THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Mason	**v**	Nyetimber Vineyard Limited

Heard at: London Central **On**: 2-3 February 2017

Before: Employment Judge Baty

Representation:
Claimant: Ms N Cunningham (Counsel)
Respondent: Mr R Owen-Thomas (Counsel)

RESERVED JUDGMENT

1. **The claimant's complaint of breach of contract succeeds.**

2. **A total award of <u>£24,233.44</u> is made, payable by the respondent to the claimant, which comprises:-**

   2.1 £19,386.75 (damages for breach of contract); and

   2.2 £4,846.69 (25% uplift for unreasonable failure to comply with the ACAS Code).

RESERVED REASONS

The Complaint

1 By a claim form presented to the Employment Tribunal on 10 October 2016, the claimant brought a complaint of breach of contract in relation to his notice pay. The respondent defended the complaint.

The Issues

2 It was not in dispute that, other than in circumstances where the respondent was entitled to dismiss without notice, the claimant was entitled to three months' notice of termination of employment under his employment contract. It was agreed that the respondent had summarily terminated the claimant's

employment contract with effect from 11 July 2016. The issues for this hearing were as to whether it was entitled to do so. In addition, there was a further issue about the applicability of the ACAS Code on Disciplinary and Grievance Procedures 2013 ("the ACAS Code"). The issues before the Tribunal were, therefore, agreed between the representatives and myself at the start of the hearing and were as follows:-

1. Was the respondent entitled to terminate the claimant's contract without notice or payment in lieu of notice? It was agreed that the sole alleged act of misconduct/negligence relied on by the respondent in this respect was the claimant's behaviour in relation to an enquiry by Mr Christian Philipson ("Mr Philipson") in June/July 2016; and

2. Does the ACAS Code apply in relation to the claimant's dismissal? If it does apply, it is conceded by the respondent that the ACAS Code was not complied with and that a 25% uplift should be made on any award made to the claimant in respect of his breach of contract claim (if successful).

3 However, in his submissions, Mr Owen-Thomas conceded that the ACAS Code did apply and that, should the claimant be successful in his breach of contract complaint, the 25% uplift should apply. I did not therefore have to determine the second issue above.

4 Furthermore, during the course of the hearing, the representatives liaised amongst themselves and agreed that, should the complaint of breach of contract be successful, the amount due from the respondent to the claimant would be as set out in the claimant's schedule of loss which had been provided to me at the start of the hearing. This provided that the compensation for breach of contract was £19,386.75 (net) and that, having added in a 25% uplift in relation to the ACAS code, the total amount payable would be £24,233.44.

<u>The Evidence</u>

5 Witness evidence in the form of witness statements was provided from the following:-

For the claimant:

The claimant himself; and

Mr Jonathan Boobyer, who had worked as a Regional Account Manager at the respondent from around 1 July 2014 until around 18 December 2015.

For the respondent:

Mr Craig Havard, the Respondent's Business Services Manager from 4 July 2016 onwards;

Mr Eric Heerema, the Chief Executive Officer and owner of the Respondent; and

Mr Seamus MacCormaic, the Respondent's Interim Finance Manager from January 2016 onwards (and Permanent Finance Manager from August 2016 onwards).

6 Ms Cunningham and Mr Owen-Thomas confirmed at the start of the hearing that Mr MacCormaic's evidence was agreed and would not be challenged and, consequently, Mr MacCormaic did not therefore need to and did not attend the Tribunal to give evidence. All of the other four witnesses did attend the Tribunal and were cross examined on their evidence.

7 An agreed bundle in two volumes numbered pages 1-544 was produced to the hearing.

8 I read in advance the witness statements and any documents referred to in the respondent's statements. Ms Cunningham informed me at the start of the hearing that, particularly given that the claimant's statement was lengthy, it was not necessary for me, in the interests of time and proportionality, to read the documents in the bundle which were referred to in the claimant's statement and that, where necessary, I would be taken to these in cross examination. I proceeded on that basis.

9 A timetable for cross examination and submissions was agreed between the representatives and myself at the start of the hearing. Although both representatives exceeded their time estimates for cross examination slightly, the timetable was otherwise adhered to and it was possible to complete the evidence and submissions within the two days allocated.

10 Both representatives produced written submissions, which I read before hearing their oral submissions.

11 As the evidence and submissions were completed part way through the afternoon of the second day of the hearing, there was not enough time for me to consider my decision and give that decision with reasons during the hearing, so I reserved my decision.

12 Before beginning her cross examination of Mr Heerema, Ms Cunningham indicated that she was intending to cross examine him briefly on issues to do with the manner in which he treated staff generally and the claimant in particular. Mr Owen-Thomas objected to this on the grounds that these issues were not relevant. He said that he had deliberately avoided cross examining the claimant on some of the areas of his witness statement which concerned this issue, which he considered were not relevant to the issues before the Tribunal. Ms Cunningham stated that the reason that she considered that the line of cross examination she wanted to pursue was relevant was because of the question of whether the claimant ought to have

escalated the enquiry from Mr Philipson to Mr Heerema or not and whether he was intimidated from doing so. I accepted that this could potentially be relevant to the issue. I agreed, however, that, if Ms Cunningham took this line of cross examination, it may, as Mr Owen-Thomas suggested, be necessary for him to have the claimant recalled to ask further questions on these issues of the claimant. It was agreed between the representatives and me that, if this became necessary and Mr Owen-Thomas wished to take this course of action, he could do so.

13 Part way through Mr Heerema's evidence, on the morning of the second day of the hearing (Mr Heerema was the last of the witnesses to give evidence), Ms Cunningham sought to commence this line of cross examination. Mr Owen-Thomas objected on the grounds that it was irrelevant. Ms Cunningham submitted again that it was relevant because the manner in which she alleged Mr Heerema treated his staff generally and the claimant in particular was relevant to the question of whether the claimant ought to have escalated the Philipson enquiry to Mr Heerema and, she submitted, because of the treatment, it was not surprising that he did not escalate it.

14 Mr Owen-Thomas submitted that, from his recollection, it was not part of the claimant's pleaded case. Ms Cunningham submitted that there was no need for the claimant to have pleaded this specific piece of evidence and that all that was required was for facts to be pleaded in the claim form and not this evidence (she accepted that this argument was not specifically set out in the claim form).

15 I considered the submissions made by both representatives and decided that Ms Cunningham should be entitled to pursue this line of cross examination with Mr Heerema. My reasons for this were as follows:-

1. I considered that it was potentially relevant to the reason why the respondent maintains that the claimant's actions amounted to gross misconduct/gross negligence (one of which was that the claimant did not tell Mr Heerema promptly about the Philipson enquiry);

2. I accepted that the line of cross examination and the evidence it may lead to was a matter of evidence and that therefore the fact that it was not specifically pleaded in the claim form did not prevent this being put in cross examination; and

3. Finally, Ms Cunningham had stated that this section of cross examination would be only a brief section question, so it was proportionate to allow it.

16 Ms Cunningham duly proceeded. In the end, Mr Owen-Thomas did not seek to have the claimant recalled to ask him further questions on these issues.

The Law

17 An employer will be entitled to dismiss an employee summarily (i.e. dismissal without notice or payment in lieu of notice following a repudiatory breach of contract by the employee). Cases concerning repudiatory breaches by employees typically concern dishonesty, disobedience or negligence. In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA).

18 The employer must be able to prove that there was a repudiatory breach in order to justify summarily dismissing an employee without incurring liability for wrongful dismissal. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct; the Court or Tribunal must itself be satisfied both that the employee committed the misconduct, and that it was sufficiently serious to amount to repudiation (Shaw v B and W Group Ltd EAT 0583/11).

19 The degree of misconduct/negligence necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for a Court or Tribunal to decide. In Briscoe v Lubrizol Ltd [2002] IRLR 607, CA, the Court of Appeal approved the test set out in Neary and anor v Dean of Westminster [1999] IRLR 288, ECJ (Special Commissioner), where the Special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment".

20 I was also referred to certain other authorities by Mr Owen-Thomas, the following of which are relevant.

21 Mr Owen-Thomas referred me to Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, which is authority that the employee should be expected to exercise all the skill and care that would be expected of a reasonable employee in the position he holds (in other words, in the claimant's case, that the standard of care expected of him should be judged in the light of his position as Head of Sales).

22 Furthermore, Mr Owen Thomas referred me to the case of Worrall v Hootenanny Brixton Ltd UKEAT/0381/13, which is authority that, where an employee is guilty of gross negligence or gross misconduct, either is sufficient to lead to a finding that summary dismissal was warranted.

Findings of Fact

23 I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

Background

24 The respondent is a market leading producer of English sparkling wine, employing about 59 people at the time of the claimant's dismissal. The respondent's chief executive officer ("CEO") and owner was, at all times material to this claim, Mr Eric Heerema. Mr Heerema moved to live abroad in April 2015. In March 2016, Mr Calum Wilson, a Management Consultant, joined the respondent as Mr Heerema's "right hand man". Mr Heerema conceded in cross examination that Mr Wilson worked very closely with him and could act on his behalf (albeit that that did not mean that Mr Wilson was running the company or deciding everything at his discretion). However, in a written staff announcement of 14 March 2016, Mr Heerema stated that, in the light of the fact he was now abroad most of the time and that it was not easy to remain as fully involved with all day to day activities in the company, he had appointed Mr Wilson to become his "right hand man".

25 The claimant commenced employment with the respondent as Head of Sales with effect from 8 December 2014 and remained Head of Sales until he was summarily dismissed by the respondent with effect from 11 July 2016. The claimant was employed on a salary of £127,500 (which was the highest salary paid to any employee of the respondent). Under his contract of employment, the claimant was entitled, except in circumstances justifying summary dismissal, to three months' notice of termination of employment.

26 Under the respondent's disciplinary policy and procedure, which did not form part of any employee's contract of employment, there was included the following:-

"**13. Examples of gross misconduct**

13.1 Gross misconduct will usually result in dismissal without warning, with no notice or payment in lieu of notice (summary dismissal).

13.2 Below is a list of examples of gross misconduct; it is neither exclusive nor exhaustive:

…

(d) Serious neglect of duties.

(e) Serious and unreasonable failure to comply with instructions or directions given to the employee …"

27 On 6 July 2015, the claimant was informed by letter that he had successfully completed his probationary period. However, as time went on, Mr Heerema began to have concerns about the claimant's performance. Some of these concerns were expressed in the claimant's annual appraisal conducted around January 2016. By April 2016, Mr Heerema and Mr Wilson were actively considering whether or not the claimant had a future with the company, as is evident from emails of that date between them.

28 Mr Craig Havard joined the respondent as a consultant on 4 July 2016. Mr Havard is a solicitor and became the respondent's Business Services Manager. On Mr Havard's first day of employment, 4 July 2016, Mr Wilson spoke to Mr Havard about the claimant, explaining that both he and Mr Heerema were disappointed in the claimant's performance, and asked Mr Havard to consider whether the respondent could dismiss the claimant. Mr Havard reviewed the claimant's employment contract and concluded that the respondent could dismiss the claimant on three months' notice at any time as he would not have two years' service until December 2016. He provided his advice in writing by email to Mr Wilson and Mr Heerema on 6 July 2016.

29 It is against this background that the events set out below took place.

Pricing

30 The respondent's prices are generally set by reference to an agreed price list, which designates two potential prices for a wine, Tier 1 and Tier 2, with Tier 2 being a standard price and Tier 1 a discounted price. If the claimant was agreeing a sale of wines, he would do so by reference to this price list, although there was scope for setting bespoke prices for orders of wine if the Tier 1 and Tier 2 prices had first been unsuccessfully offered.

31 On 31 May 2016, the claimant sent an email to Mr Heerema, copied to Mr Wilson, seeking approval of pricing for three products which the respondent was launching in the coming months, namely half bottles of Rose (non vintage); Jeroboams of Classic Cuvee 2009; and Blanc de Blanc 2007 magnums ("BB07 Magnums"). This was because there were as yet no Tier 1 or Tier 2 pricings in place in relation to these three products. The three products were new products of the respondent and, as there were no Tier 1/Tier 2 pricings yet in place, the claimant required specific approval from Mr Heerema on pricing before he could agree orders for these products with any client. These three products together would approximately represent 1% of the respondent's turnover when launched.

32 In order to provide Mr Heerema and Mr Wilson with all of the necessary information to determine pricing for these three products, the claimant attached a detailed PowerPoint presentation detailing estimates, margins, retail margin estimates and so on.

33 Mr Heerema replied by email the next morning with various clarifying questions. The claimant replied with the requested information on 6 June 2016 and further email correspondence followed (although no agreement was reached on the pricings).

34 By an email of 7 June 2016, Mr Heerema suggested to the claimant that they discuss the following week when Mr Wilson was back.

35 By a subsequent email of 7 June 2016 (copied to Mr Wilson), the claimant stated to Mr Heerema that it would be great if they could approve the pricings as soon as possible as he was aware the respondent already had customer interest in both the Jeroboams and the Rose half bottles so he was keen to communicate pricing on these as soon as possible. However, no decision was forthcoming.

36 By email of 8 June 2016 to Mr Heerema (copied to Mr Wilson), the claimant attached an updated presentation with relevant background information on proposed pricing which he stated that he hoped could be used as the basis for discussion the following week upon Mr Wilson's return. He stated that he thought that a phone call/face to face would be the most efficient way of aligning on these, so that they could then communicate pricing/start selling.

Philipson Wines Ltd

37 The respondent's distributor for its products in Denmark was Philipson Wines Ltd ("Philipson Wines"), whose founder, owner and chief executive officer was a Mr Christian Philipson. Denmark was an important market for the respondent. However, the respondent, and Mr Heerema, had up until this point been disappointed with Philipson Wines' achievements in selling the respondent's wine to the Danish market. Whilst the market was important, the respondent was nevertheless open to the option of selecting another distributor if Philipson Wines continued to underperform.

38 By way of background, the respondent had an interest in the destinations to which its wines ultimately went. It did not want its wine to end up on the so called "grey market"; rather it wanted the wine to end up being used by high end outfits such as Michelin starred restaurants.

39 In emails between Mr Heerema and the claimant on 7 and 8 June 2016, there had been discussion regarding Philipson Wines. In those emails, Mr Heerema had expressed the view that Philipson Wines did not perform well; that he did not think the respondent should offer its very special old vintages "like 1992" to Philipson Wines; that the respondent needed to place those wines at the very best places PR wise; and he therefore asked the claimant to confirm not to offer those wines without Mr Heerema's approval. In the emails, there was further discussion about keeping the option of selecting another distributor open. In a further email of 8 June 2016 to the claimant, Mr Heerema emphasised to the claimant that:-

"Just offering these so special old vines the easy way, to anonymous consumers, customers of an underperforming distributor misses the point of how I have been building our brand all those years!"

40 The claimant replied to this email on 8 June 2016 that he would have thought that an account like "Geranium (3 star Michelin)" (which is in fact the only 3 star Michelin restaurant in Denmark) was exactly the type of account where the respondent would want the older vintages to be listed. He agreed that Philipson Wines had been underperforming against expectations. However, he stated that, before discarding the respondent's three year partnership with Philipson Wines, he really wanted to see what the new Philipson management team could do for them over the coming months (there were two new managers at Philipson Wines aside from Mr Philipson himself).

41 Mr Heerema replied to this email on 8 June 2016 somewhat sceptically and stated that:-

"Before we commit to anything we need to see THEIR plans as to convince us that in spite of gross underperformance staying with them is justified and I don't find much about that in the info?"

Enquiry from Christian Philipson

42 On 12 June 2016, the claimant received an email from Mr Philipson which stated:-

"I have an urgent demand! How much more 2007 BdB can you supply we would like to have 6-1200 bottles more for some very big Horeca accounts?"

"Horeca" means "Hotel, Restaurant and Catering".

43 On 13 June 2016, the claimant replied to Mr Philipson by email:-

"Thanks as always for your note but as you know we have now moved onto the BdB 2009 since March this year. As such, we have no remaining stocks of 2007 and certainly nothing like in the quantities you are referring to.

Can we propose the BdB 2009 instead perhaps? In my view it is a far superior wine so can't see what the issue would be. Please let us know.

Also, can I ask what Horeca clients we're referring to? Just a bit surprised that we struggled with this wine for quite a few years in the On-Trade in Denmark and now we have no problem at all selling it in such huge quantities!

Many thanks"

44 The claimant was surprised at the nature of the order from Mr Philipson in view of its size, particularly in comparison with the previous history which Philipson Wine had had in struggling to distribute the respondent's wine in

Denmark. He was also sceptical because of the failure of Mr Philipson to identify the end user and the reference to only "very big Horeca accounts". As noted, it was a concern for the respondent generally if there was a risk that its product may in fact be distributed on the grey market. In cross examination, Mr Heerema candidly admitted that the claimant was right to be suspicious about the genuineness of the order at this stage. This explains the claimant's immediate request to Mr Philipson as to the identity of the Horeca clients.

45 On 13 June 2016, Mr Philipson emailed the claimant as follows:-

"This is a positive problem what can you offer for vintage 2007 75 cl or and 150 cl?

At this moment my guys have tried 2009 please let me no swift what you can offer in 2007? You will be very happy/proud about the name, more to come …….

Waiting for you ☺"

46 Again, at this point, Mr Philipson had not told the claimant the identity of the end user. The claimant's suspicions therefore remained.

47 The claimant replied to Mr Philipson by email on the same day, 13 June 2016:-

"Good news – can offer BdB 2007 in magnum – let me know quantities. FYI: wont be available u til next month.

Bad news – we are totally out of 2007 in 75cl (but I know you prefer magnums anyway!)

Thanks"

48 The claimant had, therefore, confirmed that, as was the case, the respondent had no more BB 2007 in regular (75cl) bottles. However, it did have BB 2007 in magnum (150cl) bottles. As noted previously, this was one of the three products in relation to which the claimant was waiting for confirmation on pricing from Mr Heerema/Mr Wilson.

49 On the same day, 13 June 2016, Mr Philipson replied to the claimant by email:-

"Great!!! At what price can you offer (only for Michelin restaurants listing)????"

50 The following day, 14 June 2016, the claimant replied to Mr Philipson:-

"Will come back to you later this week with confirmation.

Many thanks"

51 The reason why the claimant wrote this was because he was still awaiting confirmation of the prices for BB 2007 magnums from Mr Heerema/Mr Wilson.

52 The claimant did not tell Mr Heerema or Mr Wilson about the enquiry from Mr Philipson.

53 On 14 June 2016, Mr Heerema postponed the planned call with the claimant and Mr Wilson regarding pricing until Thursday 16 June 2016.

54 On 16 June 2016, in the call with Mr Wilson and Mr Heerema, Mr Wilson challenged the assumptions behind the claimant's pricing proposals. Resolving that issue would depend on some work which Mr MacCormaic was doing.

55 On 17 June 2016, Mr Wilson left a voicemail for Mr MacCormaic saying that he wanted Mr MacCormaic to help the claimant with some pricing. Later that morning, Mr Wilson, Mr MacCormaic and the claimant had a call. The claimant indicated that the matter was urgent and that he needed the information. The claimant subsequently reminded Mr MacCormaic that he needed it on virtually every subsequent occasion on which Mr MacCormaic bumped into the claimant in the office. Mr MacCormaic agreed to try and get something to him sooner. Over the following several weeks, the claimant asked Mr MacCormaic, both by email and verbally, for an update. As time progressed he asked more frequently and became persistent as he needed the information. He was asking Mr MacCormaic several times a day.

56 On 17 June 2016, Mr Philipson emailed the claimant again as follows:-

"Any news on the subject?

Have a nice weekend and holiday"

57 Mr Philipson was, therefore, aware that the claimant was about to go off on holiday.

58 The claimant was duly away on holiday from the end of 17 June 2016, returning to work on 27 June 2016. On that day, his first day back, he chased Mr MacCormaic again via email. His email sought information on pricings for all of the new products, although he added in brackets at the end of the email "(especially Jeroboams)". That email was copied to Mr Wilson.

59 On 28 June 2016, the claimant had his weekly meeting with Mr Wilson where they covered multiple topics including pricing. The claimant enquired as to where they had got to and Mr Wilson told the claimant that finance (i.e. Mr MacCormaic) was still working on it.

60 On 30 June 2016, the claimant chased Mr MacCormaic again by email.

61 On 1 July 2016, by email, the claimant chased Mr MacCormaic again. Mr MacCormaic replied by email the same day that he should be able to give him a "revised multiplier end of day Monday". "Monday" would have been 4 July 2016.

62 On 2 July 2016, in the evening, Mr Philipson emailed the claimant as follows:-

"How are you?

Have you forgotten this e-mail?

Could you give me a reply?"

63 On 4 July 2016, the claimant replied by email to Mr Philipson:-

"Promise we haven't forgotten this point. But still awaiting approval from Eric on this.

Please bear with us ..!

Many thanks"

64 Mr Philipson replied by email to the claimant later in the morning of the same day, 4 July 2016, as follows:-

"Hi James,

We can't wait for ever when will you reply?"

65 The claimant then responded by email to Mr Philipson on the same day, 4 July 2016, as follows:-

"I know – and I can't do any more than I already am to get confirmation of a price! ☹

Thanks"

66 Mr Philipson replied to the claimant shortly thereafter on 4 July 2016 as follows:-

"Should i ask Eric?

This is for a 3 star M REST!

????"

67 The claimant replied to Mr Philipson by email shortly thereafter on 4 July 2016 as follows:-

> "No – I am chasing myself.
>
> If you don't have an answer by Thursday, then please feel free to go to Eric directly, but I assure you I should have an answer by then …
>
> Thanks"

68 On the evening of 4 July 2016, the claimant chased Mr MacCormaic again asking if there was any news. Mr MacCormaic replied shortly thereafter saying that he had sent his workings to Mr Wilson earlier that day (4 July 2016).

69 On Tuesday 5 July 2016, the claimant had his weekly meeting with Mr Wilson at 10am. He once again raised the topic of pricing and asked if matters had been finalised or approved. Mr Wilson confirmed that he had now received the information from finance but that it was still not yet approved. The claimant told Mr Wilson that at that point the sales team had several important customers desperately waiting to place orders for all three products in respect of which the pricing was outstanding, including the Classic Cuvee Jeroboam, Rose half bottles and the BB07 in magnum.

70 At no point throughout this process, however, had the claimant told Mr Heerema or Mr Wilson that he had a specific enquiry from Mr Philipson. The claimant's evidence for not having done so was for a number of reasons as follows:-

1. The claimant had multiple clients awaiting pricing on more than just the BB07 Magnums (including Chichester Festival Theatre for Rose half bottles and Harrods for Classic Cuvee Jeroboams) and, although Mr Heerema knew that there were clients waiting he had not asked at any stage for their identity or the size of their orders. The order from Mr Philipson in question, whilst unusually high for a Michelin Star restaurant, was relatively small and, put in context, twelve hundred bottles represented 0.36% of the claimant's annual sales target;

2. The claimant had already mentioned that the respondent had various confirmed orders, so there was an urgency for all the products in question (not just the BB07 Magnums);

3. The BB07 Magnums were not available to be released until the end of July so in the claimant's view the BB07 was the lowest priority out of the three products; and

4. Based on Mr Heerema's emails of 7-8 June 2016 (referred to above) Mr Heerema had given the claimant strict and clear instructions not to offer

Philipson Wines any special vintage products (of which BB07 Magnums were one) without Philipson Wines having first produced "their plans" and, as far as the claimant was aware, Philipson Wines had not produced their plans by then.

71 On 6 July 2016 at 7.48am, Mr Philipson emailed the claimant again asking simply:-

"Any news?"

72 At 7.59am the same day, 6 July 2016, the claimant texted Mr Wilson, asking whether there was any update and stating in his text:-

"Under increasing pressure from customers to provide them with pricing of a new product and as such keen to get it signed off this week. Thanks, James"

73 Mr Wilson replied later in the morning saying:-

"Hi James – we have the draft figures, I aim to get them to you later today."

74 In the early afternoon of 6 July 2016, the same day, the claimant reverted to Mr Philipson via email as follows:-

"Nothing to report. I have chased (again) today.

You have my word that you will be the first to know as soon as I have confirmation of the pricing for the BdB 2007 in magnum.

Many thanks"

75 Mr Philipson's reply, later in the afternoon of 6 July 2016, by email to the claimant, was as follows:-

"Dear James,

How are you? I have waited long for an reply from James now sorry to disturb you but this very urgent for a 3 star danish Michelin restaurant. Could you organise that I get a prompt reply?"

76 A couple of minutes later Mr Philipson sent the same message in an email to Mr Heerema:-

"How are you? I have waited long for an reply from James now sorry to disturb you but this very urgent for a 3 Star danish Michelin restaurant. Could you organise that I get a prompt reply?"

77 Underneath that email to Mr Heerema were, as is the way with email chains, all of the emails between Mr Philipson and the claimant from 12 June 2016 onwards to that point.

78 Mr Heerema, on 6 July 2016, immediately forwarded the email chain to Mr Wilson and to Mr Havard. His covering email to them stated:-

> "Please see below the emergency call on me by Christian Philipson, the founder/owner of our distributor in Denmark.
>
> This is a massive order of 600 to 1,200 bottles of BB, very significant given their poor sales of Nyetimber!
>
> James did reply actively but since around 16th June he has held off over numerous emails by Mr Philipson.
>
> And to make matters worse he lies by saying that he has to wait for my approval while he hasn't asked me once about this, something that damages my reputation as I know Mr Philipson!
>
> This is incredible and could almost indicate obstruction by James versus the interest of the commercial interests of his employer, as well as an activity to deliberately damage the reputation of his boss!
>
> It shows that we can't wait much longer with our intentions. In the light of Craig's email of this afternoon, could we construct this as a reason for immediate dismissal without the right for him of three months notice pay?
>
> I will answer Mr Philipson first thing tomorrow morning."

79 As noted previously, by 6 July 2016, Mr Heerema was considering dismissing the claimant in any event. Mr Havard's advice regarding dismissing the claimant had been delivered by email to Mr Heerema on 6 July 2016 only a couple of hours before Mr Heerema circulated the Philipson email chain to Mr Wilson and Mr Havard.

80 By email in reply to Mr Heerema on 6 July 2016, Mr Wilson stated:-

> "I feel sure that James's stated defence will be that he is waiting for [pricing] details for the 07 Magnums from Seamus. This is no defence in my opinion since with an order on the table, he knows for non standard pricing he comes to us, and has done so before. This is what he should have done back in June. …"

81 Early on the morning of 7 July 2016, Mr Havard replied by email to Mr Heerema and Mr Wilson. As he admitted in cross examination, he had, before his reply, read only the email chain between Mr Philipson and the claimant but had not done any further investigation beyond that. His email of 7 July 2016 states:-

"We can be ready to dismiss James for gross misconduct (without notice or pay in lieu of notice) this morning. I will consider properly first thing in office, e.g. would be good to check if he asked Seamus about the price by email or in person – either way, his lying about asking you, Eric, is gross misconduct and should suffice to enable dismissal on that ground. Still need to consider the bigger picture, i.e. (amazingly) is it in Nyetimbers' best interest to dismiss today? Might want to check his diary etc before deciding on the timing.

Btw, this damages yours and Nyetimbers' reputation whether you know Mr Philipson or not, hence why I say this is gross misconduct – any delay in dismissal is purely for our benefit. …"

82 On 6 July 2016, the claimant emailed Mr Heerema, copying in Mr Wilson and Ms Fee Campbell, the Respondent's Marketing Manager, in relation to an unrelated matter concerning a delivery to Clarence House. His email stated:-

"Dear Eric,

Please note that we have received the order from Clarence House and will arrange delivery for next week (Monday 11th).

I have proposed the following:

Wine, Classic Cuvee (2010 vintage)

Pricing: £22.68 (equivalent to Tier 2 + VAT).

Please let me know if you are ok with the above and/or if there is anything else that is required for this very important sales order."

83 This order was for a much smaller amount in terms of volume than the Philipson enquiry (the Clarence House Order was for 72 bottles of the respondent's standard Cuvee). However, Clarence House was a known prestigious client as end user and this was a confirmed order. This was why the claimant not only wrote to Mr Heerema about it but also copied in Ms Campbell as Marketing Manager, given the prestigious nature of the end user. By contrast, the Philipson enquiry was only at enquiry stage (albeit it was potentially for a much higher quantity of wine) and the claimant had suspicions about the nature of the enquiry and the risk that it may have been for the "grey market", given Mr Philipson's seeming reluctance to identify the end user and the contrast between the amount of wine potentially required and the previous performance of Philipson Wines in relation to the respondent's products.

84 The claimant was subsequently called into a meeting on 11 July 2016. He was offered, and rejected, a settlement agreement under which he would receive his notice pay in two instalments the following October and January, subject to the respondent's being satisfied "at its sole discretion" that he had not acted in breach of a non disparagement clause in the settlement agreement. Having rejected the settlement agreement, he was summarily dismissed.

85 The termination letter gives details of other alleged failures on the part of the claimant as well as the issues concerning the Philipson enquiry. However, as noted, the respondent does not rely on those other issues in these proceedings as entitling it to dismiss the claimant summarily and relies only on the issues concerning the Philipson enquiry.

86 The respondent, primarily through Mr Wilson, subsequently agreed an order from Philipson Wines, including in respect of BB 2007 magnums, worth several thousand pounds.

Conclusions on the Issues

87 I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

88 At the very beginning of his oral evidence, Mr Heerema confirmed that there were essentially three complaints in relation to the Philipson enquiry: that the claimant had failed to respond promptly; that he should have escalated the enquiry to Mr Heerema; and that he had lied in telling Mr Philipson that the reason for the delay was that he was waiting for confirmation from Mr Heerema. In addition, in his written submissions, Mr Owen-Thomas submits a fourth issue, namely that the claimant allegedly failed to deal with Mr Philipson in a courteous manner.

Lies

89 I accept Ms Cunningham's submission that this the most serious of the allegations made about the claimant's behaviour. It involves an allegation of dishonesty rather than merely an allegation of grossly negligently failing to carry out his job. It is evident from Mr Heerema's email of 6 July 2016 that this is of key importance to him as he is concerned about dishonesty and its consequent effect on his reputation as he knows Mr Philipson. Furthermore, this is also reflected in Mr Havard's email in reply of 7 July 2016 where Mr Havard focuses in particular on the claimant's alleged lying, which he states to be gross misconduct which should suffice to enable dismissal on that ground.

90 I have no doubt that Mr Heerema and Mr Havard at the time genuinely thought that the claimant was lying (and may indeed prior to the commencement of this hearing have thought the same way). If you read just the chain of emails between the claimant and Mr Philipson alone and in isolation, that is the impression which one could get. That is, of course, what Mr Heerema and Mr Havard did before dismissing the claimant (as Mr Havard admitted that no further investigation was carried out). On such a reading, the first of the emails which the respondent maintained contained a lie, namely the claimant's email on 4 July 2016 stating that he was "still awaiting approval from Eric on this", could be read as if the claimant was suggesting that he had told Mr Heerema about the potential enquiry from Mr

Philipson and was waiting for his approval of the order per se, when in fact the claimant had not told Mr Heerema or anyone else about the enquiry from Mr Philipson.

91 However, when one looks at the full picture, including all the incidences during which the claimant was chasing, variously, Mr Heerema, Mr MacCormaic and Mr Wilson for confirmation of pricing on various products (including 2007 BB Magnums), it is clear that what the claimant was referring to in his email was approval on pricing for the product; he was not suggesting that he had told Mr Heerema about Mr Philipson's enquiry and was waiting for approval for that. As it was the case that he was waiting for confirmation of the pricing, there was nothing untrue about what he said in that email; ultimately Mr Heerema was the one who would, either himself or through his right hand man Mr Wilson, make a decision on this and this was what the claimant had been waiting for. The claimant was telling the truth in this respect.

92 Whether Mr Philipson may or may not have interpreted the email, in the absence of any further information, as meaning that the claimant was waiting for approval from Mr Heerema of the Philipson enquiry generally and that the claimant had spoken to Mr Heerema specifically about it is irrelevant; the question is about what the claimant meant when he wrote that. The claimant had, as is evident from my findings of fact above, continually chased numerous individuals for the pricing and that was what he was waiting for. That approval was to come from either Mr Heerema or his right hand man Mr Wilson. To say that he was waiting approval from Mr Heerema was therefore true. Furthermore, the subsequent references in the claimant's emails to Mr Philipson to his chasing or having chased were all true, as is clear from the fact that, as set out in my findings above, the claimant had chased for pricing at least on each occasion when he told Mr Philipson that he had done so.

93 In this respect, in his evidence, Mr Heerema conceded that it was not a lie that the claimant was waiting for approval (of pricing), but said it was a lie to suggest that he, Mr Heerema knew about this order or request. However, as set out above, on a full reading of the emails in their context, the claimant was not suggesting that Mr Heerema knew about this order request; he merely meant that he was waiting for pricing approval, which Mr Heerema conceded was true.

94 Furthermore, the comments in the email of 4 July 2016 to Mr Philipson that the claimant "can't do anymore than I am already am to get confirmation of a price", whilst hyperbolic, was also true. I accept Ms Cunningham's submission that what this really means is "I am doing all I reasonably can" or "I am doing my best". That was certainly the case. The claimant was indeed chasing the relevant people to a huge extent, as is reflected in my findings of fact above.

95 Therefore, as the claimant did not tell any lies, the respondent had no grounds to dismiss him summarily under this heading.

Dealing with Mr Philipson in a Courteous Manner

96 The only suggestion that has been made in relation to any alleged discourteously on the part of the claimant concerns the first email in reply to Mr Philipson which the claimant wrote on 13 June 2016, and in particular the final paragraph of that email where the claimant asked which Horeca clients they were referring to and commented that he was a bit surprised that they struggled with this wine for quite a few years in the on trade in Denmark and now had no problem at all selling it in such huge quantities.

97 However, I do not consider that this remark was discourteous. It was made against the background of a potential order in which Mr Philipson had specifically not given the name of the potential customer, and where both the respondent and Mr Philipson would know that the identity of the end user was important to the respondent. The claimant was suspicious about the order (as Mr Heerema acknowledged he was entitled to be) and pressed Mr Philipson on the identity of the client. The fact that the potential order was for a large quantity of wine in the light of the fact that the Denmark market had been such a struggle up until then was a further reason to be suspicious. The claimant was perfectly entitled to ask this of Mr Philipson. I do not consider it was discourteous.

98 Even if it could have been phrased better (and I don't accept that it necessarily should have been), the tone of this email does not get anywhere near amounting to gross misconduct or gross negligence such as to justify summary termination.

Delay

99 As is evident from my findings of fact, the reason for the delay in providing Mr Philipson with a price was that the claimant's proposed pricing for the product in question had not yet been approved and that that was out of the claimant's hands. There can, therefore, be no criticism of the claimant in this respect.

100 In terms of the promptness with which he replied to Mr Philipson's emails generally, however, I accept Ms Cunningham's submission that there was little to reproach the claimant with here either. The claimant responded promptly to the initial email of 12 June 2016. On 13 June 2016, Mr Philipson sought a price and the following day the claimant promised to come back to him later that week, believing, as was reasonable at the time, that he would be able to do so. Mr Philipson chased on the afternoon of 17 June 2016, the last day before (as Mr Philipson was aware) the claimant was due to go on holiday. He returned from holiday on 27 June 2016 and, although he carried on chasing for pricing information at that point, he did not reply to Mr

Philipson until Mr Philipson's subsequent email of 2 July 2016 seeking a reply. It would have been better if he had sent Mr Philipson an update shortly after his return from holiday. However, his failure to respond at that point, when he has just returned from holiday, is very far from gross misconduct or gross negligence and is nothing which, either alone or in combination with other factors, could justify summary dismissal.

101 From 2 July 2016 onwards, the claimant was extremely prompt with any replies to Mr Philipson.

102 There were therefore not grounds for summary termination under this heading.

<u>Failure to Escalate</u>

103 This allegation is framed as conduct amounting to gross negligence. The respondent submits that the claimant should have escalated the Philipson enquiry at an early stage to Mr Heerema or Mr Wilson so that a bespoke price could be set.

104 The claimant could have done this. Indeed, once Mr Heerema and Mr Wilson learned of the enquiry, a deal for a sale of wine to Philipson Wine was agreed between the respondent and Philipson Wine thereafter. Furthermore, as I have found, the Danish market was an important market for the respondent (whether its products would be distributed on an ongoing basis through Philipson Wine or through a alternative distributor), so an enquiry for a substantial quantity of wine, such as this one, was potentially important in this context.

105 However, I accept that there were a number of reasons why the claimant did not escalate the enquiry to Mr Heerema or Mr Wilson at this stage, which are relevant to the question of whether or not his failure to do so amounted to gross negligence.

106 However, I deal with one suggestion which I thought was going to be put in submissions by Ms Cunningham but was, in the end, specifically not put forward, namely the suggestion that the claimant might be too intimidated by Mr Heerema to raise such an enquiry with him. As noted, there was a passage of cross examination of Mr Heerema about his management style which, I had understood when I allowed it, was undertaken with a view to the submission that the culture at the respondent and Mr Heerema's management style was such that the claimant may have been intimidated from raising the matter with Mr Heerema. However, that submission was not in the end made. Furthermore, in any event, I do not accept, having seen the emails in the bundle, that the claimant, who was a senior employee on the highest salary of any employee at the respondent, would have been intimidated from raising such an enquiry with Mr Heerema. In any event, he could have raised it with Mr Wilson, and there is no evidence at all he found

Mr Wilson intimidating (to the contrary, there is substantial evidence of normal business dealings between the claimant and Mr Wilson, much of which is referred to in my findings of fact above).

107 As to the reasons why the claimant did not escalate the enquiry to Mr Heerema, firstly, the claimant had numerous enquiries from prestigious clients, including Harrods and the Chichester Festival Theatre, outstanding where he did not yet have pricing information and there is no evidence that he elevated those enquiries to Mr Heerema either. The claimant had a general discretion as to whether or not he agreed prices with the client (if he had the pricing information to do so) or escalated it.

108 Secondly, it would have been unusual for him to speak to Mr Heerema or Mr Wilson about a bespoke price for a product without having first unsuccessfully offered the standard Tier 1 and Tier 2 prices and the claimant's whole difficulty was that those standard prices had yet to be proved. The claimant was clearly waiting for those prices before continuing his discussions with Mr Philipson about the nature of the potential order.

109 Thirdly, the decision about whether or not to escalate a particular enquiry was within the discretion of the claimant's role as Head of Sales. Mr Heerema was asked about the scope of this discretion in relation to Tier 1 and Tier 2 pricing and bespoke prices. Mr Heerema explained that it was not a black and white issue. However, if it was a straightforward sales deal involving Tier 1 and Tier 2 prices, the claimant would not come to Mr Heerema (although he had a discretion to) and, if a customer would not agree to a Tier 2 price and in the claimant's judgment there was no reason to go lower, Mr Heerema said that in those circumstances it was the claimant's discretion to assess when to come to him or not but, if declining the order could damage the relationship with the customer, Mr Heerema would expect the claimant to come to him. He added that it was within the claimant's discretion to decide whether to propose bespoke prices. In summary, however, it was less surprising the claimant did not come to Mr Heerema at that stage when he did not even have the Tier 1 and Tier 2 pricing information, which he was, as is evident from the chasing emails, always expecting to be just around the corner.

110 Furthermore, there were further reasons in relation to this particular enquiry why the claimant did not escalate it.

111 I accept that the claimant was genuinely sceptical about this particular enquiry (this was the claimant's evidence and Mr Heerema himself agreed that the claimant had good reason to be). This was for a number of reasons: the size of the order; because of Mr Philipson's reticence and vacillation about the nature of the end customer or customers; because of the claimant's own knowledge about what the 3 star Michelin restaurant in Denmark could realistically sell; and because the claimant considered that no top end Sommelier would be happy to buy any quantity, let alone such a large quantity, of a wine that was not yet available for tasting.

112 In addition, Mr Heerema had himself very recently expressed his scepticism about Philipson Wines as a distributor in forceful terms. The claimant, who was rightly suspicious about the order himself, had good reason to think that he should explore further the details of this order before presenting the enquiry to Mr Heerema.

113 Furthermore, it was unlikely that the respondent would be willing to allocate to Mr Philipson the kind of quantity he was enquiring about in any event, particularly given Mr Heerema's instruction that Philipson Wines should not be offered any special vintage products.

114 Furthermore, although the enquiry was about a large quantity of wine, it did not in real terms represent a huge order in terms of the claimant's total annual sales target, being only 0.36% of his annual sales target.

115 Mr Owen-Thomas submitted that the claimant knew that he should have escalated this enquiry to Mr Heerema at an early stage and that this was the right thing to do because he had done that in relation to the Clarence House order referred to in my findings of fact. However, that order was in different circumstances; in particular the email which was sent to Mr Heerema and copied into the head of marketing was to confirm that an order had been agreed with a particularly prestigious client; by contrast, the Philipson issue was only at enquiry stage and, as noted, was an enquiry about which the claimant was rightly sceptical.

116 Given the importance of the Danish market, it would probably, in retrospect, had been better if the claimant, when it became clear that there was a delay in the pricing information being supplied to him, had escalated the matter to Mr Heerema and/or Mr Wilson. However, for all the reasons given above, the fact that he did not do so was at worst an error of judgment; it was nowhere near an action which amounted to gross negligence justifying summary dismissal.

117 Finally, whilst I have found that Mr Heerema genuinely (albeit wrongly) believed that the claimant had lied in the email chain with Mr Philipson, I also accept the submission that, in the context of his wanting (before he had knowledge of the Philipson enquiry) to dismiss the claimant in any case, as he asks in his email of 6 July 2016 to Mr Havard, he was also looking for an excuse to be able to dismiss the claimant without having to pay him three months notice or, at least, in a way which would enable him to ensure that the claimant complied with certain other conditions as a condition to being paid his notice pay.

Conclusion

118 As the respondent did not have grounds to dismiss the claimant summarily, the claimant's breach of contract complaint succeeds.

119 A total award in the sums agreed at the beginning of this hearing of £24,233.44 (comprising damages for breach of contract and the 25% uplift in relation to the ACAS Code) is made, payable by the respondent to the claimant.

Employment Judge Baty
17 February 2017