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# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms C Cubillos Cruz**

**Respondent:** **City & Essex Limited**

**Heard at:** **East London Hearing Centre**

**On:** **29 & 29 August 2019**

**Before:** **Employment Judge Moor (sitting alone)**

**Representation**

Claimant: In person

Respondent: Ms Sue Hookway (Finance Director)

# JUDGMENT

**The complaint of unfair dismissal is not well-founded.**

# REASONS

1 This case arises out of the dismissal of the Claimant by the Respondent on 12 October 2018.

2 I clarified the issues with the parties at the start of the hearing as follows: (1) was the reason for dismissal a potentially fair one; (ii) if so, and the reason was for conduct, did the Respondent have a genuine belief in that misconduct, reached on reasonable grounds, after a reasonable investigation; (3) was the reason within the range of responses of a reasonable employer; and (4) was a fair procedure followed, one a reasonable employer could have adopted in the circumstances.

3 The Claimant speaks Spanish. She had not requested an interpreter from the Tribunal in advance. She brought with her Dr Techera, who interpreted all of the proceedings for the benefit of the Claimant, including any passages in documents that were referred to. The witnesses Mrs Pursglove and Ms Ribeiro read aloud their written statements so that they could be interpreted. Overnight between the first and last day of hearing, the Claimant had the benefit of interpretation of Mrs Hookway's statement so that

she knew what it said before she asked questions about it. The Respondent had provided the Claimant with the trial bundle electronically but not in hard copy. After some discussion about that, the Claimant expressed a wish to continue without the bundle but have documents that were referred to interpreted as above.

4 I thank Dr Techera for her interpretation, which enabled the Claimant to understand the evidence given in the case and ask questions of each witness. Dr Techera interpreted all of the evidence and closing submissions but she was unable to stay after 1pm on the second day of the hearing. The Tribunal's administrative staff made efforts to try to find an appropriate interpreter for the afternoon of the second day. At first they were informed that it would be possible to have an interpreter at 2.00pm and therefore I asked the parties to return at that time so that I could give an oral judgment. Unfortunately, the interpreter did not attend, as was hoped. I indicated I would be happy to send the judgment in writing but, after some discussion, the Claimant and Mrs Hookway agreed that they would prefer me to give an oral judgment followed-up in writing. The Claimant's English was sufficient to understand the outcome and she would have the benefit of the written reasons that she could seek help interpreting thereafter.

**Findings of Fact**

5 Having heard the evidence of the Claimant, Ms Ribeiro, Mrs Hookway, and Mrs Pursglove, I make the following findings of fact.

6 The Claimant worked as a cleaner for the Respondent at Canary Wharf. She was required to clean toilets on the 14th – 17th floors at night from 9.00pm until 5.00am. She was paid the London Living Wage. She started her continuous employment on 24 January 2011. On 7 November 2016 she was transferred to the Respondent under the TUPE Regulations from Mitie, her previous employer.

7 The Claimant's first language is Spanish. She can speak some English but not a great deal. I preferred the evidence of the Respondent about this and I also base this finding on the Claimant's admission that the conversation she recalls having with security set out at paragraph 7 of the statement was in English.

8 A number of managers at the Respondent spoke Spanish including Diego Lezcano, Night Supervisor and Sonia Ribeiro, the Operations Director. The Claimant's trade union representative, Alberto Durango, also spoke Spanish. I accept that, where important instructions were given to the staff, the Respondent made sure to enable its Spanish-speaking workers to understand them, either in the form of visual instructions or by ensuring that a Spanish-speaking manager or trade union official was there to translate. Follow-up memos were given to staff to sign, who could, if they did not understand them, seek assistance through one of those Spanish speakers.

9 Prior to the Respondent taking on the cleaning contract in Canary Wharf, the Claimant could take her lunch break on the floor she was cleaning. This changed when the Respondent took over because they only gained the contract with the landlord of Canary Wharf for the cleaning of the toilet areas. Unlike Mitie, they did not have a contract with the tenants on each floor. Therefore, they had no permission, other than to access the toilets, to be in the tenant areas on those floors. The Respondent insisted that staff take their breaks in a welfare area downstairs in the basement. This area was refurbished

by the Respondent for that change to take place. This new arrangement was not a change of the contractual terms of the Claimant but of her working practices and was therefore not covered by the protection that the TUPE Regulations afforded her.

10 I find the Claimant knew about the instruction that she must take her breaks downstairs and I do so relying on the following evidence. She was informed about it at induction, which was a meeting for which there was translation. Although the Claimant refused to sign the induction form, I find she had understood what she was being informed at induction. In a follow-up memo (page 52) it was made very clear to members of staff, including the Claimant, that the change to the area they were allowed to take their lunch breaks was very important and disciplinary action might follow if it was not complied with. The Claimant refused to sign this memo. I find she refused not because she did not understand it but because she did not want to go to the basement area for her breaks. Later the Claimant received a 'performance and conduct report' in connection with taking breaks in the tenant areas on the floors she cleaned (page 56). By that report she knew it was wrong to take breaks in those areas. The Claimant plainly got that report because she wrote her response to it on it. Soon afterwards it was explained to staff, including the Claimant, that breaks were staggered to allow rooms for all to sit comfortably in the welfare area in the basement and I find the Claimant knew about this, too.

11 The Claimant said she continued to take her lunch break on the floors that she cleaned and I find it likely she did so. She said in her evidence at one stage that she did not ever see managers during her work but at a later stage that managers saw her taking these breaks. This evidence was inconsistent and not therefore reliable. I find that prior to the 'performance and conduct report' she had been seen by a manager (hence the reason for the report), but that there is no clear evidence that the Claimant had been seen by managers taking her lunch breaks since then.

12 There has been some evidence before me about the Claimant's poor performance and failure to reach the necessary standard. She was given a written warning for this in January 2017. The Claimant was not however dismissed for poor standards and this is not relevant to my decision.

13 On 23 January 2017 the Claimant also received a final written warning for her refusal to sign forms, her refusal to sign performance and conduct notices and her refusal to accept instructions (page 84). This warning was to stay on her file for 12 months. By the time of events leading to dismissal it was no longer 'live'.

14 In 2018 there was a high turnover of night managers. A number of incidents of alleged further poor performance were not followed-up, including those described by Mrs Pursglove and Ms Ribeiro in their evidence. If it was the case that a manager had seen the Claimant taking her breaks in an unauthorised area then in 2018, it is likely that that this too was not followed up because of this high turnover of managers. I do not consider however that the Claimant would have been lulled into a false sense of security by this. It had been made very clear to her that she must not take breaks in the tenant areas and this was emphasised again at the appeal meeting that she attended in 2017 before Ms Ribeiro at page 96.

15 In the past, the Claimant had been allowed by previous employers to take a four-week holiday. The Claimant asked for this again in 2018 now that she was employed by

the Respondent. They refused. Their practice was to only allow two weeks of holiday at any one time. This was lawful and within the rules set out in the Working Time Regulations. The Claimant was aggrieved about this and expressed her annoyance to a number of managers, who told Mrs Pursglove. I do not accept the Claimant's evidence that she was not upset or angry as credible. I find that the Claimant thought that the four-week holiday was her right. She was articulate in expressing what she perceived to be her rights (which is no criticism of her). Unfortunately, however, in this case she was mistaken about them.

16 Mrs Hookway alleges that the Claimant had a consistently poor standard of work from June 2018 to September 2018. At the same time the Respondent has given evidence to me that they were kept to very high standards by the client at Canary Wharf, requiring 95 percent on audit. The Respondent also emphasised to me that the Canary Wharf contract was prestigious, valuable and very important to them. Mrs Hookway also refers to an occasion upon which the Claimant allegedly failed to attend work without authorisation on two days in September 2018. Going absent without leave is a serious matter. It is a mystery to me why these two very serious matters (a consistently poor standard of work on an important contract that required very high standards and an absence without leave) were not included as allegations in the disciplinary process that later took place in September 2018. Nevertheless they were not and those two matters are therefore irrelevant to my decision because they were not part of the reason for dismissal.

17 It appears to me the Respondent has failed, at times, to manage the performance and conduct of the Claimant in 2018 before the final disciplinary process. While this is not ultimately affected my decision for reasons I shall give, the Respondent should be aware that it is responsible for managing conduct and performance and should do so promptly.

*Events leading to dismissal*

18 A new site manager Aneta Szkodlarska reported a problem with the Claimant and the shift starting on 19 September 2018. Her report (page 200) is detailed and written very near the time and a contemporaneous document (therefore more likely to be reliable). She reported that a client had complained about standards on 17th floor, which is where the Claimant worked. She said the Claimant had loudly complained to her about the Respondent, the refusal of holidays and argued that the refusal of holiday was an abuse of her rights. Ms Szkodlarska found the standards of the Claimant's cleaning to be poor but the Claimant refused her instruction to redo an area. The Claimant shouted and screamed at her. When the manager made another check on the 16th floor, she also found this to be of a poor standard. The Claimant again became very angry and shouted again about the Respondent and refusal of her holiday request. The Claimant again refused to go back and clean.

19 Plans were made by the Respondent to call the Claimant to a meeting about this matter in order to hear her account. Before that could take place, on a shift beginning 25 September 2018, Amal Touhami a night manager found the Claimant taking her break in a tenant area. The Claimant, Ms Touhami stated, was aggressive towards her shouting that she did not have the right to talk to her on a break. Ms Touhami asked her to come down to the welfare area and the Claimant refused saying that she was not rubbish and had the right to use the area. She aggressively complained to Ms Touhami about her

holidays. The manager again recorded this contemporaneously (page 222). Ms Touhami asked the Claimant to go downstairs three times but the Claimant refused. Eventually Ms Touhami said that her refusals could not be tolerated and decided to suspend her. This was in accordance with the suspension policy, which provides that suspension could take place where relationships break down.

20 Once downstairs the Claimant demanded the letter of suspension immediately and again shouted at the manager. She stayed on in the welfare room until 5.00am when she could get her transport home. The managers initially insisted that she should leave in the middle of the night. But the Claimant did not have any transport to get home. A letter of suspension was sent to the Claimant and later an invitation to a disciplinary meeting was also sent to her. The disciplinary invitation sets out the reasons for the meeting and the allegations against the Claimant and provided a statement from the manager.

21 I find the Claimant received that invitation, contrary to her evidence to me. It was also sent to her trade union representative. Her representative made detailed submissions on her behalf before the disciplinary meeting and I find that must have been on her instruction, knowing the allegations in the letter.

22 The Respondent's disciplinary procedure allowed an investigation to be done separately or at the same time as the disciplinary hearing. Mrs Pursglove confirmed that, in this case, the Claimant's account of the matter was to be obtained and investigated at the disciplinary hearing and that is what occurred.

23 The disciplinary hearing took place with an interpreter on 11 October 2011. The Claimant's submissions were set out in a very clear and detailed submission drafted with the help of her union. (If Mrs Hookway criticises the use of a lawyerly approach in those submissions, that criticism is misplaced. It is very important for an employer to know what an employee has to say about allegations. All the better if the Claimant's submissions are set out in a clear and structured way, as were the submissions here. The document is not littered with legal jargon or obscure. An employer should expect that an employee might use the benefit of trade union representation.) In essence, the Claimant disagreed that she had screamed or shouted. On the contrary she alleged that Ms Touhami had been aggressive towards her. Mrs Pursglove asked Ms Touhami about this before the disciplinary hearing and she maintained her original account and disagreed that she had been aggressive. When asked about this at the disciplinary hearing the Claimant reduced her allegation that Ms Touhami had shouted at her, to her having a raised voice. Ultimately, Mrs Pursglove believed the managers over the Claimant. Mrs Pursglove had experienced the Claimant rudeness and shouting herself. I believed her evidence of how she went about investigating the allegations as it was given in a straightforward way and in some detail.

24 The Claimant explained at the disciplinary hearing that she had not left immediately upon being suspended because there was no transport in the middle of the night. Mrs Pursglove understood this. In her written submissions the Claimant also said that she had never been informed that it was inappropriate to take a break in the tenant area. Mrs Pursglove did not accept this because she knew of the memos that had been sent and the performance and conduct report in 2017 through which the Claimant had been informed about the instruction. Mrs Pursglove tried to obtain statements from the security guards as requested by the Claimant's trade union but they refused. They were

employed by a different company. Mrs Pursglove therefore had no control over that matter.

25 Mrs Pursglove, having heard the Claimant's side of the story, then discussed the matter after the disciplinary hearing with Mrs Hookway, Finance Director. They both agreed that dismissal should be the outcome because they believed the manager's account, they thought the conduct was gross misconduct both being in the wrong area, that being a breach of security and the insubordination and aggressive verbal conduct towards managers. The decision to dismiss was Mrs Hookway's final decision, which she took after reading the submissions, the statements of the minutes and discussing the matter with Mrs Pursglove. She discounted the allegation that the Claimant had refused to leave the building immediately upon suspension because, by then, she understood that the Claimant was not able to travel home at that time.

26 Mrs Hookway decided that the allegations that were proved were gross misconduct. She used examples in the procedure to explain her conclusion: at page 295 the Respondent's procedure gives examples of gross misconduct including serious acts of insubordination, serious breach of the procedure, unauthorised entry of the client premises and aggressive verbal behaviour towards a manager. Mrs Hookway decided that these were relevant here. She did not take into account the expired warning, except as history to inform her that the Claimant knew the insubordination was a disciplinary matter.

27 The Claimant was informed of dismissal by letter. She appealed. At the appeal meeting, the Claimant was again represented by her trade union. Ms Ribeiro interpreted for much of that meeting in Spanish. I do not accept the Claimant's assertion that Ms Ribeiro spoke little Spanish. I preferred Ms Ribeiro's account that she spoke a great deal of Spanish at work. If Ms Ribeiro had had little Spanish it would not have made sense for her to offer to translate at the appeal meeting (as the minutes record and Ms Ribeiro stated in her evidence). The Claimant would have objected to that at the time, but she did not.

28 The trade union had sent appeal grounds (252) and Ms Ribeiro considered those grounds. In respect of the request for CCTV, Ms Ribeiro put in a request for it but it was declined and the Claimant was informed of this at the appeal. Again Ms Ribeiro had no control over the CCTV recordings. Secondly, Ms Ribeiro took the view that she did not need to question colleagues as statements had been provided and the Claimant had admitted taking a break in the tenant area. Ms Ribeiro upheld the appeal and the outcome letter was sent to the Claimant, enclosing the minutes.

29 I find as a fact that the dismissal was for the reasons given by Mrs Hookway and the appeal upheld for the reasons given by Ms Ribeiro. This is **not** a case, in my judgment, where the employer was trying to get rid of an employee because of a much earlier transfer. Many of those employees transferred from Mitie to the Respondent are still working for the company. There are about 40 of them and the company has dismissed only about 6 in the intervening years. Those figures do not support the Claimant's contention that she was dismissed because of the transfer. Furthermore, another staff member had been dismissed for being in an unauthorised area during their break, which would suggest that this was regarded as a serious matter by the Respondent. It found it hard to recruit night staff at this location. I therefore find that the reasons given to this dismissal are not somehow a smoke screen for another reason.

## Legal Principles

30 I summarised the legal principles to the parties at the outset. I refer to section 98 of the Employment Rights Act 1998. First, I have to ask whether there was a 'potentially' fair reason for dismissal. If I find it was conduct, then I have to ask whether the Respondent had a genuine belief in the misconduct, based on reasonable grounds, after a reasonable investigation.

31 I have to consider whether there has been a fair procedure, which includes giving the Claimant an opportunity to have her say when she knows the allegations against her; allowing her to have representation; and giving her the opportunity of an effective appeal.

32 In relation to those reasons and procedure I consider whether they come within a range of reasonable reasons and procedures of reasonable employers. I cannot make the decision afresh myself, my role is to review the decision and the process to ensure that it was reasonable.

## Application of Facts and Law to Issues

33 The reason for this dismissal was misconduct. Thus, it was potentially fair within Section 98(1) of the Employment Rights Act.

34 I have found that the Respondent had a genuine belief in misconduct by the Claimant. There was no ulterior motive here. The dismissal was for the reasons given: the complaint by managers triggered the disciplinary process. The dismissal was for gross insubordination and taking breaks in an unauthorised area contrary to instruction.

35 I find that the Respondent's belief in that misconduct was based on reasonable grounds after a reasonable investigation. Mrs Pursglove and Mrs Hookway referred to statements written very close to the time of the events and therefore more likely to be reliable. They had tried but failed to obtain CCTV. Mrs Pursglove had cross-checked the submissions of the Claimant with the manager. They had also cross-checked the statements of the managers with the Claimant at the disciplinary hearing. The Claimant had been given an opportunity to make her statement through her trade union, which she had done in a clear and straightforward way. She had been allowed, through her representatives, to say what she wished with the benefit of interpretation. Ultimately, I find it was reasonable for the Respondent to believe the managers over the Claimant. It was reasonable to believe that the Claimant had shouted at the two of managers: they both described very similar behaviour on different days. This is not one manager getting it somehow wrong. This was two managers independent of each stating that they had experienced similar conduct. It was so bad on the second occasion that the manager had to suspend. It was plausible that inappropriate shouting and the refusal of a reasonable instruction would lead to such suspension. While the Claimant suggested that one of the managers, Amal, had shouted at her in her submissions, she changed that at the disciplinary hearing to her having a raised voice. This would reasonably cast doubt on the reliability of her account. It was not unreasonable for them to believe the managerial accounts. It was reasonable of them to believe that the Claimant was taking her break in an unauthorised area and that she knew that was wrong. She had admitted that she had done so and there had been plenty of prior instruction and a prior performance and conduct report about that. It was also reasonable to believe that the Claimant had refused

to leave the area she was taking her break on the instruction of the manager: this fits with the shouting and fits with the suspension. Here Mrs Pursglove and Mrs Hookway had to weigh up the accounts. Given that the managers' accounts corroborated each other and were about similar behaviour on different days, it is not at all surprising that they were believed over the Claimant's denials.

36 Then I have to consider whether the misconduct that was found was sufficiently serious to warrant dismissal.

37 First, I wondered whether the failure to discipline the Claimant earlier in 2018 may have led her into a false sense of security or caused her to be treated unfairly because there was an inconsistent approach towards her. I also asked myself whether it was reasonable to go straight to dismissal without a further final written warning. If the Claimant had been represented today, those are probably the primary submissions that would have been made on her behalf.

38 On balance, it seems to me that, because the Claimant had had a final warning in the past, albeit a warning that had ended; a warning about a refusal to accept instructions, she knew such conduct was wrong. And, because she had received the performance and conduct report in the past about taking breaks in a tenant area, she also knew that was wrong and equally this had been reiterated to her in the 2017 appeal. In my judgment, therefore, that she had not been disciplined earlier in 2018, is not a reason to find that this decision fell outside the range of reasonable responses. It seems to me it was perfectly reasonable for this employer to decide that the Claimant knew what she was doing was wrong, had been doing it deliberately and that the matter was serious both in relation to where she took her breaks and in relation to insubordination. Equally, dismissal was a reasonable response to these two aspects of misconduct because they are exemplified as gross misconduct in the Respondent's procedure. It seems to me dismissal was within a reasonable range of responses because there is not just one aspect of serious misconduct here but two: the taking breaks in the unauthorised area and the insubordination, refusing to move and shouting at managers. I therefore find that the decision to dismiss was one a reasonable employer could have taken.

39 I should add that it would not have been reasonable to include, as a reason for dismissal, the Claimant not leaving straight away after suspension, in the particular circumstances. It was in the middle of the night and she had no transport home. Those would be good reasons to refuse to leave a building in the middle of the night. Mrs Hookway reflected on the Claimant's explanation and did not take that allegation into account in her final decision.

40 So far as the procedure is concerned, in my judgment the process was within a reasonable range of procedures that an employer could take. The allegations were provided to the Claimant in writing before the disciplinary hearing. She had a full opportunity to state her case both in writing beforehand and verbally at the disciplinary hearing. She had the benefit of trade union representation, of interpretation and a full appeal.

41 Some employers would have split the investigation and the disciplinary hearing. And, in my view, this would have been better. But I cannot decide that it was unreasonable here not to do so because the Claimant's account was fully explored at the

disciplinary hearing. What was done here was sufficient to be reasonable and came within the disciplinary procedure that the Respondent had.

42 For all those reasons I have decided that the complaint of unfair dismissal is not well-founded.

43 The Respondent may want to reflect on what might be a better disciplinary procedure for the future. It may be better, as I have indicated, that the employer obtains an employee's account and considers whether there is any evidence that might support it before commencing disciplinary proceedings.

Employment Judge Moor

16 September 2019