim and the reluctance of Tribunals to take a stand on what does or does not justify dismissal. If the Tribunal had simply said, 'look this conduct is not sufficiently serious in the circumstances for a dismissal to be a reasonable outcome', it would have been at risk of substituting its own view for that of a reasonable employer and justifying an appeal to the EAT. Instead, it focussed – as Tribunals tend to – on the process of dismissal and the way in which the employer went about it. But I'm not sure it is consistent to criticise an employer for not giving proper consideration to handling the matter informally – which implies that it would be a reasonable option to do so - and then find that the employee is 90 per cent to blame for his dismissal. I think the employer in this case has got off quite lightly.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman