EMPLOYMENT TRIBUNALS

Claimant: Mr D Atherton

Respondent: Bensons Vending Ltd

Heard at: Manchester **On:** 23 October 2018

Before: Employment Judge T Ryan

REPRESENTATION:

Claimant: Mr S Flynn, Counsel
Respondent: Mr T Wood, Counsel

JUDGMENT having been sent to the parties on 31 October 2018 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. By a claim presented to the Tribunal on 15 June 2018 the claimant brought complaints of unfair dismissal and breach of contract, namely a failure to pay notice pay. The respondent defended both complaints.

2. I heard evidence on behalf of the respondent from Mr Haselden, the Managing Director, and Ms Pedley, the Financial Controller, and the claimant gave evidence on his own behalf. I was provided with witness statements from all three witnesses, a bundle of documents to which I refer by page number and a List of Issues.

Findings of Fact

3. I make the following findings of fact:

4. The claimant's employment with the respondent started in April 2012. His continuous employment began in August 2001 and was maintained by a transfer from Britvic via Kuehne & Nagel.

5. The respondent is a small company of which Mr Haselden is the Managing Director and Ms Pedley is the Financial Controller.

6. The respondent had a practice of giving a discretionary Christmas bonus gift to its employees. Initially these were in the form of bottles of alcohol. The respondent accommodated the preference of some employees to have a voucher of similar value, but it accommodated the claimant's request to have a cheque which he could donate to a charity of his choice. That had gone on for some 5 or 5 years, but in 2017 the respondent decided to reduce the value of the Christmas gift which had become £50 per employee per annum. It reverted to the gift of a bottle of alcohol due to financial constraints. That being announced, 2 members of staff apparently expressed a preference for a voucher or a non-alcoholic drink, and that was accommodated.

7. The claimant and another employee complained about it. They did so in the workplace, in the warehouse and in the office. They did so in sufficiently strident terms that other employees came to Mr Haselden and reported that the claimant and his colleague had been voicing dissatisfaction about the Christmas bonus, and they had been verbally aggressive about Mr Haselden both in the warehouse and in the front office. Mr Hasleden was also informed that there had been comments posted on Facebook instigated by the claimant's colleague, Simon.

8. At a later stage it was discovered that the claimant had allegedly made these comments: "We've all just bought Ken a new dog with our Christmas bonus!!!." subsequently, "He spends a few grand on a new dog then we get told 'no bonus this year' but we can have a bottle!!!" and in a later post again, "Well, he can stick his bottle where the sun doesn't shine because I refuse to be insulted in this way!!!".

9. The claimant himself did not further identify who he meant by "Ken", but he was posting on the site of his colleague, Simon Minshull, who had first posted "Just when you thought staff morale couldn't get any worse, hey fucking presto #insult #disgusted", then a picture of Ronald McDonald and the comment, "The only difference between McDonalds and where I work is McDonalds has only one clown running the show." This prompted acquaintances of Mr Minshull to ask if he was ok. That promoted the first of the three comments by Mr Atherton about "sticking the bottle where the sun doesn't shine". It is after that that Mr Atherton appears to have posted the "just bought Ken a new dog", and then when somebody only said they only got "six mince pies between the three of us", and another ex employee had said, "you're kidding aren't you" the comment by Mr Atherton, "No, he spends a few grand on a new dog". Mr Minshull in that context then re-posted a comment about "rather be drinking a bottle of piss than accept the insult".

10. On 14 December 2017 Mr Haselden, in the presence of Mr Bradley, the Operations Manager, had a conversation with Mr Minshull, who was apparently a warehouse supervisor. A record produced to me today indicates that on that occasion he told Mr Minshull that an engineering supervisor and other members of staff had advised him about the comments and advised as well that the reference to managers being clowns was unfair. He told Mr MInshull he would

be suspended. He would carry out an investigation and when completed he would contact him. Mr Minshull accepted he had made the comments regarding the managers but not ones which attacked Mr Haselden personally. He made it clear that he was uncomfortable regarding that content. Mr Haselden said he would checked the Facebook for content and download it for future reference. He said that two hours later Mr Minshull contacted him to apologise for the comments and to confirm he did not agree with Mr Atherton's personal attack on him.

11. On 15 December 2017 Mr Haselden conducted a meeting with the claimant to investigate the allegations. The notes are at page 71. It was clear this was an exploration of the issues rather than a disciplinary meeting but Mr Bradley, the Operations Manager, was in attendance as a witness. The claimant said he felt aggrieved regarding the withdrawal of vouchers. He said he did not need the money or the gift of a festive drink, that customers had given him drink. Mr Haselden said he should have raised the matter with him by a grievance or directly. Mr Atherton said that Mr Haselden was not in the office that day so he could not formally establish a grievance, but he agreed he had not made a formal complaint to his line manager, Mr Bradley. The note then reads: "I then asked Darren that during his verbal protests on the Wednesday, both in the warehouse and in the front office, had he referred to me by name as a reason to be dissatisfied, he replied that me may have used my name. I also asked Darren had he tried to persuade other employees to refuse the festive drink offer, he replied that he had not, it was purely their personal choice". The claimant accepted that that was a fair record of what he said on that day.

12. The meeting was adjourned and Mr Atherton was told that the investigation would continue. At that stage it does not appear that he was suspended, although at a later stage he was. According to Mr Haselden's note he investigated the matter afterwards, and apparently it was only Mr Atherton who had refused the offer of the festive drink.

13. On 18 December 2017 after being suspended Mr Haselden conducted a return to work meeting with Mr Minshull. At that meeting he accepted Mr Minshull's apology. Mr MInshull said Darren Atherton had wound him up, and at the end of Wednesday's working day Darren Atherton had said to Simon, "I can't wait to see your Facebook tonight". According to Mr Haselden, he produced a hard copy of the Facebook content which I have quoted above, and Mr Minshull agreed that was his Facebook page.

14. At his meeting on the same day with Mr Atherton, Mr Haselden recorded that Mr Atherton was offered the opportunity to comment regarding the content of the comments on Facebook but he declined to respond. Mr Haselden read out the comments to the meeting. Mr Atherton agreed he had posted them and he accepted that Mr Haselden had copies of all of his comments under his Facebook name. Mr Haselden said that he felt the comments were unjust and untrue, that he disliked the comments about his personal life, to which Mr Atherton replied "So what". Later on, the claimant was to raise an argument that he had replied "so what" not to that but to a statement by Mr Haselden said he was going to consult a solicitor. I was unconvinced that was the reason for the dismissive

comment. I notice that Mr McGrath, the engineer, had written on this document in manuscript to confirm it was a fair record of the meeting.

15. I also had some concern as to the reliability of the claimant's evidence on a further issue.

16. One of the matters that was in issue is whether he was issued with terms and conditions of employment. The claimant having come to the respondent by way of a TUPE transfer, the respondent had obtained employee information from the proposed transferor, that is Kuehne & Nagel. It was set out at page 63.

17. The claimant appears to have started in early May 2011.

18. The terms on which he was engaged, specifically with regard to sick pay, holiday pay and notice pay, were more favourable, Mr Haselden told me and I accept, than the terms that other people, who were doing the same job of vending operator, enjoyed at the respondent. Accordingly, Mr Haselden told me that he amended the respondent's standard contract of employment.

19. He himself signed a copy on 6 June 2011. He said he had a meeting at which he signed it and gave a copy to the claimant. The claimant denies he received a copy. That was the issue.

20. There is then a letter from Mr Haselden to Mr Atherton dated 12 July 2011 saying, "Following our Monday 11th July I confirm that I have no objection to your intention to seek Union opinion regarding your contract with Bensons". He went on to say that the company did not recognise any union for collective negotiations. Mr Haselden also said "the contract was in line with your previous employer and your terms and conditions protected under TUPE guidelines. The terms and conditions are in line with the documents I received from Jeanette Burton HR at Kuehne & Nagel. I have included with this letter a copy of a schedule".

21. The note in manuscript at the top of the document says, "File. First Class" indicating how it was to be sent. The claimant denies that he received the letter or that there was a meeting at which terms of employment were discussed.

22. In my judgment, unless I were to find that these are fabricated documents, it is more than likely that on 12 July 2011 Mr Haselden was accurately recording what occurred on 11 July. That leads me to conclude that the claimant is wrong when he says he did not receive a contract of employment, and I find that he did receive the terms set out in the document in the bundle beginning at page 51.

23. Returning then to the events of December 2017, at the end of the meeting on 18 December 2017 the claimant was told that he would be called to a disciplinary meeting. Because of the unavailability of his union representative and being called for jury service in early January 2018 the meeting was postponed. Notification of the disciplinary hearing was given on 21 December 2017.

24. The invitation to the disciplinary hearing dated 12 January 2018 identifying the actual date of the hearing contains the following material points, that the hearing

was to consider an allegation of gross misconduct: "The allegation is that you made a series of online (Facebook) comments which were derogatory about the claimant's Managing Director, Ken Haselden". The basis of the allegation was that the Facebook postings had come to light. Documents were enclosed. They included the email of Mr Haselden suggesting the 18 January disciplinary meeting, copies of the procedure, minutes of the meetings of 15 and 18 December and a copy of the Facebook comments. There were also letters dated 19 and 21 December 2017, from the union representative for the claimant raising concerns whether it was appropriate for Mr Haselden to conduct the disciplinary hearing and making additional points about disclosure of documents, minutes of the earlier meetings and the suspension.

25. Mr Haselden conducted the disciplinary hearing on 21 January 2018. Mr Bradley and Mr McGrath were present. The meeting was brief. The meeting started with Miss Kemp of the union explaining what her involvement would be. It was recorded that her emails about what I have just recited would be noted on the minutes.

26. The note says, "KH then proceeded to the recollection of previous meeting with DA on 13 December 2017", that must in my judgment be a typographical error for 14 December. There was a summary of the allegation, and it is noted that Mr Atherton had replied to Mr Haselden on that occasion that the comments to other staff members were purely banter.

27. Mr Haselden then went on to discuss the second meeting on 18 December 2017. It was maybe at that point of the discussion that Mr Atherton said previously to the meeting Mr Haselden said he would be seeking advice from a solicitor, which Mr Haselden denied. Mr Atherton said that Mr Haselden mentioned the name of the solicitor he would use, and when Mr Atherton was asked who it was he did not know. Mr Haselden pointed out there were two other people in the previous meeting as witnesses.

28. At that point it appears that Miss Kemp asked if the meeting could be adjourned. The claimant said that he asked for the adjournment. In my judgment it matters not who requested it for there was a brief adjournment.

29. When the meeting resumed Mr Haselden began to discuss the postings on Facebook, "DA asked to speak and apologises for all his comments on Facebook, stating that at 55 years old he is embarrassed and regrets what he had posted". That in brought the meeting swiftly to an end. Miss Kemp then pointed out that Mr Atherton had no previous warnings of misconduct and had always had a previously good working relationship. Mr Haselden concluded the meeting saying he needed to think about it and he would write in due course. There was a conversation about whether Mr Atherton should leave or retain his company mobile phone, and he was told to keep it until further notice.

30. In a brief letter on 22 January 2018 Mr Haselden wrote to the claimant saying that he was dismissing him without payment in lieu of notice or notice, saying that he had considered all the events, the comments posted on the Facebook, "the way you have conducted yourself during the meetings and your apology". He said, "I found several of the comments you made during our meetings and in particular

the comments on Facebook were extremely derogatory, and I have had to consider whether or not I could continue working with you. I have also taken into account the length of your service but this does not mitigate your actions. I now inform you my decision is formally to dismiss you for gross misconduct". The claimant was informed of his right of appeal.

31. By a notice of appeal dated 30 January 2018 he made a number of points in support of the appeal. He raised the following principal issues: a fair and impartial hearing, inconsistent treatment, dismissal for behaviour we should not form part of the allegations, his length of service and record not been taken into account.

32. The appeal took some time to arrange because of the trade union official's availability. The appeal meeting took place on 6 March 2018. It was conducted by Ms Pedley.

33. In the minutes each point raised by the claimant was identified as "reason 1, 2, etc." i.e. as reasons for the appeal. The second reason concerned inconsistent treatment, citing Simon Minshull. Ms Pedley listened to the appeal and said that she needed time to consider it.

34. Ms Pedley is by profession an auditor and had clearly gone through the matters in great detail. Notes (page 95 and onwards) show how she dealt with the matter.

35. With regard to inconsistent treatment, although she did not put this in her outcome letter she had noted that "SM apologised shortly after being challenged regarding his Facebook comments even though he had been suspended. DA had been offered the same opportunity as SM to explain his comments but chose to make no other comment. Apology only offered during the disciplinary meeting".

36. She wrote to the claimant on 12 March 2018 dismissing the appeal. She gave reasons for rejecting the appeal although she did not say why she did not uphold the ground about consistent treatment, simply saying "I am unable to discuss individual cases as this would be a breach of confidentiality". In relation to length of service she wrote this: "Length of service and clean disciplinary record are taken into consideration during all grievance procedures. However, given the nature of the comment and the reluctance to remedy the grievance the relationship between yourself and senior management has broken down irretrievably".

37. Mr Flynn mounted a substantial argument in relation to that point. Ms Pedley accepted that she probably should not have been referring in that context to the two more junior managers because although some of the Facebook posting might have been seen to refer to them that was not a posting made by the claimant but by his colleague. However, it was clear, in my judgment, that in that part of the response to the appeal Ms Pedley was not talking about these matters disjunctively but was talking about the nature of the comments made by the claimant and his reluctance to apologise or recognise that anything he had done was wrong at an earlier stage earlier, as having led, in her judgment, to a

breakdown of relations with management in the general sense, but in effect with Mr Haselden.

The Law

38. Against that background I remind myself that the relevant statutory framework is section 98 and section 98(4). It is for the respondent to prove the reason for dismissal. If it is shown that it is a reason relating to conduct I must be satisfied the respondent had a genuine belief in the conduct alleged, that it had reasonable grounds for that belief, that it was formed after as much investigation into the circumstances as was reasonable, and the decision to dismiss for that conduct was one which a reasonable employer could reasonably make (see **British Home Limited v Burchell [1978] IRLR 379 EAT** and **Iceland Frozen Foods v Jones [1982] IRLR 439**). The test for a fair investigation is only the reasonable range test (see **Sainsbury's Supermarkets Limited v Hitt [2003] ICR 111 Court of Appeal**).

39. I remind myself of the appropriate test by reference to the first paragraph of the judgment of the CA in **Turner v East Midlands Trains** [2013] IRLR 107 where Elias LJ said:

> "It is now a firmly established principle of unfair dismissal law that when an employment tribunal has to determine whether an employer has acted fairly within the meaning of section 98 of the Employment Rights Act 1996, it applies what is colloquially known as the "band of reasonable responses" test. In other words, it has to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the reasonable employer. That principle has been enunciated in the line of cases beginning with *British Home Stores v Burchell* [1978] IRLR 379 and affirmed in cases such as *Post Office v Foley* [2000] IRLR 827, *Sainsbury's Supermarkets v Hitt* [2003] ICR 111, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 and, most recently, *Orr v Milton Keynes Council* [2011] ICR 704."

40. I remind I remind myself as well of the warning given by Mummery LJ in the **London Ambulance Service NHS Trust v Small** case, quoted by Moore-Bick LJ in paragraph 50 of the judgment in **Orr v Milton Keynes Council [2011] ICR 704**, which can be summarised by his words, "…it is not the function of the employment tribunal to place itself in the position of the employer", and in which he quotes Mummery LJ's warning against even the experienced tribunal slipping "into the substitution mindset."

41. Having regard to the issues raised in relation to inconsistent treatment, I considered and discussed with counsel the dictum of Brandon LJ in **Post Office v Fennell [1981] IRLR 221** and the case of **Hadjioannou v Coral Casinos [1981]** where the EAT stated a complaint of unreasonableness based on inconsistency would only be relevant in limited circumstances, one of which is where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss. That was subsequently endorsed by the Court of Appeal in **Paul v East Surrey District Health**

Authority [1995] but that did not refer to **Post Office v Fennell**, nor was **Fennell** referred to by the Court of Appeal in **Securicor Limited v Smith [1989] IRLR 356**, a case in which there were two employees, C and S, dismissed for the same incident, one was successful on appeal but the other was not. The question to be asked was whether the appeal panel's decision was so irrational that no employer could reasonably have accepted it. The Court of Appeal held S's dismissal on the ground there was a clear and rational basis for distinguishing between the cases, namely that S was more to blame for the incident than C.

42. As far as the complaint of a failure to pay notice pay is concerned, the appropriate direction is this. The situation is governed by general contractual principles, since the failure to give notice or pay in lieu on termination would in general amount to a breach of contract. Yet the employer may dismiss summarily, i.e. without notice or the requirement to pay in lieu, if the employee has in fact committed gross misconduct. In that event, the conduct being so serious that effectively the employee evinces the intention no longer to be bound by the contract, the employer is not required to give notice. If there is no requirement to give notice then there can be no entitlement to pay in respect of the notice period. However, where there is a dispute about the conduct, either as a matter of fact or as to its gravity, it is for the employer to prove on the balance of probabilities that the conduct occurred and it was sufficiently grave so as properly to be judged by the Tribunal as gross misconduct. That is a different test from that in unfair dismissal where the employer does not have to prove as a fact that the conduct occurred.

Conclusions

43. So far as unfair dismissal is concerned, the conduct relied upon by the respondent in this case is the posting by Mr Atherton of the Facebook comments which, as Mr Atherton accepted in the course of questioning from me, for all he knew could have come to the attention of anybody who could access Mr Minshull's Facebook site. They were derogatory comments. They were personal about his Managing Director, and at least by implication raised the suggestion of some impropriety, not as grave perhaps as in a somewhat high flown passage Mr Haselden said was tantamount to an allegation of embezzlement of company money, but of some penny-pinching impropriety, namely depriving the employees of the full Christmas bonus so as better to be able to pay himself money out of the company with which to purchase a dog. The comments were in the more Scrooge-like mean-spirited sense of treating himself more favourably than his employees. That general proposition was one which the claimant accepted, and I think Mr Haselden as well as a proper characterisation of what was alleged.

44. Anybody who knew the company, and they could identify it from the fact that Simon MInshull identified himself as an employee there, and the claimant clearly identified with it and therefore was a fellow employee, would be likely to know that it was a small company and that Mr Haselden, "Ken", was the Managing Director. Absent Mr Atherton's postings the complaint was a generalised one, again in unpleasant terms by Mr Minshull but he did not identify anyone in particular.

45. It is suggested at one point by Mr Haselden in his witness statement that it brought the respondent into disrepute. It does not seem to me looking at it objectively that it was likely to do that. Certainly it could bring Mr Haselden into some disrepute. The fact of that conduct is not disputed by the claimant. He accepts he made the postings.

46. Did the respondent have reasonable grounds to take disciplinary against him? They did. The reasonable grounds are the claimant's admission that he had made inappropriate posts connected with his employment.

47. At that point the focus shifts to the decision maker. The claimant submits that it was inappropriate for Mr Haselden (a) being, as it were, the victim of these comments, (b) the investigator, to carry on to become (c), the dismissal officer. Had this been a case in which there was no appeal I consider that that would be a complaint of some merit.

48. The tribunal has to look at the procedure as a whole, and that includes the appeal. Mr Haselden had decided that he would keep Ms Pedley, if I may put it in this way "in reserve" to deal with any appeal. She had dealt with an appeal on another occasion against one of his decisions, and he thought it was more appropriate that he should deal with it at the first instance and leave Mrs Pedley to deal with the appeal.

49. Generally, it is right that people who are not involved in the matter, particularly as being the subject of grievances or unsavoury comments or other action, should be the determining officer, but in a small employer that may not always be possible.

50. Because of that safeguard of the deployment of Ms Pedley, who I am satisfied went about her task objectively and exhaustively and independently, although regrettably for the claimant she came to the same conclusion, I am not satisfied that the determination by Mr Haselden at the dismissal stage rendered the dismissal unfair.

51. The appeal was thorough, it was a re-hearing. Ms Pedley considered all the points that were being raised and came, I am satisfied, to an independent conclusion.

52. What has exercised me is the argument for the claimant that by not applying any sanction to Mr Minshull the respondent, as it were, "set the bar" such that looking at the conduct of both of them and the inconsistency of treatment it would render the decision to dismiss the claimant unfair.

53. The analysis it seems to me that I should adopt is this: so far as what they did is concerned, I find that the conduct is similar but not identical. Mr Minshull's comments were of a general nature but Mr Atherton's were specific and identified Mr Haselden. Mr Minshull tendered an apology within a couple of hours after his first investigatory meeting. Although the claimant was not asked about the Facebook posting at the investigatory meeting he attended, I am certain that he knew that he had posted on it and it would have been open to him at that first stage, it seems to me, to say if he was going to make an apology "by the way,

that's what happened", but he did not do that, and at the second meeting he did not do it either. He made no comment in relation to the postings and I am satisfied said "So what" in answer to them. I am not satisfied that the claimant's account of saying "so what" in relation to Mr Haselden saying he was going to instruct a solicitor was right; it seems to me inherently unlikely that Mr Haselden would say that.

54. At the disciplinary hearing he did tender his apology, but it was done at a time which in my judgment reasonably entitled Mr Haselden, as he said he did, to consider it to be a reluctant apology and potentially, at least, insincere. Furthermore, in describing how they were treated, which was no sanction for Mr Minshull and yet a dismissal for Mr Atherton, in answer to my question as to why he did not conduct any further proceedings in respect of Mr Minshull he said that Mr Minshull's personal circumstances were such that it was not appropriate to do so.

55. Taking that into account along with the guidance of the Court of Appeal in the **Securicor** case, it seems to me the question is: could no reasonable employer have reached these two apparently inconsistent decisions? Avoiding as I must the decision to substitute my decision, I come to the conclusion that no they could not.

56. I therefore ask myself the final question: can it be said that there was a fair procedure overall? For the reasons I have explained I think it was fair.

57. Do I consider that no reasonable employer could reasonably have dismissed in response to this conduct? Given the nature of the small employment, given the personal comments that were derogatory of the managing director, I am unable to conclude that no reasonable employer in those circumstances would dismiss. For that reason, I find the dismissal fair.

58. Turning to the question of breach of contract, failure to give notice pay, I reach a different conclusion as I indicated in the course of argument. Whilst properly applying the test in unfair dismissal leads to one conclusion, it does not say anything about the other. It seems to me that where an employee posts personal comments about what is seen to be the meanness of the employer in relation to a discretionary Christmas bonus, the question is: does that conduct go sufficiently to the heart of the contract as to evince, on the part of the employee who is guilty of the conduct, an intention no longer to be bound by its essential terms?

59. In the course of argument, I postulated that in relation to constructive dismissal when deciding whether the conduct of the employer is so serious that it entitles the employee to be treated as dismissed, recent authorities have indicated that that is a very high hurdle to pass, and the nature of the language, particularly in **Malik v BCCI**, suggests that it is a high hurdle.

60. That being so, that same high hurdle must operate the other way as well. In other words, in order for the respondent to establish that there was in fact gross misconduct by the same actions that high hurdle must be overcome in order to deprive the employee of their right to notice pay.

61. In my judgment this conduct does not cross that hurdle for the reasons I have explained, and in those circumstances, I find that the claimant was wrongfully dismissed. He is therefore, in my judgment, entitled to notice pay but not, because I have dismissed that claim, to compensation for unfair dismissal.

62. Since I have found that the claimant did receive terms and conditions of employment I make no award under section 38 of the Employment Act 2002.

63. I record therefore that the appropriate damages for the respondent to pay to the claimant in respect of breach of contract is the net sum of £5,376.00.

_____

Employment Judge Tom Ryan

Date 9 January 2019

REASONS SENT TO THE PARTIES ON

14 January 2019

FOR THE TRIBUNAL OFFICE