Neutral Citation Number: [2022] EAT 104

Case No: EA-2020-000362-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2021

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MISS R GAFARI TIJANI **Appellant**

- v -

THE HOUSE OF COMMONS COMMISSION **Respondent**

- -
- -

Giles Powell for the **Appellant**
Bianca Venkata (instructed by **The House of Commons Commission**) for the **Respondent**

Hearing date:1 December 2021

- -

JUDGMENT

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SUMMARY

Unfair Dismissal

The ET did not err in law in upholding the dismissal for persistent lateness of an employee already subject to a warning for similar behaviour. There appeared to have been no case management hearing before the liability hearing, but although there were shortfalls in the disclosure process, the ET was not obliged to order disclosure mid-way through the proceedings.

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HIS HONOUR JUDGE MARTYN BARKLEM:

1. In this judgment I will refer to the parties as they were below.

2. This is the full hearing of an appeal against the dismissal of the claimant's unfair dismissal claim by an Employment Tribunal sitting at Central London, Employment Judge Norris sitting alone. The hearing took place on 19 and 20 February 2020 and written reasons were prepared dated 9 March 2020.

3. The appeal was rejected on the sift by HHJ Auerbach but permitted to proceed by HHJ Tayler following a Rule 3(10) hearing at which the claimant was represented by Mr Powell of counsel who appeared under the ELAAS scheme. The claimant had been represented by her son at the at the tribunal hearing.

4. Before me Mr Powell again represented the claimant, now under the auspices of Advocate from the Bar Pro Bono Unit. I am sure that the claimant is as grateful as I am for the thorough skeleton argument and economical oral submissions made today. The respondent was represented by Ms Venkata of counsel, who also appeared below. I am grateful to her, too, for her written and oral submissions.

5. I have been taken to a number of authorities, but as they mainly deal with issues and principles which are well-known, I shall not set them all out. I have had regard to everything to which I have been taken.

6. The facts are straightforward. The claimant had worked as a cleaner at the House of Commons from 15 June 2015 until her dismissal in May 2019. She was dismissed because of her continual lateness in arriving at work. In the claim form she stated that she had been unfairly dismissed "because I was sometimes late to work". She complained that the dismissal was not

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proportionate to the number of times on which she had been late and that others who were late were not dismissed. She also complained why she had not been told why her "two or three minutes here or there had an impact to the business".

7. The tribunal noted that, unusually, neither the claimant's contract nor the disciplinary policy was in the hearing bundle. I am told that there was no hearing dealing with case management in advance of the hearing. I assume that there must have been some form of standard written directions but neither party has put it in the appeal bundle.

8. The tribunal heard from the claimant's line manager, a Ms Steffens, the cleaning manager; Mr Mansfield, who was the dismissing officer and Ms Conway, Chief of Staff, In-House Services, who heard the appeal against dismissal. The tribunal recorded that the claimant received a first written warning for lateness in December 2017 for having been late on 17 out of 20 days. Further disciplinary proceedings for lateness took place in 2018 resulting in a final written warning on 23 April 2018. The claimant confirmed in her evidence that she was aware of that warning and that it was for 24 months. She did not appeal the sanction and the tribunal found at paragraph 4.11 of the Reasons that:

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

9. The claimant continued to be late by between 2 and 33 minutes. The tribunal records that there had been 43 instances by 10 January with a further 7 instances before the matter was dealt with formally.

10. An investigation was carried out by Ms Steffens when the claimant was accompanied by a union representative. She gave reasons for her lateness, including an assertion that the clock on

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the system was late. This was rejected. Her trade union rep seemed, the tribunal found, to be asking if the claimant could be permitted to start work early, which, the tribunal noted:

> "4.14… sits uneasily with the Claimant's assertion before me that she could not start earlier because she needed all her sleep to accommodate her evening job."

11. A disciplinary hearing took place on 15 April. It is noted at paragraph 4.15 that Mr Mansfield explained that it was difficult to plan and provide the service with the claimant's lateness and he asked her what caused it. By a letter of 10 May, the claimant was dismissed. The dismissal letter cited the live final written warning and approximately 50 occasions of lateness since that warning had been imposed.

12. The appeal hearing took place on 23 July 2019. Ms Conway found (see Reasons paragraph 4.20) that there had been a clear ongoing pattern of lateness, although a number of the instances were only one or two minutes. Even discounting those, there was still evidence to show that the claimant had not shown significant improvement. The outcome reached would therefore have been the same. Ms Conway also found that timeliness was a legitimate business need for operational reasons. The tribunal held that the dismissal was fair.

13. The grounds on which the appeal has been permitted to proceed are at paragraphs 15.1 to 15.5 of the skeleton argument prepared by Mr Powell for the Rule 3(10) hearing. In his note detailing the reasons for allowing the appeal to proceed, HHJ Tayler noted that there were two grounds, first relating to whether there were any knock-on effects, and the second relating to the alleged inconsistency of treatment as compared to other employees. The principal point in the appeal, as he saw it, was the second ground although initially minded to dismiss the "knock-on effect", he allowed it to proceed as "just sufficiently arguable" because the respondent's disciplinary procedures "may require some consideration of consequences of conduct when being assessed for disciplinary

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sanction". Mr Powell has not pressed this point in oral submissions. It is right to record that Ms Venkata had with her a copy of the respondent's disciplinary process but both Mr Powell and I declined to look at those at this at this late stage in the proceedings.

14. The grounds of appeal are, in my summary, as follows. 15.1, as the tribunal did not have the disciplinary policy, it could not measure the nature and extent of the alleged misconduct and the appropriate reasonable range for sanction. Plus, the conclusion of the judge that the poor timekeeping is generally an issue of misconduct was not properly informed and was speculative. The tribunal had not identified or tested evidence as to whether the claimant was treated differently from others in the same material circumstances. Such evidence was dealt with orally and not by disclosure. (3) In considering that consistency of treatment, the tribunal erred in concluding that the claimant's admitted lateness meant that the investigation could be more limited. (4) The tribunal erred in failing to address whether shortcomings in the appeal process rendered the dismissal bad, and finally (5) a sweeping up ground arguing that the tribunal did not consider the earlier matters in totality when considering whether the decision to dismiss was fair.

15. Mr Powell's skeleton argument amplifies these points with a helpful, lengthy introduction setting out the basis of the legal basis of the right not to be unfairly dismissed, the relevant statutory provisions and he cites authorities which are sufficiently well known not to need repetition in this judgment. He criticises the failure of the respondent to have given disclosure of its disciplinary rules and procedures, as well as details of comparators, the claimant having set out the consistency point in her ET1. He comments that the height of the evidence of the respondent appears to have been that it was not its recollection that five individuals continued to come in late and that Ms Steffens set out in her statement that the timekeeping of others improved. Thus, he argues, the matter was not properly ventilated and adequate reasons were not given for it. The same argument applies to the tribunal's finding that the investigation could be more limited because of the claimant's admission that she was

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sometimes late so that it did not have to cover every possible avenue. It is incongruous, he argues to suggest that the admission can justify a limited investigation or consideration of consistency in decision-making. Such an approach would limit and undermine consideration of a material issue concerning fairness.

16. Ms Venkata has, as I have already explained, had the advantage over Mr Powell of having been present at the hearing. Her submissions began by setting out the relevant law as to when the EAT is entitled to interfere with an employment tribunal decision. She then deals with whether the tribunal is entitled to find that lateness generally can constitute misconduct in the absence of a disciplinary policy, when a dismissal is rendered unfair by inconsistent treatment, and the extent to which a tribunal is required to assist a litigant in person in terms of the evidence to support his or her case.

17. As to the first point, it is not controversial that the EAT can interfere only where there has been an error of law. It should respect the tribunal's permissible findings of fact and should not go through the judgment with a fine -tooth comb. As to the second, Ms Venkata points to the finding of the tribunal that the claimant was fully aware following the final written warning that continued lateness could result in dismissal and that there then continued to be an ongoing pattern of lateness. She points out that the claimant raised no issue at the hearing as to whether any provision of the disciplinary policy rendered lateness unreasonable conduct. The question whether there was a knock-on effect was, she submits, dealt with squarely by the tribunal with adequate reasons having been given.

18. So far as consistency is concerned, she argues that the tribunal had adequate evidence before it that the claimant had not been treated inconsistently with others. The claimant had been invited by the Employment Judge to name any colleague who she maintained had a similar record of lateness to her but was unable to give any names. If the claimant had been aware in advance of the contents of

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the second statement that mentioned other cleaners who had been disciplined for lateness but whose attendance had then improved but chose not to seek further details of these. It was not, she submits, the duty of the tribunal to make such an order.

19. She relied on the dicta of Rimer LJ in **Muschett v HM Prison Service** [2010] IRLR 451 CA in which he says, speaking of employment judges:

> "31…It is not their role to engage in the sort of inquisitorial function that Mr Hopkin suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah v. East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14] -[22] and the cases there cited by Peter Gibson LJ). Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."

20. Ms Venkata submitted the investigation had been legitimately limited given the claimant's admitted lateness and the tribunal was correct so to find.

21. The tribunal identified flaws in the appeal procedure but was entitled to find that these were of a minor nature and did not affect the outcome.

22. I turn now to the conclusions of the tribunal as to the issues which arise on the appeal:

> "5.1 I do not accept that it is incumbent on the Respondent to demonstrate that it actually suffered loss or damage as a result of the Claimant's conduct. Mr Akindutire did appear also to accept that it is not for the Respondent to wait to see if there were any actual problems

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before taking action. I conclude that it cannot be said that no reasonable employer would take action pre-emptively in such circumstances. The Claimant was on a live final written warning for the same conduct. While, unusually, I did not have a copy of the disciplinary policy in the bundle before me, nonetheless, I accept that poor timekeeping is generally an issue considered to be misconduct. In extreme cases, it can be gross misconduct. I am not considering such a case here, but rather, as the Respondent asserts, an ongoing pattern of lateness.

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

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

5.4 I do not accept that the Claimant was treated worse than her colleagues. She was unable to give me the name or names of anyone who had a record equivalent to or worse than hers. Ms Steffens however was able to look at the list of Intellikey logins and tell me the names of five other employees against whom proceedings were taken. Her evidence was that unlike the Claimant, they all then improved so that none of them was dismissed. The Claimant did not challenge that evidence, which I accordingly accept.

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

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

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

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

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

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> 5.10 I have to ask myself whether no reasonable employer would have dismissed the Claimant in these circumstances. I did not find Ms Conway to be a very impressive witness, because although I accept the dates in question were some time ago, I would have expected her to refresh her memory and know whether, for instance, the days when the Claimant had been on holiday or otherwise legitimately absent had been taken out of the equation. It was unsatisfactory that evidence of annual leave was being produced during the submissions. Even though Ms Conway said in her report that she found the use of exaggerated wording or inaccurate numbers concerning, even before me there was still an element of glossing over the facts at the risk of accuracy: for instance, 43 is not one third of 150 as Ms Conway went on to suggest, and in any case, the figure according to Mr Akindutire is far higher than "around 150", so the proportion of times when the Claimant was late is further reduced.
>
> 5.11 Nonetheless, I conclude that this was a comparatively minor issue that did not affect the overall outcome. Even though I accept that more than half the time the Claimant was late it was by under five minutes, for a large minority of the time it was by more than that, and this occurred while she was on a final written warning. It cannot be said that no reasonable employer in a time-critical role where the work could not be made up by staying late would have dismissed, in the circumstances. Improvements that the Respondent saw after the warnings were imposed were not sustained."

23. In my judgment, the tribunal was entitled to make the findings that it did in terms of lateness being a conduct issue. It is apparent that there was no preliminary hearing in this case and the reasons recorded a list of issues that was gone through at the outset of the hearing and the claimant's son confirming that there were no other issues arising. I have now seen that list of issues. The factors in the **Burchell** test were set out and under the heading "Was the dismissal within the range of reasonable arguments?", the claimant's arguments were summarised as (a) the dismissal was not proportionate to the amount of times the claimant was late; (b) the claimant was told that she was improving; (c) other cleaners who were late but not dismissed; and (d) the claimant was not late intentionally.

24. The matters advanced by the claimant were clearly as to the proportionality of the sanction from her admitted lateness and, although the absence of a disciplinary policy was unfortunate, the tribunal was entitled, in my judgment, to form the conclusion that it did at paragraph 5.1. In general

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terms, given the sheer number of occasions on which the claimant was late and her acknowledgement that she had been told following the final written warning that continued lateness could lead to dismissal, I dismiss the suggestion that there was any element of speculation in this.

25. As to the submission that many of the latenesses were of only a few minutes, I note the tribunal's point at 5.2 that it is incumbent on employees not only to be present but to be ready for work. Having regard to the dicta in **Muschett**, I also reject the submission that it was incumbent on the tribunal to order disclosure in the course of the hearing of the disciplinary process. This is so notwithstanding that it ought really to have been disclosed in the normal course of events.

26. The issue of consistency was addressed by the judge at paragraph 5.6. Contrary to Mr Powell's submission as to the limited evidence and the nature of the evidence, it is clear that the claimant was unable to name anyone whom she thought to have a similar lateness record to her. Ms Steffens was found to be a reliable witness who was able readily to identify those who had a poor record. The tribunal made the obvious point that there was no reason for the claimant to have been singled out for further proceedings. A suggestion advanced in the course of the hearing that the real reason for the dismissal might have been to avoid a redundancy payment a year later had the House of Commons had to shut down for repairs, was rightly rejected at 5.5.

27. I do not accept the suggestion that some sort of disclosure ought to have been ordered. The EAT can interfere with factual findings of the tribunal only when such findings are based on no evidence. Here there was unchallenged evidence that six other cleaners had not been dismissed because their lateness had improved. This was a witness who gave not only a witness statement but oral evidence, which the tribunal was entitled to accept as truthful. The ET3 had pointed to the lack of any named comparators in the ET1 and had said that if details were provided it would give further information. Nothing further seems to have been advanced.

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28. The limitation on the investigation was covered at paragraphs 5.5 and 5.9. This is limited to the claimant's case that there was sometimes reasons for lateness to do with closure of the entrance gates or similar excuses. Given the extent of the admitted lateness over such a long period, the tribunal was entitled, in my judgment, to find that the respondent had carried out sufficient investigation to justify its conclusions.

29. As to the appeal, the limitations of it and the reservations which the tribunal had, these are set out clearly at paragraph 5.10, the ET having found Ms Conway not to have been an impressive witness. However, the conclusion reached by the tribunal is, in my judgment, unimpeachable given the number of times that the claimant was late.

30. Finally, as to the knock-on effect point, I can find no fault in the tribunal's reasoning that an employer does not have to demonstrate that persistent lateness had a specific knock-on effect, but if I am wrong about that in general terms, when an individual is in receipt of an unappealed final written warning arising from persistent lateness and warned that such further conduct could result in dismissal, he or she is clearly on notice as to the consequences such as to make the need for any such explanation otiose.

31. So with grateful thanks for the well-argued points advanced by Mr Powell on behalf of the claimant in this appeal, I dismiss it.

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