EMPLOYMENT TRIBUNALS

Claimant: Mark Petherick

Respondent: Elm Surfacing Ltd

Heard at: London (South) via Cloud Video Platform

On: 10 February 2022

Before: Judge of the First-tier Tribunal T Lawrence,
acting as an Employment Judge

Representation
Claimant: In person
Respondent: E MacDonald of counsel, instructed by Thomson Snell & Passmore LLP

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

REASONS

Introduction

2. Claimant complains of unfair dismissal arising from his dismissal from the Respondent's employment in September 2020. The Claimant had been employed as a Sweeper Driver, driving a 16-ton truck on public roads and work sites.

3. The Respondent's case is that the Claimant's dismissal was fair, for the reason of gross misconduct. The Respondent asserts that the Claimant was dismissed because he tested positive for cocaine and for benzoylecgonine, a metabolite of cocaine. The Respondent also asserts that the Claimant had in fact been a user of cocaine.

4. The Claimant denies ever using cocaine and asserts that the drug test was administered incorrectly. The Claimant further asserts that the Respondent

failed to follow a fair procedure regarding the investigation of the positive drug test and regarding the disciplinary procedures leading to his dismissal, including denying him the opportunity to investigate the matter for himself and denying him a right to appeal against the decision to dismiss him.

The Hearing

5. The hearing was conducted on Cloud Video Platform with all attendees joining by video link.

6. I confirmed with the Claimant and Mr MacDonald that the documents for consideration were as follows:

   6.1. Agreed bundle of 239 numbered pages.
   6.2. ET3 (completed copy – the version in the bundle is blank).
   6.3. Written statement by Hamid Safavi, an employee of the Respondent, dated 3 February 2022.
   6.4. Written statement by Megan Bailey, an employee of the Respondent, dated 4 February 2022.
   6.5. Written statement by the Claimant, dated 7 February 2022.
   6.6. Written submissions for the Respondent by Mr MacDonald.
   6.7. Case law reports.

7. Oral evidence was heard from the Hamid Safavi, from Megan Bailey, and from the Claimant, each of whom was cross-examined.

8. Oral submissions were made by Mr MacDonald and by the Claimant.

9. I reserved judgment to follow in writing.

The applicable law

10. Section 98 of the Employment Rights Act 1996 provides as follows:

> 98 General.
>
> (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-
…

(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
…

11. The Tribunal should undertake a four-stage process to determine:

    11.1. Whether the employer genuinely believed the employee to be guilty of misconduct;

    11.2. Whether the employer had reasonable grounds for that belief;

    11.3. Whether the belief was based on a reasonable investigation; and

    11.4. Whether the dismissal was within the range of reasonable responses open to a reasonable employer.

12. The consideration of whether the dismissal was within the range of reasonable responses encompasses the investigation: *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*.

13. The degree of investigation required depends on the circumstances: *Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94*. Relevant factors include the strength of the *prima facie* case against the employee, the seriousness of the allegations and their potential to blight the employee's future.

14. The employer's investigation should be particularly rigorous if the charges are particularly serious or if the effect on the employee is far-reaching: *A v B [2003] IRLR 405* per Elias J. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job, and even the prospect of

securing employment in their chosen field. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable:

> "59. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> 60. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.
>
> 61. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness."

15. The Tribunal should have regard to the ACAS Code of Practice as a guide to "good sound industrial relations' policy and Practice". Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

    15.1. Deal with the issues promptly and consistently;
    15.2. Establish the facts before taking action;
    15.3. Ensure the employee was informed clearly of the allegation;
    15.4. Ensure that the nature and extent of the investigation reflect the seriousness of the matter, i.e. the more serious the matter then the more thorough the investigation should be;

15.5. Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;

15.6. Keep an open mind and look for evidence which supports the employee's case as well as evidence against;

15.7. Make sure that the disciplinary action is appropriate to the misconduct alleged; and

15.8. Provide the employee with an opportunity to appeal the decision.

16. The following principles relating to compensation were identified in *Software 2000 Ltd v Andrews [2007] ICR 825*:

> "…
> (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
>
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just 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.
> …"

Material facts

17. My findings of fact have been made on consideration of the documentary and oral evidence in the round and applying the evidential standard of the balance of probability.

18. The Claimant was an employee of the Respondent at the date of his dismissal on 20 September 2020.

19. The Claimant had been furloughed during the coronavirus pandemic from 1 April 2020 until 21 August 2020, by which time it had become the Respondent's routine practice to administer drugs tests on employees returning to work. On 10 September 2020, the Claimant was informed that he was required to undergo a drug test. The Claimant was informed of that requirement after his arrival at the Respondent's office after a day's work, from 6AM until 4 or 4:30PM. He had been asked to attend that that office after parking the heavy vehicle he had been driving for the Respondent that day at another location that was close to his home.

20. The Claimant reacted to the request that he take the test with verbal abuse, including swearing at the Mr Safavi and Ms Bailey who were both present when he was asked to take the test. That assertion has been consistent between the written evidence of the two witnesses and their oral evidence, which also described the Claimant's initial refusal to take the test and him walking out of the office where he had been asked to do so, after which Ms Bailey persuaded him to return to take the test. The Claimant denied being abusive but accepted that he initially refused to take the test, that he left the office where he had been asked to do so, and that he was "aggrieved" and "a little angry", which I consider is likely to be a minimisation of his reaction.

21. The Claimant's explanation for his negative response to being asked to take the test is that he had worked a long day, after his usual working hours, had been called into an office that was a considerably further distance from his home from where he had parked the vehicle he had driven for the Respondent that day, thus considerably extending the journey to his home, and that he was aggrieved that he had not been informed of the true reason why he was called into that office until his arrival there. It is Mr Safavi's consistent evidence that the Claimant's reaction appeared to Mr Safavi to be suspicious. The Claimant's reaction was verbally abusive, but I consider that the Claimant's account of his grievance is plausible.

22. The drug tests involved taking a sample of fluid from the Claimant's mouth using a swab which was then placed into a sealed tube. Three samples were taken, because the first sample was indicated a positive result for drugs, after which the Claimant accepted an invitation to provide two further samples to be sent for analysis by Hampton Knight, the company that had provided the testing kit. It was Mr Safavi's and Ms Bailey's consistent evidence that the Claimant's

reaction on seeing that the initial test was positive was similar to his reaction on being asked to take the test. Ms Bailey's evidence was that the reaction was similarly angry and abusive, only more so. The Claimant did however agree to provide the two additional samples.

23. Regarding the procedure by which the samples were taken, I find that on each occasion Mr Safavi opened the packet containing the swab but that the Claimant used the swabs to take samples of fluid from his mouth that were then placed in a sealed container. It was Mr Safavi's and Ms Bailey's consistent evidence that only the Claimant handled the swabs at any time. Under cross-examination, the Claimant stated that Mr Safavi had also opened the container containing the swab, but that was not in the Claimant's written statement and had not been asserted by him beforehand, and he did not put that assertion to Mr Safavi in cross-examination. I prefer Mr Safavi's and Ms Bailey's evidence on this point.

24. An information sheet, sample consent form and sample chain of custody form provided by Hampton Knight are included in the agreed bundle. Ms Bailey stated during cross-examination that she remembered a form being filled out. However, the Respondent has failed to provide completed versions of any consent form or chain of custody form relating to the Claimant's samples, and the Respondent has not explained its failure to do so. The Respondent's failure to provide completed versions of any consent form or chain of custody form relating to the Claimant's samples is surprising and is of potential significance for at least two reasons.

25. One such reason is that the sample consent form includes Company Tester and Donor Declaration that the steps for the drug test outlined within the form were followed correctly. Those steps include that the donor and the company tester should put on sterile gloves before handling the test equipment. The Claimant claimed in his written statement that Mr Safavi did not wear gloves when handling the test equipment, and the Claimant stated that he objected to that at the time on the basis that Mr Safavi was not following covid restrictions guidelines set by the Government. The Claimant did not state that he had, or that he had not, worn gloves himself. In his written statement, Mr Safavi stated that he followed the correct procedure outlined in the guide, but he did not state that he had or had not worn gloves when handling the test equipment and did not state whether the Claimant had worn gloves. Mr Safavi was not asked about the wearing of gloves in examination in chief. Ms Bailey stated in oral evidence under cross-examination that she recalled that Mr Safavi had worn gloves when handling the test equipment, but she was not asked whether the Claimant had worn gloves. Under cross-examination, the Claimant stated that he did not know whether the form had been sent with the samples but repeated that Mr Safavi had not worn gloves and that he had not been provided with gloves. The Respondent's failure to provide a copy of the consent form is damaging to the

credibility of the Respondent's claim that the correct procedure was followed when the samples were taken, in relation to the requirement that the company tester and donor should wear sterile gloves. I find as a fact that sterile gloves were not worn by Mr Safavi or by the Claimant during the taking of the samples of oral fluid.

26. The Claimant accepted under cross-examination that neither he nor Mr Safavi had touched the end of the swab sticks that were used to take the samples. Mr MacDonald submitted that fact made it unlikely that the samples were contaminated during the procedure by which the samples were taken. However, the there is no evidence that the results of the tests could not have been affected by a failure to adhere to the requirement that the company tester and donor should wear sterile gloves and it is not obvious that the reliability of the tests could not have been affected by that failure, even given the level of the two substances that are reported, which I return to below.

27. The Claimant noted that Mr Safavi had viewed a video on YouTube for guidance on how to take the two samples for laboratory analysis, which indicated that Mr Safavi was not familiar with the process, but Mr Safavi had admitted that and explained that most if not all employees who had tested positive for drugs had declined the opportunity to have samples sent for laboratory testing. It was Mr Safavi's unchallenged evidence that he had carried out at least 500 of the initial swab tests during his employment with the Respondent.

28. The other reason why the Respondent's failure to provide a copy of the consent form is of potential significance relates to the fact that the sample form requires the donor to declare whether they are or are not taking medication which, it is stated in the form, 'will assist the laboratory analysis process'. It is the consistent evidence of the Claimant, Ms Bailey and Mr Safavi that the Claimant declared that he was and stated the names of the medicines. In oral evidence, the Claimant claimed not to be able to remember the medication he was receiving at the time. Ms Bailey stated in her written statement that she "googled" the medicines the Claimant told her he was taking but that "none of them would have given a positive result for cocaine". However, internet research by a person without relevant specialist knowledge or expertise on such a subject could not reasonably be relied on. Ms Bailey also stated in the written statement that the laboratory test would provide the necessary clarification in any event. However, there is no evidence that Hampton Knight was informed of the medicines that the Claimant was taking, and I find that they were not so informed. There is no evidence that is probative of the likelihood of the result of the laboratory analysis being affected by such information and it is not obvious that the reliability of the tests could not have been affected by medication.

29. The two samples for laboratory testing were apparently sent to Hampton Knight. The Respondent has failed and without explanation to provide a completed copy of the chain of custody form to confirm that the sample tested by Hampton Knight was in fact the sample provided by the Claimant. Again, that omission in the evidence is surprising given the obvious critical importance of establishing that the sample tested by Hampton Knight was the correct sample.

30. On 16 September 2020, Mr Safavi received the related drug test analysis report, which is also dated 16 September 2020. The test result was to confirm Cocaine use consistent with misuse of a controlled drug.

31. An element of detail in the Hampton Knight test result report was that the tested sample contained Cocaine for Benzoylecgonine at levels greater than 32ng/ml; the report also stated a Cut-off Level for those substances of 8ng/ml. Mr MacDonald described Benzoylecgonine as a metabolite of Cocaine, the presence of which indicated that the sample could not have been, or was less likely to have been, contaminated by the substance Cocaine finding its way into the sample, because the presence of the metabolite indicates that Cocaine has been processed by the human body. However, the Respondent did not raise those assertions at any stage prior to the hearing, in writing or otherwise, and it has not provided any evidence to support them. I do not consider it appropriate to treat the assertions as uncontroversial or common knowledge because in my judgement they are not.

32. It was Ms Bailey's consistent evidence that the Claimant did not deny using Cocaine at any point during the meeting when the sample was taken or during the 16 September 2020 disciplinary meeting and there is no suggestion to the contrary in the Claimant's written statement. Ms Bailey's consistent evidence was that the Claimant stated in the disciplinary meeting on 16 September 2020 that he had not taken Cocaine "for a while". In oral evidence however, the Claimant stated that he had stated during the meeting when the sample was taken that he did not take drugs and during the disciplinary meeting when he had also stated that he did not know how the test could have been positive unless that was due to the medication ("tablets") he was taking at the time. Ms Bailey stated in cross-examination that she thought that notes would have been taken by Ronald Schreur, another of the Respondent's employees who had attended the meeting as a witness. Mr MacDonald stated that the instructions given by the Respondent were that no contemporaneous written record of the 16 September 2020 disciplinary meeting had been taken. It is, I consider, of significance regarding those disputed claims that the Respondent has without explanation failed to provide any such record, that Mr Schreur was not called as a witness in these proceedings, and that no written statement has been provided by Mr Schreur, all of which is damaging to the credibility of the Respondent's claim that the Appellant did not deny Cocaine use during the meeting. I find as a fact that the Appellant did deny Cocaine use during the

disciplinary meeting, and that he stated during that meeting that he did not know how the test could have been positive unless that was due to the medication he was taking at the time.

33. I also consider that the Respondent's failure to provide any contemporaneous written record of the 16 September 2020 disciplinary meeting nor call Mr Schreur as a witness is damaging to the Respondent's claim that the Claimant declined an opportunity to postpone the meeting, which the Claimant denies. Ms Bailey has stated that she telephoned the Claimant on 16 September 2020 to inform him that the Respondent had received the results of the laboratory assessment of his oral fluid sample, and that he needed to attend at the Respondent's office for a disciplinary meeting at a convenient time. Ms Bailey has stated that she informed the Claimant that he would need to prepare any documents and witnesses, and she informed him of his right to be accompanied. The Claimant's response during the call was to say "let's get this over and done with" and that he would be at the office within 20 minutes. Ms Bailey's evidence is also that the Claimant was very agitated and questioned Mr Schreur's role in the meeting, and that the Claimant was offered the opportunity to postpone the meeting when told that Mr Schreur was present as a witness, his response being to ask where his witness was, but to decline the opportunity to postpone the meeting when that was offered by Ms Bailey. However, the Claimant's consistent written and oral evidence was that he asked for a hearing to put his own evidence forward but that that was refused, and he was told that the matter was concluded. I accept that evidence and find that Ms Bailey had made the decision for the Respondent that the Claimant was to be summarily dismissed on or before 16 September 2020.

34. The Claimant's claim that he was denied the opportunity to postpone the meeting is supported by the Respondent's admitted failure to entertain an attempted appeal by the Claimant against his summary dismissal, in the sense that the alleged conduct would form a consistent pattern with the admitted conduct. In his appeal letter, which was sent by email dated 21 September 2020 in response to a letter from the Respondent of that same date confirming his dismissal, the Claimant asserted that the drug test had not been carried out in a satisfactory manner.

35. On 17 September 2020, Mr Safavi received an e-mail from Sarah Pinner on behalf of Hampton Knight stating that they could deduce from the test that C had ingested the cocaine within 24 hours of taking the test, or 48 at the absolute maximum.

36. The Respondent appears to assert in submissions that the Claimant was offered the opportunity to have Hampton Knight analyse the second of the two further samples that were sent for analysis, for which he would be required to pay £255 + VAT. However, there is no written evidence to support that

assertion, which the Claimant denied under cross-examination, stating that he asked whether that was possible but never received an answer. Therefore, I find that the Claimant was not informed of that opportunity.

37. In his oral submissions the Claimant questioned why the Respondent would have been content to allow him to drive his own vehicle home after the positive test during the meeting on the 10 September 2020. However, the point was not put to Mr Safavi or to Ms Bailey and attracts little weight.

38. The drug test has been described by the Respondent as a random drug test throughout and there has been no assertion by the Respondent that it had any reason other than the results of the drug tests to believe that the Claimant had been under the influence of Cocaine at any time.

Reasons

39. There is no dispute between the parties that it would be dangerous and grossly negligent for an employee to drive a 16-ton vehicle on public roads while impaired due to drugs or alcohol, and that the recent use of cocaine by the Claimant at the time he was tested for drugs on 10 September 2020 would constitute gross misconduct justifying his summary dismissal by the Respondent.

40. The Respondent submits, and I find, that the evidence establishes that it had a genuine belief that the employee was guilty of misconduct namely, being under the influence of Cocaine when he provided the samples of his saliva.

41. There was no evidence before the Respondent at the time of the dismissal indicating that the Claimant had been on duty under the influence of Cocaine other than the results of the drug tests and the Claimant denied taking Cocaine. Mr Safavi was not familiar with the process of taking two samples for laboratory analysis, because most or all employees who had tested positive for drugs had declined the opportunity to have samples sent for laboratory testing, but he had conducted over 500 of the initial swab tests. However, the results of the two drugs tests and the anger and abuse displayed by the Claimant in his reaction on 10 September 2020 on being informed that he would be required to take a drug test and on being informed of the result could have been seen as indicating that he had recently used Cocaine. Sterile gloves had not been worn by Mr Safavi or by the Claimant when the samples of oral fluid were taken, which was contrary to procedure set out in the Hampton Knights guidance and consent form, but the swab sticks had been handled by the Claimant only while the samples were taken and bottled, and I find that Ms Bailey genuinely believed that the sample would not have been contaminated. The Claimant had informed Ms Bailey on 10 September 2020 of the medication he was using at the time, which information was not passed on to Hampton Knight, but Ms Bailey had

conducted her own research on the internet, from which she concluded that the drug test results could not have been affected by the Claimant's medication. Ms Bailey stated that she remembered a form being filled out and there is no suggestion that she did not believe that the required consent form and chain of custody form had been submitted to Hampton Knight with the samples of the Claimant's oral fluid.

42. I find that the Respondent did not have reasonable grounds to believe that the Claimant had been on duty under the influence of Cocaine. I make that finding with reference to the factors mentioned in the preceding paragraph. The allegation made against the Claimant was of criminal misbehaviour, which he disputed. The Respondent's officers were laymen and not lawyers, but reason required a careful and conscientious consideration of the facts, including any evidence that might exculpate or at least point towards the innocence of the employee. In the Claimant's case, there was such evidence. There was the absence of any evidence indicating that the Claimant had been on duty under the influence of Cocaine other than the results of the drug tests. There was the failure to ensure that sterile gloves were used when the samples were taken contrary to Hampton Knight's guidance, the following of which could not reasonably be discounted as being unnecessary. There was the Claimant's denial that he had ever used Cocaine and his suggestion that the results might have been false due to the medication he was taking at the time. The related failure to inform Hampton Knight of the Claimant's medication was also contrary to Hampton Knight's guidance. The Respondent has failed and without explanation to provide a completed copy of the chain of custody form. However, Ms Bailey stated that she remembered a form being filled out and it would have been reasonable to assume that Hampton Knight must have received a consent form and chain of custody form before processing the sample in relation to which it produced the drug test analysis report. However, Hampton Knight had not been informed of the medicines that the Claimant was taking, and Ms Bailey's internet research was plainly inadequate to reasonably dispel any doubt that the medication mentioned by the Claimant might have produced a falsely positive result.

43. I also find that the Respondent's belief was not based on a reasonable investigation.

44. The allegation was very serious, as were the potential consequences for the Claimant's position of employment by the Respondent and future employment in a similar capacity. Reason demanded a careful and conscientious investigation, including the investigation of any evidence that might exculpate or at least point towards the innocence of the employee. Such an investigation would necessarily have included ensuring that Hampton Knight were made aware that sterile gloves had not been used in the taking of the sample, and that Hampton Knight had not been informed of the medication declared by the

Claimant, which would have enabled Hampton Knight to comment on whether the test result could be considered reliable in the light of those issues. Such enquiries would have been essential to reasonably dispel any doubt that the failure to use sterile gloves and the Claimant's medication might have produced a falsely positive result.

45. The Claimant was informed by telephone that a disciplinary meeting was to be held, and he attended the Respondent's office shortly afterwards where Ms Bailey and Mr Schreur were also present. During that meeting, the Claimant denied that he had ever used Cocaine and he suggested that the results might have been false due to the medication he was taking at the time. The Claimant asked during that meeting for a hearing to put his own evidence forward, but that that was refused, and he was told that the matter was concluded. The Claimant was not offered the opportunity to have Hampton Knight analyse the second of the two further samples that were sent for analysis, and he was denied the opportunity to appeal the Respondent's decision that he was to be summarily dismissed, which decision was taken by Ms Bailey for the Respondent on or before 16 September 2020.

46. In his oral submissions, the Claimant referred to the case of *Kenneth Ball v First Essex Buses*, which is a judgment by Employment Judge G D Tobin at first instance (number: 3201435/2017). Mr Ball was employed by the respondent company in that case as a bus driver before being dismissed for failing a drug test that indicated he had used Cocaine, and later submitted a more accurate hair follicle test that showed no trace of the drug. Judge Tobin found Mr Ball to have been unfairly dismissed for reasons including the failure by the respondent to make further reasonable enquiries during the investigation or appeal. Mr MacDonald correctly submitted that the case turns on its own facts, but the Claimant's reliance on the case emphasises his argument that the Respondent had made up its mind without undertaking a reasonable investigation.

47. In oral submissions, Mr MacDonald asked me find on a balance of probability that the Claimant had in fact taken Cocaine within 24 to 48 hours of the sample that produced a positive result for drugs, to reject the suggestion that Cocaine could have found its way into the sample for any other reason, and to find that the presence of Benzoylecgonine in the sample indicated that Cocaine had been ingested by the donor. Considering the evidence in the round, I find that those assertions are not proven. The Claimant has denied taking Cocaine and I consider that the failures to follow the Hampton Knight guidance regarding sterile gloves and medication are sufficiently serious to render the test results unreliable. As stated earlier, there is no evidence before me to support the assertion that the presence of Benzoylecgonine in the sample was likely to mean that Cocaine had been ingested by the donor, and I do not consider that assertion to be uncontroversial or common knowledge.

48. I therefore find that the dismissal was not within the range of reasonable responses open to a reasonable employer. The Respondent genuinely believed the Claimant to be guilty of the alleged misconduct, but the Respondent did not have reasonable grounds for that belief and the belief was not based on a reasonable investigation.

DIRECTIONS

49. I direct that a hearing is arranged before me on the first available date after 11 May 2022 to determine remedy including the consideration of mitigation and whether and if to what extent it would be appropriate to reduce the Claimant's compensation because of his verbally abusive behaviour on 10 September 2020.

50. I direct that any written evidence, witness statements and written submissions relied on by the parties are exchanged electronically and provided to the Tribunal electronically no later than 7 days prior to the date of the hearing.

51. Evidence should cover any health issues relied on, mitigation including job applications, and income received.

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Judge of the First-tier Tribunal T Lawrence,
acting as an Employment Judge
10 March 2022