EMPLOYMENT TRIBUNALS

Claimant: **Mr Stuart Hills**

Respondent: **Arriva Rail London Limited**

Heard at: **London South**

On: **6 - 9 June 2023**

Before: **EJ Harley**
Ms Styles
Ms Thompson

Representation

Claimant: **In person**
Respondent: **Paul Wilson (Counsel)**

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent. His claim is not well founded and is dismissed.

2. The Claimant was not subject to Disability Discrimination and his claim is dismissed.

3. The claim for wrongful dismissal is dismissed.

REASONS

Claim

1. The Claimant, Mr Hills, presents claims for Unfair Dismissal, Disability Discrimination and Wrongful Dismissal against his former employer Arriva Rail London Limited which were received by the Employment Tribunal on 7 August 2020.

2. The Respondent, a train operator, denies the claims. They assert that they fairly dismissed the Claimant for gross misconduct as the result of his failing drugs and

alcohol test during a random screening on 18 November 2019. The screening, which had included seven other drivers, fell within the terms of the Claimant's contract, it was conducted in accordance with company policy by an accredited tester, and the result was confirmed by the qualified Medical Review Officer as being a positive result for cannabis use. The Respondent underlines that the Claimant was employed to perform a safety critical role in a safety critical environment and that he was contractually required to observe requirements regarding alcohol and drug use. They invite us in the alternative, should we disagree that this constituted misconduct, to find that the dismissal was justified by another substantial reason from the role he held, namely that this result represented a breach of trust and confidence. The Respondent says the Claimant had the benefit of a fair investigation and disciplinary process, had independent union representation throughout and had taken the opportunity offered to him to appeal the decision at company level. The Respondent considered and addressed challenges the Claimant raised during that process, investigated other medical explanations he offered for the positive result, and he also had the opportunity to test a reserved 'B' sample which he chose not to do. Their decision to dismiss him was in their view reasonable and fell within the range of reasonable responses available to an employer.

3. The Claimant denies cannabis use. He asserts that he had been using "hemp/CBD products to assist with his health condition" which he described as "pain and difficulties with his joints". These difficulties were alleged to date from mid-2018 and had caused him to be absent from work, triggering an occupational health review. The Claimant asserted in his ET1 that the Respondents failed to properly engage with issues he raised during the investigation. These included:
    - flaws in the sampling and testing process,
    - failure to consider his consumption of Hemp/CBD products or other medical explanations which might have affected the result,
    - failure to offer a medical review before the test result was issued to the employer,
    - failure to provide him with the documentation he required to review the result.

    It was therefore, in his view, unreasonable for the Respondents to rely on the test result, as it was unsound and so did not provide reasonable grounds to believe that he had committed gross misconduct. In his view the procedure was unfair and therefore as a result his dismissal lay outside the band of reasonable responses open to an employer.

4. The Claimant asserted that he was disabled for the purposes of the Equality Act at the relevant times and if THC-COOH was present in his urine it was due to his consumption of hemp/CBD products taken to assist with his condition. In that case his dismissal was a consequence of his disability, was without justification and not a proportionate means of reaching a legitimate aim. Further, he asserted that his disability motivated the dismissal.

5. The Respondents denied that the Claimant's condition amounted to a disability and that in any event the Respondent had no actual or constructive knowledge of any disability. They did not accept that the amounts of TCH-COOH detected by the test could have been attributable to over-the-counter hemp/CBD products, or that the Claimant was prescribed hemp/CBD oil prior to a diagnosis of arthritis.

In any case the dismissal was reasonable based on the available information and a proportionate means of achieving the legitimate aim of safeguarding health and safety and tackling misconduct.

Issues

6. The question of the Claimant's disability was determined at a preliminary hearing on 4 May 2020 where EJ Andrews found that the Claimant was disabled at the relevant time due to osteoarthritis in his right big toe. The Respondent's knowledge of this (actual or implied knowledge) was left as a matter to be determined at the full hearing.

7. A case management hearing was held on 8 October 2021 and was attended and addressed by both parties. The Case Management Order included the following warning:

> *Claims and Issues*
>
> *18. The issues to be addressed were identified as follows and confirmed at the outset of the hearing. The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side within 7 days of the date of this record. If you do not, the list will be treated as final unless the Tribunal decides otherwise.*

The case, claims and issues were captured as follows:

> "The claim is about the Claimant's dismissal for gross misconduct following a random drugs and alcohol test at work at which he tested positive for cannabis. The Claimant says this is an unfair dismissal and disability discrimination and that the Respondent failed adequately to consider that he was self-medicating with hemp oil and over the counter CBD products at the time of the test and had been fasting for a GP-ordered blood test, which may have affected the results."

Discrimination arising from disability (Equality Act 2010 section 15)

- Did the Respondent treat the Claimant unfavourably by dismissing him?
- Did the following things arise in consequence of the Claimant's disability:
  Was the Claimant dismissed because of the use of hemp/CBD products to assist with a disability (arthritis). The Respondent asserts that (i) the medical advice confirmed that the test result could not be attributable to hemp/CBD oils (ii) the Claimant was not diagnosed with arthritis until after the drugs and alcohol test and was not therefore under treatment for arthritis at the material time.
- Can the Respondent justify the alleged unfavourable treatment as being a proportionate means of achieving a legitimate aim?

For example, the protection of the health and safety of the Claimant, the Respondent's employees and customers?

- Was the treatment an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; how should the needs of the Claimant and the Respondent be balanced?
- Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Unfair dismissal

- What was the reason or principal reason for dismissal? The Respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

- Did the Respondent act reasonably in all the circumstances in treating misconduct or some other substantial reason as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide whether:
  - there were reasonable grounds for that belief;
  - at the time the belief was formed the Respondent had carried out a reasonable investigation;
  - the Respondent otherwise acted in a procedurally fair manner; was within the range of reasonable responses.

No challenge was offered to this formulation of the case, claims or issues, and no application made to broaden the list.

Procedure

7. This was listed as a four day in-person hearing before a panel, consisting of the Employment Judge and two panel members. All participants appeared in person. The panel noted Mr Hill's health issues and allowed his requested adjustments. It was agreed after submissions that the Respondents put their case first, following the usual practice for unfair dismissal claims where the Claimant has been in post for over two years. As the dismissal was central to the Disability Discrimination claim, being the 'unfavourable treatment', the Claimant asserted he suffered, it was considered sensible to place our initial focus on the dismissal. The panel spent the rest of the morning session reading into the papers.

8. At the outset of the Employment Tribunal (ET) hearing the Claimant sought to apply (without previous notification) to strike-out the Respondent's defence because of irregularities and inconsistencies in the submitted meeting transcripts, the preparation of which misrepresented what had occurred to an extent he alleged amounted to criminal conduct. The Tribunal noted that meeting records are rarely verbatim, and that we were aware from reading his statement that he disagreed with some of the meeting notes. I explained that it would be open to him to put any discrepancies to the witnesses and allow the Tribunal to consider his arguments on the points raised. The Claimant withdrew the application at that stage and did not reapply.

9. We heard evidence from Andy Mercer (Claimant's manager, conducted the initial investigation), Stella Rogers (Former Customer Experience Director, appeal chair), Charlotte Whitfield, (Customer Experience Director, dismissal hearing chair, dismissal decision maker) in that order, owing to issues with Mrs Rogers availability. Each witness was cross examined by the Claimant, with further questions posed by the EJ and the panel members. We then heard from the Claimant, who, after adopting his evidence was cross examined by Counsel for the Respondent. He was given the opportunity to re-examine his evidence but chose not to. We then accepted submissions for the Respondent and Claimant respectively on liability only. The Decision and Judgment were reserved and arrangements made to reserve a date for a future remedy hearing should that have proved necessary. The Tribunal and panels members met to discuss the case on Day 4.

10. The Claimant and Respondent's witnesses produced witness statements which were adopted as evidence and supplied in electronic format. The Tribunal was supplied with an electronic bundle comprising 445 pages, and a paper copy including an index of documents. In addition, the Respondent provided a 'cast list' document identifying those involved in the case together with a chronology to assist the Tribunal, copies of which were passed to the panel and the Claimant. Counsel helpfully supplied copies of precedents he cited, and the Tribunal furnished copies of a case we recalled as bearing a similarity in terms of issues and facts to this one.

Facts

11. All findings of fact are made on the balance of probabilities. Where we have reached a finding of fact where there was conflicting evidence, it is because we preferred that party's evidence. We heard evidence concerning a wide range of matters not all of which were relevant to the Issues. Where we have not referred to a matter put before us in this judgment it does not mean that we have not considered it, merely that it was not relevant to our conclusions. The findings were discussed and carefully considered by the panel and reflect our unanimous view. All documents referred to here were within the bundle agreed by the parties.

12. The Claimant commenced employment with the Respondent on 14 September 2009 until his dismissal on 18 February 2020. At the date of his dismissal, he was employed at the New Cross Gate Depot. The Claimant was employed under a contract signed 25 August 2009 which included the following provisions regarding Disciplinary Procedures, and on Alcohol and Prohibited Drugs:

> *"16. DISCIPLINARY PROCEDURE:*
>
> *… you are to become thoroughly acquainted with all Rules and Regulations relevant to your position and the work required to be undertaken.*
>
> *The Company may…*
>
> *• dismiss you without notice;*

• suspend you from duty and, after enquiry, dismiss you without notice;

• suspend you from duty, as a disciplinary measure for certain offences, including (but not limited to) ;…

…misconduct or negligence; attending duty under the influence of drugs or alcohol;…

An employee so dismissed forfeits any right to notice and any right to salary for any period subsequent to dismissal, or suspension from duty prior to dismissal, as the case may be. …

19. ALCOHOL AND PROHIBITED DRUGS:

In the interest of safety and standards of behaviour, you should never allow your judgement to be impaired by alcohol and / or drugs… At any time whilst on duty, or on the Company's premises for the purpose of taking up duty, you will provide, immediately on request by a person authorised by the Company, a specimen of breath and/or urine for the purpose of screening for alcohol and/or misuse of prescribed or prohibited drugs… ***The signing of your statement of Terms and Conditions of employment constitutes your consent to details of the result of any screening referred to above being passed to the Company by any authorised person"*** (Our emphasis).

13. The Claimant then signed a document on 14 Sept 2009 entitled Alcohol and Drugs which provided:

1. All employees are responsible for ensuring that they do not
a) Report, or try to report, for duty at any times when unfit due to taking alcohol or drugs; …
6. ***Any employee may be required to undergo screening for alcohol or drugs (a) on a random selection basis,*** *(b) following an accident or Incident, or on grounds of behaviour / appearance****. A positive result may result in dismissal….*** *(Our emphasis)*

In signing the document, the employee accepted and agreed to abide by the Alcohol & Drugs Policy. The Claimant accepted at the outset of the hearing that he was familiar with his responsibilities regarding the Alcohol and Drugs policy.

14. With regards to drug testing, the TUC Guidance for Workplace Representatives dating from February 2019 to which the Claimant referred us and which is included in the bundle, states:

"Trade unions have always made it clear that the use of mind-altering substances, whether legal or illegal, has no place in the workplace, and can be a major safety risk. Estimates of the number of injuries that occur where drugs are a contributory factor vary but any person who is under the influence of a mild altering substance can pose a risk to themselves and others…"

and it goes on to note:

"The drug tests that were introduced for drivers in England and Wales in 2015 were not based on safety levels but a "zero tolerance" to illicit drugs approach."

15. With regards to Drug & Alcohol (D+A) testing, the company policy at the time of the test was found in the "Safety, Quality & Environment Manual" (SQE) at Chapter 12.01. Para 11 provides:

"11. TEST RESULTS AND SUBSEQUENT ACTIONS
11.1 The results of any screening for drugs and alcohol shall be deemed positive if it shows: -
• The presence of drugs for which there is no legitimate medical need for either their use or the quantity of their use…"

and goes on to say:

11.6: Employees have the right to challenge the validity of a positive result. The Testing Company is required to retain for one year the second sample of urine, where the testing of the first sample proved positive, to allow independent analysis to be arranged if requested by the employee concerned. The employee is solely responsible for paying all costs associated with challenging the validity of the test result.

16. The governing Rail Safety and Standards Board (RSSB) guidance[1] requires that railway undertakings use laboratories for test analysis that are UKAS accredited. The company employed by the Respondent to administer testing was Hampton Knight (HK), who are accredited to provide this service under the Rail Industry Supplier Qualification Scheme. They subcontract the testing to Matrix Diagnostics, as is permitted under the governing European Guidelines for Workplace Drug Testing in Urine (EGWDU) guidelines (at para 7.6). Matrix Diagnostics are UKAS accredited. On the interpretation of results the EGWDU provides as follows:

"8: Interpretation of Results
A confirmed analytical positive result may be due to medication (prescribed or over-the-counter) or due to dietary causes. An essential part of the drug testing process is the final review of analytical results. The interpretation is best carried out by a qualified medical professional (e.g., Medical Review Officer) or a Toxicologist…

1. Medical Review
The Medical Review Officer (MRO) is a medical physician with responsibility for interpreting laboratory results together with a toxicologist.
…
The MRO must have specialist knowledge of and training in

- specimen collection procedures,
- analytical procedures,
- chain of custody and
- alternative explanations for positive analytical results.

[1] Dec 2012 (GE/RT8070) at G2.16 (Positive results of Drug and Alcohol testing)

The MRO can issue a negative report for a positive analytical result if the test result ***is likely*** to be due to the use of ***declared medication***, or ***a valid alternative medical explanation has been found***. The service provider may provide access to an independent medical review service." (Our emphasis).

17. The Claimant had an unblemished work record having not been involved in accidents, incidents, disciplinary procedures, nor recorded minor errors.

The Test

18. On 18 Nov 2019 the Claimant was subject to a random D+A test administered by HK. Seven other drivers were similarly tested in this screening. The Claimant had booked onto his shift at 2.31pm, drove a train and was on a break when he told at 8.15pm that he was being tested. The Claimant's unchallenged evidence in his statement was that he had undergone 'dozens' of these tests during his career. Before the test was conducted by the tester the Claimant signed a pro-forma HK form entitled "Chain of Custody Form for Drug Analysis". During both the ET hearing and the investigation process the Claimant raised detailed complaints with aspects of the sample taking the test and the disciplinary procedure, giving these as reasons why the Respondent could not rely on the Result, or their processes. We will deal with his challenges and find facts where necessary as we proceed.

19. The Chain of Custody form required the Claimant to sign to confirm that he had read, or had read to him, a donor information sheet and that either: - he was not taking medication; or, he had taken identified medication in the last 14 days (identified by name); or, he had taken medication but was choosing not to declare it. The Claimant signed to confirm that he had read/had read to him the information sheet and that he had not taken any medication.

20. The Claimant suggested that despite this signature he had not been supplied with the information sheet, nor had the contents been read to him. He also suggested that he told the tester that he had taken Immodium and Gaviscon (both being over-the-counter medications) but that the tester "didn't put it on the sheet", saying it wouldn't affect the result. The text on the Chain of Custody sheet is explicit that it is for the person being tested to sign the declaration. He accepted that he signed the declaration.

21. The guidance sheet is explicit that all medications, prescribed or not, together with *"alternative or herbal preparations"*, be recorded by the donor on the Chain of Custody form. The Claimant disclosed in his statement and during the process that he had been taking hemp oil "in concentrated capsule form" having been recommended to use it by his sister and brother-in-law (both medically qualified), to assist with pain. Hemp/CBD oil is marketed as and categorized as a food or herbal supplement. No reference is made to any of the mentioned products (Immodium, Gaviscon, hemp oil capsules/CBD capsules) on the Chain of Custody form.

22. The Claimant signed a separate box which confirmed that "the laboratory analysis result will be communicated to my employer/company". The Claimant then provided a sample of urine. A further section of the document provides the Tester Declaration:

> "I confirm that the sample(s) identified on this form is/are the sample(s) provided by the donor who has given their informed consent to this test. I also confirm that I have followed the accepted sample collection and testing procedure. (The urine sample was at the correct temperature and visual checks were made)."

The accompanying box was ticked, signed and time/date recorded as "8-26, 18-11-2019". The tester is identified as "J Mc Gill" and a signature provided.

23. The Claimant alleged that the tester did not advise him to wash his hands prior to giving the sample, so he didn't, and in so doing the tester created the possibility of contamination. He then suggested in the ET hearing that the tester told him to wash his hands *after* giving the sample. The Claimant then suggested that he had noticed that the toilet water had not been dyed and the taps had not been sealed, contrary to the suggestions in the EGWDU guidelines, and wondered if splashes from these sources could have contaminated the sample. These precautions are suggested by EGWDU to prevent anyone from diluting or adulterating the sample.

24. The sample is provided in a sealed cup chosen by the donor. Regarding contamination the Claimant repeatedly asserted that he did not wash his hands before giving the sample, so by his own account there would not have been any contamination from the tap in his sample. It is not clear how water from the toilet bowl could get into the sample bottle considering the mechanics of the sample donation process. Water from either source would therefore only create contamination here if the Claimant had used these sources to dilute the sample. The question was put to him by Counsel as to whether he had done this, and the Claimant denied having done so.

25. The only other contamination source in this scenario would have been from the claimants unwashed hands. He asserts that he was not in contact with or used cannabis. He asserted that he had not been in contact with anyone else being tested. He was unable to offer an explanation as to how he might have had THC-COOH – Cannabis Metabolite (a by-product created within the body from metabolising Cannabis and found in urine) from another source on his hands.

26. The tester from HK, an accredited provider of D+A testing to the Rail Industry, signed his declaration that he had "followed the accepted sample collection and testing procedure". The Claimant offered no evidence to counterbalance this contemporaneous record and did not to make the conduct of the sampling an issue at the ET hearing. As such, on the balance of probabilities we are not persuaded that the irregularities the Claimant suggested

happened during the sample taking occurred. We would therefore accept the contemporaneous record signed by both Claimant and tester as being correct (i.e., he received the guidance, he declared he had not taken medication, the required procedures were followed).

27. The sample was subsequently tested by Matrix Diagnostics, an accredited laboratory. The sample testing procedure is in two parts – an initial screening test looks for prohibited substances, and where prohibited substances are detected a detailed confirmation test is performed. The first D+A test was positive for cannabis ("above cut off level of 50 ng/ml"). A confirmatory test, for cannabis was then performed using LC-MS/MS (Liquid Chromatography with tandem Mass Spectography), testing for levels of THC-COOH. The test confirmed the level of THC-COOH as being 73 ng/ml. The cut off level for the substance in the context of testing in the railway is 15ng/ml (set as being the baseline safe limit for this substance under the train drivers' conditions under industry guidelines). His test result was therefore recorded as being at 4.87 times the safe limit for THC-COOH.

28. This process was challenged by the Claimant. He highlighted a lack of signature on the Chain of Custody form for the receiving laboratory suggesting that represented a fatal failure under EGWDU. In fact, Section 12 Appendix C identifies: "No collecting officer name and signature on the chain of custody form" as a fatal error. The collecting officer name and signature was in place on the Chain of Custody form here. What was absent was a receiving signature, which was no longer provided (the receipt was recorded electronically, but we were not shown this in the bundle). Consequently, the Claimant questioned what had happened to the sample between donation and testing.

29. Regarding onward conduct of the sample, the EGWDU guidelines provide:

> "x. Transportation to Laboratory: Collecting officers will arrange to dispatch the collected specimens to the drug-testing laboratory. …Since specimens and the corresponding documents are sealed in packages that would indicate any tampering during transit to the laboratory by couriers, carriers, and postal services, usually ***there is no requirement for documented chain of custody procedures for the transport of the package."***

Therefore, a lack of signature would not constitute a breach of EGWDU. On what happens when samples arrive at the laboratory, the guidelines provide:

> "5.1 Process: When specimens are received at the laboratory, initial checks on the specimen's chain of custody and appearance are carried out. If the specimen passes these checks a portion of the specimen in bottle "A" is taken and goes through initial screening tests for the presence of drugs. Further testing of sample validity may also take place at this point…."

On the reporting of the test results:

> "6.6 Authorisation and Reporting of Results: Before any laboratory test result is released, the results and chain of custody documentation must be reviewed and certified as accurate and complete by a competent member of staff (analytical validation). At a minimum, the report must include the specimen identification number and the test result (positive/negative) for each specimen submitted…."

30. The Matrix Diagnostics Test Certificates were validated by the Laboratory Manager - his name, phone number and email address for contact are clearly visible on the certificates, along with the UKAS Testing mark. They confirm the collection date and time for the sample, Tester name, date of receipt, donor details and the barcode attached to the original Chain of Custody Form (60222459). This information was handwritten on the Chain of Custody Form, so someone in the laboratory had to input this from a copy of the hand-completed Chain of Custody Form. The screening test certificate outlines the Sample Integrity Checks conducted: indicating that the samples had passed those checks. The tests have been validated as per EGWDU by an employee of an accredited provider. There would therefore be no issue with the chain of custody or validation of the tests here under EGWDU.

31. The positive test was communicated to Dr Mark Hall, the Clinical Director for Transport and Infrastructure at Medigold Health, described by the Respondent's witnesses as an expert in Occupational Health medicine, and their senior medical resource. Dr Hall was also Medical Review Officer for the purposes of the Hampton Knight tests (Medigold being the parent company for HK). Dr Hall reviewed the test and produced a certificate headed: "Medical Review Officer Opinion of Workplace Drug Test Result" dated 22 November 2019. The certificate confirms the level and states:

> "Test Result: Confirmed Positive. …
> This report is based on a review of the toxicology result of the urine analysis performed by UKAS Accredited laboratory Matrix Diagnostics in line with UK and European workplace guidelines.
> This confirms Cannabis use, no medication declared."

32. The Claimant challenged this reporting in the absence of a Medical Review. As noted above, a Medical Review is required before a positive result is confirmed, where there is positive test and it is likely to be caused by declared medication or by a relevant medical situation. There was no declared medication here of any type. The substance detected (cannabis) is a controlled drug. There are situations in which medicinal cannabis may be prescribed, but there was no declared prescription for such here. (HK subsequently offered to pass any such prescription, if it existed, to Dr Hall for a medical review.) The Medical Review Officer deduced that there was no medical explanation for this reading of this substance. Dr Hall subsequently explained that none of the explanations the Claimant suggested could have accounted for the reading. The Claimant's employment contract provided for the communication of results directly to the employer. The Claimant reported for work on 25 Nov 2019 and was suspended pending further investigations. The Claimant was the only one among the eight drivers tested that day who tested positive for drug use.

Investigation - First meeting

33. On 27 Nov the Claimant was sent a letter inviting him to an investigation meeting. The meeting took place on 5 Dec, chaired by his manager Andy Mercer, he was accompanied by Amy Fitzpatrick from the HR department, and a note taker. The Claimant was accompanied by James Titchener, his chosen union representative whose availability had required the meeting to be moved from 2 Dec.

34. During the meeting the Claimant raised issues with the D+A test (specifically that he did not have the process explained to him by the tester, and that the tester did not record his medication). The Claimant then raised an issue about fasting for a medical test which he had on the morning of the D+A test and which he said his GP suggested might have affected the result. He complained that he had not been supplied with all the test related documents he should have received, and which his doctor wanted to see. Ms Fitzpatrick indicated he should have been supplied with a form containing the 'chain of care' (by which we assume she meant the pink donor copy 'chain of custody' form). Ms Fitzpatrick indicated she'd request the documents the Claimant wanted from the medical provider, but indicated HK were the data owners so it might be best if he interacted with them himself.

35. The Claimant then informed the meeting he had been using Hemp Oil for some time. He indicated that he'd acquired it from the internet, and some was provided by his sister, indicating that some of the oils were labelled as being of foreign origin. He denied taking any controlled substances. In that investigation meeting he objected to a reference in the note saying, 'he hadn't taken controlled substances since being in employment'. The Tribunal accepts that he did not say that in the meeting.

36. With regards to the results of the test - immediately after that meeting and in response to the queries raised – Ms Fitzpatrick contacted Martin Hughes, Arriva Rail's account manager at HK. She asked him for information on the Chain of Custody, a detailed report on the tests, and info on concentration levels of substances found. He responded that afternoon attaching documents requested – these appear to be limited to the original chain of custody form signed by the Claimant, the lab result documents, and the medical review certificate. He also explained what testing methods had been used and referred her to the Lab Report and Medical Review documents attached. He offered to obtain lab copy of the Chain of Custody form and photo evidence of the retained "B" samples if required. This information was subsequently passed to Mr Halls by Mr Mercer. Mr Mercer characterised this exchange in his witness statement as HK confirming that there were 'no issues with Chain of Custody or any other aspect of the test'. The exchange does not bear that interpretation, not least because Ms Fitzpatrick did not ask that broad question at that stage and Mr Hughes did not offer that warranty at that point.

Investigation - Second meeting

37. The Claimant was invited by letter dated 16 December to the second meeting which occurred on 19 December 2019, involving the same attendees

including the Claimant's union representative but a different note taker. During this meeting Mr Hall raised issues around the degree to which the testing regime was in accordance with the EGWDU. Specifically, he complained that he had not been afforded a 'medical review'. He asserted that there remained documentation outstanding that he had not yet been supplied with. He again raised the fasting issue, raised various issues with the conduct of the testing, including with how the sample was taken, and the fact that he had been using hemp oil on a daily basis and which could, by his own account, remain in his system for up to 120 days (thus affecting the result).

38. Mr Mercer and Ms Fitzpatrick asked the Claimant about the hemp oils he used. The Claimant said he used different oils, some were sourced from internet sites, and one was supplied by his sister, who he describes in his statement as medically qualified and a modern matron, but this was not mentioned during these investigative interviews. None of these oils were prescribed. He did not identify these oils. The Claimant at one point is quoted as saying, in response to a question about whether he bought the oil online: "Yes, do you need a receipt?". The Claimant suggests that he was offering Mr Mercer receipts, and that they were in his possession. No receipts were sought by Mr Mercer. However, neither were receipts produced or offered then or subsequently, nor were any produced or disclosed by the Claimant to the Respondent or the Tribunal as part of these proceedings. The Claimant indicated at this meeting that his doctor thought his pain might be arthritis, and that they were awaiting results which would come in the New Year.

39. A point to note here is that the Claimant had been absent from work on two occasions (September, October) with foot pain. These (together with other earlier absences for other unrelated conditions) had triggered an Occupational Health (OH) referral. This generated an OH report from their provider Medigold dated 8 November 2019 which described the Claimant as medically fit to remain in his role, was suffering from intermittent foot pain and that no adjustments or restrictions were sought or required. This was addressed to Ms Fitzpatrick. Regarding the deficiencies the Claimant alleged regarding HK's compliance with EGWDU on document production, Ms Fitzpatrick again suggested that it might be better for the Claimant to deal with HK directly and passed him their contact details. The Claimant made a subject access request to the company on 21/12.

40. Immediately after the meeting, Ms Fitzpatrick contacted Martin Hughes at HK to raise issues Mr Hill's had raised, and Mr Hughes responded that night. Regarding the relevant questions: on Medical Review, Mr Hughes confirmed that no contact would be made unless the donor had declared that they were on relevant medication and the claimant had not. On the potential effect of Hemp Oil on results, and whether fasting could result in the THC concentrations detected, he confirmed that neither could account for the THC concentrations detected in the test. He explained the significance of the certification offered by Dr Hall and the change in process whereby an electronic record of receipt replaced a signature on the Chain of Custody document. Mr Hughes engaged with all the questions raised by Ms

Fitzpatrick. Ms Fitzpatrick however failed to raise the issue the Claimant had raised regarding how the sample was taken by HK.

41. Mr Mercer produced a report dated 20 January 2020 for Morag Lang, the Operations Manager who was due to hear the disciplinary hearing. He attached material including the test certificates, exchanges between Ms Fitzpatrick and HK, EGWDU, and guidance from the Home Office, NHS on Cannabis and CBD oils. The report concluded that The Claimant had returned a positive test result "…based on drug testing and results provided by HK". He asserted that the hemp oil products "he'd used" did not contain the levels of "THC" which would result in a positive drug test result, or to give a 'false positive'; that the evidence of the Medical Review Officer and HK was that "a cannabis (THC) product must have been consumed"; and that "…the Claimant purchased hemp oil products from second-hand sources and the internet. There is no guarantee as to the exact ingredients contained within these products and whether they have been tested".

42. The Tribunal notes that Mr Mercer had no basis to say the Claimant had used or purchased oils at all, as he had not seen any evidence that he had done so. Nor had he invited the claimant to supply or identify the oil his sister had provided him. However, it would appear unlikely that the Claimant's sister, a matron would have provided her brother with an unlicenced product and in any event by that stage the Claimant was claiming to be using oils in a capsule format, so it was unlikely that Mr Mercer thought that question relevant at that stage. Mr Mercer noted that the Claimant had denied "taking any product containing cannabis products (THC)". He concluded by recommending that the Respondent proceed with a gross misconduct charge, on the basis that he had reported for duty and booked on under the influence of Cannabis contrary to ARL's Drug and Alcohol policy.

Disciplinary Hearing

43. The Claimant was invited by letter to an investigation interview on 4 February, which confirmed the Claimant was charged with gross misconduct, risked summary dismissal, and that he could be accompanied at the meeting. The Claimant asked that the hearing be rescheduled and held at a different venue. The Respondent agreed, rearranging it for 18 February. By this stage Morag Lang was not available and was replaced by Charlotte Whitfield, accompanied by Ms Fitzpatrick. The Claimant was not previously known to Ms Whitfield. The Claimant was again accompanied by Jim Titchener.

44. During the meeting the Claimant complained that the pack provided did not include all of the EGWDU and indicated that he had requested documentation from HK which had not been supplied in full. He raised issues with the fact that Martin Hughes was providing views on medical issues, although he was not a doctor. It was put to him that the company routed these queries through the account managers who would seek answers from HK's doctors. The Claimant characterised the investigation as amounting to the company advice from the OH supplier's account manager, and that he was effectively blocked from his own investigation because he was being denied documentation. He reiterated his challenges on CBD oil potentially giving rise to positive tests,

the conduct of the test, and the chain of custody. It was put to him that he had the opportunity to independently test the sample and was provided with that information at the test. He denied being aware of this option. It was put to him that aside from being on the documents supplied to him the information on the donors' right to requisition an independent test was in the SQE manual.

45. During a break Ms Fitzpatrick sent a series of questions (shared with the Claimant) to Medigold, their OH provider, for Dr Hall's response. While the response was pending, the Claimant was shown the questions asked, and it was reiterated to him that he could seek an independent test as per the company policy and the European Guidelines.

46. The response arrived at 14:06. The answers had been routed via a client service coordinator and having considered the correspondence and circumstances we accept these as having come from Dr Hall.

    1. *In the case of Stuart Hills, following the sample that was collected by Hampton Knight on 18/11/2019, is there any evidence/concern with the way in which this test was carried out, sample storage, chain of custody etc. which could have led to either a false positive result or contamination?* ***No***
    2. *Has this test been carried out as per EU Regulations?* ***Yes***
    3. *Were there any issues with the chain of custody for Stuart's sample* ***No***
    4. *Stuart is currently under investigation by his Doctor for a condition relating to his feet. He has been for blood tests recently which he has advised required him to fast. He believes that this fasting could have increased the metabolic rate of which he is burning stored fat that could have had an effect on the concentration levels of THC that were present in his system at the time of the test (that would have been as a result of trace amounts of THC found in the hemp oil he has been consuming). In your medical opinion, could this result in a potential positive test result?* ***No****.*

47. The meeting reconvened at 14:22. The Claimant immediately commented that the independent test would only confirm or not confirm the original result, that there was no opportunity for commentary from the second tester, so in effect there was no point in testing the B sample. This appears to have been his interpretation of the EGWDU. We will return to this point. His opportunity to seek "a second opinion" was reiterated to him by the Respondent's officers.

48. Ms Whitfield proceeded to read her decision, where she addressed several points including:
    - that he had not supplied any evidence of what products he alleged he used, leaving open the possibility that any products used were unregulated,
    - he had offered no evidence that any products used could have led to the high level of the substance detected,
    - that the Medical Review Officer confirmed that the result could not have resulted from diet, over the counter medication or fasting,
    - he had offered no evidence to substantiate the allegation that the test was carried out incorrectly and that he had not challenged the conduct of the test at the time.

She closed by asserting that she believed the test result was correct and accurate, that he had indeed tested positively for THC-COOH which she believed confirmed cannabis use based on the evidence supplied to her, that he therefore reported for duty and booked on under the influence of cannabis, this constituted gross misconduct and he was being summarily dismissed with immediate effect. A letter of dismissal issued dated 19 February 2020, confirming the dismissal on the grounds outlined at the disciplinary hearing.

Appeal: Hearing 1

20. The Claimant appealed the decision, and an appeal hearing was scheduled for 19 March with Stella Rogers. The Claimant was not known to Mrs Rogers before this meeting. It was at this point the Covid-19 crisis was emerging in the UK but just prior to the first national lockdown of 26 March. The Respondent proposed the hearing be held remotely but the Claimant was not content to do this, requiring a face-to-face hearing. Given the restrictions the hearing was initially delayed, was then scheduled for 23 June, this was cancelled with one day's notice on 22 June, then was rescheduled for 31 July.

49. In advance of the meeting the Claimant had submitted a statement and a pack of materials including newspaper articles suggesting that legally available CBD oils from retailers could lead to positive test results. In his statement he asserted that HK were withholding documentation from him which he

"…needed to have them independently checked. Without them I cannot verify if the test was carried out correctly."

On the suggestion that he was seeking graphs detailing the substances in the sample he says in his appeal hearing statement: "This is not correct. I just want the documents I am entitled to". He contradicted this account in the ET hearing, saying that one of the reasons he did not take the documents he had to the GP was because graphs were outstanding, that the GP had mentioned graphs and that he had repeatedly pressed during the process for the graphs.

50. At the meeting the Claimant was accompanied and represented by Dickie Fisher of ASLEF. He pressed the point that HK was withholding documents from him, and Stella Rogers undertook to look further into this, and went on to refer other queries to Martin Hughes. The Claimant raised numerous issues regarding licenced CBD oils and their capacity to produce positive results in drug tests. He also raised issues around the company's lack of warnings around the potential dangers of this in the context of the use of its employees potentially using CBD oils. Mrs Rogers ultimately adjourned the meeting to consider and address these issues.

51. During the meeting the Claimant stated that he had not been told of the opportunity to test the second sample, telling the meeting that he'd only been told about the possibility in the termination letter. (As noted above, he was told this during the first part of the Disciplinary meeting, and he indicated that it was not something he would pursue.) He then said that "the second test can only relate to consistency so there's no point in doing this". In fact, he volunteered during the ET hearing that he never wanted to have the second

sample tested. During the ET hearing he asserted that he would have been happy for the sample to be subject to a test which would discern between THC-COOH which came from CBD oil as opposed to from Cannabis use, but that this was not available at the relevant time. He later stated that he'd have liked the sample released "so it could be tested for everything".

52. The Claimant said that a reasonable employer would have agreed to fresh testing (to overcome the issue the Claimant asserted was caused by the hemp/CBD oil ingestion) but Mrs Rogers was clear that the company had faith in their provider and the test result. At the end of the meeting Mrs Rogers asked the Claimant what products he had been using ("Kangaroo and others") and when she asked if he'd supply her with these he replied, "I will". There was no suggestion that The Claimant ever complied with that request. No such evidence was supplied to the Tribunal.

Appeal: Hearing 2

53. What became the final appeal hearing was scheduled for 1 September. The Claimant was again accompanied by Dickie Fisher (ASLEF). Mrs Rogers confirmed that the three outstanding issues had been addressed. Firstly, HK had confirmed that CBD oil could not have rendered the positive test result and the OH provider Medigold had confirmed that in a letter dated 10 August which had been supplied to The Claimant. The letter from Dr Hall stated:

> *Dear Suzanne (Suzanne Patterson – Head of HR),*
> *You asked me to give a medical view on your question below: -*
> ***'Could someone using CBD oil have a drugs test result of THC level - 73ng/m? I believe the cut off for our drugs and alcohol policy is 15ng/ml?'***
> *My answer is emphatically no. The amount of THC CBD oil (sic.) is absolutely tiny and is sold as a food substance and not a medicine. Even passive inhalation of cannabis would be below the cut- off point. In my opinion, this is a positive result for use of cannabis.*
>
> *Kind Regards*
> *Dr Mark F. R. Hall*
> *MB, BS, DRCOG, AFOM, MFOM, FFOM,*
> *Accredited Specialist in Occupational Medicine."*

54. The Claimant and his rep rejected Dr Hall's guidance, citing grammatical error, and asserted that the information they'd supplied (in the form of news articles) undermined his position. Mrs Rogers confirmed that she would rely on his advice and that she had adjourned in part to allow the Claimant to seek advice or a contrary view from a medical professional. She would not accept a newspaper article as evidence sufficient to question the advice of her expert.

55. Secondly, the Claimant had been supplied with some, but not all, outstanding materials by the testing company Matrix Diagnostics (items excluded including training records and standard operating procedures) were withheld "due to confidentiality clauses". These included the graphs and detailed analytical information pertaining to the tests undertaken on Mr Hall's samples which Mr Hall had indicated at various points his GP wanted to consider.

56. Thirdly she was prepared to discuss issues around CBD oils and the guidance prevailing in the rail industry and the discussion which ensued simply confirmed that the parties did not accept one another's positions. The Claimant took the position that it was the employer's responsibility to offer guidance on the use of these substances. Mrs Rogers position was that there were different views on the use of these products, but the collective view communicated to the RSSB by the Occupational Health Advisory Group was that existing D+A policies were sufficient to cover this area without further guidance, and it was this policy which was applied in this case. Ultimately it was the driver's responsibility to ensure he did not breach his contractual obligations.

57. Mrs Rogers proceeded to wrap up the meeting, confirming that she had re-considered the case, but that in effect the Claimant had covered largely the same ground as was covered in the original disciplinary hearing. She had facilitated and supported his request to secure further documentation to check issues he raised around calibration, and he was in possession of this information. She confirmed that she was satisfied with the test undertaken by her suppliers and the information supplied was unnecessary for her to reach her decision. She proceeded to uphold Ms Whitfield's decision to summarily dismiss him based on gross misconduct. She confirmed that the sample remained available for him to test and that his adviser could explain his options. The dismissal was confirmed in a letter of 7 September.

58. To address two points at issue: the Claimant repeatedly suggested that his ingestion of hemp oil, combined with his having fasted for a time in preparation for a medical test, might have combined to render the result in the test. This was put to HK during the investigation, and appeal and the medical advice was that the ingestion of licenced hemp oil/CBD oil would not and could not render a test result of 73ng/ml, a result at this level could only be indicative of cannabis use, and fasting issue was rejected as not being a relevant consideration.

59. Despite referring the Respondents and the Tribunal to news articles on the potential for Drug tests to detect THC-COOH from CBD oils, the Claimant offered no evidence beyond his own assertions that he was using these oils. He did not disclose them at the test (as he would have been expected to under the guidance, not as a drug but as a herbal supplement he said he was using to alleviate pain). Despite asking if the fact-finding panel would like to see purchase receipts, no receipts were produced to them. Mr Mercer did not request the receipts, which was an omission, but no receipts were produced at subsequent meetings or indeed included in the bundle. When asked for examples of the oils he used by Mrs Rogers, and for him to supply them to her – which he agreed to do – none were produced, although he offered one brand name 'Kangaroo'. The Claimant also referred to having used different brands of oils. No evidence of these oils (brand names, suppliers, concentrations) was supplied to the Tribunal. There is no evidence that the Claimant ever used Hemp/CBD oils or capsules.

60. One of his other repeated challenges to the process was that he had suggested his GP had said that he would like to review the test documents to consider whether the test had rendered a 'false positive', and that because of the delay in his accessing the 'graphs' this put him at a disadvantage. He suggested this conversation had happened when he attended with the doctor on 4 Dec. The doctor's note does not record this conversation. It is fair to assume that such a significant disclosure as a positive drugs test, albeit one that is disputed, would have had to have been noted in the GP's notes. There is no indication that it was ever discussed in the context of the GP checking the result. There is no indication in the notes that he discussed either then or subsequently the use of hemp or CBD oils in connection with any medical condition with his GP.

61. More significantly the Claimant suggested at various points that he had been fasting immediately prior to the D+A test on 18 November for a medical test relating to his conditions which his doctor suggested might have affected his metabolism. If such a test had occurred, we would have expected to see the GP notes referring to that test to be supplied to the Tribunal. The first note he supplies is from 4 December. The 4 Dec note reads as the first report of the pain to his toe. The GP notes record him recommending 'NSAID's' – non-steroidal anti-inflammatory drugs (these would include aspirin and ibuprofen). In fact, when challenged as to whether he had consulted with the doctor before the date on which arthritis was mentioned as a possible explanation for his pain in his notes (4 Dec) he confirmed that he had not been to see the doctor before that point, that the issue was not continuous or serious enough to warrant seeing the GP and that this was his first report of the condition to the GP. We were shown no evidence of a test which required fasting at the relevant time, no evidence that the GP was sighted on the disputed test and no evidence that he was aware of the Claimant's use of CBD or Hemp oil. While it was not part of his case it is worth noting that his GP at no point discusses or recommends Hemp or CBD oil in relation to the alleviation of pain.

Discrimination arising from disability: Law

62. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his or her disability and the employer cannot show either:

    (a) that it did not know, and could not reasonably have been expected to know, that the employee had the disability;
    (b) or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere but a Claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65, [2019] IRLR 306.

63. Mrs Justice Simler in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:

    - A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.
    - The tribunal must determine what caused the impugned treatment, or what was the reason for it.
    - The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
    - The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

    I have also considered the case of Gallop v Newport City Counsel [2016] IRLR 395 on the issue of knowledge which may, or may not, be imputed to a decision maker.

<u>Discrimination arising from disability: Conclusions</u>

64. The Tribunal accepts the dismissal of the Claimant by Ms Whitfield constitutes unfavourable treatment. The Tribunal also notes the previous finding that the Claimant was disabled at the relevant time by reason of osteoarthritis in his toe.

65. The Claimant suggests this unfavourable treatment was because of his disability and that his ingestion of hemp oil/CBD oil to relieve his condition had created the issue which led to his dismissal. He suggested that if he was permanently unable to resume his driving role, he'd be entitled to be moved to a non-safety critical role at 90% of his salary. He did not put this argument to any of the witnesses at the hearing or in his final submission, nor did he produce or direct us to any evidence to support that suggestion.

66. Firstly, dealing with knowledge, there was no evidence that Ms Whitfield, the decision maker, was aware of the Claimant's disability. The Claimant did not

suggest to Ms Whitfield as decision maker, that she was aware of his disability, that she should have been aware of his disability, or that his disability had any bearing on her decision. This was despite our prompting to ensure that he at least put this crucial part of his case to the witness, having failed to address it. When, so as to ensure the Tribunal had heard her evidence on the point, we asked the question, she was clear that she was not aware of any pre-existing condition, the OH referral or had any discussions with colleagues about this issue.

67. In fact, the extent of the Respondent's knowledge (the employer generally) was an OH report (triggered by absences for different conditions) which described the Claimant as medically fit to remain in his role, and suffering from intermittent foot pain for which no adjustments or restrictions were sought or required. The report does not suggest the subject is in a condition where he is impaired, or that he considered himself to be impaired. In any event there is no suggestion that Ms Whitfield was aware of that report, Ms Whitfield denied any awareness of that report or of having discussed or had Mr Hill's health raised with her.

68. The Claimant argued that he had used hemp/cbd oil, in order to alleviate pain from his osteoarthritis, and that this is 'something arising' from his disability for which the Respondent has treated him unfavourably. Setting aside the issue of whether he actually used these oils, the Claimant has not established that their use was in fact something arising from his disability. The Claimant acknowledged at the ET hearing that he had not attended his GP before 4 December 2019 in connection with this condition, asserting under cross examination that it was not serious or continuous enough to warrant a GP visit. At that point, from his GP's notes, there was no discussion of hemp/CBD oils. The GP, being first appraised of the condition, recommended NSAID's to the claimant. These oils were not prescribed for him by his GP. He has suggested without substantiation that their use was previously suggested by family members. He has offered no evidence to persuade the Tribunal that his arthritis required him to use hemp/CBD oil. Nor did he offer any evidence that he used hemp/CBD oil.

69. Even if the claimant cleared that hurdle there remains the issue that hemp/CBD oils could not cause the test result his sample returned, according to the Respondent's medical evidence. Ms Whitfield was clear on this point when making the decision to dismiss. She also noted that there was no evidence that the Claimant actually used CBD oil. The Claimant offered no medical or scientific evidence to challenge that finding.

70. The Tribunal considers that the Claimant failed to establish that hemp/CBD oil use was something that arose from his disability. He did not establish that hemp/CBD oil was something he used, and even if he used it, it was not responsible, on the balance of probabilities, for the test result.

71. Ms Whitfield found herself considering the Claimant's dismissal because he tested positive in a D+A test for cannabis use. On the evidence we have seen and heard, he was dismissed because he tested positive for cannabis use. He

was not dismissed because he was disabled, nor was he discriminated against because of something arising from his disability. The Tribunal is therefore satisfied that this result did not arise in consequence of something arising from his disability, and the dismissal was not related to his disability.

72. Even if that had not been the case, and the Respondent was aware of the disability, given the positive test result leading to this reading for THC-COOH, the Tribunal would have found the dismissal was still justified as a proportionate means of achieving a legitimate aim (namely ensuring safety in a safety critical industry, encouraging strict compliance with its terms of employment and showing a zero tolerance to breaches of Drug and Alcohol rules).

Unfair Dismissal : Law

73. The Respondent's case is that this was dismissal for conduct (gross misconduct). That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

> 98. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
> (a) The reason (or if more than one, the principal reason) for the dismissal, and
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it – …
>
> (b) Relates to the conduct of the employee, …

If the Respondent establishes that reason, a determination of the fairness of the dismissal under s98(4) ERA is required.

> 98 (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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.

74. This involves an analysis known as the *Burchell* test [2] - whether the Respondent's decision makers had a reasonable and honest belief in the misconduct alleged, and whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the

[2] British Home Stores Limited v Burchell [1978] IRLR 380

dismissal once the Respondent has established that the reason is a potentially fair reason for dismissal. The Tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

75. The factors that may inform the standard of reasonableness of investigation vary with the circumstances. An employee being caught in the act or admitting the misconduct requires less in the way of investigation than a case based on inference. *(**Gravett v ILEA [1988] IRLR 497**).* In other cases, a relevant factor may be the likely sanction. An allegation likely to lead to dismissal will typically require more by way of investigation than one likely to lead to a first warning. Similarly, the greater the impact and consequences the decision will have on an individual being able to work in their chosen field in the future, the more that will be expected of the investigation. (***A v B [2003] IRLR 405 EAT***, approved in ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA***).

76. Counsel directed us to paras 58 – 63 of ***A v B***, where Elias J said at para 60, on the reasonableness of investigations in serious cases (where dismissal is likely):

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

77. I would also note ***Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820***, at para 15, where the Court of Session described the approach to deciding whether the sufficiency of an investigation into misconduct is adequate: -

> "the tribunal necessarily has to examine and consider the nature and extent of the investigations carried out by the employer and the content and reliability of what those investigations reveal before it can reach a view on whether a reasonable employer would have regarded the investigatory process as sufficient in matters such as extent and reliability or as calling for further steps. That decision is essentially one for the assessment of the tribunal, as a specialist, first instance tribunal."

78. The Tribunal must not to substitute its own view regarding the investigation into misconduct or regarding the decision to dismiss. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23***). This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. I know that I must assess the reasonableness of the employer not the potential injustice to the Claimant (***Chubb Fire Security Ltd v Harper***

[1983] IRLR 311) and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (***W Devis and Sons Ltd v Atkins [1977] IRLR 31***.) It is not for the investigator to undertake a forensic investigation – she is required to conduct a reasonable investigation, and the reasonableness of that investigation is assessed by reference to the way the Claimant puts his case during the internal procedure.

79. The test as to whether the employer acted reasonably in section 98(4) ERA 1996 is an objective one. We have to decide whether the employer's decision to dismiss the employee 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***). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (***Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82, London Ambulance Services NHS Trust v Small [2009] EWCA Civ 220)***.

80. There is always an area of discretion within which a Respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether the dismissal was reasonable (***Boys & Girls Welfare Society v McDonald [1996] IRLR 129***). In this case we also bear in mind that employers have been allowed latitude in the context of Zero Tolerance policies in respect of Drug and Alcohol testing (***O'Flynn v Airlinks the Airport Coach Company EAT/0269/01***).

Unfair Dismissal: Conclusion

81. The first question to be determined is what was the reason for the dismissal?

    The reason given by the Respondent for the dismissal was gross misconduct. The Claimant did not in fact seriously dispute this at the ET hearing, and indeed appeared to accept this at the end of the hearing despite outlining at the outset in his statement a different motivation the Respondent had to dismiss him relating to disability. The Tribunal accepts that based on the contemporaneous evidence supplied, taking into account what was known at each stage and the evidence that emerged at the ET hearing that, on the balance of probabilities, the Respondent dismissed the Claimant for what they believed to be his gross misconduct, based on a certified positive test for THC-COOH, produced by accredited test provider and certified as a positive result for Cannabis use by a Medical Review Officer, qualified to make that determination under EGWDU. As is established in law, a reason for dismissal which is related to conduct is a potentially fair reason under section 98(2)(b) of the ERA 1996.

82. Next: did the Respondent reasonably and honestly believe, based on reasonable grounds, and after an appropriate investigation that the Claimant committed the misconduct? The first part of the question has been addressed – the Respondents believed the misconduct had occurred and the Claimant did not challenge that. The challenge the Claimant made was regarding the basis the Respondent had for that belief – and the investigation which underpinned it. It is important to bear in mind the sequence of events and what was known to the parties at each stage.

83. The Respondent, a rail operator operating in a safety critical industry, was presented with a certified positive test result for Cannabis use by one of its drivers. The test was conducted by accredited testers and the result was certified by a qualified Medical Review Officer who was also the Clinical Director of the Respondent's Occupational Health provider, with specific responsibility in the field of Rail Transport. The Claimant's contract was explicit that a positive result for drugs may lead to dismissal, and that a positive test could be communicated directly to the employer. We heard and considered a great deal of evidence on the challenges made by the Claimant and the responses and actions taken in response by the Respondent. At each stage the Claimant was accompanied and advised by his choice of union representative.

84. At the investigation stage the Claimant raised 4 challenges which I consider relevant and which can be summarised as:

    1. The use of Hemp/CBD oil, and whether this might explain the result,

    2. Metabolism/Fasting, the suggestion that this might explain the result,

    3. The suggestion that the tester conducted the sampling incorrectly,

    4. The suggestion that the testing process was not compliant with guidelines, and that he had not been supplied with documents he was entitled to.

    These queries were, with one key exception, adequately addressed by the time the investigation report was produced. The questions around the way the sample was taken, raised in the second meeting, were not raised with the health provider by the end of the investigatory stage. Mr Mercer claimed to be responsible for the investigation, but it was Ms Fitzpatrick, a HR professional, who handled or was tasked with communications with HK. Ms Fitzpatrick failed at this stage to capture that issue or put it to HK. In his report Mr Mercer confirms that the issue was raised by the Claimant but in effect deals with it by saying the tester was accredited, there had been no problems before, and 7 other tests were conducted that day without a positive result. While that was all correct, he had missed an opportunity to explicitly raise this specific question with HK. He had also failed to test the Claimant's assertions that he had used and purchased Hemp/CBD oils. This point was picked up by Ms Whitfield at the disciplinary stage noting that no evidence of the use of CBD oils or their purchase had been proffered.

85. The points that emerged from the exchanges with HK were that hemp/CBD oil could not generate the level of result recorded here, that fasting would not generate the result recorded here, and that in fact the Claimant was not entitled to a medical review because of the reasons previously outlined (non-declaration of medication, no legitimate explanation for cannabis use). Steps were taken to ensure the Claimant was supplied with the material he sought and indeed he was quite properly directed to seek that material directly from the testing lab – it was not the Respondent's job or responsibility to do this.

86. The exchanges and other relevant material were supplied to Ms Whitfield in advance of the disciplinary hearing. The disciplinary hearing of 18/2 followed,

which the decision maker suspended to clarify remaining questions around the sample and the test with the Clinical Director. The query she directed to Dr Hall was shared with the Claimant in the meeting. I would focus on the first three questions:

1. *In the case of Stuart Hills, following the sample that was collected by Hampton Knight on 18/11/2019, is there any evidence/concern with the way in which this test was carried out, sample storage, chain of custody etc. which could have led to either a false positive result or contamination?* ***No***
2. *Has this test been carried out as per EU Regulations?* ***Yes***
3. *Were there any issues with the chain of custody for Stuart's sample* ***No***

87. Taking the responses to these three questions together the Dr Hall is confirming, there were no chain of custody issues, the D+A test was compliant with the EGWDU guidelines, and nothing 'with the way in which this test was carried out' could give rise to contamination, or a false positive. The Doctor was approached in his capacity as Clinical Director of the OH Provider, but he was also the Medical Review Officer who verified HK's test. All providers involved in this process were accredited. While it would have been better to include a line to the effect that 'the donor is alleging the taking of the sample was not conducted in a way that was compliant with the guidance', the decision maker is asking the person who was tasked with originally signing off these tests, in the manner he was required to do under the European guidance, as to whether contamination or a false positive could explain the result and he responded that it could not. The decision maker was clear that for her not to dismiss him, there would have to be doubt in the testing processes. To her mind she addressed those questions to the appropriate authority, she had shared the questions with the Claimant and his representative – giving them an opportunity to comment on them - and the response came through was that there was no issue with the test.

88. Looking at the investigation the Respondent followed, was there anything within it or about it that was unreasonable – were all the steps taken and questions asked, including questions arising from challenges raised by the Claimant, that would be expected of a reasonable employer in these circumstances? It is our view that there was not. They addressed the Claimant's questions, considered his explanations and they assembled the information they needed to assess his arguments and reach their decision. They sought expert input where that was necessary. This was a reasonable investigation.

89. Was it reasonable for the Respondent to rely on the investigation? The Claimant is adamant that it was not, raising all manner of issues with the testing process and the science. The Respondent took his challenges to their expert provider and were reassured by the responses they received on the conduct of the laboratory test and Chain of Custody. They asked the expert if the use of oils could have generated the result. Setting to one side the fact that there was no evidence he had ever used these oils, the OH provider repeatedly rejected the idea that hemp oil/CBD oil ingestion could generate

the result. His arguments around fasting were similarly rejected, and again there is no evidence that he had taken such a test before the D+A test. If the answer to either of those questions had been yes, at that point it would have warranted further investigation. They asked the questions, and the answers were no. On testing process and chain of custody, they again asked questions and were provided with answers from their accredited provider. They were reassured by the answers and the accreditation. This was understandable and reasonable.

90. We would have to say that it was reasonable to rely on this investigation. The Respondent had asked and answered all the matters of concern the Claimant had raised. They were entitled to rely on the result provided by their testing provider, in all circumstances outlined here, particularly given the reassurances they offered in response to the Claimant's specific challenges. It was already Dr Hall's responsibility, at the 'Result' stage, to complete all the necessary checks and validation before issuing such a serious declaration. This exchange was therefore in effect a 'double reassurance', issued by the accredited professional with responsibility for advising the Respondent this area and for validating this test. This would act as reassurance to any reasonable employer in this situation, and it was reasonable for this employer to rely on it.

91. On this point the Tribunal notes that although the Claimant raised issues with the taking of the sample in his ET1, and mentioned his allegations during the ET hearing, he did not set this issue down as an issue to be considered at the ET hearing, despite the issues to be considered being very clearly identified in the Case Management Order. The Order provided an opportunity to both parties to remedy or challenge any omissions. In fact, his case was captured quite differently - that he was self-medicating with CBD oil, that the Respondent did not properly take this into account when considering the results (which he developed into arguments about whether hemp/CBD oils and their use might lead to positive D+A results). The significance of this omission is that in failing to identify this as an issue for the ET hearing, the Respondents were not on notice to call evidence to meet any challenge on the point, he denied himself the opportunity to cross-examine the tester, and denied the Tribunal the opportunity to hear from the tester on the points he alleged.

92. In any event, it is not the Tribunal's job to impose our critique on the testing – the question for us is, 'was it reasonable for the Respondent to rely on the reassurance given by the provider regarding the test that was done and the reliability of the result?' We have already provided our answer to that. We heard and carefully considered the issues the Claimant raised during the process and in the ET precisely because of the serious consequences the positive test had here and the significant complaints he raised regarding its conduct both with us and the Respondents. Having had the benefit of the live evidence, the EGWDU and considered the material in the light of the challenges and allegations the Claimant made, particularly on chain of custody, there appears to be no basis to say that the processes were not EGWDU compliant. There was no basis for the Respondent not to be reassured by the

accredited expert provider given what we saw. It follows that the three elements of the Burchell Test are satisfied in this case.

93. Turning to procedural unfairness - was the process followed here fair? In terms of the investigation process, the Tribunal finds that the process was appropriate and complied with ACAS requirements under their "Code of Practice on disciplinary and grievance procedures". The Respondent's processes provided for a manager to investigate, which comprised two meetings, held with notice, minuted, the manager was accompanied by an HR professional, and the Claimant was independently represented. An independent manager handled the disciplinary process - she picked up outstanding issues, waited for those to be addressed, again the meeting was minuted, with the HR professional present, and the Claimant had the opportunity to bring a representative, which he did. An appeal process followed headed by another independent person consisting of two hearings, each held with notice, minuted, with the Claimant represented at both. The Claimant had the opportunity and was repeatedly reminded of his opportunity to independently test the reserve sample.

94. The overall process was sufficient to ensure that the Respondent captured and dealt with queries and challenges raised by the Claimant. The deficiency identified at the investigation stage was, in our view, addressed during the disciplinary stage. The failure of the Claimant to evidence his suggestion that he had used hemp/CBD oils, had undergone a test requiring fasting, or to produce medical/scientific explanation for the levels of TCH-COOH detected in his sample undermines any suggestion that the Respondents should have engaged further with the debate he generated regarding whether CBD oils might or might not be detected in drug tests, or generate positive drug tests.

95. The Claimant denied receiving information about, or knowing about, independent testing. This was despite the D+A policy containing the clause highlighting this option to him, his being advised by experienced union representatives, and being required to familiarise himself with rules and regulations relevant to his role. While the issue of the Claimant challenging the result via independent testing was not raised until the disciplinary hearing, the Claimant did not in fact suffer any prejudice from a delay. The possibility remained open to him to test the sample at that stage - that option was offered to him which he refused - or later during the internal appeal process. Once sighted on the option he did not the exercise the option to do so. That was his right, and a choice that he made. In fact, he stated in clear terms during cross examination that he never wanted or intended to test the second sample.

96. At one point in the appeal meeting, it was recorded that he and his representative asked for the Respondent to commission an independent test. In his statement he suggested this was in fact a request for a second opinion on whether CBD oil could generate the result, elsewhere in he asserts that he in fact wanted them to conduct a new test. With regards to the employer conducting an independent test of the second sample – that was simply not

possible (the second sample is reserved for the use of the donor under EGWDU, to enable an independent test). With regards to a new test, the Respondent was clear they were confident of the first result and what it indicated (i.e., that he had presented for work under the influence of Cannabis on a given day).

97. As to commissioning the second test, or seeking a second opinion, it was his responsibility to do so and to fund this if he wished to pursue it, under the contract. The Claimant assumed that the independent test could only confirm or not confirm the previous test (this was from his reading of EGWDU, which suggests the second test could not comment on whether the test was positive or negative). In fact, under the company guidance the sample could be sent to an independent laboratory of his choice for testing to challenge the validity of the test result. There was no limit placed by the policy on what the laboratory might do with the sample, albeit it may well be that the laboratory would have considered itself limited in terms of its response by the EGWDU. We don't know the answer to that because this was not something the Claimant chose to do. In any event there was no evidence produced to challenge the result or explain the level of the metabolite detected for any reason other than cannabis consumption.

98. If he wanted a second opinion on the existing test and result, rather than to test the B sample, it was incumbent on him to seek this out. The Claimant had pressed for the provision of the 'graphs' (various calibration readings and analytical graphs (when supplied were dated 18/8/20) and which were ultimately supplied on 28/8 by Matrix Diagnostics. The Claimant complained that this material arrived very shortly before the second appeal hearing, compromising his ability to provide the material to his GP. It was open to the Claimant to ask for additional time to adjourn that hearing, to have the GP review the material. It is however clear that it was not the Claimant's intention to challenge the test, and there is no evidence of him ever having discussed the test, the result or any aspect of this situation with his GP at this time.

99. In order to overturn the confirmed test result here, or to create doubt in Mrs Rogers mind at the appeal stage it was her position that the Claimant needed to supply some form of medical or scientific evidence at that point to identify shortcomings in the process and results, or to support the arguments he was making. Mrs Rogers made it clear that she was happy to adjourn the second hearing – there was no particular rush given that the Claimant had already been dismissed and was off the payroll. He did not do this then, nor did he pursue the point in advance of the ET hearing.

100. The Claimant raised issues with the communications between the Respondent and HK. There was certainly a lack of precision in the exchanges, which is explicable where non-experts discuss medical and scientific terminology. He suggested that it was inappropriate for a non-doctor to be providing responses to scientific and medical questions. It emerged that it was

the custom for queries to be routed via the account manager. It is not reasonable to expect that the handling of all queries being received and responded to by an OH Provider be handled personally by a doctor, and where questions were posed that required a medical opinion, the account manager identified those. It was also clear that where specific medical questions were to be routed to the doctor that this was done, and a doctor responded, as we saw later in the process.

101. The Tribunal and the Claimant both identified the case of ***Ball v First Essex Buses Ltd ET 3201435/2017*** as a factually similar case worth considering in this context. The case concerned a bus driver who failed a drug test and successfully challenged his dismissal. The Claimant suggested his situation was almost the same as Mr Ball's and joked that the Tribunal could take that decision replace his name with that of Mr Ball and reach the same outcome. While not a precedent, the case bore circumstantial similarities to this case. Both their roles were safety critical; both had been subject to random drug tests which they'd failed, and both were summarily dismissed.

102. In the ***Ball*** case the drug test was a saliva test, which as ***Ball*** notes is a less reliable test than either urine or hair follicle testing. Like the Claimant, Mr Ball had disputed the test result and asserted his innocence. However, in that case Mr Ball actively set about countering the Respondent's scientific case by commissioning his own independent tests. He took hair follicle tests, which established that he did not take the drugs at the relevant time or at all, establishing that he was not a drug user. The Respondent in that case ignored and rejected that evidence, undermining the credibility of their investigation. He also challenged the conduct of the test, by making it an issue in the case and cross examining the tester. Taking all that evidence together, Mr Ball succeeded in persuading the Tribunal that the result was not safe (as it was not coherent with independent medical evidence he procured) and the process followed was unfair. In this case we are dealing with a more sensitive test, and the Claimant has provided no independent challenge to the scientific result, either by retesting the B sample, or evidencing his own status through follicular testing, or engaging his GP or someone else to raise and address the points he wanted to make. He offered nothing in this area for the Respondent to consider. He produced newspaper articles, and scientific reports from the internet, raising general points – but in the face of a specific and expertly produced laboratory result backed by an expert Doctor, he would need, as was explained to him, an account from a qualified person addressing (what he was asserting) were the problems with that report. There is no evidence here of resistance on the part of the Respondent to engage with his challenges (quite the reverse), nor is there any evidence of them failing to follow their own procedures. The situations are therefore quite different. We would have to conclude that the procedure followed here was a fair one.

103. Did the dismissal fall within the band of reasonable responses? Was it reasonable to dismiss for the misconduct outlined, in the circumstances? The range of sanctions open to an employer is wide, as is well established. The Claimant was employed in a safety critical role, in a safety critical industry. He was aware of his contractual and personal responsibilities not to breach the

drug and alcohol policies. There is a zero-tolerance approach to the use of drugs and alcohol at work in the rail industry, which is why the testing regime is mandated and in place. The Respondent conducted a reasonable investigation and disciplinary procedure and the circumstances outlined in Ms Whitfield's dismissal letter place the dismissal within the range of reasonable responses. She was presented with a train driver who failed a random drugs test, during a shift where he drove a train, which detected levels of THC-COOH at more than 4.8 times the maximum permitted cut off, indicating cannabis use. There was no legitimate reason for the use of this controlled drug. It is difficult to think of a more safety critical role on land than driving a train. The panel agreed that dismissing the Claimant was reasonable in all the circumstances.

104. It is the Respondent's duty, and a condition of their licence to operate, to ensure a testing regime is in place for their drivers, and to consider any issues arising with the process. Under the rail regulations the Claimant's employer is not permitted from the point of his positive test to allow an employee to conduct safety critical tasks. His contract made it clear that a positive test could result in dismissal. His misconduct was established by a test result which recorded him two-thirds of the way through a shift at 4.87 times the maximum permitted level of THC-COOH. Relying on that result, the Respondent came to the reasonable conclusion the Claimant had knowingly consumed cannabis in advance of his shift. Despite the Claimant having had an unblemished work record with the Respondent the Tribunal is satisfied that he failed to uphold his fundamental responsibility to act in compliance with the strict requirements around drug and alcohol use. It cannot be realistically suggested that in these circumstances dismissal falls outside the range of reasonable responses. The decision to dismiss was well founded and within the bounds of reasonable responses for an employer in this industry. The Claimant was fairly dismissed for reasons of conduct.

Wrongful Dismissal (Breach of Contract)

105. As previously noted, this was not particularised in the issues here, but nor had it been formally dismissed as a claim at an earlier stage.

106. Had this been pursued the test the Tribunal would apply is whether the Claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment (gross misconduct), warranting summary dismissal. This is an objective test – in other words, it is not sufficient that an employer thinks the Claimant was guilty, there must be evidence sufficient to show that there was gross misconduct.

107. The Claimant denied using cannabis. The Respondent's random screening conducted during a working shift detected levels of THC-COOH 4.87 times the maximum permitted level, indicating cannabis use. The Claimant sought to persuade us that we could not rely on the laboratory test process and the result, but he offered no scientific or medical evidence to counter the positive result in his case. The arguments he made regarding the provider's compliance with EGWDU did not bear careful scrutiny. He suggested he had tested positively because he had used hemp/CBD oils, but

he offered no evidence to show that the ingestion of these oils could generate a positive drug test at the level he recorded. Nor did we see any evidence that he had ever used these oils in the first place. He then sought to argue that the test result was caused by irregularities in the sample donation but did not seek to challenge the test. He undermined his own credibility on this point (when trying to suggest the test was not conducted with care) by confirming that he had signed a declaration to say that he had not taken any medication including over-the-counter medications within the previous 14 days, when he admitted under oath that he did exactly that. Given the potential consequences of this test for his employment, this was an extraordinary admission. In addition, the guidance provided the prompt that any herbal preparations being consumed should also be declared. A person undertaking a drug test, who was using hemp oil/CBD capsules in concentrated form as he asserted he used for pain would reasonably have been expected to disclose this on the Chain of Custody form, as a herbal supplement, in response to that prompt. This failure also undermined any suggestion that he was in fact using this product at the time.

108. Having considered all the evidence before us, we can find no basis on which to question the test result, conducted by industry accredited medical professionals, which evidenced cannabis use by the Claimant in advance of his shift, and showing him 4.87 times the maximum permitted level for the by-products of cannabis use during his working day. The seriousness of his actions and the potential consequences for himself, his employers, co-workers and the travelling public cannot be over-stated. We are satisfied that the Claimant was guilty of Gross Misconduct. This was our unanimous view. We are satisfied that the Claimant's own actions led to this outcome, and that he bears responsibility for this fundamental breach in the employment relationship. The Claimant's conditions of employment could not be clearer. Respect for the health and safety of drivers, colleagues and the public are at the heart of that working relationship. It is a requirement that drivers observe the rules on the use of Drugs and Alcohol. The Claimant, despite his positive work record before this point, failed to do so here. Summary Dismissal was justified here, his contract provided for summary dismissal in this scenario, and so any claim for wrongful dismissal would fail.

All claims are hereby dismissed.

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Employment Judge Harley
Date: 24 July 2023