RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms Houda Dakibou**

Respondent: **IOC Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 February 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: Mr Robert Parkin, Counsel

Respondent: Mr Paul Bradley, HR Consultant

Interpreter Mr Speller (French language)

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's unfair dismissal claim is well founded and succeeds.

REASONS

1. The Claimant, Ms Houda Dakibou, had been employed by the Respondent, IOC Limited, as a Cleaning Operative. On the Respondent's case, she was fairly dismissed for gross misconduct. The Claimant argues this was an unfair dismissal.

2. This hearing has taken place remotely, over the Cloud Video Platform. The Claimant has been represented by Mr Robert Parkin of Counsel. The Respondent has been represented by Mr Paul Bradley, HR Consultant. Mr Speller is a certified French interpreter. He has assisted with today's hearing because English is not Ms Dakibou's first language. Apart from the submissions at the conclusion of the case, all of the proceedings were translated into French for Ms Dakibou's benefit,

and the Claimant's communications were translated into English for the benefit of the Tribunal and others participating in the Final Hearing.

3. Witness evidence has been given by the following individuals:

    a. Paul Bradley, HR Consultant;
    b. The Claimant.

4. Mr Bradley was cross examined by Mr Parkin and answered questions from the Tribunal. Mr Bradley chose not to ask any questions of the Claimant in cross-examination. Reference was also made to various documents in a bundle of documents. This bundle, including the witness statements, comprised 120 pages. One witness statement prepared on behalf of the Respondent was from Victor Marin, London Regional Manager. He was not called to give evidence and no satisfactory explanation was given for his absence. Mr Bradley asked for it to be admitted into evidence and given such weight as the Tribunal considered appropriate. In the circumstances, given it is disputed by the Claimant, I have not been able to give it any weight.

5. Surprisingly, the Respondent did not prepare and exchange a witness statement from Ms Nicola Hart, who had carried out the disciplinary investigation, and who was noted on the disciplinary outcome as the decision maker. Evidence as to the basis for dismissal was given only by Mr Bradley.

The issues

6. At the outset of the hearing, there was a discussion about the issues to be determined. The Claimant argued that the Tribunal should also award her three weeks' notice pay, on the basis that her dismissal was a wrongful dismissal as well as an unfair dismissal. This is not a claim that had been included in the original Claim Form [13]. Following discussion, Mr Parkin agreed that it was not a claim that had been brought and accepted that the claim before the Tribunal was limited to one of unfair dismissal contrary to Section 98(4).

7. There is a dispute between the parties as to the effective date of termination. The Respondent says it dismissed the Claimant by email on 16 April 2020, which would have been received on the same day. The Respondent therefore argues that 16 April 2020 is the effective date of termination. The Claimant disputes that the email was sent on that date or received on that date. Her case is that she was not dismissed until 1 May 2020 when she received a payslip which she took as confirmation that her employment had ended.

8. If the Claimant is correct, then the claims for unfair dismissal and for failure to pay the notice pay have been brought within the required time limits. This is because the Claimant initiated Early Conciliation on 20 July 2020, within three months of the date on which she says she was dismissed. If the Respondent is correct, then both

complaints have been initiated five days outside the three months required by statute.

9. Even if the Respondent is correct, the Claimant argues that the Tribunal should extend the primary limitation period to allow the claim to be considered on its merits on the basis that, given confusion over the date of dismissal, it was not reasonably practicable to issue proceedings within three months of 16 April 2020 and proceedings were issued within a reasonable time thereafter.

10. So far as the unfair dismissal case is concerned, the evidence concentrated on the process followed by the Respondent, rather than on whether the Claimant was in fact guilty of the matters for which the Respondent claims she was dismissed. It was agreed the Tribunal would not determine any remedy issues, including the chance that the Claimant would have been fairly dismissed if a fair procedure had been followed (the "*Polkey* issue"); and on whether the Claimant was guilty of contributory fault. These matters would, if applicable, be considered at any future Remedy Hearing.

Factual findings

11. The Claimant started work for the Respondent on 30 August 2016. She was engaged to work two hours each weekday from Monday to Friday, a total of 10 hours each week. Her hours of work were 5am to 7am. This is set out in her Employment Contract. The Employment Contract states that the Disciplinary and Grievance Procedures are set out in the Employee Handbook. No part of the Employee Handbook has been put in evidence before the Tribunal. Therefore, the Tribunal has not seen any list of examples of gross misconduct that may have been communicated to the Claimant before these events.

12. In this role, the Claimant's line manager was Victor Marin. His role was London Regional Manager for the Respondent.

13. Towards the end of March 2020, the Respondent decided to start disciplinary action against the Claimant, in relation to her timekeeping. In the course of the disciplinary process, the Claimant alleged she had been harassed and insulted and assaulted by her manager and by other employees. Nicola Hart, a manager at the Respondent, emailed the Claimant on 31 March 2020 reiterating the Claimant's contractual hours. She stated she "would like to bring this matter to a close" and trusted "your contractual hours will be adhered to going forward" [57]. There were then further email exchanges on 1 April 2020 in which Ms Hart confirmed that no verbal or written warnings had been issued, merely a reminder of her contract start and end times. She added that Victor Marin would speak to her at her work the following day. If she wished to raise a formal grievance after this meeting with Mr Marin, then these should be recorded in writing and would be passed to the Respondent's HR Advisor.

14. On 2 April 2020, as promised in Ms Hart's email, Mr Marin arrived to speak to the Claimant. At about 7am, there was an argument between the Claimant and Mr Marin in the reception area of the building. This argument was witnessed by others. Following the incident, the Claimant emailed Nicola Hart at 08:51, setting out her version of events. The email was written in English and worded as follows:

> *"I've got a problem Victor came aggressively and he start to bring people and he start to bully me in front of everyone and provoke me. He couldn't even speak to me properly as he comes and bully me now is to much I'm going to go to the police and complain because I warn everyone already but apparently it was not understood. He didn't even take me apart and try to find a solution he insult me and bought people to bully me with him. Now I'm going to complain for harassing, bullying, aggression and abuse of power and everyone else that was with him. You can dismiss me right and properly because it a harassment in group I came out from the work and I'm going to the police and put the company in justice. is not normal that i'm scared and insecure to go to work this is ridiculous.*
>
> *And just to let you know I will not quit you can dismiss me. 50 find a solution quickly."*

15. In her witness statement, the Claimant describes this as a grievance. I agree. Viewed in the context of Ms Hart's email the previous day asking the Claimant to put her complaint in writing if she wanted it to be formally investigated, this was a written grievance. It did not lack that status because it was not titled "Grievance". Again, because there has been no evidence from Ms Hart, it is unclear why the Respondent did not treat it as being a grievance, and why the Respondent did not follow the Respondent's grievance procedure in relation to its contents. This email from the Claimant was not even specifically acknowledged by Ms Hart.

16. A minute later, the Claimant emailed Mr Marin. It was only addressed to Mr Marin and was worded in English as follows [65]:

> *"I give you my respect mr manager. You came aggressively and start to bully me and provoke me they are CCTV that show you harassed me with the lady, first of all you don't even do your job properly you were disrespectful and you getting involved people that have nothing to do with it. Even in the corridor I was scared you start to fight me because you have a attitude of it. You are incompetent and your abuse of your power you should have bought another woman because I felt like they were 2 woman because i didn't feel to presence of a responsible man. As I already told the company I will complain to the police and bring you to justice because I warn you and everyone else but it seems to be taken for granted. You couldn't even defend yourself you have to bring other people with you that's pathetic. If you have a problem then dismiss me cause I will not quit it simple."*

17. At 09:33 Ms Hart emailed the Claimant. Her email said that further to that morning's incident "we cannot have you onsite until this has been fully investigated and the matter resolved". She said that the HR consultant – a reference to Paul Bradley to whom the email had been copied – would be in contact in due course [72]. Mr Paul Bradley had been engaged by the Respondent on a retainer basis to provide external HR advice. It is clear from Ms Hart's email that Mr Bradley would be taking charge of matters going forwards, at least in terms of communications.

18. At that point, an investigation was started. I infer that Ms Hart was the investigator. Whilst the investigation was underway, Mr Marin emailed Ms Hart at 10:05. Because neither Mr Marin nor Ms Hart has given evidence to the Tribunal, it is unclear whether Ms Hart asked Mr Marin to write his version of events, or whether Mr Marin's email was unsolicited. Given that it was sent after the Claimant had been suspended and after an investigation had started, it is more likely that it would have been requested as part of Ms Hart's investigation. In his email, Mr Marin described the Claimant as shouting at him, and saying he repeatedly asked her to calm down.

19. Further statements were obtained from some of those who witnessed events, although the circumstances in which the statements were obtained are unclear. There were statements from Albino Domingues; two statements from Dania Morales, and a statement from Gloria Morales, who was apparently the Site Supervisor. It is unclear why there were two statements from Dania Morales. The statements from Albino Domingues and Dania Morales were in word documents. The way in which these statements were prepared is unclear. It is unclear whether they were typed by the individuals or whether they were prepared by Ms Hart based on what these individuals told her over the telephone. If the former, there are no emails in the bundle showing that the statements had been emailed to Ms Hart. If Ms Hart had prepared them herself from what she had been told by the individuals, then it is unclear whether the individuals accepted the contents of the statements. It is even unclear whether the individuals were fluent in English. From their surnames, it may well be that English was not their first language, as in the Claimant's case. The statement from Dania Morales was worded "*Houda insults Mr Victor constantly in her own language, which is French*". It is unclear whether Dania Morales was fluent in French so she could give this evidence first-hand, or whether she had been told this by someone else. The statements in the bundle were not signed, but the names of the individuals were typed at the end. The content of the statement obtained from Gloria Morales is entirely unclear because it was missing from the bundle. As a result, it is unclear whether this statement was ever sent to the Claimant.

20. No attempt was made to obtain a more detailed version of events from the Claimant during the investigation, beyond what was written in her grievance email.

21. At 10:24, Ms Hart sent an email to Mr Bradley. By this point it is likely that there had been a discussion between Ms Hart and Mr Bradley, who had first been alerted to the issue when copied into Ms Hart's email suspending the Claimant, just under an

hour earlier, or shortly before. I infer Mr Bradley had asked Ms Hart to send him the statements together with a covering email summarising the issue on which his assistance was required.

22. Ms Hart's email is revealing in a number of respects. Firstly, it shows she was concerned that there was an unresolved issue in terms of the working relationships between the Claimant and other members of staff, which she felt it important to raise with Mr Bradley. She did not send him the background email correspondence to this issue. She told Mr Bradley she had sent Mr Marin to the site to try and find a resolution. Secondly, it shows Ms Hart herself was apparently a witness to the events, in that her email claimed: "*Victor called me and I could hear Houda very clearly in the background shouting"*. Thirdly, it contained several comments which indicated she had already formed a view that the Claimant was guilty of misconduct that morning. Not only did she record she had heard the Claimant shouting, but she also stated that the Claimant *"cannot return to site, her behaviour is not acceptable"*; and referred to the Claimant's email to Mr Marin as *"quite offensive".* Fourthly, her language indicated that, in forming her view, she was influenced by events that had occurred on previous occasions, because it ended *"even after trying to reason with her she shown no signs of improvement"*. Given she had not spoken to the Claimant at all on 2 April 2020, she must have been taking earlier matters into account, despite concluding the previous disciplinary process without imposing any sanction. The email ended "*Your assistance in this matter is much appreciated"*. Finally, the email referred to Ms Hart having a video of the incident but added she was "*not sure this would be of any help*". The reason why a video would be unhelpful has not been explained.

23. There is no evidence there was any further investigation by Ms Hart thereafter. By that point, it had taken her no more than one hour. Her investigation had concluded with remarkable speed.

24. At 11:26, Mr Bradley sent the Claimant an email giving notice of a disciplinary meeting scheduled to take place on Monday 6 April at 1100. This was two working days later. She was told that this meeting would take place on the telephone due the COVID-19 pandemic. The email said that he would be chairing the meeting. In evidence, Mr Bradley said that the original plan had been that he would be the decision maker at the disciplinary hearing, rather than Ms Hart.

25. The allegations to be addressed in the disciplinary meeting were framed as follows:

> *1.Inappropriate behaviour, and victimisation towards colleagues and management as detailed in the attached statements and emails.*
> *2. Failing to accurately complete attendance records on site.*
> *3. Insubordination towards managers Victor and Nicola who have tried to assist and remedy the matters of concern.*
> *4. Inappropriate conduct on a client premises witnessed by colleagues and building contractors.*
> *5. These allegations, which potentially constitute as gross misconduct, have led our company into disrepute with our staff, clients, strategic partners*

and statutory processes.

26. The email recorded that *"the statements and evidence that the company will rely upon*" were attached for the Claimant's review. Because of the way in which the email has been copied, it is not clear exactly which statements were attached. What was not provided was the video of the incident referred to in Ms Hart's email at 10:24. Mr Bradley had been sent the video, although how this was done is unclear. There is no covering email attaching a video file in the bundle. Although he watched the video himself, Mr Bradley told the tribunal he decided that the video should be excluded for consideration. However, this contradicts paragraph 9 of his witness statement, which indicates that part of the evidence against the Claimant was a recording of the incident ie the video. I find it was not excluded from consideration but was not never sent to the Claimant or seen by her.

27. In the email from Mr Bradley, the Claimant was told she had the right to be accompanied at the meeting by a fellow employee or a trade union representative. The wording did not offer her the right to bring any witnesses to the disciplinary meeting, or to submit any evidence on which she intended to rely.

28. In response to this email, the Claimant asked: *"can you hire a French interpreter for the meeting?"*. Mr Bradley replied: *"You can arrange this yourself"*. The further response from the Claimant stated: *"I will find one myself but the company has to pay for it"*. Mr Bradley emailed back *"This is not accepted – feel free to have a colleague with you during the call who speaks both English and French"*. [69].

29. On 3 April 2020, Mr Bradley received an email from a firm of solicitors. By that point, the day after the incident, this firm had been instructed to act for the Claimant. The email stated that their client wished to proceed with the hearing as planned provided that provision was made for an independent French to English translator. If this was not provided, then the solicitors asked for the meeting to be rescheduled so that suitable translation could be obtained. Mr Bradley replied that he was happy to postpone for a short period and asked the solicitors to advise the timescale expected. He offered her the opportunity to have a friend attend to assist with translation. On 6 April 2020 he asked for an update on the proposed timescale. The response from the solicitors was that they had arranged for a colleague to translate on 27 April 2020 at 11am. This was in three weeks' time. Mr Bradley replied as follows:

> "*We simply cannot wait three weeks to process this. Noting the complaints received and allegation threats.*
>
> *I can reschedule for later this week - your client knows several staff on site who can assist. If this cannot be arranged later this week I propose processing this via written response.*
>
> *Please advise of the preferred option by noon tomorrow*."

30. In evidence, Mr Bradley explained that it would not be possible to delay the process until 27 April 2020 because of the *"cost implication"* of waiting over that period. Upon further analysis, the extent of that cost implication was this – it would cost the Respondent just over £300 to wait until that point, given that the payslips show the Claimant's gross pay as £211 per fortnight. However, by then the process had not concluded, so the marginal cost would have been the additional salary and employer costs associated with the additional delay that waiting until 27 April 2020 would have caused. In his witness statement, Mr Bradley expressed scepticism as to the Claimant's need for an interpreter, given she appeared able to write emails in English without apparent difficulty. It is not necessary for me to make specific findings as to the extent of the Claimant's fluency in English. Given that the disciplinary process may well lead to her dismissal, it was reasonable for her solicitors to ask for an interpreter to be present to assist her at a disciplinary hearing.

31. In reply to Mr Bradley's email, the solicitors said *"our client agrees on the written response, kindly send us questionnaire and provide response by date"* [77]. In argument, Mr Parkin says this agreement was effectively forced on the Claimant, given the Respondent's refusal to wait until 27 April 2020, and lack of an alternative proposal. On 7 April 2020, Mr Bradley emailed referring back to the invitation to the disciplinary letter and the attachments to that letter. He said that what he required was "*a timeline statement of events from her perspective (times, dates, who said what etc); an admission/denial to each specific allegation; also, can she detail any mitigating circumstances remedies she may propose"* [76]. He asked for a response by noon on Thursday 9 April 2020. This was the day before Good Friday at the start of the Easter weekend.

32. In evidence, Mr Bradley justified his unwillingness to delay the disciplinary hearing beyond 9 April 2020 as consistent with the ACAS Guide. This was a reference to the following passage at paragraph 4.14:

> *"The employee may offer a reasonable alternative time, normally within five days of the original date, if their chosen companion is unable to attend".*

33. The proposed latest alternative date offered by Mr Bradley was in fact only three days after the original date. It therefore offered a shorter period than provided in the ACAS Guide.

34. At 13:52 on 9 April 2020, the solicitors wrote that *"our client has posted written response to your office via Royal Mail First Class Post as our client has no access to a scanner"* [75]. Mr Bradley responded on the same day to say that this was not what had been agreed. He wrote that the Claimant should really have delivered her points by scanning them over, given that she was represented. He gave a deadline of Wednesday afternoon, saying *"we would consider how best to conclude this matter on Wednesday afternoon if nothing was received by then."* Wednesday afternoon was 15 April 2020.

35. I accept the Claimant's evidence, confirmed by the email from her solicitors, that she had prepared a written response, which was sent by first class post by the Claimant to Mr Bradley's work address at around 9am on 9 April 2020. It was written by her daughter in English from what the Claimant had told her. It was not sent by email because the Claimant had no means of scanning the handwritten pages and attaching them to an email.

36. The likeliest explanation is that this letter arrived at Mr Bradley's offices but was not received by Mr Bradley's staff until sometime later, by which time the Claimant had already been dismissed. The Tribunal was not taken to the contents of that letter in the course of the evidence, although a legible copy was emailed to the Tribunal at the start of the hearing.

37. Despite the email from the Claimant's solicitors telling Mr Bradley that a written response had been posted, Mr Bradley did not make a specific check to see whether any post had been received at his work address. His evidence was that he relied on being notified by the post room staff at the shared offices where he was based. When the handwritten statement was posted, it was around two weeks after the start of the first national lockdown. At that point very few individuals were working in offices, even if the work could not be done from home. Even if in normal times, such a letter was likely to have arrived on the next working day and been promptly brought to Mr Bradley's attention without further enquiry on his part, this was most unlikely to happen in the unprecedented circumstances that applied in early April 2020. Far fewer, if any, staff would have been in offices, and the post itself is likely to have been delayed by the impact of the lockdown on postal deliveries.

38. The fact that no check was made by Mr Bradley to see that the promised post had been received, nor any check made with the Claimant or her solicitors that it had ever been sent, is indicative of the casual and hasty approach taken to the whole process by or on behalf of the Respondent.

39. On 16 April 2020, the Respondent decided to proceed to an outcome, in the absence of specific evidence from the Claimant. The evidence from Mr Bradley as to how this was done was confused. He initially told the Tribunal that he was the decision maker. This is consistent with his witness statement where he states (at paragraph 3) that at times "he took over matters that require a higher level of HR Management" and "this matter was passed to me to conduct the disciplinary process" (paragraph 7). When it was pointed out to him that the outcome email clearly wrote that Ms Hart was the decision maker, his evidence changed. This is what he said in cross-examination:

> *"The decision is the firms, I have to underwrite it. I have confused two things. She made the decision, but I would have had the power that they don't do this if I thought that this was particularly unfair*."

40. He explained his use of the word “underwrite” as follows. He said that the nature of his retainer is a fixed fee service. Therefore, he would not be paid extra for time spent defending any employment tribunal litigation. The implication of his evidence was that he would effectively have the right to veto a dismissal decision if he felt it could not be defended in employment tribunal proceedings. This is because he would need to spend additional time without generating additional fees in defending such a decision. He confirmed he would not be personally liable for paying any employment tribunal award, which would be payable by the Respondent.

41. Mr Bradley accepted that the original plan had been that he would be the decision maker, as indicated in the notice inviting the Claimant to attend the disciplinary hearing. He said this plan had changed when it had been decided that the disciplinary process would conclude without a hearing. This would enable him, if necessary, to be available to conduct any appeal. If so, then this change of plan was not communicated to the Claimant. It is also at odds with the contemporaneous emails. After it had been decided that the Claimant would provide written submissions and there would not be a hearing, Mr Bradley asked for the submissions to be sent to him, rather than to Ms Hart.

42. Mr Bradley’s evidence as to the process that was followed in holding the disciplinary hearing in the Claimant’s absence was equally unsatisfactory. In his witness statement, he gave no details as to the decision-making process, saying only that the decision was taken to dismiss the Claimant for misconduct (at paragraph 9). In oral evidence, he said that he and Ms Hart were not present in the same room for the disciplinary hearing held in the Claimant’s absence. Rather, they discussed the evidence on the telephone. His evidence as to how this discussion took place was vague and unconvincing. Given it was Mr Bradley who drafted the outcome letter, I asked him if he had sent Ms Hart a draft of the reasons for her to approve before it was sent to the Claimant. He could not remember whether this was done. Certainly, there is no earlier draft in the bundle.

43. The outcome email was worded as follows:

> *“I write to advise that as of the 16th April 2020 the company has still not received and further representations from you so subsequently IOC Manager Nicola Hart reviewed the case and made the decision that I now communicate to you.*
>
> *The matters of concern were that set out to you in my email below and were as follows:*
>
> *1. Inappropriate behaviour, and victimisation towards colleagues and management as detailed in the attached statements and emails.*
>
> *2. Failing to accurately complete attendance records on site*
>
> *3. Insubordination towards managers Victor and Nicola who have tried to assist and remedy the matters of concern.*

4. Inappropriate conduct on a client premises witnessed by colleagues and building contractors.

5. These allegations, which potentially constitute as gross misconduct, have led our company into disrepute with our staff, clients, strategic partners and statutory processes.

It is further alleged that you failed to comply with a reasonable management instruction requiring you to attend the disciplinary hearing arranged or provide reasonable assistance in investigating this matter.

At the hearing Nicola Hart considered your actions in these matters and found that your conduct here was proven and was unreasonable. She also considered it unreasonable that you failed to respond to the instructions detailed to you and your representative regarding cooperating with this process.

In summary the balance of probability noting the numerous statements confirming your actions and the overall tone of your own communications to management outweigh your counter arguments and are not accepted.

Your actions are therefore considered as gross misconduct and as such are not acceptable as the required standard of a cleaner working for IOC Limited as defined in your terms and conditions of employment issued to you when you joined the company.

You have been found in breach of failing to follow company procedures and management instructions in your position as a cleaner as set out in your Terms and Conditions of employment which have led to complaints made against you and continue to be absent from duties having failed to respond to any letters or attend any arranged meetings. As a result of your actions the Company has totally lost its confidence in you. You are therefore summarily dismissed from lOC Limited for gross misconduct as from the date of this email, and as such you are not entitled to notice or pay in lieu of notice."

44. The email concluded by offering the Claimant the right of appeal, which was to be made to Mr Bradley within seven days of the date of the email. The Claimant did not exercise this right of appeal, for reasons to which I come.

45. Notwithstanding what the email says, on the balance of probabilities, I find that the decision to dismiss the Claimant was taken by Mr Bradley, rather than by Ms Hart. This is for the following reasons:

    a. At the outset of his oral evidence, Mr Bradley told the Tribunal that he was the decision maker, before subsequently changing his evidence. Even his revised evidence suggested he still had a role, given he *"underwrote"* the outcome;

b. When the Claimant was initially notified of the disciplinary hearing by Mr Bradley, he wrote *"This meeting will be chaired by me"*. It was Mr Bradley who had drafted on the disciplinary charges;

c. Ms Hart was not independent of the matters to which the disciplinary charges related. To Mr Bradley's knowledge, she was a witness to events at the site on 2 April 2020, in that she had apparently overheard the Claimant shouting; she had carried out the disciplinary investigation; one of the disciplinary charges alleged insubordination against her; and she had already expressed views as to the appropriate outcome, namely that the Claimant could not return to the site. It is most unlikely that Mr Bradley would have thought it appropriate to suggest Ms Hart was suitable to swap into his role late in the process;

d. There is no good reason why the change of format for the disciplinary process should lead to a change of decision maker. I reject Mr Bradley's explanation for the change;

e. Mr Bradley drafted the outcome to the disciplinary process, but there is no evidence he confirmed the written record of the reasons with Ms Hart before it was sent to the Claimant – that would ordinarily be standard practice in a case such as this;

f. In the past, on Mr Bradley's own evidence, he had decided on the disciplinary outcome involving other employers. There was no reason to adopt a different approach here, particularly given the Claimant had threatened to go to the police about the events on site;

g. The ET3 form suggests that Mr Bradley did make the final decision in that it says that *"the decision was appealed but upheld by an independent HR consultant"*. This is clearly wrong as to an appeal - as there was no appeal - but it is revealing as to the extent of Mr Bradley's real decision-making input.

h. Mr Bradley's status as the decision maker explains why Mr Bradley prepared a witness statement and gave evidence; and why there was no witness statement disclosed at any point by Ms Hart. This is the inference I draw from Ms Hart's unexplained failure to provide evidence, despite apparently still being employed by the Respondent.

46. On the balance of probabilities, the reason why Mr Bradley chose to express the decision as being that of Ms Hart was so he could be the decision maker in the event of any appeal. As there had been no disciplinary hearing, it would not be evident to the Claimant that Mr Bradley had already taken the dismissal decision.

47. Mr Bradley's evidence was that the outcome to the disciplinary process was emailed to the Claimant on 16 April 2020 and copied to Ms Hart. There is an email in the bundle purporting to be an outcome to the disciplinary process. It is

addressed to the Claimant, dated 16 April 2020, and timed at 12:31. It was apparently copied to Ms Hart. However, the version in the bundle, whilst apparently addressed to 'Houda Dakibou', does not specifically state the Claimant's email address. Several other emails included in the bundle received by Ms Hart were printed from Ms Hart's computer, as is clear from the format in which they appear in the bundle (eg pages 48 and 50). There is no equivalently formatted version of this email from Ms Hart in the bundle. If the email had been received by Ms Hart on 16 April 2020, this could have been confirmed had Ms Hart chosen to give evidence.

48. In the absence of evidence from Ms Hart, I find this email was never communicated to the Claimant, either on 16 April 2020 or subsequently. Given the expedited way in which the Respondent and Mr Bradley was conducting the disciplinary process, he could well have mistyped her address.

49. I accept the Claimant's evidence that she never received the email. This was not specifically challenged in cross examination by Mr Bradley, who took the view it would be unnecessary to simply put his case to her that she had received it at the time, because she was bound to deny it. That the Claimant did not receive this email is consistent with the lack of any response to the email from either the Claimant or her solicitors at any point before proceedings were issued. Up until that point, the Claimant had shown she was able to send emails promptly to Ms Hart when dissatisfied with a work issue. She had also instructed solicitors to assist her in responding to the disciplinary process. The overwhelming likelihood is that there would have been a response from either the Claimant or from her solicitors had Mr Bradley's email of 16 April 2020 been received.

50. It is notable that the Claimant gave 30 April 2020 as the date on which her employment ended in answer to this question on her ET1 Claim Form. Mr Bradley completed the ET3 Response form and submitted it to the Tribunal on 12 October 2020. In answer to the question *"Are the dates of employment given by the Claimant correct?"*, there is a tick in the box for "Yes". The ET3 did not maintain, as might have been expected if completed by an experienced HR Consultant, that an unfair dismissal claim was, or was potentially, time-barred – on the basis that there was more than a three-month gap between the date of dismissal and the date on which early conciliation was initiated. Thus, the Respondent's current stance as to the effective date of termination is contrary to its stated position on the ET3. No amendment has ever sought to be made to the ET3 to rely on a different date.

51. The Claimant subsequently sent Particulars of Claim to the Tribunal. For some reason, these had not been attached to the Claim Form when it was issued. This maintained that 30 April 2020 was the correct date on which her employment ended, stating that the first indication that the Claimant had been dismissed was when she received holiday payslips totalling £21.10. She said in evidence she received her fortnightly payslip on 1 May 2020. She was expecting to be paid £211 for two weeks' pay, but instead received only limited holiday pay.

52. In its Grounds of Resistance, sent to the Tribunal on 3 December 2020, the Respondent indicated that the dismissal email had been sent on 16 April 2020 and that as a result, the claim may be out of time. Aside from the purported email of 16 April 2020, this is the first document from the Respondent referring to a termination date of 16 April 2020.

53. As a result, I find that effective date of termination was probably 1 May 2020, when the Claimant received her payslip indicating she had not been paid any salary for the second half of April 2020. Neither side has produced a copy of the Claimant's P45.

Relevant legal principles

54. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

55. Section 98 ERA provides so far as relevant:

> **In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **A reason falls within this subsection if it—**
>
> > **…**
> >
> > **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

56. Therefore, the Tribunal must first consider whether the reason for dismissal was the Claimant's conduct, as the Respondent alleges.

57. If so, the starting point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

58. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

59. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

60. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

61. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness

that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

62. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

63. This hearing did not address issues of *Polkey* and contributory fault. As a result, it is not necessary to set out the legal principles that apply when deciding these issues.

Conclusions

64. Because I have found that the effective date of termination was 1 May 2020, the early conciliation process commenced within the statutory time limits. As a result, the Tribunal has jurisdiction to consider the Claimant's unfair dismissal claim on its merits.

65. The preliminary question to address is the reason why Mr Bradley decided that the Claimant should be dismissed. Mr Bradley argues the Respondent did so because it genuinely believed that the Claimant was guilty of misconduct. Because Mr Bradley's evidence is that Ms Hart was the decision maker, and he was waiting if necessary to decide the appeal, his evidence is not that he genuinely believed the Claimant guilty of misconduct.

66. I find that the principal reason why Mr Bradley decided the Claimant should be dismissed was because this was what he had been told to achieve by his client, Ms Hart. She had made it clear to Mr Bradley since her email at 10.24 on 2 April 2020 that the Claimant *"could not return to site as her behaviour was quite unacceptable".* Far from revealing the extent of his independence as an HR Consultant, the evidence show that Mr Bradley attempted at every stage to achieve the Claimant's dismissal as quickly as possible, without any objective evaluation of the disciplinary evidence:

    a. He did not consider whether the email from the Claimant to Ms Hart at 08:51 on 2 April 2020 was a grievance, requiring separate determination. Alternatively, if he did, then he chose not to pause the process to enable this to be investigated and resolved – at the very least alongside the existing disciplinary process;

    b. Within an hour of receiving the evidence from Ms Hart's investigation, he had framed the disciplinary charges;

    c. The disciplinary charges suggested a decision had already been made to accept Mr Marin's evidence. This was despite the Claimant's clear position in her 08:51 email that Mr Marin was the aggressor. The third disciplinary

charge accused her of insubordination towards Victor before adding "who have tried to assist and remedy the matters of concern";

d. The content of the disciplinary charges appeared to go well beyond the evidence with which Ms Hart had provided to him. According to the fifth disciplinary charge, the result of her conduct was leading *"our company into disrepute with our staff, clients, strategic partners and statutory processes"*. The identity and nature of the strategic partners and statutory process was wholly unclear from the evidence provided to Mr Bradley. The fourth allegation said that her behaviour had been witnessed by "*building contractors"* but there was no evidence of this in the evidence Ms Hart had sent him;

e. He did not reveal the existence of potentially relevant video evidence to the Claimant. He had viewed this evidence himself, and therefore it was only fair to the Claimant to disclose the existence of this evidence to her. Mr Bradley did not provide any clear or convincing explanation in the course of his evidence as to the circumstances in which this evidence came to be made and provided to Ms Hart and seen by him but could not be disclosed to the Claimant;

f. Not only did he set a very short timescale for the original hearing, he did not even allow the five days suggested by the ACAS Guide before the proposed rescheduled date to allow a translator to be sought. The explanation for the rush is unconvincing, namely *"cost concerns"*, given that the cost to the Respondent was little more than £100 per week;

g. He made no attempt to check whether the Claimant's submissions sent by First Class Post had arrived in his offices, and proceeded to decide on the outcome of the disciplinary process without any input from the Claimant;

h. He hid his identity as the true decision maker in relation to the Claimant's dismissal so as to be able, if necessary, to hear the Claimant's appeal himself;

i. In his disciplinary outcome, he did not make any factual findings in relation to each of the disciplinary allegations but dealt with them all compendiously saying that the Claimant's *"conduct was proven and unreasonable"*. He went on to show a degree of antipathy towards the Claimant by saying that she *"continued to be absent from duties having failed to respond to any letters or attend any arranged meetings."* Given the sequence of events described above, this was an unfair exaggeration of the true position – the Claimant had been prevented from attending site; had responded to correspondence both herself and through her solicitors; and given a plausible reason (lack of interpreter) why she could not attend either of the two disciplinary hearing dates;

j. Finally, and tellingly, Mr Bradley's witness statement makes almost no reference to the substance of the evidence on which the decision was taken. Its focus is almost entirely on the process that was followed.

67. Mr Bradley's reason for dismissing the Claimant, in acting on Ms Hart's instructions to remove the Claimant, was not a potentially fair reason. Therefore, the Claimant's dismissal was an unfair dismissal.

68. Even if I had concluded that Mr Bradley's reason for dismissal was the Claimant's conduct, I would have found it was an unfair dismissal, both substantively and procedurally. In order to evaluate the gravity of any comments made by the Claimant, Mr Bradley needed to make specific findings as to what the Claimant said and to whom and then had to assess to what extent she had been provoked into those comments by bullying, as the Claimant had argued. Given that this was not done, the investigation fell outside the range of reasonable investigations and any belief by Mr Bradley that the Claimant was guilty of misconduct was an unreasonable one.

69. Without such findings, it is not possible to decide whether dismissal for that conduct would fall within or outside the band of reasonable sanctions that could have been imposed by a reasonable employer. Rudeness to management may or may not be potentially gross misconduct, depending on the circumstances. Given this was apparently a one-off act from a Claimant with an otherwise clean disciplinary record, where there was no specific evidence that anyone had been insulted other than Mr Marin, it is far from clear that dismissal was within the range of reasonable sanctions.

70. Procedurally I find that the process that was followed here was unfair, and outside the range of reasonable procedures, for the following reasons:

a. The disciplinary hearing ought not to have taken place until the Claimant's grievance had been addressed. The ACAS Code of Conduct indicates that either the disciplinary process should have been suspended pending resolution of the grievance process, or the two processes should have been conducted concurrently (paragraph 46);

b. This was not an appropriate case for the disciplinary process to be concluded without a disciplinary hearing of some kind, even if that took place over the telephone in the light of restrictions to deal with the Covid-19 pandemic. A disciplinary hearing is required by the ACAS Code unless the employee is persistently unable or unwilling to attend the disciplinary hearing without good cause (paragraph 25). The factual and evidential complexity of the events giving rise to the disciplinary charges, and the number of charges, made this disciplinary process particularly unsuited to being concluded without a hearing;

c. Given the reasonable request for an interpreter to be present, there was good reason for a delay, and a potentially longer delay would be reasonable given the restrictions imposed by the national lockdown. The hearing should have been delayed until 27 April 2020 as requested. Alternatively, the Respondent ought to have arranged for one of its own members of staff to translate if it was important to hold the meeting on an earlier date. The modest additional cost of delay was not an appropriate justification for pressing on with the process;

d. All evidence which was potentially being relied upon ought to have been provided to the Claimant to enable her to comment on this evidence in her defence. This included the statement of Gloria Morales and the video recording;

e. Clearer disciplinary charges ought to have been framed, so that the Claimant could understand the case she had to meet:

   i. *It did not state the particular respects in which her behaviour was "inappropriate"*;

   ii. It did not state in what respects or towards which colleagues and management the Claimant had behaved in a way amounting to *"victimisation"*;

   iii. The particular attendance records that were inaccurate was never specified;

   iv. It was unclear whether the alleged *"insubordination"* in allegation three was the same as, or in addition to the respects in which her behaviour was "*inappropriate*" in allegation one;

   v. It was unclear whether the *"inappropriate conduct"* in allegation four was the same as the *"inappropriate conduct"* in allegation one;

   vi. The identity of the *"clients, strategic partners and statutory processes"* with whom the company had been brought into disrepute was also unclear.

f. The Claimant ought to have been given a cogent reason as to why each of the disciplinary charges were upheld. Simply referring to *"numerous statements"* and *"the overall tone of her own communications to management"* was not a sufficient explanation for why the disciplinary charges were found against the Claimant.

71. For all these reasons, the Claimant's dismissal was an unfair dismissal. The Tribunal will list a Remedy Hearing with a time estimate of 1 day to determine the Remedy to be awarded to the Claimant. To the extent to which it is applicable,

given the findings already made, at the Remedy Hearing, the Tribunal will consider if it is possible to determine the percentage chance that there would have been a fair dismissal had a fair process been followed; and if so, the extent of that percentage chance. It will also determine whether the Claimant's conduct contributed to the dismissal and if so, to what extent. Finally, it will consider to what extent there should be an adjustment to the Claimant's compensation for failing to comply with the ACAS Code of Conduct. Here, this relates to the extent to which there has been a failure to comply with both the disciplinary and the grievance procedure.

72. At that Remedy Hearing, my present view is that it would not be appropriate, without further application and explanation from the Respondent, for the Tribunal to hear evidence from Ms Hart or from Mr Marin on the issues remaining. Both witnesses could and should have been called to give evidence at the Final Hearing which was listed to decide all issues.

73. As both parties are represented, they are encouraged to explore whether agreement can be reached as to the financial consequences of the finding of the Claimant's unfair dismissal so as to avoid the further time and expense of preparing for and attending a Remedy Hearing.

Employment Judge Gardiner

15 February 2021