



EMPLOYMENT TRIBUNALS

Claimant: MR R CHAUDHRY
Respondent: LHR AIRPORTS LTD
Heard at: Watford **On:** 6 December 2019
Before: Employment Judge Skehan

Appearances

For the Claimant: In person
For the Respondent: Mr Salter, Counsel

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed contrary to the Employment Rights Act 1996 and his claim for unfair dismissal is dismissed.

REASONS

1. By claim form received at the employment tribunal dated 30/10/2018, the claimant claimed unfair dismissal only. The respondent's notice of appearance dated 06/12/2018 was accepted by the tribunal and the matter was defended.

Issues arising during the hearing

2. At the outset of the hearing, the claimant made a request for the hearing to be adjourned. The claimant told me that he had appointed solicitors and they were in the process of taking over his case. He had no guidance in preparing his case and there was no funding available for him to seek advice. He was not qualified to present his case and this has caused him a lot of stress and anxiety. The claimant said that he was not fit to proceed.

The claimant said that he was not educated enough nor was he a lawyer or a barrister. He was not able to piece together the evidence to present it properly. I noted that the claimant's application for a postponement had been considered twice by EJ Lewis prior to this hearing and refused. I noted that the claimant had produced a letter from his GP however the letter gave insufficient information to postpone the hearing on medical grounds. The refusal of the application had been communicated to the claimant prior to this hearing. The claimant told me that he had contacted his GPs practice to gain further medical evidence however they were not available until the following week and no further medical evidence was available. The claimant told me that he had not been in employment since his dismissal. He recently repaired his relationship with his family and they were now willing to assist him to prepare for his claim. Mr Slater said that the respondent would suffer considerable prejudice in the event that an adjournment was allowed and the matter further delayed. The respondent's witnesses no longer worked within the business and they had travelled some distance for today's hearing. The claimant's application for a postponement has been rejected twice by the employment tribunal and no circumstances had changed. I carefully considered the claimant's application for an adjournment. I considered the request in accordance with the provisions of the overriding objective to deal with the matter justly by ensuring that the parties are on an equal footing, dealing with the case in ways which are proportionate to the complexity and importance of the issues, avoiding delay, and saving expense. There was insufficient medical evidence before me to allow any adjournment on the basis of any medical condition. I acknowledged the difficulties faced by litigants in person but noted that it is commonplace within the employment tribunal for parties to appear in person. Lack of legal representation is not sufficient reason to adjourn a final hearing at this late stage. I considered that it was simply too late for the claimant to seek a delay for the purposes of seeking legal advice at this stage of the proceedings. Any postponement would result in a lengthy delay to the proceedings that would affect the quality of all witnesses' recollection and add considerable cost for the respondent.

For these reasons, the claimant's application was refused. The application to adjourn was repeated by the claimant during the course of the hearing and refused for the same reasons provided above.

3. I provided a detailed explanation for the claimant of how the employment tribunal hearing would be conducted including the process of giving evidence and cross examination. The claimant had not prepared a witness statement, however the claimant had prepared a document containing 'further information' to the employment tribunal on 21/02/2019. I explained that this document would be taken as the claimant's evidence in chief. The claimant was provided with an adjournment to read the respondent's two relatively short witness statements. During the course of the hearing, the claimant participated in cross-examining the respondent's witnesses. The employment tribunal took an active role in accordance with the provisions of Rule 61 of the Employment Tribunal Rules in dealing with the hearing.

Issues to be Determined

4. With the assistance of the parties, I identified a list of issues to be determined by the tribunal and explained to the claimant that these were the questions that the tribunal would need to address in its judgement.
5. What was the reason for dismissal? If the reason for the claimant's dismissal related to conduct:
 - 5.1. What was the misconduct for which the claimant was dismissed? The respondent claims that the misconduct was testing positive for an illegal substance during periodic drug and alcohol testing while on a rehabilitation programme and breach of trust and confidence.
 - 5.2. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which he was dismissed? Did the respondent have in its mind reasonable grounds upon which to sustain that belief? Was that belief formed after a fair and adequate investigation? The burden of proof is neutral here, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and the main issues previously identified by the claimant were:
 - (a) Mr. Charles Esterling-Cooper accused he Claimant of withholding the details of his 2016 Drug test and for being dishonest;
 - (b) Mr. Esterling-Cooper accused the Claimant of smoking cannabis since 2017; and
 - (c) The letter calling the claimant to his appeal hearing was sent to the wrong address.
 - 5.3. In reaching the decision to dismiss, did the respondent follow a fair procedure? Did the respondent follow the ACAS code?
 - 5.4. Was the dismissal within the band of reasonable responses open to an employer in the circumstances?
 - 5.5. If there is a finding of unfair dismissal, did the claimant cause or contribute to the dismissal and if so by how much should the basic and/or compensatory award be reduced?
 - 5.6. In the event that the dismissal was unfair due to the respondent following an unfair procedure should the compensatory award be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. This is commonly referred to as a Polkey deduction (or reduction) following the case of Polkey v AE Dayton Services Ltd [1987] IRLR 503.

- 5.7. It was agreed at the commencement of the hearing that the I would hear evidence on matters concerning liability, Polkey and contribution only, with remedy to be determined separately if appropriate.

The Law

6. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. There are five potentially fair reasons for a dismissal under section 98 of the ERA: conduct, capability, redundancy, breach of statutory restriction and "some other substantial reason of a kind as to justify the dismissal" (SOSR).
7. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
8. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of Burchell v BHS [1978] IRLR 379. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.
9. A claim for unfair dismissal is a claim to which section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures.
10. Section 123(6) of the ERA provides that: "Where a tribunal finds that a 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." The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary

process in which he or she has become involved. A tribunal may also reduce the basic award under section 122(2) of the ERA if it finds that the claimant's conduct before dismissal was such that it would be just and equitable to reduce it.

The Facts

11. I heard evidence from Mr. Esterling-Cooper, who dealt with the disciplinary process and Mr Willis who dealt with the appeal on behalf of the respondent. I heard evidence from the claimant on his own behalf. These witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined.
12. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
13. The claimant was employed as a security manager within London Heathrow Airport. Between 25/05/2010 and 03/07/2018.
14. The respondent has a substance abuse policy that contains, inter-alia the following provisions:

No person should carry out their work duties when they are unknowingly under the influence of illegal drugs.....

Any breaches of this policy will be formally investigated and may result in formal action which could include dismissal....

If you believe you may have some form of drug dependency or addiction, you should inform your line manager or the human resources department as soon as possible. You will then be given encouragement and assistance in overcoming the problem (see the section headed 'Employee support and rehabilitation'). This may be done by referral to occupational health. You may also be asked to refer to the Employee Assistance Program. Any such declaration of the dependency of addiction by an employee will not be treated as a disciplinary offence provided that it is made prior to, and in the absence of, any breach of this policy.

Employee support and rehabilitation - Any employees who believe they have either an alcohol or drug dependency are urged to

declare this to their line manager, HR department or occupational health as soon as possible. In any event, they should do this before they incur a breach of this policy.....

Anyone who declares a dependency and seeks help for the company will be given encouragement and assistance in overcoming the problem. Such employees that will be required to co-operate with approved rehabilitation programs and undertake periodic tests to monitor progress and compliance. Progress will be overseen by the occupational health department. This cooperation by an employee should include: attending all relevant appointments, being willing to be tested, agreeing to obtain (and provide details of) a diagnosis of their condition by a medical professional, being honest about all matters relating to their drug or alcohol dependency.....

If the employee does not make or maintain appropriate progress and the situation does not improve then disciplinary action or dismissal may result.....

15. There is correspondence dated 17/04/2018 within the bundle from Turning Point confirming that the claimant has been engaging with the service regarding his substance misuse since 09/03/2018. He has been attending Reclaim Group every week since 14/03/2018 and is due to complete the 6 sessions on 19/04/2018. A completion certificate of achievement dated 19/04/2018 from Turning Point is also included within the bundle.
16. On 13/04/2018 the claimant underwent a drug test. This test was supposed to be random with no prior notice given to the claimant. However, the claimant had been mistakenly informed of the random drugs tests by the respondent as the text notification function on the respondent's system has not been deactivated as it should have been in the case of random tests. The claimant was therefore given notice of the drug test.
17. The urine sample collected from the claimant tested non-negative on initial screening. The sample was thereafter analysed further and found to be positive for a class B drug. On 20/04/2018 the claimant was suspended and an investigation launched. The investigation was handled by Ms Finlay and the notes of the meeting undertaken with the claimant are contained within the bundle. The claimant highlighted his prior knowledge of the test taking place. The claimant advised that he had been informed by those conducting the test that it was possible to test positive for cannabis through passive smoking. The claimant explained to Ms Finlay that the reason for his positive test was likely to be that he slept in a room where his brother had been previously smoking cannabis. The claimant said he was not in the room while his brother was smoking in the room. Ms Finlay raised this query with Mr Gillard who conducted the test and was informed that, 'if there is a positive laboratory result I phone the person and inform them that I will be sending the result to the referring manager/s. The determination of a positive result is with the Medical Review Office (MRO) the doctor from the laboratory. They would have conducted an investigation and checked the

process to confirm a positive result. When I spoke to [the claimant] I did not give my opinion. I relayed to [the claimant] the unsolicited remarks by the MRO to me about passive smoking; it is possible to test positive through passive smoking but unlikely. However, my assumption is that the MRO would have taken this into consideration. ‘

18. Ms Finlay asked Mr Gillard confirm how likely it would be to test positive for cannabis if a person entered a room after people smoking in it had left the room. The response she received states that the on-site test only shows if there is a trace and is not conclusive in any way. The laboratory tests are the definitive result. The results from the laboratory has come back as positive. When Mr Gillaard spoke with the MRO they indicated that it is possible to test positive through passive smoking but unlikely.
19. Ms Finlay’s investigation report is contained within the bundle. It notes that during a long-term sickness absence in January 2018 the claimant declared that he had a dependency to cannabis. He tested negative for drugs and alcohol initially but thereafter tested positive as set out above giving rise to the disciplinary allegation.
20. The disciplinary matter was allocated to Mr Esterling-Cooper. The claimant showed on the balance of probability that he did have work related contact with Mr Esterling-Cooper prior to the disciplinary matter. Mr EsterlingCooper demonstrated on the balance of probability that he had no recollection of dealing with the claimant prior to the disciplinary matter.
The disciplinary allegations set out were:
Serious and/or deliberate breach of company disciplinary policy and substance abuse policy namely:
 - ✦ the excessive consumption of alcohol/taking of an illegal substance prior to or during the working day whilst on duty;
 - ✦ non-compliant periodic D&A test while on a rehabilitation programme
 - ✦ breach of trust and confidence.
21. The disciplinary meeting invitation letter confirms that the allegations are considered serious and may result in the claimant’s dismissal. The claimant was provided with a copy of the company procedures and the investigation report in advance. The claimant was accompanied by a trade union rep. During the course of the hearing the claimant explained that he had been having a difficult time. He had an arranged marriage that had been difficult to get out of, but his family were now happy for the claimant to have a divorce. The claimant had been in a relationship with a recovering alcoholic in the previous year and it was a difficult time. The claimant spoke to his doctor and embarked of course therapy. He had been misusing cannabis. Mr Esterling-Cooper noted that he either used cannabis or he did not use cannabis. There was no ‘misuse’. The claimant clarified that he used cannabis but had not used it in months. The claimant explained that he was

part of the rehabilitation programme called Turning Point, he started going to the gym, and had passed a drugs test in February 2018. He said that the reason why he failed his drug test in 2018 was because of passive smoking and both his doctor and Turning Point had said that passive smoking was a possibility. The claimant explained that where he had been living, his brother and his brother's friends had been smoking cannabis and the claimant had later slept in that room.

22. The disciplinary hearing was adjourned. The claimant agreed to take a drug test on that day, and that test was negative. The claimant consented for his previous records to be released to Mr Esterling-Cooper. On reviewing the records Mr Esterling-Cooper noted that there was a further drug test that the claimant undertook in November 2016 that Mr Esterling-Cooper had not been aware of. This was not mentioned by the claimant during the course of the initial disciplinary hearing and Mr Esterling-Cooper found it odd that the claimant did not tell him about this.
23. The disciplinary meeting was reconvened for 18/06/2018. Mr Esterling-Cooper raised the previous 2016 test and asked the claimant if he was prepared to discuss it. The claimant explained that he had not smoked a full 'spliff' in 2016 it was just a couple of puffs. He became reliant on [marijuana] when he was off sick last year but before that [in 2016] it was just a one-off. During the course of the hearing the claimant reiterated that his marijuana use in 2016 was restricted to 'a couple of puffs' on one occasion only. The claimant said that in 2016, he had felt obliged to tell his manager, Irfan Khan. Mr Esterling-Cooper again adjourned the meeting to check with Mr Khan. Mr Khan had retained the text messages received from the claimant in 2016 and forwarded them to Mr Esterling-Cooper. Mr Esterling-Cooper forwarded all of this information to the claimant prior to the reconvened hearing that was arranged for 03/07/2018.
24. On 08/11/2016 the claimant sent a text message and email to his manager Irfan Khan stating:

Good Evening Irfan

As you are already aware of the current situation in my personal life and the difficulties I am facing. I would like to take this opportunity to confess to you and the business and request for assistance. Over time due to the issues I am facing, I have turned to cannabis as a way of blanking out life and the problems I have. The use of cannabis has helped me sleep and ease my mind at this difficult time. I now know this is so stupid as the problems still remain but I [words cut off message] hence my cry for help. I would like to state I take my career very seriously and have never come into work under the influence of anything let alone cannabis. I have only taken this drug on my rest days. I am aware of our company offers support and I would very much like this support and help to come off this addiction. Please guide me in the right direction so as to get my career back on track and to assist me in getting this demon out of my life.

25. The claimant explained that in 2016 he only had a couple of puffs of a 'spliff' on one single occasion. The text message from 2016 set out above was not written by the claimant but was written by his trade union representative Mr Dadral and was factually incorrect and misleading. The claimant could not say, and the trade union representative could not admit to his part in writing this 2016 text during the disciplinary process as Mr Dadral was fearful for his position. The claimant produced an email from Mr Dadral dated 13/05/2019 (post the termination of his employment) that stated, "I Manoj Dadral can confirm that I assisted [the claimant] in writing the letter addressed to Irfan Bhatti". This information was not shared by the claimant with the respondent at any point during the disciplinary or appeal proceedings. The claimant did not provide any explanation for why his union rep would write such a misleading message in 2016 or why the claimant would send such a misleading message to his manager.
26. Following this message sent to Mr Khan in 2016, the claimant was tested for drugs and the results were negative. He remained at work with no restrictions. It was agreed that there would be a 3 to 6 month period of occupational health appointments, regular one to ones with his line manager and regular counselling.
27. During the reconvened disciplinary hearing for a 03/07/2018 Mr EsterlingCooper raised the content of the above text with the claimant. Mr Esterling-Cooper noted that the email strongly suggested that the claimant was regularly using cannabis in 2016. However when describing this matter to Mr Esterling-Cooper the claimant had previously stated that the 2016 issue had slipped his mind as it was a one off and he only had one 'spliff'. The claimant raised concerns that he had felt unsupported by the respondent. However Mr Esterling-Cooper noted that the claimant had received support and a terminal move had been offered to but rejected by the claimant. There were various adjournments during this hearing. Following a final adjournment, Mr Esterling-Cooper told the claimant that his decision was that the allegations against the claimant had been proved. Mr Esterling-Cooper also said that the claimant had over 3 disciplinary hearings consistently failed to tell Mr Esterling-Cooper the truth relating to previous drug use and it was only when Mr Esterling-Cooper uncovered further information that the claimant changed his story. However that story is inconsistent with the text sent at the time. These inconsistencies added to the allegation of breach of trust and confidence and that allegation was proven.
28. Mr Esterling-Cooper said that initially when he first read the investigation report he considered whether a disciplinary process was the correct process as it appeared the claimant was attempting to sort his life out and rehabilitate himself. However during his conversations with the claimant and further information coming to light, it became apparent to Mr EsterlingCooper that

the claimant was not being truthful despite having plenty of opportunities to be and therefore Mr Esterling-Cooper's initial position changed significantly. Mr Esterling-Cooper was aware that the claimant's role required him to manage a large number of staff in the security setting and he did not have any trust in the claimant to be able to do that effectively. In summary, Mr Esterling-Cooper found that the claimant's explanation of passive smoking for the test carried out in April 2018 was implausible. The failure to disclose the previous events of 2016 was a severe breach of trust and confidence. The claimant had been untruthful and inconsistent and Mr Esterling-Cooper had absolutely no faith in the claimant to perform his role as a security manager or any other role in an organisation such as LHR.

29. Mr Esterling-Cooper considered matters raised by the claimant's representative during the course of the disciplinary process. The claimant had not been informed of his right to be accompanied to the drugs test. Mr Esterling-Cooper noted that there had been a delay and that the timeframes of the test could have been better however Mr Esterling-Cooper could not see how the claimant being accompanied during the test would have made any difference whatsoever to the test results. Mr Esterling-Cooper also noted that the claimant was an ex-trade union representative and likely to have been aware of his rights to be accompanied. Mr Esterling-Cooper considered whether a lesser sanction than dismissal would be appropriate and his length of service was taken into account. He did not think it was appropriate as the respondent expected their managers behaviour to be above reproach and the claimant's conduct fell short of what is expected not just of a manager but of all employees.
30. The claimant appealed Mr Esterling-Cooper's decision and the appeal was dealt with by Mr Willis. Mr Willis explained that on 26/07/2018 he wrote to the claimant advising him that he had made arrangements to his appeal on 08/08/2018. The address on the letter was incorrect. During the course of the hearing Mr Willis explained that this was an administrative error and a genuine error.
31. During the course of the appeal hearing the claimant explained that he had been going through a difficult time in 2016, he did take cannabis with his friend and told his line manager Mr Khan. The claimant complains that during the disciplinary hearing he had been told by Mr Esterling-Cooper that if he passed the D&A test he would get his job back. The claimant explained why he had been sleeping in a garage where his brother had smoked cannabis. He explained that he had been going through a midlife crisis and had no choice in the matter. Mr Willis asked the claimant what he would find should he examine the claimant's HR record. The claimant said that he enjoyed his job as the security officer and manager but he had not been performing well in his role for the last 2 years because he had been going through a lot of stress however he was not on any attendance warnings. The claimant said that he did not mention the live attendance review matter relating to sickness as he was not specifically asked about it by Mr Willis.

32. The claimant told Mr Willis that he considered that been a miscommunication between him and Mr Esterling-Cooper. The claimant's representative stressed that the claimant had completed a rehab course he was clean and that the claimant had stated that this would not happen again. The trade union representative also wished for Mr Willis to take into account the fact that the drugs test may be failed due to passive smoking.
33. Mr Willis adjourn the matter to consider it further. He upheld the dismissal decision and set out his reasons for doing so in writing to the claimant by letter dated 15/08/2018. Mr Willis considered it implausible that the claimant failed his test due to passive smoking by sleeping in a room where cannabis had previously been smoked. Mr Willis considered the view of the occupational health consultant which said that it was possible to test positive due to passive smoking but unlikely. Mr Willis considered that the claimant, during the period in question at the very least chose to sleep in a room being utilised for drug use. He was employed during this time, earning a salary and could have chosen to live elsewhere. Mr Willis considered that if the claimant was seriously trying to rehabilitate himself it would have made sure that he was not in an environment such as that. Mr Willis considered the information provided by the claimant in relation to passive smoking. Mr Willis concluded that the claimant took a low level of responsibility for his actions
34. Mr Willis carefully considered the relevance of the 2016 admission on the claimant's part of taking cannabis. The claimant denied that he was being disingenuous by not mentioning it during the investigation meeting. Mr Willis considered that the claimant had given an inconsistent version of events during the initial disciplinary hearing when compared with the text messages subsequently supplied by Mr Khan. Mr Willis agreed with the findings of dishonesty made by Mr Esterling-Cooper on the part of the claimant with passive smoking, his insistence that he did not have a drug issue in 2016 which contradicts text messages sent at that time. Mr Willis also noted that during the course of the appeal the claimant told him that it was not on any attendance warnings. However when Mr Willis subsequently reviewed the claimant's file, he saw that the claimant was not only on a live stage II warning for his attendance but also that his trade union representative had appealed against the sanction in April 2018. Mr Willis considered this to be a further example of dishonesty on the claimant's part. Mr Willis considered that the findings in relation to the claimant's honesty in particular made it inappropriate to consider demotion to the security officer role as it also requires a lot of trust and confidence. Overall Mr Willis considered that the role of the security officer, and especially security manager requires a substantial amount of trust and confidence, especially in one of the largest airports in the world. Inconsistencies within the claimant's accounts during the process were troubling and demonstrated that the claimant was untrustworthy and dishonest.

35. I note the letter in the recording that on 13/11/2017 the claimant was issued with a six-month written warning relating to poor attendance – FUA, set to expire on 15/03/2018. I also note the ‘progression to stage 2’ letter addressed to the claimant dated 16/04/2018 relating to the respondent’s the absence review process.

Conclusions

36. I turn first to the reason for dismissal. There was no evidence to support any allegation that anything other than the claimant’s conduct as set out above played any part in the claimant’s dismissal. The respondent has shown on the balance of probability that the reason for the claimant’s dismissal related to his conduct as alleged.
37. The conduct allegations related to a positive drugs test and a breach of trust and confidence. No particular issue with the investigation was raised by the claimant. I have examined the investigation carried out by the respondent. Initially this investigation consisted mainly of the test result itself and the additional questions raised by the claimant in respect of the possible impact of passive smoking. At the disciplinary process progressed, further matters were investigated by Mr Esterling-Cooper such as Mr Khan’s employment in 2016. The claimant has not identified, nor can I identify any further reasonable step that should have been taken by the respondent. I conclude that the investigation falls within the band of reasonable investigations of a reasonable employer.
38. In reaching the decision to dismiss, did the respondent follow a fair procedure? The respondent carried out an investigation, invited the claimant to a disciplinary meeting setting out the allegations and providing information, set out their disciplinary finding and allowed for an appeal. No breach of procedure or breach of the ACAS code on disciplinary matters was highlighted during the hearing or identified by the employment tribunal.
39. Was the dismissal within the band of reasonable responses open to a reasonable employer in the circumstances? This was the main part of the claimant’s claim. I note that the claimant initially approached the respondent requesting assistance in accordance with their drugs and alcohol policy. The reason for the drugs test in the claimant’s case was because of this initial approach. The claimant had openly sought assistance, and this is in my view a potential mitigating point. However, this point was considered by Mr Esterling-Cooper as set out above. The weight given to this point was reduced by Mr Esterling-Cooper due to the claimant’s conduct during the course of the disciplinary process.
40. I have considered the weight given by Mr Esterling-Cooper to the events of 2016. Mr Esterling-Cooper accused he Claimant of withholding the details of his 2016 drug test and for being dishonest. The events of 2016 were not considered by the respondent to be a ‘misconduct history’ nor were they considered to be ‘live’ in any way. The events of 2016 were relevant only to

the extent that they appeared to show the claimant providing an incomplete history of events relating to his explanation for previous drug use to Mr Esterling-Cooper during the course of the disciplinary hearing. Further, when the claimant was expressly asked about this matter, the claimant's explanation did not match the contemporaneous text message sent by the claimant to his manager.

41. I note that the claimant alleges that Mr Esterling-Cooper accused the Claimant of smoking cannabis since 2017, however I can find no evidence to support for Mr Esterling-Cooper making this allegation and it does not form part of the respondent's reason for the claimant's dismissal. The drug use relied upon by the respondent during the course of the disciplinary process relates to the positive test only as set out above.

42. When viewing the decision made by the employer I note that:

42.1. Both Mr Esterling-Cooper and Mr Willis considered the available evidence and noted that while it was possible to test positive by passive smoking, it was implausible. I note the claimant's evidence that he was not in the room when his brother and his brother's friends were smoking cannabis, but slept in that room when they had gone. I conclude that the respondent's conclusion that the claimant's explanation for his positive drug test result is implausible and the claimant has therefore failed to comply with its drugs and alcohol policy falls squarely within the band of reasonable responses from a reasonable employer.

42.2. In light of the above, the respondent's conclusion that the claimant was dishonest in his explanation as to passive smoking damaging the trust and confidence that should exist between employer and employee again falls within the band of reasonable responses from a reasonable employer.

42.3. The mitigation provided by the background to the drugs test being the claimant's attempts to seek help, the claimant's length of service and previous negative tests were considered by the respondent.

42.4. The text messages uncovered during the disciplinary proceedings relating to the events in 2016 appeared to show the claimant having a drug addiction in 2016. This history is not consistent with the claimant's explanation to Mr Esterling-Cooper during the initial disciplinary hearing. The claimant's claim that he had less than 'a spliff' prior to bringing this matter to the attention of his manager Mr

Khan in 2016 appears unlikely to Mr Esterling-Cooper. The claimant acknowledges that he did not provide any explanation to Mr Esterling-Cooper as to this possibility of the text message being written by a third party or being inaccurate at the time. Mr Esterling-Cooper (or Mr Willis) could not consider information not provided at the time. I find that the conclusion reached by Mr Esterling-Cooper that the claimant's initial failure to mention any issue in 2016 and thereafter the inconsistencies between his explanation and the text messages subsequently discovered raised further issues in respect of the claimant's honesty, is a conclusion that falls within the band of reasonable responses from a reasonable employer.

- 42.5. I have considered whether it was appropriate for the respondent to include allegations of dishonesty arising during the disciplinary process as opposed to allegations of dishonesty in existence prior to the disciplinary process. In this case, it can be seen that where issues arise, the respondent took the procedural step of adjourning meetings and providing information in advance to the claimant prior to the reconvened meeting. The original allegation in relation to breach of trust and confidence arose from the claimant's suspected drug use resulting in a positive test. The respondent rejected the claimant's explanation of passive smoking. The matters raised during the course of the disciplinary process do not in themselves raise 'new' disciplinary allegations, they arise from the original allegations and are an extension of them relating to the credibility of the claimant's explanation and mitigation. Their inclusion within the respondent's final decision do not render the decision outside the band of reasonable responses.
43. Taking into account the entirety of the evidence, I conclude that the Mr Esterling-Cooper's decision to dismiss the claimant by reason of his conduct falls within the band of reasonable responses of the reasonable employer.
44. The claimant was afforded the opportunity to appeal. Mr Willis conducted a comprehensive appeal process as set out above. The mistake in relation to the address of the appeal letter was clearly unfortunate. Mr Willis has shown on the balance of probability that this was a genuine administrative error and not in any way connected personally to the claimant. I do not consider that this error had any impact on the appeal process.
45. In the event that I am wrong, and the claimant's dismissal could be considered unfair. I conclude that the claimant's actions in this matter have been culpable or blameworthy and have contributed to his dismissal. The claimant had a positive drugs test as set out above. The evidence available to the tribunal is that while passive smoking is a possible cause of a positive test, it is unlikely. Further, the claimant does not claim to have been in the company of people smoking cannabis but that he used a room where cannabis had previously been smoked. On the balance of probability, I

conclude that the claimant's drug test result was positive and not caused by passive smoking. The claimant has breached the respondent's drug and alcohol policy and breached the trust and confidence provision as it applies to the respondent's security staff in particular. When discussing this matter with the respondent during the disciplinary process the claimant gave a misleading history, more favourable to the claimant, of his drug use when compared with his previous text message from 2016. The email from the claimant's union representative referred to by the claimant during the hearing does not address the alleged factual inaccuracy of the 2016 text message. On the balance of probability, I conclude that in 2016 the claimant had a problem with marijuana, not limited to a single use as he has claimed, that he disclosed to his manager 2016. The claimant chose to ignore/minimise the previous drug issue in 2018, giving a misleading picture to Mr EsterlingCooper in 2018. In the circumstances I consider that the claimant is effectively the author of his current misfortune and any basic and compensatory unfair dismissal award would be reduced by 100% to reflect this.

46. The claimant was dismissed by reason of his conduct in accordance with the provisions of the Employment Rights Act 1996 and his claim for unfair dismissal is unsuccessful and dismissed.

Employment Judge Skehan

Date: 23/01/2020

Sent to the parties on: ..23/01/2020

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For the Tribunals Office