EMPLOYMENT TRIBUNALS
(**England and Wales)**
London Central Region

Claimant: Mr Brady
Respondent: London Underground Ltd

Heard by CVP on 11 and 12 May 2023
Before: Employment Judge J S Burns

Representation
Claimant: Mr D Renton (Counsel)
Respondent: Miss R Thomas (Counsel)

JUDGMENT

The claims are dismissed

REASONS

1. The Claimant, who was employed by the Respondent as a Customer Service Assistant, and who was promoted to Train Operator in 2021, claimed that it was wrong and unfair that he had been summarily dismissed on 15/8/22 for refusing to submit to a hair-follicle test, the purpose of which would have been to ascertain whether or not he had taken illegal drugs in the three month period prior to the request being made on 23/12/21.

2. I heard evidence on behalf of the Respondent from Dr C Coltofean, an Occupational Health Physician, Mr J Woodcock, chair of the Claimant's disciplinary meeting, and Ms M Adesina, Senior Manager who presided over the Claimant's appeal against dismissal; and then from the Claimant, and then from Mr E Lynch, a RMT staff representative called as witness by the Claimant. The documents were in a bundle of 449 pages. I received a written chronology written by Mr Renton and written and oral final submissions from each side, all of which I have carefully considered, even if I have not mentioned each and every one in these reasons.

Findings of Fact

3. Relevant parts of The Transport and Works Act 1992 are as follows: *Section 27(1) If a person works on a transport system to which this Chapter applies—(a) as a driver, guard, conductor or signalman or in any other capacity in which he can control or affect the movement of a vehicle, or (b)in a maintenance capacity or as a supervisor of, or look-out for, persons working in a maintenance capacity, when he is unfit to carry out that work through drink or drugs, he shall be guilty of an offence. Section 28(1) If a person commits an offence under section 27 above, the responsible operator shall also be guilty of an offence….. (3) No offence is committed under subsection (1) above if the responsible operator has exercised all due diligence to prevent the commission on the transport system of any offence under section 27 above.*

4. Hence, the Respondent would be criminally liable if its employee was guilty of working in a safety critical role while unfit by reason of drugs or alcohol, unless the Respondent had exercised all due diligence to ensure that the employee was not so unfit.

5. In response to this the Respondent has since 1992 introduced formal policies to regulate its testing employees for drugs and alcohol for purposes of appointment and promotion but also "for cause" (ie because of behaviour giving rise to suspicion) and on a random basis across 5% of the relevant work-force per year. These policies are the product of negotiation and agreement between the Respondent and the union/s representing its employees.

6. The Respondent has a Drugs and Work Standard (policy) that applies to all its employees. This includes the following:

   The purpose of this standard is to ensure that all London Underground (LU) employees and suppliers are aware that LU has a zero tolerance approach to drugs and forbids the use, possession, consumption, storage and sale of illicit drugs on the company's premises.

   1.2 This standard has been developed to: a) minimise the risk of damage to passengers, staff and property; b) compliance with relevant legislation; c) protect LU reputation as a provider of safe public transport….

   3.1 (b) The Transport and Works Act 1992 places a duty on LU to exercise 'all due diligence' to prevent employees from working whilst they are unfit for duty through alcohol and or drugs or where an individual's ability to work is impaired through the use of alcohol or drugs. ……

   3.2 All employees and suppliers are required ……d) to co-operate fully with the company's drugs screening arrangements if ……..there is reasonable suspicion that drugs have been consumed or used; …….. e) in addition to the requirements outlined above employees and suppliers who are required to perform safety critical activities are required to: undergo screening for drugs prior to appointment, transfer or promotion to a post; co-operate fully with unannounced drugs screening arrangements;

   3.3 In the event of any breach of this standard: …3.3.1 Disciplinary procedures shall apply to LU employees, which may result in charges of gross misconduct and dismissal. ……

   4.2 All LU managers: c) shall ensure drugs screening takes place as appropriate for employees prior to their undertaking posts in which they will be identified as safety critical; d) shall co-operate with Human Resources in carrying out unannounced drugs tests and with Occupational Health in arranging drugs screening to monitor employees who have undergone rehabilitation for drug abuse or a drug related problem;

7. The Respondent has another document entitled "*Alcohol and drugs at work Guidelines and Information For Managers".* This document which dates from 2003 (and is itself an update from similar guidance first produced in 1992) discusses drugs screening in various sections and the detailed procedures to be followed in various scenarios. Paragraph 3.2 reads inter alia as follows: "*The four key requirements employees must meet are:- (1) Not to consume or use illegal drugs at any time so as to ensure they are not under their influence when reporting for duty, carrying out work for the company or when on company premises….(4) To co-operate with the company's drugs screening arrangements if they are involved in a dangerous incident at work or where there is reasonable suspicion that drugs have been consumed or used.'* The section which deals with "*pre-employment, Promotion and Transfer"* reads inter alia as follows "*Drug screening must be undertaken for all recruitment, promotion and transfer into safety critical posts, including*

secondments….” A section entitled “*8.7 Procedure for Employees Refusing to Take a Test*” reads as follows: *“Employees who refuse to take the tests will be advised of the company's Alcohol and Drug Standards, the approved screening programme, the terms of their contract of employment and the consequences of refusing. If the employee still persists in not taking the tests he or she will be told that the matter will be referred to a disciplinary hearing in accordance with normal disciplinary procedures*”. The document refers to two kinds of tests namely the urine drugs test and the alcohol breath test and makes no reference to tests of hair. Another section refers to the procedure which should be followed in relation to tests to be carried out by the Respondent’s laboratory. This includes the following (referring to the time to be given to an employee to produce a specimen of urine and the consequences if he fails to do so within the initially allotted time period): “*12.4.4 Employee Not Able to Produce a Sample; If after drinks of water the employee still cannot provide a sufficient sample of urine or they are at the end of their rostered duty and unwilling to remain to continue the test, a new test MUST be arranged to take place at LUOH the following day if possible, or at the earliest opportunity if it is not possible to test the next day.*”

8. The Respondent has another document R2692 A3 which is entitled “*Alcohol and drugs at Work - Information for managers and employees”* which again refers to the urine drugs test and the alcohol breath test. There is no reference to hair-follicle testing in the document (including in paragraphs 11.7 and 11.8 of this policy which were amongst the policy provisions which the Claimant was subsequently charged with breaching).

9. The subject of hair-testing for drugs was the subject of a letter sent in 2013 by a Respondent HR Director to an RMT Organiser (a colleague of Mr Lynch). The relevant part reads as follows: *“I can only reiterate that Hair Testing is not part of the Company’s Drugs and Alcohol testing procedures and is only initiated as part of a medical intervention. To put this issue in perspective there have only been two recorded cases of hair testing since the introduction of the Alcohol and Drugs Policy in 1992. In each case permission for the test has to be obtained from the individual concerned and the retention of such information follows both medical and data protection legislation. It has only been used on LU in this context in cases of chronic drug abuse to establish the recent drug history of an individual where the professional opinion has suggested a relapse despite the employee claiming total abstinence. The results from the test enables our professionals to accurately assess an individual and advise on the right course of action to take or tailor support to the individual concerned where necessary. It is consistent with the Transport and Works Act 1992 which places a duty on LU to exercise all due diligence to run a safe transport system. There are no proposals to extend the use of hair testing into the testing procedures but it is a medical option for our professionals to exercise if necessary and as I have stated it is not a widespread practice*.“

10. Mr Lynch in evidence stated that he was aware of the existence and gist of the letter, (although he had not obtained a copy of it from his colleague when the issue arose in relation to the Claimant); and to the best of his knowledge no further hair testing had been carried out by the Respondent on any of its employees since the letter was written in 2013 until the present day.

11. The Respondent has a Code of Conduct document S5254 which states inter alia : *'3.1.1 Employees are required to comply with their employment contract; all LUL policies, standards and supporting guidelines, working procedures and safety instructions relevant to their job."*

12. Urine does not show the presence of some illegal drugs (for example cocaine) after about three days abstinence. Hence urine provided by an employee who has three days notice of the fact that he will have to provide urine for testing has an opportunity to abstain for that period and submit urine which does not show the illegal drug even if he has been consuming it before the notice was given.

13. Hair or hair-follicle testing (the terms are used to mean the same thing) is able to show whether the producer of the hair has taken drugs within a far longer period - typically up to about three months prior to production.

14. The Claimant applied for employment with the Respondent in 2015. He was required to complete a Medical History questionnaire which stated the following at the beginning *"Please complete this form to the best of your knowledge. If subsequent events prove you have completed the form untruthfully this may lead to your dismissal. Have you ever had any of the following?"*

15. As the Claimant knew at the time, these questions were asked to ascertain whether he was fit physically and mentally to work in a safety-critical role. He gave false negative answers when he filled in the questionnaire on 29/9/2015, and verified its truth by signing his name under the declaration: *"I declare that all answers given above are to the best of my belief, true and correct."*

16. The questions included: *'Have you ever suffered from anxiety/depression/stress/panic attacks/any mental illness which required treatment from your GP?"* The Claimant's negative answer to this was untrue because he had a history of depression including suicidal ideation for which he had sought GP advice, medication and psychological intervention and had been referred by his GP to Whittington Mental Health Liaison Team on 28/7/2015 with a further assessment by the Islington Crisis Resolution Team on 4/9/2015.

17. The questions included "*Have you ever had or do you have a drink or drug problem? Have you ever consulted a doctor about a drink or drug-related problem?"* The Claimant's negative answers to these questions were also untrue as the Whittington note records "*Binge drinking on nights out"* and "*Hx of Cocaine use*" and the Islington assessment on 4/9/2015 recorded "*Drinks alcohol every day (bottle of vodka every day)"* and "*snorts cocaine £40 a week" (socially)".*

18. Under cross-examination the Claimant agreed that these answers were false and he explained that he had lied because he thought if he gave truthful answers he would not get the role for which he was applying. He was aware that the Respondent had a zero-tolerance policy regarding drug abuse the purpose of which was to protect the employee, other employees and the public.

19. The Claimant however was not asked to produce his medical records in 2015, and his false declarations were apparently taken at face-value by the Respondent. The Claimant was required to take a breath and urine test which he passed, and he was recruited into the role of Customer Services Assistant (CSA1) with effect from 19/10/2015. His duties involved working on the Gateline and helping passengers with their routes and ticketing. His role also had a safety-critical element including announcements on platforms and dealing with incidents.

20. The Claimant's statement of Main Terms and Conditions of Employment contained inter alia the following: "*DRUGS AND ALCOHOL : You are required to comply with the Alcohol and Work and drugs and Work Standards …Your employment as a Customer service Assistant is classified as Safety Critical. Therefore at any time whilst on duty or reporting for duty you may be required, on request by an authorised person, to provide a specimen of breath and/or urine for the purposes of medical screening for alcohol and prohibited drugs, in accordance with these standards. Any failure to comply will be a disciplinary offence, which may render you liable to summary dismissal"*

21. The Claimant carried out his CSA role until 2015 without any problems, and in April 2015 successfully applied for promotion to a train operator's role, - also safety critical- subject to an OH assessment. Again he had to fill in a medical declaration which he did on 7/4/2015. He disclosed the fact that he was taking Citalopram for depression but gave negative false answers to the question "*do you have or have you ever had any drug or alcohol problems" ?*

22. Under cross-examination the Claimant accepted that this was also untrue, and that the Respondent would have expected him to give honest answers.

23. Prompted by the disclosure of the depression in mid-2021, Dr C Coltofean, the Respondent's Occupational Health Physician, wrote to the Claimant's GP, who replied by letter on 20/7/21 stating "*There is a history of cocaine use. I am not sure if this is ongoing and if this has stopped I do not know when this was*". Additionally, the GP attached the reports from the Claimant's hospital visit and assessments in July and September 2015. For the first time the Respondent's OH department were made aware of a history of substance abuse and suicidal ideation.

24. Dr Coltofean was very concerned as the Claimant had been appointed to a safety-critical train operator's role. She considered she needed to satisfy herself that that the Claimant was no longer using cocaine or illegal drugs.

25. Hence Dr Coltofean attempted to subject the Claimant to an unannounced urine drugs and alcohol breath tests on 11/9/21. He provided a breath sample which returned a negative result for alcohol. The Claimant was given two hours in which to provide a urine sample but he did not do so.

26. The Claimant said that the tester had to leave early as he did not want to lose his parking place. The Claimant's line manager confirmed *"I can state that the tester did attend the VSH and had to leave as his vehicle parking permit was about to expire, I believe the total time spent at VSH was approximately a 2hr visit on that day*".

27. Dr Coltofean stated that two hours was the standard period for urine production and it is usually sufficient provided that the employee drinks water to encourage the process.

28. The Claimant stated that he was made anxious by the testing/attempted testing on 11/9/21, and woke up on 12/9/21 with chest pains. He attended A&E at a hospital on 12/9/21 and was found to have high blood pressure. He contacted his line-manager to discuss taking the test which he said he would do when he returned to work which he wrote would be by midday on 14/9/21.

29. He was not rostered to work on 12/13 September 2021 (a Sunday and Monday) but returned to work on 14/9/21 when he tested again negative for alcohol and was able to produce a urine sample which when tested was negative for drugs.

30. Dr Coltofean was not satisfied with this because, for whatever reason, the Claimant had not had an unannounced urine test, and his negative urine sample on 14/9/21 had been provided after about three days notice during which time, even if he was a recent habitual cocaine user, he would have been able to use the interval to abstain so as to give a false negative result.

31. A follow-up OH appointment was arranged for 24/9/21 but the Claimant failed to attend. The appointment was rescheduled for 22/10/21. On that occasion Dr Coltofean explained her concerns. In respect of other medical issues (depression and sleep apnoea) he was asked to supply further information from his GP. The Claimant was restricted from undertaking safety critical duties. This was interpreted by the managers as placing a "hold" on his transfer to the train operator role. It appears that by oversight the Claimant was permitted to continue performing the safety critical duties of his CSA role until he was later suspended on 23/12/21.

32. The GP on 11/11/2021 provided an update on the Claimant having attended A&E in September 21 following which his blood pressure had been measured in the practice on 21/9/21 but there was no change in the previous statement: "*There is a history of cocaine use. I am not sure if this is ongoing and if this has stopped I do not know when this was".* Based on all this information Dr Coltofean was unable to pass the Claimant fit for the role of Train Operator.

33. On 20/12/21 the Claimant attended another OH appointment. At the appointment, Dr Coltofean asked him to give a hair sample so that she could test for drugs in his system. She explained the problem with the 14/9/21 urine test and told him that she had arranged for the testing specialists to be available on that day so that they could test a hair sample, which was the next best appropriate step to show that he had not used cocaine (or other illegal substance) within the previous three months. She explained that if he refused to have this test, this would be taken as a breach of the drug and alcohol policy.

34. The Claimant seemed hesitant, so Dr Colyofean offered him some time to speak to his trade union and to return later that day. The Claimant left to speak to his trade union representative Mr Lynch on the telephone and then returned, refusing to give a hair sample and saying that he had been told that the Respondent's policies did not permit such a test.

35. In his witness statement Mr Lynch gave his account of his telephone call on 20/12/21 as follows: "*The Claimant confirmed that on that day he spoke to me he had not been subject to a for cause test, random test or post incident test. I advised the Claimant to ask the OH clinician under what procedure they were requesting the hair follicle sample*…"

36. In his witness statement Mr Lynch did not state whether or not he had advised the Claimant to refuse or consent to the hair test. Mr Lynch's oral evidence about this was unclear and he failed to say clearly that he had advised the Claimant against it. However he did confirm that when discussing the matter that day with the Claimant, the Claimant did not tell him that he had a history of cocaine use recently disclosed by his GP.

37. On 23/12/21 Mr Z Khan the Mr Brady's line manager, met with the Claimant to start an investigation. Mr Khan informed the Claimant that in order to get him back to work he needed OH to give medical clearance. The Claimant repeated his policy-based objections and refused to submit to a hair test. Mr Khan suspended the Claimant from work.

38. The Claimant's and Mr Lynch's approach from then on, and continuing throughout the subsequent disciplinary procedures and during the Tribunal hearing was that, as the Claimant's urine test on 14/9/21 was negative for drugs, the Claimant had passed that test and that should have been the end of the matter.

39. Mr Khan met the Claimant again on 10/1/22. Mr Khan explained to the Claimant "*safety is the number one factor and the OH have made a perfectly reasonable request, which is for a hair*

sample to be provided by you to allay the safety fears that they have . By doing the hair sample test you would put to bed once and for all, the whole issue". However the Claimant maintained his refusal which he claimed was on policy grounds. In so doing he stated the following to Mr Khan *"The information in my medical records (ie about the Claimants drug abuse) from my GP was from about nine or ten years ago*.." This was misleading and untrue because, even taking the Claimant's account at face value, the last reference to the Claimant using cocaine was in a document in the medical record dated 4/9/2015, some 6 and a half years before 10/1/22, and as recently as November 2021 his GP had written to say that he was still unaware whether or not the Claimant was still using cocaine.

40. There was a further meeting between Mr Khan and the Claimant on 20/1/22 where a similar discussion occurred.

41. There were no more meetings between the Respondent's managers and the Claimant from 20/1/22 until the disciplinary hearing and he remained away from work on suspension, but he was written to several times by Mr Khan during that period, and the Claimant could at any time have contacted Mr Khan or Dr Coltofean to offer to take the hair test if had had a change of mind. However he did not do so.

42. On 8/2/22 Mr Khan wrote to the Claimant, confirming the outcome of his investigation and on 24/2/22 confirming that he would be invited to a CDI (disciplinary hearing) for the charge of gross misconduct to be considered, and that a possible outcome may be summary dismissal.

43. On 5/4/22 Mr Khan wrote to the Claimant inviting him to a disciplinary hearing. The charge was that "*on 20 December 2021 he stated that he would not participate in a medical test that was deemed clinically necessary by an Occupational Health Physician, contrary to section 3.1.1 of Code of Conduct and section 3.2 of the Drugs and Work Standard and sections 11.7-11.8 of document R2692 entitled "Alcohol and drugs at Work - Information for managers and employees."*

44. Mr Woodcock presided over a disciplinary hearing on 27/4/22. Mr Lynch made various policy-based arguments. The Claimant stated that he had originally objected to the hair sampling based on advice he had received from his trade union, but that he was now willing to give a hair sample for testing. By 27/4/22 however over four months had expired since the Claimant had been asked to provide a hair sample and the offer was not taken up.

45. After the disciplinary hearing Mr Woodcock asked the Claimant for permission for get his medical records from OH, and the Claimant agreed, and Mr Woodcock obtained and read them. Mr Woodcock also obtained and considered a copy of the 2013 letter (referred to in paragraph 9 above) on the subject of hair testing within the Respondent. Mr Woodcock however did not send this 2013 letter to or ask the Claimant for any comments on it before Mr Woodcock made his

decision. The Claimant and his representative first saw the 2013 letter when it appeared in the Tribunal bundle.

46. Mr Woodcock decided on 15/8/22, that the Claimant should be summarily dismissed. The following is the relevant part of the dismissal letter:

Based on the evidence in the CDI papers and reviewed during the CDI meeting and following careful consideration of all the other available information, including the points made by you and your chosen companion in the meeting, we find the disciplinary complaint upheld.

Following your CDI, and with your consent, the panel sought clarification on OH's reasoning for requesting a hair sample from you. This request provided a clear timeline of events which led to your medical review on 20th December 2021. On 5th July 2021, you attended a promotion-transfer medical examination. It was decided further medical information was necessary to assess your medical suitability for the role of Train Operator, owing to your history of depression since late 2015 to early 2016. On 20th July 2021, your GP wrote to Dr Cristina Coltofean and advised: "There is a history of cocaine use. I am not sure if this is ongoing and if this has stopped, I do not know when this was."

Based on the information provided by your GP, you were subject to a for-cause test; however, were unable to provide a urine sample on the day. You were then absent from work for a few days due to high blood pressure and stress and returned to work where you provided a negative urine sample. Due to concerns regarding your inability to provide a negative urine sample on the day of testing and subsequent absence you were referred to DAATs for further testing. The panel accept that you passed your breathalyser test on 11th September 2021 and eventually provided a negative urine sample some days later. The panel accept that there were complications outside of your control which contributed to a delay in providing a urine sample on the day of testing. The panel are unable to conclude whether you would have provided a negative urine sample on 11th September 2021. As a result of the information provided by your GP, and concerns regarding the delay in your for-cause testing on 11th September 2021, you were referred to OH and restricted from safety critical duties. You were unable to complete your full substantive role and OH were unable to provide a timescale for a return to your full duties.

On 20th December 2021, you attended a medical review appointment with a view to progressing your promotional Train Operator opportunity with Dr Cristina Coltofean. At this appointment, Dr Coltofean requested a hair sample, explaining the reason for the assessment, what it would involve and the implications of not participating. Hair testing is not part of LU's drug and alcohol testing procedures and is only initiated as part of a medical intervention. The result enables OH to accurately assess an individual and advise on the right course of action to take depending on the circumstances of the individual; in your case, your ability to safely operate a train. Considering your acknowledged history of drug use and uncertainty surrounding continued use, this was an entirely reasonable request from OH to ensure consistency with the Transport and Works Act 1992 which places a duty on LU to exercise all due diligence with running a safe transport system. After some consideration, you informed Dr Coltofean that you would not provide a hair sample and consequently were suspended from work on 23rd December 2021.

The panel find your lack of engagement with this request concerning and, reasonably raises the possibility that the explanation for your refusal is because you had taken drugs within the detection timeframe of a hair sample test. You have provided no definitive evidence that you have not taken drugs and refused to engage with a process which would have substantiated your claims of abstinence.

This is a very serious matter that was correctly a gross misconduct charge, and we considered a full range of sanctions. We have decided that the most appropriate sanction is summary dismissal (dismissal without notice) and your last day of service is 15th August 2022."

47. The words "*Hair testing is not part of LU's drug and alcohol testing procedures and is only initiated as part of a medical intervention*" in the above extract were taken from the 2013 letter.

48. As stated in the penultimate sentence of the quotation above, I find that Mr Woodcock and the "second chair" at the CDI did consider a range of outcomes and decided that summary dismissal was the most appropriate. In his oral evidence Mr Woodcock gave more detail about this. He explained that - "*in light of the implications of not complying, and the Claimant's conscious decision not to engage, the drug and alcohol policy being most important, and it being unacceptable for people to take drugs - a lower sanction would dilute the process and weaken the zero-tolerance message."*

49. The Claimant appealed and the appeal was heard on 2/9/22 by Ms Adesina, a senior manager with 20 years' service with the Respondent and a knowledge of its drug and alcohol duties and policies. She met with the Claimant and Mr Lynch, along a notetaker and an Employee Relations Partner. She discussed and considered all the Claimant's grounds of appeal. The Claimant was given a further opportunity to put forward all matters he wished to rely upon. Mrs Adesida made further investigations into the Claimant's duties and she spoke to Dr Coltofean and Mr Woodcock. She also reviewed the provisions of the Transport and Works Act 1992. She decided to dismiss the appeal which she did by letter dated 28/11/22.

Relevant law

50. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under section Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

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 upon 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.'

51. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

52. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

53. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

Conclusions

54. As spelt out, for example in section 3.2 of the 2003 Guidance document referred to above, the Respondent's employees are not permitted to consume illegal drugs at any time during the period while they remain such employees. The prohibition against drug abuse extends to the employee's whole life style while he remains employed by the Respondent, and not just to the times when he reports for or is at work.

55. On the evidence of this Tribunal, as a means of enforcing the prohibition, the Respondent's anti-drug screening and testing arrangements and the terms of the standard terms of employment used in the Claimant's case, contain several obvious shortcomings.

56. On recruitment the Respondent is willing to accept at face-value (and without requiring production of medical records), self-serving false declarations that the prospective employee does not abuse drugs. Drug-testing on recruitment is restricted to the urine test which the prospective employee can prepare for by abstaining from illegal drugs for three days so as to give a clear but misleading result.

57. In practice, urine tests during employment are conducted on the basis that the time permitted to produce urine to an employee on the first day of asking is limited to two hours instead of the employee being given until the end of shift (as required by paragraph 12.4.4 of the 2003 Guidance) after which there may be a postponement of the giving of urine until such time as the testing of it will be useless for its intended purpose.

58. The on-notice employee whose giving of urine is postponed is thereafter able to rely on that useless test to argue that the policy-based testing procedures are exhausted, leaving the Respondent without a clear policy-based power to require the effective hair follicle test to be carried out.

59. I hope the Respondent will take early steps to review and amend its practice, drugs standard, guidance and terms of employment so as to provide expressly that prospective employees and employees in safety critical roles must submit promptly to all reasonable types and means of pre and during employment screening and testing (including hair follicle tests or such other test as OH may reasonably require) for illegal drug/alcohol abuse or a tendency towards or history of such abuse; and to ensure than when tests are carried out they are carried out under sufficiently rigorous and time restricted conditions.

60. Turning to the facts of this case, the question is whether in all the circumstances the Respondent acted reasonably in treating the Claimant's refusal to submit to a hair-follicle drug test as gross misconduct warranting summary dismissal.

61. As already stated, the hair-follicle test was not provided for in the Respondent's policies or in the Claimant's employment contract/statement of terms of employment. This is the main point underlying his submissions that his refusal to take such a test was reasonable and his consequent dismissal unfair. I have noted Mr Renton's very able and detailed submissions on this theme, for example, but not limited to, the points he has made in paragraphs 10-15 of the Claimant's skeleton argument.

62. However, I find that the omission of references to or provision for a hair-follicle test in the policies and employment terms did not in the circumstances of this case make the Respondent's request that the Claimant should submit to a hair follicle test, an unreasonable one. Even though not covered by a policy, or expressly required by the Claimant's written terms of employment, it was obviously necessary in the circumstances, namely that it had come to the Respondent's OH's attention that the Claimant had dishonestly failed to disclose his cocaine abuse, both when being first recruited by the Respondent in 2015, and then again in April 2021 when obtaining promotion to train operator, and then, for whatever reason, he had failed to provide urine on an unannounced basis. This was an unusual combination of events which Dr Coltofean sensibly and professionally identified as requiring a response going beyond the normal testing and screening procedures.

63. Having regard to the Respondent's basic obligations to exercise due diligence to minimise the risk (of its employees under the influence of illegal drugs performing safety critical roles,) it would have been reckless and impossible for the Respondent, to allow the Claimant to continue in his employment without a further and different test which would show whether or not he was a recent illegal drug user.

64. Furthermore, depending on the circumstances, an employee acting reasonably can be bound to comply with a reasonable management request, even if the obligation to do so is not expressly required by either his employment contract or a policy document. Not all facets and circumstances of the employer/employee relationship can be anticipated and prescribed for in advance in a policy document or employment contract. The relationship requires both sides to act reasonably so as to preserve the trust and confidence of each other, as particular situations and circumstances dictate.

65. There is no rule in employment law that a persistent refusal to take a reasonable step requested by an employer, (which it would be harmless and easy for an employee to take if he was conducting the employment relationship honestly and properly himself, and potentially very harmful to the employer and other people if the employee was able to refuse to take it with impunity), cannot be treated as gross misconduct simply because the step has not be written down in advance in a policy or contract as a specific obligation.

66. In the instant case, for obvious reasons which the Claimant and his experienced TU representatives well understood (as it was repeatedly explained to them) the Claimant had not been adequately tested for drug abuse, and he was suspected of unfitness for service by reason of ongoing drug abuse, which suspicion, if correct and not explored further, would not only breach the Respondent's duty of due diligence but potentially expose other employees and the travelling public to danger. The impasse could only be dispelled by his agreeing to take a hair follicle test. If he was innocent he would have nothing to lose by taking it.

67. The possibility that the Claimant was still using cocaine was to be reasonably inferred from (i) his dishonest and repeated lying about it in medical declarations (ii) the fact that he insisted that the urine test on 14/9/21 should be taken as conclusive (as to whether he was still taking drugs) when he well knew it was nothing of the kind (iii) his initial reluctance, even before speaking to his TU representative, to take the hair test when it was first suggested on 20/12/21 (iv) his subsequent deploying of technical policy-based objections to taking the hair test, which test it would have been easy and harmless for him to take if he was drug-free, and (v) his final abandonment of that policy-based objection in April 2022, but only when it was too late for the hair test to have any value in determining whether he had been abusing drugs in the last three months of 2021.

68. The implications of the Claimant's refusal had been explained by Dr Coltofean and Mr Khan and was in any event obvious. The whole reason for the dispute was the Claimant resisting testing to ascertain whether he was still using illegal drugs. He was also asked directly by Mr Woodcock during the disciplinary hearing whether or not he had used any "*drugs or substances in the 7 years he had worked for (the Respondent)".*

69. In these circumstances while the Claimant could not be compelled (and was not compelled) to take the hair test, his refusal to take the test was rightly regarded as gross misconduct.

70. The Respondent's view was not that Mr Lynch's advice was bogus but that his advice to the Claimant (which advice the Respondent accepted he had given) that hair testing was not in the policies, was not a sufficient excuse for the Claimant's non-compliance with the request that he take such a test, and that the Claimant had used that advice to provide a purportedly innocent but in fact dishonest excuse for his refusal. The Respondent's conclusions did not imply or require complicity (dishonest or otherwise) by Mr Lynch in the Claimant's misconduct.

71. I agree that Mr Woodcock should have sent the 2013 letter to the Claimant and Mr Lynch for comment during the period between Mr Woodcock himself obtaining it and Mr Woodcock issuing his dismissal letter. However, Mr Lynch was already aware of the letter and its gist, and he had already made to Mr Woodcock the main point which the letter confirms - namely that hair testing is not a part of the Respondent's routine drug screening procedures. The letter suggests that hair testing had been used only very rarely in exceptional circumstances. The Claimant's dismissal letter makes a short passing reference to one line from the 2013 letter and the main reasoning and cause for the dismissal decision does not depend on it. I do not regard this minor omission as having resulted in an unfair procedure.

72. Paragraph 8.7 of the 2003 Drugs Guidance ("*Employees who refuse to take the tests will be advised of the company's Alcohol and Drug Standards, the approved screening programme, the terms of their contract of employment and the consequences of refusing*") had already been applied in practice in that Dr Coltofean and Mr Khan had repeatedly explained matters to the Claimant and asked him to comply, but he had maintained his refusal, hence the disciplinary course being followed. He had been a persistent refuser against a very unsatisfactory background in which it would be reasonable to expect immediate compliance from an innocent and honest employee.

73. I reject the submission that Mr Woodcock and Ms Adesina did not consider alternatives to summary dismissal as the appropriate outcome. This is contrary to the terms of the dismissal letter and their evidence. Summary dismissal can be appropriate response to a single instance of gross misconduct, despite a previous clean disciplinary record.

74. I reject the submission that the Respondent should have accepted or responded positively to the Claimant's offer to take the hair test, which offer he made somewhat in passing and for the first time at the disciplinary hearing in April 22. By that time, over 4 months had elapsed since he was first asked to undergo it, so it would have been worthless for its original purpose. If his refusal was genuinely based on the state of the Respondent's written policies, he would have been expected to have maintained that position, seeing that the policies were the same at the disciplinary hearing as they had been in the previous four-month period during which he had persistently refused to comply.

75. I was impressed by Ms Adesina's evidence both written and oral and reject the submission that she did not "deal with red flags". I am satisfied that in conducting the appeal she did consider all

relevant matters apart from the failure by Mr Woodcock to disclose to Mr Lynch the 2013 letter which she did not know about. In context I regard that as insignificant in any event.

76. In summary, I find that the Respondent's managers had a genuine belief based on reasonable grounds that the Claimant was guilty of gross misconduct, and that the Respondent's procedures and decision to summarily dismiss the Claimant were both within a range of reasonable responses. Hence the Claimant was fairly dismissed.

77. In case I am wrong about this, I have gone on to consider what my decisions would have been in applying the principles of Polkey and Contributory Fault in the event that I had found that the Claimant was dismissed unfairly.

Polkey

78. The Claimant had deliberately lied to OH in 2015 about his mental health problems, drug and alcohol abuse on a form which contained an express warning that false answers may lead to dismissal. While partially disclosing his depression in 2021 when obtaining promotion, he had then again dishonestly failed to disclose his drug abuse, and had then again dishonestly misrepresented the matter to Mr Khan in January 2021. A safety-critical employee lying about drugs to an employer with a zero-tolerance drugs policy strikes at the heart of the employment relationship. The Respondent's deciding managers did not focus on these deceptions, when they were engaged in the dismissal/appeal process, because by then they were focused on the fact that the Claimant had persistently refused the hair test, and the resulting uncertainty about whether he was still an illegal drug-abuser. Mr Woodcock saw the Claimant's medical records and false OH declarations only after the dismissal hearing. However, I would have found that, but for the dismissal process which in fact occurred, the Respondent, which places the high importance on its due diligence obligations, would not have thought it proper to retain the services of the Claimant, by reason of his false declarations. Furthermore, the Respondent would not have been able to disregard the OH advice and return the Claimant to his role. Hence he would have been fairly dismissed anyway at much the same time. Hence, I would have made a 100% Polkey reduction of any damages.

Contributory fault.

79. The Claimant's dishonest failure to disclose his drug problems on recruitment in 2015 and on promotion in 2021, and then his persistent refusal to submit to the reasonable request that he take a hair test, was significant contributory fault, before dismissal, which in my view would have made it make it appropriate to reduce any basic award to nil under Section 122(2) ERA 1998.

80. The same misconduct caused or contributed to the dismissal such that it would have been be just and equitable to reduce any compensatory award to nil also under Section 123(6) ERA 1998.

Wrongful dismissal

81. The question here is whether on a balance of probabilities the Claimant fundamentally breached his contract with the Respondent. I find he did so by (i) obtaining promotion in 2021 by fraudulent non-disclosure (ii) in the period December 2021 - April 22 evading reasonable testing without reasonable excuse and (iii) on a balance of probabilities taking illegal drugs in the three month period before 23/12/21 which, again on a balance of probabilities, was the real reason for his evasion. Furthermore he induced the contract in 2015 by fraudulent misrepresentation, which by itself would have given the Respondent the right to cancel the contract without notice, or set up the fraud as a defence to any action by the Claimant on the contract. Hence the Respondent was entitled to dismiss him without notice or pay in lieu of notice.

J S Burns Employment Judge
London Central
16/5/2023
For Secretary of the Tribunals
Date sent to parties: 16/05/2023