Appeal No. EA-2021-000584-DA
(previously UKEAT/0109/21/DA)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 July 2021
Judgment handed down on 26 October 2021

Before

MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

RENEWI UK SERVICES LIMITED — APPELLANT

MR CARL PAMMENT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON FORSHAW (of Counsel) Instructed by: Clyde & Co (Scotland) LLP 144 West George Street Glasgow G2 2HG
For the Respondent	MS HELENA IFEKA (of Counsel) Instructed by: Addleshaw Goddard LLP Exchange Tower 19 Canning Street Edinburgh EH3 8EH

SUMMARY

UNFAIR DISMISSAL – FAIRNESS OF DISMISSAL – POLKEY DEDUCTIONS – CONTRIBUTORY CONDUCT

The Claimant, who was a Team Leader working in recycling, tested positive for cannabis as part of a random drugs test. He was dismissed on 31 March 2020 following a disciplinary hearing on the basis that he was under the influence of drugs which affected his performance. An appeal was unsuccessful. The Employment Tribunal held that the Claimant was unfairly dismissed because, among other matters, the Respondent paid no or insufficient regard to mitigating factors, it was not the Claimant's job to drive a van, there was no impairment of the Claimant's performance at work and the dismissing manager had obtained evidence about the treatment of comparable cases from an HR employee who was not wholly objective. The Employment Judge also criticised the reliability of the test result.

The Employment Judge went to find that there should be no reduction to compensation (i) based on **Polkey v AE Dayton Services Ltd** [1988] ICR 142 or (ii) owing to contributory conduct under s.122(2) and s.123(6) of the **Employment Rights Act 1996**.

Held (allowing the appeal). In relation to the question of fairness, the Employment Tribunal had wrongly substituted its own findings in deciding that the cannabis did not affect the Claimant's performance and it was not his job to drive a van, rather than focussing on the reasonableness of the employer's belief about these matters. While the Tribunal was entitled to have regard to the failure of the Respondent to have regard to mitigating factors, it also substituted its own judgment in criticising the reliability of the drugs test in considering that the information about comparators was tainted by the lack of objectivity of the source.

On the question of the **Polkey** deduction, the Tribunal's reason that the involvement of the HR employee "went to overall fairness but not to a consideration of a Polkey reduction" could not be reconciled with principles on **Polkey** summarised in **Software 2000 Limited v Andrews** [2007] ICR 825. The Tribunal also erred in relation to contributory conduct, by reasoning that the Claimant would not have been dismissed if the Respondent had acted in accordance with its own policies. First, there is no causation test in s.122(2), on the basic award. Second, s.123(6) requires a tribunal to examine the actual conduct of the Claimant and ask itself if that conduct caused or contributed to the dismissal, and not to answer the different question of whether a claimant would have been dismissed if the Respondent acted reasonably, fairly or in accordance with its own policies.

MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. This is an appeal by Renewi UK Services Limited against a judgment of the Employment Tribunal, sitting in East London. The claim was heard Employment Judge ("EJ") Housego, sitting alone, on 13 January 2021 and written reasons were sent the parties on 19 January 2021. The Tribunal held that (i) the Claimant was unfairly dismissed, (ii) there should be no reduction to his compensation based on **Polkey v AE Dayton Services Ltd** [1988] ICR 142 and (iii) there should be no reduction to compensation owing to contributory conduct.

2. I shall refer to the parties as the Claimant and Respondent, as they were before the Tribunal.

3. The Respondent appeals each of the Tribunal's rulings, by a Notice of Appeal received on 5 February 2021. There are six grounds of appeal.

4. Before me, the Respondent was represented by Mr Simon Forshaw and the Claimant was represented by Ms Helena Ifeka, neither of whom appeared in the Tribunal. I am grateful to both counsel for their focused and clear written and oral submissions, and especially grateful to Ms Ifeka who was acting pro bono on this appeal, instructed through the Bar Pro Bono Connect Scheme.

Outline facts

5. I take the outline facts principally from the Tribunal's written reasons.

6. The Claimant began working for the Respondent as a full-time employee on 1 October 2010, having transferred from predecessor companies as a result of transfers under the **Transfer of Undertakings (Protection of Employment) Regulations 2006**. At the date of his dismissal, the Claimant's post was Recycling Team Leader.

7. The Respondent's business involves waste recycling. Though not referred to in the Tribunal's reasons, it was common ground that teams of its employees delivered recycling bags in East London by van. In addition, 7.5 tonne lorries were used to empty large bin banks, which involved work with heavy machinery. The Claimant did not have a licence to drive 7.5 tonne vehicles but he worked, and led, a team doing both sorts of work.

8. The Claimant was off work with severe back pain from June 2019 until 6 January 2020. The Tribunal noted that his absence had a detrimental effect on his relationship with some in the Respondent, and in particular with Ms Lisa Bailey, a Human Resources Advisor who worked for the Respondent (paragraphs 51-54).

9. At the material time, the Respondent had the following relevant policies:

(1) A policy on Alcohol, Drugs and Medicines, which came into effect on 1 November 2018. Its objectives included minimising the risks associated with drugs and alcohol at work, laying down clear rules on substance abuse and supporting employees with alcohol and drug problems. It defined "drug abuse" as including the use of illegal drugs. Under "Policy Rules" it stated that working under the influence of alcohol or drugs was unacceptable. It explained that the Respondent used screening and testing as a means of controlling drugs and alcohol problems. The Policy indicated that in

the event of suspected misuse of drugs, management would decide whether it would be "treated as a matter for discipline rather than a health problem". It went on to say:

> **"In circumstances where an employee breaches the policy on an individual case, such as reporting for work drunk or under the influence of drugs at work, we will class this behaviour as a conduct issue and handle it via the normal disciplinary procedures."**

It added that where an individual admitted to a drugs or alcohol problem, the disciplinary process "may be held in abeyance".

(2) A Health and Wellbeing Policy, also dated December 2017, which had a section dealing with drugs and alcohol. It stated that where the Respondent was aware that an employee may have a problem with substance abuse it would focus on rehabilitation; but "Any employee discovered to be under the influence of alcohol or illicit drugs may suffer disciplinary action - such misuse is defined as gross misconduct by Renewi".

(3) A Disciplinary Policy, listing "being under the influence of alcohol, drugs or any substance which impact [sic] performance and those around you" as an example of gross misconduct.

(4) A Driving Policy, dated December 2017, which stated that driving under the influence of alcohol and drugs that "may affect your ability to drive" was not tolerated.

10. On 11 March 2020 the Claimant was given a urine test as part of a random drugs test at the workplace, conducted by Crystal Health Group ("Crystal") for the Respondent. The preliminary analytical test showed he was "non negative" for cannabis and opiates. It was followed by a second, confirmatory test result which showed that the Claimant was positive for

cannabis, recorded as >500 ng/ml (the EJ was in error in recording this as 50 ng/ml at paragraph 45.1) and for morphine, recorded as 977 ng/ml. Both results were above the different "cut-off levels" used in the tests, designed to ensure that environmental contamination did not give a positive result and that a negative result was reliable. The report noted that the opiate result was consistent with the Claimant's declared medication.

11. On the same day as the test, the Claimant was invited to an investigation meeting, conducted by Mr John Maara as the investigating manager. According to the notes, the Claimant was asked questions about the test result. He confirmed he was aware of the Alcohol and Drugs Policy. He explained that he had been prescribed co-codamol and a friend had advised him to try smoking cannabis to help with his back pain, which he had smoked earlier that week. He said that he did not believe smoking cannabis impaired his performance at work. Mr Maara suspended the Claimant. Though he was not the correct person to take this decision, the EJ found this was not relevant to the fairness of the decision to dismiss (paragraph 55).

12. The Claimant was invited to a disciplinary hearing, chaired by Marc Congdon, an Engineering Manager. It took place on 30 March via telephone owing to the lockdown. Though the Tribunal did not set out any of the evidence at the hearing (judgement, paragraph 57), I was told that there was no dispute about the accuracy of the notes. According to those notes, the Claimant explained to Mr Congdon that he had had serious back problems, his medication did not work, and he very much wanted to return to work. At the suggestion of a friend, and because he was so desperate to be pain-free and get some sleep, he tried cannabis. He would smoke each evening before he went to bed but he had not smoked since the test.

13. There was evidence before the hearing about the Claimant's job which is relevant to this appeal: it was the only evidence about his duties in the disciplinary process and, in particular, his driving. According to the notes, the evidence was the following:

> **"Carl [the Claimant] said he was a Team Leader. His team would deliver orange bags and service bins out on the streets. He deals with agency hours, ordering of supplies etc.**
>
> **Marc mentioned Carl's responsibility to his staff and their safety. Carl said he was very disappointed in himself. He knew he had let them and himself down.**
>
> **Marc asked how many staff reported to him and Carl answered 5.**
>
> **Marc asked if Carl ever did any driving. Carl answered that only when absolutely necessary if no one else was available, but it was not a regular part of his job.**
>
> **Marc asked Carl how he felt about driving a company vehicle and the impact on the company's reputation had he been tested while driving.**
>
> **Carl said he knew he had let the company down badly. He said he loves and values his job and everything he does and would never intentionally do anything to hurt the company's good name.**
>
> **Marc asked Carl if the vehicles he drives have company markings on. Carl confirmed they did not. They are just white vans"**

14. The Claimant went on to repeat, by way of mitigation, that he took cannabis because of the constant pain, he was depressed being at home for such a long time and he was desperate to get back to work. He was recorded as saying at the end of the meeting that he was "totally dedicated" to the Respondent and his job, and he knew "how much he [had] let everyone down, but these were unusual circumstances", saying he had not touched cannabis since the incident.

15. After the hearing, Mr Congdon telephoned Ms Bailey to ask what had happened to other employees who had failed drugs tests. She told him all seven individuals had either been dismissed or resigned.

16. Although the Tribunal did not refer to it, Mr Congdon dismissed the Claimant by a letter dated 31 March with effect from that day. The letter stated:

> **"I understand your recent poor health condition and appreciate your honesty surrounding your reasons for starting to smoke cannabis. However, I must consider the Company position in my decision and therefore conclude that the above act constitutes gross misconduct, namely 'being under the influence of alcohol, drugs or any other substances which impact performance or those around you' and 'Gross incapability e.g. loss of faith or trust and confidence in ability to**

perform role as per specific examples of gross misconduct in the Company Disciplinary Policy. As a result, you are summarily dismissed on the grounds of gross misconduct".

17. On 8 April the Claimant submitted a letter of appeal, saying that he deeply regretted his decision to smoke cannabis and asking the company to take account of his more than 12 years' service, his work performance and his unblemished record. He added that he had never come to work under the influence of drugs and would never have put any of his colleagues at risk.

18. The appeal was heard by Mr Simon Lee, the General Manager for some sites of the Respondent. The notes of the telephone hearing which took place on 22 April were before the Tribunal and are not in dispute. The Claimant complained to Mr Lee that Ms Bailey had been involved in the decision-making process, that his long service had not been taken into account and that there had been no proper investigation of his performance at work. He repeated that he had not been under the influence of drugs and alcohol at work. He said with his service he could have been given a warning, but that the decision had already been made. Nothing was said at the appeal about his driving duties.

19. Mr Lee informed the Claimant of the outcome of an appeal in a letter dated 29 April. His reasons for disallowing the appeal were cited by the EJ at paragraph 60 of his judgment. The reasons were, in summary, that Mr Lee did not believe the decision was personal; the Claimant was randomly selected for a test; a fair investigation and disciplinary process was followed; the Claimant had not discussed his cannabis use with management or sought support; and the Claimant's use of cannabis was in breach of the Respondent's Alcohol, Drugs and Medicines Policy.

The Tribunal's Reasons

20. At paragraphs 4-16 of its judgment, the Tribunal set out a summary of the key relevant statutory provisions, including section 98(4) of the **Employment Rights Act 1996** ("ERA") and the sections relevant to remedy. It reminded itself that a tribunal must not substitute its view of whether the dismissal was unfair but, rather, must determine whether the decision to dismiss fell within the range of reasonable responses which a reasonable employer might have adopted (paragraph 17). It also referred to the "helpful" approach in cases of misconduct, implicitly referring to the well-known guidance in **British Home Stores v Burchell** [1980] ICR 303.

21. The Tribunal recorded the submissions from each party before setting out its findings of fact at paragraphs 42-60. Many of those findings related to events during the Claimant's absence from work, which may be a reflection of how the case was put before the EJ. The Tribunal dealt with the facts of, and evidence before, the disciplinary process rather shortly (paragraphs 55-60).

22. The Tribunal's conclusions begin at paragraph 61. They include, as is usual, supplementary factual findings. The conclusions are structured as follows.

(1) At paragraph 61 the EJ appears to have found that because there was no issue with the Claimant's performance at work during the period he was smoking cannabis, he was not in fact "under the influence" of cannabis for the purpose of the Drugs, Alcohol and Medicines Policy.

(2) The EJ made some criticisms of the reliance on the test results at paragraphs 62-64. He questioned whether the legal limit for driving was relevant[1]; questioned the cut-

[1] This was based on the evidence of Mr Congdon that the legal limit for driving was 2 ug/l (equating to 2,000 ng/l or 2 ng/ml).

off point in the test; and criticised the test as being an initial one requiring laboratory analysis, ignoring that a second, confirmatory test had been conducted by Crystal. This paragraph contained some factual errors, which I address below.

(3) Next, at paragraph 66 the EJ referred to various "difficulties" with the Respondent's pleaded case. The paragraph combines criticisms of the evidence before the Respondent with factual findings. For example, the EJ said it was "a presumption without evidence that the Claimant's behaviour and abilities would have been affected" by cannabis (paragraph 66.3), and found that in fact it "was not the Claimant's job to drive a vehicle" (paragraph 66.2), his role was not "safety critical", he did not work with recycling machinery and he worked as a "driver's mate" (paragraph 66.5). Though the Tribunal referred to what the Claimant had told Mr Congdon at the disciplinary meeting as the source of this evidence, it is clear that some of these findings do not correspond with the evidence of the Claimant at that hearing.

(4) The Tribunal made further criticisms of the Respondent at paragraphs 70-71. These included the following: (i) Mr Congdon was in fact heavily influenced by what Ms Bailey told him after the disciplinary hearing, echoing the finding of fact at paragraph 58 (see paragraph 70.1); (ii) there was no evidence that the Claimant's performance at work was adversely affected (paragraph 70.3); (iii) as a matter of fact the Respondent failed to consider mitigating factors, such as why the Claimant took cannabis, his long service and his good record (paragraph 70.5); (iv) the Respondent treated a failed drugs test as inevitably gross misconduct leading to dismissal (paragraph 71).

(5) At paragraphs 72-75 the EJ criticised Mr Lee's decision on appeal. In relation to Mr Lee's evidence that the Claimant was required to drive a van as part of his job, the EJ stated "[the Claimant] was not required to drive a van" and found it was not a sufficient reason to dismiss the Claimant because, as Mr Lee contended, he might in future relapse and drive a van above the legal limit (paragraph 72). The Tribunal was similarly critical of Mr Lee's view that the cannabis was not prescribed, describing this as "lacking realism", and his taking into account that the Claimant had not told the company he was taking cannabis for medical reasons (paragraphs 73-74). In rejecting Mr Lee's evidence as to why he had dismissed the appeal, the EJ again found that "the use of cannabis by [the Claimant] had not interfered with his health, social function, work capability or conduct" (paragraph 75).

(6) Following his decision that that cannabis had not affected the Claimant's performance, the EJ reasoned that "as a matter of simple logic, the sole reason for dismissal was that the cannabis was illegal not legal" (paragraph 77). He was also critical of Mr Congdon and Mr Lee for not considering it relevant that the Claimant took cannabis owing to acute back pain, echoing his earlier finding that the Respondent failed to consider mitigating factors.

23. The EJ summarised his reasons for finding the dismissal to be unfair at paragraph 80, but also emphasised that the decision "must be read as a whole and this summary is not intended to be comprehensive" (paragraph 81). Those reasons were as follows:

> **"80.1. No (or inadequate) account was taken of the genuine reason for taking cannabis.**
>
> **80.2. Likewise for of [sic] his long unblemished service**

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

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

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

80.6. It was a key part of the justification for dismissal that there was a risk to the public and colleagues by Mr Pamment driving a company vehicle, said to be an integral part of his job, when it was not, and there was no evidence that he had driven a company vehicle since 6 January 2020 (The summation of the grounds of resistance has justifies [sic] dismissal in part by wrongly asserting that Mr Pamment had breached the Road Traffic Act 1988).

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

80.8. There had been no concerns about the Mr Pamment's work or attitude (or in any other way) after his return to work on 6 January 2020.

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

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

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

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

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

24. At paragraphs 82-89 the EJ dealt with two preliminary aspects relevant to remedy. I consider these in more detail under grounds (3) and (4). The EJ rejected the argument there should be any reduction to the compensatory award based on **Polkey**. He also held there should be no reduction to the basic or compensatory award as a result of what is usually called contributory conduct.

25. For completeness, in a later decision sent to the parties on 29 April 2021, the same EJ ordered the Respondent to reinstate the Claimant, and made various supplementary orders. That judgment too is subject to an appeal to the EAT.

The Grounds of Appeal

26. The Respondent raises six grounds of appeal. I shall deal with them in turn.

Grounds (1) and (2): Substitution on Unfair Dismissal

27. The first ground of appeal is that the EJ erred in substituting his own findings of fact or approach rather than assessing whether the employer's decision to dismiss and the procedure fell within the band of reasonable responses. The second ground of appeal refers to specific examples of facts and matters which, it is said, demonstrate that the Tribunal substituted its own judgment for that of a reasonable employer. The two grounds operate in tandem and it is convenient to deal with them together.

28. The legal principles on the correct approach to fairness in s.98(4) of **ERA** are well-established and were not in dispute. A useful summary of the relevant principles as they apply to misconduct is set out in the judgment of **Aikens LJ in Orr v Milton Keynes Council** [2011] ICR 704 at paragraph 78.

29. While the fairness of dismissal is judged on the basis of facts known to the employer at the time, the important words "in accordance with the equity and the substantial merits" in s.98(4) **ERA** mean that the band is not "infinitely wide" and mean tribunals should not turn the assessment of fairness into a matter of "procedural box ticking": see Bean LJ (with whom King

LJ and Sir Terence Etherton agreed) in **Newbound v Thames Water Utilities** [2015] IRLR 734 at paragraphs 60-61.

30. Mr Forshaw relied, in particular, on the judgment of Mummery LJ in **London Ambulance v Small** [2009] IRLR 563. In criticising the approach of the employment tribunal in that case, Mummery LJ (with whom Lawrence Collins LJ and Hughes LJ agreed) said:

> **"41. On the liability issue the ET ought to have confined its consideration to facts relating to the Trust's handling of Mr Small's dismissal: the genuineness of the Trust's belief and the reasonableness of the grounds of its belief about the conduct of Mr Small at the time of the dismissal. Instead, the ET introduced its own findings of fact about the conduct of Mr Small, including aspects of it that had been disputed at the disciplinary hearing. …**
>
> **42. The ET used its findings of fact to support its conclusion that, at the time of dismissal, the Trust had no reasonable grounds for its belief about Mr Small's conduct and therefore no genuine belief about it. By this process of reasoning the ET found that the dismissal was unfair. In my judgment, this amounted to the ET substituting itself and its findings for the Trust's decision-maker in relation to Mr Small's dismissal."**

Mummery LJ went on to contrast the exercise conducted by an employment tribunal in objectively reviewing the fairness of a dismissal with the very different issue about an employee's conduct in relation to contributory fault, which is a decision for the tribunal, not the employer, based on the evidence heard by the tribunal (paragraph 44).

31. Mummery LJ added this advice at paragraph 46:

> **"… As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

32. However, he also cautioned against another danger zone. In analysing an appeal based on substitution, an appellate court must be on guard against committing the same error of which the tribunal is accused, of substituting its own subjective view of reasonableness under s.98 **ERA** for the assessment of the employment tribunal: see Mummery LJ in **Brent London Council v Fuller** [2011] ICR 806 at paragraph 28.

33. There is no suggestion here that the EJ misdirected himself as to the relevant law on s.98 **ERA** in paragraphs 4-16 of his judgment, and the EJ referred again to the range of reasonable responses test when he came to summarise his reasons for finding the dismissal to be unfair (see paragraph 80). In addition, consistent with **Small**, the EJ directed himself as to the different functions of fact finding in relation to unfair dismissal, based on what the employer did, and contributory conduct, based on what the claimant did, at paragraph 5. The sole issue is whether he misapplied the law in reaching his conclusions, as in **Small**.

34. In that regard, I do not consider I can simply read paragraph 80 in isolation, as setting out the exclusive reasons why the EJ considered the dismissal to be unfair. That would be inconsistent with the EJ's own statement in paragraph 81 that his decision must be read as a whole. The various criticisms the EJ made of the Respondent's decision-making throughout his conclusions, it seems to me, also form part of his reasoning as to why the dismissal was unfair.

35. Mr Forshaw's challenge under these two grounds fell under five headings. In approaching these grounds, I bear in mind the cautionary words of Mummery LJ in **Fuller**.

36. **(i) Claimant's Performance/Job**. The first challenge was that the EJ erred by substituting his own factual findings that the Claimant's performance at work was not affected, that driving was not part of his role, and that his role was not safety critical. Though grouped together, these arguments in fact raise distinctive points and need to be unpackaged.

37. During the course of the disciplinary procedures, the Claimant had consistently asserted that his performance had not been impaired by his use of cannabis. By contrast, the conclusion in the dismissal letter written by Mr Congdon was that the Claimant had taken a drug, cannabis,

which did impact his performance. He confirmed this in his evidence to the Tribunal: he assumed from the high result in the confirmatory drugs test that the Claimant was under the influence of cannabis at work.

38. For the Claimant, Ms Ifeka rightly accepted it was not the function of the Tribunal in resolving this conflict to decide itself if the Claimant's performance at work was in fact affected by drugs; but in addressing the question of fairness she argued it was permissible for the EJ to decide if the Respondent was reasonably entitled to rely on the only evidence it had - the report of Crystal on the detected level of cannabis - to decide that the Claimant's performance was affected. That, she argued, is what the Tribunal here had done.

39. I do not consider that is a fair reading of the Tribunal judgment. I accept her first point, that the EJ could rightly have decided that any reasonable employer should have sought more information about how likely it was that the detected drug levels would have had an impact on the Claimant's work. But I do not consider that is how the EJ analysed the matter. The closest he came was on one or two occasions where he referred to the absence of any evidence for the conclusion that the Claimant's performance was impaired (see, for example, paragraphs 66.3 and 70.3), which *might* suggest he was reviewing the evidence before the employer. But there *was* some evidence for the Respondent's view - the reports of Crystal – and nowhere did the EJ address the correct question, of whether the analysis in those reports was sufficient to provide reasonable grounds for the Respondent's belief. On the contrary, the EJ specifically decided himself that the Claimant's performance at work was not *in fact* affected by cannabis, it seems because no issue had arisen about poor performance: see, for example, paragraphs 61, 75 and 80.9. Whether he was correct on this is beside the point; it was an answer to the wrong question.

40. This finding was fundamental to some of the EJ's reasons why he considered dismissal was unfair. At paragraph 80.9, for example, the EJ concluded that because there was no impairment to the Claimant's performance, he did not fall within the provision of the Health and Wellbeing Policy allowing disciplinary action to be taken against employees "under the influence of alcohol or illicit drugs" while at work, so that he should have been supported and subject to rehabilitation under the relevant polices.

41. In my judgement, the EJ committed precisely the sort of error in the reasoning process of which Mummery LJ was critical in **Small**. He made his own factual findings about the effect of cannabis on the Claimant's performance, based on the evidence he had heard coupled with some observations of his own, rather than focusing on the evidence before the employer at the time.

42. I consider the same applies to the EJ's conclusion that driving was not part of the Claimant's role. Here, the evidence before the disciplinary hearing was not in dispute. At the hearing on 3 March, the Claimant accepted that his role involved some driving, although the Claimant only drove when "absolutely necessary" and it was "not a regular part of his job". If the Tribunal had asked itself whether the Respondent had reasonable grounds to believe that the Claimant's job involved driving, it seems only one answer was possible. But the EJ did not pose the question in this way and instead decided that driving was not in fact part of the Claimant's job at all: see paragraphs 66.2, 66.5, 72, 80.6.

43. That approach, based on evidence before the Tribunal rather than on that before the Respondent, may also explain the EJ's finding that the Claimant's role was not "safety critical" in practice because of the work he did (paragraph 66.5), when the Claimant did not dispute he had safety responsibilities either before the disciplinary hearing or before the Tribunal (according

to the EJ's notes). While the "safety critical" aspect of the work did not appear to be central to the decision to dismiss or the EJ's decision on fairness, the findings the EJ made about it are a further indication that the EJ shifted focus away from the reasonableness of the employer's belief and instead examined what he thought was in fact the case.

44. **(ii) Consulting Ms Bailey about Comparator Cases**. Mr Forshaw's second submission was that the Tribunal substituted its own decision that it was unfair of Mr Congdon to consult Ms Bailey about how comparable cases had been dealt with because she was not objective: see Tribunal paragraphs 80.3 and 80.12. He argued Mr Congdon was entitled (and right) to seek information on how comparator cases were dealt with, he did not know about any lack of objectivity on the part of Ms Bailey, and her lack of objectivity should not be attributed to the Respondent as the employer for this purpose: see **Royal Mail Group Ltd v Jhuti** [2020] ICR 731 per Lord Wilson at paragraph 60.

45. The background to the EJ's conclusions at paragraphs 80.3 and 80.12 was an earlier finding by the Tribunal that, following text exchanges when the Claimant was off ill in 2019, the attitude of Ms Bailey and the Respondent towards the Claimant changed for the worse: see judgment paragraphs 51-54. This view, according to the EJ, continued from that time onwards.

46. I am conscious I should not be over-critical in reading the Tribunal decision. Moreover, as Mr Forshaw accepted, the Tribunal was entitled to consider as a factor relevant to fairness if the employer adopted an inflexible policy of dismissing for any failed drugs test (see paragraph 80.5); that, it seems to me, is the essential point the EJ was making in paragraph 80.3. But paragraph 80.12 appears to set out a distinct reason relevant to finding the dismissal to be unfair, that Ms Bailey was not wholly objective.

47. With some hesitation, I consider on balance that here too the Tribunal drifted away from the statutory question into the territory of substitution. Had it correctly followed its own self-direction, it would have been clear that Mr Congdon had reasonable grounds for his belief of how comparable cases were treated because that belief was true. I do not accept Ms Ifeka's argument that Ms Bailey's lack of objectivity meant that, to act reasonably, Mr Congdon should have consulted someone more independent about the treatment of comparators. The argument only gets off the ground if Mr Congdon knew of Ms Bailey's lack of objectivity; and, on the premise that the information Mr Bailey gave to Mr Congdon was correct, it is difficult to see why a reasonable employer could not take it into account. As the EJ rightly found at paragraph 80.4 and 80.5, fairness would still require consideration of the Claimant's individual circumstances; but that is a different matter from saying that the information should have been ignored owing to its tainted source.

48. **(iii) Mitigation**. Mr Forshaw's third heading under these grounds (1) and (2) is that the EJ substituted his own view for that of a reasonable employer in deciding that the employer gave inadequate or no weight to mitigating factors. He referred, in particular, to paragraphs 80.1-80.2 of the Tribunal judgment. The weight to be given to mitigation was, he submitted, "quintessentially a matter for the [Respondent]" (skeleton, paragraph 34).

49. I do not accept this argument. There were very significant mitigating factors here, including that the Claimant had genuine health reasons for taking cannabis, had stopped taking it, had offered to take regular tests, had long and unblemished service with the Respondent and had no incidences of poor performance, to which the Tribunal referred at paragraphs 70.5, 80.1 and 80.2. To those might have been added his contrition at the meeting on 3 March and his evident commitment to his job.

50. In upholding a tribunal judgment of unfair dismissal in **Newbound**, Bean LJ held that the tribunal was entitled to have regard to the lack of training given to the claimant and the fact he had owned up to his guilt. In rejecting a submission for counsel for the employer (Mr Jones) that the weight to be given to his length of service was a matter for the employer - an argument which echoed Mr Forshaw's argument before me - Bean LJ said this at paragraph 77:

> **"Mr Jones' submission, which found favour with the EAT, is an attempt to stretch the band of reasonable responses to an infinite width. In assessing the reasonableness of the decision to dismiss, length of service is not forbidden territory for the employment tribunal. The fact that Mr Newbound was an employee of 34 years' service with a clean disciplinary record was a factor the judge was fully entitled to take into account: it would have been extraordinary if he had not done so."**

51. Those comments are equally pertinent to the EJ's decision on mitigation. First, the EJ found as a fact that the Respondent did not take account of mitigation (see paragraph 70.5), a finding cannot be categorised as perverse. For example, the letter of 31 March dismissing the Claimant mentioned his poor health and honesty but indicated that his failed drugs test inevitably - "therefore" - constituted gross misconduct, providing support for the EJ's finding; and Ms Ifeka pointed out that Mr Congdon's witness statement to the Tribunal did not refer to his taking account of the significant mitigation here. Second, the EJ was entitled and no doubt right to take that finding into account in relation to the evaluative question of whether the dismissal was unfair. All the mitigating factors listed by the EJ were potentially highly relevant to that statutory question; and Mr Forshaw accepted that the Claimant's long service, not mentioned in the dismissal letter, was relevant to fairness under s.98 **ERA**.

52. **(iv) Other Factors**. Finally, Mr Forshaw referred to other factors which, he argued, demonstrated the EJ applying a "substitution mind-set". I shall deal with these briefly: I consider they each support the submission that the EJ substituted his own views of fairness for that of the reasonable employer.

(1) At paragraph 70.4 the EJ decided that Mr Congdon had a "mistaken reason" for an adverse opinion of the Claimant because he did not explain the source of his view that cannabis is sometimes prescribed. Mr Congdon had said in his witness statement that the fact the cannabis taken by the Claimant was not prescribed "had an impact on my decision. Cannabis that is not prescribed is an illegal drug" (paragraph 10). Whether cannabis was prescribed or not was a reasonable matter for Mr Congdon to explore, given its obvious relevance to mitigation. In deciding his belief was "mistaken" the EJ seems to have reached his own view of the facts about cannabis prescription, and departed from reviewing the fairness of Mr Congdon's response.

(2) In making various criticisms of the Respondent's reliance on the test results at paragraphs 62-64, the EJ made some wrong assumptions and factual errors. He wrongly stated that the test had a cut-off point of 15 ng/ml - presumably a reference to the preliminary test - whereas in fact the confirmatory test showed that the Claimant had a level of over 500 ng/ml; and he criticised the test as being an initial one requiring further laboratory analysis, ignoring that a second, confirmatory test had been conducted by Crystal. In themselves, these errors do not amount to errors of law. But in my judgement the approach taken in those paragraphs, including the EJ's decision that it was "illogical" to conclude that cannabis affected performance but to ignore the result for opiates, shows him substituting his own views of why the testing procedure was inadequate, rather than assessing the fairness of the Respondent's procedure and decision.

(3) The EJ's conclusion that cannabis did not in fact affect performance seems to have driven his conclusion that the "sole reason for dismissal was that cannabis was illegal

not legal" (paragraph 77). For, once the effect of cannabis on performance was eliminated, the necessary result was that there must have been some other reason for the dismissal. In reaching this conclusion, the EJ drifted away from the actual reason for dismissal - that the Claimant's performance at work was affected - and from considering whether the Respondent had reasonable grounds for this belief.

53. **Summary**. In summary, I consider that grounds (1) and (2) of the appeal are made out, although I do not accept that the EJ erred in his approach towards the mitigation factors. It is understandable why the EJ saw the decision of the employer as harsh, given the significant (and undisputed) mitigating factors which were present and the Claimant's contrition and commitment to his job. But his analysis exhibited the kind of erroneous approach against which Mummery LJ warned in **Small**. The EJ's own findings of fact based on evidence before him, and his subjective reasons for criticising the dismissal process, seeped into his reasoning about fairness. The specific examples set out above reinforce each other and indicate in my judgement that overall the EJ approached the question in the wrong way.

Grounds (3) and (4): *Polkey* Deduction.

54. These grounds of appeal are that the Tribunal failed to apply the correct approach to **Polkey** deductions and/or failed to give sufficient reasons for not making a **Polkey** deduction.

55. The statutory basis of **Polkey** deductions is s.123(1) of **ERA**, by which the amount of the compensatory award "shall be such amount as the tribunal considers just and equitable in all the circumstances". The principles relevant to such deductions were summarised by the EAT in **Software 2000 Limited v Andrews** [2007] ICR 825 at paragraph 54. The exercise involves an

assessment of whether the employee could or would have been dismissed on the assumption the employer acted fairly.

56. In its section on the law, the EJ quoted s.123 **ERA** and referred to having considered the EAT guidance in **Software 2000**: see judgment paragraphs 9, 13. He then came to apply **Polkey** at paragraphs 82-85. After saying that he "did not consider the procedure itself to be unfair" (paragraph 82), the EJ said this at paragraphs 84-85:

> **"84. The implementation of the procedure was not fair, in that Ms Bailey had an input into to it after the hearing and before the decision. It was not unfair for Ms Bailey to provide guidance as to how to run a meeting. It was unfair for her to have Mr Congdon's ear given the background of September 2019 which was still relevant to the Respondent (see grounds of resistance). That goes to overall fairness not to a consideration of a *Polkey* reduction.**
>
> **85. I do not find that there should be any *Polkey* reduction in any award."**

57. Mr Forshaw submits that, having identified an aspect of procedural unfairness (the involvement of Ms Bailey in the process), the Tribunal should have assessed whether it would have made a difference if the employer had acted without that assumed unfairness. For the Claimant, Ms Ifeka submitted that if a tribunal finds that no reasonable employer could have dismissed the employee in the circumstances, so that a fair procedure could not make the dismissal fair, there is no need for a **Polkey** deduction. She cites by way of example the judgment of HHJ Stacey in **Jagex Limited v McCambridge**, UKEAT/0041/19/LA at paragraph 70.

58. I have not found the Tribunal's reasoning on **Polkey** easy to follow. I accept, of course, that the EJ could have decided against making any **Polkey** deduction on the basis that, in the circumstances, the sanction of dismissal fell outside the range of reasonable responses, as Ms Ifeka argued. The difficulty, however, is that the EJ did not refer to this as the reason. His sole reason was the statement Ms Bailey's involvement "goes to overall fairness not to a consideration of a **Polkey** reduction" which I find hard to reconcile with **Polkey** or the guidance in **Software**.

If the intervention of Ms Bailey in the process was procedurally unfair, as the EJ found, the application of **Polkey** would ordinarily lead to the Tribunal considering whether the Claimant would or might have been dismissed in the event that unfairness were corrected.

59. In the absence any sufficient explanation from the EJ of why no **Polkey** deduction was appropriate, I would have remitted this issue to the Tribunal on the basis paragraph 84 amounted to a misdirection or that the decision was insufficiently reasoned; but this aspect of the EAT ruling has effectively been overtaken by my ruling on grounds (1) and (2): see Disposal below.

Ground (5): Contributory Conduct.

60. The fifth ground is that the EJ did not apply the correct test on contributory conduct for the purpose of s.122(2) and s.123(6) of **ERA**. This ground, too, has mostly been overtaken by my decision on grounds (1) and (2); but I address it for completeness.

61. Once again the legal principles were not in dispute. First, in assessing contributory conduct a tribunal makes findings of fact on the balance of probabilities about what the Claimant did. Second, a reduction may be made where the employee's conduct before the dismissal was "culpable or blameworthy": see **Nelson v BBC (No.2)** [1980] ICR 110. Third, if such conduct is found, the tribunal (i) has a discretion to make a reduction to the basic award where it considers it would be "just and equitable" to do so (s.122(2) **ERA**); and (ii) where "the dismissal was to any extent caused or contributed to by" that conduct, the tribunal "shall reduce the compensatory award by such proportion as it considers just and equitable" (s.123(6) **ERA**). Despite the difference in wording of these provisions, a tribunal will require a good reason to adopt a different approach to the two types of award.

62. The Tribunal cited the relevant statutory provisions in its judgment at paragraphs 8 and 10. It did not refer to any case-law; but that is hardly a point of criticism in such well-trodden territory for an experienced EJ.

63. The EJ's reasons for not making a reduction to either award are set out at paragraphs 86-87. He rejected as "oversimplistic" the analysis that the Claimant took an illegal drug which showed high levels and so should have a substantial or total reduction for contributory conduct. His reasons were as follows:

> **"87. … Given the analysis above, I do not consider that any reduction for contribution is warranted. The Respondent's own position means that the presence of the drug itself would have been uneventful if (as they thought it could be) it was prescribed. One is left with the fact that it was an illegal drug only. But that is not something that leads to dismissal if the Respondent's own policies are applied in suitable cases.**
>
> **88. Nor does the evidence subsequently obtained by the Respondent as to the levels of cannabis help [a reference to evidence from Crystal obtained after the dismissal], as the causation of the dismissal can only be by reason of things known at the time. They were right that it was a high level, but all they knew about it was that it was high, but that it had no discernible effect on the work performance of Mr Pamment."**

64. In those paragraphs the EJ did not make any finding that the Claimant's conduct was not culpable or blameworthy. Nor do I read the judgment as saying that a nil reduction was, in the circumstances, just and equitable for the purpose of s.122(2) or s.123(6) of **ERA**. Rather, he seems to have focussed on whether the conduct led to or caused the Claimant's dismissal. In both paragraphs it seems he decided that the Claimant's conduct did not cause or contribute to his dismissal because, if the Respondent had acted properly and in accordance with its own policies, the Claimant would not have been dismissed at all.

65. That approach can only work in relation to s.123(6) **ERA** because under s.122(2), relating to the basic award, it is not necessary that the conduct caused or contributed to the dismissal at all. The conduct must occur before the dismissal or before notice was given, but the wording of

s.122(2) does not prevent a tribunal considering evidence of such conduct which is only obtained after the dismissal or giving of notice.

66. But in any event the EJ's approach does not accord with how s.123(6) operates. The subsection focuses on the *actual* conduct of the Claimant and whether that conduct, if blameworthy, caused or contributed to the actual dismissal. It does not direct tribunals to answer the different, counterfactual question of whether the respondent would have dismissed the claimant for that conduct if it had acted properly, reasonably or fairly. Such an approach confuses factual causation under s.123 with considerations relevant to s.98 of **ERA**. That cannabis had no discernible effect on the Claimant's performance would or might be an element relevant to blameworthiness and what reduction was just and equitable; but it did not mean that the fact he had smoked cannabis did not cause or contribute to his dismissal.

67. For those reasons in my judgement the EJ's reasoning shows a misdirection in relation to contributory conduct.

Ground (6): Perversity

68. This ground of appeal, which overlaps with the preceding grounds, is that it was perverse of the Tribunal (i) to decide the Claimant's dismissal was unfair; (ii) not to make any **Polkey** deduction; or (iii) not to make any reduction for contributory conduct. In addition, (iv) the specific findings on contributory conduct in paragraphs 87-88 of the Tribunal judgment were said to be perverse.

69. Ms Ifeka reminded me of the high threshold on a perversity challenge, reflected in the various phrases and strong adverbs used to describe it: see, among many others, **Stewart v**

Cleveland Guest [1996] ICR 535 at 542-3. Reading the Tribunal decision in the round, I do not think its decision crosses this threshold.

70. In relation to unfair dismissal, Mr Forshaw accepted that if any of the reasons given by the Tribunal for finding the dismissal to be unfair were valid, his perversity argument was undermined. I have already concluded that the Tribunal was entitled to find that the failure to take any or inadequate account of the very significant mitigation factors was highly relevant to fairness in s.98 **ERA**: see the citation from **Newbound**, above. The Tribunal's conclusion that the Respondent applied an unwritten, inflexible policy of dismissing all those who failed a drug test, without examining the individual circumstances, was also a highly relevant consideration to fairness (see Tribunal judgment paragraphs 80.4-80.5). It could also be relevant for a Tribunal to consider whether the employer had reasonable grounds for its belief that cannabis affected the Claimant's performance at work based on the reports of Crystal alone. It seems no steps were taken to investigate this matter, supporting the EJ's finding about the Respondent's inflexible approach.

71. As for the **Polkey** issue, this is effectively dealt with in paragraph 58 above. It was open to the ET to decide, for example, that the significant mitigation factors listed by it at paragraph 50 of its judgment meant that no reasonable employer could substantively dismiss the Claimant for the admitted conduct, or the EJ might have decided that seeking to reconstruct what might have happened was too riddled with uncertainty to make a deduction appropriate. The perversity challenge is not made out.

72. In relation to contributory conduct, it is not clear which findings of fact are said to be perverse. Moreover, the EJ found that the Claimant smoked cannabis for severe back pain, to

help him sleep, and not for recreational purposes. The Respondent did not dispute his evidence to the hearing of 30 March that he tried it because he was desperate to be free of the constant pain and get some sleep when his medication was not working. Given these circumstances, a tribunal *might* - I put it no higher than that - decide that the conduct was not blameworthy or that it was just and equitable not to reduce either the basic or compensatory award.

Disposal

73. My conclusion above is that each of the grounds of appeal succeeds, save for ground (6) on perversity.

74. The first issue consequential issue is what happens in relation to grounds (1) and (2). Ms Ifeka submitted that, even if I found the EJ erred in relation to some of the reasons for which he found the Claimant's dismissal to be unfair, in light of the other reasons the inevitable result was that his dismissal was still unfair so that the decision on unfairness should be upheld.

75. Following **Jafri v Lincoln College** [2014] ICR 544, where the EAT detects a legal error it must remit the matter to the employment tribunal unless the EAT concludes that (a) the error cannot have affected the result and was therefore immaterial or (b) even if the result would have been different, the EAT is able to conclude what the result must have been (Laws LJ at paragraph 21). Law LJ added in the same paragraph:

> **"… In neither case is the appeal tribunal to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the employment tribunal, supplemented (if at all) by undisputed or indisputable facts. Otherwise, there must be a remittal."**

76. As I have already held above, I consider the EJ was entitled to consider some of the factors he did as relevant to unfairness. Examples are his conclusions that the Respondent took no or

inadequate account of mitigation or applied an unwritten policy of dismissing all those who failed a drugs test. Although at one stage I was tempted to uphold the Tribunal's decision once the "bad" reasons are stripped out, ultimately I do not consider that would be the correct or fair approach following **Jafri**.

77. First, the EJ did not treat each of his reasons as discrete and independent reasons, each of which made the dismissal unfair in itself. Consistent with that approach, he correctly directed himself that in assessing whether a dismissal is unfair for the purpose of s.98 **ERA**, a tribunal must consider all the circumstances (ET judgment paragraph 16). In those circumstances, I do not consider I can say the error cannot have affected the result for the purpose of (a) above.

78. Second, nor do I consider that (b) from **Jafri** applies. Even if the EJ's findings that no account was taken of mitigation and that the Respondent applied a blanket rule of dismissing for a negative drugs test both provide very strong support for a finding of unfair dismissal, they do not ineluctably dictate such a result. It is possible that a tribunal might conclude that, having regard to all the circumstances, other operative factors, such as the level of cannabis, point the other way. Moreover, adopting such an approach could operate unfairly against the Claimant, because if a finding of unfair dismissal were substituted by the EAT in relation to some specific grounds of unfairness only, this would have knock-on effects in relation to the issue of **Polkey** deductions (which would have to be remitted)

79. The question of liability for unfair dismissal should therefore be remitted. The issues of **Polkey** deduction and contributory conduct should also be considered afresh, since each will depend on findings by the new tribunal.

80. I consider remission should be to a different tribunal, in accordance with the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The hearing only took one day; I have found that the decision was wrong in relation to both liability and remedy; and there is a risk of the appearance of pre-judgment if the matter were remitted to the same tribunal.

81. Finally, in light of my judgment the decision of the Tribunal on reinstatement, sent to the parties on 29 April 2021, cannot stand. The terms of the EAT's order should reflect this.