



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Patel

**Respondent:** ASDA Stores Limited

**Heard at:** Leicester      **On:** Monday 29 October 2018

**Before:** Employment Judge Brewer (sitting alone)

## Representatives

**Claimant:** Mrs M Khanshan, Wife/Representative/Witness

**Respondent:** Ms J Danvers of Counsel

## JUDGMENT

Claims of unfair dismissal and breach of contract are dismissed.

## REASONS

### Introduction

1. This is a claim by Mr Patel for unfair dismissal and breach of contract following his dismissal by the Respondent for gross misconduct. I had an agreed bundle of documents running to some 134 pages. I had witness statements from the Claimant and on behalf of the Respondent from the dismissing manager Mr Umar Farooq, Mr Mark Stafford who heard the first appeal stage and Mr Steven Gamble who heard the second stage appeal.

2. I have considered their witness evidence and the relevant documents in reaching my judgment.

### Issues

3. Given that this is an unfair dismissal case the issues are as follows:-

3.1 Did the Respondent hold a genuine belief that the Claimant committed an act of gross misconduct?

3.2 If so, did the Respondent hold that belief on reasonable grounds?

3.3 At the time the Respondent held its belief, had it carried out as much investigation as was reasonable in all the circumstances?

3.4 Did the Respondent undertake a procedure which was within the band of reasonable responses? and;

3.5 Was dismissal within the band of reasonable responses?

4. In relation to breach of contract, the issue is whether the Claimant fell to be dismissed for gross misconduct and was therefore not entitled to notice or pay in lieu of notice.

## Law

5. I remind myself that it is not for me to substitute my view for that of the Respondent.

6. In considering whether a dismissal is fair or unfair I have taken into account Section 98 of the Employment Rights Act 1996 and have considered the size of the Respondent and its administrative resources.

7. I remind myself that in **British Leyland (UK) Limited v Swift** [1981] IRLR 91, the Court of Appeal said that the correct test in an unfair dismissal claim was whether it was reasonable for the employers to dismiss the employee. If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. This is the so called band of reasonable responses.

8. This of course was most famously applied in the case of **Iceland Frozen Foods Limited v Jones** [1983] ICR 17. In the context of that case, I also remind myself as I have set out above that it is not my view that counts (see **Foley v Post Office; HSBC Bank Plc (formerly Midland Bank Plc) v Madden** [2000] ICR 1283).

9. In relation to the procedure followed and the question of whether it was in the band of reasonable responses I refer to the decision of the Court of Appeal in **J Sainsbury Plc v Hitt** [2003] ICR 111.

10. I also remind myself of the ACAS code of practice on disciplinary and grievance procedures which I have taken into account.

11. In relation to the question of procedural unfairness I remind myself of the decision in **Polkey v AE Dayton Services Limited** [1988] ICR 142 to the effect that if I decide that the Claimant was dismissed because of some procedural unfairness, I should have to determine the percentage chance that he would have been dismissed had a fair procedure been followed and reduce any compensation accordingly.

12. In this case I also remind myself of Sections 122 and 123 of the Employment Rights Act 1996 which enables me to reduce both the basic award and the compensatory award for so called contributory fault.

13. Finally I remind myself that in order for there to be gross misconduct there must be a wilful act by the Claimant which amounts to a fundamental breach of contract.

**Facts**

14. I make the following findings of fact. The Claimant was employed as a Warehouse Operative from 6 November 2006 until his dismissal on 30 January 2018 which is the effective date of termination.

15. The Claimant operated a fork lift truck as part of his duties for the Respondent. It is self-evident that health and safety is critically important in the Respondent's business and particularly in the warehouse operation.

16. The Respondent is a large employer with a access to significant resources including HR advice as well as legal advice.

17. Immediately before 10 January 2018 the Claimant had 2 weeks' leave. On return to work on 10 January 2018 he was subject to a drug test. The Respondent operates a drug testing regime which includes both random tests and tests "for cause". The Claimant was tested for cause and the test was positive for both cocaine and cannabis.

18. The Respondent's drugs and alcohol policy states amongst other things that a positive drug test is one in which the level of detected drugs exceeds a given amount which is called the cut-off point. The reason for a cut-off point is to account for things such as false positives. Because of this the policy at page 37 defines a positive drugs test, that is one in which the cut-off point is exceeded as the employee being under the influence of drugs or intoxicated.

19. The Respondent's disciplinary policy sets out as one example of gross misconduct "under the influence, taking, buying, selling or unlawful possession of none prescription drugs on company premises or at social or training events" (see page 30 of the bundle).

20. In relation to employees who have a positive drugs test the Respondent in effect operates a two track system. Track one is that any member of staff who volunteers that they have a drugs or alcohol issue prior to that issue being discovered by the Respondent, they will be disciplined but offered support with rehabilitation which will include for example regular monitoring.

21. Track two is for those who do not volunteer their problem but who are discovered to have a drugs of alcohol problems following drug testing. These staff do not get the benefit of the rehabilitation process.

22. The reason for the distinction is self-evident. It is to encourage staff to admit to these issues and to not hide them from the Respondent which enables the Respondent to better manage risk. If staff hide these issues then they remain a risk and the Respondent is not able to manage that and in effect those staff are treated rather more harshly under the policy.

23. Following his positive drug test the Claimant was suspended.

24. On 12 January 2018 the Claimant attended his GP where it is noted that he said that he misuses cannabis and cocaine.

25. The Claimant attended an investigation meeting on 17 January 2018.
26. The Claimant was written to on 26 January 2018 and invited to a disciplinary hearing to consider the positive drugs test. He was reminded of his right to be accompanied and he was advised that he could be summarily dismissed.
27. The disciplinary hearing took place on 30 January 2018 and was conducted by Mr Umar Farooq. Having listened to the evidence he determined that given the positive drugs test and in accordance with the Respondent's policy the Claimant was under the influence of drugs or intoxicated. In the event after an adjournment to consider his decision Mr Farooq decided that the Claimant should be dismissed for gross misconduct. The Claimant was advised of this on the day. Dismissal was confirmed in writing on 2 February 2018 (see page 84 of the bundle).
28. The Claimant appealed and his appeal appears at page 87 of the bundle.
29. The Respondent operates two stages of appeal. In this case stage one was heard by Mark Stafford on 26 March 2018. Mr Stafford upheld the dismissal (see page 104 of the bundle).
30. The Claimant appealed to stage two of the appeal process and his appeal grounds can be seen at page 108 of the bundle. That hearing took place on 20 April 2018 and was heard by Steven Gamble. His decision was to uphold the dismissal and his written decision can be heard at page 124 of the bundle.
31. Those are the necessary findings of fact save for one matter which became an issue during the hearing which is whether the Claimant had been using drugs for two weeks or two months prior to the drugs test. I have considered the evidence in relation to this. At page 67 of the bundle it is noted that during the investigation meeting the Claimant was asked "did you not know to declare the drugs to the company?". He responded "it has only been two months". During the disciplinary hearing itself, at page 79 of the bundle, the Claimant is reported as saying "I have never been under the influence during working hours, been seeking help. Started the last two month. Become a problem". During the appeal process the Claimant submitted detailed grounds of appeal in a letter to Natalie Hersley on 2 February 2018. In that he states as follows "I developed a drug difficulty which I was feared of being judged in the last 2 months. I truly want to seek help and have a rehabilitation programme" (see page 88). Finally and most tellingly the GP's notes which appear at page 63 of the bundle state under history "misuses drugs, taking cannabis and cocaine since 2 month. Bad friend company. Want to stop".
32. The Claimant's evidence was that the reference to two months was to the period in which he was having difficulties but I cannot on any sensible reading of these 4 separate notes find that that is the case. The clear evidence is that the Claimant had had an issue for some two months with drug taking.

## **Discussion**

33. I now apply my findings of fact to the law.

34. I note that no issue is taken with the potentially fair reason for dismissal which is clearly conduct. Further, the Claimant does not take any issue with the procedure followed by the Respondent whether at disciplinary or appeal stages.

35. The Claimant agrees that he had a positive drug test, he could hardly do otherwise. In essence the Claimant's entire case for unfair dismissal is in effect based on a single issue which is that instead of dismissal he ought to have been given rehabilitation in accordance with the Respondent's drugs and alcohol policy.

36. I must therefore turn to that policy. The policy starts at page 37 of the bundle. Its purpose is as follows:-

- "To provide appropriate arrangements, rules, procedures and guidance on substance abuse in the workplace, in order to maintain a satisfactory and safe standard of work
- To meet the requirements of the health and safety at work act 1974, the misuse of Drugs Act 1971 and all other relevant legislation."

37. The policy says in terms that substance dependency and substance intoxication are viewed quite separately by the Respondent. In essence if an employee is deemed substance dependent then the Respondent says it will "endeavour to assist colleagues who raise this with the company on an independent basis". But this assistance is clearly limited to those who raise their dependency with the company, as the policy says, on an independent basis and I accept the Respondent's evidence that this means the employee raising the issue out with the testing regime. A person who does independently raise dependency is called a self-referrer and the policy states in terms that "the term self-referrer or self-referral relates to a colleague who has an alcohol and/or drugs problem and makes themselves known to the business. Self-referral is not possible at the point of testing". While I think this could have been rather better worded, it seems to me reading the policy as a whole, the clear meaning and intent is that those who raise issues of alcohol or drugs problems before those are discovered by the Respondent through drugs testing are "self-referrers" and are raising the matter independently or on an independent basis as the policy puts it. That defines the category of employee who are treated as having a substance dependency under the policy.

38. Substance intoxication conversely arises where there is a positive drugs test which is not the result of dependency. I can quite understand why the Claimant argues that having admitted he is drug dependent, he ought to have been treated as a dependency within the meaning of the policy but that is to misread the policy or at least to fail to read it as a whole. As I have said it is quite clear when considering the objectives and drafting of the policy that the Respondent is using the term dependency not simply to mean somebody who has a drug dependency. They mean somebody who themselves identify outside of the drug testing regime as dependent. The Claimant did not do that. The Claimant did not tell the Respondent he had a drugs issue, the Respondent discovered it when they tested him and therefore he does not fall under paragraph 5.2 of the policy which deals with substance dependency, he falls under paragraph 5.3 of the policy which deals with substance intoxication irrespective of whether as a matter of fact he is drug dependent.

39. It also follows that because he had a positive drugs test and entirely in accordance with the Respondent's policy he is deemed to be under the influence or intoxicated and therefore his positive drugs test does fall within the list of matters set out in the disciplinary policy as amounting to gross misconduct.

Of course it does not follow that dismissal was a reasonable sanction. It does not follow that somebody who is guilty of gross misconduct automatically falls to be dismissed. It is a matter of judgment for the Respondent.

40. Having said that I turn to the issues I am required to determine in this case.

41. I am satisfied that the Respondent had a genuine belief that the Claimant attended for work on 10 January 2018 under the influence of drugs within the meaning of their policy.

42. I am satisfied that that belief was held on reasonable grounds and that the Respondent carried out as much investigation as was reasonable in all the circumstances. As Ms Danvers said in submissions, given the clear admission by the Claimant, to his credit, very little if any investigation was in fact necessary in this case.

43. I have said already that the Claimant does not take issue with the process followed and I am satisfied that the procedure followed does fall within the band of reasonable responses.

44. That simply leaves the question of whether dismissal was a sanction which was within the band of reasonable responses.

45. I found Mr Farooq to be a credible witness and he quite clearly gave careful consideration to this issue. He also well understood the policy which he was applying. Although it took a little bit of working through, he made it plain that given the Claimant had not independently admitted that he had a dependency issue, given that he raised this only after he had had a positive test, the Claimant fell to be treated as intoxicated and therefore under the influence within the meaning of the policy and indeed within the meaning of the disciplinary policy. I accept Mr Farooq's evidence that he considered the Claimant's length of service but he also considered where the Claimant worked and the nature of the health and safety risk he or anyone in that position could pose. Given my finding as to when the Claimant was likely to have been taking drugs, that is to say in the 2 month prior to 10 January 2018, he had sufficient time to alert the Respondent to this issue and even if I am wrong about that and it was only 2 weeks, there is no reason why the Claimant could not have turned up for work and immediately spoken to his manager or anyone else in the organisation to say he had a problem, but he did not, he waited for the outcome of the test.

46. Given all of that I cannot say that dismissal was not within the band of reasonable responses, or to put it the other way round, in my judgment dismissal was clearly within the band of reasonable responses in this case.

47. Along with the unfair dismissal claim the Claimant also appears to be claiming breach of contract but that seems to be limited to the fact that notice was not given in this case.

The Claimant bears the burden of showing that there was a breach of contract and in my judgment there clearly was not in this case. Turning up for work in a health and safety critical environment having taken drugs which are still in the system seems to me to have justified the Respondent's actions and there appears to be no breach of contract on their part at all let alone a fundamental breach of contract.

Employment Judge Brewer

Date: 22 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE