EMPLOYMENT TRIBUNALS

Claimant: **Mr N Batt**

Respondent: **Dow Silicones UK Limited**

Heard at: **Cardiff** **On: 21st 22nd & 23rd October 2019 (Chambers discussion on 2nd December 2010)**

Before: **Employment Judge Howden-Evans**
Ms S Hurds
Ms C Izzard

Representation:

Claimant: Mr J Morgan, Counsel

Respondent: Ms K Moss, Counsel

RESERVED JUDGMENT

The unanimous reserved judgment of the Employment Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. This means the respondent unfairly dismissed the claimant;

2. Contrary to s39(2) Equality Act 2010 the respondent has treated the claimant unfavourably because of something arising in consequence of his disability (s15 Equality Act 2010); and

3. The complaint of wrongful dismissal is well-founded. This means the respondent broke the claimant's contract by failing to provide him with notice of the termination of this contract.

The case will now be listed for a one-day remedy hearing, at which the Tribunal will consider whether to make an order for reinstatement or reengagement. The parties will be sent a separate case management order setting out required steps for preparing for the remedy hearing.

REASONS

1. The respondent is part of a multi-national group of chemical companies. Its Barry site, in South Wales, manufactures a range of products including silicone fluids, rubber and specialty polymers for use in construction sealants. The site has to adhere to the Control of Major Accident Hazards Regulations 1999 (the COMAH Regulations) and is a top tier site for the purposes of the COMAH Regulations.

2. Prior to his dismissal, the claimant had worked on the Dow site at Barry since the age of 16. At the age of 22, he was employed directly by the respondent, as a Process Operator. His continuous service with the respondent started in April 2001. He was summarily dismissed on 27th June 2018.

3. On 2nd August 2018 the claimant notified ACAS in accordance with the early conciliation procedures. The period of ACAS early conciliation lasted until 2nd September 2018. On 2nd October 2018 the claimant issued these tribunal proceedings, alleging he had been unfairly and wrongfully dismissal. At a Preliminary Hearing on 19th June 2019, the claimant was permitted to amend his claim to include a claim that he had been treated unfavourably because of something arising in consequence of his disability (s15 Equality Act 2010).

4. This case was listed for a three-day hearing. By the time of the final hearing, both parties were represented and had complied with case management directions. At the final hearing, Mr Morgan, counsel, represented the claimant and Ms Moss, counsel, represented the respondent.

5. We heard evidence on oath from:

    5.1. The claimant;
    5.2. Ryan Howell, who was the respondent's UK HR Manager (prior to returning to the US in July 2018) and who jointly took the decision to dismiss the Claimant;
    5.3. Dominic Lamb, the respondent's Elastomers Operations Leader, who jointly took the decision to dismiss the claimant; and
    5.4. Vicky Edwards, the respondent's Technical Expertise and Support Leader, who considered the claimant's disciplinary appeal.

6. We had the benefit of a written statement for each witness and a bundle of documents of approximately 637 pages. We read the witness statements and key documents prior to starting the hearing. When it came to hearing evidence, we adopted the same procedure with each witness: having read their statement, we accepted their written statement as their evidence in chief but did allow supplemental questions. Each witness was cross examined by the opposing counsel, before answering any questions that the tribunal had and finally being re-examined by their own counsel.

7. In addition to the four witnesses that gave evidence on oath, the tribunal had a signed witness statement from the respondent's Company Medical Advisor, Dr Richard Taylor. Whilst the tribunal were grateful to Dr Taylor for providing this statement, as it could not be tested by cross examination, the tribunal gave this statement little evidential weight.

8. Whilst we were able to finish hearing evidence and closing submissions on the final day of the hearing, there was insufficient time for the tribunal to consider its decision. The tribunal had a chambers discussion on the first available day, 2nd December 2019. The employment judge apologises for the delay in providing this reserved judgment.

The Issues

9. Ms Moss had kindly prepared a Draft List of Issues prior to the hearing, which we discussed at the outset. Ms Moss confirmed the respondent conceded that at the date of dismissal, (1) the claimant had a disability (namely stress and depression) ; and (2) the respondent had knowledge of this disability, for the purposes of s15(2) Equality Act 2010 ("EqA 2010"). The respondent also conceded that a more than trivial reason for the dismissal was the positive drug test result for cocaine. During the hearing, the claimant indicated that if his claim was successful, the remedy he was seeking was reinstatement or reengagement. Both counsel agreed the issues to be determined were:

<u>Unfair Dismissal</u>

9.1. Was the principal reason for dismissal one related to conduct?

9.2. Did the respondent have a genuine belief that the claimant had committed an act of misconduct?

9.3. Was that belief on reasonable grounds?

9.4. At the time of dismissal, had there been an investigation within the range of reasonable investigations?

9.5. Was the dismissal fair or unfair in all the circumstances according to s98(4) Employment Rights Act 1996 ("ERA 1996")?

9.6. Was the decision to dismiss a sanction within the band of reasonable responses?

<u>Discrimination arising from disability</u>

9.7. Did the positive drug test for cocaine arise in consequence of the claimant's anxiety and depression?

9.8. If so, has the respondent shown that the dismissal was a proportionate means of achieving the legitimate aim of protecting the health and safety of staff and personnel on the respondent's premises?

Breach of contract

9.9. Did the claimant fundamentally breach the contract of employment by an act of gross misconduct?

Findings of Fact

Extracts from relevant policies

10. The respondent's **Disciplinary Policy** [at p47B & C] provides

*"**Gross Misconduct***

It is unlikely that any set of rules will cover all possible acts which may constitute gross misconduct, but this procedure is intended to cover the following types of behaviour or conduct…

- *Serious incapability at work brought on by alcohol or drugs"*

11. By email of 21st March 2016 [49A & B], Creighton Williams advised managers at the Barry site that the site was introducing a zero-tolerance policy with regard to alcohol and that any reading on a breathalyser during routine or random testing would result in sanctions being imposed on the individual concerned. The **Contractor Substance Misuse Policy** was being reworded to read:

"Update to Site Drug and Alcohol Policy

The Partnership Team and Barry Site Management have agreed to move to a zero tolerance policy when it comes to alcohol testing. Practically this means that any employee or contractor found to have alcohol in their system while working, will be found to have violated the company's policy…"

12. During training sessions, employees are shown a slide headed *"**Drug & Alcohol Policy & Process**"* [63]. This confirms

"Important - All Dow sites are ZERO tolerance. Anybody found to be under the influence of drugs of alcohol will be asked to leave site immediately. Everybody at the Dow Site is subject to random testing…. Positive readings will result in being escorted off site immediately. "For Cause" testing will take place when the behaviour, appearance or actions of anyone on site causes their colleagues supervision or manager to suspect the influence of alcohol drugs or another substance, In these circumstances you will be referred directly to the Occupational Health Department for testing. Positive readings will result in being escorted off site immediately."

13. The respondent's **Substance Free Workplace** document [64-66] provides:

"Rationale

Dow is committed to assuring an alcohol and drug free working environment safeguarding the health, safety and security of our employees….

Aims

This policy has been developed to actively promote the health and wellbeing of all employees. Its purpose is to ensure that:

- *All employees understand the dangers and harmful effects of drug and alcohol misuse*
- *All employees are aware of their responsibilities regarding drugs and alcohol in the workplace*
- *Problems are identified and dealt with appropriately at the earliest stage possible*
- *Support and assistance is offered to those having a drug or alcohol problem which affects their work and performance*
- *All employees understand the penalties for non-compliance with this policy*

Rules and Procedures

No employee will report for work while under the influence of drugs or alcohol.
No employee must possess consume sell or give away illegal drugs whilst on duty.
Employees in safety critical jobs who are found to be under the influence of drugs or alcohol will be suspended and may, following a thorough investigation, be subject to disciplinary action up to and including dismissal according to the procedures set out in our disciplinary policy. Depending on the nature of the conduct the employee may be dismissed without notice….

Support

All employees should be assured that advice and assistance will be offered to anyone identified as possibly having a drug or alcohol problem that may adversely affect their work…..

What to do:

If any person on the premises is suspected of being under the influence of drink drugs or other substances…..

….if supervisor suspects the person to be under the influence of alcohol drugs or other substances then an immediate on-site drug and alcohol screening test should be requested via Dow service provider….The Person should be suspended on full pay immediately pending investigation….The background leading to the incident should then be investigated. This may involve consultation with Occupational Health, HR and use of disciplinary procedures….In the event of a positive test, confirmed by laboratory techniques and standards the disciplinary process may well be invoked. The employee will on request have the opportunity of discussing their result with the supervisor and/or occupational health…Test results will remain confidential to the supervisor, HR and Occupational Health and the suspended employee will be personally notified at home by telephone….Each case will be consider on individual circumstances and balance of consequences. Disciplinary action may be taken up to and including summary dismissal."

Background

14. The claimant (who was 39 years old at the date of dismissal), started work on the Dow site at Barry at the age of 16, through a Youth Training Scheme, working as a store person. Having completed his 2-year YTS he was employed, via Manpower agency, to work in the safety and technical chemical stores on site. In April 2001, at the age of 22, he became employed directly by the respondent, as a Process Operator in the role of Kit Preparation Operator in the Rubber Elastomers department. He has been continuously employed by the respondent from April 2001 until his summary dismissal in June 2018.

15. For over two decades, the claimant has experienced symptoms of depression and anxiety. He has taken antidepressant medication daily since 2008. The claimant's mental health has had a significant impact on his life and career. In 2002 he changed role and became an Operator as he had found the Kit Preparation Operator role very stressful. He successfully performed the Operator role for 6 years before being promoted to the position of Lead Process Operator in 2008. The claimant was a conscientious employee and performed this new role well for many years and had an excellent safety record. Sadly, the claimant witnessed, and supported a colleague, during a traumatic accident in the workplace in 2016 which had a detrimental impact on the claimant's mental health. This combined with the pressures involved in managing additional duties as a Lead Operator, resulted in the claimant feeling excessively stressed and unable to cope. His performance review for that year noted *"[The claimant] has a strong desire to do a good job. This can mean he tries to do everything himself."* By the end of 2016 the claimant asked to step down from his position of Lead Operator. The respondent supported him with this request and the claimant reverted to the more junior role of Operator and his salary was reduced to reflect this.

16. The tribunal notes that at all relevant times, both Mr Howell and Mr Lamb, who jointly took the decision to dismiss the claimant, were aware that the claimant had stepped down from the Lead Operator role due to difficulty coping with stress. In early 2018, Mr Howell had discussions with the claimant, about his decision to step down from the Lead Operator role and about coping with stress in general.

17. Whilst the claimant was able to maintain a good attendance record during 2016 and 2017, he was also experiencing considerable stress and difficulty in his personal life following the breakdown of his relationship with the mother of his two young children.

18. On 26th January 2018 the claimant began a period of two months' sick leave with anxiety and depression. He was supported by Dr Taylor, the respondent's occupational health doctor and was able to return to work on 28th March 2018.

19. At 10pm on 25th April 2018, whilst at work, the claimant had an acute mental health breakdown and became distraught, in floods of tears. He phoned Rob Harris, the shift manager, who asked him to go straight to the medical centre. Mr Harris met the claimant at the medical centre and was very supportive and sent the claimant home. Dominic Lamb, the claimant's Department Manager, phoned the claimant the

next day and was sympathetic and told the claimant to take some time off to get help.

20. Whilst on sick leave, as well as seeing his GP, the claimant was seen by the respondent's occupational health doctor, Dr Taylor. On 10th May 2018 Dr Taylor encouraged the claimant to start counselling sessions and the claimant followed this advice.

21. The claimant felt under pressure to return to work, as from 16th June 2018, his company sick pay reduced to 50% of his normal salary. Mr Howell had written to the claimant advising him of this. The claimant saw his GP on 22nd May 2018 and enquired about returning to work. The claimant's GP signed him off for a further 28 days, but the sick note recorded *"I will not need to assess your fitness for work again at the end of this period".*

Events of 21st June 2018

22. On 21st June 2018, the claimant attended a 30-minute review appointment with the respondent's occupational health officer, Dr Taylor. Dr Taylor was concerned the claimant might be under the influence of alcohol, so he contacted HR (Mr Howell) for guidance. Mr Howell advised Dr Taylor to request the claimant undertake a voluntary drug and alcohol test. The claimant said he couldn't wait for a test as he had to collect his daughter from school.

23. Mr Lamb, and subsequently Mr Howell, joined the meeting and encouraged the claimant to take the test. A representative from Screen4, a drug testing company, tested the claimant for alcohol at 12.56pm – this result was negative. At 1.00pm the claimant gave a urine sample. Shortly after the test had been completed, Mr Howell met the Screen4 representative and was advised the urine test had recorded an initial "non-negative" result for cocaine. Mr Howell told the claimant the test had indicated a cocaine type substance and explained the claimant would be suspended on full pay pending investigation.

The Meeting on 26th June 2018

24. On 25th June 2018, the respondent's occupational health nurse, Ms Pinkney phoned Mr Howell and told him the drug test result was back and advised him it was positive and "was high".

25. On the morning of 26th June 2018, Mr Howell phoned the claimant and invited him to attend a meeting during the afternoon of 26th June 2018 to discuss the drug test result. Mr Howell had already made arrangements for the claimant's trade union representative to attend the meeting, prior to phoning the claimant. During the telephone call, Mr Howell confirmed the claimant could be accompanied by this trade union representative if he wished but did not warn the claimant that one possible outcome from this meeting could be the claimant's dismissal. The claimant reasonably believed the meeting was a follow up meeting and did not appreciate that this was his disciplinary hearing.

26. At the start of the meeting on 26th June 2018, the claimant was handed a letter dated 26th June 2018 which read *"I am writing to formally invite you to a disciplinary*

discussion on 26th June 2018 in my office. The purpose of the meeting is to share the outcome of our investigation and have a discussion of the following – the positive result on your drug test on 21st June 2018. Because of the nature of this offence, in line with company disciplinary procedure you are being suspended on 50% pay in line with our prior communication with regards to the sickness policy beginning 21st June 2018, without prejudice whilst I carry out a full investigation...". This letter is from Ms Bohun, who described herself as UK HR Manager in the letter. (Mr Howell was actually the UK HR Manager until he left the UK on 30th June 2018).

27. Whilst Ms Bohun was present during the meeting, the meeting was conducted by Mr Howell. Mr Lamb also attended the meeting, as did the claimant and his trade union representative, Mr Lawrence. Whilst the claimant was handed the letter inviting him to the meeting, there was still no warning that the respondent was considering disciplinary action, let alone considering terminating the claimant's employment.

28. Nobody has been able to produce any minutes for the meeting on 26th June 2018. The claimant was not provided with a copy of the drug test results; nor was he provided with the disciplinary policy or the Substance-Free Workplace document or any documentary evidence at all (eg Dr Taylor's notes). The claimant was aware that the site was a zero tolerance site and remembered seeing a slide [63] during training that explained the site was zero tolerance, however, the claimant had not seen the disciplinary policy [47B & C] or the Substance-Free Workplace document [64-66] prior to these tribunal proceedings.

29. During the meeting, Mr Howell told the claimant the drug test had picked up high levels of cocaine and asked the claimant to explain this. The claimant admitted that some days prior to his appointment with Dr Taylor, he had taken cocaine. He explained he was not attending work at the time; rather he was off sick and was attending an occupational health appointment. He said because of his shift pattern he would not have been due to attend work for a further 10 days, if Dr Taylor had declared him fit to return to work. He apologised for having taken cocaine.

30. The tribunal concluded the meeting had started as an investigatory discussion but was subsequently treated like a disciplinary hearing by the respondent. This denied the claimant an opportunity to make his own investigations and prepare for a disciplinary hearing. The tribunal accept Mr Howell was trying to resolve this HR matter before leaving to take up a new post for the respondent in the US (4 days later).

The decision to dismiss the claimant

31. Shortly after the meeting there was a discussion between Mr Howell, Mr Lamb and Ms Bohun. Mr Howell and Mr Lamb both state that they jointly took the decision to dismiss the claimant. Mr Howell's evidence was that he was unaware of the claimant's disability and of his history of ill health and occupational health support and so this was something that was not considered by the decision makers. Mr Lamb's evidence was that the claimant's ill health was discussed and considered by the decision makers during their discussion on 26th June 2018. The tribunal find that it is more likely than not that the claimant's ill health was discussed, as both decision makers were aware the claimant was on sick leave and that the claimant had previously had to step down from a more senior position due to stress. Mr Lamb

had also supported the claimant following his acute breakdown on 25th April, two months earlier, so the tribunal are satisfied that it is more likely than not that the decision makers did discuss the claimant's ill health.

32. Mr Howell took the view that the claimant had admitted he had taken a drug and had tested positive, so Mr Howell did not need to investigate further as the site was a zero-tolerance site. Mr Howell did not feel he needed to explore the circumstances behind the claimant having taken drugs. He did not look at the drug test results. Mr Howell explained he believed he could not see the drug test result as he understood that only the claimant and occupational health were able to see the drug test result. Whilst he had read the Substance Free Workplace policy sometime previously, he was unable to confirm that he had read this prior to considering the claimant's situation. In fact, the Substance Free Workplace policy provided that test results would remain confidential to *"the supervisor, HR and Occupational Health"* - as the UK HR Manager, Mr Howell could have seen the drug test result.

33. Mr Lamb's evidence was that the claimant had raised his ill health during the meeting on 26th June 2018 and the decision makers had discussed his medical history as part of their decision, however the decision makers had not consulted occupational health to consider any mitigating circumstances. To his credit, during cross examination, Mr Lamb honestly admitted that he had not read the respondent's Substance Free Workplace policy at all, prior to the claimant's dismissal. He had read the Disciplinary Policy but had not really considered the difference between being under the influence of drugs at work and testing positive for drugs at an occupational health appointment.

34. Ultimately both decision makers felt the respondent had a zero tolerance policy for drugs and as the claimant had tested positive, dismissal was the only option.

35. During cross examination, Mr Howell confirmed that in 2015 a different employee had failed a random drug test whilst actually working on site. Mr Howell had decided to give that employee a final written warning and support by the respondent to remain in employment. That employee had been suspended pending treatment through BUPA and the Employee Assistance Program. The employee was also required to undertake additional drug and alcohol screening prior to returning to work and random follow up testing thereafter. When asked to explain why the claimant wasn't given a final warning and support like the 2015 employee, Mr Howell explained the 2015 employee had been immediately apologetic and very upset whereas the claimant had said he didn't realise he had broken the rules as he wasn't attending for work.

36. Mr Howell phoned the claimant on 27th June 2018 to tell him he was being dismissed with immediate effect. The claimant was shocked as he had thought there would be further investigation and a disciplinary hearing.

37. By one page letter of 29th June 2018, Ms Bohun wrote to the claimant confirming his dismissal *"…As you are aware one of the conditions of your employment is to adhere to all Dow Silicones polices and procures and in not doing so can result in dismissal. Due to erratic behaviours displayed you were asked to submit a substance abuse test under the company's for-cause substance abuse policy. As you are aware your test was returned with a positive result…Following review of the toxicology report*

and discussion with our testing vendor, it has been substantiated that your limits for this illegal drug were significantly above the cut off level for detection. These results clearly show that you had used this illegal drug in the days leading up to your test. A very concerning fact given the safety critical nature of Dow Silicones. This behaviour represents gross misconduct and cannot be tolerated. Based on the above facts Dow Silicones UK has come to the difficult decision to separate you from the company on grounds of gross misconduct."

The Appeal

38. By letter of 3rd July 2018 the claimant appealed the decision to dismiss him. His grounds for appeal were *"The company did not adhere to its own disciplinary procedure in that I was not provided with the allegation and supporting evidence. At the time of the offence I was still on sick leave. That those who took the decision to dismiss me did not take into consideration the serious mitigating circumstances leading up to the meeting on the 22nd and the circumstances I found myself in on the 22nd"*

39. By letter of 13th July 2018 the claimant was invited to attend an appeal investigation meeting with Vicky Edwards, on 25th July 2018. Ms Bohun would also attend the meeting to take notes. Surprisingly, the claimant was still not provided with any documentary evidence, copies of policies or the drug test results.

40. Ms Edwards, the appeal officer, confirmed that ahead of the appeal meeting she had received:

    40.1. a copy of the dismissal letter of 29th June 2018; and
    40.2. a copy of the appeal letter of 3rd July 2018.

41. Prior to the appeal meeting, Ms Edwards had a meeting with Ms Bohun to discuss the events leading up to the claimant's dismissal. Ms Bohun explained the claimant's ill-health absences in 2018 and explained that during an occupational health appointment in June the claimant had undertaken a drug test that had returned a non-negative result. Ms Bohun also advised Ms Edwards that the claimant had 17 years' service with the respondent.

42. Ms Edwards then had a meeting with Mr Lamb. In her notes of a conversation with Mr Lamb, she has recorded *"significant substance levels. Poor decision making / addict."*

43. Ms Edwards also had a meeting with Ms Pinkney. During the meeting with Ms Pinkney or the meeting with Mr Lamb (Ms Edwards was not clear which meeting these notes related to), Ms Edwards records *"Attendance and high drug result. Significant case mgt. Oc Health"* . In the meeting with Ms Pinkney she records *"He did not request results – via Occ Health. We cannot. He can request. 1000 – limit 150 off scale. High Bradford factor Stress related issues Sept 17 stepped down as Lead Op (reduce stress). Money problems / gambling rumour…."* When asked to explain these notes and discussions, Ms Edwards explained she was trying to understand what had been going on. Crucially, all of this information was in her mind at the point of considering the claimant's appeal and the claimant was not given a proper opportunity to respond this information. For instance, Ms Edwards was

listening to allegations that the claimant was an addict and/or a gambler and the first time they were being raised with the claimant, if at all, was during his appeal meeting.

44. At the appeal meeting on 25th July 2018, the claimant confirmed that he had attended the occupational health appointment hoping he would be fit to return to work, but was not expecting to return to work for 10 days as his shift colleagues were not due to return until that date. Ms Edwards said the drug test result was back from the laboratory and was *"very high"* and *"off the scale of which the levels are recorded".* The claimant responded that he was sorry for this and willing to do whatever the respondent wanted him to do to be able to keep his job.

45. Turning to the appeal grounds, the claimant confirmed he had not yet been given the drug test results. Ms Edwards replied "*The company will not lie*" and the claimant was advised he could request the results from Screen4.

46. Turning to the claimant's submission that he was on sick leave at the time, Ms Edwards could not see why that was relevant. She referred to the occupational health meeting on 21st June 2018 as being a return to work interview. The claimant explained he was "*in such a dark place that [he] did stupid things*" and that the doctor had said he was not fit for work.

47. Turning to the claimant's submission that there were mitigating circumstances, during his appeal meeting, the claimant explained that he had been experiencing sickness and acute depression. He talked about the traumatic accident he had witnessed in work in 2016 and the impact it had on his health. He was frank about having used cocaine during two periods of his life – in January / February 2018 when he was on sick leave, "in a very bad place" with depression and again in June 2018. He explained he was getting help and talking to his counsellor to ensure he never used cocaine again.

48. By her letter of 26th July 2018 to the claimant, Ms Edwards confirmed she had determined his appeal was unsuccessful and she was upholding the decision to dismiss him. She concluded the claimant was required to comply with the code of conduct whilst on paid sick leave. Whilst she acknowledged the claimant's personal stress she concluded the company had supported the claimant through his absences. She also concluded the company had followed a staged procedure prior to the claimant's dismissal.

The Tribunal's Own Findings relevant to the Wrongful Dismissal and Disability Discrimination claims

49. In considering whether the claimant had committed an act of gross misconduct, the tribunal note that contrary to the rumours that Ms Edwards heard and noted, the claimant was not a drug addict. He has taken drugs at the age of 16/17 whilst on holiday in Ibiza and again as a 39-year-old, in January/ February 2018 and June 2018 during his lowest points with his mental health. This is supported by his medical records. The tribunal note the circumstances in which the claimant turned to drugs in 2018. He described being in a ball crying on the floor in the pits of despair, desperate to escape his acute depression. The claimant was suicidal in 2018 and his use of cocaine was a desperate attempt to escape the anguish he was

experiencing. The tribunal accept the claimant has not used cocaine since his dismissal.

50. By 21st June 2018, the claimant's extreme financial pressures meant he had to try to return to work. He had attended 3 (out of 6) counselling sessions, but was not really well enough to return to work. On 21st June 2018, he was attending an occupational health appointment with the respondent's occupational health officer, Dr Taylor to see if he was fit to return to work. The respondent has suggested that if Dr Taylor had declared the claimant fit to return to work, the claimant could have been working on site, with a different shift team, within a couple of days. The tribunal do not accept this to be the case. Given the claimant's anxiety, and previous return to work arrangements, if Dr Taylor had declared the claimant fit to return to work, the claimant would have returned to work when his shift team were next due to work, ie 10 days later.

51. Dr Taylor's office is on the Dow site at Barry, next to reception. The respondent submits that in attending Dr Taylor's office / the occupational health department, the claimant was entering onto a high-risk COMAH site. Whilst the Dow site is a high risk site with stringent Health and Safety procedures, in attending this occupational health meeting, the claimant had not really accessed the site itself - any visitor is able to gain access to the reception area of the Dow site and, whilst you need a swipe card to access them, Dr Taylor (and Mr Howell)'s offices were both located next to the reception area. You are not required to wear any personal protective equipment to access any of these areas. Mr Howell's had suggested the claimant's children could wait in his office unattended, supporting that this reception / office area was not really part of the high-risk COMAH site. Whilst there has been some suggestion that Mr Howell was not referring to his own office, we found that Mr Howell was actually referring to his own office, as Dr Taylor's notes referred to Mr Howell referring to the "office next door" which was Mr Howell's office.

52. Dr Taylor's notes of this meeting recorded the claimant as being unshaven, red-eyed and having a smell of alcohol on his breath. Dr Taylor was concerned the claimant might be under the influence of alcohol, so he contacted HR (Mr Howell) for guidance. Mr Howell advised Dr Taylor to request the claimant undertake a voluntary drug and alcohol test. Dr Taylor made this request of the claimant and Dr Taylor's note records *"Reassured that presence of alcohol would not be a disciplinary issue and that any passive smoking of cannabis etc would be determined by toxicology".* Dr Taylor's witness statement also indicated that subsequently Mr Howell had also reassured the claimant that the presence of alcohol would not be a disciplinary issue. Mr Howell told the claimant that if he did not take the test this would be recorded as a "non-negative" test which could have disciplinary consequences.

53. A representative from Screen4 a drug testing company tested the claimant for alcohol at 12.56pm – this result was negative. At 1.00pm the claimant gave a urine sample. Shortly after the test had been completed, Mr Howell met the Screen4 representative and was advised the urine test had recorded an initial "non-negative" result for cocaine.

54. On 25th June 2018, the respondent's occupational health nurse, Ms Pinkney phoned Mr Howell to advise him the drug test result was back and advised him it was positive

and "was high". The tribunal note that the drug test result does not give an indication as to whether this was a high level of cocaine or not – it states only

"Creatinine cut off levels [0.4-1.77] result 1.3. Sample is watery. Creatinine concentration we below cut-off level or 1.7mmol/L. this could be due to the sample being diluted or the ingestion of excess fluid prior to donating. Tested – Non-Negative on site…

LCMS Confirmation Benzoylecgonine cut off levels [150] result >1000 [Positive]"*

55. The claimant admitted that at some point in the days before his appointment with Dr Taylor, he had taken cocaine. He was not attending work at the time; rather he was off sick and was attending an occupational health appointment. Nobody had any real expectation of the claimant returning to work on that day or in the days that followed. Subsequently, the claimant was signed unfit for work by his GP up until September 2018.

The Law

Unfair dismissal

56. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the respondent persuades the tribunal that it did have a genuine belief in the claimant's misconduct, and that the claimant was dismissed for that potentially fair reason, we must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

57. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

58. In considering the question of reasonableness, we have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office and Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:
    58.1. When considering Section 98(4) ERA, we should focus our enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of the investigation.
    58.2. However, we should not put ourselves in the position of the respondent and test the reasonableness of their actions by reference to what we would have done in the same or similar circumstances. This is of particular importance in a case such as this where the claimant is seeking, in effect, to "clear his name".

58.3. In particular, it is not for us to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before us at the Hearing) and substitute our own conclusions as if we were conducting the process. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that band.

58.4. The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

59. The Court of Appeal highlighted the dangers of the "acquittal mindset" in *London Ambulance Service NHS Trust v. Small* [2009] IRLR 563. According to Mummery LJ (at paragraph 43):

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

60. The ACAS Code of Practice: Disciplinary and Grievance Procedures applies to misconduct dismissals and the Tribunal is required to have regard to this Code, when considering the range of procedures that a reasonable employer might adopt.

61. As this case involved a positive drug test, counsel have referred the tribunal to the cases of *Roberts v British Railways Board* EAT 648/96 and *Ball v First Essex Buses Limited* ET 3201435/17.

Discrimination arising from disability

62. S15 Equality Act 2010 ("EqA") provides,

> **(1) A person (A) discriminates against a disabled person (B) if—**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

63. In a s15 claim is that the tribunal does not need to compare the claimant's treatment to that of a comparator, real or hypothetical. The claimant must prove "unfavourable treatment", i.e. that they have been put at a disadvantage, and that this was because of something arising in consequence of the claimant's

disability. The Equality and Human Rights Commission Code of Practice on Employment (2011) explains that arising in consequence includes anything which is the result, effect or outcome of the person's disability.

64. In *Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Mrs Justice Simler* summarised the proper approach to determining s15 claims at paragraph 31,

> *"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act,…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
>
> *(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*
>
> *(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

Conclusions

Unfair dismissal – Reason for dismissal and Genuine belief in misconduct

65. Returning to the issues that were identified at the start of the hearing, the Claimant does not really challenge the Respondent's assertion that the principal reason for dismissal was one related to conduct. We are satisfied that the principal reason for dismissal was that the Claimant had failed a drugs test whilst on site and that this was an act of misconduct. We are also satisfied that both Mr Howell and Mr Lamb held a genuine belief the Claimant had committed an act of gross misconduct, simply by failing the drugs test on site.

Was that belief on reasonable grounds?

66. Mr Howell and Mr Lamb were both aware the test result had been "non negative" for cocaine and subsequently this was confirmed to be a positive result. During the meeting on 26th June 2018, the Claimant had admitted having taken cocaine. We are satisfied that this could be reasonable grounds to found a belief in gross misconduct.

At the time of dismissal, had there been an investigation within the range of reasonable investigations?

67. Mr Howell, in particular, felt that as the Claimant had failed a drugs test on a zero-tolerance site, Mr Howell was not required to make any further investigations and was entitled to treat this as an act of gross misconduct. The difficulty with this argument is that "failing a drugs test on a zero-tolerance site" is not automatically a gross misconduct offence.

68. The Respondent's Substance Free Workplace document explains those "*found to be under the influence of drugs or alcohol will be suspended and <u>may</u>, following a thorough investigation, be subject to disciplinary action up to and including dismissal".* It correctly states *"Each case will be considered on individual circumstances and balance of consequences. Disciplinary action may be taken up to and including summary dismissal."*

69. The Respondent's Disciplinary Policy refers to "*Serious incapability <u>at work</u> brought on by alcohol or drugs"* as being an act of gross misconduct. As the Claimant repeatedly told Mr Howell and Mr Lamb, at the time of failing the drug test, he was not "at work" rather he was attending an occupational health appointment.

70. At the time of forming their belief that the Claimant had committed an act of gross misconduct, neither Mr Lamb, nor Mr Howell considered the Substance Free Workplace policy or saw the actual drug test results.

71. In addition, neither decision maker investigated the Claimant's ongoing medical condition, despite both being aware of the Claimant's extensive mental health illness.

72. When the tribunal asked itself whether a reasonable employer would regard this investigation as being within the range of reasonable investigations, we concluded it would not. The Substance Free Workplace document made it clear that each case needed to be considered on individual circumstances – instead, Mr Howell adopted a blinkered approach focusing solely on the positive drug result and Ms Edwards subsequently relied on gossip (that the Claimant was an addict and gambler) that the Claimant was not given an opportunity to rebut, which took this investigation beyond the range of reasonable investigations.

73. Further and in the alternative, the ACAS code of conduct makes it clear that a reasonable investigation must look for evidence that acquits the employee as well as evidence that establishes misconduct. In failing to look for evidence that supported the employee, such as the Claimant's ongoing acute mental health illness, the tribunal were satisfied that this investigation was not extensive enough for a reasonable employer to regard it as being reasonable.

Was the dismissal fair or unfair in all the circumstances according to s98(4) Employment Rights Act 1996 ("ERA 1996")?

74. The tribunal are satisfied the dismissal was not procedurally fair, as the Claimant was not aware he was attending his disciplinary hearing or that he was facing

dismissal. He was not provided with the test results or relevant policies and nobody considered the relevant policies. No minutes were taken during the disciplinary hearing. Further during the appeal, Ms Edwards took into account gossip without giving the Claimant an opportunity to rebut these allegations. In light of the ACAS Code of Conduct, the tribunal are satisfied that no reasonable employer would regard this procedure as being within the range of reasonable responses that a reasonable employer might adopt.

75. The tribunal concluded the dismissal was unfair in all the circumstances according to s98(4) Employment Rights Act 1996.

Was the decision to dismiss a sanction within the band of reasonable responses?

76. Further and in the alternative, as the claimant had 17 years' service with the respondent, and was unwell with mental health illness, we are satisfied that the respondents' decision to dismiss him, in these circumstances, fell beyond the band of reasonable responses open to a reasonable employer of a similar size and with similar administrative resources, particularly as another employee had not been dismissed but had been given support when he failed a drugs test whilst actually working.

Polkey Considerations

77. Whilst it was not stated on the List of Issues at the outset of the hearing, in closing submissions, both counsel addressed the Polkey issue, ie the question as to what difference it would have made to the outcome, if any, if the claimant had been provided with a fair disciplinary procedure. Would he have still been dismissed? We are satisfied that if the Claimant had been provided with proper notice of his disciplinary hearing and copies of the relevant policies, he would have been in a position to ensure the decision makers had proper regard to the Substance Free Workplace policy which instructs decision makers to investigate the background leading to the incident and consider each case on its individual circumstances and balance of consequences. The claimant would have had time to get medical evidence which would have prompted the decision makers to properly consider whether there were mitigating circumstances (as they are directed to do by the ACAS Code). We are satisfied that this would have tipped the balance in the Claimant's favour, particularly as another employee had previously been supported to remain in work, having failed a drugs test. As such we are not persuaded that he would have been dismissed or that there was any likelihood of him being dismissed if he had been given a fair disciplinary procedure.

Discrimination arising from disability

78. The tribunal notes the Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011) specifically excludes "addiction to or dependency on alcohol or any other substance" from being a disability.

79. As explained at paragraph 9, the respondent concedes that at the date of dismissal, (1) the claimant had a disability (namely stress and depression) ; and (2) the respondent had knowledge of this disability, for the purposes of s15(2)

Equality Act 2010 ("EqA 2010"). The respondent also conceded that a more than trivial reason for the dismissal was the positive drug test result for cocaine.

Did the positive drug test for cocaine arise in consequence of the claimant's anxiety and depression?

80. The Tribunal has noted that the claimant has suffered anxiety and depression for a number of years but has managed to work for most of this period. The tribunal notes that in January /February 2018 and again in April to June 2018 the claimant was acutely unwell with depression; he was unable to work and suicidal during these periods.

81. The Tribunal has accepted that the claimant is not a habitual drug user; he has used cocaine as a 16/17-year-old and again as a 39-year-old, in January/ February 2018 and June 2018. His first use of cocaine was as a teenager, experimenting with drugs during a holiday in Ibiza. He realised drugs did not have a good impact on his mental health and vowed to never use drugs again.

82. When the claimant used drugs as a 39-year-old, the circumstances in which he was turning to drugs were very different. The claimant described "being on the floor in a ball" "in the pits of despair". His was suicidal and his reason for taking drugs was to escape from the depths of his depression. His depression was acute at that point in time and caused him to take drugs to try to escape his unbearable feelings of despair. Objectively viewed, the tribunal concludes the claimant's depression caused him to take drugs in 2018, which caused him to fail the respondent's drugs test, which was the reason for his dismissal.

Has the respondent shown that the dismissal was a proportionate means of achieving the legitimate aim of protecting the health and safety of staff and personnel on the respondent's premises

83. The tribunal accept protecting the health and safety of staff and personnel (particularly on a COMAH top tier site) is a legitimate aim. However, we did not find that dismissal was a proportionate means of achieving this aim. Another employee had failed a drug test whilst actually working on site and had been supported to seek help and continue employment with the respondent. The respondent could still have protected health and safety of staff and personnel by giving the claimant a final written warning, suspending him pending treatment through BUPA and the Employee Assistance Program (which the claimant had already started), requiring him to undertake drug and alcohol screening prior to returning to work and subsequently undertaking random follow up drug and alcohol testing. The claimant succeeds with his discrimination arising from disability claim.

Did the claimant fundamentally breach the contract of employment by an act of gross misconduct?

84. The Tribunal considered their findings of fact as set out in paragraphs 49 to 55 of this judgment. Turning to consider the Disciplinary Policy, this makes it clear that *"serious incapability at work brought on by alcohol or drugs*" would be gross misconduct. Equally, the Substance Free Workplace document makes it clear *"No employee will report for work while under the influence of drugs or alcohol"*.

However, the claimant was not *"at work"* or *"report[ing] for work".* He was attending a health appointment. Both Dr Taylor and Mr Howell recognised the significance of this on the day, as they both reassured the claimant that the presence of alcohol would not be a disciplinary issue. Whilst this is a zero-tolerance site, for both alcohol and drugs, the context in which the test was being carried out was important.

85. A different employee had failed a random drug test whilst actually working on site. Mr Howell had decided to give that employee a final written warning and support by the respondent to remain in employment.

86. The tribunal concluded that in light of the respondent's policies, failing a drug test, whilst on sick leave with mental health illness, was not an act of gross misconduct; the claimant had not committed a repudiatory breach of contract. The respondent was not entitled to summarily dismiss the claimant.

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Employment Judge Howden-Evans
Dated: 15th March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON 18 March 2020

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS