Case Number: 2418270/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs Amy Harding

Respondent: Oldham College

Heard at: Manchester

On: 29 November 2021, 5 January and 3 February 2022

Before: Judge Miller-Varey sitting alone

Representation

For the Claimant: Ms Nicola Owens (Representative)

For the Respondent: Mr John Martin (Solicitor)

RESERVED JUDGMENT

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

REASONS

1. These reasons make reference to page numbers. Unless otherwise stated, these relate to the correspondingly numbered pages of the hearing bundle.

2. By a claim issued on 20 November 2020 the Claimant seeks compensation for unfair dismissal by the Respondent. The Respondent denies that the dismissal was unfair, contending that it was for the potentially fair reason of the Claimant's conduct.

THE ISSUES

3. I prepared a draft list of issues. This was circulated via email to the parties' representatives following clarification of the potential amendment matter and resulting case management order (dealt with further in paragraph 8 below).

4. The issues to be determined were as follows:

   i. Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of conduct? This will require the Respondent to show a genuine belief in the Claimant's misconduct.

   ii. If so, was that belief held on reasonable grounds following as much investigation into the matter as was reasonable in the circumstances?

   iii. Did the decision to dismiss fall within a range of responses open to a reasonable employer?

   iv. Was the dismissal procedurally fair?

   v. If the procedure was defective, was it remedied on appeal?

   vi. Would or might the Respondent have fairly dismissed the Claimant had a fair procedure been carried out?

   vii. Did the Claimant contribute to her dismissal?

THE HEARING

Preliminary matters

5. The Claimant's witness statement of 26 July 2021 made complained of her fitness to attend investigation and disciplinary meetings [paragraph 6]. She described having *"long standing mental health issues"* of which the Respondent through its staff, was aware. She asserted *"the Equality Act would be applicable to me as an employee"*. Within the ET1 however, she had answered the question *"Do you have a disability?"*, negatively [p.9 ET1].

6. I raised with the Claimant's representative the relevance of the reference to the Equality Act 2010, and in particular whether the Claimant sought to bring any discrete, additional claim arising out of it. Ms Owens contended that in consequence of the Claimant's mental health, she was disabled. Accordingly, fair and reasonable adjustments should have been adopted throughout the disciplinary process. She did not wish to pursue any separate claim. However, she maintained that the Claimant's mental health difficulties had existed for 12 months, had been witnessed on earlier occasions by her employer and had been the cause of a referral to the Respondent's occupational health department. Ms Owens further indicated that she had not been involved in the preparation of the ET1, hence the issue being raised at a later stage.

7. Mr Martin for the Respondent submitted the matter had first been raised in the Claimant's witness statement, and his client was *"not in a position to concede that the Respondent was disabled"*. There was equally no application to amend the claim.

8. I made a case management order under r.1(3)(a) that:

    8.1 the Claimant should not be permitted to advance, as a facet of the claimed unfairness, that she had specific statutory rights to adjustments as a disabled person, which were not met in the course of the disciplinary process; but

    8.2 the order at 8.1 did not preclude her from arguing that her actual illness at the relevant time(s) (as supported by disclosed sick notes – pp.17J - 17L) was not fairly heeded during the disciplinary process.

Procedure, documents and evidence heard

9. The hearing bundle comprised 95 pages of documents, together with a separate pleadings bundle and a witness statement bundle.

10. I decided that the Respondent should lead evidence first. I heard evidence from the following witnesses on behalf of the Respondent:

    Heather Green – Vice Principal, Strategy and Quality
    Debra Woodroof – Deputy Principal

11. I then heard evidence from the Claimant.

12. All witnesses gave evidence by way of witness statement which I had read in full before they gave their oral evidence. All witnesses were cross examined.

13. The evidence concluded at 4.05pm and I gave directions for the parties to file and exchange written submissions sequentially, with the Respondent going first. Both parties complied. I considered the submissions and prepared my judgment and reasons over two days: 5 January and 3 February.

FINDINGS OF FACT

14. Having considered all the evidence, I find the following facts on the balance of probabilities. The parties will note that not all the matters that they told me about are recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.

15. The Respondent is a college. The Claimant was employed by the Respondent from 28 September 2009 until her summary dismissal on 9 October 2020. Her role was that of Student Data and Curriculum Compliance Officer.

16. In addition to the three witnesses, four further members of the Respondent's staff are material to the case. Their names and positions are:

    Sharon Figgins – Data Services Manager and immediate line manager of the Claimant;
    Shelley Hutchinson – Safety Engagement Operative;
    George Yewdale – Safety Engagement Supervisor; and
    Roger Clegg – Investigating Officer and Director of Quality.

17. The Respondent has a zero-tolerance policy in respect of illegal drugs on college premises. This is an agreed fact between the parties [pp.3 & 28] and is recorded within the Searching Persons for Prohibited Items Policy [p.35, paragraphs 1.1, 2.4 and 3.1, "the Stop and Search Policy"].

18. The Respondent's disciplinary procedure sets out that the Respondent may dismiss an employee without notice or pay in lieu of notice if on completion of an investigation and a disciplinary hearing, it is established that an employee has been guilty of gross misconduct. Breach of the zero-tolerance policy is not specified in the list of offences which may be regarded as ground for summary dismissal. However, that list is non-exhaustive. It does include (a) wilful and serious breach of the rules and procedures concerning health and safety at work and (b) the committing of a criminal offence which may adversely affect the college's reputation, the employee's suitability for the type of work he or she is employed by the college to perform, or his or her acceptability to other employees or students. Offences of a similar nature will be dealt with in the same, summary way [p.45].

19. Returning to the Stop and Search Policy, it applies to both students and staff of the college. At clause 3.4 it provides that where there are grounds for suspicion that a person is in possession of a prohibited item (which term expressly includes illegal drugs – clause 1.1) that person will be subject to a search by members of the Stop and Search team. In addition to body searches the policy makes special provision for the search of a bag where there is a suspicion of prohibited items. Six actions are set out which should be followed by the staff undertaking the search (clause 3.11). The final two of these are:

Log the search on the safeguarding database

Invite the person to return items to the bag, retaining any prohibited items.

20. I am satisfied from the evidence of Ms Green and of Ms Woodruff to the Tribunal that in practice however, small amounts of illegal drugs found through a search (for example, just a few leaves) would be disposed of by members of the safety and engagement team rather than handed to the police. Where there was a suspicion – from the amount – that it may not for personal use but for dealing, seized illegal drugs would be retained, placed in the College safe and passed to the police. Paraphernalia would normally be retained too.

21. On 4 September 2020 Sharon Figgins expressed concern to the Claimant that she could smell cannabis in the vicinity of the Claimant. The Claimant passed her bag to Ms Figgins who commented again on the smell. The Claimant sprayed perfume around her bag. Ms Figgins escalated the matter, and the Respondent provided authorisation for a search to be conducted of the Claimant and her belongings. This was conducted by trained searchers, Shelley Hutchinson and George Yewdale (together "the searchers") but with the clear understanding that Shelley Hutchinson would physically undertake all physical aspects of the body and bag search. Sharon Figgins observed the search. Shelley Hutchinson was experienced in undertaking Stop and Searches on students, having undertaken up to 80 at the time of the Claimant's search and completed three training courses. This was the first Stop and Search conducted on an employee. A small amount of a substance which the searchers reported to be cannabis was found in the Claimant's bag along with items identified as a "cone" and "roach". These were not taken from the Claimant. The cannabis was seized. As a result of the search, the Claimant was required to leave the college straightaway. The same day she was advised in writing of her suspension on the basis of two allegations:

You have brought illegal substances onto the college premises and were in possession of illegal substances when confronted and

You were under the influence of illegal substances whilst in work.

The Investigation

22. Roger Clegg conducted an investigation between 8 and 14 September 2020. For that purpose, he interviewed: the Claimant, Shelley Hutchinson, George Yewdale and Sharon Higgins. Detailed notes of these interviews were before the Tribunal as part of his report. In addition, a separate undated statement was taken from Shelley Hutchinson. It is written in the first person but is unsigned. This statement was in hand before the investigation report was concluded as it appears at appendix 6 to his report. The Claimant was furnished with all of these documents when she was notified of the disciplinary hearing [p.17A]. They are an accurate account of what was said and done within the investigation.

23. The Claimant volunteered the following relevant information to the investigator:

    i. She had allowed her bag to be used the night before by her cousin in order to store items of his which he usually kept in his car. This arose because the Claimant and her cousin were spending time together, during the course of which the Claimant's cousin had his car cleaned. The Claimant's cousin smokes cannabis for medical purposes. He replaced his items after the car was cleaned. The Claimant had limited reasons to access her bag again until the search that had followed the morning after at the college. She agreed a large cone shape was found. She said this was a rizla. She did not agree that resin had been found. She said *"I think it was tobacco"*. The Claimant said that she smokes cigarettes but this is not widely known. She said that she had forgotten to take the rizla out of her bag [p.3]. She had never used cannabis, ever [p.3].

    ii. That at time of the search George Yewdale said it was a *"negative bag search"* but Shelley Hutchinson had said to her that there was *"resin"* [p.2].

    iii. That there <u>was</u> something that had the appearance of tobacco. She told the investigator this: *"I don't know what that [resin] is because I don't smoke cannabis and it wasn't mine. I said it was tobacco...."* .

24. Shelley Hutchinson told the investigator that cannabis, tobacco and paraphernalia were found in the Claimant's bag, plus there was a strong smell of cannabis which the Claimant acknowledged [p.6]. The investigator did not put to Ms Hutchinson in interview what form the cannabis took or whether she mentioned *"resin"* to the Claimant. However, in her written statement she says that she found *"small amounts of ground up cannabis leaves"* [p.12]. She told the investigator she was able to identify leaves [p.6]. The searchers used the term *"negative search"* in reference to a negative person search, since Shelley Hutchinson did not find anything on the Claimant's person. As well, the Claimant's coat, which she had removed, did not yield anything despite a strong smell emanating from it. In terms of paraphernalia, she described finding *"a cone and a roach in the bag"*.

25. George Yewdale said *"cannabis leaves and paraphernalia"* were found in the bag. He did not mention tobacco. In terms of paraphernalia, he said: *it's something I have seen previously like a big cone shape and a roach that you use to make a joint..."*.

26. Sharon Figgins, the observer whose concern had led to the search, told the investigator she witnessed Shelley Hutchinson find *"something you use to roll things to smoke and then she [Shelley] found residue at the bottom of the bag". S*haron Figgins reported of this that: *"Shelley said it was cannabis, Amy said no it was tobacco..."*[p.11]. The cone and roach were items she had seen before that are used to make a joint.

27. Sharon Figgins also told the investigator that she thought the term *"negative bag search"* used was used, she believed to reflect that it was *"not a large amount only residue*".

28. Roger Clegg's investigation report concluded that:

    Whilst there are some minor inconsistencies in the statements relating to timings of events, the context and content of the days event is consistent and the fact there is strong smell of cannabis from the bag is not disputed. The stop &search was completed professionally and followed college procedures by a female member of staff, who has successfully undertaken a significant number of searches, and is experienced in detecting the use of cannabis and traces of the substance. This is confirmed by her line manager GY who supervised the search alongside her which is seen as good practice. This includes saying it was a negative search which refers to outcomes when completing body searches for safety and security reasons and not bag searches for illegal substances. This was the "negative search" that AH heard.

    It is clear why SF felt the need to refer AH for a Stop & Search plus the strong smell of cannabis and her behaviour gave SF justifiable suspicion that AH could have been under the influence of an illegal substance. The findings of the Stop & Search confirmed these suspicions to be correct given the traces of cannabis found and the associated paraphernalia, cone and roach. This is categorised as Gross Misconduct under the college's disciplinary procedure for Managing Problems of Misconduct. [pp.16-17]

29. He recommended that a formal disciplinary meeting proceed to consider two allegations against the Claimant:

    AH brought illegal substances on to the college premises and was in possession of illegal substances when confronted

    AH was under the influence of illegal substances whilst in work.

The disciplinary hearing

30. By a letter dated 14 September 2020 the Respondent invited the Claimant to a formal disciplinary meeting to be held via Google Meet on the 21 September at 12:30pm. The letter enclosed the investigation report, accompanying interview records and appendices. The letter indicated that in view of the seriousness of the allegation the disciplinary panel would consider what disciplinary action to take where the possible sanction could be up to and including dismissal.

31. The letter advised the claimant that she would have the right to hear and question all evidence presented and to provide a statement on her own behalf. She was given the opportunity to provide any documentation she wished to be considered by no later than four working days prior to the hearing. She was also advised of her right to be accompanied by a work colleague, recognised trade union officer or recognised trade union representative. She was asked to confirm her attendance and was also

advised that the hearing would take place potentially in her absence if either she or her representative failed to attend without good reason. The author of that letter, HR Advisor Katy Blackshaw, was then in contact with the Claimant.

32. In an email of the 21 September 2020 sent at around half past midnight, [p.17C and 17D] the Claimant asked for the meeting due to be heard that day to be adjourned for a short period of time as her mental health and anxiety *"through this incident"* had reached high levels to a point where she could no longer even function on a day-to-day basis. The period sought was a couple of days in which she would speak to her doctor and compose herself [p.17D]. She further highlighted extra worry and stress including being a single parent and that her children had been unable to attend school because of COVID isolation. She went on to request a copy of the Stop and Search policy as this had not been included in the investigation documents. She also requested a copy of the record of the Stop and Search that was carried out on 4 September, including the details and the conclusion. She expressed too that it was fundamental for the witnesses who had provided statements, Sharon Figgins, Shelly Hutchinson and George Yewdale to be called in order that she could ask them questions.

33. Katy Blackshaw agreed to the request by an email of 9.35am the same day. She said that obviously the Respondent would need to rearrange the hearing as the longer the matter was prolonged the further stress it may cause. She referenced Medicash and also asked for contact by lunchtime the day following to update the Respondent on how the Claimant was and what the doctor had said. On 22 September 2020 the Claimant emailed to say that following a telephone consultation with her GP she had been issued with a two-week sicknote and her medication was being increased. Her next appointment was the 28 September at 10:00 AM. She expressed that she wanted to *"present myself in a professional manner, this is my job and my life has been majorly affected at thought of losing it all"*. Ms Blackshaw replied the following afternoon thanking the Claimant for the update and asking for a copy of the sicknote.

34. The note issued was for the period 21 September 2020 until the 5 October. It cited anxiety and depression as the cause of the Claimant being not fit for work [p.17J]. On 28 September the Claimant apologised for the delay in sending the Respondent a copy of the sick note, indicating that there had been difficulties with illness on the part of her son. She referred to her impending review at the doctors on 29 September, when she would collect the sick note to send over. She also referenced that she was feeling *"a little better and a little stronger"* and would call HR about rearranging the disciplinary meeting.

35. A second sicknote for the period 1 October to 15 October was issued following assessment on the 1 October. This note referenced anxiety states and depression.

36. There was some difficulty or confusion over the sending of the sick notes whereby they were acknowledged as received by the Respondent for the first time only after the disciplinary hearing on 9 October.

37. The disciplinary hearing took place on the 8 October in advance of which the Claimant furnished a written statement dated 7 October. That statement alluded to the two medical certificates. The statement was forwarded to the Respondent on the morning of the hearing. It addressed a number of aspects:

    i. The Claimant did not feel fit to attend but had been told by the Respondent's HR department on 7 October that it would go ahead, despite the sick notes. She had been advised to provide a statement in lieu of attending.

    ii. That a written statement was not a full and fair opportunity to put forward a defence to the allegations but as she was not mentally strong enough to endure a full disciplinary hearing this was her better option as the hearing would not be adjourned.

    iii. She referenced that her request for a copy of the Stop and Search policy had not been answered. She commented that on the 7 October HR had indicated they did not have an answer to her request at that time.

38. The remaining part of the statement (roughly the second 2/3rds) addressed itself to the substance of the allegations. In summary the claimant said:

    i. She had never brought illegal substances into the college.

    ii. She had never been under the influence of illegal substances on the day in question or ever before during her employment. She had never taken illegal substances, specifically cannabis.

    iii. She had been suffering recent significant personal stress following the breakdown of her marriage.

    iv. She wanted to be present at the hearing to ask all the questions she wanted to of the witness but as she was not in a position to do so, proffered her written recollection of the day.

    v. Within that she described that following the comments of her colleague about the smell it dawned upon her that she had been with her cousin the night before. However, she knew that her cousin would not have left anything illegal in her bag when she allowed him to use it for storage. She was upset that originally it was stated resin was found in her bag and then changed to *"green cannabis leaves"*. There was nothing of the sort in her bag; it was tobacco and sand. She said it was a misunderstanding.

39. I accept the evidence of Ms Green who I found credible and open that she took her decision to proceed with the disciplinary hearing in conjunction with HR and taking into account the Claimant's communications. Her rationale was that it was reasonable to postpone the hearing on the first occasion but

from the Claimant's recent emails her current mental health and anxiety levels were connected to the incident. Correspondingly, and with a month already having elapsed, she decided in good faith that it was better to move forward in order that a conclusion could be reached

40. In fact, at the outset of the meeting the Claimant was able to attend. I find the Claimant was upset, visibly so. The notes of that meeting are fulsome and have not been the subject of challenge. I accept them as accurate. The claimant was afforded the chance to attend without her camera on in order to make her feel more comfortable. Before reading her pre-prepared statement, the Claimant raised three main points: the substance found was tobacco and not cannabis, Shelley Hutchinson had *"changed"* her statement and she had not received the Stop and Search policy. After reading her statement, the Claimant indicated to Ms Green that she did not feel able to question the witnesses to which Ms Green responded that she would. That's corroborated by the meeting notes [p.23] which also confirm the Claimant was offered the opportunity to type her questions too. The Claimant left the meeting because her distress was so great. Ms Green therefore took it upon herself to ask the questions she considered were the only areas of dispute, namely clarification of what was in the bag she described.

41. The meeting continued. Ms Green asked George Yewdale on his own and then Shelly Hutchinson (in his presence) about the substance found in the Claimant's bag. George Yewdale said it was cannabis leaves *"100%"*. Shelly Hutchinson was asked if it was tobacco or cannabis which was found in her bag. The response was that it was cannabis *"because of the smell and because of the leaves"*.

42. At no point in the course of the disciplinary hearing was the Stop and Search policy discussed. The searchers were not asked about it. Ms Green did not collect information from them about what had happened to the seized cannabis or to the paraphernalia. I find, as Ms Green told the Tribunal that (a) in the case of small amounts of cannabis leaves found during a search, the search team would flush these away as a matter of standard practice, rather than retain them for passing to the police; and (b) she assumed because the substance found in the Claimant's bag was a small amount of cannabis leaves, Shelley Hutchinson and George Yewdale had done so in this case.

43. The disciplinary hearing was adjourned following which Ms Green explained she had sufficient information to reasonably believe that the Claimant brought drugs on site. However, there was insufficient evidence that she was under the influence. She described that as *"subjective"*. She further described that the Claimant had not taken responsibility for her actions and the lack of an admission meant the Respondent could not work with her. With reluctance therefore, she decided to dismiss the Claimant.

44. The Claimant was notified of the outcome in a letter of 9 October 2020 [p.24]. It explained to her the additional efforts to question the two witnesses. Ms Green reported that both had described the substance found as

cannabis leaves and that she had confidence in the searchers because of their experience. It recorded the conclusion that the Claimant had brought cannabis and paraphernalia into the premises which is prohibited and that she had not taken responsibility for this despite the evidence against her. This had resulted in a breakdown of trust and confidence. The upheld allegation was considered as gross misconduct for which the sanction was dismissal effective from the date of the letter. She was given information about the right of appeal.

The Appeal Hearing

45. The claimant duly made her appeal on two grounds:

    i. First that her first hearing was unfair and her adjournment request had been unreasonably refused. This deprived her of the opportunity to question witnesses or fully provide a defence to the allegations.

    ii. Second, she had not been provided with the Stop and Search policy in advance of the hearing this had denied her the right to a fair defence.

46. On 21 October 2020 the claimant chased the respondent for a reply to confirm receipt of her appeal. This was acknowledged on the 21 October when she was encouraged to access support again through Medicash.

47. In the week beginning 26 October the Claimant requested and was provided with a copy of the Stop and Search policy and notes of the disciplinary hearing. This led her to request the entry on the safeguarding database from the 4 September relating to her search [p.17P]. The Respondent received this request on Thursday 30 October. The appeal meeting was scheduled for Monday 2 November.

48. On the morning of 2 November, there was the following email exchange [p.17Q]:

    Josie Elson (Director of HR) to the Claimant (08.19 am)

    There is no entry on the safeguarding database - it's the college's practice that in the case of staff information about a search [sic] is not recorded in the safeguarding database due to the number of staff who have access to the system.

    Reply Claimant to Josie Elson (09.44 am)

    Where was the information kept for my search? The Stop and Search policy states it enters it but not clear about whether it is staff or student.

    Further response Josie Elson to the Claimant (09.55 am)

    Just to clarify where the search was on a member of staff the information is not entered onto the safeguarding system as we would not want other staff to be able to access such sensitive information about staff members in cases involving staff the information is kept by HR.

49. The appeal hearing took place via a Google meeting on the 2 November conducted by Deborah Woodruff, Deputy Principal in the presence of Josie Elson. The claimant confirmed that she had chosen not to be accompanied. She was further told to request adjournments if struggling or in need of a break.

50. Ms Woodruff told the Claimant she had made arrangements for relevant staff to be able to join the meeting if appropriate and also for adjournments to carry out further investigations.

51. The grounds of the appeal were addressed in turn. The material points were as follows:

    i. The Claimant asserted that she had sought the Stop and Search Policy during the investigation stage and also prior to the disciplinary hearing. It was only at the appeal stage that Josie Elson had provided it. Prior to that the claimant had not been able to find the policy on the college intranet. The Claimant complained that the blinds in the room in which she was searched were not closed, meaning she could be seen by builders outside.

    ii. She again raised that what she considered to be an inconsistency in the statement of Shelley Hutchinson (resin in the course of the search but cannabis leaves in her statement). It had also been described as a negative search and that was consistent with there being no drugs and the fact evidence had not been retained.

52. Regarding the postponement of the disciplinary hearing, Ms Woodruff asked the Claimant if there were any other questions she would have wanted to ask the searchers. She replied that she was not aware of the Stop and Search policy then and had not seen it. She raised the issue that according to the policy, prohibited items should be retained. Why, therefore, had the searchers not retained the alleged cannabis leaves. She also identified an alleged breach of the policy whereby searches ought to have been conducted by someone of the same gender and accompanied by someone of the same gender. The Claimant stated she would not admit having illegal substances when she had been searched but she did admit there was a smell and she did accept that her bag was her responsibility

53. She reiterated she felt the college should have retained the evidence against her. Ms Woodruff explained that she wanted to interview George Yewdale and Shelley Hutchinson again to seek clarification and therefore adjourned.

54. Ms Woodroof interviewed George Yewdale on the same day. She raised issues around compliance with the search policy. Mr Yewdale explained that Shelley Hutchinson was the only female trained person on the team and that due to the sensitivity of the case (the Claimant being a staff member) they had not wanted to go beyond the Stop and Search team to another member of staff. He indicated the room had been chosen to afford the greatest discretion to the Claimant rather than taking her via a route through various

public corridors where the other staff would see her being escorted by the team. He was asked why if he and Shelley Hutchinson had found illegal substances, they had not retained them. George Yewdale told Ms Woodruff that the identified cannabis *"bits"* had been scooped up and flushed away. The quantity was not enough to make a full joint. The paraphernalia had not been seized. The circumstances were that the Claimant had started to repack her bag frantically and was very emotional. George Yewdale judged that Claimant would not be in a position to harm herself with the other items, after the cannabis had been taken from her.

55. Ms Woodruff did not interview Shelley Hutchinson.

56. Just over a week later on the 9 November Ms Woodruff wrote to the Claimant confirming the outcome of the appeal meeting. She upheld the decision to dismiss the Claimant. She addressed the two grounds of appeal in this way:

    i. The college had been understanding of her sickness on one occasion. A statement had been received and given consideration. Witnesses were asked relevant questions on her behalf and she had been encouraged to seek support.

    ii. It was acknowledged explicitly that the Stop and Search policy had not been provided but was available on the college's intranet. It would never usually have been provided at the point of Stop and Search. The search location had been chosen to protect her reputation. Having carried out her further investigation and considered matters, Ms Woodruff concluded that the offence was a serious one. This was compounded by the inconsistency and the accounts the Claimant had given and the absence of any acceptance of responsibility which made the matter worse.

THE LAW

Unfair Dismissal

57. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

58. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

59. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:

    a. did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

    b. did it hold that belief on reasonable grounds?

    c. did it carry out a proper and adequate investigation?

60. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

61. Tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason in all the circumstances of the case.

62. I remind myself that my proper focus should be on the claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved (Ham v the Governing Body of Bearwood Humanities College [UKEAT/0397/13/MC]

63. I have also reminded myself that the central question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision of what I might have done in the Respondent's position.

64. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from her employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA)

65. I also accept that when considering the question of the employer's reasonableness, I must take into account the disciplinary process as a whole, including the appeal stage. (*Taylor v OCS Group Limited* [2006] EWCA Civ 702)

66. Ultimately the question is whether the employer had a reasonable belief that the employee committed such serious misconduct that instant dismissal was justified. Just because the claimant has committed gross misconduct, does

not mean the dismissal was fair. I accept that the usual approach under s98(4) must be followed and the use of the label gross misconduct and the fact of summary dismissal is a factor to be considered along with all the other circumstances

67. In reaching my decision, I must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render her liable to any proceedings.

68. Paragraph 12 of the code says: "*The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses".*

69. On this point I have also had regard to *Santamera v Express Cargo Forwarding t/a IEC Ltd* [2003] IRLR 273, EAT in which the Claimant's grounds of appeal included not having the opportunity to put questions to those who had complained about her. At paragraphs 35 and 36, Wall J remarked thus:

Section 98 of the Employment Rights Act 1996 and the cases decided under it and its predecessors do not, of course, require the dismissing employer to be satisfied, on the balance of probabilities, that the employee whose conduct is in question has actually done what he or she is alleged to have done. In a dismissal based on conduct, it is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which he, she or it may lack the means.

These considerations, we think, explain why, in the workplace investigation of misconduct, cross-examination of complainants by the employee whose conduct is in question (or even confrontations between them) are very much the exception. To a lawyer, accustomed to the judicial process, cross-examination designed to undermine credibility - in this case putting to the complainants the matters alleged by the Appellant in paragraph 19 of this judgment - would appear the natural way of testing whether or not they were telling the truth. It does not, however, follow that an employer is bound to take the same course; nor, on the facts of this case does it necessarily follow, in our judgment, that the process was unfair because [Ms Phillips and Mr. McKenna] did not put to the contents of paragraph 19 to the complainants when they re-interviewed them. Whilst, in order to be fair, it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which

is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst of course an individual component, on the facts of a particular case, may vitiate the whole process, the question which a Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances, was the investigation as a whole fair?

CONCLUSIONS

Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of conduct? This will require the Respondent to show a genuine belief in the Claimant's misconduct.

70. I am wholly satisfied that Ms Green and later Ms Woodruff both genuinely believed that the Claimant had brought cannabis and connected paraphernalia into the college. It has not been suggested, and I found no evidence to support that there was any alternative or additional reason for the dismissal.

If so, was that belief held on reasonable grounds following as much investigation into the matter as was reasonable in the circumstances?

71. In my judgment, it was. The cornerstone of the Respondent's belief in the misconduct was the reports received from the two searchers and the observer. Ms Green said in the hearing that, to her knowledge, the team had undertaken up to 80 searches in all. That was right [p.3]. Objectively and subjectively therefore, the searchers' evidence was compelling. They were experienced in identifying illegal substances both by sight and smell. At no point in the disciplinary process did the Claimant advance a motivation for the search team to wrongly identify the drug or to collude together in wrongly identifying it, whether for the purpose of causing harm to the Claimant or otherwise.

72. During the course of the Tribunal hearing the Claimant mentioned, for what she accepted was for the very first time, that there was animosity between George Yewdale and a member of her family. She accepted she had not mentioned this at any time sooner, saying this was because of her mental health difficulties. The Respondent was never on notice of any connection between the Claimant and George Yewdale, still less any circumstances that could have raised any concern of bias. Since the Claimant never raised this, either at the time of the search or subsequently, there was no need for the Claimant to speak to him about this or take account of it as part of a reasonable investigation.

73. The Claimant had also acknowledged clearly and explicitly within the investigation that there was tobacco in her bag. In reality therefore the defence of the Claimant was that the searchers were straightforwardly wrong and had inferred the substance was cannabis from the surrounding circumstances, including the smell.

74. It is fair to say there were small discrepancies which the investigator did not fully take up with the witnesses. Principally: Shelley Hutchinson was not asked whether during the search she described what she had found to the Claimant, as resin and neither Shelley Hutchinson nor George Yewdale had put to them that Sharon Figgins seemed to recall a "negative bag search" being spoken of.

75. Regarding the identifiable discrepancies, I have set out in paragraphs 23 to 27 above the respective accounts given by the parties to Roger Clegg. The Respondent's witnesses and the Claimant did not completely dovetail. However, there were significant common features: there was a smell of cannabis throughout the search, a disputed substance was found in the Claimant's bag that was either cannabis or tobacco, and a large cone shape was found. More significantly, the Respondent's own witnesses converged to such a degree on the essential points, that further enquiry was not reasonably warranted until, at the earliest, the Claimant highlighted the discrepancies she felt were material in her witness statement for the disciplinary hearing.

76. The important thing was that Mr Clegg had explored the circumstances of the search and the outcome with each of the witnesses independently and documented their answers faithfully and transparently. This was how the Claimant was able to raise these issues later on in her statement to the disciplinary hearing. At the investigation stage, his role was to investigate the facts, compile a report of his findings and make recommendations so that a manager could determine whether there was a case to answer [p.40, paragraph 5.4]. I do not accept the Claimant's submission that the investigation is materially undermined because Mr Clegg made no enquiries of the searchers as to what had happened with what was seized. No one, including the Claimant, was suggesting at that stage that the factual difference could or should reasonably be resolved by analysis of the substance. It has to be remembered, the Claimant was not suggesting any bad faith on the part of the searchers and was herself somewhat equivocal saying *"I think it was tobacco"* [p.3] To the extent that the policy was touched upon briefly by Mr Clegg with the Claimant, the clear purpose of his questions - correctly in my view - was to identify whether the Claimant felt she had been treated appropriately by the way in which the *search* had been carried out upon her [p.3]. The other issues the Claimant later asserted around non-compliance with the letter of the policy – including retention - were never apt in the circumstances to displace the weight of evidence Mr Clegg took from the two searchers and the observer about the identification of cannabis in the Claimant's bag.

77. I do not consider Mr Clegg investigated the second allegation he put forward (being under the influence of drugs) to anything like an equivalent or appropriate degree. However, nothing turns on this. Ms Green was unhesitating in her rejection of the second allegation. Correctly in my view, she found that there was nothing to support that. This corroborates that she revisited and evaluated the source materials underpinning the investigation,

and scrutinsied them independently from Mr Clegg's conclusions. I do not consider Mr Clegg's shortcomings with the second allegation raise serious doubt about his investigation of the possession allegation. I rely on his detailed notes of interviews.

78. The alleged discrepancies were then pursued by Ms Green in her questioning of the two witnesses again about the key question of what was found. The answers came back strongly positive and she was entitled to rely on what the searchers said when asked about the specific issue.

79. I also reject that it was unreasonable for Ms Green to rely on the searchers' statements because one or more aspects of the written policy - particularly retention of prohibited items - were not complied with by them. I have set out already how in practice the policy was applied in a modified fashion and the factors which informed this. In essence two possibilities arose for illegal drugs that were found, they were seized and flushed away or they were seized and retained. Common to both is that they were not returned to the person searched and the risk of harm was removed. In my judgment, that was the clear intended purpose of the College's policy - safeguarding. In my judgment, "retention" was not specified in the policy for the purpose of preserving the rights of any searched student or staff member in relation to a decision that had been made by the college e.g., a decision to exclude or suspend or in the case of a staff member, dismiss.

80. Also, as far as Ms Green was concerned, the fact a small amount of illegal drugs had been flushed away was consistent with what happened in other cases. It was not such as to arouse suspicion about the searchers' competence, probity or attitude to the Claimant. The implementation of a policy may be modified by custom and practice. When judging fairness what matters is whether the Claimant was treated in some way differently than others or in a way which prejudiced a fair process. I found no persuasive evidence that she was. The Claimant, on her own account, did not know of the policy so had not been falsely drawn in, during the search, into relying upon it. She told the Tribunal both that the amount taken was *"minute"* but also that she *"just thought"* it would be retained. That was entirely her surmise. No one gave the Claimant such an indication and the Claimant at no stage before she was made aware it had been disposed of, suggested that the substance should be tested. She did not need the policy or the record of the search referred to within that policy - both of which she did actively seek - to make that straightforward suggestion to the Respondent.

81. Related to this, I reject that because the Claimant went on to raise a specific factual defence this somehow meant the Respondent, acting reasonably, was required to discount the searchers' evidence and dismiss the Claimant only with irrefutable evidence, from a laboratory. They were required to have a reasonable belief only. The Claimant has submitted that there was no "overwhelming evidence" of illegal drugs. I consider that cumulatively the evidence of both illegal drugs and paraphernalia being in the Claimant's possession whilst at work, was very strong. It was not necessary to fairly

dismiss the Claimant that the evidence be more than enough to form a reasonable belief – it had surmounted that threshold.

82. Having gone back to the searchers after the disciplinary hearing and again to George Yewdale after the appeal, no additional investigations were suggested by the Claimant or obvious. The fact the witnesses were unwavering entitled the Respondent to reasonably conclude that the substance was cannabis.

83. I would also add, it was also fair for weight to be attached to the probative circumstantial evidence of:

    i. The search not being a random search - it followed reports of a smell which the Claimant later acknowledged; and

    ii. The Claimant was by the disciplinary hearing asserting unequivocally that the substance was tobacco [p.22] whilst also volunteering circumstances in which she exercised so little control of her bag that an item the searchers identified as being for drug use (the cone) had been in her bag with her consent but its removal overlooked [p.3 “she forgot to take it out”].

84. It was only raised for the first time in the Tribunal hearing by the Claimant that she had *seen* cannabis in a sealed bag being placed in her bag by her cousin and later removed by him. This was not shared with the decision makers and was not something they could take account of as being the source of the smell or substance found.

85. Regarding the selection of the room and the deliberate decision not to upload information about the search in a way that meant it could be accessed by colleagues generally, the Respondent gave credible explanations for these deviations from the written policy. These were actually the result of concern for the Claimant and the novel situation of her being a staff member. The situation was unusual. Moreover, there was a record of the search in the form of the statements promptly taken in the investigation process.

Did the decision to dismiss fall within a range of responses open to a reasonable employer?

86. The college stresses its zero tolerance to drugs and, given the impressionable age and vulnerability of those it teaches, the reasons for this are both clear and unarguable. On the findings made, including that there was a lack of contrition and failure to take accountability, I find immediate dismissal was amply within the range of reasonable responses open to a reasonable employer. I take into account that the Claimant’s length of service and genuine love for her job meant the loss to her was both financial and emotional. The Respondent reflected, fairly, that the position might have been otherwise had the incident been acknowledged and the Claimant had engaged with them.

Was the dismissal procedurally fair?

87. There was no procedural unfairness in either rejecting the adjournment request for the disciplinary meeting, or of continuing it in the Claimant's absence when she became too distressed to continue.

88. Prior to the disciplinary hearing, the Claimant had provided medical certificates. However, the Respondent had clear information directly from her (I refer to the emails at paragraphs 32 and 33 above) that her employment situation was a great source of stress. The Respondent was entitled to rely upon that and the decision that fell to it was not purely one driven by the Claimant's health. I do not find there was any unfair or unreasonable failure to refer the Claimant to occupational health. When balancing the need to postpone or adjourn part way through, the Respondent also needed to consider the prejudice caused by delay both to the memories of the witnesses and the unfairness on those parties of the matter hanging over them. The Claimant had not previously been able to reliably predict when she would be well enough (seeking initially a couple of days for the first adjournment), so if there had been a further adjournment, there was no clear end in sight. By 8 October, the events were already over a calendar month ago.

89. The Claimant was able to put together a comprehensive statement and this was considered. It is clear that Ms Green well understood what was then the key issue for the Claimant and she took this forward with the witnesses independently.

90. As I have mentioned, the Acas Code does not specifically state that employees have the right to cross-examine witnesses, merely to call them. It would naturally be pointless to call a witness to attend if it was not then possible to put questions to them. So consistent with the code, I accept the opportunity for questions to be put should have been afforded, particularly against the backdrop of the Claimant's email stressing the importance of the searchers' attendance. That happened here. It was not unfair that Ms Green – who came to the situation new - posed the questions. The ones she asked directed themselves to the only real line of defence volunteered by the Claimant: innocent or negligent mistake by the searchers in identifying tobacco wrongly as cannabis. The Claimant's absence when the answers were given meant she was not afforded the chance for follow-ups or to pursue a more forensic line of questioning about the discrepancies she perceived in the searchers' statements. However, and importantly, the disciplinary hearing was not criminal or civil proceedings. There was also a third party notetaker and the Claimant was provided with the transcript.

91. I also reflect that during the Tribunal the only questions the Claimant said she would have asked if well were: where the evidence was and why being under the influence was not put to her on the day of the search. The latter issue became irrelevant because it was not upheld by Ms Green. It follows from what I have said about the usual practice of disposing small amounts

of drugs, that the answer to the former question would not have altered the decision by Ms Green, in any event.

92. Where I do consider there was unfairness at the disciplinary stage is failing to provide the Stop and Search policy in advance of the disciplinary meeting. It had been requested. This would have empowered the Claimant to challenge – through Ms Green or potentially if well enough, on her own - their apparent lack of adherence to the policy in the areas she highlighted. She might have used this as a platform to challenge their reliability before her employer.

93. The Respondent did not dispute the second appeal ground that the Claimant requested this from HR. She was initially told they did not know if there was such a policy, then that they had no response and the disciplinary hearing would still go ahead. It seems clear to me that at some point the Respondent must have appreciated that the Claimant was asking for the policy precisely because she had not been able to access it on the college intranet. It took on a heightened importance where the Claimant's only defence was to undermine the certainty and competence of the searchers. Her long service and investment in the process were clear. Acting fairly, efforts ought to have been made to provide the document to the Claimant directly, before the disciplinary hearing.

If the procedure was defective, was it remedied on appeal?

94. I find the unfairness I have referred to was remedied on appeal. The Claimant was provided with the policy [p.28] and had full sight of the document at the time of the appeal hearing. She told the Tribunal, she had support before the appeal hearing from her representative within these proceedings. She was not, to the knowledge of the Respondent, under any continuing medical certificate at this stage. At no point did she say she was unwell or in need of an adjournment. She was specifically asked the questions she would ask the searchers by reference to it. Ms Woodruff took forward these questions with George Yewdale before considering and reaching her decision. It follows that the earlier unfairness was remedied on appeal. Acting reasonably, the further evidence obtained gave the Respondent no reasonable cause to revise its decision. As I have found, the deviations from the Stop and Search policy were for credible reasons, and so far as disposal rather than retention is concerned, consistent with established practice.

95. It follows that as I find there was no unfairness in the dismissal, the remaining issues from the list of issues fall away. I do not uphold the Claimant's claim.

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Tribunal Judge A Miller-Varey
(acting as an Employment Judge)

4 February 2022

Sent to the parties on:
15 February 2022

For the Tribunals Office

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.