6370/147

Case Number: 1200504/2012

FJU

EMPLOYMENT TRIBUNALS

Claimant: Mr C Trasler

Respondent: B and Q

HEARD AT: BEDFORD **ON:** 6 September 2012

BEFORE: Employment Judge Adamson

REPRESENTATION

For the Claimant: Mr D Maxwell, Counsel

For the Respondent: Miss S Davidson, Counsel

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant.

2. The Claimant contributed to his dismissal and I assess that contribution at 50%. Any sum that would otherwise be paid to the Claimant a Basic or Compensatory Award will be reduced by that percentage.

Note:
There will be a further Hearing to determine remedy, half a day being allowed. The parties are reminded that the case management orders previously made continue to apply.

REASONS

1. By a claim presented to the Tribunal on 28 March 2012 the Claimant complained of unfair dismissal by the Respondent. The Respondent presented a response in which it disputed the claim. The claim has been presented by the Claimant through solicitors and was represented today by Counsel. The Claimant has complied with case management orders to prepare witness statements. Although the claim and response indicated a

dispute of facts in respect of what the Claimant had allegedly done there was no suggestion within the claim that the Respondent's procedure was unfair. The issue to be determined was whether the Respondent's decision to dismiss was within the range of reasonableness (and similarly whether the investigation was within that range.)

2. At the outset of the Hearing the Claimant sought to introduce a new issue of whether the Respondent's dismissal of him was procedurally unfair in respect of a document the Claimant's Counsel suggested the Respondent had had regard to at the Appeal stage but which had not been disclosed to the Claimant at the time. This was not identified within the claim, had not been raised in other correspondence or dealt with in the Claimant's witness statement. The Respondent objected to this issue being raised, being taken by surprise, and informed that it was not in a position to consider the matter. As the matter had not been raised before and was not addressed in the (exchanged) witness statements and indeed if the issue was to be allowed the Respondent would have to consider and address the matter possibly necessitating an adjournment with everyone now being present for the Hearing as listed and the issue that had been prepared for I refused the application.

3. The Claimant through his Counsel accepted there had been a breach of the Respondent's relevant policy and that the Respondent was entitled to take a dim view of the Claimant's actions. There was no dispute that the Respondents reason to dismissal for the Claimant was one related to conduct. The issue to be determined today remained whether Respondent was entitled to dismiss the Claimant rather than issue a lesser penalty i.e. whether the decision was within the range of reasonableness.

4. Section 98 Employment Rights 1996 (the Act) provides that when an employer has established a potentially fair reason for dismissal, then on a neutral burden of proof, the decision as to whether that decision was reasonable must be determined in accordance with the criteria contained in Section 98(4) Employment Rights 1996

Guidance on this provision position is provided in Iceland Frozen Foods Limited v Jones 1982 IRLR439 Paragraph 24 namely:

1. The starting point should always be the words of s. [98(4)] themselves;

2. In applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

3. In judging the reasonableness of the employer's conduct an Industrial

4. Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

5. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

6. The function of the industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case of the decision to dismiss the employee fell within the band of reasonable employer might have adopted. If the dismissal falls outside the band it is unfair

5. In Neary and Neary v Dean of Westminster 1999 IRLR288 a review of authorities on the question of what constituted Gross Misconduct took place and which concluded 'conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.

6. Section 207 (3) Trade Union and Labor Relations (Consolidation) at 1992 require me to have regards to any part of the Accas Code of Practice 1 Disciplinary and Grievance Procedure 2009. I consider Paragraphs 17 to 23 to be relevant.

7. I heard evidence on oath or affirmation from the Claimant; Jamie Moppett employed by the Respondent as a Senior Stock Manager; and Ian Scott employed by the Respondent as a Unit Manager. I had presented to me a bundle of documents and had regards all documents within it to which I was referred. Also presented to me were two Employment Tribunal decisions namely VC Preece v J D Whetherspoons Plc Case 2104806/10 and Samuel Crisp v Apple Retail UK (Ltd) Case 1500258/2011, I was also provided with a copy of a printout from a website Out-Law.com being Legal News and Guidance from Pinset Masons.

8. The Respondent is a well known retailer which employs 32000 people in Great Britain. The Claimant whose date of birth is 25/10/1990 was employed by the Respondent as a 'Customer Advisor' at its premises in Towster Road Northampton beginning that employment on 24 March 2007 and remaining in it until he was summarily dismissed on 3 January 2012 that latter date being the Effective Date of Termination of his employment within the meaning of Section 97 of the Act. There was no dispute on the 27 December the Claimant made various postings on his Facebook page and those postings were as follows:

Claimant:	My place of work is beyond a fucking joke!!
Jamie C Hughes:	What's up Geezer?
Claimant:	You know what it's like, they reckon we can do more than one job at a time!! I have had to come home before I do something I regret!!
Jamie C Hughes:	Ha is it overtime or your normal hours? They push the boundaries so often there's only so much you can take!!

Claimant:	No normal hours, well there in for a shock when I come in tomorrow!!
Jamie C Hughes:	What you gonna do?
Claimant:	I'll let you know tomorrow lol *[laugh out loud]*
Jonathan Tilley:	Look mate do you need me a Jamie to do sum Q busting we will jump on the tills haha!!! x
Claimant:	I'll be doing some busting but it won't be queues lmao!! *[laughing my arse off]* Don't work on the shopfloor anyways thank fuck! Lol *[laugh out loud]*

9. Those postings were reported to the Respondent by a person who considered them to be contrary to the Respondent's policies albeit did not themselves feel threatened. That afternoon the Claimant was called to an interview by Ms Janice Oliver a Trading Manager employed by the Respondent. There are notes of the meeting which the Claimant signed to confirm that he had read and that they are an accurate record. Today the Claimant disputes that they were an accurate record. Within the claim to the Tribunal the Claimant had not given any indication that he disputed that the notes were inaccurate neither did he do so in his witness statement nor at anytime during the internal proceedings.

10. After the Claimant was dismissed he appealed against that decision and in his appeal letter stated 'From the day I started work at B and Q upto the day I was dismissed I never received a copy of the company handbook. I have never seen or had it explained to me about the policies for social networking comments regarding B and Q. I was never offered a handbook in any of my disciplinary meetings and the policy was never read or explained to me in these meetings." During the appeal the Claimant that conformed he had received the handbook, included in the handbook is the Respondent's disciplinary procedure which at the time relevant to this claim contain the section on gross misconduct. That section stated that in cases of gross misconduct employees 'will be subject to summary dismissal' and provided a list of examples one of which was " Posting, uploading, forwarding, videoing, copying or adding inappropriate derogatory or defamatory comments, photographs, video or audio clips relating to or about the company, any fellow employee, customer or contractor, supplier or any other party related to the company onto or for use on public chat-rooms, blog sites or social networking sites"

11. The Respondent also has a Social Networking Policy issued on 5 May 2011 which specifically referred to Facebook amongst other such sites as which provided amongst other things that It's employees are responsible for ensuring:

    a) They must not make derogatory, defamatory, rude, threatening or insulting comments about the company, it's products or services, the

brand, their workplace or any Managers, colleagues, suppliers or other business partners;

b) They do not use blogs or social networking sites to discuss internal issues or concerns. If you have any concerns relating to your work, you may discuss it with your Manager/HR or follow the Company's grievance procedure information on which is available on the intranet following filepath: HR>Information Library>Policies and Procedures>Grievance Procedure;

The policy provided that a breach of it would be investigated in accordance with the Respondent's disciplinary procedure and maybe subject to disciplinary action which may result in summary dismissal. The policy was introduced after various team briefings were given to the Respondent's employees around the beginning of March 2011. As Mr Scott for the Respondent accepted the company handbook which the Claimant was provided with most likely would not have had the example of gross misconduct in it that was subsequently relied on by the Respondent. To the tribunal the Claimant's position was that he had not seen the policy or heard of it before being provided with a copy at the investigatory meeting. This was not identified in his claim and although it is something raised in his appeal the Claimant had also stated that he understood the handbook procedure on social networking and agreed when it was put to him that his comments were "derogatory, defamatory, rude, threatening and insulting to the Company and his Colleagues" but by way explanation said that he had had a bad day and it was his way to relieve stress, and accepted that he should not have made them. The Respondent's handbook is available on the company intranet in the premises where the Claimant worked. The Claimant informed in the evidence that he had been given a more recent handbook and was aware that the handbook was in the office albeit handbook that a copy that was meant to be on a notice board was not The Claimant was aware that he had access to use Respondent's intranet.

12. I find that the notes made at all the various meeting are an accurate record of what took place. Specifically I accept that the Claimant was asked whether he wanted a witness with him before the allegation was put to him, and that he informed the Respondent that he understood the handbook procedure on social networking, and agreed that his comments were as described before, before the interviewer at the investigatory meeting provided the Claimant at that meeting with a copy of the Company Policy in full.

13. At the investigatory meeting when asked what he meant by his comments the Claimant responded that he'd had a bad day; his comments being his way to relieve stress and should not have made them. In respect of the statement that that he had to come home before he'd do something that he regretted, the Claimant informed that the pressure he was being put under at the time had just wound him up. In respect of the statement that Respondent will be in for a shock tomorrow the Claimant's explanation was that he was "just pissed off at the time" Similarly when asked about "doing some busting but not on the queues" Claimant responded that he was" just pissed off". The Claimant accepted to the Respondent that these comments could be perceived as threatening. When asked what had made him write the

comments the Claimant informed: "I was just pissed off to the point I had to let it out, and that was the only way" The Claimant informed that his manager was not present at the time it was the end of his shift and he went home to cool down. The Claimant informed that the background of his comments was mainly that he was frustrated by an instruction given to him by a manger which was to carry out a task in two days time despite the fact that he was working on his own in the warehouse and the manager was insistent that he did so. The Claimant explained it was the way in which the manager had insisted that he carry out his instruction rather than the task itself. The Claimant accepted that his comments reflected badly on the Respondent.

14. Following this meeting the Claimant was suspended and then invited to a disciplinary meeting to discuss the alleged misconduct namely that on "27 December 2011 you breached the Social Networking Policy whereby you posted inappropriate comments about the company on your Facebook page, which had the potential to appear threatening." The Respondent advised in that letter that the outcome of that meeting could be disciplinary action which could result in the termination of the Claimant's employment.

15. The disciplinary meeting took place on 3 January 2012 conducted by Mr Moppett. At the meeting the Claimant accepted that he had a Facebook Page and that he had placed the comments on there as referred to earlier in these reasons, that he did not have any security settings to block anyone from reading his account at the time: anyone could look at it, and that he had about 200 odd friends on Facebook of which around 50 to 45 were employees of the Respondent. The Claimant had not listed his place of work on his page and the Claimant confirmed Mr Moppett's statement that none of his other friends knew he worked for the Respondent. The confirmed that he did other jobs which were listed on Facebook and that someone could potentially think it was that job namely running events & being DJ albeit when put to him Claimant accepted that people reading the page would know it did not relate to those jobs and people would understand it was specifically B and Q based. The Claimant accepted he should not have posted comments on his page and he hadn't thought it through but did so because of the state he was in following the instruction given to him despite the Claimant explaining to him two or three times that he was working on his own at the time. The Claimant confirmed the task was to be carried out two days later. When asked "and what or who you gonna be busting? The Claimant repeated his earlier explanations he had given at the investigatory meetings about his feelings at the time, that he did not plan on doing any "busting" and it was all due to the stress he was put under. The Claimant confirmed that he was employed as Customer Advisor and complained that being asked to do a job in any part of the store would be fine if he was not working on his own.

16. The Claimant was subsequently dismissed that day the reason being confirmed in writing on 6 January 2012 namely the Claimant had "breached the Social Networking Policy whereby you posted inappropriate comments about the Company (B & Q) on your Facebook page which had potential to be threatening." In making his decision Mr Moppett worked on the basis that between 45 and 50 readers on his Facebook page would know where the Claimant worked and that "busting" could only be damage to property or

personal. M Moppett informed the tribunal that he took the Claimant's postings as a real threat to the Respondent's business. The Claimant accepts that his comments are caught by the example quoted in the disciplinary handbook as inappropriate conduct but did not accept that it was threatening.

17. At this hearing Mr Moppett was pressed on his understanding of his discretion in respect of penalty in gross misconduct code. Mr Moppett responded in differing ways to the questions put to him which lead me to be satisfied that Mr Moppett understood that acts which fell within the list of examples of gross misconduct in the disciplinary procedure did not mean that a dismissal was the only inevitable outcome and that the seriousness of the matter was a relevant consideration. Also taken into account in his consideration was that the Claimant had also posted the comments at the earliest about three quarters of an hour after the instruction given to him which instruction was to be acted on two days later. In those circumstances Mr Moppett's evidence was that he concluded that this was not the Claimant letting off steam but a considered judgment.

18. The Claimant alleged to the Respondent that M Moppett was put under undue influence by a more senior manager. That matter was subsequently investigated by the Respondent and no undue influence was found.

19. Mr Scott was then charged with conducting the appeal. Mr Moppett provided a statement for Mr Scott in which he stated that he had originally believed the Claimant's comments were made in the heat of the moment but when he found out what had transpired between the Claimants and the manager changed his mind as: The Claimant had continued to work before he went home and put the comments on Facebook; had shown no remorse; did not apologise; and had seemed uninterested. These comments were taken into account and formed part of Mr Scott's reasons when he upheld the decision to dismiss the Claimant. Mr Scott concluded that, "taking into account the levels of the applicable discipline, I am convinced that the decision to dismiss you was justified. Therefore, your Appeal has been unsuccessful."

20. In evidence to the Tribunal the Claimant's position was that Mr Moppett had been unduly influenced by a senior manager and had it not been for that senior manager he would not have been dismissed. The Claimant had no evidence to support that belief himself relying on rumour and that he believed the senior manager had been in the same building as the Claimant and Mr Moppett on the day of dismissal. I do not find any evidence of any improper influence, instruction or pressure placed on Mr Moppett.

21. It was put to Mr Moppett in cross examination that the meaning of the word "busting" could have a different one to the one Mr Mappett understood and that Mr Moppett should have raised this in more detail with the Claimant. This was an internal disciplinary meeting and not a Chancery Court Trial. The word "busting" in the Respondent's jargon is used when there are insufficient tills open, queues forming and the steps the Respondent then takes to deal with that intention. In the context in which the Claimant used the term however, the interpretation which Mr Moppett made of it particularly when he asked the Claimant who or what he was going to "bust" and the

Claimant's response, I consider Mr Moppett's understanding of the term to be a reasonable and the natural and most obvious one. The Claimant did not dispute Mr Moppett's understanding of the word, "busting" during the disciplinary meeting. I find that Mr Moppett's understanding was correct. The Respondent's policy on social networking specifically provides that a breach of it may result in disciplinary action including summary dismissal. The example given in the handbook of gross misconduct includes inappropriate postings as described before.

22. The Claimant through his Counsel accepts that there was misconduct, although and in evidence the Claimant stated he did not believe he broke any rules, did not accept that the comments were derogatory, defamatory or inappropriate or shared to B & Q and in a negative light. The Claimant further informed that he would not do anything inappropriate and that he was " bigging himself up" and that people who knew him at work would know that he was not violent. Further the fact that he had put the in acronyms "lol" and "lmao" indicated that he was joking when he made the statements. That was not the view that Mr Scott took considering from his experience that people often used such abbreviations and others without any particular thought or strict applicability to the text.

23. There was no evidence to the Respondent that anyone themselves actually felt physically threatened by the Claimant's actions, Mr Moppett's conclusion was that the Claimant's statement showed a serious threat to the Respondent's business, the Claimant being in a position to cause damage to the Respondent's property.

24. A breach of the Respondent's policy does not automatically necessitate a dismissal. For there to be a dismissal for gross misconduct there must be such behavior that the Respondent could no longer accept the Claimant as it's employee, as described in *Neary*. The question I must determine is whether the Respondent through Mr Moppett and Mr Scott could reasonably believed the Claimant's comment amounted to gross misconduct. It was put in submissions that the Claimant was simply letting off steam.

25. The cases referred to me that were determined by Employment Tribunals do not greatly assist me. In this case there were disparaging comments and also a threat. The Claimant's employment with the Respondent was in excess of four years and he had a clean disciplinary record. The Respondent was aware that the Claimant had been given an instruction which he had resisted. The Claimant had repeatedly described the reasons for his actions during the investigation and disciplinary meeting, albeit Mr Moppett did not accept the explanations of such given that there was little else in his view the Claimant could say as his words were in print.

26. Applying the test of reasonable responses which a reasonable employer may adopt, although the Claimant did not show any remorse and his actions were in contravention of the Respondent's policy about which he was aware no one felt threatened individually. There had been a heated discussion. The Claimant had a clean disciplinary record and been in the Respondent's employment for four years. In these circumstances I can not accept the

Respondent's conclusion that the Claimant's actions were a threat to the business was within the range of reasonableness.

27. I do not find on the facts found that the employment relationship between the Respondent and the Claimant was so undermined such that the Respondent could no longer retain the Claimant in its employment. For that reason I find the Respondent's dismissal of the Claimant to be outside the range of reasonableness and unfair.

28. I consider the issue of whether there should be a reduction of any compensatory award pursuant to Section 123(1) of the Act and/or a reduction for contribution pursuant to Section 123(6). In respect of the Section 123(1) I do not consider there was any flaw in the Respondent's procedure and thus do not make any reduction under that provision. In respect of Section 123(6) however the Claimant's conduct clearly contributed to his dismissal, not only in the words he used but in not showing any remorse or full appreciation of his actions. The Claimant was aware at the very least that his comments would be read by between 45-50 people who would know that his comments related to Respondent. I assess the Claimant's contribution 50%. Any sum payable to the Claimant pursuit to 123 of the Act will be reduced by the percentage..

29. In respect of the Basic Award, pursuit Section 122(2) for the same reason that any Compensatory Award should be reduced by 50%, the Basics. Award will also be reduced by 50%.

30. The parties informed the Tribunal that should the Claimant succeed they anticipated being able to resolve the issue of remedy between themselves. Should the parties do so should inform the Tribunal as soon as possible in order that the Remedy Hearing may be vacated.

V. J. [signature]

Employment Judge, Bedford

JUDGMENT SENT TO THE PARTIES ON

15th October 2012

[signature]

FOR THE SECRETARY TO THE TRIBUNALS