



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104600/2024

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Held in Glasgow on 5 & 6 August 2024

Employment Judge S MacLean

10 **Mr C Hainey**

Claimant
Represented by:
Mr C Bett -
Lay Representative

15 **Augean Limited**

Respondent
Represented by:
Mr G Cunningham -
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application is dismissed.

REASONS

Introduction

1. The claimant complains that the respondent unfairly dismissed him. He seeks
25 compensation. The respondent admits dismissing claimant. The respondent
says that the reason for dismissal was gross misconduct. The respondent
denies that the claimant was unfairly dismissed.

2. For the respondent, I heard evidence from Donna Matts, HR business partner-
Scotland, Andrew Cameron, disciplinary manager; and Matt Blake, appeal
30 manager. The claimant gave evidence on his own account. The parties
prepared a joint file of documents to which the witnesses were referred.

3. I have set out facts as found that are essential to the reasons or to an
understanding of the important parts of evidence. I have dealt with the points
made in submissions whilst setting out the facts, the law and the application

of the law to those facts. It should not be taken that a point was overlooked, or the facts ignored because a fact or submission is not part of the reasons in the way it was presented to me.

Findings in fact

- 5 4. The respondent is a national company involved in waste recycling, recovery, treatment and disposal services. The respondent employs approximately 600 employees UK wide.
5. Donna Matts, has HR responsibility for employees based at depots in Paisley, Aberdeen and Berwick. She is assisted by Lynne Brown, regional HR
10 manager who is based in Aberdeen. Ms Matts reports to the group HR director.
6. The respondent employed the claimant from 29 September 2014. He was based at the Paisley depot. When his employment terminated, the claimant held the post of operations co-ordinator. This was a safety critical role.
- 15 7. In 2022, the respondent introduced a drug and alcohol policy which was updated in August 2023 (the policy). The policy was distributed by email to employees including the claimant.
8. The policy sets out the respondent's approach to drug and alcohol use. There is a zero tolerance approach for non-prescribed drugs and unauthorised
20 consumption of alcohol. The policy refers to the respondent's commitment to support employees with alcohol or drug related problems. The policy provides for drug screening and states that a positive test could result in dismissal. The employee handbook reserves the right to the respondent to test employees during working hours. The respondent engages a specialist third party
25 company to administer the individual test and provide a laboratory test where the initial test is non-negative.
9. During the week commencing 3 January 2024, the general manager at the Paisley depot and Ms Matts discussed arrangements for random drug and alcohol testing in January 2024. As managerial and HR staff need to be on
30 site when testing takes place they agreed 5 January 2024 as a suitable date.

10. On 5 January 2024, Ms Matts had a list of 17 employees who were schedule to be working that day. Many employees in safety critical roles work at client's sites. Ms Matts selected three employees for testing on the basis that they were at the depot when the tester arrived, and they had not been previously tested.
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11. The claimant and two others were tested individually. Ms Matts was not in the room when the tests were being carried out. The claimant had a non-negative urine result (the test). He was provided with a copy of the test result and a copy of the chain of custody form that was used to send the urine sample to the laboratory. Ms Matts was informed of this by the tester.
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12. In accordance with the policy, the claimant was suspended on full pay. He handed a company vehicle key and his driving fob to the operations manager. The claimant spoke to the general manager before leaving the depot. Ms Matts emailed a letter to the claimant on 5 January 2024 confirming his suspension on full pay pending investigation.
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13. Around 10 January 2024, the respondent received the laboratory investigation report showing the positive results for cocaine metabolite, which has a half-life of about eight hours and can generally be detected for 12-72 hours after cocaine use or exposure.
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14. On 16 January 2024, the site manager (the investigating manager), wrote to the claimant advising that he was conducting an investigation into the positive drug result that had been obtained. The claimant was invited to a meeting on 22 January 2024 to discuss matters.
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15. Mr Bett, the claimant's son and an HR manager with CIPD accreditation, contacted Ms Matts on 18 January 2024 advising that he was representing the claimant. Mr Bett asked for all the witness statements and investigatory notes relating to the incident and for the respondent to allow him to accompany the claimant at the investigatory meeting as the claimant was stressed.

16. Ms Matts responded to the claimant advising that he had no legal right to representation at this stage. She confirmed that the respondent was content for the claimant to attend with a companion who could be a trained mental health first aider/employee, or an accredited trade union representative.
5 Alternatively, an offer was made for the claimant to provide a written statement.
17. On 22 January 2024, the investigating manager emailed the claimant attaching a copy of the laboratory investigation results; the policy; and driving results taken from the vehicle tracking system relating to the claimant's fob.
10 The investigating manager sought comments from the claimant on (a) the results showing that the claimant had taken cocaine at least 12 to 24 hours before the test; (b) the oral swab would indicate that cocaine had been taken within 24 hours of the non-negative results (c) the driving results also showed that the claimant had been driving a company vehicle on 3, 4 and 5 January
15 2024. The investigating manager asked if there was any other information that he should consider.
18. Mr Bett responded by email sent on 22 January 2024 advising that:
- (a) when the urine test showed non-negative, the tester advised the claimant that there was no point in continuing with the oral swab. This
20 was confirmed in the documentation taken at the time. This was an unfounded allegation and there was no oral swab showing cocaine had been taken within 48 hours of the non-negative test.
- (b) The driving records were flawed as they indicated the claimant was driving on 6 January 2024. He had already been suspended. This
25 should be struck from the investigation.
- (c) The investigating manager was asked to consider that the test was not random. The suspension letter sent by Ms Matts referred to the matter "having been brought to the company's attention" therefore it was felt that it was not random.

19. The investigating manager carried out further investigation. In an email exchange, the transport manager confirmed that on 6 January 2024, the claimant's fob had been accidentally used by the operations manager. The claimant had given vehicle keys and his fob to the operations manager on 5
5 January 2024. The operations manager had accidentally used the claimant's fob instead of his own on 6 January 2024.
20. On 25 January 2024, the investigating manager prepared an investigation report (the report). It stated that that the claimant had agreed to take the test on 5 January 2024 that produced a non-negative result; the third party testers
10 had confirmed a positive test on 10 January 2024; the driving records suggested the claimant was driving a company vehicle on 3, 4 and 5 January 2024. The investigating manager had also looked at CCTV footage recorded on 5 January 2024 showing that the claimant had been driving a company vehicle. The investigating manager suggested that the allegation relating to
15 the swab test was removed as there was no evidence to clarify that.
21. The report also recorded that the investigating manager's enquiry showed that the test was randomly selected from the list of 17 employees in safety critical roles, not already tested. The three employees selected were the only
20 employees available from the list. Those selected agreed to take the test on the day and signed to say so. At this stage, it was noted that the claimant had not provided any mitigating information. The report concluded was that a disciplinary hearing could be convened.
22. The report was passed to the general manager who asked Ms Matts to arrange a disciplinary hearing that he would conduct.
23. Ms Matts attached the report to an email sent to the claimant on 26 January
25 2024 in which she advised that the claimant was to be invited to a disciplinary hearing. She confirm that the disciplinary hearing would be chaired by the general manager to consider an allegation that during a random drug and alcohol test on 5 January 2024, the claimant tested positive for cocaine
30 metabolite and were driving a company vehicle while being positive for an illegal drug namely cocaine. This was seen as a serious breach of the policy.

5 The claimant was advised that if the allegation was proven, it would be considered gross misconduct and that his employment may be terminated summarily. The claimant was provided with the evidence upon which his case relied. He was also advised that there was CCTV footage which he could view on the day of the disciplinary hearing. The claimant was also advised of his right to be accompanied.

24. The claimant confirmed that Mr Bett would accompany him at the disciplinary hearing which was rescheduled to a time that was mutually convenient.

10 25. Due to illness, the general manager was unable to attend the disciplinary hearing. With the parties' agreement, Andrew Cameron, general manager treatment and transfer-North, agreed to conduct the disciplinary hearing.

26. At the disciplinary hearing, the claimant was accompanied by Mr Bett. Ms Matts attended to provide HR support to Mr Cameron. Ms Brown participated remotely by Teams to take notes.

15 27. During the early part of the discussion, Mr Bett took issue with Ms Matts being present given her involvement in arranging the test, suspending the claimant and the investigation. Mr Bett said that he had "intelligence that someone called it in". Mr Cameron explained that it was a random test. He said that if evidence could be provided, he would take it into consideration. There was discussion about Mr Bett's role at the disciplinary hearing. Ms Matts left given 20 that Mr Bett had an issue with her presence. Mr Cameron reiterated that if there was evidence then this should be presented to him.

25 28. Mr Cameron explained that from the investigation the comments about the swab were removed. The claimant insisted that selection for the test was not random. He provided no evidence of this. The claimant was shown the CCTV footage. He said that it was not clear that he was in the footage. He indicated that the driving records were not accurate. He did not know why they showed a company vehicle at his home address. The claimant denied taking cocaine the week before the test but indicated that he may have taken cocaine in the 30 last two months. The claimant was adamant that it was not in his system and had he taken the swab, it would have highlighted that in evidence.

29. During the adjournment, Mr Cameron considered that the claimant was aware of the policy and the consequences of a positive test. The urine lab tests were accepted as a positive result above the cutoff limit. No swab tests were considered. Mr Cameron considered that the claimant was evasive about whether he was driving a company vehicle on 3, 4 and 5 January 2024 and why the driving records would show a vehicle at his home address. Mr Cameron disregarded the CCTV footage. The driving records showed that the claimant's fob was being used. It was accepted that the claimant was not driving a company vehicle following his suspension. There was an explanation for its use on 6 January 2024. While the claimant questioned the random selection process, no alternative evidence was provided for consideration. Mr Cameron concluded that the selection process was random. Mr Cameron considered that the investigation carried out had been independent. The claimant said that he would not have taken cocaine during working hours but the policy had a clear zero tolerance. No further evidence or mitigation had been provided by the claimant. Mr Cameron decided that the claimant should be dismissed.
30. The disciplinary hearing was reconvened and the claimant was advised that Mr Cameron had concluded that the claimant had a non-negative result which following laboratory testing was positive. He had been driving a company vehicle on 5 January 2024. Mr Cameron concluded in the absence of any further evidence that he would need to proceed with dismissal. The claimant was advised of the decision and his right of appeal by letter dated 1 February 2024.
31. The claimant exercised his right of appeal. This was considered by Matt Blake, industrial services director. The appeal was based on five points:
- a. the involvement of Ms Matts at various stages of the process which made the entire process unfair;
 - b. the test was not random (he later alleged that he was targeted for the test);
 - c. the reliability and credibility of the drug testers were challenged;

- d. the driving data relied upon was not reliable or credible; and
- e. the process was procedurally unfair.

32. Mr Blake had no previous involvement in the process. He asked for a timeline to be prepared. He was unaware who prepared this other than HR. At the appeal hearing, he was supported by the group HR director. The claimant was accompanied by Mr Bett. All the points raised at appeal were considered by Mr Blake.

33. Following adjournment, Mr Blake reconvened and set out his overview of the appeal and advised the claimant that he was upholding the decision. Mr Blake wrote to the claimant on 23 February 2024 setting out his decision and reasons. He concluded that Ms Matts as an HR professional was not involved as a decision maker at any stage. HR is independent. All members of the HR team report to the group HR director. In the event, Ms Matts withdrew from the disciplinary hearing. Mr Blake considered that the test on 5 January 2024 was random. Employees in safety critical roles had not been tested because they were offsite. There was a list of employees and three of those on that list were present on 5 January 2024 and were tested. The tester was from an independent company. The vehicle tracking system showed that the vehicle was parked at the claimant's home on three evenings/nights before the test, and was driven to the site in the morning including the day of the test. Mr Blake considered that the process was fair.

34. At the date of termination the claimant was claimant was 49 years of age. He had been continuously employed by the respondent for nine years. He found alternative employment from 1 March 2024.

Observations on witnesses and conflicts of evidence

35. There was little significant conflict of evidence about the material findings of fact. However, I make the following general observations.

36. In relation to the evidence before me, I had difficulty understanding the claimant's concern about Ms Matts involvement. Her role within the business is as an HR partner.

37. Ms Matts' involvement in the arrangements for the testing on 5 January 2024 appeared to follow usual practice. The decision to conduct random testing on 5 January 2024 was taken by the general manager. The timing appeared to be motivated by management availability on site.
- 5 38. The claimant's suspension was in line with the policy. The claimant confirmed in his evidence that he spoke to the general manager before leaving and ultimately confirmed that he received the letter of suspension but due to an oversight, he did not read it. There appeared initially to be some confusion over whether a swab test was taken. Ms Matts was not present during the testing and this appeared to be her misunderstanding. The investigating manager, who had no previous involvement, clarified this in the report. The issue of a swab test was disregarded by Mr Cameron and Mr Blake. It was undisputed that a urine sample had been taken which following laboratory analysis was positive.
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- 15 39. The general manager decided to hold a disciplinary hearing. He did not do so for reasons unrelated to the claimant. The disciplinary and appeal hearings were conducted by operational managers, who had no previous involvement. There was no evidence that Ms Matts had any influenced the decision that Mr Cameron reached. Ms Matts involvement in the appeal was to prepare a timeline (the content of which was not disputed). Mr Blake was unaware that it had been prepared by Ms Matts.
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40. Much of the evidence focused on whether or not the test on 5 January 2024 complied with the policy. In particular, was the test bi-monthly and if so was it random. During submissions, my understanding was that there was no suggestion that Ms Matts had personally targeted the claimant. The claimant hinted at the final hearing and at a disciplinary hearing to having other evidence but this was not presented nor did he allude to the nature of that evidence and why it was not being produced. Against this background, I considered that the evidence showed that Ms Matts arranged the testing for 25 5 January 2024 because the last random test was in November 2023 and the date suited management availability. Given that the claimant worked in a safety critical role, and had not been previously tested, there was a likelihood
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that at some point or other, he would be tested. I had no reason to disbelieve Ms Matts' evidence that in December 2023 the testing was arranged because of a report that an employee was under the influence of a substance. While a new start and the transport manager were also tested, the latter
5 volunteered. The drop down menu did not allow her to enter that the transport manager's test was voluntarily which was why it was recoded as random. The evidence before me was that from time to time, people, usually management, volunteered to take tests to show that no one was exempt from the policy. This seemed entirely plausible to me. I considered that the previous random
10 testing took place on 27 November 2023. Accordingly the testing in January 2024 satisfied the bi-monthly provision.

41. There was much issue made of driving records and the CCTV footage. I was slightly at a loss as to why this was of such significance given the claimant did not dispute that he attended work on 5 January 2024 and had used a company
15 vehicle to travel to a client's site in the morning before the test. It was unclear to me why the claimant was so equivocal about driving on the previous days but it did seem reasonable, in my view, for Mr Cameron to believe that the claimant had been doing so as there was be no other explanation for a company vehicle being parked at the claimant's home address.

20 42. The claimant's evidence about the independent third party specialist company carrying out the testing was unclear. There was no evidence that a swab test had been carried out. That was confirmed during the investigation. Mr Cameron understood that and based his decision on the positive urine test.

Deliberations

25 43. It was agreed that the respondent dismissed the claimant on 31 January 2024. I therefore referred to section 98 of the Employment Rights Act 1996 (the ERA) which deals with fairness of the dismissal.

44. Under section 98(1), it is for the employer to show the reason (or if there is more than one, the principle reason) for the dismissal and that was the
30 potentially fair reason falling within section 98(2).

45. The respondent said that the reason for dismissal was conduct (a potentially fair reason). Mr Cameron confirmed that he believed that the claimant had drugs in his system when he was tested on 5 January 2024 and that they would have been in his system the previous few days. This was why he dismissed the claimant. I was satisfied that the respondent had shown the reason for dismissal was conduct. I concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason.
46. I then considered whether dismissal was fair or unfair under section 98(4). This involves having regard to the reasons shown by the employer and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with equity in the substantial merits of the case.
47. As this was a conduct dismissal I asked, the burden of proof being neutral, whether the respondent had a genuine belief in the claimant's guilt.
48. I was satisfied that when dismissing the claimant, Mr Cameron believed in the claimant's guilt. The claimant had been at work on 5 January 2024 and had earlier in the day driven in a company vehicle to a client's site. He consented to taking the test on 5 January 2024. The test result showed a non-negative result which following lab analysis was positive.
49. I then asked if the respondent held such genuine belief on reasonable grounds after carrying out a reasonable investigation. I was mindful that I could not substitute my own view. I turned to the investigation in this case.
50. The non-negative test came to the respondent's attention through independent testing. Once confirmation of a positive test was received, an investigation was undertaken which focused on whether the claimant had been driving a company vehicle before the test. The investigation produced evidence to suggest that the claimant had been driving a company vehicle while testing positive and recommended disciplinary proceedings.

51. The investigating manager did not take any decision and had no further involvement in the proceedings. While Ms Matts continued to be involved in the internal process, she did not make any decision regarding any disciplinary action. That decision was originally taken by the general manager and was revisited by Mr Cameron when he agreed to conduct the disciplinary hearing. The investigation continued during the disciplinary hearing. The claimant was invited to provide an explanation about whether or not he had been driving a company vehicle and give an explanation for a company vehicle apparently being at his home address. The claimant's responses were evasive and equivocal. He did not confirm whether or not it was he who was shown on the CCTV footage.
52. While the claimant alleged that there were flaws in the disciplinary process, I was not satisfied that this was the case. There was no suggestion that the decision to suspend the claimant was pre-determined. Suspension only arose after the claimant had the non-negative test. It was the claimant who was keen to leave the depot as soon as possible. Ms Matts told the claimant that he required to speak to the general manager before leaving. A letter was sent to the claimant confirming the basis upon which he was being suspended.
53. In relation to the investigation, there was no suggestion that the investigating manager had any prior involvement. He made enquiries and endeavoured to follow matters up as best he could and given that most of the facts were based on documentation that had been provided. He took account of the written information provided by the claimant.
54. Before the disciplinary hearing, the claimant was advised of the allegation against him. He was accompanied at the disciplinary hearing. There was no suggestion that Mr Cameron's decision was in any way premeditated. His involvement was unexpected and he had no animosity towards the claimant. Indeed, the contrary appeared to be the case as the claimant had high regard for Mr Cameron.
55. During the disciplinary hearing, Mr Cameron endeavoured to encourage the claimant to provide an explanation. The claimant had an opportunity to

respond to the allegation. The claimant inferred that he had taken drugs but not while he was working. Mr Cameron did not consider that the claimant's responses during the disciplinary hearing were convincing. Where appropriate, Mr Cameron discounted evidence, such as the CCTV footage, where he felt unconvinced of its unreliability.

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56. An employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal of process. I was satisfied that the claimant was offered a right of appeal which he exercised. There was an appeal hearing where he was accompanied by Mr Bett. Mr Blake had no previous involvement. He considered each ground of appeal and allowed the claimant an opportunity to respond and provide any information.

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57. The claimant was provided with an opportunity to provide mitigating circumstances. He did not do so. The claimant's focus throughout the disciplinary proceedings was on process rather than providing any explanation as to why he had tested positive and whether there were any medical or other reasons for that to be so. The claimant was clearly upset about the impact of a positive test on him but did not appear to show any insight as to how his actions might have a bearing on the respondent and its business.

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20 58. I then applied the range of reasonable responses test to the decision to dismiss. I was satisfied that there was a reasonable investigation. The claimant knew that he had a positive test. He admitted that he had in the past taken cocaine. The claimant accepted that employers considered a breach of the policy to be gross misconduct which could lead to dismissal.

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25 59. I did not consider that Mr Cameron's decision to dismiss was predetermined. The claimant was well regarded by the respondent. There was no animosity between the claimant and his colleagues. The claimant was suspended as that was required under the policy. Dismissal was not automatic as the policy provides for disciplinary action not to be taken in certain circumstances. The claimant was aware of those circumstances but did not suggest during the investigation or at any time during the internal process that they applied.

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60. The claimant inferred during the disciplinary hearing that he had previously taken cocaine. The claimant was given opportunities at the disciplinary and appeal hearings to explain why he should not be dismissed. I was satisfied that Mr Cameron and Mr Blake considered the points raised by the claimant about Ms Matts' involvement and the claimant's concern that the test was not random. They were unconvinced that the correct procedure had not been followed.
61. My impression was that the claimant's focus was on process and the need for the respondent to provide proof of his guilt. He appeared reluctant to make any reasonable concessions during the investigation and disciplinary proceedings. He appeared to display no remorse about breaching the policy of which he was fully aware.
62. I concluded that the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. I concluded that the dismissal was fair.
63. Having reached that decision, I did not consider it necessary to go onto consider remedy. I noted that the parties had agree the calculation of the basic and compensatory award subject to arguments on reductions.
64. The unfair dismissal claim is dismissed.

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S MacLean
Employment Judge

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19 August 2024
Date

Date sent to parties

19 August 2024