EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104920/2022

Held in Glasgow on 9, 10 and 11 January 2023

Employment Judge M Kearns (sitting alone)

Mr S Blair	**Claimant** **Represented by:** **Mr D James - Advocate**
One Subsea UK Limited	**Respondent** **Represented by:** **Mr R Alexander - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant - who is aged 44 years - was employed by the respondent as a field service specialist III (J59). His employment was from 17 September 2012 until 3 June 2022, when he was dismissed. On 1 September 2022, having complied with the early conciliation requirements, the claimant presented an application to the employment tribunal in which he claimed that his dismissal was unfair.

Issues

2. The respondent admitted dismissal. The issue for the employment tribunal was whether the dismissal was unfair contrary to section 98 Employment Rights Act 1996 ("ERA");

3. Following the claimant's admitted non-compliance with the tribunal's order dated 5 October 2022 requiring him to lodge details of his post-dismissal income, the present hearing was restricted to liability only.

Applicable Law

Unfair Dismissal

4. Section 98 of ERA indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a potentially fair reason under section 98(2).

5. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant (in this case, Mr Lawrence) believed that he was guilty of misconduct. Thereafter, the employment tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the band of reasonable investigations a reasonable employer might have conducted in the circumstances.

6. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply section 98(4) which provides:

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

7. In applying that section, the tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

8. Finally, the tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have made to the conduct in question.

9. The employment tribunal is not permitted to substitute its own view on any of these issues for that of the employer. Specifically, the tribunal is not permitted to re-run the disciplinary hearing, decide whether the claimant was guilty or not guilty of the misconduct alleged and substitute its own decision for that of the employer. Instead, the tribunal must consider whether the process and decisions of the respondent fell within the band of reasonable responses to the conduct, noting that within that band, one employer might reasonably take one view, another might quite reasonably take another.

Evidence

10. The parties had prepared a joint bundle of documents (J) and referred to them by page number. The claimant lodged some additional documents relating to remedy at the hearing. The respondent called Mr Thomas Fitzmaurice, Field Service Manager, who conducted the investigation; Mr Mark Lawrence, Subsea Operations Manager, who chaired the disciplinary hearing; and Mr David Shea, Manager of Projects, who conducted the appeal. The claimant gave evidence on his own behalf.

Findings in fact

11. The following relevant facts were admitted or found to be proved:

12. The respondent designs, manufactures and installs subsea equipment for use in oil and gas extraction and production throughout the world. The respondent has field teams who work on offshore rigs. The field teams are involved in installing, commissioning and decommissioning subsea equipment. There are two types of specialist field teams. The first team type works with hydraulics. The second works with oil tools. The claimant was a field service specialist based in Portlethen, Aberdeenshire. He worked in one of the respondent's field hydraulics teams.

13. Within the oil and gas industry, it is standard practice to require employees and contractors to take an alcohol breathalyser screening test before travelling offshore for work. The reason for this is that those working on rigs operate heavy machinery which is under considerable (<15,000 psi) pressure. There is zero tolerance of substance abuse or alcohol consumption while offshore or immediately prior to going, due to the risk that a worker's impairment would pose to his own health and safety and that of other rig workers. Zero tolerance of alcohol consumption is an industry norm. All rig workers are well aware of this norm and expect to be breathalysed before boarding a flight to a rig. Specifically, the claimant was aware that the respondent and the client he had been sent by them to assist had a zero tolerance policy in relation to offshore workers testing positive for alcohol. Under this Policy, a worker with a blood alcohol concentration of more than 0.00% will not be allowed to board a flight to a rig. The claimant had been sent the respondent's client's offshore travel guidelines (J186) and was aware of their terms. Specifically, he was aware that the client required that "*all individuals have a blood alcohol concentration (BAC) reading of zero at all times whilst onsite or undertaking activities*" on their behalf (J193). The claimant had worked for this client before, most recently around the end of January 2022.

14. The respondent itself has a Disciplinary Procedure (J37). This contains a list of examples of offences that are normally regarded as gross misconduct (J42). The list includes the following example: "*for employees who work offshore or in safety-critical positions: testing positive for alcohol or illegal drugs or reasonable suspicion that such substances have been taken."*

15. The respondent also has a Substance Abuse Policy, referred to as an 'Appendix' (J44) which is owned by its Health and Safety Department. The Policy contains contradictory provisions. On the one hand, in the 'Definitions' section of the Policy, it states:

"***Drug and Alcohol Screening***

Drug and alcohol screening is a quick method of detecting the presence of a prohibited substance from a sample of urine, breath or blood whilst detecting the presence of a substance the procedure does not quantify levels and cannot be used in evidence for legal or disciplinary action. It is however, often used as justification for a subsequent drug and/or alcohol test." (My emphasis). In this section of the Policy, "screening" is distinguished from drug and alcohol "testing", which is defined as: "*the scientific analysis of urine, blood, breath or hair to establish the exact levels of particular identified chemicals within the sample*". The section goes on to say that the testing must be undertaken at an accredited laboratory under strict governance rules and that the results of such tests are evidential and can be used in a court of law or for internal disciplinary proceedings.

16. Section 5 of the Policy is headed "Company Position". It states so far as relevant for present purposes: "*Any person under the influence of a Prohibited Substance is prohibited from reporting for work, entering Company or Third Party premises, engaging in Company business or operating Company equipment*." It includes the following words: "*A person whether working onshore or offshore, will be deemed to be impaired by or under the influence of a Prohibited Substance, and in violation of this Standard Appendix, if:*

- *in the reasonable assessment of a Company or Client supervisor or representative, they are incapable of safely discharging their duties; and/or*
- *they register a positive result when tested for Prohibited Substances.*

17. Section 5.3 is headed 'Employees working Offshore' and states: *"Employees should proceed on the basis that all offshore clients operate a "zero tolerance" policy on Prohibited Substances. Any employee may be tested for Prohibited Substances prior to departure at a heliport and, if the test is positive they will not be permitted to board the flight.*

Consuming even moderate amounts of alcohol the evening prior to check in at a heliport may give a positive result at an alcohol test the following day. In view of this, personnel who are scheduled to work offshore shall refrain from

drinking alcohol for at least 24 hours prior to departure…." (My emphasis). The claimant was aware of this requirement.

18. Section 5.4 of the Policy is headed: 'Repercussions for Employees'. In contrast to the 'definitions' section of the Policy, it states: "*In the event that an employee, as the result of assessment by a Company or a Client representative or a positive alcohol/drug screening/test, is deemed to be impaired by or under the influence of a Prohibited Substance, the employee may be suspended from work with full pay pending further investigation. Disciplinary action, up to and including termination may subsequently be taken."* (My emphasis).

19. On Monday 21 March 2022 at 6.45am, the claimant was due to fly from a heliport in Dakar, Senegal to undertake work for one of the respondent's clients on the client's offshore rig. In accordance with standard industry practice and along with all seven of the other passengers booked onto the flight to the rig, the claimant was breathalysed (J75). The claimant was the only passenger whose breathalyser screening showed a positive result. A positive result is one that shows a BAC of more than 0.00%. After a wait of 37 minutes, the claimant was then breathalysed again. The second result was also positive. The claimant's first breathalyser was administered at 06:48 hours and showed 0.91. The second was administered at 07:25 hours and showed 0.78. By way of comparison, the drink driving limit in England and Wales is 0.8 and in Scotland it is 0.5. The respondent's client informed them at around 7:50 AM on 21 March 2022 that the claimant had failed two breathalyser tests and was accordingly not fit to board the helicopter flight to the offshore rig. The claimant was sent home by the respondent.

20. The respondent investigated the incident. Mr Tom Fitzmaurice, field service manager was appointed investigating officer. He met with the claimant via Microsoft Teams on 24 March 2022. The claimant was made aware that the purpose of the meeting was to investigate the allegation that he had failed two breathalyser tests. The claimant confirmed that he was aware that the tolerance for the breathalyser tests was zero and that the respondent's policy was, in his words: "*zero tolerance for drugs or alcohol*" (J84). The claimant

said that he had last consumed alcohol on the Saturday night, 19 March before leaving to travel on the Sunday morning (20 March). However, he denied having consumed alcohol whilst travelling or on location on the Sunday. He said that before taking the first breathalyser test he had been sick and had cleaned his teeth and used mouthwash. He said that the mouthwash was alcohol based and that he had not known the difference between alcohol based and alcohol free mouthwash "*until this carry on now*". The claimant said that he had spoken with Kevin Michie, field service supervisor (his line manager) after the second breathalyser result and that Mr Michie had initially told him he would be getting a third test. However, Mr Michie had then told him that the decision had been made that there was no need for a third test. The claimant also stated at the investigation meeting that on a previous trip on 27 January 2022, he had had a breathalyser reading over the limit. However he had had a coffee and had passed a second breathalyser on that occasion.

21. As the claimant had raised the issue of a third test, Mr Fitzmaurice interviewed Colin Lupton, project operations manager on 30 March 2022 to ask why a third breathalyser test was not carried out. Mr Lupton said that the levels were too high and that the client did not therefore proceed with another test. Mr Lupton said he had spoken to Allan Pritt, field services manager (the claimant's second line manager) about whether the claimant should be sent for a blood test and Mr Pritt had said no and to just get him back to the hotel. In relation to the claimant's previous failed breathalyser on 27 January 2022, Mr Lupton explained that mouthwash had been mentioned on that occasion also. However, the second breathalyser reading had then been negative and the claimant had been allowed to go on the rig.

22. On 30 March 2022 Mr Fitzmaurice interviewed Mr Michie. He asked Mr Michie if the claimant had given any indication as to why he failed the breathalyser tests. Mr Michie said that the claimant had told him on 21 March 2022 after failing the breathalysers that he had consumed a few bottles of wine on the plane to Senegal and had been sick in the early hours of the morning. (Mr Michie later clarified that these had been the small individual airline wine

bottles and not regular bottles). Mr Michie said he had told the claimant he would have to report this to their manager, Alan Pritt. He said that the claimant had asked him not to tell Mr Pritt he had been drinking but Mr Michie told him he could not hold this information back. Mr Michie also stated that he had asked the client's representative Jean Da Sylva whether the claimant seemed intoxicated and he had said that he was fine and only had red eyes which was most likely from travelling.

23. On receipt of the actual breathalyser results from the client, Mr Fitzmaurice asked that they be run by the respondent's medical adviser, ISOS to ensure they were interpreting the results correctly (J104). Mr Fitzmaurice also obtained a copy of the preboarding screening test sheet from the heliport. This showed that eight passengers had been screened for alcohol prior to the flight and that the others screened had all been negative (BAC 0.00%). Mr Fitzmaurice obtained and reviewed a copy of the user manual for the breathalyser that had been used to check he was interpreting the results correctly. He also obtained a copy of the calibration tag for the actual breathalyser tool used for the claimant's screenings (J130). This showed that the breathalyser was within its calibration period.

24. Thereafter, Mr Fitzmaurice interviewed Dave Whalen, the lead hand and field service specialist. Mr Whalen expressed surprise and said he felt it was out of character for the claimant. Mr Fitzmaurice contacted Allan Pritt to ask about the sequence of events on 21 March and why he had advised against a blood test. Mr Pritt emailed him back with his response (J121). In the email Mr Pritt stated that he had first been contacted by Mr Lupton at 9.22 am, had called him back straight away and been given the facts. He said he had advised Mr Lupton to get the claimant back to the hotel. Mr Lupton had then called him back at 10:01am to ask about a blood test. Mr Pritt said he had advised Mr Lupton that as it was now 3 hours since the last test, it was too late to do this in his opinion. Mr Fitzmaurice considered that finding a clinic and instructing a blood test might also have been a logistical challenge, given the location.

25. Dr Jonathan O'Keeffe, the respondent's global medical adviser was asked by HR to provide Mr Fitzmaurice with a medical opinion on the possible impact

of mouthwash and hand sanitizer on breathalyser results in light of the claimant's written representations he sent to Mr Fitzmaurice on 24 March 2022 (J84 to 94) in which he stated that he had not consumed alcohol and that the breathalyser tool had given false positive results. By email dated 11 April 2022 (J137) Dr O'Keeffe gave the following advice:

- That the results may be due to ingestion or presence of mouthwash but that the key to understanding if the result is reliable is often in the accompanying evidence. Was there witness evidence?; Was the result part of a pattern? etc.
- A false positive reading was not unheard of but was uncommon.
- Hand sanitiser on the skin was unlikely to interfere with a breathalyser result.
- Breathing in and out of a mouth that has residual and recent mouthwash is a known way of triggering a positive breathalyser result. Re commonly used mouthwashes, "*you may obtain a false positive for up to 15 minutes after use*"… "*The levels presented here above (first and second readings) suggest a different mode of ingestion, possibly drinking, and are less likely to be due to mouthwash use 37 minutes or earlier*."
- A person with the claimant's BAC reading levels would be in a normal to impaired physical or mental state.
- That the BAC tests are reliable. It is desirable in such cases to proceed quickly from an initial screening result to a blood sample where suspicion of alcohol ingestion by drinking is high. Often this is not possible.

26. After reviewing the information gathered from the investigation, Mr Fitzmaurice considered that there was a case to answer and informed the claimant accordingly. The claimant attended a disciplinary hearing on Friday 29 April 2022. The allegation was that he had failed two breathalyser tests on 21 March 2022 at the heliport in Senegal which resulted in him being unable to board the scheduled flight to the client's rig. The letter inviting him to the disciplinary hearing (J145) informed him that if substantiated this would

constitute gross misconduct and "*your future employment with the Company may be subject to the outcome of this meeting*". Along with the letter, the claimant was provided with copies of all the documents and witness statements gathered in the investigation.

27. The disciplinary hearing was chaired by Mark Lawrence, operations manager. Samantha Johnston, HR business support was also in attendance and Kate Fyfe, HR intern took minutes. The claimant was informed of his right to be accompanied by a work colleague or trade union representative but declined. The claimant suggested that the two positive breathalyser test results had been due to using mouthwash. One of his key arguments was that he should have been sent for a blood test following the two positive breathalyser results.

28. Mr. Lawrence decided to investigate further the points the claimant had raised during the disciplinary hearing and he carried out the following further investigations: He re-interviewed Mr Michie in connection with points the claimant had raised about the reliability of his evidence of the timing and manner of his phone calls with the claimant on 21 March. Mr Michie said he had spoken to the claimant for five minutes or more on Mr Da Sylva's phone. Mr Michie confirmed that the claimant had said to him he had had a few bottles of wine on the flight on 20 March. He clarified that it was the small measures provided when travelling, not the big bottles. He also confirmed that the claimant had asked him not to tell Mr Pritt and he had said that he would have to. Mr Michie said that the claimant was a good worker and he didn't want to see him lose his job. Mr Lawrence did not find any evidence that Mr Michie had a grudge or grievance against the claimant. Mr Lawrence looked into the issue the claimant had raised about the timing of Mr Michie's calls, but concluded that nothing turned on this. He concluded that there did not appear to be anything wrong with the breathalyser tool since the seven other passengers on the flight had all registered as alcohol free and the tool was within its calibration period. With regard to the statement the claimant had produced from a third party (J158), in which the third party stated that he had failed a first breathalyser test on 6 October 2021 and then passed a second

test 30 minutes later, Mr Lawrence did not think this was particularly relevant since in contrast to the claimant, this person had passed his second test.

29. By email dated 3 May 2022, the claimant referred Ms Johnston, HRBP to the statement in the respondent's Drug and Alcohol policy (quoted at paragraph 15 above) which states that screening cannot be used for disciplinary action. Ms Johnston responded by sending the claimant an email from the respondent's health and safety department stating that a blood test was not required under the policy for an offshore employee who had failed two breathalysers (J140).

30. Having looked at the evidence, Mr. Lawrence concluded that the claimant had failed two breathalysers on 21 March at the heliport in Dakar, Senegal and that the breathalyser failures were due to the claimant's consumption of alcohol. He considered it unlikely that the use of mouthwash or hand sanitizer would account for two failed breathalyser results. He felt that it was strange that the claimant should have used mouthwash containing alcohol again after failing a breathalyser in January because of alcohol in mouthwash. He wondered why the claimant would do the same thing again. Mr Lawrence reasoned that even if the first failed breathalyser *had* been down to mouthwash again, that the claimant would have passed the second breathalyser 37 minutes later as had happened in January. Mr. Lawrence considered that while in an ideal case an employee should be sent for a blood test following two failed breathalyser results, this is not always possible when working in remote locations. The claimant acknowledged during the investigation meeting that he knew that the respondent and the client had a strict zero tolerance approach to alcohol consumption prior to attending a rig. Mr Lawrence concluded that the claimant had committed gross misconduct.

31. With regard to the appropriate sanction, Mr Lawrence felt that the claimant had been well aware of the zero tolerance policy for alcohol offshore. He considered it a very serious safety issue. Mr Lawrence accepted the evidence of Mr Michie that the claimant had told him on 21 March that he had consumed a few bottles of wine on the flight to Senegal the night before his departure to the rig. Thus he concluded that the claimant's breathalyser failures were due

to the consumption of alcohol contrary to the respondent's policy and that they were not false positives as stated by the claimant. In these circumstances, Mr Lawrence concluded that the claimant should be dismissed. He felt that dismissal was consistent with other cases he was aware of. Had he accepted the claimant's explanation relating to mouthwash and had he not had the evidence of the conversation about alcohol consumption from Mr Michie, he would probably have given the claimant a final written warning on the basis that mouthwash clearly states when it contains alcohol.

32. By letter dated 26 May 2022 (J206), Mr. Lawrence informed the claimant that he was summarily dismissed for gross misconduct. He was advised of his right of appeal. The claimant appealed against his dismissal by letter dated 5 June 2022. He was invited to attend a disciplinary appeal hearing on 17 June 2022. He was informed of his right to be accompanied. The appeal hearing was chaired by David Shea, Manager of Projects and minuted (J221) by Kate Fyfe, HR intern. Having listened to the claimant, Mr Shea further investigated points the claimant had raised relating to the suitability of the breathalyser tool used by the client in terms of the respondent's policy; the competency of the individual using it; why the claimant had not been sent for a blood test; whether, as the claimant asserted, a blood test was "common and accepted practice" following two failed breathalyser results; and whether it was acceptable for the breathalyser screening to be done through a straw (due to Covid). Mr Shea's further investigations established to his satisfaction that: the breathalyser tool was suitable and appropriately calibrated; that it had been administered by ground handling staff at the heliport in accordance with a standard operating procedure; that this did not require any particular training and that all the other helicopter passengers had achieved a zero result. Mr Da Sylva referred Mr Shea to the iBlow High Speed Industrial Breathalyser Manufacturer's YouTube video for further information. Mr Shea noted from this that the use of a straw was approved.

33. Mr Shea established from ISOS that they operated a blood testing facility 17km from the heliport where the claimant had failed the breathalyser tests. He spoke to Mr Pritt regarding why a blood test had not been done. He also

interviewed Mr Lawrence and contacted the respondent's offshore health and safety manager, Ms Vikse (J243). Mr Pritt (J226) told Mr Shea that as the claimant had failed two standard tests, a further test was not required. Also, he said that it would be very difficult to get a blood test in Senegal quickly enough for it to be efficient. He had not therefore explored getting a blood test. Ms Vikse advised that the second breathalyser test was evidentiary in line with police procedures. Mr Shea concluded from his further investigations that it was not "common and accepted practice" to get a blood test done after two failed breathalysers. Having considered all the evidence before him, Mr Shea reached the view that Mr Lawrence's decision was appropriate in all the circumstances.

34. By letter dated 3 August 2022 (J244) Mr Shea informed the claimant that his appeal had been unsuccessful and explained his reasons in some detail, addressing each point the claimant had raised.

Discussion and Decision

35. I was satisfied that the respondent had shown that the claimant was dismissed for a reason relating to his conduct. The list of examples of gross misconduct in the respondent's disciplinary procedure includes the following example: "*for employees who work offshore or in safety-critical positions: testing positive for alcohol or illegal drugs or reasonable suspicion that such substances have been taken."* The claimant worked offshore and in a safety critical position. Obviously, he did not 'test positive for alcohol' as defined in the respondent's policy but there were, in my view, grounds for reasonable suspicion that alcohol had been taken in the previous 24 hours.

36. It was clear from the evidence that Mr Lawrence believed that the claimant had failed two alcohol screening breathalysers and that he had done so because he had consumed alcohol the previous evening and not because they were false positive results as the claimant alleged. Mr Lawrence did not believe the claimant's denial and did not accept the explanations the claimant put forward for the positive screening tests. The grounds upon which Mr Lawrence reached his belief in the claimant's misconduct were: firstly, the two

failed breathalyser results (with associated documentary evidence and correspondence from the respondent's client and the heliport) and secondly, the evidence of Kevin Michie that the claimant had told him on 21 March 2022 that he had consumed a few bottles of wine on the plane to Senegal the previous evening. It appeared to me that these were reasonable grounds for Mr Lawrence's belief. (To avoid repetition, I have considered the claimant's arguments about the admissibility of the breathalyser results and the respondent's acceptance of Mr Michie's evidence below).

37. In relation to whether sufficient investigation had been carried out, I considered that the respondent's investigation was well within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. Mr Fitzmaurice met with the claimant who confirmed that he was aware that the respondent's policy was, in his words: "*zero tolerance for drugs or alcohol*" (J84). The claimant said that he had spoken with Kevin Michie, field service supervisor (his line manager) after the second breathalyser result and that Mr Michie had initially told him he would be getting a third test. However, Mr Michie had then told him that the decision had been made that there was no need for a third test. The claimant also stated at the investigation meeting that on a previous trip on 27 January 2022, he had had a breathalyser reading over the limit. However he had had a coffee and had passed a second breathalyser test on that occasion.

38. As the claimant had raised the issue of a third test, Mr Fitzmaurice interviewed Colin Lupton, project operations manager on 30 March 2022 to ask why a third breathalyser was not carried out. Mr Fitzmaurice interviewed Mr Michie. He asked Mr Michie if the claimant had given any indication as to why he failed the breathalyser tests. Mr Michie said that the claimant had told him on 21 March 2022 after failing the breathalysers that he had consumed a few bottles of wine on the plane to Senegal and had been sick in the early hours of the morning. On receipt of the actual breathalyser results from the client, Mr Fitzmaurice had asked that they be run by the respondent's medical adviser, ISOS to ensure they were interpreting the results correctly (J104). Mr Fitzmaurice also obtained a copy of the preboarding screening test sheet from

the heliport. This showed that eight passengers had been screened for alcohol prior to the flight and that the others screened had all been negative. Mr Fitzmaurice had obtained and reviewed a copy of the user manual for the breathalyser that had been used to check he was interpreting the results correctly. He had also obtained a copy of the calibration tag for the actual breathalyser tool used for the claimant's screenings (J130). This showed that the breathalyser was within its calibration period.

39. Thereafter, Mr Fitzmaurice had interviewed Dave Whalen, the lead hand and field service specialist. Mr Fitzmaurice had contacted Allan Pritt to ask about the sequence of events on 21 March and why he had advised against a blood test. Mr Pritt emailed him back with his response (J121). Dr Jonathan O'Keeffe, the respondent's global medical adviser was asked to provide Mr Fitzmaurice with a medical opinion on the possible impact of mouthwash and hand sanitizer on breathalyser results in light of the claimant's written representations he sent to Mr Fitzmaurice on 24 March 2022 (J84 to 94) in which he stated that he had not consumed alcohol and that the breathalyser tool had given false positive results. All told, this appeared to me to be a fairly painstaking investigation in which leads given by the claimant had been carefully followed up.

40. Mr James submitted that the respondent had not established the reason for dismissal because the charge the claimant faced was that he had failed two breathalyser tests on 21 March 2022 etc, whereas the dismissal letter stated that Mr Lawrence believed the claimant had failed the breathalyser tests because he had consumed alcohol. I considered that this argument was unduly legalistic. Everyone knows that the point of a breathalyser is to screen for alcohol. The claimant accepted in cross examination that it was common knowledge and an industry norm that there was zero tolerance of offshore workers testing positive for alcohol and that the reason for this was health and safety. He knew that the point of the breathalyser administered to him was to screen for alcohol. He accepted that a BAC reading of 0.00% was needed and that he was required to refrain from drinking alcohol for at least 24 hours prior to departing offshore. His position was not that he did not understand

this or did not know that the breathalyser was to screen for alcohol. His position was that the breathalyser results were false positives. The claimant was given the opportunity to comment upon and attack Mr Michie's evidence that the claimant had told him he had consumed wine on the plane the evening before departure to the heliport. Indeed, the claimant lodged screenshots and was critical of Mr Michie's evidence and his criticisms were followed up and investigated, both by Mr Lawrence and by Mr Shea on appeal.

41. A further argument put forward by Mr James on behalf of the claimant was that the respondent's reason for dismissal "*impermissibly took into account prior conduct*" because: "*Part of the respondent's basis for concluding that the claimant had consumed alcohol was a similar incident which had occurred in January 2022 (207). That prior incident did not result in any disciplinary sanction, and was not investigated*." Mr James argued that the January incident did not form part of the charge against the claimant and he was entitled for it to be ignored. I did not think there was anything in this point. The only relevance of the claimant having failed a first breathalyser screening in January 2022 was that he had explained it as down to alcohol-based mouthwash and was now giving the same explanation in March. The point was that the claimant would have known from his experience in January that some mouthwashes contained alcohol and could trigger a breathalyser and would have been unlikely to make the same mistake again. It was not a "charge", it was a factor that was thought 'strange' and that cast doubt on his explanation.

42. Mr James was understandably critical of the wording of the respondent's policy on substance abuse. I agree with Mr James that it was for Mr Lawrence to take responsibility for interpreting the respondent's policy and that the interpretation of the person who drafted the policy was not conclusive. It was particularly unhelpful that the policy contradicted itself, though it was clear from the claimant's responses in cross examination that although he knew about the requirement for a BAC reading of 0.00% on a breathalyser prior to going offshore and understood that that meant not drinking alcohol in the 24 hours prior, he was not, in fact familiar with the policy in the bundle.

43. The difficulty with the policy is that, as Mr James pointed out, in the 'Definitions' section, under "*Drug and alcohol screening*", it says: "*Drug and alcohol screening … whilst detecting the presence of a substance the procedure does not quantify levels and cannot be used in evidence for legal or disciplinary action…..*" Whereas, in the section of the policy headed 'Company position', it says: "*Consuming even moderate amounts of alcohol the evening prior to check in at a heliport may give a positive result at an alcohol test the following day. In view of this, personnel who are scheduled to work offshore shall refrain from drinking alcohol for at least 24 hours prior to departure…."* Furthermore, Section 5.4 of the Policy is headed: 'Repercussions for Employees and states: "*In the event that an employee, as the result of assessment by a Company or a Client representative or a positive alcohol/drug screening/test, is deemed to be impaired by or under the influence of a Prohibited Substance, the employee may be suspended from work with full pay pending further investigation. Disciplinary action, up to and including termination may subsequently be taken."* (My emphasis). Thus section 5.4 does envisage that a positive alcohol screening may lead to an employee being deemed to be impaired by or under the influence of a prohibited substance and does indicate that disciplinary action up to and including termination may be taken.

44. Mr James argues (correctly) that the breathalyser results are the cornerstone of the respondent's case against the claimant. However, he submits that the respondent cannot take the breathalyser results into account in disciplinary proceedings in terms of its own policy and that to do so would be outside the range of reasonable responses. I have considered this argument carefully. In my view, the difficulty with it is that whilst the 'definitions' section of the policy does indeed say that screening 'cannot be used in evidence for disciplinary action', the section headed 'repercussions for employees' clearly says that in the event that an employee is deemed to be impaired by or under the influence of a prohibited substance as a result of assessment by a company or client representative or a positive alcohol screening/test, disciplinary action up to and including termination may be taken. As observed above, the policy contradicts itself. However, given the admitted and well-known practice in the

industry of relying on breathalyser screening, and the claimant's acquaintance with and acceptance of it, it was not, in my view, outwith the band of reasonableness for the respondent to interpret the policy as they did.

45. At the investigatory meeting with Mr Fitzmaurice, the claimant confirmed that he was aware that the respondent's policy was, in his words: "*zero tolerance for drugs or alcohol*" (J84). However, his position was that the results were false positives and that he ought to have been offered a third test and latterly, that he ought to have been offered a blood test. Although the breathalyser results were an important part of the evidence the respondent gathered, they were not the only evidence. The respondent also accepted on balance the evidence of Mr Michie that the claimant had told him he had been drinking on the plane. The claimant was given the opportunity to challenge this evidence and he did so. His challenges were considered by the respondent's decision-makers. Ultimately, the respondent accepted Mr Michie's evidence. In my view, this acceptance was also not outside the band of reasonable responses to the evidence in question. It is not therefore, for this tribunal to substitute its own assessment of the evidence for that of the employer.

46. In all the circumstances, I am satisfied that the respondent has shown that the claimant was dismissed for a reason relating to his conduct. That is a potentially fair reason for the purposes of Section 98(2) of the Employment Rights Act 1996 ("ERA").

47. I turned to consider the application of Section 98(4) to the facts of this case. In the context of the reason for dismissal I considered the procedure adopted by the respondent in reaching its decision. As Mr Alexander submitted, the claimant was made aware of the case against him. He knew he was at risk of dismissal. He was given a chance to put his position forward at the investigation meeting and to state his case at the disciplinary and appeal hearings. He had a right of appeal and was made aware of his right to be accompanied, though he chose not to exercise this. The disciplinary and appeal hearers were impartial and careful. Viewed as a whole (per Taylor v OCS Group Limited [2006] IRLR 613 CA) the procedure adopted by the

respondent was within the range of reasonable procedures a reasonable employer might have adopted in the circumstances.

48. With regard to the appropriate sanction, as Mr Alexander submits, different employers take different approaches to whether something constitutes gross misconduct. This issue must be considered in relation to the particular employment and employee. In this case, the respondent believed on reasonable grounds that the claimant had failed two breathalysers because he had consumed alcohol in the 24 hour period immediately prior to travelling offshore. The claimant accepted that he was aware that zero tolerance of offshore workers testing positive for alcohol is an industry norm and was the specific policy of the respondent and the client to whom he had been sent. He agreed that the reason for this is the health and safety of offshore workers. The discussion at paragraphs 42 to 45 is also relevant here. For some employers, breathalysing for alcohol and adopting a policy of zero tolerance of alcohol in a particular business area might not be within the band of reasonable responses. However, within the oil and gas industry, it is standard practice to require employees and contractors to take an alcohol breathalyser before travelling offshore for work because those working on rigs operate heavy machinery which is under considerable (<15,000 psi) pressure. Indeed, the claimant was himself involved in such work. Alcohol is accordingly a very serious health and safety issue and in my view, the respondent's approach to it was within the range of reasonable approaches in the circumstances. There is zero tolerance of alcohol consumption while offshore or immediately prior to going, due to the risk that a worker's impairment would pose to his own health and safety and that of other rig workers.

49. I was satisfied that although there was zero tolerance of alcohol offshore, that did not mean that there was a policy of automatic dismissal in the event of an employee failing two breathalysers. I concluded that in this case, the respondent had considered all the evidence in adopting its sanction of dismissal, including the evidence of Mr Michie that the claimant had told him he had been drinking on the plane the previous evening. Mr Lawrence testified and I concluded that had Mr Lawrence accepted the claimant's explanation

relating to mouthwash; and had he not had Mr Michie's evidence of the conversation about alcohol consumption on the plane, Mr Lawrence would probably have given the claimant a final written warning on the basis that mouthwash clearly states when it contains alcohol.

50. Taking all the foregoing facts into account and bearing in mind the size and administrative resources of the respondent, I have concluded that dismissal as a sanction, although at the harsh end of the spectrum, was nevertheless within the band of reasonable responses of a reasonable employer in the circumstances. It follows that the claim does not succeed and is dismissed.

Employment Judge: M Kearns
Date of Judgement: 10 February 2023
Date sent to Parties: 10 February 2023