



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103203/2023

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Held in Glasgow on 27 and 28 November 2023

Employment Judge R King

10 **Mr William Watson**

**Claimant  
In Person**

15 **Argent Energy**

**Respondent  
Represented by:  
Mr J Heath -  
Solicitor**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the claimant's claim is dismissed.

### REASONS

#### Introduction

1. The claimant claims that he was unfairly dismissed when his employment was terminated on the grounds of misconduct. The respondent maintains that it dismissed the claimant fairly for being under the influence of marijuana while at work.

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2. The claimant gave evidence on his own behalf. John McGhee (Production Manager) and Allan Stewart (Site manager) gave evidence on behalf of the respondent. A joint bundle of documents was produced.

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#### Relevant law

3. Section 94 of the Employment Rights Act (ERA) 1996 provides the claimant with the right not to be unfairly dismissed by the respondent.

4. It is for the respondent to prove the reason for dismissal and that it is potentially a fair reason in terms of section 98 (ERA 1996). At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal; merely that it was capable of doing so.
5. If the reason for dismissal is potentially fair, the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 94 (ERA 1996). This depends on whether in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus on proof is neutral.
6. If the reason for the claimant's dismissal relates to the conduct of the employee, the Tribunal must determine whether at the time of the dismissal, the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation – ***British Home Stores v Burchell 1978 IRLR 379.***
7. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range.
8. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss – ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT.***
9. Any provision of a relevant Acas Code of Practice, which appears to the Tribunal may be relevant to any question arising in the proceedings, shall be considered in determining that question (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).

10. The Acas Code of Practice on disciplinary and grievance procedures provides that:

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- a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of these decisions;
  - b. Employers and employees should act consistently;
  - c. Employers should carry out any necessary investigations to establish the facts in the case;
  - 10 d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case and response before any decisions are made;
  - e. Employers should allow employees to be accompanied to any formal disciplinary or grievance meeting; and
  - 15 f. An employer should allow an employee to appeal against any formal decision made.

11. The code also provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

### Issues

12. The Tribunal had to determine the following issues:

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- a. What was the reason for the claimant's dismissal?
  - b. Was the reason for dismissal a potentially fair reason within the meaning of section 98(1) and 98(2) of the Employment Rights Act 1996?
  - 25 c. If, as asserted by the respondent, the reason for the dismissal was related to the claimant's conduct and thus potentially fair, was the dismissal actually fair having regard to section 98 (4) of the Employment Rights Act 1996 and in particular the following:

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- i. Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?
  - ii. Did the respondent have reasonable grounds for that belief?
  - iii. By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?
  - iv. Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?
  - v. Did the decision to dismiss and the procedure adopted fall within the “*range of reasonable responses open to a reasonable employer*”? (***Iceland Frozen Foods Limited v Jones 1983 ICR 17***)
  - vi. If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any ***event (Polkey v AE Dayton Services Limited 1987 All ER 974)***.
  - vii. Did either party unreasonably fail to comply with the Acas Code of Practice and, if so, should the Tribunal reduce or increase any compensatory award due to the claimant (and if so by what factor not exceeding 25%)?
  - viii. By his conduct, did the claimant contribute to his dismissal and should any compensatory award be adjusted accordingly (and, if so, by what factor?)
  - ix. Did the claimant engage in conduct that was culpable of blameworthy and, if so, should the Tribunal make a

reduction to any basic award to which the claimant would be entitled (and, if so, by what factor) to reflect this?

- 5 x. What financial loss has the claimant suffered in consequence of his dismissal and has he taken reasonable steps to mitigate his loss?

### **Findings in fact**

Having heard evidence, the Tribunal makes the following findings in fact.

### **Background**

- 10 13. The respondent is a waste-based biodiesel producer based at Biggar Road, Motherwell. It employed the claimant there between 3 December 2010 and 31 March 2023. During his employment, the claimant carried out various roles, working his way up to team leader in August 2018, that being his role at the time of his dismissal. Save for the events leading to his dismissal he was highly valued within the respondent's business.
- 15 14. The respondent's premises at Motherwell are split into two main parts, the Pre-Treatment Plant ('PTP') and the Biodiesel Refinery ('BDR'). The claimant's duties at the material time included the operation of machinery around both parts of the premises as well as some computer-based tasks, which he carried out in an office area within the PTP. That particular office area is routinely regularly visited by the respondent's employees and by 20 external contract drivers who visit the site to deliver loads of tallow. During his employment the claimant's responsibilities included regular liaison with the external contract drivers, whose delivery paperwork he dealt with and to whom he issued their work permits.
- 25 15. The claimant also managed two other employees who reported to him on a day-to-day basis and whom he trained and supervised.

### **The events of Friday 3 and Saturday 4 March 2023**

16. The respondent's disciplinary policy provides, *inter alia*, that –

*“Being under the influence of drugs or illegal drugs; incapacity at work due to the effect of alcohol or drugs”*

*will normally be regarded as gross misconduct.*

17. On Monday 6 March 2023, the respondent received reports from two external contract drivers and from two of its own logistics assistants, which suggested  
5 that the claimant and a colleague may have been under the influence of marijuana while on duty within the PTP office area on those dates.

18. One of the contract drivers, Ali Murray had initially informed Kevin Downey, a logistics assistant, that he had been in the PTP and that -

10 *“the boys in PTP were wired to the moon, the smell of weed was unbelievable, and he was nearly sick.”*

Mr Downey had therefore gone to the PTP where the claimant and his colleague were working and he subsequently reported that -

15 *“I went in to speak with them about it, when I noticed their eyes were funny, they were laughing and giggling, clear to me they were on something.”*

19. Another contract driver, Craig Mathie, reported to Debbie Macleod, logistics assistant that on visiting the PTP and speaking to the staff there, *“he could smell weed and he could see with their eyes the two of them were under the influence of something”*

20. Debbie MacLeod also reported that *“the boys from PTP came over to test the sample in the lab in BDR. I could smell weed from them, looked under the influence and could see it in their eyes”*

21. As a result of these reports Darryl McLean, UK logistics manager conducted a disciplinary investigation, during which he spoke to three of the four  
25 individuals who had provided the initial reports (both logistics assistants and one of the external contract drivers), as well as four other employees who had been working in and around the PTP on 3 and 4 March 2023.

22. The individuals who had provided the initial reports all maintained the positions they had taken in their initial reports and Miss Macleod and the contract driver positively identified the claimant from photographs shown to them. Miss MacLeod also admitted that she had been mistaken when she initially said she had seen the claimant under the influence on the Sunday of that weekend and clarified that it must have been the Friday or the Saturday.
23. Mr McLean also had fact-finding meetings with the claimant on 13 and 23 March 2023. During his fact-finding meetings the claimant denied that he had ever smoked marijuana at work. He told Mr McLean that he believed that the accusations had been made falsely by the contract drivers because there had been a recent altercation between him and one of them in relation to the unloading of a delivery.
24. Having concluded his investigations, Mr McLean concluded that matters should move to the next stage of the disciplinary procedure in circumstances where several witnesses had identified the claimant as having been under the influence of marijuana at work.

#### ***The disciplinary meeting on 27 March 2023***

25. In the circumstances, the respondent wrote to the claimant on 23 March 2023 inviting him to a disciplinary meeting on 27 March 2023 which would be conducted by John McGhee, Production Manager. Louise Booth, HR advisor, would also be in attendance as a note taker. This letter also confirmed the claimant's suspension from duty pending the outcome of the disciplinary proceedings.
26. The allegations set out in the disciplinary letter were as follows:
- “1 Smoking marijuana on site within the BTP office on Friday 3 March 2023 and Saturday 4 March 2023. Smoking out with the designated smoking area and smoking of illegal drugs of any kind is a serious breach of H&S and insubordination.
- 2 Breach of trust and confidence; failing to adhere to your contracted working hours.

*Both allegations are viewed by the company to be gross misconduct and may result in your dismissal following the disciplinary meeting”*

27. The disciplinary meeting took place as planned on 27 March 2023. The claimant chose not to be accompanied or represented.

5 28. So far as the allegations in relation to failing to adhere to his contracted working hours were concerned, the claimant admitted his misconduct.

29. Otherwise, the claimant was offered every opportunity to provide his account of events of 3 and 4 March 2023. In that regard the claimant explained that the allegations against him had been false and had arisen from a “beef” that he had with one of the contract drivers with whom he had disagreed about who was responsible for unloading a delivery.

10 30. He also believed there were inconsistencies in Miss MacLeod’s evidence about the days when the alleged misconduct had taken place as she had initially said she had smelt marijuana on Sunday 5 March – a day when he had not even been at work. Further, he explained that there were numerous different smells in the PTP all the time and therefore it was not possible to reliably identify marijuana. Ultimately, as far as he was concerned, the allegations were “a pack of lies”.

15 31. In light of the concerns raised by the claimant, Mr McGhee decided to adjourn the disciplinary hearing part heard in order to clarify matters with some of the witnesses and also to speak to certain other individuals from whom statements had not yet been obtained.

20 32. During the adjournment Mr McGhee arranged to speak to two individuals who had been present at the PTP on 3 and 4 March but had not yet been questioned, namely Joseph Finlay, a PTP senior operator and Paul Roy, a PTP team leader. He also took further statements from the contract drivers Craig Mathie and Ali Murray.

25 33. While Mr Finlay and Mr Roy both stated that they had seen nothing untoward on 3 and 4 March, Mr Mathie and Mr Murray continued to identify the claimant and his colleague as having been in the PTP control room on 3 and 4 March

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when they had the appearance of being under the influence of drugs and there was a strong smell of marijuana. When asked about any alleged ill feeling between them and the claimant both drivers denied there had been any fall out or conflict between them at all.

5 34. Having shared these further statements with the claimant, the disciplinary hearing was reconvened on Friday 31 March 2023. At the reconvened hearing the claimant maintained his denial of any misconduct and continued to accuse the contract drivers of having made false allegations because of an earlier disagreement over the loading issue.

10 35. After the claimant had made his final submissions Mr McGhee adjourned the disciplinary hearing in order to consider all of the evidence. Having reached his decision Mr McGhee reconvened the hearing later that day. He informed the claimant that based on the evidence available he had concluded that he had been under the influence of marijuana while at work on 3 and 4 March  
15 2023. As such conduct was considered to be gross misconduct his employment would be terminated immediately, although with one month's pay in lieu of notice as a goodwill gesture.

36. On 3 April 2023, Mr McGhee wrote to the claimant confirming his decision:

20 *"The allegations have been fully investigated, evidence gathered, including witness statements and subsequent meetings with witnesses have taken place.*

*During your disciplinary meeting, you failed to provide an adequate explanation as to why this accusation of smoking marijuana whilst at work would have been made against you (by more than one person).*

25 *We have reasonable belief that you were under the influence of marijuana whilst at work.*

*You are currently on a live final written warning for your conduct. The company takes the allegation extremely seriously and feels this conduct amounts to gross misconduct and therefore I have decided to dismiss you  
30 from your employment with immediate effect."*

37. Notwithstanding the reference in the dismissal letter to the existence of a current live warning, Mr McGhee would still have dismissed the claimant if that had not already been on his record, such was the seriousness of his misconduct.

5 ***The appeal against dismissal***

38. The claimant subsequently appealed against his dismissal. In his written notice of appeal, he set out his grounds of appeal as follows –

10 *“One of the reasons for my appeal is that I feel that the company’s disciplinary policy and procedure was not carried out properly. There are other points also that have to be addressed. Statements, confidentiality issues”*

39. In due course an appeal hearing took place at the respondent’s Motherwell premises on 19 April 2023. The appeal was conducted by Allan Stewart, Site Manager. The claimant elected again not to be accompanied or represented,

15 40. During the appeal hearing the claimant was given every opportunity to advance his appeal. In relation to procedure, the claimant questioned his having not been suspended when the allegations first came to light but rather after the first stage of the investigation had taken place. If he had truly been under the influence of drugs he should have been suspended straight away. Further, nobody had claimed to have seen him smoking at work. The claimant  
20 also criticised Debbie MacLeod’s initial statement, in which she had referred to having smelt marijuana on the Sunday when he did not work on a Sunday.

25 41. In respect of confidentiality, the claimant said he was concerned that a letter without a stamp had been delivered to his house. He also believed that identification of him by the contract driver had been made by virtue of the respondent having sent photographs of him to the driver’s employer rather than that identification having taken place within the respondent’s own premises from its own systems.

42. Having heard the claimant’s submissions in support of his appeal, Mr Stewart adjourned the appeal hearing to consider his decision. When the appeal

hearing reconvened later that day Mr Stewart informed the claimant of his decision.

43. In the first place Mr Stewart did not accept that there had been any procedural failure. He concluded that in all the circumstances it had been fair to complete the interview process and assess the information before making any decision to suspend the claimant rather than making a 'knee jerk' decision based on initial reports.
44. In respect of the alleged inconsistency in relation to statements, Mr Stewart accepted that Debbie MacLeod's first statement did refer to Sunday. However, he was satisfied that this was an honest mistake and that she had initially got her days mixed up and had subsequently clarified her position during Mr McLean's fact finding. In Mr Stewart's view, the most important feature of Ms MacLeod's statement was that she had consistently positively identified the claimant as having smelt of marijuana and having given the appearance of being under the influence of drugs.
45. Mr Stewart accepted that no one had seen the claimant smoking. However, in his view that did not mean that the respondent could not conclude that he had been under its influence in circumstances where there was witness evidence of a strong smell of marijuana in his work area and several witnesses had spoken of his having given the appearance of being under the influence of drugs.
46. In respect of confidentiality, Mr Stewart assured the claimant that no photographs were shown to any witnesses other than on the respondent's own premises and none was ever sent to the employer of the two driver witnesses.
47. In all the circumstances, Mr Stewart was satisfied that there was evidence upon which Mr McGhee had formed a genuine belief that the claimant had been under the influence of marijuana while at work and that such conduct amounted to gross misconduct for which dismissal without notice was a proportionate penalty.

48. Mr Stewart therefore explained to the claimant that he believed Mr McGhee's decision was fair, and that his appeal against dismissal should be rejected. Following the meeting, Mr Stewart wrote to the claimant on 20 April 2023 confirming his decision.

5 49. The claimant accepts that had he committed the misconduct alleged, which he denies, dismissal would have been a fair outcome. Following his dismissal, he found new employment the following week and he remains in that employment.

10 50. In parallel disciplinary proceedings the claimant's colleague who was working with him in the PTP office on 3 and 4 March, and was also observed to be under the influence of marijuana, was also dismissed.

## Submissions

### *Respondent's submission*

15 51. In the first place, Mr Heath submitted that the respondent had dismissed the claimant for a potentially fair reason, namely his misconduct. He referred to the respondent's policy on drugs which made it plain that the conduct in question was characterised as gross misconduct. He referred to the claimant's own admission that his dismissal would have been fair if he had truly been smoking marijuana at work.

20 52. Referring to the case of **BHS v Burchell**, Mr Heath submitted that Mr McGhee had been a credible witness with no axe to grind with the claimant. Indeed, they had a good working relationship before his dismissal. He had been consistent in his evidence and had plainly relied on the investigation which had been fair and thorough in the circumstances. It was plain from his  
25 evidence that Mr McGhee genuinely believed that the claimant had committed the misconduct alleged.

53. In response to the claimant's suggestion that taking multiple statements was an indication of a flawed investigation Mr Heath submitted that, on the contrary, this was evidence of a thorough investigation and that it had been a  
30 reasonable one in all the circumstances. Any apparent inconsistencies in the

witness statements had been resolved by the respondent having carried out additional enquiries during the adjourned disciplinary hearing and it was ultimately entitled to rely on the key evidence provided by the two contract drivers and by the two logistics assistants.

5 54. It had also been reasonable for the respondent *not* to suspend on the Monday following the allegations because the claimant would not have been under the influence at that point in time. In those circumstances it had been fair to wait until the initial investigation had taken place before suspending him. That had not been an indication of procedural unfairness. Further, there had been no  
10 breach of confidentiality. None of the photographs on which the respondent had relied had been shared outside the respondent's organisation.

15 55. Mr Heath accepted on the respondent's behalf that no one had witnessed the claimant smoking marijuana. However, that was not the essence of the conduct that had resulted in dismissal, which was that he was under the influence of marijuana while at work and there was sufficient evidence of that to allow the respondent to dismiss.

20 56. In all the circumstances dismissal had been a proportionate response. All parties had agreed that being under the influence of drugs in this particular workplace amounted to gross misconduct. Even though it was accepted that the claimant had up until that point been an exemplary employee, his dismissal had been within the band of reasonable responses.

#### *Claimant's submissions*

25 57. The claimant submitted that the respondent's statements had been inconsistent. The first allegation related to Friday 3 March 2023 and was not produced until Monday 7 March 2023. The initial report of his alleged misconduct had referred to his having smoked marijuana in the workplace on Sunday when he had not even worked that day. Further, there had been no physical evidence of drugs found in the workplace – no paraphernalia and no cigarettes. Debbie MacLeod's statement had changed simply because Darryl  
30 McLean had prompted her to change it. The allegations were false and

hearsay. They had been made because of a dispute with the contract drivers and they were not genuine.

### Discussion and decision

58. The Tribunal has little hesitation in finding that the respondent dismissed the claimant for a reason related to his conduct, namely his being under the influence of drugs in the workplace, which the respondent reasonably viewed as gross misconduct.
59. The Tribunal is also satisfied that the respondent carried out a fair and thorough investigation into the claimant's alleged conduct, which was reasonable in the circumstances. In total the respondent interviewed ten independent witnesses. It is also significant that it adjourned the disciplinary hearing part way through in order to investigate concerns raised by the claimant, which involved interviewing new witnesses who had not previously been interviewed until that stage. It was therefore clear to the Tribunal that the investigation was even handed and set out to discover all of the material facts rather than to simply gather evidence pointing to the claimant's misconduct.
60. The Tribunal noted that the respondent's disciplinary letter dated 23 March contained an allegation of *'smoking marijuana on site'* but that his dismissal was for being *'under the influence of marijuana whilst at work'*. On the face of it there is a clear distinction between that allegation and the conduct that was found to have taken place, in response to which the respondent has dismissed the claimant.
61. The Tribunal was however ultimately satisfied from the content of the statements that were taken and shared with him and the minutes produced of the disciplinary and appeal hearings that the claimant knew the case against him and was given every opportunity to answer it at each stage of the procedure. In those circumstances there was no unfairness to him. It was also evident that the respondent adopted a fair procedure throughout and complied with the Acas Code.

62. The Tribunal also finds that the respondent was entitled to conclude, based on the evidence available to it, that the claimant had been under the influence of marijuana while in the workplace on Friday 3 and Saturday 4 March 2023. The evidence had come from four different sources as to the smell of marijuana in the workplace and as to his appearance there. Its belief that the claimant had committed the misconduct alleged was undoubtedly genuine.
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63. In a workplace such as the respondent's which involves heavy machinery and chemicals, the danger posed by anyone under the influence of drugs in the workplace is significant and obvious and therefore the respondent was entitled to treat the claimant's conduct as gross misconduct. In those circumstances the Tribunal concludes that the claimant's dismissal was within the band of reasonable responses available to the respondent and was fair.
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64. The claimant's claim for unfair dismissal must therefore fail and is dismissed.

**Employment Judge: R King**  
**Date of Judgment: 08 January 2024**  
**Entered in register: 10 January 2024**  
**and copied to parties**