EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Delroy Bonner	**v**	**Fourways Plant Limited**

Heard at: Watford by Cloud Video Platform **On**: 23 – 25 February 2021

Before: Employment Judge Bedeau
Members: Mr D Bean
Mr D Sutton

Appearances
For the Claimant: In person
For the Respondent: Mr J Braier, Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well-founded and is dismissed.

2. The claim of direct race discrimination is not well-founded and is dismissed.

3. The claim of wrongful dismissal has not been proved and is dismissed.

4. The claim of accrued unpaid holiday is not well-founded and is dismissed.

5. The provisional remedy hearing listed on 10 June 2021 is, hereby, vacated.

REASONS

1. By a claim form presented to the tribunal on 25 July 2018, the claimant claims against the respondent unfair dismissal; direct race discrimination; wrongful dismissal; and accrued unpaid holiday.

2. In the response presented to the tribunal on 5 September 2018, the claims are denied. The respondent avers that the comparator referred to by the claimant in respect of his direct race discrimination claim, was treated no differently than the claimant.

The issues

3. The case was listed before Employment Judge McNeill QC on 21 December 2019, for a preliminary hearing, who clarified the claims and issues for this tribunal to hear and determine. They are set out below.

4. Unfair dismissal

4.1 The claimant was dismissed for gross misconduct on 30 April 2018. There is little factual dispute between the parties in the case. On 21 April 2018 the claimant had laser eye surgery. He was in severe pain following that surgery and his partner gave him some Tramadol medication. When he attended for work on 23 April the respondent asked the claimant to undergo a routine company drug test. As a result of having taken Tramadol, he failed the drug test. He was given a second drug test a day later, which he passed. The claimant worked as a member of yard staff and his duties included loading and unloading vehicles, operating a forklift truck and other yard machinery and equipment and sorting and servicing materials. The claimant did not inform the respondent that he had taken Tramadol on 23 April. He alleges that he did not realise that Tramadol medication would lead to his failing a drug test.

4.2 The respondent alleges that the reason for the claimant's dismissal was that he failed a drugs test and failed to tell the respondent that he had taken Tramadol.

4.3 In the circumstances outlined above, the reason for the claimant's dismissal was a reason relating to his conduct: a potentially fair reason within s.98(2) of the Employment Rights Act 1996 (ERA)?

4.4 The claimant does not dispute the genuineness of the respondent's stated reason for dismissal.

4.5 Did the respondent carry out a reasonable investigation? In particular:

4.5.1 Should Ms Foley, who dismissed the claimant, have dealt with both the investigation and the disciplinary hearing which led to the claimant's dismissal?

4.5.2 Should Mr Twort, Ms Foley's father, have dealt with the appeal?

4.5.3 Did the respondent fail to comply with the ACAS Code of Practice for either or both of the reasons set out above?

4.6 Was dismissal within the range of reasonable sanctions which the respondent could impose in all the circumstances?

4.7 Was the claimant treated more harshly than a Mr John Daniels who, in allegedly similar circumstances to the claimant's, was not dismissed?

5. Remedy for unfair dismissal

5.1 If the claimant's claim for unfair dismissal is upheld:

5.1.1 What is he entitled to by way of a basic award?

5.1.2 What financial compensation is just and equitable in all of the circumstances?

5.1.3 Has the claimant taken reasonable steps to mitigate his loss?

5.1.4 Should any compensation for unfair dismissal awarded be reduced applying Polkey v AE Dayton Services Ltd on the basis that the claimant might have been dismissed in any event if a fair procedure had been followed and, if so, what reduction is appropriate?

5.1.5 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to ERA s.122(2); and if so to what extent?

5.1.6 Did the claimant by blameworthy or culpable actions cause or contribute to his dismissal to any extent and, if so, by what proportion if at all would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA s.123(6).

5.2 Is the claimant entitled to any and, if so, what uplift of his compensation by reason of any failure to comply with the ACAS Code of Practice?

6. Wrongful dismissal/Breach of contract

6.1 It is not in dispute that the respondent dismissed the claimant without notice.

6.2 Unless the respondent had the right to dismiss the claimant summarily, the parties agree that the claimant was entitled to receive notice.

6.3 Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct?

6.4 If the respondent was not entitled to dismiss the claimant without notice, to what notice was he required and what is he entitled to by way of damages?

7. Holiday pay

7.1 If the claimant was wrongfully dismissed, how much holiday pay is the claimant entitled to for the holiday that would have accrued during his notice period?

8. Section 13 Direct discrimination because of race, Equality Act 2010

8.1 It is not in dispute that the respondent dismissed the claimant.

8.2 Was that treatment less favourable treatment and did the respondent treated the claimant less favourably than it treated a comparator, Mr John Daniels, in not materially different circumstances?

8.3 If so, was this because of the claimant's race?

9. Remedy for discrimination

9.1 If the claimant's race discrimination claim is upheld:

9.1.1 What is the claimant entitled to by way of compensation for injury to feelings?

9.1.2 What financial compensation is appropriate in all of the circumstances? It is noted that the claimant cannot recover twice for the same losses.

9.2 What recommendations, if any, should be made by the tribunal?"

Evidence

10. The tribunal heard evidence from the claimant who did not call any witnesses.

11. On behalf of the respondent, evidence was given by:

a. Ms Rebecca Foley, Director;

b. Mr Kenneth Twort, Managing Director and owner of the company; and;

c. Mr Desmond Kelly, former Transport and Yard Manager, now Director, who was the claimant's line manager.

12. In addition to the respondent's oral evidence from its witnesses, it invited the tribunal to give whatever weight we considered appropriate to the written statement of Mr Paul Ackland, former Compliance Manager, who has since left the respondent. This was objected to by the claimant who required Mr Ackland's attendance in order that he be cross-examined. The issue of Mr Ackland's evidence would be considered by the tribunal, should it be relevant.

13. In addition to the oral evidence, the parties produced a joint bundle of documents comprising of 253 pages. Where appropriate, the page references will be given.

Findings of fact

14. The respondent provides scaffolding, principally to the construction industry, from its premises at Edmonton and Fordham. It is a family run business with clients in London, South East England, and Cambridgeshire. It employs around 100 people.

15. We find that it is a high risk, safety critical business with workers being required to work 30 to 40 metres above the ground on scaffolds. In the yard

where the claimant worked, there were 22 lorries and a fork lift truck. There is a limited amount of space for the fork lift truck and the lorries to manoeuvre. Concentration when driving is critical. In addition, there were two circular saws, one for cutting wood and the other for cutting metal. A large amount of scaffolding is stored on site.

Substance Misuse Policy

16. Mr Kenneth Twort, Managing Director and owner of the company, told the tribunal that the genesis for the introduction and implementation of the respondent's Substance Misuse Policy came out of an incident involving one of its workers who was working on a Balfour Beatty contract in Kings Cross, London. He was tested positive for drugs. Mr Twort said that he was shocked when the news was relayed to him. He did engage in research and discovered that a lot of people took drugs while at work. A decision was then taken to introduce and implement a no drugs and alcohol policy. He gave staff six weeks' notice of the introduction of such a policy.

17. From the evidence given it appears that the policy was first introduced around 10 or 11 years ago. It is a zero tolerance drugs and alcohol policy. We were further told that the policy which applied in the claimant's case, was updated in May 2018. The old one being overwritten and there were no material changes made in the new policy.

18. In the existing policy, in paragraph 1.1, it states:

> "We are committed to providing a safe, healthy and productive working environment. This includes ensuring that all staff are fit to carry out their job safely and effectively in an environment which is free from alcohol and drug misuse. We operate a zero tolerance policy on drugs."

19. It then continues in paragraph 1.2:

> "The purpose of this policy is to increase awareness of the effects of alcohol and drug misuse and its likely symptoms and to ensure that:
>
> (a) all staff are aware of their responsibilities regarding alcohol and drug misuse and related problems
>
> (b) staff who have an alcohol or drug related problem are encouraged to seek help, in confidence, at an early stage
>
> (c) staff who have an alcohol or drug related problem affecting their work are dealt with sympathetically, fairly and consistently."

20. Of note is paragraph 1.3, states:

> "We will not accept staff arriving at work under the influence of alcohol or drugs, and/or whose ability to work is impaired in any way by reason of the consumption of alcohol or drugs, or who consume alcohol or take drugs (other than prescription or over the counter medication, as directed) on our premises."

21. The policy applies to all employees, officers, consultants, contractors, casual workers, and agency workers. It does not form part of the employee's contract of employment but may be amended at any time.

22. Under section 4, entitled "Alcohol and Drugs at Work" the following paragraphs are of relevance:

> "4.1 Alcohol and drugs can lead to reduced levels of attendance, reduce efficiency and performance, impaired judgment and decision-making and increased health and safety risks for you and other people. Irresponsible behaviour or the commission of offences resulting from the use of alcohol or drugs may damage our reputation and, as a result, our business.
>
> 4.2 You are expected to arrive at work to carry out your job and to be able to perform your duties safely without any limitations due to the use or after effects of alcohol or drugs. In this policy drug use includes the use of controlled drugs, psychoactive (or mind-altering) substances formerly known as "legal highs", and the misuse of prescribed or over the counter medication…
>
> 4.5 If you are prescribed medication you must seek advice from your GP or pharmacist about the possible effects on your ability to carry out your job and whether your duties should be modified or you should be temporarily re-assigned to a different role. If so, you must tell your line manager without delay. It is your responsibility to inform us of any medication you are prescribed so we can amend your duties if needed and so that we are aware already in relation to any random drug testing that may take place whilst you are on medication.
>
> 4.6 You should not take any prescription medication not intended for you."

23. In section 6, on drug screening, it states the following:

> "6.1 We will operate a rolling programme of random drug testing for all staff.
>
> 6.2 If you fail a random drug test, you will be called into the office for a second test with another person present from the office. If that test is also a fail then you will be suspended immediately on full pay pending further investigation and it is likely that we will then follow the disciplinary policy and procedure." (Paragraphs 73-77 of the bundle of documents)

24. The claimant commenced employment with the respondent on 4 April 2011 as yard staff. His duties included loading and unloading vehicles, operating a fork-lift truck and other machinery and equipment, as well as using the circular saws. Operating the respondent's fork-life truck and machinery requires a lot of concentration as fork-lift trucks can cause accidents within the workplace.

25. An article by the British Safety Council (BSC) on fork-lift truck accidents dated 26 September 2017, states:

> "The most recent accident statistics show fork-lifts are officially the most dangerous form of workplace transport in the country: injuring more people

> than heavy goods vehicles (HGV) or large goods vehicles (LGV). In fact, 25% of workplace transport injuries are a direct result of fork-lift truck accidents.
>
> Around 1,300 UK employees are hospitalised each year with serious injuries following fork-lift accidents, and that number is rising. That is five UK workers each workday suffering debilitating and life-changing injuries including complex fractures, dislocations, **…** and amputations." (98)

26. The respondent would randomly test its employees for drugs and alcohol, on average, twice a year but this could be more frequently. In the claimant's case, he said in one month he was tested three times and had been tested five times in a year. Up until the events of 23 April 2018, he passed all drug and alcohol tests.

The claimant's contractual provisions

27. He is African Caribbean, and his main work was driving the fork-lift truck to load and unload lorries. The most busiest times were in the mornings and in the evenings. He had a clean disciplinary record and told the tribunal that he was the only black person employed by the respondent during his employment but stated the position may have changed since he was dismissed.

28. In his contract of employment which he signed on 4 April 2011, he worked full-time Monday to Friday.

29. In relation to holidays, the provisions were under the Working Time Regulations 1998. His contract stated that he was entitled to eight bank holidays, three days shut down over the Christmas period, and 17 working days, 28 days in total. The holiday year ran from 1 January to 31 December. However, at the time of his dismissal, he was entitled for the year to 30 days' leave.

30. The contract also provided a non-exhaustive list of examples of gross misconduct. This includes:

> "Attendance at work whilst in possession of or under the influence of non-prescription drugs" (18.4(v)),
>
> "Attendance at work whilst under the influence of alcohol or other intoxicant or non-prescriptive drugs." (18.4(vi)) (63-72)

31. In the respondent's disciplinary policy, under gross misconduct, it states the following:

> "If, after investigation, it is confirmed that you have committed an offence which is deemed to be gross misconduct, the normal consequence will be summary dismissal without notice or payment in lieu of notice."

32. There is then the non-exhaustive list of examples of gross misconduct including attendance at work whilst in possession of or under the influence

of non-prescriptive drugs, and attendance at work whilst under the influence of alcohol or other intoxicant or non-prescriptive drugs. (79)

33. Where there is a disciplinary hearing, the outcome can be appealed in five working days. If the appeal relates to dismissal, dismissal is suspended pending the outcome of the appeal. It further states that the appeal hearing may be a complete re-hearing of the matter; or a review of the fairness of the original decision considering the procedure that was followed and any new information that may have come to light. What form the appeal should take is at the respondent's discretion depending on the circumstances of the case. (80)

The claimant's suspension

34. On Friday 20 April 2018, the claimant reported to Mr Desmond Kelly, Transport and Yard Manager at the time, that he was seeing images described as "floaters" in his eyes and had called an optician to make an appointment at approximately 1pm later in the day. Mr Kelly allowed him to go home. Following an examination at Edmonton Green, the optician referred him to North Middlesex Hospital. When he arrived at the hospital a few hours later, he was examined and referred to Moorfields Eye Hospital for an appointment at 10am the following day, Saturday 21 April.

35. On Saturday he had laser eye surgery and was sent home the same day. He said in evidence that on his journey back home he was experiencing an excruciating headache and severe back pain due to the long hours sitting in the waiting room prior to his surgery. When he arrived home in the afternoon, his condition had worsened. He had not been given any pain relief medication after his eye surgery. His partner offered him two pain relief tablets after he had told her that he was in pain. He said he took the medication which helped him a lot, however, before going to bed the pain returned, whereupon he asked for more medication and was given a further two tablets. He said that at that time his eyes were painful but after taking the medication the pain was greatly reduced. It did not occur to him to ask his partner what type of medication she had given him, and he had no knowledge of its chemical composition.

36. The following day, Sunday 22 April, he was feeling much better.

37. He returned to work on Monday 23 April. He told us that he did not receive a welcome back from the respondent. No-one asked about his health nor how he was feeling after his eye surgery. He said he sensed an uncomfortable, tense environment as the respondent was not happy with him taking time off.

38. After the morning break, Mr Paul Ackland, Compliance Manager, instructed all yard staff to have a routine drug test. Ten employees took the test including the claimant. They were required to complete a multiple drug/alcohol screening consent form, give their name, selection date, details of recent medication over the last two weeks, and their consent for urine

and saliva samples to be given to detect or monitor the presence of alcohol and drugs.

39. As in previous cases, the claimant did not read the consent form but provided a urine sample for Mr Ackland to test which was positive for drugs, the precise identification of the drug was not known at that time. The other employees who were tested proved negative for drugs and alcohol.

40. When the claimant attended work that morning, he did not tell neither Mr Kelly, his line manager, nor Mr Ackland, that he had taken painkillers over the weekend which may affect his performance at work. On the consent form, he did not provide any information about the pain relief medication that he had taken over the weekend.

41. In evidence he said that Mr Ackland told him the results, but at that point he did not tell Mr Ackland that he had recently taken pain relief medication. When Mr Ackland said to him that he had failed the test, his response was "You're crazy. How could I have failed? How could I have failed?". Mr Ackland told him to sit down. After he had finished with the other employees' tests, he invited the claimant to his office and asked him whether he had taken any drugs, to which the claimant replied by saying his partner had given him tablets. Mr Ackland then asked him to phone his partner to find out what they were. The claimant phoned his partner and she told him that it was Tramadol or Amitriptyline.

42. Mr Ackland asked the claimant who were the tablets prescribed for, to which he said, his partner.

43. There is no dispute that the claimant was tested positive for Tramadol and had taken 4 x 50mg tablets on Saturday 21 April (144).

44. Mr Ackland was initially unsure how to proceed as the respondent had not had anyone fail a drug test for Tramadol. He needed to check what to do next and instructed the claimant to return to his work area but not to operate any machinery or drive his fork-lift truck.

45. Mr Ackland then contacted Ms Rebecca Foley, Director, for advice as she oversaw human resources. Although she was on holiday at the time, she spoke to him. He informed her that the claimant had been tested positive for Tramadol. She decided to speak to Mr Kelly, the claimant's line manager, before deciding on what to do next. They decided that the claimant should be suspended and sent home pending an investigation. She then contacted Mr Ackland instructed him to send the claimant home.

46. Ms Foley said in evidence that a second test was not carried out that day as the claimant had admitted to taking Tramadol. A second test is usually carried out within a few hours to ensure the first test was not faulty but in the claimant's case that was irrelevant as he admitted taking the drug. She instructed Mr Ackland to tell him to come into the office the next day to write a statement. The next day she thought that in line with the respondent's

policy, a second test should be carried out although it was pointless given the claimant had already admitted to taking the drug he had failed on.

47. The claimant attended the respondent's office on 24 April 2018 and completed a statement. Thereafter, he took a second drug test which was negative.

48. In his statement he wrote the following:-

> "On Saturday I went and had my eyes lasered on the way back on the train I had a bad headache and my side was playing up and sitting down from 9.30 til 5.30 did not help at all. So by the time I got home both pain got worse. My missus said she has some painkillers so I took two of them and before I went to bed I took another two. I woke up on Sunday the pain was not as bad so I did not take any more. I came into work on Monday and failed a drug test because of it. I did not realise what I was doing or is that thinking what I was doing I just did not realise I've done anything wrong I just saw it as I had a pain and I took some painkiller for the pain. I did not look at the big picture. Now I know I could have hurt someone or myself. I am sorry for all the trouble it's caused and I will not be taking any painkillers again without doctor's orders or telling the company. I don't know what more to say than I'm very sorry. And it will not happen again. It was just the once as you can see from my other test." (146)

49. Ms Foley wrote to the claimant on 24 April and gave him by hand a letter explaining that he was suspended and would receive his basic salary. She made it clear it was not a disciplinary sanction. She stated that during the suspension the respondent would carry out a full investigation into the incident which would be carried out by Mr Kelly. Once the investigation was complete, he may be invited to attend a disciplinary hearing in accordance with the respondent's procedures. It may be completed by the end of the week. During his period of suspension, he was not permitted to attend any of the respondent's premises or contact its customers, clients, suppliers, or employees. (147-148)

50. Contrary to the claimant's assertion, it was Mr Kelly who conducted the investigation and not Ms Foley. Mr Kelly had taken the statement from the claimant in which the claimant admitted taking the four 50mgs of Tramadol medication which was not prescribed for him but for his partner.

Disciplinary hearing

51. On 24 April, the claimant was sent an email letter by Ms Foley inviting him to a disciplinary meeting on Friday 27 April, at 11am, at the respondent's Edmonton office. She wrote:

> "The purpose of the meeting is to consider your failed routine company drug test on Monday 23/4/18. I attach any statements and material I have received as part of the investigation process carried out for you to review prior to this meeting.
>
> If you have any information or documentation which you would like to be considered at the hearing, please provide this as soon as possible. If you do not have access to

documents that you consider to be relevant, please provide details so that they can be obtained.

The hearing will be held in accordance with the company's disciplinary and grievance procedure (a copy of which can be provided to you if you require).

If you are found guilty of misconduct we may decide to dismiss you with notice or pay in lieu of notice depending upon the nature of the misconduct or you may be issued with a first or final written warning. Please note that if you are found guilty of gross misconduct, you may be dismissed without notice or pay in lieu of notice.

The hearing will be conducted by Rebecca Foley. You are entitled to bring along a fellow employee or Trade Union representative to the meeting in accordance with our disciplinary procedure. If you wish to bring a companion please let me know their name as soon as possible."

52. At the end of the letter, the claimant was instructed to return any of the respondent's equipment in his possession. Should he be allowed to return to work following the hearing, the equipment would be handed back to him. She confirmed that his suspension was with pay pending the outcome of the disciplinary hearing (27, 149-150).

53. The disciplinary hearing was conducted by Ms Foley. Mr Stephen Ackland, the brother of Paul Ackland, was in attendance as note taker. The claimant attended but was unaccompanied. The hearing lasted, according to Ms Foley, about 30 minutes. The notes taken are very brief. The claimant was asked by Ms Foley if he had anything to say regarding the incident, to which he replied that he had taken the Tramadol given to him by a third party not really knowing what they were apart from them being painkillers for a pain he had. He said that this was the only time he had taken the medication, to which Ms Foley replied, "We could only take his word on that". She said it was his first drugs test that year and he replied that he had three drug tests late last year and they were all clear. Ms Foley then said that he had several incidents on the fork-lift truck which made the respondent wonder, whether it was the first time. The claimant said that had he realised that the medication would get him into so much trouble, he would not have taken them. Ms Foley then asked him whether he was aware that it was illegal to take Tramadol without it being prescribed to him. She further stated that there were warnings about the respondent's drugs test in its monthly newsletter, and what employees should do if they were on any kind of drug. He was then asked whether he had anything else he would like to say, to which he replied that the drugs were given to him by someone whom he trusted and he would never do it again. It was a bad mistake. He would like to apologise and asked for leniency. Ms Foley then told him that because it was a case of gross misconduct, he would need to clear all his personal items from the site if he was dismissed and would not be allowed back on site. (151)

54. Prior to the disciplinary hearing, we find as fact that Ms Foley, using the internet, had carried out a thorough investigation into Tramadol. She discovered that it is a Class C controlled drug, an opiate. Its side effects

could be dizziness, drowsiness, confusion, fainting, hallucinations, and fits. It was confirmed that it was illegal to take it without prescription in the United Kingdom.

55. She considered that the claimant had taken the drug as a painkiller but decided that his failing the drug test and having failed to inform Mr Kelly or anyone else that he had taken the drug over the weekend, amounted to gross misconduct under the respondent's Substance Misuse policy. It operates a zero tolerance policy to ensure the safety of and protection of its employees and third parties; to prevent damage to property and vehicles; and reliance is placed on its employees following the rules. The claimant operated heavy machinery, including a large circular saw and fork-lift truck, and worked in a dangerous environment. If he had an accident while under the influence of Tramadol, the consequences could have been serious resulting in a possible fatality or serious injury. He was well aware of the respondent's zero tolerance policy due to the monthly reminder in its newsletters.

56. She also considered the reputational damage and what repercussions there could be for the respondent if an employee fails a drug test. This can result in the respondent losing huge contracts; being fined by customers and/or the Health and Safety Executive; insurance being invalid; and action potentially being taken against its directors.

57. She wrote to the claimant on 30 April 2018, by email, informing him that it was her decision to terminate his employment summarily on grounds of gross misconduct. She stated that the reason for her decision was that he had failed a routine drug test. She informed him of his right of appeal to Mr Twort, which must be exercised by 8 May 2018. He would be paid his full pay until the day of notification of his dismissal which would be suspended pending the outcome of an appeal. (152)

58. The claimant was given a breakdown of his monetary entitlement by letter and by email on 30 April. It stated that he was not entitled to notice pay and that his holiday pay owed was two days which would be paid. (153)

59. We have seen the breakdown of the claimant's holiday entitlement and what was due and paid to him, namely two days. (154)

<u>The appeal against dismissal</u>

60. On 2 May 2018, the claimant appealed against the decision to dismissed him and stated that as he had passed the second drug test he should not have been dismissed; he had forgotten to inform the respondent that he had taken the drug due to the passage of time; he did not know the painkillers he was taking; his partner had offered them to him which he took without asking any questions, which was unusual for him because he did not like taking medication of any kind; that he had neither failed a drug test nor had he refused one; he had been working for the respondent for over seven years without any trouble; and he always did what was asked of him. He

then wrote: "So please can you reconsider my dismissal because of the nature of how the test showed positive?" (155)

61. By letter dated 4 May 2018, sent by email, the claimant was invited to an appeal hearing on Tuesday 8 May 2018 at 10am, before Mr Twort, Managing Director. He was advised of his right to be accompanied and about any documents he wished to refer to during the hearing. He was informed that there was no further right of appeal following Mr Twort's decision. (158)

62. The hearing went ahead on the scheduled date. In attendance were Mr Twort and the claimant. The claimant set out the circumstances leading up to taking the pain relief medication, Tramadol. He confirmed that he had taken on Saturday four tablets and felt groggy the following day, Sunday. He then described what happened on Monday when he returned to work. He did acknowledge that he did not inform Mr Ackland that he had taken painkillers. He referred to the fact that he passed the drug test the following day, 24 April, and that he would like his job back. He did not intend to be a danger to other people and did not know that it was still in his system. He said it was a mistake not to mention he had taken the painkillers on Saturday. (159)

63. On 11 May 2018, Mr Twort wrote to the claimant setting out his outcome decision. Amongst other things, he stated:

> "All of the evidence and representations made at the appeal hearing have been considered and I have decided to uphold the original decision to dismiss you without notice. Although you have given us reasons why you failed our routine company drug test, we have decided to hold fast to our company drug testing policy on this and treat this as gross misconduct. Our working environment is too dangerous to run the risk of anyone being here under the influence of drugs.
>
> This decision is final and you have no further right of appeal against it.
>
> A copy of the minutes of the appeal hearing are available should you wish to have a copy to keep." (160)

64. The claimant asserted that Mr Twort should not have conducted the appeal as he is the father of Ms Foley who took the decision to dismiss him, and it was highly likely that he would not overturn her decision.

65. Having heard the evidence given by both Ms Foley and by Mr Twort, we are satisfied that they are two independent individuals and, according to Mr Twort, on occasions they have not agreed. However, he said that in the three drug test appeals he chaired, he upheld the decisions of Ms Foley because he applied the respondent's zero tolerance policy. He also said that Ms Foley had been with the company for over twenty years, and he had not sought to influence any of her decisions.

66. We are further satisfied that Mr Twort conducted a re-hearing rather than a review to allow the claimant to put forward his case. Contrary to the

claimant's assertion, Mr Twort did not make his mind up before meeting him. He said in cross-examination, in answer to a question put to him by the claimant about the effects of mitigating factors such as length of service, clean disciplinary record as well as the fact that previously he tested negative, that it was a "big load to shift when looking at mitigation" set against the respondent's zero tolerance policy. Although not impossible, mitigating factors have got to be viewed in light of its policy.

Comparators

67. At the preliminary hearing held on 21 December 2018, the claimant said that in respect of his claim of inconsistent treatment, he would be comparing his treatment with that of Mr John Daniels. During the hearing and in paragraph 22 of his witness statement, in relation to the race discrimination claim, his comparator changed to Mr Graham Morris.

68. In the hearing the claimant also made reference to two other individuals, one of whom was Mr Nick Jones.

69. In the previous six years the respondent had four employees who failed a drug test. This included the claimant. The other three were white. They were all dismissed for gross misconduct for having failed the test. One of them was Mr Morris who had worked for the respondent for several years. Sometime after his dismissal he applied to the respondent, in writing, to be re-employed to which the respondent agreed. Another employee was dismissed in April 2017, but he did not later apply for his job back. In the case of Mr Jones, he was dismissed in November 2018 and applied in writing for his job back and was taken on on 14 May 2019, after a period of six months. (195-197)

70. Mr Jones had worked for the respondent for over twenty years and had a clean disciplinary record.

71. In Mr Daniels' case he had been, according to the respondent, tested about ten or eleven years ago, on site, but not on the respondent's premises. When he returned to the respondent's premises he was tested by the respondent and passed. He was allowed to return to work a few days later. Following his case, the respondent decided to implement its Substance Misuse Policy.

72. The claimant said that he was in employment at the time Mr Daniels failed the initial test and was present when he was due to take his second test. He gave a description of Mr Daniels being tall, slim with fair hair. The respondent, however, disagreed with the description and stated that he has brown hair. It appeared to the respondent that the claimant was confusing Mr Daniels with some other person.

73. We find that in Mr Daniels' case, after the first test, he did not admit to having taken a prohibited drug and had passed the second test. The respondent would have a much clearer recollection of Mr Daniels than the

claimant and we accept the evidence given that the claimant did not correctly described him.

74. We have concluded that Mr Daniels is not an appropriate comparator because, in the claimant's case, he, the claimant, had admitted to having taken Tramadol after he had been told about the positive outcome of the first test. The second test was of little evidential value. Mr Daniels did not admit to having taken any illicit drugs.

75. As found, Mr Morris and Mr Jones, as well as the other employee, were all dismissed, and several months later two of them re-applied, successfully, and got their jobs back. The claimant did not re-apply for his job although he made reference in the claim form to seeking reinstatement.

76. We are satisfied that the respondent regularly reminded its employees of its zero tolerance policy and the consequences should they fail a drug test. We are further satisfied that the claimant had a good relationship with both Ms Foley and Mr Twort. He told us that last Christmas, when he needed money, Ms Foley loaned him, on behalf of the respondent, £500 for him to repay through his wages. She also resolved a disagreement between him and Mr Kelly.

77. As already found, at the time of his dismissal, he was a third of the way through the holiday year. His full holiday entitlement was 30 days.

Submissions

78. We have considered the submissions by the claimant and by Mr Braier, counsel for the respondent. In summary, the claimant submits that Ms Foley should not have conducted the disciplinary hearing as she dealt with the investigation; that Mr Twort should not have dealt with the appeal because of his familial relationship with Ms Foley; that he passed the second drug test; he admitted his guilt; that the penalty of dismissal was too severe; he had been treated more severely than named individuals in similar circumstances; that he had not committed a fundamental breach of his contract of employment entitling the respondent to dismiss him summarily; and that the respondent had not paid him for outstanding holiday. Mr Braier submitted, in brief, that a fair procedure had been followed; the claimant admitted his guilt; the no drugs policy was applied; in a family run business it is difficult to avoid family members taking part in the disciplinary process; the appeal was reserved for Mr Twort as the most senior person in the company; dismissal fell within the range of reasonable responses as there had been no inconsistent treatment. The claimant was in fundamental breach of his contract of employment, in relation to the drugs policy, entitling the respondent to terminate his employment summarily without pay in lieu of notice. In addition, the claimant had been paid all his holiday entitlements. Moreover, it had not been shown that he was treated less favourable because of race or of his race. We do not repeat their submissions in detail herein having regard to rule 62(5) Employment

Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have taken into account the authorities referred to.

The law

79. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

80. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following must be established:

a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

b. Second whether that genuine belief was based on reasonable grounds,

c. Third, whether a reasonable investigation had been carried out,

81. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

82. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

83. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

84. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones

[1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

85. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

86. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

87. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

88. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

89. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, “It’s been a few months since I have been in this position with a man underneath me” was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

90. The level of inquiry the employer is required to conduct into the employee’s alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. “At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure

inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

91. In Hadjioannou-v-Coral Casinos Ltd [1981] IRLR 352, the EAT held, Waterhouse J,

> "We should add, however, as counsel has urged upon us, that industrial tribunal would be wise to scrutinise arguments based on disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from the proper consideration of the issues raised by section 53(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunal is to think that a tariff approach to industrial misconduct is appropriate. …"

92. In that case the EAT adopted counsel's argument that the disparity argument becomes more relevant "in truly parallel circumstances" where the claimant is dismissed and the other is given a lesser penalty.

93. In the case of Kuehne v and Nagel Ltd v Cosgrove UKEAT/0165/13, it was held that where an employer has a zero tolerance drugs policy, the reasonableness of the dismissal for gross misconduct for being in breach, has to take into account the safety critical reasons for the policy. In that case the claimant was dismissed for failing to pass a drugs test after having taken cannabis, was adjudged not to have been not unfairly dismissed, after 15 years' service and with a clean disciplinary record.

94. A wrongful dismissal claim is a common law action based on a breach of contract. It has to be established that the employer was in breach of the contract of employment by dismissing the claimant summarily. However, if it can be shown that the employee committed the misconduct in question thereby repudiated the contract of employment, the claim will fail, British Heart Foundation v Roy (debarred) [2015] UKEAT/0049/15, Langstaff J. It is for the tribunal to decide what happened and not the employer, Enable Home Support v Pearson UKEAT/0366/09.

95. As regards holiday pay under the Working Time Regulations 1998, regulation 14 provides that the worker's entitlement to holiday leave, is at date of termination and that they would be entitled to payment for any leave accrued but untaken by that date.

96. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

97. The protected characteristics are set out in section 4 EqA and includes race and sex.

98. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

99. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

100. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

101. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

102. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a

tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

103. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

104. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

105. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

106. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

107. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

108. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

109. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

Conclusion

Unfair dismissal

110. We are satisfied that the reason for the claimant's dismissal was that he had breached the respondent's Substance Misuse policy, in that, he had taken Tramadol and had not disclosed it to the respondent when he turned up for work on 23 April 2018. He also did not disclose to Mr Ackland prior to the drugs test, that he had taken prescribed medication over the weekend. The respondent has shown that the reason for his dismissal was conduct, which is a potentially fair reason. In respect of the fairness of the dismissal, section 98(4), the burden is neutral.

111. Had the respondent conducted a reasonable investigation into the claimant's conduct? Once the claimant had failed the drugs test, he was eventually sent home. Mr Kelly conducted a short investigation by taking your statement from the claimant. There were the results of the drug tests, the second one the claimant passed. The claimant was suspended on basic pay pending the outcome of the investigation.

112. He attended the disciplinary hearing conducted by Ms Foley during which he admitted to having taken a prescribed drug not meant for him. With that admission the scope of the investigation was limited, ILEA v Gravett.

113. The claimant appealed against the dismissal outcome, which was conducted by Mr Twort, as a rehearing. The claimant was able to put forward his case and matters relevant to mitigation. He argued for his job back.

114. We have come to the conclusion that the respondent had conducted a reasonable investigation, British Home stores v Burchell.

115. In relation to whether Ms Foley and Mr Twort had reasonable grounds for believing in the claimant's guilt? They had the results of the drugs test; his admission that he had taken 4 x 50mgs of Tramadol not prescribed for him; that he had not told his line manager when he returned to work on 23 April 2018, that he had taken the drug over the weekend; he also did not tell Mr Ackland prior to the drug test; the respondent has a zero tolerance substance abuse policy; and that Tramadol is a class C drug and to use it without a prescription, would be committing an offence as it is a strong painkiller that gives rise to side-effects, such as dizziness, drowsiness, fainting, hallucinations and fits. In addition, the claimant worked in a safety critical business with potentially dangerous vehicles and machinery.

116. There was no evidence that either Ms Kelly or Mr Twort, was motivated by any animosity or prejudice towards the claimant. They held a genuine belief, on reasonable grounds, in his guilt.

117. The zero tolerance Substance Misuse policy was first introduced when Mr Twort became aware of the prevalence of drug taking at work. Where the claimant worked there are a few lorries, circular saws, scaffolding and other materials in the yard. The claimant drove a forklift truck and under the influence of a non-prescribed drug, there remain the risk of damage or injury either to himself or others in this safety critical business. The scaffolders are required to work at heights where, if they are on drugs, can cause injury to themselves and others. The same applies to those who drive the respondent's vehicles including its forklift trucks. Hence the need for the policy.

118. It is for the employer to consider the seriousness of the conduct, Tayeh v Barchester Healthcare Ltd. For the reasons given in the above paragraph, the claimant's conduct was considered serious because of the potential risk of injury. Both Ms Foley and Mr Twort applied the policy in the claimant's case. They considered his length of service and clean disciplinary record but felt that there had been a serious breach of the policy. The application of which has been consistent, in that those who breached it were dismissed.

119. The claimant did not apply, in writing, for his job after six months, unlike those who were dismissed and later successfully applied, in writing, for re-engagement. We do not accept that the circumstances in which he compares himself with the formally dismissed employees, can be considered as "parallel", Hadjioannou-v-Coral Casinos Ltd.

120. We are satisfied that Mr Twort was completely independent of Ms Foley, although the relationship is one of father and daughter. We accept what Mr Twort told us, that they do sometimes disagree on certain issues. In rejecting the claimant's appeal, Mr Twort was applying the respondent's Substance Misuse policy and was not slavishly following Ms Foley's decision to dismiss the claimant. The appeal was a rehearing.

121. It is not our function to put ourselves in the position of the reasonable employer and we do not do so. While a reasonable employer may consider a sanction short of dismissal, another may dismiss. Dismissal fell within the range of reasonable responses, Bowater-v-Northwest London Hospitals NHS Trust and Newbound v Thames Water Utilities Ltd . Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

Wrongful dismissal

122. We have to consider the evidence and our findings of fact to determine whether the claimant had fundamentally breached the terms of his employment. We are satisfied that he had breached the respondent's policy, in that, he had taken a class C drug without it being prescribed to him. He did neither informed his line manager when he returned to work on 23 April 2018, nor did he inform Mr Ackland prior to taking the drug test; he took the pain killer tablets without enquiring what they were; and he admitted his guilt.

123. He attended work while under the influence of Tramadol. It is gross misconduct to attend "work whilst in possession of or under the influence of non-prescription drugs" (18.4(v)).

124. Having regard to our findings of fact, we have concluded that the respondent was entitled to treat the claimant's conduct as a fundamental breach of his contract of employment, entitling it to terminate his employment summarily. Accordingly, the claimant has not proved that he had been wrongfully dismissed by the respondent and this claim is dismissed, British Heart Foundation v Roy (debarred) and Enable Home Support v Pearson.

Holiday pay

125. We are satisfied that the claimant was paid his full entitlement to holiday pay, namely 10 days, upon termination of his employment. He had taken 8 days holiday with pay prior to his dismissal and was, therefore, entitled to 2 days holiday which was paid to him in his final pay. This claim is not well-founded and is dismissed.

Direct race discrimination

126. It is for the claimant to show that he has been treated less favourably because of race or his race, section 136 Equality Act 2010, Madarassy.

127. He compares himself with Mr Daniels, who is white. However, as already found, there are differences between the two cases. Firstly, we accept that Mr Daniels' case predates the introduction of the respondent's Substance Misuse policy. It follows that the policy could not have applied to him. Secondly, Mr Daniels was tested on site where he was working at the time by a third-party and not by the respondent. Thirdly, unlike the claimant, Mr Daniels did not admit to having taken any proscribed drugs.

128. We have come to the conclusion that Mr Daniels is not an appropriate comparator as his circumstances were materially different from those of the claimant's. A hypothetical white employee of the respondent who had admitted to having taken a drug not prescribed for them and is a class C drug, would have been dismissed notwithstanding the fact that a second drug test was negative, as the respondent would have applied its zero tolerance Substance Misuse policy.

129. Reference was made to Mr Graham Morris who worked for the respondent for several years and had breached the Substance Misuse policy. He is white and notwithstanding his length of service, he was dismissed. He later after his dismissal successfully applied, in writing, for re-engagement. He is not an appropriate comparator as he was treated in the same way as the claimant. The claimant did not apply, in writing, or at any time prior to the presentation of his claim form, for re-engagement.

130. The decision-makers, Ms Foley, and Mr Twort, both had good personal and work relationships with the claimant. The claimant had not shown that their decisions were motivated in a negative way by his race or race. In fact, he had an understanding and sympathetic approach from Ms Foley, who, when he requested financial assistance over the previous Christmas period, she obliged by lending him £500 as he had requested.

131. The other individuals to whom the claimant referred, were white and were dismissed for having taken proscribed drugs.

131. We have concluded that the burden had not shifted to the respondent for a non-discriminatory explanation, section 136(3) Equality Act 2010. Accordingly, the claimant's direct race discrimination claim is not well-founded and is dismissed.

132. The provisional remedy hearing listed on 10 June 2021 is, hereby, vacated.

_____
Employment Judge Bedeau

28 April 2021
Date: ……..

Sent to the parties on: .10 May 2021...

.....GDJ.....
For the Tribunal Office