EMPLOYMENT TRIBUNALS

Claimant: Mr P Glenholmes

Respondent: Network Rail Infrastructure Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 16, 17 and 18 October 2023

Before: Employment Judge Brewer

Representation

Claimant: Ms I Ferber KC, Counsel
Respondent: Mr J Tunley, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1. the claimant's claim for unfair dismissal succeeds,

2. the claimant's claim for unauthorised deductions from wages fails and is dismissed,

3. the claimant's basic award for unfair dismissal is reduced by 100% on a just and equitable basis,

4. the claimant's compensatory award shall be nil because it is not just and equitable to award him compensation or alternatively the compensation should be reduced by 100% to reflect his contributory conduct.

REASONS

Introduction

1. In this case the claimant is Mr Paul Glenholmes. He was represented by Mr Tunley, Counsel. The respondent is Network Rail Infrastructure Limited which was represented by Ms Ferber KC.

2. I had witness statements and heard oral evidence from the claimant and his sister Ms P Glenholmes. For the respondent I had witness statements and heard oral evidence from Ms Choudhry, dismissing manager, Mr Mallinson, appeal manager and Mr Lidgett, Senior HR Business Partner. I was also given a witness statement from the claimant's Trade Union representative, Mr Stanton but he was not present to be cross-examined and therefore I give that such weight as is appropriate in the circumstances.

3. I had an agreed bundle running to 1049 pages. I also had an opening statement from Ms Ferber which also largely served as written submissions.

4. At the conclusion of the evidence I heard oral submissions from both representatives and I am grateful to them for their assistance during this hearing.

5. We concluded the evidence by lunch on day 2 and I heard submissions in the afternoon of day 2. I deliberated and gave an oral judgment on the afternoon of day 3. I set out below my detailed reasons.

6. One significant point to state here is that despite the respondent denying the claim, at the outset of her submissions, Ms Ferber, on behalf of the respondent conceded that the dismissal was procedurally unfair, and she focused her submissions on why the claimant should receive no basic or compensatory awards.

Issues

7. Given the concession in relation to the unfair dismissal claim, the issues I must decide are as follows:

    a. what is the claimant's basic award,

    b. should the basic award be reduced pursuant to section 122(2) Employment Rights Act 1996,

    c. what compensation should be awarded to the claimant,

    d. should any compensation be reduced on a just and equitable basis,

    e. should any compensation be reduced pursuant to section 123(6) Employment Rights Act 1996.

8. In relation to the claim for unauthorised deductions the issues are:

a. whether the claimant was reinstated on suspension and if so

b. whether he was then entitled to full pay, and if so,

c. what is the amount that was properly payable, on what dates and what was the deduction made by the employer on those dates.

Law

9. By a claim form presented on 25 October 2022, the claimant brought claims for unfair dismissal and unauthorised deductions from wages. Below is a brief description of relevant law for each claim.

Unfair dismissal

10. The relevant statute law is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). I need not set out the text of those sections here.

11. The issues in an unfair dismissal claim, where the fact of dismissal is not in dispute, are:

a. What was the reason or principal reason for dismissal?

b. If the reason or principal reason for dismissal was a potentially fair reason under the Employment Rights Act 1996 (ERA) then did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

c. Was the dismissal fair in all the circumstances taking into account the size and administrative resources of the respondent and equity and the merits of the case?

d. If the claimant was unfairly dismissed, then he may be entitled to a compensatory award. If there is a compensatory award, how much should it be?

i. What award of compensation would it be just and equitable to make?

ii. Did he cause or contribute to dismissal by blameworthy conduct?

iii. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

iv. What basic award is payable to the claimant, if any?

v. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

The basic award

12. The amount of the basic award is of course determined by reference to length of service, age and a week's pay.

13. In relation to reductions in the basic award, it is the conduct of the employee alone that should be considered, not that of any other employee, see **Parker Foundry Ltd v Slack** 1992 ICR 302, CA. Nor is the conduct of the employer a relevant consideration (see **Williams v Amey Services Ltd** EAT 0287/14).

14. The conduct of the employee should be 'culpable or blameworthy' (see **Langston v Department for Business, Enterprise and Regulatory Reform** EAT 0534/09).

15. In **Steen v ASP Packaging Ltd** 2014 ICR 56, EAT, the EAT, summarising the correct approach under S.122(2), held that it is for the tribunal to:

    a. identify the conduct which is said to give rise to possible contributory fault,

    b. decide whether that conduct is culpable or blameworthy, and

    c. decide whether it is just and equitable to reduce the amount of the basic award to any extent.

The compensatory award

16. Section 123 of the Employment Rights Act 1996 (ERA) requires an employment tribunal to award an amount which is just and equitable and the case law confirms that regard must be had to the loss incurred by the employee as a result of the dismissal. However, other factors apart from actual loss can be taken into account.

17. In considering what award it is just and equitable to make, where there is procedural fault, but the employee is otherwise culpable and but for the procedural unfairness the dismissal would have been fair, it may be just and equitable to reduce the compensatory award. This type of reduction is commonly known as a 'Polkey reduction' (or deduction) after the case in which the House of Lords confirmed that such a reduction was possible — **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL.

18. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

19. There is in practice little difference in effect between a just and equitable '**Polkey'** reduction as set out above and a reduction in compensation for contributory conduct in cases where the dismissal has been rendered unfair

solely because of procedural failings in the dismissal procedure, where the tribunal is satisfied that the employee could nevertheless have been fairly dismissed at a later date or if the employer had followed a proper procedure.

20. In **Nelson v BBC (No.2)** 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

    a. the conduct must be culpable or blameworthy,

    b. the conduct must have actually caused or contributed to the dismissal, and

    c. it must be just and equitable to reduce the award by the proportion specified.

21. The EAT in **Sanha v Facilicom Cleaning Services Ltd** EAT 0250/18 stressed that the words 'culpable' and 'blameworthy' are synonyms, not alternatives: *culpable* just means 'deserving of blame'.

22. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was — **Steen v ASP Packaging Ltd** 2014 ICR 56, EAT.

23. In **Hollier v Plysu Ltd** 1983 IRLR 260, EAT, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent). This is of course guidance only. The amount of any reduction is a matter of discretion for the tribunal.

Reason for dismissal

24. In this case the reason for dismissal was conduct, in particular, gross misconduct. In terms of case law, the relevant test is as follows: did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:

    a. Did the respondent genuinely believe in the claimant's guilt,

    b. Were there reasonable grounds for the respondent's belief in the claimant's guilt,

    c. At the time the belief was formed the respondent had carried out a reasonable investigation,

    d. Did the respondent otherwise act in a procedurally fair manner,

    e. Was dismissal within the range of reasonable responses?

(see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588)

25. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

Gross misconduct

26. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e., it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

Reasonableness of summary dismissal

27. In determining the reasonableness of a summary dismissal, the tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct. In **Eastland Homes Partnership Ltd v Cunningham** EAT 0272/13 the EAT held that the employment tribunal had fallen into error when it failed to consider whether it was reasonable for the employer to characterise the employee's conduct as gross misconduct.

28. Even if an employee has admitted to committing the acts of which he or she is accused, it may not always be the case that he or she acted wilfully or in a way that was grossly negligent. See for example **Burdett v Aviva Employment Services Ltd** EAT 0439/13 B) in which the EAT said that assuming that there were reasonable grounds for a finding of gross misconduct, the tribunal should have assessed whether it was within the range of reasonable responses for the employer to dismiss Burdett for that gross misconduct. It cannot simply be assumed that a finding of gross misconduct will always justify dismissal. Evidence of mitigation was very relevant in this case and the tribunal had erred in failing to consider its impact on the reasonableness of the sanction imposed.

29. I note the case of **Kuehne and Nagel Ltd v Cosgrove** EAT 0165/13. in which C, a warehouse operative in a safety-critical role, was dismissed when she tested positive for cannabis. C admitted having smoked cannabis the previous weekend (and it was agreed before the tribunal that this historic use could produce a positive test result). The tribunal found the dismissal was unfair in part because the employer had not conducted further investigations to establish whether the positive test result was because C was in fact under the influence or was simply due to her historic use of the drug. Overturning the tribunal's decision, the EAT held that the employer could not be criticised for failing to conduct further tests when, as the tribunal had accepted, the relevant tests were not capable of assessing current intoxication. Furthermore, the tribunal had erred in ignoring the fact that the employer's policies, introduced because

of the safety-critical environment in the warehouse, provided that a positive drug test result in itself constituted gross misconduct.

30. Further, in **Roberts v British Railways Board** EAT 648/96 the employer operated an alcohol and drugs policy which involved random testing of its staff, a policy which, the tribunal found, was '*of great importance so far as safety in the railway network is concerned'*. The policy stipulated that a positive test would result in the employee's dismissal. When the employee tested positive for cannabis in a random test, he was summarily dismissed. The tribunal ruled that the dismissal was fair and the EAT upheld that finding. Similarly, in **Sutherland v Sonat Offshore (UK) Inc** EAT 186/93 an employee who worked on an offshore rig was dismissed because of a positive drug screening without a formal disciplinary hearing. The EAT said that this was a case in which the employer was entitled to take the view that, from the time the urine sample was confirmed as positive, to hold a formal hearing would serve no useful purpose.

31. Where a policy does not provide that failing a test in itself is a ground for dismissal, a full investigation must be carried out (see for example **Ball v First Essex Buses Ltd** ET Case No.3201435/17).

Unauthorised deductions from wages

32. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

> *'An employer shall not make a deduction from wages of a worker employed by him.'*

33. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

34. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. a contract of employment (defined as a 'contract of service or apprenticeship'), or

    b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

35. Section 27(1) ERA defines 'wages' as:

> *'any sums payable to the worker in connection with his employment'*

36. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

37. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

38. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Findings of fact

39. I make the following findings of fact. Numbers in brackets refer to pages in the bundle.

40. On 14 July 2014 the claimant commenced employment with the respondent as an On Train Technician. The claimant's role related to track safety, and he was therefore in what is best described as a health and safety critical role. At all material times the claimant's line manager was Mr Richard Wilkinson-Ford.

41. Clause 17.2 of the claimant's contract of employment signposts the claimant to the respondent's Drug and Alcohol Policy, which was to be found on the respondent's intranet, in the Employee Handbook [82].

42. I find that the Drug and Alcohol Policy was contractual on the basis that it is incorporated by reference in clause 17.2 of the claimant's contract of employment and there is nothing to suggest it was not intended to be so incorporated. I contrast that with, for example, clause 17.7 which expressly states that the disciplinary policy is non-contractual.

43. The respondent's disciplinary policy lists as one of the examples of gross misconduct "*Breach of Network Rail's alcohol and drugs policy*" [106]. Paragraph 2.10.1 of the disciplinary policy, under the heading "Gross Misconduct" states:

> "*Instances of gross misconduct where found* ***will result in dismissal*** *without notice or pay in lieu of notice*" (emphasis added)
>
> [105]

44. The respondent's Drug and Alcohol Policy, which can be found from [108], is very detailed. In relation to drugs, the following are noteworthy:

a. 'Drug' is defined as a substance that, when taken into the body is capable of affecting mental or physical performance [114],

b. an "*unfit state through drugs*" includes having taken a dosage of any drug that could adversely affect a person's safety, performance, conduct or efficiency…" [115],

c. the drugs listed as ones not to take include cocaine [115],

d. one of the purposes of the policy is to prevent problems resulting from drug misuse [116] and in this context, 'misuse' includes using drugs for a purpose not consistent with legal guidelines [114] which I find must inevitably include as misuse the taking of illegal drugs,

e. one of the express responsibilities of employees under the policy is to find out if there might be side effects to any medication which might impair safety, and this includes prescribed and non-prescribed drugs [116]

45. The claimant was on prescribed medication for a disability. That medication caused him indigestion and he had been taking over the counter medication to alleviate the indigestion. However, on 6 September 2020 the claimant purchased what he refers to as Inka Tea (although the product name is Mate Tea and sold as "*tea of the Incas*"). He did not know what was in the tea, but it worked almost immediately to relieve his digestion issue. He continued to use the tea thereafter.

46. Having received 8 weeks' prior notice, on 24 Sept 2020 the claimant was given a periodic drug and alcohol screening test. The result was that the claimant tested positive for benzoylecgonine, which is the metabolite of cocaine routinely looked for in urine to establish that cocaine had recently been used by the test subject [126 - 8].

47. On 30 September 2020 the test result was confirmed to the claimant's line manager by the respondent's HR team. The email from HR at [225] states that:

> *"The failure of a drugs and alcohol test is a breach of Network Rail's Drug and Alcohol Policy…and the disciplinary procedure is to be initiated…"*

48. The HR team also gave guidance to Mr Wilkinson-Ford that the claimant "*should be suspended with immediate effect due to the failed D&A test"* [237]. HR also told Mr Wilkinson-Ford what documentation he needed to complete [239], what the specific wording of the allegation was [239], how to complete a risk assessment [239] and what his next steps were to be [239].

49. The claimant was suspended on 30 September 2020 [226 - 7].

50. Mr Shuren Suthanthiran was appointed as the investigating officer and on 14 October 2020 he invited the claimant to an investigation meeting to take place on 21 October 2020 [270].

51. On 19 October 2020 the claimant provided a personal statement for the investigation [276-9]. In this statement the claimant confirms that the most likely cause of his failed test was his ingestion of the "*Inka Tea*" (*sic*) which he purchased from a market stall on 6 September 2020. The product purchased by the claimant did not include a list of ingredients [601, 602]. He said that having researched the product, the claimant now understood that the tea contained cocaine and he says expressly:

> "*Having the information and research which I now know, I would not have in good conscience bought the product or consumed it."*
>
> [278]

52. On 21 October 2020 Mr Suthanthiran held an investigation meeting with the claimant. Notes of the meeting with the claimant's corrections in red is at [306-9].

53. On 3 November 2020 Mr Suthanthiran's investigation report recommended a formal disciplinary hearing based on the finding that the claimant "*knowingly ingested Coca Tea without understanding what it contained*" [312 - 4]'

54. On 10 November 2020 the claimant was invited to a disciplinary hearing with Shaun Bradley to take place on 18 November 2020 [324-5].

55. On 16 November 2020 the claimant emailed Mr Bradley refusing to attend disciplinary, raising various concerns as well as ill health [334 - 5].

56. On 17 November 2020 Mr Bradley emailed the claimant, responding to his concerns [336].

57. On 18 November 2020 the claimant informed Mr Bradley that he was not fit to attend a disciplinary hearing [346-7] and on 19 November 2020 the claimant produced a sick note citing "*stress at work*" [349].

58. On 23 November 2020 the claimant raised a grievance against Mr Suthanthiran and Mr Bradley [355-6]. The grievance refers to a lack of due diligence citing what he called errors with the investigation meeting minutes and that Mr Bradley had ignored the claimant's concerns.

59. As a result, on 1 December 2020 disciplinary procedure was put on hold, pending the grievance being dealt with [362]. Helen Wilkinson was appointed to hear the grievance.

60. On 22 January 2021 Helen Wilkinson held her first grievance meeting with the claimant. Notes of the meeting are at [483-8].

61. Between 28 January and 15 February 2021 Ms Wilkinson corresponded with Mr Bradley and Mr Suthanthiran as part of her grievance investigation [504 - 7, 509 - 513].

62. In early March 2021 the clamant was sick with COVID [550].

63. On 19 March 2021 Ms Wilkinson held her second grievance meeting with the clamant and the notes of that are at [555 - 61].

64. On 24 March 2021 Ms Wilkinson issued her grievance report and outcome letter. She upheld the grievance and made recommendations as follows:

    a. the wording of the disciplinary Investigation Report should be amended to replace the words “Paul knowingly ingested coca tea without understanding what it contains”,

    b. the wording of the disciplinary Investigation Report should be amended to reflect that there were now 2 versions of the Investigation Meeting notes,

    c. provision of a suitable device to the claimant, so he can take part in future virtual meetings,

    d. the appointment of new disciplinary manager,

    e. additional support for the claimant’s disability, to be advised by HR,

    f. the new disciplinary manager to review all of the evidence and determine whether the disciplinary process should continue,

    g. all information to be shared with the claimant before any disciplinary hearing,

    h. the claimant to be given the opportunity to provide further evidence,

    i. the claimant should have assistance in obtaining more detailed test report of the original drug test, and

    j. the claimant’s line manager must complete additional training.

    [562 - 7, 578 - 9]

65. On 25 March 2021 the claimant asked for his urine sample to be re-tested at his own expense [575].

66. On 1 April 2021, and in accordance with the 4th Grievance Recommendation, a new disciplinary manager was appointed, Julia Choudhry, and she emailed the claimant to introduce herself [603].

67. On 15 April 2021 the claimant requested that the laboratory is asked how coca tea and cocaine could be differentiated in future, because “*It’s going to happen again and there should be something in place to stop it happening*”. This evidenced an apparent misunderstanding on the part of the claimant that there was a difference between cocaine and coca leaves. In response, the Laboratory replied that:

    “*Drinking coca tea can cause a positive result for benzoylecgonine, the main urinary metabolite of cocaine as the donor is actually drinking tea with cocaine in it… we cannot tell if the cocaine positive result is due*

> *drinking coca tea or using cocaine by other means, as the benzoylecgonine detected in both cases is due* [to the] *ingestion of cocaine. This is because coca tea is made from coca plant leaves and contains cocaine…this means that* [the claimant] *has used cocaine…drinking cocaine in tea does not make it legal*"
>
> [590 – 591].

68. Having agreed a new hearing date with the claimant, on 23 April 2021 Ms Choudhry postponed the hearing until receipt of the result of the re-testing of the claimant's urine sample [615].

69. On 30 April 2021, in accordance with Grievance Recommendation 6, Ms Choudhry emailed the claimant confirming that she had reviewed the evidence, and that she considered that there did need to be a disciplinary hearing [629].

70. On 7 May 2021 the claimant attempted suicide.

71. On 17 May 2021 the claimant's chosen laboratory, Eurofin, provided a re-test report which stated that the sample was positive for benzoylecgonine at 417 ng/ml. It also confirmed that the "*Confirmation cut-off*" is 100 ng/ml, which means that the claimant had over 4 times the cut-off amount in his urine which the laboratory said was "*consistent with misuse of a controlled drug*" [655].

72. Between May 2021 to February 2022 the claimant was off sick. He attended regular OH appointments and was always seen by the same OH advisor, Jackie Mason. According to her reports the claimant remained unfit for either work or to attend a disciplinary hearing [665, 677, 683, 689, 714, 721, 726, 730].

73. On 4 October 2021 Mr Wilkinson-Ford wrote to the claimant informing him that, backdated from 12 May 2021, his pay was to be classed as sick pay, not paid suspension [719-20].

74. On 10 November 2021 the claimant's 6-month full Company Sick Pay entitlement ended and was replaced by 6 months' half pay which would last to 11 May 2022, after which he would move to nil pay having exhausted the Company Sick Pay [725].

75. The claimant's final OH review took place on 25 February 2022. The OH report states that the claimant was fit to attend a disciplinary hearing. However, the report also states expressly that the claimant,

> "*remains unfit to return to work. He requires a few more weeks of recovery and treatment before he can return to work. I further recommend that the disciplinary is undertaken before he returns to work so that he can process the outcome, and then concentrate on his return to work. Following undertaking the disciplinary, and when* [the claimant] *has recovered further, I recommend that management refer* [the claimant] *to occupational health for return to work adjustments*"
>
> [738-41].

76. There is no further medical advice confirming that, at any point before the clamant was dismissed, he was in fact fit to return to work.

77. On 31 March 2022 HR contacted Ms Choudhry with the OH update on the claimant's fitness to attend a disciplinary hearing [211].

78. On 26 Apr 2022 the claimant sent a text message to Mr Wilkinson-Ford, asking to return to work as "*I cannot afford to live like this*".

79. On 6 May 2022 Ms Choudhry emailed the claimant to re-schedule the disciplinary hearing and check if the claimant was available for 19 May 2022 [762].

80. The claimant and/or his representative had availability difficulties and there followed an exchange of emails about various possible dates for the disciplinary hearing.

81. On 19 May 2022 Ms Choudhry sent a formal invitation to the re-arranged disciplinary hearing to take place on 27 May 2022. She provided a large number of documents as well as a list of potential questions for the claimant as a reasonable adjustment [787 – 789].

82. On 26 May 2022 the claimant emailed Ms Choudhry objecting to the disciplinary hearing proceeding because of what he said were failures to comply with Grievance Recommendations 1 and 2 because Ms Choudhry's invitation letter had attached the un-amended version of the Investigation Report [798-9].

83. On 27 May 2022 Ms Choudhry apologised to the claimant, re-scheduled the disciplinary hearing for 24 June 2022 and confirmed that the corrected version of the Investigation Report would be considered [797-8].

84. On 31 May 2022 Ms Choudhry sent another formal invitation to the disciplinary hearing to take place on 24 June 2022 and she re-sent the documents (including the corrected version of the Investigation Report) [816-7].

85. On 21 June 2022 the claimant confirmed that all the correct documents had now been issued to him [824].

86. On 24 June 2022 the claimant again messaged Mr Wilkinson-Ford about returning to work and he told Mr Wilkinson-Ford that his last OH report said that he "*would be fine after 2 weeks*". It did not say any such thing however, it appears to have been taken at face value by Mr Wilkinson-Ford who responded: "*Guess if your no longer sick you will be suspended again till hearings sorted*" (*sic*) and although it is a little unclear exactly when, it seems that very quickly Mr Wilkinson-Ford changed the claimant's status on the respondent's payroll system from off sick to suspended. Mr Wilkinson-Ford emailed HR to conform what he had done. His email states that "*given I've no instructions from anyone…I hope this is now the correct 'state' [the claimant] should be in until conclusion of his hearing*". One of the recipients of the email was Mr Lidgett.

87. Following receipt of the email Mr Lidgett forwarded it to Mr Craig Etherington, Project Manager (HR) to ask for his view. Mr Etherington's view was that after such a lengthy absence it would be reasonable to ask OH to undertake a review of the claimant to confirm fitness to work and until such time the claimant should remain on sick leave. Subsequently, Mr Lidgett spoke to and emailed Mr McGovern, Head of Shared Services, and asked him to change the claimant's status on the payroll system back to 'sick leave' which Mr McGovern confirmed he had done [848 - 849]

88. On 24 June 2022 Ms Choudhry held the disciplinary hearing with the claimant notes of which are at [832-8].

89. On 12 July 2022 Ms Choudhry held a meeting with the claimant to deliver outcome of the disciplinary hearing to him [8567 – 868]. That outcome was summary dismissal, and this was confirmed by letter dated 12 July 2022 [869-70].

90. On 21 July 2022 the claimant appealed against his dismissal [890-1].

91. On 19 August 2022 Richard Mallinson held an appeal hearing with the claimant, but this was adjourned prior to its conclusion to allow the claimant time to obtain documents following his Data Subject Access Request to the respondent [911].

92. On 15 September 2022 Mr Mallinson re-convened the adjourned appeal hearing with the claimant who was accompanied by his Trade Union Representative Michael Stanton. Following an adjournment to consider his decision Mr Mallinson gave his decision to reject the appeal at the appeal hearing [919 – 922].

93. On 26 September 2022 Mr Mallinson emailed the claimant with the appeal outcome letter, confirming that he had rejected the appeal [925].

94. The claimant commenced early conciliation on 15 August 2022, and he received his early conciliation certificate on 26 September 2022 [1].

95. On 25 October 2022 the claimant presented his ET1 [2-23]

Discussion and conclusions

Unfair dismissal

96. Given the respondent's concession in relation to unfair dismissal, my task is to determine whether it is just and equitable for the claimant to receive a compensatory award and, if so, whether that should be reduced for contributory conduct. In relation to the basic award my task is to determine whether that should also be reduced for contributory conduct.

97. In considering my decision the following seem to me to be relevant:

    a. the claimant was long serving with service from 2014,

b. he worked in a health and safety critical environment and well understood and accepted the need for control over alcohol and drug use by employees of the respondent,

c. he was aware of the Drug and Alcohol Policy and understood that there is a zero tolerance of the use of certain drugs,

d. he agreed under cross-examination that responsibility for following the Drug and Alcohol Policy rested with him,

e. he was taking over the counter medication for digestion problems but decided to seek an alternative as a result of which he bought Mate Tea from a market stall on 6 September 2020,

f. that tea states it is from Peru and does not contain a list of ingredients,

g. within a day or so the tea alleviated the claimant's indigestion, and thereafter he took it daily,

h. the claimant knew that the tea was not "*ordinary green tea*" (accepted under cross examination) and that he drank it without knowing what it contained,

i. the tea contained cocaine from Coca leaves, and after the failed drug test the claimant researched the tea which led him to believe that the tea caused the drug test failure,

j. when assisting the claimant to try to establish what might have caused the failed drug test, the claimant's sister, a retired nurse with some 38 years' experience, was immediately suspicious of the tea, and under cross-examination she said that the tea "*stood out*" because of the South American connection and because the package did not contain a list of ingredients.

98. I also take into account the respondent's disciplinary policy. The respondent's witnesses, Ms Choudhry and Mr Mallinson, said in their evidence that they understood that dismissal for gross misconduct was not inevitable. But the wording of the policy would suggest otherwise. There is nothing in the wording in relation to gross misconduct other than the un-caveated "*Instances of gross misconduct where found* ***will result in dismissal*** *without notice or pay in lieu of notice*" (again emphasis added).

99. That the claimant's conduct was culpable cannot, in my judgment, be in doubt.

100. Given that after the failed drug test he seemingly very quickly identified the tea as the source of the cocaine, this is clearly something he could have done prior to drinking the tea, but he chose not to.

101. The claimant chose to replace over the counter medication with what was clearly a different form of treatment. In my judgment it ought reasonably to have occurred to the claimant that if the tea was as effective as he said it had been in his evidence, the active ingredients ought to have been investigated as

they were clearly having the same or an even better effect than the over the counter medication he had hitherto been taking. The claimant's sister clearly understood the possible problem with the tea from Peru and in my judgment so should the claimant have.

102. I remind myself that in **Nelson** (above) the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

a. the conduct must be culpable or blameworthy,

b. the conduct must have actually caused or contributed to the dismissal, and

c. it must be just and equitable to reduce the award by the proportion specified.

103. I also remind myself that '*culpable'* and '*blameworthy'* are synonyms, not alternatives: *culpable* just means 'deserving of blame' and that I must focus on what the employee did or failed to do.

104. I am in no doubt that the claimant was entirely to blame for his dismissal. He deliberately drank tea from South America without knowing, and not researching prior to drinking it, what it contained. He further failed to consider finding out what it contained notwithstanding that it was at least as effective as the over the counter medication he had replaced with the tea.

105. It is not in dispute that the failed drug test was the sole reason for the dismissal.

106. As to whether it is just and equitable to reduce compensation and if so by what amount, the point was addressed by the EAT in **British Gas Trading Ltd v Price** EAT 0326/15. There, Mrs Justice Simler (then President of the EAT) held that the words '*just and equitable'* in section123(6) gave a discretion that is expressly limited to considering what is just and equitable having regard to the extent to which the employee's contributory conduct contributed to the dismissal. Simler P thought it was difficult to envisage circumstances justifying a conclusion that it would not be just and equitable to reduce the award at all when the claimant's blameworthy conduct has been found to have caused or contributed to his or her dismissal.

107. Here the claimant was wholly blameworthy. There were no other contributing factors to his dismissal other than the failed drug test which he could have avoided if he had done the research he did after the failed drug test either before he drank the tea or shortly thereafter once he was aware of its efficacy. But he chose not to.

108. Mr Tunley submitted on the fact's dismissal was not within the band of reasonable responses because he says the respondent did not adequately scrutinize the reason for the failed drug test.

109. Gross misconduct is a creature of contract. It captures both the deliberate and willful contradiction of the contractual terms or conduct which amounts to gross negligence.

110. As I set out in my findings of fact, in this case I find that the claimant's contract included the Drug and Alcohol Policy on the basis that it is incorporated by reference in clause 17.2 of the claimant's contract of employment.

111. The claimant deliberately contradicted the terms of that Policy and therefore his contract by not finding out what he was ingesting when drinking tea from South America where the packaging showed no ingredients.

112. In my judgment dismissal for that, given the factual matrix set out above, was clearly within the band of reasonable responses, which is to say that I cannot say that no employer acting reasonably in the circumstances in which this respondent found itself could not reasonably have dismissed the claimant.

113. In my judgment it is not just and equitable to award the claimant any compensation.

114. Even if I am wrong about that, in my judgment the claimant was wholly to blame for his dismissal and although there were procedural problems with how the case was dealt with by the respondent, leading as it did to the respondent's concession that the dismissal was procedurally unfair, these are not so serious as to mean that the dismissal was also substantively unfair and in my judgment it was not. In short, had the procedure been within the band of reasonable response the claimant would still have been dismissed, quite possibly sooner than was in fact the case. In that case I would reduce the compensation to nil for contributory conduct.

115. Whichever way this is looked at, it is my judgment that the claimant should not receive a compensatory award.

116. In relation to the basic award the same basic approach applies save that the conduct does not have to have caused the dismissal, so the test of culpability is broader. I do not see the need to repeat my conclusions set out above and for the same reasons the claimant's basic award shall also ne nil.

Unauthorised deductions from wages

117. This claim turns on whether the claimant's suspension was reinstated by Mr Wilkinson-Ford on or around 24 June 2022.

118. Mr Wilkinson-Ford's reinstatement was based on misinformation from the claimant. The claimant told him that the February OH report said he would be well in 2 weeks. It did not.

119. More significantly, on all the facts it seems to me to be clear that the leave status of the claimant was not driven by Mr Wilkinson-Ford, but by HR. As I set out above, following him changing the claimant's leave status on the payroll system, Mr Wilkinson-Ford emailed HR to confirm what he had done, and he says expressly that "*I hope this is now the correct 'state'*". In other

words, he was checking with HR that he had done the right thing. HR concluded he had not, and the claimant's leave status was put back to sickness absence.

120. The role of HR in this regard is consistent with their proactive input throughout the suspension, grievance and disciplinary matters, but even if it was not it seems clear to me that the fact that Mr Wilkinson-Ford checked with HR whether he had done the right thing, and the absence of any disagreement from him following the change back to sick leave by HR leads me to conclude that the decision by Mr Wilkinson-Ford to reinstate the claimant's suspension was either never actually implemented or if it was, that was for less than a day when it was legitimately overturned by HR and in that context the claimant has not suffered any unauthorised deductions from his pay.

121. In summary:

a. the claimant was unfairly dismissed,

b. the claimant's basic award is reduced by 100% to reflect his conduct before dismissal,

c. the claimant's compensatory award shall be reduced by 100% because given the facts it is not just and equitable to award him compensation or alternatively the claimant was wholly to blame for his dismissal and the compensation should be reduced by 100% to reflect his contributory conduct,

d. the claimant did not suffer unauthorised deductions from wages.

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Employment Judge Brewer

Date: 18 October 2023

JUDGMENT SENT TO THE PARTIES ON

..25th October 2023.....

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FOR THE TRIBUNAL OFFICE