RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Pamment**

Respondent: **Renewi UK Services Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **13 January 2021**

Before: **Employment Judge Housego**

Representation

Claimant: In person
Respondent: Stewart Healey, Solicitor

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**

2. **A remedy hearing will now be listed.**

REASONS

Summary

1. The Respondent says that it dismissed the Claimant for misconduct. That was failing a random drugs test, revealing cannabis. They say this was gross misconduct justifying dismissal, particularly as he was a driver. Mr Pamment says that he while he was a team leader, for vehicles he was a driver's mate so there was no risk to the public, and no criticism had been made of his work. He says that took cannabis to help with severe and chronic back pain, and that the Respondent has failed to follow its clear policies to help people with an issue with alcohol or drugs, which should have led them to help him, not dismiss him, after 12 years excellent service. He suggests that his extended absences in the recent past, due to his back, meant that this was a good excuse to get rid of him.

Evidence

2. I heard oral evidence from Mr Pamment, and for the Respondent from

Marc Congdon, who made the decision to dismiss Mr Pamment, from Simon Lee, who heard his appeal against dismissal, and from Lisa Bailey, of human resources.

3. The Respondent provided an agreed substantial bundle of documents and a skeleton argument, and a cast list and chronology.

Law

4. The reason put forward is conduct, which is a potentially fair reason for dismissal.[1] Was that the reason? If yes, did the Respondent have a genuine belief on reasonable grounds of misconduct by the Claimant? If yes, was it misconduct justifying summary dismissal? (No notice period was paid.) Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not what were the chances of dismissal if there had been a fair procedure? If there was an unfair dismissal did the Claimant cause or contribute to her dismissal by his conduct?

5. The decision whether a dismissal is fair or unfair involves findings of fact about what the employer did, and an assessment of whether it was fair or unfair. Findings of fact about contributory conduct are findings of fact, on the balance of probabilities, about what the Claimant did, or did not, do.

6. In deciding fairness Section 98 (4) of the Employment Rights Act 1996 ("the Act") provides

> *"…. 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"*.

There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer. The test in *Burchell* (reference below) is whether the employer had a genuine belief in misconduct on reasonable grounds, after proper investigation.

7. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

8. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice*

[1] S98(2)(b) Employment Rights Act 1996

was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

9. The compensatory award is dealt with in section 123. Under section 123(1):

"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

10. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

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

11. There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee.

12. If the claim is successful, the Judge must set out the remedies for unfair dismissal of reinstatement or re-engagement, and ask the Claimant if he wishes to seek such an order.[2] The primary remedy is an order for reinstatement or re-engagement.[3] It is such an order that Mr Pamment seeks.

13. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588; Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61. It is unfair to dismiss automatically by reason of gross misconduct: Department for Work and Pensions v Mughal (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0343_15_1406. I have considered the guidance in Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601 about remedy.

14. The reason given by the Respondent was misconduct which is a potentially fair reason for dismissal, and so the first question is whether that was the reason. If it was the reason the next issue is whether it was fair, or not. Those latter questions are determined by reference to the findings of fact, but there is no standard or burden of proof.

15. Accordingly, if the reason is shown to be misconduct, the starting point for the issue of fairness is the words of section 98(4) themselves. In applying that

[2] Sections 112-115 Employment Rights Act 1996.
[3] S116 Employment Rights Act 1996

subsection the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own view of the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

16. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

The Respondent's policies

17. The Respondent has a drugs and alcohol policy, introduced on 01 November 2018 (65). The letter introducing it, of 09 October 2018 stated:

> *"The updated policy reflects our new values and recognises that your safety is our number one priority. It also underlines that we are all accountable for one another, and we should also offer support to each other during difficult times."*

18. The 8 policy objectives included: *"To support employees experiencing alcohol and drug problems."*

19. *"Drug abuse"* was defined as including the use of illegal drugs. Use of prescribed drugs was excluded from the definition. It was a policy rule not to come to work under the influence of drugs or alcohol.

20. The policy has a section headed "misconduct". It states that:

> *"Our policy is principally concerned with ongoing issues of substance misuse. Be classed these as 'capability issues' as the problem will primarily impact how the individual performs the job. In circumstances where an employee breaches the policy on an individual case, such as reporting for work drunk or being under the influence of drugs at work, we will class this behaviour as a contact issue and handle it via the normal disciplinary procedures."*

21. It also states:

> *"If an employee admits to having a substance misuse problem, the disciplinary process may be held in abeyance. This will be subject to the successful outcome of treatment and improvement of performance/job capability. If the employer subsequently admits to a substance misuse problem following an instance of serious misconduct, we may carry out the support route and the disciplinary route in tandem."*

22. A section headed *"Referral by management"* states:

> *"Managers will offer support to employees who are suspected of having an alcohol or drug problem."*

23. There is a disciplinary policy (70). In a list of matters stated to be gross misconduct is:

> *"Being under the influence of alcohol, drugs or any substances which impact performance and those around you."* (Sic)

24. There is Health and Wellbeing Policy (77). It has a section on drugs and alcohol (80). It states:

> *"While Renewi, where it is aware that an employee may have a problem with substance abuse will concentrate on rehabilitation: … any employee discovered to be under the influence of alcohol or illicit drugs may suffer disciplinary action – such misuse is defined as gross misconduct by Renewi…."*

25. The Alcohol, Drugs and Medicines policy has a section on misconduct[4]. It states:

> *"Our policy is principally concerned with ongoing issues of substance misuse. We class these as "capability issues" as the problem will primarily impact on how the individual performed their job. In circumstances where an employee breaches the policy on an individual case, such as reporting for work drunk or being under the influence of drugs at work, we will class this behaviour as a conduct issue and handle it via the normal disciplinary procedures."*

Submissions

Respondent

26. Renewi say that the drugs policy is not relevant for it relates to those with substance abuse problems – addictions – and Mr Pamment had never said he had such a problem. He said that he had not taken cannabis since the test on 11 March 2020, so it was plain that was the case.

27. He must have been under the influence of cannabis given that his level was many times the cut-off level of 15, and the limit for driving a vehicle was only 2. While the decision makers said that he drove vehicles and it was plain at the

[4] Page 3 of 4, page 68

hearing that he would do so only rarely, and they had no information that he had done so since he returned on 06 January 2020, there was a risk that he might do so in future. It was not challenged that he had not taken cannabis before December 2019, so could not have driven while under the influence of cannabis before June 2019. While he said that he would not take it again there was the risk that he might relapse. That he said he had not taken it since 11 March 2020 and offered regular testing was not, it was submitted, to the point.

28. He had not disclosed this to his manager and there had been ample opportunity to do so after he returned to work.

29. Nor had this been prescribed by his doctor. It was an illegal drug. He was in a management role and this reflected badly on him and the company.

30. Since he was under the influence of cannabis (the level was so high it was submitted that this was self evidence) he was prone to making bad decisions for those he was leading. While it was accepted that there was no incidence of such bad decision making, and no-one suspected that he was other than fully able to carry out his role effectively, that did not necessarily mean that some decisions were adversely affected.

31. He had not told his GP so there was the possibility of the combination of the drugs having an unknown effect

32. Consistency was important, and of all 7 tests failed throughout the UK all had resigned or been dismissed. The level of the test, and that it was an illegal drug undisclosed to the employer was important.

33. It was not unfair for the decision maker to ask Lisa Bailey after the hearing, and before the decision to dismiss, about what had happened about other people who had failed a random drugs test. Mr Pamment had already given his plea in mitigation and there was nothing more he could have said had he known.

Claimant

34. Mr Pamment said that there had been no consideration of his long service, and his reason for taking cannabis. They had said he was *"under the influence"* of an illegal drug at work, but he had worked entirely satisfactorily from 06 January 2020 until 11 March 2020, and he was most certainly not *"under the influence"* in the sense that his performance was adversely affected for it was fully accepted that it had not been.

35. It was entirely wrong to use driving as a reason – he had not got a licence for the vehicle he worked in every day, and his colleague drove that. While he would drive a company vehicle if asked, he never had been asked. There was no evidence at all to support this reason for dismissal.

36. His return to work had not been in accordance with policy, and he got on well with his manager. He should have been asked about medications at that interview and that would have been his opportunity to tell his manager, and he would have done so.

37. It was unfair to say there was a risk he might return to cannabis by the meeting of 30 March 2020 he had not taken it since before 11 March 2020, and had offered to have regular drugs tests, even at his own expense.

38. The person who suspended him was not his manager or his manager's manager, and they were the only people who could suspend him, according to the policy.

39. The health and safety person should have conducted the investigation, not the person who suspended him, John Maara.

40. It was wrong for Lisa Bailey to be involved for she had a bad relationship with him, and he said that Marc Congdon had referred to *"we"* having decided to dismiss. She had been consulted by Marc Congdon after the hearing but before the decision, and she had influenced the outcome unfairly.

41. Ms Bailey had told him that everyone gets dismissed for reasons of consistency, and that was not fair given his particular circumstances (which he set out, and are apparent from what follows).

Findings of fact

42. Mr Pamment started work for Renewi (or rather for a predecessor company – there have been transfers of undertaking) about 14 years ago. He became a full time employee on 01 October 2010. He was dismissed on 01 April 2020, following a meeting on 30 March 2020. The reason for dismissal was that Mr Pamment was recorded with a *"non-negative"* random test result for cannabis, that test being taken on 11 March 2020. He was not paid for a notice period. The dismissal was said to be for gross misconduct.

43. From December 2019 onwards Mr Pamment had taken cannabis some nights to help with his acute and chronic back pain and to help him sleep. This was not disputed or challenged by the Respondent.

44. Mr Pamment blamed Lisa Bailey for him taking the test, thinking that she had made sure he was on the list. I do not think this at all likely, but even if it was so it is not to the point, as the test result was what it was, and the policy is that the Respondent is entitled to test people, and Mr Pamment, sensibly, agreed to the test.

45. The test showed positive results for opiates and for cannabis:

45.1. That for cannabis was greater than 50ng/mL, that being the limit of the test's calibration. The cut-off (pass) level was 15 ng/mL.

45.2. The result for opiates was greater than 2,500, above the limit of calibration. The cut-off level was 300ng/MmL.

45.3. There was also a non-negative result for morphine of 977, the cut-off level being 300ng/mL

46. The opiates and morphine were from prescription medicines, and so were

not the reason for dismissal. Mr Pamment had not disclosed the medications as he had not been asked about medications, and had not had a return to work interview after 6 months absence for back problems, returning to work on 06 January 2020.

47. Mr Pamment had been off work with severe back paid for 6 months. He returned only on 06 January 2020, after being off since June 2019. Despite this being a 6 month absence there was no return to work meeting. Mr Pamment's line manager was not available. He filled in the form himself, and the team leader with whom he worked countersigned it, and it went to human resources. Renewi accept that this was not within their policies and was not as it should have been. Mr Pamment says this is relevant, because he got on well with his line manager, and had there been a full chat about things he would have told his line manager about the beneficial use of cannabis. On the balance of probabilities I find that he would. Mr Pamment was an entirely credible witness.

48. In its grounds of resistance Renewi devote considerable space to an analysis of Mr Pamment's absence record over 9 years (paragraphs 11 and 12). No reason was given in the hearing as what relevance this had, or to the reference to absenteeism procedures being invoked in 2012. Mr Pamment does not, however, assert that this was a pretext to get rid of him for his sickness absence. Nor in the hearing did Renewi say that it was of relevance to any issue before me.

49. What is undoubted is that Mr Pamment's back problem was entirely genuine. He had frequent visits to the doctor. He was due to have an epidural injection. He was given various different medications to help the pain, including morphine patches. None seemed to work for him. In December 2019 a friend told him that cannabis helped, and he bought some from a friend (whether that friend or another is immaterial). It worked for him, and helped him sleep, the pain being a problem preventing him sleeping well. This was not something he discussed with his GP. Eventually his medication, perhaps with the cannabis, was effective enough for him to return to work.

50. During his absence Lisa Bailey from human resources kept in touch with him. Mr Pamment did all that might reasonably be required of him in keeping his employer informed. Ms Bailey was assiduous in her contact with him to the extent that it became stressful for Mr Pamment, who was finding the unremitting and long standing pain hard to deal with. She would text him and he would reply. She visited him. He asked her to deal with his GP, but Renewi does not do this, relying on the employee and occupational health reports.

51. Mr Pamment became frustrated at the frequency of Ms Bailey's requests for information. He had told her of his treatment as it progressed. On 17 September 2019 Ms Bailey texted to ask how he was. Mr Pamment said he had a scan on 24th and an appointment on 25th, but although he chased things up no-one came back to him. He was no better. On the same day, Ms Bailey asked about blood in his urine. Mr Pamment replied to say that was what the scan was about, on 24th. On 24th Ms Bailey texted him to ask how it went and whether she could call him on 25th after his appointment. Mr Pamment replied that the scan had been cancelled and was rebooked for Saturday. On 26th Ms Bailey texted again asking how he was feeling, whether he had his appointment on 25th, whether he had any update on treatment and asking if she and Mr Pamment's

manager could come and visit him again *"just for a catch up"*. Mr Pamment responded the same day:

> *"I'm not being funny but nothing has changed in the two days, I didn't have a GP appointment I had an appointment with the consultant at the private hospital about my abscess. I have kept all my letters so if you need to see them I'll show you, I really don't see why you need to come round my house again. I'm so stressed about all this at the minute and you ain't helping because all your messages wanted me to explain everything, they are stressing me out more, if you need any more info please contact my doctors, they are happy to help".*

52. Ms Bailey responded to say that she would write to him to remind him of his obligations as an employee, and of theirs as an employer.

53. Mr Pamment is correct is saying that Ms Bailey, and the Respondent as a whole took Mr Pamment's comment badly, and that it affected their relationship with, and attitude to him adversely. This is evident from the pleaded defence[5] which referred to this (it should have been an irrelevance to the issue of fairness or otherwise of the dismissal) stating:

> *"Due to the frustrated and* ***unacceptable*** *manner in which the Claimant communicated to Miss Bailey, it was escalated to the Claimant's line manager, Ian George, senior operations manager who sent a letter to the claimant to set up another welfare meeting on 10 October 2019."* (Emphasis added.)

54. I find that Mr Pamment was not out of order in complaining about the level of reporting he was being required to undertake to Ms Bailey, particularly as the Respondent refused to contact his GP for updates, relying instead on occasional occupational health assessments (one was arranged for 31 October 2019 as a result of this exchange). This a complete overreaction by the Respondent, and it is relevant to any assessment of their approach to Mr Pamment that their feelings about this continue to the date of the hearing[6].

55. Mr Maara suspended Mr Pamment. This was not in accordance with company policy as only Mr Pamment's line manager, or that person's own line manager had the authority to do so. Mr Pamment does not think this was fair. I do not find this has any relevance to the decision to dismiss or to the appeal, with which Mr Maara was not involved. Mr Maara also investigated. Mr Pamment says that the health and safety person in the Respondent, Mr Anderson, should have done so. Mr Anderson was at a meeting, but did not take charge of the investigation. That is significant not for the reason Mr Pamment gives, but because it underlines that this was not, and never was, a health and safety matter.

56. Mr Congdon wrote on 24 March 2020 to call Mr Pamment to a disciplinary hearing[7]. Mr Congdon started work with the Respondent only on 17 February 2020. He had no previous experience in the waste industry. He is an engineering

[5] At paragraph 14
[6] Being referred to in the grounds of resistance, as above
[7] Page 120-121

manager at a different site. He was an appropriate person to take the meeting.

57. The hearing was on 30 March 2020 and was a telephone discussion, it being shortly after the 1st lockdown started. Mr Congdon dismissed Mr Pamment.

58. After that discussion but before making his decision Mr Congdon telephoned Ms Bailey to ask what had happened to others. She told him that everyone who had failed a drugs test had been dismissed if they had not resigned. It was 7 people. This was part of Mr Congdon's decision making process. It influenced his decision to dismiss.

59. After that Mr Pamment spoke to Ms Bailey. She told him that there was a need for consistency of decision making and that everyone else who had failed a drugs test had left the company. Mr Pamment was (understandably) emotional. He had thought that he would work for Renewi until he retired. He speaks ordinarily in a loud voice (this was the case in the hearing). He has no history of poor behaviour at work. I find that he was not aggressive in that conversation. He was exercised by Ms Bailey telling him that there was a need for consistency of decision making, which he (rightly) felt that whatever he said he was always going to be dismissed.

60. Mr Lee held the appeal. He was a suitable person to take the appeal, which was on 22 April 2020, in person. He dismissed that appeal, by a one page letter of 29 April 2020[8]. That letter gave reasons:

- *I do not believe the decision was personal or that the decision was in any way related to a period of long-term absence at the end of last year.*
- *The evidence I have gathered from our drugs and alcohol testing providers clearly shows that you had randomly been selected for a test on 11 March and were not on a reserve list.*
- *A fair investigation and disciplinary process was followed in line with the company's policies and procedures.*
- *At no point did you discuss your cannabis use with management or seek any support from the company prior to being tested positive for the use of cannabis.*
- *You tested positive for cannabis because you use this drug, and this is was not under prescription from your GP and is in breach of the companies alcohol, drugs and medicines policy specifically; we define drug abuse as the use of illegal drugs, the deliberate misuse of prescribed or over-the-counter drugs, and use of solvents, either intermittent or continuous, which interfere with health and/or social functioning and/or work capability or conduct.*

[8] Page 143

Conclusions

61. Renewi rely on Mr Pamment being *"under the influence"* of cannabis. He had a substantial trace of that drug in his system. His performance was not adversely affected. The phrase *"under the influence"* has as an essential component that performance is not as good as it would be without the ingestion of the drug. That was accepted not to be the case for Mr Pamment. There was no issue with his performance.

62. Nor is it helpful to refer to the legal limit for driving as 2ng/mL. The random test had a cut-off point of 15, over 7 times that figure, to cover accidental exposure to cannabis from others. 7 times the alcohol figure of 35 would leave a person, at best comatose. It is not a parallel, and the legal limit for driving with cannabis is effectively zero tolerance, which is plainly not the case for the random test, as the lower limit is to cover accidental exposure.

63. It was submitted that as the figure was above the maximum calibration it was extremely high. However no explanation was given as to why this was the maximum test result. The test is described as initial, and requiring laboratory assessment for full accuracy.

64. The results for opiates and morphine were ignored as they were prescribed drugs. The level for opiates was also above the maximum recordable in this test. No one from Renewi had been concerned to find out about his medication on his return, and as he was considered able to undertake all duties when over the maximum for opiates (and way over the morphine level also) it is illogical to say that (because the cannabis was not prescribed) it affected performance, when the prescribed drugs did not, particularly (and perhaps surprisingly) as the combination of all 3 had not prevented Mr Pamment carrying out his role entirely effectively.

65. The pleaded case is summed up in paragraph 37 of the ET3. It states:

> *"The Respondent avers it was a significant and dangerous amount of cannabis in the Claimant's system given his safety critical and driving duties. The Respondent considers that this is strong evidence that the Claimant:*
>
> *i. did not come to work free from the effects of illegal drugs and had a significant and perilous presence of cannabis in his system during working hours arising from his consumption during normal working hours;*
>
> *ii. was unable to legally drive a motor vehicle on the public highway and on the ELWA sites pursuant to the Road Traffic Act 1988 due to the significant presence of cannabis in his system;*
>
> *iii. created a health and safety risk to himself, the Respondent's employees, ELWA's customers and the public as his behaviour and abilities would have been impaired due to the significant presence of cannabis combined with the effects of the codeine and morphine medication in his system;*
>
> *iv. was in breach of the AD&M Policy and the Respondent's driving*

policy which stated "we do not tolerate the following behaviours:… Driving under the influence of alcohol or drugs that may affect your ability to drive."

66. The difficulties with this justification for dismissal are that:

66.1. The statement that the amount of cannabis was *"perilous"* is speculation, and not borne out by Mr Pamment's performance at work.

66.2. There is no evidence that the Claimant drove any company vehicle after returning to work on 06 January 2020, and it was not his job to drive a vehicle.

66.3. It is a presumption without evidence that the Claimant's behaviour and abilities would have been affected, and there was no concern raised about his work from 06 January 2020 before the test on 11 March 2020.

66.4. Mr Pamment did not drive a vehicle under the influence of drugs.

66.5. While the role is said to be *"safety critical"* it was not, in practice. Mr Pamment drove round as driver's mate, delivering orange sacks and tending to their recepticals. He was not at the sharp end of recycling machinery. Mr Congdon knew this as Mr Pamment told him in the telephone call that was the dismissal meeting[9].

67. Marc Congdon dismissed Mr Pamment. His dismissal letter[10] states:

"I understand your recent poor health condition and appreciate your honesty surrounding all the reasons for starting to smoke cannabis. However, I must consider the Company position in my decision and therefore conclude that the above act constitutes gross misconduct, namely 'being under the influence of alcohol, drugs or other substances which impact performance or those around you' and 'Gross incapability e.g. loss of faith or trust and confidence in ability to perform role as per specific examples of gross misconduct in the Company Disciplinary policy. As a result, you are summarily dismissed on the grounds of gross misconduct." (Sic)

68. Mr Congdon's witness statement says[11]:

"This letter was not well worded. The reason that Carl was dismissed was for the reasons I have given but it all stems from the fact that he had failed the drugs test and had attended work under the influence of drugs and so breached the drugs and alcohol policy."

69. After the telephone conversation with Mr Pamment, but before telling Mr

[9] Page 128.
[10] Page 129-130
[11] Paragraph 15

Pamment his decision (and I found as a fact[12], having heard both Mr Congdon and Ms Bailey's evidence, before he made that decision) Mr Congdon telephoned Ms Bailey and asked her what had happened in other cases. She told him that there had been 7, and that all 7 had either resigned or been dismissed, and that influenced his decision. It was submitted that this made no difference as Mr Pamment had said all he could say in any event. Mr Pamment would inevitably have said that there cannot (or should not) be a blanket policy to dismiss everyone who failed a drugs test. That is what the Company policy is.

70. The difficulty with these reasons is that:

70.1. Mr Congdon was clear that he was heavily influenced by the fact, conveyed to him by Ms Bailey, that failing a drugs test always resulted in the person leaving.

70.2. While he said that each case was decided on its merits, he was unable to suggest any circumstance when failing a drugs test would not result in dismissal (if the person did not resign). His attempt to do so by referring to prescription medications is not sound, as that would be a *"non-negative"* result that was permissible, and so not a failed test at all.

70.3. There was no evidence that his performance was adversely affected, such that he was *"under the influence"* of illegal drugs.

70.4. Mr Congdon's witness statement[13] says that he was aware that some people have cannabis prescribed for them for pain. He did not say where he got this information from, and since it is an important part of the Respondent's case that he could have got the cannabis as a medication prescribed by his GP, but did not, I find that this was a mistaken reason for an adverse opinion of Mr Pamment's consumption of cannabis.

70.5. While it was said that mitigating factors were considered, I find as a fact that they were not. For the avoidance of doubt these were:

70.5.1. Mr Pamment had given an entirely credible reason why he took the cannabis. He was not a recreational user.

70.5.2. He had said that he had stopped and it would never recur.

70.5.3. He had offered to have regular tests and to pay for them himself.

70.5.4. He had 10 years' service and 14 years' work for the Respondent and its predecessors.

70.5.5. There had been no incidence of poor performance and no concerns raised about him or his work.

[12] Paragraph 58
[13] At paragraph 9

71. It follows that first Mr Congdon found that failing a drugs test was inevitably gross misconduct, and that gross misconduct for such a matter would always mean dismissal. That is an error, as set out above[14].

72. The witness statement of Simon Lee augmented by his oral evidence drew attention to this not being a borderline fail. However he stated[15]

> *"This is significant given that he was required to drive a van as part of his job role."*

Mr Pamment was not required to drive a van. I do not find it good reason to dismiss Mr Pamment, as Mr Lee said in his oral evidence, that he might a) relapse from abstention from cannabis in future and then b) be asked to drive a van, which happened only very rarely, and that c) he would be above the legal cannabis level when he did so, particularly when Mr Pamment had offered regular tests at his own expense.

73. Mr Lee found it significant that Mr Pamment was not prescribed cannabis by his GP. This lacks realism. There is no evidence put before me that GPs prescribe cannabis for back pain, and my limited judicial knowledge is that it is done so in very limited circumstances such as for severe multiple sclerosis.

74. Mr Lee found it important that Mr Pamment had not told the company he was taking cannabis for medicinal reasons. He did not take account of the fact that the opportunity to do so in a return to work meeting did not exist. Mr Pamment could have told his manager later, and Mr Pamment is correct in saying that such a meeting should have involved discussion of his situation which would have led to this being talked about: rather different to an unsolicited disclosure.

75. Mr Lee's witness statement states:

> *"I did consider the Company Alcohol, Drugs and Medicines Policy and in particular how the policy defines drug abuse as the use of illegal drugs, the deliberateness use of prescribed or over the counter drugs, and the use of solvent, either intermittent or continuous, which interfere with health and/or social function and/or work capability or conduct."*

The use of cannabis by Mr Pamment had not interfered with his health, social function, work capability or conduct.

76. Mr Congdon and Mr Lee both thought (probably wrongly) that Mr Pamment could have got the cannabis from his GP, and they were concerned that there might be complications from the interaction of the drugs he was prescribed with the cannabis. In fact there were not such complications, as his work was not criticised in any way, but there is a different point. Mr Congdon and Mr Lee would not have been concerned had this been a prescription drug, which they thought it could have been. They had no concerns over Mr Pamment's work.

77. If follows, as a simple matter of logic, that the sole reason for dismissal

[14] Para 13: *Mughal*
[15] Para 6

was that the cannabis was illegal not legal.

78. Mr Lee found it relevant that Mr Pamment had not disclosed his use of cannabis, and that he had no dependency issue, such that that policy was not applicable. In a Company with such an enlightened policy it is unfortunate that neither Mr Congdon nor Mr Lee thought it relevant that Mr Pamment had a long standing and acute back pain problem and that this was the reason why he had taken cannabis. This is in stark contrast with the commendable approach to those with substance abuse problems. Mr Pamment's motivation was not hedonistic. This is all relevant to the assessment of fairness under S98(4).

79. Mr Lee was entirely clear in his oral evidence[16] that Mr Pamment fell within the *capability* section of the Alcohol Drugs and Medicines policy (and so fell to be helped), but nevertheless upheld his dismissal for misconduct when there was no evidence (as would be required to do so, under that policy) that he had attended for work *"under the influence*" of drugs: other than that he had shown a non negative response to a drugs test for cannabis (and failure levels for opiates and morphine).

80. In summary I find the dismissal to have been unfair (and outside the range of responses of the reasonable employer) for the following reasons:

80.1. No (or inadequate) account was taken of the genuine reason for taking the cannabis.

80.2. Likewise for of his long unblemished service.

80.3. Ms Bailey was consulted before the decision was taken, and after the telephone disciplinary hearing, and her information (that everyone was dismissed if they did not resign) was a factor in Mr Congdon's decision to dismiss Mr Pamment.

80.4. It was taken to be gross misconduct because it was a failed test, without any assessment of the circumstances.

80.5. It was a matter of policy that everyone who failed a drugs test would be dismissed if they did not resign. Even if it was gross misconduct that is unfair, as even for gross misconduct there must be consideration of whether dismissal is fair.

80.6. It was a key part of the justification for the decision that there was a risk to the public and colleagues by Mr Pamment driving a company vehicle, said to be an integral part if his job, when it was not, and there was no evidence that he had driven a company vehicle since 06 January 2020. (The summation of the grounds of resistance[17] has justifies the dismissal in part by wrongly asserting that Mr Pamment had breached the Road Traffic Act 1988).

80.7. There was an unevidenced reliance on health and safety risks[18]

[16] In answer to questions put to him in re-examination
[17] At para 53, page 30
[18] See para 53 of the grounds of resistance

when there was no evidence of any such risk (Mr Pamment being driver's mate in a 7.5 tonne truck driven by another delivering orange sacks around London Boroughs, and maintaining the bins containing them).

80.8. There had been no concerns about Mr Pamment's work or attitude (or in any other way) after his return to work on 06 January 2020.

80.9. No account was taken of the ethos of the Respondent towards those with difficulties, notably the drugs and alcohol section of the Health and Wellbeing Policy[19] which states *"… Renewi, where it is aware that an employee may have a problem with substance abuse, will concentrate on rehabilitation".* That expressly does not preclude disciplinary action for those at work *"under the influence of alcohol or illicit drugs"*, but that did not apply to Mr Pamment as that requires an impairment of performance and there was none in his case.

80.10. The policy on alcohol drugs and medicine[20] expressly commits the Respondent to supporting employees with drug problems, and that expressly includes illegal drugs (set out in the definitions section of the policy).

80.11. Dismissal was for misconduct, when Mr Pamment was accepted to fall within the non disciplinary part of the drugs policy.

80.12. Ms Bailey was not wholly objective, given the texts of September 2019 and the Respondent's continuing view of this towards Mr Pamment, and had an influence in Mr Congdon's decision to dismiss.

80.13. Mr Lee's appeal reasons did not engage with any of the above.

81. This decision must be read as a whole and this summary is not intended to be comprehensive.

Remedy

82. I consider firstly the Respondent's assertion that there should be a *Polkey*[21] reduction. I do not consider the procedure itself unfair: suspension was not inappropriate, and it did not become so because the wrong person suspended him. The investigation was not improper (though it failed to identify that Mr Pamment did not drive at work, and did not investigate whether cannabis can be prescribed for pain relief). Mr Congdon and Mr Lee were appropriate people to take the meetings. A telephone disciplinary hearing was far from ideal, but understandable on the date it took place.

83. It follows that I do not find that there should be any increase for failure to follow the ACAS code.

[19] Page 80
[20] Page 66-69
[21] See paragraph 13

84. The implementation of the procedure was not fair, in that Ms Bailey had an input to it after the hearing and before the decision. It was not unfair for Ms Bailey to provide guidance as to how to run a meeting. It was unfair for her to have Mr Congdon's ear given the background of September 2019 which was still relevant to the Respondent (see grounds of resistance). That goes to overall fairness not to a consideration of a *Polkey* reduction

85. I do not find that there should be any *Polkey* reduction in any award.

86. The Respondent seeks a reduction for contributory conduct. Mr Pamment accepted that he had taken cannabis and that this was an illegal drug and that it showed in his system at levels that the test showed were high. A simple response is that this should result in a substantial or total reduction in compensation on the basis that he brought it on himself by taking an illegal drug.

87. After considerable thought I conclude this would be oversimplistic. Given the analysis above, I do not consider that any reduction for contribution is warranted. The Respondent's own position means that the presence of the drug itself would have been uneventful if (as they thought it could be) it was prescribed. One is left with the fact that it was an illegal drug only. But that is not something that leads to dismissal if the Respondent's own policies are applied in suitable cases.

88. Nor does the evidence subsequently obtained by the Respondent as to levels of cannabis help, as the causation of the dismissal can only be by reason of things known at the time. They were right that it was a high level, but all they knew about it was that it was high, but that it had no discernible effect on the work performance of Mr Pamment.

89. I decide that there is no reduction by reason of contribution.

90. There will now be a remedy hearing. Mr Pamment seeks reinstatement or reengagement. The Respondent should prepare accordingly. I observe that I saw nothing in the evidence that would preclude such an order, as nothing in it indicated any performance issue, any likelihood that Mr Pamment would continue to take cannabis (or had done so after 11 March 2020), or that there was any damage to any working relationship. Doubtless Ms Bailey is professional enough to engage with Mr Pamment if needed, and there are others in the human resources team in any event.

Employment Judge Housego

18 January 2021