Case Number: 3401454/2016

EMPLOYMENT TRIBUNALS

Claimant: Mrs E Plant

Respondent: API Microelectronics Limited

HEARD AT: NORWICH **ON**: 30th March 2016

BEFORE: Employment Judge Postle

REPRESENTATION

For the Claimant: Mr Gill (Counsel)

For the Respondent: Mrs Smeaton (Counsel)

JUDGMENT

1. The Claimant was not unfairly dismissed.

2. The Claimant was not wrongfully dismissed.

REASONS

1. This is a claim of unfair dismissal and wrongful dismissal. The essence of the claim for unfair dismissal appears to be whether the decision to dismiss fell within the range of reasonable responses test. In this Tribunal we have heard evidence on behalf of the Respondents from Mrs Hart a Manufacturing Manager who conducted the disciplinary hearing and Mr Curley Head of Engineering and Operation who conducted the appeal both giving their evidence through prepared Witness Statements.

2. For the Claimant we heard evidence from the Claimant and Mr Walker a Trade Union Representative both giving their evidence through prepared Witness statements. A Witness Statement was tendered on behalf of Mr Catchpole a Trade Union Representative, no cross examination of this witness was required by the respondents. The Tribunal also had the benefit of a bundle of documents consisting of 92 pages.

3. The facts of this case show that the respondents are a subsidiary of API Technologies Corporation a leading manufacturer of radio micro electronics and security technologies for defense, aerospace, industrial and consumer uses. The Claimant had been employed by the respondent for 17 years in the capacity as an operator of machinery in the bonding area of the manufacturing unit. At the time of the Claimants dismissal she had a clean disciplinary record. The Claimant reported to a Team Leader Miss Rowney who in term reported to Mrs Hart.

4. The respondents in December 2015 introduced a new social media policy and procedures to all staff as part of roll out of similar policies across the wider API Technology Group. That policy is found at pages 36 to 39 and sets out the scope of the policy, it's aims and objectives, what is meant by social media, the use of employees own equipment to access social media sites whilst at work, what is considered as posting responsible content on social media sites, it then provides a list which is not exhaustive of the sort of things that employees should not be doing for example; making comments that could damage the reputation of the company, it's products, services or it's employees, make comments which could damage the company's relationship with customers and suppliers, made comments about colleagues, customers or suppliers which are disrespectful, insulting, offensive or discriminatory or indeed comment on sensitive business related topics such as potential site closures, the list goes one. The document also reminds employees that conversations between friends on Facebook are not truly private and can still have the potential to cause damage, reminding employees that comments can be copied forward onto others without the permission, it stresses the need to not rely on privacy settings. The document concludes with breaches of this policy, and states that any breach of this policy will be taken seriously and may lead to disciplinary action under the respondent's disciplinary policy. Serious breaches will be regarded as gross misconduct and may lead to summary dismissal under the respondent's disciplinary procedure.

5. In or about the 16th August the respondents made an announcement that it was considering moving the Great Yarmouth factory, possibly out of Great Yarmouth this apparently caused tension and concern amongst the staff who were not surprisingly concerned about their future.

6. On the 17th August Miss Rowney raised a concern with Mrs Hart that the Claimant had been posting what was considered inappropriate comments on Facebook relating to the respondent. Apparently other employees had seen the comments, and where upset about the contents and had raised their concerns with Miss Rowney.

7. As a result of this the Claimant was invited to a disciplinary hearing by letter of the 17th August (page 54) in that letter it sets out the allegations which were; your profile on Facebook is linked to API Technology, you have your employer and job title twice on the Facebook Profile, one stating general dogsbody at API Technologies Great Yarmouth, a comment that you made against the company has been reported to us stated "PMSL bloody place I need to hurry up and sue them PMSL" (PMSL relates to pissing myself laughing) the letter goes on to advise the right to be accompanied it encloses

the Company's Disciplinary Policy and Social Media Policy, and warns the Claimant that one outcome could be summary dismissal.

8. The Disciplinary Hearing takes place on Wednesday 25th August, the Claimant was accompanied by a Union representative and the meeting is conducted by Mrs Hart. The allegations are put to the Claimant, she is asked for an explanation, her explanation is that she didn't realise her Facebook was linked and she did not believe that the comments were aimed at the company but offered no other explanation other than they were a private matter and that Mr Starkey another employee would be aware of the relevance of the comments she had made.

9. The comments were not disputed by the Claimant, they are there to be seen on the Claimant's Facebook at (78 & 79) and having considered the nature of the comments, that they were a breach of the social media policy, the derogatory nature of them and in the absence of an adequate explanation they were clearly aimed at the respondent, Mrs Hart took the decision to dismiss and confirmed this in a letter to the Claimant of the 25th August (61 & 62) and sets out the reasons for her dismissal. That letter gave the Claimant her right of appeal.

10. The Claimant appealed in an undated letter at 64. The grounds for her appeal was that the decision was unfair given the fact that she'd worked for the company for 17 years and had a clean record.

11. The person who was to conduct the appeal hearing Mr Curley was not clear as to the specific reasons for the appeal, and wrote to the Claimant on 5th September asking for further information. The Claimant duly provided this information on the 8th September (66). The grounds for the appeal being the Facebook comments were not aimed at API she was referring to the Great Yarmouth Energy Park and that they were tongue in cheek, that the Facebook profile stating general dogsbody was a joke from years ago and she'd failed to amend it, that she was not very computer literate and did not realise she was linked to API Technology and that she's worked for the company for 17 years and had a clean record.

12. The appeal hearing took place on the 22nd September and was Chaired by Mr Curley and again the Claimant was accompanied by her Trade Union representative.

13. Prior to the appeal hearing Mr Curley given the Claimants comments at the disciplinary hearing that the matter was private and Mr Starkey would know all about it arranged to interview Mr Starkey, and notes of that interview are at 69. When asked about the matter Mr Starkey was at a loss to provide an explanation and seemingly did not know what the Claimant was referring to.

14. The Claimant was once again at the appeal hearing given an opportunity to explain her comments and once again in the absence of an adequate explanation and reviewing the original disciplinary hearing and what had been said at the appeal Mr Curley came to the conclusion that the sanction of dismissal was the correct one given the nature of the comments.

15. The Law, under the Employment Rights Act 1996 sets out it is for the employer to identify the potentially fair reason to dismiss under Section 98(2). In this case it is conduct thereafter the burden of proof is neutral and the Tribunal has to consider Section 98(4) which deals with fairness and says "where the employer has fulfilled the requirements of sub-section 1 the determination of the question whether dismissal is fair or unfair having regard to the reasons shown by the employer; a) depends on whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case." Given that this is a conduct case the Tribunal follows the well trodden path of British Homes Stores v Burchell and that is was the employee guilty of misconduct, did the respondent have reasonable grounds to sustain that belief and at the time at which they formed that belief had carried out as much investigation into the matter as was reasonable in the circumstances it does not have to be a counsel of perfection but nevertheless has to be reasonable.

16. The next question is; was the dismissal fair i.e. was it within the range of reasonable responses open to an employer. In that respect I do remind myself it is not open to me to substitute my view as to what I would have done, so returning to Section 98(4) the correct approach from me to adopt in answering the questions in applying Section 98(4) a Tribunal must consider the reasonableness of the employers conduct not simply whether they The Tribunal consider the dismissal to be fair. In judging the reasonableness of the employers conduct a Tribunal must not substitute it's decision as to what was the right course to adopt for that employer, in many though not all cases there is a band of reasonable responses to the employers conduct within in which one employer might reasonably take one view another quite reasonably take another. The function of the Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of a reasonable response which a reasonable employer might have adopted, if the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. If across the spectrum of reasonable employer's sanctions some would dismiss and some would impose a sanction short of the dismissal then dismissal falls within the band and is fair.

CONCLUSION

17. In this case that the Claimant made the comments, she accepts that, it is clear that those comments were in breach of the Social Media Policy. It is clear that the Claimant's Facebook Profile applies to the policy it is ongoing, the Claimant did not review her Facebook Profile in the light of the new policy. It was linked to family and friends and there was nothing to stop those family and friends forwarding those comments open to a wider audience. The Claimant gave no real explanation for her comments at the disciplinary other than to say she did not realise her profile was linked to the respondent and her comments were not aimed at the respondent despite what was said, and that the matter was private and that Ryan Starkey would know what the conversation concerned. That was subsequently investigated

prior to the appeal stage by Mr Curley and Mr Starkey was unable to throw any light onto the matter as to what the Claimant was referring to. So clearly the first three parts of the Burchell test are satisfied, on the face of it there is misconduct, there is a breach of the Social Media Policy and the respondent had reasonable grounds to sustain that belief. There was a reasonable investigation, so was it within the range of reasonable responses test I repeat it is not for me to substitute my view as to what I would have done. The Claimant was aware of the Policy and one assumes she read it, she must have been aware what was and what was not allowed. The Claimant would have been aware of the consequences if she breached that policy despite this her profile referred to her position within respondents as an operator and dogsbody, it was clearly a description of her job with respondent clear to see it was derogatory and insulting if not to the respondents certainly to her colleagues occupying the same position. There is then that reference to that bloody place and the need to hurry up and sue them and pissing myself laughing. In the absence of an adequate explanation from the Claimant which was sadly lacking the respondents were entitled to believe that these comments were aimed at the respondent. In fact it is only today that the Claimant has advanced any form of explanation as to why those comments were made and that today they were not aimed at the respondent. Amongst other things the company viewed the Claimants behaviour as a breakdown in trust and cited that quite clearly in the dismissal letter in conjunction with the comments that had been made in breach of the Social Media Policy. I repeat that it might be that one would dismiss and another would not dismiss. It may be seen as harsh but the respondents taking account of the Claimants long service and clear record nevertheless dismissed for a clear breach of the Policy and that would fall within the range of a reasonable response open to an employer. The dismissal was therefore not unfair and the dismissal was not wrongful.

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Employment Judge Postle, Norwich

Date: 28th April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.