



EMPLOYMENT TRIBUNALS

Claimant: Mr E Adomako

Respondent: Sab Park Services Limited

Heard at: London Central (remotely by CVP)
On: 5, 6 and 7 January 2022

Before: Employment Judge Heath (sitting alone)

Representation

Claimant: Mr Elum-Smith (Trade Union representative)

Respondent: Ms B Samuels (Senior litigation consultant)

RESERVED JUDGMENT

The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. This was a claim of unfair dismissal following the respondent's dismissal of the claimant for gross misconduct.

The issues

2. I discussed my understanding of the issues at the start of the hearing, and both parties agreed them to be as follows:
 - a. What was the reason for the claimant's dismissal, and was such reason a potentially fair one under section 98(2) Employment Rights Acts 1996 ("ERA")? The respondent asserts the reasons as being misconduct and some other substantial reason ("SOSR") (the irretrievable breakdown of trust).

- b. Did the respondent act reasonably or unreasonably in treating the above reason as sufficient reason for dismissing the claimant?
In particular:-
- i. Did the respondent have a genuine belief in the claimant's misconduct?
 - ii. Was such a belief based on reasonable grounds?
 - iii. Following a reasonable investigation?
 - iv. And following a reasonable procedure?
 - v. Was dismissal within the range of reasonable responses open to a reasonable employer?
- c. If a fair procedure was not followed, what was the chance that the Claimant would have been dismissed in any event had a fair procedure been followed, such that any award of compensation should be reduced (Polkey v AE Dayton Services Limited [1987] ICR 142)? If so, by how much should any award of compensation be reduced?
- d. Did the claimant cause or contribute to his own dismissal, and if so to what extent?

Procedure

3. During the discussion of the issues at the start of the hearing, there was discussion about the fact that the claimant had referred to a claim of "Victimisation" at Section 8 of his ET1. The claimant, at the hearing, said that he was abused by management and forced to come to work when he was sick. He said this made his "disability" worse. He also referred to the fact that he was "harassed".
4. I explained to the claimant that, on the face of it, he had not pleaded a claim for disability related harassment or victimisation and that the respondent had not prepared for such. I explained that if he did wish to run this case, he would have to apply to amend his claim (which the respondents confirmed they would resist) and that if the amendment were granted then the matter would in all likelihood have to be adjourned and further evidence adduced. I explained that what the claimant referred to as harassment and victimisation could form part of the evidential background to his current unfair dismissal claim. After discussion with Mr Elum-Smith the claimant confirmed clearly that he did not wish to apply to amend his claim, and he wished to proceed with his unfair dismissal claim.
5. The claimant initially represented himself. Mr Elum-Smith had been the trade union representative who had accompanied him at his internal appeal, and had produced a witness statement. Shortly into the hearing, the claimant told me that stress was aggravating his gastric difficulties (see below). He asked if Mr Elum-Smith could represent him. Ms Samuels

objected, but I considered that it was in the interests of justice for a litigant in person experiencing medical difficulties and under stress to be assisted by their trade union representative. Mr Elum-Smith thereafter represented the claimant.

6. Unfortunately, on the final day of the hearing, when Mr Elum-Smith was due to be cross-examined, Mr Elum-Smith tested positive for Covid. He had a sore throat which made it extremely difficult for him to talk. This was the third and final day of the hearing and this presented a number of difficulties. Mr Elum-Smith was both witness and representative and would obviously need to speak to fulfil either role. I gave the parties the following options as possible ways ahead: -
 - a. The tribunal could adjourn to another day for Mr Elum-Smith to be cross-examined and for him to make oral closing submissions, and I would attempt to give an oral decision at the adjourned hearing;
 - b. Mr Elum-Smith's witness statement could be accepted into evidence without him being cross-examined. The fact that his evidence had not been tested in cross-examination may mean that the respondent may make submissions about the weight to be attached to it, but I would take into account that he had been ready and willing to give evidence, but prevented from doing so by ill-health. The claimant would then make oral closing submissions and I would attempt to reach a decision that day and give it orally;
 - c. Mr Elum-Smith's witness statement could be accepted into evidence as in b) above, and the matter would be adjourned for the parties to supply written submissions and replies, and I would provide a written decision.
7. The claimant proposed option a) and the respondent option c). For reasons I gave orally at the hearing, I adopted option c). Briefly, I considered that Mr Elum-Smith's evidence was not really contentious and consisted largely of his reiterating what he had submitted at the appeal hearing, which had been minuted. As he had been ready and willing to give evidence, I could not see that there was a strong argument for giving his evidence less weight. Option a) would delay matters as I was unable to confirm my own availability in the near future, and it would put the respondent to expense. Option b) had been the least attractive option as it forced the claimant to resume representing himself when stress exacerbated his medical issues. Option c) would give him the opportunity to enlist Mr Elum-Smith's help in putting across his submissions in writing. In all the circumstances, and having regard to the overriding objective, I considered it marginally preferable to have written submissions than to call everyone back to hear very short cross-examination of a not particularly contentious witness.
8. I made directions for the provision of written submissions and replies in a Case Management Order sent to the parties

9. I was provided with a 137 page bundle.
10. The claimant provided a witness statement and gave evidence. Mr Elum-Smith provided a witness statement but was unable to give live evidence. I did not consider that I should reduce the weight to be attached to his evidence, as set out above.
11. Mr Saliu provided a witness statement, and gave evidence for the respondent. Shortly into his live evidence, it became clear that he did not have access to the bundle. I suggested pausing his evidence until the following day when the respondent would supply him with a paper bundle. Mr, Ano, Mr Hussain, Mr Carter, Mr Downer and Ware provided witness statements and gave evidence.
12. Both parties provided written submissions, and the claimant provided a written reply.

The facts

13. The respondent is an industrial parking operator based in Watford, Hertfordshire. The claimant was employed by a company known as APCOA Parking as a Car Park Attendant from 4 February 2015. His employment was transferred under the provisions of TUPE to the respondent, trading as Vinci Park shortly afterwards. The claimant works night shifts.
14. The respondent operates disciplinary procedure which sets out a formal procedure to be followed in the case of serious misconduct or failure to improve following warnings. This procedure sets out an investigation stage, suspension and disciplinary hearing and appeal. Paragraph 9.2 of the procedure set out a non-exhaustive list of examples of gross misconduct which includes “*Inability to fulfil duties and responsibilities as a result of alcohol or the misuse of drugs*”.
15. The respondent has a drugs and alcohol policy. This policy makes clear that “*Any employee, worker or contractor who disregards the details outlined in this policy will be deemed to have committed an act of Gross Misconduct and their employment or services may be terminated as a result*”. The policy further states:

“Where there is reasonable belief that an individual is under the influence of alcohol or drugs when reporting for work or during the course of work or when representing the company without prior consent from a company director, they will be suspended immediately. Whether an employee is unfit for work is a matter for the reasonable opinion of the manager on duty”. And

“3.1. If an employee is known to be, or strongly suspected of being, intoxicated by alcohol or drugs during working hours, arrangements will be made for the employee to be suspended, escorted from the company premises and taken home immediately. Disciplinary

action may be taken in line with the company's disciplinary procedures

5.1. It is a condition of employment that no employee shall:

- a. *Report or endeavour to report to work in an unfit state due to the use of alcohol. Note: Unfit State will normally be defined as either someone who has consumed sufficient alcohol whereby if undertaken they would fail a breathalyser test i.e. 35 milligrams per 100 mL of [breath] or 80 mg per hundred millilitres of blood, (equivalent to the current UK driver limit) or is unable to perform his or her normal duties to a level of performance acceptable to the company”.*

16. On 10 April 2017 the claimant was diagnosed with a hiatus hernia and gastritis. This condition because the claimant significant unpleasant and painful symptoms including heartburn, acid reflux and difficulty or pain when swallowing. It appears also to be a condition exacerbated by stress and anxiety.
17. On 12 July 2018 a disciplinary procedure was initiated to investigate allegations of high levels of lateness by the claimant. On 26 July 2018 the operations manager, Mr Downer, held a disciplinary meeting in respect of these allegation, which he upheld and issued a written warning to be placed on the claimant's file for 12 months.
18. On 10 September 2018 a number of people reported that the claimant appeared to be drunk while on duty. Mr Downer set out the relevant events in a statement used for a subsequent disciplinary process. In short, Mr Downer said that the Team Manager, Mr Saliu, had reported that he and other staff members had noticed that the claimant was drunk. Mr Downer went to a restroom where the claimant was asleep. Mr Downer subsequently witnessed the claimant on a CCTV monitor, and he went to approach him in a car park. The claimant was walking strangely and Mr Downer could tell that he had been drinking. Mr Downer took the claimant into an office and explained that there been reports of him being drunk on duty. The claimant admitted he had been drinking and said that he had problems. The claimant was suspended.
19. A disciplinary hearing took place on 2 October 2018 conducted by the Operations Supervisor, Mr Mohammed Hussain. The claimant was accompanied by his trade union representative, Mr Pettaway. This disciplinary hearing was regarding the alleged incident of drunkenness on duty on 10 September 2018, allegations of lateness and failure to follow reporting procedures in respect of lateness and falsification of timesheets. At this hearing the claimant set out a number of mitigating factors, such as the recent death of his uncle, relationship problems and medical issues. He admitted to having had a little wine in the morning of 10 September 2018.

20. A human resources officer advised Mr Hussain of flaws in the investigation process and highlighted the claimant's mitigation. She advised that whilst all three disciplinary charges could be considered to be gross misconduct on their own merit, her view was that the claimant should be issued a final written warning for serious misconduct.
21. In the event, Mr Hussain issued the claimant with a Letter of Concern on 15 October 2018. This letter set out disciplinary charges under investigation and the claimant's explanations for his conduct. Mr Hussain indicated that on this occasion he had decided not to proceed with formal disciplinary action due to the claimant's "strong" mitigation. He went on "*However, this letter is to be treated as confirmation that I have discussed my concerns with you and that you are expected to make every effort to address the shortcomings that have been identified*". He went on to explain that during the disciplinary process it had come to light that the claimant had also slept on duty and that this matter could have been pursued as a further allegation. However, this would not be pursued due to the claimant's explanations as to how he was affected by painkillers.
22. Mr Hussain explained that the letter was not intended to be a formal warning, but that it would be kept on the claimant's personal file and takes the form of a "*reasonable written management construction*". He then set out a number of bullet points where improvement to the claimant's conduct and performance was required. These included "*Report to line manager if you are not fit to carry out your duties*", and "*Be honest with any circumstances that may impact your ability to perform your role and responsibilities*". Mr Hussain emphasised that failure to make the required improvements, and any re-occurrence misconduct may lead to further disciplinary action being taken against the claimant, which could lead to his dismissal. Mr Hussain also referred the claimant to the Employee Assistance Program, a free confidential service.
23. On 22 August 2019 the claimant attended a meeting under the respondent's attendance Management policy regarding a couple of incidents of lateness and high levels of sickness absence. This minutes of the meeting show that the claimant was asked by his manager, Mr Saliu, who conducted this meeting, whether he had health issues which warranted a referral to the company doctor, or whether he can deal with it himself. The claimant said he could take care of things himself and said that he was fit for work. There is no reference in the minutes to the claimant making any complaint that he was being pressurised to attend work all that the attendance management process was being carried out improperly. The meeting concluded with Mr Saliu saying that he would let the claimant know the outcome, but the matter appears to end there according to the evidence in the bundle.
24. On 15 October 2019 the claimant's brother died whilst the claimant was on holiday in Ghana. The claimant returned from holiday on 27 October 2019 and took responsibility for the funeral arrangements and repatriation of his

brother's body to Ghana. This, understandably, was an extremely difficult time for the claimant.

25. On 5 November 2019 the claimant attended the funeral directors with his brother's son to make funeral and repatriation arrangements. He came to work afterwards to work his night shift feeling stressed and upset.
26. The claimant worked the night shift of 5-6 November 2018 with Mr Saliu's son. Mr Saliu witnessed some sort of incident taking place involving the claimant apparently scattering parking tickets at the office. It is difficult for me to tell on the evidence whether any altercation took place between the claimant and Mr Saliu's son, but it was not put to Mr Saliu that he was subsequently to take retaliatory action against the claimant as a result of any incident involving his own son.
27. The claimant was rostered to work a shift on the night of 6-7 November 2018. He attended at 7 PM at the London Wall car park to start to the shift at which he allegedly committed the gross misconduct that led to his subsequent dismissal.
28. Mr Saliu made an incident report at 00.45 on 7 November 2019 in which he set out that he visited the London Wall car park for a site check and found the claimant drunk and unable to continue his shift. He said that he had to deploy the "meal relief" to take over. He mentioned that a bottle of vodka found with the claimant on site and that he had to retire him into the mess room for health and safety reasons with colleagues Mr Ano and Mr Ahmed.
29. Mr Ahmed, who no longer works for the respondent, wrote an incident report at 00.45 on 7 November 2018. He set out that he was contacted by the duty manager and asked to go to London Wall as the claimant was unfit for work. He described how he approached the kiosk at the car park at London Wall with the duty manager Mr Saliu, and was asked if he could smell alcohol. He replied that he could. He observed that the claimant did not look very well. He was saying that he wanted to go home and he was told by the duty manager to go to the mess room to rest. Mr Ahmed described the back door of the kiosk as being open, and he and Mr Saliu going into the room behind. There Mr Ahmed saw the claimant's valuables and a bottle of alcohol which was half empty. He said Mr Saliu photographed this.
30. Mr Ano wrote up an incident report at 01.30 on 7 November 2019. He described how he and Mr Saliu were on cash collection at London Wall and how Mr Saliu wished to give the claimant a letter. They found the claimant sleeping in the mess room, unable to notice their presence or to wake up. Mr Saliu wanted the claimant to confirm his address but the claimant could not do this and Mr Ano noticed that the claimant "might be drunk". Mr Saliu said he would return when the claimant was able to confirm his address. They left mess room with the claimant sleeping.

31. Mr Saliu took two photographs of what was on the table in the room at the back of the kiosk. The first shows a pile of clothing with a plastic shopping bag next to it with three bottles in it. The second photograph is of the shopping bag, and shows three large bottles, one of Lucozade, one of vodka and one of water.
32. At some point following Mr Ano and Mr Saliu's visit, at around 1.30 am, the claimant left the mess room to go home. He left without his keys and had to return for them. At around 6:25 am he returned to London Wall where he was given a notice of suspension and accompanying letter by Mr Saliu in the presence of Mr Tetley. This notice set out the reason for suspension being that the claimant was drunk whilst on duty which endangered himself and colleagues and customers. The letter confirmed the allegation was one of gross misconduct and confirmed the suspension was on full pay pending an investigation.
33. Mr Carter, the Operation Manager and Training Officer for the respondent, was given the responsibility of investigating this matter. He made a number of attempts to contact the claimant unsuccessfully by telephone. He did not issue a written invitation to any investigating meeting but eventually made contact with the claimant on 17 November 2019 and invited him to an investigation meeting which took place on 18 November 2019.
34. There were handwritten minutes of this meeting in the bundle. The claimant was asked for an account of the incident. He explained that he had lost his brother whilst he was away in Ghana and that on the day in question he had gone to see his brother's body, which understandably devastated him. He said that his manager came in and told him he was drunk and should go home. He denied being drunk but had said that he had had a drink earlier that day. He denied being asleep or incapacitated with alcohol. He suggested that Mr Saliu had "personal things against me", but had not reported these issues because Mr Saliu picks on him. He said that he did not call in because Mr Saliu was always threatening him with the sack and he said his state of mind was affected. He could not explain why they had said what they had and could not explain how drinks had got into the kiosk and next to his bag. He denied being unable to provide his address because he was drunk and said the office had his address already. He confirmed he had attended the employee assistance programme. He again denied the bottle of alcohol being his.
35. On 19 November 2019 the claimant offered corrections to the investigation meeting notes. He indicated that he was shocked, devastated and temporarily depressed after inspecting his brother's body. He was specific that he had a glass of wine between 10:30 AM and 11 AM before seeing his brother's body. He indicated that he had come to work in a bad state of mind having taken strong painkillers. He emphasised that he may have been sleeping due to his state of mind and the painkillers, but was not drunk.

36. On 25 November 2019 Mr Downer sent a letter erroneously dated 13 November 2019 to the claimant inviting him to a disciplinary hearing on 27 November 2019. The disciplinary charge was "*Inability to fulfil duties and responsibilities as a result of alcohol or the misuse of drugs*". It was made clear that if these allegations were substantiated they would be considered as gross misconduct and his employment could be terminated. He supplied investigation notes, incident reports and photographs. He indicated that the claimant was entitled to be accompanied by a fellow employee and he was asked to indicate you might wish to bring so that Mr Downer could approach them on his behalf.
37. On balance I find that the letter would have, in the normal course of things, been delivered on 26 November 2019, but the claimant was not available to sign for it. A notice was left at the address and the claimant collected the letter on 27 November 2019.
38. On or around 27 November 2019 the claimant spoke to Mr Downer and indicated that if he was unable to attend the meeting on 27 November 2019, wished to postpone it and wished to be accompanied. Mr Downer wrote to the claimant on 29 November 2019 setting this out and indicating that no satisfactory explanation for non-attendance was offered. He rescheduled the meeting for 5 December 2019 at 10 AM. The claimant was warned if he did not attend the hearing without notification or good reason this would constitute misconduct. This was a final opportunity to attend a formal hearing to discuss the issues.
39. The claimant attended the disciplinary hearing alone on 5 December 2019. He said that he did not wish to conduct the hearing alone and wanted his union rep. He was allowed to make a telephone call and came back to the meeting to say that his rep had called the office. Mr Downer said that neither he nor the office had been called. The claimant explained that he had been told that he could not do this alone and that his representative had been hospitalised. Mr Downer explained that there would be no scope to reschedule, and that the decision could be taken in his absence if he did not wish to continue. The claimant made another telephone call and returned to ask if he could be accompanied by a colleague. A list of names read out to him and he selected Mr Tetteh, a fellow parking attendant.
40. The hearing proceeded, and the claimant indicated that he had drunk a glass of wine on the day in question before he had seen his brother. He could not explain why three members of staff believed and suggested they had been "*ill-advised to make a statement against me*". As to why they should do this, he said a cleaner had previously been asked to make a statement against him in previous incident.
41. The claimant denied the bottles belonged to him but accepted that they were next to his clothing, and he accepted they were in what should be a locked office where he should not have entered. He accepted that he had taken his clothing but had not taken any bottles when he had returned to collect his keys. When asked whether he believed it was strange that he had retrieved his clothes from a locked room and that the bottles had also

gone he suggested that somebody must have planted them. He denied that he had taken any bottles away by mistake.

42. The claimant was asked about his previous disciplinary where he had been told not to come into work if he was not fit for duty. He indicated he felt compelled to come into work because of threats from Mr Saliu. He indicated that he did not have a health issue at the time, but had “shut down” after seeing his brother. He also indicated that one of the side effects of his painkillers was drowsiness, but the real issue was his state of mind. He apologised for coming to work in a poor state of mind due to seeing his brother’s body but said this was down to the threats of his line manager.
43. On 11 December 2019 Mr Downer wrote to the claimant informing him of his decision. He set out the disciplinary charge as “*Inability to fulfil duties and responsibilities as a result of alcohol the misuse of drugs on 7 November 2019*”. He set out the claimant’s explanation for his actions which he considered to be unsatisfactory given that three staff members said they believed he was under the influence of alcohol. He went on to indicate that the claimant appeared so drunk that he did not notice the presence of other people and could not confirm his own address. He referred to the bottle of vodka with the claimant’s jacket in a room that was normally locked, and that this bottle had gone when the claimant collected his jacket. He referred to similar incident the previous year after which he was warned that if he was unfit for work he must not attend work. Mr Downer pointed out that the claimant confirmed his previous warning that if he were to come into work under the influence of alcohol and disciplinary action be taken that could result in his dismissal. Mr Downer indicated that he carefully reviewed circumstances and decided “*that your conduct has resulted in a fundamental breach of contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction*”. He dismissed the claimant with immediate effect without notice and indicated he had a right of appeal.
44. On 14 December 2019 the claimant appealed against his dismissal on the grounds that it was “*incorrect and procedure inappropriate. I have not fallen against your drug and alcohol policy*”.
45. On 15 January 2020 Mr Ware, Regional Support Manager, invited the claimant to an appeal hearing on 20 January 2020. The Appeal hearing was to be by way of review. He offered the claimant a right to be accompanied by a fellow employee or a trade union representative.
46. The appeal hearing actually took place on 27 January 2020, where the claimant was accompanied by his trade union representative Mr Elum-Smith.

47. The claimant set out his account of the events of the 6 November 2019 and the night of 7 November 2019. He said he was tired and distressed. He said that Mr Saliu accused him of being drunk he said that he was not, just tired and depressed and in pain. He was asked for his address and he replied that he told Mr Saliu that he wanted to go home and he left at 1.38am. When he got home he realised he had forgotten his keys and had to return for them arriving back at work at 6:30 AM. It was then that he was given a letter by Mr Sally you advising of his suspension.
48. Asked why three colleagues would mention alcohol, he responded that Mr Sally was unpopular and would effectively bully staff. He indicated a list of people who have been sacked or had left.
49. The claimant complained about being invited to the investigation meeting without a letter and not being allowed to be accompanied by a trade union rep. He pointed out that his invitation to the disciplinary meeting was dated 13 November 2019 but he received it on 27 November 2019 prior to the investigation. He said this showed prejudice and bias. He mentioned his lack of representation at the meeting of 5 December 2019 on the day his trade union rep was in hospital, pointing out that the meeting was not postponed.
50. The claimant said he changed in the room where the alcohol was found but denied knowing anything about it. He denied being drunk and said he did not see the alcohol when he returned to collect his belongings at 6:30 AM.
51. Mr Elum-Smith made various challenges to the incident reports, and pointed out breaches in policy and health and safety and a breach of the duty of care towards the claimant. He pointed out that CCTV footage was not used to confirm the case against the claimant. He also drew attention to reference to an allegation of an incident over 12 months previous to this. He indicated that the disciplinary officer knew about the allegation prior to the disciplinary hearing which jeopardised his impartiality. He referred to the claimant's health and said there was no basis for him to be dismissed as the respondent had failed to prove he was under the influence of alcohol and failed to carry out an alcohol test.
52. On 6 March 2020 Mr Ware dismissed the appeal. He observed that the claimant had alcohol due to his personal circumstances but he should not have attended work. He pointed out the fact that all incident reports referred to the smell of alcohol or the claimant looking intoxicated whilst on duty. He pointed out that there had been no evidence of allegations of bullying made against Mr Saliu. He felt that the photographs of the alcohol next to the claimant's clothes in the room made it probable that the claimant was drinking.

The law

53. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason

under section 98(2) ERA 1996. In this context, a reason for dismissal is “a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee” (**Abernethy v Mott, Hay & Anderson [1974] ICR 323**).

54. Potentially fair reasons include a reason relating to conduct (section 98(2)(b)) and “Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held” (section 98(1)(b) “SOSR”).

55. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

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.

56. Where the reason for the dismissal is said to be misconduct, the approach to fairness is the test in **British Home Stores v Burchell [1980] ICR 303** set out in the issues at paragraph 2d) above. This approach is suitable to an SOSR dismissal where it is alleged that trust and confidence broke down (**Perkin v St George’s Healthcare NHS Trust [2006] ICR 617**).

57. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (“ACAS Code of Practice”).

58. Under the principal in **Polkey v AE Dayton Services Ltd [1987] IRLR 503** where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

59. The burden is on the employer to show what might have happened had a fair procedure been followed, but the tribunal is to take account of all the evidence in making an assessment. Sometimes reconstruction of what might have been is so uncertain or speculative that no sensible prediction can be made (**Software 2000 v Andrews [2007] IRLR 569** and **King v Eaton (No 2) [1998] IRLR 686**.)

60. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and

equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct “*deserving of blame*” by the employee **Sanha v Facilicom Cleaning Services Ltd UKEAT/0250/18**.

Conclusions

Reason for dismissal and whether potentially fair

61. The claimant’s case is that his manager Mr Saliu had “framed him” and that the dismissing officer, Mr Downer, had in 2018 falsely accused him of being drunk on duty in order to try and get him dismissed.

62. Mr Downer, however, gave cogent evidence that he firmly believed that the alcohol in the room behind the kiosk belonged to the claimant, that he was heavily under the influence of alcohol on the day in question, having previously been warned that he should not attend work when he is unfit to do so. He told me that he believed that the claimant had been “*pretty much unconscious in the mess room*” after being discovered by Mr Saliu, was unable even to provide his own address, and had been in no fit state to patrol the car park and possibly assist customers safely.

63. In the circumstances, I consider that the set of beliefs that led the respondent to dismiss related to the claimant’s conduct. This is a potentially fair reason for dismissal. Given this conclusion, I do not need to consider SOSR, which was very much pursued in the alternative.

Did the respondent genuinely believe in the claimant’s misconduct and was such belief held on reasonable grounds?

64. I have set out above that Mr Downer gave evidence of his beliefs in the claimant’s misconduct. He told me that during the disciplinary hearing he received evidence that the claimant was a lone worker who had clearly let himself into a normally locked room behind the kiosk that he should not have done. The claimant’s belongings were in that room next to a bag containing alcohol. The claimant was observed by a number of people to be substantially under the influence of alcohol and clearly unfit for his duties. The claimant had also been clearly warned, when similar issues had previously arisen, not to attend work when he was unfit.

65. The claimant could not provide any explanation to Mr Downer about why alcohol was found in the room behind the kiosk. He also put forward an allegation that Mr Saliu had been picking on him and was trying to get him sacked. Mr Downer gave evidence to me that Mr Saliu had been the claimant’s manager for over four years and had never raised to management any difficulties he was having with him.

66. I find that Mr Downer, and Mr Ware during the appeal hearing, genuinely believed that the claimant was unfit for duty because he was intoxicated. This belief was sustained on i) seeing photographic evidence of a bottle of alcohol in what should have been a locked room next to the claimant’s

belongings, ii) the evidence of a number of the claimant's colleagues who observed him to be clearly very drunk. Mr Downer did not hear evidence from the claimant which would reasonably undermine a conclusion that the claimant was intoxicated and unfit for work.

67. In the circumstances, I conclude that the respondent genuinely believed in the fact of the claimant's misconduct, and that such belief was entertained on reasonable grounds.

Fair investigation

68. The ACAS Code of Practice sets out the keys to handling disciplinary issues in the workplace fairly. The Code recognises by its use of language ("in some cases", "where practicable", "it would normally be appropriate" "wherever possible") that it is not setting out rigid tramlines for how every disciplinary case should be run. The first step is for the employer to establish the facts of the case, if necessary by having someone not involved in decision-making investigate the case. The second stage is to give the employee sufficient notice of the disciplinary issue that he or she is facing and its potential consequences. Any written evidence relied on should be provided at this stage. Next, a meeting to discuss the problem should be held without unreasonable delay, and the employee should be given the opportunity to be accompanied should they wish. After the meeting it is for the employer to decide on appropriate action and then to provide an opportunity to appeal to an impartial person not previously involved with the case.

69. The claimant points to several features of the overall investigation which he says were unfair.

CCTV footage

70. The claimant says that there should have been CCTV footage which would have been able to show whether any other people had gone into the room behind the kiosk (his case being that the vodka was "planted").

71. Mr Carter gave evidence that he did not use CCTV footage during his investigation. He said that the CCTV in the kiosk was not working. He said he could not see any reason why any other CCTV camera would point at a locked door, as they would be pointing towards the car park. The CCTV cameras are the property of the client, the City of London. Mr Ware also gave evidence that he did look at investigating the CCTV issue (which had been raised at appeal) but that there was none available for that day. He also said that any CCTV footage would not necessarily be of the kiosk.

72. I have to assess whether the investigation fell within the band of reasonable responses open to the reasonable employer. I am not to substitute the steps I might have taken as an investigating employer. Reasonableness does not necessarily involve chasing down every possible defence or area of mitigation. I also take account of the fact that the employer was not solely relying on the presence of the bottle of vodka

in the room behind the kiosk as supporting the claimant's unfitness to carry out his duties. It was also relying on eyewitness evidence of the claimant appearing very drunk. In all the circumstances, I do not find any failure or inability to chase down CCTV evidence as being outside the band of reasonable responses.

Alcohol testing

73. It was suggested that clause 5.1 of the drugs and alcohol policy (see paragraph 15 above) obliged the respondent to administer a breathalyser test to conclude whether an employee was, effectively, over the drink drive limit. This is clearly a misreading of the policy which simply equates unfitness with the drink drive limit and does not oblige the employer to administer a breathalyser test. It also conflicts with the commonsensical part of the policy which states "*Whether an employee is unfit for work is a matter for the reasonable opinion of the manager on duty*". I do not consider that a failure to carry out a breathalyser test put the investigation outside the band of reasonable responses.

Failure to reschedule disciplinary meeting/no trade union representation

74. The right to be accompanied at a meeting is set out in section 10 Employment Relations Act 1999, with additional guidance in the ACAS Code of Practice. The worker must make a reasonable request to be accompanied, and what is reasonable will depend on the circumstances of each individual case. A worker should provide enough time for the employer to deal with the companion's attendance at the meeting, and should consider perhaps letting the employer know in advance the name of the companion where possible. Section 10(4) Employment Relations Act 1999 provides: -

*"If... his chosen companion **will** not be available at the time proposed for the hearing by the employer, and the worker proposes an alternative time [which must be reasonable and fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer] the employer must postpone the hearing to the time proposed by the worker" (emphasis added).*

75. The future tense in section 10(4) (also reflected in the ACAS Code of Practice paragraph 16) envisages a worker realising their companion is unavailable in advance of the hearing and proposing an alternative date within five days of the proposed hearing.

76. The situation in this case was that the claimant was invited to the meeting by an erroneously dated letter which he received on the 27 November 2019, the day of the hearing itself. The date of the hearing was changed to 5 December 2019. It was not until the meeting itself that the claimant told the employer that his chosen companion had not attended. From the respondent's perspective no notification that the representative could not attend had been received either from the claimant or his union

representative. No reasonable date for a proposed hearing within five days was proposed by the claimant. The circumstances which engage the obligation to postpone the hearing were not present.

77. Secondly, the claimant was able to choose a companion from a list of colleagues who were on duty nearby. Obviously, this was not the claimant's first choice of companion by any means.
78. In all the circumstances the decision not to postpone the disciplinary hearing to allow the claimant to be accompanied by his chosen trade union representative did not fall outside the band of reasonable responses.
79. Having covered the factors relied on by the claimant to suggest the investigation was unfair, I return to the overall fairness of the investigation. There was an investigation stage conducted by Mr Carter. The claimant was invited to a disciplinary hearing to which he was given sufficient notice. He was given adequate details of the case against him, provided written evidence and warned of the possible consequences of the hearing. He was given the opportunity to put forward his own case and challenge the case against him. He was given a decision which he was able to appeal. His appeal was heard and an outcome given. No point was taken before me about any particular breach of the employer's own procedures (beyond the alleged failure to breathalyse).
80. Overall I find that the employers carried out an investigation that fell within the band of reasonable responses.

Reasonable sanction

81. Mr Downer determined that the claimant was unfit to carry out his duties as he was so drunk he could not even provide his address, and he was practically unconscious in the mess room. He considered the claimant would not have been able to deal with problems arising in the car park or assist members of the public. He considered that there was no way he could safely carry out his duties in an environment with moving vehicles. He did not take account of the 15 October 2018 Letter of Concern as a written warning. But he did consider the claimant had been warned not to attend work if he were unfit to do so. In many ways, this is just common sense and hardly needs a warning. Essentially, Mr Downer was considering a stand-alone act of gross misconduct.
82. "*Inability to fulfil duties and responsibilities as a result of alcohol or the misuse of drugs*" is clearly set out as an example of gross misconduct within the employer's disciplinary policy. The invitation to the disciplinary hearing also spelled-out the charge being one of misconduct which carried the risk of dismissal.
83. Again, I remind myself not to substitute my own view for that of the employer, but to assess whether the decision fell within the band of reasonable responses. I find that it falls squarely within this band.

Overall conclusion

84. I therefore find that the claimant was not unfairly dismissed.

Polkey and contributory fault

85. Having determined that the claimant was not unfairly dismissed, I do not need to make findings on the Polkey issue or on contributory fault. However, had I found that there had been a procedural failing in this case, I would have reduced compensation by a very considerable degree under both of these principles. Had I, for example, considered that the disciplinary hearing should have been postponed, I am sure that the chances of a fair dismissal occurring at the postponed hearing would have tended towards 100%.

Employment Judge **Heath**

1 March 2022 _____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
01/03/22.
FOR EMPLOYMENT TRIBUNALS