Case Number: 2203021/19

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms R Gafari Tijani	**v**	The House of Commons Commission

Heard at: Central London Employment Tribunal On: 19-20 February 2020
Before: Employment Judge Norris, sitting alone

Appearances
For the Claimant: Mr M Akindutire, Lay Representative
For the Respondent: Ms B Venkata, Counsel

WRITTEN REASONS

1 Background

The Claimant worked as a cleaner at the House of Commons from 15 June 2015 until her dismissal in May 2019.

2 Hearing

2.1 The Hearing was listed for 19 and 20 February 2020. On the first day it was agreed that the correct Respondent is as set out above, and then we went through the list of issues in line with the draft prepared by the Respondent's counsel Ms Venkata. I read the bundle and witness statements in the absence of the parties. Following this, Mr Akindutire for the Claimant confirmed that there were no further issues arising.

2.2 I heard evidence from the Respondent's witnesses: Ms Eliza Steffens, Heritage Cleaning Manager, Mr Simon Mansfield, Head of Service Delivery and Ms Megan Conway, Chief of Staff, In-House Services. Ms Steffens was the Claimant's line manager, Mr Mansfield was the dismissing officer and Ms Conway heard the appeal against dismissal.

2.3 During Ms Conway's evidence, the fire alarm sounded and the building was evacuated. On return, the Respondent's case was concluded before we took a lunch break.

2.4 In the afternoon session, I heard evidence from the Claimant. Shortly after we had taken a comfort break at around 15.20, and while she was giving evidence, the Claimant became unwell and was taken by ambulance to the hospital.

Before they left, Ms Venkata handed Mr Akindutire a copy of her written submissions.

2.5 On day two, the Claimant attended and said she had recovered. However, it was agreed there was no necessity for any further cross examination.

2.6 I heard submissions from the Respondent, Ms Venkata speaking to her written document. I then adjourned for the Claimant to read through the submissions in more detail as Mr Akindutire had understandably not had the opportunity to do so overnight. Mr Akindutire then addressed me before Ms Venkata had a brief right of reply.

2.7 During submissions, the Respondent also handed up some materials relating to the Claimant's holiday taken in 2018/2019. I return to the evidence below. I do not set out in full the submissions, but I did have careful regard to what each representative said to me.

3 Issues and the Law

3.1 The claim comprised a single complaint, of unfair dismissal. The Respondent relied on conduct (lateness), which is a potentially fair reason for dismissal pursuant to section 94(1) Employment Rights Act 1996. The Claimant was not convinced that that was the reason, suggesting in her witness statement that her dismissal had been a sham to avoid making her a redundancy payment. She said in her witness statement that she knew Parliament was to be "closed down". I therefore have to determine the reason for dismissal, and the burden of proof is on the Respondent in that regard.

3.2 If I find that the reason was the Claimant's conduct, I must not substitute my own view for whether the dismissal was fair or not, but I must consider whether in all the circumstances, the Respondent acted reasonably or unreasonably in treating conduct as sufficient reason to dismiss, taking into account the Respondent's size and administrative resources. The *Burchell* test is applicable: in other words, I need to be satisfied on balance of probabilities that the Respondent's belief in the Claimant's misconduct was both genuine and reasonable, and based on as much investigation as was reasonable in all the circumstances.

3.3 I must then consider whether the Respondent's dismissal of the Claimant was within the range of reasonable responses. The burden of proof here is neutral. The Claimant's challenges to the fairness of the dismissal are that the decision to dismiss was disproportionate, i.e. it was not in the range of reasonable responses, that she had been told her performance was improving, that others who were similarly late were not dismissed and that her lateness was unintentional. She also contends that she was not given a sufficient response as to why lateness of just a couple of minutes had an impact on the business.

4 Findings

I make the following findings based on the evidence before me:

4.1 The Claimant started work on 15 June 2015. The parties agree that she was a hard-working member of the team of cleaners working on the Parliamentary Estate.

4.2 Unusually, I did not have the Claimant's contract in the bundle. However, I accept the Claimant's corrected evidence that when she began working for the Respondent, her hours of work started at 06.30, but that following a meeting of the cleaning staff, a majority agreed to start from 06.00 and finish at 09.00 at the latest. I heard evidence that the Respondent is under considerable pressure to finish on time before MPs arrive for work. In some offices, the finish time is earlier than 09.00. Further, there is a rubbish collection schedule pursuant to which, rubbish must be bagged up and placed in designated collection points at designated times. The timings and requirement for rubbish to be in the right place at the right time appeared to be common ground between the parties.

4.3 Ms Steffens also said that other issues, such as the BBC or other media outlets filming in the Palace of Westminster, can cause difficulties so that normal routines are disrupted and cleaners have to be moved off other teams to ensure the work is still completed on time.

4.4 This earlier start time was not very convenient to the Claimant. Her principal route to work in the morning was the number 53 bus. The stop is 15 to 20 minutes' walk away from her home. There was another bus – the number 89 - but it took longer. In any case, it appears that the bus she caught most regularly was scheduled to leave the stop at 05.10 and then she was supposed to arrive at 05.40 in time for her start at 06.00, taking into account the need to get through the gates and key in using the Respondent's system "Intellikey".

4.5 However, in December 2017, the Claimant received a first written warning for lateness. I have records in the bundle of the preliminary investigation meeting, which show that the Claimant had been late for work on 17 out of 20 days. She acknowledged this but said she could not run for the bus because she had hurt her leg, but it was now better and she was on time. Although there had been an improvement, however, the chair of the meeting noted that even if the Claimant was only late by five or ten minutes, she was still late.

4.6 In February 2018, further disciplinary proceedings were commenced. There was an extract from the Intellikey system in the bundle, from early 2018. This showed the Claimant, in common with others, arriving late for work. At an investigation meeting with Ms Steffens in March 2018, the Claimant was told she had improved "quite significantly" since the formal warning was imposed but nonetheless, she had been late eight times in the preceding two months. Some of the delays were only a couple of minutes, but others were longer (nine and eleven minutes). The Claimant said she thought these longer delays might be down to her bus being on diversion. Ms Steffens encouraged her to take an earlier bus as Ms Steffens herself said she did, but the Claimant said this would mean she would arrive 30 minutes before her start time and nobody would pay her for the overtime. I note that she did not mention, as she has done before

me, that she had another job working as a cleaner in the evenings. She focused entirely on the fact that if she caught the earlier bus (and assuming it was not also delayed like the 05.10) she would be in work well before her start time.

4.7 On one occasion when the Claimant had been particularly late, it was because she had left her pass at home. Ms Steffens said that she no longer allowed a "grace period" after 06.00, because although the Intellikey system records when employees arrive, they then have to go and get ready, so that even a short delay in arriving could mean that they would be half an hour late starting work.

4.8 I note the Claimant's submission that at the meeting with Ms Steffens, the Claimant did not have a companion. However, I do not accept that this was a breach of the ACAS Code of Practice because firstly, it was not a meeting at which any warning was to be imposed, but an investigation meeting. She was not given a final written warning at this meeting but on 23 April following a disciplinary hearing on 16 April 2018. Secondly, the Claimant was invited to reconvene the investigation meeting with a representative, but she declined.

4.9 At the disciplinary hearing, the Claimant was again asked why she did not get an earlier bus and again said that it would mean she would get into work half an hour before her start time and would have to get up earlier. I accept that the Claimant said she did want to come into work early, finish her job and go home. She was nonetheless issued with a final written warning because despite the improvement that had been seen, there needed to be more consistency and the Claimant needed to arrive on time, ready to start work no later than 06.00.

4.10 There is confusion as between the letter and the notes as to whether the final written warning was on record for 12 or 24 months. I am satisfied that it was 24 months and that the Claimant knew this, as she confirmed it in her oral evidence. Although the Claimant said she had not seen the letter in the format in which it appeared in the bundle (which I accept), I find that she was aware of the final written warning and of her right to appeal, which she did not exercise. It was not argued before me that the final written warning had been inappropriately imposed. I therefore do not go behind that warning.

4.11 I find it was made very clear to the Claimant what was expected of her and that if her timekeeping did not improve, the next stage of the disciplinary process could lead to her dismissal.

4.12 However, the Claimant continued to be late by between two and 33 minutes, so that by 10 January 2019 there had been a further 43 instances of lateness according to Intellikey. Before the matter could be dealt with formally, there were a further seven instances of lateness.

4.13 An investigation took place on 19 February 2019. The Claimant was accompanied by her union representative. Ms Steffans, who conducted the investigation, said that the Claimant had been late more than 50 times in half a year, with lateness of between two and 44 minutes.

4.14 In relation to the latter, the Claimant said she had returned from holiday in February 2018 and had been unwell, but because she knew the team was short staffed with a colleague already on sick leave, she came in anyway. The Claimant said that the clock was not working properly, but Ms Steffans said it had been checked and it was. The Claimant's union representative asked if there was any flexibility over working hours, but Ms Steffans explained that there could not be. Indeed, the union representative appeared to be asking if the Claimant could start work (and be paid) if she came in earlier. This again sits uneasily with the Claimant's assertion before me that she could not start earlier because she needed all her sleep to accommodate her evening job.

4.15 The matter was referred to a disciplinary hearing which Mr Mansfield conducted on 15 April 2019. Again, the Claimant was accompanied by Mr Bickford. Mr Mansfield explained that it is difficult to plan and provide the service with the Claimant's level of lateness and asked what caused it. The Claimant said sometimes she would arrive at the entrance at Carriage Gate and a car would be coming through, so the pedestrian entrance would be closed, or the cleaners have to use a different entrance. She had also forgotten her pass once, which Mr Mansfield said he considered was her responsibility.

4.16 It was noted that if the Claimant caught the 132 bus and then the Jubilee line, she could be in work in good time, but the Claimant said the 132 had been cancelled on the one occasion she had taken it. She said she did not mean to be late and then that perhaps she could get an earlier bus. Following a short adjournment Mr Bickford submitted that there would be an increased cost to taking the bus and the tube. Using a different entrance gate would mean a longer walk through the Palace.

4.17 By letter of 10 May the Claimant was dismissed with notice paid in lieu. Mr Mansfield found that she was on a live final warning for lateness but had not improved and she had been late on "approximately" 50 occasions since the warning was imposed; she had cited entrances being closed and waiting for cars to come through as contributing to her lateness and had said the bus was her only travel option. However, Mr Mansfield found that cleaners need to be on duty and ready to work at their allocated start time, as even being a few minutes late can have a knock-on effect.

4.18 The Claimant has asserted that part of the reason for her complaint of unfair dismissal is that the Respondent has failed to show that there were <u>in fact</u> any knock-on effects on the work. She says that her work could be and was completed within the time allocated and that there were no complaints, for instance that she was still in an MP's office when they arrived, or that she missed the bin collection. Mr Akindutire very properly acknowledged that such incidents would potentially cause problems for the Respondent, if they had occurred. He pointed out however that in fact the Claimant's performance appeared to be improving, and that her standards were generally considered by the Respondent to be acceptable, save in relation to her timekeeping.

4.19 Ms Conway conducted an appeal. She spoke to the managers who had dealt with the matter to that date, Ms Steffans and Mr Mansfield. She also carried out an appeal hearing on 23 July 2019, at which the Claimant was accompanied again by Mr Bickford. The Claimant thought the sanction of dismissal was excessive because she had been told her attendance had improved. The lateness had also been exaggerated. She was just one or two minutes late and sometimes had to wait outside the gate. No disruption had been caused by her lateness. She now took an earlier bus but sometimes still had to walk over Lambeth Bridge if it was on diversion.

4.20 Dismissing the appeal, Ms Conway found however that the Claimant had shown a clear ongoing pattern of lateness despite the live final written warning; although a number of the instances were only one or two minutes, even discounting those, there was still evidence to show that the Claimant had not shown significant improvement; the outcome reached would therefore have been the same. As to the lack of adequate reasons, Ms Conway found that timeliness is a legitimate business need for operational reasons.

5 Conclusions

5.1 I do not accept that it is incumbent on the Respondent to demonstrate that it actually suffered loss or damage as a result of the Claimant's conduct. Mr Akindutire did appear also to accept that it is not for the Respondent to wait to see if there were any actual problems before taking action. I conclude that it cannot be said that no reasonable employer would take action pre-emptively in such circumstances. The Claimant was on a live final written warning for the same conduct. While, unusually, I did not have a copy of the disciplinary policy in the bundle before me, nonetheless, I accept that poor timekeeping is generally an issue considered to be misconduct. In extreme cases, it can be gross misconduct. I am not considering such a case here, but rather, as the Respondent asserts, an ongoing pattern of lateness.

5.2 I accept that on many occasions, the lateness was a matter of only one or two minutes. I do not consider that those should simply be disregarded. I accept the Respondent's submission that it is incumbent on employees to be not only arriving at work but ready to start work from the time they are being paid. In this case, the Claimant should have been ready to start work from 06.00. On a number of occasions in the period leading up to her dismissal, the Claimant had not logged in by 06.00. I accept that this would have meant she would be considerably late in actually starting work.

5.3 The Claimant did know, or ought reasonably to have known, the impact that her lateness would or could have on the rest of her team. I conclude that in fact she did know and hence came into work even when she was ill and even though she arrived 44 minutes late, because of the impact of a colleague's absence.

5.4 I do not accept that the Claimant was treated worse than her colleagues. She was unable to give me the name or names of anyone who had a record equivalent to or worse than hers. Ms Steffens however was able to look at the

list of Intellikey logins and tell me the names of five other employees against whom proceedings were taken. Her evidence was that unlike the Claimant, they all then improved so that none of them was dismissed. The Claimant did not challenge that evidence, which I accordingly accept.

5.5 Nor do I accept that the Respondent dismissed the Claimant in order to avoid having to make her a redundancy payment. Mr Akindutire suggested that there are details of the Palace closure during refurbishment online; they were not in the bundle, but in any case, it did not sound at all plausible to me that the Respondent would dismiss one cleaner years in advance to avoid paying her redundancy and particularly where it did not dismiss the other five who also had poor timekeeping records. There was simply no evidence that the Claimant was scapegoated. On the other hand, there was ample evidence that the Respondent had a genuine and reasonable belief in her lateness. It had the Intellikey records. The Claimant did not deny that she had been late in any case. The authorities confirm that there is a reduction in the amount of investigation that must be done if the misconduct is admitted.

5.6 Instead, the Claimant relied on other factors to suggest the dismissal was unfair. I have already dealt with the question of a differential in treatment with other colleagues and concluded that I am not satisfied there was such a discrepancy. I found Ms Steffens to be a clear and reliable witness, who was able unchallenged to identify colleagues with poor records from the very long lists in the bundle, and I can see no reason why she would have singled out the Claimant for further proceedings if all six of those originally disciplined had continued to come in late. Indeed, I accept Ms Steffens' evidence that she had tightened up the procedures for the morning cleaning team to raise standards, and I consider that she was entitled so to do; this was not unreasonable on her part.

5.7 I have also addressed the issue of the lack of correlation between the potential knock-on effects and any actual impact of the lateness; I have said that it is not incumbent on an employer to prove to an employee that there has been actual damage arising from their conduct, though of course normally there will be. If all the Claimant's colleagues took the same approach and started even one or two minutes late every day, I accept that it would have been highly disruptive to the Respondent; but even when it was just the Claimant, I can see that the Respondent would not know whether she was merely late or whether they would have to find cover for her, and that timings were tight for reasons outside the Respondent's control.

5.8 It is not for the Respondent to come up with solutions for how the Claimant can be at work on time. It is for the Claimant to ensure she is, whether that be by ensuring she has her pass every day and/or that she gets an earlier bus so that if there is even a five-minute delay, she is not late starting work. I accept that it would have been more expensive for the Claimant to take a tube as well as a bus, but her method of travel is again a matter for her and not for the

Respondent. Mr Mansfield went further than he perhaps needed to in suggesting the "bus + tube" possibility.

5.9 The Claimant relied latterly on the closure of entrance gates as being an issue. I accept the evidence of Mr Mansfield that he spoke to Ms Steffans and she told him this was not an issue for the other cleaners in the team, as it would undoubtedly have been if this was a genuine or longstanding problem. I have indicated that the investigation must be reasonable, but it does not have to cover every possible avenue. The fact therefore that Mr Mansfield used his own experience and spoke to Ms Steffans is sufficient in this regard, even though I accept the submission that he might have been coming in at different times of the day when the car traffic was lighter and he did not speak to all the cleaners individually. I cannot accept that the MPs would be arriving at 06.00 however, because the cleaners were starting work then in order to finish before the MPs got there.

5.10 I have to ask myself whether no reasonable employer would have dismissed the Claimant in these circumstances. I did not find Ms Conway to be a very impressive witness, because although I accept the dates in question were some time ago, I would have expected her to refresh her memory and know whether, for instance, the days when the Claimant had been on holiday or otherwise legitimately absent had been taken out of the equation. It was unsatisfactory that evidence of annual leave was being produced during the submissions. Even though Ms Conway said in her report that she found the use of exaggerated wording or inaccurate numbers concerning, even before me there was still an element of glossing over the facts at the risk of accuracy: for instance, 43 is not one third of 150 as Ms Conway went on to suggest, and in any case, the figure according to Mr Akindutire is far higher than "around 150", so the proportion of times when the Claimant was late is further reduced.

5.11 Nonetheless, I conclude that this was a comparatively minor issue that did not affect the overall outcome. Even though I accept that more than half the time the Claimant was late it was by under five minutes, for a large minority of the time it was by more than that, and this occurred while she was on a final written warning. It cannot be said that no reasonable employer in a time-critical role where the work could not be made up by staying late would have dismissed, in the circumstances. Improvements that the Respondent saw after the warnings were imposed were not sustained.

5.12 While the purpose of disciplinary proceedings is to correct, not to punish, the Claimant did not meet the required standards even though the Respondent had tried to correct her conduct both informally and then formally on multiple occasions. It does not make a difference that the Claimant was not intentionally late, though it may have induced another employer, also acting reasonably, to prolong the final written warning.

5.13 A similar consideration applies to the fact that the Claimant was hardworking and well-liked generally. It may explain why the Respondent tolerated the lateness for as long as it did. That does not mean that this employer acted

unreasonably in saying that, in terms, enough was enough and that dismissal with notice should follow.

5.14 Accordingly, I conclude that dismissal was within the band of reasonable responses; the claim is not well-founded and is therefore dismissed.

Employment Judge Norris
5th March 2020

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Sent to the parties on:

09/03/2020

For the Tribunal:

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