EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Fermin**

Respondent: **Priory Healthcare Limited**

HELD at Teesside Justice Centre Middlesbrough ON: 14 and 15 February 2023

BEFORE: Employment Judge Aspden (sitting alone)

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr P Tomison, Counsel**

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Claims

1. Mrs Fermin was employed by the first respondent until she was dismissed without notice. The claimant complained that the termination of her employment was:

   1.1. unfair dismissal by virtue of s98 Employment Rights Act 1996; and

   1.2. wrongful dismissal ie a breach of her contract of employment (being a termination without notice).

2. This case was originally due to be heard on 3 January 2023. However, I postponed the hearing on the application of the respondent.

3. It is not disputed that the decision to dismiss was taken by Mr Graham. What was not clear from the respondent's pleaded case was the reason for dismissal ie the facts known to or beliefs held by Mr Graham that caused him to dismiss. Specifically, it was not clear whether Mr Graham dismissed the claimant because he believed she had been under the influence of cannabis whilst at work or whether he dismissed her because he believed she had cannabis 'in her system'. At the hearing on 3 January 2023 the respondent was represented by Mr Frew of counsel. I asked Mr Frew what the respondent was asserting was the reason for

the claimant's dismissal. Mr Frew said he could not say because he was unable to take instructions from the person who took the decision to dismiss: indeed Mr Frew relied upon the ambiguity as to the reason for dismissal in support of the respondent's application for a postponement.

4. At the outset of this hearing Mr Tomison said the respondent's position was that the reason for dismissal was that 'the claimant attended work while there was an illegal substance in her system.'

Legal framework

Unfair dismissal

5. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed.

6. When a complaint of unfair dismissal is made, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held: ERA section 98(1).

7. The reference to the reason, in section 98(1)(a), is not a reference to the category within section 98(2) into which the reason might fall. It is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. In Abernethy the Court of Appeal noted that: 'If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason'.

8. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In this case the respondent contends that the reason for the claimant's dismissal was a reason relating to the conduct of the claimant, which is a potentially fair reason for dismissal within section 98(2)(b).

9. Where an employer alleges that its reason for dismissing the claimant was related to her conduct the employer most show:

   9.1. that, at the time of dismissal, it genuinely believed the claimant had committed the conduct in question; and

   9.2. that this was the reason (or, if there was more than one reason, the principal reason) for dismissing the claimant.

10. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the employee had done so.

11. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

12. Section 98(4) of ERA 1996 provides that: '… 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.'

13. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

14. The Employment Appeal Tribunal (EAT) set out guidelines as to how the reasonableness test should be applied to cases of alleged misconduct in the case of British Home Stores Ltd v Burchell [1980] ICR 303. The EAT stated there that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

15. In that case the EAT also made clear that, in deciding whether an employer had reasonable grounds for believing that the employee had committed the misconduct alleged, the test is not whether the material on which the employer based its belief was such that, objectively considered, it could lead to the employer being 'sure' of the employee's guilt. What is needed is a reasonable suspicion amounting to a belief and that the employer had in his or her mind reasonable grounds upon which to sustain that belief. If the employer's decision was reached his or her conclusion of guilt on the balance of probabilities that will be reasonable.

16. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal.

17. The Tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct.

18. Defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

19. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances ie one falling within

the range of reasonable responses open to a reasonable employer. As noted above, it is not for the Tribunal to substitute its view for that of the employer.

20. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 of the Act.

21. Section 123(1) ERA provides that, subject to certain other provisions, the compensatory award shall be such amount as is just and equitable having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

22. The compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed: Polkey v AE Dayton Services Ltd [1987] ICR 142. As the Employment Appeal Tribunal said in Software 2000 Ltd v Andrews [2007] IRLR 568 a degree of uncertainty is an inevitable feature of this exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

23. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (section 123(6) of the 1996 Act). Similarly, where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) of the 1996 Act). The contributory conduct must be in some way 'culpable or blameworthy': Bell v The Governing Body of Grampian Primary School UKEAT/0142/07.

Wrongful dismissal

24. A dismissal without notice where summary dismissal is not justifiable will be a wrongful dismissal and give rise to an action for breach of contract.

25. An employer is entitled to dismiss an employee without notice for gross misconduct. In this context, ‘gross misconduct’ means conduct that constitutes a repudiatory breach of contract.

26. The question here is not whether the respondent believed the claimant to be guilty of gross misconduct. It is for the Tribunal itself to determine (a) whether the claimant actually committed the conduct alleged to constitute the breach; and (b) if so, whether that conduct did constitute a repudiatory breach of contract.

27. The concept of gross misconduct was considered in the case of Sandwell & West Birmingham Hospitals NHS Trust v Westwood, where the EAT held that to amount to gross misconduct the employee’s conduct must either be a deliberate and wilful contradiction of contractual terms or be conduct amounting to a very considerable degree of negligence. In Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at para 61) Etherton LJ said the legal test for whether there has been a repudiatory breach of contract is: ‘…whether, looking at all the circumstances objectively, that is from the perspective of the reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.’

Evidence and facts

28. I heard evidence from Mrs Fermin. From the company I heard evidence from Mr Rice-Thompson, who carried out the initial investigation, from Mr Graham, who took the decision to dismiss, and from Miss Jackson who dealt with the appeal.

29. I also took into account documents that I was referred to in a file of documents prepared for this hearing.

30. A couple of elements of this case were dependent on evidence based on people's recollection of events that happened some considerable time ago. In assessing that evidence I bore in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Memories can change over passage of time. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. People's perceptions of events differ. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in Gestmin: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from contemporaneous documents and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections.

31. Mrs Fermin started work for the respondent in January 2016. In the period this case concerns the claimant worked as a ward manager at one of the respondent's sites in Darlington. In her role she was responsible for patients with often serious mental health problems. The claimant has 40 years' experience as a nurse.

32. The respondent has an internal policy document entitled 'Substance Misuse by Colleagues.' It contains the following provisions, amongst others:

> *'1.1 We are committed to providing a safe, healthy and productive working environment. This includes ensuring that all colleagues are fit to carry out their jobs safely and effectively in an environment which is free from alcohol and drug misuse.*
>
> *1.2 The purpose of this policy is to increase awareness of the effects of alcohol and drug misuse and its likely symptoms and to ensure that:*
>
> *(a) All colleagues are aware of their responsibilities regarding alcohol and drug misuse and related problems.*
>
> *(b) Colleagues who have an alcohol or drug-related problem are encouraged to seek help, in confidence, at an early stage.*
>
> *(c) Colleagues who have an alcohol or drug-related problem affecting their work are dealt with sympathetically, fairly and consistently.*

1.3 This policy is not intended to apply to 'one-off' incidents or offences caused by alcohol or drug misuse at or outside work where there is no evidence of an ongoing problem, which may damage our reputation, and which are likely to be dealt with under our Disciplinary Procedure.

1.4 We wish to promote a culture which understands and is sympathetic to the problems associated with alcohol and drug misuse in which colleagues with dependency problems are encouraged to seek help and are supported. However, we will not accept staff arriving at work with any illegal substance in their system, and/or whose ability to work is impaired in any way by reason of the consumption of alcohol or drugs, or who consume alcohol or take drugs (other than prescription or over the counter medication, as directed) on our premises.

...

4 ALCOHOL AND DRUGS AT WORK

4.1 Alcohol and drugs can lead to reduced levels of attendance, reduced efficiency and performance, impaired judgement and decision-making and increased health and safety risks for you and other people. Irresponsible behaviour or the commission of offences resulting from the use of alcohol or drugs may damage our reputation and, as a result, our business.

4.2 You are expected to arrive at work fit to carry out your job and to be able to perform your duties safely without any limitations due to the use or after effects of alcohol or drugs. This includes ensuring that there is no such illegal substance within the body whilst attending work. In this policy drugs use includes the use of controlled drugs, psychoactive (or mind-altering) substances formerly known as 'legal highs', and the misuse of prescribed or over-the-counter medication.

…

6 RANDOM SCREENING

6.1 Due to the nature of our business we operate a programme of random testing for any illegal substances, alcohol or drugs for all colleagues.

6.2 Screening will be conducted by an external provider. Arrangements will be discussed with affected colleagues at the start of each screening programme.

7 MANAGING SUSPECTED SUBSTANCE MISUSE

…

7.3 If you arrive at work and a manager reasonably believes you are under the influence of alcohol or drugs, they shall immediately contact HR in order that you can be provided with assistance and an investigation can be undertaken.

7.3.1 If a manager feels that a colleague is not fit to be in at work due to being under the influence of drugs or alcohol the colleague will be sent home, arrangements will be made to ensure they do not drive under the influence.

7.4 If you agree to be referred to Occupational Health your manager will request an urgent appointment and prepare a letter of referral, a copy of which will be provided to you.

7.5 Occupational Health may ask for your consent to approach your GP for advice. A report will be sent to your manager who will then reassess the reasons for their investigatory meeting with you and decide on the way forward.

7.6 If, as the result of the meeting or investigation, your manager continues to believe that you are suffering the effects of alcohol or drugs misuse and you refuse an offer of referral to Occupational Health or appropriate treatment providers the matter may be dealt with under our Disciplinary Procedure.

8 PROVIDING SUPPORT

8.1 Alcohol and drug-related problems may develop for a variety of reasons and over a considerable period of time. We are committed, in so far as possible, to treating these problems in a similar way to other health issues. We will provide support where possible with a return to full duties…

33. The respondent also has an employee handbook containing working standards. Those standards include a section on 'Alcohol, drugs or other toxicants' which says the following:

'…

If there are reasonable grounds for believing you have taken controlled drugs, alcohol, intoxicants or other substances and your work performance or ability to work is impaired, you may be suspended from duty and subjected to a test. This includes any alcohol or drugs taken outside of official working hours.

Due to the nature of our business the company reserves the right to randomly test colleagues for any illegal substances, alcohol or drugs. …'

34. In February 2022 someone anonymously contacted the Care Quality Commission and made certain allegations about Mrs Fermin. Those allegations included allegations of drug use (including during working hours). The CQC notified the respondent of this and arrangements were made with a company called Hampton Knights for them to conduct a drug test on site. That company is part of or connected with the occupational health service provider that the respondent uses.

35. On 10 February 2022 the claimant's line manager, Ms Murray, asked the claimant to come to her office. When there, Ms Murray told the claimant that allegations had been made against her about her taking cannabis and cocaine and being under the influence whilst at work. The claimant agreed to undergo a urine test and gave a sample for that purpose. The claimant said at the time that the test would show she had used cannabis; that she had never smoked it before work or at work; that she had never used cocaine; and that there were others on site who used cannabis.

36. A note of that meeting records that the claimant said that she had last taken cannabis recreationally with a friend the previous Thursday (3 February). The claimant's evidence was that she subsequently told Ms Murray at the end of the meeting that she smoked cannabis every night, but that is not reflected in the note. Ms Murray did not give evidence at this hearing.

37. Ms Murray told the claimant that she was suspending her pending an investigation because the claimant had admitted using cannabis. The next day a

letter was sent to the claimant confirming her suspension pending a disciplinary investigation. The allegations were described as follows: 'You have allegedly used taken illegal substances within work time and in your own time. You have attended work under the influence of drugs.'

38. On 14 February Ms Murray spoke to the claimant on the 'phone. She had been appointed as the claimant's point of contact, including for support purposes. At some point Ms Murray completed a document said to be a record of that conversation. The claimant disputes its accuracy. In the note Ms Murray wrote that the claimant had said:

    38.1. she was 'out of shock' and 'wants to take full responsibility as she knew the consequences of using cannabis recreationally'

    38.2. she used cannabis to help her relax and unwind, as well as sleep

    38.3. she was very sorry for actions

    38.4. she always knew it was a risk but it has been 'a never event at work' and she has most definitely never smoked it at work.

39. The full test report was subsequently received from Hampton Knights. The results were recorded in a document that appears at page 48 of the file of documents. The document bore the heading 'Medical Review Officer Opinion of Workplace Drug Test Result.' It was signed by a Dr Swan who was described as a Consultant in Occupational Medicine and Accredited Specialist Occupational Physician. The report contained a table showing the results. The table had four columns headed, respectively: Analyte; Cut-off level; Result; Level. There were two entries in the table. In the first, the analyte was referred to as THC-COOH. The table recorded a positive result showing that the substance had been detected in the claimant's urine and the level detected was 271 ng/ml. The Cut-off level was shown as 15 ng/ml. The second entry referred to a different substance and was said to be negative. The report went on to say

    'This confirms Cannabis use and is consistent with misuse of a controlled drug.

    Please note the presence of these medications/substances.

    Even when a Negative or No Result is declared, they have the potential to affect performance.

    If there are concerns, please contact your medication helpline/occupational health provider.

    It is recommended that you contact your medication helpline/occupational health provider if relevant advice has not previously been sought.'

40. Mr Rice-Thompson was asked to investigate the drug use element of the allegations made to the CQC. On 25 February there was a telephone call between the claimant and Mr Rice-Thompson. Mr Rice-Thompson had seen the notes from the 10 February meeting and from Ms Murray's calls with the claimant as well as the toxicology report. Mr Rice-Thompson said during that phone call the claimant had tested positive for cannabis and her results were very high. Mr Rice-Thompson asked the claimant how often she used cannabis and she said 'through the week.' He asked when was the last time she used it and she said 10.30pm the night before the test. The claimant made the point that having something in your system is different from being 'under the influence.' The claimant told Mr Rice-Thompson she had been accepted by a clinic. Mr Rice-

Thompson did not accurately record the type of clinic in his subsequent report. That was a mistake on his part but I find nothing turns on it. During the conversation, the claimant referred to her impeccable record. She also expressed the belief that the whistle-blower who had contacted the CQC had been malicious.

41. On 1 March Mr Rice-Thompson prepared a report from his investigation. It is at page 57 of the file. He set out towards the beginning of that report the allegation, saying 'It is alleged that on 10th February you attended work while under the influence of a Class B controlled drug, namely cannabis.' He said that, if proved, the allegation could amount to a breach of the respondent's policies on drugs and substance misuse referred to above and may constitute gross misconduct.

42. Mr Rice-Thompson went on in his report to say that the toxicology test report 'showed that THC COOH (a metabolite of cannabis) was present to a level of 271 ng/ml… and the Occupational Health Consultant Physician who examined the results felt that this level was consistent with the misuse of cannabis.' He summarised the conversation he had had with Mrs Fermin. He referred to matters that were relevant to mitigation and then he went on to set out his conclusion. There he said 'There is sufficient evidence from AF's admissions of cannabis use and the test results which showed a high level of THC still present in her urine. Therefore there is a case to answer and I recommend this is reviewed at a disciplinary hearing on the grounds that she attended work whilst under the influence of a controlled substance, namely cannabis.'

43. During this hearing Mr Rice-Thompson was questioned about the extent of any investigation he conducted into the issue of whether or not the claimant was under the influence of cannabis whilst at work on the day in question. Mr Rice-Thompson acknowledged that he did not speak to anyone else to gauge their assessment of the extent to which the claimant's behaviour might have seemed to have been influenced by cannabis or to ask generally about her behaviour that day. There had been some filming done that morning of 10 February which included the claimant. Mr Rice-Thompson acknowledged that he did not inspect that footage to consider the claimant's behaviour.

44. When being questioned at this hearing Mr Rice-Thompson said he changed the focus of his investigation from being 'under the influence' to 'having cannabis in the system.' That is not, however, reflected in his witness statement which contained his evidence in chief. Nor is it reflected in the report that he prepared. I considered that Mr Rice-Thompson's claim that he changed the focus of the investigation was an attempt to deflect any criticism that might be levelled at the investigation into the issue of whether the claimant was 'under the influence' of cannabis at work by suggesting that the real issue was not whether the claimant's behaviour was impaired but merely whether cannabis was present in the claimant's body.

45. The claimant was sent a letter dated 6 April requiring her to attend a disciplinary hearing. The allegation said to be under consideration was 'on 10 February you attended work whilst under the influence of a Class B controlled drug, namely cannabis.'

46. There were various documents enclosed in that letter, including the records of meetings that the claimant now says are inaccurate. The claimant was given an opportunity to challenge the accuracy of those records. She was invited to say if

she did not agree with them. In response, she did not highlight the issues in those records that she now says were inaccurate.

47. The disciplinary hearing took place on 12 April. It was held by Mr Graham. He was the person deciding on disciplinary action. He told the claimant towards the beginning of the hearing that the reason for the meeting was that it was a disciplinary hearing regarding the allegation made that on 10 February Mrs Fermin was 'under the influence of cannabis, a Class B drug.'

48. At that meeting Mr Graham asked the claimant some questions about her use of cannabis. The claimant said, amongst other things, that:

    48.1. she used cannabis 'in a medical way' and recreationally in private;

    48.2. she knew it was illegal and felt ashamed she had let the company down but she did not believe the respondent's reputation would be damaged;

    48.3. she used cannabis every night for her physical and mental health and for insomnia;

    48.4. she did not consider this 'misuse' of cannabis;

    48.5. she was now being prescribed cannabis legally by a clinic that she had attended after she became aware of this complaint;

    48.6. no issues had ever been raised about her performance or her behaviour;

    48.7. with regard to the urine test, a saliva test would have been better and shown if she was 'under the influence'; the urine test showed 'spent cannabis' and nothing had been done to test her actual capability to do the job; she also referred to the fact that she had been filmed on the morning in question;

    48.8. other accusations made in the whistleblowing complaint were disgraceful and she had been horrified by the claims that she'd behaved inappropriately;

    48.9. she felt the whistleblowing allegation against her were personal.

49. The meeting was adjourned for about 60 to 90 minutes and afterwards Mr Graham came back into the meeting and told the claimant that he was dismissing her without notice. In telling the claimant his conclusions he said 'It is alleged that on 10 February 2022 you attended work whilst under the influence of a Class B controlled drug, namely cannabis. You have subsequently stated that you smoke cannabis every night. On the balance of probability, given this and the levels detected in the UDS test taken on 10 February you did attend work with an illegal substance in your body.' Mr Graham then referred to the part of the respondent's substance misuse policy which says 'you are expected to arrive at work fit to carry out your job and be able to perform your duties safely without any limitations due to the use or after effects of alcohol or drugs. This includes ensuring that there is no such illegal substance within the body whilst attending work. In this policy drugs use includes the use of controlled drugs etc.' Mr Graham went on to say 'this amounts to gross misconduct under the disciplinary policy.' He said 'you are dismissed without notice or pay in lieu of notice.'

50. A letter was sent by Mr Graham confirming the dismissal. This is at page 85. The allegation, referred to as 'the matter of concern to us', was described as it had been previously ie: 'It is alleged that on 10th February 2022 you attended

work whilst under the influence of a Class B controlled drug, namely cannabis.' Mr Graham summarised his findings. He referred to the report from Hampton Knight, including the presence and level of THC COOH detected and the fact that the occupational health consultant who signed the report had said the result 'confirms cannabis use which is consistent with misuse of a controlled drug'. He said the 'results of the test proves you have an illegal substance in your body while in work.' He referred to the fact that the claimant had said she used cannabis every night and was aware it is a controlled drug. He also referred again to paragraph 4.2 of the substance misuse policy and said 'it is clear you have breached the above policy.'

51. An issue for me to determine was what was the reason, or if more than one, the principal, reason for the claimant's dismissal. That means what were the facts known or beliefs held that caused the respondent to dismiss the claimant.

52. In his evidence in chief contained in his witness statement, Mr Graham said he had 'concluded that the claimant was attending work with illegal substances in her system **and was therefore under the influence of drugs and the allegation against her was well founded**' (my emphasis). The 'allegation' against the claimant, as set out in the investigation report, the invitation to the disciplinary hearing, at the start of the disciplinary hearing, at the end of the disciplinary hearing when Mr Graham informed the claimant of his conclusions, and in the letter of dismissal, was that the claimant attended work on 10 February whilst under the influence of a Class B controlled drug, namely cannabis. Furthermore, Mr Graham referred in his evidence in chief to the drug test and said he had 'found it difficult to believe an individual could perform at the best of their abilities with that level of substance in their system.' It is clear from that evidence that Mr Graham considered, and formed a belief about, the likely effects on the claimant's performance of the substance that he believed was in the claimant's system when she attended work on the day in question. Under questioning, however, Mr Graham said that the reason for dismissal was not that he found the claimant to have been under the influence of cannabis but that she had cannabis 'in her system.' I did not find Mr Graham's evidence in this respect to be reliable. I considered it to be inconsistent with his evidence in chief. As with Mr Rice-Thompson, it appeared to me that Mr Graham was seeking to play down the fact that he had concluded that the claimant was 'under the influence' of cannabis whilst at work.

53. I found that the belief held by Mr Graham that caused him to dismiss the claimant was that it was more likely than not that the claimant had cannabis in her system while at work and that, at that time, the cannabis was having an influence on her behaviour or functioning to some degree in a way that was relevant to her work. The belief that the cannabis was influencing the claimant's behaviour/functioning was not a secondary or subsidiary reason for dismissing the claimant; it was core to the decision to dismiss. The reason for dismissal was a composite of the conclusion that the claimant had cannabis in her system while at work and the conclusion that the cannabis that was in her system was influencing her behaviour or functioning to some degree in a way that was relevant to her work.

54. At the time Mr Graham dismissed the claimant he believed that the urine test that had been conducted showed that there was cannabis present in the claimant's system (ie her body) at the time of the test. That was clear from the answers Mr Graham gave at this hearing and the reference in his witness statement to his beliefs about someone's ability to perform at the best of her abilities 'with that

level of substance in their system.' In fact the toxicology test report only referred to the presence of THC COOH, a cannabis metabolite. I found that, when he reached the decision to dismiss the claimant, Mr Graham thought that THC COOH is itself cannabis (or a psychoactive component of cannabis). Although Mr Rice-Thompson had identified in his report that THC COOH is a metabolite of cannabis, Mr Graham was not familiar with what a metabolite is.

55. Indeed, it was not clear whether Mr Rice-Thompson understood the distinction either. For although he identified THC COOH as a metabolite in his investigation report, in his conclusions he referred to 'levels of THC'. That might have been a typographical error or it may be that Mr Rice-Thompson believed that THC COOH was the same substance as THC. In fact there was no reference in the 'analyte' column in the report to THC (or any other component of cannabis). I inferred that the claimant's urine was not tested for the presence of cannabis or its components (the alternative is that it was so tested and the result was negative but if that was the case one would expect a negative test result to have been included in the report).

56. The claimant was given the opportunity to appeal and did so. Miss Jackson dealt with that appeal. She also assumed that the substance detected by the urine test, THC COOH, was cannabis itself or at least a component of cannabis. That was evident from the fact that she said to the claimant in the appeal meeting on 6 June 'So you was dismissed due to being under the influence, but you're saying you weren't. I'm aware the drug screening says that you did have it in your blood stream.' Miss Jackson reiterated later in that meeting that the test identified that the claimant had illegal substances in her system.

57. After that meeting Miss Jackson asked some questions of HR. Ms Smalley from HR emailed Hampton Knight. In her email she said

> *'We recently tested one of our employee's through your services and it came back that she had 271ng/ml of cannabis / THC in her system. She is calling into question the validity of the drug test we used and a few other things. Please can you clarify:*
>
> *1. The validity of urine drug screening for cannabis usage*
>
> *2. What is the acceptable limit before anyone is deemed 'under the influence' with cannabis use?*
>
> *3. Can cannabis remain in someone's system for days/weeks at a level above the 15mg/l? If so would this imply the person to be under the influence and unfit to work for duration of weeks/months?'*

58. This email did not accurately reflect the results of the claimant's urine test. Her test results did not reveal that she had 271 ng/ml of cannabis/THC in her system but that she had that level of the cannabis metabolite THC COOH in her urine. Like her colleagues before her, Ms Smalley appears to have assumed THC COOH and THC were one and the same. She did not ask Hampton Knight what THC COOH was, or what a metabolite was, or if there was any difference between THC COOH and cannabis itself or THC. Ms Smalley did not send a copy of the test results with her email and nor did she tell Hampton Knight which employee's test she was making enquiries about.

59. A Mr Wakeham from Hampton Knight replied by email. He described himself as 'Client Services Director'. He did not reveal in his email whether he had any

medical qualifications or how familiar he was with test results and what they showed.

60. In answer to the second of Ms Smalley's questions, Mr Wakeham replied:

'A positive laboratory confirmation drug test defines that the donor has breached your alcohol & drug testing policy. Unlike alcohol, cannabis is an illegal substance and there is no regulation on how it is made and what is in the substance. On that basis, illegal drugs cannot have levels in the same way alcohol does. However, there are many side effects of consuming illegal substances which would impair someone at work.'

There is no evidence that Mr Wakeham was provided with a copy of the respondent's 'alcohol and drug testing policy' and I infer he had not been.

61. In answer to the third of Ms Smalley's questions, Mr Wakeham said

'With urine testing, the time cannabis can be detected after first consuming the drug does depend on several factors but in general:

A one off user (someone who has smoked cannabis for the first time)– 1-3 days

A regular user (smokes 3-4 times per week) – 5-7 days

A Chronic user (Smokes once a day or more) – up to 28 days.'

62. Mr Wakeham said these were general responses and if the company wanted him to comment on the particular case they should let him know the details so he would look into the paperwork and result.

63. The respondent did not ask Mr Wakeham to comment specifically on the claimant's test results. However, Miss Jackson did ask a further question ie 'So, to confirm cannabis could be in the system for several days during which time the person could still be impaired by the drug?' Mr Wakeham replied:

'The below figures are detection windows, so for someone that smokes cannabis 3-4 times per week, if they smoked today and suddenly abstained, there is a chance cannabis will be identified in their urine sample for up to 7 days from today. However, this would be affected by a number of factors such as, how strong the drug they smoked today was, how often they had smoked before today and some other personal biological factors (size, weight, metabolism).

In terms of impairment, it is a difficult one to confirm as we do not know what the donor has taken in terms of the strength, how often they smoke and what else is mixed with the drug. However, cannabis has a number of short term and long term effects on individuals who consume it.

Therefore in any drug and alcohol policy; impairment is defined as a positive drug test.'

64. Miss Jackson decided to uphold the decision to dismiss the claimant. On 24 June she wrote to the claimant confirming her decision. In her letter Miss Jackson repeated her incorrect assertion that the claimant had tested positive for THC. She had not tested positive for THC; she had tested positive for THC COOH. Miss Jackson went on to say

'the positive laboratory confirmation drug test confirms that you were in breach of Priory policy H16 Drug Misuse by Colleagues. The policy states:

> *You are expected to arrive at work fit to carry out your job and to be able to perform your duties safely without any limitations due to the use or after effects of alcohol or drugs. This includes ensuring that there is no such illegal substance within the body whilst attending work.*
>
> *Cannabis is an illegal substance and, as with all illegal drugs, there is no regulation on how it is made and what is in the substance; consequently there is not a level in the body which can be deemed to determine the degree to which the person who has taken it is under the influence. There are many side effects of consuming illegal substances which would impair someone at work, the type and duration of which can vary depending on the strength of the drug and frequency it is used. In the case of cannabis, it is known to have short and long term effects on the individuals who take it. Therefore, impairment is determined by a positive drug test.'*

65. The final paragraph I have quoted was copied from the emails sent by Mr Wakeham.

Conclusions

Unfair dismissal

Reason for dismissal

66. As recorded above, I have found that Mr Graham dismissed the claimant because he believed that it was more likely than not that the claimant had cannabis in her system (ie in her body) while at work and that it was having an influence on her behaviour or functioning to some degree in a way that was relevant to her work.

67. That was a reason related to the claimant's conduct. That is a reason within section 98(2) of ERA 1996 and, as such, was a potentially fair reason for dismissal.

Reasonableness

68. Mr Graham's belief that the claimant had cannabis in her system when she was at work on 10 February was based on a fundamental misunderstanding of the urine test result, as was his belief that the claimant's behaviour or functioning was relevantly impaired by cannabis at that time.

69. The test result revealed the presence of THC COOH. Notwithstanding that Mr Rice-Thompson had identified in his report that THC COOH is a metabolite of cannabis, Mr Graham assumed, incorrectly, that THC COOH is itself cannabis or a component of it. That assumption was not one that any reasonable employer would have made. Any reasonable employer would have taken steps to understand what the substance was that had been tested for, particularly as it had been identified as a metabolite at the investigation stage.

70. Mr Graham did not have reasonable grounds for believing that the claimant had cannabis in her system: reaching that conclusion was not within the range of reasonable responses to the evidence available that a reasonable employer in those circumstances might have adopted.

71. Mr Graham's belief that the claimant's behaviour or functioning was relevantly impaired was based entirely on the test result and his unreasonable (and incorrect) assumption that the substance detected in the claimant's urine (THC COOH) was cannabis itself, which contains psychoactive compounds, or a

chemical compound found in cannabis, and that the level of cannabis detected was high. Again, that conclusion was not one that a reasonable employer could have reached based on the test result. Whilst it was not unreasonable for Mr Graham to conclude that the level of THC COOH was high, it was unreasonable for him to assume that THC COOH was cannabis or a chemical compound found in cannabis.

72. In light of the above, Mr Graham did not have reasonable grounds for believing the claimant had cannabis in her system (ie in her body) while at work and it was having an influence on her behaviour or functioning to some degree in a way that was relevant to her work.

73. That unreasonableness was not remedied by the appeal given that Miss Jackson made the same mistake as Mr Graham in assuming THC COOH was cannabis. The information received from the testing company in response to queries did not provide reasonable grounds for believing the claimant had cannabis in her system and was under its influence because the respondent misstated what the test had shown in their email to Hampton Knight. Furthermore, Miss Jackson should have recognised that Hampton Knight's opinion as to whether the respondent's own policy had been breached was not something that could be relied upon, there being no suggestion by Hampton Knight that they had seen the respondent's policy.

74. In light of the above I decided the respondent did not have reasonable grounds for believing the claimant had cannabis in her system (ie in her body) while at work and it was having an influence on her behaviour or functioning to some degree in a way that was relevant to her work. I concluded that the respondent acted unreasonably in treating that as a sufficient reason for dismissing the employee.

75. It follows that the dismissal of the claimant was unfair.

Issues relevant to remedy

76. There was not time to determine all issues relevant to remedy at this hearing. However, I did reach conclusions on the following issues:

    76.1. The chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed ie the Polkey issue.

    76.2. The question of whether any compensatory award should be reduced on the ground that the dismissal was caused or contributed to by any action of the claimant.

    76.3. The related issue of whether any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent.

    76.4. Whether any compensatory award should be increased or reduced on account of any failure to follow the ACAS Code.

<u>The Polkey issue</u>

77. Mr Tomison submitted that the claimant should not receive a compensatory award because if the respondent had acted reasonably it would have carried out a different type of test - a saliva test or a blood test – and it is inevitable that the claimant would have been dismissed as a consequence. I did not accept that submission, for two reasons. Firstly, the issue for me to consider was not what

the respondent could, hypothetically, have done, but what they would have done. The evidence before me was that it was not the respondent's policy to do that kind of test. They chose to do a urine test and Mr Rice-Thompson said there were no other tests within the respondent's policy that could have been done. Secondly, even if they had tested for cannabis in the manner suggested I cannot possibly speculate as to what the result would have been.

78. Although I rejected that submission, I did consider there was a possibility that the respondent could have dismissed the claimant fairly if it had acted reasonably, for the reasons that follow.

79. Had the respondent acted reasonably, Mr Graham would have identified that THC COOH was a metabolite of cannabis. He would also have recognised, had he (or someone else) made reasonable investigations or enquiries, that what the presence of THC COOH showed was that the claimant's body had metabolised cannabis, which in turn showed that the claimant had ingested cannabis at some point in the past (and the claimant admitted that was the case). He could not reasonably have concluded, however, that the presence of THC COOH meant that the claimant must still have had cannabis in her system, still less that she must still have had any psychoactive compounds in her body that might be affecting her behaviour or functioning when the claimant attended work on 10 February. The fact that Dr Swan had said in his report *'This confirms Cannabis use and is consistent with misuse of a controlled drug*' would not have provided support for such a conclusion. At most, the adoption of the word 'misuse' (rather than the more neutral 'use') could have lead Mr Graham reasonably to conclude that the claimant was a regular user of cannabis but that was not in doubt in this case: the claimant had told Mr Graham she used cannabis every night.

80. Nevertheless, although the conclusions that could be drawn from the report itself were limited, that in itself would not have precluded the respondent from investigating, and forming a view as to, whether the claimant was under the influence of cannabis that she admitted using when she attended work on 10 February ie whether her functioning was affected in some relevant way. A reasonable investigation would have entailed forming a view as to how much time may have passed between the claimant's cannabis use ending and the start of her shift (the claimant said she used it at 10.30 at night but Mr Graham might well have formed the view – if he had addressed his mind to the issue – that the claimant's cannabis use had ended significantly later). A reasonable investigation would also have involved investigating the chance that the claimant's behaviour or functioning (including cognitive functioning) was still affected by cannabis at the time she started her shift. Such an investigation is likely to have involved researching – or seeking expert advice on- the effects of cannabis. That investigation might also have involved speaking with the claimant's colleagues who had worked with her and/or viewing the video footage referred to by the claimant. However, I did not consider that a dismissal could only have been fair if the respondents had taken those particular steps and if those investigations revealed evidence to the effect that the claimant's behaviour seemed impaired.

81. Even if, having carried out such an investigation, the relevant manager(s) were left in doubt as to whether the claimant's behaviour or functioning (including, for example, her judgement or other cognitive functioning) was likely to have been affected by cannabis when she attended work on 10 February, I considered it possible that they could have decided to dismiss the claimant in any event. I considered it possible that the respondent might, if it had acted reasonably, have

dismissed the claimant on the ground that there was a risk that the cannabis use had an effect on the claimant's cognitive (or other) functioning or behaviour, either on 10 February or on one or more of the many prior occasions when the claimant (on her own admission) had used cannabis during the night prior to a shift. A dismissal for that reason could conceivably have fallen within the band of reasonable responses open to a reasonable employer, particularly taking into account the potential reputational risk to the respondent (a matter which the evidence of Mr Graham in particular suggested was of real concern to the respondent). For such a dismissal to be reasonable a fair process would need to have been followed, which would have entailed telling the claimant that this was what was being considered and providing her with an opportunity to have her say.

82. It does not follow from that that the respondent would inevitably have dismissed the claimant. It may have formed the view that the extent of any impairment after several hours was likely to be minor and the risk of any adverse effect low. In those circumstances, the respondent may have been more inclined to be sympathetic to the claimant, and more inclined to look favourably on the fact that the claimant was no longer taking the drug illegally. Of relevance in this regard was the respondent's policy on drug use, which espoused a broadly compassionate approach to employees affected by drug or alcohol misuse.

83. I concluded that there was a chance the claimant would have been dismissed fairly had the respondent acted reasonably. Looking at the evidence in the round and acknowledging that this is a speculative exercise, I put the chance that the respondent would have dismissed the claimant fairly at 50%. That was a matter to be taken into account in assessing the amount of any compensatory award.

Reduction of compensation for conduct

84. The claimant used cannabis in her private life. It is this that, ultimately, led to her dismissal. I must consider whether the claimant's actions in using cannabis outside work, in her own time, was culpable or blameworthy conduct that warrants a reduction in the basic and compensatory awards.

85. Possession of cannabis is a criminal offence. In order to use cannabis the claimant had it in her possession. It follows that her use of cannabis entailed the commission of an offence. The claimant knew that was the case. I accepted the claimant's evidence that she used it to 'self-medicate' and help her sleep. The claimant could have taken steps to have cannabis prescribed sooner than she did, however, but she chose not to do so.

86. I decided that the fact that this was an offence committed in the claimant's private life could not be separated completely from her work. Although the respondent's policy did not prohibit cannabis use in private life and although the claimant did not believe her behaviour at work had been influenced by her cannabis and there had been no problems at all with her work performance, the claimant could not have been sure of the strength or constitution of the substance she was using. The claimant herself acknowledged that her behaviour was wrong and she had referred to knowing there was a 'risk' during the course of the disciplinary process. She acknowledged at this hearing that some sort of sanction would have been reasonable.

87. In all the circumstances I found that the claimant's actions in using cannabis on a night before starting a shift the following morning could properly be described as

blameworthy or culpable and it contributed to the decision to dismiss the claimant.

88. It is also suggested by the respondent that the claimant had a flippant attitude during the investigation process. I did not discern that from the evidence before me. In this regard I reached a different conclusion from Mr Graham. I noted that in her disciplinary hearing the claimant did not accept that her drug use was a problem but that I did not consider that reflected a flippant attitude on her part.

89. I was also referred to what Mr Rice-Thompson described as a 'lack of candour' about the last time the claimant had smoked cannabis (before her 10 February shift). Looking at the evidence in the round, I agreed with the respondent that the claimant was not entirely honest with the respondent's managers from the outset about her use of cannabis. In reaching that decision I thought the notes of discussions were more likely to be an accurate record of what was said than the claimant's current memory, especially as the claimant did not at the time question those notes and was given a chance to do so. That lack of candour was blameworthy conduct. It contributed to the claimant's dismissal in the sense that it led to a certain level of distrust, which fed into the decision to dismiss.

90. In light of the above I concluded that it would be just and equitable to reduce the compensatory and basic awards.

91. In deciding on the amount by which the awards should be reduced, I took into account the fact that the compensatory award would already be reduced to reflect the chance that the claimant would have been fairly dismissed in any event. In the circumstances, I considered that any compensatory award should be reduced by 40% pursuant to section 123(6) of the 1996 Act. I decided that the basic award should be reduced by the same amount under section 122(2) of the 1996 Act.

Acas Code

92. The claimant made some criticisms of the disciplinary process followed by the respondent, particularly with regard to Ms Murray being allocated as support. I did not find that there was any unreasonableness on the part of the respondent in that regard.

93. In so far as the ACAS Code is concerned, the claimant was told of the allegations, provided with the evidence relied upon (the report), had a chance to state her case before a decision was made at a hearing at which she was represented, and given an opportunity to appeal. I did not consider there was a breach of the ACAS code on either side in this case.

Wrongful dismissal

94. The respondent's case was that the claimant committed a repudiatory breach of contract by attending work under the influence of cannabis or with cannabis in her system.

95. The claimant did not believe she was under the influence of cannabis when she came to work. The test result showing the presence of a metabolite of cannabis was not evidence from which I could conclude that the claimant had cannabis in her system when she attended work on 10 February, still less that she had a psychoactive substance in her system that could be affecting her in some relevant way.

96. I concluded that there was no evidence on which I could find that it was more likely than not that cannabis was still having an effect on the claimant's brain or her nervous system at the time she was in work such that her behaviour at work or her performance was influenced by cannabis.

97. Nor was I persuaded that there was a fundamental breach of contract by the claimant in simply using cannabis in her private life. The respondent's policies did not, on a fair reading, prohibit cannabis use in private life. A fair reading of the policies was that they were aimed at tackling the problem of employees coming into work under the influence of drugs or alcohol.

98. I concluded that the claimant had not committed a repudiatory or fundamental breach of contract by the claimant.

99. The claim of wrongful dismissal was well founded.

Employment Judge Aspden

Date: 19 June 2023