EMPLOYMENT TRIBUNALS

Claimant: Mr P Clarke

Respondent: BAE Systems Marine Limited

HELD AT: Manchester **ON:** 15 and 16 September 2020

BEFORE: Employment Judge B Hodgson

REPRESENTATION

Claimant: Mr S Walker, Solicitor

Respondent: Mr R Lassey, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claim of unfair dismissal fails and is dismissed

REASONS

Background

1. This is a claim of unfair dismissal which is denied. Standard directions for the preparation of the case were given by the Tribunal without a Preliminary Hearing and the parties attended having agreed a bundle of documents and exchanged witness statements

2. Given the timescales for the hearing, it was agreed that the Tribunal would initially limit itself to hearing evidence, and reaching a finding, on liability and then move to a remedy hearing if that proved necessary

Issues

3. The issues as to liability raised for the Tribunal to determine, in summary, were agreed at the outset of the hearing as follows:

    3.1. Was there a potentially fair reason for the claimant's dismissal? The respondent relies upon misconduct as defined in section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). The claimant does not dispute that this was the reason for dismissal

    3.2. Should the Tribunal find that the circumstances giving rise to the dismissal of the claimant do not amount to misconduct, the respondent contends that they amount to some other substantial reason of a kind such as to justify dismissal (as defined in section 98(1)(b) of the ERA)

    3.3. Was the decision to dismiss the claimant fair and reasonable in all the circumstances (taking into account the size and administrative resources of the respondent)? In particular, given the claimant's admissions, was summary dismissal within the range of reasonable responses open to the respondent?

    3.4. Was a fair procedure followed and did that procedure comply with the requirements of the ACAS Code?

Facts

4. As indicated, the parties had agreed a bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle

5. The claimant gave evidence on his own behalf. The respondent called to give evidence Mr Stuart Knagg - Operations Area Delivery Manager, Ms Helen Barrett - Head of Operations and Mr Leon Dennis – Head of Supply Chain

6. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary

7. The respondent is a significant business engaged in the design and manufacture of naval ships and submarines in the defence sector

8. The claimant had, up until his dismissal, worked for the respondent (or its predecessors in title) at their Barrow factory since 1978, starting as an apprentice

9. His most recent role was described by the respondent in their Grounds of Resistance (see page 39) as follows: "The claimant's role at the time of his dismissal was Plant Maintenance Plumber which involved day-to-day maintenance of the plant which included replacement of filters, removal of equipment, fitting of pipes, dealing with boilers, general plumbing and working at height as well as working with high pressure steam, hot temperatures and electrical systems. The claimant's role required him to carry out high risk tasks on a daily basis and was a safety critical role". The claimant accepted the accuracy of this summary

10. Up until the issues which resulted in his dismissal, the claimant had a clean disciplinary record throughout the entirety of his employment with the respondent

11. The claimant had a number of health issues going back over a number of years. These included mental health issues, a wrist injury and a hip injury for all of which he was prescribed medication (see medical records at pages 230 – 241)

12. Despite the medication he was taking, the claimant continued to experience chronic pain and he was also concerned as to its potential long-term effects. He became aware of the claimed medicinal effect of a cannabis derived oil – known as CBD oil – which had been legalised for use within the UK and, having carried out some research, identified a potential source

13. In December 2018, the claimant exchanged e-mail correspondence with the identified company (see pages 71 – 73) about the product including asking "could cbd oil show up in a drugs test as we're now having random tests in my work" to which the reply was "absolutely not – what the tests are looking for you won't have in your system"

14. He had in the meantime also contacted his employers seeking to ascertain whether taking CBD oil may give rise to issues at work. He was referred to Mr Rob Eccles, the respondent's Occupational Health Nurse, with whom he met on 10 December 2018. Having agreed to look into the matter, Mr Eccles e-mailed the claimant (page 78) setting out what he describes as "the best answer I can get at the moment". The source is not specified but the content includes the statement that "The screening tests have little or no crossreactivity to CBD and consequently it is highly unlikely that a sample from a donor that has consumed only CBD oil from a UK health food store in a quantity consistent with recommended dosage guidelines would test anything other than negative". It goes on the say that "the concentration of THC required in order for a laboratory confirmation test to be positive for THC is highly unlikely to be exceeded given the low level of THC in CBD oil products". THC is the psycho-active component of cannabis

15. The claimant proceeded with the purchase of the product in December 2018 and began taking it

16. The Tribunal was referred to various documents from the respondent relevant to its policy concerning illegal drugs

17. A general Disciplinary Policy (see pages 269 – 280) was in force at the relevant time. One of the examples of gross misconduct – for which "the result will normally be summary dismissal without notice or payment in lieu of notice" – is "being under the influence of alcohol or unlawful drugs or in unlawful possession of drugs on Company premises"

18. There is also a specific Alcohol and Drug Misuse Process (see pages 261 – 268). This was issued on or about 1 November 2018

19. The responsibilities for an individual include "not to be at work whilst impaired due to the use of alcohol or drugs". The policy goes on to state that "any person found to have consumed illegal drugs or misused any prescription drug or solvent (to be confirmed by an appropriate test) is deemed to be impaired due to the use of drugs and therefore in breach of this process instruction" and "impairment through the misuse of drugs will result in disciplinary procedures". It refers to random testing for drugs and the testing selection process. One of the responsibilities of Management is stated to be "to take the appropriate action against those individuals whose job capability is impaired due to the use of alcohol or drugs or when an individual is found to be in breach of this process instruction"

20. On 2 November 2018, a circular was sent by the respondent to all staff (pages 63 – 64). It begins with the statement that "the safety of all our personnel and the security of our business are of paramount importance." It advises that random drug testing is to be carried out more frequently. Included in the points to note is the following:

    "If you are confirmed to have recorded a positive drug or alcohol test on site, or refuse to take a test, you will be deemed to have committed a disciplinary offence. Each case will be considered on its merits and the company will usually seek to support an individual with appropriate advice and counselling as a first response. Disciplinary sanctions cannot be ruled out in extreme cases and for repeat occurrences"

21. Attached to the circular was a Question and Answer paper (pages 65 – 68). The answer to the question: "Shouldn't people always have a chance if they record a first positive test?" is "Whilst the business will look to support people who record a first positive test, there cannot be a 'free pass' for a first offence as this would encourage unsafe behaviour and send conflicting messages regarding the importance we attach to safety and security. A deterrent only works if it is clear and unambiguous. As with any disciplinary case the individual will have the opportunity to explain the circumstances and the action taken will be decided by the usual process"

22. The claimant acknowledges that he had sight of the above documents prior to the events that led to his dismissal.

23. The respondent's Managing Director subsequently sent a letter to all staff which is undated but said by the claimant to have been received by him on 4 April 2019 (pages 175 – 176). This chronology is not disputed on behalf of the respondent and is accepted by the Tribunal. This letter was accordingly received by the claimant after his dismissal. It purports to "reinforce the message" of the November 2018 policy referred to above and includes the statement that "we take any positive test extremely seriously and consider this to represent gross misconduct"

24. On 29 January 2019, the claimant was required to attend a random drugs test. On that day, the claimant was scheduled to carry out safety critical work on a steam boiler although, as it turned out, he had to proceed by way of visual check only. The sample he provided subsequently proved positive for cannabis (see pages 87 - 88) with a reading subsequently confirmed at 17ng/ml (see page 132), the threshold being set at 15 above which it is deemed that the person involved is impaired by the content within their system. He was accordingly suspended by his Line Manager pending further investigation, confirmed by letter dated 11 February (see page 88a)

25. The claimant was called to an Investigation Meeting by letter dated 13 February (page 89) sent by Mr Stuart Knagg . The meeting proceeded on 21 February and the claimant was accompanied by his Trade Union representative. The content of the meeting is set out at the notes at pages 90 – 93

26. The claimant maintained at this meeting, and throughout the internal process, that he did not have a cannabis dependency and had not used cannabis. He had prepared a statement setting out the circumstances of his taking of the medication which Mr Knaggs read (pages 94 – 97). He handed over his e-mail communication with Occupational Health and the receipts for the purchase of the CBD oil

27. At this meeting also, the claimant had with him bottles of the product he had taken and offered Mr Knagg the opportunity to have the content analysed. Mr Knagg declined on the basis that the test had been carried out some two weeks earlier, the bottles were not brand new and open and had been used – in Mr Knagg's view, there was no way to ensure that the content was in the same state it would have been in prior to the claimant taking the test

28. Investigation as to the content of the CBD oil was carried out, with the analysis reports of the product being obtained (see pages 102 – 107), which showed an extremely low level of THC. Correspondence with the testing company confirmed that "in short, consuming CBD oil that is legal and regulate[d] will not produce a positive THC result on a drug test" (see page 108). The continuing e-mail trail shows the testing company indicating that they are "getting a lot of these at the moment as you can imagine" (page 134)

29. Following these enquiries, Mr Knagg produced an Investigation Summary Report (pages 116 – 118). The report set out "Key Evidence/Findings" and

"Mitigation Factors" and concluded that there was a case to answer, setting out Mr Knagg's reasons for that conclusion

30. The matter was passed to Ms Helen Barrett who, by letter dated 7 March (pages 119 – 120), called the claimant to a disciplinary meeting. The allegations made were set out as follows

- Breach of the Alcohol and Drugs Policy – confirmed positive drugs test result indicating recent cannabis use and not in line with declared medication

- Alleged breach of the UK Disciplinary Procedure

The letter warns of the potential for "disciplinary action up to and including dismissal" if the allegation is substantiated

31. The hearing proceeded on 19 March and was subsequently resumed on 21 March. Notes of the content of the two meetings were produced (pages 138 – 140). The claimant was again accompanied by his Trade Union representative

32. At the meeting on 19 March, the claimant handed in a letter from his GP dated 6 March (pages 114 – 115) outlining further medication that the claimant was taking that he had not previously declared and concluding that "if he has been found to have contravened the allowed levels of cannabis in his blood this is because of a fault with the over the counter medicine that he has bought". This letter also references that the GP believes "that the shipyard now operates a zero tolerance policy towards drugs of all sorts". The claimant also produced positive character references from colleagues (pages 121 – 124)

33. The meeting was adjourned to enable further enquiries to be made as to possible impact upon the test result by the newly disclosed medication but the response received was that this would not have impacted on the result (see pages 125 – 131)

34. This further information was outlined to the claimant at the resumed meeting on 21 March and Ms Barrett advised the claimant of her conclusion that, given the information provided, the CBD oil cannot have been the reason for the positive test. With the claimant having provided "no further reason for the fail other than the CBD oils and by testing positive and coming onsite to do your role", her decision was that "this constitutes gross misconduct and … the appropriate action is summary dismissal with immediate effect". This outcome was confirmed by letter dated 26 March (pages 164 – 166)

35. The meeting did not completely end at the point of the notification of the decision and there is a dispute between the parties as to what may have been said at its conclusion. The notes record that the claimant commented that "I was saying to my wife if I was sat on the other side I would probably have made the same decision with what it looks like". The claimant accepts he said these words. He claims however that Ms Barrett also commented with words to the

effect that the claimant was a nice man and that she hoped he would win his appeal. Ms Barrett denied saying this. The Tribunal accepts Ms Barrett's denial for the following reasons. The notes of the meeting continue to record exchanges after the notification of the decision. There is no record of such words as described by the claimant or anything resembling them being said. The notes were sent to the claimant under cover of the confirmatory letter and he did not raise this allegation at any time in the internal process. On balance, therefore, the Tribunal accepts the evidence of Ms Barrett over that of the claimant on this point

36. The confirmatory letter advised the claimant of his right of appeal which he exercised by completing a pro-forma document (pages 177 – 178) dated 4 April

37. The appointed appeal officer was Mr Leon Dennis who wrote to the claimant, calling him to an appeal hearing, by letter dated 7 May (page 195). He prepared for himself an aide-memoire as to the various points of appeal raised by the claimant ((pages 193 – 194)

38. Enquiries were made by the respondent as to further issues of potential cross-contamination raised by the claimant (see pages 184 – 186) but these proved negative

39. As part of the preparation for the appeal, the claimant's representative also carried out his own enquiries with Occupational Health as to their pre-test communication with the claimant (see pages 187 – 189)

40. The appeal hearing took place on 14 May, with the claimant being again accompanied by his Trade Union representative, and the content was noted (see pages 196 – 203)

41. Following the meeting, on the question of the prior involvement of Occupational Health, Mr Dennis interviewed Mr Eccles (see pages 208 – 209) and obtained further information from Ms Macpherson by e-mail (pages 210 – 211)

42. Having then considered all material before him, Mr Dennis concluded that the appeal should be rejected which he confirmed at a meeting with the claimant held on 5 June (see notes at pages 216 – 218). He then wrote a confirmatory letter to the claimant dated 7 June (pages 219 – 221) setting out his decision and the rationale for it

43. In summary his findings were

    - the case had been investigated correctly
    - all relevant documentation had been provided to the claimant prior to the disciplinary hearing

- the reference [see paragraph 28 above] to "getting a lot of these at the moment as you can imagine" was to drugs tests generally as opposed to any specific reference to CBD oil
- there had been a valid test
- proper consideration had been given to the claimant's employment history, length of service and character references
- Occupational Health had not failed in any duty of care to the claimant

Law

44. Section 98(1) of the Employment Rights Act 1996 states:

> In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

45. Relating to the "conduct of the employee" is one of the reasons set out in subsection (2)

46. Section 98(4) of the Employment Rights Act 1996 states:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

47. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof.

48. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct.

49. The case of *British Home Stores Limited v Burchell (1980) ICR 303* proposes a three-fold test. The Tribunal must decide whether:

49.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;

49.2. it had in mind reasonable grounds upon which to sustain that belief; and

49.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances (which include the gravity of the charges and the potential impact upon the employee – *A v B 2003 IRLR 405*).

50. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances

51. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (*Iceland Frozen Foods v Jones 1983 ICR 17)*. This applies to procedural as well as substantive matters (*Sainsburys v Hitt 2003 ICR 111*).

Submissions

52. Both parties made oral submissions, the claimant's representative also submitting his outline argument in writing, which are summarised as follows

53. On behalf of the claimant, it was conceded that the reason for dismissal was conduct in his failing drugs test. There was no dispute over the first two limbs of the *Burchell* test and the outstanding issues were the quality of the investigation and whether summary dismissal was in the range of reasonable responses

54. The claimant's position was that that the only explanation for the failed test was the CBD oil. He had offered the opportunity for the product to be tested which had not been taken up. He was recognised as being honest, and he had some 41 years of service clear of any disciplinary action. Cannabis use is a criminal offence and accordingly attention needs to be paid to the guidelines in the case of *A v B* [referred to above]. The drugs test did not arise from any concerns as to the claimant's conduct or performance at work and produced a marginal fail

55. The policy documents are not consistent and do not state in terms that failing a drugs test is a disciplinary matter. This is not an "extreme case" on the reading the test produced and no consideration was given to treating the failed test other than as a disciplinary issue. The policy position only seems to have crystallised after the decision to dismiss

56. In terms of possible contributory conduct, he had done all that he could with his enquiries of Occupational Health not to contravene any policy and should not have been dismissed. *Polkey* issues do not arise as this is a substantively rather than procedurally unfair dismissal

57. On behalf of the respondent, it was agreed that the issues now in play appeared to be those identified on behalf of the claimant. There is no challenge as to genuine belief

58. It is submitted that there was a full and proper investigation with all points raised being properly considered. The Tribunal was referred to the various enquiries undertaken by the officers involved in the process. To propose that the product should have been tested as offered by the claimant could appropriately be described as a counsel of perfection and it was reasonable not to have taken that step for the reasons given

59. The decision to dismiss has to be reasonable given that, if the defence offered – "I must have taken a bad batch of permitted medication" – was accepted without clear evidence, it would drive a coach and horses through the efficacy of the drugs policy

60. As regards the appropriate level of investigation, the specific allegation of being under the influence of illegal drugs does not of itself constitute a criminal offence

61. In terms of the decision summarily to dismiss, this was well within the range of reasonable responses. The claimant's role was accepted as being safety critical and he had attended work impaired. His background of length of service and clean disciplinary record had been taken into account when the decision was taken

62. It is not accepted that there is inconsistency within the various policy documents. There is provision for support for declared drug dependency but zero tolerance for failing a drugs test

63. If there is a finding of unfairness based upon the procedural issue surrounding the claimant's offer to have the product tested, the submission is that the claimant would have been dismissed in any event. The reading would either have been in accordance with the analysis produced or would have showed a higher than expected level of TCH (" a dodgy batch") – either way, the claimant had attended work impaired by drugs and would have been fairly dismissed summarily for gross misconduct

64. The claimant had also significantly contributed to his dismissal by taking the risk of self-medicating CBD oil purchased through the internet. He had not been misled by Occupational Health – on the contrary, the risks had been pointed out and he went ahead even whilst expecting further information from Occupational Health. It was a reckless act of his part in taking this medication

65. In response, it was submitted on behalf of the claimant that he should not have been penalised if the failed drugs test could be categorised as a complete accident and he had no reason to doubt the credentials of the provider of the product

Conclusions

66. Although the potential issues had been identified at the outset of the hearing, these had been narrowed down by the time of the parties' submissions

67. It was not in dispute that the reason for the respondent's decision to dismiss was conduct and this was accepted by the Tribunal

68. This being a conduct dismissal, the Tribunal has considered the application of section 98(4) of the ERA through the prism of the *Burchell* test. It is not for the Tribunal to form or substitute its own view but rather to examine the reasonableness of the respondent's actions and conclusion. In doing so the Tribunal must take into account the size and administrative resources of the respondent.

69. There is no challenge being made to the respondent genuinely holding the belief that the claimant was guilty of the conduct alleged

70. There is no issue raised surrounding the framework of the process followed by the respondent. There was an investigation, followed by a disciplinary hearing and then an appeal hearing. These steps were conducted by independent individuals who had no prior involvement with the claimant and the claimant was represented throughout. The claimant makes no complaint as to that framework and the Tribunal is satisfied a proper process was followed exhibiting no breach, certainly no material breach, of the ACAS Code

71. The claimant does however challenge that a proper investigation was carried out with specific reference to the decision by the respondent not to carry out an analysis of the content of the bottles produced by him at the investigative meeting. The Tribunal heard competing submissions as to the applicability of the guidance in *A v B*. The Tribunal does not seek to embroil itself in a technical argument as to whether or not there is an actual allegation of a criminal offence. It is however undoubtedly the case that the failure of the test is a significant reputational matter for the claimant and, particularly given the size and administrative resources of the respondent, a high level of investigation should properly be expected

72. This was not an oversight by the respondent but a deliberate decision taken for the reasons set out in the findings of fact, namely that the test had been carried out some two weeks earlier, the bottles were not brand new and open and had been used – in Mr Knagg's view, there was no way to ensure that the content was in the same state it would have been in prior to the claimant taking the test. Was this decision within the range of reasonable responses?

73. The Tribunal has not found that an easy question to answer but ultimately concludes that it was. The claimant says that his integrity and honesty were never in question so there is no proper reason to believe that the content of the bottles he had offered was anything other than precisely what he had taken, in the dosages claimed, and there had been no tampering or doctoring of the

content. He was however facing the consequences of failing a drugs test at that point and the respondent is reasonably entitled to be wary of the offer made, given the passage of time. The Tribunal accordingly accepts, looking at the surrounding context and the explanation given by the respondent, that it was within the range of reasonable responses to decline the offer of further analysis. Although responsibility for a proper and reasonable investigation rests with the respondent, it was also available to the claimant, had he so chosen and with representation, to have arranged for his own analysis of the product but he did not so

74. The claimant also takes issue with the various policy documents relevant to the potential disciplinary action. Contrary to the respondent's position, for example the description by Ms Barrett of "really clear communications", the Tribunal's view is that the documentation is not as clear as it could or indeed should be – particularly given the size and administrative resources of the respondent - and perhaps can appropriately be described as clumsy

75. There is however no suggestion made that the claimant was misled in any way by the various ways in which the documentation is worded. The dismissing officer is clear that her understanding was that there was at the relevant time a zero-tolerance policy in place. Those who came forward and admitted that they had a dependency or had used illegal drugs would be treated sympathetically but those who failed a test, even one test, would be subject to disciplinary action for conduct classed as gross misconduct

76. Despite the forensic analysis of the documentation by both parties in the course of the hearing, there is no suggestion from the claimant that he was of a contrary view at the relevant time. He was sufficiently concerned as to the risk of failing a drugs test that he chose to make enquiries on that point before consuming the product. It is not correct, on the evidence, to say that he was misled by Occupational Health. They did not seek to interfere with his decision to take a lawful medicinal product but gave no definitive view that it would be safe to do so. Following a consultation between the claimant and his GP, there is specific reference in the follow-up letter from the GP (pages 114 – 115) to the belief that the respondent " operates a zero tolerance policy". There is no suggestion at all that the claimant was led by any elements of the documentation to believe that there may be a degree of potential leeway once a test had been failed

77. The lengthy employment history of the claimant, his clean disciplinary record and the positive character references were all taken into account when the decision was made

78. Accordingly, given the basis of the decision, it cannot properly be said that summary dismissal was outside the range of reasonable responses. This is in fact precisely what is encompassed by the claimant's own words: " … if I was sat on the other side I would have probably made the same decision with what it looks like"

79. The Tribunal's conclusion is that the respondent acted reasonably both procedurally in terms of the process it followed and substantively in the decision it came to. In the circumstances the Tribunal's judgment is that the claim of unfair dismissal is not well-founded and must fail

80. The Tribunal did also, however, go on to consider the issues of potential *Polkey* contribution and contributory conduct which would be relevant in the event that the Tribunal's conclusion were wrong and there had been an unfair dismissal

81. If the dismissal had been unfair as a consequence of the failure to analyse the content of the bottles as offered by the claimant, the question would arise as to whether, and to what extent, it was likely that a fair dismissal would have ensued. Had the analysis been carried out, there were two possible results. If the result had come back that the product contained minimal traces of THC, the facts and the outcome would have been the same. If it turned out that the analysis indicated a "dodgy batch" (namely with sufficient TCH content to explain the test result), would that have resulted in a different outcome? The evidence of the dismissing officer, Ms Barrett, was that it would not. The claimant had consumed the product knowing that there was an inherent risk in doing so and had subsequently failed the drugs test – he had accordingly attended work in a safety-critical role, while "impaired", in the context of a zero tolerance policy

82. The Tribunal accepts this reasoning and accordingly would have concluded that a 100% *Polkey* contribution was appropriate

83. In summary, the same analysis would equally lead to a conclusion that the claimant had contributed to his dismissal by a factor of 100%

Employment Judge B Hodgson

Date 23 November 2020

REASONS SENT TO THE PARTIES ON

27 November 2020

FOR THE TRIBUNAL OFFICE