



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000478/2026

Held in Glasgow on 24 & 25 June and 20 July 2026

Employment Judge Doherty

Mr M Walker

**Claimant
Represented by,
Mr R Lawson,
Solicitor**

McGill's Bus Services Limited

**Respondent
Represented by,
Ms C Fowlie,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is;

- (1) The claim of unfair dismissal is well founded;
- (2) The Basic award should not be subject to any deduction under Section 122 of the Employment Rights Act 1996 (the ERA); the Compensatory award should not be subject to any deduction under Section 123 (1) or 123 (6) of the ERA;
- (3) The claim under section 1 of the ERA is well founded;
- (4) The breach of contract claim is well founded.
- (5) The remedy to which the claimant is entitled will be determined at a remedy hearing

REASONS

1. This was a three day hearing to consider the claimant's claims of unfair dismissal; nonpayment of wages; breach of contract (wrongful dismissal); and failure to provide a statement of further particulars under Section (1) of the Employment Rights Act 1996 (the ERA). The remedy sought is compensation.
2. The claimant was represented by Mr Lawson and the respondents by Ms Fowlie, both solicitors.

The Hearing

3. For the respondents evidence was given by;

Tom Miller (TM) – drug and alcohol tester
Neil Burge (NB), the disciplinary officer
Kirsty Marshall (KM) – HR advisor.
4. For the claimant evidence was given by;

The claimant
Colin Beattie (CB) – Formerly engineering manager with the respondents.
5. The parties lodged a joint bundle of documents.

The Issues

6. The reason for dismissal is in issue. Thereafter, if there is found to be a potentially fair reason for dismissal the Tribunal has to determine whether the respondents had carried out a reasonable investigation and had reasonable grounds on which to form their belief in the conduct for which the claimant was dismissed and whether dismissal fell within the band of reasonable responses.
7. In respect of the wrongful dismissal claim the issue is whether the claimant was guilty of conduct which amounted to a repudiation of his contract of employment justifying summary dismissal.
8. It was agreed that merits and remedy could be separated for the purpose of this hearing, but in the event of the unfair dismissal claim succeeding, the issue of whether there should be any deduction from compensation awarded on the basis of the principles to be derived from the case of **Polkey** or any

deduction in respect of contributory conduct would be determined at this hearing.

9. In connection with the unlawful deduction from wages/breach of contract claim in respect of nonpayment of wages during the suspension period, it was confirmed that this has been conceded and did not require to be determined by this Tribunal.
10. In connection with the claim of failure to provide terms and conditions of employment, it is conceded these were not provided, but there is no concession on the remedy sought and the amount to be awarded in respect of this breach will be considered at the remedy hearing.

Findings in Fact

11. The respondents are a company involved in operating a bus service in Scotland. They have policies and procedure in place for the management of staff. The respondent's disciplinary policy sets out 4 stages of disciplinary action from verbal warning to dismissal. It contains a non-exhaustive list of examples of gross misconduct which include refusal to obey a reasonable instruction; and attending work under the influence of alcohol or drugs or the consumption of alcohol and/or drugs on the company premises or during working hours.
12. The respondents have an Alcohol Policy and Procedure (the Alcohol Policy). Under *Alcohol Guidelines* the Alcohol Policy sets out the acceptable alcohol limits, that breach of the guidelines will be dealt with under the Disciplinary policy, and test level of alcohol where attending work will be deemed an act of gross misconduct. It provides;

“

If you suspect that a colleague is under the influence of alcohol, you must report your suspicions to your Line Manager or Senior Manager immediately. Any report(s) shall be treated with the utmost confidentiality.

The Alcohol policy also contains a 'For Cause' testing procedure. It provides;

Where it is necessary for an alcohol test to be carried out, the following procedure will apply.

A designated Authorised Officer will conduct the test. The Authorised Officer will have a third party as a witness, and the third party shall sign the appropriate forms to witness the test.

The employee will be asked to give a sample of breath.

If the employee involved refuses to give a sample of breath, they will be informed that such a refusal may constitute gross misconduct and may be suspended without pay awaiting a formal disciplinary meeting.

The Authorised Officer will administer a breathalyser test.

If the breath test is negative, the individual will be asked to sign a record of this and return to work.

If the breath test is positive, the employee will be asked to wait 30 minutes, and a second test will be administered."

....

13. The Alcohol Policy also provides for unannounced random testing.
14. The respondents have a Drugs Policy and Procedure (the Drugs Policy). This provides that the company has a zero tolerance approach to the consumption of drugs. The Drugs policy outlines the safety reason behind this approach. It provides that if an individual refuses to take a test, they will be informed that the refusal to take the test without good reasons may constitute an act of gross misconduct and may result in suspension without pay.
15. The Drugs Policy provides for unannounced random testing and with cause testing.
16. Random tests are carried out by means of random computerised selection of employees for testing. One of the consequences of random testing is that some employees are not tested, or not tested over a long period, while others may be tested more than once over a shorter period.
17. Drug and Alcohol Tests are not always administered at the same time, and the type of testing administered depends on the circumstances of the case, however drug testing is rarely carried out on its own. The drug and alcohol testing processes are different to each other. A drugs test involves a different testing procedure, using different kinds of equipment to an alcohol test.
18. Both the Drug and Alcohol policies and testing for drugs and alcohol are considered by the respondents to be important to maintain health and safety in their working environment, which includes areas where there is industrial machinery, such as forklift trucks, moving cars and buses, and open pits. They consider that employees being under the influence of drink or drugs in such an environment would constitute a significant health and safety risk.
19. The respondents have a Health and Safety Policy.
20. All of the respondent's policies and procedures are generally provided to employees at the commencement of their employment as part of an induction

process conducted by HR. They are available on the respondent's intranet which is called Blink. The policies are stored in the Blink 'Hub'. Employees can confirm on the Hub that they have read a policy, although a policy can be accessed without the employee confirming it had been read. Updates to the Drug and Alcohol policies were issued by the respondents in March and April 2025. These were issues as 'mandatory reads' and important policy updates. Each mandatory read which is unopened remains in a red coloured banner visible to the employee when they go into Blink.

21. Paper copies of the Policies are stored centrally in a folder in each depot where they are available to staff.

The Claimant

22. The claimant, whose date of birth is 18/03/1995 was employed by the respondents as a store manager from 4 July 2022 until his dismissal on 22 September 2025. The claimant's duties included from time to time operating machinery such as forklift trucks. The claimant was not issued with terms and condition of employment. The claimant did not receive an induction from HR. When he started he was shown his job duties by his line manager.
23. The claimant had access to Blink and he had accessed Hub, where the policies are stored. He had not indicated on Blink that he had read the Drug or Alcohol Policy. The claimant had not opened the mandatory reads for the Drug and Alcohol policies which the respondents had issued. The claimant had not read the Drug or Alcohol policy until after his suspension from work on 28 August.
24. The claimant knew that the respondents operated for cause and random testing for drugs and alcohol. The claimant had been tested twice during his employment prior to the incident which led to his dismissal. The claimant had complied with the requests to take these tests, one of which was with cause and one of which was random. He was not provided with the Drug and Alcohol policies when he took these tests.

The incident

25. On 28 August 2025 at around 2.30 pm the claimant was asked by TM, to undertake a for suspicion drugs and alcohol test. TM oversaw the administration of the respondents Drug and Alcohol procedures throughout the Depots.

26. TM had been approached by the Area Director, Jamie Ried (JR) who asked him to conduct a for cause drugs and alcohol test on the claimant. TM did not know the reason for the request for the test, but assumed that there was one. He did not ask JR the reason for the test, but simply did as he was instructed.
27. It had been reported to JR that the claimant had posted a video on his Snapchat account which showed him taking beers out of a box and stacking them into a fridge at work with a caption along the lines of 'I love my work lunchtime'. This Snapchat video was sent to JR by a fellow worker of the claimant's in what the respondents regarded as a whistleblowing compliant. The Snapchat video caused JR to ask TM to carry out the tests.
28. The claimant had posted this Snapchat video. He had been asked by CB, who held a more senior position to the claimant, to load the beers into the fridge and it was this which gave rise to the video and caption.
29. NB had spoke to CB at some point before this video was posted and told him to remove a case of beers belonging to CB from the workspace.
30. TM approached the claimant in the Stores and told him that he had been asked to carry out a for cause drug and alcohol tests on the claimant. The claimant responded that he was not doing that. The claimant asked TM why he was being tested and who had reported him. TM said he could not comment.
31. TM asked the claimant to accompany him to the office where tests are generally administered. He asked the claimant if he would like a witness, but the claimant said no. When they got to the office TM told the claimant that if he did not take the tests this would be regarded as gross misconduct. TM asked the claimant again if he would take the tests. The claimant again refused to take the tests. TM told him if he had nothing to worry about he should take the tests. At this point the claimant asked if he could have a private chat with CB the Engineering manager, who was a friend of the claimant's.
32. TM brought CB to the office and left him with the claimant to have a private discussion.
33. TM decided to bring a witness from his side to any subsequent conversation. He found KM and asked her to come to the office. When they arrived he asked the claimant if there was any objection to KM being there to which he responded no. TM again asked the claimant if he would undertake the tests. The claimant said he would not do so.

34. TM then told the claimant that he had no choice but to suspend him with no pay as per the respondent's policies. He escorted the claimant out of the building after he had collected his belongings.
35. After the incident on 28 August TM prepared a statement setting out what had occurred. This statement did not contain reference to advising the claimant about the consequences of the refusal to take the test on a second occasion when KM was present. TM's statement contained a passage to the effect that as he was accompanying the claimant out of the premises, he asked the claimant why he had not taken the test, to which the claimant responded that he had taken 'stuff' the night before. TM asked him what 'stuff' and the claimant replied had taken base and a joint. TM asked him what 'base' was to which the claimant replied a 'type of speed'.

The Disciplinary Process

36. NB was asked by HR to carry out a disciplinary hearing in respect of the claimant's conduct. NB was given the snapchat video, TM's statement and the Policies.
37. By letter dated 4 September the claimant was invited to attend a disciplinary hearing on the 8 of September. He was told that the reason for the hearing was;
- *You refused to take a for cause drug and alcohol test that was to be conducted by authorised officer, Tom Millar in the presence of two witnesses;*
 - *You allegedly admitted to taking base and smoking a joint the night before to Tom Millar whilst he was escorting you off the premises.*
38. The letter contained copies of the Drug and Alcohol policies. The Snapchat video which had caused JR to request TM to carry out the tests was not provided.
39. The claimant was advised of the right to be accompanied and that dismissal was a potential outcome of the disciplinary proceedings.
40. The disciplinary hearing was rescheduled on 3 occasions due to the unavailability of the claimant's representative. The meeting took place on 19 of September. The claimant was accompanied by his trade union representative, James Smith (JS). KM attended as a note taker, but she did also input into the meeting. KM told JS at the outset of the meeting that he

could not speak on behalf of the claimant but he could confer with him, and request a recess. KM was not prepared to minute any contribution JS made.

41. Ultimately 2 sets of minutes were prepared from this meeting, one by KM which omitted any comment which JS made, and one by the claimant, which included JS's comments.
42. The claimant had prepared a statement which he wished to read at the start of the hearing. Shortly after he commenced his statement, he was interrupted by KM asking him what the statement had to do with the disciplinary hearing. The claimant responded that it was because he felt he was victimised. KM responded that she could assure him that was not the case.
43. The claimant's statement set out his position to the effect that he thought he was being victimised. He said he did not understand why he had been selected for a test as he had been working all day and operating a forklift truck without incident. He cited the fact that this was the third test he had been asked to take in a two year period, comparing that to other employees with 10 years plus service who had never been tested.
44. The claimant stated that a mechanic, whom he named (PW), had failed a drug test for amphetamines, but was able to return to work with no disciplinary action taken against him.
45. The claimant complained that when he took his previous alcohol test there was a serious breach of GDPR. He said he informed KM about this in her office. She had acknowledged that it was a clear breach of GDPR but no action was taken.
46. The claimant also complained that this drug and alcohol test came just 12 or 14 weeks after he was sanctioned with a gross misconduct disciplinary hearing for carrying out depot maintenance along with an engineering manager, Mr Pasternak. He stated that he had been told by the depot manager that KM had pressured him into sending an e-mail with a statement regarding the claimant's actions. KM had then enforced a gross misconduct disciplinary hearing against him with no investigation having taken place.
47. The claimant denied drug use, and denied the conversation which TM said had taken place as they were leaving the premises. He said the conversation between himself and involved TM saying to the claimant you should have taken the test. The claimant had responded he did not want to take the test due to victimisation and not because he was under the influence. He said to TM, *'I do not take stuff'* adding it's *not as if I was smoking joints and taking*

base last night. TM had asked him what 'base' was. The claimant stated it would be highly surprising he would have admitted to taking drugs to the testing manager.

48. NB asked the claimant if he had asked why he was being tested. The claimant said he had asked TM, but no reason was given and he was just told it was a with cause test.
49. NB told the claimant that management were made aware of a social media video from Snapchat on the claimant's account where he was filling up the work fridge with beer and that this had come to their attention as a result of a whistle blowing complaint. He told the claimant it was against company policy to have alcohol on the premises. Issue was taken by JS with the fact that putting beer in a fridge was a fair cause for a drug and alcohol test. The claimant said that KW kept a bottle of wine in the work fridge, which KW confirmed was correct.
50. The claimant said he had not seen the video in question so he did not know what was being talked about. It was said that they could not prepare for the hearing fairly without it.
51. The video was shown to the claimant. He accepted that it was his Snapchat account and he accepted that in the video he was filling up the work fridge with individual bottles of beer. The claimant was unsure when it had been posted.
52. NB asked him and not just place the box of beer in the fridge why he would open the box of beer and empty the bottles into the fridge. The claimant said they were not his beers. NB did not ask whose beer it was.
53. NB had told CB to remove a case of beer from the workspace at some time before the snapchat video was reported.
54. NB put TM's statement about taking drugs the night before to the claimant, which he denied.
55. NB asked the claimant if he had had time to read the Drugs and Alcohol policies which were sent to him. The claimant said that he had not read them, and that he had not seen a Drug and Alcohol policy until he was invited to this disciplinary hearing. He asked where he signed up for this. NB told him that the policies were read and signed up for at induction.

56. JS asked if there was a record of the claimant reading or acknowledging the policies. KM confirmed there was no record of that. The claimant said that he did not have an induction and has not seen any policies; he sat with his manager when he started and was shown his job role, but that was all.
57. NB asked him if he knew that there were company policies and why he hadn't ever asked to see them if he did not receive them at induction. The claimant said he had no knowledge of any company policies and had never been asked to agree to any of them.
58. KM asked if he had access to Blink and the claimant confirmed that he did have. KW asked if he accessed the Blink hub. The claimant responded no, and asked what was that ? KM told him that it was where the policies were kept.
59. NB asked the claimant if he was aware of the severity when he declined to take the test. The claimant said that he was not aware. TM had just said that he would be suspended without pay and the claimant did not understand why he was suspended. He said he was not told about the severity.
60. There was a recess of about half an hour, after which NB resumed the meeting and asked the claimant if he would like to take the Snapchat video away, and if so he offered to reconvene the meeting the following week. The claimant declined this offer saying that he had now seen the video.
61. During the recess KW accessed the claimant's Blink data. This showed the Drug and Alcohol policies were shared in March and April 2025 and were issued as a mandatory read and important policy update. Activity on Blink showed that the claimant had been in the Blink hub in the month of August, but did not show when in August his had been accessed by the claimant.
62. On resumption of the meeting NB gave this information to the claimant. The claimant asked whether he needed to click to acknowledge that he had seen the policy. KM confirmed that that was correct and that the claimant had not done so, but that each mandatory read was on a banner at the bottom of the app in red which the claimant would have seen each time he opened the app. The claimant said he did not recall seeing that.
63. NB told the claimant that he wished to consider matters over the weekend before giving his decision.
64. NB decided to dismiss the claimant. He wrote to him confirming this on the 22 of September. The letter of dismissal stated that the last date of the

claimant's employment was 28 August. In his reasons for dismissal NB stated that did not consider that the claimant had been victimised when he was asked to take the test, but was satisfied that this was done because of a whistle blowing complaint.

65. NB considered that had the claimant felt victimised, he should have taken the test if he had nothing to hide and then lodged a grievance. He considered that there was a health and safety risk attached to the claimant refusing to take the test in that his job required him to operate machinery including driving a forklift truck, and the environment in which the claimant worked was one where health and safety was important.
66. NB considered that the Snapchat video contained material which reasonably gave rise to the claimant being asked to undertake a with cause alcohol test. He attached weight to the fact that the claimant was putting individual beers into a work fridge, and the caption which the claimant had posted with the video. NB did not think that the Snapchat video gave rise to grounds for a with cause drugs test.
67. NB attached weight to the fact that the claimant had been sent copies of the policies on three occasions prior to the hearing and therefore he found it difficult to accept the claimant's statement that he had not read them. This was compounded in his view in that the claimant had denied any knowledge of the Blink Hub where the policies are stored, but the respondent's records showed that he had accessed the Blink Hub. He took into account that all of the policies are shared on Blink and he was satisfied that the claimant had access to the portal where the policies had been stored, and that he had accessed the Blink hub on three occasions in August. He also took into account that the policy updates were flagged as mandatory reads on the app which the claimant had access to. In concluding that the claimant was aware of the policies NB also took into account that the claimant had been tested before and he believed the policy would have been provided to the claimant.
68. NB accepted what TM said in his statement about what happened when he asked the claimant to take the test. NB considered he had no reason to question what TM said happened in his statement about this, which he considered to be very factual. NB's experience of TM was generally, as he put it, very *black and white*, and that he was experienced in administering tests.
69. NB did not disbelieve TM's statement as to what the claimant said when exiting the premises, but he concluded that there could have been misinterpretation on both sides, and therefore did not attach weight to the

statement attributed to the claimant by TM in reaching his decision to dismiss the claimant.

70. NB attached considerable weight should be attached to the health and safety aspect of the work which the claimant performed and the environment in which he worked, which NB considered to be high risk, in reaching his decision.
71. The claimant was advised of his right to appeal, which he did. The claimant's appeal was dealt with by a Paul Cockley. It was not upheld.

Other Matters

CB Alcohol test

72. As part of his appeal the claimant complained that TM had allowed CB to leave work and go home, rather than take a with cause alcohol test. CB and TM were interviewed as part of this process. Both gave different accounts of what occurred. CB said TM gave him the option to go home rather than take an alcohol test. TM denied this.
73. At some point approximately one week before the claimant was asked to take a drug and alcohol test TM had been approached by a Deputy Manager, who advised him that he thought CB was smelling of drink. TM located CB and asked him to accompany him to the testing office where he told him about the allegation, although not the source of it. CB denied being under the influence of alcohol. TM asked him if he would have any concerns about taking an alcohol test, to which CB said no and that that he would take the test, saying words to the effect 'come on let's go'. TM did not smell alcohol on CB's breath or notice any effects of drink and decide not to do the alcohol test.

PW Drugs test

74. An employee, PW received a non-negative result from a drugs test. A non-negative result initiates further laboratory testing. PW provided the respondents with a prescription for medication which he takes, which explained the non-negative result and as a consequence of this no disciplinary action was taken against him.

KW Bottle of Wine

75. KW had a bottle of wine in the fridge at work which had been gifted to her and another HR person as a thank you. It was unopened for around 7 months and then disposed of.

Prior Disciplinary Incident involving the claimant

76. At some point around May 2025 KW was copied into an email from the Deputy Manager, Robert Gibson (RG) stating the claimant and another employee had been seen on the roof of the building, and when asked what he was doing there, had replied that he was sunbathing. CCTV footage available of the claimant and the other employee on the roof which showed the claimant lying down.
77. KW asked CB to carry out a disciplinary hearing with the claimant following this. There was no prior investigation. CB gave the claimant a file note/documented discussion as a result of this.
78. The other employee involved, who was more senior than the claimant, was also disciplined, and received a warning.

Note on Evidence

79. Not all of the evidence which the Tribunal heard was directly relevant to the issues it had to determine, and the Tribunal did not find it necessary to resolve every conflict in the evidence which it heard, however there were some issues of credibility which the Tribunal had to determine.
80. **TM** – the Tribunal formed the impression that TM was in the main a reasonably credible and reliable witness, although his recall of events was on occasion diminished, no doubt by the passage of time. In reaching this view the Tribunal take into account that he made appropriate concessions. For example, he readily accepted that a Snapchat video of the claimant putting beer into a fridge at work did not provide grounds for a with cause drugs test. He accepted that he did not ask the claimant if he had been taking drink or drugs, and he did not form the impression that the claimant was under the influence of either.
81. The Tribunal accepted the evidence of TM on some, but not all the matters, and the specific relevant conflicts between the evidence of TM, and the claimant and CB are dealt with below.
82. **NB**-The tribunal formed the impression that NB was generally a credible and reliable witness. He was able to make appropriate concessions, and like TN

accepted without difficulty that the Snapchat video did not give grounds for a with cause drugs test. There were no material issues of credibility arising from his evidence as to how the disciplinary proceedings were conducted.

83. The Tribunal did not conclude that NB had prejudged the matter and it was satisfied that he was the sole decision maker. The fact that he took the weekend to deliberate on his decision did not suggest prejudgment. The Tribunal take into account the fact that the date of dismissal was the 28 of August. NB explained this as a typographical error. The 28 of August was the last date upon which the claim had worked, and the Tribunal did not draw the inference that the decision to dismiss had been made on that date from the fact that this date appeared in the dismissal letter of 22 September.
84. **KM-** KM's approach to initiating disciplinary proceedings without initiating an investigatory process, and her refusal to note comments made by the trade union representative on the grounds that they were unable to speak on behalf of the employee in the course of a disciplinary hearing where the subject of criticism by the claimant and the Tribunal formed the impression that generally KM was inclined to a summary approach to disciplinary proceedings. This is reflected in the approach she took to the claimant's disciplinary proceeding not just in this case, but also from her evidence that no investigation was required before commencing disciplinary action in the case involving the claimant being on the roof.
85. This however, they did not impact on the credibility or a reliability of KM evidence on matters of fact, and the tribunal found her to be a generally credible witness. The Tribunal did not conclude that KM had victimised the claimant.
86. KM accepted that there was a no investigation prior to the disciplinary hearing which CB conducted with the claimant in May. She denied having told CB to give the claimant a warning as a result of this, and the Tribunal accepted this. CB in his evidence did not say he had been told by KM proceed in this fashion.
87. Nor did the Tribunal conclude that she had pressurised RG to send her an email implicating the claimant for the purposes of disciplinary action. The claimant said that RG told him this was the case, however this the Tribunal did not hear from RG and it formed the view that the claimant's evidence was to a not insignificant degree coloured by his perception that he had been wronged.
88. Nor did the Tribunal accepted the claimant's evidence that he had complained to KM about breach of GDPR. KM gave convincing evidence

about her role in a previous position in which she had responsibility for GDPR issues and she struck the tribunal as an individual who would have acted on such concerns had they been raised. .

89. **The claimant-** While the Tribunal did not form the impression that the claimant set out to deliberately mislead, it did not form the impression that his view of matters was to a degree influenced by his very strong conviction that he has been wronged, in particular that he had been victimised and that KM had been to a large degree responsible for that.
90. Further, the Tribunal's impression of the claimants credibility and reliability was to some degree adversely impacted by the fact that on occasion he appeared evasive in answering questions and to have some difficulty in making appropriate concessions.
91. For example the claimant was asked if he agreed he had to follow an instruction even if not spelt out in a policy? He said it depends, and he often questioned things. When asked if he accepted his job duties as a storeman did not require him to be on the roof of the building, he replied that he was not required to do a lot of things. The claimant's evidence in cross examination to the effect that after he went on the roof of the building he lay down because he was feeling dizzy as he did not like heights, but that he had put himself out of his comfort zone at work and did something that he did not want to do for the benefit of the company, lacked plausibility.
92. The Tribunal did not conclude that the claimant had been victimised. The tribunal was satisfied that the respondents employed random testing and that this was likely to account for the fact that some drivers had not been tested at all over a long period while the claimant had been. Nor did it conclude for the reasons set out above the KM had a particular agenda against him.
93. The first material conflict in the claimant's evidence related to whether TM had told him that failure to take the Drug and Alcohol test could be regarded as gross misconduct.
94. There was a dispute between the evidence of the claimant and of TM as to whether TM told the claimant that refusal to take the drugs test could be regarded as gross misconduct. The claimant denied that this was said by TM. On balance the Tribunal was satisfied that TM's evidence was to be believed on this point. His evidence that he explained the failure to take the test would be regarded as gross misconduct was consistent with the contemporaneous statement which he produced on the 28 of August in which he states he explained the ramifications of failing to take the test to the claimant.

95. The Tribunal did not however conclude that TM had told the claimant on more than one occasion that if he failed to take the test it would be regarded as gross misconduct. KM suggested he had said this when she was present, however that is not reflected in TM's contemporaneous statement, and the Tribunal was not persuaded on balance that this had occurred.
96. There was also an issue as to whether the claimant asked TM the reason for the test. It was the claimant's position that he had. TM was asked in cross examination if the claimant had asked him the reason for the test and said he could not recall if he had been asked.
97. The Tribunal accepted the claimant's evidence that he had asked TM what was the reason for the test and who had reported him, and that TM said he could not comment. In reaching his conclusion the Tribunal takes into account that the claimant clearly was surprised and aggrieved at being asked to take the tests, which rendered it likely that he would have asked the reason why he was being tested. Further, TM did not know the reason for the test, which on balance rendered plausible the reply attributed to him by the claimant. TM said that he did not enquire of JR what the reason was, he simply followed the *chain of command*. Lastly, the claimant's position at the disciplinary hearing was that he had asked why he was being tested and he did not know the reason for the test, which was consistent with his evidence before the Tribunal.
98. There was also an issue as to whether the claimant made the statements attributed to him in TM statement as they exited the building. The claimant was not cross examined on his evidence in chief to the effect that he had not made these statements. On balance the Tribunal was not satisfied that the claimant had made the statements. In reaching this conclusion it takes into account that, as pointed out by the claimant, it made no sense whatsoever that he would have told the testing officer he had taken drugs the previous evening, after he had been suspended. The Tribunal did not conclude that TM had lied about this matter, but rather that his evidence was likely to be explained by their being a communication issue between the two men.
99. The second material point arising from the claimant's evidence related to whether the claimant was aware in that in terms of the respondent's Drug and Alcohol policies refusal to take a test would be regarded as gross misconduct.
100. The claimant accepted in evidence he was aware the respondents had Policies, although he denied any knowledge of there being policies at the disciplinary hearing. It was the claimant's position that he had not read the

Drug and Alcohol policies and was unaware of the terms of the policies. On the balance of probabilities the Tribunal concluded that the claimant had not read the Drug and Alcohol policies, at least until after his suspension. The claimant had not been directed to the policies at the commencement of his employment and the evidence about his use of the Blink Hub did not indicate that he has accessed them in August before he was suspended. The data did not indicate when in August the claimant accessed Blink and on the balance of probabilities it was more likely that he would have motivated to try to find out what the policies said after he was suspended.

101. NB said the claimant would have been given the policies when he took the two earlier tests, however that was only his belief. The claimant was not provided with a copy of the policies in August when he was asked to take the tests. He denied having received them when he was tested on two earlier occasions and there was nothing, other than NB's belief they would have been sent to him then, to suggest he had received them on those occasions.
102. The tribunal was however satisfied that the claimant was aware that his employers could request tests from employees and was aware that random and with cause tests could be requested. It was also satisfied that as noted above the claimant had been told by TM that refusal to take the tests would be regarded as gross misconduct, and therefore at the point when the claimant refused to take the tests at least on the second occasion and third occasion on which he was asked, he was aware of the consequences of that.
103. **CB** The Tribunal formed the impression that CB's evidence was at times motivated by his desire to help the claimant, who was his friend, and this an adverse impact on the credibility and reliability of some of his evidence. Ms Fowlie made submissions as to the claimant's credibility on the basis that he did not accept the extent of the friendship, however the Tribunal did not consider a great deal turned on this.
104. It was the claimant's evidence that TM allowed CB to go home rather than take an alcohol test. CB's version was that he was prepared to take the test, but TM said he would give him the option to go home. He told PC that he was not well and went home, returning work a few hours later.
105. TM's version of events was that CB was prepared to take the test, but TM was satisfied there was no need to administer it from his own observations. He did not know that CB had gone home.

106. In reaching its conclusion that TM's version was to be preferred the tribunal also attached some weight to its general assessment of the credibility of the witnesses, and to the fact that the claimant and CB give different versions of how the claimant came to know about this. It was the claimant's version that CB had telephoned him during his working day and was upset about what had happened. CB did not give evidence that he was upset at what had happened or that he had phoned the claimant about it. He said he had suggested to the claimant on 28 August, when the claimant asked to meet with him, that TM had given him the option to go home.
107. In any event CB accepted he was willing to undertake the test, and therefore on that point there was no dispute.
108. The second point was that CB told him that KM had pressured him to give the claimant a final written warning as a result of the roof incident. On balance the tribunal did not accept this. KM accepted that she asked CB to commence a disciplinary hearing with the claimant on the basis of RG's email and the CCTV footage of the claimant on the roof, but that CB was the decision maker, and she did not apply any pressure as to the outcome. While KM could be criticised for failing to instigate an investigation procedure, it would be an normal function of HR to ask a manager to conduct disciplinary proceedings, and the tribunal was satisfied that this is what had occurred in this case. The general credibility of both the claimant and CB on this point was not enhanced in that it was the claimant's position that the area manager had told CB what sanction he should impose on him, however this was not a matter which CB spoke to.
109. Another matter arising from the claimant, CB and KM's evidence was whether the mechanic (PW) had provided a prescription to the respondents which explained his non negative drug test. It was CB's position that this had definitely not happened. He said he had 'hounded' PW to provide the prescription and eventually PW left the respondent's employment because he could not do so.
110. KM said a prescription had been provided and it was on PW's personnel file. The tribunal accepted KM's evidence on this and was supported in this conclusion in that it was satisfied the respondents did take health and safety seriously, which would render it unlikely that they would have retained an employee who had tested positive for amphetamines.
111. Mr Lawson made written submissions on this matter providing a text exchange between the claimant and PW suggesting no prescription had been provided. The Tribunal however could not attach any weight to this untested

evidence. In any event the consistency of treatment argument was not one which the Tribunal required to address, for reasons which are dealt with below.

Submissions

112. Both parties provided written submissions. In the interests of brevity these are not reproduced here but are referred to below where relevant.

Consideration

Unfair Dismissal

113. The tribunal firstly considered the complaint of unfair dismissal. Section 94 of the ERA established the right not to be unfairly dismissed.

114. Section 98 provides:

“

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it –*

.....

(3) (b) *relates to the conduct of the employee,*

.....

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

115. The burden rests with the respondents to establish a potentially fair reason for dismissal under section 98 (1) of the ERA. If they get over that, the fairness of the dismissal is considered under section 98(4) where the burden of proof is neutral.
116. The starting point for consideration of fairness under section 98(4) in a conduct dismissal is the guidance given in the well-known case referred to by both parties of *British Home Store v Burchill* 980 ICR 303, EAT, to the effect that:
- (1) The employer must believe the employee guilty of misconduct;
 - (2) That the employer must have had in mind reasonable grounds upon which to sustain that belief; and
 - (3) At the stage at which that belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances.
117. In applying the *Burchill* test the employer has the burden of establishing the reason for dismissal, which is the first limb of the test, and that thereafter in considering the second and third limb of the test the burden of proof is neutral.
118. The Tribunal reminded itself that an objective test of reasonableness, judged against the standards of a reasonable employer applies to the investigation as it does to the substantive aspects of the decision to dismiss. It also reminded itself that it must not substitute its view for that of the employer.

Reason for Dismissal

119. The Tribunal began by considering the reason for dismissal.
120. The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal. The fairness of the dismissal for that reason is a matter which is assessed when considering the question of reasonableness.
121. As referred to by Ms Fowlie, in *Abernethy v Mott Hay and Anderson* 1974 ICR 323 CA 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."
122. The reason which the respondents advance for dismissal was the claimant's conduct. That conduct was his refusal to take a 'for cause' drug and alcohol test that was to be conducted by TM in the presence of two witnesses. There

was reference in the dismissal outcome letter of comments attributed to the claimant by TM about having taken drugs the night before he was asked to undertake the test. However, NB did not conclude that the claimant had made the alleged comments and the Tribunal accepted that these alleged comments did not form part of the reason for dismissal.

123. The Tribunal was satisfied that NB believed the claimant had refused to take a 'for cause' alcohol test and that was a gross misconduct offence under the respondent's Alcohol Policy. The basis of this belief was the Snapchat video of the claimant loading beers into a fridge at work with the caption about liking lunch time work attached, which NB considered reasonably gave rise to a request that the claimant undertake a 'for cause' alcohol test, and the claimant's refusal to take that test, having been advised of the consequences of not doing so, as confirmed in TM's statement.
124. Mr Lawson argued that there was no cause for an alcohol test, however the Tribunal was satisfied that NB did believe that the Snapchat video was a ground on which the claimant could be asked to submit to a for cause alcohol test and that such a belief on his part did not fall out with the objective band of reasonableness.
125. The respondents have separate Drug and Alcohol policies. Different testing procedures are employed to test for alcohol and to test for drugs. NB accepted without difficulty in cross examination that there was no cause for the claimant to be asked to undertake a drugs test. There was nothing to indicate that the claimant's performance at work was in any way impaired suggesting his consumption of drugs, (or indeed alcohol). NB did not believe the claimant's performance at work was in any way impaired, suggesting drug consumption. It follows from that that there were no set of facts known to NB or beliefs held by him which caused him to believe that there was cause for the claimant to be asked to take a 'for cause' drugs test and that the claimant had refused to take a 'for cause' drugs test.
126. The single reason for dismissal advanced was refusal to take 'for cause' drug and alcohol tests. There was no attempt to separate the reason for which the claimant was dismissed (refusal to take a for cause alcohol test) from his refusal to take a for cause drugs test, with an argument that refusal to take one of the tests would have justified dismissal independently of the other. The charge against the claimant was cumulative rather than two separate charges of failure to take each of the two different tests. Where the charge is cumulative, in the sense that it was the claimant's refusal to take both a 'for

cause' alcohol test and a 'for cause' drugs test that was the misconduct for which he was dismissed, then it is fatal to the fairness of the decision that there were no facts known or beliefs held by the dismissing officer which caused him to conclude that the claimant had refused to take a 'for cause' drugs test.

127. Ms Fowlie's submissions dealt principally with the basis on which it was suggested the respondents had grounds to ask the claimant to submit to a for cause alcohol test. She did however submit that asking the claimant to take a with cause drugs test was appropriate. She submitted that with hindsight a drugs test may not have been necessary, however TM acted in accordance with the instructions he received; and both tests are not uncommonly requested.
128. Objectively, none of these matters relied upon by Ms Fowlie could give rise to facts or a reasonable belief that the claimant had refused a for cause drugs test. TM's evidence was that while drugs test were rarely carried out on their own, the respondents did carry out alcohol testing on its own, separately to drugs testing. The fact that TM considered he was simply following a chain of command as he put it, did not justify the respondent's belief that the claimant had refused a *for cause* drugs test.
129. Ms Fowlie argued in the alternative that should the Tribunal not consider the test to constitute a "for cause" test, then the respondent relied on NB's evidence to the effect that the claimant's refusal to undertake the tests amounted to a refusal to obey a reasonable management instruction. Mr Lawson correctly pointed out that this was not the reason advanced for dismissal at the time of dismissal and it was not identified as the basis of dismissal at the outset of this hearing. It was only a matter which emerged in the course of NB's evidence.
130. In any event, in light of the fact that NB did not consider there were any grounds giving rise to asking the claimant to undergo a for cause drugs test, he could not have reasonably held the belief that refusal to undertake such a test amounted to refusal to comply with a reasonable management instruction. Objectively it could not be a reasonable instruction to ask an employee to submit to a for cause drugs test, for which there is no 'cause'. NB did not believe there was any cause for the claimant to be asked to submit to a drugs test, and therefore there were no facts known to him or beliefs held by him which could have caused him to conclude that asking the claimant to undertake such a test was a reasonable management instruction, or that in

refusing to undertake the test the claimant had refused a reasonable management instruction.

131. The Tribunal was not satisfied that the respondents had discharged the burden which rests with them to establish a potentially fair reason for dismissal.

Section 98 (4) of the ERA

132. The Tribunal's conclusion on the reason for dismissal means that the respondents did not get over the first limb of the *Burchill* test, as a consequence of which the dismissal is unfair.
133. For the sake of completeness however the Tribunal dealt with the investigation process and whether this met the third limb of the *Burchill* test. Ms Fowlie relied on *Gallagher v Abellio Scotrail (2020) 2 WLUK 691* and submitted that an investigation would have served no useful purpose. She submitted the scope of the investigation depends on the circumstances, especially where the core facts are clear or undisputed.
134. The only core fact which was undisputed in the case was that the claimant had posted the offending Snapchat video and refused to take the tests. There was a dispute on what the claimant was told by TM; on whether the claimant was aware of the policies; and on whether there were any grounds for him being asked to undertake the tests in the first place; and on what he was accused of saying to TM as he left the premises; and whether the claimant was being victimised in being asked to take the tests. An investigation could have provided the opportunity for these matters to be explored prior to the disciplinary hearing taking place. While a disciplinary hearing is itself part of the investigating process, judged against the standards of a reasonable employer, it was unreasonable to proceed straight to a disciplinary hearing in the absence of any investigation.
135. As it was the claimant attended the disciplinary hearing still not knowing why he had been asked to take a for cause drug and alcohol test and it was not until the hearing itself that he was presented with the video evidence on which the respondents relied As submitted by Mr Lawson the respondents were in breach of the ACAS code on Disciplinary Procedures in failing to provide this information in advance of the hearing. The offer of an adjournment of the hearing so that the claimant could take the Snapchat video away, was only given to him after he had answered NB's questions about the video.

136. Further, in terms of the procedural aspects of the disciplinary hearing, the respondents refused to allow the claimant's trade union representative to speak or comment on his behalf, but only to confer with him, contrary to Paragraph 17 of the ACAS Code of Practice, referred to by Mr Lawson. Paragraph 17 states: *"The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case."*
137. The respondents produced minutes which excluded comments made by JS.
138. The Tribunal concluded that for these reasons the investigation carried out fell out with the band of reasonable responses.
139. There was an appeal but no evidence was lead about how this was conducted, other than the interviews carried out with TM and CB, or what factors the appeal officer took into account in reaching his decision and the Tribunal was unable to make findings about this which may have impacted the reasonableness of the investigation.
140. The Tribunal also considered the second limb of the *Burchill* test. The tribunal was satisfied that NB did believe that the claimant's Snapchat comprised grounds for a with cause alcohol test. While such a conclusion may not have been reached by all managers, it could not be said the contents of the video which showed the claimant packing beers into a work fridge that such this conclusion fell out with the range of reasonable responses.
141. There was no dispute that the claimant had refused the test, and therefore there were reasonable grounds for the belief that the claimant had refused the with cause alcohol test when he was asked to undertake this, and that he was advised of the consequence of not doing so by TM. NB was reasonably entitled to accept TM's statement on this point, even if the claimant did not accept what TM said. It is not unreasonable for an employer to accept the word of one employee over the other, and NB was reasonably entitled to take into account TM's experience in administering tests and his impression of him as being as a straightforward individual.
142. There was no basis however on which NB could reasonably conclude that that the claimant was told the reason for the tests, or that the claimant had refused to take a with cause drugs test. TM accepted he did not tell the

claimant the reason for the test. Ms Fowlie submitted the claimant could have asked the reason for the test, however the claimant had asked TM the reason for the test and received no substantive reply, and the claimant told NB this in the course of the disciplinary hearing.

143. Applying the objective standard of a reasonable employer there were no reasonable grounds to conclude that the claimant had refused to take a for cause drugs test, which formed the reason for dismissal alongside his refusal take a with cause alcohol test or that he had refused a for cause alcohol test, having been told the reason by his employer as to why this was considered necessary.
144. Having reached this conclusion it follows that the the sanction of dismissal fell out with the band of reasonable responses open to a reasonable employer in the circumstances.
145. The Tribunal concluded that the dismissal was unfair both with regard to the failure to establish the reason for dismissal and the fairness of the procedure adopted prior to dismissal.

Remedy

146. The Tribunal having concluded that the dismissal was unfair, went on to consider the specific issues of Remedy identified above. It was agreed that the Tribunal would make findings in principle on any adjustments to the Basic and Compensatory award on the basis of *Polkey*, and contributory conduct
147. In terms of section 118 of the ERA a successful claimant is entitled to both a compensatory and basic award.
148. In terms of section 122 (2) of the ERA where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.
149. The compensatory award is assessed under section 123. It provides;
“(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss

sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

.....

(6)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."

Polkey

150. Ms Fowlie submitted that the *Polkey* principle requires the Tribunal to assess whether, if a proper procedure had been followed the claimant would (not could) have been dismissed by this employer. She submitted that in this case, if a reasonable investigation had been conducted, dismissal would have followed.
151. Ms Fowlie submitted that if the Tribunal finds that there were procedural flaws with the process and that those flaws rendered the dismissal unfair, a fair dismissal would have still occurred had those errors not been present and the dismissal would have taken place at the same time. She submitted that any compensation for unfair dismissal should be reduced by 100% to reflect this.
152. In considering whether there should be a *Polkey* reduction, the Tribunal has to consider all the relevant evidence available to it. The burden rests with the respondent to show from the evidence that the claimant would have been dismissed in any event.
153. The Tribunal had regard to the guidance in the case of *Software 200 Ltd v Andrews* 2007 ICR 825 referred to by Mr Lawson. That guidance included;
- *in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal*
 - *if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future)*
 - *there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so*

riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal

- *however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*
- *a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.*

154. In considering whether there should be a *Polkey* reduction, the Tribunal considered the following;

- what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process?
- depending on the principal reason for any future hypothetical dismissal, would dismissal for that reason be fair or unfair?
- even if a potentially fair dismissal was available, would the respondent in fact have dismissed the employee as opposed to imposing some lesser penalty, and if so, would that have ensured the employee's continued employment?

155. Ms Fowlie did not direct the tribunal to any evidence upon which the respondents sought to rely in arguing for a *Polkey* reduction, beyond that had a proper investigation been applied they would have dismissed the claimant in any event.

156. From a proper investigation and disciplinary process it was likely to have become apparent that the claimant had not consumed drugs or alcohol; he showed no signs whatsoever of impairment on the basis of drug or alcohol use ;that the claimant had not undergone an induction at the commencement of his employment; that the claimant had the potential to access the respondent's Drug and Alcohol policies via the respondents intranet; that he

had posted a Snapchat video at some point in which he was loading beers into a work fridge; the claimant was not told of the reason why he was being asked to undertake a for cause drug and alcohol tests; that the claimant had asked why he was being tested and received no reply beyond that it was a for cause test; and that there was no basis for him being asked to undertake for cause drugs test.

157. What would have emerged as the reason for dismissal was that at some point the claimant posted the Snapchat video referred to above, he was asked to take for cause drug and alcohol tests; the claimant asked why he was being subjected to a for cause testing but was given no reason for this; there was no 'for cause' for him being asked to submit to a drugs test; he was told if he did not take the tests it would be regarded as gross misconduct; that the claimant refused to take the test; and that the claimant had access to the relevant policies and that updates to them had been flagged on Blink
158. Ms Fowlie submitted the test is not *could* but *would* the respondents have dismissed for that reason. Whether the particular respondents would have dismissed for that reason is however not the only matter the Tribunal has to consider, and it firstly had to decide if a future hypothetical dismissal for that reason would be fair.
159. The Tribunal did not conclude that objectively dismissal for such a reason would have been fair, in that there no basis upon which he could have been asked to undertake a for drugs test. The claimant had asked why he was being subjected to for cause testing, but had not been given any reason as to why he was being subjected to these tests. The claimant's refusal to take the test in these circumstances could not objectively be regarded as unreasonable. The fact that the claimant was told refusal to take the tests could be regarded as gross misconduct, did not mean that his refusal automatically became gross misconduct. For these reasons the Tribunal did not conclude a potentially fair reason would have been available to the respondents to dismiss the claimant.
160. The Tribunal considered that the unfairness of a dismissal for reason identified above was such that there should be no a percentage reduction to the compensatory award on the basis that there was a chance of fair dismissal having occurred had a proper procedure been followed.
161. On this basis the tribunal declined to make a *Polkey* reduction.

Contributory Conduct

162. Ms Fowlie referred to the case of *Nelson v The British Broadcasting Corporation (no.2)* [1980] ICR 110 where the court said:

“For conduct to be the basis for a finding of contributory fault, it has to have the characteristic of culpability or blameworthiness. Conduct by an employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature, it could also include conduct that was perverse or foolish, bloody-minded or merely unreasonable in all the circumstances. In order for a deduction to be made under section 123(6) of the Act, a causal link between the employee’s conduct and the dismissal must be shown to exist.”

163. Ms Fowlie submitted that the dismissal was largely because the claimant refused to undergo a for cause drug and alcohol testing which was deemed to be gross misconduct. She referred to the case of *Hollier v Plysu Ltd* [1983] IRLR 260 where it was suggested that the contribution should be assessed broadly and should generally fall within the following categories: Wholly to blame: 100%; Largely to blame: 75%; Employer and employee equally to blame: 50%; Slightly to blame: 25%.
164. Ms Fowlie submitted that that the claimant’s conduct was largely to blame for the dismissal. He refused to undergo a drug and alcohol test and was dismissed as a direct consequence of that refusal. There is a clear causal link between his conduct and the dismissal, and he is solely responsible for the decision not to comply with the instruction.
165. Ms Fowlie submitted there should be a 75% for the claimant’s contributory conduct as the dismissal would not have occurred if it were not for the claimant’s wilful actions. The claimant’s refusal was significant contributory fault which caused or contributed to his dismissal. Taking account of Section 122(2) of the ERA, she submitted it was appropriate to reduce any basic award to nil while under section 123(6) of the Employment Rights Act 1996, it is just and equitable to reduce any compensatory award to nil.
166. In order for the Tribunal to conclude that there should be a deduction from the compensatory award under section 123 (6) on the grounds of conduct it must find the claimant’s conduct to be culpable and blameworthy conduct, and that it contributed to the dismissal. Ms Fowlie’s argument rests on the claimant’s refusal to take the tests, when he was aware that his refusal will be regarded as gross misconduct, rather than any other conduct on the part

of the claimant. No submission was made with regard to the claimant's conduct in posting the Snapchat video.

167. The Tribunal was satisfied that it was the claimant's conduct in refusing to take the for cause tests for drugs and alcohol was conduct which led to the claimant's dismissal.
168. The question was however, whether such conduct was culpable and blameworthy? At the point when the claimant refused to take the tests, he had asked why he was being asked to submit to a with cause drug and alcohol test and was given no reason for this. TM's response to him was that he could not comment on the reason. The claimant had not consumed drugs or alcohol and did not know the reason why he was being asked to submit to these tests.
169. Refusal to take the tests, even when the claimant was made aware that this refusal would be treated as gross misconduct could not be regarded as blameworthy conduct or perverse or foolish or bloody minded, or unreasonable in all the circumstances, given the claimant did not have any notion, even after he asked, why he was being subjected to these tests. There was no basis to ask him to take a drugs test. Even if it was reasonable for the respondents to consider that the claimant posting a Snapchat video gave rise to a reason for a for cause alcohol tests, it did not follow that the claimant was aware that the video was the reason for the request. When he refused to take the tests he had no idea why he was being asked to submit to them. The fact that the claimant was told refusal to take the tests could be regarded as gross misconduct, did not mean without more that his refusal was foolish or perverse or bloody minded conduct.
170. In these circumstances the Tribunal did not conclude that the claimant was guilty of conduct which was culpable or blameworthy and declined to make a deduction under section 123 to the Compensatory award. For the same reasons the Tribunal declined to make a deduction on the grounds of justice and equity to the Basic award under Section 122 (2) of the ERA.

Breach of Contract

The issue for the tribunal here is whether the claimant had been guilty of conduct justifying summary dismissal. The burden of proof rests with the respondent. The employer must be able to prove that there was a repudiatory breach in order to justify summarily dismissing an employee. It is not enough for the respondent simply to prove reasonable belief in the conduct for which the employee is dismissed. The tribunal itself must be satisfied that on the

balance of probabilities the employee committed the misconduct ,and that it was sufficiently serious to amount to repudiation.

171. Ms Fowlie submitted that the claimant was guilty of conduct which breached the implied term of mutual trust and confidence in refusing to take a drugs and alcohol test, for which there was cause, in a working environment where health and safety were critical, and where he was told his refusal to take the test was gross misconduct.
172. For the reasons given above the Tribunal did not conclude that there was any basis for the claimant being asked to submit to a drugs test and his refusal to do so did not amount to repudiatory conduct justifying dismissal on his part, or conduct which breached the implied term of mutual trust and confidence. Nor did the Tribunal conclude that refusing to take a for cause alcohol test, when the claimant had not consumed any alcohol, and having asked, been given no reason why he was being subjected to a for cause test, amounted to repudiatory conduct justifying dismissal ,or conduct which breached the implied term of mutual trust and confidence. The importance of health and safety, the existence of the policies, or the fact that the claimant was told refusal to take the tests amounted to gross misconduct, did not in these circumstances render the claimant's conduct in fundamental breach of his contract of employment.
173. The wrongful dismissal claim therefore succeeds.

4 August 2026

Date sent to Parties