



EMPLOYMENT TRIBUNALS

Claimant: Mr H Clark

Respondent: R&R Ice Cream Limited

Heard at: Bristol Employment Tribunal via Video hearing
On: 30-31 January 2023

Before: Employment Judge Youngs

Representation
Claimant: In person
Respondent: Mr T Cordrey, Counsel

JUDGMENT

The Claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Claims and parties

- 1) By a Claim Form dated on 20 August 2022, the Claimant brings a claim for unfair dismissal. The Respondent responded on 20 September 2022, resisting the Claim, having dismissed the Claimant due to the Respondent upholding an allegation that the Claimant had been under the influence of alcohol at work.

Procedure, documents and evidence heard

- 2) The hearing was held by video hearing, initially via the Video Hearing Service platform, and subsequently converted to Cloud Video Platform due to connectivity issues which delayed the start of the hearing.
- 3) The Claimant represented himself and he gave evidence on his own behalf. The Respondent was represented by Mr Cordrey of Counsel. Evidence was given by Mr S Higman, Factory Manager, Mr P Buhus, Shift Manager, and Katie Henderson, who at the time was a Factory Manager. Mrs Everleigh, the Respondent's Goods Inwards Inspector, also attended to give evidence, statements having been presented from her by both the Respondent and the Claimant.

- 4) Each witness had a written statement that stood as their evidence in chief, save for Mrs Everleigh in respect of whom there were three statements to the Tribunal. I also had before me an agreed bundle of documents and a supplemental Bundle, a list of issues from the Respondent, and a chronology and cast list, which was agreed at the hearing.
- 5) I took into account the evidence and the oral submissions of both parties.

The issues

- 6) The issues to be determined at this hearing on liability were set out by the Respondent in a draft list of issues and agreed by the Claimant, as follows:
 - A. What was the real reason for the dismissal (as per the Employment Rights Act 1996 (ERA) s 98? The burden is on the Respondent to show the reason for the dismissal (ERA s 98(1)(a)).
 - B. Was the real reason for the dismissal a potentially fair reason within the categories set out in ERA s 98(2) or as some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held? The burden is on the Respondent to show this (ERA s 98(1)(b)).
 - C. In all the circumstances (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason?. That question is to be determined in accordance with the equity and substantial merits of the case (ERA s 98(4)). Here the burden of proof is neutral.
 - D. In answering the question at para D, above, and in accordance with *British Home Stores Ltd v Burchell* [1980] ICR 303:
 - a) Did the Respondent have a belief that the Claimant was guilty of the misconduct;
 - b) Were there reasonable grounds to sustain the belief in the misconduct;
 - c) Had the Respondent carried out as much investigation as was reasonable in the circumstances; and
 - d) Was the dismissal fair having regard to all the circumstances and to the equity and substantial merits of the case: did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissal?
- 7) The Claimant alleges that the following matters give rise to the dismissal being unfair:
 - a) No attempt to gather actual evidence. The Claimant says that the Respondent relied on circumstantial evidence that the Claimant had been drinking at work based on him visiting his locker, car and the smoke shed on numerous occasions that day, but on the day in question the Respondent did not check a) his work area or b) his car for evidence of alcohol despite ample opportunity to do so;
 - b) All the evidence was circumstantial. The Claimant says that the Respondent relied on evidence that the Claimant smelled of mints to imply that he was trying to disguise the smell of alcohol, but discounted the Claimants evidence

- that the reason he smelled of mint was because he was using a menthol liniment for a shoulder injury;
- c) Insufficient investigation. The Claimant says that although the Respondent relied on the Claimant making numerous visits to his work area and car as evidence of his drinking, they did not search his work area or car;
 - d) Inadequate opportunity to rebut evidence or bring witnesses. The Claimant says that he was not given adequate opportunity to rebut evidence or bring witnesses to support his innocence. He says he was initially told to attend a disciplinary hearing but not speak to any work colleague involved and was not told who was involved in the investigation;
 - e) Contractor gave irrelevant evidence. The Claimant says that evidence from the contractor was not relevant because it was not about the day in question and the Claimant was not told who the contractor was and the contractor did not attend the hearing and the Claimant was unable to question them;
 - f) The Respondent breached its own procedures. The Claimant says that the Respondent breached its own procedures from its Handbook and Company Policy in that: no second opinion was sought before disciplinary action was started; no drink or drugs test was administered; if the Respondent really thought the Claimant was under the influence they should not have let him drive home;
 - g) Sanction too harsh. The Claimant says that in light of procedural flaws and purely circumstantial evidence the sanction was too harsh;
 - h) Evidence presented was not fairly considered. The Claimant says that the evidence he presented was not fairly considered and the decision to dismiss was based on circumstantial evidence and hearsay evidence;
 - i) Outcome was predetermined before the investigation. The Claimant says that the Respondent was looking to reduce staff numbers and had decided to dismiss him for that reason, prior to the investigation taking place. The Claimant says this is corroborated by the suspension letter which said that the decision to hold a disciplinary hearing had already been determined prior to investigation being completed and that the subsequent procedures were a sham; and/or
 - j) Health and safety issue not adequately explained. The Claimant says that the Respondent has given no explanation how his actions were seen as a health and safety issue. The Claimant says that he did not work in the sensitive or dangerous or safety relevant areas.
- 8) In addition, I confirmed and agreed with the parties that I would consider the following issues as part of liability:
- E. If the dismissal is unfair, is there a chance that the Claimant would have been dismissed fairly anyway? And if so, by what percentage (the so-called Polkey issue)?
 - F. If the dismissal was unfair, did the Claimant cause or contribute to dismissal by blameworthy conduct? if so, would it be just and equitable to reduce the Claimant's compensatory award and by how much?

Findings of fact

- 9) The Claimant commenced employment with the Respondent at its Bodmin Factory on 1 November 2004 as a forklift truck driver. There are power tools, machinery and

explosive material on site.

- 10) In 2016 the Claimant was promoted to Lead on Site Projects. The Claimant was a valued and experienced employee, liked by his colleagues who appeared as witnesses before the Tribunal.
- 11) The Claimant was suspended from work on 02 October 2020 due to concerns that he was under the influence of alcohol whilst at work that day.
- 12) That suspension ultimately led to a disciplinary hearing, chaired by Mr Higman, Factory Manager and the Claimant's line manager, the result of which was a final written warning and eight weeks' unpaid leave so that the Claimant could rehabilitate and deal with personal issues. The Respondent took into account the Claimant's length of service and his personal circumstances, among other things. The Claimant had suffered a personal loss.
- 13) The Claimant returned to work on 26 April 2021, following his period of rehabilitation and a period spent on furlough. He was undertaking handyman duties at this time.
- 14) It was not disputed that health and safety are critical at the factory where the Claimant worked, albeit that the Claimant disputed that health and safety requirements are always followed.
- 15) On 19 April 2022, the Claimant attended work as usual. He did little work that day, according to the Respondent. He was not seen using any power tools.
- 16) Lisa Everleigh, the Respondent's Incoming Goods Inspector, noted that the Claimant had a bloodshot eye in the morning, and smelt of "stale fags and mint". The Claimant became frustrated at work, due to going to get gas for the work van, but there being no gas available. The Claimant says that this was not the first time that this had happened. He returned to site and subsequently went to the office, where he displayed his frustrations, including on the phone to his line manager, Mr Higman. Lynsey Hill, Technical Manager for the Respondent, and Mrs Everleigh were in the office at the time.
- 17) Following the call between the Claimant and Mr Higman in the office, CCTV in the office shows Ms Hill gesticulating to Mrs Everleigh that the Claimant had been drinking. At 14.29 on 19 April 2022, Ms Hill sent a WhatsApp message to Steve Higman (SH), Bodmin Factory Manager and the Claimant's line manager saying: "He's stinking of [booze]". The text exchange continued and Ms Hill stated that she was 100% sure she should smell alcohol, and Lisa Everleigh, the Respondent's Incoming Goods Inspector, was 50% sure. As it happened, Mrs Everleigh had not indicated any such belief to Ms Hill. Mrs Everleigh's evidence before the Tribunal was clear that she did not tell Ms Hill that she thought the Claimant was under the influence of alcohol, that she did not refer to being 50% sure of this, and that she had never said that the Claimant smelt of alcohol. However, she had said that he "seemed to be under the influence of something". Mrs Everleigh said, at the time and before the Tribunal, that she had smelt a mint aroma (or a minty smell) around the Claimant.
- 18) Mr Higman reports that he then spoke to Ms Hill and Mrs Everleigh. He says "both [Ms Hill and Mrs Everleigh] said that they believed Mr Clark was under the influence

of alcohol". Mr Higman further notes that Ms Hill said that she was "100%" sure that the Claimant smelt of alcohol that day and that he had "red eyes" and he notes that "Mrs Everleigh also said that he had a "bloodshot eye" and that Mr Clark was irate, "talking about random stuff not work-related" and that "no work seemed to be getting done" by the Claimant that day. Mr Higman's statement further reports that Mrs Everleigh believed that the Claimant "seemed to be under the influence of something". Mrs Everleigh did not tell Mr Higman that she thought the Claimant was under the influence of alcohol, as suggested by Mr Higman in his witness statement.

- 19) Mr Higman was told that a contractor had also commented that the Claimant smelt of alcohol. Mr Higman spoke to the contractor and asked him for a statement. The contractor subsequently clarified that he thought the Claimant had smelt of alcohol on 11 April 2022, not on 19 April 2022. Mr Higman also spoke to another employee, Sam, at the suggestion of Ms Hill. Sam was not able to corroborate the allegation that the Claimant had been drinking / smelt of alcohol; Mr Higman told Ms Hill that Sam said he did not speak to the Claimant for long enough. Reference to this is not included in the subsequent investigation.
- 20) At around 3.20pm, according to the CCTV summary, and around an hour after Ms Hill sent the WhatsApp message to Mr Higman, Mr Higman required the Claimant to speak with him in an office. He reports that the Claimant sat next to an open window, which Mr Higman shut and then asked the Claimant to remove his face mask. Mr Higman says that it became apparent very quickly that the Claimant smelt of alcohol, body odour and mints. Mr Higman does not say that he smelt alcohol on the Claimant's breath. Mr Higman reports that the Claimant's eyes were "very puffy and red" and that the Claimant "did not seem himself", was "fidgeting, having difficulty speaking, and he was slurring his words".
- 21) Mr Higman concluded in the meeting that "it was clear" to him that the Claimant had been drinking alcohol. He decided to suspend the Claimant.
- 22) Mr Higman told the Claimant that he had received multiple reports of the Claimant smelling of alcohol whilst at work that day and that he was suspending the Claimant and that the matter would now be investigated.
- 23) The Claimant said that he had not drunk any alcohol since Saturday (16 April 2022). Mr Higman said that he could smell alcohol. The Claimant said that maybe it was the spray he uses for his arm. Mr Higman reports that the Claimant responded promptly to deny the allegation that he smelt of alcohol.
- 24) The Claimant asked Mr Higman "not to do this again", a reference to the previous disciplinary proceedings. As Mr Higman walked the Claimant to the site exit, the Claimant asked Mr Higman to "treat it as we did last time" (which Mr Higman took as a reference to the previous time off work given in response to a finding of Mr Higman being under the influence of alcohol at work). On the balance of probabilities, I find that the Claimant did not refer to treating this incident "as we did last time" as an admission of guilt. I accept the Claimant's evidence that he was feeling desperate, a serious allegation having been made. However, Mr Higman interpreted this as an admission of guilt (which was not an unreasonable conclusion).
- 25) Mr Higman was angry and frustrated at having to deal with another incident of the Claimant being under the influence of alcohol at work, as confirmed in his evidence to the Tribunal.

- 26) Mr Higman did not consider performing a breath-test or swab test on the Claimant, or consider whether one could be obtained. Whilst Mr Higman's statement says that he did not consider a test to be necessary, it is clear that he simply did not consider a test at the time. That said, no tests were kept on site and the Respondent's policy did not require that a test must be carried out.
- 27) Mr Higman did not ask the Claimant to show him what was in his pockets or the contents of the Claimant's vehicle, to see whether the Claimant had any alcohol on his person or otherwise in his possession.
- 28) Mr Higman escorted the Claimant off site and the Claimant drove home. Mr Higman did not think about whether the Claimant was safe to drive.
- 29) Mr Higman wrote to the Claimant the same day, 19 April 2022, confirming that he was suspended on full pay pending an investigation. Mr Higman wrote a statement, passed the matter to HR to investigate, and asked Ms Hill and Mrs Everleigh to prepare statements too.
- 30) At this stage, CCTV evidence had not been reviewed, so neither Mr Higman, Ms Hill nor Mrs Everleigh knew that the Claimant had made multiple trips to his car during the day. However, Mr Higman's suspicion, as stated in his evidence to the Tribunal, was that the Claimant was drinking off site, before he returned from getting gas.
- 31) The investigation considered whether the Claimant was under the influence of alcohol at work, putting himself and others at risk. The investigation consisted of summarising the statements given by Mr Higman, Ms Hill, Mrs Everleigh and the unnamed contractor, and summarising CCTV evidence of the Claimant's movements on 19 April 2022.
- 32) One witness, who was anonymous at the time, but who we now know to be Mrs Everleigh, commented that she was informed on 19 April by another member of staff that the trans waste driver had asked whether the Claimant had gone to get some mints because he smelt of alcohol. Mrs Everleigh's contemporaneous statement says that she could not smell alcohol, only a minty smell. Mrs Everleigh's statement does say, however, that the Claimant seemed like he was under the influence of something.
- 33) The CCTV evidence showed that over the course of the day, the Claimant had been to his car 14 times and to the smoking area 15 times. There is no suggestion that the Claimant was seen drinking in the smoking area, which is visible on CCTV.
- 34) The investigator commented on what she saw as aggravating features of the offence, that the Claimant was potentially endangering himself and others. Under the heading "mitigating features", the investigator noted that the Claimant had no formal disciplinary offences on record.
- 35) The investigation report is dated 25 April 2022.
- 36) The same day, 25 April 2022, Mr Paul Buhus, Shift Manager, wrote to the Claimant, enclosing a copy of the investigation report and inviting him to a disciplinary hearing. The allegation to be considered was that the Claimant was under the influence of

alcohol contrary to Company rules, putting himself and others at risk as he was in a safety sensitive environment. The Claimant was informed of his right to be accompanied and that a consequence of the hearing could be dismissal.

- 37) The disciplinary policy gives the following example of misconduct: "Incapability/intoxication due to consumption of alcohol or drugs; consumption of such on site".
- 38) The disciplinary policy says that gross misconduct is "any of the above offences or any others if deemed to be 'so serious' that it falls outside the normal stages of the disciplinary procedures. The following is given as an example of gross misconduct: "health and safety matters that endanger yourself and others, including being under the influence of drink and drugs...".
- 39) The disciplinary hearing was re-arranged twice to accommodate the Claimant, and then took place on 3 May 2022. The hearing was conducted by Mr Buhus, Site Manager. Mr Buhus had given evidence in the Claimant's previous 2020 disciplinary proceedings.
- 40) The Claimant brought a deep freeze cold spray to the disciplinary hearing and asked Mr Buhus to smell it. Mr Buhus confirmed that he used it himself and it did not smell of alcohol. Mr Buhus did not address whether the spray smelt of mint.
- 41) Mr Buhus said to the Claimant that the Claimant's behaviour had changed on the day of 19 April 2022. He referred to the Claimant having red puffy eyes, being wobbly, irate and shouting. He said that the Claimant was fine in the morning, but was wobbly in the afternoon. Mr Buhus placed weight on the close relationships between colleagues at the Claimant's place of work, the Claimant, Mr Higman, Mr Buhus and others having known each other for many years, and I accept that Mr Buhus believed that colleagues would notice when the Claimant was acting strangely and out of character, including in the way he spoke, the things he said, whether he was slurring his words, and whether he was swaying.
- 42) The Claimant provided a copy of a text message from Mrs Everleigh to Mr Higman, confirming that she did not smell alcohol on the Claimant on 19 April 2022.
- 43) Mr Buhus also commented that "if you have four different people that work with you on a daily basis reporting to their manager that you smell of alcohol and look drunk, then how could that be wrong?" And that "if only one person was reporting it, then it could be in doubt." Later, Mr Buhus refers again to four people noticing the Claimant's change in behaviour on 19 April 2022.
- 44) The Claimant said he had not been sleeping well. Mr Buhus queried that the Claimant had puffy eyes in the afternoon but not the morning, which did not suggest a sleeping issue. Mr Buhus did not notice that one witness, who we now know to be Mrs Everleigh, had reported that the Claimant had a bloodshot eye in the morning. Before the Tribunal, the Claimant suggested that this may have been a result of hay fever. However, this was not a point that was raised by the Claimant during the disciplinary or appeal process.
- 45) Mr Buhus referred the Claimant to his movements that day, and suggested that the way he was talking and acting, shouting and irate, and repeated trips back to his car,

indicated that the Claimant was under the influence of alcohol, and also referred to no one smelling alcohol on the Claimant in the morning. Mr Buhus said that Mr Higman had smelt alcohol on the Claimant's breath, although this is not specified in the statement provided by Mr Higman as part of the investigation.

- 46) There was no discussion with the Claimant about health and safety at the disciplinary hearing.
- 47) The outcome of the hearing was that the Claimant was summarily dismissed due to being under the influence of alcohol. Mr Buhus found that being under the influence of alcohol at work was a gross misconduct offence. He said that it was in breach of health and safety policy in that the Claimant had a legal responsibility for his and for others' safety, although Mr Buhus does not say that the Claimant was in fact a risk to others. The Claimant was told the outcome on the day, and it was confirmed in writing by letter of 8 May 2022. Mr Buhus concluded that the Claimant was under the influence of alcohol, that the Claimant had acted in breach of the health and safety policy in that the Claimant had a legal responsibility for his own safety and that of others. Mr Buhus found that the Claimant's actions were unacceptable and showed that he did not learn from his (the Claimant's) previous mistakes. The Claimant was informed of his right of appeal.
- 48) The Claimant appealed his dismissal by letter of 16 May 2022.
- 49) Mrs Henderson, then a Factory Manager at one of the Respondent's other factories, and as of 1 January 2023 the Respondent's Head of UK Operations, chaired the appeal hearing. The Claimant attended accompanied by Mrs Everleigh.
- 50) At the hearing, the Claimant was able to set out his points of appeal. This included that the Claimant has said that he had not been sleeping, that he was frustrated on the day in question, and that no evidence had been presented to him that he had operated unsafely on the day, along with other points as set out in the notes of the appeal hearing.
- 51) The Claimant commented that he had made trips to his car because he needed to go to his car to get his tools. Mrs Henderson noted that the Claimant could not be seen carrying tools on the way back from the car. The Claimant says that he put them in his pocket. There is no evidence of the Claimant requiring a variety of different tools on the day in question. However, it is not disputed that the Claimant did keep tools in his car.
- 52) The Claimant was asked if there was anyone who could "support his innocence", and he referred to Mrs Everleigh and another colleague Paulo Marques.
- 53) Mrs Henderson asked the Claimant questions about whether he was receiving ongoing support following his rehabilitation in 2020, and the Claimant confirmed what support he received.
- 54) The Claimant again submitted a text from Mrs Everleigh, which indicated that she had spoken to Mr Higman again after the Claimant had been suspended and said that she could not smell alcohol only mint, and that she thought it was from a freeze spray the Claimant used.

- 55) Whilst before the Tribunal the Claimant suggested that any alcohol smell could have been hand sanitiser and further that any out-of-character behaviour could have been because of blood pressure medication, he did not raise either of these points in the disciplinary hearing or appeal hearing.
- 56) After the appeal hearing, Mrs Henderson made further enquiries. She asked a number of questions of Mr Higman, some relating to site issues rather than relating to the matters that she considered would affect the outcome of the Claimant's appeal, and some that were directly relevant to the appeal and to which she needed answers in order to complete her investigation. Mr Higman provided his responses on 27 May 2022.
- 57) Mrs Henderson spoke with Mrs Everleigh and Paulo Marques, as requested by the Claimant.
- 58) Mrs Everleigh's evidence changed from her previous statement. Although she maintains that she could not smell alcohol the suggestion that the Claimant could have been under the influence of alcohol is stronger, and the reference to the minty smell is a reference to the Claimant's breath not a smell coming from his body, as she said would have been the case with a freeze spray. Mrs Everleigh confirmed to the Tribunal that she wrote the appeal statement herself. Mr Marques indicated that there were other occasions where the Claimant was not acting himself, which Mr Marques's statement attributes to him having a few drinks or being on medication.
- 59) Mrs Henderson reviewed the CCTV evidence in detail and concluded that the Claimant was swaying and that his movements and behaviour shown on the CCTV supported the contention that he was under the influence of alcohol. She also smelt the freeze spray and concluded that it did not smell of alcohol or mint.
- 60) Mrs Henderson's full findings are set out in detail in writing in the appeal outcome. She concludes, among other things, that:
- a) The Claimant was under the influence of alcohol based on the evidence obtained in the original investigation;
 - b) It was not credible that a deep freeze spray would have caused the Claimant to smell of alcohol.
 - c) The Claimant made a huge number of trips to his car for tools that could not be seen on CCTV and which did not appear to be required that day.
 - d) That the decision to dismiss was appropriate. Mrs Henderson refers to the Claimant swaying, being "out of control", smelling of alcohol and mints and with red puffy eyes.
 - e) Witnesses noticed the smell, out of character behaviour and puffy eyes.
- 61) The Claimant's appeal was not upheld. A detailed outcome letter was sent to the Claimant on 9 June 2022.
- 62) As part of his claim, the Claimant alleges that the Respondent was looking to reduce the size of its workforce at this time. I find that this was not the case. The Respondent's witness evidence was consistent that the Respondent had a staff shortage. There is no evidence to support the assertion that redundancies were or would have been required at the time of the Claimant's dismissal.

The Law

63) The relevant law in respect of unfair dismissal is set out in Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") and they are as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

- (b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

64) In terms of case law, the relevant test I have applied is as set out in the leading case of *British Home Stores Limited v Burchell* [1978] IRLR 379, referred to by both parties and which reflects the list of issues set out above. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of a reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439; *Sainsburys Supermarkets Limited v Hitt* [2002] EWCA Civ 1588).

65) A lack of a proper investigation or enquiry at the initial stage of a disciplinary and dismissal may be cured by an appeal process. In *Khan v Stripestar Ltd* UKEATS/0022/15/SM the Employment Appeal Tribunal confirmed previous case law and ruled that there are "no limitations on the nature and extent of the deficiencies in the first stage of the process that can be cured by a thorough and effective appeal".

66) Where a Claimant has been unfairly dismissed, if the Tribunal considers that there is some likelihood that the Claimant would still have been dismissed had a fair process been followed, then the Tribunal must make a percentage reduction in the compensation awarded to the claimant to reflect this (*Polkey v A E Dayton Services Ltd* [1988] AC 344).

67) If a Tribunal finds that the dismissal was unfair, then pursuant to section 122(2) of the Employment Rights Act 1996 the Tribunal may reduce the basic award where the Claimant's conduct before the dismissal makes it just and equitable to do so and pursuant to ERA s 123(6) reduction can be made to the compensatory award where

the dismissal was, to any extent, caused or contributed to by any action of the Claimant.

Conclusions

I have reminded myself that I must not substitute my view for that of the Respondent. Whether I believe the Claimant was under the influence of alcohol or whether the Claimant was in fact under the influence of alcohol on 19 April 2022 is not the test in this case. Therefore, applying my findings to the issues, I conclude as follows:

What was the real reason for the dismissal (as per the Employment Rights Act 1996 (ERA) s 98? And is this a potentially fair reason pursuant to s.98(2) ERA? The burden in this regard rests with the Respondent.

68) The reason for the Claimant's dismissal was that the Respondent genuinely believed that the Claimant was under the influence of alcohol at work and in so doing putting health and safety of himself and others at risk. This is a conduct reason and is therefore a potentially fair reason pursuant to s.98(1) ERA.

69) Whilst the Claimant has suggested that there was an ulterior motive to reduce staff numbers, this is not supported by the evidence before the Tribunal or the sequence of events, where concerns about the Claimant were reported by a Manager to the Claimant's manager. There is no credible evidence, or indeed any evidence beyond the bare assertion by the Claimant, to suggest that the reason for the Claimant's dismissal was anything other than a conduct reason. For the avoidance of doubt, I accept the Respondent's evidence that it is looking to increase, not decrease, headcount.

In all the circumstances (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason? That question is to be determined in accordance with the equity and substantial merits of the case (ERA s 98(4)). Here the burden of proof is neutral. Turning to the strands in *British Home Stores Ltd v Burchell* [1980] ICR 303:

70) Did the Respondent have a reasonable belief that the Claimant was guilty of the misconduct?

71) Had the respondent carried out as much investigation as was reasonable in the circumstances; and

72) Did the respondent have reasonable grounds for its belief that the claimant was guilty of the misconduct at the time of dismissal:

- a) Whilst Mr Higman says that he was not the investigator, in effect he was the person who spoke to the witnesses on the day and formed the initial belief that the Claimant was under the influence of alcohol. Mr Higman confirmed he was frustrated and angry with the Claimant. He did not seek to include in his investigation evidence that may have cast doubt over the Claimant's guilt in that Sam was not referred to in Mr Higman's evidence and Mr Higman relied on Ms Hill's interpretation of Mrs Everleigh's evidence, despite Mrs Everleigh expressly telling Mr Higman that she had not smelt alcohol. Ultimately, Mrs Everleigh's evidence suggested that the Claimant was under the influence of something in any event, and then was strengthened at appeal stage. I do not find that

- inclusion of these points would have made any difference to the outcome.
- b) As alleged by the Claimant, no consideration was given to whether a breath test would be appropriate, although I accept the Respondent's evidence that there were none on site. I remind myself that a Respondent does not have to conduct a perfect investigation, but a reasonable one. In the context of not having any tests on site at the relevant time, it was not outside the range of reasonable responses for the Respondent not to test the Claimant.
 - c) As alleged by the Claimant, no enquiries were made of the Claimant as to whether he had any alcohol on him or in his vehicle. However, the absence of alcohol at the time of any search or enquiry would not have been conclusive and given the weight attributed to the witness evidence (and by Mrs Henderson to the CCTV evidence), the absence of any alcohol on the Claimant's person or in his car would not have made a difference to the outcome of the investigation.
 - d) The eventual investigator relied on the work done by Mr Higman, supplementing it with CCTV evidence and collating the statements from people with whom Mr Higman had said he had spoken. The CCTV evidence was detailed, and the Respondent did all it reasonably could in that regard.
 - e) By the time of the appeal, the Respondent had obtained evidence from all persons identified by the Claimant as relevant witnesses and had spoken to those employees who said that they could smell alcohol (Mr Higman and Ms Hill), and a third employee (Mrs Everleigh) who was present when Ms Hill said she could smell alcohol. Taking the process as a whole, the Claimant had a fair opportunity to put forward his case and seek additional witness evidence. In the event, the change in Mrs Everleigh's evidence at appeal stage provided stronger corroboration of Mr Higman's and Ms Hill's evidence, and that was in the context of Mrs Henderson knowing that Mrs Everleigh had supported the Claimant and sent a message to Mr Higman in support of the Claimant. Mrs Everleigh clearly did not have an axe to grind. The Respondent acted reasonably in relying on the witness evidence it had.
 - f) Mrs Henderson's evidence to the Tribunal was clear, robust and considered. She looked more critically at the evidence than the previous managers had. She investigated the points raised by the Claimant in his appeal and concluded that there was sufficient evidence to conclude that Mr Clark was under the influence of alcohol at work on 19 April 2022. Both Mr Buhus and Mrs Henderson considered the Claimant's movements and behaviour on the day in question, including swaying, being irate, the things he spoke about, the lack of work done, and numerous trips to the Claimant's car, and found that they supported the allegation that the Claimant was under the influence of alcohol.
 - g) Whilst neither Mr Higman nor Ms Hill were asked to smell the freeze spray at any stage, Mrs Everleigh had clarified that she could smell mint on the Claimant's breath and not on his body, as would be the case if he smelt of the freeze spray. Mrs Henderson did smell the freeze spray and concluded it did not smell of alcohol or mint.
 - h) The Respondent was not required to prove whether the Claimant had been under the influence of alcohol; for the dismissal to be fair the Respondent needed to have a reasonable belief that this was the case, based on a reasonable investigation. The Claimant alleges that the evidence against him was circumstantial and no attempt was made to gather actual evidence. However, the Respondent relied on the evidence of four witnesses, one of whom was not a witness to the alleged conduct on 19 April but provided corroborating background evidence. The Respondent relied on two of those witnesses (Ms Hill and Mr Higman), who were managers at the site, saying that the Claimant smelt

of alcohol. Mr Higman was the most senior manager at the Bodmin Factory, and he believed that the Claimant smelled of alcohol; had red and puffy eyes; slurred his words when he spoke; and did not seem himself. Mr Higman and the Claimant had worked together for 18 years and knew each other socially and weight was placed on this because Mr Higman would know whether the Claimant was acting out of character, which was persuasive to Mr Buhus. Three of the witnesses described as behaviour changes throughout the day in question. Mrs Everleigh had said that the Claimant seemed to be under the influence of something.

- i) At appeal stage, Mrs Everleigh's evidence changed slightly, and added further weight to the case against the Claimant.
- j) On the face of it, there were reasonable grounds for the Respondent's belief that the Claimant was under the influence of alcohol on 19 April 2022.
- k) Whilst there was little consideration to whether the Claimant had in fact put the health and safety of himself and/or others at the disciplinary stage, this was considered at the appeal stage. Having watched the CCTV, Mrs Henderson considered that the claimant has attended work "swaying and out of control". Mrs Henderson confirmed to the Tribunal that the Claimant worked with tools, there was heaving machinery on site and explosive material on site, none of which was disputed by the Claimant, and accordingly Mrs Henderson considered that attending work under the influence of alcohol did in fact pose a risk to the health and safety of the Claimant and others. This conclusion was a reasonable conclusion.
- l) Accordingly, the investigation and conclusions were within the band of reasonable responses when taken as a whole and including the appeal stage.

73) Was the dismissal fair having regard to all the circumstances and to the equity and substantial merits of the case: did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissal?

- a) The Respondent had provided the Claimant with a copy of the investigation report and wrote to the Claimant to invite him to a hearing to consider the allegations against him. The Claimant knew that an outcome could be dismissal. Whilst the Claimant was confused as to whether he could bring a workplace colleague to the meeting, having been told when he was suspended not to contact other employees, the Respondent had informed the Claimant of his right to be accompanied. The eventual dismissal was confirmed in writing and the Claimant was offered, and exercised, his right to appeal. There was an appeal hearing, at which the Claimant was accompanied, the points raised by the Claimant were investigated, and the outcome was confirmed in writing. The Claimant was able to put forward his case at the disciplinary and appeal hearings. These were fairly considered.
- b) The Claimant did not during the process raise hay fever or blood pressure tablets as potentially explaining his behaviour and appearance on 19 April 2022, and the Respondent was not under an obligation to assume that this may have been an explanation in the absence of the Claimant raising these points.
- c) The procedure followed by the Respondent was reasonable.
- d) I do not find the decision to have been predetermined, as alleged. Consideration was given to the evidence available and to the appropriate sanction. Being under the influence of alcohol is specified as being misconduct under the Respondent's policy and may amount to gross misconduct. In any event, in considering whether the dismissal was fair or unfair I must consider whether dismissal was a reasonable response to the misconduct, not whether the misconduct amounted

to gross misconduct. The Respondent took the view that it could not trust that the Claimant would not attend work under the influence of alcohol in the future, it having happened before, and that there was a health and safety risk if he did so, which was considered to be an aggravating factor. Whether the dismissal was too harsh is not the test. In assessing the reasonableness of the decision to dismiss, the Tribunal has to consider the Respondent's decision against the objective standards of the hypothetical reasonable employer. The Tribunal has to consider whether the Respondent has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. It cannot be said that no reasonable employer would have dismissed the Claimant. Dismissal was within the range of reasonable responses open to the Respondent, it having reasonably concluded that the Claimant was guilty of misconduct as alleged.

74) This does not mean that the Claimant had in fact been drinking at work. The Respondent is not required to prove that he was. There may be other explanations for the Claimant's behaviour, including him being frustrated on the day and him taking blood pressure tablets, but the Respondent was reasonable in reaching the conclusion that it reached and in dismissing the Claimant for the conduct reason stated.

75) The Claimant's dismissal was therefore a fair dismissal.

Employment Judge Youngs

Date: 28 February 2023

Judgment sent to the Parties on 16 March 2023

For the Tribunal Office

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