# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| Mr R Sahonta | | The Automobile Association Developments Limited |

**HELD AT** Birmingham **ON** 24th and 25th February 2020

**EMPLOYMENT JUDGE** Choudry

**Representation:**

**For the claimant:** In person

**For the respondent:** Ms K Anderson - Counsel

**RESERVED JUDGMENT**

The claimant's claim for unfair dismissal fails and is dismissed.

**REASONS**

***Background***

1. The Claimant brought a claim for unfair dismissal and other payments following the termination of his contract of employment by the Respondent on 19th February 2019 by reason of gross misconduct.

2. The Respondent is a British Motoring Association headed by a public limited company. The Claimant was employed as a Customer Manager.

***Evidence and documents***

3. I had an agreed bundle of 274 pages. During the course of the hearing pages 214a – 214d (inclusive) were added to the bundle.

4. I heard evidence from the claimant and for the respondent from Adam Woolls (Deployment Manager); Marc Russell (Operations Manager for Service Delivery) and from Mr Howard Curle (Head of Operations, Motoring Services). I also heard evidence from the claimant.

5. I was also provided with a proposed list of issues by Miss Anderson for the respondent. Ms Anderson also provided me with written closing submissions on the facts and also separate submissions in relation to the relevant law.

6. During his closing submissions the claimant referred to the case of **Kuehne & Negal v Cosgrove UKEAT/0165/13/DM**. However, the claimant did not have a copy of the case with him. As such, I granted Ms Anderson a period of 7 days after the date of the hearing to make any further written submissions which she wished to do so in relation to this case.

7. By an email dated 3rd March 2020 solicitors for the respondent emailed the Tribunal (copying in the claimant) to state :

"*Counsel confirms the submission she made orally at the hearing, which is that although that case arose out of similar facts to those in the instance case, the ratio was simply that a tribunal must not elide two separate questions: (1) the question of the employer's belief, an essentially subjective test, which does not require the belief itself to be reasonable but simply requires the respondent to demonstrate that this was the belief that it had in mind that led it to dismiss, and (2) the secondary question of fairness - whether the respondent had reasonable grounds for that belief. It provides no authority or guidance to this tribunal as to whether, in this case, the Claimant's dismissal was fair or unfair*".

8. I confirm that this email was considered by me in making my decision.

***Issues***

9. The issues for the Tribunal to consider were as follows :

9.1 What was the reason for the dismissal and was it a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent relying upon misconduct as the reason for dismissing the claimant ?
9.2 Did the respondent carry out a reasonable investigation ?
9.3 Did the respondent reasonably believe that the claimant had committed the act of misconduct, namely was a user of illegal drugs?
9.4 Was dismissal a sanction within the range of reasonable responses?
9.5 Was the dismissal procedurally unfair ?
9.6 If the dismissal was procedurally unfair, what difference, if any would a fair procedure have made?
9.7 Did the claimant contribute to his dismissal ?
9.8 If the respondent is found to have unfairly dismissed the claimant, has the claimant mitigated his losses, and to what extent ?

10. The claimant accepts that the reason for his dismissal was conduct although he disputes that his conduct was sufficiently serious as to amount to gross misconduct warranting his summary dismissal.

11. The claimant confirmed that he was not making any claim other than unfair dismissal and that he had ticked the box "other payments" on the claim form in error.

***Facts***

12. I make the following findings of fact :

12.1 The claimant commenced employment with the respondent on 14th August 2006 and was latterly employed as a Customer Manager within Service Delivery at the respondent's Oldbury site. The claimant managed one of the respondent's Night Operations Teams, who deliver service to the respondent's members through out the evening. The claimant managed a team of staff who reported directly to him.
12.2 .Towards the end of 2018 the respondent became aware of some suspected drugs use by one of its employees. As a part of that individual's disciplinary process he provided names of some other employees based at Oldbury whom he

said also used drugs. One of the names provided was that of the claimant.

12.3 The respondent operates a Drugs, Alcohol and Substance Policy which provides that no employee should report or try to report to work whilst impaired due to alcohol, drugs (whether illegal or not) or any other substance. The policy makes it clear that a breach of the policy could lead to dismissal.

12.4 The respondent's disciplinary policy states that the respondent considers an example of gross misconduct: *"Being unfit to work, in the opinion of the AA, because of… illegal or recreational drugs…or being under the influence of any substance whilst at work".*

12.5 The respondent also had a document entitled "*AA Drugs, Alcohol and Substance Procedures and Guidance"* which provided definitions of the word "impaired" ("*any person found to have consumed illegal drugs in an unsanctioned way or unreported way (to be confirmed by an appropriate test")* is deemed to be impaired due to "drugs" and substance *"misuse"* applies to *using substances in an unsanctioned way. For example any illegal drug use".*

12.6 On 7th January 2019 the respondent arranged for Hampton Knight, a third party organisation which specialises in testing employees for drugs to attend its Oldbury site in order to test the named employees. In his evidence the claimant indicated that on the morning of 7th January 2019 whilst he was still at home, he has received a call from his girlfriend, who also worked for the respondent. During the call the claimant was informed by his girlfriend that she had been drug tested at work as someone had accused her of taking drugs. The claimant's girlfriend also informed the claimant that other people were on the list of individuals to be tested and the claimant would possibly be tested too when he came into work later that day.

12.7 The claimant attended work at around 7.28pm on 7th January 2019 after some rest days. On arrival he was met by Mr Woolls, the respondent's Deployment Manager, who explained to the claimant that he wanted to speak to him as a part of a formal investigation. Mr Woolls advised the claimant that someone had alleged that he currently took drugs and asked the claimant to confirm whether he did or not. The claimant's response was *"Na I don't and if I do it's in my own time*". The claimant was asked whether he would be willing to co-operate in the respondent's investigation and take a drug test which would be carried out by a third party collection agency specialising in alcohol and drug testing. The claimant readily agreed to the test. As such the meeting was adjourned so that the claimant could be tested. Mr Woolls accompanied

the claimant to the testing room but did not remain in the room while the test was being carried out.

12.8 The claimant signed the relevant form to provide a sample and it was noted on the form *"Donor happy for it to be sent to lab"*. The claimant's test came back non-negative which meant that it showed some cannabis in his system. The claimant was advised that his sample would need to be sent to a laboratory for a confirmation analysis. The claimant was asked to provide his consent to this. The claimant respondent with the words "*it is what it is"* and indicated that he would not be willing to provide his consent for his sample to be sent away for analysis.

12.9 As such, the consultant from Hampton Knight completed a form a form headed "*Failure to Consent/Provide a Sample*". Option C on the form was circled which was headed "*Donor failed to give Consent to Laboratory Confirmation Analysis".* Section C stated "*The implication of my actions have been explained to me and I understand that I may be suspended from work and following an investigation a decision on possible action will be based on the facts available. This may include disciplinary action up to and including dismissal. My reason(s) for not consenting to the drug test/confirmation analysis/failing to provide a valid urine sample is:*" Underneath this was written the words used by the claimant "*it is what it is*". This comment was signed by the claimant. Below these words was a signature declaration which was once again headed *"Failure to Consent/Provide a Valid Sample"*. The Claimant signed directly below this in two places.

12.10 Following this and in light of the claimant's refusal to consent to further tests Mr Woolls took the claimant into a meeting room and suspended him on full pay pending further investigations. The claimant's suspension was confirmed in writing. I was presented with two versions of the notes of the meetings with the claimant on 7th January 2019. One version notes Mr Woolls saying to the claimant "*Following you consenting to the tests you have failed a detection for Cannabis. On these grounds I will be suspending you with immediate effect to enable our investigations to continue…"* The second version are the words highlighted in bold "*Following you consenting to the tests you have failed a detection for Cannabis.* ***You have also declined for the urine sample to be sent for further examination in the laboratory****. On these grounds I will be suspending you with immediate effect to enable our investigations to continue…"* The claimant asserts that the words in bold were added later and were not said to him at the time. Mr Woolls asserts that the words in bold were said to the claimant at the time but he

forgot to include them in the minutes as he typed them up onto the computer. It was only the following day when he read the minutes again that he saw that the words were missing and included them. He sent the amended version to Mr Russell. It was clear from his evidence that Mr Woolls was not a manager experienced in dealing with disciplinary matters and based on the evidence before me it is quite possible that he may have failed to mention the words highlighted in bold otherwise he would not have forgotten to type them into the notes.

12.11 In light of the failed drug test and the claimant's refusal to consent to further laboratory tests Mr Woolls took the view that the claimant had a disciplinary case to answer for breaching the respondent's Drug, Alcohol and Substance Policy. The disciplinary allegation against the claimant being that of he had taken illegal substances and refused for the test sample to be sent for further investigation.

12.12 By a letter dated 8th January 2019 the claimant was invited to attend a disciplinary hearing on 23rd January 2019 to respond to these allegations. In the letter advising the claimant of the disciplinary hearing he was advised *"For clarity, the disciplinary hearing will be considering the allegation that you have taken illegal substances and refused for the test sample to be sent for further investigation*". The claimant was advised of his right to be accompanied and also that if the allegations were substantiated this could result in a finding of gross misconduct against him resulting in his summary dismissal.

12.13 The disciplinary hearing was conducted by Mr Marc Russell, the respondent's Operations Manager for Service Delivery. The disciplinary hearing duly went ahead on 23rd January 2019. The claimant was accompanied by Marlean Blake, his trade union representative. After introductions the claimant confirmed that he had received a copy of the relevant policies and the investigation pack. During the disciplinary hearing the claimant was asked by his trade union representative to elaborate on his comment "*it is what it is*" which had been recorded on the test refusal form. The claimant confirmed that his comment had been a sarcastic remark as if he did take drugs it he did so in his own time. The claimant further confirmed that he had used cannabis on his rest days in the lead up to him being tested on 7th January 2019. However, he denied misusing drugs or taking any other drugs.

12.14 Mr Russell explained in the disciplinary hearing that had the claimant agreed to send off the test for analysis then the respondent would have know for sure how much was in the claimant's system. He pointed the claimant to the 3 options

on the form and the fact that the claimant had declined to have his sample sent to the laboratory with the comment "*it is what it is*". The claimant indicated to Mr Russell that he had not read the form when he had signed it but had no issue with his sample being tested. I find it difficult to accept the claimant's assertion that he did not read the form given the fact that he was asked to initial his comment and to sign the form in several places all of which were clearly indicated his refusal of consent.

12.15 The claimant also challenged the notes of the investigatory hearing indicating that Mr Woolls had only told him that he was being suspended because he had failed the test and not also because he had refused for his sample to be sent for testing. The claimant also asserted that he should not have been given the choice as to whether or not his sample was tested although the claimant accepted that he had refused to give his consent to the second opinion.

12.16 During the hearing Mr Russell indicated to the claimant that he took the view that if a person tested posted for a substance then this would amount to them being impaired for the purposes of the respondent's Drugs, Alcohol and Substance Policy. Mr Russell also referred to the definition of "impaired" in the Manager's Guidance. In response the claimant's trade union official argued that the respondent had allowed the claimant to drive home in his car following his suspension and that therefore the respondent had acted in breach of its own policy by allowing the claimant to do so when impaired. Mr Russell took this comment as an acknowledgement that the claimant had, indeed, been impaired in breach of the respondent's policy.

12.17 Mr Russell decided to adjourn the disciplinary hearing in order to investigate some of the points raised by the claimant. Following the hearing he arranged for, Jalmia Begum, a HR colleague to speak to Mr Woolls to ascertain the process that he had followed and to discuss the concerns raised by the claimant in relation to the notes of the investigatory hearing. Mr Woolls confirmed to Ms Begum that the notes that he has provided were accurate. Mr Woolls also confirmed that he was not present when the drugs test took place so he had had to rely on what he had been told by the representative from Hampton Knight namely that the claimant had declined consent for further testing.

12.18 Mr Russell also arranged for further enquiries to be made of Hampton Knight and a statement was obtain from their representative who had tested the claimant. The representative from Hampton Knight confirmed that after completing the relevant forms he had conducted a breath test on the claimant which gave a reading of zero. The claimant

then provided a urine sample for instant testing which indicated the presence of cannabis. The claimant admitted that he took cannabis to the representative from Hampton Knight. The claimant was then offered the opportunity to send the urine sample for further analysis to a laboratory. At this point the claimant declined and said *"It is what it is*". The representative from Hampton Knight then called Mr Woolls into the room to inform him of the test result and the fact that the claimant had declined to send his sample for further analysis. The representative then completed the necessary forms in the presence of the claimant and Mr Woolls, recording the claimant's comment. The forms were then signed by the representative, the claimant and Mr Woolls. The meeting was brought to an end with the representative from Hampton Knight informing the claimant that the implications of the test results would no doubt be discussed between him and the respondent. The representative from Hampton Knight also indicated that he had given the claimant a Donor Information Sheet which stated, inter alia:

*"If you do not give your consent to your urine sample being sent to the laboratory for analysis, the Company Representative will explain the consequence of your decision (if you do not provide your consent, this is normally treated in the same way as a positive test result)".*

12.19 On 25th January 2019 the claimant raised a grievance regarding Mr Woolls' management of the investigation. It was alleged, inter alia, that Mr Woolls had failed to advise the claimant of the allegation relating to his refusal to send off the sample for further analysis but had added it to the investigation report; that Mr Woolls had not shown the claimant what he was typing in his notes nor was he offered the opportunity to sign or amend the notes. The disciplinary process was put on hold pending the outcome of the grievance which was chaired at the request of the claimant's trade union representative by an alternative manager, a Mr Spencer. Following a grievance hearing on 19th February 2019 Mr Spencer upheld one aspect of the claimant's grievance, namely, a process error in not asking the claimant to sign the notes of the investigation hearing. The claimant was advised of his right of appeal.

12.20 In light of this Mr Russell reconvened the disciplinary hearing on 19th February 2019. The claimant was again accompanied by his trade union representative. At the start of the hearing Mr Russell confirmed that the hearing was being reconvened to consider allegations of substance misuse and failure of a drug test against the claimant. The claimant was also informed of the possible outcome if Mr Russell found that the allegations were well founded. Mr Russell also confirmed

that the hearing had been adjourned to enable further enquiries to be made of Hampton Knight.

12.21 Mr Russell also indicated that it had come to his knowledge that the Manager's Guidance that he had referred to at the hearing on 23rd January 2019 was out of date. The claimant queried why it was still on the system and Mr Russell explained that the guidance had not been removed when documents had migrated from one HR system to another. The claimant was presented with a copy of the Drugs, Alcohol and Substance Policy which was the applicable policy. Mr Russell made it clear that he would be basing his decision on this policy and the Disciplinary Policy and asked the claimant whether he would like an adjournment in order to consider these documents but the claimant did not require one.

12.22 Mr Russell also indicated that he had fed with his chain of command the comment from the claimant's trade union official about the claimant not being offered a taxi after his test showed cannabis in his blood and that appropriate steps had been taken in this regard. Mr Russell accepted that a taxi should have been offered and lessons had been learnt.

12.23 Mr Russell then referred to the email statement from Hampton Knight and after reading out the contents he provided a copy to the claimant and his representative and adjourned the hearing to enable the claimant and his representative to consider it further.

12.24 Following the adjournment the claimant was given the opportunity to comment on the additional evidence from Hampton Knight. The claimant denied that he was advised of what could happen if he refused to have his sample sent off for further tests as alleged by the Hampton Knight representative. The claimant also denied making any comment about not coming back. The claimant also asserted that the second test would have only confirmed what was already known. Mr Russell pointed out that the second test would have indicated the strength of the drugs in the claimant's blood. When questioned the claimant confirmed that the he taken " *a couple of drags of a spliff with my friends in my own time outside of working hours*". The claimant also indicated that he understood that the respondent would not want people working for it who were dependent and reliant on drugs as this would bring the respondent into disrepute. The claimant denied being a regular drug user and indicated that if he did this would be reflected in his performance. After hearing all the representations by and on behalf of the claimant Mr Russell adjourned the hearing to make his decision.

12.25 Mr Russell took the view that the claimant's failure of the drug test, his acceptance that he had used drugs while in a

position where, as a manager, he was responsible for people in the building at certain times amounted to gross misconduct warranting the claimant's summary dismissal. In making his decision the fact that the respondent's Drugs, Alcohol and Substance Policy made it clear that all employees had a duty of care not only for their own health and safety, but also the health and safety of others who may be affected by their acts or omissions. Mr Russell also took into account that the test taken by Hampton Knight on the respondent's site indicated that the claimant had taken drugs. The claimant was informed of Mr Russell's decision and advised of his right of appeal. On hearing the outcome the claimant alleged that the decision was predetermined, that

he would see Mr Russell in court and that he would *"do him over*".

12.26 In his evidence Mr Russell indicated that he had based his decision to dismissal on the claimant's failed drug test and his believe that the claimant was misusing cannabis whilst in a position of responsibility. The fact that the claimant had refused his consent for his test to be sent to the laboratory for further testing was not something that the claimant had relied on.

12.27 Mr Russell confirmed his decision to dismiss in writing and gave the claimant the opportunity to comment on the notes of the hearing, which the claimant duly did.

12.28 The claimant duly exercised his right of appeal raising 15 points of appeal including inconsistency of treatment. The appeal was ultimately heard by Mr Howard Curle, the respondent's Head of Operations, Motoring Services. Initially, Jason O'Keefe, Head of Operations, Analytics was appointed to hear the appeal but the claimant's trade union representative requested that the appeal officer be based at another site hence the appointment of Mr Curle.

12.29 An appeal hearing was arranged for 4th April 2019 as Mr Curle was on holiday between 16th to 31st March 2019. However, ahead of the appeal hearing the claimant lodged a grievance. The grievance was considered by one of the respondent's HR team who advised the claimant that as the grievance related to disciplinary process and the decision to dismiss him, they would be dealt with as a part of the appeal process in accordance with the respondent's grievance procedure. The claimant was informed of this by an email dated 29th March 2019. The claimant responded the same day to indicate that he wanted his appeal decision to be sent to him in writing and that he would not be attending as he did not want to face the people involved in the earlier stages of the disciplinary process. He further asked that his grievance document be considered as a part of his appeal. As such, the

claimant's email was forwarded to the Mr Curle for consideration as a part of his consideration of the claimant's appeal.

12.30 The respondent wrote to the claimant again on 1st April 2019 to afford the claimant a further opportunity to attend a face to face meeting with Mr Curle at a neutral venue. However, the claimant declined the opportunity and confirmed that he wanted the decision in relation to his appeal to be sent to him in writing.

12.31 As such, on 2nd April 2019 Mr Curle conducted a review of the appeal documentation, the circumstances relating to the claimant's suspension on 7th January 2019 and his dismissal. Mr Curle also reviewed all relevant documentation. As a part of his review Mr Curle spoke to Lee Simpson to understand the background to the testing which took place. He also spoke to Hampton Knight.

12.32 Mr Curle also considered the claimant's assertion that he had been treated differently to others and considered the procedures that were followed on 7th January 2019. He noted that all staff that underwent a drugs test had the option of a second opinion. Mr Curle considered that the paperwork clearly set out the options available and in his opinion Mr Curle was satisfied that the claimant had refused his consent and had signed the forms to acknowledge his refusal as well as annotating "*It is what it is"*. Mr Curle could not see any departure from the normal process in relation to the claimant. Mr Curle did not review any other appeal or request any information from any other appeal because at the time he carried out the appeal, he was not aware of any others.

12.33 Mr Curle took the view that the claimant had contravened the respondent's Drug, Alcohol and Substance Policy and that the positive test result could have resulted in him making impaired decisions. He took the view that given the claimant's seniority and the fact that he had to make decisions in relation to fire and evacuation procedures for the night shift any impaired decision making could put people's lives at risk. Mr Curle also did not see the claimant acknowledging this nor did he, in Mr Curle's view, take this issue seriously during the disciplinary process. Mr Curle was also satisfied that the correct process had been followed in relation to the investigation and disciplinary process.

Furthermore, given the claimant's acknowledgement that he used cannabis, had failed a drug test at work and given his seniority Mr Curle decided to uphold the decision to dismiss the claimant on the grounds of gross misconduct.

12.34 The Tribunal was presented with evidence in relation to other 3 employees of the respondent who had also tested positive for drugs at the same time as the claimant. The had

also been dismissed but were re-instated on appeal. Their appeals were heard by other managers and not Mr Curle. None of these employees were as senior as the claimant. Furthermore, their circumstances were different to the claimant. One of the individuals had tested positive due to passive smoking, and therefore re-instated. A second individual had had his dismissal overturned on appeal as the appeal manager had not been satisfied that the consequences of not taking a drug test had been adequately explained to the employee in question. A third individual had taken cannabis for medicinal purposes in order to treat psoriasis and given his exceptional work history and his honesty in the disciplinary process the appeal manager decided to re-instate this employee on appeal and give him a final written warning instead. I was also referred to a fourth case which had happened after the claimant's dismissal.
The individual in that case had confessed to having a drug addiction and was provided with support by the respondent.

***Applicable law***

13. Section 98 (1) Employment Rights Act 1996 provides that 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 principle reason for the dismissal).*

*(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.*

*A reason falls within the subsection if it –*

*( b) relates to the conduct of the employee,*

14. Section 98(4) provides that 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 reasons shown by the employer) -

*(a) depends on whether in the circumstances (including the size and administrative resources of the employers 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.*

15. The guidelines set out in the case of ***British Home Stores Limited -v- Burchell [1978] IRLR 379*** applies to this case in that the test to be satisfied is that:-

- The respondent honestly believed that the claimant was guilty of the misconduct alleged;

- The respondent had reasonable grounds on which to sustain that belief; and

- The Respondent had carried out an investigation that was reasonable in the circumstances.

16. The Tribunal must finally consider whether dismissal was a reasonable sanction for the alleged misconduct. In determining whether the respondent's decision to dismiss for conduct is reasonable pursuant to Section 98(4) of the ERA, the Tribunal is assisted by the band of reasonable responses approach which is proved in the case of ***British Leyland (UK) Limited -v- Smith [1981] IRLR 91***. It was stated that:-

*"the correct test is:*

*was it reasonable for the Employer to dismiss [the Employee?]. If no reasonable Employer might reasonably 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 cases, there is a band of reasonable responses within which one Employer might reasonably take one view whereas another might reasonably take a different view".*

17. The Tribunal cannot substitute its own decision for that of the Respondent (affirmed by the Court of Appeal in ***Sainsbury's Supermarkets Limited -v- Hit [2003] IRLR 23*** even if it believed that the decision to dismiss was harsh in the circumstances,. The dismissal will be fair unless the respondent's decision to dismiss was one which no reasonable employer could have reached.

18. It is clear from the case of ***Hadjioannou -v- Coral Casinos Lts [1981] IRLR 352*** that an employers previous decisions not to dismissal employees for the same type of misconduct will only make a dismissal unfair where (1) the employer had previously treated similar behaviour less seriously so that employees are left

with the understanding that certain types of misconduct will not lead to dismissal; (2) in cases where it can be inferred from the evidence that the reason given by the employer for dismissal is not the real reason; or (3) where employees in "truly parallel circumstances" arising from the same incident are treated differently.

19. The case of ***Polkey –v- A E Dayton Services Limited 1987 IRLR 503 HL*** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been "futile".
Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

20. Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2009 into account in that it sets out the basic requirements of fairness which are applicable in most cases of misconduct.

21. Section 123(6) of the ERA states:

*"where the Tribunal finds dismissal was to any extent the cause or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding".*

***Conclusions***

22. In reaching my conclusions I have considered all the evidence I have heard and considered the pages of the bundle to which I have been referred. I also considered the oral submissions made by and on behalf of the parties. I have also considered the written submissions made by Ms Anderson.

23. I am satisfied that the reason for the claimant's dismissal was conduct namely for failing a drug test. I note that the claimant did not dispute that the respondent's reason for dismissing him was not real or genuine.

24. I am therefore satisfied that the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996.

25. In his oral submissions the claimant referred to the case of **Kuehne & Negal v Cosgrove UKEAT/0165/13/DM** which involved an appeal against a finding that the claimant had been unfairly dismissed after a positive drug test. The appeal was allowed in this case on the basis set out in the email from the respondent's solicitors referred to in paragraph 7 above. Although the case involved the dismissal of an employee who tested positive for drugs I agree with the submissions made on behalf of the respondent that this case does not provide any authority or guidance to the Tribunal as to whether, in this case, the Claimant's dismissal was fair or unfair.

26. As such, the first issue I need to consider is whether the respondent followed a fair procedure. In this particular case, whether the respondent had reasonable grounds for holding a belief that the claimant had committed an act of gross misconduct and having conducted as much investigation into the circumstances as was reasonable.

27. I am satisfied that the investigation was a thorough as the circumstances warranted. All relevant witnesses were spoken to and it is noted that much of the evidence is not disputed in that the claimant accepted that he had taken illegal drugs in his own time. Further, investigations were conducted at both the disciplinary and appeal hearings in relation to points raised by the claimant.

28. The claimant is clearly vexed by Mr Woolls' failure to inform him that one of the grounds of his suspension was the fact that he had declined for his sample to be sent for further examination in the laboratory. However, this conversation took place after the claimant had already refused his consent. In addition, the letter sent to the claimant the day after confirming the disciplinary allegations made it clear that one of the allegations against the claimant was the fact that he had declined for his sample to be sent for further examination. As such, the claimant was aware ahead of the disciplinary hearing of the allegations against him. I am satisfied that any failure to be advised of this at the suspension meeting does not render the dismissal procedurally unfair. In any

event the claimant was not ultimately dismissed for failure to provide his consent to his sample being sent for final analysis.

29. Whilst it is unfortunate that Mr Russell initially referred to the Manager's Guidance incorrectly at the first disciplinary hearing he was made aware before the reconvened disciplinary hearing and before he made his decision that this was not a document he could rely on. He based his decision on the disciplinary and Drugs, Alcohol and Substance Policy which was also provided to the claimant. I am satisfied that the respondent was entitled to rely on the claimant's failure of the drug test on which to form a reasonable belief that the claimant was under the influence of illegal drugs or impaired even if it could not determine the extent of the influence or impairment.

30. I also do not accept the claimant's argument of unfair dismissal based on inconsistency of treatment as a result of the claimant being dismissed for gross misconduct and other colleagues having their dismissals overturned on appeal. There is no evidence to suggest that the respondent had previously treated similar behaviour less seriously so that employees were left with the understanding that taking drugs would not lead to dismissal; nor could it be inferred from the evidence that the reason given by the respondent for dismissal was not the real reason. I am also not satisfied that the individuals relied on in support of his argument for inconsistency of treatment were employees in "truly parallel circumstances" arising from the same incident as the claimant. The claimant was not taking cannabis due to a medical condition nor did he allege it was due to passive smoking nor that he had an addiction for which he needed the respondent's support.

31. The claimant argues that dismissal was too harsh a penalty and the respondent should have considered demotion as an alternative. I note that not all employers would have dismissed in such circumstances but it is not for me to substitute my view for that of the respondent. The important issue is whether dismissal is within the bands of reasonable responses. Given the claimant's position of responsibility I am satisfied that dismissal was within the bands of reasonable responses open to the respondent. In the circumstances, I am satisfied that a fair process was followed and that the dismissal is a fair and reasonable one taking into account equity and the substantive merits of the case. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

Employment Judge Choudry

29th June 2020