EMPLOYMENT TRIBUNALS

Claimant: Mr H Basson

Respondent: Strong Services Ltd

Heard at: **London Central Employment Tribunal**

On: **16-18 March 2021 and 12 April 2021**

Before: **Employment Judge Gordon Walker**

Representation

Claimant: Mr Baker, counsel (16-18 March 2021)
Ms Veale, counsel (12 April 2021)

Respondent: Mr Caunce

JUDGMENT

1. The Respondent's application to strike out the claim is dismissed;
2. The claim of unfair dismissal is well founded;
3. The Respondent is ordered to pay the Claimant £38,500, made up of:
    a. Basic award: £2,100;
    b. Compensatory award: £36,400.
4. The Claimant's application for the Respondent to pay a financial penalty pursuant to Employment Tribunals Act 1996 section 12A is dismissed.

REASONS

Introduction

1. The Respondent is an electrical and telecommunications company. The Claimant was employed by the Respondent from 17 June 2015, until his employment was terminated with notice by letter dated 13 May 2019.

2. Following a period of ACAS early conciliation from 9-29 August 2019, on 22 September 2019, the Claimant presented a claim of unfair dismissal, contrary to section 94 Employment Rights Act 1996 ("ERA"). The Respondent contested the claim, maintaining that the Claimant had been fairly dismissed on grounds of conduct, capability or due to a statutory ban.

3. The hearing was heard remotely on 16-18 March 2021 and 12 April 2021. The parties did not object to the case being heard remotely. The form of remote hearing was video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

4. I heard evidence and submissions on liability and remedy on 16-18 March 2021. I gave my judgment on liability and remedy, with reasons, at a hearing on 12 April 2021. The parties subsequently requested written reasons.

5. The Claimant was represented by Mr Baker of counsel on 16-18 March 2021, and Ms Veale of counsel on 12 April 2021. The Respondent was represented by Mr Caunce, who, although not a legal representative, described himself as having experience of the legal process.

6. The matter has been listed for a further hearing to determine the Claimant's costs application. The parties will be notified separately of this.

Claims and issues

7. A preliminary hearing was held before Employment Judge Nicolle on 8 June 2020. The issues between the parties were agreed and recorded at paragraph 7 of Employment Judge Nicolle's order.

8. At the hearing, Mr Caunce clarified that the statutory ban relied upon by the Respondent was that contained in section 27 of the Transport and Works Act 1992.

Procedure, documents and evidence heard

9. I heard evidence from ten witnesses, all of whom produced a written witness statement.

10. On behalf of the Claimant, in addition to himself, I heard from his brother (Johan Basson) mother (Leonie Goddard) and stepfather (Michael Goddard).

11. On behalf of the Respondent, I heard evidence from five of their employees or directors (Dan Woolnough; Rob Ridley; Regina Ridley; Paula Roberts and Roxanne Walsh). I also heard evidence from Robert Jamieson, an employee of Cubic Transportations Systems Ltd, a First-Tier contractor of Network Rail who sub-contracted the Respondent to perform certain telecommunications installation tasks for Network Rail.

12. The parties produced an agreed bundle of 462 pages. The Claimant produced a further document (a written statement of employment dated May 2019) that the Respondent had declined to include in the bundle.

13. The parties each produced their own cast list, chronology and written opening submissions. The Respondent also provided a recommended reading list. The parties gave closing submissions on 18 March 2021. Mr Baker produced a written closing, which he supplemented orally. Mr Caunce made oral closing submissions.

14. At the hearing on 12 April 2021, Ms Veale made an application for costs (pursuant to Rule 76(1)(a)-(b) of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013) and oral submissions on the application of the statutory cap on unfair dismissal awards (pursuant to section 124 ERA). Mr Caunce made submissions in response point in writing. I have incorporated within my reasons below my determination of the section 124 ERA issue. The matter has been listed for a further hearing to determine the costs application.

Applications: to strike out the claim and to amend the claim

15. I heard and determined two applications on 16 March 2021.

16. At the outset of the hearing, I head the Respondent's application to strike out the claim. I dismissed the application as I found that there were crucial and central facts in dispute, most notably in relation to the 1 April 2019 conversation. This was a key issue in the case on which the parties held diametrically opposed views. In reaching my decision I had regard to the legal authorities namely: ***Balls v Downham Market High School and College*** 2011 IRLR 217; ***Ezsias v North Glamorgan NHS Trust*** 2007 ICR 1126; ***Tayside Public Transport Co Ltd v Reilly*** [2012] IRLR 755; ***Sajid v Bond Adams LLP Solicitors*** UKEAT0196/15. I rejected the Respondent's submission that the claim had been presented out of time. The pleaded case for both parties was that the effective date of termination was 13 May 2019. Having regard to the ACAS conciliation and the statutory time limits at section.111(2)-(2A) ERA, I found that the claim had been presented in time.

17. Later on the first day, but before the witness evidence had commenced, I heard an application from the Claimant to amend the claim to assert that the effective date of termination was not 13 May 2019 as pleaded, but was six weeks after the date when notice was given. There was a factual issue between the parties as to when notice was given. I allowed the amendment, having regard to principles set out in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. The amendment was a minor one and the Respondent stated they were not prejudiced by it. The termination letter stated that the six week notice period would commence on 13 May 2019, which was consistent with the Claimant's amended case. It therefore appeared that the Claimant's amended case had merit. If the Claimant was not permitted to amend his claim, and was then successful, the level of his basic award would be reduced. I therefore found that the balance of hardship fell in favour of granting the amendment.

Findings of fact

The parties

18. The Respondent is an electrical and telecommunications company specialising in electrical and telecommunications installation for London Underground and Network Rail.

19. The Claimant is a South African citizen. He was employed by the Respondent pursuant to a Tier 2 General Migrant Visa. This means that his immigration status, and that of his family, is dependent upon him being sponsored by a specific UK employer. The Respondent sponsored the Claimant to work for them as an electrical and telecommunications installation expert. He was initially employed by Transcomm Services Ltd. From November 2015 he was employed by the Respondent. It is not in dispute that he has continuity of employment with the Respondent from 17 June 2015.

20. The Claimant was employed as an electrical and telecommunications installation expert to perform services for Transport for London and Network Rail. His work was highly regarded by the Respondent, and by his line manager Dan Woolnough.

Policies and procedures

21. The Respondent has a drugs and alcohol policy and procedure dated November 2016. On 17 June 2015 the Claimant signed a document to confirm that he had read, understood, and would conform to the Transcomm policy, which I was not provided with. Pursuant to the Respondent's policy:

    a. The responsibilities on employees included:

        i. Not to consume alcohol and drugs eight hours before going on duty;
        ii. To report prescription or over the counter medication to the project manager, who would then contact the approved Medication Advice Centre to determine if the medication or drugs could affect the person's ability to undertake their work;

iii. To ascertain whether there would be any side effects which may affect work performance as a result of taking medication, by informing their line manager before they commenced work. Work is defined as when a person is being paid and is "on duty" including periods of paid "on call" duties.

b. The disciplinary penalties and/or procedures are set out as follows:

i. To report for work under the influence of drugs and alcohol will lead to instant dismissal;
ii. Refusal to take an alcohol or drugs test shall be regarded as gross misconduct;
iii. The disciplinary procedure is referred to in the drugs and alcohol policy. I take this to mean that the disciplinary procedure will be applied in circumstances of disciplinary action arising from breach of the drugs and alcohol procedure.

22. The Respondent's disciplinary policy dated November 2016 sets out the process that will be followed by the Respondent in circumstances of employee misconduct. This dictates that a formal investigation should be conducted, and an investigation report prepared. In most circumstances it will be appropriate to set up an investigatory hearing at which full presentation of the facts will be given and the opportunity will be afforded to the employee to state his side of the case. A decision will then be reached as to whether to proceed with a disciplinary hearing or to take no further action. A disciplinary hearing may follow on immediately from the investigation hearing if certain criteria have been met. These criteria include a requirement to inform the employee in advance by letter, to tell him of the nature of the complaint, and to produce all of the facts. Every employee is afforded the right to appeal the outcome of a disciplinary hearing.

23. The Claimant was required to hold a Sentinel card in order to work on the railways and on London Underground. This is a smartcard signifying, amongst other things, that the contractor has complied with all necessary health and safety requirements to carry out safety critical work. On 1 December 2016 the Claimant and the Respondent signed a document entitled Contract of Sponsorship, pursuant to the Sentinel Scheme Rules, which set out various

obligations on the parties in respect of the Sentinel scheme. The Contract of Sponsorship states that, before de-sponsoring a contractor for breach of the Sentinel Scheme Rules, the company will investigate the suspected breach, maintain records, and request a formal review where a scheme outcome is recommenced following a local investigation. Pursuant to the terms of this document, the Respondent was required to provide a reason for de-sponsoring the Claimant. Mr Ridley explained, and I accept, that non-compliance with the Sentinel scheme could have put the Respondent's contract with Network Rail at risk. Given the importance of this client to the Respondent, he explained that this would have been a *"big risk"* to the Respondent.

24. I was taken to the drugs and alcohol procedures of Network Rail. These provide, so far as relevant:

    a. Contractors who fail a drugs and alcohol test shall have any Sentinel card issued cancelled and returned to Network Rail immediately;

    b. Test results shall be notified to managers of the Sentinel scheme and recorded on the Sentinel database;

    c. The person taking a drugs and alcohol test (the donor) shall be asked by the person administering the test (the collection officer) to declare any medication they are taking or have taken in the past two weeks. If the laboratory result reveals the presence of a drug consistent with the declared and acceptable medication, this shall be recorded as a negative and pass result, providing the medical review officer is satisfied that there is a legitimate medical need for the quantity of substance used. The medical review officer shall advise the employer of the relevance of the donor's medication or medical condition to their fitness to work.

Contract of employment

25. The Claimant was employed under a contract of employment signed on 3 April 2017. The parties agree that the Respondent sent the Claimant a new draft contract on or around 9 May 2019. The job title for the Claimant as stated in both contracts was Telecommunications Engineer. There was no clause in the

Claimant's contract of employment to permit the Respondent to make a payment in lieu of notice.

The Claimant's use of painkilling medication

26. The Claimant was absent from work from February to November 2018 with back and neck pain. The Claimant's GP records show that he was prescribed strong painkilling medication during this period.

27. The GP records also show that the Claimant was prescribed such medication at the end of April 2019, the beginning of May 2019, and in July 2019. The Claimant's evidence was that he did not always pick up his prescriptions, and, in any event, he did not take this medication when he was working, but rather at weekends.

28. The Respondent asserted that the Claimant's evidence was inconsistent with a letter from his solicitors dated 12 May 2020. Within that letter, and in answer to the Respondent's questions regarding the Claimant's use of painkilling medication, the Claimant made reference to prescription medication and stated that *"depending on the severity of the pain and discomfort, [the Claimant] may take [the prescribed medication] daily but usually at a maximum of 2 Co-Codamols twice per day, and, very rarely, 3 times per day"*.

29. I accept the Claimant's evidence that he did not take prescription medication whilst he was working, because:

    a. The Claimant's GP records show that he was prescribed medication in 2018 and after 1 April 2019. These were periods of time when he was not at work. He was absent in 2018 with neck and back pain. As explained below, following the events of 1 April 2019, he was not given any more work by the Respondent;

    b. I do not find that the letter from the solicitors is inconsistent with this, because it does not state which time period it is referring to.

30. It is not in dispute that the Claimant took over the counter co-codamol medication after his return to work from long term sickness absence on 12 November 2018, but before the telephone conversation of 1 April 2019. His

position is that he only took this when he was off work, and that he disclosed this orally to Mr Woolnough.

31. I accept the evidence of the Claimant that he only took the co-codamol during periods when he was not working, as his evidence on this point was credible and was not challenged. The Claimant came across as a conscientious employee who took his health and safety duties seriously.

32. However, I find that the Claimant did not bring this to the attention to Mr Woolnough. Perhaps, because he believed that he did not need to do so if he was taking non-prescription medication whilst he was off duty. I have reached this conclusion because:

    a. This point was not put to Mr Woolnough in cross examination, and Mr Woolnough's evidence on this was unchallenged. Mr Woolnough's evidence was that at no stage prior to 1 April 2019 did the Claimant inform him that he was taking any medication or substances that would result in him failing a drugs and alcohol test;

    b. If this had been disclosed, pursuant to the Respondent's policy, the Respondent would have contacted the Medical Advice Centre, which they did not do. Whilst the Respondent did not always follow their written policies (I shall go on to discuss their disregard for the disciplinary policy), given the importance of this issue to health and safety, and therefore their contract with Network Rail, I find that this omission is supportive of the Respondent's case on this point.

33. I therefore find that the Claimant breached the Respondent's drugs and alcohol policy by failing to disclose his over the counter co-codamol medication to the Respondent prior to 1 April 2019.

November 2018 to March 2019

34. The Claimant's first shift after he returned from long term sickness absence was on 25 November 2018.

35. At no point between November 2018 to March 2019 did the Respondent request any information from the Claimant about his use of painkilling medication.

36. The Claimant worked just 22 shifts over the next four months. He did not work at all in January and February 2019.

1 April 2019 conversation

37. On 1 April 2019 Mr Woolnough telephoned the Claimant at home to arrange a drugs and alcohol test. During that conversation, the Claimant disclosed that he had taken over the counter co-codamol.

38. The Respondent's case is that the Claimant informed Mr Woolnough that he could not undertake the drugs and alcohol test, as he would fail the test since he had taken co-codamol. The Respondent treated this as a refusal to attend, which they deemed to be an automatic failure of the test. The Claimant was therefore immediately stood down from duties.

39. The Claimant's case is that he informed Mr Woolnough that he could come for the test, but that he would like to speak to his GP first about the effects of the co-codamol. He then telephoned his GP who informed him that the co-codamol would be out of his system within 48 hours. He called Mr Woolnough back and relayed this information, but he was told by Mr Woolnough that, as there was no work lined up for him, there was no need for him to attend the test.

40. I prefer and accept the Claimant's evidence regarding the 1 April 2019 conversation. I prefer the Claimant's evidence because I find that the Respondent's subsequent actions are inconsistent with the Respondent's account of the 1 April 2019 conversation, specifically:

    a. The Respondent did not invoke its disciplinary policy, or immediately move to dismiss the Claimant. This is notwithstanding that their drugs and alcohol policy dictated that a refusal to take the test was a gross misconduct offence, to which the disciplinary procedure would apply;

b. Contrary to their own contractual obligations, and notwithstanding the importance of their contractual relationship with Network Rail, the Respondent did not disclose this to Network Rail.

41. I have also taken into account Mr Woolnough's evidence under cross examination, which is also at odds with the Respondent's account. I accept Mr Woolnough's evidence that he did not book a drugs and alcohol test for the Claimant on 1 April 2019, but merely rang the Claimant with the intention of booking it 36-48 hours later. This is somewhat inconsistent with the Respondent's account of the 1 April 2019 conversation, because:

a. The Claimant could not have refused to take a test, if it was not booked;

b. It is unlikely that the Claimant would have said or believed that he was bound to fail the test, given that the co-codamol would probably have left his system before the test was undertaken.

Revocation of Sentinel Licence

42. The Respondent's case is that they cancelled the Claimant's sentinel licence on 7 April 2019. The Respondent has produced a printout from the Sentinel website, which shows the Claimant's status as *"operational"*, and that he was last sponsored on 7 April 2019. I heard no evidence as to what *"operational"* or *"last sponsored"* meant. I do not know how, or if, this relates to the cancellation of the licence. The Respondent has also produced a reporting form, the authenticity of which the Claimant questions, as he did not see this before the disclosure process for this litigation. The reporting form states that the Claimant was removed from the Sentinel database on 7 April 2019. But it also states that the Respondent took the decision not to report the Claimant to Sentinel. Both of these documents contain statements that appear on the face of it to be contradictory, namely: "*operational"* versus *"last sponsored"* (in the sentinel website printout), and *"removed from database"* versus *"not report"* (in the reporting form).

43. I do not accept that the Respondent formally cancelled the Claimant's licence on 7 April 2019. I have reached this conclusion because:

a. I have seen no conclusive or clear evidence that they did so;

b. Pursuant to the Contract of Sponsorship, the Respondent was required to carry out various steps before de-sponsoring the Claimant, including a local investigation and formal review. The Respondent did not do this;

c. The Respondent's reporting form states that they did not report the Claimant to Sentinel;

d. The Respondent failed to notify Network Rail of the cancellation;

e. A month later, the Respondent produced a draft contract which gave the Claimant the job title of Telecommunications Engineer, a role that he could not have performed if his Sentinel licence had been cancelled.

44. Given the importance of the Network Rail contract to the Respondent, I find that, if the Claimant had refused to undertake the drugs and alcohol test, as alleged, the Respondent would have complied with its obligations to Network Rail. I do not accept Mr Ridley's explanation for this omission, namely that they were trying to protect the Claimant given his immigration status. Mr Ridley stated that the Claimant was not a friend. I find that it is inconceivable that Mr Ridley would have taken such a risk on the part of the company, for an employee who, on the Respondent's case, was guilty of gross misconduct.

8 April 2019 meeting

45. The parties agree that there was a meeting by telephone on 8 April 2019 attended by Mr Ridley, Mr Woolnough, the Claimant and Johan Basson, and that, during the course of that meeting, there was a discussion about health and safety training work, that being the line of work that Johan Basson was involved in.

46. The Claimant's case is that the meeting was purely for the purpose of the Respondent's business development into the area of health and safety, and that there was no discussion about the events of 1 April 2019, the cancellation of the Claimant's sentinel licence, or indeed any allegation of misconduct against the Claimant. The evidence of Johan Basson was that, whilst there was some general discussion about the Claimant potentially performing health and safety work, the Respondent did not make it clear to the Claimant that he should

retrain in this field, or agree to fund the cost of such training, which would have been in the region of £1,500 to £2,000.

47. The Respondent's case as presented in Mr Woolnough and Mr Ridley's witness statements, was that this was a disciplinary meeting. Johan Basson attended as the Claimant's companion. The Respondent asserts that (1) there was no dispute from the Claimant at the meeting that he had refused to attend the drugs and alcohol test; (2) they informed the Claimant that his Sentinel licence had been cancelled and that he could therefore no longer be employed in his current role; and (3) they discussed and agreed that an alternative role would be for the Claimant to re-train in the field of health and safety, so that the Respondent could continue with his immigration sponsorship.

48. I accept the Claimant's case regarding the 8 April 2019 meeting, as the Respondent's case is inconsistent with:

    a. Their pleaded case. The April meeting is therein referred to as a telephone conference to discuss the Claimant retraining as a Health and Safety instructor. This is broadly consistent with the Claimant's case, albeit that the Claimant's case is that health and safety was discussed in general, rather than in the context of his own redeployment. The Respondent does not describe the meeting as a disciplinary hearing, or suggest that there was any discussion of the alleged misconduct or the cancellation of the Sentinel licence;

    b. Their own disciplinary procedure. No prior formal investigation was carried out, report produced, or meeting held. The Claimant was not told in advance of the nature of the complaint or given any letter inviting him to the hearing and informing of his right to representation;

    c. Their own allegedly contemporaneous documents. In addition to the reporting form, the Respondent disclosed minutes from a monthly team meeting of 30 April 2019. Again, the Claimant questions the authenticity of this document. The team minutes and the reporting form do not describe the meeting as a disciplinary hearing. The notes are consistent with the Respondent's pleaded case;

d. Their subsequent actions. If this was a disciplinary meeting where a decision was reached that the Claimant would retrain in health and safety, the Respondent would be expected to provide an outcome letter explaining that. Further, the subsequent production of the draft contract of employment with the job title of Telecommunications Engineer is inconsistent with the Respondent's case.

49. Mr Woolnough stated in evidence that the meeting was informal. I do not accept that the Respondent would have held an informal disciplinary meeting, because this would have been inconsistent with their disciplinary procedure, particularly given the severity of the alleged misconduct.

3 May 2019 conversation

50. The parties agree that by 3 May 2019 the Claimant had not been paid his April 2019 wages. Pursuant to his contract of employment, these fell due on 26 April 2019.

51. It is common ground that the Claimant had a telephone conversation with Mr Ridley on 3 May 2019 regarding his unpaid wages. Under cross examination the Claimant explained, and I accept, that Mr Ridley stated during this conversation: *"no work, no pay"*. I take this statement to mean that Mr Ridley had formed the belief that he did not need to pay the Claimant if he was not working.

Professional advice to Mr Ridley

52. The Respondent disclosed an email chain between Mr Ridley and his accountants dated 15 April 2019. The original request for advice was not disclosed. There is no mention in this email chain of the events of 1 April 2019 or the alleged cancellation of the Sentinel licence. In his reply of 15 April 2019, Mr Ridley explains that his intention is for the Claimant to retrain in health and safety. He states that he cannot afford to pay the Claimant until the Respondent is offering those courses, but that the Respondent intends to *"keep him on the books"* for the next couple of months until he is trained. As stated above, the Respondent did not pay the Claimant his wages when they fell due on 26 April 2019. On the basis of this email chain and the delay in paying the Claimant his wages, I find that Mr Ridley believed that he could "*keep the Claimant on the*

books" without paying him i.e. he believed that he only needed to pay the Claimant for the work that he performed for the Respondent.

53. The evidence of Mr Ridley, which I accept, was that he sought legal advice in response to the Claimant's assertion on 5 May 2019 that the Respondent owed him for April's wages. The advice Mr Ridley received was that the Claimant was not on a zero hours contract but remained on the books as a salaried employee.

54. Thereafter, on 9 May 2019, almost two weeks late, the Claimant was paid for his April 2019 wages.

55. I find that, prior to seeking legal advice on 7 May 2019, the Respondent believed that the Claimant was on a zero hours contract and that they therefore did not need to pay him when he was not working. I have reached this conclusion because it is consistent with Mr Ridley's statement on 5 May 2019 *"no work no pay"*, Mr Ridley's evidence as to the content of the advice he procured, and the delay in paying the Claimant his wages for April 2019.

Decision to dismiss

56. Mr Ridley's oral evidence was that the decision to dismiss was a collective decision between himself and Mr Woolnough. That decision was based on the advice he was given on or around 7 May 2019. This evidence was consistent with the Respondent's pleaded case, and also their reporting form which stated that, on 7 May 2019, Mr Ridley sought legal advice and terminated the Claimant's employment.

57. Mr Ridley also explained that the reason for dismissal was because the Claimant had not taken active steps to undertake health and safety training, which he believed was agreed following the 8 April 2019 conversation. He stated that, if the Claimant had retrained, he would have continued to employee him. Mr Ridley stated in evidence that the outcome would have been different if a different process had been followed: if the Claimant had undergone the test and passed, he would have remained employed.

Termination letter

58. The Claimant was dismissed by letter dated 13 May 2019.

59. Although the letter refers to a tele-con, it is common ground that there was no further meeting or disciplinary hearing convened before issuing the letter.

60. The stated reason for termination in the letter was that the Claimant was medically unfit to carry out the job he was employed to do. Mr Woolnough explained in cross examination that this was a reference to the fact that the Clamant had informed him that his stepfather had had to drive him to site. The Respondent did not seek any medical opinion on the Claimant's fitness to work.

61. The termination letter also refers to the events of 1 April 2019 but does not categorise these as misconduct or gross misconduct.

62. The letter informed the Claimant that his six-week notice period would commence on 13 May 2019. The Claimant's notice payment was not described as a payment in lieu of notice. The Claimant's notice was paid in instalments on 9 May 2019 (for the April 2019 payroll) and then at the end of May and June 2019.

63. I accept the Respondent's evidence that they sent the termination letter by post. I also accept the Claimant's evidence that he did not receive the letter in the post. I accept the Claimant's evidence that he did not read the email containing the termination letter (which was sent on 14 May 2019) until June 2019. The Claimant thinks that he overlooked the email due to his dyslexia, which I accept.

Job search

64. The Claimant has not found alternative work. I accept the Claimant's evidence on this point. I find that he contacted agencies to look for sponsorship and work, as well as contacting some of the key players in the industry. The Claimant has faced particular difficulties in his job search as he requires a potential employer to sponsor him under a Tier 2 Visa, which is an expensive and lengthy process. He has instructed solicitors (Healy's LLP) to assist him with his immigration issues. Healy's LLP provided a letter and email to the Tribunal for the purposes of this litigation. These documents explain, and I

accept, the difficulties the Claimant has experienced in obtaining employment, given his immigration status.

The law

65. When a contract of employment is terminated by notice, the effective date of termination is the date on which the notice expires section.97(1)(a) and section.145(2)(a) ERA. Notice is not effective until the employee has read the letter containing the notice or had a reasonable opportunity to do so: ***Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust*** [2018] ICR 882.

66. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

67. Section 98 ERA provides so far as relevant:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> *(b) relates to the conduct of the employee;*
> *…*
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
> *….*
>
> *(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

68. The burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2) ERA. As noted in ***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323, the reason for dismissal is the:

'... set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'

69. As per the guidance in ***Burchell v British Home Stores*** [1980] ICR 303 there are three questions for the Tribunal to consider when assessing if conduct was the reason for dismissal, and, if so, the reasonableness of that dismissal.

(1) Did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?

(2) Did the Respondent hold that belief on reasonable grounds?

(3) Did the Respondent carry out a proper and adequate investigation?

70. In cases of dismissal arising from long-term sickness absence, there are three main issues for the Tribunal to consider when assessing fairness, as summarised in the case of ***BS v Dundee City Council*** [2014] IRLR 131:

a. Whether it was reasonable for the employer to wait any longer;
b. Whether the employer reasonably consulted with the employee;
c. Whether the employer obtained medical advice on the employee's position and prognosis.

71. In cases of statutory ban, the employer must show that continued employment of the employee does in fact contravene a statutory enactment. It is not enough to show a genuine belief on reasonable grounds and after reasonable investigation that there would be such a contravention: ***Bouchaala v Trusthouse Forte Hotels Ltd*** [1980] ICR 721. If the employer does this, a

Tribunal must then decide whether it was reasonable to dismiss for this reason under section 98(4) ERA.

72. The range of reasonable responses test applies to all of the procedural and substantive aspects of the decision to dismiss an employee. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. In ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, Elias LJ (at paras 16–17) held:

> *'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'*

73. In reaching my decision, I must take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), the Code is admissible in evidence and, if any provision of the Code appears to me to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not in itself render him liable to any proceedings. However, I can adjust the value of the compensatory award for an unreasonable failure to apply with the code. The level of adjustment is that which I consider to be just and equitable, up to a maximum of 25%.

74. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in my view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (***British Leyland (UK) Ltd v Swift*** [1981] IRLR 91).

75. Turning to remedy, the general principles regarding mitigation of loss were summarised in ***Cooper Contracting Ltd v Lindsey*** UKEAT/0184/15. The main points are as follows:

a. The burden of proof regarding a failure to mitigate is on the employer;

b. Responsibility for providing the relevant information belongs to the employer;

c. The employer must prove that the claimant has acted unreasonably;

d. The tribunal should not apply a standard to the claimant that is too demanding.

76. General guidance on *Polkey* reductions was provided in ***Software 2000 LTd v Andrews*** [2007] ICR 825, to which I have had regard.

77. The basic award can be reduced on grounds of the Claimant's culpable and blameworthy conduct, if I consider it just and equitable to do so. The compensatory award can similarly be reduced. However, in order for a deduction to be made to the compensatory award for contributory fault, a causal link between the employee's conduct and the dismissal must be shown. This means that the employer must have dismissed the employee at least partly in consequence of that conduct.

78. In reaching my decision, I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

Conclusions on liability

Reason or principal reason for dismissal

Capability

79. Although the letter of termination refers to capability, I do not find that this was a reason or principal reason for dismissal.

80. I do not accept that the Respondent had a genuine belief in the alleged incapability, or that this was based on reasonable grounds or reasonable investigation. I have reached this conclusion because:

a. In evidence, Mr Ridely explained the reason for dismissal. He did not refer to the Claimant's incapability at all;

b. The only evidence from the Respondent on this point was Mr Woolnough's statement under cross examination that the Respondent was referring to the Claimant's stepfather needing to drive him to work. However this point was never discussed with the Claimant, and it is not mentioned in the Reporting Form or team meeting minutes, which the Respondent asserts are contemporaneous documents;

c. No medical opinion was sought or obtained.

Conduct

81. I do not accept that the Respondent had a genuine belief in the alleged misconduct, namely the Claimant's refusal to take a drugs and alcohol test. The Respondent may have formed some erroneous belief in the misconduct, but that was not based on reasonable grounds or on a reasonable investigation. I have reached this conclusion because:

    a. I accept the Claimant's account of the 1 April 2019 conversation;

    b. Even if the Respondent's account of the conversation were correct, that does not necessarily amount to a refusal or failure to take or pass the test:

        i. As already stated, given that the Respondent did not actually book the Claimant a test, he did not technically refuse it;

        ii. Pursuant to the Network Rail drugs and alcohol procedure, it is permissible to declare medication even at the point of taking the test, and, if deemed to be acceptable, the donor will pass the test. The Claimant declared his medication 36-48 hours before the test would have taken place, had it actually been booked;

    c. The Respondent carried out no investigation. They did not seek advice from the medical review officer (as mentioned in the Network Rail

procedure) or the Medical Advice Centre (as mentioned in the Respondent's own procedure).

Statutory ban

82. The Respondent relies on section 27 of the Transport and Works Act 1992. I presume that the Respondent relies on sub-section 27(1)(b) as that is the most relevant to the facts of the Respondent's case:

27 Offences involving drink or drugs on transport systems.

(1) If a person works on a transport system to which this Chapter applies—

…

(b)in a maintenance capacity or as a supervisor of, or look-out for, persons working in a maintenance capacity,

when he is unfit to carry out that work through drink or drugs, he shall be guilty of an offence.

83. I do not find that the Claimant's conduct contravened this enactment, because:

    a. The Respondent has not proven that the Claimant was unfit to carry out work through drugs, namely co-codamol;

    b. The Claimant was not working on a transport system at the time that the 1 April 2019 conversation took place, he was at home;

    c. The Claimant's evidence, which I accepted, was that he only took co-codamol when he was off work, on the weekends. The advice he received from his GP was that it would leave his system within 48 hours.

Actual reason for dismissal

84. I find that the principal reason for dismissal was the Respondent's wish to cease paying the Claimant his salary.

85. The Respondent formed an erroneous view that they were only required to pay the Claimant when he was working. This conclusion is supported by the following evidence:

    a. Mr Ridley's email to his accountant of 15 April 2019;

    b. Mr Ridley's statement to the Claimant on 5 May 2019: *"no work no pay"*;

c. Mr Ridley's lawyer provided advice on to whether the Claimant was on a zero hours contract;

d. The Claimant was paid his April 2019 wages two weeks late, and only after this legal advice had been provided to Mr Ridley.

86. When the Respondent was advised that they would have to pay the Claimant his salary, they decided to dismiss him. I have reached this conclusion on the basis of Mr Ridley's evidence, namely:

a. His oral evidence, corroborated by the ET3 Response Form and the Reporting Form, was that the Respondent made the decision to dismiss on or around 7 May 2019, upon receiving legal advice;

b. His witness statement, which states that the legal advice he had received at this time was that the Respondent needed to pay the Claimant, as he was not on a zero hours contract.

87. The Respondent's actions may have arisen due to them forming an erroneous belief that the Claimant was no longer able to perform the work that he was employed to do. This belief was erroneous because:

a. The Claimant had not refused to undergo a drugs and alcohol test; and

b. I have found that the Respondent had not formally cancelled the Claimant's Sentinel licence.

88. Alternatively, the Respondent may have been motivated to cease paying the Claimant due to a downturn in work (as evidenced by the sporadic nature of his employment following his return to work in November 2018) or due to their own financial difficulties (as evidenced by the email of Mr Ridley to his accountants dated 15 April 2019). It is not necessary for me to determine the precise motivation on the part of the Respondent.

Conclusion on reason for dismissal

89. The Respondent has not discharged their burden of proving a potentially fair reason for dismissal. The dismissal was therefore unfair.

90. For completeness, I shall briefly consider reasonableness under s.98(4) ERA.

Section 98(4) ERA

91. I find that the Respondent acted outside the band of reasonable responses and the dismissal was unfair pursuant to section.98(4) ERA, because:

    a. The Respondent failed to carry out any process, in accordance with their own policies or the ACAS Code of Practice. There was no investigation, consultation, meeting, or formal letter (save for the letter of termination). The Claimant was not informed of his right to appeal the decision;

    b. Contrary to good practice for ill health dismissals, the Respondent did not obtain any medical advice;

    c. The Respondent sought to rely on a statutory ban in circumstances where they failed to notify Network Rail of the alleged misconduct, thus denying the Claimant the right to a Sentinel formal investigation. Such an investigation may have considered the Network Rail drugs and alcohol procedure, which permits the disclosure of medication at the time of the taking the test, in certain circumstances.

Conclusions on remedy

Basic award

92. I find that the Claimant was continuously employed for four years. The Claimant was still employed on 17 June 2019 (four years after he commenced employment), as evidenced by the fact that:

    a. The termination letter did not purport to pay the notice in lieu;

    b. There was no contractual term allowing the Respondent to make such a payment in lieu;

    c. The Claimant was paid his notice in three instalments through the payroll, the last of which was paid on 28 June 2019 i.e. after 17 June 2019.

93. Given the Claimant's age and salary, the basic award is £2,100 (£525 x 4).

94. The Respondent submitted that the basic award should be reduced on account of the Claimant's conduct (1) in not declaring over the counter medication before 1 April 2019; and (2) in refusing to take a drugs and alcohol test on 1 April 2019.

95. I have found that the Claimant failed to declare his over the counter medication before 1 April 2019, contrary to the Respondent's drugs and alcohol policy. I do not find that this was culpable or blameworthy conduct, because:

    a. The Claimant only took such medication when he was not working. This was consistent with the policy which prohibits the employee from taking drugs eight hours before starting work;

    b. The Respondent did not request any information from the Claimant about his painkilling medication, notwithstanding that they knew that he had been off work for most of 2018 with neck and back pain.

96. I do not consider the Claimant's conduct on 1 April 2019 to be culpable or blameworthy either. The Claimant declared his medication when advised of the test, which is a situation envisaged under the Network Rail procedure. In fact, since the Claimant was not actually requested to take the test on that date, his declaration was made at an earlier stage than envisaged in that policy.

97. Even if I had found that the conduct was blameworthy, I would not have considered it to be just and equitable to reduce the award, given the Respondent's own flagrant disregard for their procedures.

98. I therefore make no reduction to the basic award.

Past loss and mitigation of loss

99. At the date of the hearing, 90.75 weeks after termination, the Claimant had not been able to find alternative employment.

100. I do not accept the Respondent's submission that the Claimant failed to mitigate his loss. I remind myself that the burden is on the Respondent to prove that the Claimant has acted unreasonably and that I must not place too demanding a standard on the Claimant.

101. Given the barriers to employment facing the Claimant as a result of his immigration status, I find that it is reasonable that he has not found employment after 90.75 weeks. The Claimant can therefore recover for all net loss of earnings together with pension loss, as claimed in the schedule of loss (£56,6991).

Other heads of loss

102. The Claimant is entitled to a payment to compensate him for loss of statutory rights. The £350 sought is reasonable and recoverable.

103. At the date of forming my decision and delivering it to the parties orally, I had not seen any evidence of the cost of the Claimant's immigration legal fees. I therefore made no award for this head of loss. I was subsequently provided with evidence of these legal fees by the Claimant. I do not treat the provision of this evidence as an application for reconsideration of my judgment under Rule 71 of the Employment Tribunal Rules. The Claimant, who was legally represented by solicitors and counsel, did not state that he was making such an application. I understand that this evidence was produced by the Claimant not in the context of his claim for damages but as part of his application for costs, which (as stated in the statement of costs) included the costs of his immigration legal fees. I therefore make no award for the claim for the Claimant's immigration legal fees. Given the application of the statutory cap, even if I had made an award for this head of loss, it would have made no difference to the Claimant's final award of damages.

Polkey reduction

104. There is no basis on which to make a *Polkey* reduction to the compensatory award.

105. There is no evidence that the Claimant would have been dismissed for a fair reason. The Respondent's evidence was that he was a highly regarded employee with a clean disciplinary record. The Respondent did not assert that there was a downturn in work that would have led to the Claimant's dismissal on grounds of redundancy.

106. When asked by Mr Caunce about *Polkey*, Mr Ridley's evidence was that the Claimant would have been retained if a different process had been followed. I think Mr Ridley may not have understood the nuance and significance of the question. However, I agree with his assessment that the Claimant would not have been fairly dismissed, had a fair process been applied, because:

a. If due process had been followed, the Claimant probably would have passed the drugs and alcohol test, and therefore there would have been no misconduct, because:

i. The Claimant was not at work on 1 April 2019. The Respondent's policy defines this as being "on duty", and the Claimant was at home. The Respondent simply sought to book the Claimant into a test on a later date. By that stage, the co-codamol may well have left the Claimant's system, as the Claimant's GP had advised. In such circumstances, the Claimant would have passed the drugs and alcohol test;

ii. If a proper investigation had been conducted, the conclusion may have been that the declared medication was acceptable, and therefore the Claimant would have passed the drugs and alcohol test even if the co-codamol was still in his system.

b. In respect of the reason of incapacity, given the Claimant had been working throughout March 2019 and his capacity was not challenged during the hearing, it seems likely that, if the Respondent had sought medical opinion, they probably would have concluded that the Claimant was capable and fit for work;

c. In respect of the statutory ban, if the Respondent had carried out an investigation, they would have concluded that the Claimant was not in breach, because he was not at work on 1 April 2019.

ACAS uplift

107. The Respondent unreasonably failed to comply with the ACAS Code, notwithstanding that they had their own policies in place which reflected the ACAS Code.

108. The failure was absolute. However, I also have regard to the fact that the Respondent does not have a dedicated human resources function. I find that an uplift of 20% is just and equitable in all the circumstances, and therefore award this amount pursuant to s.207A TULR(C)A.

Contributory conduct

109. I have found that the Claimant's conduct was neither culpable nor blameworthy. I also do not consider that it caused or played a part in the dismissal. The principal reason for dismissal was that the Respondent had sought to stop paying the Claimant his wages. I therefore make no reduction to the compensatory award on this basis.

Statutory cap

110. The statutory cap of 52 weeks' gross salary applies. Given my findings above, the Claimant's claim exceeds the statutory cap at s.124(1ZA) ERA. It is therefore not necessary for me to consider grossing up, or the period of future loss.

111. At the hearing on 12 April 2021, Ms Veale submitted on behalf of the Claimant that the statutory cap should be applied before the section 207A ACAS uplift is made. In support of her submission, Ms Veale relied on s.124(5)(b) ERA which expressly refers to reductions, but not to uplifts to the compensatory award. Although the Claimant drafted his schedule of loss in this way (i.e. the uplift was applied after the statutory cap), this submission was not made on his behalf by Mr Baker. I therefore did not expressly consider this point until after I gave judgment orally on 12 April 2021.

112. I invited the Respondent to make written submissions on this issue by 26 April 2021, which Mr Caunce duly did. In his written submission, Mr Caunce referred me to the remedy judgment in the first instance decision of

Weerasinghe v Basildon and Thurrock NHS Foundation Trust 3200773/2012 & 3200709/2013. In that case, Employment Judge Russell and members, determined that the statutory cap applies after the application of the section 207A TULR(C)A ACAS uplift ("ACAS uplift").

113. I find that the statutory cap at s.124(1ZA) ERA applies after the application of the ACAS uplift, because:

a. s.124(1) ERA states that the amount of compensation shall not exceed the amount specified at s.124(1ZA). If the ACAS uplift were applied after the statutory cap, the amount of compensation would exceed that specified at s.124(1ZA) ERA, which would be contrary to s.124(1) ERA;

b. s.124(5) ERA refers to reductions, but not to uplifts. I do not accept Ms Veale's submission that therefore uplifts are applied after the statutory cap. It is not necessary for s.124(5) ERA to refer to uplifts, as these could not be applied after the statutory cap, as that would be contrary to s.124(1) ERA, for the reasons I have given;

c. Even though it is not binding on me, I agree with the judgment of Employment Judge Russell and members on this point. It is settled law that the statutory cap is applied after a deduction for contributory fault under s.123(6) ERA. Section 124A ERA expressly provides that the ACAS uplift is made *before* the contributory fault deduction. It follows that the statutory cap is applied after the ACAS uplift also.

Conclusion on compensatory award

114. The Claimant is due a compensatory award at the level of the statutory cap at s.124(1ZA)(b) ERA i.e. £36,400.

Penalty under Employment Tribunals Act 1996 section 12A

115. I do not consider that there are any aggravating features that justify a penalty under the Employment Tribunals Act 1996 s.12A, as contended by the Claimant.

116. Whilst there was a stark dispute of fact in this case, I have not concluded that the Respondent lied, acted with malice, or deliberately acted in such a way as to breach the Claimant's employment rights. Given the lack of contemporaneous evidence, and the passage of time, it was not that surprising that the parties had different recollections of the events and the key telephone conversations of April and May 2019.

117. I have also had regard to the fact that the Respondent does not have a dedicated human resources department and that they did not repeatedly breach the Claimant's rights.

Employment Judge Gordon Walker

Date 10 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/05/2021

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FOR THE TRIBUNAL OFFICE