EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K McGill	**v**	**Chepstow Plant International Limited**

Heard at: Cambridge

On: 16, 17, 19 and 20 April 2018.
23 April 2018 (Discussion day – no parties in attendance)

Before: Employment Judge Foxwell

Members: Mr D Sutton and Ms HT Edwards

Appearances
For the Claimant: Mr Rozycki, Counsel.
For the Respondent: Mr Kember, Counsel.

JUDGMENT

1. The Claimant's claims are not well-founded and are dismissed.

2. The Remedy Hearing listed on 19 July 2018 is cancelled.

REASONS

Introduction

1. The Claimant, Mr Keith McGill, began working at Tyttenhanger Quarry near St Albans as a plant operator in 2013. The quarry is owned by Tarmac, the well-known aggregates company, but operations on site are in the hands of its contractor Chepstow Plant International Limited, the Respondent to this claim. Initially the Claimant was an agency worker supplied to the Respondent by Mando Solutions, an employment agency, but in 2014 he was taken on directly by the Respondent as an employee.

2. In October 2015 the Claimant was promoted to lead driver/site safety co-ordinator and received additional pay. The Claimant was one of two lead drivers/site safety co-ordinators on the site; the other was Ian Garner.

3. The Claimant was summarily dismissed for alleged gross misconduct by letter dated 23 August 2016. The immediate factual circumstances of the alleged misconduct are not in dispute. The Claimant was asked to take a drug and alcohol test at work on 19 July 2016 but declined to do so and left site instead. The Respondent contends that such conduct is serious misconduct under its and Tarmac's drug and alcohol policies. The Claimant acknowledges this, but says that he had been wrongly singled out for a drug and alcohol test that day in breach of the Respondent's policy because he had drawn its and Tarmac's attention to a recent near-miss incident at the quarry.

4. An issue the Tribunal has had to consider is whether written records of safety briefings produced by the Respondent in evidence are reliable or might even have been tampered with to give the Respondent an advantage in this litigation.

The claims

5. The Claimant presented complaints of unfair dismissal and breach of contract as to notice to the Tribunal on 30 November 2016 having gone through early conciliation between 20 October 2016 and 20 November 2016. The claims were defended on the basis that the Claimant had been fairly dismissed for gross misconduct and that the evidence showed that he had committed a repudiatory breach of contract entitling the Respondent to dismiss him without notice.

6. On 3 April 2017, Employment Judge Southam granted the Claimant's application to amend his claim to assert that he was subjected to a detriment, namely the request to have a drug and alcohol test, because of a public interest (protected) disclosure and that his dismissal was automatically unfair for the same reason. Judge Southam also allowed corresponding claims relating to the Claimant's role as a health and safety representative. The Respondent was not required to file an amended response to meet the new claim as Judge Southam found the new claims amounted simply to a re-labelling of facts already pleaded.

The hearing

7. The final hearing of this claim was listed over 6 days commencing on 16 April 2018. Due to an administrative error no members had been booked to sit on the case despite there being a requirement for members because of the detriment claim. Fortunately, Mrs Edwards and Mr Sutton were available at short notice, and the Tribunal was able to begin receiving evidence on the afternoon of 16 April 2018, having read the witness statements. Due to the unavailability of the Judge and one of the members the Tribunal could not sit on Wednesday, 18 April 2018 and we made the parties aware of this at the outset. We asked counsel to ensure that the evidence and submissions relating to liability were concluded by close of business on 20 April 2018 to allow the Tribunal sufficient deliberation time within the overall allocation. We are grateful to them both for achieving this objective.

8. We also asked counsel to provide us with an agreed list of factual issues arising in the claim, which they did in the following terms.

Disclosures

1. *Did the Claimant disclose on 12th July 2016 to Tarmac a near miss issued by his colleague Michael Bonner and signed by weighbridge tarmac staff and/or employees?*

2. *Did Mr Bonner issue a near miss to Juby McCulloch on 7th July 2016 (as C contends) or 4th July 2016 (as R contends)?*

3. *Did the Claimant discuss this near miss at a site safety meeting with Tarmac on 12th July 2016?*

4. *Did the Claimant provide the Respondent's Juby McCulloch with the results of that site safety meeting?*

5. *Did Juby McCulloch unilaterally cancel a Tarmac safety meeting on the morning of 19th July 2016 (as C contends) or did Mr McCulloch prevent C attending the meeting (as R contends)?*

6. *Did C inform Alan Jenkinson that Juby McCulloch had cancelled a Tarmac safety meeting?*

7. *Do any of the disclosures listed in paragraphs 1, 4 and 6 above amount to protected disclosures within the meaning of the ERA 1996?*

8. *Did the Claimant believe on reasonable grounds that the disclosures or any of them tended to show that the health and safety of any individual had been or was likely to be endangered?*

9. *Did the Claimant believe on reasonable grounds that the disclosures or any of them were in the public interest?*

10. *Did the Claimant believe on reasonable grounds that efforts might be made to conceal the matters which are the subject of the disclosures?*

Detriment

11. *Did the Respondent require the Claimant to take a drug and alcohol test because there was cause to do so under the Respondent's drug and alcohol policy?*

12. *Did the Respondent require the Claimant to take a drug and alcohol test by reason of the fact that he had made one or more of the disclosures referred to above?*

13. Did the Respondent require the Claimant to take a drug and alcohol test by reason of the fact that the Claimant had been designated to carry out activities in connection with reducing risks to health and safety at work and the Claimant carried out or proposed to carry out such activities?

14. Was the requirement that the Claimant undertake a drug and alcohol test a detriment with the meaning of the ERA 1996?

Unfair Dismissal

15. Did the Respondent have cause under the terms of its policy to require the Claimant to take a drug and alcohol test?

16. Was the ostensible reason given by the Respondent for dismissal (ie gross misconduct based in his refusal without good cause to take a drug and alcohol test) the real reason for the dismissal?

17. If not, what was the real reason for the dismissal? Was it a potentially fair reason for the dismissal?

18. Was the sole or principal reason for the dismissal that the Claimant had been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work and the Claimant carried out or proposed to carry out such activities or that the Claimant had made protected disclosures in the manner identified above?

19. Did the Respondent have a genuine belief that the Claimant was guilty of refusing without good cause to take drug and alcohol test?

20. Was the belief held on reasonable grounds?

21. At the time that the Respondent formed the belief on those grounds had it carried out as much investigation as was reasonable in the circumstances?

22. Was the decision to dismiss the Claimant within the range of reasonable responses?

23. Was dismissal a reasonable sanction in all the circumstances?

9. At the beginning of the hearing Mr Rozycki identified allegations 1, 4 and 6 as the protected disclosures relied on. He did not pursue the allegation at paragraph 6 in closing because the Claimant had accepted in evidence that the factual basis of this was wrong; Juby McCulloch had not cancelled a Tarmac safety briefing, rather he had gone in the Claimant's place.

10. Mr Kember accepted that allegations 1 and 2, if established on the facts, would constitute protected disclosures within the scheme in part IV A of the Employment Rights Act 1996. He accepted in particular that a disclosure by the Claimant to Tarmac in one of its daily safety briefings (which the Claimant usually attended) would constitute a disclosure to an employer within the meaning in s.43C(2) of the Employment Rights Act 1996.

11. The parties agreed that the burden of establishing the reason for dismissal lay on the Respondent as the Claimant had more than 2 years' continuous service. They also agreed that the Respondent would have to prove the reason for the alleged detriment, namely requiring the Claimant to undergo a drug and alcohol test, it the Claimant established a protected disclosure and given that his status as a health and safety representative was not in dispute. Consequently, they agreed that the Respondent's witnesses should give evidence first. In fact, the order of witnesses was dictated somewhat by their availability over the week, because many were attending under witness orders. Counsel co-operated with each other to accommodate this and the Tribunal was content to receive evidence in the order most convenient to the parties and the witnesses.

12. The Respondent called the following witnesses:

Alun Jenkinson – Mr Jenkinson managed the Tyttenhanger site for Tarmac at the time of the Claimant's dismissal. He was also senior manager on site for the Respondent. He is now a regional manager employed by the Respondent. Mr Jenkinson conducted an investigation into the Claimant's alleged misconduct and made the decision to dismiss.

Steve Smith – Steve Smith is employed by the Respondent as a senior environmental health & safety and quality manager based at its head office in Caldicot in Wales. He was involved in arrangements for drug and alcohol testing at the quarry on 19 July 2016.

Phil Jackson – Mr Jackson began working for the Respondent in 2013 and in early 2016 was its site manager at the quarry. He took over this role when the previous manager was on sick leave. He requested a transfer from site in 2016 and this took place in June 2016 when he handed over to Juby McCulloch.

Juby McCulloch – Juby McCulloch became site manager at the quarry in the middle of June 2016. He was employed by the Respondent between September 2015 and December 2016 when he decided to return to Scotland.

Robert Smith – Robert Smith was the Respondent's general manager at the time of the Claimant's dismissal and oversaw 15 sites in this capacity. He is now the Respondent's senior operations manager based in Caldicot.

13. The Claimant gave evidence in support of his claim and called the following witnesses:

Michael Bonner – Mr Bonner was a dumper truck driver employed by the Respondent at the quarry at the time of the Claimant's dismissal.

David Roach – Mr Roach was also employed by the Respondent on the site at the time of the Claimant's dismissal. He was a plant operator.

Stephen Coker – Mr Coker was employed by Tarmac at the site. He frequently attended and chaired Tarmac early morning safety briefings. Mr Coker attended this hearing under a witness order (as did others) but had not provided a witness statement in advance. We accept that this was not a deliberate omission by him. He produced a handwritten statement on the day he gave evidence which was disclosed to the Respondent and the Tribunal before he gave evidence.

David McCulloch – David McCulloch was employed by the Respondent at the site at the time of the Claimant's dismissal. He was a plant operator/bulldozer operator. He is not related to Juby McCulloch.

14. In addition to the evidence of these witnesses the Tribunal considered the documents to which it was taken in an agreed bundle, and references to page numbers in these Reasons relate to that bundle. We also considered some additional documents exhibited to the Claimant's witness statement.

15. Finally, the Tribunal received written submissions from both counsel which they amplified orally. Mr Rozycki referred us to three cases in particular; Abernethy v Mott, Hay and Anderson [1974] ICR 323, Labour Party v Oakley [1988] ICR 403 and Eiger Securities LLP v Korshunova UKEAT/0149/16. Mr Kember referred us to Orr v Milton Keynes Council [2011] ICR 704 and Taylor v OCS Group Limited [2006] ICR 1602. We considered all of these cases in reaching our conclusions. It is fair to say that there was no real dispute between the parties about the legal principles applying to this case.

The legal framework

Detriment

16. It is unlawful to subject an employee to a detriment because he is a person designated to carry out activities in connection with preventing or reducing risks to health and safety or because he has made a public interest disclosure (see sections 44, 47B and 48 of the Employment Rights Act 1996 and below). The term 'detriment' is not defined in the Act but it is a concept that is familiar throughout discrimination law and is to be construed in a consistent fashion. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

17. In order to succeed in a claim of detriment an employee or worker need only establish that he is protected, either because he falls within the hierarchy of health and safety protection in section 44 or has made a protected disclosure, and that he has been subjected to a detriment. If he does so it is then for the

employer to establish on the balance of probabilities the reason for the detriment and to show that the treatment was in no sense whatever on the ground of the protected act (*Fecitt v NHS Manchester [2011] IRLR 111*). An employer will succeed in this if the evidence shows that the protected act played no more than a trivial part in the application of the detriment.

18. Dismissal of an employee is not a "detriment" for these purposes but must be considered separately under the principles in Part X of the Employment Rights Act 1996 (unfair dismissal). As this is generally the most significant claim (as it is in this case) we have set out the relevant statutory provisions more fully in this context.

Automatic unfair dismissal

19. Section 100 of the Employment Rights Act 1996 ("ERA") says as follows:

> *"**100 Health and safety cases.***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b) being a representative of workers on matters of health and safety at work or member of a safety committee—*
>
> *(i) in accordance with arrangements established under or by virtue of any enactment, or*
>
> *(ii) by reason of being acknowledged as such by the employer,*
>
> *the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*
>
> *(c) being an employee at a place where—*
>
> *(i) there was no such representative or safety committee, or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to*

leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

20. Section 103A of the ERA says as follows:

*"**103A Protected disclosure***

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

21. In each of these grounds of automatic unfair dismissal the question for the Tribunal is whether the prohibited reason is the sole or principal reason for dismissal.

22. Where an employee asserts that there was an automatically unfair reason for his dismissal he must produce some evidence supporting this positive case. That does not mean, however, that the employee has to prove that the dismissal was for this reason; it is sufficient for the employee to challenge the evidence produced by the employer to show its reason for dismissal and by the employee producing some evidence of a different reason. It is for the employer to show the reason for a dismissal. The Tribunal must consider all of the evidence to make a primary finding of fact on the reason(s) for dismissal. This may be based on direct evidence or by reasonable inferences from the primary facts established by the evidence (*Maund v Penwith District Council [1984] ICR 143*, *Kuzel v Roche Products Ltd [2008] IRLR 530*).

Health and safety dismissals

23. Section 100 of the ERA protects employees from dismissal for raising health and safety concerns. The Claimant's case is based on the fact that he had a designated health and safety role so as to fall within sub-section 100(1)(a). He contends that he was dismissed because of what he did in carrying out this role.

Whistleblowing dismissals

24. Disclosures qualifying as 'protected disclosures' are defined in section 43B(1) of the 1996 Act as follows:

> ***43B Disclosures qualifying for protection***
>
> *(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

25. The Claimant contends that his disclosure falls within section 43B(1)(d), in that it related to a danger to an individual's health and safety.

26. The word 'disclosure' must be given its ordinary meaning which involves the disclosure of information, that is conveying facts; as a result, the mere making of allegations by the claimant will not be a 'disclosure' for these purposes: *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38*; similarly, merely expressing an adverse opinion of what the employer is proposing to do does not qualify: *Goode v Marks & Spencer plc [2010] UKEAT/442/09*; *Smith v London Metropolitan University [2011] IRLR 884*). That said, asserting that there has been an omission can be 'information' for these purposes (*Millbank Financial Services Ltd v Crawford [2014] IRLR 18*) and care must be taken not to draw false distinctions between allegations and information when often a disclosure may be both (*Kilraine v London Borough of Wandsworth [2016] EAT 260*).

27. An employee must reasonably believe the matter disclosed to be true and that he is making the disclosure in the public interest. "The public" may be a narrow class of individuals but the interest must be more than the employee's alone (see *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*).

28. Qualifying disclosures can only be made to certain classes of person as defined in the 1996 Act, these include the Claimant's employer (section 43C ERA 1996). There is no dispute that in this case the Claimant's disclosures are to be treated as if the Claimant made them to his employer by virtue of section 43C(2).

29. Where a disclosure is made to an employer it does not need to be true to qualify for protection but the employee must reasonably believe it to be true (*Babula v Waltham Forest College [2007] IRLR 346*). That said, the test of reasonable belief must take account of what a person with that employee's understanding and experience might reasonably believe (*Korashi v Abertaw Bro Morgannwg University Local Health Board [2012] IRLR 4*).

"Ordinary" unfair dismissal

30. In any case where an employer dismisses an employee, it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. It suffices to state that misconduct is a potentially fair reason for dismissal.

31. If the Tribunal is satisfied that misconduct is the reason for dismissal, it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in section 98(4) of the Act which provides as follows:

> *"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."*

32. There is no burden of proof on either party in respect of this.

33. The test of fairness does not permit the Tribunal to decide what it might have done had it been making the decision to dismiss (*London Ambulance Service NHS Trust v Small [2009] IRLR 563*). On the contrary, what the Tribunal must do is consider the reasonableness of the Respondent's decision and decision-making process. In the context of a conduct dismissal it is well established that the questions a Tribunal must consider are as follows (see *British Homes Stores v Burchell [1978] IRLR 379* as approved by the Court of Appeal in *Weddell & Co Ltd v Tepper [1980] ICR 286*):

> 32.1 Did the employer genuinely believe that the employee was guilty of the conduct alleged against him?

32.2 Did the employer have reasonable grounds for that belief? Important components of this are the existence of a fair procedure and an adequate investigation.

32.3 If the Tribunal is satisfied of those matters on the evidence before it, the final question is whether the decision to dismiss fell within the band of reasonable responses of an employer (see *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*).

34. Furthermore, when the Tribunal approaches questions such as the adequacy of the procedure or investigation it must also apply the band of reasonable responses test (see *Sainsbury's Supermarkets Limited v Hitt [2003] ICR 111*); it is certainly not a *'one size fits all'* approach to these matters, although the Tribunal will have regard to the ACAS Guidelines on Discipline and Grievances at Work and to any relevant workforce agreement. The focus of the Tribunal's enquiry is, therefore, on the reasonableness of the employer's decision-making process when measured against a range of approaches that could be open to different employers looking at the same facts as they were reasonably believed to be at the time (see *Devis v Atkins [1977] ICR 662*).

35. The "band of reasonable responses" test is well-established in the law of unfair dismissal. The test requires a Tribunal to treat with respect the conclusions of an employer who has concluded on reasonable grounds that misconduct has occurred but the band is not infinitely wide: the test of fairness requires a Tribunal to decide whether in dismissing the employer has acted reasonably or unreasonably "in accordance with equity and the substantial merits of the case" (see *Bowater v NW London Hospitals NHS Trust [2011] IRLR 331* and *Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677*). In establishing the parameters of the band of reasonable responses a Tribunal must walk a narrow line between an assessment of the evidence in accordance with the test of fairness and what has been termed the "substitution mindset".

36. A relevant consideration in assessing whether a disciplinary investigation was reasonable in its scope (or even necessary at all) is whether the employee has admitted the relevant misconduct (*RSPB v Croucher [1984] ICR 604*).

37. No special legal principles apply to dismissals where the misconduct is said to relate to a breach of health and safety rules (*Newbound supra*).

38. It is irrelevant to all of these questions whether the Claimant actually did what was alleged against him but, if the Tribunal is satisfied that the dismissal is unfair, what the Claimant did is relevant to the issue of contributory fault as the Tribunal must consider whether any compensation should be reduced because of the Claimant's own blameworthy conduct.

Findings of fact

39. We make the following findings unanimously and on the balance of probabilities.

40. Although we were not given precise details, we understand that the quarry is a large site with operators in different locations, sometimes as much as a mile apart. There were between 15 and 20 plant operators on site operating bulldozers, tractors and trucks. The machinery is large and potentially dangerous. By its very nature the site is also potentially dangerous.

41. The Respondent's operations on the site are managed by a site manager who was Juby McCulloch at the time of the Claimant's dismissal. He had only taken on this role on 16 June 2016.

42. There are daily safety briefings. Tarmac holds a morning briefing at about 6.00 am and one of the Claimant's duties was to attend this on behalf of the Respondent. He received an extra hour's pay for doing this as the Respondent's start time was 7.00 am. The Tarmac briefing generally lasted about 15 minutes.

43. The Respondent held its own safety briefings at the start of its day at about 7.00 am. These were run by the site manager and the Claimant would report back on relevant issues arising from the Tarmac briefing. We were told that those attending the Respondent's safety briefing were expected to sign the minutes of the meeting which were completed on a standard form.

44. The Claimant did not turn up for work on Thursday 14 July 2016, and therefore did not attend the Tarmac briefing (page 95AJ). The Claimant did not turn up for work again on Monday 18 July 2016, and again did not attend the Tarmac safety meeting. The Claimant reported for work on Tuesday 19 July 2016 and was expecting to go to the Tarmac safety briefing but was told he was not required as Juby McCulloch was already in attendance. The Claimant was annoyed by this decision and went to see Juby McCulloch about this later that morning. Mr McCulloch described the Claimant as angry but does not claim that he smelled alcohol on the Claimant's breath at that time. He said that the Claimant was standing by the door while he was sitting at a desk some distance away.

45. At about 8.00 am that morning Juby McCulloch contacted Steve Smith at head office having first tried to get hold of Robert Smith unsuccessfully. He asked Mr Smith whether he could carry out drug and alcohol testing of some of the men on site, including the Claimant.

46. The Respondent has a formal drug and alcohol testing policy (pages 96-101); this identifies two circumstances in which testing can take place, "random" testing and "with cause" testing. It is common ground that these are the only circumstances in which testing is permitted under the Respondent's policy. It is the Respondent's case that Juby McCulloch's request on 19 July 2016 was for a "with cause" test and we shall come on to the reasons he has advanced for asking for this. Sticking with the policy for the time being, however, it provides that a "with cause" test can take place where:

> *"A manager considers there is evidence that alcohol consumption or drug use has occurred".*

47. The policy then gives the following examples which might give rise to with cause screening:

- *Abnormal behaviour,*
- *discovery of an alcohol container with a broken seal,*
- *possession of a controlled substance,*
- *signs of current intoxication*
- *a work place incident/accident.*

These examples were said to be neither exclusive nor exhaustive.

48. The policy deals with refusal to provide a sample for testing in the following terms:

> *"Failure to comply with any aspect of the screening procedure, including with cause and random screening, without good cause will be viewed seriously and will be dealt with under the company's disciplinary procedure."*

and later in the policy:

> *"Refusal to provide a sample for drug or alcohol testing could result in disciplinary action which may lead to dismissal."*

49. Tarmac also has a drug and alcohol policy which applies to site and extends not only to its own employees but also to contractors working there (pages 41-55). This policy provides for random and with cause testing too. It identifies refusal to provide a sample without justifiable grounds as the equivalent of a positive result and states that this will lead to disciplinary action. It also identifies refusal to comply with any aspect of the drug and alcohol screening policy as gross misconduct. It states that a breach of these rules will normally result in summary dismissal.

50. The parties described Tarmac's approach in evidence as *"zero tolerance"*. The Claimant acknowledged that he was aware of Tarmac's zero tolerance approach and that he knew he would not be permitted to work on any Tarmac site were he to fail such a test.

51. Juby McCulloch's evidence was that he requested a "with cause" test for the following reasons:

51.1 He had received one report that the Claimant had been drinking alcohol over the previous weekend and had heard rumours to the same effect. David Roach confirmed that he had reported this to Juby McCulloch on the afternoon of 18 July 2016.

51.2 There were rumours that the Claimant had not come into work on Monday 18 July 2016 because he was still under the influence of alcohol.

51.3 There were also rumours that there had been some drug-taking going on at the weekend.

51.4 The fact that Juby McCulloch had found another worker, known to us only as 'R', who lived on the same campsite as the Claimant, asleep in his car on the morning of 19 July 2016.

51.5 Juby McCulloch also said that the Claimant's speech was slurred and stopped frequently when speaking over the site radio on the morning of 19 July 2016.

52. As we shall come onto, the Claimant disputes that he had been drinking or taking drugs on the days prior to 19 July 2016 or that his behaviour was out of the ordinary that morning.

53. There are two people who perform drug and alcohol tests within the Respondent, Steve Smith and Mike Dobbs. Although Steve Smith took Juby McCulloch's call and approved the decision to test men at the site, he could not go himself and sent Mike Dobbs instead. Mr Dobbs arrived on site at between 10.30 am and 11.00 am that morning. The Claimant questioned in evidence the speed of his arrival in Hertfordshire from South Wales, suggesting that this showed that the decision to send for him had been made the day before. We accept the Respondent's evidence that the motorway connections are such that Mr Dobbs was able to arrive from South East Wales by this time, having been called on to do so that morning.

54. When Mr Dobbs arrived Juby McCulloch went with Phil Jackson to fetch the Claimant. Mr Jackson was on site by coincidence as he was collecting some personal protective equipment (PPE) for the new site he was managing nearby. Juby McCulloch asked Mr Jackson to accompany him so that he could take over operating the Claimant's machine while he was tested. The Claimant was aware that Mr Dobbs was on site before Juby McCulloch and Mr Jackson arrived at his machine as other operators had seen Mr Dobbs arrive during their tea break. It was well known that Mr Dobbs administered drug and alcohol tests and that therefore this was the likely reason for his attendance. In any event, Juby McCulloch and Mr Jackson arrived at the Claimant's machine, which was at the lagoon area of the quarry, and Mr Jackson took over from the Claimant.

55. Juby McCulloch drove the Claimant back to the office. It is common ground that Juby McCulloch told the Claimant in the car that "Dobbsie" (Mr Dobbs) wanted to see him which the Claimant understood to be a referral to the likelihood of a drug and alcohol test. We find on the balance of probabilities that the Claimant replied, *"Fuck off, I am not going to take a test from that wanker"* (nothing turns on the language the Claimant used, which we are sure was unexceptional for this workplace). The Claimant also made a phone call whilst travelling in Mr McCulloch's car towards the site office.

56. Shortly after the Claimant and Juby McCulloch arrived at the site office, David McCulloch turned up saying that he was there to take the Claimant home. David McCulloch and the Claimant lived on the same campsite and David McCulloch supervised the Claimant when he was driving to and from work

as he only had a provisional driving licence at the time. When David McCulloch announced that he was there to take the Claimant home Juby McCulloch told him that he was also to be tested and that if he left site he would lose his job. Despite this, David McCulloch chose to leave the site with the Claimant without having taken the test. One other person, R, who had been found asleep in his car that morning, was also tested and returned a positive test. R lived on the same campsite as the Claimant and David McCulloch but we were also told was often away visiting his girlfriend.

57. The Claimant's explanation for not taking the drug and alcohol test that morning is that he felt he was being victimised and singled out. He advanced two reasons for this: firstly, that he was regularly asked to take so-called random tests and that this showed that they were not random at all; secondly, that he had been asked to take a test that morning because of his protected disclosures. He suggested that for these reasons testing him was not in accordance with either the Respondent's or Tarmac's policies as it was neither random nor with cause.

58. We received evidence about the drug and alcohol testing process. Alcohol testing is done using a breathalyser device providing almost instantaneous results. Drug testing is by urine sample with preliminary results available on site but, where a positive result is returned, further analysis being necessary at a laboratory.

59. The Respondent keeps records of each test and these are summarised in the documents at pages 152-156. These records are said to cover the period from 5 June 2015 to the date of the Claimant's dismissal and beyond. They show the Claimant was not tested for drugs or alcohol in this period. The Claimant agreed that this was correct but insisted that he had had 5 or 6 such tests. He alleged these had occurred in the period 2014 to 2015 to begin with but later in his evidence said simply that they had occurred in 2015. He could not give us the precise dates of these tests which we found to be unsurprising but we were surprised that he could not remember the approximate time of his last such test by reference to the seasons or key dates such as Easter or Christmas.

60. We were shown evidence concerning a drugs test which the Claimant failed in March 2013 because of traces of cannabis. This happened when he was an agency worker. Self-evidently he was not dismissed from site and it is common ground that he was permitted to remain subject to a testing programme which we find required him to have 6 drug and alcohol tests over a 12 month period. We find on the balance of probabilities that these are the regular tests which the Claimant refers to in his evidence. We do not find that these amounted to victimisation of or singling out of the Claimant, rather they were part of a programme which meant that he could continue to work on site despite the positive drugs result. The documentary evidence shows that there had been no recent testing of the Claimant when he was asked to have a test on 19 July 2016, and there had certainly been none in the preceding year. It was not part of the Claimant's case that the records of drug testing contained in the bundle had been tampered with by the Respondent (although he said this about other documents).

61. The second reason why the Claimant says he was subjected to a drug and alcohol test concerns a "near-miss" report. The Claimant's evidence is that at a

morning safety briefing on 11 July 2016 he informed Tarmac of a near-miss incident involving two of the Respondent's tipper trucks. He said that he reported this to Tarmac because, as a site safety co-ordinator, he had been approached by Michael Bonner the previous Thursday or Friday (7 or 8 July 2016) regarding this. Mr Bonner felt that his earlier report of this incident to the Respondent had not been acted upon by the it.

62. Both parties agree that near-miss reporting is important as it shows an awareness of health and safety issues. Furthermore, such incidents are dangerous because of the size and location of the equipment. The Respondent referred in evidence to an email from Robert Smith dated 20 June 2016 (page 102) to site managers and other senior staff encouraging near-miss reporting. Vehicles contain a book in which reports of near-misses can be made. The operators hand the top copy of any such report to the site manager and the bottom copy remains in the book in the vehicle. Site managers are then required to forward any near-miss reports to Steve Smith who maintains a log showing the report and the remedial action taken. The Respondent has produced the near-miss log which it says is the document at page 140.

63. The near-miss in question in this case concerned two tipper trucks working too closely together at a stockpile. The records produced by the Respondent do not corroborate the Claimant's evidence about the date of this disclosure, but suggest that this matter was raised some days earlier. The computer record prepared by Steve Smith at page 140 shows that a near-miss of this type was logged on Monday 4 July 2016, and that on Tuesday 5 July 2016 Robert Smith re-briefed operators on stockpile management. The record of the Tarmac morning safety brief for 11 July 2016 (the date contended for by the Claimant) at page 95AG in the bundle does not refer to the near-miss incident, nor do the records of the other Tarmac safety briefings that week. On the other hand, the Tarmac safety briefing dated Friday 1 July 2016 at page 95Y does mention such an incident.

64. The Respondent has also produced its record of its daily briefing on 5 July 2016, and this suggests that an incident involving two tipper trucks was raised by Juby McCulloch that morning (page 102A); this is consistent with Steve Smith's log. On the face of it therefore the documents we have been shown are consistent with such an incident having been reported and dealt with at the beginning of July 2016. While these documents do not corroborate the date contended for by the Claimant, they do corroborate his evidence that he mentioned such an incident in a Tarmac safety briefing.

65. It is the Claimant's case that the documents we have referred to have been amended, probably by the Respondent, to make them consistent with this interpretation and inconsistent with his recollection.

66. On the third day of the hearing the Claimant asked to adduce new evidence, namely enlarged photographs of the photocopies of the Tarmac safety briefing reports in issue. The Claimant alleged that these showed that changes had been made to these documents. We did not allow this as we did not think we had the necessary expertise to judge this and it was too late to obtain expert evidence on the point as it had only been raised part way through the trial and

with no notice to the Respondent. Accordingly, we have not taken this suggestion into account in reaching a conclusion on the reliability of the documents produced by the Respondent.

67. The Claimant raised other matters about the genuineness of the Respondent's documents. He questioned the number of signatures on the Respondent's safety briefing note at page 102A. The Claimant's evidence, and that of a number of his witnesses, is that they would have expected to see between 15 and 20 operators' signatures on this document as that is the number of operators working on the site and all were required to sign the briefing minutes to show that they had attended. Mr Bonner also challenged the genuineness of his signature on this document. We accept that there are some unexplained inconsistencies in this document, not least that it refers to a safety briefing delivered by Robert Smith later that day in the past tense. This may point to this document not having been prepared at the time of the morning safety briefing but later. Nevertheless, this does not lead us to the conclusion that the underlying information in this document is false insofar as it relates to the timing of the near-miss disclosure and the steps taken to address it as three of the Claimant's witnesses, Mr Bonner, Mr Roach and David McCulloch, confirmed that they had attended a safety briefing given by Robert Smith on 5 July 2016 concerning safe tipping methods.

68. Against this background we find on the balance of probabilities that the issue of a near-miss between two of the Respondent's tipper trucks was raised at the beginning of July 2016 and dealt with as recorded in the Respondent's documents. We find that the Claimant is mistaken when he says that he reported this to Tarmac on the 11 July 2016. We find it more probable that he did so on 1 July 2016 as recorded in Tarmac's documents.

69. The Claimant suggested that some of the Tarmac documents produced by the Respondent in disclosure had been fabricated. He referred to a change in the format of the proforma used by Tarmac for these briefings which can be seen by comparing pages 96Q and 96R. We reject this aspect of the Claimant's case. It is notable that he called the author of many of the Tarmac briefing reports, Mr Coker, but this allegation formed no part of Mr Coker's evidence. He was the witness best placed to know. We find that there is nothing sinister in the change of format.

70. It follows that we find that the Claimant disclosed a near-miss tipping incident to Tarmac on 1 July 2016 and that this is a protected disclosure based on the Respondent's concession at the commencement of the hearing (which was correctly made in our view). We do not find that the Claimant provided Juby McCulloch with this information later as he alleges.

71. We have noted the Claimant's evidence that he provided a top copy near-miss report to Juby McCulloch which he alleges Juby McCulloch threw to the floor angrily. This may be a reference to a second copy of the same report which the Claimant told us he gave to Juby McCulloch.

72. The critical questions for us in this case are whether the Claimant's disclosure was a material reason for requiring him to take a drug and alcohol test

and/or the reason or principal reason for his dismissal? We must address the same questions in the context of the Claimant's role as site safety co-ordinator which we find is one falling within the scope of section 100(1)(a) of the Employment Rights Act 1996. We turn then to the aftermath of the Claimant's refusal to take a drug and alcohol test.

73. The Claimant was suspended pending a disciplinary investigation following his refusal to take the test and leaving site (page 104). Mr Jenkinson carried out the investigation. He interviewed the Claimant on 29 July 2016 (page 106) and saw Phil Jackson that day too (page 109). On 30 July 2016 he interviewed Adam Conway about a grievance the Claimant had raised against Juby McCulloch but which has not been pursued as an issue in this case. On 1 August 2016 Mr Jenkinson spoke to Juby McCulloch and he also obtained an undated statement from Mike Dobbs.

74. The Claimant did not mention reporting a near-miss in his meeting with Mr Jenkinson on 29 July 2016, rather he complained of being excluded from the Tarmac safety briefing on 19 July and of being "targeted" for drug and alcohol tests. He alleged that he had had 5 or 6 such tests over the last 3 years.

75. On 3 August 2016 Julie Haywood, an office manager, wrote to the Claimant requiring him to attend a disciplinary hearing on 5 August 2016 at 2pm (page 121). The disciplinary charges were as follows:

> *"1 You have refused to take a drugs and alcohol test when requested to do so on site.*
>
> *2 You have acted in breach of the company's alcohol and drugs policy."*

76. The Claimant was told that relevant witness statements might be used at the hearing but was not provided with copies of these. He was asked to give details of any witnesses he intended call by 4 August 2016 and was informed of his right to be accompanied at the meeting. He was told that he might be summarily dismissed if found guilty of gross misconduct.

77. Pausing there, we are critical of the Respondent in two respects: firstly, its failure to provide the Claimant with copies of the evidence obtained and to be relied on against him; and, secondly, the extremely short timescale outlined in the letter which gave the Claimant little time to consider and prepare a defence.

78. In the event the Claimant was unable to attend on 5 August 2016 and the meeting was rescheduled for 7 August 2016 at 10.00 am when the Claimant attended alone. The meeting was chaired by Mr Jenkinson who was accompanied by Victoria Jenkinson as notetaker. Mr and Mrs Jenkinson are married but Mrs Jenkinson also works on site. The minutes of this meeting are short but were signed by the Claimant to confirm their accuracy. He is recorded as saying that he stood by his original statement and did not wish to add to it. He did not mention the protected disclosures relied on in this case. The notes of the meeting are ambiguous in that they suggest the Claimant was told of his dismissal there and then, but that was not the Claimant's evidence to us. We find

that Mr Jenkinson informed the Claimant of his summary dismissal for failure to take a drug and alcohol test and for leaving site without authorisation by letter dated 23 August 2016 (pages 125-126). The letter notified the Claimant of his right of appeal.

79. We are critical of the dismissal procedure because of Mr Jenkinson's role both as investigator and chair of the disciplinary meeting. The Respondent is a company of some size with over 160 employees so it should have been possible to separate these roles in accordance with ACAS guidance.

80. In a further unusual twist in this case Mr Jenkinson visited the Claimant at his campsite after the disciplinary hearing and dismissal to give him a note with suggested points for an appeal against his decision. Some of these suggestions feature as issues in the case before us. The Claimant refers to this note at paragraph 37 of his statement and attaches it as an exhibit. We accept Mr Jenkinson's evidence that he did this to help the Claimant as the Claimant and David McCulloch, who he had also dismissed, were the first employees he had dismissed in a career which had lasted many years.

81. One of the criticisms levelled at Mr Jenkinson and his investigation is that he did not cast the net of interviews more widely, particularly by including employees of Tarmac. We find this criticism to be unjustified given that the Claimant had not raised his protected disclosure with Mr Jenkinson as a reason for his treatment.

82. The Claimant exercised his right of appeal by letter dated 31 August 2016. He had consulted solicitors and we understand this letter was drafted by them on his behalf: it did not refer to the protected disclosures but alleged that the requirement for the Claimant to undergo drug and alcohol test was outside the Respondent's policy (pages 127-130).

83. On 22 September 2016 Julie Haywood wrote to the Claimant to tell him that an appeal hearing would take place on 28 September 2016. The letter informed the Claimant that the appeal would be a complete re-hearing and it purported to enclose copies of the *"relevant witness statements and other documents which may be used at the hearing"*, together with a copy of the disciplinary procedure. The Claimant denied in evidence that the witness statements had been enclosed and it is impossible for us to resolve this conflict given the passage of time, but we note that the Claimant raised no written complaint in the appeal about this. We also note that he was given a chance to read the statements at the appeal and when he was asked by Robert Smith whether he was happy to proceed, he said that he was (page 133).

84. The appeal hearing duly took place on 28 September 2016, chaired by Robert Smith. Derek Pollock attended as note taker and Alun Jenkinson was there to present the company case and answer any questions about the investigation process. The Claimant was accompanied by David McCulloch.

85. The Claimant alleged at the appeal that the origin of events was his near-miss report. This is the first documented occasion when the protected disclosure was referred to. Mr Jenkinson's response was that the near-miss had been

recorded and acted upon. The question arose whether the drug and alcohol test was requested with cause and when Robert Smith asked the Claimant why he refused to take it the Claimant said that he had felt victimised and that this was all to do with the near-miss (pages 133-135). The Claimant also questioned why statements had not been taken from Tarmac employees.

86. At the end of the appeal hearing Robert Smith summarised the Claimant's case as follows:

> *"RS in summary said that KMCs appeal was that it was unfair that Juby selected him for a with cause test due to being victimised and it was part of a witch hunt to remove him."*

The Claimant agreed that he was being victimised and said that he should never have been picked on that day for a test.

87. Robert Smith said he would re-visit the statements, speak to Juby McCulloch and any others who might be relevant and then consider his decision which he would send in writing.

88. Robert Smith obtained further written statements from Mike Dobbs and Juby McCulloch. These were sent to the Claimant with the appeal outcome letter and appeal minutes with a request for further submissions if the Claimant had any comments on them (page 138-139).

89. Robert Smith dismissed the Claimant's appeal in a detailed and reasoned letter. He told the Claimant that there was no further right of appeal. The Claimant did not make any representations about the additional witness statements that had been enclosed. That concluded the Respondent's internal procedure.

Conclusions

90. In this section of our reasons we set out our conclusions on the issues having regard to the legal principles and findings of fact set out above.

91. For the reasons given above, we find on the balance of probabilities that the Claimant made a protected disclosure to Tarmac employees and to Juby McCulloch about a near-miss involving two of the Respondent's tipper trucks. This was a disclosure of information relating to a significant risk to health and safety. The disclosure was made in the Claimant's capacity as site health and safety co-ordinator and, judged objectively, it was made in the public interest as it concerned avoiding a potentially serious or fatal workplace accident. We find that this disclosure was made at the beginning of July 2016 and not on 7 or 11 July 2016 as contended for by the Claimant. We think that he is simply mistaken about the date; other evidence suggests that, like many of us, he is not particularly good at remembering dates or even approximate dates

92. We do not find that the protected disclosure was a reason for Juby McCulloch asking for, or the Respondent requiring the Claimant to undergo a

drug and alcohol test on 19 July 2016. Similarly, we do not find that the Claimant's status as a person designated to carry out duties in connection with the prevention or reduction of risks to health and safety at work was a reason for this request. The reason for the request was Juby McCulloch's suspicion that the Claimant might be under the influence of drugs and/or alcohol. This suspicion was based on two absences from work in quick succession, rumours circulating on site and one specific report from Mr Roach about the Claimant's alleged behaviour. We are satisfied that this was a "with cause" request under the Respondent's drug and alcohol policy. For these reasons the claims of detriment in employment fail.

93. We find that the reason for the Claimant's dismissal was his refusal to have a drug and alcohol test without good reason, which conduct was compounded by him then leaving site without permission. In our judgment this was reasonably construed by the Respondent as an act of misconduct under its policy. We do not find that the protected disclosure was a reason for the Claimant's dismissal, let alone the principal reason, nor was his status as a person designated to carry out duties in connection with the prevention or reduction of risks to health and safety at work. Accordingly, the claims of automatic unfair dismissal fail.

94. We find that the reason for dismissal was misconduct and we must therefore consider the test of fairness in this context as part of the claim of ordinary unfair dismissal.

95. In our judgement the dismissal process was imperfect, particularly in its early stages. Our impression is that the Respondent was not used to dismissing employees, for example Mr Jenkinson said in evidence that he had not let anyone go in 20 years in the industry. Judged as a whole, however, we find that the process was fair, particularly as the appeal was treated as a complete re-hearing.

96. We find that the decision to dismiss lay within the band of reasonable responses of an employer having regard to the reasons for the drug and alcohol policy and the clear explanation contained in it of the consequences of failing to comply. The Claimant clearly understood these. We find, therefore, that the decision to dismiss was fair.

97. We turn then to the claim for notice pay. This requires us to decide whether, judged objectively on the evidence presented, the Respondent was entitled to treat itself as discharged from the obligation to give notice by the Claimant's own repudiatory breach of contract. We find that it was. The Claimant was required to undertake a test with cause but refused and left site instead. Judged objectively, we find that this was a repudiatory breach of contract by him. Accordingly, the claim for notice pay also fails.

98. Turning then to the factual issues identified by counsel at the commencement of the hearing – we find as follows:

Disclosures

1. *Did the Claimant disclose on 12th July 2016 to Tarmac a near miss issued by his colleague Michael Bonner and signed by weighbridge tarmac staff and/or employees?*

   The Claimant made a disclosure to Tarmac of a near miss but at the beginning of July 2016 and not on 12th.

2. *Did Mr Bonner issue a near miss to Juby McCulloch on 7th July 2016 (as C contends) or 4th July 2016 (as R contends)?*

   We have not found it necessary to resolve this allegation to decide this case.

3. *Did the Claimant discuss this near miss at a site safety meeting with Tarmac on 12th July 2016?*

   Our finding is set out in respect of allegation 1 above.

4. *Did the Claimant provide the Respondent's Juby McCulloch with the results of that site safety meeting?*

   We find that the Claimant told Juby McCulloch of the outcome of the Tarmac safety briefing in which he reported the near-miss and that this is likely to have happened at or near the beginning of July 2016 rather than on 12 July 2016.

5. *Did Juby McCulloch unilaterally cancel a Tarmac safety meeting on the morning of 19th July 2016 (as C contends) or did Mr McCulloch prevent C attending the meeting (as R contends)?*

   We do not find that Juby McCulloch cancelled any Tarmac safety meeting, rather he attended on 19 July 2016 in the Claimant's place as he could not be certain that the Claimant would report for work that day.

6. *Did C inform Alan Jenkinson that Juby McCulloch had cancelled a Tarmac safety meeting?*

   This allegation was not pursued.

7. *Do any of the disclosures listed in paragraphs 1, 4 and 6 above amount to protected disclosures within the meaning of the ERA 1996?*

   We have dealt with this issue in the conclusions set out above.

8. *Did the Claimant believe on reasonable grounds that the disclosures or any of them tended to show that the health and safety of any individual had been or was likely to be endangered?*

We have dealt with this issue in the conclusions set out above.

9. *Did the Claimant believe on reasonable grounds that the disclosures or any of them were in the public interest?*

   We have dealt with this issue in the conclusions set out above.

10. *Did the Claimant believe on reasonable grounds that efforts might be made to conceal the matters which are the subject of the disclosures?*
    We do not find that there was any attempt to conceal matters as alleged by the Claimant, on the contrary and as the Claimant knew, near-miss reporting was encouraged.

Detriment

11. *Did the Respondent require the Claimant to take a drug and alcohol test because there was cause to do so under the Respondent's drug and alcohol policy?*

    We find that there was cause to require the Claimant to take a drug and alcohol test.

12. *Did the Respondent require the Claimant to take a drug and alcohol test by reason of the fact that he had made one or more of the disclosures referred to above?*

    We reject the Claimant's case that his protected disclosure was a reason for this.

13. *Did the Respondent require the Claimant to take a drug and alcohol test by reason of the fact that the Claimant had been designated to carry out activities in connection with reducing risks to health and safety at work and the Claimant carried out or proposed to carry out such activities?*

    We reject the Claimant's case that he was required to take this test because of his health and safety responsibilities.

14. *Was the requirement that the Claimant undertake a drug and alcohol test a detriment with the meaning of the ERA 1996?*

    We accept that the requirement to undertake a drug and alcohol test could be a detriment within the meaning of the Employment Rights Act 1996, but for the reasons already given the claims of detriment for a prohibited reason fail.

Unfair Dismissal

15. *Did the Respondent have cause under the terms of its policy to require the Claimant to take a drug and alcohol test?*

    We are satisfied that the Respondent had cause to require the Claimant to take a drug and alcohol test.

16. *Was the ostensible reason given by the Respondent for dismissal (ie gross misconduct based in his refusal without good cause to take a drug and alcohol test) the real reason for the dismissal?*

    We are satisfied that the reason for the Claimant's dismissal was his refusal to take the test without good cause.

17. *If not, what was the real reason for the dismissal? Was it a potentially fair reason for the dismissal?*

    This allegation does not arise in light of our earlier findings.

18. *Was the sole or principal reason for the dismissal that the Claimant had been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work and the Claimant carried out or proposed to carry out such activities or that the Claimant had made protected disclosures in the manner identified above?*

    We are satisfied on the evidence that the reason for dismissal was misconduct.

19. *Did the Respondent have a genuine belief that the Claimant was guilty of refusing without good cause to take drug and alcohol test?*

    We find that the Respondent had a genuine belief in the Claimant's guilt. The essential facts were not in dispute in this case.

20. *Was the belief held on reasonable grounds?*

    That belief was held on reasonable grounds in our judgement having regard to the evidence adduced.

21. *At the time that the Respondent formed the belief on those grounds had it carried out as much investigation as was reasonable in the circumstances?*

    While we are critical of aspects of the dismissal procedure, judged as a whole and having regard to the Claimant's own participation in it, the process was fair.

22. *Was the decision to dismiss the Claimant within the range of reasonable responses?*

We find that the decision to dismiss was within the range of reasonable responses.

23. Was dismissal a reasonable sanction in all the circumstances?

We find that dismissal was fair having regard to the test of fairness contained in s.98(4) of the Employment Rights Act 1996.

99. In light of our findings we have cancelled the provisional remedy hearing listed on 19 July 2018.

_____
Employment Judge Foxwell

Date: 22 May 2018

Sent to the parties on: .....

.....
For the Tribunal Office