EMPLOYMENT TRIBUNALS

Claimant: Mrs Bibi Hassan Ally

Respondent: Interserve FM Limited

Heard at: **London South (Croydon)** **On: 24 & 25 August 2017**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr P Wareing of Counsel (Directly Instructed)
Respondent: Mr J Newman of Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. The Claimant's claim form was presented at the Tribunal on 18 December 2015. In her ET1 she had claimed Unfair Dismissal and discrimination because of race. By a judgment of EJ Balogun dated 1 July 2016 it was determined that the tribunal had no jurisdiction to entertain the discrimination claim as it had been presented after the primary limitation date imposed by Section 123 of the Equality Act 2010 and the it was not just and equitable to extend time. That left only a claim for unfair dismissal brought under the Employment Rights Act 1996.

2. The Claimant had been employed by the Respondent as a cleaner. In 2015, she worked at the New Addington Police Station, a client of the Respondent. In late February 2015, a query was raised about whether or not the Claimant was fulfilling her contractual duties. Whilst this was investigated and disciplinary proceedings concluded the Claimant was suspended from duty. It is the Respondent's case that its client raised concerns about the Claimant's return to the New Addington Police Station and, as a consequence, the Claimant was displaced. When no suitable vacancies were found for her she was dismissed upon contractual notice. Her claim is that that dismissal was unfair.

3. At the hearing that took place on 1 July 2016 the issues for the final hearing were identified as follows:

"Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2) [sic] of the Employment Rights Act 1996, namely [some other substantial reason.

Was the dismissal in all of the circumstances fair taking into account equity and the substantial merits of the case?"

4. The Claimant required the assistance of a Mauritian Creole interpreter, unfortunately this, and other difficulties, have led to series of delays in bringing this matter to a final hearing.

5. At the outset of the hearing some confusion arose because of reference in Mr Wareing's skeleton argument to claims of disability discrimination (by association) and to the case of ***Coleman*** in the CJEU. When the position was explored Mr Wareing confirmed that his reference to disability and to discrimination were neither intended as proposed amendments nor to suggest that such claims had been brought but were included to add weight to his contentions that the dismissal was unfair. He said that these were matters which I should consider when conducting any assessment under Section 98(4) of the Employment Rights Act 1996. We agreed that the issues that had been identified remained the same as set out above. However, in addition I asked the parties to deal with the question of whether there could or would have been a fair dismissal ("Polkey issues") and whether there had been any contributory fault.

6. At the hearing before me there was an agreed bundle and I heard evidence from Delores Robinson, a Regional Manager for the Respondent and the Claimant's Line Manager and the person who instigated the investigation, Nick Finch, a Facilities Manager and the person who conducted the disciplinary hearing relating to the Claimant's hours of work, Gareth Pretty, a General Manager at the time and the individual who took the decision to dismiss the Claimant and Graeme Shadbolt, a General Manager who heard the appeal. Finally, I heard from the Claimant who, throughout the hearing, had the benefit of an interpreter.

7. At the conclusion of the hearing the advocates gave oral submissions and Mr Wareing referred me to his skeleton argument. Those submissions are not reproduced in full here but I have had regard to the arguments raised and deal with the central points below. I record my gratitude to the assistance of both Counsel who both used the time available as effectively as possible. Unfortunately, a lack of time prevented me giving an oral judgment and I was forced to reserve my decision. I regret the time it has taken to finalise these reasons but they have been delayed by the weight of professional commitments.

Findings of Fact

8. The Respondent is a company which, amongst other activities, office facilities management services to its clients including both public and private sector clientele. Mr Graeme Shadbolt, who has worked for the respondent for 24 years and is now a General Manager, describes the Respondent's business as follows: *"at Interservefm we provide services to a diverse range*

of estates environments-schools, banks and shopping centres-through to industrial parks. We are experts in delivering resilient and compliant facilities management, from cleaning, catering, security and maintenance to industrial cleaning, mechanical and electrical maintenance and project services".

9. The Claimant started work for the Respondent on the 31st of April 2007. She was employed as a cleaner and was working at the premises of the Metropolitan Police Service (below "MPS") in South London. Her ordinary hours of work included an obligation to work for 40 hours a week between Monday and Friday from 08:00 until 16:00. Unfortunately, the Claimant's husband has been unwell since about 2003 when he was diagnosed with a cancer. However, matters have taken a turn for the worse when in February 2013 he was diagnosed with a further cancer of the bladder. The Claimant said, and I accept, that she had to cope both with her work and her other family responsibilities. It appears that at some point, prior to 2013, the Claimant had reached an agreement with her then manager Mr Simon Marshall that she would be permitted to return home to feed and care for her husband at lunchtime before returning to work. She would then work through until seven or 8 o'clock at night to make up her hours. The existence of that agreement is evidenced by an email chain between the claimant's trade union representative and Mr Simon Marshall in the latter part of 2013.

10. The Claimant's employment had not gone entirely smoothly up to that point. When Mrs Delores Robinson gave evidence, she adopted the following passage in her witness statement: "*Generally around once a month I endeavour to visit all the police stations within my remit. Check the general cleaning standards and iron out any issues that may have arisen. I knew Bibby, and had met with her previously on a number of occasions. Previously she had worked in other police stations in the Croydon area. Bibby had been moved from one station to another at the client's request. The client had asked for her removal generally because of her cleaning standards. In all the previous occasions when such requests were made there were roles available at the other stations to move Bibi to or I had been able to move other employees around".* In her oral evidence, she expanded upon that and described at least three or perhaps four occasions when the Claimant had been asked to move police station as a consequence of concerns about her work or, in one instance, because having been moved there are insufficient hours to occupy her.

11. In 2013, as a consequence of a client request, the Claimant was moved to New Addington. A further email exchange between the Claimant's trade union representative and Mr Simon Marshall took place in March/April 2014. This once again refers to the fact that the Claimant would be taking an extended lunch hour and working additional hours in the evening to make up the time. The Claimant was at all times required to record her arrival and leaving times on a timesheet. The agreed bundle contained timesheets from the outset of the Claimant's engagement at New Addington. These show that initially the Claimant was signing the timesheets suggesting that she was working from 08:00 until 16:00 but then after a few weeks the time sheets indicate that she is taking time off in the middle of the day before returning to work later into the evening. However, this is not consistent and there are still occasions where the Claimant signed in at 8:00 and out at 16:00.

12. Mrs Delores Robinson gave evidence, which I accept, that she was

entirely unaware of any arrangement that had been made to permit the Claimant to take time off at lunchtime. She also said that, had such an arrangement been in place, in her view, the Claimant would still have been expected to have recorded her arrival and departure times on the timesheets. What is more she expressed a view that in those circumstances it would have been even more important that she accurately recorded her hours of work.

13. In February 2015, Mrs Delores Robinson attended at the New Addington police station arriving at around 10:00. When she arrived, she was approached by one of the police officers who asked her about the Claimant's normal working hours. Mrs Robinson, who did not know of any special arrangement, said that the ordinary hours were 08:00 until 16:00. She was then told by the police officer that she had only seen the Claimant first in the morning and for a couple of hours in the afternoons. The officer also expressed some dissatisfaction as to the standard of cleaning. Mrs Robinson, who had expected to find the Claimant at work, telephoned her to ascertain her whereabouts. When the Claimant picked up the telephone she said she was in the toilet. Mrs Robinson initially assumed that meant the toilet in the workplace but the Claimant then explained that she was still at home. In the course of that conversation the Claimant said that she had reached an arrangement whereby she could take an extended lunch hour. This was the first that Mrs Robinson had heard of the matter. Mrs Robinson pointed out that even if that were the case it was 10:00 and not lunchtime. She asked the Claimant to attend the workplace but by 12:00 when she left the Claimant had still not arrived.

14. On 26 February 2015 Mrs Robinson decided to ask Ray Dash, an Operations Manager for the window cleaning team who were to attend the New Addington police station that week, to monitor the Claimant's attendance at work. Mr Dash then reported back in a written statement in which he disclosed the following information. He said that on 26 February 2015 he had been handed an email setting out complaints about the Claimant's cleaning standards. The Claimant did not arrive at work on time and when contacted said that the been a road accident which had delayed her. On 2 March 2015, Mr Dash was at the police station until 08:25 and did not see the Claimant before he left. On 3 March 2015, he once again did not see the Claimant before he left at 10:25. On 5 March 2015 Mr Dash arrived at the police station and decided to look at the signing in book. He noted that the Claimant had signed the book to suggest that she had worked from 08:00 on 26 February and 2 and 3 March 2015. When he left at 09:30 he saw the Claimant arriving. He reported all of that information to Mrs Robinson in a written statement made on 5 March 2015.

15. On 12 March 2015 Mrs Delores Robinson attended personally at the New Addington police station. She purposely arrived before the Claimant’s start time. She saw the Claimant arrive at 09:40 and when she later checked the signing in book it showed that the Claimant had made an entry suggesting that she had started work at 08:00. Mrs Dolores Robinson concluded that there were sufficient grounds for commencing a disciplinary investigation. She decided that the Claimant should be suspended. The Claimant has suggested that the suspension was carried out in a high-handed manner. On the balance of probabilities, I do not accept that. My reasons for preferring the account of Mrs Robinson over that of the Claimant are that I noted in the Claimant’s witness statement and oral evidence a tendency to put her case at its very

highest. She appeared to have no insight as to the difficulties her sporadic attendance might have had on the Respondent's operational needs to fulfil its contractual obligations. She was, in my view, far too quick to invoke conspiracies against her which I find have no evidential foundation. Both before me, and during the investigation that followed, she had no reasonable or proper explanation as to why she had signed a timesheet saying that she had arrived at 08:00 when both Mr Dash and Mrs Robinson herself had observed her arriving much later. In the investigation, she catagorised this as "mistakes". She attempted to suggest that she must have been elsewhere on the premises and merely putting on her outdoor clothing. I reject that as being wholly implausible and I regret to say that her propensity to bend the truth when it did not suit her arguments infected much of her evidence and, where her evidence was contradicted, I do not accept her account of events. Mrs Robinson accepts that the Claimant was suspended and I would accept that this was naturally distressing. I do not accept that there was anything high-handed or oppressive about the manner of suspension.

16. Mrs Robinson then commenced some further investigations. She approached the inspector at the police station, Inspector Fitzgerald, in the course of her conversation he raised his own concerns about the cleaning standards provided by the claimant and was also concerned about her working hours. Mrs Robinson asked him whether he would provide himself or from other officers written statements setting out any concerns that they had. She followed up that request in an e-mail. Inspector Fitzgerald sent Mrs Robinson an email on 18 March 2015 responding to her request. He said: *"yes we will, but only if she does not return to Addington ? Is this possible, as officers may feel uncomfortable."* He then proceeded to say that he had attended work on 10 March 2015 at about 09:30 and had seen the Claimant with her coat and hat on at 09:45. He then noted that she had signed in at 08:00. He said that on the following day he had been at work between 10:30 and 20:30 and had not seen the Claimant when he had left.

17. On 23rd of March 2015 a police officer, Sinead Bond, made a formal witness statement set out on a standard Magistrate's Court template. she said that on 11 March 2015 she had been working from midday until 20:00. The Claimant had been at work when she first arrived but she had not seen her thereafter despite the fact that she had signed out at 19:30. She further expressed surprise to learn that the Claimant had been expected to work between 08:00 and 16:00 as she generally had only seen her for a few hours at around midday. Another police officer Katherine Lott made a statement in the same format. She said that on 7 March she had been on duty from 09:00 to 19:00 hours. She had seen the Claimant in the morning but had actively looked for her in the afternoon because the ladies' toilet had run out of hand towels. She was unable to locate the claimant despite the fact that, according to the timesheet, she was still in the building. She said that on 10 March 2015 she had been on duty from 07:00 to 17:00. She had seen the Claimant arrive at the police station at 09:45 but had noted she had signed in at 08:00. She said that on the following day she did not see the Claimant until late morning.

18. The Respondent has, in addition to a disciplinary policy, a policy which it would apply where there is an indication by its clients that they wish for an employee to be removed from their site. This is the "client removal policy". It needs to be read and understood alongside the ordinary disciplinary policy. Where a client asks for the removal of the employee because of a matter

which could amount to misconduct the first port off call under the policy is the disciplinary policy. Where the outcome of that process is a dismissal then the client removal policy does not come in to play. However, where the outcome is something less than a dismissal, then it is envisaged that the client removal policy will be used. Essentially the policy provided that the client's reasons for seeking removal would be reduced to writing and be explained to the employee. The employee will be permitted to comment and their comments should be fed back to the client who will be invited to reflect on their decision. The policy provides that the client should be informed that, if the decision is maintained then, absent an alternative role, the employee faces dismissal. The purpose clearly being to put the client on notice of the seriousness of the position for the employee. If the client proves to be intractable then a final meeting will be held to make a decision. That meeting should cover the decision and the reasons given. It should also cover the possibility of any alternative role. If there is no alternative role then dismissal is permitted under the policy. There is a right of appeal and provision for re-instatement if the client should change its mind.

19. On 26 March 2016, the Claimant was invited to a disciplinary investigation meeting to take place on 30 March 2016. The letter described the potential disciplinary charges as "*Breaching your contract and bringing the company disrepute [sic] AND Breach of trust and confidence"*. The Claimant was also notified that as the client had requested her removal there was the potential for her employment to be terminated on that basis under the client removal policy. She was invited to ask for a copy of that policy.

20. The Claimant failed to attend that meeting possibly due to short notice or the availability of her trade union representative and it was adjourned twice. A meeting finally taking place on 15 April 2016. That meeting was conducted by Marten Holding. In the meantime, the Claimant had remained suspended with full pay. At the meeting on 15 April 2016 Ray Dash's statement was put to the Claimant and she suggested that there may have been "mistakes". She further suggested that time sheets outside the period reflecting the complaints might be relevant and suggested that others also filled in the time sheets incorrectly. She then is recorded as raising complaints of race discrimination and bullying. She accepted that she had not arrived on time on the day that she was suspended but apparently attributed this and the other occasions to the arrangement that had been made with her manager.

21. Marten Holding adjourned the investigatory meeting and made further enquiries. The Claimant supplied a document which summarised the e-mails between her trade union representative and her manager which set out the agreement for an extended lunch hour. Further enquiries were made of Mrs Delores Robinson who maintained that no change of hours had come to her attention and referred to the time sheets in 2013. She also dealt with a contention by the Claimant that she was not provided with proper cleaning materials.

22. The Claimant was invited to a further investigation meeting. It seems that the first date suggested was at short notice and the Claimant did not attend. A further date of 20 May 2016 was proposed and the Claimant did attend that meeting. In the invitation letter the allegations were said to be *"Falsification of documentation – signing in and out sheet"*.

23. On this occasion, the meeting was conducted by Steve Jones a Contract Manager. Having reviewed the notes of that meeting I find that Steve Jones asked direct questions designed to elicit an explanation of why, regardless of any adjusted hours, the Claimant had not accurately recorded her actual working hours in the time sheets. He considered that a review of earlier time sheets was irrelevant to that task. I find that he was entirely reasonable in taking such an approach. The Claimant at some points said that there had been mistakes and in others she tended to suggest that Ray Dash must have been wrong about her presence on site. She then went on to describe the illness of her husband and the impact that this had upon her. Steve Jones then concluded the meeting explaining that he would conclude the investigation and make a decision as to whether a disciplinary hearing was merited.

24. Whilst the Claimant has suggested that Steve Jones approach in the investigatory meeting was oppressive I do not accept that characterisation of the meeting. It seems to me that Steve Jones simply got straight to the point and demanded explanations from the Claimant as to her arrival and departure times and in relation to inconsistencies with the time sheets. The fact that the Claimant found the experience uncomfortable was, I conclude, because she had no real explanation for the discrepancies and was discomforted when Steve Jones declined to be distracted from the task in hand.

25. On 3 June 2015, the Claimant brought a grievance complaining of her treatment at the hands of Steve Jones and Bhupinder Ubhi (the HR advisor present) but mistakenly attributing that to Andrew Welch another HR advisor.

26. A decision was taken that the investigation into the Claimant's time keeping and time recording justified convening a disciplinary meeting. Accordingly, the Claimant was invited to a disciplinary meeting to be chaired by Nick Finch to take place on 5 June 2015. The Claimant was accompanied by her trade union representative Nikola Bryce. In the course of that meeting Mr Finch explored with the Claimant her explanations for the discrepancies between her time sheets and her reported physical presence on site. Rather than dealing with the specific allegations the Claimant and Ms Bryce focused their defense on the failure to provide all of the time sheets rather than those of the dates of the alleged discrepancies. It seems that they were intent on establishing that the Claimant's hours of work varied from 08:00 to 16:00 and had done throughout her recent employment. The Claimant then spent some time explaining her, I find baseless, theory that the investigation was in retaliation for her raising a previous complaint.

27. When the meeting returned to the issues of the discrepancies in the time sheets noted by Ray Dash. Mr Finch accepted, irrationally in my view, that because Mr Dash himself had not signed the time sheets on some occasions he could not rely on what he said about the Claimant on those days. He decided to adjourn the disciplinary meeting in order that further pages of the signing in book could be provided. The disciplinary meeting was then re-convened on 19 June 2015. At this meeting the Claimant was provided with further signing in sheets. The Claimant's Trade Union representative argued that the signing in sheets read as a whole disclosed that the Claimant was working flexibly and that this would be *"custom and practice"*. She catagorised the occasions when the Claimant had incorrectly recorded her arrival and departure times as arising from "confusion" rather than deliberate falsification.

As an advocate , which was her role, Ms Bryce worked very hard for the Claimant.

28. Mr Finch was not entirely convinced by the Claimant's explanation and concluded that she had filled in the time sheets incorrectly. However, in his view, the fact that Ray Dash had omitted to complete a time sheet on at least one occasion persuaded him that the conduct he found proven did not justify dismissal. He therefore decided to issue a final written warning. In his evidence Mr Shadbolt indicated that, whilst he considered that he could not go behind it, in his view the Claimant had been extremely fortunate in relation to the outcome of that meeting. The Claimant, erroneously believed that the fact that no gross misconduct had been established meant that the matter should have been abandoned altogether. For reasons which were never satisfactorily explained the letter confirming the final written warning was not sent out until 3 August 2015.

29. Aware that the disciplinary process had concluded with a sanction short of dismissal Dolores Robinson contacted Inspector Fitzgerald and canvased his views as to the return of the Claimant to the New Addington police station. He indicated to her that he did not want her to return. He was then asked to put that in writing. He sent an e-mail on 23 June 2015 in which he said: *"I wish to confirm that I would not want Bibi to return to Addington Police Station. Myself & other officers would feel in a bad position, and unable to converse with her. The situation would not be acceptable for all."*

30. In parallel with the disciplinary process the grievance lodged by the Claimant was investigated and a meeting was conducted by Andrew Welch on 25 June 2015. The meeting was adjourned for further enquiries to be made.

31. Shortly after that meeting Andrew Welch sent the Claimant and her trade union representative a vacancy list of all available vacancies. Whilst the list appears extensive it does include jobs all over the United Kingdom. There were however some cleaning jobs available in the London area although none local to the Claimant.

32. Alive to the fact, as yet undisclosed to the Claimant, that Inspector Fitzgerald did not want her to return to the police station, Dolores Robinson started to investigate what alternatives there may be. On 3 July 2015, she sent an e-mail to all of the MPS Service managers asking for details of any vacancies. That provoked only one response from a Manager in East London/Essex who identified 4 possible vacancies in his area. There were sent by Dolores Robinson to Mr Welch to discuss with the Claimant at the adjourned grievance meeting. Prior to that meeting taking place Mr Welch sent an updated general list of vacancies to the Claimant. Delores Robinson gave evidence that whilst she had always managed to relocate the Claimant following previous client requests essentially, she had run out of Police Stations in the area as the Claimant had been moved from most, if not all, local stations where the Respondent provided cleaners.

33. On 13 July 2015, the Claimant and her trade union representative once again met with Andrew Welch. He indicated that he wanted to complete the grievance process but also wanted to deal with the first meeting of the "client removal" policy. There was no objection made to him taking that course and it

is to be inferred that the Claimant and her union representative were aware that the possibility of the client removal policy being followed remained a live issue. Certainly, nobody had questioned the purpose of supplying vacancy lists.

34. Whilst Andrew Welch did not uphold the Claimant's grievance as amounting to bullying he acknowledged that the meeting with Steve Jones had been difficult and he recommended that he received training in conflict resolution. It appeared from the notes that the Claimant expressed herself as being content with that outcome at the time. Andrew Welch confirmed his decision by a letter dated 20 July 2015.

35. Andrew Welch then proceeded to deal with the issue of the client being unwilling to permit the Claimant to return to the police station. Whilst the grievance hearing was carefully minuted only the outset of the "client removal" meeting was recorded in the notes. However, the part that is recorded suggests that Andrew Welch intended to set out the concerns and to warn of the consequences if the client maintained their refusal to permit the Claimant's return. I conclude that that is in fact what happened. Further lists of vacancies, which were weekly updates, was sent to the Claimant by e-mail on 15 and 22 July 2015.

36. On 23 July 2015, Chantelle Morris, an HR advisor for the Respondent, sent an e-mail to Inspector Fitzgerald. She introduced herself as being the HR support for the "client removal process". She informed the Inspector that she was obliged to refer the Claimant's representations to him for his consideration. These were quoted as follows: *"Bibi feels that those who have provided statements in the investigation against her are nice people and that she harbours no ill will against any of the police officers. Bibi would like to continue working and building on the relationship with the police officers at this site".* I infer that this statement was the product of representations made at the meeting with Andrew Welch who appears to have been attempting to follow the provisions of the client removal policy. Chantelle Morris's e-mail makes it plain that, if the refusal to permit the Claimant to return is maintained, one possibility is dismissal.

37. When she gave evidence Dolores Robinson stated that in addition to contact from HR she had also spoken to Inspector Fitzgerald and indicated to him that the Claimant's employment was jeopardised by the unwillingness to permit her return. I accept that evidence as it seems that as a response Inspector Fitzgerald sent a further e-mail to Dolores Robinson where he said: *"I wish to confirm that the removal of the cleaner Bibi, as previously stated, myself and other officers are in a position that her return would not be right. I am very happy with David who we have right now".* The reference to David was to a cleaner that had been supplied as an interim measure from a relief team to maintain the contractual obligations. I explored whether that deployment created a vacancy that could have been offered to the Claimant but I was satisfied that it did not.

38. The Respondent continued to send the Claimant weekly lists of vacancies. In addition, in advance of a meeting due to take place on 13 August 2015 to consider the position, Chantelle Morris resent the vacancies that had been found by Dolores Robinson in East London. On 10 August 2015, the Claimant sent a combative e-mail in which she set out her belief that the disciplinary

action taken against her had been dropped (she had by then belatedly received the outcome letter). She then went on to say: *"an alternative position was supposed to have been arranged for me. However, all I have received is the internal vacancy list with irrelevant positions".* The then went on to threaten media exposure and tribunal proceedings if the meeting resulted in her dismissal.

39. On 10 August 2015 Chantelle Morris sent out a further e-mail to managers explaining that she was looking for a vacancy for the Claimant. This resulted only in a further response from the Manager in East London who had a somewhat reduced list of vacancies.

40. On 12 August 2015, the Claimant obtained a "Statement of Fitness for Work" that stated that she was unfit for work because of "Multiple symptoms" (a completely unhelpful document). The Respondent therefore offered the Claimant the possibility of conducting the meeting by telephone. The Claimant's son sent a text message rejecting this as an option.

41. On 13 August 2015 Gareth Pretty reviewed the history of the matter and noted that there had been a number of adjournments of meetings because the Claimant had not attended. He therefore decided to proceed in the absence of the Claimant. He reviewed what had been done against the client removal policy. He concluded that the Claimant had been made aware through the disciplinary process of the reasons why the Claimant had expressed dissatisfaction with her. He noted that the Claimant's representations had been forwarded to the client. He noted that the refusal to permit her to return had been maintained. He checked to see whether the Claimant had been sent vacancy lists and found that she had. He decided that all that could reasonably have been done had been done and decided that the Claimant should be dismissed with a payment made in lieu of notice. He confirmed his decision by a letter dated 14 August 2015. He advised the Claimant that she had a right of appeal. I have no doubt whatsoever that the reason for the dismissal in Gareth Pretty's mind was a genuine belief that the Claimant could not return to the New Addington Police Station and that there were no alternative roles which she was willing or able to do. I note that the alternative theories put forward by the Claimant, namely a campaign against her following previous complaints was scarcely explored in evidence and insofar as it was I reject the idea that such events played any part in the decision.

42. On 16 August 2015, the Claimant sought to appeal her dismissal. She also sought to appeal against the final written warning although there was no suggestion in the letter of dismissal that that warning had been taken into account in any way. The appeal letter, consistent with other correspondence, makes serious and unsubstantiated allegations of a lack of transparency.

43. The Claimant's appeal was heard by Graeme Shadbolt. A hearing took place on 15 October 2015 and the Claimant was accompanied by her trade union representative. In the course of the meeting it was suggested that the Claimant had expressed interest in one of the vacancies sent to her but that she had been unable to get a response by telephone. When the matter was investigated, it turned out that the vacancies had been filled. The Claimant complained that she had been given no support or CV training. Graeme Shadbolt, having heard from the Claimant decided to uphold the original

decision. He confirmed his decision by a letter dated 28 October 2015. His decision was expressed as being final. Latterly it was explained to the Claimant that her appeal against her final written warning had not been separately considered as it had been submitted later than permitted by the Respondent's disciplinary policy.

The Law

44. A claim for unfair dismissal is a statutory claim and is brought under Part X of the ERA 1996. Section 94 of the ERA 1996 makes it unlawful for an employer to unfairly dismiss an employee. That right is only available to employees with over 2-years continuous service. It is accepted that the Claimant fulfils this requirement.

45. It is necessary for the Claimant to establish that there has been a dismissal falling within the definitions of dismissal contained in Section 95 ERA 1996. Here the Respondent does not dispute that the Claimant was dismissed.

46. Section 98(1) of the ERA 1996 provides that, in order to avoid a finding of unfair dismissal, an employer bears the burden of proof in showing that the reason, or if more than one, the principal reason for the dismissal was for one of the potentially fair reasons set out in section 98(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. It is that latter category of dismissal relied upon by the Claimant in the present case.

47. What was meant by the reason for a dismissal was discussed in ***Abernethy v Mott, Hay and Anderson*** **[1974] ICR 323** where it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason."*

48. The existence of some ostensibly fair reason for a dismissal does not necessarily mean that that was the actual reason for the dismissal see ***Aslef v Brady*** **[2006] IRLR 576**.

49. Dismissal for 'Some Other Substantial Reason' is widely seen as an important residual category of reason for dismissal. Provided the reason is not whimsical or capricious it is capable of being substantial and, if, on the face of it, the reason could justify dismissal then it will pass as a substantial reason ***Kent County Council v Gilham*** **[1985] IRLR 18, CA**.

50. It has been recognised that a dismissal because of third party pressure by a client or customer may amount to reason amounting to *'some other substantial reason'* ***Dobie v Burns International Security Services*** ***(UK) Ltd*** **[1984] IRLR 329*, CA,* *Henderson v Connect (South Tyneside) Ltd*** **[2010] IRLR 466, EAT *and* *Jafri v Secretary of State for Justice*** **UKEAT/0436/12.**

51. If the employer can establish that the reason for the dismissal was for a potentially fair reason then the Tribunal must consider whether the dismissal was fair or unfair applying the statutory test set out in Sub-Section 98(4) ERA

1996 namely:

> "*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."*

52. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439** and ***Post Office v Foley; HSBC Bank plc v Madden*** **[2000] IRLR 827**

53. Where an employer is relying on third party pressure the following guidance can be extracted from the cases set out above:

53.1. *"In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the facts known to him at that time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are all matters which affect the justice or injustice to the employee of being dismissed."* ***Dobie v Burns International Security Services***

53.2. "*As we understand it, the effect of Dobie is that in a case where the client's stance appears liable to cause injustice, the tribunal must consider with special care whether the employer had indeed done all that he could to avoid or mitigate that injustice: in a case of patent injustice it may be necessary for an employer to pull out all the stops. But Dobie cannot be read as holding that, even where the employer has done all he could to avoid or mitigate the injustice but without success, an eventual decision to dismiss will be unfair."* ***Henderson v Connect (South Tyneside) Ltd***

53.3. My understanding from those cases is that the any injustice caused by the decision of a third party will be in all cases a very important factor in deciding whether or not a dismissal as a consequence is fair or unfair. The graver the injustice the greater the burden on the employer to seek to avoid the injustice whether by "pulling out all of the stops" or otherwise.

Discussion and conclusions

54. The first issue that I must determine is whether the dismissal was for a potentially fair reason. I have set out above in my findings of fact my rejection of the Claimant's suggestion that there was some general animosity towards

her. The documents disclose that Dolores Robinson made a number of enquiries about alternative jobs for the Claimant and the evidence was that she had been moved due to client dissatisfaction a number of times. There was simply no evidence to support the Claimant's contention that there was some ulterior motive for the dismissal.

55. I accept the Respondent's evidence that the MPS, through Inspector Fitzgerald, was refusing to permit the Claimant to return to the New Addington Police Station. Whilst the expression of that sentiment is made in mild terms Inspector Fitzgerald is entirely consistent throughout his e-mails and maintained his stance even after being told in terms that the effect of that may lead the Claimant to be dismissed. In the light of the authorities I have set out above I am satisfied that there was a potentially fair reason for dismissal.

56. I therefore turn to the question posed by Section 98(4) and the issue of whether this dismissal was fair or unfair. The essential question is whether or not the decision made by Gerard Pretty was one which was open to a reasonable employer.

57. As Mr Wareing urged upon me that the authorities I have referred to above require an employer, who wishes to act fairly, to have regard to the potential injustice to the employee. If they do not then a tribunal may regard that failure as rendering the dismissal unfair. Clearly the extent of the injustice may vary case to case. Where an employee has been wholly or partly to blame for the third party adopting the stance that they do any injustice may be substantially diminished. In ***Dobbie*** the Court of Appeal suggested that the employees record may be a significant factor. In the present case, the trigger for the events that followed was, as found by Mr Finch, conduct which justified a final written warning. I have some sympathy with the view of Mr Shadbolt that Mr Finch had perhaps taken a very lenient view of the Claimant's actions. It is very difficult to see why Mr Finch discounted parts of the compelling evidence of Ray Dash simply because of his failure to sign the record book when the issue he had to consider was whether the Claimant had made a false entry in the record book. There is no logical connection between the two. If I had to decide the matter I would have considered that the injustice caused by Inspector Fitzgerald was not of the same order of magnitude as the dismissal of an otherwise blameless employee. However, at this stage, I am not deciding the matter but examining the decision of the Respondent. Neither Mr Pretty or Mr Shadbolt said that they placed any real weight on the fact that, at least to an extent, the Claimant had set the train of events into motion by her own conduct. They approached the matter on the simple basis that, having followed their own policy there was little alternative. That is in my view a lenient approach and one about the Claimant can have little complaint.

58. Mr Wareing sought to persuade me that the e-mails I have quoted above from Inspector Fitzgerald cannot amount to a "client instruction" as they are more akin to expressions of wishes than client demands. Whilst that is true of some of the earlier e-mails it is not true of the last e-mail. The submission must be seen against the fact that each e-mail is a response to an earlier oral conversation with Delores Robinson. The e-mails provide confirmation of what was said. Taken as a whole I believe that the Respondent had a solid basis for treating them as a refusal to permit the Claimant to return to the New Addington Police Station.

59. It is clear that the Claimant must have understood that the reasons that the police officers were putting forward for their stance was their discomfort in working alongside a person against whom they had given evidence in the disciplinary proceedings. My reasons for reaching that conclusion rests on the nature of the representations made by the Claimant and quoted in the e-mail sent to Inspector Fitzgerald by Chantelle Morris 0n 23 July 2015 which shows that she understood the nature of the objection.

60. Mr Wareing suggested that the efforts of the Respondent to persuade Inspector Fitzgerald were wholly inadequate and fell short of the standard of "pulling out all of the stops". I accept that the approach of the Respondent both in the evidence of the oral conversations of Dolores Robinson and in the e-mails of Chantelle Morris was generally neutral rather than advocating a change of heart. That said, in accordance with the policy, Chantelle Morris did spell out that dismissal may be a consequence of the stance being maintained. I had evidence that the MPS is a significant client for the Respondent. In all such cases there would be commercial considerations about how forceful representations could be. I also bear in mind that the evidence that the Police Officers had given in relation to the falsification of time sheets amounted to accusations of dishonesty. Whether the accusations were true or false it would have been obvious to the Respondent that the concerns expressed by Inspector Fizgerald could not be dismissed as without foundation. In my view this is a paradigm example of a situation where there could be a range of reasonable responses. Some employers may have tried harder but that does not render the Respondent's response unreasonable.

61. Mr Wareing sought to persuade me that the efforts to secure alternative employment were inadequate. I find that the Claimant was aware that there had been a client request for her removal shortly after she was suspended. She was informed of that in writing and thereafter never questioned the fact that she was sent vacancy lists. She was sent those lists for some time but never responded. I accept that many of the jobs on those lists were unsuitable but amongst them were a number of cleaning jobs in London. The evidence of Delores Robinson was that, due to previous client requests for the Claimant's removal, there was no possibility of swopping the Claimant with another staff member. I accept that evidence.

62. Once again, the question is not whether the Respondent could have done more but whether what they did was within a band of reasonable responses. I consider that the actions of Delores Robinson in proactively looking for vacancies, later followed up by Chantelle Morris and coupled with sending general vacancy lists over a number of weeks was a reasonable response in the circumstances. In the minutes of the appeal hearing Mr Shadbolt is recorded as saying *"we obviously cannot create a position for you nor can we keep you on paid suspension until something suitable is available"*. Bearing in mind the length of time that the Claimant had been sent vacancy lists whilst on paid suspension I do not consider that to have been an unreasonable statement.

63. I find that broadly speaking the Respondent did follow its own Client Removal Policy. That policy is perhaps a little cumbersome and not all factual situations are catered for. Here the essential elements were all present. The Claimant knew of the events that had given rise to the client's requests. Those were all explored in the disciplinary proceedings. The damage to the

working relationships caused by the involvement of the police officers in the internal disciplinary process was plainly understood by the Claimant and had been reduced to writing. She had the opportunity to make representations to the client and she did so. Unfortunately for her those representations were not heeded. A reasonable effort was made to seek alternative employment but there was none available or at least none which the Claimant was able or willing to do.

64. I was concerned by the decision of Mr Pretty to proceed with his meeting in the absence of the Claimant. He did look into the history of the processes and not unreasonably concluded that there had been a number of adjournments and failures to attend meetings. He could have quite reasonably concluded that the Claimant was attempting to delay the process. He also took steps to involve the Claimant on the telephone which were declined for no apparently good reason. His decision to proceed in the absence of the Claimant was robust and not one which every employer would have made. When he made that decision, he knew that there would be an opportunity to appeal and offered that in his decision letter. I conclude that the decision to proceed in absence was not one which, by itself, rendered the dismissal unfair. Insofar as the Claimant was prevented from having her say that was a matter adequately and sufficiently cured during the appeal process.

65. Mr Wareing asked me to have regard to the Claimant's personal circumstances and to take into account the fact that the Claimant needed to care for her disabled husband. I consider that, as he accepted, this simply feeds into the question of whether there was any injustice or unfairness to the Claimant. The Claimant was not ultimately disciplined for not being at work between 08:00 and 16:00. It appears that, by the time matters were investigated, it was accepted that there was some prior agreement as to a change in hours and the issue of quite what had been agreed was put to one side. The reason for the disciplinary action was the Claimant not accurately recording her hours. In my view than was not something that could be said to have been caused by her husband's disability. There was no suggestion that either Mr Pretty or Mr Shadbolt were unaware of the fact that they were taking away the Claimant's livelihood or failed to take account the personal consequences of that. The Claimant was not dismissed because of her timesheets or time keeping but because the client had decided that it did not want her in their premises. The Respondent's reaction to that did not fall outside the range of reasonable responses.

66. For the reasons set out above I consider that the decision of the Respondent was reasonable, in the sense that it fell in a band of reasonable responses, and accordingly I conclude that the dismissal was fair. It follows that I must dismiss this claim.

67. For completeness, I should deal with the question of whether, if I am wrong about the fairness of the dismissal, the Respondent has shown that there could or would have been a fair dismissal in any event or whether there was any blameworthy conduct that caused or contributed to the dismissal. In answering these questions, I am the primary fact finder.

68. Having listened to the Claimant's explanations of how it was that she had signed time sheets indicating that she had started work at 08:00 when she

had been observed to arrive later than that I remain wholly unconvinced by her explanations. There explanations varied between the fact that there had been “mistakes” to a suggestion that she was elsewhere in the building. Those explanations were totally implausible. I find that it is very likely that the Claimant had been given permission to take a long lunchbreak and work in the evenings. I find it highly unlikely that the Claimant was told that she could work entirely the hours of her choice. I find that having been given an inch the Claimant took a mile. She knew that she was not permitted to arrive on an as and when basis and it is for that reason that she would fill in the time sheet saying she had arrived at 08:00 when she had not. Whilst I have every sympathy for the Claimant having to cope with her husband’s ill-health she ought to have regularised the position with the Respondent rather than, as I find she did, taking matters into her own hands. Once the issue was identified she should have been truthful. Again, I regret to say, I find she was not. There were a number of independent witnesses who witnessed her arriving late and then signing a time sheet indication he had arrived on time. Had I been in the shoes of Mr Finch I would have concluded that the Claimant had been dishonest.

69. I consider that the Police Officers were well aware that the Claimant had acted as I have found above. That was the thrust of the evidence that they gave. In the circumstances, even if the Respondent had made a much stronger case for her to return to the Police Station I find that it would have fallen on deaf ears. I would have therefore concluded that if the dismissal was unfair for that reason a fair dismissal would inevitably have occurred had more effort been made.

70. Finally, it follows from the above, that I consider that the Claimant was the principle author of her own misfortune and that her conduct was blameworthy and contributed to her dismissal. Having found no procedural failing it is not possible for me to assess the level of any such contribution.

Employment Judge John Crosfill

Date 13 November 2017