EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Harrison**		
Respondent:	**City Plumbing Supplies Holdings Limited**		
Heard at:	**Southampton** **By CVP**	**On:**	**29 and 30 March 2021**
Before:	**Employment Judge Smail**		

Representation
Claimant: **Miss Harrison (Daughter)**
Respondent: **Miss Dawson (Solicitor)**

JUDGMENT having been sent to the parties on 20 April 2021 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 form presented on 9 November 2019, the Claimant claims unfair dismissal and disability discrimination. The Claimant was employed between 1 March 2004 and 21 August 2019 as a Driver and Branch Sales Assistant at City Plumbing in Southampton. City Plumbing is part of the Travis Perkins Group. He was dismissed for gross misconduct in particular for posting on Facebook the following posts which were made on or about 28 July 2019.

   > *"You will not get your bonus tosser, without me, wanker, wanker, wanker."*
   >
   > *"Cos Caroline Craven and Mark Rude were the best bosses a man could have, I now work for wankers".*

2. These were found to be directed towards the Respondent's management and were found to be in breach of the Respondent's social media policy. A defence that his daughter's boyfriend had written the post was rejected.

3. The Claimant has claimed disability discrimination saying that there were no reasonable adjustments in the disciplinary procedure for his disability and further the decision to dismiss, directly discriminated against his disability. The Respondent does not accept that the Claimant was a disabled person.

<u>Ruling on Preliminary Issue of Disability</u>

4. I have decided to treat as preliminary issues first, whether the Claimant was a disabled person; and secondly, whether the Respondent knew or should have known this.

5. The disability contended for is a mental impairment involving processing of information and communication deficienc;, dyslexia is mooted as is autism. There has been no formal diagnosis and there is no medical evidence, the Claimant accepts, that can be relied upon. There is for example, no record in any GP note of the impairment. Nevertheless, I am invited to find a mental impairment on the balance of probability. Caroline Craven a former manager has given uncontradicted evidence in a witness statement relied upon by the Claimant that the Claimant had no confidence in using a computer. He had struggled to learn to use an e-pod device for recording deliveries. His managers would have to help him use it. They would repeatedly have to log in for him whereafter he could use it. For example, in booking holiday they would have to use the computer system for him. In a disability impact statement, the Claimant tells me that he struggles to read and retain information. He is not able to keep up to date with the latest technologies. His social skills are lax and he can bury anxiety and lack of knowledge in behaviour such as loud outbursts. On the other side of the coin, it is not disputed that the Claimant has made a great number of posts on Facebook from his smart phone, he plays computer games and the Respondent relies upon a video taken by the Claimant on his phone after dismissal where he manifestly takes delight in the burning with petrol of an effigy of one of his managers, accompanying it with a range of obscenities.

6. I observed at the time that there was a question as to the probative versus the prejudicial value of this piece of evidence bearing in mind it came into existence after the dismissal. The Respondent submits that it shows competence with a smart phone for videoing an event, and to that extent that is right.

7. The Claimant accepts he never told anyone at the Respondent that he believed he was disabled with a mental impairment. The Claimant's case is they should have worked it out for themselves.

8. Disability is defined by s6 of the Equality Act 2010 in this way: a person has a disability if (a) he has a physical or mental impairment and (b) the impairment has a substantial and long-term effect on his ability to carry out normal day-to-day activities. Substantial means more than minimal. Long-term means lasting or likely to last twelve months. The Claimant's case is that he has always been like this.

9. The burden on this part of the case to prove disability is on the Claimant on the balance of probabilities. I am not persuaded that the Claimant does prove first, that he has a mental impairment; and secondly, that it had more than trivial effect on day-to-day activities. There is some evidence that he was slow to learn how to use a computer, but he does use it. He plays computer games, he uses his smart phone to post on Facebook and record videos. There is insufficient evidence adduced by the Claimant for me to infer the interference with day-to-day activities and then to infer in turn that he has a mental impairment. I do not have evidence that he struggled to communicate effectively. The Respondent may have refused to be party to commissioning a psychological report. This would not have prevented the Claimant from investing in one if he thought it worthwhile. I do of course appreciate such a report would be costly. However, the psychologist would have no entry in any GP record to place any reliance upon in reviewing the matter and the Claimant's history. On balance I find the Claimant was not disabled or in any event that he has not proved that he was disabled.

10. Even if I were wrong about that, there is no basis really at all for me to find that the Respondent did or should have known this.

11. Further, I confess to struggling to see the relevance of any of this when the fundamental issue in question, I suspect, is whether the Respondent had reasonable grounds for believing that the Claimant had posted the Facebook posts in a derogatory manner against the managers in question.

12. To conclude first, the Claimant does not prove he was disabled: being slow to learn computers is not enough when it is clear that he did use computers, he used the smart phone to post entries on Facebook and to record videos. Secondly, and in any event, there is no basis for me to find that the Respondent did or should have known, that he had the mental impairment contended for.

Unfair Dismissal?

13. I turn then to the question of unfair dismissal. I acknowledge, of course, that this was an undignified and sad way in which to end a 15 year employment. The issues are as follows:
    (i) First, was misconduct the reason for dismissal?
    (ii) If so, were there reasonable grounds for the belief?
    (iii) Was there a reasonable investigation following a fair procedure?
    (iv) Was dismissal within the range of reasonable responses?

The Law

14. The tribunal has had regard to section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By section 98(4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

    This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 (EAT) as involving the following questions:
    (a) Was there a genuine belief in misconduct?
    (b) Were there reasonable grounds for that belief?
    (c) Was there a fair investigation and procedure?
    (d) Was dismissal a reasonable sanction open to a reasonable employer?

    I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 (CA) that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT) to the effect that the starting point should always be the words of s. 98(4) themselves; that in applying this section an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the

employment tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course for that of the employer. 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, whilst another quite reasonably take another. The function of the employment 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 reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal is outside the band, it is unfair.

Findings of Fact continued

15. James Carnell, the Branch Manager in Winchester was brought into sit on the disciplinary. He found the Claimant had committed misconduct in the form of posting the comments on social media that I have already made reference to earlier in the Judgment. The comments he found were defamatory, detrimental, threatening, harassing, offensive or disrespectful to members of the Travis Perkins family which included colleagues. Self-evidently the posts were that. He found that the bonus post referenced the branch management because the management get bonuses based on the performance of the branch. He found that that post was aimed at the local managers in Southampton. He found that the Claimant was responsible for the post by which he meant the Claimant had written them. He noted a change in position and therefore inconsistency on the part of the Claimant. There was an initial explanation that the Claimant had been drunk when posting one of the posts. This was later changed to a contention that a daughter's boyfriend had written the post. No boyfriend came forward to support that explanation, no-one came forward to support that explanation, the explanation was rejected on the balance of probability. Under the disciplinary policy, unsurprisingly, posting such comments on social media could amount to gross misconduct justifying dismissal.

16. On 21 August 2019, Mr Carnell decided to dismiss rather than issue for example, a final warning because he was not persuaded the Claimant would not repeat the behaviour. He was not persuaded of this because the Claimant denied responsibility, implausibly. This decision was confirmed on appeal by Dan Stevenson, the Regional Director of Dorset, Hampshire and Berkshire. In an appeal taking the form of a review, he found that Mr Carnell was entitled to conclude that the Claimant had made the posts.

Conclusions

17. Plainly the reason for dismissal was misconduct. There was a reasonable belief that the Claimant had made the posts because the suggestion that anyone else made the posts on the Claimant's phone was unsupported by evidence and implausible. There was a reasonable investigation and a fair procedure. The fact that Caroline Craven, a former employee was not allowed to act as a friend at the appeal when she had done at the disciplinary did not undermine that position. The Claimant was offered an adjournment to get a replacement but he declined it. He did not have a right to bring a former employee, he had a right to bring an existing employee or a trade union representative. In the event, he decided to proceed without

accompaniment, it was his right to do so. The Claimant was given every opportunity to say whatever he wanted.

18. Dismissal, I find, was within the range of reasonable responses. The Claimant did not what clearly he had done; he did not plead guilty, notwithstanding overwhelming evidence that he was responsible for this, having put forward a wholly implausible case that someone else had access to his phone. He did not proffer, for example, an apology. In the circumstances it was difficult to arrive at a sanction other than dismissal.

19. The Claimant made much of whether he knew the social media and disciplinary policies. He had access to them whether or not he read them but in any event you do not need a policy to tell you not to call your bosses wankers in a public forum. You simply do not need a policy about that. The comments were obviously grossly offensive. Accordingly, the claim of unfair dismissal fails.

Footnote

20. Even if the Claimant had established unfair dismissal, I doubt it would have been just and equitable to compensate him, leaving aside the question of contributory fault for the events at the time. Sometime after the dismissal and the unsuccessful appeal, but in advance of this hearing, the Claimant posted and he accepts it was him - there is no issue about it - on Facebook a video of him burning with petrol and abusing an effigy of the Assistant Branch manager in Southampton, Mr Maggs. I have discounted that matter from considering the fairness of the dismissal because, of course, this happened afterwards; but I would have invited submissions as to whether I could rely on it in reducing or extinguishing any compensation on the basis that would not be just and equitable to compensate in the light of that behaviour which I have found troubling.

Employment Judge Smail
Date: 21 May 2021

Reasons sent to the Parties: 24 May 2021

FOR THE TRIBUNAL OFFICE

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