EMPLOYMENT TRIBUNALS

Claimant: Mr N Shaw

Respondent: B & M Retail Limited

HELD AT: Manchester **ON:** 21 and 22 February 2017
28 February 2017
(in Chambers)

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Ms L Gould, Counsel
Respondent: Mr I Steele, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. The claimant was wrongfully dismissed.

3. The respondent did not refuse to permit the claimant to be accompanied by an appropriate companion at a disciplinary hearing.

REASONS

1. The claimant, who was employed by the respondent as a warehouse operative from 27 November 2009, was dismissed by the respondent on 29 March 2016. He alleges that he was unfairly dismissed, that his dismissal was in breach of contract and that the respondent failed to allow him to be accompanied at a disciplinary hearing.

2. The respondent is a large retailer operating warehouses as well as retail shops.

3. The claimant gave evidence on his own behalf and called Mrs N McChrystal. The respondent called Mr K McGarry who took notes of the disciplinary hearing, Mr R Stanciu who made the decision to dismiss the claimant, and Mr D Simpson who dismissed the claimant's appeal. The bundle of documents contained around 175 pages.

Findings of Fact

4. On 20 March 2013 the claimant signed to the effect that he had read and understood the respondent's drugs and alcohol policy. The company reserves the right to carry out random testing for drugs or alcohol. Alcohol testing is based on a sample of breath whilst drugs and illegal substance tests are based on a sample of urine. The respondent's drug and alcohol policy for warehouse and distribution staff provides that the use of non-prescribed drugs is not only dangerous but also illegal under criminal law. Being under the influence, in possession, using or supplying drugs for non-medical purposes, whether on or off company premises, is strictly forbidden. Any employee committing such an offence during the course of their employment may face disciplinary action which could result in dismissal. If you are prescribed drugs by your doctor that may affect your ability to perform your work in any way you must discuss this with your line manager or a member of the Human Resources team.

5. The claimant was working a late shift on Thursday 17 March 2016, having commenced work at 14:00. At approximately 15:00 the shift supervisor, Aric, told everyone on shift to go down to reception. Individuals were then taken to the toilet either by Aric or Simon Hendren and it soon became apparent to the claimant that they were being tested for drugs and/or alcohol.

6. It was Aric who accompanied the claimant to the toilet and who gave him a pot to urinate in. The claimant did so and returned the pot to Aric. With pot in hand Aric walked the claimant to the office and said that they had to wait a minute for the result. After a minute or so Aric told the claimant that the sample had tested positive for methadone. The claimant was staggered by this result as he knew he had not taken any illegal drugs. When asked why he thought the test showed positive for methadone the only explanation he could think of was that one or more of his prescription medications had affected the result. The strongest medication he was on was called Marol and his first thought was that this might have triggered the test but the claimant was taking a number of different medications in respect of COPD, back pain and for his stomach. He kept the respondent up-to-date with a list of the medications he was on.

7. The respondent has produced a drug screening consent form which refers to the name of the claimant, the date and that his recent medication is on file. He consented to the urine test and signed to that effect as did the supervisor. The test results, on the same page, showed a test start time of 15:00, results read at 15:20 and in respect of eight items to be marked, the only adverse mark was in relation to methadone. The employee was therefore found to be positive for methadone. The claimant and the manager both signed the form.

8. At 15:27 on 17 March 2016 the claimant was in a drug and alcohol test investigation hearing chaired by Simon Hendren. The record of the meeting shows the claimant not knowing what it was that caused the positive test. Maybe it was prescribed medication. He referred to the Marol which had been prescribed. He agreed that there could have been no cross contamination of the sample. He was aware of the drug and alcohol policy. Mr Hendren is noted as having spoken to a pharmacist who said that the medication stated would not show up as methadone and did he have anything to say? All that the claimant could do was to go and see his doctor and get a blood test. He agreed that the test showed positive for

methadone and had no idea as to any other reason why it should have done so. The claimant was suspended pending a disciplinary hearing on full pay. At the end of the meeting the claimant said that he had nothing to hide, that he had never taken illegal drugs and had only ever taken prescribed drugs.

9. It appears that the urine sample is disposed of at the end of the testing process after a photograph is taken showing the positive outcome.

10. The claimant saw his GP on 21 March 2016 but the doctor would not put in writing the view that the medication might have caused the positive test. He would not do a blood test on the claimant and instead suggested he contact a drug and alcohol support group.

11. The claimant's wife made contact with such a group on his behalf but they could not help and suggested returning to the GP. The claimant and his wife decided that they would do some research online. They gathered their results together so they could take them to any disciplinary meeting.

12. By a letter dated 22 March 2016 the claimant was required to attend a disciplinary hearing on Friday 25 March 2016 at 09:00. This was Good Friday. The matter of concern was that it was alleged that the claimant had failed a drug test on 17 March 2016 and tested positive for methadone. If substantiated it would be regarded as gross misconduct and in the absence of a satisfactory explanation his employment may be terminated without notice. He was advised it was important to bring with him any medical evidence from a member of the medical profession which will support Marol medication producing a positive drug test result for methadone. Failure to provide the information would result in a decision being made on the evidence available at the time. If there was a cost for the information the company would reimburse against a valid receipt. The claimant was sent the notes of the 17 March meeting, the drug screening consent form including the results and the drug and alcohol policy. He was told that Rob Stanciu, Shift Manager, would conduct the meeting in the presence of a note taker. The claimant was told of his right to be accompanied by a fellow employee or trade union representative.

13. On 21 March 2016 Dale Simpson, Transport Office Manager, had sent an email to Drug-Aware, suppliers of the testing kit used on the claimant, to ask whether Marol would show up as opiate or methadone on the drug test results. The reply was to the effect that Marol contains tramadol “so it won’t show positive for opiates for methadone but it is likely to trigger the tramadol test on the ten drug cup if taken recently enough”.

14. The claimant went to the meeting on 25 March accompanied by his wife. The notes were taken by Karl McGarry.

15. From the notes it is apparent that the claimant could only put the failure of the test down to prescribed drugs and he would try to prove this later. He thought Marol might have caused the failure of the test. He had not got any proof that any of his prescribed medication would show up for methadone on a drug test. He explained why he had no medical evidence on the basis of what he had discussed with his doctor. He had not taken a private test because the letter was only received the preceding day and he had not had time to take one.

16. The claimant said he was going to hospital as other symptoms had arisen. Mr Stanciu said that Simon Hendren had contacted Drug-Aware who said Marol contained tramadol so would not show positive for methadone.

17. At this point Dale Simpson interrupted the meeting and told Mr Stanciu that the claimant's wife could not be in the meeting and so she left the room. The meeting was adjourned without further notes being taken and was to be reconvened on Tuesday 29 March 2016. The claimant did not ask to be accompanied at the meeting by a fellow employee or a trade union official following the departure of his wife.

18. According to the claimant's witness statement the notes of the meeting did not accurately reflect the contents because his wife asked a number of questions that were not recorded. She asked Mr Stanciu what temperature his urine was at when the test was completed and Mr Stanciu said everyone's urine was the same temperature. She asked why the urine sample had not been split and Mr Stanciu said it was not part of the respondent's procedure. She asked what training Aric and Mr Hendren had received to enable them to perform the test and the reply was that they had carried out the test in the way in which the respondent had told them to do it. The claimant said he was asked to sign some paperwork in a number of different places at the end of the meeting and at no stage was his asked to read through the minutes or notified of his right to amend them.

19. The claimant later accepted that the notes had been read to him as they went along and then at the end before he signed them. He did not know why he had not asked for the points he says his wife made to be put in.

20. Mr McGarry said that he had noted down the direct conversation between the claimant, his wife and Mr Stanciu but he had not noted down what appeared to him to be discussions between the claimant and his wife. Mr McGarry believed that he had captured the matters discussed between Mr Stanciu and the claimant. In cross examination Mr McGarry said that if a direct question was asked it would be put down. If it was a conversation between Mr and Mrs Shaw then it would not be. He did not recall if urine sample splitting was discussed or not. If anything was missed there was every opportunity for it to be added either as they went along or at the end.

21. Having considered the evidence including the notes being reviewed as the meeting proceeded and then read out at the end, I prefer the evidence of Mr McGarry to the effect that the direct questions allegedly put by Mrs Shaw were not put to Mr Stanciu although I have no reason to doubt that these points might have been discussed between Mr and Mrs Shaw at the meeting.

22. The disciplinary meeting was to reconvene on Tuesday 29 March 2016 at 11.00am. The period between the meetings was the Easter weekend which included a Bank Holiday on Monday 28 March 2016.

23. The same parties were present save for Mrs Shaw. The claimant did not bring an alternative companion and did not ask to be accompanied. Mr Stanciu asked the claimant why he had not brought any proof with him and the claimant said that between the meeting on Good Friday and Easter Monday GPs were shut but he had been on to someone that morning. Mr Stanciu said he could have had a private test with the company refunding expenses and he had two days before the first disciplinary so why did he not get a test done? The claimant again referred to having

seen the GP and tried the drug charity that could not help. His internet information had not been accepted by the company as proof.

24. The claimant said that on that day, 29 March, he had contacted BioClinics for a private blood test but the earliest appointment they could offer was Thursday 31 March at a cost of £174. He would get back to them. He had spoken to Dale Simpson and had been told to attend that meeting. The claimant was willing to take another drug test there and then and would be carrying on with BioClinics as he needed to clear his name. Mr Stanciu told him it was too late to do another drug test there. What he was supposed to bring in was a letter saying that his prescribed medication could result in a positive test for methadone. The claimant reminded him of his previous statement that doctors were closed due to the Bank Holidays.

25. After a short adjournment Mr Stanciu made his decision based on the fact that the claimant had failed a drug test for methadone, he had been advised to see a doctor to get proof that his medication did not result in a positive drug test for methadone. The GP had refused to give him proof in writing. Drug-Aware had been contacted regarding Marol. This would not show up as methadone. The noted words of Mr Stanciu are:

> "Therefore you have left me no alternative but to terminate your contract with immediate effect with B & M. All monies due will be forwarded to you in due course. You can appeal my decision but this must be done in writing to HR within seven working days."

26. The claimant confirmed he understood what was said and that he would be appealing. The claimant signed the notes of the 29 March meeting which were a continuation of the notes of 25 March starting on the same page.

27. Mr Stanciu's decision was confirmed in writing on 29 March 2016. Transcripts of the meeting were said to have been enclosed along with a copy of the appeals procedure.

28. The claimant spoke to BioClinics again and confirmed he did want to have a private urine test and he was given an appointment on 5 April.

29. In the meantime on 31 March 2016 he wrote his letter of appeal, the reasons being:

> "(1) The drug test procedure used.
>
> (2) The information I have that I was not allowed to use.
>
> (3) Timeframe I was given at the adjournment. It was over the Easter Bank Holiday. All doctors, drug testing companies are closed. It left me two hours to get what was required."

30. In conclusion the claimant said he was going to have a drug test done as soon as he could.

31. The claimant went to BioClinics for a private urine test on 5 April. He noted that the process at the private clinic was rather more refined than that used in the respondent's warehouse.

32. On 7 April 2016 the claimant was told by someone at BioClinics that the urine test had been negative for methadone as well as a number of other drugs.

33. On 8 April 2016 the claimant was contacted by Nicola McChrystal, a Director of BioClinics, who told him she did not think the respondent had followed the right procedures when testing him and she thought there was something that could be done to challenge it. She pointed out to him that the respondent should have had the test checked at a laboratory and he should have been given some of the urine sample to take away and have tested himself. He told her that he had appealed and was due to attend an appeal meeting on 21 April 2016.

34. The letter setting up the hearing of the appeal for 21 April 2016 said that it would be by way of a review of the original decision, and the meeting would be with Dale Simpson, Transport Manager. The claimant had with him an employee colleague. Manuscript notes were taken. At the beginning the claimant, referring to the sample, said it could have been contaminated in the bathroom, something could have fallen into it, he did not know that it had not been contaminated and why had it not been sent away for a second opinion? The claimant told of his own drug test which had been taken in a different way. He then referred to information from the internet and why he was not allowed to use it. Mr Simpson explained that the company had contacted the drug testing company and been told Marol would not show up as methadone. He had also been in touch with a local pharmacist.

35. The claimant produced the results of the BioClinics urine test which Mr Simpson looked at, and then the claimant said that if anything had shown up BioClinics would have to carry out another stage of testing and if he wanted to Mr Simpson could contact them. Mr Simpson said a test could go back further but hair follicles were needed. Mr Simpson continued to read through the information from BioClinics and would contact them and could he have a copy of the information. Mr Simpson contacted BioClinics and was told that his test went back over five days. The claimant said he was interested in clearing his name. Did he want to elaborate on the information from the internet that he had but was not allowed to use? No, he did not. They then discussed the timeframe with things not being capable of being done over the Easter Bank Holiday weekend. The claimant was awaiting information about his tablets that he would send when he had it. The meeting then appears to have come to a conclusion with Mr Simpson being left with copies of the urine test and other documents brought in by the claimant showing test results.

36. BioClinics contacted the claimant and said that they were going to arrange for the provision of a statement in support of his case. This was in the form of a witness statement from Michalakis Michael BSc MSc, a scientific adviser with LGC Limited from Middlesex. Mr Michael specialised in the analysis and interpretation of results from human biological samples for the presence of drugs. The purpose of his report was to comment upon the analytical result of the claimant's April urine sample and to comment on the practise of using the results from an on site screening test (or Point Of Care Test/POCT) as being legally defensible in determining the presence of drugs in a urine sample.

37. Mr Michael stated that the claimant’s April urine sample was screened and the screening tests were negative.

38. Mr Michael then went on to deal with the test with reference to immunoassay screening saying that such tests are, in their simplest form, used to quickly and

inexpensively eliminate true negative specimens from further consideration and to identify those specimens that may contain a target substance. The tests depend upon a biological process creating a colour change when a particular substance was present. Immunoassay tests are generally very sensitive but they are not very specific for the substance for which they are targeted. For this reason a sample that is not a true negative should only be considered to be "presumptively positive". After some scientific explanation he went on to say that once a sample has been deemed "presumptively positive" it must undergo a second confirmation test specific for the target substance and that will definitively identify it if it is present in the sample. The use of gas chromatography coupled with mass spectrometry is universally regarded to generate a legally defensible result and should be used when determining a positive urine result.

39. Mr Michael goes on to say that a key reason to follow up immunoassay screening with a confirmation test is that immunoassay screening is susceptible to cross reactivity which might result in a positive screening for a drug that was not present.

40. He then went on to look at the results of the B & M drug screening from the sample collected on 17 March 2016. He notes that the test was recorded as methadone positive, with methadone being one of the most common heroine substitutes for drug treatment in the UK:

> "This result indicates that further analysis (confirmation analysis) should be conducted to obtain a legally defensible result. As it stands the analytical result could only be considered 'presumptively positive' but not conclusively confirmed. This is not the same as a positive result.
>
> A second sample was taken on 5 April 2016…and gave a negative result. It should be noted that many drugs (prescription, over the counter, and illicit) will only remain detectable in urine for a matter of 3-5 days."

41. Mr Michael summarised the position stating that non negative immunoassay screening results are not a definitive result and simply inform the need for a further analysis. In conclusion Mr Shaw's April urine sample was negative but a POCT without a subsequent confirmation test could only be considered "presumptively positive" and any result obtained using a POCT screen is not considered to be a true positive result. Mr Michael added an expert witness declaration at the end of his statement.

42. The claimant received a copy of Mr Michael's statement on 3 May 2016 at 17:56. His wife forwarded it to Dale Simpson at 18:42 and on 5 May at 06:55 Mr Simpson replied to say that they should have the appeal outcome mid next week. The claimant did not send any comments or representations with Mr Michael's statement and Mr Simpson did not raise any issues with the claimant having received it.

43. The claimant decided to proceed with a hair test and he had an appointment fixed for 23 May. He phoned Mr Simpson but Mr Simpson did not answer. The claimant left a voicemail message but Mr Simpson did not call him back. The claimant had a hair test carried out and the result on 25 May 2016 was that in the period from approximately 17 February to 17 May 2016 methadone was not detected in the hair sample analysed. This information does not seem to have been

communicated to Mr Simpson because it came after the claimant's appeal had been dismissed.

44. In his witness statement Mr Simpson said he had asked the respondent's employee who had carried out the urine test with the claimant whether the company process had been followed and had been assured that it was. This involved the sample being placed in a sterile container and the manager using sterile gloves. Mr Simpson had taken advice from HR to the effect that if there was a reasonable belief that the claimant was under the influence of methadone they had grounds to dismiss. It did not have to be proven to a criminal standard. He had been provided with details from the CIPD website explaining this, and in particular the test used by the respondent would not be sufficient for a criminal conviction.

45. In cross-examination he considered that this was also relevant to the phrase on the statement of Mr Michael that the 17 March 2016 test could be considered "presumptively positive". The drug testing kit manufacturer confirmed Marol would not have resulted in a positive test for methadone. He had spoken to BioClinics. On being told their urine test would only detect methadone up to five days prior to the sample being taken, he did not think the test on 5 April was relevant to what was in the claimant's system on 17 March. The internet information the claimant had referred to was not produced to him.

46. Mr Simpson rejected the appeal in a letter dated 17 May 2016. He apologised for the delay in responding due to his need to discuss and investigate points from the evidence sent on 3 May from BioClinics before arriving at his decision. He dealt with the lack of internet information which the claimant had not put forward at the appeal, the 5 April drug test that would not have related to his position on 17 March, and then he went on to deal with Mr Michael's statement. He noted Mr Michael confirming that the second sample of urine would not rule out methadone being present on 17 March in the claimant's urine. Mr Simpson does not appear to engage with any other point from Mr Michael's report in the outcome letter which goes on to refer to the drug testing procedure. Mr Simpson found it was carried out in accordance with the company's policy and procedure, and the claimant brought no further evidence to the appeal meeting that the correct policy and procedure had not been followed. At the time of the drug test they had a genuine belief that methadone was present. The prescribed medication would not show up as methadone on the testing cup. A local pharmacist stated the same. The claimant had not brought any evidence of a medical nature and still by 29 March nothing had been provided that would mitigate the situation:

> "Therefore based on all the evidence provided we had genuine belief that at the time the original drug test was taken that there was methadone present. In summary I found nothing substantial in your appeal, you provided me with no new evidence to support your appeal, and I found your explanation to be unsatisfactory; therefore I uphold the decision of dismissal."

47. In the cross examination of Mr Stanciu the following matters appear to me to be relevant:

- He had carried out urine testing and had been tested himself and had been trained by the company in respect of the procedure.

- He had never previously seen a Drug-Aware document produced by the claimant giving further information about the POCT test and the need for a second test.

- Aric had left some four months ago. There is a written procedure to use when carrying out the tests. There are no instructions on the box.

- We are trained by HR how to carry out the tests and are refreshed each year.

- The claimant had been given the chance to bring blood test results to the meeting.

- Suspension was appropriate; the warehouse has moving machinery and can be dangerous.

- He agreed that the claimant had not been told what information to bring. Nothing said what an acceptable explanation might be.

- He agreed he needed to be satisfied that the employee was guilty of the misconduct alleged. It was for him to satisfy himself as to the guilt of the employee.

- Proof from a GP, medical practitioner or from a clinic, signed and stamped, would have been acceptable. He thought a week would have been enough for the claimant to get his evidence after the drug test. He might have found a private clinic working at Easter.

- It is particularly serious to dismiss someone for gross misconduct in respect of a heroine substitute.

- He did not agree that the claimant should have been allowed to wait for further test results.

- He did not remember the questions allegedly raised by Mrs Shaw.

- He had nothing to do with the urine test on the claimant.

- It was not our procedure to split samples. We never do this. We are fully trained and carry out the test. If a person asks on the same day for another test – that's the procedure – I would have given that. This is something I was told when I received my training. No repeat test was offered to the claimant. We don't have to ask, but if the person asks…

- He had spoken to HR who had spoken to the drug testing company. He took this into account. He did not tell the claimant what he had been told. The decision was his not that of anyone else. He based it on the facts.

- Dale Simpson told him that Mrs Shaw could not be in the hearing. It was not unfair because she was not supposed to be there from the start. In two letters sent to him he was aware of his opportunity. He did not offer an adjournment but the claimant did not ask him to stop the meeting. The

claimant did not ask for another companion and he had not offered to get him one.

- He did not think it would have made any difference if the claimant had a period to get the hair test done. He would have a chance to bring things to the appeal meeting.

- He refused the claimant's internet documents.

- He did not know who would conduct the appeal.

- He did not think to give the claimant more time rather than to wait. He thought he had to dismiss him. If it had been for a different reason then he would have taken it into account but methadone was a high risk drug with machinery etc.

- The procedure does not tell them to send the results off. There is nothing beyond the initial test in the company's procedure. It does not refer to splitting the sample into two parts.

48. In the cross examination of Dale Simpson the following matters appear to me to be relevant:

- He confirmed he received the report of Mr Michael on 3 May before he had decided the outcome of the appeal. He had read and considered it before upholding the dismissal.

- Anything brought to the hearing of the appeal would be considered.

- His training on drug testing was done by HR not by Drug-Aware. He did not know where HR got their training from. In the training he had never been told about the need to get positive results confirmed.

- He never queried from the statement of Mr Michael whether there was a need for a second opinion. He noted from the report references to immunoassay screening, presumptive positive, second confirmation test and further analysis should be considered.

- He understood they needed to get the cup test confirmed. At the time the evidence in front of him pointed to a positive result and he took this into account and made a decision as to having a reasonable belief that the claimant had tested positive for methadone.

- Presumptively positive – it is a positive result – what he has failed for.

- My reasonable belief on all the evidence in front of me – that's the decision I came to.

- Presumptively positive – that's the key word in there – presumptively. I'm guessing they say it might not be a positive result.

- I weighed it all up and my decision was to uphold the dismissal based on the evidence I had.

- It did not enter my mind to follow up the report with Drug-Aware. I never thought to check it out with them.

- I read the advice from CIPD provided by HR which said proof was not required to decide on guilt in disciplinary hearings. The test thus gives adequate grounds for a genuine belief that there is methadone present unless you believe otherwise. The device, a little like a roadside breathalyser, is not accurate enough to provide proof beyond reasonable doubt for criminal conviction but is enough for someone to be arrested and charged with a criminal offence if they refuse further testing.

- When considering this information he would uphold the original decision. If he personally was suspended he would have had a blood/urine test on the day or no later than the day after to prove his innocence. He did not think the claimant had something to hide; it's just what he would have done.

- The claimant did take quite a few steps to clear his name.

- He genuinely believed the claimant had methadone in his system hence he failed a drug test. He was not prepared to disbelieve that based on the evidence he heard.

- Two stage testing is not the procedure we follow.

- The second test is something to consider.

- He did not provide the claimant with information as to his contact with the local pharmacist.

- He did not make further enquiries into the hair follicle test and did not speak to Drug-Aware about it either. He did not receive information from the claimant about his tablets.

- It is a serious matter to dismiss in connection with methadone but he was more than 51% certain.

49. Nicola McChrystal of BioClinics gave evidence on matters scientific and as to documents put out by Drug-Aware She was not called as an expert witness. She was cross examined.

50. Documents submitted on behalf of the claimant included a 2017 document from Drug-Aware called "Drug Testing – The Facts!" The onsite urine and drug testing kit was shown and then:

> "The clear advantage of testing with an onsite test is the speed, but you have to confirm a positive result by laboratory means if you intend to take action against the donor when you get a positive drug test result – for example if a positive result will affect their employment, or status on a rehabilitation programme. Using a two stage process which involves an initial onsite drug test followed by laboratory confirmation will stand up in court but will also give you the advantage of speed."

51. The document goes on to refer to hair drug testing which has the advantage that it can detect drug use for a long period of time measured in months.

52. There was an employee information sheet said to come from Drug-Aware explaining about the collection of urine samples for analysis. It stated that if any of the drug tests showed positive on the preliminary test the urine sample would be divided into two sample tubes, A and B, and barcode seals placed over the lid of each. One tube would be sent away to be tested and the other held in storage in case of dispute.

53. An information sheet for use with a multi drug urine test was also produced. According to the note, it provides only a preliminary analytical test result. A more specific alternate chemical method must be used in order to obtain a confirmed analytical result.

54. Ms McChrystal was not able to state what information was put out by Drug-Aware in March 2016.

55. The claimant gave evidence and was cross-examined.

56. No evidence was called by the respondent as to the relationship at a higher level between the respondent company and Drug-Aware. There was no evidence as to why the company only used the initial screening test and did not go beyond it or indeed that they were aware of anything beyond the initial test.

Submissions

57. Ms Gould made oral submissions and Mr Steele made written submissions which he supplemented orally. I have taken them into account when reaching the conclusions which follow.

The Relevant Law

58. Section 98 of the Employment Rights Act 1996 is relevant to the unfair dismissal claim and is as follows:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(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.

59. Both advocates agree that the case of **British Home Stores Limited v Burchell [1978] IRLR 379** EAT is relevant. In a case where an employee is dismissed because the employer suspects or believes that he had committed an act of misconduct, in determining whether that dismissal is unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

60. Also relevant is **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** EAT. The authorities establish that in law the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98(4) is as follows:

(1) The starting point should always be the words of section 98(4) themselves;

(2) In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

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

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

61. The right to be accompanied appears in section 10 of the Employment Relations Act 1999:

"(1) This section applies where a worker –

(a) Is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) Reasonably requests to be accompanied at the hearing.

(2A) Where this section applies the employer must permit the worker to be accompanied at the hearing by one companion who –

(a) Is chosen by the worker; and

(b) Is within subsection (3)

…

(3) A person is within this subsection if he is –

(a) Employed by a trade union of which he is an official…

(b) An official of a trade union…

(c) Another of the employer's workers."

Discussion and Conclusions

62. Looking first at the right to be accompanied, the claimant has not satisfied me that he was not allowed to be accompanied by a companion who came within subsection (3). His wife clearly did not come within the category of persons within subsection (3). This element of the claimant's claim is therefore dismissed.

63. As to the decision taken by Mr Stanciu, he was presented with the results of a test of the claimant's urine where he had shown positive for methadone. The claimant had not satisfied him that any of his prescription medication would have caused the urine test to give a falsely positive result for methadone. On the basis of the information before him, in my judgment Mr Stanciu made a reasonable decision to dismiss the claimant. It was suggested that the claimant should have been given more time, particularly given the intervening Easter weekend, but it seems to me that at the time of the decision to dismiss being taken the claimant had not got in place any arrangements for any further tests and in any event Mr Stanciu was aware that if

the claimant did find any further information or produce proof that the result was falsely positive then he could raise it in his appeal.

64. In respect of the appeal to Mr Dale, the claimant still had not produced any evidence as to how his prescribed medication might have caused the positive screening test result. The claimant had provided a clear test following a subsequent urine sample but the timing of this was such that Mr Dale could rightly reject it. It did not cover the period when the claimant was tested by the respondent. The hair test result did not appear until after the decision had been taken to dismiss the appeal and indeed did not seem to have been communicated to Mr Dale.

65. What was different was the information provided to Mr Simpson in the witness statement of Michalakis Michael that a urine sample that is not a true negative should only be considered to be presumptively positive, and that once a sample has been deemed presumptively positive it must undergo a second confirmation test specific for the target substance that will definitively identify the substance if it is present in the sample.

66. I can make no judgment as to the knowledge held in the respondent company as to what would appear to be the scientific need to have a sample that is not a true negative sent for laboratory analysis because no evidence was called on this question. Having said that, I am in no doubt that the claimant did provide Mr Michael's clear statement to Mr Simpson who was in possession of it before he reached his conclusion on the appeal. There is no evidence that he questioned Mr Michael or that he asked Drug-Aware, the supplier of the test, for their comments on the statement of Mr Michael.

67. In my judgment this report put Mr Simpson on notice that where there was a presumptively positive urine test then something more should be done involving sending the sample for proper laboratory analysis at the very least.

68. Looking at the elements in **British Home Stores v Burchell** I conclude that having received Mr Michael's clear witness statement it should have been apparent to Mr Simpson that the respondent had not carried out as much investigation into the matter as was reasonable in all the circumstances of the case which involved dismissing an employee for testing positive for methadone. It could not put this right because the urine sample had been disposed of rather than retained pending the conclusion of the disciplinary process. In the absence of having carried out as much investigation into the matter as was reasonable, and it being impossible to remedy this due to the disposal of the sample, the employer, in my judgment, did not have in his mind reasonable grounds upon which to sustain the belief. The respondent's failure properly to test the urine sample was not, in my judgment, within the band of a reasonable investigation.

69. In these circumstances I conclude that following the **British Home Stores v Burchell** principles the dismissal of this claimant was unfair.

70. Had the claimant not provided Mr Simpson with the report of Mr Michael then I would have found that the dismissal process, including the appeal, resulted in a fair dismissal.

71. Was the dismissal in breach of contract? In this case the employee was dismissed without notice because he had failed a drug test for methadone. The

claimant having established that he was dismissed without proper notice or pay in lieu, the burden shifts to the respondent to prove on the balance of probabilities that the employee did the act on which it relied, the act that it says amounted to a fundamental breach and that the dismissal was for that reason.

72. The evidence before the Tribunal on the basis of the subsequent hair test is that the claimant had not used non prescribed drugs. He was not under the influence of methadone when he gave the sample of urine for testing. Taking into account the negative result of the hair test and the evidence of Mr Michael as to the need for a presumptively positive urine sample to be sent for further analysis, I am unable to conclude that the claimant had used non prescribed drugs or that he was under the influence of them, and so I am unable to find that he was in breach of contract. In my judgment the claimant was entitled to be paid for his due period of notice based upon his contractual entitlement.

Remedy

73. The parties are invited to reach agreement on the question or remedy. If this cannot be done the claimant should apply to have a remedy hearing listed.

Employment Judge Sherratt

28 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 March 2017

FOR THE TRIBUNAL OFFICE