



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Mansaray

**Respondent:** Mitie Limited

**Heard at:** London South

**On:** 7 October &  
3 November 2020

**Before:** Employment Judge Corrigan

## Representation

Claimant: Mr Ijezie, Solicitor

Respondent: Mr Platts-Mills, Counsel

## RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. There was a 50% chance she would have been fairly dismissed in any event.
3. The Claimant contributed to the dismissal to the degree of 50%.

## REASONS

1. The Claimant brought a claim of unfair dismissal. At the outset I asked whether she brought a claim of wrongful dismissal in addition, as although she had not ticked the box in respect of notice pay it was apparent she had been dismissed without notice. The Claimant's Representative acknowledged it was not in the claim but did wish to include it. The Respondent objected and I decided not to

allow the amendment as wrongful dismissal involves a different test (whether or not on the balance of probability the Claimant actually did commit gross misconduct) and I accepted the Respondent would have considered calling different witnesses, namely the witnesses to the alleged misconduct itself, and I accepted the Respondent was prejudiced in not being able to call those witnesses.

2. The matter was reopened in the adjournment between the hearing dates but was only brought to my attention at the outset of the resumed hearing. I am normally sympathetic if the claim of wrongful dismissal is obvious from the facts pleaded, will not cause prejudice and the person is representing themselves (the Claimant's representative became involved just before the first day of the hearing), which is why I had originally raised the issue. I might have allowed the amendment if it had been raised again at the end of the first day of the hearing by the Claimant's representative, but as it was, we were back in the position we had been in on the last occasion with the Respondent being prejudiced by not having called the relevant witnesses. The application was refused again.

### **Issues**

3. The issues were agreed with the parties at the outset to be as follows.
4. What was the reason for the dismissal? Was it misconduct?
5. If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?
6. Was it within the range of reasonable responses to dismiss?
7. If the Respondent had adopted a fair procedure would the Claimant have been fairly dismissed in any event?
8. Did the Claimant contribute to the dismissal?
9. Did either side unreasonably breach the ACAS Code and should any award be adjusted accordingly?

### **Hearing**

10. On behalf of the Respondent I heard evidence from Mr Volkan Bekiroglu (Senior Contracts Manager), Ms Joanna Bukowinska (Customer Service Manager), and Mr Mark Degaute (Service Support Manager). I heard evidence from the Claimant on her own behalf.

11. There was a 133 page bundle. Both sides were allowed to produce additional documentation during the hearing. I heard oral submissions from each side.
12. Based on the evidence heard and the documents before me I found the following facts.

**Facts**

13. The Claimant began working for the Respondent on 1 January 2007. She was employed as a cleaner for the Respondent's Lloyds Banking contract and therefore worked on the client's premises. She had a clean disciplinary record.
14. The Claimant accepted she was aware that no items were to be removed from site without the permission of Ms Bukowinska, the Facilities Manager. She had previously requested Ms Bukowinska's permission to take items. This included items to otherwise be disposed of. Examples given of such items included IT equipment, furniture and shoes. Theft is listed as an example of gross misconduct in the Respondent's disciplinary procedure (p35).
15. It is not disputed that on 8 November 2019 the Claimant took an opened tin of paint belonging to contractors who were renovating the site, without the knowledge or permission of Ms Bukowinska.
16. This was brought to the Respondent's attention by the Claimant's colleague who saw her with the tin of paint.
17. The Claimant was suspended and invited to an investigation meeting on 15 November 2019 with Mark Degaute (Service Support Manager). At that meeting the Claimant said that the paint had been leaking onto the floor leaving a mess and that a colleague, the onsite engineer, had said it was going in the bin as it was rubbish. She said she had asked if she could have it and he had said yes and that he would tell security that he had given it to her. She said that she believed him to be in charge of maintenance and contractors. She said the tin was half full. She also said she believed that the contractors had been "fired" and left the paint behind.
18. Mr Degaute investigated the Claimant's account with Ms Bukowinska (pp55-56). She confirmed that there had been a change in contractor, but that the paint stored on the ground floor belonged to the new contractor and the painting was still in progress.
19. The onsite engineer was asked for his account and this was recorded in the email chain with Mr Degaute on 15 November 2019, which was not initially in the bundle but was provided on 6 October 2020 (which the parties agreed to label pages 59 A-D). His account was recorded as follows:

“he had a conversation with [the Claimant] on Friday lunchtime....they came across a tin of paint that had tipped over and caused some mess in the Cleaners Bin/Storage Area on GF...she found him a bag to put it in to stop it leaking further ...he said he was going to throw it away....she said to him that she was going to take it. He said that he replied that he has “nothing to do with that””.

20. According to the email chain that was disclosed on 6 October 2020 he was then asked via an email to his Line Manager from Mr Degaute on 15 November 2019 to sign the following statement:

“I....confirm that I had a conversation with [the Claimant] ....This took place on Friday 8th November 2019 over a half used tin of paint in the Ground Floor small corridor between the Fireman’s Lift and the cleaner Storage & Bin Area. During this conversation I unequivocally did not give her permission to take this item home.”

21. At that point Mr Bekiroglu was copied into the chain of emails.

22. Then on 18 November 2019 there was a request for the onsite engineer to put it into his own words via an email from Mr Degaute to his Line Manager, copying in Mr Bekiroglu. The message that was then sent to the onsite engineer himself was as follows (p59):

“If you did not give permission for the paint to be taken, then you will have to put this in writing stating exactly that.

If you did give the ok to take, then you need to email us stating exactly that.”

23. He then replied with the email at page 59 as follows: “I ...confirming to you that I did not tell [the Claimant] to take half used paint on the ground floor by the loading bay.” One interpretation of this email is that he did not even accept he had had a conversation with the Claimant (which is how the Claimant understood it). This was substituted into the bundle for the disciplinary hearing instead of his original oral account as recorded by Mr Degaute (paragraph 19 above), as can be seen by page 73 (where the word “substitute” was underlined).

24. The Claimant did not see the onsite engineer’s original statement (which supports her account that they had a conversation about the paint, that it had spilled, and that it was going to be thrown away) until it was produced the day before this hearing. As a result she has put a lot of focus onto arguing for disclosure of CCTV showing their conversation occurred as she did not understand that the onsite engineer had even accepted that they had a conversation. In fact, the CCTV would not assist further as the onsite engineer had accepted there was a conversation.

25. The Claimant was invited to a disciplinary hearing on 22 November 2019 with Mr Volkan Bekiroglu. The letter set out the allegation to be that the Claimant had taken a tin of contractor's paint from site without permission from an authorised person. At the outset of the disciplinary meeting Mr Bekiroglu said "I must say that I am not in the slightest, impressed by what I have seen and feel very disappointed that a member of my staff would take an item out of the building without prior authorisation". He went over the evidence against the Claimant as set out at page 64 of the bundle before finishing with the statement that he was "greatly disappointed in the fact that someone with your length of service would let the team down in such a manner and jeopardise their employment over a tin of paint." It was only after this that the Claimant was asked any questions or given the opportunity to speak.
26. She then said that the reason she took the paint was that the onsite engineer had given it to her and he had said to her he was in charge. She said he had said she could take all of it home (not just the half tin she had taken). She said that the day that the Respondent's HR had attended site in relation to the matter the onsite engineer had phoned her to tell her HR was there and she should bring the paint back. She said she said she would not do so as she could not use her pass to return as she was not working. She said she had said "there is CCTV everywhere so they could call the police on me". She later said she that he had given it to her so she did not see any reason to return it after the permission had been given to her. She said he had called her again on the Saturday to see what she had decided to do and had advised that she should lie that security had given her the paint. She made the comment about their relationship at 7 boxes down on page 66 ( although she made no point of this at the tribunal hearing). The Claimant showed Mr Bekiroglu text messages from the onsite engineer, including a message dated 13 November 2019 that he had a very important message for her.
27. Mr Bekiroglu sought advice from HR as per the emails at pages 69-70, which suggest the Claimant was believed to have taken more items than just the tin of paint.
28. The Claimant was summarily dismissed by letter dated 28 November 2019. The Claimant was given the right to appeal but did not do so. The reason given was that there was enough evidence to support the allegation of theft in that she removed a tin of contractor's paint from site without the permission from an authorised person. The reason was that the CCTV show that she had taken the tin of paint, along with other unknown items in the her bags; there was no evidence of permission from any authorised person; she had not followed process by taking the tin of paint on someone else's say so; the process had been made clear previously to all members' of staff, and the Claimant herself had previously followed it; theft of goods was serious and could seriously impact the relationship between the Respondent and its clients. He said that even if

the onsite engineer had given permission, she should still have checked with someone with authority. He said the Claimant's account in respect of the number of bags she was carrying on CCTV was contradictory.

29. Despite his reference to the additional bags in his letter, Mr Bekiroglu said in his witness statement that he only took account of the tin of paint, and not his suspicion that she had taken additional items, as that was all that she had been charged with and that had been established. His letter shows that he did take account of his belief that she had taken other unknown things and given a contradictory account about it, as set out above. This is also supported by the HR advice he received. He also said in evidence that it was of concern to him that the Claimant had been afraid of being caught on CCTV returning the paint, rather than discuss the potential misunderstanding with her Line Manager and offer to return it.
30. The Respondent's evidence is that the onsite engineer has no management responsibility and no authority to give permission to the Claimant to take the paint. The Respondents' witnesses believe the Claimant knew this. The Respondent's witnesses found it incredible that the Claimant said she believed the onsite engineer had authority to give permission to take anything from the premises as he is at the same level in the organization as the Claimant. The Respondent's witnesses believe the Claimant would have been well aware of this given her length of service and having been in meetings with him. The onsite engineer no longer works for the Respondent for a reason unconnected with this case.
31. Mr Bekiroglu said he spoke with the Facilities Manager and other staff as part of the process to check the understanding in relation to getting authorisation but these conversations are not documented in the bundle.
32. He said he also took account that the Claimant showed no remorse nor offered assurance she would not do it again. He believed she did not understand the gravity of the situation. In oral evidence he said that had the onsite engineer thrown the paint away that would also have been an issue as he had no authority to do so.
33. Ms Bukowinska said that apart from IT items, items to be disposed of can be taken by staff after a verbal conversation and prior approval from herself and the security team.
34. The Claimant speaks English as a second language and describes herself as semi-literate. She relied on her daughter in respect of understanding the contents of the dismissal letter and neither realized that there was a right to appeal until she believed it was too late.

35. The Claimant's case has been inconsistent. On page 51 she said she asked if she could take the paint. She said it was leaking on the floor and the onsite engineer said it would be disposed of so she asked for it. She made a similar statement in her claim at page 11. In evidence she said she did not ask for the paint. In her updated witness statement she said that the onsite engineer called her to the location of the tins of paint, all of which she said were used, and asked if she wanted any of it as it was to be disposed of. She said she accepted his offer and then did not return the paint after his phone call because she was already using the paint, but this was not what she said at the time.
36. The Respondent's representative himself said in oral submissions that the Respondent's size and resources are such that more would be expected of the Respondent. He said the Respondent is a leading facilities management company with 10,000 employees, resources are not an issue and the process should be "right at the top" of the spectrum. I also note that the Respondent's Representative opened by stating that the other suspicions in respect of the Claimant's bags were not relied on as it was accepted there was insufficient evidence, and it was argued that the Respondent only relied on the evidence in respect of the tin of paint.

**Relevant law**

37. The test in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) 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.**

**(2) A reason falls within this subsection if it-**

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

**(3) . . .**

**(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.**

38. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

39. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

40. The compensation to be awarded in respect of a successful claim for unfair dismissal is set out at ss118-124 Employment Rights Act 1996 and consists of both a basic award and a compensatory award. Section 123 (1) states that the amount of a compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

41. Section 122(2) provides for a deduction to the basic award where the Tribunal considers any conduct of the complainant before the dismissal make it just and equitable to reduce the amount of the basic award to any extent. Section 123(5) provides that where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

42. S 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that in unfair dismissal proceedings if it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and either party has unreasonably failed to comply with that Code in relation to that matter then the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, vary any award it makes to the employee by no more than 25%.



## Conclusions

*What was the reason for the dismissal? Was it misconduct?*

43. The reason for dismissal was misconduct, namely that the Claimant took a tin of paint belonging to contractors' without the relevant authorization.

*If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?*

44. The Respondent's decision makers had a genuine belief that the Claimant had taken the tin of paint without asking permission from the relevant manager. Mr Bekiroglu and HR also believed the Claimant had taken other unknown items in her bags on the same date.

45. The Claimant accepts she took a half used tin of paint without having asked permission from the Facilities Manager. The Respondent therefore has reasonable grounds to believe this.

46. The Respondent's Representative accepts there is insufficient evidence to support a belief that there were other items taken.

47. Mr Bekiroglu accepted in his witness statement that the Claimant had only been charged with taking the tin of paint and that was all that had been established. Nevertheless it is clear that his decision was influenced by his belief that other unknown items had been taken. This is apparent from his dismissal letter (paragraph 29 above) and the email exchange he had with HR at pages 69-70. He said there "[she] claims that the 5 bags she's seen leaving with on the day were empty despite them looking completely full when we have reviewed CCTV footage...she stated that she had been collecting personal items that she was taking away on that day...to ship off internationally. This is rather contradictory and causing further speculation as to whether she's being truthful overall." HR replied "...she has said that someone has allowed her to take the paint, but cannot provide any evidence to support it, and furthermore we have evidence stating that she needs to ask the right people and she has not. I think based on those two factors as well as the cctv/pictures showing she is leaving with bags full of things but only entered with empty bags, on the probability of doubt I think we can say that theft has occurred".

48. There are some issues with the investigation. Mr Bekiroglu's comments at the outset of the disciplinary hearing do suggest that he had formed certain views about the Claimant's conduct, before hearing from her. The Respondent's representative in submissions acknowledged that I might think it "fit to levy criticism" or "raise eyebrows" at his opening remarks that were critical of the Claimant but argued that the case was not predetermined as he went on to

question the Claimant. I accept that he had not finally made up his mind what to do, nevertheless I agree with the Claimant's representative that he did not approach the matter with an open mind and this likely influenced his decision and investigation. I accept that a Respondent might have a preliminary view by the time of a disciplinary hearing but these comments went beyond that and suggested decisions about the Claimant's culpability had already been made.

49. The way that the Respondent approached the onsite engineer's evidence was somewhat unusual. Usually employers produce the record of an interview with a staff member (as the Respondent did with the Claimant's investigation meeting) or alternatively request a statement in the staff member's own words (as the Respondent has produced from other cleaning staff in this case). The nearest we have to this is the note from Mr Degaute describing his initial conversation with the onsite engineer as described at paragraph 19 above, and which in evidence he said was accurate. This was partially supportive of the Claimant's account. It confirmed the conversation took place, that the Claimant "rescued" the tin of paint after it had spilled and stopping it leaking further, and that the onsite engineer said he was going to dispose of it so she asked if she could take it. The Respondent nevertheless deliberately remove this from the "disciplinary bundle" and the Claimant never saw it during the disciplinary proceedings. Instead the Respondent sought to have a very limited confirmation from the onsite engineer that he had not given authority. In my experience it is not usual for a Respondent to limit what an employee said as part of an investigation in this way. I accept that it may have been in order to obtain in writing the part that the Respondent viewed as significant but it deprived the Claimant of the parts which supported her case, and also caused her to be fixated on proving the conversation had taken place via the CCTV, as she understood the conversation itself was being denied. It also demonstrates that the Respondent placed little or no weight on the aspects of the account which supported the Claimant. The Respondent did not produce this document until the day before this hearing began.
50. The Respondent also did not follow up the Claimant's account with the onsite engineer, including asking why, if he was no involved, he had been contacting the Claimant to tell her something "important" just after this incident.
51. Mr Bekiroglu also said he spoke with other staff to confirm the understanding of the policy in respect of taking items but these conversations have not been noted at all, which is surprising given the Respondent's Representative's acknowledgment that the Respondent's process ought to be exemplary. A reasonable process would make a note of all those interviewed or spoken to who provided information that was taken into account.
52. I note there is also the comment made by the Claimant on page 66 which I refer to at paragraph 26 but neither side has made any point about this and so I have not taken it into account.

53. Despite the concession made that more should be expected of an employer with the Respondent's resources, I acknowledge that the investigation is not required to be perfect, only reasonable. Not every error will necessarily render a process unreasonable. Nevertheless I do consider that the withholding of the on site engineer's account, the failure to follow up the Claimant's account with him including asking him about the calls he made to her after the event, and the failure to document conversations with other colleagues was unreasonable.
54. There were nevertheless reasonable grounds to support the conclusion that the Claimant did "rescue" a half spilled tin of paint which the onsite engineer then said he would throw away. She then, after some form of discussion with him, took it off site, without checking with the Facilities Manager as she usually would. There were reasonable grounds for the Respondent's belief that she was aware that the onsite manager was at the same level of the organization to her. When asked to return the paint she did not do so and she did not offer an apology during the process. The reason given at the time for not returning the paint related to fears of being caught, rather than the fact she had used the paint as she now says.
55. For the avoidance of doubt, I do not find it unreasonable not to give the Claimant the opportunity to cross examine the onsite engineer in the disciplinary process. The CCTV of her conversation with the onsite engineer was not relevant as he did in fact admit to having had a conversation with her by the paint.

*Was it within the range of reasonable responses to dismiss?*

56. As the Claimant's representative accepted, a disciplinary penalty was appropriate.
57. However, following the conclusions above, it was unreasonable to make a decision to dismiss that was influenced by the unsubstantiated belief that there were other stolen items. It was also unreasonable to dismiss based on the investigation due to the problems identified above.
58. Dismissal for the conduct outlined at paragraph 54 was harsh after 12 years' service and a clean disciplinary record. I take into account the importance of trust in respect of property given the Respondent's reputation with clients and the Claimant's role. I also take account that she did not bring the paint back and the lack of contrition. Even so, the decision was harsh given that the paint had spilled/was leaking and the onsite engineer was going to throw it away. There is a difference between those circumstances and the examples given of the application of the unwritten policy to furniture, IT and shoes.

59. However, my view is not relevant. The question is whether the decision to dismiss falls outside the range of reasonable responses. Although I find it very harsh, given the importance of trust as a cleaner, I cannot find the decision outside the range of reasonable responses as a penalty for the conduct outlined at paragraph 54.

60. However I do find that the decision was unreasonable because it was influenced by the unsubstantiated belief that the Claimant had other stolen items in her bags, and was tainted by the decision maker's closed mind, the lack of transparency in respect of the onsite engineer's evidence, and the failure to fully explore the Claimant's case about what happened with the onsite engineer or to give weight to his statement that she retrieved the paint from spilling further and he was otherwise going to put it in the bin.

*If the Respondent had adopted a fair procedure would the Claimant have been fairly dismissed in any event?*

61. Given I find the dismissal harsh, but not unreasonable, for the conduct outlined at paragraph 54, I cannot say that there would not have been a fair dismissal if there had been a fair procedure. However given the decision was harsh and inappropriately influenced by suspicions about other unsubstantiated wrongdoing, it is certainly possible that a complete and transparent investigation, coupled with an openminded decision maker, might well have led to a lesser penalty, especially as it was a first offence of an employee with 12 years' service. There should be a reduction to reflect the chance of dismissal in any event, but I cannot say that that chance is more likely than not. In my view 50 % chance of dismissal fairly reflects the possibility.

*Did the Claimant contribute to the dismissal?*

62. The Claimant's representative did accept that a lesser disciplinary penalty was appropriate in the circumstances. Given the Claimant took an item without authority, and then did not return it once there was an issue, she did contribute to her dismissal. In my view the appropriate contribution is 50%.

*Did either side unreasonably breach the ACAS Code and should any award be adjusted accordingly?*

63. The Claimant did not take up the opportunity of the appeal which is a breach of the ACAS Code. However I accept her explanation that she is semi-literate and relied upon her daughter to inform her of the contents of the letter. I accept that she did not become aware of the right to appeal until after the deadline. In these circumstances I do not find the breach unreasonable. In addition or alternatively I do not consider it just and equitable to reduce her award for this.

64. Although an uplift is requested in the schedule of loss the Claimant's representative did not raise this point in oral submissions or identify the conduct relied upon as an unreasonable breach of the ACAS Code of Practice. The Respondent did explain the alleged misconduct to the Claimant, conducted an investigation, gave the Claimant an opportunity to explain her

case, and gave detailed reasons for the decision. She had a companion at the meeting. The Respondent was therefore seeking to comply with the requirements of the Code.

65. I have accepted that the decision maker, though he had preconceived ideas, did not finally make up his mind until after the disciplinary hearing. The lack of transparency with the onsite engineer's evidence is potentially a breach of the Code but I accept that the intention was to obtain the part the Respondent considered relevant in writing from him. The influence of the suspicions in respect of the contents of the Claimant's other bags is more substantive than procedural. The failure to record the conversations with other staff could potentially breach the Code but this was a less significant omission. Overall I do not consider any breach unreasonable and/or I do not consider it just and equitable to increase the award. The issues with the Respondent's procedure are adequately addressed by the finding of unfair dismissal.

66. A remedy hearing is now required and will be listed in due course.

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Employment Judge Corrigan  
29 June 2021

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