EMPLOYMENT TRIBUNALS

Claimant: Mr J Jarvis

Respondent: Department for Work and Pensions

HELD AT: Manchester **ON:** 30 August 2017

BEFORE: Employment Judge Ross
Mr R W Harrison
Mrs J A Newsham

REPRESENTATION:

Claimant: In person
Respondent: Mr A Weiss of Counsel

JUDGMENT having been sent to the parties on 4 September 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent from 1 March 2015 as an executive work coach. He was dismissed on 7 October 2016 for gross misconduct related to the post made on a Facebook account on 24 July 2016. He appealed against his dismissal but was unsuccessful.

2. The claimant brought a claim to this Tribunal on the basis that he was automatically unfairly dismissed for being a member of an independent trade union and/or he had taken part in the activities of an independent trade union. There was no dispute that the claimant was a trade union representative for the PCS trade union. There was also no dispute that on 24 July 2016 when he was at home, absent

from work on sick leave sick, he had shared a post on Facebook in the terms set out at pages 180-181.

3. That post at pages 180-181. It was agreed it is a spoof news report. It is entitled “BBC breaking news”. It appears on a page where the claimant is identified as a PCS representative at UK Civil Service. Under “breaking news” says:

> “Gaming giants Nintendo team up with the Government and hide hundreds of Pokeman in the Jobcentre in a bid to get all the lazy bastards to actually go in there.”

There is a picture of a number of people wearing casual clothes who appear to be benefit claimants and a woman who appears to a reporter.

4. There is no dispute that the claimant had not specifically commented on that post but it had been shared with the people who had access to his PCS page. The claimant explained he used that page to communicate with PCS members. He did not know precisely how many people viewed the post.

5. There is no dispute that following a complaint about the post by a member of staff, the respondent conducted an investigation. The respondent considered the post inappropriate and the caption offensive. The respondent holds an Electronic Media Policy and Standards of Behaviour Policy which warns that an individual can be dismissed for a post that the respondent considers to be inappropriate and work related. The claimant was invited to a disciplinary hearing and was dismissed.

6. We heard from the dismissing officer Mr Gerard, the appeal officer Mr Lapping and the claimant. A statement was provided to the Employment Tribunal from the branch secretary for PCS West Lancashire(Department of Work and Pensions) , Mr Vargerson, but he did not attend so we attached very little weight to that statement because he could not be questioned about it.

The Law

7. The claimant has less than two years’ service so the Tribunal has no jurisdiction to hear a claim for unfair dismissal pursuant to s95 and s98 Employment Rights Act 1996.

8. The claim is brought pursuant to s 152(1)(a) and s152(1)(b) Trade Union and Labour Relations(Consolidation) Act 1992.

Issues

9. Can the claimant show the dismissal was for a reason prohibited by s152(1)(a) or (b)? The claimant has less than two years service so it is for him to provide prima facie evidence that he was dismissed for a prohibited reason, then for the respondent to produce evidence to the contrary.

Applying the law to the facts

10. The claimant did not suggest at his dismissal hearing or at his appeal hearing that the reason he was subjected to disciplinary action was because of his trade union membership or his activities.

11. In his claim form to the Employment Tribunal the claimant appeared to suggest that the very fact the facebook post to which his employer took exception was made in his capacity as a trade union representative because it was shared on his PCS page was sufficient to show that his dismissal was trade union related within the meaning of s152(1)(b). We a find that that cannot be so. We are satisfied that the wording of section 152 (1) (b) suggests that the claimant must be engaged in an activity that actually relates to his trade union. We find that what occurred on this occasion was that the claimant was sharing a joke with those who accessed his PCS facebook page but that content was not union related and we are not satisfied, therefore, that this was a trade union related activity.

12. We are conscious that the claimant is a litigant in person so we considered any evidence that the claimant might be relying on to suggest that his dismissal was trade union related.

13. Bev Glenn, who was a former manager of the claimant, was asked by the dismissing officer as to whether or not she was in a trade union. We find the only reason the dismissing officer asked that question was to distinguish between a friend request on Facebook mentioned in her statement at page 194 and to ascertain whether that request was made through the claimant's private page on Facebook or whether it was made through the claimant's PCS page. We find there is no suggestion that the enquiry contains some sort of animus against the claimant because of his trade union activity.

14. We considered the timing of events. We find that the claimant, after he had been invited to an investigation meeting about the Facebook post, on or around 4 August, presented a grievance against his line manager.p229-230. We find towards the end of that document he complains that she was hostile to him in his role as trade union representative.

15. The dismissing officer accepted that he had had sight of that grievance letter so he was aware of it. We rely on his evidence that it did not feature in his decision to dismiss the claimant, not least because there was no discussion at the dismissal hearing of any trade union activity on the part of the claimant in relation to that particular manager. Neither was there any evidence of the type that the claimant suggested in answer to one of the Panel member's questions: none of that evidence was suggested at the dismissal hearing or the appeal hearing when one might have expected it to if the claimant felt that was the real reason at the time as to why he was dismissed.

16. The same situation occurred at the appeal. Mr Lapping accepted that he was aware of the grievance letter but by that stage the grievance hearing had taken place (p244-255).It had been dealt with by a different manager, Ms Helen Griffiths. We rely

on Mr Lapping's evidence that the fact the claimant had complained about his line manager did not feature in his decision that the claimant was unsuccessful at his appeal hearing.

17. The claimant relied on various procedural matters as rendering his dismissal unfair. The Tribunal is not satisfied they relate to his contention that the real reason he was dismissed was because of trade union membership or activities. However if there were significant procedural irregularities it perhaps could cause the Tribunal to conclude that the reason relied upon by the respondent was in some way not genuine and that the claimant can show that the real reason was actually something else. So we have turned to look at those alleged procedural irregularities

18. The claimant relied on the fact that he did not attend at the investigation meeting. First of all we are satisfied that the claimant was able to give a full explanation as to the circumstances surrounding the Facebook post at the disciplinary hearing. We find is no specific requirement for an employee to attend an investigatory hearing, but even putting that to one side we rely on the "keeping in touch" notes that the claimant was due to return to work. We find if he had communicated to the respondent that he wanted a short postponement then it was likely it would have been granted given the respondent had rearranged the investigatory meeting on an earlier occasion.(P184) However such a request was not made by the claimant. In any event the respondent did give him an opportunity to make written representations as well as the opportunity to put his side in full at the disciplinary hearing, so we are not satisfied that that failure to attend an investigatory amounts to an irregularity.

19. The claimant repeatedly referred to a failure by the dismissing officer to complete a template, and there is reference in the documentation to a template to be completed and we heard from one of the witnesses that from memory the template was a tick list.

20. What is most important from a Tribunal's point of view is that the dismissing officer both at the time and at the Tribunal gives a clear account of the real reason why the claimant was dismissed. We find Mr Gerrard to be a witness who was clear and careful. We find there was a very clear account in the detailed decision letter to the claimant as to why he was dismissed, and a clear account was given to the Tribunal. Accordingly the failure of the dismissing office to complete a template or tick list in relation to his dismissal is not significant.

21. Insofar as the claimant was concerned about failure to consider different types of penalty we are satisfied that Mr Gerrard considered which type of penalty to issue. We rely on his discussion with the respondent's HR department reflected by the document at page 277(a) and (b).

22. The claimant said there was an alleged procedural irregularity in the delay in communicating the decision to him until 7 October. We are not satisfied that that this amounts to a procedural irregularity. If (and we are not) the Tribunal was considering this as a ordinary unfair dismissal case the relevant question would be whether a reasonable employer of this size and undertaking could have delayed in communicating the decision. We find the disciplinary hearing took place on 29 September. We find Mr Gerrard reflected on the evidence and consulted HR about

the range of penalties on 3 October and wrote to the claimant by letter dated 5 October (p277A), which the claimant received on 7 October. We find a delay of that nature can not be regarded as a procedural irregularity.

23. The claimant also relied on an inconsistency of the failure of the respondent to suspend him and the fact that he was then finally dismissed. We find, having regard to our industrial experience, it is not uncommon for an employer to permit an employee to continue working and then dismiss for gross misconduct. We accept the evidence of the dismissing officer that no decision was taken to dismiss until all the evidence had been considered and in those circumstances we find no inconsistency in a dismissal where the claimant was not suspended.

24. Finally the claimant relied on an alleged inconsistency of outcome in comparison with others. We are not satisfied that that did amount to an inconsistency. It is for a reasonable respondent to give an explanation of why it has treated individuals in different ways and we find there was an adequate explanation by the respondent at the appeal stage.(p228 and paragraph 6 Mr Lapping's statement)

25. We turn to another argument raised by the claimant. The claimant is convinced, he says, that the post that he made was not a joke at the expense of benefit claimants. Obviously he is entitled to hold that opinion but ultimately it is for his employer to consider how a reasonable person may have viewed that post. We find, looking at the matter objectively, the employer is entitled to consider that a reasonable person could construe that post as a joke at the expense of benefit claimants. We find it is therefore reasonable for the employer to consider the post inappropriate.

26. We find none of those alleged irregularities give any substance to the claimant's argument that actually the real reason he was dismissed was because of any trade union activities or membership and we are not satisfied the claimant has established a prima facie case.

27. However in case we are wrong about that we turn to scrutinise the respondent's reason for dismissal.

28. There is no dispute the claimant made the relevant post. The claimant agreed he was aware of the respondent's Electronic Media Policy (p146-163) and the respondent's standard of behaviour. (p118-145).We find the respondent's policy at page 127 paragraphs 30-32 makes it clear that if a post is considered inappropriate disciplinary action can be taken by the employer that could lead to dismissal. The claimant was aware of the guidance on social media which states "avoid making any kind of personal attack or tasteless or offensive remarks to individuals or groups-ie anything that would cause offence to a reasonable person"p213

29. We find Mr Gerrard conducted a disciplinary hearing with the claimant and took his evidence into account. We find Mr Gerrard concluded the post was wholly inappropriate and had the potential to embarrass the respondent and bring it into disrepute. He considered a variety of penalties. When considering which penalty was appropriate he took into account that the claimant showed no remorse for his

actions: indeed he argued there was nothing wrong with the post and said it was not an error of judgement.(p212)

30. Accordingly we find the real reason the respondent dismissed the claimant was because he placed a post on facebook which was considered wholly inappropriate and had the potential to cause offence. Therefore his claim that he was automatically unfairly dismissed for being a member of an independent trade union and/or he had taken part in the activities of an independent trade union fails.

Employment Judge Ross

Date 9 October 2017

REASONS SENT TO THE PARTIES ON
11 October 2017

FOR THE TRIBUNAL OFFICE

[AF]