THE EMPLOYMENT TRIBUNALS

Claimant: **Mr N Friend**

Respondent: **London Fire and Emergency Planning Authority**

Heard at: **East London Hearing Centre** **On: 21 and 22 September 2017**

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

Representation

Claimant: Mr J Wharnsby (Friend)

Respondent: Ms N Joffe (Counsel)

JUDGMENT

The Claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Issues

1 At the outset of the hearing the following issues were identified as relevant:-

1.1 Whether the Respondent has established a potentially fair reason for dismissal. The Respondent asserted conduct, namely the Claimant failing a drug test for an illegal Class A drug, cocaine.

1.2 If so, whether the dismissal was fair and reasonable in all the circumstances. The key factors of consideration in this regard are:-

1.2.1 Whether the Respondent believed, on reasonable grounds, that the Claimant was guilty of misconduct;

1.2.2 Whether there was a reasonable investigation; and

1.2.3 Whether dismissal was in the band of reasonable responses open to the Respondent.

1.3 If the Claimant was unfairly dismissed the Respondent contends that the Claimant would have been fairly dismissed in any event pursuant to *Polkey*.

2 The Claimant has adamantly maintained, both during the internal disciplinary proceedings and before the Tribunal, that he is anti drugs and had not consumed cocaine. I made it clear to the parties that whether or not the Claimant took cocaine would not be a relevant matter for me to consider in respect of unfair dismissal albeit I accepted that it could be relevant a consideration for *Polkey* if appropriate.

Witnesses and evidence

3 The Respondent called Mr Allen Perez, Deputy Assistant Commissioner, (dismissal officer) and Mr Richard Mills, Assistant Commissioner for Operational Policy, (appeal officer) to give evidence. The Claimant gave evidence on his own behalf.

4 All witnesses gave evidence by way of sworn witness statements and were subject to cross-examination and questions from the Tribunal.

5 The Claimant also relied on the unsigned statements of Ms Hazel Wilcock, Mr Michael White, Mr Jon Wharnsby, Mr Robin Taylor, Mr Martin Knight and Mrs Joan Taylor. Save for Mr Wharnsby, none of the witnesses were in attendance to attest their statements and Mr Wharnsby chose not to do so. I read these statements, the content of which was of limited relevance to the issues, and in view of them not being attested considered them to be of extremely limited evidential value.

6 I was also referred to relevant documents of an agreed 288 page bundle.

Facts

7 I have found the following facts from the evidence.

8 The Claimant commenced employment with the Respondent on 8 December 1997 as a Firefighter. The Claimant had 19 years service at the date of his dismissal on 14 December 2016, prior to that date he had a clean disciplinary record and was highly regarded and respected by his managers and work colleagues.

9 The Respondent has an alcohol and drugs policy aimed at safeguarding the public and maintaining public confidence. The policy indicates that the Claimant's role was safety critical and the Claimant was fully aware of, and understood, the Respondent's policy which specified zero tolerance of illegal drug consumption.

10 Clause 3.2 of the Respondent's alcohol and drugs policy states that no employee should report for work with traces of illegal drugs in their body systems and it further states that the Respondent has a zero tolerance of illegal drug consumption.

11 Clause 12.1 of the ensuing code of conduct of the Respondent's alcohol and drugs policy states, amongst other things, that employees will normally be subject to disciplinary action, which may include dismissal if they fail a drugs test and/or if they report or try to report for duty when unfit through alcohol and/or drugs.

12 The management rules for the Respondent's disciplinary process provide that being unfit for work through the influence of alcohol or illegal drugs is an example of an offence that may result in summary dismissal. However, the Respondent's actual disciplinary procedure does not contain this example. Whilst providing for a list of non exhaustive examples of gross misconduct the Respondent's disciplinary procedure states, at paragraph 11, that '*serious incapacity'* at work brought on by misuse of alcohol or illegal drugs is classed as gross misconduct.

13 The drugs and alcohol policy also allows for support to be given in appropriate circumstances to officers who may have alcohol or drug dependency. However, the Claimant denied being a user of illicit drugs and as such the provisions were not engaged in this matter.

14 On 14 March 2016, the Claimant was required to attend a Routine Periodical Medical (RPM). The Claimant attended the medical late and in usual circumstances, due to pressure of appointments, the medical would have had to be rearranged for another date. This could have led to separate consideration of whether disciplinary action was appropriate for failing to attend a medical. However, despite the Claimant attending the RPM proceeded.

15 Prior to the RPM the Claimant signed a consent form for a drug test from a urine sample and he was fully aware that any positive result may result in him being placed unfit for duty and liable for disciplinary action.

16 The Claimant's on site test return following the RPM was non negative for a cocaine metabolite, benzoylecgonine, (BZE). Consequently, he was placed as unfit for work pending further testing of his second urine sample. This tested positive for BZE on 16 March 2016.

17 The Claimant was suspended from work on 22 March 2016 and on 23 March 2016 he was informed that there would be an investigation into alleged breaches of the Respondent's code of conduct, relating to testing positive for an illegal drug and reporting for work with an illegal drug in his body.

18 The Claimant made enquires about how he could have tested positive. He initially considered that a drink could have been spiked or that a health condition was the reason behind it. Both of these considerations were subsequently discounted by him.

19 An investigatory interview took place with Ms Sarah Miller on 20 April 2016 and the Claimant confirmed that he was aware of the Respondent's alcohol and drugs policy. The Claimant stated that he had not taken drugs and believed that the result was a mistake as he could not explain why he tested positive for cocaine.

20 The Claimant stated that Ms Miller made inappropriate questions during the investigatory interview and made him feel anxious. The Claimant thought that Ms Miller had a predetermined view of his guilt. Ms Miller was not called to give evidence and I accept that the Claimant was upset by her, clumsy or perhaps less benign, approach to the investigation. However, her investigation report and notes were not inaccurate and she played no part in the subsequent decision to dismiss or the appeal outcome.

21 On 25 April 2016 the Claimant subsequently arranged for a hair follicle test to be undertaken with BioClinics to assess drug use. The hair follicle test returned negative on 28 April 2016 and the Claimant sought to rely on that as evidence that he had not taken cocaine. The Respondent's position on this, relying on expert medical evidence, was that the hair analysis was not used as it did not detect single or infrequent use of cocaine.

22 By letter dated 2 November 2016 the Claimant was invited to attend a disciplinary hearing on 28 November 2016. He was required to answer allegations that he tested positive for cocaine metabolite and that he reported for duty with traces of an illegal drug in his system. All the relevant documentation was provided to the Claimant to review and consider. He was informed that if the allegations were upheld one outcome may be that he is dismissed.

23 The disciplinary hearing, held by Mr Perez took place over 2 days on 28 November and 14 December 2016. The Claimant had a proper opportunity to consider the allegations and advance his case. Numerous character witnesses were advanced, the hair follicle evidence produced and statement from Claire Thorpe, family law solicitor of Creighton & Partners was obtained stating that a hair strand test is seen as the most comprehensive and reliable method of testing for drug use.

24 At this stage the Claimant sought to question the propriety of reliance on urine sample and contended that hair follicle tests were more reliable. The Claimant also stated that the urine sample must have been contaminated by cocaine that must have transferred from his forefinger to the urine sample receptacle. This theory was supported by evidence of other firefighters who provided signed statements saying that they were told not to wash their hands or flush the toilet when required to give samples. This theory was seemingly suggested by Mr Wharnsby, who was aware of a case of a bus driver who was found to be unfairly dismissed due to contamination of sample. The Claimant espoused the theory that his forefinger was inside the urine sample receptacle and that there must have been cocaine remnants on his forefinger at the time of the test as he had handled £800 in cash earlier in the morning of the test. The Claimant maintained that it was common knowledge that UK bank notes contained traces of cocaine and he observed that he was not asked to wash his hands nor informed that his finger should not be put into the receptacle at the RPM. The Claimant also leveled criticisms about the professionalism of the nurse who took the sample in giving him a receptacle that had a seal broken. The Claimant did however state that he

used a receptacle with an unbroken seal.

25 The thrust of the Claimant's defence was that, whilst he failed the drugs test the test must have been contaminated by cocaine transfer from his forefinger and that there were not traces of illegal drugs in his body as he had not taken cocaine.

26 During the adjournment of the disciplinary hearing Mr Perez sought clarification from HML and Synergy Health Laboratory Services on the procedures followed for the collection of samples on 14 March 2016. The Respondent was unable to question the nurse as she had left HML, the testing organisation by the time of the investigation by that time.

27 At the resumed hearing, having considered the additional information, Mr Perez outlined that he had been informed that urine samples are industry standard and a legally defensible method of testing and that hair test results cannot be compared to urine sample as they may not detect single or irregular use. In respect of potential contamination, Mr Perez concluded that if there was a transfer from the Claimant's forefinger it would not have registered as metabolite BZE, it would have been identified as cocaine and not a metabolite BZE. However, Mr Perez did not give the Claimant an opportunity to consider these additional matters of clarification before he made his decision.

28 It is evident that Mr Perez gave full consideration to the Claimant's case and concluded on the balance of probabilities that the allegations were established. Mr Perez considered all aspect of the Claimant's case and informed the Claimant that he was to be summarily dismissed effective 14 December 2016. A letter was issued to this effect and the Claimant was provided with a right of appeal which he exercised by letter dated 21 December 2016.

29 A comprehensive appeal was heard by Mr Mills on 8 May 2017. All documentation and issues were considered. By this stage the Claimant had paid for a detailed analysis of the B Sample and obtained a report from LGC Laboratories. This was before Mr Mills and carefully considered by him. The LGC Laboratories report demonstrated the presence of BZE in the B sample. The Claimant called expert evidence from Mr Dan Williams, a joint author of the report, at the appeal hearing. The report writers were of the view that it was inconceivable that someone with an addiction would present for a medical, with knowledge that they were to be drug tested. The attendance at the drug test was said to be irreconcilable with drug addiction and the Claimant's hair test also confirmed this.

30 In respect of the scientific challenges that the Claimant made at the appeal hearing, Mr Mills requested a full report from SynLab and the highly qualified expert Dr Frank Evers. Dr Evers' report was dated 12 June 2017 and it undermined the Claimant's challenges about the propriety of urine tests and the possibility of contamination of sample by transfer of cocaine to the forefinger. It was stated that if this was the case the metabolite BZE would have been unlikely to have been detected but that the cocaine derivative Ecogonine Methyl Ester would have been detected.

31 Following consideration of the information before him Mr Mills dismissed the

Claimant's appeal and informed the Claimant of this by letter dated 4 July 2017.

Law

32 Section 98 of the Employment Rights Act 1996 states:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee,*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) In subsection (2)(a) –*
>
> *(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
>
> *(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) shall be determined in accordance with equity and the substantial merits of the case.

33 When considering the law, I have considered the principles in the case of *BHS v Burchell*, that is where the employer believed in the allegation against the employee, whether reasonable grounds for that belief and whether the employer carried out such investigation as was reasonable in the circumstances.

34 When considering the nature of the investigation I considered the principles in the case of *Sainsbury's Supermakets Ltd v Hitt* where the investigation had to be within a reasonable band of options open to the employer. I had in mind that it is not for the Tribunal to substitute the view for that of a reasonable employer.

35 I also considered advanced by the Respondent, namely *Taylor v OCS Group* and *Kuehne and Nagel Ltd v Cosgrove*.

36 I also had regard to the ACAS code of practice on disciplinary proceedings.

Conclusions

37 In view of my findings of fact outlined above I conclude that the Respondent has established a potentially fair reason for dismissal namely conduct in that it concluded that the Claimant acted contrary to the terms of its alcohol and drugs policy.

38 When considering whether the dismissal was fair and reasonable in all the circumstances I had regard to the nature of the allegations the Claimant faced, the investigation and the approach the Respondent took to it.

39 The investigation and consideration of matters was extensive and, when considering the appeal, comprehensive. Save for criticisms about the approach of Ms Miller there was no real criticism of the nature of the investigation.

40 There was a procedural shortcoming from Mr Perez in dismissing the Claimant following enquiries made with HML and Synergy without giving the Claimant a proper opportunity to consider them before he was dismissed. However, the findings were clearly outlined in the disciplinary hearing and related to central matters of challenge that the Claimant had made raised. The Claimant and Mr Wharnsby could not have properly objected to further enquires being made and the result of those enquiries was unfavourable to the Claimant. As such the procedural deficiency was not sufficient to render the dismissal unfair. Further, the Claimant also had a comprehensive appeal process where all matters were fully considered and the procedural shortcoming dealt with.

41 In respect of sanction, I conclude that dismissal was in the band of reasonable responses open to the Respondent. The Claimant was a highly regarded, long serving employee who was maintaining he had not taken drugs. The scientific evidence contradicted that the Claimant who provided a number of explanations and ultimately stated that there must have been contamination. It is clear that the Claimant's

contamination theory was difficult for the Respondent to accept and the explanation he provided to the Tribunal in this regard was littered with inconsistencies. This is clearly an unhappy case given the Claimant's previous good service and unblemished record but he was reasonably found to be non compliant with the alcohol and drugs policy. The scientific evidence demonstrated this. The seriousness in which the Respondent views drug taking is evident from its policies and as such I cannot accept the submission that, even with the Claimant's exemplary prior record, the dismissal was outside the band of reasonable responses.

42 Mr Wharnsby made a number of separate submissions. He stated that the Claimant was not on duty, that the Claimant was not '*seriously incapacitated*' as required by the disciplinary policy and that there were no drugs in the Claimant's system. I conclude from the evidence, and the Claimant's admission during the disciplinary hearing that he was on duty. If there was confusion about the policy that applied the Claimant was aware from the alcohol and drugs policy and the disciplinary invite letter that dismissal may be an option. Finally, the scientific evidence was such that BZE was in his system when he took the test at the RPM.

43 In these circumstances the Claimant's claim fails and is dismissed.

Employment Judge Burgher

27 September 2017