EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4107691/2020

Hearing Held by Cloud Video Platform (CVP) on 24, 25 and 26 August 2021

Employment Judge: J McCluskey

Mr G Cowe	**Claimant** **Represented by:** **Mr Q Muir** **Solicitor**
Chemring Energetics UK Limited	**Respondent** **Represented by:** **Mr K Duffy** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed and his complaint is therefore dismissed.

REASONS

Introduction

1. A claim was presented on 8 December 2020 in which the claimant made a complaint of unfair dismissal.

2. The respondent accepts the claimant was dismissed but denies unfairly dismissing him as alleged or at all. The respondent contends that it was entitled to dismiss the claimant summarily for gross misconduct. The respondent submits that the claim should be dismissed.

3. The case came before the Tribunal for a final hearing to consider both liability and remedy.

4. The respondent led evidence from (1) Alan Hill (2) Gary Gardiner (3) Ian Hackney and (4) Peter McCallum. The claimant gave evidence on his own account.

5. There was a joint bundle of documents extending to 161 pages which was referred to throughout the course of the hearing. References to page numbers in this judgment are references to pages in the joint bundle.

6. The parties helpfully agreed that the claimant's gross weekly pay was £557.76 and his net weekly pay was £520.15.

7. Both parties made submissions. Mr. Duffy provided a copy of his written submissions to the Tribunal and to Mr. Muir and then spoke to those submissions. Mr. Muir made oral submissions. A brief summary of the submissions is below.

Issues

8. The Tribunal considered that it had to determine the following issues:

    a. What was the principal reason for dismissal?

b. Was it a potentially fair reason in accordance with section 98(1) and (2) of the Employment Rights Act 1996 (the ERA)?

c. If so, was the dismissal fair or unfair in accordance with section 98(4) of the ERA and in particular:

i. Did the respondent believe that the claimant was guilty of gross misconduct?

ii. If so, did the respondent have reasonable grounds for believing that the claimant was guilty of gross misconduct?

iii. Did the respondent carry out as much investigation as was reasonable?

iv. Did the respondent's decision to dismiss fall within the range of reasonable responses available to the reasonable employer in the circumstances?

v. If the claimant's dismissal was unfair, what compensation should be awarded?

Findings in fact

The Tribunal made the following findings in fact:

9. The claimant began employment with the respondent on 15 May 2005. Latterly he was a supervisor with operational responsibilities for processes, planning and production and for people management. His employment was terminated summarily with effect from 15 October 2020. At his effective date of termination the claimant was 50 years old.

10. The respondent is a company engaged in the production and testing of energetics, such as high explosives, propellants and pyro-mechanics. The site where the claimant worked is in Stevenston, Ayrshire. The work carried out by the respondent is of a safety critical nature. Due to the nature of the work undertaken by the respondent it is a high hazard site, known as an

"upper tier site", and is regulated by the Control of Major Accident Hazards Regulations ("COMAH").

11. The respondent has a drugs and alcohol policy. The most recent version was dated 30 January 2020 and had been sent to the claimant around that date. The claimant also had access to the policy through the respondent's internal Q Pulse system. On 27 August 2020 the claimant, along with other employees, was selected for random drugs and alcohol testing under the policy. The claimant had on a previous occasion, some time ago, undergone random drugs and alcohol testing under the policy. There was no alcohol or drugs found in his system on that previous occasion.

12. The claimant signed a consent form on 27 August 2020 to participate in the random testing (page 85). The consent form was also used for recording the results of the testing. The testing was carried out by Ayrshire Medical Services (AMS), an external occupational health provider, on behalf of the respondent. The testing was carried out at around 4pm on 27 August 2020. The consent form was an AMS consent form with the AMS logo on it.

13. On the consent form the claimant was required to declare any medication or drugs which he had taken in the last three weeks, including all prescription and non-prescription medication. The claimant declared he had taken heartburn medication. He did not declare that he had taken any other medication or drugs in the time period.

14. The results of the alcohol testing on 27 August 2020 showed a trace of alcohol present on the first two tests. The third test was negative. The results of the drugs testing on 27 August 2020 showed a positive reading for benzodiazepines present in the claimant's system. The results of the drugs and alcohol testing were recorded by AMS on the consent form (page 85). The form had an option for the tester from AMS to circle pass or fail. The tester, Garry Savage, had circled "pass".

15. The claimant worked some further shifts on the days following 27 August 2020. During that period the respondent discussed internally next steps and

what investigation should take place. The claimant was suspended by letter dated 2 September 2020 pending investigation into allegations of potential gross misconduct. The suspension letter stated "*Specifically, it is alleged that you have been under the influence of drugs and/or alcohol whilst on site undertaking your normal duties on Thursday 27 August 2020*" (page 87).

16. The respondent appointed Louise Morrison, Site Inventory Manager of the respondent to carry out an investigation into the allegations. Ms Morrison interviewed the claimant. The claimant said he had taken one diazepam tablet. The claimant confirmed that the diazepam had not been prescribed to him and that he had received it from a family member. The claimant's account of whether he had received the diazepam from his wife or his mother in law changed during the course of the disciplinary process.

17. During the investigation meeting with Ms Morrison the claimant stated that the diazepam *"…has not altered me. Not that I know of any way as I am always professional*" (page 108).

18. During the investigation there was a discussion with the claimant about when he had taken the diazepam tablet. He stated "*It could have been a week ago round about the week of the 17th [August 2020]."* This was queried by the investigator. The testing lab had told the investigator that the diazepam must have been taken within five days of the drugs test for the result to appear as it had for the claimant. The claimant disagreed with the timescale. The claimant agreed that there was no way of proving when he had taken the diazepam as there was no prescription.

19. Ms Morrison also interviewed Hillary Thomson, Garry Savage and Roseanne Savage, all from AMS and Sandra Frew from the respondent's HR team. Ms Savage, the managing director of AMS, said in her witness statement that the side effect of benzodiazepines "*makes you relaxed and relaxes muscles*" and "*can make you sleepy. You should not operate machinery if you are on it long term or short term and have to declare it*" (page 95). Ms Savage was asked about the time line for taking benzodiazepines and showing on a test result

as a feint line. She said "*it would have been within a couple of days…*" (page 96),

20. Ms Morrison completed her investigation report (pages 121 – 125) which recommended formal disciplinary action.

21. By letter dated 14 September 2020 the respondent invited the claimant to a disciplinary hearing. The disciplinary invite letter stated "*This hearing relates to the allegations of gross misconduct , namely, that you have breached the CEUK Drugs & Alcohol Policy by being under the influence of drugs and/or alcohol whilst on site undertaking your normal duties on Thursday, 27 August 2020*" (page 126) The claimant was advised that a potential outcome of the hearing could be his summary dismissal. The claimant was given a copy of the investigation paperwork as set out in the disciplinary invite letter, including the respondent's drugs and alcohol policy (page 70 – 74) and the respondent's disciplinary policy (page 75-84).

22. Section 4 (Definitions) of the respondent's drugs and alcohol policy defines "*prohibited drugs*" as "*Drugs which are prohibited by law and medically unauthorised use of prescription medications which are capable of causing any or all of dependency, alteration of mood, impairment of judgement, concentration or co-ordination"* (page 71).

23. Section 5 (Company Rules) of the drugs and alcohol policy states that "*The misuse of legitimate drugs, or the sale, possession, distribution or use of prohibited drugs and other substances of abuse on Company business or Site is strictly prohibited. Incidents of sale, possession, distribution or use of prohibited drugs on the Site will always be reported to the Police as well as being subject to normal disciplinary procedures*" (page 71).

24. Section 5 of the drugs and alcohol policy also states *"The Company requires its employees to be fit for work and so must not be under the influence of alcohol or of non-prescription drugs. With regard to alcohol, "fit for work" will be taken to mean fit to drive under the applicable government driving limit in force for the part of the UK the site is based, being under the prescribed legal*

limit for the amount of alcohol consumed. *With regard to recreational or non-prescription drugs, the phrase "fit for work" will be taken to mean "drug-free". Being unfit for work because of impairment due to the use of alcohol, drugs or abuse of other substances is prohibited and grounds for termination of employment*." (page 72).

25. The respondent's disciplinary policy provides example of gross misconduct including "*being under the influence of alcohol or drugs during working hours*" (page 82).

26. On 15 September 2020 the claimant wrote to the respondent raising a written grievance (page 47-48). His grievance was in relation to the allegations of gross misconduct contained in the suspension letter dated 2 September 2020. His grievance was heard by Mr Alan Hill, Quality & Business Improvement Manager on 22 September 2020. The claimant was accompanied by a trade union representative. Mr Hill wrote to the claimant with his outcome by letter dated 29 September 2020 (page 59 – 62). Mr Hill did not uphold the claimant's grievance and found that the majority of the points the claimant made should be raised via the disciplinary process.

27. The claimant appealed against the outcome of the grievance process. His appeal was heard by Mr Gary Gardiner, Finance & IT Director on 6 October 2020. The claimant was accompanied by a trade union representative. Mr Gardiner did not uphold the claimant's grievance appeal. In relation to the appeal point that the disciplinary outcome had been pre-determined he confirmed that he was only involved in the grievance process and that the process he had followed had been independent.

28. Following conclusion of the grievance process, the disciplinary hearing took place on 7 October 2020. The hearing was conducted by Mr Ian Hackney, Engineering, Quality & Business Improvement Director. The claimant was accompanied at the hearing by a trade union representative. A copy of the minutes of the hearings is at pages 130 – 140.

29. At the disciplinary hearing the claimant stated that he had taken a diazepam tablet to help him sleep at some point between one or two weeks before the random testing had taken place. The claimant was unable to provide a date. The claimant was unable to provide a prescription, in his name, for the diazepam he had taken.

30. In the disciplinary hearing Mr Hackney said it was his understanding from research he had undertaken that diazepam would have been detectable in a test up to six days before taking a single pill. The claimant did not agree with this.

31. Mr Hackney asked the claimant about the trace of alcohol found. The claimant confirmed he had a rum and coke the previous evening after finishing his shift. The claimant maintained that the result of the alcohol and drugs testing was a "pass". The claimant maintained that he was not impaired. The claimant said that he had carried out his normal duties in the workplace after having taken the diazepam and if there had been a concern "*My colleagues would have seen it if I was impaired then wouldn't I have been whisked away?*" (page 134). The claimant was asked by Mr Hackney "*So because your colleagues didn't notice an impairment, you regard that as evidence that you weren't impaired?*" to which the claimant responded "*yes*" (page 134).

32. During the disciplinary hearing Mr Hackney put to the claimant that "*There is no way to go back now and measure how much you were impaired….*" "*There is no way I can go back retrospectively*" (page 139). The claimant did not dispute this.

33. During the disciplinary hearing the claimant alleged that inappropriate contact had been made with his wife by the respondent's human resources personnel and by AMS about the diazepam which the claimant had taken. Mr Hackney could find no evidence of this.

34. During the disciplinary hearing the claimant alleged that aspects of the witness statements which had been taken during the investigation were inaccurate. Mr Hackney could find no evidence of those inaccuracies.

35. Following the disciplinary hearing Mr Hackney took the decision to summarily dismiss the claimant without notice as he considered the claimant's actions to constitute gross misconduct. A copy of the dismissal letter is at pages 141-143.

36. The rationale for Mr Hackney's decision is set out in the dismissal letter. Mr Hackney's reasoning was that the claimant was in breach of the company's drugs and alcohol policy at section 5 (Company Rules) on two counts and that the claimant had failed to demonstrate any accountability or remorse for his actions.

37. The dismissal letter sets out Mr Hackney's rationale as follows "*Regardless of your explanation as to the origins of the controlled substance as well as your non-medical declaration that you were not impaired by the consumption of Diazepam. It is evident from the CEUK Drug and Alcohol Policy that a failure to provide a prescription, in your name, for Diazepam, a Class C drug, is a clear breach of company rules. For clarification the policy states…. With regard to recreational or non-prescription drugs, the phrase "fit for work" will be taken to mean "drug-free". Being unfit for work because of impairment due to the use of alcohol, drugs or abuse of other substances is prohibited and grounds for termination of employment*" (page 142). "*In addition, the policy, is again, transparent in relation to the term "prohibited drugs" and unmistakeably refers to these as drugs which are prohibited by law and medically unauthorised use of prescription medications which are capable of causing any or all of dependency, alteration of mood, impairment of judgement, concentration or co-ordination…. The misuse of legitimate drugs, or the sale, possession, distribution or use of prohibited drugs and other substances of abuse on Company business or Site is strictly prohibited. Incidents of sale, possession, distribution or use of prohibited drugs on the Site will always be reported to the Police as well as being subject to normal disciplinary procedures. To confirm, misusing prescription drugs and taking medication in a manner or dose other than as prescribed is not only a breach of the CEUK Drug and Alcohol policy but is also breaking the law…."* (page 142).

38. Mr Hackney also sets out in the dismissal letter that "*Upon reviewing the investigation report and notes coupled with your explanation at the disciplinary hearing it is also evident that you have continually failed to demonstrate any accountability or remorse for your actions*" (page 142).

39. The claimant appealed against his dismissal. His appeal letter is at pages 144 – 145. There was an appeal hearing conducted by Peter McCallum on 29 October 2021. A copy of the minutes of the appeal hearing is at pages 147 – 150. The claimant was accompanied by a trade union representative. The claimant was given an opportunity to put forward his grounds of appeal.

40. Mr McCallum upheld the decision to summarily dismiss the claimant without notice as his actions constituted gross misconduct. He set out his reasoning in his appeal outcome letter dated 10 November 2020 (page 151 – 154). Mr McCallum's rationale was that the respondent was entitled to rely on its drugs and alcohol policy which stated that "fit for work will be taken to mean drug free". The claimant was not drug free. By the claimant's own admission there was diazepam, a class C drug, in his system without a prescription and the claimant had consumed alcohol the previous evening whilst the diazepam was in his system. Mr McCallum also found that the claimant knew of the respondent's drugs and alcohol policy and of the zero tolerance approach to taking diazepam, a controlled drug, in the claimant's circumstances (page 152).

Observations on the evidence

41. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.

42. Where the evidence of the claimant differed from the evidence of the respondent's witnesses, the Tribunal preferred the accounts given on behalf of the respondent. The evidence for the respondent was clear, concise and consistent with the documentation.

43. The evidence of the claimant was at times inconsistent with the documentation. The claimant's inference that Lanzoprozac, the drug he had declared at the test, may have caused the positive test result, was inconsistent with the documentation and the claimant's position during the disciplinary process.

44. In the claimant's evidence under cross examination he said that his trade union representative had not represented the claimant's position accurately at the appeal hearing. The representative had stated on behalf of the claimant that there had been a clear breach of the drugs and alcohol policy and asked for leniency on behalf of the claimant. The claimant's evidence under cross examination was that the representative had made that statement off his own back and the claimant had not asked him to do so. It appeared to the Tribunal that, if that was correct, such an important matter would have been challenged by the claimant at the appeal hearing itself or would have been raised by the claimant at any earlier stage in this hearing.

Relevant Law

45. Section 94 of the Employment Rights Act 1996 (the ERA) provides that an employee has the right not to be unfairly dismissed.

46. Section 98 of the ERA sets out that for a dismissal to be fair, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98 (1) or (2) of the ERA.

47. A reason relating to the conduct of the employee is one of the potentially fair reasons for dismissal (section 98(2)(b) of the ERA).

48. In terms of section 98(4) of the ERA, if the Tribunal was satisfied that the respondent has established a potentially fair reason for dismissal, it must then determine the question of whether the dismissal was fair or unfair having regard to the matters set out in section 98(4) (a) and (b): whether taking into account the size and administrative resources of the employer, it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and the equity and substantial merits of the case.

49. Once it is established that the claimant was dismissed for a potentially fair reason relating to conduct the test of the substantive fairness outlined in British Home Stores Limited v Burchell 1978 IRLR 380 is relevant to the question of whether it was reasonable for the respondent to treat that reason as sufficient to justify dismissal.

50. When applying the Burchell test, the Tribunal should consider three issues: a. whether the employer genuinely believed that the employee was guilty of misconduct; b. did the employer have in its mind reasonable grounds on which to sustain that belief and c. at the stage at which the employer formed the belief on those grounds had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

51. The ultimate test in determining the application at section 98(4) is whether the dismissal fell within the "band of reasonable responses", a test which reflects the fact that inevitably there may be different decisions reached by different employers in the same circumstances (see British Leyland (UK Limited) v Swift 1981 IRLR 91).

52. In applying section 98(4) of the ERA, the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether the dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer (see Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Post Office v Foley and HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827CA).

53. There is always an area of discretion within which a respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether or not the dismissal was reasonable (see Boys & Girls Welfare Society v McDonald [1996] IRLR 129).

54. For a summary dismissal to be fair, the misconduct in question must amount to gross misconduct: conduct being a deliberate and willful contradiction of the contractual terms or amount to gross negligence (see Laws v London

Chronical (Indicator Newspapers Limited) 1959 1 WLR 698CA and *Sandwell & another v Westwood EAT* 0032/09).

55. There are no special rules that govern dismissals in circumstances where the dismissal relates to the use of non-prescribed drugs. However, Mr Duffy drew the Tribunal's attention to the case *of Kuehne and Nagel Ltd v Cosgrove UKEAT/*0165/13/DM which considered a similar factual scenario to the instant case. In Kuehne a staff member tested positive for cannabis long after she was alleged to have taken it. The Tribunal in Kuehne found that "*de minimis"* use was a breach of the company's drug & alcohol policy and the subsequent dismissal was found to be fair. This was irrespective of any allegations of impairment at the time of the test. Mr Duffy acknowledged that such cases are fact sensitive.

56. There was no dispute between the parties that diazepam is a class C controlled drug under the Misuse of Drugs Act 1971.

Submissions

Both parties made oral submissions. Mr Duffy also provided written submissions to the Tribunal and to Mr Muir. There follows a summary of the submissions.

Submissions for respondent

57. Mr Duffy for the submitted that the potentially fair reason for dismissal, in terms of s.98(2) ERA 96, was made out, that being conduct.

58. He submitted that the dismissal was fair, in terms of s.98(4) ERA 96. The claimant was a supervisor in an explosives factory who had a non-prescribed, class C controlled drug in his body. It was a trace amount, but it is still in breach of the clear wording of the company drug and alcohol policy.

59. He submitted that a reasonable investigation took place, in terms of British Home Stores Ltd v Burchell [1980] ICR 303 (EAT). The decision to dismiss falls within the band of reasonable responses open to an employer, as per Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. He respectfully reminded

the Tribunal that it should not substitute its view for that of the employer, as per *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 827.

60. He submitted that the decision in *Keuhne and Nagel Ltd v Cosgrove* UKEAT/0165/13/DM. is persuasive, in that even trace amounts of drugs, in breach of an employer's policy, can justify a fair dismissal; this being the case where there is no objective evidence of impairment of the employee. He accepted that such cases are fact-sensitive, nevertheless.

61. He submitted that the ACAS code has been followed.

62. He submitted that the dismissal was fair and that claimant's claim should be dismissed.

63. Mr Duffy made the following submissions on the facts-

64. He submitted that it is alleged that the claimant ingested diazepam. This is a class C controlled drug, in terms of the Misuse of Drugs Act 1971. The claimant was tested during random workplace test on 27 August 2020 (p85).

65. He submitted that it was common ground that the claimant was not prescribed this drug on/around 27 August 2020, nor has he presented a prescription. At most, the claimant stated it was ingested in error, in ignorance of the effects and only found out about the identity of the drug after having taken it. Latterly in the hearing he appeared to infer that the drug he had declared at the test – Lanzoprozac – may have caused the positive test result.

66. He submitted that there has been a breach of its drug & alcohol policy (p70-74), especially the first paragraph of p72, and that dismissal was justified. He submitted that the disciplinary procedure (p75-84) had been correctly followed.

67. He submitted that throughout both processes there was discussion about: Who had supplied it to him: be that his mother in law or his wife. When he had ingested the tablet: be that one week, 10 days or two weeks' previous. The size/strength of the dosage: be that 2mg or 5mg.

68. Mr Duffy submitted that the following process was followed. He submitted that the claimant was suspended on full pay on 2 September 2020 (p87-88) with Ms Morrison investigating the matter. She interviewed witnesses (p90-104) and thereafter held an investigation meeting with the claimant on 9 September 2020 (p105-113). Following this meeting, she conducted follow up witness interviews (p115-120). This culminated in an investigation report, dated 11 September 2020 (p121-125). This report recommended formal disciplinary action.

69. He submitted that on 15 September 2020, however, the claimant raised a grievance (p47-48). The disciplinary process was paused and a grievance meeting held on 22 September 2020, chaired by Mr Alan Hill (p50-53). Following this, Mr Hill interviewed witnesses (p54-58) and gave a reasoned decision, rejecting the grievance (p59-62). The claimant appealed (p63) and a grievance appeal meeting was held on 5 October 2020, chaired by Mr Gary Gardiner (p64-66). Mr Gardiner thereafter issued a reasoned decision letter, rejecting the claimant's appeal (p67-69)

70. He submitted that the disciplinary process commenced, and a disciplinary meeting was held on 7 October 2020, chaired by Mr Ian Hackney (p130-140). This meeting had been rescheduled twice from earlier dates. He made the decision to dismiss the claimant for gross misconduct, by letter of 13 October 2020 (p141-143). The EDT was 12 October 2020.

71. He submitted that the claimant appealed (p144-145) and an appeal meeting was held on 29 October 2020, chaired by Mr Peter McCallum (p147-150). By letter of 10 October 2020 (p151-154), Mr McCallum rejected the appeal.

72. Mr Duffy referred to various alleged mitigating factors raised by the claimant throughout: It was only a trace amount of drugs. He was not suspended immediately after the test. There is no evidence of actual impairment. The test was deemed a pass. In appropriate contact was made to, or by, his wife by respondent and/or OH staff. There were procedural faults in the process, e.g. inaccuracies in witness statements. He was not given a fair hearing at

the disciplinary meeting. He had not been given access to relevant policies. The outcome was predetermined.

73. Mr Duffy submitted that apart from the first three – which are factually correct – the other points were not proven in evidence. He submitted that the fundamental point is that the claimant was in clear breach of the respondent's drug and alcohol policy at p72 : "The Company requires its employees to be fit for work and so must not be under the influence of alcohol or of non-prescription drugs. With regard to alcohol, "fit for work" will be taken to mean fit to drive under the applicable government driving limit in force for the part of the UK the site is based, being under the prescribed legal limit for the amount of alcohol consumed. With regard to recreational or non-prescription drugs, the phrase "fit for work" will be taken to mean "drug-free". Being unfit for work because of impairment due to the use of alcohol, drugs or abuse of other substances is prohibited and grounds for termination of employment."

74. Mr Duffy submitted that the claimant had a non-prescription drug in his body. He was clearly not drug free, despite his protestations to the contrary in cross-examination. So, by the clear wording of the policy, he was unfit for work. This is grounds for termination of employment by reason of gross misconduct.

75. Mr Duffy submitted there was clear evidence of Mr Hackney: the claimant held a supervisory role in the propellants department of the respondent (the claimant used the term 'Mechanite' regarding this department). The respondent manufacturers 'energetics', ranging from high explosives, to propellants to pyro-mechanics. The respondent submits that it is obvious that safety must be of the highest priority in the workplace. Mr McCallum also mentioned the COMAH regulations, which impose high standards of safety, lest the company's operating license be revoked.

76. Mr Duffy submitted that the claimant also had initially registered a trace amount of alcohol, which was latterly deemed a pass by AMS. Nevertheless, there were reasonable grounds for Mr Hackney viewing this – in conjunction with the use of diazepam – as a negative, contributory factor.

77. Mr Duffy submitted that the comments of the AMS staff member, Ms Roseanne Savage, on 8 September 2020 in the investigatory interview with Ms Morrison are of the utmost importance (p95): LM: What are the side effects of medication such as this? RS: Makes you relaxed and relaxes muscles. LM: If working in factory would you expect an employee to declare they are taking this medication? RS: Yes, they have to say they are taking it as it can make you sleepy. You should not operate machinery if you are on it long term or short term and have to declare it.

78. Mr Duffy submitted that at p149, at the dismissal appeal meeting on 29 October 2020, it was admitted by the claimant's trade union representative that there had been a "…clear breach" of the policy. The representative basically asks the respondent for leniency and the imposition of a lower sanction. The respondent notes that this admission comes after an adjournment in the appeal meeting, and so submits that this is clearly the claimant's considered position. Only at the 11th hour in the tribunal hearing under cross and re-examination did the claimant seek to argue that Mr Neilson was not representing the claimant's views.

79. Mr Duffy submitted that: Five separate managers had input into this matter and all found that the processes were fair and/or the claimant had a case to answer.

80. Mr Duffy asked the Tribunal to find that all of the respondent's witnesses were credible and reliable. He submitted that are senior managers and most have previous HR experience. He asked the Tribunal to find, by contrast, the claimant was neither credible nor reliable, with his evidence being hesitant and contradictory. Especially regarding Mr Paul Neilson. Particularly on this point he submitted that the claimant's position is not tenable. He submitted that the claimant's 11th hour inference that that the drug he had declared at the test – Lanzoprozac – may have caused the positive test result, was also not tenable. He submitted that although the claimant further argued that he had emails showing false statements of AMS, these emails were not presented in the joint bundle.

81. Mr Duffy submitted that the claimant gave no evidence-in-chief to contradict many of the statements taken by the above managers, nor – importantly - on any of the grievance process. He submitted that the claimant agreed in evidence-in-chief, that non-prescription drugs included drugs not prescribed to him, including diazepam.

Submissions for claimant

82. Mr Muir for the claimant invited the Tribunal to find that the dismissal of the claimant was unfair. He submitted that the onus of proving that the dismissal was fair rests with the employer. This is a two-stage test; there must be a potentially fair reason for dismissal and the employer must have acted reasonably in all of the circumstances, applying the band of reasonable responses test.

83. He submitted that on the first point the catalyst was the random test. The policy in the bundle (page 70) is a version dated 30 January 2020. It was not clear from the evidence what the claimant had known of the existence of the policy. Although he accepted that he had recourse generally to the policy he did not accept that he knew about the zero-tolerance approach to drugs. The policy refers to ensuring that employees are fit to carry out their work and refers to the safety of others. But there was no incident which took place. Nothing happened to justify a "for cause" investigation. The claimant accepted that he had taken one tablet of diazepam which had not been prescribed to him. Whilst the policy references the drink drive limit for alcohol there is no reference in the policy to trace elements of drugs and ability to perform the job. There was no suggestion the claimant's drug taking was recreational in character. The policy (page 72) says what will happen; a disciplinary process that could lead to dismissal. The issue is about the interpretation of the test. The claimant says that he was told he had passed the test. There was a handwritten note on the consent form (page 85) "*pass per POCK protocol*" after the tester spoke to the managing director of AMS but there was no evidence about what this was or could include. There may have been an issue with the test. If it was recorded by AMS as a pass why was there any

subsequent disciplinary process at all. Mr Muir said this called into question the principal reason for dismissal.

84. Mr Muir also addressed whether the decision to dismiss fell within the band of reasonable responses and invited the Tribunal to look critically at this. The claimant had an unblemished record and held a supervisory role. There was no or little evidence of the concentration of the drugs or the effect on him. The claimant accepted that he had taken something albeit he did not know what it was until he clarified with his wife. Mr Hackney places reliance on the amount ingested (p132) and that the claimant said it was a "*one off*" then later made reference to another occasion twelve years previously following the death of his father. There was no actual evidence of impairment. There was dubiety about the test result. Mr Hackney says he considered alternatives to dismissal but there was no or little evidence about why they fell to be excluded. The claimant said he had no dependence or addiction and that his actions were an error of judgment with no evidence of impairment or breach of any safety protocol. At appeal stage Mr McCallum referred to the claimant having taken diazepam in the past when his father had died but it was not clear why this excluded the viability of other sanctions short of dismissal. For these reasons, said Mr Muir, the decision to dismiss, which was upheld on appeal, did not fall within the band of reasonable responses open to the respondent.

85. The parties had agreed wage loss to assist the Tribunal with quantum if required and these figures were referred to by both parties. Both parties also made submissions in relation to mitigation of loss.

Discussion and decision

86. The first issue to be determined by the Tribunal was what was the principal reason for the claimant's dismissal. It is for the respondent to show the reason for the dismissal and that it was for one of the potentially fair reasons. The reason is a set of facts known to the employer or may be of beliefs held by him which cause him to dismiss the employee. At this stage the Tribunal was not considering the question of reasonableness.

87. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that claimant was dismissed. On the basis of the evidence given by the respondent, the Tribunal was satisfied that the reason, or principal reason, for dismissal of the claimant was because he had diazepines in his system, for which he had no prescription, and which Mr Hackney determined was in breach of the respondent's drugs and alcohol policy.

88. The Tribunal is supported in its conclusion as to the reason for dismissal in that at the point when the decision was taken to dismiss the claimant, he had admitted that he had taken diazepam which was found in his system and he had admitted that he did not have a prescription for the diazepam. The oral and documentary evidence of the respondent, which was accepted by the Tribunal, was that the respondent applied their drugs and alcohol policy to these circumstances and reached the conclusion that the claimant was in breach of the policy.

89. In submissions for the claimant Mr Muir suggested that as the test had been recorded by AMS as a pass there ought not to have been any subsequent disciplinary process at all. Mr Muir said this called into question the principal reason for dismissal. The Tribunal did not accept this given the documentary and oral evidence of Mr Hackney as to the reason for dismissal.

90. The Tribunal was satisfied that the respondent had shown that the claimant was dismissed for misconduct which is a potentially fair reason under section 98 of the ERA.

91. The Tribunal then considered if the dismissal was fair or unfair in accordance with section 98(4) of the ERA. It noted that it had determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the substantial merits of the case.

92. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what was the right course to adopt for that of the respondent. The Tribunal applied the range of reasonable responses approach; whether the respondent genuinely believed the claimant was guilty of misconduct, had reasonable grounds on which to sustain that belief and had carried out a reasonable investigation.

93. The respondent's investigation was prompted by a random drugs and alcohol test, in line with their policy, where the claimant was shown to have traces of benzodiazepines in his system. The claimant had previously been sent a copy of the policy and had previously undergone random testing under the policy.

94. During the investigation the claimant admitted that he had taken diazepam and that he was unable to provide a prescription for this medication. The claimant also admitted that he had drunk alcohol the previous evening when the diazepam was in his system. The respondent spoke to various witnesses from AMS. Ms Savage, the managing director of AMS, advised that a side effect of benzodiazepines is that it can make you sleepy and you shouldn't operate machinery. She also advised that in her view the claimant would have taken the benzodiazepines within a couple of days of the test. The respondent's investigation culminated in an investigation report which recommended a formal disciplinary process.

95. The disciplinary hearing was further opportunity for the claimant to respond to the allegations which he did. Mr Hackney considered the investigation which had been carried out with various personnel from AMS and from the respondent's human resources department as part of his preparation for the disciplinary hearing. He also carried out his own investigation by looking online to understand the timescales for when diazepam could have been taken and then show up on a drugs test. His research found that the diazepam would have been taken no later than six days before the testing. This was different from the timescales given by the claimant who said he could not remember exactly when he had taken it and gave a varying timeline of around ten days to two weeks.

96. During the disciplinary hearing the claimant admitted again that he had taken diazepam which he had not disclosed to the respondent and that he was unable to provide a prescription for this medication.

97. Mr Hackney considered the policy wording about non-prescription drugs and the reference to "fit for work" meaning "drug free". He considered that the use of diazepam, without a prescription, fell within the category of non-prescription drugs. He considered that the claimant was not fit for work as he was not drug free and he was therefore in breach of the drugs and alcohol policy.

98. Mr Hackney considered representations made by the claimant that he was not actually impaired and therefore not in breach of the policy. The claimant relied on the measure of impairment for diazepam being if his colleagues had seen him as impaired and he had been removed from duties. Mr Hackney was not persuaded by that argument.

99. The Tribunal considered that the respondent genuinely believed the claimant was guilty of misconduct, had reasonable grounds for sustaining the belief and had carried out a reasonable investigation.

100. The Tribunal then asked if the respondent acted reasonably in treating the claimant's conduct as gross misconduct. The Tribunal referred to its findings.

101. The respondent carries out work of a safety critical nature. A breach of its drugs and alcohol policy is a serious health and safety matter for it. The claimant was a supervisor with management responsibilities for operations and for people. He had access to the respondent's drugs and alcohol policy and had previously been subject to random drugs and alcohol testing under the policy. He was not drug free when he was tested nor had he disclosed this to AMS in advance of the testing. He was unable to provide a prescription for the benzodiazepines he had taken.

102. The Tribunal considered that there were reasonable grounds for the respondent concluding that the claimant's conduct amounted to gross misconduct.

103. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

104. The Tribunal was satisfied from Mr Hackney's evidence that he did not automatically impose the sanction of dismissal. He knew that he was able to impose a lesser sanction and did not take the decision to dismiss lightly. Mr Hackney was aware that the claimant had a clean disciplinary record. He considered whether this mitigated the claimant's gross misconduct. Mr Hackney considered that the claimant worked on a safety critical site. He took the view that the respondent had to rely on its staff to follow policies and procedures and if these were not followed it breached trust. As the claimant had not followed the drugs and alcohol policy and was not drug free Mr Hackney formed the view that the claimant could not be trusted to follow policies; therefore a lesser sanction was not appropriate.

105. The impression of the Tribunal was that Mr Hackney's concern was that while the claimant said that he was not actually impaired the claimant did not accept responsibility for having taken benzodiazepines without prescription nor for his failure to disclose this at the testing stage. Nor had the claimant been honest at the outset of the testing process. He had declared having taken heartburn medication but had not declared having taken diazepam.

106. It was this lack of awareness, lack of honesty and inconsistent information about where he had obtained the benzodiazepines and when he had taken them which caused Mr Hackney to believe that the claimant could not be trusted in relation to health and safety. He noted that the claimant worked at a supervisory level in charge of staff and plant processes on an upper tier COMAH site.

107. The claimant felt that the decision to dismiss him was unfair as there was only a trace of drugs in the claimant's system. The Tribunal was, however, satisfied that the respondent's conclusion that a trace of drugs was still a breach of the policy, in a safety critical environment, was within the range of reasonable responses open to the respondent.

108. The claimant felt that the decision to dismiss him was unfair as the AMS tester had circled "pass" on the AMS consent form. The Tribunal was, however, satisfied that the respondent's conclusion that it could follow its own drugs and alcohol and disciplinary policies, although "pass" had been circled by AMS on their consent form, was within the range of reasonable responses open to the respondent.

109. The claimant felt that the decision to dismiss him was unfair as he was not suspended immediately after the test. The Tribunal was, however, satisfied that the respondent's conclusion that it was entitled take a few days to consider next steps and its investigation, was within the range of reasonable responses open to the respondent.

110. The claimant felt that the decision to dismiss him was unfair as there was no evidence of actual impairment. The Tribunal was, however, satisfied that the respondent's conclusion that the claimant was not "*drug free*" and was therefore in breach of policy, was within the range of reasonable responses open to the respondent. The Tribunal was satisfied that the respondent's conclusion, that no evidence of actual impairment was required by the policy, was within the range of reasonable responses open to the respondent.

111. The claimant felt that the decision to dismiss him was predetermined because he had been told by the respondent before the dismissal that he could appeal the dismissal outcome. The claimant also felt that he had not been given a fair hearing at the disciplinary meeting and that aspects of the investigatory witness statements were inaccurate. The Tribunal noted that this was contrary to the respondent's oral and documentary evidence, which it preferred. Further, the Tribunal's impression was that Mr Hackney approached the disciplinary hearing with an open mind, spent time considering documentation before the hearing and considered the information supplied by the claimant at the hearing.

112. In submissions Mr Muir said that whilst the claimant had accepted in evidence that he had general recourse to the drugs and alcohol policy in the workplace it was not clear from the evidence what the claimant had known of the

existence of the policy and its terms. The Tribunal noted that the claimant had been asked at the disciplinary hearing to confirm if he had received a copy of the policy in January 2020. The claimant had responded "*I will have if it was sent*" (page188). The Tribunal was satisfied that the respondent's conclusion that the claimant had received a copy of the policy in January 2020 and knew of its terms was within the range of reasonable responses open to the respondent. The Tribunal also noted that the claimant had confirmed in evidence that he had access to the policy through the respondent's Q Pulse system and that he had previously been subject to random testing under the policy.

113. The Tribunal concluded that Mr Hackney's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

114. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

115. The Tribunal then considered the appeal process. Mr McCallum is senior to Mr Hackney. He approached the appeal hearing by carefully considering the issues and the information before him. At the appeal hearing the claimant was accompanied by a trade union representative. Mr McCallum asked the claimant to talk through his grounds of appeal. The Tribunal referred to Mr McCallum's decision set out in his letter of 10 November 2020. The Tribunal considered that Mr McCallum thought about the points raised at the appeal hearing and had set out his reasons for reaching the conclusions that he did. This included the conclusion that the claimant was aware of the respondent's drugs and alcohol policy. This was considered by Mr McCallum at the appeal stage as part of the claimant's grounds of appeal. The claimant accepted in the appeal hearing that he was aware of the respondent's drugs and alcohol policy (page 148).

116. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

117. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

118. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge: Jacqueline McCluskey
Date of Judgment: 29 September 2021
Entered in register: 05 October 2021
and copied to parties