EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Z Walkowiak	**v**	**DHL Supply Chain Limited**

Heard at: Norwich **On:** 12 & 13 February 2018

Before: Employment Judge Postle

Appearances
For the Claimant: Mr Hind, Counsel.
For the Respondent: Miss Brown, Counsel.

Interpreter: Mrs Vann – Language: Polish.

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed.

RESERVED REASONS

1. The claimant brings a claim to the tribunal on the grounds that he was unfairly dismissed. The respondent asserts that the claimant was dismissed on the grounds of gross misconduct for breaching the respondent's substance misuse policy by attending duty with cannabis in his system. The claimant was under the influence of cannabis whilst driving a heavy goods vehicle for the respondent. Particularly on the day in question the claimant was involved in a collision. Pursuant to the respondent's policies, the claimant was tested for drugs and alcohol. The claimant tested non-negative for cannabis and consequently the laboratory test result was positive. This means there was cannabis in the claimant's system.

2. In this tribunal we have heard evidence from Mr S Adlam a transfer shift manager who conducted the disciplinary and who gave evidence on behalf of the respondent through a prepared witness statement.

3. For the claimant a Mr Fazackerley, an employee of the respondent, and the claimant himself. Again, both giving their evidence through prepared witness statements.

4. The tribunal also had the benefit of a bundle of documents consisting of 194 pages. In the course of the hearing, there were also additional documents provided to the tribunal, in particular a further substance misuse policy which has a published date of 27 June 2008 on the front of the document, and then on page 1 refers to the document being updated in November 2016.

5. The claimant worked as a heavy goods vehicle driver at the JD Wetherspoons distribution centre at Daventry. He commenced his employment on 4 November 2010. The claimant's main duties were to deliver loads from DHL's national distribution centre to DHL's various bases across the United Kingdom. A copy of the claimant's contract of employment and job description are at pages 62-65 of the bundle.

6. The respondent has a clear policy that it would treat any employee under the influence of drugs/cannabis as gross misconduct, in particular:

> "The respondent's operating agreement at page 95 states "a list of examples of possible offences leading to summary dismissal including the following:
>
> Being under the influence of alcohol and/or intoxicants, drugs or other substances"
>
> The respondent's substance misuse policy confirms that employees must not drive any company vehicle after taking alcohol or drugs which may affect their capability to drive (44). Further, that "any employee who is found to be in breach of these rules will be liable to dismissal on the grounds of gross misconduct under the company's dismissal and disciplinary procedure up to and including summary dismissal."

7. The outcome provided for is dismissal, to the extent that a range of sanction is provided for, it is dismissal to summary dismissal. The company's most recent policy update refers to a zero tolerance in relation to substance misuse (67A). Compliance with the substance misuse policy is a condition of the claimant's contract of employment (43).

8. On 21 December 2016 the claimant was involved in a road collision which caused damage to a third-party vehicle. In accordance with the respondent's policies one of the respondent's managers, Mr Bowen completed an incident first contact form (119). Following that, Mr Nash a front line manager with the respondent completed a motor incident form (120-122). Thereafter, Synergy Health, an external company were called out to the respondent's site to carry out a post incident drugs and alcohol test on the claimant in the normal way. The claimant's drugs test recorded a non-negative result for adulterants, cannabis which required further laboratory analysis. The claimant was subsequently suspended whilst an investigation took place. A copy of the letter confirming his suspension is at pages 123-124. Further laboratory analysis confirmed that the claimant

had tested positive using the stated cut off for cannabis metabolite. A copy of that report is at pages 125-127.

9. Mr Hamilton a transport first line manager was appointed as investigation manager and following the investigation process decided that there was a disciplinary case to answer. The relevant documents relating to the investigation are at pages 128-145 of the bundle. The claimant had made it clear at the investigation hearing that he was familiar with the respondent's substance misuse policy (143).

10. The claimant as a HGV driver received a copy of any updated policies and procedures as and when they were introduced by the respondent. The respondent asks each employee to sign and confirm they have received a copy of them. In the claimant's case in November 2010 he signed to acknowledge that he had received a copy of the updated substance misuse policy and to confirm that he was aware that if he was involved in an accident he would be required to have a drugs and alcohol test. Those are at pages 66-67 of the bundle. Furthermore, in May 2016 the claimant undertook a full driver development exercise which entails a full driving assessment and review of all policies, procedures and safe systems of work. The claimant was then issued with a reminder of the respondent's substance misuse policy which explicitly states that in the event the rules are breached an employee will be liable for dismissal on the grounds of gross misconduct. That policy is obviously referred to and the claimant's signature confirming receipt is at page 67A.

11. Mr Adlam was asked to conduct the disciplinary. He had not previously met or spoken to the claimant, and had no direct line management responsibilities for the claimant. That was the reason he was asked to deal with the disciplinary. Mr Adlam prior to inviting the claimant to a disciplinary read all the investigation notes. From the notes it could be seen that the investigation had been adjourned so that a second drugs test could be carried out and this had come back negative. A copy of the negative result of the 14 January is at page 138 of the bundle.

12. It is not normal company policy to re-test an individual. Mr Adlam therefore telephoned Synergy Health laboratory to ask about the difference in the results. Synergy Health informed him that the first test was non-negative and that the second test was negative which would mean cannabis had left the individuals systems between those two dates. Synergy Health confirmed that the first result was in the claimant's system at the time of the accident on 21 December. At the same time Mr Adlam enquired of Synergy Health whether the medication the claimant had raised at the investigation, particularly cream and other medication had or would have affected the results. Synergy Health confirmed that none of these would account for cannabis in the claimant's system.

13. On 19 January Mr Adlam wrote to the claimant inviting him to attend a disciplinary hearing on 24 January. That letter is at page 146-148 of the bundle. The claimant was provided with all the documentation from the

investigation, the allegations were clearly set out, he was advised of his right to be represented and finally informed that a potential outcome of the disciplinary was summary dismissal. The disciplinary hearing proceeded on 24 January and Mr Adlam was accompanied by Miss Tyldesley a HR resolution manager. The claimant was accompanied by Mr Sargant, Trade Union representative and a HGV driver. A copy of the disciplinary notes are at pages 149-170.

14. At the disciplinary hearing the claimant confirmed that he had collided with a car whilst he was moving lanes. The claimant confirmed that he had undertaken a urine test at the DHL site. The claimant's Trade Union representative referred to the second test taken a month later which in his view demonstrated that the claimant was not a regular drug user. The claimant was questioned as to why he had cannabis in his system, the claimant informed Mr Adlam that he'd never taken drugs, and then proceeded to give a number of reasons why he thought cannabis was in his system. The first reason was that he'd been taking tablets for back pain and for quitting smoking. That he had been using some cream that his sister had given him which could also cause a non-negative result. The claimant was informed that HR having checked whether cream would make any difference and they were advised that such a cream would not have resulted in cannabis being present in the claimant's system. Furthermore, Mr Adlam had spoken to the laboratory, and they had confirmed none of the medications that the claimant had raised would result in a non-negative result for cannabis.

15. Mr Adlam was then concerned that the claimant changed his story, or at least offered another explanation and that was, that he had taken a cigarette from a stranger when he was out shopping with his wife. The claimant said the cigarette made him feel funny. The claimant confirmed he had not sought medical advice following this incident or had informed anyone at the respondents about feeling unwell/strange after smoking the cigarette he had taken from the stranger.

16. Mr Adlam adjourned the meeting and considered what the claimant had said. He was concerned that a number of reasons had been advanced for the cannabis, being in his system none of which proved correct. Mr Adlam was concerned that the claimant was not taking any responsibility for his actions. Mr Adlam was not convinced that the claimant had unknowingly smoked cannabis especially as the claimant was a smoker.

17. When the meeting was reconvened Mr Adlam challenged the claimant as to why he had taken a cigarette from a stranger. The claimant and his representative admitted that it was a naïve action. The claimant then raised new concerns about the process with Synergy Health, and a possible discrepancy in the way the tests had been carried out. Particularly the doctor had put a 'do not disturb' sign on the door but had not done so on the first test. Given these new concerns it was agreed the disciplinary would be adjourned for Mr Adlam to make further investigations before reconvening the meeting.

18. On 25 January Mr Adlam contacted Synergy Health to understand process followed in taking urine samples. Mr Adlam was informed that the collection technician would normally accompany employees to the toilet to ensure that the sample is not compromised. Synergy Health confirmed that the first test which was conducted on the day of the incident was conducted in a communal toilet where the claimant had his own cubicle. The collection technician who was carrying out the test stood directly outside the door and therefore there was no need to put a 'do not disturb' or 'out of use' sign up. The second test was conducted in a private toilet and so the individual carrying out the test had put a 'out of use' sign up to ensure that no one else used the toilet during the test. Synergy Health informed Mr Adlam that this was not an issue of any concern and could not have affected the results of the tests. A statement was taken from the collection technician and that it at page 182 of the bundle.

19. On 26 January the disciplinary was reconvened, a copy of the notes are at pages 171-177. Mr Adlam explained the additional investigations that he had carried out with Synergy Health. The claimant was provided with a copy of the statement from Synergy Health, the claimant was given a further opportunity as was his representative to put forward any further matters in relation to the incident. Mr Adlam then adjourned to consider his decision. The adjournment lasted approximately 1 hour.

20. During the adjournment Mr Adlam reviewed the notes of the disciplinary hearing considering all points that had been advanced. He found it difficult to accept the reasons that had been variously advanced by the claimant as to why cannabis had entered his system, in terms of the cigarette the claimant had received from a stranger Mr Adlam did not believe that was in any way credible. Mr Adlam accepted the claimant did not have a cannabis dependency issue. Having regard to Synergy Health's first test and the fact that the claimant had tested positive Mr Adlam concluded by having cannabis in his system this may have impaired the claimant's judgment when driving the HGV vehicle. Accepting this was not the reason for the collision he was nevertheless satisfied that the claimant was under the influence of drugs whilst at work, therefore the claimant had committed an act of gross misconduct. Of concern is that the accident could have been much more serious and led to the prosecution of DHL and/or the claimant.

21. Mr Adlam then went on to consider what the appropriate disciplinary sanction should be having taken into consideration the claimant's six years' service and previous good disciplinary record, he nevertheless concluded that the claimant knew or ought to have known that his conduct was wrong, he had signed the policies, knew the risks, the claimant's behaviour was an unacceptable risk to the business and to everybody's health and safety.

22. Mr Adlam concluded after what is clearly careful deliberation that summary dismissal was appropriate. Mr Adlam did consider whether a lesser sanction would have been appropriate, for example a final written warning. However, he concluded he did not want to condone the illegal drug use and could not risk the claimant being involved in another accident given the potential consequences.

23. After reaching his decision Mr Adlam reconvened the disciplinary hearing, a copy of the notes of the hearing, for that part of the disciplinary are at pages 177-181. He confirmed the claimant's dismissal and his right of appeal. The decision was confirmed in writing, in a very detailed letter at pages 183-185. The appeal under the company's procedures has a time frame referred to in the letter of dismissal particularly:

> "As this letter has been issued to you by registered post on Friday 27 January we expect you will receive this letter on Monday 30 January and therefore, the deadline by when you must have sent an appeal letter is Monday 6 February."

The letter went on to provide the name of the person to whom to appeal to.

24. Unfortunately, the claimant had chose not to appeal Mr Adlam's decision within the timeframe which had clearly been set out. In fact, the claimant appealed some 3 weeks after the expiration of the appeal deadline on 28 February. The claimant's appeal letter is at pages 186-187. Given the claimant's appeal was out of time and the claimant had made no application or request for an extension to the time. Mr Wescott the man who would have heard the appeal wrote to the claimant to inform him that the appeal was out of time and he would not be hearing the claimant's appeal. That letter is at pages 188-189. The claimant made no further representations regarding an appeal.

The Law

25. Section 98 of the Employment Rights Act 1996 sets out the potentially fair reasons to dismiss, one of which is conduct as we find in this case.

26. That is not the end of the matter, the tribunal should then in deciding if the dismissal is fair or unfair consider the wording of s.98(4):

> "(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."

27. There is also the well-trodden law in dealing with such cases which sets out effectively a three-fold test which came out of the EAT case in British Homes Stores Ltd v Burchell [1980] ICR 303, that the employer must show:

- It believed the employee guilty of misconduct.
- It had in mind reasonable grounds upon which to sustain that belief, and
- at the stage at which the belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

28. The burden rests on the employer for the first of those three elements and is neutral in respect of the remaining two.

29. In deciding whether the Burchell test has been met, the tribunal must also ask itself whether what occurred fell within the "range of reasonable responses" for a reasonable employer. The tribunal reminds itself it should not substitutes its own view as to what they would have done. The test really is if across the spectrum of reasonable employer's sanctions some would dismiss and some would impose a sanction short of dismissal, then if dismissal falls within the band and is fair. The dismissal will only be unfair if dismissal is a sanction outside that spectrum that no reasonable employer would have dismissed the employee for the employer's reasons.

30. Finally, the range of reasonable responses tests applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

Conclusions

31. It is clear that the reason for dismissal was conduct and thus a potentially fair reason to dismiss. In particular the respondent can demonstrate the claimant was in breach of the respondent's substance misuse policy, because the claimant had in his system whilst driving a HGV vehicle cannabis which he had been tested for by the respondent's third-party provider Synergy.

32. The above was the subject of an investigation carried out by the respondent. That investigation was thorough and reasonable. The claimant was then invited to a disciplinary hearing by letter which set out very clearly the allegations the claimant faced (146). Those allegations were also outlined at the start of the disciplinary hearing by Mr Adlam. The claimant had in the letter at (146) been provided with all the notes of the investigation. The claimant did not say at any stage nor his Trade Union representative they did not understand the allegations.

33. The respondent's policy on substance misuse is clear, particularly it would treat any employee found under the influence of drugs as gross misconduct. The respondent's operating policy (95) makes it clear. As

does the substance misuse policy (44). There was a zero tolerance (67A). The claimant did not at any stage of the process suggest he had not received any of the policies, indeed he had signed for them. The claimant was not only aware of the policies but understood them.

34. Furthermore, compliance with the substance misuse policy was a condition of the claimant's employment contract (43).

35. In the above circumstances it is clear the respondent would and did have reasonable grounds to sustain the belief that the claimant was under the influence of cannabis whilst driving a HGV in breach of the substance misuse policy. Particularly the claimant had been the subject of a third-party test which had confirmed the presence of cannabis (136). That result had been tested and confirmed in a laboratory outside the respondent's control.

36. The claimant's various explanations as to why cannabis had entered his system, were thoroughly investigated (painkillers, creams) and had been ruled out by Synergy. Mr Adlam further did not believe quite reasonably the claimant's explanation that having received a cigarette from a stranger that must have contained cannabis. Mr Adlam did not believe that story was credible.

37. There were no concerns over the procedure adopted for the urine test by Synergy after further enquiries had been made by Mr Adlam.

38. Mr Adlam considered mitigation/alternatives to dismissal given the claimant's unblemished service record. However, concluded in evidence, on reasonable grounds, breach of the company's policies and sanction of dismissal was an appropriate sanction given what had occurred and the explanations advanced by the claimant which had all been investigated and discounted. The sanction of dismissal was therefore a fair one.

39. As to the appeal, the claimant had lodged his appeal three weeks out of time despite being advised clearly of time limits. The claimant had advanced no exceptional/compelling reason to hear the appeal out of time.

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Employment Judge Postle

Date: ……12 April 2018……..

Sent to the parties on: 12 April 2018.....

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For the Tribunal Office