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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr T Heliodore	**AND**	OCS Group UK Limited

Heard at: London Central **On**: 19 & 20 September 2018

Before: Employment Judge Oliver Segal QC
Members: Ms J Tombs; Ms L Simms

Representation
For the Claimant: Mrs Heliodore, wife
For the Respondent: Mr A Johnson, of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

(1) The claim of unfair dismissal is upheld.
(2) The claim of race discrimination is dismissed.
(3) The Claimant contributed to his dismissal within the meaning of s. 123 ERA to the extent of 10%.
(4) In respect of the unfair dismissal claim, the Claimant (who was not in receipt of any state benefits at the material times) is awarded: -
    (a) 2,072.70 basic award;
    (b) £11,101.73 compensatory award.

REASONS

Introduction

1. The Tribunal is grateful to both representatives for their assistance and able representation

Evidence

2. The Tribunal had an agreed bundle of 123 pages. The Tribunal heard oral evidence on behalf of the Claimant, from himself and Mr Felix Akumanyi; and on behalf of the Respondent, Mr Daniel Perez, Mr Stephen Warwick and Ms Holly

Trenholme. The Tribunal considers that all the witnesses were doing their best to assist the Tribunal with truthful evidence.

Issues

3. The Claimant complains that he was unfairly dismissed, the Respondent dismissed the Claimant by reason of alleged gross misconduct. There was a Preliminary Hearing in this case which helpfully identified some of the main likely sub-issues within that context and I do not set them out here. They are set out at paragraph 6 and 7 of the Case Management summary of Employment Judge Spencer on 18 October 2017.

4. The Claimant also relies on the fact of his dismissal as direct discrimination on grounds of his race, being a black Afro-Caribbean (from St Lucia) and he asserts that in that regard there were direct comparators who had been guilty of similar conduct but who had been treated more leniently, in that they were given only final writing warnings, being Mr Jose Goncalves and Mr Antonio Mendes Rosa and Mr Jose Luis Prado.

Facts

5. The Claimant worked for the Respondent since 2010 as an estate cleaner, working on the TMO Kensington and Chelsea contract at a site known as Wiltshire Close. The Claimant had, at least as far as the Respondent was concerned at the material time a good record both as a competent employee and in terms of his conduct.

6. On 6 April the Claimant was working on site with others when he saw a manager Phillip Howell together with people he did not recognise from the client organisation (and one he knew, Mr Akumanyi) coming towards the office. The Claimant had a unlit roll up cigarette which he was about to go off site to smoke. The purpose of the visit from the clients and Mr Howell was to inspect the site.

7. In the past such inspections had taken place with the relevant cleaning operatives in attendance, but on this occasion the client neither expected nor wanted the cleaners to be in attendance. As a result, although Mr Heliodore and his colleague Mr Jose Goncalves began to follow the inspectors, Mr Howell told them not to. At first, they were not sure if he meant that seriously but at least at the second or third time of asking, the clients having made their position clear, it was evident that they should leave and eventually they did so. It is, we find as a fact, the impression of the client that to have the relevant cleaning operatives following them around on the inspection somewhat intimidating.

8. During the course of the inspection there were various issues that had to be attended to, in particular there was glass that had to be cleared away from a children's playground area and Mr Heliodore and Mr Goncalves were at one point involved with that and in that context again found themselves in proximity with Mr Howell and the representatives of the client, Ms Safira Juttla, Ms Sarah Lynch and Mr Akumanyi towards the end of their visit. At this stage an issue arose when it was identified that there was rubbish emanating from a locked bin. Mr Howell asked the operatives to deal with that and the operatives replied that it

was not their job to do so and they could not because it was locked and they did not have a key. There is some dispute as to whether in giving those replies Mr Heliodore in particular expressed himself loudly and/or waived his arms in a slightly agitated way.

9. What is agreed is that at some point during that period he had a conversation with Ms Juttla which may or may not have been overhead by some or all of the other people, when Ms Juttla addressed a couple of questions to him in relation to the position on the ground and he gave her some answers. Ms Juttla alleged - though this was not overheard by anyone else – that in giving those answers the Claimant addressed her as either “babe” or “baby” or “babes” on more than one occasion. The Claimant has always and continues to deny this and in so far as it is relevant the Tribunal is not able to make a positive finding one way or the other, though it will become clear that the Respondent did accept on the balance of probabilities that that had happened.

10. The Claimant - and then shortly afterwards Mr Goncalves after an agitated exchange with Mr Howell - left the scene as it were. Sometime thereafter Ms Juttla and Ms Lynch expressed their concerns about the conduct of the Claimant and to a lesser extent Mr Goncalves, which resulted in emails being written first by Ms Lynch which is at page 69 of our bundle which was then copied to Ms Juttla and then her own email followed at page 70 of our bundle.

11. I am not going to quote at length from those emails, suffice to say that Ms Lynch in brief terms suggests that there had been conduct which she had found intimidating and Ms Juttla in rather longer terms does the same; both identifying in particular the way in which Mr Heliodore had spoken to Mr Howell with Ms Juttla also making the complaint I refer to above about Mr Heliodore calling her “babe”. On the same day as that latter complaint was put in to writing Mr Perez who had been appointed to investigate the issues, spoke to Mr Heliodore in an investigatory meeting on 18 April.

12. By that time Mr Perez had himself in fact witnessed the Claimant and other cleaning operatives on 10 April leaving the premises before their contractual stopping time having signed themselves out as in fact having left only at the end of their contractual shift being 4pm; they in fact left nearer 3pm. That also was something that Mr Perez explored with the Claimant at the investigatory meeting.

13. The 10 April incident happened in the following circumstances, we find. The Claimant and other colleagues had been working until about 3 and then stopped to take lunch, which involved at least for some of them heating food up in a microwave. The microwave was not working that day and, with the blessing of their supervisor who they contacted by phone, they decided to leave an hour early. They changed into their normal clothes and signed out as having worked their full shift. They were about to leave and were on the phone to their supervisor when they observed Mr Perez arriving. They told their supervisor this, who said that in that case they had better remain until 4pm. But having got changed, signed out, and hot having had lunch, they decided to leave anyway.

14. The result of the investigatory interview with the Claimant was that Mr Perez felt that there was a case to answer for potential serious or gross misconduct.

15. That case was heard by Mr Warwick on 27 April. Mr Warwick conducted an interview at which the Claimant was represented not by the trade union representative of his choice but by another trade union representative, Mr Campbel a lay GMB representative. At that disciplinary interview Mr Warwick sought to establish, what happened and certain parts of that interview, which is by no means recorded in full by the note taker, we should refer to.

15.1 Firstly, there is a passage near the beginning which Mr Warwick presses quite fairly Mr Heliodore as to whether he had used the word "babe" the effect of Mr Heliodore's various answers is clearly that he says he did not, that had he done so he would have expected something to be said at the time and had he done so he would have remembered doing so.

15.2 In relation to the incident concerning the bin towards the end of the inspection his answer was to the effect that without the key he could not do anything about opening the bin and that it was in fact Mr Howell who got somewhat agitated at that point rather than himself.

15.3 And then a passage that I will quote in full even though the notes are not verbatim. In relation to 10 April on which the Claimant and others had left earlier than their contractual shift end time Mr Heliodore is recorded as saying this in answer to Mr Warwick's questions

Mr Warwick "You said your supervisor know that you are leaving"

Mr Heliodore "Yes, he knew it. Before Daniel (Perez) came I called the supervisor to tell him that I am leaving"

Mr Warwick "Steve red (sic) from the supervisor statement, said no one called him and he had given no one permission to leave early" [short statement is at page 61 of our bundle]

Mr Heliodore "Ok it is my fault Steve"

16. There is a further passage of questioning followed by an adjournment in the meeting at around 12.15pm the meeting having begun at about 11am during which Mr Warwick gathered his faults and came to a decision - which he communicated when the meeting resumed some twenty to thirty minutes later. He said that he was going to dismiss the Claimant and I quote from the short note of the minute taker. *"Phillip (Howell) said on more than one occasion not to follow them. Inappropriate behaviour, too familiar with the client. Next on the fact having a cigarette in your hand but not lit while following the clients around. Continue reading from the statement allegations. That you were leaving early but signed out at the correct time when your shift was supposed to finish and then said you have permission from your supervisor. Taking all this in to account I do not have any other alternative but to dismiss you for <u>accumulation of gross misconduct offenses</u>*. (emphasis added).

17. Mr Heliodore at some point referred to the fact that others had only got a final written warning and also to the fact that Jose and Felix had heard the relevant conversations and should have been asked about what they had heard. At this Mr Warwick said that he would speak to those two people to see what they had to say on that. He took the decision to go fairly immediately to the site where they were and there asked them in effect a fairly short question, whether they had overhead the Claimant say the word "babe", or "baby" to Ms Juttla or if not whether they were able to say with certainty that he had not done so. Mr Goncalves spoke to Mr Warwick who as a result wrote a short statement for Mr Goncalves to sign that reads

> "I saw a TMO manager call over Tertulien to a bin room area, this was not my area. I did not follow, I did not hear any of the conversation that followed"

Mr Akumanyi wrote his own statement which reads

> "I have been asked by OCS (Steve Warwick) to give a statement about a conversation between Tertulien and TMO member of staff (Safira) in the bin room area, I cannot remember most of the things being said on that day".

18. The letter communicating formally the dismissal is dated 5 May; it sets out the charges - unfortunately taking them from a version of the charge letter which was not in fact sent, but we do not think much turns on that - and then on the second page Mr Warwick set out his findings and I am going to read those

1. *I believe from the statements that you were asked on more than more occasion to not follow the client*

2. *I also believe you did use inappropriate language and this came across to the female client as intimidating*

3. *That you were walking about the contract with a cigarette in your hand even though it was unlit it is still unprofessional*

4. *You admitted leaving work early and even though you said it was with permission of your supervisor you have now admitted this was untrue and you have lied to management regarding this matter*

5. *You admitted to dishonesty defrauding the company by falsifying the signing in and out book*

6. *You did not agree that the first two incidents happened as stated*

Then after a short additional passage perhaps the critical paragraph in which he writes

> *"After very careful consideration I have decided to terminate your employment due to your gross misconduct, your actions have intimidated*

our client TMO bringing the company in to disrepute. Furthermore, you have breached the trust and confidence placed in you by OCS by defrauding the company, breaching policy and procedure and acting in an unprofessional manner which has resulted in a serious complaint being received by our client. I have considered, but do not think it is appropriate that it should impose a lesser sanction or an alternative sanction to dismissal"

19. The Claimant appealed that dismissal ably assisted by or what I understand is the regional GNB representative who composed the letter of appeal and represented him at the Appeal Hearing conducted by Ms Jennifer Webster. We have read the notes of that Appeal Hearing and the Claimant gives a rather fuller account perhaps of what had happened then is recorded in the minutes of the meeting he had with Mr Warwick (but they may reflect in part the fuller notes taken on the latter occasion).

20. As a result of that Appeal Hearing Miss Webster decided to conduct a few further enquiries and spoke to Ms Juttla, Ms Lynch and Mr Howell at some length. We note that from those the following:-

20.1 *Ms Juttla said "he spoke in his dialect as if he was speaking to someone in his family he actually answered a question by saying "nah baby....."*

20.2 *In Mr Howell's evidence he said "he is Caribbean, and they do raise their voice, I am used to it so yes his voice was raised". He was asked whether he recalled Mr Heliodore swearing or using bad language and said "I can't remember".*

20.3 *Miss Webster also spoke briefly to Mr Goncalves who confirmed that the reason the bin was not opened was because there was no key and he commented on the alleged way in which Mr Heliodore had raised his voice etc in these words "yes but that is how he is".*

20.4 Miss Webster also spoke briefly to Mr Akumanyi. We accept Mr Akumanyi's evidence that she asked him two or three very specific questions namely whether Mr Heliodore was following the inspection around, whether he had been smoking, whether Mr Akumanyi had heard Mr Heliodore call Safira Juttla "baby"; and some of the answers to those questions are reflected in the email that Miss Webster created following her telephone interview with him, they do not take matters much further.

21. During this period Mr Goncalves in particular was also subject to a disciplinary process, the charges against him were in some respects identical to those against the Claimant. He was not accused of calling anybody "baby" nor was he accused of lying about whether a supervisor had given him permission to leave on 10 April – though in his case he had previously been warned about a similar incident a few months earlier, otherwise there was a fairly significant

overlap in the charges many of which are worded in identical terms. There were other staff who were subjected to disciplinary procedures to whom the Claimant refers. For the reasons that will become clear later, we do not feel it necessary to record the facts relating to those cases.

22. The Appeal outcome was communicated in a letter of 27 June 2017 and the Appeal was dismissed.

The Law

23. We of course had regard to the statutory provisions at ss.98, 122 and 123 Employment Rights Act 1996.

24. It is common ground that the Tribunal should have regard to the well-known decision in **Birchall v BHS** and focus its attention on whether the Respondent had a genuine belief in the conduct that it held the Claimant to have committed, whether that belief was reasonable in the circumstances and whether those circumstances had evidenced a proper investigation.

25. We are also of course tasked to determine whether the sanction of dismissal was within the reasonable range of an employer's responses given the conduct that they had found.

26. We are rightly reminded by Mr Johnson that the reasonable range of an employer's potential responses extends not simply to the sanction of dismissal but also to the procedure as a whole that the employer saw fit to adopt.

27. Finally, we were referred to the case of **Polkey** and the effect of that decision in relation to a Tribunal deciding a dismissal was unfair by a reason of particular procedural failings.

Discussion

1. Unfair Dismissal

28. We accept that Mr Warwick did have a genuine belief that the Claimant had committed the conduct that he recorded as having found the Claimant had committed in the dismissal letter.

29. We go on then to ask ourselves whether that was a belief reasonably formed and in particular whether there had been a proper investigation in all the circumstances. It is on this point that we first express some significant misgivings.

30. The concern of all the members of the Tribunal begins at the point that Mr Perez does the investigating. Whilst we do not accept there is any significant force in the objections taken to his appointment as the investigating officer by reason of his peripheral involvement in the leaving early incident, we do think there is more force in the suggestion that he should have conducted a fuller investigation in particular in respect of the client personnel on site. He was guided by what they had writing in two cases. Ms Juttla and Ms Lynch and did not try to speak to them. More fundamentally there was a third member of the

client team present throughout and present at least at most of the conversations referred to, namely Mr Akumanyi, and no attempt was made to speak to him.

31. The Tribunal feels that in the context of this particular case where the allegations were of behaving in an unprofessional manner or a manner that caused clients to be concerned or upset – a category of alleged conduct which could range from the trivial to the most serious - the Respondent really was obliged to form a very full picture or as fuller picture as it could of the context and what had happened and how different people had perceived what had happened in order that it could then properly decide the level of seriousness that it ought to impute to any conduct that it had found proved.

32. Mr Warwick was not of course an investigating officer and was not obliged to conduct any investigations before the Disciplinary Hearing that he conducted. However, and we think rightly, he did decide that it was sensible to speak to both Mr Goncalves and Mr Akumanyi following the conclusion of that Hearing. However, having done so we do criticise him for the narrowness of the questions that he asked at that point. We understand and have some sympathy with the fact that the Hearing having been concluded he was loath to reopen the investigation as it were from scratch but having decided to speak to those two men it would have been more sensible we think, and fairer, for the meetings to have been conducted more formally, perhaps on notice, but more importantly for each of them and particular Mr Akumanyi to be given an opportunity to express themselves in more open and complete terms as to what they had observed and how it had struck them on the day.

33. We are confirmed in the view that that would have been a sensible course yielding significant results by the fact that sometime after the dismissal the union representative then representing the Claimant did take a fairly full statement from Mr Akumanyi as to what had happened, that statement is found at page 63 of the bundle and it does give a rather different picture to that provided at least by Ms Juttla and Mr Johnson rightly conceded that had that statement been before Mr Warwick and had he accepted its contents as true, which he was of course not bound to do, then it would have been of influence.

34. We note significantly that in this case it cannot seriously be disputed that the three statements that Mr Warwick and Mr Perez did rely on are not entirely consistent, some of the basic facts are common to all but the impression given by the manager Mr Howell is much less critical of the Claimant's conduct both in terms of how it struck him but also in terms of how it differed from the conduct of Mr Goncalves, whereas Ms Juttla in particular directs most of her criticism to the Claimant alone and in more emotive terms.

35. At the risk of repetition, the Tribunal felt that in circumstances such as these where the conduct might have been, objectively, not particularly serious (or perhaps, objectively, rather more serious), when one has inconsistent accounts it is important to get as full a view as one can of what had happened.

36. The Tribunal also has a concern that at certain points during the disciplinary interview and in particular in relation to the suggestion that Mr Heliodore had lied about having had a supervisors' permission to leave early on April, Mr Warwick

dealt with matters a little too quickly and could and should have explored matters further. Had he done so we are fairly sure that he would have received answers much as the Claimant gave in his evidence to this Tribunal (which we accepted as true and which the effect of which we have set out above at para 13), which would have put a rather different light on the suggestion that he had lied about getting permission and would have led to Mr Warwick taking a rather more lenient view on that point.

37. For all those reasons we do find the investigation to have been flawed. We are conscious of the fact that no investigation is perfect nor should we hold this employer to such a standard. We are also conscious of the legal principal that we have already referred to, that one needs to look at the totality of the investigation and procedure and see whether it is within the reasonable range of what we would expect a reasonable employer to give evidence in the factual circumstances that apply. However, in the particular factual circumstances of this case where the Claimant was, for reasons that will become clear, effectively dismissed for his actions on 6 April - we are all sufficiently uncomfortable with the deficiencies in the investigation to consider that it was not such as we would expect a reasonable employer to have provided.

38. This links in very much to the question of sanction. I have noted that Mr Goncalves was given a final written warning despite having been similarly implicated in much of the conduct on 6 April and all of the conduct on 10 April; moreover, in his case he had already been given a letter by the Respondent three months previously where he had been warned about leaving work early and told that if he did so again he would be subjected to disciplinary process.

39. In circumstances where this particular employer took a relatively lenient view of staff leaving an hour or so early and signing out with the wrong time. it becomes clear that the Claimant would not have been dismissed had Mr Warwick not taken the view that his conduct on 6 April amounted as he put it in his Disciplinary Hearing to an accumulation of incidents of gross misconduct. Bluntly, the Tribunal is not able to accept that such characterisation of Mr Heliodore's conduct on 6 April at least on the hypothesis of a fuller investigation, was within the reasonable range of what a reasonable employer might decide. Although it is not relevant in law per se, our own view is that, on a full investigation, Mr Heliodore's conduct on 6 April would warrant an oral or first written warning.

40. Mr Johnson made much of the fact that OCS is providing a service to a client pursuant to a contract which presumably the client has the ability not to renew or perhaps even to terminate, and therefore the Respondent is in a difficult position where the client has become upset or agitated about the behaviour of any of its employers. We of course accept that. However, there is nothing even in Ms Juttla's statement which indicates that she feels that she could no longer work with Mr Heliodore or that Mr Heliodore should no longer be employed on the contract, and one knows that clients will often say things like that if that is what they think. Had, for instance, the client been reassured that Mr Heliodore had been given a written warning in respect of his conduct on that day and had been told that any repetition of it might lead to his dismissal (and perhaps even had been given some training in addition) the Tribunal is reasonably confident that Ms

Juttla - at least if she had any sense of fairness about her - would have considered that a perfectly appropriate way of dealing with the situation. There is nothing either expressed or implied in the evidence of the Respondent as a whole that indicates that they felt that the client required the most serious sanction of dismissal.

41. As we say, there is an important nexus between the investigation deficiencies and the decision to dismiss; had the conduct found been obviously gross misconduct, then the investigation deficiencies would not have mattered so much; had there not been any investigation deficiencies it would have been less easy to criticise the seriousness of the view that Mr Warwick took of the relevant misconduct. However, at the end of the day we simply do not accept, given the investigation that was conducted and the inconsistences within the evidence in front of Mr Warwick, that a reasonable employer would have taken the view that the conduct on 6 April was gross misconduct.

42. That leaves the final submission on behalf of the Respondent to consider, which is there was a combination of conduct under consideration in Mr Heliodore's case, namely leaving early and falsifying the signing in book on 10 April and the conduct on 6 April, which cumulatively merited dismissal.

43. Given the way in which the conduct on 10 April was dealt with in Mr Goncalves' case - and indeed in another case in which an employee had done the same things three or four times (he also got a final warning) - it seems to us that there needs to be some quality in the conduct on 6 April which elevates it to the level of gross misconduct or at least something close to gross misconduct, to entitle the reasonable employer to move from final written warning to dismissal as opposed to giving a final written warning and another warning of some sort in respect of the conduct on 6 April. And we are of course mindful that much of that of that conduct was also committed, as found by the Respondent by Mr Goncalves who was subject to only a final written warning for all of his misconduct combined on 6 and 10 April.

2. Race Discrimination

44. We can deal with this relatively shortly. The question is whether the Respondent, in effect Mr Warwick, in deciding on the sanction of dismissal did so consciously or unconsciously in part or entirely because of the Claimant's race. There are many ways, as the highest appellate authorities have made clear, of trying to unpick or address that question, but we favour Mr Johnson's approach on this occasion, which is to ask ourselves whether the Respondent would have conducted itself any differently if Mr Warwick had reached the same views as to the conduct committed but that the employee in question had been white or Hispanic.

45. We are all confident that he would have reached the same view (to dismiss) and that his decision to dismiss was not influenced either consciously or unconsciously by considerations of the Claimant's race.

46. We note in passing that, as Mrs Heliodore pointed out, it may be (and we make absolutely no findings on this), that Ms Juttla was so influenced

consciously or unconsciously; we say so only to make it clear that we cannot take that in to account, even were it to be true, in deciding on whether the Respondent was liable for race discrimination.

Remedy

47. Before dealing with the amount of loss we deal in principle with submissions the Respondent made that reductions should be made to the award under the **Polkey** head or on the basis that the Claimant had caused or contributed to his dismissal by his culpable conduct prior to it.

48. In relation to any **Polkey** argument, given that we have found that in the circumstances of the investigation that was in fact conducted the sanction was too harsh, it is, as Mr Johnson conceded, unlikely to be an appropriate case to make such a deduction; that is all the more so given that we find that had further investigation been conducted it would have tendered to lead to a more favourable rather than less favourable view being taken of the Claimant's conduct on 6 April and of his explanation for leaving early on 10 April.

49. In relation to contributory conduct we accept the submission that Mr Johnson makes that even if we find the conduct did not cause the dismissal we are entitled to find that it played some contributory part to it if it was blameworthy and if that causal connection is evident. We find that to some fairly small degree that was the case in this matter we find that Mr Heliodore (quite possibly Mr Goncalves also) could have been more compliant and more respectful to Mr Howell given the presence of the client at the time, even if they had felt that Mr Howell was asking them to do things unreasonably, and they could have been more respectful and courteous in their dealings with the client directly in so far as they had such conversations. We make a reduction for contributory conduct from both the basic and the compensatory award of 10%.

50. Other issues of Remedy were in the end agreed, say for the Respondent's contention that the Claimant had not acted sufficiently to mitigate his loss. The Claimant gave evidence that he had been trying every working day to find a job by as it were knocking on doors, he cannot use the internet, he cannot read and write and he was dismissed from gross misconduct in his last job and finding permanent work proved for a long time impossible. Whilst unemployed he also, mainly at weekends, did some paid painting and decorating work.

51. With the assistance of his wife they got some way through application processes for in particular certain supermarkets and they got job alerts for certain jobs in the cleaning and related sectors but none of them came to anything.

52. He finally got employment through a friend and neighbour and he has started working there last month at what we are told to assume is a similar salary.

53. During the fifteen odd months he was not in work full-time he states that he was earning between one or two days' worth of painting and decorating money at about £70 or £80 a day per week and we make a deduction for £120 per week during the relevant fifteen month period.

54. Those decision of principle having been made, the sums are agreed in the following amount, basic award £2,072.70, compensatory award £11,101.73.

55. the Claimant did not claim and did not receive job seekers allowance or any other state benefit.

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Employment Judge Segal

Dated: 28 September 2018.

Judgment and Reasons sent to the parties on:

1 October 2018

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For the Tribunal Office