Case Number: 3201435/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr Kenneth Ball**

Respondent: **First Essex Buses Limited**

Heard at: **East London Hearing Centre**

On: **15 - 17 August 2018**

Before: **Employment Judge G D Tobin (sitting alone)**

Representation

Claimant: Ms N Ling, Counsel
Respondent: Mr N Newman, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. **The claimant was unfairly dismissed.**

2. **The claimant was wrongfully dismissed, i.e. dismissed in breach of contract.**

3. **The claimant is awarded compensation, including damages, of £37,639.32.**

REASONS

The Case

The claim

1. The claimant issued proceedings on 31 October 2017. The Claim Form identified the claimant as a bus driver with the respondent company from 28 December 1996 until his dismissal on 20 July 2017, i.e. over 20 years. In his Grounds of Complaint, the claimant contended that the decision to dismiss him for failing a drug test was both procedurally and substantively unfair. The clamant contented that the respondent failed to adopt a fair procedure and he made specific complaints as follows:

1.1 The random drug test was undertaken in a haphazard way and not to the European Union laboratory guidelines, i.e. the claimant was not required to wash his hands prior to handling the swab and he did not wear gloves whilst handling the swab. The respondent stated that this was in line with 'national' policy but had not sought clarification from the toxicology lab on the testing procedures followed for the collection and processing of samples.

1.2 The claimant had come back from a busy shift where he had picked up a lot of students and had handled a lot of cash.

1.3 The claimant was diabetic and would have had to have checked his blood sugar levels every 2 hours. He had very sore fingers which he would constantly lick to stop the blood. This would result in the claimant tasting the blood, taking money and licking his fingers which was constant hand to mouth interaction and this could have led to the contamination of the sample.

1.4 The bank notes contained traces of cocaine as traces of cocaine can be found in a large percentage of bank notes as was the case in *First Bristol Limited v Brailes* which concluded that dismissal was unfair by reason of a failure to investigate the possibility of accidental contamination of the saliva test from bank notes.

1.5 The claimant provided evidence of 2 private hair follicle tests, both of which tested negative for cocaine and benzoylecgonine. The tests were undertaken on 11 June 2017 and 17 August 2017 and cover a period of 216 days prior to the date the sample was collected. There was no national or government endorsed cut off level for saliva testing and as a result it is sometimes considered unreliable, particularly when compared with urine or hair testing, which is accepted by the courts. The respondent refused to consider the hair follicle tests as evidence during the disciplinary hearing, despite the claimant having had no disciplinary record in his lengthy career history. The failure to consider the hair follicle test questioned the reasonableness of the respondent's investigation. An employer acting reasonably in the circumstances would have conducted their own test to try to establish why there was a difference between the hair follicle and the saliva test. Failure to consider the hair follicle test would have been highly relevant to whether the claimant should be dismissed, as the test would call the positive saliva test into doubt or provide an innocent explanation for the positive result. The respondent simply considered the test results and closed their mind to the normal principles underlying a disciplinary investigation into misconduct.

1.6 The claimant was 61 years of age with diabetes. He questioned whether the respondent had a reasonable belief that he had taken cocaine recreationally. This was backed up by the appeal outcome letter to the claimant where Mr Davis expressed his doubts that a

diabetic man on blood pressure medication would take cocaine.

2. The claimant also contended that the decision to dismiss him was outside the range of reasonable responses that an employer could choose in the circumstances and that this was so particularly given the claimant's long service history, which included his service as trade union Fleet Chair, Branch Chair and his unblemished disciplinary record and his age and medical condition.

3. In respect of wrongful dismissal, the claimant also contended that the respondent failed to pay his appropriate notice pay and sought a declaration that he had been wrongfully dismissed.

The response

4. The Response was received by the Tribunal on 5 December 2017. This stated that the claimant's employment started on 2 January 1996. The respondent referred to its Drugs and Alcohol Policy which provided for unannounced random testing. The claimant was required to take a random test on 6 June 2017, which he failed. The claimant was suspended following receipt of the results of the test. The claimant provided a hair follicle test result which provided a negative response for the detection of cocaine. No chain of custody was proven for this test and upon enquiry, the respondent was told that it took 14 days for drugs to appear in a hair shaft. The respondent thereupon sent a "B sample", i.e. a second sample of the 6 June 2017 test, to a second independent drug testing agency who confirmed the positive result for cocaine.

5. The claimant was invited to a disciplinary hearing on 20 July 2017, chaired by Mr Lee Berry (Operations Manager – Clackton), following which he was summarily dismissed for gross misconduct. The claimant appealed against his dismissal and that appeal was heard on 8 August 2017. Mr Simon Davis (Head of Operations) undertook further enquiries in respect of the presence of cocaine on bank notes and was informed that no "false positives" were identified in over 200 tests carried out last 12 months. Mr Davis confirmed the claimant's dismissal on 16 August 2017. The claimant lodged a further appeal on 18 August 2017 and submitted further information and "purported" [as the respondent describes it] to have undertaken a second hair follicle test. The respondent contended that no chain of custody could be proven for this test. On 29 August 2017 the claimant attended his final stage disciplinary appeal hearing, which was chaired by Mr Justin Davies. Mr Davies conducted further investigations with the laboratory, which reported that the time period covered by the hair sample may not have included 6 June 2017 and the amount and regularity of cocaine use may not have been sufficient to be detected in a hair sample. The laboratory reported that the transfer of cocaine from money onto hands and then into an oral fluid sample was highly unlikely to cause a positive result, even with an individual who regularly placed their hand in their mouth. On 13 September 2017 Mr Davies dismissed the claimant's appeal.

6. The respondent denied the relevance of the factual matrix to the case of *Bailes v First Bristol Limited*. The respondent contended that at the time of the

claimant's dismissal, it had:

6.1 a genuine belief in the claimant's gross misconduct;

6.2 reasonable grounds upon which to sustain that belief;

6.3 conducted a full and proper investigation as was appropriate in all of those circumstances and

6.4 provided an explanation for its decision.

7. In the context of the respondent's formal procedure, the claimant was:

7.1 informed of the allegation against him;

7.2 afforded the opportunity to state his case;

7.3 afforded the opportunity to be accompanied throughout;

7.4 provided with the right of a two-stage appeal which upheld the decision to summary dismissal on both occasions.

8. The Respondent contends that the sanction of dismissal was within the band of reasonable responses available to it and in all the circumstances, the claimant's dismissal was fair. The respondent denied the claim of wrongful dismissal stating that the claimant had been in fundamental and repudiates breach of his contract of employment.

The law

9. The claimant claims that he was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

10. Section 98 ERA sets out how the Employment Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

11. The s98(4) test can be broken down to two key questions:

a. Did the employer utilise a fair procedure?

b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

12. The respondent said that it dismissed the claimant for a conduct-related reason, pursuant to s98(2)(b) ERA. Although the claimant denied the misconduct in question, there was no dispute between the parties that failing the drug test was a conduct-related matter. For misconduct dismissals, the employer needs to show:

a. an honest belief that the employee was guilty of the offence;

b. that there were reasonable grounds for holding that belief; and

c. that these came from a reasonable investigation of the incident.

These principles were laid down in *British Home Stores v Burchell [1980] ICR 303.* The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that they have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief based upon a reasonable investigatory process.

13. Accordingly, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to his purported misconduct.

14. ACAS has issued a Code of Practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Established the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Ensure that the nature and extent of the investigation reflect the seriousness of the matter, i.e. the more serious the matter then the more thorough the investigation should be;
- Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
- Keep an open mind and look for evidence which supports the employee's case as well as evidence against;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal the decision.

15. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can appropriately reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

16. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

The List of Issues

17. The List of Issues agreed between the parties were as follows:

Unfair Dismissal

17.1 What was the reason for the principle reason for the claimant's dismissal?

17.2 Was it a potentially fair reason under s98(2) ERA?

17.3 Did the respondent have a genuine belief that the claimant was guilty of misconduct?

17.4 Did the respondent have reasonably grounds for that belief?

17.5 Did the respondent carry out a reasonable investigation in all the circumstances?

17.6 Was the decision to dismiss within a range of reasonable responses?

Wrongful Dismissal

17.7 Was the dismissal justified because of the claimant's breach of contract?

Findings of fact

18. I (i.e. the Employment Tribunal) made the following findings of fact. I did not resolve all of the disputes between the claimant and the respondent, I merely concentrated on those disputes that would assist me in determining the issues as identified above. I have set out how we have arrived at such findings of fact where this is not obvious or where, I determine, this requires further

explanation. When resolving disputes about contested fact, I place most reliance upon contemporaneous documents and correspondence unless there are especially strong reasons not to do so. Contemporaneous sources tend to provide a more accurate picture of what occurred rather than after the event justifications or the recasting or reinterpretation of events following professional advice.

19. The hearing bundle was large, 437 pages. At the outset of the hearing, I emphasised to the parties that, as a matter of course, I would not read all of the documents contained in a hearing bundle. I stated I would read documents referred to me and I may read additional documents that have not been cross-referenced in any statement; however, if a party thought that a document was relevant and important, then he or she needed to bring that document to my attention.

20. I was disturbed that for unfair dismissal case with such a large hearing bundle the respondent had not provided a copy of the disciplinary procedure. I directed that the respondent produced a copy for this hearing, which was provided part-way through the hearing. Mr Newman did not provide a proper explanation as to why this document had not been provided. The failure to adduce/late production of the disciplinary hearing was one factor, I took into account when assessing the credibility of the respondent's witnesses.

21. The claimant worked for the respondent as a bus driver from 2 January 1996. Notwithstanding the *agreed* chronology identified the claimant's employment as commencing on 28 December 1996, the claimant's contract of employment identified (in 2 places) his employment as commenced on 2 January. The claimant's statement stated that his employment started on 2 January 1996, and this is the date that I determine from which the claimant's employment runs.

22. On 6 June 2017 the claimant was subject to a routine drug test. The claimant provided a saliva sample.

23. The claimant sample was reported on 9 June 2017. The Final Certificate of Analysis from Alere Toxicology reported that of the 6 substances tested, the claimant had a positive result for cocaine. The final outcome was:

> POSITIVE/FAIL – positive for drugs and/or alcohol:
> This specimen was reported POSITIVE. This is CONSISTENT with ILLICIT DRUG use and is NOT CONSISTENT with ANY PRESCRIBED OVER-THE-COUNTER MEDICATION for at least one substance as listed above. This result should therefore be treated as a FAIL with regards to a Drug and Alcohol Testing Programme.

24. The claimant was informed that he had tested positive for cocaine that day by Mr Dan Worley (Operations Manager). The claimant expressed shock and was unable to provide an explanation for the result as he contended he had never taken any drugs other than those prescribed by his doctor. The claimant was then suspended by Mr Worley and told that he would need to attend a "fact-finding" meeting on 15 June 2017. At this meeting Mr Worley questioned the claimant about the medication he had taken before the test. At the time of the test, the claimant had identified taking some prescription medication and he

subsequently referred Mr Worley to a list of medication which had been on his personal file for 10 years and updated periodically. The claimant went through this list when it was produced to further update it. He also wrote to Mr Worley after the meeting advising him that he sometimes took an identified pain relief medication for his rheumatoid arthritis.

25. When he was asked about the positive result for cocaine, the claimant reiterated that he had never taken any drugs other than those prescribed by his doctor. He said to Mr Worley that it would have been reckless for him to take cocaine given his age (i.e. 60 years) and his medical history as an insulin-dependent diabetic with hypertension (which could lead to heart problems and a stroke). The claimant informed Mr Worley during the meeting that he had arranged for a hair follicle test. The claimant's representative raised issues around the reliability and efficacy of the test which, having read the accounts of the meeting and heard the evidence I determine, Mr Worley dismissed as not relevant without any further investigation.

26. Mr Worley then retired to a meeting with Mr Steve Leonard, the General Manager. When Mr Worley emerged from that meeting, he told the claimant that the case would proceed to a disciplinary hearing and this was confirmed the following day. The claimant submitted his resignation on 19 June 2017 citing the stress and pressure that he was under and the respondent's refusal to wait a couple of days for the results from the hair follicle test. The claimant said that this made him feel that the respondent's decision had already been made. Nevertheless, the claimant was reinstated on 29 June 2017.

27. The claimant had attended the Crystal Health Group offices to undertake a hair follicle test on 17 June 2017 and he received the results on 22 June 2017. The Certificate of Analysis reported that cocaine (and 4 other substances) were not detected in the samples given. The report set out the laboratories accreditation and identified a chain of custody as follows:

> A strict chain-of-custody was maintained throughout every step of this testing process, including verification of documentation by the sample collection officer and the secure shipment of samples to the laboratory.

In respect of the identification of the test participant:

> At the time test samples were collected, the test participant was required to provide current photographic identification to the sample collection officer in the form of a Passport or Drivers Licence.

Prominent on the report was the UK Customer Services telephone number and an email address, together with a website address, for any questions concerning the test report.

28. The respondent organised a test of the second sample collected on 6 June 2017, which was received at Matrix Diagnostics on 13 July 2017 and reported upon the following day. The Certificate of Analysis of "B" sample confirmed:

> Cocaine results consistent with Lab A results

and commented that all seals and packaging were intact.

29. The claimant wrote to the respondent on 15 July 2017. He denied taking cocaine ever and put down the positive reading to cross contamination. He said:
    - he was not given the opportunity to wash his hands when tested;
    - that he had been handling notes which, he said, he has since found out that 80% of notes in circulation were contaminated with drugs;
    - he pricked his fingers with needles for his diabetes test which could have caused a misreading;
    - he was tested in the depot's counting area for money;
    - the witness was doing other things and not paying attention; and
    - the tester was unable to put on his gloves securely.

30. A "follow up" investigation meeting took place on 17 July 2017 which was chaired by Mr Phil Sage (Staff Manager, Basildon). At the outset of this meeting, Mr Sage made it clear that the respondent "will not be ignoring or cancelling the previous investigations" and that the respondent would not accept the result of the hair follicle test provided by the claimant.

31. So far as the investigative process, this amounted to a random saliva test (and retest of samples taken), updating the claimant's medication details and listening to the claimant's explanation for the positive test of cocaine. Mr Worley or Mr Sage (or anyone else) did not undertake any further investigation, for example: reviewing the claimant's sickness absence; assessing his attendance and punctuality; checking for any cash shorts; speaking to work colleagues and other managers; and/or contacting the claimant's medical practitioner. When he was asked by the claimant why the respondent rejected the hair follicle results, Mr Sage said that "it is not recognised by us as an approved tester". Mr Sage made it clear that he was following orders as he offered to adjourn in interview for someone to provide him with further information as to why the hair follicle results were rejected. When he did adjourn the explanation, he gave conveyed little more than previously proffered: "that it is not within our policy to recognise it". This is not true. The respondent's Drug and Alcohol Policy neither provided for, nor precluded, alternative tests because it made no mention of this.

32. There was a reference in the Drug and Alcohol Policy to a donor challenging the results of positive test, but the respondent did not bring this to the claimant's attention, nor did the investigation officers follow their own procedure because the policy provides for the donor identifying a suitable independent laboratory to carry out a test on the B sample, and this course was not followed. The Drug and Alcohol Policy did refer to the local disciplinary procedures, which were thereby incorporated into the correct protocol. Point 3.2 of the (contractual) Disciplinary Policy and Procedure allows for an employee to set out their case and be afforded a reasonable opportunity to present evidence. Furthermore, Appendix A – Carrying out a formal Investigation/Disciplinary Meeting provides that both the investigating officer and disciplinary manager *will* carefully consider any verbal or written evidence submitted by the employee or their representatives. So, the respondent's decision to disregard the claimant's hair follicle test was in breach of their own

Disciplinary Policy and Procedure and this represented a significant breach of contract.

33. Following the investigative meeting with Mr Sage, the claimant complaint about the investigation process as he had lost faith with the respondent's conduct. This coincided with Mr Sage inviting the claimant to a disciplinary meeting set for 20 July 2017. The reason given for the disciplinary hearing was the positive results taken from the claimant's company drug and alcohol test. The claimant was advised that one possible outcome of this meeting might be the termination of his employment.

34. The disciplinary hearing was scheduled to be conducted by Mr Lee Berry (Operations Manager, Clacton). The day before the disciplinary hearing, Mr Leonard instructed Mr Berry "Do not get embroiled in a discussion about the hair follicle test – our procedures do not allow for it, and we have followed/will continue to follow our procedures".

35. At the disciplinary hearing of 20 July 2017, Mr Berry said he would only consider the initial and second (saliva) test results and that he would not consider the hair follicle results. The claimant's representative raised issues of potential cross-contamination of samples at various stages and he questioned how the test was carried out. Mr Berry somewhat illogically decided not to deal with the cross-contamination issues because, he said, they should have been dealt with at the fact-finding investigatory stage, and not at the disciplinary stage. He blamed the claimant because the claimant had supposedly declined to discuss this further with Mr Sage. The claimant raised significant issues in mitigation, nevertheless Mr Berry did not engage with the claimant's mitigation. On the basis that the claimant failed a random drug test Mr Berry made the decision that the claimant's employment be terminated with immediate effect. Mr Berry confirmed the decision the following day. He did not proffer any reasons for his decision, he merely communicated the outcome with no further explanation.

36. The claimant appealed against his dismissal and an appeal hearing took place on 8 August 2017. Mr Simon Davis, Head of Operations, chaired this appeal hearing. The basis of the claimant's appeal was that the evidence was disputed. At the appeal hearing, the claimant's representative criticised the investigation. Mr Davis called the drug-tester, Mr Perry Williamson, and his witness, Mr Graham Drake. Mr Williamson confirmed that the claimant did not wear gloves when handling a swab, that he was test immediately after his shift and that the claimant did not wash his hands prior to handling the swab. At the hearing, the claimant explained that he had come back from a busy shift where he had picked up a lot of students and handled cash. His representative referred to the claimant's diabetes and his finger-prick tests to check his blood sugar level every 2 hours, which resulted in sore fingers which he would constantly lick to stop the blood. He claimed that the constant handling of money and hand to mouth interaction potentially contaminated the sample. Mr Davis referred to the respondent's policy on drug testing and determined, incorrectly, that he could not consider the results of the claimant's hair follicle test. The claimant's representative referred to the local disciplinary policy

which did allow supporting evidence to be adduced and also presented a copy of the case of *First Bristol Limited v Brailes*, on facts similar to the claimant's case which accepted cross-contamination from handling money. Significantly, the claimant offered to undertake any further test the respondent may require "to demonstrate his innocence". Mr Davis made a passing reference that he would "do some more investigations on certain points" but he did not elaborate further.

37. Mr Davis upheld the decision to dismiss, which was communicated to the claimant by letter dated 16 August 2018, over a week later. The claimant was anxious by this delay, which his representative queried and which unknown to the claimant was caused by Mr Davis' further investigations. Mr Davis did not advise the claimant of these investigations, which he took into account in coming to his final decision. This is not a fair way to conduct a disciplinary process. If any further information was to be considered, then the claimant should have been given full details of these further enquiries so that he could adduce evidence or make representation if appropriate.

38. In his outcome letter, Mr Davis said "although I find it hard to believe that a diabetic man on blood pressure medication would take cocaine, I can only follow the evidence". He noted the anomaly of the swab being touch by the donor but said that this was in line with group (national) policy. Mr Davis confirmed that the respondent's procedures were reviewed following the *Brailes case*, but he said no changes were made. Mr Davis determined that it was not appropriate to either consider the claimant's hair follicle test or undertake a similar test by one of the respondent's approved contacts. So having excluded a key part of the claimant's evidence, and also in refusing to extend the respondent's investigation to provide for another test, Mr Davis determined on the balance of probabilities, that it was likely that the claimant provided an oral sample containing cocaine. He determined that this therefore breached the respondent's drug policy. He deemed the decision of summary dismissal for gross misconduct, a reasonable response.

39. The claimant arranged for a second hair follicle test on 17 August 2017 and the result of this test was that the claimant again tested negative for cocaine. Again, the report set out the laboratories accreditation and this test complied with rigorous procedures in respect of identifying the person tested and establishing the chain of custody.

40. The claimant submitted a final appeal which took place on 29 August 2017. The final hearing was held before Rev[1] Justin Davies, Interim Managing Director. The claimant's representative provided or submitted:

    40.1 the result of the second test.

    40.2 there was potential contamination of the sample and read out a number of facts concerning bank notes and that most bank notes had traces of cocaine on them.

[1] Mr Justin Davies subsequently retired from the bus industry and now works as a vicar; hence I will address him as Reverend.

40.3 the *Brailes case* demonstrated that saliva testing was unreliable when compared to urine or hair follicle tests.

40.4 there was an apparent breach of the Drug and Alcohol Policy, which he contended should have been reviewed every 6 months and that this had not been done since 2012.

40.5 the longevity and impeccable nature of the claimant service.

40.6 that in accordance with the ACAS guideline and the respondent should keep an open mind in such case.

40.7 the respondent had not complied with their own process in respect of affording the claimant the correct opportunity to challenging the positive test.

40.8 the claimant had previously raised concerns on the cross-contamination issue in that he was not asked to wash his hands or wear gloves.

40.9 the fact that the claimant was diabetic and checked his blood every 2 hours and sucked his fingers because they were sore. Therefore, contamination was possible from the banknotes that he handled.

41. Rev Davis questioned the chain of custody for the claimant's tests, yet there was absolutely no basis for him not to accept the exactness of these tests. He adjourned the hearing for a short while and then reconvened. When he reconvened, he said:

41.1 He had ascertained that 3 tests were carried out on the same day and 2 came back negative, and 1 positive. So, there was nothing to cause him concern that the test was done incorrectly.

41.2 In respect of the banknote transfer, a low-level of cocaine contaminate would be tightly held to the banknote structure and therefore not readily transferable. The response from the lab on 11 August 2017 (which was not provided to the claimant) opined that such a transfer unlikely because of the presence of the metabolite benzoylecgonine.

41.3 The hair follicle testing was not in the company procedures, so he could "lay this aside" i.e. disregard this evidence.

41.4 The decision was "black or white" and the disciplinary policy could not change this.

41.5 The tests carried outside the respondent's procedure did not have a chain of custody [which was not true] and that gave him a degree of "uncomfortableness" so he said he would go and ask more questions and then invite the claimant back to hear his decision.

41.6 He noted the appellant's 21 years of service in the bus industry and his involvement in the trade union over the years.

41.7 He stressed that the claimant must not have false hope about the delay and the outcome and that he was purely ensuring that everything was looked at carefully and thoroughly. Having heard Rev Davies' account, I conclude that he had already made his decision and that this was an indication that he had already made his decision but that he merely wanted to ensure that all boxes were ticked.

42. Rev Davis then adjourned the hearing and subsequently tasked a HR adviser with contacting the lab to clarify 2 points:

42.1 whether they could explain the difference between the results of the oral sample tests, which were both positive, and the hair sample test; and

42.2 the issue of cross contamination caused by handling money and having to check the claimant's blood glucose level every 2 hours.

43. The response in respect to the first question referred to the obvious difference in the time period covered by the samples. However, the response did indicate that the amount and regularity of cocaine use would have to have been small and infrequent not to have shown in the hair test. The Customer Operation Reporting Administrator at the laboratory also said that it was highly unlikely that the cross contamination could have occurred in the oral fluid sample. She did not provide any analysis or research, she merely restated an opinion which she stated was previously explained. Rev Davis chose not to share these enquiries with the claimant or to invite the claimant's comments prior to reconvening the appeal hearing, which not a fair way to consider additional evidence.

44. At the reconvened hearing Rev Davies dismissed the hair test because, he said it did not have a chain of custody. He determined that the amount of cocaine held on the bank note and then the process of the swab test would reduce the sample considerably at each stage. So, contamination would be highly unlikely. Rev Davies identified a final issue that the presence of the metabolite benzoylecgomine reduced the likelihood of cross contamination of cocaine significantly further. Rev Davies said that he was assured that the test had been followed correctly and that he understood the results and the outcome. Therefore, he concluded that the summary dismissal should be maintained.

My determination

Unfair dismissal

45. As stated above, the parties accepted that the reason for the claimant's dismissal was in respect of his purported (mis)conduct, i.e., under s98(2)(b). Mr Berry's dismissal letter was perfunctory and inadequate because he did not

set out the basis why he came to that conclusion. The purpose of the disciplinary hearing had been stated to discuss the failed random drug test on 6 June 2017. Mr Berry proceeded to terminate the claimant's employment "with immediate effect, on the grounds of gross misconduct". No further explanation was proffered. Gross misconduct is potentially a fair reason under s98(2) ERA.

46. The specific gross misconduct contended according to Mr Newman was "Reporting for duty, or being on duty, under the influence of illegal drugs or alcohol. As per First Group Drug and Alcohol Policy available on Intranet or on request)". Failing a random drug test was not identified as gross misconduct in the respondent's disciplinary procedures nor was it contended by the respondent to be an act of gross misconduct in itself; it was merely contended by the respondent to be sufficient evidence of being under the influence of illegal drugs.

47. The indication that the claimant may have been under the influence of illegal drugs was 2 negative samples taken at the same time in a single random saliva drug test. The respondent had no other reason to believe that the claimant had been on duty under the influence of cocaine and the claimant's behaviour whilst on duty or at the time of the test, his demeanour, good character, longevity of service, exemplary service, age and health condition were all contra-indicators.

48. The claimant was perplexed as to why he had failed the drug test. He was adamant that he had not taken cocaine and proffered a number of explanations as to what might have given rise to the positive test result. I am not particularly convinced by the student–cocaine nexus and I am not going to reconcile the conclusion of the *Brailes case*. However, I do note that this case was open to the issue of cross-contamination of cocaine from handling money.

49. Mr Newman submitted that the respondent was not required to go behind a "fail" test result and investigate further. This is wrong, and I reject this submission. The claimant was not dismissed for some other substantial reason, i.e. failing a random drugs test, he was dismissed for a gross misconduct offense, which was subsequently described as being under the influence of drugs while on duty and this required a full consideration of all of the circumstances and not just the respondent's saliva test results. The respondent's Drug and Alcohol Policy correctly stated that a positive test *may* lead to dismissal, but this required a consideration of all surrounding circumstances. The claimant had clearly failed the drug test (because that is what the test results said) however thereafter the dismissing officer and 2 appeal officers - Mr Ball, Mr Davis and Rev Davies - took the result of the random drug tests to indicate that the claimant had taken an illegal drug, specifically cocaine, and they closed their minds to all possible explanations that did not fit this predetermined conclusion.

50. The respondent's investigating officers – Mr Worley and Mr Sage – did not afford the claimant the opportunity to properly challenge the drug test in breach of their own procedures. The Drug and Alcohol Policy set out a means to challenge a positive test. This involved the claimant identifying a suitable

independent laboratory to carry out the testing. However, 2 investigating officers and the dismissing officer made no reference to this. Given that the respondent did not follow its own procedure in affording a donor the opportunity to challenge the positive test within the Drug and Alcohol Policy, then the respondent should not have so readily dismissed the claimant's efforts to provide a drug test outside of the policy.

51. The claimant was left floundering as to why he had failed the drug test. He told Mr Worley that he would get his own test. He asked Mr Worley to pause the investigation for a few days to allow him to obtain an alternative drug test. Mr Worley promptly spoke to the respondent's General Manager, Mr Leonard and then promptly scheduled a disciplinary hearing at which, the claimant was informed, an outcome could be dismissal without notice and that he should prepare for the meeting with that in mind. The claimant took this to mean that he faced a foregone conclusion and he resigned.

52. I am concerned about the General Manager's behaviour and his influence in the decision-making process. Upon being informed of the claimant's resignation, Mr Leonard's response was a rather puerile: "All our fault then!" Rather than convey concern that a long-standing and previously upstanding employee had failed a random drug test and was grappling for answers as to why, Mr Leonard gave a clear indication of his closed mind. This is reinforced by his initial opposition to reinstating the claimant. Mr Leonard's email to Ms Stephanie Nixon (the respondent's Human Resources Business Partner) of 26 June 2017 was dismissive of the claimant's predicament. He noted that the claimant's representative was "keen to remind me that Ken has 21 years' service and an impeccable record prior to the drug test". He described the claimant's trade union involvement and said, "it was clear the union were going to do everything they could to get him off". Mr Leonard set out his indication: "my initial thoughts are to deny his request [to retract his resignation] as I do not believe we have any legal obligation to take him back and it would save a lot of time and effort on our part with the disciplinary hearing, two appeal hearings and no doubt a tribunal case to follow…" This is a very clear indication that on 26 June 2017, the respondent's General Manager at least, was convinced that the respondent was going to dismiss the claimant.

53. On 26 June 2017 by email Ms Nixon advised Mr Leonard (and Rev Davies) to reject the hair follicle result "as that was not part of our procedure". I conclude from this that it was clearly Mr Leonard's decision – following Ms Nixon's advice – to reject the claimant's hair follicle test and thereafter Mr Berry, Mr Davis and Rev Davies followed his lead. This advice was poor advice. Although there was nothing in the Drug and Alcohol Policy that stated other tests should be considered, there was nothing within the procedures that stopped the respondent from considering evidence that came from outside the company. So far as the Disciplinary Policy and Procedures were concerned, there was a positive obligation on the respondent to consider all aspects of the claimant's case. This is reinforced in the ACAS Code of Practice. So to discount evidence on such basis was illogical, grossly unfair and in breach of the disciplinary procedures (which form part of the claimant's contract). This advice was obviously so poor that it should have been questioned at every

stage of the disciplinary process and if such advice was reiterated, then it should have been ignored. Managers cannot abrogate their responsibilities to conduct a process fairly. I conclude that this advice was so wrong that it was tendered so as to allow the respondent to arrive at a pre-ordained conclusion, i.e. that the claimant was to be dismissed.

54. The disciplinary hearing was scheduled to be determined by Mr Berry. On 19 July 2017, the day before the hearing, Mr Leonard sent Mr Berry an email entitled "As discussed" and reminded him "Do not get embroiled in a discussion about the hair follicle test – our procedures do not allow for it…" This email was not shared with the claimant throughout the disciplinary process, so he did not know of Mr Leonard's instructions.

55. At the dismissal hearing, the claimant was adamant that he had not taken cocaine. He was grappling for an explanation as to why the random saliva test had returned positive. The surrounding circumstances suggested that the result was incongruous, and the claimant obtained a hair follicle test, which he maintained proved his innocence. Yet Mr Ball was extraordinarily resistant to accepting that the random test result may have been an anomaly or that arranging a retest would assist clarifying matter.

56. In his evidence to the Tribunal Mr Berry said that unless the drugs test was disproved, a positive result would lead to a finding of gross misconduct and the claimant's dismissal. So to him it was an open and shut case. However, Mr Berry said that he did consider mitigation in coming to his decision but was not consistent with his earlier evidence and this consideration was not recorded in the contemporaneous notes or correspondence despite the claimant raising mitigation. I do not believe that Mr Berry gave me a truthful account and I determine that Mr Berry did not consider any mitigation. Mr Berry looked no further than the failed random drug test and he was resolved to dismiss the claimant on that basis.

57. Mr Berry was clearly following Mr Leonard's instructions, so the dismissing officer did not have a genuine belief that the claimant was guilty of the misconduct alleged. It follows from the above that he did not have reasonable grounds to sustain that belief and his total and exclusive reliance upon a single piece of questionable random saliva test evidence meant that he failed to ensure a reasonable investigation in all of the circumstances.

58. Mr Davis' comment that "although I find it hard to believe that I diabetic man on blood pressure medication would take cocaine, I can only follow the evidence" is rather curious. He did not follow the evidence because he discounted the hair follicle test result. He did not reconcile the evidence in respect of cross contamination. During the course of the Tribunal hearing, Ms Ling spent some time examining the issue of the sample labels with Mr Davis. The accounts given at the first appeal hearing by Mr Drake and Mr Williamson were inconsistent. Mr Drake had signed to say that the collection process had been properly followed when clearly he had not been paying attention and had been distracted by other tasks. Mr Davis admitted in hindsight that he should have probed into this. He criticised the claimant for not raising the issue of possible

mislabelling of the samples but the first time the claimant could have been aware of this was at the appeal hearing so this criticism is not valid. These flaws were fundamental, and a reasonable employer properly considering this matter would have either weighed all of this evidence properly and come to a different conclusion or arranged for a retesting of the claimant. Mr Davis' insistence that there was "no reason to doubt" the saliva test result was wholly unsustainable. His insistence at the hearing that he did consider other sections was not consistent with the contemporaneous evidence and I also conclude that he is not a credible witness, so I do not accept that he could have come to an honest and genuine belief in the claimant's guilt.

59. At the first appeal hearing, Mr Davis sought at least to engage with some of the wider issues. He heard from the person responsible for administering the drug test and also the person who was supposed to be the witness. He heard that that the tester (who does not touch the sample) should wear gloves, but that the donor (who handles the sample) seemingly did not need to. This is a puzzling application of the policy and one which Mr Davis sought to justify at the hearing, which damaged his credibility further.

60. At the appeal hearing, Mr Davis commented that it took 2 weeks for cocaine to get into the system and show up in the hair follicle test. He did not want to take up the claimant's offer for a further test so this was not a genuine concern with an apparent limitation of the hair follicle test, rather it was merely an attempt to discredit the claimant's evidence.

61. Mr Davis discounted the following factors that made it unlikely that the claimant had taken cocaine:

    61.1 The fact of the claimant's and high blood pressure;

    61.2 The claimant's age, long service and exemplary disciplinary record with the company;

    61.3 The surprise of all of the respondent's managers who knew the claimant

    61.4 The shortfalls in the respondents testing procedure.

    All of these indicators suggested that a reasonable employer would have retested the claimant. Mr Davies is insistent that there was "no reason to doubt" the test result was wholly unsustainable.

62. I also find that Rev Davies did not have an honest and genuine belief on the claimant's guilt. His involvement was at the end of the process when all of the arguments had been clearly made. He also went to extraordinary lengths to set his face against the claimant's 2 tests. Such was Rev Davies' eagerness to establish the claimant's guilt that he discounted the hair follicle test because of the time it had taken for the cocaine to get into hair. A number of issues emerge from this.

62.1 By the time of the second appeal hearing Rev Davies was presented with a negative second hair follicle test which covered the period of the random saliva test. So Rev Davies was wrong to rely upon Mr Davis assertion that the claimant could have cocaine in his system on the morning of the test.

62.2 There was absolutely no basis for Rev Davies to reject the chain of custody for the hair follicle tests. The copy of the claimant's hair drug test reports provided in the hearing bundle testify to accreditation, chain of custody and appropriate identification on the first page of the report. There was no evidence adduced at the hearing that the report was not provided in full and Mr Newman made no submissions in this regard. If it was the case that the first page of the Crystal Health Group Hair Drug Test Report was not provided with the Certificate of Analysis, then this was easily remedied by asking for the full report or making appropriate enquiries to see verification of the chain of custody, which is a standard feature in drug reports for legal purposes.

62.3 It was asserted by the claimant's representatives that the hair follicle test was more accurate in detecting illegal drugs. Rev Davies made no investigations in this regard. I note that in criminal and judicial proceedings hair follicle testing is accepted to be more reliable than saliva tests. I accept the claimant's submission that the respondent in general, and in this instance Rev Davies, was not going to make further enquiries that were likely to undermine the case against claimant (or perhaps alternatively put, the respondent was not going to make enquiries that might benefit the claimant).

62.4 If it was the case that the claimant had taken cocaine, then according to the respondent's laboratory contact, he was a very infrequent user and low quantity user. This reveals that the trace elements detected were so small that the claimant could not have been under the influence of illegal drugs, which was the whole point of the test. Given that this disciplinary matter supposedly arose from a random drug test to establish if the claimant was at work under the influence of illegal drugs, the respondent's laboratory advice was that the claimant was, at most, a very infrequent and low quantity user. Rev Davies did not engage this point, which would have been obvious to any reasonable employer exercising a degree of independent judgement on this matter.

63. Rev Davies concluded that the test had been followed correctly when patiently it had not. The cross-contamination issue alone should have raised the need for a re-test. When coupled with 2 alternative and likely more accurate tests showing a contrary result, particularly as this matter arose out of a random test, then a reasonable employer would have, at least, re-tested in such circumstances

64. Rev Davies approach was also to treat the saliva tests positive outcomes as conclusive unless they were disproved, which appeared to have reversed the burden of proof to the claimant. He referred to this as "black and white" and as

"final" in the contemporaneous documentation. In his evidence Rev Davies said that there was no question that the claimant tested positive, but this missed the point as to whether the test was reliable.

65. The above were all factors that Rev Davies should have weighed in the balance of assessing evidence. He did not because Rev Davies closed his mind on this issue; he was committed to one outcome only and that was to find the claimant guilty.

66. Further enquiries made by the appellant's solicitors following the claimant's dismissal revealed that the balance of cocaine to its metabolites indicated that if the results were accurate then the claimant must have taken cocaine up to 8 hours before the sample had been given. This was the type of enquiry that a reasonable employer would have undertaken in the circumstances of this particular case, especially when given the contra-indicators highlighted above. Such further enquiry would have rendered even more unlikely a conclusion that the claimant had taken cocaine.

67. I am concerned that throughout this process, various additional enquiries were made that were not disclosed to the claimant. This did not give rise to a fair process and it is also outside the range of reasonable responses available to disturb respondent to undertake various piecemeal investigations without disclosing this to the claimant. This is why I am not in a position to determine the veracity of the respondent's saliva test. The methodology, under-pinning research, etc was not made available to the claimant so he did was denied the opportunity to put forward a case on the internal reliability of the saliva test. This all contributes to a sense that the respondent would pursue any avenue that would shore-up the case against the claimant yet ignore any factor that might support the claimant's position.

68. I find at various stages above that the conduct and responses of the respondent's managers were *unreasonable* or *not the actions of a reasonable employer*. However, the reasonableness or otherwise of the respondent is not the appropriate test. The test is whether the conduct of the respondent's managers was so unreasonable so as to fall *within a range of reasonable responses*, i.e. an employer can be unreasonable but not so unreasonable that no reasonable employer in similar circumstances would have conducted itself in a similar manner. Having reflected carefully on these issues, I find the respondent's actions identified above (individually and cumulatively) were so unreasonable, so as to fall outside the range of reasonable responses for an employer of this type and nature. Mr Berry's decision to dismiss and Mr Davis and Rev Davies decisions to confirm the dismissal were also outside the range of reasonable responses available to a reasonable employer of the size of the respondent with the administrative resources available to it.

69. The respondent had no reason to believe that the claimant's performance had been impaired through the use of drugs so there was no specific safety risk under investigation. The claimant's test was at random. The claimant worked in a safety critical industry and as a bus driver he could pose a safety risk if his driving was impaired through drug abuse. I make no criticism whatsoever of

the respondent's provision of random drug tests. That said, I accept Ms Ling's submission that the respondent ought to have treated the results from a random drug test differently than a result of a test taken "with cause". There was no suggestion, indication or evidence that the claimant was unreliable or that his performance was impaired through drug abuse. The claimant handled cash yet there was no question of money going missing. There was nothing to suggest that any safety issues had ever arisen in respect of the claimant's driving. Any disciplinary process required a degree of common sense and that was surprisingly lacking from Mr Berry, Mr Davis and the Rev Davies who treated the initial positive test result as something that would stand unless disproved, rather than assess this result in the balance of all of the other evidence. That was not within a range of responses that a reasonable employer would adopt in such circumstances.

70. The dismissing officer and the two appeal officers were content with a pass/fail notification, in circumstances in which the result clearly seemed odd to the extent that this was commented upon by the investigating officer, the dismissing officer and both appeal officers. Yet other than test the second sample, which was taken at the time, no one from the employer made further enquiries. It was only towards the end of the process – after career ending decisions had been made – that it became clear that the amount of cocaine found in the saliva test was very small. Given that a long-standing and unblemished employee was facing a career ending decision, it was outside band of reasonable responses available to an employer with the administrative resources of the respondent not to conduct these further enquiries.

71. I returned to the fundamental point, the claimant was dismissed not for failing a drug test, but for being under the influence of cocaine whilst on duty (which was the gross misconduct offence). During all these threads together, given: the random nature of the test; the contra-indicators of the claimant's good character, age, health, etc; the possibility of cross contamination; the possibility of mislabelling the sample; the 2 negative hair follicle tests; and the claimant's offer to we take any drug test, the respondent's decision to dismiss was outside the band of reasonable responses.

Wrongful dismissal

72. Wrongful dismissal is a claim for breach of contract in relation to the claimant's notice period. For wrongful dismissal. I am required to determine whether the claimant breach his contract of employment in such a way as to entitle the respondent to dismiss him. Given the random nature of the test, the contra-indicators and the claimant's firm conviction that he had not taken cocaine, the employer should have properly identified that the specific gross misconduct contended. This was according to Mr Newman was "Reporting for duty, or being on duty, under the influence of illegal drugs or alcohol. As per First Group Drug and Alcohol Policy available on Intranet or on request). Unlike unfair dismissal, in respect of the breach of contract claim, I am required to make findings as to whether the claimant was guilty or culpable of the gross misconduct offence.

73. The only indication that the claimant may have been under the influence of illegal drugs was 2 negative samples taken at the same time in a single random drug test. The respondent had no other reason to believe that the claimant had been on duty under the influence of cocaine. His behaviour, demeanour, good character, longevity of service, exemplary service, age and health condition were all contra indicators. Considerable question marks have been raised over the contamination of the swabs and the labelling of the test samples. The respondent's cursory investigations did not resolve the doubts about cross contamination and those question-marks remain even after the employment tribunal proceedings. Rather than either accept the claimant's test (which I accept was more accurate than the saliva test and which contained a properly attested chain of custody) or, alternatively, retest the claimant the respondent's managers chose to continue a flawed approach. I am not satisfied on the balance of probabilities that the respondent's tests were accurate given the issue of cross contamination and incorrect labelling was never resolved conclusively. In any event, I am not at all satisfied that the claimant was under the influence of illegal drugs whilst on duty. Accordingly, I determine the claimant was dismissed in breach of contract.

Remedy

74. The claimant confirmed hearing that he did not wish to pursue possible reinstatement, or re-engagement with the respondent (under S114 and S115 ERA, respectively). So, under the circumstances I confine my consideration in respect of remedy to damages and compensation.

75. The claimant had prepared a schedule of loss for the hearing and the respondent prepared a counter-schedule of loss. The parties were able to agree the figures for various elements of possible compensation, so I appreciate their efforts in that regard. The claimant's statement dealt with his mitigation and losses and the hearing bundle contained documentary evidence. The respondent did not adduce witness evidence in respect of remedy, which is not unusual. I take a proportional approach to remedy. If the claimant was a modest earner and if he had obtained suitable replacement employment fairly quickly, then I do not expect to see extensive witness evidence nor copious documentary evidence to assess his efforts to find suitable alternative work.

<u>Unfair dismissal basic award</u>

76. The claimant is entitled to a basic award under s118(1) ERA, which is intended to compensate him for the loss of his employment. These awards are normally calculated in exactly the same way as a redundancy payment. The parties have agreed the calculation of the claimant's basic award at **£14,425.50** and I award that sum.

<u>Compensatory award under ERA</u>

77. S118(1)(b) provides that the claimant is entitled to a compensatory award for the financial loss he suffered as a result of his unfair dismissal. This award is

subject to a limit or cap, pursuant to s124 ERA, which is the lower of £80,541[2] or 52 weeks gross pay, which in this instance is £28,000. The compensatory award is intended to reflect the actual loss that the claimant suffered as a consequence of being unfairly dismissed. So far as the claimant's unfair dismissal is concerned I should award "such amounts as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer": s123(1) ERA.

78. I note that the compensatory award is limited to making good the claimant's financial loss. I should not bring into my calculation any consideration of what might be "just" in order to reflect any disapproval of the respondent's behaviour. Nor should the award reflect any feelings of sympathy for the claimant or my view of what a fair severance payment would be: *Lifeguard Assurance Ltd v Zandrozny & Another 1977 IRLR 56 EAT*. The purpose of the compensatory award is confined to compensating financial loss and is not in any sense to be used to penalise the employer: see *Morgans v Alpha Plus Security Ltd 2005 IRLR 234 EAT*.

79. The claimant was under a duty to mitigate his losses. Compensation may be decreased if the claimant had reduced, or could reasonably have been expected to reduce, his financial losses. It is for the respondent to demonstrate that the claimant had failed to mitigate his loss and adduce appropriate evidence in respect of this purported failure: *Ministry of Defence v Hunt & Others 1996 ICR 554*. A key question for me to ask is whether the claimant had taken reasonable steps to mitigate his loss.

Loss of earnings and other benefits until the hearing

80. The claimant was dismissed on 20 July 2017. He had been in secure employment with the respondent for 21 years. The claimant obtained some employment at the end of July 2017 working for Thorley Bay Park Limited. This was a holiday park and the claimant's job was washing caravans. He was able to secure this job through his wife's connections. After 2 months the claimant became a full-time caretaker at the Sandy Bay site.

81. He had previously applied for several drivers' jobs for Arriva, Stevenson's Buses, Nips and as a school bus driver without success. The appellant joined an online recruitment agency which did not lead to any suitable job. The claimant anticipated that it would be difficult for him to find another job because of: the circumstances of his summary dismissal from the respondent; his age and health; and the local labour market conditions. Nevertheless, it is to the claimant's credit that he was able to secure a broadly similar job, albeit a non-driving job, fairly quickly. The claimant currently works between 37 to 47½ hours per week. He initially earned £8 pounds per hour, which increased to £10 per hour from February 2018. At the time of the hearing, the difference between the claimant's former bus driver job and his caretaker job was £6,160 gross per annum based on a 42-hour week. I accept that this is reasonable

[2] Because the claimant was dismissed after 6 April 2017

mitigation.

82. The respondent and the claimant have agreed that the total difference between the claimant's past earnings and his current earnings, until the hearing was a £**3,878.44** shortfall so I award this sum.

83. The claimant identified a loss of free bus travel following his dismissal. He said that it was a significant benefit for him, and his wife, which allowed both to travel for free on First Buses and trains throughout Great Britain for life. I accept that this is a significant benefit, the loss of which was occasioned by the claimant's unfair dismissal. the claimant said that this benefit was worth £760 per annum because that is that is the value that was ascribed on his last P60, i.e. his HMRC end of year pay and benefits schedule for tax purposes. I calculate the value of this loss as £14.62 weekly. The claimant lost this benefit for 58 weeks before the Tribunal hearing. Therefore, I award **£847.96** for the loss of this benefit.

Reimbursement for the cost of hair follicle tests

84. I exercise my discretion to refund the cost of **£516.00** for the 2 hair follicle tests. I do not award this because the claimant won his case. The respondent did not follow its Drug and Alcohol Policy for the correct procedure for retesting the sample provided. Furthermore, a second test was necessary because the respondent raised issues about the lead-in time for drug abuse to show in the hair follicles. I have determined that the respondent' managers had no intention of accepting the test in any event so this put the claimant to additional unnecessary cost. I determine that, it is fair in the circumstances that the respondent reimburse the claimant for his out-of-pocket costs in respect of these tests.

Expenses in looking for alternative employment

85. The claimant has not claimed reimbursement for any expenses in looking for replacement work. Therefore, I make no award in this regard.

Loss of pension rights

86. The claimant made a claim in respect of pension loss. The claimant was a former-member of the respondent's money purchase pension scheme. The claimant had stopped paying into the respondent's pension scheme sometime before his dismissal. I note that the claimant said that he would have re-joined the pension scheme; however, he had not taken any active steps in this regard, so I do not allow any claim in respect of this purported loss because this was not a potential loss that was accruing at the time of dismissal or for some considerable time prior to dismissal.

Loss of statutory rights

87. Where an employee is not reinstated or re-engaged, he will lose his statutory employment protection rights which are dependent upon the claimant having

remained in employment for a qualifying period. Most notable amongst these rights is the fact that the claimant has lost his right not to be unfairly dismissed until he will have worked for 2 years for a new employer. It is commonplace for Employment Tribunals to award a nominal sum to reflect the loss of these rights: see *SH Muffett Ltd v Head 1986 IRLR 488 EAT.* In the past, I set a nominal amount of £350 for this head of compensation, which was multiplied by 2 when the qualifying limit increased to 2 years' service from April 2012. I note that the claimant has claimed a lesser figure of **£500** to assess such loss and I see no reason not to accept his lower suggested valuation.

Future losses

88. In all of my considerations I have had consideration to the overarching objective of, so far as possible, putting the claimant into the position that I assess he would have been but for the respondent's unfair dismissal. The claimant's loss of employment with the respondent was career ending. He was employed in a public service industry, which is safety critical, and he lost his job in circumstances where he would find it extremely difficult to get another job. To his credit, the claimant has established himself in another job fairly quickly through his wife's contacts. Although my Judgement and Reasons may to some limited extent remove the blot on his employment history, I accept claimant's contention that he will still find it extremely difficult or impossible to be able to re-establish himself as a bus driver, given the fact that he was dismissed for failing a drug test (which I cannot re-write), his age and his health. Nevertheless, the claimant has re-established himself in a role as a caretaker, which is reasonable in the circumstances. I accept that he may be working longer hours for less pay, but this was the consequences of the respondent's unfair dismissal. I note the claimant has not claimed that he will need to extend his retirement beyond reaching the age of 65 years because of his reduced earning capacity.

89. The difference between the claimant's net wage has been agreed between the parties at £89.59 and I award future losses until his anticipated retirement which is a little over 3 years away. Accordingly, I award 162 weeks x £89.59 which equals £14,513.58.

90. The loss of the claimant's travel until his retirement is 162 weeks x £14.62, which equals £2,368.44. There needs to be some degree of finality and it is unusual to award future losses for very long periods of time. I am satisfied that limited the award to just over 3 years future losses is just and equitable circumstances. Accordingly, for future loss of earnings, I award **£16,882.02**.

Adjustments to the unfair dismissal award

91. S3(2) Employment Act 2008 inserted the provision of S207A Trade Union & Labour Relations (Consolidation) Act 1992 which provided that an Employment Tribunal may increase an award by up to 25% where the employer fails to comply with the relevant ACAS Code of Practice – which in this instance the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) – and that failure was unreasonable. Under s124A ERA such an adjustment will

only apply to the compensatory award. Following *Lawless v Print Plus EAT 0333/2009* the relevant circumstances to be taken into account when considering an uplift will vary from case to case but the Employment Tribunal should always take into account: (a) whether the procedures were applied to some extent or were ignored altogether; (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there were circumstances that mitigated the blameworthiness of the failure to comply. The size and resources of the employer may be a relevant factor although this has limited application if the Tribunal assesses that the employer's motives for disregarding the ACAS guidance were deliberate or blameworthy.

92. The respondent's breach of the ACAS Code of Practice related to the investigation and amounted to discounting key evidence from the claimant when its managers should have kept an open mind. This was not an understandable error as there was absolutely no basis to discount such evidence – and maintained that stance – other than to assist in coming to a preordained conclusion of the claimant's guilt. Notwithstanding, this is a fundamental breach of process, the ACAS guidelines are there to ensure that a correct process is followed in order to make a substantially fair decision. Given the respondent's behaviour they were always going to make an unfair decision, however, the process did substantially follow the ACAS Code of Practice procedures as there was a separate investigation, disciplinary and appeal process. The claimant was represented throughout (even at the investigatory stage) and the claimant was afforded the opportunity to state his case at 2 investigatory interviews, 1 disciplinary hearing and 2 appeal hearings. I am not going to penalise the respondent harshly for failing to follow an extensive process even though its managers undermined the veracity of ACAS guidelines. Under the circumstances I provide an uplift of 5% to show my disapproval of the respondent's behaviour.

Recoupment

93. The claimant did not claim any unemployment benefits, so the recoupment provisions do not apply.

Damages for wrongful dismissal and compensation for the claimant's notice period

94. Wrongful dismissal is a claim for breach of contract in respect of the claimant's notice period. I have not been provided with a copy of the claimant's contract of employment, so I calculate the claimant's notice period in accordance with the statutory notice provisions of s86 ERA. The claimant had completed 21 full years' service, so he is entitled to 12 weeks' notice of dismissal or payment in lieu thereof. Following *Stewart Peters Limited v Bell 2009 ICR 1556 CA*. a Tribunal calculating damages for wrongful dismissal should take full account of any sums earned during the notice period and set these off against the notice pay to which the claimant is entitled. However, the claimant is not entitled to double recovery and he has been compensated for his wrongful dismissal in the loss of earnings calculation for unfair dismissal. Accordingly, I make no award in this regard.

Aggravating features

95. The claimant has not set out why I should penalise the respondent in respect of s12A Employment Tribunal's Act 1996. I have considered all of the features of this case, including allegedly aggravating features, and I am satisfied that my award in respect of the ACAS uplift reflects sufficiently the remedy that is fair and appropriate in the circumstances.

Summary

To recap, I have awarded as follows:

Basic award -	£14,425.50
Loss of earnings, etc to remedies hearing -	£3,878.44
Expenses in looking for work -	£847.96
Future losses -	£16,882.02
Loss of statutory rights -	£500.00
ACAS uplift	£1,105.40
Total =	£37,639.32

96. I award the claimant in the sum of **£37,639.32**

Employment Judge GD Tobin

5 November 2018