Case Number: 3201774/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bailey**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **26 & 27 March 2019**

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

Representation

Claimant: Mr Nicholas Toms (Counsel)

Respondent: Miss Rebecca Thomas (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant was not unfairly dismissed, as he alleges or at all. Accordingly his claim is itself dismissed.

REASONS

1. By his claim, presented to the Tribunal on 16 August 2018, the Claimant Mr Paul Bailey raises one complaint of unfair dismissal against London Underground Limited, his former employer and the Respondent in these proceedings. The Respondent accepts that it employed the Claimant from 6 September 1999 until 22 March 2018, when he was summarily dismissed. The Respondent contends that its reason for dismissing the Claimant was misconduct, in that the Claimant had failed a random and unannounced drug test on 20 October 2017, and submits that it was reasonable in all the circumstances to dismiss him. At the time of his dismissal, the Claimant was working as a train operator or driver, and it is accepted that he had been continuously employed by the Respondent for nearly 19 years and had an effectively clean disciplinary record.

2. I heard evidence from (a) the Claimant; (b) Mr Paul Shannon, his union representative who accompanied and represented the Claimant at the disciplinary hearing following which he was dismissed; (c) Mr Kieran Dimelow, the manager who jointly conducted that hearing and took that decision; (d) Mr Chris Taggart, the manager who heard and dismissed the Claimant's appeal; and (e) Dr Sheetal Chavda, a consultant occupational physician who advises the Respondent on medical standards for safety purposes. I also heard closing submissions from Mr Toms and Ms Thomas, Counsel for the respective parties, for which I am grateful.

3. The relevant factual background to the Claimant's claim can be summarised as follows. For obvious reasons which do not need to be spelt out, the Respondent, which operates the London Underground train network and related travel and transport activity in London, adopts a zero-tolerance approach towards drug and alcohol use by its employees in this safety critical industry; and indeed it is a criminal offence for certain of its workers, including drivers such as the Claimant, to be unfit through drugs or alcohol whilst working on the railway. That approach, which is reflected in the Respondent's disciplinary policy, is well publicised and well known among the Respondent's employees, and the Claimant confirmed that he was aware of it.

4. On 20 October 2017, an unannounced drug test was carried out at the Respondent's Leytonstone Train Depot, and the Claimant, who was based there, was one of those members of staff who were randomly selected for testing. Whilst the Claimant's alcohol breath test was negative, he returned a positive reading for cannabis, the screening cut-off level for that test being 50 ng per millilitre, in what is an initial binary assessment. Once that result was made known to the Respondent by Alere Toxicology, the independent laboratory who are responsible for administering the Respondent's drug and alcohol testing procedures, the Claimant was stood down from safety critical duties on 26 October 2017.

5. The Claimant was then invited to and duly attended a medical review conducted by the Respondent's Occupational Health advisers on 15 November thereafter. That meeting did not in fact go ahead, since the Claimant wished his trade union representative to be in attendance, and that turned out not to be possible. The following day, the Claimant was suspended on full pay pending the outcome of the Respondent's investigation into his positive cannabis reading, and the OH medical review went ahead on 20 November, the Claimant then being appropriately accompanied, when his positive drug screening test was duly confirmed to him in the form of the document at page 62 in the agreed bundle.

6. A fact-finding meeting with the Claimant and his union representative took place two days later on 22 November. The Claimant confirmed that he was well aware of the provisions of the Respondent's drugs and alcohol policy, and raised the possibility that his drug test outcome had in fact been a 'false positive' result since, whilst he denied having consumed cannabis, he said that during a recent sickness absence he had been prescribed and taken Promethazine Hydrochloride and other drugs; and in addition that he had been regularly consuming hemp seed or hemp seed oil products as supplements and part of his ordinary everyday diet for many months. The Claimant suggested that either or both of those factors might have led to the positive reading recorded. That fact-finding meeting was adjourned, and subsequently reconvened on

12 December 2017, when the Claimant requested that the second urine sample which he had provided on 20 October that year be sent to an accredited laboratory (called 'SynLab') which he/his advisers had chosen for separate and independent testing; and that was duly done, the Respondent submitting the other urine sample which the Claimant had then provided to Alere Toxicology for analysis.

7. Following the fact-finding meetings, the Respondent decided to proceed to a disciplinary hearing, and the Claimant was invited to attend such a meeting, charged with gross misconduct arising out of his having tested positive for cannabis whilst at work, by letter dated 11 January 2018, which also informed him of his right to be accompanied, and that dismissal was a possible outcome if that charge was established. The disciplinary hearing took place on 27 February thereafter. It was jointly chaired by Mr Dimelow and Mr Friel, and the Claimant was in attendance, accompanied by his union representative Mr Shannon.

8. Much of that disciplinary hearing was taken up by a discussion concerning the apparent contradiction between the document or certificate which had been produced by Alere Toxicology and provided to the Claimant, and which simply confirms that he had tested positive for cannabis on the initial screening test, the cut-off level being identified as 50ng per millilitre (page 143), and the certificate provided to the Claimant by SynLab (page 147), a copy of which was provided at the disciplinary. That certificate, although confirming that the sample results for the two urine batches provided by the Claimant on 20 October 2017 were consistent, also indicated an actual reading for cannabis in the sample tested by SynLab as being 19ng/ml, apparently significantly lower than the cut-off level which had been applied by Alere Toxicology. Mr Shannon also produced on the Claimant's behalf an explanation by Alere Toxicology of the drug testing process and procedure which they adopt, copies of which are at pages 129 to 134 in the bundle.

9. Mr Friel and Dimelow duly adjourned the hearing, and went away at its conclusion to make further enquiries. They obtained medical confirmation from the Respondent's OH advisers that none of the hemp products which the Claimant had said at the original fact-finding meeting that he had been taking regularly for some time, nor any of the medication prescribed for his earlier bout of ill-health preceding the drug testing on 20 October 2017, could have had any significant impact on that test, or resulted in a 'false positive' outcome. In fact, information to that effect had already been obtained by the Respondent and disclosed to the Claimant as part of the disciplinary documentation pack. In considering the Claimant's case, Mr Friel and Mr Dimelow, as the latter said in his evidence, ultimately relied on the confirmation from SynLab, provided in the documents submitted by the Claimant, that the two urine samples tested by themselves and Alere Toxicology were consistent. That, they believed, validated and supported the original positive screening test outcome and, dismissing the possibility of innocent and unintentional cannabis consumption or ingestion by the Claimant, they concluded that it was probable that the Claimant had knowingly consumed cannabis within the three or four days preceding his drugs test on 20 October 2017.

10. The disciplinary hearing was accordingly reconvened on 22 March 2018 when, for the reasons set out in their joint outcome letter (pages 167 to 171) and as summarised above, Messrs Friel and Dimelow said that they found the allegation of gross misconduct proved, and they summarily dismissed the Claimant.

11. The Claimant duly presented an appeal through his trade union representative (page 176). That appeal was heard by Mr Taggart on 12 July 2018, when the Claimant was represented by Mr Leach, a very experienced full-time official with the RMT. The single issue pursued and relied upon by the Claimant and Mr Leach at that meeting was the apparent contradiction between the Alere Toxicology screening test result of a cannabis reading in excess of 50ng/ml on the one hand, and the figure provided by SynLab of 19ng/ml on the other hand, representing the *'Delta 9 THCC'* element in the sample provided to and tested by them, *'THCC'* being the active ingredient in cannabis. The Claimant and Mr Leach strongly contended that, based on those two figures, the Claimant had in fact passed, rather than failed, the Respondent's drugs screening test. Mr Taggart, like Messrs Friel and Dimelow before him, adjourned at the conclusion of the hearing in order to undertake further investigations. In his case, that specifically included speaking to Dr Chavda, a consultant occupational physician and medical adviser to the Respondent, which he did on 30 July 2018.

12. Dr Chavda explained to Mr Taggart, and as is in fact set out in the Alere Toxicology documentation which Mr Shannon had helpfully provided at the original disciplinary hearing, that two separate and different drug tests had been undertaken in the Claimant's case. The first was the initial screening test on 20 October 2017, which simply indicates in binary terms whether the individual concerned has tested positive or negative for a range of specific drugs, and where the relevant cut-off levels for specific drugs are set and determined on an industry wide and EU approved basis, in the case of cannabis being 50ng/ml. The second and subsequent test, assuming a positive outcome in the initial screening test and that either the employer or employee requested it, was a specific test to assess the presence and amount of the active ingredient of the drug in question, being cannabis in this case. That was the test which had been conducted on the Claimant's behalf by SynLab, which had produced an identical reading to the same test conducted by Alere Toxicology on the urine samples provided by the Claimant, namely 19ng/ml. The relevant cut-off figure when testing the active ingredient for cannabis is 15ng/ml, so that both the subsequent urine tests conducted confirmed that the Claimant had failed to pass the drugs test he had taken, and that the original screening test outcome had been correct.

13. On the basis of Dr Chavda's advice, which is set out and explained in his outcome letter dated 8 August 2018 (pages 188/189), Mr Taggart dismissed the Claimant's appeal. In that letter, Mr Taggart records that of all the original grounds of appeal put forward by the Claimant, the only one pursued at the hearing was the contention that the Claimant had passed the Respondent's drugs test; secondly, that the Claimant had then confirmed that he did not wish to pursue a number of related grievances which he had submitted; and thirdly that in Mr Taggart's view, it was fair to say that a clear explanation concerning the different scores obtained from the drugs test taken by the Claimant had not been provided to him either before or at the disciplinary hearing. Following the dismissal of the Claimant's appeal, he and Mr Leach sought the discretionary remedy of a review of the disciplinary decision by one of the Respondent's directors. Although initially refused, such a review was ultimately undertaken, albeit unsuccessfully, in that the Claimant's dismissal was confirmed.

14. The sole claim before this Tribunal is a complaint of unfair dismissal. As noted, the Respondent asserts that its reason for dismissing the Claimant was misconduct, which is a potentially fair reason for dismissal falling within s.98(2) Employment Rights Act 1996. It has never been suggested, nor was any evidence led, that there was any hidden or ulterior reason on the Respondent's part for dismissing the Claimant. All the evidence suggests that the Respondent acted as it did because the Claimant apparently failed a random drugs test at work, and that was in fact accepted by Mr Toms on the Claimant's behalf. I have no difficulty in finding that the Respondent has proved on a balance of probabilities that misconduct was the reason for the Claimant's dismissal.

15. It follows, as Counsel for both parties accepted, that this is a case that falls squarely within the principles established in the well-known authority of **British Home Stores v Burchell [1978] ICR 303**: did the Respondent genuinely believe, on reasonable grounds and after an appropriate investigation, that the Claimant was guilty of misconduct?

16. Once again, the Respondent's belief in the Claimant's misconduct, and the genuine nature of that belief, has not been challenged; and no contrary case was put or suggested to any of the Respondent's witnesses. From the evidence I heard and read, I find that the Respondent held such a belief. The more significant question is whether there were reasonable grounds for that belief. Mr Toms contends that there weren't any such grounds, for the reasons which he helpfully summarises at paragraph 38 of his submissions. These include a chain of custody issue concerning the samples provided by the Claimant on 20 October 2017, as appears from the document at page 33A in the bundle; the contradictory and essentially limited evidence at the Claimant's disciplinary hearing concerning his drugs test readings; the lack of any clear policy or statement of procedure that would prevent any such confusion and uncertainty; and the (rejected) possibility of innocent and inadvertent cannabis consumption through hemp seed oil and/or hemp products by the Claimant.

17. Ms Thomas submits that there were ample grounds to justify and validate the Respondent's belief. They include the identical and mutually confirmatory results of the analyses conducted by Alere Toxicology and SynLab on the samples provided by the Claimant, which, properly understood, confirm that he failed to pass either the initial screening test or the active ingredient assessment; the Respondent's investigation into, and ultimate ruling out of, the possibility of either recent medication or hemp products or food supplements having any impact on the Claimant's test results, once he had raised those matters; and the Claimant's own testimony, which he repeated to the Tribunal, that whilst some of the products he consumed were unlabelled they came from reputable and trusted suppliers that he had been using for some time. In relation to the first two such issues, Ms Thomas submits that the Respondent was entitled, and that it was reasonable, to rely on the advice of its OH professionals and the specialist laboratories.

18. In my judgment there were substantial, and certainly reasonable, grounds for the Respondent's belief that the Claimant had voluntarily and knowingly consumed cannabis. As Ms Thomas correctly points out, the analytical evidence, as confirmed by the Claimant's own specialist, is consistent with and supportive of such a conclusion, particularly when combined with the medical advice taken by the Respondent, which

effectively ruled out the possibility of inadvertent consumption, or of other medication providing a misleading outcome. The fact that that analytical evidence was poorly and confusingly presented, up until the Claimant's appeal and as Mr Taggart acknowledges, does not undermine its validity, or the ultimate reasonableness of the Respondent's belief, certainly by the time it was reflected in what I find to be Mr Taggart's clear explanation in his outcome letter to the Claimant. With respect to Mr Toms, the chain of custody issue is a red herring, since it is clear from page 33A that the missing witness' signature relates to the superimposed print-out from the Lion Alcometer test for alcohol consumption by the Claimant, which it is accepted he passed. Additionally, the documentation from both Alere Toxicology and SynLab specifically states that the chain of custody checks concerning the samples that they tested had been passed. I accept that the Respondent took appropriate steps to investigate the possibilities of both inadvertent consumption and the impact of recent medication affecting the samples provided, including repeated references to their OH physicians and thereby to Alere Toxicology, and that it was reasonable to accept and act on their advice and to reject the Claimant's explanations. Lastly, the difference between the initial drug screening test and any test to establish the level of active ingredient contained in samples provided is made very clear in documents which were already in the Claimant's possession, namely the explanation from Alere Toxicology at page 131.

19. For reasons already touched upon above, I do not believe that any substantial criticism can be levelled at the investigation undertaken by the Respondent into the Claimant's alleged misconduct. The positive drug screening test outcome was supplied by an external specialist adviser, the Claimant was given every opportunity to provide an explanation for that result, and his explanation was properly investigated, by means of repeated references to the Respondent's OH medical advisers and to Alere Toxicology. In addition, the sample provided to the Claimant for his own independent testing confirmed the accuracy of the results relied upon by the Respondent. The Claimant and his union representative complained that they were never provided with the actual result, in terms of the specific figure recorded by Alere Toxicology when conducting their initial drug screening test, but simply with the information that he had tested positive for cannabis and in the excess of the cut-off level of 50ng per millilitre. Whilst I can understand why the Claimant would be interested in the actual figure, I was told, and it was not contested, that neither were the Respondent provided with those details. In any event, in my judgment the actual figure ultimately became irrelevant in the light of the subsequent active ingredient tests undertaken and confirmed by both Alere Toxicology and SynLab. Finally, and as mentioned above, by the time of his appeal the Claimant had already been provided with a clear explanation of the different tests undertaken on samples provided and the different results/figures that would arise (page 131), following his subject access request in April 2018.

20. It follows that, in my judgment and for these reasons, the three elements of the **Burchell** test are satisfied.

21. Turning to possible procedural unfairness, there are two issues to be addressed. The first is that the dichotomy or contradiction between the initial screening test outcome, and the subsequent specific active ingredient test, was neither explained nor adequately addressed at either the Claimant's disciplinary

hearing or in Mr Dimelow's subsequent letter dismissing him. That seems to me to be a legitimate criticism of the process adopted, as Mr Taggart recognised, albeit I accept that the reason for their error was that Messrs Friel and Dimelow had not previously dealt with a case where the active ingredient test was involved. However, I am rightly reminded me that, when considering potential procedural unfairness, it is necessary to look at the whole of the disciplinary process adopted and undertaken by the Respondent; and I accept that that earlier defect in explanation and reasoning was addressed and rectified in Mr Taggart's clear analysis and explanation in his own letter dated 8 August 2018 dismissing the Claimant's appeal. I also bear in mind the fact that a similar explanation had already been obtained by the Claimant.

22. Secondly, it is submitted that Mr Taggart should have ranged wider in considering and determining all the various issues raised by the Claimant following his disciplinary hearing and in his grounds of appeal. With respect to Mr Toms, I cannot accept that submission. I find that it was reasonable for Mr Taggart to focus on only those matters which were specifically raised and relied upon by the Claimant and his very experienced union representative at the appeal hearing, not least because, as Mr Taggart recorded in his outcome letter, that was essentially what he was asked to do. Had the Claimant or Mr Leach wanted Mr Taggart to consider and determine other matters or grounds of appeal, then no doubt they would have said so, including in the application for a director's review. Overall, I find that the disciplinary procedure adopted by the Respondent was a reasonable one, in accordance with their well-established disciplinary policies and procedures, and that no unfairness to the Claimant resulted from its application. For the avoidance of doubt, I should record that no criticism was raised of either Messrs Friel and Dimelow, or Mr Taggart, for any failure on their part to reconvene their respective hearings, or to invite further submissions, after they had undertaken further investigations and obtained further advice, and before providing their respective outcome letters.

23. The sole remaining issue therefore concerns the sanction applied in the Claimant's case, namely dismissal, and whether or not that falls within the range of reasonable responses which were available to the Respondent, which, it is well established, is a wide one. Given the clarity of the Respondent's disciplinary procedure which, as Mr Toms accepted, makes plain that the Respondent adopts a zero-tolerance approach to drugs and alcohol at work, particularly for those employees like the Claimant who undertake roles where safety is critical not only for themselves, but also for their colleagues and the travelling public, together with the Respondent's clearly stated approach, that summary dismissal almost inevitably follows a finding of a breach of this policy, I do not think that it can realistically be said that dismissal falls outside that range. In addition, Ms Thomas points out that the Respondent is under a specific legal duty to exercise 'all due diligence' to prevent their employees from working whilst unfit to work, or with their ability to do so impaired, through alcohol or drugs; and that all comparator cases involving positive drug tests have resulted in dismissal. Whilst this was a first offence, and the Claimant had an effectively clean disciplinary record going back over his nearly nineteen years of employment with the Respondent, and whilst it is fair to say that Mr Dimelow in his evidence took the view that dismissal in these circumstances was virtually inevitable, he did address and consider the possibility of imposing a lesser penalty in his letter of 22 March 2018, and gave reasons (which were not themselves unreasonable) why, in his view, anything less than dismissal of the Claimant would not meet the gravity of

the case. In my judgment, the Respondent having come to the reasonable conclusion that the Claimant had knowingly consumed cannabis relatively shortly before attending for work, when on his own admission he was well aware of the Respondent's drugs and alcohol policy, and of the likely consequences of breaching that policy, it was not unreasonable to dismiss him in spite of his previous good work record.

24. For these reasons, the Claimant's claim of unfair dismissal must be dismissed.

Employment Judge Barrowclough

15 May 2019