EMPLOYMENT TRIBUNALS

Claimant: Mr Philip Clarke

Respondent: Booker Group Limited

Heard at: Manchester **On:** 9 and 10 February 2022

Before: Employment Judge Ganner

REPRESENTATION:

Claimant: Mr P Quinn (Solicitor)
Respondent: Ms R Urmston (Solicitor)

JUDGMENT

The judgment of the Tribunal is:

1. The claim for wrongful dismissal/notice pay is dismissed upon withdrawal.

2. The claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 20 January 2021 Mr Philip Clarke, the claimant, complained of unfair dismissal from Booker Group Limited, the respondent.

2. By a response form of 27 April 2021 the respondent resisted the complaint. Their position was that the claimant had been fairly dismissed for gross misconduct.

The Issues

3. The issues to be determined by the Tribunal were agreed at the outset of the hearing. Since the reason for dismissal was not contested, the questions for the Tribunal were as follows:

(1) Did the respondent genuinely believe the claimant was guilty of the misconduct complained of?

(2) Did the respondent have reasonable grounds for that belief?

(3) Was that belief formed following a reasonable investigation?

(4) Did the respondent follow a reasonably fair procedure?

(5) Was the dismissal process including sanction within the band of reasonable responses?

Evidence and Witnesses

4. There was a bundle of documents consisting of 457 pages. Reference to page numbers in this Judgment is a reference to that bundle.

5. The respondent called two witnesses:

(1) Neil Mason, the Warehouse Operations Manager, who made the decision to dismiss the claimant; and

(2) Stephen Crawford, the General Manager, who dealt with the claimant's appeal.

6. The claimant gave evidence on his own account.

Relevant Findings of Fact

7. The claimant began his employment with the respondent on 6 August 2012. He was a warehouse operative and was employed to receive, pick and load goods and to operate manual and Mechanical Handling Equipment ("MHE") correctly and safely (66).

8. At the commencement of his employment the claimant signed a document acknowledging receipt of the respondent's substance misuse policy which formed part of the terms and conditions of his employment (64). This (72-90) states, "breaches of this policy will be treated as misconduct or gross misconduct issues". At page 80 it states:

> "Where an employee is found to be responsible for any act of gross misconduct in relation to the alcohol and substance misuse policy in the same way as all other cases of gross misconduct may still result in escalation straight to dismissal."

9. It also states:

> "Substance misuse can be defined in the following categories: misuse of legal substances such as prescribed medicines (81);
>
> Prescribed drugs can be misused (84);
>
> Examples of medicines/prescribed drugs can be tranquilisers such as benzodiazepine e.g., Valium, diazepam." (84)

10. Booker's site substance misuse policy, specific to the Haydock distribution centre (96-114) states:

> "The Company will not put anyone at risk by allowing the misuse of alcohol and drugs or other substances (including the misuse of prescribed drugs such as sleep and tranquiliser pills."
>
> "The misuse, whether intentional or not, of prescription drugs is also prohibited"

11. The substance misuse policy was updated from time to time. However, the rules on misuse of prescription drugs has been part of the policy since its inception and has not materially changed since 2012 when the claimant was inducted (232).

12. Attending work whilst under the influence of alcohol or drugs as defined by the central substance misuse policy is given as an example of gross misconduct in the company's disciplinary policy (138).

13. In the summer of 2020, the claimant took time off work due to some nerve issues in his leg and arm. He returned to work between 31 August 2020 and Monday 7 September 2020. These were the dates provided in the claimant's fact-finding interview (156) and witness statement respectively.

14. On 15 September 2020, the MHE he was operating hit a static truck. In accordance with the respondent's policy (97) the claimant was required to undergo a drugs and alcohol test on site. The drugs test is an instant urine test which provides results within ten minutes. Whenever an employee is required to undergo a drugs and alcohol test the relevant manager conducting the test will explain the testing procedure (107).

15. Anthony Baxter was the warehouse manager on shift at the time of the incident. Prior to the first test the claimant was asked to declare any current or recent mediations taken in the prior two weeks. Mr Baxter wrote down (143) the claimant's answer to this question as follows:

> (1) Co-codamol – 4 x 500mgs
>
> (2) Diazepan [sic] (sleep aid)
>
> (3) Max strength sleep aid

16. The claimant was non-negative for benzodiazepine – diazepam is a benzodiazepine.

17. Mr Baxter than arranged for the respondent's approved drug collection agency to attend the site and conduct a new second drugs test. A collection officer attended the site and repeated the first test from scratch.

18. The result of the second test was also non-negative for benzodiazepine (144).

19. Given the two non-negative tests, a further test had to be conducted and analysed by the laboratory off-site. A non-negative result is a preliminary one which shows at least a trace of the substance has been detected. It has to be confirmed by a laboratory analysis. A sample was packaged under chain of custody procedures and sent to the laboratory for that analysis (the third test). The result of the third test was negative for benzodiazepine, using the 100ng/mL UK workplace drug testing guidelines cut-off, meaning that the saturation of benzodiazepine in the specimen analysed by the laboratory was not high enough to trigger a non-negative result (145)

20. In accordance with both disciplinary and substance misuse policies, the claimant was suspended for the company to carry out an investigation. The investigation was conducted by Chris Brett, another warehouse manager. By a letter dated 18 September 2020 Mr Brett invited the claimant to attend a fact-finding interview in relation to allegation of gross misconduct, specifically the claimant admitting prescription medication which was not prescribed to himself (146-147).

21. On 23 September 2020, the claimant attended the interview with Mr Brett and was accompanied by a work colleague (148-165).

22. When told about the result of the third test the claimant stated that he had gone home and researched everything on benzodiazepine. He said that Mr Baxter had not asked if he took any supplements and the test was quite rushed. Only when he went home did the claimant realise (having researched it) that supplements could show up as positive for benzodiazepine (155). The claimant told Mr Brett that he took amino acids, creatinine and multivitamins. He believed that the B12 that is in the multivitamins could trigger benzodiazepine and ibuprofen could do so as well (155).

23. It was at that point, having tested and failed, that the claimant rang his mother and asked whether it was diazepam that she had given him. Although he had presumed that it was diazepam at the time he took the test, he maintained that "apparently" the drug given by his mother was diphenhydramine hydrochloride 50mg and showed Mr Brett a box to confirm this. His mother had told him it was not diazepam that had been provided to him (155) The claimant stated the tablet he had from his mother was on the Thursday or Friday before returning on 31August 2020 from his nine weeks off (156). He said he had been prescribed and taken diazepam a long time/years ago (157, 162), he was aware it was a prescription drug although unaware he could not take other people's prescription drugs "if I had done" (158).

24. Considering this account, Mr Brett sought guidance from Doctor Kindred of the laboratory by telephone, and a summary of the conversation is documented in an

email dated 23 September 2020 (166). Dr Kindred stated that although there was not enough benzodiazepine to trigger a non-negative result on the third (laboratory) test benzodiazepine would have had to have been taken in order to trigger the first and second (initial) tests. He stated that even one 2 milligram tablet of diazepam would still trigger a negative result under the saturation because of the low dose on a secondary test panel. He also opined that the pre-declared co-codamol would not contain benzodiazepine nor would any over the counter sleeping aids.

25. On 24 September 2020 Mr Brett took a statement from/interviewed Mr Baxter the warehouse manager who had administered the initial tests (167-171). Mr Baxter was asked what, at the point of declaring any medication in the last 3 weeks did the claimant declare? He replied "if I remember correctly, he said he'd had some diazepam off his mum. He said he'd also had some sleep aid tablets, he showed me the picture on his phone, which I wrote down. I think he'd said pain relief. I think it was co-codamol…I couldn't tell you the strengths of them, but they are the three drugs he said he'd taken". Mr Baxter said that the test had failed or showed benzodiazepine and that the claimant had said he had got the benzodiazepine off his mum to help him sleep. He was asked whether the claimant had mentioned what day or time he had taken that medication, and Mr Baxter stated, "I'm not 100% but I think he said it was the Saturday before to help him sleep". He stated that at no point during the test did the claimant raise that he was taking supplements (171).

26. On 6 October 2020 Mr Brett resumed his interview with the claimant (172-189). He covered all aspects of his investigation focussing now on what the claimant had/had not declared in respect of medications he was taking on his return to work. He presented Dr Kindred's findings and asked the claimant to account for the presence of benzodiazepine in his system if he was only taking over the counter medication, etc. The claimant repeated his assertion that he was taking many supplements and that "ibuprofen can show up as benzodiazepine…the false rate for benzodiazepine was 25% also, vitamin B12. He was pressed on why he had listed diazepam on the test and repeated that he had not been sure what it was as stated on last meeting "plus I was frustrated not thinking straight" (183).

27. On 6 October 2020(190-192) Mr Brett concluded there was a case to answer and the matter should proceed to a disciplinary hearing. This was conducted by Mr Neil Mason, a warehouse operations manager responsible for general management of the warehouse and its operations.

28. On 12 October 2020, the claimant was issued with a letter inviting him to a disciplinary hearing to discuss all the allegations that arose from the incident. The Tribunal is concerned only with that of admitting to taking prescription medication not prescribed to himself (204). The claimant was given a copy of the investigation paperwork as set out in the disciplinary invite. He was informed he could be accompanied to the meeting by a trade union representative or workplace colleague and made aware that dismissal could be one possible outcome of the meeting, should an allegation of gross misconduct be substantiated (206-207).

29. The meeting took place on 23 October 2020 (208-223). The claimant told Mr Mason that prior to the MHE incident he had been off work for nine weeks due to a

pinched nerve. During that time, he had asked his mother if she had a sleeping tablet. He was aware that his mother took sleeping tablets and diazepam. At the time of the initial tests the claimant thought that the tablet given to him by his mother was diazepam but she later clarified it was diphenhydramine hydrochloride. The claimant also stated that when he took the tablet given to him by his mother it was 2½ or 3 weeks before the incident. He stated he would not take a sleeping tablet if he was in work the next day (213). The claimant believed that ibuprofen could have triggered the non-negative results of the initial tests. The claimant stated:

> "I am teetotal. I had a lot of things coming at me...then failed on benzodiazepine which I've never heard of. I take creatinine, multi vits, protein, amino acids. The vit B12 can set benzodiazepine so can amino acids and creatinine."

30. The claimant was asked whether he believed that supplement B12 could trigger a positive result, and replied "yes, even a combination of them". The claimant was asked to explain Mr Baxter's statement that he had said diazepam from his mother, and the claimant replied:

> "Because the chemical is benzodiazepine, I thought benzodiazepine/diazepam similar. I was off. …… When I saw the result, I thought it must have been diazepam what she [mother] gave me. That's why I put that down and the other sleep aids as well. I failed and got suspended. I asked her what it was, and she said it wasn't diazepam." (217-8).

31. As a result of this account Mr Mason adjourned the hearing to conduct further enquiries with the laboratory, specifically to consider the claimant's suggestion that the initial non-negative results for benzodiazepine could have been triggered by the over-the-counter diphenhydramine or supplements that he took. The supplements were identified as amino acids, creatinine and multivitamins. The claimant's suggestion that B12 in the multivitamin could trigger an initial non-negative was also presented to the laboratory (224).

32. The laboratory (Dr Kindred) replied (page 227-228) that hydrochloride is an antihistamine which would "no way" fall into the benzodiazepine drug group and secondly, it was impossible to know exactly what would be in each supplement the claimant says he was taking and to know how this would react with the onsite testing kit. He described this event (whilst possible) as being unlikely.

33. On 30 October 2020 Mr Mason considered the allegation of gross misconduct by the claimant admitting taking a prescribed medication which was not prescribed to him. The full findings are set out in his witness statement and pp231-3 of the bundle. These document that he had taken into account the claimants explanations presented at the disciplinary meeting specifically concerning his assertion that what he took from his mother was diphenhydramine and his case that the benzodiazepine result had been falsely triggered by his legitimate medications/supplements. He considered Mr Baxter's account of what the claimant had said during the testing procedure concerning how/when he had taken benzodiazepine and concluded it was his reasonable belief that he had taken diazepam a few days before the incident that

was prescribed for his mother and obtained from her. He felt that the claimant had, during the investigation and disciplinary hearing, attempted to divert attention away from the admission he initially made to Mr Baxter by suggesting that supplements, ibuprofen or B12 had triggered the results in this case.

34. He concluded that the claimant had breached the respondent's substance misuse policies. Mr Mason went on to consider the appropriate sanction and found that taking prescription medication that was not prescribed to the claimant and then operating MHE a few days later could have had serious consequences and a zero-tolerance approach needed to be taken. He made the decision to summarily dismiss the claimant. Mr Mason considered mitigating factors, including the claimant's length of service and previous disciplinary record, but he concluded the nature of the conduct was so serious that any action short of dismissal would be inappropriate. The disciplinary meeting was reconvened on 30 October 2020 to deliver his decision, and the claimant was informed his last day of service would be 30 October 2020. The claimant was informed of his right to appeal against the decision, which was confirmed in writing (234-237).

35. Mr Mason told the Tribunal that summary dismissal was not automatic. He stated there was a policy to provide help/counselling for employees with a drugs problem but made a distinction between those who came forward and those (like the claimant) who were found out.

36. The claimant appealed against the outcome of the disciplinary hearing by a letter dated 6 November 2020 (238-239). His complaint included assertions the respondent had not followed a thorough and fair investigation. He felt Mr Brett's investigation was insufficiently rigorous insofar as he did not inform the laboratory of supplements he was taking. He felt the second (he meant third) test was negative and requested his urine sample be returned for independent testing.

37. By a letter dated 13 November 2020(240) Mr Stephen Crawford, the respondent's general manager, agreed to the claimant's request to release the sample for analysis on the basis the claimant bore the cost. The date of the appeal was fixed for 20 November and the claimant was advised of his right to bring along a representative. The claimant signed the release form for the sample (241) but did not in the event have it independently examined.

38. On 20 November 2020, the appeal hearing took place. The claimant was accompanied by his trade union representative. Mr Crawford upheld the decision to summarily dismiss the claimant without notice. He set out his reasoning in an appeal outcome letter dated 11 December 2020 (253-254). This dealt with four points the claimant had raised (242-252):

(1) *The claimant believed the company had not followed ACAS guidelines on a thorough and fair investigation/disciplinary on the basis that Mr Brett had not made a note of the medication and vitamins the claimant was taking, and that his investigation was rushed. He had made the decision in only 20 minutes.*

Mr Crawford concluded the investigation was very comprehensive, with eighteen pages of notes being taken at the first investigation and a further eighteen pages of notes being taken at the second meeting, that the content of the minutes included all the details of the medication and vitamins the claimant was taking. A thorough investigation had taken place.

(2) *The claimant believed the evidence he provided was dismissed from the outset.*

The response to this was that all the details of his medication and vitamins throughout the process were noted and the fact that guidance was sought from the laboratory shows evidence the claimant had submitted from the outset was not dismissed

(3) *The claimant had raised the fact the 2nd test (he meant the 3rd) was "fine", and that Mr Brett did not even look at it. He said that Brett said the laboratory had said the result could have been Diazepam or sleep aid and that Brett had not informed the laboratory of supplements he had been taking which could have interfered.*

This was dismissed on the basis that the disciplinary pack showed that Chris Brett had indeed sought advice from the laboratory and that what came back from the laboratory was sufficient for him to come to the decision he made.

(4) *The claimant considered that Mr Mason in his outcome letter, the claimant having stated he had taken diazepam a few days before the initial test, should have carried out a more enhanced laboratory test which would have confirmed this beyond doubt, which it did not.*

Mr Crawford considered it was reasonable in the circumstances for Mr Mason to arrive at his belief the claimant had taken diazepam on the basis of the initial tests and that both Mr Mason and Mr Brett had sought independent guidance from the laboratory which taken together with his statement to Mr Baxter made Mason's decision to dismiss reasonable in the circumstances.

39. The claimant gave evidence to the Tribunal. It was largely in accordance with what he had told the disciplinary hearing. His point was, he may or may not have taken a one-off dose of prescription medication 2-3 weeks before the incident but he believes it was in fact diphenhydramine. He believed the non-negative result was triggered by supplements and over the counter medication.

Sanction

40. Mr Crawford determined that at the date of the MHE incident the claimant had a prescription drug in his system which had not been prescribed to him and which he had admitted to taking. The respondent had a zero-tolerance approach to this conduct as set out in their substance misuse policy. Since the nature of the

claimant's work involved manoeuvring heavy quantities of stock in an active warehouse the misuse of drugs had the potential to jeopardise safety of all and had to be taken seriously this basis the dismissal was upheld (253-254).

The Law

Unfair Dismissal

41. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. This reads as follows:

> (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

42. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

43. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

44. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

45. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

46. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

47. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

48. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

49. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38)

Submissions

Claimant's Submission

50. Mr Quinn's submission was that there was insufficient evidence for the respondent to demonstrate reasonable grounds on which to sustain its belief that at some point a few days prior to the accident on 15 September 2020, the claimant had taken prescription medication not prescribed to him. He submitted the focus had to be on the allegation concerning the admission to taking prescription medication **within this short timeframe only.** He submitted that the claimant's evidence to the effect that it was some time before his return to work on 9 September *(date incorrect- please see paragraph 13 above)* that medications were taken (up to 3 weeks) had been clear and consistent during the disciplinary process and this matter. The claimant had never shied away from saying to Mr Baxter that he may have taken diazepine or it may have been a sleep aid. He submitted that Mr Baxter may have misconstrued the claimants' words regarding taking the medication "the Saturday before" and suggested this conversation was in the context of his absence from work and prior to his return on 9 September. It was further submitted there was no evidence that diazepam (if it was diazepam), had been taken three days before the test. He said there was a conflation in the respondent's mind between the non-negative test and the accident the claimant had but that the two were not related.

51. Criticism was made of Mr Mason for having failed to "clarify or question" Mr Baxter on precisely when the claimant had suggested he had taken medication. This was on the basis that Mr Baxter was "far from clear" when he said he was not 100% but thought the claimant had said it was the Saturday before to help him sleep that

he had taken the medication. Mr Baxter had misconstrued what had been said. Mr Quinn also submitted there should have been further investigation from the laboratory as to how long traces would remain in the body and that the investigation should have taken copies of the labels or details of ingredients to pass them on to the laboratory. It was contended that since the laboratory confirmed it was "possible" they could have interfered this was a "clear indication" that supplements could have caused the non-negative results.

52. Additionally, it was said the applicable substance misuse policy had not been presented to the claimant or the Tribunal.

53. Further submissions were made to the effect that the sanction of dismissal was not reasonable assuming the respondent established the dismissal itself was fair.

Respondent's Submissions

54. Ms Urmston, for the respondent submitted that that it had established the dismissal was for a potentially fair reason and that the dismissal of the claimant for that stated reason was fair and reasonable in all the circumstances under section 98(4) of the Employment Rights Act 1996.

55. She reminded the Tribunal that it is sufficient for the respondent to genuinely believe on reasonable grounds that the employee was guilty of misconduct and did not have to prove the offence.

56. Ms Urmston re iterated a point made in cross examination (and argument) to the effect that the claimant in cross examination had accepted that if he **had** taken non prescribed drugs a few days before the incident and thereafter operated manual equipment resulting in an accident there could be little dispute that this was misconduct justifying summary dismissal. She submitted that whether the time frame was three days or nine days there was still a serious offence warranting dismissal. Ms Urmston further argued that the respondent had not been clear regarding the timing that diazepam had allegedly been taken with Mr Quinn having stated at the outset of this hearing that it was one to two weeks before the incident on 15 September, whilst during the investigation and appeal it was submitted the period was up to 2.5-4 weeks before the incident.

57. She argued the evidence justified a finding that the claimant had taken diazepam a few days before the accident based on what he had told Mr Baxter, the drug test results and the interpretation of the results given by Dr Kindred.

58. It was further submitted the claimant had never pleaded a fair procedure had not been followed despite some criticisms made in final submissions. Accordingly, this issue was not in dispute.

59. It was submitted that the claimant's substance misuse policy on the misuse of prescription drugs had not changed since 2012 when the claimant was inducted so the argument he had not been "presented" with the up the date version was misconceived.

60. Ms Urmston highlighted the point that the respondent operated, ran manual handling equipment, and had extensive health, safety and legal responsibilities. Such an offence had to be treated with the utmost seriousness and a zero-tolerance approach taken to protect his employees. Further the lack of any acknowledgement of fault could not be ignored,

Discussion and Conclusions

61. In this case it was not in dispute, and would have been my finding in any event, that the respondent dismissed the claimant because it believed he was guilty of misconduct. This is a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996.

62. In these circumstances the only issue for me to decide is whether the dismissal was fair or unfair in accordance with the provisions of section 98(4) of the Employment Rights Act 1996 set out above.

63. The issues were as identified at the outset of proceedings and can be answered as follows.

Did the respondent have a genuine belief the claimant was guilty of misconduct?

64. The respondent genuinely believed the claimant had taken diazepam which was not prescribed to him and which had been prescribed to his mother. Specifically, the respondent genuinely believed the claimant made an admission that he had done so a few days prior to 15 September when he operated MHE and had an accident.

Did the respondent have reasonable grounds for that belief?

65. Based on the outcome of the tests and the expert opinions from Dr Kindred made to the respondent at two stages of the investigation, there was compelling evidence presented to the respondent that the claimant had taken diazepam..

66. The claimant argued that the initial tests could have been triggered by other medication and supplements he was taking. The respondent rejected this contention based upon the laboratory findings and Dr Kindred's reports. It was reasonable for them to have done so.

67. The respondent's belief that the claimant had admitted to taking prescription medication not prescribed to himself was a reasonable one based upon Mr Baxter's evidence that the claimant had told him he had taken diazepam off his mother. I reject the argument that Mr Baxter's account should have been regarded as equivocal by virtue of the qualifying words "if I remember correctly."

68. The evidence gathered by the respondent as to the claimant's admission was that diazepam was taken about the Saturday before the 15 September. The claimant argued there would be no unfair dismissal if he had taken diazepam 2.5-3 weeks before 15 September when he would have been off work. The respondent suggested timing was not decisive. I note neither the policy nor the specific charge

requires actual impairment to be proved to substantiate a finding of gross misconduct so the claimant would, in my judgment, potentially have committed misconduct even if he had taken diazepam at an earlier stage but which was still in his system whilst operating the MHE.

69. However, I do not need to resolve this argument as my finding is that the respondent **did** have reasonable grounds for believing it was about the Saturday before the 15th September on which the claimant had taken diazepam to help him for the following reasons:

(1) Firstly, Diazepam (sleep aid) was declared on the list of current/recent (last 2 weeks) medication on the form which the claimant signed to provide consent to the collection and testing of a sample. It seems odd that the claimant "presumed" this was diazepam from his mother if (as he later stated to the investigation/disciplinary) it had been taken as long as 2.5-3 weeks before the incident. According to the claimant he had not been prescribed diazepam "for years."

(2) Secondly, Mr Baxter who took the samples recalls (though not with 100% accuracy) that he thought the claimant had said the drug had been taken the Saturday before by his mother to help him sleep. His overall account summarised above is carefully worded, consistent with what he wrote on the laboratory submission form and with other undisputed evidence. For example, his (correct) recollection that the claimant did not mention taking supplements at the time of the test.

(3) Thirdly, the respondent had reasonable grounds to believe that after making an admission of taking diazepam to Mr Baxter, he realised the seriousness of his position and began to deny that which he had admitted. Based on the reports from Dr Kindred, the respondent was entitled to find that the claimant's assertion that legitimate substances had triggered the non-negative tests was incorrect and was therefore put forward to divert attention away from that admission.

Was that belief formed following a reasonable investigation? Did the respondent follow a reasonably fair procedure?

70. The matters raised by the claimant to the effect that other legitimate drugs were falsely tiggering a non-negative result for benzodiazepine were fully investigated and I reject Mr Quinn's assertion that the laboratories statement that it was "possible" supplements could have interfered was a "clear indication" that they could have caused the non-negative result. Nor in my view was it necessary/proportionate (on the facts of this case) to investigate how long traces can last in the body given the evidence the respondent already had. The claimant did, prior to appeal, make a request for his sample to be tested by an independent sample of his choosing and the respondent agreed to facilitate this.

71. Criticism was made of Mr Brett for not having included in his referral to the laboratory details of the supplements the claimant said he was taking. It should be recalled that Mr Brett's investigatory focus was on the declarations made to Mr

Baxter wherein the claimant did not mention supplements as “recently taken” medication. Mr Brett did, however, record supplements in his interview notes and forwarded these to disciplinary so they had the full picture.

72. Given the claimant signed acknowledgment of receipt of a substance misuse policy in 2012 and that he did not dispute it had remained the same as far as prescription drugs are concerned, I do not see any valid argument this was not properly brought to his attention.

73. Ms Urmston, when submitting the claimant had not pleaded the respondent had not followed a fair procedure commented there had been a “perfect” investigation and disciplinary process. Whilst that is something of an overstatement, I find it was both fair and thorough. This is evident from the facts set out in this judgment. In summary the ACAS Code was followed, the claimant was provided with sufficient details of the allegation in enough time before the disciplinary hearing to enable him to respond and he had a right of appeal. Crucially, diligent enquiries were made as to the correct interpretation of the laboratory data, and these were fed back to the claimant. As set out above he was given an opportunity to commission his own tests of the samples provided.

Did the decision to dismiss the claimant rather than impose some lesser disciplinary punishment fall within the band of reasonable responses?

74. The question is as set out and depends on whether a reasonable employer could have dismissed him for the reasons they found. How I would/might have handled it had I been the decision maker is irrelevant.

75. This was a first offence and I must be satisfied that the respondent acted reasonably both in characterising it as gross misconduct and then in deciding that dismissal was the most appropriate punishment.

76. The claimant was a long-standing employee without previous disciplinary findings. I do not know the concentration of drugs in his system nor their effect and although an accident took place using MHE, I cannot not find it resulted from an impairment. However, given it was found the medication was taken days before, this would be a matter of great concern to the respondent given the **potentially** serious consequences. The admission made by the claimant was that this was something of a “one-off” event. He had been off sick for nine weeks with pain to his arms and legs and could not sleep for one night. It was submitted that consideration should have been given to providing confidential help and counselling in these circumstances but this in my judgment was not tenable given the nature of the misconduct and the finding that the claimant had not been frank/accepted fault during the disciplinary process.

77. Having regard to all the above factors I find the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer could have adopted.

78. This was gross misconduct and the claimant was found to have knowingly taken prescription medication (diazepam) not prescribed to him and thereafter operated manual handling equipment.

79. The respondent justifiably operated a zero tolerance drugs policy as the operation of the warehouse in general and this equipment in particular was highly safety critical. A breach of this policy, when operating equipment, risked an unsafe working environment for all and could have endangered the workforce and persons attending the warehouse.

80. Moreover, the respondent had a legal duty to ensure health and safety at work and manage risks caused by those who may have misused prescription drugs as they found the claimant did. Breaches of this duty exposed them to risk of regulatory action, and potentially criminal liability. It was an offence under the Misuse of Drugs Act 1971 for the claimant to have been in possession of diazepam/benzodiazepine, a controlled drug, without a prescription. This reinforces the gravity of the matter as far as an employer is concerned.

Conclusion

81. For the reasons above, the claimant was fairly dismissed.

Employment Judge Ganner
Date: 14 March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 March 2022

FOR THE TRIBUNAL OFFICE