# EMPLOYMENT TRIBUNALS

**Claimant:** **'M'**

**Respondent:** **'N'**

**Heard at:** **Bristol (in public, by CVP video)** **On: 19 and 20 December 2024**

**Before:** Employment Judge Cuthbert

**Appearances:**

For the claimant: Represented himself
For the respondent: Mr Walker (consultant)

# RESERVED JUDGMENT ON LIABILITY

1. The claimant's claim for unfair dismissal succeeds.

2. The claim shall proceed to a further hearing to deal with remedy.

# REASONS

## Introduction

1. The claimant brought a claim for unfair dismissal against the respondent, following his dismissal for gross misconduct.

2. The claimant appeared in person at the hearing and the respondent was represented by Mr Walker, an employment consultant.

3. Judgment on liability was reserved, following the conclusion of the evidence and closing submissions on the second day of the hearing, as there was insufficient time remaining for deliberation and delivering oral judgment. The start of the evidence was delayed on the first day, as there was a preliminary issue concerning a protected conversation and, in addition, I had not

received copies of the respondent's witness statements before the start of the hearing.

**Preliminary issue – section 111A Employment Rights Act 1996**

4. I had noted when reading the ET1 in the bundle and reading the claimant's witness statement that various references were made to evidence which appeared to be potentially inadmissible, under section 111A of the Employment Rights Act 1996 (ERA). Section 111A provides as follows (insofar as is relevant):

***Confidentiality of negotiations before termination of employment***

*(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111…*

*(2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.*

5. I explained the position to the parties and apologised for the fact that the issue had not been picked up by the Tribunal at the sift stage and before the final hearing, despite the respondent expressly flagging the point in its ET3.

6. It was necessary to deal with the s.111A point before hearing any substantive evidence - I explained that if the evidence was inadmissible, I should not be hearing it and it should not be taking up time in the hearing. I also explained that if I decided that the evidence was inadmissible, I could disregard it and go on to hear the claim if both parties agreed. The alternative, if the evidence was inadmissible, would be that I recuse myself having read that evidence, and the case is relisted before a different judge in 2025 and all references to the relevant evidence would need to be removed from the bundle and witness statements.

7. I pointed out that in the Tribunal's experience, settlement discussions at outset of possible disciplinary proceedings which may result in termination of employment are very commonplace and nothing would be likely to turn on them even if they were admissible. Both parties were content for me to determine the preliminary issue and to go on to hear the case if the evidence were inadmissible.

8. The claimant confirmed under oath that his account of the pre-termination negotiations set out in the ET1 was accurate and the respondent did not dispute the account.

9. I concluded that the evidence about the pre-termination negotiations fell squarely within section 111A(1) - as such, any references to the pre-termination negotiations within the bundle and witness statements was inadmissible evidence. I did not take any account whatsoever of such evidence in considering the substantive claim below.

**Order for anonymity**

10. At the end of the hearing, I heard an application by the respondent that the judgment be anonymised, so that the identity of the parties and the witnesses could not be determined. The claimant did not oppose the application, which I allowed on the following basis.

11. Rule 50 of the Employment Tribunal Rules of Procedure 20213 provides as follows:

> *(1) any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice. Or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*
> *(2) In considering whether to make order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right of freedom of expression.*
> *(3) Such orders may include –*
> *a. …*
> *b. an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;…*

12. The main basis of the application was that the evidence in the proceedings necessarily included reference to sensitive information about the family circumstances of the only witness against the claimant during the respondent's disciplinary process. More specifically the issue concerned a referral being made to social services, arising out of concerns for the welfare of that witness' children, and whether or not it was suspected by the witness that the claimant had made the referral.

13. The need, notwithstanding the well-recognised principle of open justice, to restrict the extent to which information is kept in the public domain has been acknowledged by the Court of Appeal recently in *Clifford v Millicom Services Limited [2023] IRLR 295 .* The burden of establishing any derogation from the principle of open justice lies on the person seeking it and in order to do so, it is necessary to provide clear and cogent evidence that harm will be done to the privacy rights if the derogation is not granted. In addition, and consistent with the need to balance the effect of a restriction on the interests of open justice, the level of press interest in a case will be a factor of relevance (see *Campbell v MGN* [2004] AC 457). See also *AEL v Flight Centre (UK) Ltd* [2024] EAT 116.

14. In the present there had been no press or public interest in the proceedings – the only attendees during the hearing had been the parties and the witnesses. It was self-evident that disclosure of the fact of the referral to social services impacted materially upon the rights of the witness and his family under Article 8 of the ECHR. The respondent is a small employer and any identification of the parties would enable an informed reader to identify

the witness and his family. I was satisfied that this was a case in which it was appropriate to make an anonymisation order.

15. References to the parties and relevant individuals in these reasons and in any documents forming part of the public record of these proceedings shall be as follows:

    a. Claimant – 'M'
    b. Respondent – 'N'
    c. 'Witness A' – the witness against claimant during the disciplinary proceedings (who also gave evidence at the Tribunal hearing)
    d. 'Director X' – the respondent's director primarily involved in the proceedings (who gave evidence at the Tribunal hearing
    e. 'Director Y' – the author of the email dismissing the claimant – another director at the respondent/

## The issues

16. I discussed with both parties the issues on liability, which were agreed as follows.

17. Unfair dismissal was the only claim before me, by way of a claim form presented on 18 March 2023. This gave rise to the following issues.

    a. What was the reason for the dismissal? The respondent asserted that the reason for dismissal was misconduct. The burden was on the respondent to establish the reason for dismissal.

    b. Was the dismissal fair? The burden of proof was neutral here.

        i. Did the respondent carry out a fair and reasonable investigation into the allegations of misconduct?

        ii. Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds following the investigation?

        iii. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer in all of the circumstances of this case?

    (Here, I explained to the claimant, that these tests did not involve the Tribunal stepping into the shoes of the respondent and deciding the disciplinary case against the claimant for itself – it was not a re-hearing. Rather the role of the Tribunal was to determine whether or not, based on the evidence which was before the respondent at the time of the dismissal, the respondent's investigation and its decision to dismiss were within the range of reasonable responses open to a reasonable employer in the respondent's position – it was essentially a review of the respondent's processes and decision-making).

    c. If the respondent did not follow a fair procedure, would the claimant

have been fairly dismissed in any event and / or to what extent and when?

d. If the claimant's unfair dismissal claim is successful, did the claimant contribute to the dismissal by culpable conduct? This required the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

## Practicalities

18. Case management orders had been made by the Tribunal on 15 August 2024. These specified a hearing bundle of up to 100 pages. The bundle ran to 232 pages at the start of the hearing and was missing some documents – the respondent's disciplinary policy and claimant's letter of appeal – by the end of the hearing the bundle ran to 275 pages. References below in square brackets [ ] are to pages within that bundle.

19. The claimant was permitted a witness statement of up to 3,000 words – his statement came in at 4,167 words. The respondent was permitted a total of 5,000 words for its witness statements - its two statements came in at just over 1,000 words in total.

20. I suggested, and it was agreed by the parties, that I would hear evidence and submissions on liability, including contributory conduct, only, and would hear evidence separately on remedy, if relevant, following my decision on liability.

21. Finally, the respondent's representative suggested, and the claimant agreed, that the claimant give evidence first, notwithstanding that the claim was for unfair dismissal. This was primarily because one of the respondent's witnesses, Witness A, was not available on the first day of the hearing. I agreed to this, as it would also allow the claimant, as a litigant in person, to better understand how to put his own questions to the respondent's witnesses, when the time came.

## The evidence and findings of fact

### *Introduction*

22. I have only made findings of fact where those are required for the proper determination of the issues in the unfair dismissal claim. I did not and have not therefore made findings on each and every area where the parties have been in dispute with each other where that was not necessary for the proper determination of the complaint which was before me.

23. At various times during the hearing I had to remind both the respondent's representative and the claimant to keep the questions being asked of witnesses focused upon the issues to be decided by me in the unfair dismissal claim, which had been identified and agreed at the outset of the case. I also pointed out that the case before me was not a claim for disability discrimination, and did not materially concern various historical issues relating to the claimant's employment. This approach was in accordance

with the overriding objective set out in Rule 2 of the Employment Tribunal Rules 2013 and my powers under Rule 41 in respect of the hearing and its scope.

24. I received witness statements and heard oral evidence from the following witnesses for the respondent:

    a) Director X – employed by the respondent since 2015 and appointed as a director in June 2022.

    b) Witness A – employed by the respondent since May 2022, and (until the events giving rise to these proceedings) a close personal friend of the claimant for around 15 years.

25. I also received a witness statement and heard oral evidence from the claimant.

***Facts***

26. The claimant commenced his employment with the respondent in 2021, as a Sales Assistant in its shop. The respondent is a small business, specialising in fishing and camping.

27. In late 2022/early 2023, the claimant experienced a breakdown in his mental health due to events outside of work. He was prescribed medication, including diazepam, to take as and when needed. He was off work for around two weeks.

28. In March 2023, Director X and the manager of the shop met with the claimant about an allegation that the claimant had been taking diazepam at work [40 – 41]. The claimant said that he had but had been unaware it had been affecting his work.

29. In May 2023, Director X and the shop manager met with the claimant about his sickness absence [230 – 231] – the meeting notes record a discussion about the reasons for the absences, said to be significantly higher than other members of staff, and that the respondent was treating the issue as a "disciplinary", although the sanction itself is not recorded.

***Allegations that the claimant was taking edible cannabis before work***

30. On 22 October 2023, Director X met with Witness A [218]. The notes of the meeting record that:

    a. Director X had requested the meeting with Witness A the previous day

    b. Witness A said that, on 25 September 2023, when only the claimant and Witness A were working in the shop, that the claimant had consumed some 'crumbs' of edible cannabis in the morning before attending work, which the claimant had said had taken around four hours to wear off. Witness A said that the claimant said he hoped the till was correct, when cashing up later in the day. Witness A had

reported this to the shop manager the next day.

c. Witness A also gave an account of 14 October 2023, when only the same two individuals, Witness A and the claimant, were working in the shop but Director X was also present at the start of the day for around an hour. The claimant had arrived slightly late for work, which the claimant had said was due to irritable bowels. Witness A said that the claimant had again, after Director X had left the shop, admitted to having consumed edible cannabis (cookies) before work. Witness A said that the claimant told him that the effects had "hit him" whilst the claimant was speaking to Director X and that the claimant had worked in the back office for large parts of the day. Witness A said that he had informed the shop manager the following day.

31. The claimant was notified of an investigation into his conduct (unspecified at this stage) by way of a letter from the respondent on 1 November 2023 [42]. By this time, the respondent had appointed employment consultants, Peninsula, to conduct an investigation.

***Investigation by Peninsula – November 2023***

32. The claimant met with Jim Crouch of Peninsula on 1 November 2023 and a transcript of the meeting was at pages [50 – 55]. The allegations raised by Witness A were put to the claimant by Mr Crouch and the claimant denied them.

33. During the meeting, Mr Crouch made reference to some CCTV footage in the respondent's possession, which he said was *"some CCTV footage of you taking some crumbs from a clear plastic bag, in the car park prior to work".* The claimant was not shown any CCTV footage in the meeting, but was asked by Mr Crouch what it might show. The claimant speculated that it might have been his breakfast, possibly a bacon sandwich purchased in a petrol station on the way to work, and asked on what dates the footage was. Mr Crouch said it was for both 25 September and 14 October and later in the meeting said that it was of 25 September (in fact it was only for 14 October).

34. During the same meeting, the claimant said that he did smoke cannabis outside of work, which he said was to try and stem issues with ADHD, but he did not take edible cannabis. He said that he felt he was being set up, that the respondent was looking to get rid of him and that something was not right.

35. Earlier the same day, Mr Crouch had met with Witness A [56 – 60]. Witness A gave Mr Crouch broadly the same account of 25 September and 14 October, as he had to Director X, with the following additional points:

a. Witness A said that on 25 September, the claimant had said to Witness A, whilst cashing up, *"I wasn't feeling myself for most of the day at one point I felt as though I could have been handing out fistfuls of cash".* Witness A said that made him think that the claimant "*was a bit fuzzy from said substances".*

b. There was nothing "visually" to suggest to Witness A that the

claimant had consumed cannabis – it was *"just what he told me".* Witness A had seen nothing untoward in the running of the shop.

c. By way of explanation for why he raised the matters about the claimant, Witness A said [58]:

> *The end of the day this issue that has arisen puts me in a position, where I was not to say anything about it and that the company where to find out about it some other way that he had done this and that I knew about it would put my job at great risk and for the sake of my family and the roof over my head is not something…I cannot say nothing about it because the implications are too big. It's more than a friendship and my family means more to me done this longstanding friendship. As unfortunate as it is. I have three kids under four and a partner to look after. My hands were forced, and I had to say something.*

And at [60]:

> *Family is more important that friendship at the end of the day. I've got my kids and everything in my head, if I was to lose my job, I don't know what I would do. I mean I wasn't the one at fault here. It was my colleague at the end of the day that has put me into this position, unfortunately.*

36. The minutes record that Mr Crouch thanked Witness A for his "*honesty*" twice during the meeting - [59] and [60].

37. In emails to Mr Crouch following their meeting, the claimant said as follows:

a. 4 November 2023 [179]: *There are reasons, after thinking about the accusations made against me and why they were made, that I believe have caused these false allegations to come to light and believe an external issue within the relationship I had with [Witness A] outside of work has caused this and he is no longer comfortable working with me so has chosen to create these fabricated statements in the hope of no longer having to work with me. I could think of no valid reason as to why I would have upset him at the time of interview and what would cause him to make these allegations as the allegations came as such a shock and the time to digest what was happening just simply wasn't reasonable to process everything I was being accused of.*

b. 6 November 2023 [181 - 182]: the claimant said that he felt that Witness A and his partner believed that the claimant had made a report to social services about the welfare of the children of Witness A. The claimant said he had been vocal about his concerns about such issues to Witness A.

c. The claimant then went on to say to Mr Crouch, in the same email:

> *I also wish to disclose that [Witness A] is also directly involved*

> *in the sale and purchase of illegal tobacco products within the store, during working hours and on his days off which not only in itself is illegal and can carry fines or worse for the individuals involved but can also carry huge financial penalties for the business where this exchange is being carried out as untaxed smuggled tobacco is being sold within a retail environment. This has been going on for approximately 12 months and the exchange for this happens multiple times a week, every week either in the store or in the carpark for the shop. Again this will all be on recorded CCTV and there will be literally tens of occasions you will be able to witness this happening on camera, especially if you look out for [Witness A] coming to the shop on a day he is not rota'd for work, he will usually only visit on a day off to make another purchase of tobacco.*
>
> *I've been reluctant to disclose this information as it could and probably will have serious implications not only for [Witness A] but for another colleague who I also work with who has done nothing to upset me at all and i really didn't wish to bring trouble his way but now feel that [Witness A] has left me no choice but to disclose this information as he has unfairly put my job in jeopardy with his false accusations with no attempt on his part to retract his allegations whilst also breaking the law in the workplace himself repeatedly.*

***Investigation report – 22 November 2023***

38. Mr Crouch did not complete the subsequent Investigation Report on behalf of Peninsula, for the respondent. This was completed by a different consultant, Helen Pearson and is dated 22 November 2023 [43 - 49].

39. The report included reference to an interview by Mr Crouch with Director X (which was not included in the papers before the Tribunal), in which Director X is said to have construed the CCTV footage as follows:

> *In the CCTV footage, [the claimant] is holding what appears to be a bag. He first puts his hand in the bag to collect crumbs from the bottom, before pulling the bag tought [sic] and tipping the remaining crumbs directly into his mouth. You would not be able to do this with the plastic covering on the bacon sandwich.*

40. I make no specific findings about what the CCTV does or does not show – a copy was provided to the Tribunal but, as noted further below (see paragraph 49.b of these reasons), by the stage of the disciplinary hearing outcome, Peninsula (and by extension the respondent) no longer sought to rely upon the CCTV evidence in support of the disciplinary decision/outcome in respect of the claimant.

41. Director X had evidently carried out some further investigations, following the earlier interview of the claimant by Peninsula, by way of purchasing a bacon sandwich from the petrol station mentioned by the claimant and speaking to the owner of the petrol station. Bacon sandwich packaging was

exhibited as a photograph, provided by Director X, in the investigation report by Ms Pearson. Ms Pearson noted [46]:

> *32. HP notes that [Director X] went to the garage and asked how these sandwiches are served and they advised that they are sold 'in a cardboard box, with a plastic covering' (Appendix 5).*
>
> *33. HP further notes that when asked if they had ever sold a bacon sandwich in a plastic bag (Appendix 5) they confirmed that they had not.*
>
> *34. HP notes that this is the wrapping that the bacon sandwiches are sold in as per the following image provided by [Director X] from the garage (Appendix 6)…*

42. Ms Pearson concluded as follows in her report in respect of the CCTV [47]:

> *HP considers that the CCTV evidence correlates to [Witness A's] comments regarding [the claimant] having taken a substance before work and therefore recommends that there is a case to answer at a formal disciplinary hearing.*

Thus, at this initial stage of the disciplinary proceedings, the CCTV evidence *was* a key aspect of the disciplinary case against the claimant, in addition to the evidence of Witness A.

43. The disciplinary allegations against the claimant were framed as follows by Ms Pearson (sic) [48]:

> *It is alleged that breached company rules and procedures in that you have taken part in activities that cause the Company to lose faith in your integrity, namely:*
>
> *a. It is alleged that on the 25th September 2023 you knowingly consumed substances immediately prior to your shift at work to cause you to be in an unfit state for work.*
>
> *b. It is alleged that on the 14th October 2023 you knowingly consumed substances immediately prior to your shift at work to cause you to be in an unfit state for work.*
>
> *The company alleges that either of the above matters, if proven, represents a gross breach of trust and may constitute gross misconduct.*

***Disciplinary hearing and further investigations – December 2023***

44. A disciplinary hearing date was fixed and, after a postponement at the claimant's request to allow him more time to prepare, the disciplinary hearing took place on 6 December 2023 before Graham Hall, another consultant with Peninsula [80 – 121].

45. The claimant was shown the CCTV footage of the car park on 14 October 2023, for the first time during the proceedings, by Mr Hall and invited to comment upon it in writing following the hearing. He continued to deny the allegations of taking edible cannabis and maintained that the allegations were fabricated. He pointed out that, aside from the CCTV, the only evidence against him was that of Witness A reporting what the claimant had allegedly said, and that there had been no behaviour out of character reported or reports of intoxicated behaviour by the claimant.

46. The claimant said to Mr Hall that Witness A was portrayed as *"whiter than white"* and it was portrayed that Witness A was doing something to protect the respondent's business. The claimant repeated his allegation that Witness A was illegally re-selling tobacco products whilst working in the respondent's shop (an issue relating to Witness A's "integrity", as the claimant put it during the disciplinary hearing) and that the claimant felt that Witness A believed that the claimant was responsible for referring Witness A's family to social services. The claimant said that his allegation about the tobacco re-selling by Witness A in the respondent's shop, made the previous month to Mr Crouch, had not been investigated. The claimant also provided a written submission [200 – 204] to Mr Hall.

47. Following the hearing, Mr Hall carried out a further interview on behalf of Peninsula with Witness A on 8 December 2023 [220 – 229]. During that interview, Witness A said that it was his mother, rather than the claimant, who had raised concerns with social services about his family situation and denied that he had ever suspected the claimant of having done so. The claimant's counter-allegation about tobacco re-selling was not, however, put to Witness A by Mr Hall.

48. Mr Hall also received an email from the claimant in respect of the CCTV footage on 11 December 2023 [191], in which the claimant said:

> *I have now seen the CCTV footage (after my disciplinary hearing) and it is extremely unclear as to what i am eating, how [Director X] can state that he can see me eating crumbs from a clear plastic bag and state it does not look like a bacon sandwich wrapper is beyond me as the footage is terrible. I would also like to note that it is stated that i was late for work and a full conversation was had between [Witness A] and [Director X] regarding my lateness etc, I pulled up in the carpark just over 60 seconds after [Director X].*
>
> *My final point is that [Witness A] is claiming I ate 'crumbs' on the 25th September and 'edibles' on the 14th of October, [Director X] is claiming that I'm seen tipping 'crumbs' into my mouth on 14th of October. This does not tally.*

***Peninsula disciplinary report - 14 December 2023***

49. Mr Hall prepared a report for the respondent dated 14 December 2023 [69 – 78]. Key aspects of the report were as follows:

    a. Mr Hall's report made a relatively brief reference to the claimant's

counter-allegations that Witness A had been re-selling tobacco illegally from the respondent's shop [73]:

> *However, in respect of [Witness A] and [another employee] selling tobacco illegally, GH does not consider this to be a reason for [Witness A] to make his statement. This information has been disclosed during this investigation and [Witness A's] statement cannot then be linked to a disclosure by [the claimant] of the alleged illegal activity. This will be a matter for the Company to investigate and in GH's view is not directly relevant to this case. [The claimant] said that it demonstrates [Witness A's] character and GH has taken this point into account when considering the evidence.*

b. Mr Hall *"discounted the video evidence because the item consumed cannot be proven"* [76] i.e. the CCTV evidence had no bearing upon the conclusions in the report.

c. Mr Hall accepted Witness A's account that Witness A did not suspect the claimant of having reported his family to social services [76]

d. He also accepted Witness A's account that he reported his friend, the claimant, because he was fearful of losing his job if he did not do so and were the respondent to have found out that Witness A was aware of the claimant having consumed cannabis before work. Mr Hall found that this was *"plausible"*.

50. Mr Hall concluded as follows [78]:

> *42. GH finds that [the claimant] is in breach of the Company's Alcohol and Drugs Policy. That from the evidence of [Witness A] there was an impact on [the claimant's] performance on these occasions and GH considers that there could be a Health and Safety risk with the nature of the equipment that [the claimant] would be handling in the shop. GH also considers that if [the claimant] would be required as part of his role to come to the assistance of a user of the lake[1] in an emergency, if [the claimant] was impaired by being under the influence, this could be detrimental. This could be minimised however, with other members of staff being present.*
>
> *43. GH finds that [the claimant] was not productive at work at least on both occasions and had admitted to being under the influence for 4 hours to [Witness A] on one occasion.*

51. Mr Hall then went on to recommend that the claimant be dismissed without notice.

***Dismissal decision – 14 December 2023***

52. On the same date as the report, 14 December 2023, a director of the respondent, Director Y, wrote the claimant as follows [123]:

[1] Part of the respondent's business included fishing lakes

> *As you know, we engaged a third party consultant to conduct the disciplinary hearing on 6™December 2023. Please find attached their report and further documents relevant to the Disciplinary.*
>
> *Having carefully considered the report of their findings and recommendations, it is my decision that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. I have referred to our standard disciplinary procedure when making this decision. It states that an act of misconduct of this nature warrants summary dismissal, however, I have considered whether, in the circumstances, a lesser sanction may be appropriate. However, I am unable to apply a lesser sanction in this case because of the reasons given above.*
>
> *You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.*

53. Director Y did not give evidence at the Tribunal hearing. The evidence in respect of the respondent's decision to dismiss the claimant was instead given by Director X, whose relatively brief witness statement said as follows in respect of the dismissal decision itself:

> *10. The company accepted [the recommendation of Graham Hall]. [Witness A] had no reason to lie about this, he had a 15-year friendship with the Claimant. CCTV footage viewed by the consultant also played a part in their conclusion. Based on what we saw from the report produced, we believed that a thorough investigation had been carried out that established that [the claimant] had done what he was accused of doing. The Claimant was summarily dismissed for gross misconduct; this was agreed between three directors, including me, and the dismissal letter was signed by another director, [Director Y].*
>
> *11. …*
>
> *12. It is highly regrettable that the Claimant's employment ended the way it did, however we were and are bound by our duty of care to our customers and other employees to keep them safe and having an employee who is intoxicated, by licit or illicit substances, while at work (especially when they might be affected by two substances, diazepam and cannabis), is not something any employer could accept. This is particularly so in a the tackle shop where there are many sharp objects, cash handling and also because he might not be able to fulfil his first aid duties if needed.*

54. During his oral evidence before the Tribunal, I asked Director X to explain how the decision to dismiss was arrived at, given that Director Y's email of dismissal dated 14 December was expressed in the first person i.e. "I/my" decision, suggesting on its face that the decision had been taken by Director Y. Director X said that he and Director Y had discussed the decision and

were *"a unified front"* and that the decision was based on the consultant's report and the things which the respondent's directors *"knew about their staff members and who they are"*. Director Y said that the dismissal decision email was sent in the name of Director Y, as the claimant had raised some concerns during the disciplinary process about Director X.

55. I also asked Director X to explain his comment in para 10 of his witness statement (above) to the effect that the CCTV footage had played a part in the conclusions of Graham Hall of Peninsula to recommend dismissing the claimant (Mr Hall's report expressly said the opposite of this and the only evidence Mr Hall relied upon in the end was that of Witness A). Director X said that he regretted that sentence in his witness statement and said that the CCTV was *"never more than circumstantial evidence"* and that the first Peninsula consultant (i.e. Helen Pearson) had relied on the CCTV *"more than most"*.

56. The reference to alleged intoxication of the claimant by diazepam in para 12 of Director X's witness statement, above, was also curious, as this was not part of the disciplinary case against the claimant. I asked Director X to explain this comment with reference to the decision to dismiss the claimant, to which para 12 in the witness statement appeared to relate. He said it was not the first time that the claimant's performance at work had been affected by a drug, whether prescribed or non-prescribed. This did not really address the point raised and so I asked Director X directly whether the diazepam concern had played any part in the respondent's dismissal decision. He said that it had not.

57. Director X was also challenged by the claimant during cross examination about whether and when the respondent had investigated the claimant's counter-allegations about tobacco re-selling in the respondent's shop and Witness A's involvement in this. Director X's response was vague – he said this had been investigated by the respondent but he could not remember when this was done. He said it was possibly looked into once before the claimant's appeal (see below) and once after and that Witness A had said that he was not involved in this activity.

58. Witness A was also asked during his cross examination by the claimant about whether or not the issue of the tobacco selling had been investigated with him by the respondent. Witness A said simply that he was asked by the respondent if he had been involved in dealing tobacco from the shop and he answered *"no, absolutely not"*. He said that he was not questioned further by the respondent or aware of whether any wider investigation was conducted by the respondent.

***The claimant's appeal***

59. The claimant appealed against his dismissal on 20 December 2023 [235].

60. An appeal hearing was arranged for 19 January 2024 before Chris Cox, an employment consultant from Peninsula and notes of this hearing were at pages [127 – 151]. The hearing largely ran through points raised earlier in the disciplinary proceedings.

61. During the appeal hearing the claimant again raised the counter-allegation of tobacco selling in the shop by Witness A, saying that this brought the character of Witness A into disrepute. Mr Cox said (somewhat reluctantly it appears from the notes) that he would look into whether or not that allegation had been investigated. The following exchange also took place later in the hearing [148]:

> *[Claimant]: And the thing is as well. So I suppose I should have this. Is that now I'm going back to it, but. I was taken to the disciplinary hearing before anything was looked at with regards to the activities that was taking place in the shop and if that is founded, which I know it will be because it's on CCTV happening 3,4,5 times a week for a year, that would have absolutely put their character into disrepute. And they're honestly.*
>
> *Chris Cox: I mean, I'll have. I'll ask the question anyway about whether the investigation is happening. See how far along it is because well, as I say as much as I can't tell you what the outcome is, if there is something going on behind the scenes and it does question their character, then you know potentially that could, as you say, you could question the validity of [Witness A's] statement so.*
>
> *[Claimant]: Yeah, please do. It's the balance of probabilities of [Witness A's] statement. And obviously you know, Jim, in good faith was well, I disagree with the fact he's thanked him for his honesty and said how hard it must be. But you know that they're putting the business at risk massively. So why? Why should they be deemed as honourable characters that we can sack someone else? The balance of probabilities based on their just a statement that they've made. You know, I've given reasons that I feel that, [Witness A]. Has done that to me.*

62. Following the hearing, Mr Cox prepared a report on the appeal dated 23 January 2024 [152 – 160]. Mr Cox recommended that the conclusions of Graham Hall, recommending summary dismissal, should be upheld.

63. In respect of the issue of Witness A's credibility and the issue raised by the claimant on his alleged involvement in tobacco re-selling, Mr Cox concluded as follows in his report:

> *37. [The claimant] states that [Witness A] is creating a false accusation against him due to activities outside of work involving social services. However, CCO notes that GH has considered this mitigation. [The claimant] has not provided CCO with any further evidence to suggest that [witness A's] statement should not be considered due to this.*
>
> *38. [The claimant] states that [witness A] is engaged in unlawful activity regarding tobacco. CCO notes that the Employer is investigating this matter, but, at the time of the Disciplinary Hearing, CCO finds that there were no questions whether [Witness A] has*

*acted inappropriately and therefore CCO agrees that GH has accepted [Witness A's] statement in good faith.*

*39. Therefore, CCO finds that [Witness A's] statement can be relied upon in this investigation.*

64. At the time of the appeal conclusion, the respondent was seemingly still investigating the tobacco re-selling issue and had evidently informed Mr Cox of the same, given para 38 of the report, above.

65. The respondent accepted the conclusions of Mr Cox.

66. The claimant presented his claim for unfair dismissal on 18 March 2024.

**The relevant law**

67. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed.

68. The employee must show that they were dismissed by the employer under section 95 ERA 1996. In this case there is no dispute that the respondent dismissed the claimant.

69. Section 98 ERA 1996 Act deals with the fairness of dismissals. There are two stages within section 98:

a) Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2).

b) Secondly, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason under section 98(4).

70. A 'reason for dismissal' has been described as *'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' — Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA. (Mis)conduct is a potentially fair reason for dismissal under section 98(2).

71. Section 98(4) then deals with fairness generally and provides that the determination by the Tribunal of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

72. In misconduct dismissals, there is well-established guidance for tribunals on fairness, within the context of section 98(4), in the decisions in *BHS v Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827.

73. The Tribunal must decide:

    a) whether the employer had a genuine belief in the employee's guilt;

    b) if so, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation; and

    c) if so, whether the decision to dismiss was reasonable.

74. In *GM Packaging (UK) Ltd v Haslem* UKEAT/0259/13, it was held by the EAT to be reasonable for a small employer to appoint external consultants to deal with disciplinary and appeal hearings in a misconduct situation. It was also appropriate for the consultants to make recommendations to the employer about the sanction to be imposed.

75. In terms of the standard of investigation required, in *A v B* [2003] IRLR 405, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. It is unrealistic and quite inappropriate, however, to require the safeguards of a criminal trial. Careful and conscientious investigation of the facts is necessary. The investigation should be even-handed and not simply a search for evidence against the employee, but also include evidence that may point towards innocence (see also *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721).

76. The reasonableness or otherwise of the employer's approach with reference to the above guidance in *Burchell* and *Foley* is assessed with reference to the *"range"* or *"band"* of reasonable responses test. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, the EAT summarised the law concisely as follows:

> *We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*
>
> *(1) the starting point should always be the words of [S.98(4)] themselves;*
>
> *(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

> *(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*

77. The Tribunal must not therefore substitute its own view for that of a reasonable employer (see also *Sainsbury's Supermarkets Ltd v Hitt* (2003) IRLR 23 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563). The question is not whether the Tribunal would have believed the employee to be guilty based on that material, but whether the employer acted reasonably in forming that belief. The question of whether the employer acted reasonably is to be judged objectively (*Foley* and *Midland Bank plc v Madden* [2000] IRLR 82).

78. Furthermore, in determining the reasonableness of a dismissal, the Tribunal can only take account of those facts (or beliefs) that were known at the point of dismissal to those who took the actual decision to dismiss (after reasonable investigation).

79. *Taylor v OCS Group Ltd* [2006] IRLR 613(CA) established that if there are procedural flaws in the process followed by the employer, they should be considered alongside the reason for dismissal, when the Tribunal comes to assess whether in all the circumstances, the employer acted reasonably in treating the reason as a sufficient one for dismissal.

*Polkey*

80. In *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, the House of Lords held that a compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. A tribunal should make a realistic assessment of loss according to what might have occurred in the future. The chances of the actual employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed.

81. In *Software 2000 Ltd v Andrews and others* UKEAT/0533/06 the suggested approach to *Polkey* was as follows:

> *The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*

*Contributory conduct*

82. A Tribunal may reduce the basic award if it finds that the employee's conduct before dismissal was such that it would be just and equitable to reduce it (section 122(2), ERA 1996).

83. Furthermore, where a 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"* (section 123(6), ERA 1996).

84. In *Nelson v BBC (No.2)* [1979] IRLR 346 (CA), the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault:

    a. The employee's conduct must be culpable or blameworthy.
    b. It must have actually caused or contributed to the dismissal.
    c. The reduction must be just and equitable.

85. In *Steen v ASP Packaging Ltd* UKEAT/23/13, the EAT held that a Tribunal must consider the following four questions:

    a. What was the conduct which was said to give rise to possible contributory fault?
    b. Was that conduct blameworthy, irrespective of the employer's view on the matter?
    c. For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?
    d. If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

**The parties' submissions**

86. I heard oral submissions on behalf of the respondent and also from the claimant.

*The respondent's submissions*

87. The respondent's submissions were as follows, in summary.

88. Mr Walker referred to the test in *Burchell* and section 98 ERA. The reason for dismissal in this case was for conduct, a potentially fair reason.

89. He said that the evidence on fairness was clear and the employer was entitled to rely on the reports from the consultants, which were plausible. The allegations against the claimant were not implausible allegations but were also not automatically believed.

90. There were fifteen sub-paragraphs in the report by Graham Hall dealing with issues raised by the claimant.

91. An important point was that there was no good reason why Witness A would fabricate allegations against the claimant. Peninsula indicated this in their reports and the respondent said the same in its evidence.

92. The conclusions reached were those that Tribunals come to after weighing up the evidence – Witness A had given clear and straightforward evidence.

There was nothing put to Witness A in cross examination by the claimant that Witness A was part of a stitch-up or anything like that.

93. The respondent had a genuine belief, established by the investigation report and in following the recommendations in that report. Any defects in the initial investigation were corrected in the disciplinary report by Mr Hall. Mr Hall conceded some issues and discounted the CCTV evidence.

94. What the Peninsula consultant had to do was what Tribunals have to do, which is weigh up the evidence and say who is telling the truth. Mr Hall made his findings and set these out in his disciplinary report.

95. Fairness was scrupulously observed by the employer in this case. It accepted the consultants' recommendation as evidenced by Director X- the directors discussed, considered and accepted the plausible allegations put by its employee (Witness A) and as found in the two consultants' reports.

96. The appeal process was fair and what can be found is a clear thread in the reports of conscientiousness and the application of logic in the reasons given.

97. In terms of whether a fair sanction was imposed, the range of reasonable responses test could only lead to dismissal where such a finding against an employee had been established. Summary dismissal was the obvious sanction in this case – to extent that any lesser sanction might have been appropriate, this would only come down to dismissal with notice for an allegation of this kind.

98. There had been evidence from Director X during cross examination that the respondent made significant efforts to keep its employees happy. There was no reason why the respondent would seek to plant a false allegation to have the claimant dismissed. The Tribunal was invited to find in the respondent's favour and conclude that the dismissal was fair.

99. In terms of possible contributory fault, if the Tribunal found that the dismissal was unfair but that the claimant did what he was accused of, a 100% finding on contributory fault should follow.

*The claimant's submissions*

100. The claimant's submissions were as follows, in summary.

101. The claimant believed that the respondent failed to complete a fair investigation and act with an open mind.

102. He submitted that his mental illness was an embarrassment to the respondent and the respondent had formed a view that his health was damaging to its brand. He referred to earlier issues in his employment and he believed that these had factored into the respondent's approach towards him.

103. There had been no investigation into the claimant's claims about Witness A and Witness A's honesty and integrity and the respondent simply treated his account as being given in good faith.

104. The claimant said he had given his employer no reason whatsoever to believe that the claimant would act dishonestly during his employment. He did not feel that he had been treated equally to Witness A. He said that Witness A had put the respondent's business in danger over a lengthy timeframe.

105. He believed that the respondent had deliberately delayed any investigation into Witness A so as to allow Witness A's evidence to be accepted in good faith and as a mechanism to end the claimant's employment.

## Conclusions

106. My findings on the issues to be determined are as follows.

*Reason for dismissal*

107. On the first issue, namely whether or not there was a potentially fair reason for the claimant's dismissal, the respondent satisfied me that the reason was on grounds of the claimant's alleged conduct.

108. The claimant had suggested that there was an ulterior motive, namely concerns from earlier in 2023 broadly around his health, but there was insufficient evidence before the Tribunal for any such finding to be made.

109. I now turn to whether or not the dismissal was fair. My focus is on the actions of the respondent and whether it had acted reasonably in dismissing the claimant, and in this regard I remind myself that I must not substitute the respondent's decisions with my own – the test is whether the respondent's actions were within the range of reasonable responses.

*Did the respondent carry out a reasonable investigation?*

110. Mindful of the relevant legal tests set out above, I considered the investigation which was conducted by and on behalf of the respondent.

111. It is clear (see *A v B*) that where an employee faces serious allegations of misconduct, in this case an allegation of taking an illegal substance before starting work and attending work whilst under the influence of that substance, a suitably rigorous investigation is required.

112. The investigation in this case was **not** sufficiently rigorous, in light of the nature of the allegation and the evidence against the claimant which was relied upon. It fell outside the range of reasonable responses in the circumstances of the case in one important respect, as follows.

113. During the initial investigations which were conducted by Director X and then by Peninsula (Mr Crouch and Ms Pearson), there was substantial reliance placed upon **both** the evidence of Witness A **and** upon CCTV

footage which the respondent had obtained, of 14 October 2023, of the claimant arriving in the car park at work and allegedly eating something. When the claimant mentioned the possibility (without being shown the CCTV in issue) that he may have been eating a bacon sandwich purchased on the way to work from a petrol station, Director X carried out significant further investigations including attending the petrol station in question, speaking to the owner of it, purchasing a bacon sandwich and exhibiting the wrapper of the same in evidence against the claimant.

114. At the later disciplinary stage of the investigation, the CCTV evidence was entirely discounted by Graham Hall of Peninsula, who conducted the disciplinary, as being inconclusive. This followed the claimant having been shown the CCTV for the first time during the disciplinary hearing and having made representations about it. The result of this was that the disciplinary case against the claimant consequently then depended **entirely** upon the credibility of the evidence from Witness A as to the claimant having allegedly admitted to Witness A on two occasions to having consumed edible cannabis before work. The claimant consistently and firmly denied the same.

115. There was no corroborative evidence, to support Witness A, from other witnesses or other sources, for example errors in the claimant's work, unusual behaviour reported by colleagues or customers or shown on CCTV inside the shop. It was readily accepted by the claimant that he smoked cannabis outside of work, as did Witness A.

116. Witness A was treated by the respondent/Peninsula throughout the investigation as a witness of truth and his accounts of the claimant allegedly admitting to consuming edible cannabis, and his denial that he had believed the claimant had reported him to social services, were accepted as genuine by the various Peninsula consultants and in turn by the respondent. Witness A gave his reasons for reporting the claimant's alleged comments about consuming cannabis before work as being fear for his job were he not to have done so (see para 35.c above).

117. However, on the claimant's account, during 2023, Witness A was allegedly involved in potentially unlawful re-selling of tobacco products from the respondent's shop. If that were true, such evidence would potentially have impacted upon the credibility/reliability/integrity of Witness A – it is self-evident that any employee undertaking such illicit activity would be at a significant risk of losing their job were any reasonable employer to discover the same. Such evidence would potentially raise significant doubts as to the credibility of Witness A's reasons given for raising his concerns about the claimant, and indeed Witness A's evidence as a whole. Mr Cox of Peninsula appeared to accept this possibility during the appeal hearing (see para 61 above). The claimant had mentioned on at least two occasions that there would be CCTV evidence from within the shop of the tobacco activity (see paras 37.c and 61 above) which would support his account of Witness A's involvement in the tobacco re-selling.

118. Yet, in contrast to the approach it, and in particular Director X, took to investigating the CCTV of the car park and the bacon sandwich issue, the

respondent seemingly failed to conduct any, or at least any meaningful investigation, into the claimant's counter-allegations about Witness A.

119. In a disciplinary case such as the present one:

a. involving serious allegations of the claimant being intoxicated at work through an illegal substance; and
b. which depended **solely** upon the uncorroborated account of a single witness and whether that witness was more credible than the claimant; and
c. where the employer had conducted relatively extensive investigations into matters potentially **adverse** to the claimant (obtaining CCTV of the car park and the investigation of the bacon sandwich at the petrol station); and
d. where the claimant had raised counter-allegations which went to the credibility of the only witness against him and which he said would be evidenced on CCTV held by the respondent

I have concluded that any reasonable employer in these circumstances **would** have properly investigated the counter-allegations against the witness, before forming a final view on whether it believed the claimant's account or the account of the witness.

120. The attempts by the respondent to deal with and disregard the claimant's counter-allegations, within the reports of Mr Hall (see para 49.a above) and Mr Crouch (see para 63 above) in the absence of any meaningful investigation into the same, fell outside the range of reasonable responses for the same reasons given in the preceding paragraph.

121. In short, the respondent's failure to investigate the counter-allegations about Witness A's credibility, took its investigation of the alleged misconduct of the claimant **outside** the range of reasonable responses.

*Was the respondent's belief that the claimant had committed misconduct reasonably held?*

122. I have again reminded myself that, in considering this question, the issue for me is **not** whether I would have believed the claimant to be guilty based on the material before the respondent, but whether the respondent has acted reasonably in forming its belief. The question of whether the respondent acted reasonably and had reasonable grounds for its belief is to be judged objectively.

123. On balance, I find that the respondent's conclusions that this issue amounted to misconduct on the part of the claimant, viewed objectively, were **not reasonable** i.e. they were outside the range of reasonable responses. The respondent based its decision that the claimant committed the misconduct alleged solely upon the uncorroborated evidence of Witness A and concluded that Witness A was a reliable and plausible witness, who raised concerns about his friend, the claimant, out of fear for his job.

124. No reasonable employer could have reached these conclusions whilst the matters which the claimant had raised about the credibility of Witness A remained outstanding – they had not been investigated, either adequately

or at all. If the claimant's counter-allegations about Witness A were true, they would have cast significant doubts upon what Witness A said about fearing for his job and about his credibility more generally.

*Reasonableness of the sanction*

125. On the basis of the findings which were made by the respondent, a decision to dismiss based on those findings would plainly be within the range of reasonable responses. No issue therefore arises in this regard.

*Conclusion on unfair dismissal*

126. I conclude that the respondent dismissed the claimant for misconduct, a potentially fair reason for dismissal. By virtue, however, of (i) the serious procedural failing identified above in respect of the potential credibility of Witness A, and (ii) the consequent lack of a reasonably-held belief in respect of the misconduct allegation, the claimant's dismissal was **unfair**.

*Polkey and contributory fault*

127. I do **not** consider that the facts of the case give rise to any basis for reducing any award to the claimant based on *Polkey.* The failings by the respondent in this case are substantive rather than merely procedural and it cannot be said what the outcome would have been of a proper investigation into the counter allegations about Witness A and how that may have affected the credibility of Witness A and in turn the overall outcome. It certainly cannot be said that the claimant would have been dismissed in any event.

128. The respondent has also failed to establish (the burden here being on the respondent) that there should be any reduction to the claimant's compensation on the basis of culpable conduct. I am unable to conclude, on the balance of probabilities, that the claimant committed the misconduct alleged. The claimant repeatedly and consistently denied consuming edible cannabis before attending work and the only evidence against him was the uncorroborated testimony of Witness A. The claimant had raised a significant point about the credibility of Witness A and that issue had not been adequately investigated by the respondent. The respondent therefore failed to establish, on the balance of probabilities, that the claimant committed the misconduct alleged for the purposes of culpable conduct/contributory fault.

Employment Judge Cuthbert
Date 2 January 2025

Sent to the parties on
29 January 2025
For the Tribunal Office