EMPLOYMENT TRIBUNALS

Claimant: **Mr G Carney**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **8, 9 & 10 December 2021**

Before: **Employment Judge: Mr D A Pearl**
Members: **Ms J Clark**
Mr P Pendle

Representations:
For the Claimant: Mr D Patel (Counsel)
For the Respondent: Ms R Thomas (Counsel)

JUDGMENT

The tribunal makes the following Judgment:

1 The claims of unfair dismissal, (automatic unfair dismissal and also under section 98(4)) and wrongful dismissal fail and are dismissed.

REASONS

1 By ET1 received on 28 June 2021 the Claimant claimed 'ordinary' unfair dismissal, automatic unfair dismissal for trade union activities, as well as for notice. He was employed by the Respondent from 12 July 1999 to 12 February 2021 as a train operative He was dismissed for gross misconduct.

2 The dismissal related to the events of 10 July 2020, when the Claimant was randomly selected for a drugs and alcohol test. In resolving the issues we have heard evidence from Mr Woodcock (Train Operations Manager) and Mr Tollington (Head of Modernisation, Line Operations); and from the Claimant, Mr Shannon (full time union representative, RMT), Mrs Carney, Mr Hedley (Senior Assistant

General Secretary, RMT) and Mr Leach (full time Regional Organiser, RMT). We studied a bundle of 344 pages. The hearing took place on the CVP video platform.

Facts

3 We observe at the outset that it is not our function to resolve each and every factual dispute. What follow are the findings that are relevant to the issues.

4 The Claimant is a long-standing tube train driver. He has been active in the RMT union since 1999 and has held various branch posts. From 2018 until dismissal he was the Industrial Relations Representative at Loughton.

10 July 2020

5 10 July 2020 was the Claimant's third day back at work after about 3 months, when he had been shielding at home. He left his train at Leytonstone station, went into the High Street to do some shopping and bought his lunch. At 12.50 pm he was taking his meal break at Leytonstone station and telephoned Mr Gamble, a Train Manager ('TM') at Loughton. Mr Gamble instructed him to return to Loughton. He gave no reason and the Claimant said that he would return at the end of his break.

6 At the time the Claimant commenced employment in 1999 the unannounced drug and alcohol testing policy was in force. The document at pages 34 to 76 is the comprehensive 'alcohol and drugs at work information for managers and employees.' Section 10 at page 51 explains that unannounced testing is a planned programme to detect drug and alcohol use on a selected sample of employees, who will not be informed in advance that a test is to be carried out. There is no dispute that the Respondent takes its statutory duties in this regard very seriously. Many of its employees work in safety-critical roles and the use of drugs or alcohol poses a substantial danger to public safety. Section 10.4 places a duty on managers at testing locations: they "must ensure that no employee books off duty without obtaining their permission to do so."

7 Various questions are answered in this document. Q1 on page 70 deals with the case of an employee who calls in sick before their booking on time, ie before their shift starts. They will normally be dealt with under the Attendance at Work Procedure ("AWP".) If there is evidence that the employee has "received information" about the testing and the manager suspects there is an attempt to avoid the tests, the employee should be interviewed on return to work, the matter should be explored and a test should be carried out.

8 Q2 asks what happens if, on a day of unannounced testing, the employee "books off sick or leaves before the end of their shift."

"If possible, before being allowed to leave, the manager should ascertain whether or not the person is genuinely ill and unable to take the tests. If it is considered that an employee is seeking to avoid the tests, the manager should advise the employee that avoidance may be regarded in the same way as refusal."

9 This paragraph deals with the case where the manager is aware of the employee booking off sick. The following paragraph deals with the situation where the manager lacks this knowledge. Here, the advice is similar to that set out in the

answer to Q1. The policy also says that if as a result of any fact finding the manager considers there is sufficient evidence that the employee deliberately left work to avoid being tested, appropriate disciplinary reaction may be taken.

10 The AWP (page 76H) states that:

"If the employee is unwell during their shift / working day and you or another manager send them home, this day is not classified as an item of non-attendance. However, the absence is classified as an item of non-attendance if the employee chooses to book themselves off duty. The employee will need to report to work for their next shift / working day as usual. If, however they feel too unwell to attend work, they must report their non-attendance as above. You will demonstrate due diligence to ensure employees who are at work are fit to be at work."

11 TM Gamble in the statement he wrote after the incident explained that, as we find, the Claimant telephoned the desk at Loughton at 1:52 p.m. and apologised for the time that it had taken for him to return to Loughton. He stated that he had been sick at Loughton station. This is accepted by the Respondent. We find that he travelled back by tube and then went to his car, felt unwell and went to the station staff toilets where he was "violently sick". He says that he was sweating and had a fever although we note it was a hot day. He says he believed he had covid symptoms, but for reasons we will come to, we are far from sure that this is correct and consider that he has probably rationalised this detail after the event.

12 He then telephoned Mr Gamble at 1:52. The conversation is the key event in the case. The Claimant says:

"I … Informed him that I was ill and that I was booking off sick. It was then that he told me that I couldn't book off sick and that I needed to report back for unannounced drugs and alcohol testing. He also told me the repercussions straight away, without attempting to ascertain in any way whether I was fit to attend, or showing any concern for my wellbeing. I told him that I would call him back in five minutes."

13 TM Gamble said this in his statement made nearer the event:

"He stated that he had been sick in Loughton station and that he was reporting sick and that he would not be coming to Loughton T.C.A.. At this point I informed him that he has been instructed to attend Loughton for an unannounced drug and alcohol test. If he refused to attend that would have serious implications. He said that he would phone me back in 5 minutes. I repeated that if he did not come to Loughton TCA for a drugs and alcohol test it would have serious implications. He again said he would ring me back in 5 minutes [and] then terminated the call."

14 Based upon the evidence that the Claimant gave us, we can find with confidence that he did not tell TM Gamble that he was sweating or that he had a fever. Nor did he say anything about any concern that he may come into contact with others. He told us in evidence that he was not sure that, at the time, he made any connection between his having been sick at the station and covid. We find that he had not done so at this point. The Claimant also confirmed to us that he twice told TM Gamble he would call him back. We also note that in the fact finding interview with Ms Knott (Train Operations Manager) at page 122, again nearer the event, the Claimant said that TM Gamble had talked of "something about an unannounced D & A [drugs and alcohol test]" and that he had said that if he did not come back there would be repercussions "or words to that effect." He said that

it was the mention of repercussions that led him to telephone Mr Shannon. Based on all of the evidence, written and oral, we find that the Claimant's later assertion that he was threatened by Mr Gamble Is something that has crept in some considerable time afterwards. We consider that Mr Gamble's account of the conversation has a high probability of being factually accurate. Further, what he said to the Claimant was entirely in line with Q2 at paragraph 8 above, something conceded by Mr Shannon in his oral evidence.

15 In the phone conversation that immediately followed, Mr Shannon gave his advice which was, in essence, based upon what the Claimant told him about the order of events. Because he had told Mr Gamble that he was booking off sick a few moments before he was told about the tests, Mr Shannon said that the AWP took precedence over the drugs and alcohol testing policy. He either advised the Claimant not to go back to be tested (as per the fact finding interview at page 122) or said he did not need to go back (the Claimant's witness statement.) There is no material difference. The advice was that the fact of saying that he was booking off sick took the Claimant into the AWP policy and "he should not be governed" by the drugs and alcohol policy, as Mr Shannon puts it in his witness statement. It is accepted that the Claimant did not tell Mr Shannon that he had told TM Gamble, twice, as we find, that he would call him back.

16 The Claimant drove home to Harlow and it seems that throughout the journey he was in a telephone call with his wife. He did not return the call to TM Gamble as he had said he would. Ms Knott tried to contact him, left a voice mail and also a whatsapp message. The Claimant did not return her call. The reasons given in his witness statement for not calling TM Gamble are that (a) he had been advised by Mr Shannon not to go back for the test and (b) that he feared that he would end up having an argument with Mr Gamble. Neither of these points are convincing. There was no good reason for not phoning Mr Gamble and Mr Shannon gave no advice to that effect and knew nothing of the promised call back. We reject the suggestion that the call with Mr Gamble had been heated or that the Claimant had been threatened. We conclude this is a later attempt by the Claimant to justify not calling back

17 As to Ms Knott, the Claimant in his witness statement is critical of her for even trying to contact him: he had been booked off sick, so she should not have phoned or tried to contact him at all. This is wholly unpersuasive and the tribunal considers that, had the Claimant phoned either Mr Gamble or Ms Knott, it might have been more difficult for him subsequently to argue that only the AWP applied. We infer from the evidence that he did not wish to compromise the position that he and Mr Shannon had agreed upon, namely that he was outside the drugs and alcohol procedures and that they did not apply.

Subsequent events

18 It is clear from the statements, as we find, that the covid test was booked the next day. That day, 11 July 2020, Mrs Carney telephoned the Loughton Trains Management Team to say that her husband was showing covid symptoms and was self-isolating. The test results on 17 July proved to be negative. He returned to work on 20 July 2020. He took the drugs and alcohol test and was negative.

19 It was then that the fact-finding interview took place with Ms Knott, after which he was suspended: pages 124 to 126. The allegation was the he had avoided taking an unannounced drugs and alcohol test.

20 On 24 July 2020 Ms Knott interviewed Trains Manager Mr O'Meara. He had been working at Loughton on 10 July with Train Manager Mr Garrard. His evidence about ascertaining the Claimant's whereabouts, and arranging cover for the remainder of his shift (so that he could attend the test) is irrelevant, save in one respect. When doing this, Mr Garrard said: "As it's Gary [Carney], Jo, it is better to just get someone to cover it all if they can." Mr O'Meara told Ms Knott that he assumed this was because "Gary is a Union Rep and he may ask a lot of questions, and I voiced this. TM Garrad nodded in agreement with me."

21 In his second fact-finding interview with Ms Knott on 20 August 2020, the Claimant referred to Mr Gamble's remark concerning 'repercussions' as a threat. He adhered to his reasons for not attending the test and not telephoning TM Gamble. He said that he had "half a dozen times" told Mr Gamble he would call back in 5 minutes, but was advised by Mr Shannon that he did not need to, as he had booked off sick.

22 Mr Leach of the RMT met virtually with Ms Knott and Ms Costigan, from employee relations, on 21 September 2020. This is a meeting provided for in the policies, and is held because the Claimant was a recognised union representative. Mr Leach states: "At this meeting Ms Knott informed me that she was disappointed with Gary Carney, and that as a trade union representative he would know the procedure better than others." The Claimant's witnesses say this was inappropriate; and the Claimant's case is that it is a piece of evidence from which we should infer that his dismissal was because of his trade union activities.

23 Ms Knott's decision was to refer the Claimant to a Company Disciplinary Interview ("CDI".) The charge (15 October 202, page 132) was: "Gross misconduct in that on Friday 10th July 2020 at 1350 hrs at Loughton Powerhouse it is alleged that you avoided taking an unannounced Drugs and Alcohol test." The standards alleged to have been breached were the duties to co-operate fully with unannounced alcohol and drug screening arrangements.

24 Mr Woodcock co-chaired the CDI meeting on 19 November 2020. He did not know the Claimant. The panel had a brief from Ms Knott and at its conclusion (page 82) she recorded her belief that, by reporting sick, the Claimant was attempting to avoid taking the tests. She believed he was aware that the testing team was on site and that he "purposefully stalled for time by taking his time in the high street", then going to his car at the car park, rather than going straight for the test. Mr Woodcock made clear that these beliefs formed no part of his reasoning and he rejected them. What Ms Knott was referring to was the Claimant's trip to the High Street at Leytonstone to buy a present for his wife (as well as his lunch) and his leaving the gift in the car when he arrived back at Loughton. There was no support elsewhere for Ms Knott's suspicions and we accept Mr Woodcock's evidence that they formed no part of his decision-making.

25 Mr Leach represented the Claimant at the meeting and his case was fully aired. This included the belief that Mr Carney was being treated differently because of his union activities, which was based on Ms Knott's earlier comment. A comparator, Mr Thomas, was also raised. After the meeting, Mr Woodcock

reviewed policy documents, interviewed 3 individuals the Claimant thought could assist, investigated the comparator and spoke to Ms Knott about her verbal comment that exercised the Claimant. She explained (and Mr Woodcock accepted) that her comment was to the effect that he knew the policies well, as he had to advise others about them.

26 Mr Woodcock sets out his reasoning in paragraphs 30 to 37 of his statement. He decided that the Claimant had, by failing to comply with safety-critical procedures, committed an act of gross misconduct for which he should be dismissed. He considered the comparator's circumstances to be different; and, also, thought that he had been dealt with too leniently.

27 The panel's decision and the detailed rationale is set out in the letter of 12 February 2021, pages to 168. Central to the dismissal decision is the reasoning set out on pages 166 to 167. This includes a finding that the Claimant "had not booked off sick in that, whilst he had been physically sick, he had not gained permission from … John Gamble to do so or provided sufficient time to ascertain whether he was fit enough to participate in unannounced testing." This was exacerbated by his not reverting to Mr Gamble so that he "chose not to engage with the management team at Loughton despite their efforts to contact him."

28 In cross examination, Mr Woodcock told us that he had concluded that the Claimant was deliberately seeking to avoid participation in the tests. He questioned why he had made "a procedural stand" and thought there could have been something to hide. He may have received false advice from his union colleague, but he was also ignoring a management instruction; and he thought there was deliberate avoidance of the test. We find that Mr Woodcock was accurately describing the conclusions he came to at the time. They are reflected in the dismissal letter. He repeated a number of times to us that he considered that the evidence pointed towards deliberate avoidance and that he came to that conclusion.

29 We can summarise the appeal process. Mr Tollington is a senior manager who has been employed by the Respondent for 31 years and is experienced in hearing disciplinary appeals. He struck us as an accurate witness who adopted a conscientious approach to this appeal. The appeal hearing was on 15 March 2021 and Mr Hedley represented the Claimant. Factually, the Claimant asserted the same case as earlier. Mr Tollington took his decision against the written grounds of appeal.

30 On the central question of the two policies (wrongly "conflated" by the Respondent, on the Claimant's argument) he came to the same conclusion as Mr Woodcock. "... whether Mr Carney was still on duty at the moment TM John Gamble informed him about the test was not something that could be determined by Mr Carney's own declaration that he was booking off sick." He agreed with the CDI panel that there was evidence that the Claimant had failed to cooperate with the drugs policy. He also analysed and rejected the argument that the Claimant's actions were covid-related and that he was following government policy: see paragraphs 21 to 24 of the witness statement.

31 Mr Tollington looked at the facts of the three comparator cases relied on. Comparator A (whose chronology was "very complex", said Mr Tollington) was not dismissed. He had gone missing after being requested to attend a testing location.

He said he had suffered an accident, had gone home and then went to hospital. He did answer a manager's telephone call and attended before the end of his shift. Comparator F reported being unwell before the testers arrived; and his manager was able to form a view about this as he had direct contact with F. Comparator H had soiled himself when walking between two stations, required assistance in getting home and then phoned his manager. Mr Tollington found these three cases not to be comparable to the Claimant's.

32 In cross examination, he firmly rejected the suggestion that the policy set out in paragraph 8 above only applied if the Claimant had been physically present in 'the premises'. Mr Tollington rejected that interpretation and also noted that the word 'should' amounted to an instruction to managers. He also considered that what Mr Gamble told the Claimant over the phone complied with the paragraph and that he had conducted himself correctly. He "strongly disagreed" with the suggestion that it did not matter if the manager did not carry out an assessment of Mr Carney's health. He thought it unlikely that the non-cooperation with the testing policy was 'accidental'. As for the suggestion that trade union activities were the reason for dismissal "he was definitely not dismissed" for that reason. A lesser sanction than dismissal, he believed, was not appropriate, because of the safety issue: "it's an extremely serious matter."

33 There was a further element to the appeal process, a director's review meeting which was available to the Claimant. Mr Hedley represented him on 22 April 2021. Mr Dent, Director of Customer Operations, conducted the review. It does not occupy a prominent place in the chronology and the Claimant, for example, omits mention of this in his statement. Mr Dent's decision is at pages 194-197. It is clear that the procedural issue was foremost again, it being said that the drugs and alcohol policy had not been triggered. One new aspect was that Mr Shannon attended and was questioned. Mr Dent rejected the central argument and said a point of principle needed to be established: an employee could not make "a unilateral decision based on his own interpretation of a safety critical policy when he has received a clear management instruction in that situation." He also found that references to covid had been introduced after the event. He rejected the appeal.

The Law

34 Section 152 (1) of the 1992 Act provides that: "For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee —

(a)was, or proposed to become, a member of an independent trade union,

(b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

Section 98(4) of the Act provides that:

"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."

By subsection (1) the Respondent must (on these facts) show that the reason or principal reason for dismissal related to the conduct of the employee.

Submissions

35 We are grateful to both counsel for their comprehensive and helpful submissions, written and oral. Where relevant, we refer to them below.

Conclusions

(1) Automatic Unfair Dismissal

36 The burden of establishing the reason for the dismissal is on the employer: Kuzel v Roche [2008] EWCA Civ 380. The tests are these. (1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason? (2) If so, has the employer proved his reason for dismissal? (3) If not, has the employer disproved the statutory reason advanced by the Claimant? (4) If not, dismissal is for that impermissible reason.

37 As Mr Patel submits, the initial burden on the Claimant is a light one. Even so, he has failed to show that there is a real issue as to whether the Respondent's claimed reason, conduct, was not the true reason. The contention, based on Ms Knott's comment, that there is an inference to that effect is untenable. Her comment has an innocent explanation. It is, in any event, divorced from either the decision to dismiss or the appeal decisions. The Claimant has not explained how any supposed animus on Ms Knott's part (and that is not our finding) affected these decisions.

38 There is a further and notable flaw in the Claimant's case. There is no narrative that explains why the Respondent wanted to dismiss him for trade union activities. There is no history of conflict, no relevant chronology and nothing to connect individuals, who resented his activities, with the dismissal decision. The entirety of the Claimant's evidence is comprised in ten sentences in three paragraphs of the witness statement. There was no relevant cross-examination to flesh out or explain the Claimant's case. We agree with Ms Thomas's submission that there is "a complete absence of evidence from which a Tribunal could conclude that the *sole or principal* reason for the Claimant's dismissal was his Trade Union activities." The evidence of his union activities and the evidence concerning the dismissal are self-contained areas of fact that do not overlap. It is unrealistic to say that there is either a 'real issue' or any clear evidence that the asserted reason for dismissal was not the real reason.

(2) The Reason For Dismissal

39 The Respondent has established, to our complete satisfaction, that the reason for dismissal was the Claimant's conduct. The decision to dismiss, as well as the appeal decisions, were motivated by a serious and genuine concern that the Claimant had evaded being tested under the drug and alcohol policy. There is no challenge to the general point that testing is extremely important and that great efforts are made to discover if safety-critical staff have been taking drugs or

alcohol. The main instrument used by management is the unannounced test. All of the relevant circumstances of this dismissal show that avoidance of the test was why the Claimant was dismissed and the dismissal was plainly related to his conduct. All of the relevant managers were suspicious about the Claimant's reasons for going home. It was his decision to do so that was the centre of the case against him. That is why the dismissing manager and the appeal officers examined in detail his failure to phone Mr Gamble after he promised that he would do so. Whether or not he had breached procedures and, if so, how, occupied the bulk of all the enquiries and hearings. The Respondent amply establishes that the reason for dismissal related to his conduct.

Fairness

40 The question arises as to whether or not the Respondent was acting reasonably in treating the reason as a sufficient reason for dismissal in all the circumstances of the case and having regard to the other factors set out in s.98(4). We remind ourselves that we must not substitute our view for the Respondent. This means that we must not put ourselves in the shoes of the Respondent after the event, and re-take the decision to dismiss based upon hindsight or what we have learnt in this case. A strong statement to this effect can be found in **Eaga Plc v Tidewell** [2011] in which HHJ Richardson restated the guidance as follows, after setting out section 98(4):

> "At each stage of the enquiry therefore, the tribunal is concerned to review the actions, reasons and decisions of the employer, applying the standard of reasonableness. It follows the tribunal must not reach its decision by making findings of its own and assessing the employer's actions in the light of its own findings. This would be an error because its task is to discover what the employer's findings were and decide whether they were reasonable. The tribunal must always bear in mind that reasonable people can disagree about their findings. Nor must the tribunal reach its decision by merely relying on what it would itself have done. This would be an error because its task is to consider why the employer acted and decided as it did and decide whether the employer was reasonable. The tribunal must always bear in mind that reasonable people can disagree about (for example) how to investigate a case; or conduct a disciplinary procedure; or about what sanction should be imposed. Although this is without doubt the tribunal's task, it is not necessarily straightforward for a tribunal to keep it in mind. In the London Ambulance case Mummery LJ explained why this may be: '43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. "

41 In this case, it is impermissible, in the unfair dismissal claim, for the tribunal to decide whether or not the Claimant was deliberately trying to avoid testing, as opposed to some more innocent motivation. We are satisfied that the Respondent came to the more stringent view; and the question is whether they were acting reasonably. This is the basis of the classic guidance in Burchell. The tribunal being satisfied that conduct was the reason for dismissal, the first question is whether the Respondent reasonably believed that the Claimant had committed misconduct. The next question is whether the Respondent has carried out reasonable investigation. This then leaves the overall question as to whether or not dismissal was within the band of reasonable responses open to a reasonable employer in these circumstances. This question includes the reasonableness of the sanction as well as consideration of the procedure. For all three of these

questions it is relevant to ask whether the Respondent, based on the evidence it had at the time, could reasonably conclude that the Claimant had committed deliberate misconduct; and, in terms of sanction, whether the penalty of dismissal was open to a reasonable employer in these circumstances.

42 Our first conclusion is that the belief in deliberately avoiding the test was one that a reasonable employer could reach. As Mr Tollington commented, it was not a case of accidental non-compliance with policy. The evidence showed that the Claimant knew what he was doing when he went home; and also when he decided not to return the calls to either Mr Gamble or Ms Knott. The conclusion that there was knowing behaviour on the part of the Claimant, who was versed in the relevant procedures, was virtually inevitable.

43 Mr Patel seeks to avoid this conclusion by, first, arguing that the drugs and alcohol policy did not apply. This is a repetition of the arguments advanced before managers. As a matter of interpretation, we consider that it did apply. We accept the submissions of Ms Thomas at paragraphs 29 to 31 of her written submissions. Among the points she makes are: (a) there is no suggestion that the policy only applies in limited circumstances such as when the test subject is in the testing location or the employee has been expressly informed that testing is underway; and (b) managers had to ensure that employees did not book off duty without permission. Our conclusion that the policy did apply subsumes the question of whether the employer could reasonably take that view. However, if we had concluded that it did not apply, and that an employer could not reasonably decide it did, it would have necessarily followed that the dismissal decision was flawed. For completeness, we reject the argument advanced by Mr Patel based on the Claimant's interpretation of certain passages in the policies.

44 Our conclusion is that the Claimant, who knew the full import and effect of the policies, chose to shelter behind a technical argument which was founded solely on his saying to Mr Gamble he was ill before Mr Gamble told him not to leave. Further, he acted on Mr Shannon's advice given over the telephone, in a conversation in which he omitted to say that Mr Gamble expected to be telephoned. Even so, there was no reason to leave Mr Gamble or Ms Knott in the dark, but that was the course the Claimant chose to take. It is no great surprise that the Respondent took a dim view of his conduct and saw it as a breach of policy. Taken as a whole, an employer could reasonably conclude that he had failed to cooperate.

45 There is no further investigation that they were obliged to undertake. On the contrary, this was the subject of an exhaustive series of investigations and hearings. The alleged flaws set out by Mr Patel in paragraphs 26 to 28 of his closing argument do not stand up to scrutiny. There was no impediment, for example, preventing the Claimant calling Mr Shannon to give evidence at the hearings.

46 Was dismissal a sanction within the band of reasonable sanctions available to a reasonable employer? The principal argument for the Claimant is that, because the drugs and alcohol policy 'did not apply' in these circumstances, the decision was fundamentally flawed. That argument has failed. Mr Patel, however, has two specific lines of argument that, even so, the dismissal decision was sufficiently unreasonable to render the dismissal unfair under within subsection (4).

47 The first is based on a submission of disparity. We do not regard this as a persuasive argument. First, we agree with Ms Thomas that the overall test for reasonableness requires that there must be disparity based on a truly parallel case, before any question of disparity arises. Even then, if a previous decision was unduly lenient, the argument may have limited benefit for an employee. Here, we cannot accept that the four examples are parallel or properly comparable cases. There are factual distinctions in all the cases that are of some substance. Employee A seems to be the closest but he had a medical excuse; retained contact with his manager; and attended for a test before the shift ended. He also was put before a panel. As to the employee named Tyrone, he had booked in sick in suspicious circumstances before his shift began. This was a distinction on the facts. Ms Thomas is correct to point out that Mr Woodcock thought the ultimate decision was wrong. He thought that Tyrone ought to have been taken to a CDI panel. This is an example of a case that the dismissing officer thought had been dealt with too leniently. The other two cases referred to are in our view quite distinct on their facts.

48 The second argument is that the penalty of dismissal was too harsh in the circumstances. Mr Patel's submissions include that there was scope for misinterpretation of the policies; and that Mr Carney was acting on union advice. These are the strongest of his arguments here. The difficulty is that the genuineness of the error, as is it would have to be described, and the overall assessment of blame, was a question for the relevant decision-takers. It is their assessment that has to be examined. If we were to say that we, or any of us, would have given the Claimant the benefit of the doubt, it would be an irrelevant consideration. For the submission to succeed in taking the dismissal into unfairness, dismissal as a sanction would have to be judged to be unavailable to a reasonable employer.

49 This is not our conclusion. The Respondent took the view, after a full investigation and hearings, that the Claimant was guilty of serious misconduct. He had been instructed not to go home at that point, yet he took himself off site, made no contact with the manager, did not answer Ms Knott's attempts to contact him and subsequently tried to rely on a procedural technicality. Further, the setting for the episode was the safety-critical drug and alcohol policy. Once satisfied of the misconduct, dismissal lay within the range of reasonable options open to a reasonable employer.

50 We ought to refer to one of the mitigating factors put forward, namely the danger of returning for the test if the Claimant were to have covid. The fundamental difficulty here is that covid was not in his mind and was not referred to in the conversations with either Mr Gamble or Mr Shannon. The point is encapsulated in paragraph 33 of Ms Thomas's submission, which we consider to be sound. On our findings, mention of covid came later in the process.

Wrongful Dismissal

51 Both counsel address this issue in closing submissions. The conclusion Mr Patel presses upon is that the Claimant was 'fully entitled' to go home; and in the alternative that there was no deliberate and wilful failure to cooperate.

52 Ms Thomas contends that the failure to comply with the policy was a repudiatory breach; and, further, that the advice received from Mr Shannon cannot

affect that conclusion. Relevant to that submission is her characterisation of the evidence as follows. "It is not clear that Mr Shannon was made aware that prior to attempting to book of[f] the Claimant had already been told to return to Loughton (albeit not having been told the reason why). It does not appear that the Claimant told Mr Shannon that he had twice told TM Gamble he would call him back and Mr Shannon certainly did not advise him not to call TM Gamble in line with his undertaking. Nor did Mr Shannon tell the Claimant to ignore any further calls or messages from management. There is nothing in the Attendance at Work procedure which would prevent an employee calling or receiving a call from management."

53 Mr Patel correctly sets out the legal principle. The conduct must so undermine trust and confidence that the employer is no longer required to retain the employee in employment. What the Claimant did amounts, in our view, to repudiatory conduct. We take the whole of his conduct that day into account: the going home, the failure to telephone Mr Gamble as he said he would and the failure to respond to the Respondent's attempts to contact him. We disagree with Mr Patel that this was not a deliberate and wilful failure to cooperate. Taken as a whole, that is how we would characterise the Claimant's actions. He may also have believed he had procedure on his side, but that does not alter the conclusion. In any event, Ms Thomas's critique of the argument that Mr Carney relied on advice is one we would accept. Reliance on advice requires that the advisor knows the relevant facts. It appears on the evidence to have been the Claimant's decision to leave work, not phone Mr Gamble and not answer calls. Mr Shannon endorsed the first, although possibly without knowing the relevant facts, but did not approve the second or third. We dismiss the claim of wrongful dismissal.

54 In light of these conclusions, we do not need to deal with Polkey, contribution or the claimed Acas uplift.

Employment Judge Pearl
Dated: 31 January 2022