THE EMPLOYMENT TRIBUNALS

Claimant: **Mr G Cunningham**

Respondent: **Svitzer Marine Limited**

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: **Teesside Justice Hearing Centre** **On:** **31 July & 1 August 2019**

Before: **Employment Judge Morris**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr J English, Solicitor**

REASONS

Representation and evidence

1. The claimant appeared in person, gave evidence and called his wife, Mrs A Cunningham, to give evidence on his behalf. The respondent was represented by Mr J English, Solicitor who called three employees or former employees of the respondent to give evidence on its behalf: Mr S Browell, Port Manager – Tees and Tyne; Ms W Harvey, HR Business Partner UK; Mr A Brown, Finance Manager UK at the time but now retired.

2. I also had before me a bundle of agreed documents comprising more than 130 pages.

The claimant's complaint

3. The claimant complained that his dismissal by the respondent was unfair being contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

The issues

4. As discussed with the parties at the commencement of the hearing, the issues in this case can be summarised as follows:

   4.1 Was the claimant dismissed? The respondent accepted that he had been.

   4.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct.

   4.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the 1996 Act? Conduct is such a potentially fair reason.

   4.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009) and the guidance in British Home Stores Limited -v- Burchell [1978] IRLR 379, as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.

   4.5 In this respect, the Tribunal would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

   4.6 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its managers who, respectively, made that decision and upheld that decision on appeal had in mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Consideration and findings of fact

5. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

5.1 The respondent is a large employer with some 650 employees in the UK and approximately 40 based at Teesside. It has significant resources including a dedicated HR department. Its business is the provision of a range of marine services to the shipping industry.as the claimant dismissed? The respondent accepted that he had been.

5.2 The claimant was employed by the respondent as a deck hand from 19 April 2016 until he was summarily dismissed for gross misconduct on 14 January 2019. His job was part of a two-man team on a floating waste vessel, which collected waste from other vessels. Nothing untoward occurred during the claimant's employment until the matters that gave rise to his dismissal. Indeed he was considered to be a good employee and had an exemplary disciplinary record.

5.3 The respondent's business is highly regulated to achieve essential standards of health and safety. It has a drug and alcohol policy (42) paragraph 2.6 of which says that it operates a "zero-tolerance policy" in respect of employees use of illegal drugs including in their "own time". Paragraph 2.7 continues that the company expects "ALL employees not to have illegal drugs in their system". No matter how small in amount or if only consumed once "this will still be considered by the Company as an act of gross misconduct and it is likely that this will result in your dismissal (without notice) from your employment with the Company" (44).

5.4 To enforce that policy the respondent operates a system of random drug testing (47). Although described as "zero-tolerance", the policy does recognise that people who inform the respondent that they have a drug and/or alcohol problem might be provided with support and treatment. In evidence Mr Browell also said that zero-tolerance would not be enforced if an employee brought forward a reasonable explanation supported by evidence.

5.5 Matters resulting in the claimant's dismissal began on the 4 January 2019 when he underwent a random drug test carried out by an independent company for which he volunteered to go first. The result was reported on 8 January 2019 revealing that the claimant had tested positive for two prescribed medications and cocaine. Mr Browell and Ms Harvey contacted the claimant in a telephone conference call that day to inform him of the positive result and that he was suspended. The claimant's initial response was, "Well I have been away haven't I", explaining that he had been to Edinburgh with friends to celebrate the New Year. He then said "I have let myself down and I have let my family down". From these comments Mr Browell and Ms Harvey understood that the claimant was not seeking to deny taking cocaine. The claimant added that he would have to have difficult conversations with his family and that there was no point in attending the meeting that the respondent's staff had mentioned as he understood the consequences that he would lose his job. The claimant did not respond as might have been expected; for example, to say that he had not taken cocaine, there might have been an error in the test, his drink might have been spiked or there might have been a mix-up in the test samples etc. The claimant has subsequently explained that he was in a poor state of mind at

the time of the telephone call in that he had just returned from visiting his sister-in-law who was very seriously ill in hospital and a very close friend had recently committed suicide, but he did not explain either of those matters at the time to Mr Browell.

5.6 Soon after the telephone call (19:09) the claimant sent an e-mail to Ms Harvey (64) in which he said twice that he was apologising for any inconvenience, and resigned with immediate effect. Ms Harvey accepted that resignation (65) but then the claimant wrote again at 21:07 (66) asking to withdraw his resignation. He explained that there had been fifty-thousand people in Edinburgh at New Year. They had all been sharing drinks and he strongly believed that he had unknowingly taken a drink that had been spiked with drugs. The respondent agreed that the claimant could withdraw his resignation and he was reinstated.

5.7 The claimant's suspension was confirmed to him in a letter of 9 January 2019 (70) and he was invited to a formal meeting on 11 January 2019. He was advised of his right to be accompanied and warned that "… serious disciplinary action *may* be taken against you, including summary dismissal…". In his claim form, ET1, the claimant states that he understood this to be only an investigation meeting but I cannot accept that there should reasonably have been any misunderstanding of Mr Browell's letter or the purpose of the meeting.

5.8 Prior to the meeting Ms Harvey had raised certain queries with the doctor at the testing laboratory. He clarified that the risk of contamination of the test sample was low; the claimant had used cocaine probably two to four days prior to the test; a person taking a drink spiked with cocaine would notice the taste and stop drinking it, and there would be precipitate at the bottom of the glass and maybe some debris on the surface as cocaine is often heavily cut with other agents. He suggested that if the claimant was adamant that his drink had been spiked he could agree to a hair test which would show whether it was a one-off or regular use (72A-72E). The respondent did not pursue the hair test possibility as its policy was zero-tolerance and whether one-off or regular use was not relevant.

5.9 Also on the 9 January the claimant wrote by e-mail to Mr Browell and Ms Harvey to say that he had contacted both the Edinburgh and the Cleveland Police to report the crime of his drink being spiked and had received a crime reference number, which he provided.

5.10 The meeting duly took place on the 11 January 2019 conducted by Mr Browell and Ms Harvey although the eventual decision was Mr Browell's alone. The claimant was represented by his trade union representative (75). The notes of the hearing are a matter of record and I will not set them out in detail here. The parties can be assured, however, that I read them thoroughly and several times as I did the notes of the appeal hearing. Suffice it is to say that the claimant explained his trip to Edinburgh and that he had started drinking on the train then had continued drinking through until 1.30am the following morning. He had not shown any symptoms of his drink being

spiked because "I had that much to drink. It would be impossible for me to notice anything". He had not noticed any taste or residue. He had not felt right the next day but he put that down to the amount of alcohol consumed and he had not eaten. He was clear, however, that he had never taken drugs in his life and repeated that he had reported the crime to the police and said that a police officer had commented that someone might have targeted the wives and daughters in their group and the claimant had then picked up the drink. Mr Browell considered the information provided by the claimant but was not persuaded. He considered that the claimant had not provided a credible explanation or any evidence or a reasonable basis to support his theory that his drink had been spiked.

5.11 Mr Browell concluded that the claimant had voluntarily taken cocaine. He considered the surrounding circumstances, the claimant's unblemished record, his age, his length of service and his personal situation but the respondent had high standards of health and safety. He decided that dismissal was the appropriate sanction. He confirmed that in his decision letter of 14 January 2019 (84) and offered the claimant a right of appeal, which he exercised by an undated letter. He provided two grounds of appeal:

"1) The company has overlooked or not given due weight to pertinent evidence.

2) The penalty is unduly harsh and disproportionate in the circumstances".

5.12 The appeal hearing took place on 11 February 2019 conducted by Mr Brown assisted by the respondent's HR Manager – Europe. The claimant was again accompanied by his trade union representative (90). Once more the content of the notes of the hearing are a matter of record, which I will not rehearse here. Suffice it that the claimant confirmed his account of his trip to Edinburgh and they "had been drinking all day, non-stop over the three days". He maintained his strong denial of having knowingly taken cocaine and his explanation of having contacted the police. He also explained that, given the prescribed drugs that he was taking, to take cocaine would be to sign his own death warrant. He maintained that he was the victim and the respondent had not offered him any support. He had worked in the security industry for twenty-seven years alongside police and always operated personal zero-tolerance on drugs throughout his life.

5.13 Mr Brown considered the claimant's two grounds of appeal but rejected them both as explained in the respondent's letter of 15 February 2019 informing the claimant that the original decision to dismiss was upheld.

Submissions

6. After the evidence had been concluded the respondent's representative and the claimant made oral submissions all of which I have duly considered. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and

conclusions below and comments that I have made above. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

The Law

7. The principal statutory provisions that are relevant to the issues in this case are to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it —

……

(b) relates to the conduct of the employee,

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Application of the facts and the law to determine the issues

8. The above are the salient facts relevant to and upon which I based my judgment. I considered those facts and the submissions made in the light of the relevant law and the case precedents in this area of law.

9. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

> *"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
>
> *If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so 1996 Acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in f1996 Act the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."*

10. Unfair dismissal as a concept was first introduced into the UK legislation in 1972. Some might have expected a tribunal to focus on whether it was fair that the employee had been dismissed. The higher courts have consistently said, however, that that is not the correct approach; rather a tribunal should focus its attention on the conduct of the employer: W Devis & Sons Ltd v Atkins [1977] IRLR 314. That being so, the issues arising from the statutory and case law referred to above that are relevant to the determination of this case are

summarised at paragraph 4 of these reasons. They fall into two principal parts, which I shall address in turn.

What was the reason for the dismissal and was it a potentially fair reason?

11. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

12. In ASLEF v Brady [2006] IRLR 576 it was said,

> "*Dismissal may be for an unfair reason even when misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….*
>
> *It does not follow, therefore, that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – would not be the misconduct at all, since that is not what brought about dismissal, even if the misconduct merited dismissal.*
>
> *Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so*."

13. In this case, the facts and beliefs of the respondent, as personified by those persons who took the decision to dismiss the claimant and reject his appeal (Mr Browell and Mr Brown) are clearly set out in their respective contemporaneous decision letters from which I have summarised as above.

14. Quite simply, the claimant had provided a positive test result in relation to having taken cocaine in respect of which he had not provided a satisfactory explanation supported by evidence. On the evidence presented to me at this hearing I have no hesitation in finding, and the claimant did not dispute, that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason in accordance with section 98(1) of the 1996 Act.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

15. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably as is required by section 98(4) of the

1996 Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which the Tribunal must take into account:

15.1 first, whether, in the circumstances, the employer acted reasonably or unreasonably;

15.2 secondly, the size and administrative resources of the respondent;

15.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

16. In addressing 'the section 98(4) question', I am alert to two preliminary points. First, I must not substitute my own view for that of the respondent. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not."

This approach has been maintained over the years in many decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and Sainsburys v Hitt [2003] IRLR 23.

17. Secondly, I am to apply what has been referred to as the 'band' or 'range' of reasonable responses approach. In respect each of these two preliminary points, reference is again made to the excerpt from Graham above.

18. In this context, I now turn to consider the basic question of fairness as more fully set out in the three elements in Burchell and Graham. In that regard it is important to note that in the first of those decisions it is recorded that the Tribunal has to decide whether the employer "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time".

19. For the reasons set out more fully above, I am satisfied that Mr Browell and Mr Brown both believed that the claimant was guilty of misconduct. That is clear from the evidence recorded above and was clear from their oral evidence before me. As such, the first element in Burchell, the fact of belief of misconduct, is satisfied.

20. The second element in Burchell is that the respondent must have in mind reasonable grounds upon which to sustain that belief.

21. In this regard, first and importantly, the respondent had the positive result from an independent random drug test that the claimant had consumed cocaine and Ms Harvey had made enquiries of the laboratory to gain further clarification of the bare result and none of the doctor's answers supported the claimant's account. In that regard I accept that given the respondent's zero-tolerance policy a hair test would

not have been helpful as it would only reveal one-off or habitual use, which was not the issue. Secondly, when Mr Browell and Ms Harvey contacted the claimant in a telephone conference call on 8 January 2019 he did not deny taking cocaine or react as might have been expected as set out above. I accept that he was not in a good frame of mind at the time but it is important that I consider what was in Mr Browell's mind when he made the decision: he had in his mind that at least initially the claimant did not deny having taking cocaine and offered no explanation for cocaine being in his system. Also as to reasonable grounds for the belief, very quickly the claimant resigned, twice apologising for any inconvenience. Further, by the time Mr Browell was considering his decision the claimant had raised the possibility of his drink being spiked but he had no evidence in support of that contention, although I accept that it was probably impossible for him to provide such evidence. Finally, by his own account he had not noticed any taste, sediment, symptoms or after-effects beyond what he considered was reasonably attributable to his consumption of alcohol. For all those reasons therefore I consider that the respondent did have reasonable grounds upon which to sustain the belief in the claimant's misconduct.

22. The third element in Burchell is that at the stage that Mr Browell formed that belief on those grounds and Mr Brown maintained that belief, the respondent must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

23. The investigation was certainly limited but I consider that was reasonable in the circumstances. Once more, the above matters of the test result, Ms Harvey's clarification and the initial response of the claimant during the telephone conference call are relevant in respect of this third element. In addition, the claimant attended the disciplinary meeting on 11 January 2019 during which he had the opportunity to provide his answers to the allegations and explain his position generally.

24. On a specific point, both Mr Browell and Mr Brown had raised with the claimant that he would have tasted the cocaine and suffered the effects as a non-user. The claimant's evidence at the Tribunal hearing was that after the appeal meeting he had contacted about a dozen pharmacists and had several meetings with a drug analyst and all confirmed that the small amount in his system was such that he would never have tasted it because of the amount of alcohol he had consumed and that he would probably not have felt the effects. Although I note the claimant's evidence in that respect, these points were not points of which he made the claimant's managers aware at either the initial disciplinary meeting or at the appeal meeting and, as such, they were not and could not have been taken into account by them and neither can they now be taken into account by me.

25. Stepping back and considering all the evidence before me in the round, I am satisfied that the respondent did act reasonably in the process that culminated in its decision to dismiss the claimant.

26. In summary, by reference to the elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I accept that:

    26.1 Mr Browell and Mr Brown "did believe" that the claimant was guilty of misconduct;

26.2 they had in their minds reasonable grounds upon which to sustain their belief that the claimant was guilty of misconduct; and

26.3 at the stage at which they formed that belief on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

27. The final issue is, given the above, the reasonableness or otherwise of the sanction of dismissal: i.e. the question of whether dismissal was within the range of reasonable responses of a reasonable employer. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. In this regard, I can do no better than quote Lord Denning MR sitting in the Court of Appeal in the case of British Leyland UK Limited v Swift [1981] IRLR 91. There he said as follows:

> "The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view".

28. It is quite possible therefore that another employer in these circumstances might have shown greater sympathy and understanding, and a willingness to accept its employee's explanation. My function, however, is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted. In this case, I consider it to be impossible for me to say (particularly given the nature of the respondent's operations and in the context of its zero-tolerance policy in relation to drugs) that no reasonable employer would have dismissed the claimant. Indeed I am quite satisfied that in the circumstances known to Mr Browell and then Mr Brown as a result of the respondent's investigation (including the claimant's input at the disciplinary and appeal stages), the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances. I am satisfied that it was within the range of reasonable responses for the respondent to dismiss the claimant.

29. In summary, therefore, I am satisfied that, as is required of me by section 98(4), the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

Conclusion

30. In conclusion, my judgment is that the reason for dismissal of the claimant was conduct and that the respondent did act reasonably in accordance with section 98(4) of the 1996 Act. I have to be satisfied that there was a sufficient investigation, reasonable grounds and a reasonable belief allowing the managers,

on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

31. For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

3 September 2019