



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101737/2023**

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**Held in Glasgow on 20, 21, 22 & 23 May 2024**

**Employment Judge L Doherty**

**Mr Jonathan Ferguson**

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**Claimant  
Represented by:  
Mr P McGowan -  
Solicitor**

**1 Call Direct Limited**

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**Respondent  
Represented by:  
Ms H Suleman -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:

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- (1) the claim of unfair dismissal is dismissed; and
  - (2) the claim of wrongful dismissal is dismissed.

### **REASONS**

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1. The claimant presents a complaint of unfair dismissal and breach of contract (wrongful dismissal), his complaints of disability discrimination and non-payment of holiday pay having been withdraw. A final hearing took place over three days. Mr McGowan appeared for the claimant and Mrs Suleman for the respondents.
  2. For the respondents, evidence was given by Mr Wilson, Group Support Manger and the investigatory and disciplinary officer, and Ms Buchanan the  
30 Group MD and appeals officer. The claimant gave evidence on his own behalf. A joint bundle of documents was produced.
  3. The respondents accept dismissing the claimant, but deny dismissal is unfair. They contend that there was a fair reason for dismissal which was that the

claimant had failed a drugs test, and admitted to smoking cannabis, which was properly categorised as misconduct.

4. No issue is taken with the reason advanced by the respondents for dismissal to the extent that it accepted the claimant was dismissed for failing a drugs test. The fairness of the dismissal is attacked on the basis that:
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- a. the dismissal was predicated on a flawed investigation in that the dismissing manager did not understand or misunderstood the drug test results;
  - b. there could be no reasonable belief in the misconduct for which the claimant was dismissed. The drugs test carried out was not accurate.
  - 10 c. the claimant was not dismissed for the conduct identified in the disciplinary meeting invitation letter;
  - d. dismissal was too harsh and fell out with the band of reasonable responses. There was no finding of gross misconduct under any of the company policies in force, and a lesser penalty should have been applied. No account was taken of mitigating factors.
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5. The issue for the Tribunal in broad terms was where whether there was a potentially fair reason for dismissal, and if so whether dismissal for that reason was fair or unfair under section 98 (4) of the Employment Rights Act 1996 (the ERA) having regard to the factors identified by the claimant.
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### **Findings in fact**

#### *The respondents /policies and procedures*

6. The respondents provide outsourced call centre services. They have around 100 employees based in Glasgow. Up until around February/March 2022, their biggest client was Scottish Power.
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7. The respondents have a number of policies and procedures in place for the management of staff. Staff are issued with an Employee Handbook (the Handbook), which is updated from time to time with policies. Staff access the

handbook and other policies via an office intranet. When policies are issued to staff, they are required to sign an electronic document indicating that they have read them. A record is kept of this.

8. On occasion the respondent adopt the policies and procedures of their clients to obtain or retain work; they did this with Scottish Power, adopting its Alcohol and Drugs policy.

9. The Handbook contained the following (page 85):

*Drugs and Alcohol*

*The Company has an alcohol and drugs policy, The Company regards the use of illegal drugs or alcohol as a disciplinary offence. The abuse of illegal drugs or alcohol in the workplace may lead to your dismissal. The following rules will apply: -*

- If an Employee is found to be consuming alcohol or deemed to be under the influence of alcohol in the workplace or in their working hours will be treated as gross misconduct under the Company's disciplinary procedure.*
- The taking of illegal drugs or being under the influence of illegal drugs by any Employee in the workplace or during working hours then this will be treated as gross misconduct under the Company's disciplinary procedure.*
- The possession of drugs for any reason other than medical is forbidden. If you are taking drugs for a medical reason then you must inform your Manager and tell them if they will affect your ability to work.*
- The Company may ask you to undertake a medical examination if you have a problem in relation to drugs and/or alcohol to assess if this is affecting your ability to work. You may be suspended from work until the problem is resolved. The Company will decide whether to treat it as a disciplinary matter.*

- *The Company will inform the Police if it believes there has been an abuse of controlled drugs for which criminal controls are appropriate by its Employee either in the workplace or when working on behalf of the Company when they are off the Company's premises.*
- 5 • *The Company reserves the right to randomly test for either drugs or alcohol. Failure to co-operate, or if tests prove positive then this will be treated as gross misconduct under the Company disciplinary procedure.*

10. The Handbook dealt with the respondent's disciplinary process and at Section  
10 14 set out an non exhaustive list of acts which the company considered to be gross misconduct which entitled the company to dismiss summarily. These included: *"Being unfit to work through drink or drugs, or being found in possession of unsealed alcohol, illegal drugs, or obscene material at work."*

11. In addition to the Handbook the respondents also had an alcohol and drugs  
15 policy which contained the following:

A) *ALCOHOL AND DRUGS*

*Alcohol and drug misuse can have an adverse effect not just on an individual but on their colleagues, customers and the public. Having a safe working environment, providing excellent customer service by maintaining productivity  
20 levels and avoiding days being lost to illness are all critical to our success.*

*The Company requires all employees to comply with the Alcohol and Drugs Policy. Breaches of the policy will be taken very seriously and may be dealt with under the appropriate Company disciplinary procedure.*

*For the purposes of this policy, the term 'drugs' is used to describe both illegal  
25 drugs and other psychoactive (mind-altering) substances which may or may not be illegal.*

B) *KEY RULES*

- (a) *Employees must ensure that they are not intoxicated by alcohol and are free of any drugs when they report for work and that they remain so whenever they are at work;*
- (b) *Employees must not drink alcohol during working time.*
- 5 (c) *The use, possession, storage, transportation, promotion and/or sale of drugs or drug equipment is forbidden during working time, in the workplace or at a customer's site;*
- (d) *Where employees are prescribed medication or are taking over-the-counter medicines or herbal remedies that may affect their work performance or the safety of themselves or others, they must advise*  
10 *their Line Manager.*
- (e) *Employees may be required to undergo testing for alcohol or drugs in their system in certain defined circumstances.*

C) *POLICY COMPLIANCE*

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*Employees must not have any drugs in their system when they arrive at work or at any time throughout the working day. Individuals taking illegal drugs at any time are breaking UK law and increasing the risks to their health and safety. Whilst some psychoactive substances are not illegal, they mimic the*  
20 *effects of illegal drugs and therefore pose the same risks to health and safety. Because of this, they are treated by the Company in the same way as illegal drugs for the purposes of this policy. unt how long it takes for the alcohol to clear their system.*

F) *HELP*

25 *If an employee comes forward voluntarily and seeks help for an alcohol or drug problem they will be given help and support by the Company. If an employee thinks they have a problem and may be violating the policy as a result, it is very much in their interest to come forward and seek help*

*voluntarily. The Company will be sympathetic and will ensure they get the help and support they need.*

*If an employee asks for help, the Company will be supportive in every way possible and can suggest professional advice and help. If an employee volunteers to the Company that they have an alcohol or drug problem they will be treated with dignity, at all times. Any discussions will be in the strictest of confidence.*

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12. The respondents also had a *Misuse of Drugs in the Workplace Policy*, which they issued at some point in 2018 (page 113). It included a statement of the respondent's general duties under the Health and Safety at Work Act 1974 and referred to the Misuse of Drugs Act 1971, stating that that Act made the possession or supply of controlled drugs unlawful.

13. In 2018 Mr Allan Parker, the then HR Manger, emailed all staff with Housekeeping Rules which included:

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*Drug and Alcohol policy*

*Please member we operate a zero tolerance for both use and possession within the workplace. Failure to cooperate with this policy may be deemed as a gross misconduct. We may also carry out searches and personal testing.*

#### *The Claimant*

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14. The claimant, whose date of birth is 20 January 1977, commenced employment with the respondents on 28 September 2015 as a telephone operative, gaining promotion to the position of Team Compliance Manger within about 18 months. Until 2021, he had responsibility for around 8/9 team members. For the majority of the period of the claimant's employment, the respondent's main client was Scottish Power, and the claimant worked on that account. Around March 2022, as a result of the loss of the Scottish Power contract, there was no longer work for the claimant in Compliance; his salary was protected but he was moved back onto conducting telephone calls, pursuing leads.

15. The claimant's salary from his employment was agreed to be £451.92 gross per week.
16. The claimant received the Handbook, the Drugs and Alcohol Policy and Misuse of Drugs in the Workplace policy, and had access to these on the respondent's intranet.
17. The claimant was generally regarded as a good worker. He had a clean disciplinary record.
18. The claimant has suffered from stress low mood and anxiety since around 2019. He has attended his GP and has been prescribed medication for his condition. His GP has provided a report dated 11 May 2023 confirming this information.
19. The claimant smokes cannabis on a regular basis. He estimates his cannabis usage to extent to most evening per week on a regular basis, although he attempts to keep some evenings clear.

15 *Disciplinary proceedings*

20. The respondents conduct random drugs tests. These were conducted regularly prior to Covid and by 2022 the respondents were in the process of moving back to a regular testing of staff in the office. Staff members are selected at random for testing.
- 20 21. The claimant attended work on Friday 26 August 2022, when he was selected for a random drugs test. He was advised he had been selected by Mr Wilson, the Group Support Director. The claimant gave written consent to the test.
22. The testing was conducted by an external company, Site Labour and Testing (SLT) who use Matrix Diagnostics labs for testing. The tester was a Ms Lyne Donaldson. In the course of administering the test, Ms Donaldson explained there was a 'cut off 'number above which the test is nonnegative, and below which it is a negative. The claimant understood from the information she gave him that the cut off number was 50ng/ml.

23. An immediate result was available from the test which indicated a non-negative result for the claimant. This however, was not relied upon and the result was sent for to the Laboratory in order to determine what substance has resulted in the non-negative test result.
- 5 24. After the non-negative result was returned, the claimant had a period of leave.
25. The respondents received the lab results on 7 September. The claimant's result was positive. Under the heading *Cannabis; THC-COOH (Cannabis Metabolite)* the test results indicated a cutoff point of 15ng/ml with the claimant's test recording a level of 121ng/ml
- 10 26. When this was received, the claimant was called to an investigatory meeting by Mr Wilson. In the course of that meeting, the claimant said that he knew he had failed the test at the time, as he smoked weed at night. He told Mr Wilson that he had smoked weed the night before the test.
- 15 27. Mr Wilson asked the claimant if there was anything that the respondents could help him with. The claimant said no; he smoked at night but never at work. He told Mr. Wilson that he was interested to know what the test score was, as the tester that had said that if the result was over 50 it would be a fail.
- 20 28. Mr Wilson asked the claimant why he smoked. The claimant responded that it was the stress of the current goings on at work and that he had been moved from his role and was now on the phones and being treated like an agent. He said that smoking helped him wind down and sleep at night and helped with the stress. He stressed however that he had never been under the influence of drugs at work.
- 25 29. Mr. Wilson explained that he was going to have to suspend the claimant. He went over the details of that, and gave him a letter suspending him, and asking him to attend a disciplinary hearing on Thursday 8 September.
30. The letter stated among other things:
- "You are required to attend a disciplinary hearing on Thursday 8 September at 15.30 hours to discuss the following matters of concern;*



*Use of Drugs against company policy*

*If these allegations are substantiated we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice.*

5 *I include for your information copies of the documents that will be used at the hearing (itemised below) together with a copy of a disciplinary rules and procedure*

1. *Copy of lab results*

2. *Copy of drug and alcohol policy from company handbook.'*

10 31. After he was suspended, the claimant did not have access to the respondent's internet.

32. The disciplinary hearing was conducted by Mr Wilson. He began the meeting by asking the claimant if there was anything he wanted to add from the day before. The claimant asked what the allegation was. Mr Wilson responded  
15 that it was failing a drugs test.

33. The claimant then asked what the results were and Mr Wilson went over them.

34. The claimant questioned why he results meant that he was under the influence at the time of the test or that it was in his system. He had a number of questions about the drugs test and what the result indicated. Mr Wilson did  
20 not know the answer to these questions and decided to adjourn the meeting to ask these questions of the external tester.

35. In the course of this meeting the claimant also told Mr Wilson that a number of years earlier when regular testing had been in place, he had told Mr Parker, that he smoked cannabis socially, and would fail a drugs test. He said that Mr  
25 Parker had told him not to worry about it.

36. Ms Buchanan was the respondent's point of contact with Ms Donaldson and Mr Wilson did not have Ms Donaldson's details. Further to the meeting on the

8 September, Mr Wilson emailed Ms Buchanan the questions the claimant had asked about the test results to be passed on to Lyne Donaldson.

37. Ms Donaldson replied the same day. Her email confirmed that the test shows the level of THC-COCH found in the urine as per nano gram per ml of urine. She confirmed that this is what the test was looking for and that it is the enzyme the liver secretes when someone has used cannabis; it stays in the fat cells for a longtime compared to other drugs, it can stay for as much as circa 80 days.
38. The claimant queried the cut off of 50, when the test result referred to 15mlg.
39. Ms Donaldson responded that when testing she does not divulge the specific number per drug, however she picks a number such as 50 and explains this is number for the point of explaining a cut off only and anything above is considered a fail and anything below a cut off is a pass.
40. The claimant had asked what his result meant in terms of drug use and being under the influence of drugs.
41. Ms Donaldson responded that there is no specific number to say someone is under the influence as there is in a criminal matter such as driving under the influence, however the assumption would be there is an impairment due to the fact that they have the metabolite in their body and have failed the test.
42. There was also a question about the maximin allows range, which was dealt with.
43. The claimant was called to a reconvened disciplinary hearing on 13 September. He was provided with Ms Donaldson's responses.
44. At the outset of the meeting the claimant asked again what the allegation was and was told again by Mr Wilson that it was failing a drugs test. The claimant questioned whether there was a concern over his being under the influence at work and was told by Mr Wilson that to his knowledge that was not the case.

45. Mr Wilson asked the claimant if he was a heavy drugs user. The claimant said that he smoked at night, out with working hours for medicinal purposes. He said it helped with his anxiety, stress, insomnia and depression. Mr Wilson asked if cannabis was prescribed medically. The claimant confirmed it was not and that he self-medicates.
46. The claimant asked for confirmation that he was not being dismissed for being under the influence. Mr Wilson confirmed that was correct, and that he was being disciplined because he had failed the drugs test.
47. The claimant then raised questions about the basis of the selection for the drugs testing, and why there had been an equal split of male and female employees selected. Mr Wilson adjourned the meeting again to get answers to these points.
48. The meeting was reconvened later that afternoon and the claimant was provided with answers to his questions about selection.
49. Mr Wilson took the decision to dismiss the claimant. He considered the respondents had a zero tolerance drugs policy and that the claimant had failed a drugs test, which amounted to gross misconduct for which the penalty was summary dismissal.
50. Mr Wilson did not consider any mitigation had been presented which meant that dismissal was not the appropriate sanction. He took into account that that the claimant had not come forward to ask for help prior to the test results and that his use of cannabis was not medically prescribed but was self-medication.
51. Mr Wilson communicated his decision to the claimant during the course of the meeting, he told him that as he had failed a drugs test, his employment was terminated with immediate effect.
52. The claimant asked what part of the respondent's policy he had breached, and asked again about the cut off level for testing. Mr. Wilson did not refer him to any specific part of the policy, but referred him back to Ms Donaldson's -email responses.

53. The letter dismissing the claimant was prepared by the respondent's external advisors, however Mr Wilson read and signed this letter.

54. The letter of dismissal stated:

*I am writing to inform you of my decision.*

5 *The matters of concern were*

- *Use of illegal Drugs which is against company policy.*

10 *At the hearing your explanation was that you smoke at night, but never at work as this relieves you stresses. I asked if this was medically prescribed which you confirmed it was not, you want to put on record you have never been under the influence of drugs at work and you think your standard of work speaks for itself . You have told a previous HR a manager that you would fail any random drugs and alcohol test due to you socially smoking cannabis in your own time.*

15 *I considered your explanation to be unsatisfactory, due to the independent test results confirming a positive result or 121NG/DL come up where the cut off level is 15 MG slash DL as conducted by Matrix Diagnostics. The company are not stating you are not fit to work but more than the company have a zero tolerance on illegal drugs which you have tested positive for and openly admitted to smoking an illegal drug.*

20 *Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship, to which summary dismissal is the appropriate sanction. I have referred to our standard disciplinary procedure when making this decision which does not permit*  
25 *recourse to a lesser disciplinary sanction.*

*You are therefore dismissed with immediate effect. You are not entitled to notice pay or pay in lieu of notice.*

*Appeal process*

55. The claimant appealed the decision to dismiss He was given a choice between two appeal officers and elected to direct his appeal to Ms Buchaman. He sent a lengthy letter of appeal raising a number of matters including whistleblowing and non-payment of holiday pay. A number of the points he had made at the disciplinary hearing about the testing and selection for testing were made again. The claimant wrote an additional letter on 29 September in which, among other things, he asked where the zero tolerance on illegal drugs policy was.
56. The claimant also asked for the notes of the disciplinary meetings, the Handbook and his contract of employment. These documents were provided to him together with the Alcohol and Drugs Policy and Misuse of Drugs in the Workplace policy.
57. The appeal hearing took place on 17 June 2021. In the course of the hearing, the claimant said he did not understand the dismissal. Ms Buchanan told him he was dismissed for the use of illegal drugs. The claimant asked her to show him the zero policy on drugs to which Ms Buchanan responded that it's the UK law, and the respondents followed the same laws.
58. The claimant said that his mental health had not been considered, along with his exemplary work record and length of service. He said that there were many other things the company could have offered to get him off cannabis, such as monthly testing.
59. The claimant told Ms Buchan that he was on medication from his GP. She asked if he had told his GP about smoking cannabis and the claimant said no as he did not want that on his medical record.
60. In response to this, Ms Buchanan asked the claimant if he would like help to come off cannabis. Ms Buchanan knew the claimant socially and said to him that aside from this meeting, she would be willing to help him. The claimant responded that he would have liked her help instead of being dismissed.
61. The claimant also said that the dismissal letter it said he was no other option but to dismiss, but there were other options. He said there were other options

in the handbook. He queried if Mr Wilson knew the policy. Ms Buchan said that she would look into that.

62. The meeting closed with Ms Buchan reiterating an offer of help on a personal basis.

5 63. Ms Buchan attempted to find out from Mr Parker if claimant had told him that he smoked cannabis. Mr Parker had left the respondent's employment but she checked the claimant's personnel records and spoke to the respondents external legal advisors to find out if there had been any discussion about this between them and Mr Parker. She eventually managed to speak to Mr Parker  
10 who told her that no such discussion took place.

64. Ms Buchanan decided to uphold the decision to dismiss the claimant. She considered imposing a sanction less than dismissal, but decided that in the circumstances, where the claimant had failed a drugs test, dismissal was the appropriate sanction.

15 65. A letter confirming her decision was sent to the claimant on 19 January 2022.

66. The respondent staff were aware that there was a policy of zero tolerance of drugs.

67. The two members of staff who tested positive at the same time as the claimant chose to resign before their disciplinary action took place.

20 *Post employment*

68. After his employment came to an end, the claimant immediately began to look for other work. He was unable to claim benefits because of the nature of his dismissal and was living off savings. Obtaining new employment was an imperative because of his financial situation and he managed to secure a  
25 position with a company, Domestic and General, on 14 September 2022, from which he earned £413.46 per week gross. This employment came to an end on 4 July 2023.

**Note on Evidence**

69. There were no material conflicts of evidence which the Tribunal had to resolve. The Tribunal did not form the impression that there were any significant issues of credibility or reliability in respect of any of the witnesses, but rather that they were all endeavouring to recall matters as accurately as they could and give their evidence truthfully.
70. Ms Buchanan gave evidence to the effect that staff knew there was a zero tolerance policy on drugs. The tribunal found this evidence convincing from the terms of the policy documents it was taken to . It was also supported in its conclusion to a degree in that the other members of staff who had tested positive at the same time as the claimant chose to resign before facing disciplinary action. On balance this tended to suggest the staff were aware of a zero tolerance policy, and the failure to pass a drugs test was likely to lead to dismissal.

### Submissions

71. Both parties helpfully presented written submissions and had the opportunity to respond to each other by way of oral submissions. The tribunal took all of the submission into its consideration. In the interest of brevity these are not set out here in full but are dealt with where relevant below.

### Consideration

72. Section 98 ERA 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—*

.....

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

.....

5 (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)—*

10 (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."*

73. The burden of proof rests with the respondent to establish the reason for dismissal.

15 74. The Tribunal did not understand it to be in issue that it was the fact that the claimant failed an externally administered random drugs test which caused the respondents to dismiss him. Indeed, Mr McGown confirmed that this reason for dismissal was not in dispute the outset of the hearing.

20 75. The Tribunal does however understand there to be an issue with how the respondents categorised the reason for dismissal during the disciplinary process and in their response to the claim.

25 76. The respondents categorised the reason for dismissal as gross misconduct in their ET3, however their dismissal letter stated that the reason for dismissal was the that the claimant's conduct *"has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship."*

77. Mr McGowan made submissions to the effect that the claimant had been called to the disciplinary hearing in a letter warning him that he could be found



guilty of gross misconduct and dismissed, however he was dismissed on a different infraction, and one that had not been initiated to him. He had not been warned that this was a possible finding or that it might be a ground for dismissal, and he should not have been dismissed for gross misconduct.

5 **78.** The Tribunal considered the implications of this.

79. The claimant had been called to a disciplinary hearing where the matter of concern had been identified as use of Drugs against Company policy and warned that if the allegations were substantiated, he could be summarily dismissed. He was provided with the relevant extract of the Handbook, which  
10 include a section which stated that failing a drugs test would be regarded as gross misconduct. He was told on two occasions by Mr Wilson, in the two disciplinary hearings, that the allegation was failing the Drugs test.

80. The claimant was called to answer a charge of gross misconduct, however the dismissal letter referred to a loss of trust and confidence.

15 81. The dismissal letter made clear the conduct for which the claimant had been dismissed. That was: *“Use of Illegal drugs which is against company policy. It was explained... I considered your explanation to be unsatisfactory, due to the independent test results confirming a positive result or 121NG/DL come up where the cut off level is 15 MG slash DL as conducted by Matrix  
20 Diagnostics . The company are not stating you are not fit to work but more than the company have a zero tolerance on illegal drugs which you have tested positive for and openly admitted to smoking an illegal drug.*

82. In terms of the respondent's policy, failing a drugs test was categorised as gross misconduct, not a breakdown in trust and confidence.

25 83. The Tribunal therefore concluded that there had been mislabelling of the reason for dismissal and went onto consider whether this hindered the claimant from making his case in any procedure leading up to dismissal.

84. The Tribunal had regard to the fact that although the disciplinary invite letter did not specifically identify the relevant section in part 14 of the handbook  
30 dealing with drugs and alcohol, which stated that the respondent would

consider failing a drugs test to be gross misconduct, the claimant knew that the conduct he was accused of was failing a drugs test. In response to this allegation there was not inconsiderable questioning by him during the disciplinary process of the test selection method and the test results and what they meant. He was warned, prior to the disciplinary hearing, that his use of illegal drugs might result in dismissal. Furthermore, although the dismissal letter refers to loss of trust and confidence, the actual conduct which led to dismissal was unchanged. Taking these matters into account, the Tribunal did not conclude that the mislabelling of the reasons for dismissal hindered the claimant in making his case during the disciplinary procedure.

85. The Tribunal was satisfied that the reason for dismissal had been established by the respondents and that was the failing the drugs test, which indicated the use of illegal drugs which was a conduct related reason under Section 98 (2) (b) of the ERA.
86. Having reached that conclusion Tribunal went on to consider the fairness of the dismissal under section 98(4) of the ERA. In doing so, it reminded itself that the burden of proof is neutral and that objective band of reasonable response test applies to the procedural steps taken.
87. The Tribunal began by considering the application of the well-known case of ***British Home Stores Ltd v Burchell 1980 ICR 303, EAT***, which sets out a threefold test. Firstly, the employer must show that it believed the employee guilty of misconduct; secondly that it had in mind reasonable grounds upon which to sustain that belief; and thirdly at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
88. The Tribunal considered the first limb of the test, which was whether the respondent believed the employee guilty of the misconduct. The Tribunal was satisfied that Mr Wilson and Ms Buchanan were satisfied that the claimant had failed a drugs test, which indicated that he had taken illegal drugs. Albeit the claimant took issue with what the test demonstrated, and the information provided by the tester about the cut-off point, he did not dispute that he had

failed it. In addition, he confirmed that he had smoked cannabis the night before the test. The Tribunal concluded that the respondents did believe the claimant was guilty of the misconduct for which he was dismissed.

5 89. The Tribunal considered whether the respondents had reasonable grounds upon which to sustain that belief. Mr McGowan submitted that from the outset of the disciplinary process, the claimant began questioning the testing process. To the extent that Mr Wilson did not understand the results of the drugs test and could not answer the questions the claimant asked about it at the disciplinary hearing, he passed those questions on to the external tester and relayed her responses to the claimant. That could not be said to be an unreasonable approach for him to take. There was nothing which would have suggested that what was stated in the drugs test could not be reasonably relied upon. Mr McGowan accepted that by the end of the appeal proceedings, the claimant agreed that most of his questions regarding the testing process had been answered, other than his query regarding the accuracy and apparent randomness of test level numbers which determined a pass or fail in the test. This, Mr McGowan submitted, was vital to the decision to dismiss but was not available at either the disciplinary or the appeal hearing.

20 90. In considering this point, the Tribunal take into account that the respondents had queried the cut-off point with Ms Donaldson. She explained that she provided a cut-off point as an example to the individuals she was testing, but this did not represent the cut off point for the test, which explained the difference between the numbers. This was relayed back to the claimant, who did not accept it. The respondent acting reasonably however were entitled to accept the explanation provided by Ms Donaldson and to conclude that the test results were accurate. The respondents were also reasonably entitled to take into account that the claimant advised them he had smoked cannabis the night before the test, in concluding that he had failed the test and had taken illegal drugs.

30 91. The Tribunal understood Mr McGowan to submit that there were no reasonable grounds to conclude that the claimant was guilty of the conduct

for which he was dismissed on the basis that there was an *ex post facto* rationalisation for the claimant's dismissal. He submitted that Mr Wilson decided that positive test meant dismissal without knowing why. Mr McGowan submitted that there were no the company policies linking drug offences to a penalty of gross misconduct and do not describe a scenario similar to the claimant's; they penalise an employee for being unfit to work or taking drugs at work, which the claimant did not do. Mr McGowan submitted there was no policy of zero tolerance in respect of drug testing art work.

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92. That submission, however, ignores the fact that there is a clear statement contained within the Handbook at bullet point 6 of Section 9.6 to the effect that a positive drugs test will be treated as an act of gross misconduct under the disciplinary procedure. Mr McGowan relied on the preamble to section 9.6 which he submitted referred to the abuse of illegal drugs or alcohol *in the workplace* potentially leading to dismissal. However the Tribunal did not consider that that this could be reasonably interpreted as meaning that a positive drugs test could only be treated as an act of gross misconduct under the policy, if it were established that it the drugs for which the subject tested positive were taken while at work, or that it was found that performance at work was impaired. Furthermore, the Alcohol and Drugs Policy, which was issued to the claimant, provided that employees must not have drugs in their system when they arrive at work. Mr Wilson and Ms Buchanan were reasonably entitled to rely on those documents in reaching their conclusions as to the claimant's conduct.

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93. The Tribunal concluded that there were reasonable grounds upon which the respondents could sustain their belief that the claimant had failed the drugs test and taken illegal drugs, which was in breach of the policies in place.

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94. The Tribunal went on to consider the third limb which is at the stage at which that belief was formed on those grounds, the respondents had carried out as much investigation into the matter as was reasonable in the circumstances. In considering this, the Tribunal considered the reasonableness of the disciplinary procedure.

95. The Tribunal was satisfied that on attending the disciplinary and appeal meeting that the claimant knew the conduct which he was accused of. That was failing a drugs test, which evidence illegal use of drugs. If there was any dubiety about this, it was resolved by Mr Wilson telling the claimant that the allegation was failing a drugs test at the two disciplinary meeting he conducted on the 8 and 13 September.
96. The claimant was not directed to the specific section on the policy (bullet point 6 under 9.6 of the Handbook) which states that failing a drugs test will be treated as gross misconduct, but he was provided with the relevant section of the Handbook which contained that provision before his disciplinary hearing. He was also warned in advance of the disciplinary hearing that dismissal was a potential outcome.
97. Mr McGowan submitted that the claimant no longer had access to the company intranet and that the position with regard to the policies in force was confusing and unclear.
98. The claimant however accepted he had received the company's Handbook and Drug and Alcohol policy electronically while in employment, even if he could not recall receiving the Misuse of Drugs in the Workplace policy. He was provided with a hard copy of the relevant part of the Handbook in advance of the disciplinary hearing. If there was any deficiency, copies of the Drug and Alcohol policy and Misuse of Drugs in the Workplace policy, and the housekeeping email sent by Mr Parker in 2018 were provided to him in advance of the appeal.
99. The Tribunal was also satisfied that the claimant had an opportunity to state his case in response the charge. That is demonstrated by the questions he asked about selection for the test, the test and the significance of its conclusions. Mr Wilson undertook enquires as a result of the questions the claimant raised. Mr McGowan submitted that Mr Wilson and Ms Buchanan did not understand the test results, whereas the claimant did. It was, however, reasonable for the disciplinary and appeals officer to undertake enquiries and ask the questions which the claimant raised of the external tester if they did

not know the answers to the questions he asked. It was also not unreasonable for them to accept the answers given to these queries by the external tester, even if the claimant did not accept that her responses were correct.

5 100. The Tribunal did not consider that it was unreasonable for Mr. Wilson to direct his questions to Ms Donaldson via Ms Buchanan, as Ms Buchanan was the point of contact for the external testing agency. The claimant was given the opportunity of selecting from two appeals officers, and it was his choice to select Ms Buchanan.

10 101. At the appeal stage, Ms Buchan attempted to find out from Mr Parker if the claimant had told him he smoked cannabis. Mr Parker had left the respondents employment, but she checked the claimant's personnel records and spoke to the respondent's external legal advisors to find out if there had been any discussion about this between them and Mr Parker. She eventually managed to speak to Mr Parker who told her that no such discussion took place. She made therefore made reasonable attempts to pursue this, and was entitled to conclude that, even if it had been relevant, no such conversation had taken place.

15 102. The Tribunal was satisfied that applying the objective standards of a reasonable employer, the respondents had carried out as much investigation into the matter as was reasonable in the circumstances.

20 103. The Tribunal went on to consider the reasonableness of the decision to dismiss. It reminded itself of the guidance in the well known case of ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT***. It was said in that case that:

- 25 “(1) *the starting point should always be the words of S.98(4) themselves;*
- (2) *in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;*
- (3) *in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
- 30

(4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

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

10 104. Mr McGowan submitted that the sanction of dismissal was too harsh and was unfair. There was a failure to consider any sanction less than dismissal, which was unfair. A final written warning would have been adequate. The claimant had not been found guilty of gross misconduct. The dismissal letter acknowledged that the claimant had told a previous HR manager that he took  
15 cannabis.

105. Insufficient account was taken about the claimant's medical condition; he told his GP he was self-medicating. There was no interest in exploring the claimant's medical condition and the respondents should have explored the work related stress which claimant raised. Although the respondent's policies  
20 indicated that help would be offered, no help was extended to the claimant.

106. The Tribunal was satisfied that neither Mr Wilson nor Ms Buchanan were persuaded that the mitigation advanced by the claimant meant that dismissal was not the appropriate sanction. Their decision in this regard has to be judged by the standards of a reasonable employer, and the range of  
25 responses open to such an employer. The issue of mislabelling of the reason for dismissal is dealt with above, and in terms of the harshness of the disposal, nothing could be said to reasonably turn on this. The facts which led the respondents to dismiss the claimant were that he had failed a drugs test: they had policies in place which included a statement the effect that that  
30 employees must not have illegal drugs in their system when they arrive at work and that failing a drugs test would be treated as to gross misconduct.

107. Mr McGowan cast the dismissal letter as stating a factual position with regard to the respondent's conclusion that the claimant told Mr Parker about his cannabis use. That was patently not the case. The paragraph referred to in Mr Wilson's letter recorded what the claimant had said at the disciplinary meeting about a conversation with Mr Parker and nothing more. Ms Buchanan investigated this this and had reasonable grounds on which to conclude that Mr Parker had not had any such conversation.
108. The Tribunal considered whether the respondents had failed to take sufficient account of the medical information the claimant provide. That information was to the effect that he smoked at night, out with working hours for medicinal purposes. The claimant said it helped with his anxiety, stress, insomnia and depression. Mr Wilson asked if cannabis was prescribed medically to which the claimant said no and that he self-medicates. At the appeal, the claimant told Ms Buchan that he was on medication from his GP; he had not told his GP about smoking cannabis as he did not want that on his medical records.
109. The medical report which Mr McGowan referred to in his submission confirming that the claimant having stress and anxiety from 2019 postdates his dismissal and was not information which the respondents had when they decided to dismiss the claimant.
110. The respondent's Drug and Alcohol Policy makes it clear that help is available if an employee comes forward voluntarily seeking help. That was not what the claimant did and it was not out with the band of unreasonable responses for the respondents to attach very considerable weight to that. While the respondents could have offered the claimant help instead of dismissing him, their failure to do so could not be regarded as being out with the band of reasonable responses.
111. The information the respondents had was that the claimant smoked cannabis to self-medicate for symptoms described above, and that he had not told his GP about this. It was not out with the band of reasonable responses for them to regard these reasons an insufficient mitigation for taking illegal drugs.



112. Judged against the band of reasonable responses test, while another employer might have taken a different view, in circumstances where the claimant had failed a drugs test and had admitted taking illegal drugs the evening before the test , and where the respondents had a policy in place which include a provision to the effect that failing a drugs test would be regarded as gross misconduct, and that employees must not have any drugs in their system when they arrive at work, it could not be said that the respondents decision to dismiss the claimant fell out with the band of reasonable responses open to them.
113. In these circumstances the Tribunal did not uphold the complaint of unfair dismissal which is dismissed.

### **Wrongful dismissal**

114. The claimant was summarily dismissed without notice.
115. A claim for wrongful dismissal will succeed, unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract. Such conduct must be serious, amounting to repudiation of the whole contract.
116. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.
117. In this case, the Tribunal was satisfied as a matter of fact that the claimant had failed the externally administered drugs test. It was also satisfied that the claimant had smoked cannabis the evening before the test. Indeed, the claimant was candid about his cannabis use which he estimated to extend to the majority of evenings per week.
118. Given the terms of the Handbook and Alcohol and Drug Policy which the respondents have in place, which make it clear that the use of illegal drugs will not be permitted, and that positive testing will be regarded by company as gross misconduct, the Tribunal was satisfied that the claimant was guilty of

conduct which was in repudiatory breach of his contract of employment, entitling the respondents to summarily dismiss him and the claim for wrongful dismissal is dismissed.

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**Employment Judge: L Doherty**  
**Date of Judgment: 29 May 2024**  
**Entered in register: 30 May 2024**

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**and copied to parties**