Appeal No. UKEATS/0017/16/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 19th May 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

CHIVAS BROTHERS LIMITED — APPELLANT

MR JAMES CHRISTIANSEN — RESPONDENT

JUDGMENT

APPEARANCES

For the Claimant	Mr B Napier (One of Her Majesty's Counsel) Instructed by: Lamonts Solicitors Miller Chambers 16 Miller Road Ayr KA7 2AY
For the Respondent	Mr A Hogarth (One of Her Majesty's Counsel) Instructed by: McGrade & Co Ltd Standard Buildings 94 Hope Street Glasgow G2 6PH

SUMMARY

DISABILITY DISCRIMINATION ; Disability Related Discrimination ; Justification ; Reasonable Adjustments

The claimant was employed for some years by the respondent, a company engaged in the distillation and distribution of alcoholic drinks. He suffered from depression and that was known to the respondent. He was dismissed for falling asleep while at work and subsequently refusing (on the respondent's account) to take alcohol and drugs tests on two separate occasions. The Tribunal found that the respondent had been wrong (i) to reject the claimant's explanation for falling asleep at work (ii) to fail to take account of the reasons for his refusal to take the first test, and (iii) to regard him as failing to submit to the second test when there was unchallenged medical evidence that he had been unfit to attend. The respondent had sought to rely on the justification defence in section 15(1)(b) of the Equality Act 2010 (EA 2010) and also as a defence to a claim under section 20 EA 2010 that it was reasonable to dismiss the claimant and so it would not have been a reasonable adjustment not to dismiss him. Emphasis was placed on the respondent's health and safety policy which provided that a failure to comply with a " with cause" request to submit to a drugs test could lead to dismissal. Both arguments were rejected by the Tribunal, which in its reasons relied principally on the evidence of the respondent's HR Manager that the claimant had posed no health and safety risk at the time of his dismissal.

On appeal, the respondent argued that the Tribunal, having directed itself to the correct legal test, which requires an objective balance between the opposing interests (**Hampson v Department of Education and Science [1989] I.C.R. 179**, recently approved in **Land Registry v Houghton UKEAT/0149/14**, had failed to apply that test as it had not weighed the respondent's need to enforce their health policy strictly in the balance.

However, the reasonable needs of the respondent in relation to enforcing their health and safety policy were known to the Tribunal and set out in the judgment when read as a whole. It was for the respondent to set out the justification defence and it had done no more than make a bare assertion in support. The Tribunal's conclusions on the section 15 and section 20 aspects of the claim had to be read against the backdrop of the acceptance of the claimant's account of events. The respondent could not rely on evidence that had been rejected to support its defence. The Tribunal had been left with little if anything to balance against the admitted absence of risk posed by the claimant. In the particular circumstances of the case, a detailed articulation of the balancing exercise was not required. Even if the Tribunal's approach had been a narrow one, no other outcome could have resulted. It was unnecessary to address a separate cross appeal on the section 95 unfair dismissal claim .

Appeal dismissed.

THE HONOURABLE LADY WISE

1. The claimant commenced full time employment with the respondent in its Despatch Department from 1st May 2007. The respondent is a large company engaged in the distillation and distribution of alcoholic drinks. The claimant suffers from depression, something the respondent was aware of by May 2013 at the latest.

2. In December 2014 following a disciplinary hearing the claimant was dismissed in circumstances that are detailed in the Tribunal's findings in fact. An internal appeal by the claimant was unsuccessful. He initiated a claim in the Employment Tribunal and on 3rd February 2016 following a hearing held over at least 8 days the Tribunal, chaired by Employment Judge Laura Doherty, issued a Judgment deciding unanimously that the claimant was discriminated against contrary to section 15 and separately section 20 of the Equality Act 2010 ("EA 2010") and unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 ("ERA 1996"). The claims under section 19 EA 2010 and section 23 ERA 1996 were dismissed. The respondent has appealed against the Tribunal's decision.

3. Before the Tribunal the claimant was represented by Mr G Woolfson, Solicitor and the respondent was represented by Mr Sharpe, Advocate. At the appeal the claimant was represented by Mr Andrew Hogarth QC and the respondent by Mr Brian Napier QC. I will refer to the parties as claimant and respondent as they were in the Tribunal below albeit that the respondent company is a singular entity (i.e. respondent not respondents as per the Tribunal Judgment).

4. The appeal is against the decision on both section 15 and section 20. So far as unfair dismissal is concerned this finding is on the Tribunal's reasoning expressly dependent on the finding that there was a breach of section 15. The respondent contends that if the appeal on section 15 ground succeeds the unfair dismissal finding must also fall. The claimant cross appeals on that issue contending that the unfair dismissal claim had been presented as a standalone claim not inextricably linked with the section 15 breach. The cross appeal is accordingly relevant only if the respondent's primary appeal succeeds.

Findings in Fact relevant to the Appeal

5. The Tribunal Judgment runs to some 102 pages and deals meticulously with each of the issues raised at the hearing making relevant findings and discussing the evidence. The findings in fact run to some 176 paragraphs. Those of direct relevance to the issues raised at this appeal include the following:-

> **22. "The respondents have a number of policies and procedures in place for the management of their staff. These include a disciplinary and grievance policy, and a drugs and alcohol policy (pages 44/45 and 56/69 respectively).**
>
> **23. The workplace alcohol and drugs policy provides for 'with cause' drugs testing (clause 11). The policy states:-**
>
> > **"11. `With Cause` Alcohol and Drug Testing**
> >
> > **Testing will be carried out where management has grounds to believe or suspect that an employee is or may be under the influence of alcohol or illegal drugs or where an employee is found to be in possession of illegal drugs or alcohol which is not for business purposes or which prior authorisation of security has not been obtained.**
> >
> > **The objectives of having such testing in the workplace are to:**
> >
> > - **Maintain a safe working environment for all**
> > - **Assist in the early identification of alcohol or drugs related problems**
> >
> > **Testing Procedure**

An employee will only be requested to undertake a test where a manger has clear grounds to believe that the employee appears to be under the influence of alcohol/illegal drugs or it is suspected that the employee is in possession of alcohol/illegal drugs without the required authorisation

Stage 1 – Sobriety/Co-ordination Test

Employees requested to undertake an alcohol/drugs test will initially be requested to undertake a sobriety/co-ordination test. The test should be conducted in a private room. This will require the manager who witnesses the behaviour and a second manager will be called to witness the test.

Any employee requested to undertake a Stage 1 Test – Sobriety/Co-ordination Test has the right to representation from a workplace colleague or a Trade Union Representative.

Managers may request the employee to:

- **Walk along a straight line**
- **Close their eyes and put their finger on their nose.**
- **Interview employee and look for signs such as slurred speech, glazed eyes and smell on breath (in case of alcohol).**

The outcome of the test should be recorded in writing by the manager and retained on file. If the outcome of the test is positive, the employee will be required to undertake Stage 2 of the testing process.

To fulfill their duty of care, in the event the test is negative and the manager continues to have concerns about the employee's fitness for work, they may still request the employee to undertake Stage 2 of the testing procedure.

In the event an employee refuses to undertake a Stage 1 – Sobriety/Co-ordination Test, this will be considered gross misconduct and an investigation will be conducted, the outcome of which may result in summary dismissal.

Stage 2 – External Breathalyser/Swab Test

Stage 2 of the alcohol/drug testing procedure will be conducted by an external testing agency engaged by the Company to provide a rapid response sampling and analysis facility.

If a manager believes a Stage 2 Test is required, the employee should remain in the private room allocated for the Stage 1 Test and remain accompanied by a manager until the external agency arrive. Any employee requested to undertake a Stage 2 Test will have the right of representation from a workplace colleague or Trade Union Representative. The manager must also be present.

The manager should complete the internal consent form (appendix a) before gaining consent from the employee to proceed with the Stage 2 testing. In the event an employee refuses to undertake a Stage 2 testing, this will be considered gross misconduct and an investigation will be conducted, the outcome of which may result in summary dismissal.

If an employee refuses to remain on site until the agency arrive they need to be made aware that it will be classed as a refusal to undertake the test and will be regarded as an act of gross misconduct which will be subject to disciplinary action up to and including summary dismissal."

24. Management understand that they can apply this policy by requiring employees to go directly to a Stage 2 test, in circumstances where they have cause to conclude that the employee would not pass a Stage 1 test, even when a Stage 1 has not been administered. This understanding of how the

policy can be applied has evolved due to the emphasis on testing for drugs as opposed to alcohol; however there is nothing written within the policy to explain that management interprets it in this way.

25. The policy provides at Clause 12, that:-

> **"an employee who refuses to give consent to an alcohol/drugs test or who in any way attempts to alter a sample for testing in line with the Company's alcohol and drug testing procedure will be regarded as gross misconduct, which may result in summary dismissal."**

29. The claimant suffers from depression.

30. In or around May 2013 a referral was made by his manager, Janice Wilson, to Occupational Health, because of performance and timekeeping issues. His managers where aware that the claimant had a previous history of mental illness.

32. The claimant received a first written warning on 30 September 2013 because of his timekeeping. This warning was of 3 month duration, and expired in January 2014.

43. The claimant was absent from work from 25 April 2014 to 3 July 2014. The claimant's Consultant Psychiatrist, Dr Kinniburgh, wrote to the respondents` Occupational Health Nurse, Janet Woolley on 3 July 2014 (page 92), advising of his hospitalisation', treatment, and medication, and confirmed that the claimant was attending his outpatient clinic. In that letter, Dr Kinniburgh advised that the claimant had a depressive illness; Dr Kinniburgh expressed the view that the claimant's depressive illness was already affecting him by April 2014.

48. The claimant returned to work on 16 July 2014 on a phased return basis. During Week 1 he worked 2 half days; in Week 2 he worked 4 half days; in Week 3 he worked 2 half days and 2 full days; and in Week 4 when he worked 2 half days and 3 full days.

49. On his return to work the claimant was advised by the managers, Janice Wilson and Scott Montgomery that there were quiet rooms available for him should he need to utilise this space. He was told that he could use two offices and Mr Montgomery's office' 'at a push'. In respect of one of the offices it was explained that a link would be sent to him indicating when it was free, however this was never done.

58. The claimant was continuing to experience difficulty sleeping and he reported to Ms Woolley that his main symptom of concern was difficulty in sleeping. She advised him to discuss that with his GP. The claimant also told Ms Woolley that his sleeping problems were not impacting on his memory, concentration or ability to perform at work.

64. On 27 July 2014, (Sunday evening) the claimant did not sleep well. He estimated he had about one hours sleep. When he went to work on the 28th he had an increased level of anxiety associated with the fact that from 28 July 2014 he was going to be taking on effectively had been his full time role, as a Dispatch Planner, while in the previous weeks of his phased return, he had been assisting other Dispatch Planners.

65. The claimant commenced work at 8am. When he arrived, he found a number of post- it notes on his desk with instructions on them about work matters from Friday. When he saw this and his workload, the claimant began to worry. He experienced increasing anxiety as the morning progressed, and started to worry about being unable to finish his work by 12 noon; however he did not alert his manager, or Occupational Health, to the fact this was the case. By shortly before 11 o'clock, the claimant began to panic about work. The claimant knew that quiet space had been made available, but had not seen a roster or link for a quiet room. He was unsure what meeting room was occupied. He felt in such a state of panic and embarrassment that he had to get away from his desk and colleagues. He was fearful of his colleagues thinking that he was incapable of doing his job. He felt he had to be by himself at that moment, to do his breathing exercises. He decided to go to a toilet cubicle in order to do so. On the way to the toilets the claimant passed Scott Montgomery and said "alright Scott".

66. The claimant went to the toilet, loosened his trousers and sat down with his head in his hands, his elbows on his knees, and began to do breathing exercises in an attempt to alleviate his anxiety. While doing the exercises, and as a result of doing these, the claimant fell asleep.

67. The claimant's sleep difficulties, anxiety, and feelings of panic, the need to carry out breathing exercises, and the fact that he fell asleep while doing these exercises were matters which were related to or caused by his depression.

68. The claimant went into a deep sleep, and had to be woken by Scott Montgomery banging on the toilet door.

70. Scott Montgomery gave the claimant a lift home on 28 July 2014, and in the course of the journey, the claimant told Scott that he had *"fucked everything up"* again. The claimant anticipated that disciplinary action would arise from his being found asleep in the toilets. This impacted on his mental health and he developed pronounced ruminations about the incident, becoming sad and tearful.

71. The claimant had an appointment with his psychiatrist, Dr Kinniburgh, on 28 July 2014 in any event, which he attended, and he subsequently signed off for the remained of that week.

72. When the claimant attended at Dykebar Hospital to see Mr Kinniburgh on 28 July 2014 he was in a very distressed state. Dr Kinniburgh agreed to see him on an urgent emergency basis. In Dr Kinniburgh`s assessment, at the point when he saw the claimant on 28 July 2014 he had developed pronounced ruminations about the incident, including thoughts about disciplinary procedures again, and taking it further, the claimant started to think again that he was going to lose his job. When the claimant consulted with Dr Kinniburgh, Dr Kinniburgh`s impression was the claimant was sad and tearful. In Dr Kinniburgh`s assessment this passed and he was able to talk about the issues as his anxiety settled. The claimant was certified as unfit for work for the remainder of that week.

73. On 29 July 2014 the claimant received a letter asking him to attend an Occupational Health appointment on 5 August 2014. The claimant saw Dr M Robinson on 5 August 2014 and her report from that meeting to the respondents is produced at pages 115 to 117 of the bundle.

74. A decision had been taken by the respondents that the claimant should take a drugs test when he attended the premises on 5 August 2014.

77. The claimant and Mr Fernie were alone for a short period before they were joined by Ms Campbell. The claimant did not know why he had been asked to go to the projects room and it appeared to Mr Fernie that he was agitated and upset. The claimant was unaware he was going to be asked to take a drugs test.

78. When Ms Campbell joined them, she explained to the claimant that the company wanted him to carry out a 'with cause' drugs test as they believed that his behaviour on 28 July 2014 warranted this. Ms Campbell told the claimant that he could have a witness, and the test would be carried out by an independent testing company. Ms Campbell told the claimant that she had a form which stated the reasons for the test, and that she needed the claimant to sign this form in order to take the test.

79. On hearing this, the claimant became very agitated and upset, and was tearful. He accused the company of bullying and harassment; he said that he was mentally ill, and should not be put under pressure to take the test. The claimant was behaving aggressively, particularly towards Ms Campbell, and he indicated he was not prepared to take the test. Mr Fernie attempted to calm the claimant down. Mr Fernie said that he was sorry that the claimant felt this way but if he had nothing to worry about, he should take the test, get it out of the way, and move on. The claimant became more agitated, and began swearing, and started to cry. The claimant said that he thought the company had someone else lined up to take his job, he, blamed HR for his illness, and for the situation. Mr Fernie again attempted to explain to the claimant that it was not Ms Campbell who was carrying out the process, and that it was unfair that he singled out HR. The claimant said he felt trapped.

80. In the course of this meeting, the claimant was filled with anger. As a result of his mental illness, he formed the view, that the company had set a trap for him, by asking him to take a drugs test. He believed that even if the drugs test was negative the respondents would fix the results, and would fire him. The claimant was convinced that no matter what happened with the test, the respondents would ensure that he failed in any event, and he would be dismissed. He was overcome with fear, and he felt trapped. The claimant's feelings of panic and paranoia were as a result of his depressive illness.

83. Dr Kinniburgh, in consultation with a Mr Kopric, who had assessed the claimant, considered that the claimant was a very significant suicide risk, and they arranged for him to be admitted to Leverndale Hospital. The claimant remained at Leverndale Hospital, until discharge on 8 August 2014 when he was thereafter referred into the Intensive Home Care Treatment Team for ongoing support.

84. The Intensive Home Care Treatment Team provides a high level of support, which is almost equivalent to being in hospital. They provide daily visits by nursing staff backed up by their own psychiatrist. After leaving Leverndale, Dr McArre, a Consultant Psychiatrist with the Intensive Home Care Treatment Team, helped to look after the claimant. Dr Kinniburgh had a joint consultation along with Dr McArre on 21 august 2014. The claimant was in attendance at that session. Dr Kinniburgh noted that the claimant was in low mood, irritable, and there was some evidence of lack of self care. In Dr Kinniburgh`s assessment, the claimant was under a lot of pressure from his employers, and the issue of the drugs test had clearly upset him. The claimant told Dr Kinniburgh that he was not sure how much more he could take of the way the company was treating him. In Dr Kinniburgh`s assessment the claimant was emotional at the time. Dr Kinniburgh asked the claimant for his reason for refusing the drugs test, and in Dr Kinniburgh`s assessment these came under two headings. Firstly, in his assessment, the claimant was in a state of shock on account of the fact that he was on sick leave, and had been invited in for an Occupational Health appointment with no anticipation that he was going to be asked to take a drugs test. In Dr Kinniburgh`s assessment this made him feel threatened, and that the claimant panicked. In Dr Kinniburgh`s assessment the second part of the reason was that the claimant felt people were against him in Chivas and were looking for ammunition, or tripping him up, to find a way to dismiss him. This was something which Dr Kinniburgh had noticed from the claimant from the first time he had met with him. Dr Kinniburgh had reassured the claimant many times around this, advising him that all the things which the respondents Occupational Health Department had done were fairly normal in his view, and he had been able to reassure him fairly easily that the respondents were going through normal channels regarding going back to work. However, in Dr Kinniburgh`s assessment, the claimant felt that the drugs test was a trap and that he was being set up in some way, and the claimant experienced a very very negative reaction to this. Dr Kopric`s assessment of the claimant, relayed back to Dr Kinniburgh, was that his mood had very much collapsed after he refused to take the test and he was overwhelmed by suicidal thoughts that day, which caused his admission into hospital.

87. The claimant remained under the care of Dr Kinniburgh as at 26 August 2014.

89. The claimant however continued to suffer from mental illness, with sleep problems, anxiety, and negative suicidal thoughts and to be very unwell. He met with Dr McArre and Dr Kinniburgh on 21 August 2014, and it was Dr Kinniburgh`s assessment following that consultation, that the claimant had suicidal ideas, was not sleeping properly; was anxious, and was showing all the signs of clinical depression with anxiety, poor concentration and poor appetite. In Dr Kinniburgh`s assessment the claimant was acutely unwell, and he made adjustments to his medication.

90. Dr Kinniburgh felt it inappropriate for the claimant to have contact with work. He considered it was more important for the claimant at this point to have proper sickness absence leave to recover from his illness. Dr Kinniburgh considered it might be quite harmful to the claimant for him to go back in to the work environment in case he might break down again with this contact, and might again end up in hospital as had happened on 5 August 2014.

92. Dr Kinniburgh thereafter made contact with Janet Woolley at Chivas, to let her know that in his opinion the claimant was too unwell to attend the meetings which had been arranged for 26

August 2014. There was no specific discussion between Dr Kinniburgh and Ms Woolley of a drugs and alcohol test in the course of the conversation on 26 August 2014; however, Dr Kinniburgh made it clear that he did not consider the claimant well enough to attend meetings with HR or management.

94. The claimant underwent a drugs test on 4 September 2014 which was performed by Dr Kinniburgh. This was clear, and the only drugs which were shown were prescribed drugs. The claimant contacted management to advise them of this.

100. Dr Robinson's report also contained a statement to the effect that the claimant wished the following information to be provided in relation to his psychiatrist's response to specific questions. These included:-

> "**1. Would James prescribed drugs as at 28 July typically interfere with sleep patterns and could this treatment regime at that time, or his psychological condition potentially cause him to fall asleep whilst at work?**
>
> At the time of James's phased return to work e was still suffering a degree of depression and anxiety. I know that he was not sleeping well at this time, including initial insomnia (difficulty getting to sleep) and early morning wakening. He was also taking medications during the day which would both interfere with sleep patterns and make falling asleep more likely.
>
> **2. Can you advise if James is concordant with his prescribed treatment?**
>
> As far as I am aware, James has always been concordant with prescribed treatment and has kept all appointments with myself and other health professionals involved in his care.
>
> **3. Are you aware if James has taken any other drug that has not been prescribed by a GP or a specialist?**
>
> I note that on all the occasions James has been seen by myself or other staff from Dykebar Hospital, there has been no evidence of drug intoxication or withdrawal. I do not think that drug misuse is relevant factor in James` case.
>
> **4. Is there any reason that you are aware of that James would not be agreeable to undertake an independent drug test?**
>
> I am not aware of any reason why James would be unwilling to undertake an independent drugs test. He has expressed a view on a number of occasions that he would be willing to take a drug test on his return to work and to take subsequent regular drug tests if required.
>
> **6. In his current health state, in your opinion, could James's psychological condition potentially cause a reaction or behaviour that may cause a possible threat to himself or others?**
>
> At present James is stable and focused on returning to work. I feel that he is now in a better position than he was in July to undergo a phased return. I have asked him specifically about the issue of meeting with Occupational Health and Human Resources. He is comfortable about attending any meetings which may be necessary prior to his return to work. At present he is not presenting any risk to himself or others."

102. After receiving that report, the respondents did not conclude that the claimant should be asked to return to work until the H/R management meeting had been dealt with. Ms Campbell wrote to the claimant on 6 November 2014 (page 137) noting that the claimant was fit to attend meetings with management and HR. She asked the claimant to attend a meeting on 14 November 2014 with Cheryl Brownlee, Customer Services Manager, and Iona MacDonald, an HR Advisor. The letter advised that the purpose of the meeting was to address two matters:-

(1) To hear the claimant's appeal against the final written warning issued on 24 April 2014.

(2) To carry out an investigatory interview with the claimant in relation to –

(a) his conduct on 28 July 2014 when he was found asleep in the gent's toilet at work and

(b) the claimant's alleged refusal to take a drugs test on 5 and 26 August 2014.

116. Ms MacDonald also posed another additional question for Ms Woolley, which were answered were as follows:-

"(1) How long did you spend with James Christiansen on 28 July after he had been found asleep in the toilets?

- Approximately 60-90 minutes. I spent some time while on the phone with James` Psychiatrist.

(2) Did you produce a report following that session?

- No because James was due for a review appointment on 29 July. The session on 28 July was about his wellbeing, calming James down, creating a safe plan and focusing on his present state of health.

(3) Did James attend for his appointment on 29 July?

- No as he was signed off from 28 July onwards.

(4) During your session with James on 28 July did you have any concerns that James was under non-prescription drugs or alcohol?

- No concerns at all. James has never given any concerns that would warrant a Drug or Alcohol test being evoked.

(5) What type of medication was James taking for his sleeping problems (referenced on OH report of 15 July)?

- James was on a prescription of standard sleeping tablets which he took once a day before bed.

(6) Is this medication likely to result in James falling asleep while sitting on the toilet?

- Unlikely directly but side effects can cause drowsiness. It is very normal for people to all asleep while undertaking breathing exercises."

121. Based on Ms Browne's notes of the investigatory meeting of 14 November 2014, and other documents which he had looked at, Mr Muir, who was an HR Manager with the respondents considered that disciplinary charges should be brought against the claimant.

6. The findings relating to the subsequent disciplinary hearing are at paragraphs 122-140. Of particular note is the finding at paragraph 138 noting that at the hearing:-

> **"Mr Muir also asked why the claimant refused two drugs tests. The claimant said the psychiatrist had called to say he was not fit to attend a drugs test on 28 (26) August 2014. At that point the claimant handed over a letter from Dr Kinniburgh …"**

Following the disciplinary hearing Mr Muir decided that the claimant should be dismissed and wrote to him confirming that decision. The letter is reproduced at paragraph 141 of the Tribunal Judgment. The Tribunal made the following further findings:-

> **142. "At the point when he took the decision to dismiss the claimant Mr Muir did not consider the claimant presented any health and safety risks to the respondents.**
>
> **143. In reaching his decision that the claimant should be dismissed, Mr Muir took into account that the claimant had been offered a second opportunity to take a drugs test on 26 August 2014, but he did not attend for this.**
>
> **144. Mr Muir`s view was that the in extending this second opportunity to the claimant to take the test, the respondents showed that they had taken his mitigating circumstances into account."**

7. The passages from the Tribunal's discussion of the evidence that have the most direct relevance to the justification defence are paragraphs 208, 209, 210 and 211 and are in the following terms:-

> **208. "Mr Muir's evidence in chief was that the claimant was dismissed for falling asleep while at work on 28 July 2014 and then refusing to take two alcohol and drugs tests on 5 and 26 August 2014. This was conduct which amounted to misconduct justifying dismissal.**
>
> **209. In cross-examination, however, Mr Muir accepted that an extremely clear explanation was provided as to why the claimant had not taken the test on 26 August 2014. He did not provide any explanation as to why, having accepted that there was a clear explanation as to why the claimant did not take the test on 26 August 2014 he relied on this, in concluding that the claimant was guilty of gross misconduct.**
>
> **210. Furthermore, while Mr Muir said in evidence on a number of occasions that he took account of the mitigating circumstances advanced by the claimant, there was no evidence to suggest that he had actually done so, or if he had done so, to indicate what weight he had attached to those. For example when he was cross-examined about the contents of the letter of dismissal (which set out Mr**

Muir`s reasons as to why he took the decision to dismiss the claimant) he accepted that he had not made any specific reference to the contents of the OH report of 4 November 2014, which contains a number of questions and answers from the claimant's psychiatrist. Mr Muir said that this was considered, and he considered if it was the claimant's medication and sleep difficulties were a possible factor in the incident on 28 July 2014. He went on to accept in cross-examination however that there was nothing in the Occupational Health report to suggest that the claimant's explanation for what happened on 28 July was not correct.

211. Mr Muir's evidence was that he rejected all the medical information which he had because of the reasons set out at bullet points 3, 4, 5 and 6 in his letter of dismissal (set out in the findings in fact). That was that the claimant went to the toilet when he had been made aware of a quiet room; that the claimant's excuse as to why his trousers were undone was questionable, which led Mr Muir to question if he intended performing breathing exercises; and that the claimant made no attempt to highlight any concerns about his increases workload despite having been told to do so. This however in the Tribunals view did not explain why Mr Muir rejected the medical evidence, given he appeared to accept what was said in the medical reports."

The Arguments on Appeal

8. The starting point for Mr Napier's argument that the Tribunal erred in the basis on which it found established a breach of section 15 (and also section 20) was the Tribunal's reasoning on the proportionality of the respondent's actions. The arguments in section 15 and section 20 are so similar in this case that both Counsel presented them as a single issue. After reproducing the relevant parts of section 15 and recording that the respondents accept that they knew that the claimant had a disability, the Tribunal records that the unfavourable treatment alleged by the claimant is dismissal. For reasons explained in paragraphs 302-308 inclusive the Tribunal concluded (at paragraph 309) that the claimant was dismissed because of something arising in consequence of his disability so the first part of section 15(1) was satisfied. In

considering the respondent's justification defence advanced under section 15(1)(b) the Tribunal states the following:-

310. "The respondents justification defence is contained in the additional information produced at page 205 to 207 of the bundle. It is said that the implementation of the workplace alcohol and drugs policy set out a legitimate aim, which was the protection of health and safety of persons working or visiting the respondents` premises. The tribunal did not understand it to be argued by the claimant that this was not a legitimate aim, and the Tribunal was satisfied that the implementations of the Policy pursued the legitimate aim of protecting the health and safety of employees and visitors to the respondent's premises.

311. What is said by the respondents, is that the claimant's conduct in falling asleep in the toilet, on 28 July 2014 and refusing to take a drugs test on 5 and 26 August 2014 breached the terms of that policy. The policy provided the refusal to give consent was regarded as gross misconduct and may lead to dismissal; that policy applied to all employees. It is said that dismissal for refusing an alcohol and drugs test was a proportionate means of achieving a legitimate aim, namely the protection of the health and safety of persons working or visiting the respondents` premises.

312. The difficulty with that argument, is that it was Mr Muir`s clear evidence, that at the point when he took the decision to dismiss the claimant he did not consider the claimant posed any health or safety risk to the respondents. Given that evidence the Tribunal was not satisfied that dismissing the claimant was a proportionate means of achieving the legitimate aim of protecting health and safety.

313. Mr Sharp argued that it was proportionate to ask the claimant to take the drugs test on 5 August 2014; however, it did not appear to the Tribunal that this was the relevant question. The act of discrimination is dismissal, and therefore the Tribunal has to consider the justification of the position as at that point (i.e. the date of dismissal), and in light of Mr Muir's evidence that the claimant posed no risk as at the point of dismissal, that defense fails."

9. Mr Napier argued that the Tribunal misdirected itself in law in relation to the test for "objective justification" by relying solely on what was in the mind of the respondent at the time when the decision to dismiss was made. He contended that it was not enough for the Tribunal to reject the justification defence by recording that Mr Muir's clear evidence was that he did not consider the claimant posed any health or safety risk to the respondents at the material time.

10. It is established law that in the context of disability discrimination justification requires a balancing between interests – **Hampton v Department of Education and Science [1989] ICR 179** per Balcombe LJ approved in a number of subsequent cases most recently by HHJ Peter Clark in **Land Registry v Houghton** UKEAT/0149/14.

11. In this case the "reasonable needs" of the respondent required that its interest in having and imposing a strict health and safety policy be taken into account in addition to the issue of any risk posed by the claimant. It was wrong in principle for the Tribunal to have limited its consideration of proportionality in the way that it did. The Tribunal should have looked at justification more widely and taken into account that what was in issue was the implementation of a key policy of general application. The effectiveness and value of that policy from the employer's perspective was not limited by reference to the issue of whether at the moment of dismissal the claimant was seen to constitute a risk. The significance of the policy had been highlighted by the respondents from the outset in the ET3 and in a detailed response to an Order for further particularisation of its justification and reasonable adjustments defences. The context was the running of a business involved in the distillation and bottling of alcoholic drinks. A number of health and safety critical operations were carried out on the respondent's premises. Accordingly the respondent's need to enforce this policy was self evidently important.

12. It was accepted on the authority of **Smith v Churchill Stairlifts plc [2006]** ICR 524 that what was in the employer's mind at the relevant time was a factor. However, Mr Napier submitted that there was still a requirement to look at the overall consequences for the decision on the employer's business needs.

13. On the section 20 argument the Tribunal had found that the respondent had failed to make reasonable adjustments. The application of the principle, criterion or practice (PCP) that falling asleep and then refusing a drugs test was gross misconduct justifying dismissal had put the claimant at a substantial disadvantage compared to those not suffering from his disability. The reasonable adjustment according to the Tribunal would have been not to dismiss him (paragraph 328). In rejecting the respondent's argument on this point the Tribunal had relied on the same consideration used to reject the justification argument namely that the respondent's HR Manager had accepted that the claimant did not pose a health and safety risk at the time of dismissal. In Mr Napier's submission the Employment Tribunal ought not to have placed such importance on Mr Muir's view that the claimant was not a health and safety risk at the time of his dismissal in its reasons on both statutory provisions. What was important was what the employer had done or not done rather than exclusively what was in the employer's mind – **HM Prison Service v Johnson [2007] IRLR 951 at para 76**. Reliance was also placed on the case of **Lincolnshire Police v Weaver [2008] UKEAT/0622/07** where Elias J had set out the correct approach.

14. It could not be right that the respondent could only dismiss someone who refused to take a drugs test after being found in suspicious circumstances if the individual posed an actual danger to health and safety at the time of a later disciplinary hearing. While the Tribunal had

been entitled in the context of a discrimination claim to form a view on whether the HR Manager was correct in the view he reached (namely that the incident justified dismissal) that view was not enough when looking at the justification defence which on the established law requires a balancing exercise.

15. As the Tribunal itself had recorded (at paragraph 23), the respondent's policy had two objectives. The first objective, that of maintaining a safe working environment for all was not specific to the individual and so required to be considered as part of the justification analysis. The "mischief" that the policy was designed to address was not answered fully by an individual employee not being under the influence of alcohol or drugs just as it would not be sufficient for a smoker on an oil rig found with cigarettes to show that he was in fact an ex-smoker. The wider picture was before the Tribunal and was ignored. The failure to balance the competing interests was a material error standing the nature of the respondent's business which in turn led to this being an issue of considerable importance to them. The reliance on a single item of evidence flawed the decision on both section 15 and section 20. Accordingly there should be a remit back to a freshly constituted Tribunal for a rehearing.

16. For the claimant Mr Hogarth pointed out that the respondent had advanced only one argument to the Tribunal in support of its contention that dismissal was a proportionate means of achieving a legitimate aim namely that dismissal for refusing an alcohol and drugs test was a proportionate means of achieving the legitimate aim of protecting health and safety. So the policy was presented as the means of protecting health and safety; no standalone need to enforce it vigorously had been identified.

17. The Tribunal had acknowledged the relevance and significance of the drugs and alcohol policy to the acts of misconduct alleged. It was important that only where a manager had grounds to believe that an employee was under the influence of drugs/alcohol or suspected of being in possession of those that he could be requested to undertake a test.

18. There were no findings that either of the managers involved in the 28th July incident (Ms Woolley and Mr Montgomery) had suspected the claimant of being under the influence of non-prescription drugs and/or alcohol. Accordingly the events of that date did not arise for consideration in the context of justification for his dismissal. So far as the events of 5th August were concerned again there was no evidence at all to suggest that the claimant was under the influence of alcohol or drugs on that day. In any event the Tribunal accepted the claimant's evidence in relation to his reasons for refusing to submit to a drugs test on 5th August, his evidence on which had the full support of his consultant psychiatrist Dr Kinniburgh whose evidence was unchallenged.

19. So far as 26th August was concerned the Tribunal was not persuaded that the claimant had refused to take a test on that date at all. He had not attended the meeting at which the test would have been carried out because he was too unwell. The unchallenged evidence of his treating psychiatrist Dr Kinniburgh was to that effect and the information that he could not attend had been passed to the relevant manager. Again there was no suggestion that the claimant was under the influence of drugs at that time. Shortly thereafter Dr Kinniburgh carried out a test on the claimant the result of which was negative for anything other than prescribed medication (paragraph 94).

20. Against that background Mr Hogarth argued that the scope of any justification defence that could have been advanced by the respondent was extremely limited. Such a defence has to be based on clear evidence rather than simple assertion – in **O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 at paragraph 45**. In the absence of any real connection between the alleged misconduct and the need to protect the health and safety of others the only argument would be that the claimant was in fact a risk to health and safety when dismissed and the respondent's HR Manager accepted that he was not.

21. It was also submitted on behalf of the claimant that it was too late for the respondent now to attempt to formulate a relevant submission on justification that had never been before the Tribunal. The justification defence had been limited to a suggestion that the request to submit to a drugs test had been a proportionate means of achieving a legitimate aim. The Tribunal had been directed to the correct test on justification which, it was agreed, was that enunciated in **Hampton v DES** recently approved in **Land Registry v Houghton** namely that justification required an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applied the condition. It could be seen that the Tribunal had, insofar as necessary, adopted that approach. It is accepted that the health and safety policy was legitimate and relevant but in the absence of any evidence that the claimant was a health and safety risk there could be no basis for the policy being used as justification for the dismissal.

22. In the event, even if the Employment Tribunal's approach was somewhat narrow it could not be said that there was any material error. The respondent could not point to any factor or piece of evidence suggesting that a broader analysis would have altered the outcome. Various findings in fact were relied upon to illustrate this point, with particular emphasis being

placed on paragraph 208, 209 and 210 of the Tribunal Judgment. It was clear from those passages that the HR Manager himself had accepted that the dismissal was based on the three incidents of "misconduct" namely 28th July, 5th August and 26th August. Of course the Tribunal had found that there was no refusal to submit to a drugs test on 26th August. Paragraph 209 illustrates that no explanation whatsoever could be given by the respondent's HR Manager for taking the incident on 26th August into account in the dismissal having regard to the accepted medical evidence. At paragraph 210 it could be seen that the HR Manager accepted the terms of its own occupational health report which had not suggested that the claimant's account of the 28th July incident was incorrect. And finally at paragraph 211 Mr Muir the HR Manager seems to have accepted that the medical evidence was unchallengeable but that he ignored it. On that basis Mr Hogarth argued there was nothing left of any justification case that the respondent could have put forward. The relevance of the policy was tenuous at best. Its significance as a factor could only be justified if the claimant was a general risk and the Tribunal had accepted that he was not. In essence, Mr Hogarth submitted that what the respondent was attempting to do was appeal on the facts which were squarely against them on the basis of the Tribunal Judgment.

23. For those reasons Mr Hogarth submitted it was not necessary for the Tribunal to rehearse all of the facts it had already rejected in reaching the conclusion that it did on the justification defence. Those facts were implicit by reading the Judgment as a whole and of course the Tribunal had correctly recorded the legal position at paragraph 293.

24. On the legal authorities relied on, Mr Hogarth pointed out first that the statute made clear that the onus was on the respondent, secondly that the balance referred to in **Hampton v DES** required a balance to be struck in a way that made the decision one of fact for the Tribunal

and thirdly that the passage in **Lincolnshire Police v Weaver** relied on by Counsel for the respondent supported a contention that the real point was that the obligation was to have regard to all the circumstances, something that was self evident.

25. Mr Hogarth contended also that the respondent's reliance in its written case on **Prison Service v Johnson** misinterpreted that decision. What the court concluded in that case (at paragraph 76), was that the state of someone's mind was irrelevant but the context of it was important. It was a reasonable adjustments case (and therefore relevant to the section 20 argument) but, if no reasonable adjustments could be made then of course the state of mind of the employer was irrelevant. For example where the employer had failed to consult that was a failure that existed regardless of the employer's state of mind. It was wrong to broaden the context of the state of mind in the way that Counsel for the respondent had tried to do.

The Cross Appeal

26. For the claimant, Mr Hogarth argued that a detailed standalone submission on unfair dismissal had been presented, and so the Tribunal ought to have dealt with it on an *esto* basis. This was irrelevant if the respondent's section 15 appeal failed, but in the event that it succeeded, the unfair dismissal claim could be dealt with on appeal. On the facts found and for all the arguments already made it was inconceivable that dismissal was within the band of reasonable responses open to the employer.

27. Mr Hogarth argued also that, even if the appeal on section 15 succeeded, only that matter should be remitted back to the Tribunal with appropriate guidance. The same Tribunal

could deal with the matter and there was no basis for affording the respondent a second chance at a full rehearing.

28. Mr Napier accepted that if the section 15 argument failed then the unfair dismissal finding had to stand. However, he argued that in the event of success for the respondent on the section 15 argument, the Tribunal ought to be regarded as having refused any standalone unfair dismissal claim. Submissions had been made in relation to that and had not been dealt with by the Tribunal. Implicitly that meant that they had not been accepted.

Discussion

29. Section 15 of the Equality Act 2010 states:-

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if -
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim …"

Section 20 of the Equality Act 2010 provides:-

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for these purposes, a person on whom the duty is imposed is referred to as A."

30. The issue of contention in this appeal is whether the Tribunal adopted too narrow an approach to the analysis of the evidence in considering (a) whether the respondent had made out a justification defence in terms of section 15(1)(b) EA 2010 and (b) whether a reasonable adjustment in the circumstances had been not to dismiss the claimant.

31. The first and most obvious point is that the onus for the justification defence in terms of section 15(1)(b) was squarely on the respondent. The defence arose only at the stage where, on the detailed findings made, the Tribunal had concluded that in dismissing the claimant the respondent had treated him unfavourably because of something arising in consequence of his disability. There is no challenge to that finding in the sense that there is . no suggestion that it was not a conclusion open to the Tribunal on the facts found. Most of the Judgment is taken up with an analysis of the detailed credibility challenges made of the various witnesses and in establishing the facts surrounding the events of 28th July, 5th August and 26th August 2014. The Tribunal had accepted the claimant's evidence in relation to each of those three incidents as a necessary backdrop to the section 15 decision. The findings in fact led to the now unchallenged conclusion in relation to section 15(1)(a). The respondent had sought to argue as a fall back position that, even if that was the conclusion, the actions taken against the claimant were justified as proportionate. That bare contention was made at a time when the outcome of the substantive dispute on the credibility of the claimant's account was not yet known.

32. The Tribunal records that the justification defence is that set out in writing at an earlier stage and is based on the health and safety policy of the respondent. It is accepted that the

implementation of the policy pursued a legitimate aim. However on proportionality, the respondent failed to advance anything other than a bald statement that dismissal for refusing an alcohol and drugs test was a proportionate means of achieving a legitimate aim (paragraph 311). It was not seriously contended at this appeal that an argument was before the Tribunal that it must balance the need to enforce the policy against the absence of any health and safety risk posed by the claimant. What is said is that, regardless of what was argued, as a matter of law the Tribunal ought to have carried out that balancing exercise. There is no doubt that the authorities establish an obligation to have regard to all the circumstances both in relation to a justification defence and where there is a duty to do so, that reasonable adjustment has been made.. Part of that will be to consider whether, in a case like this, there was in fact a risk posed to health and safety. Importantly, the evidence in this case pointed overwhelmingly against there having been such a risk posed by the claimant **at any time**. The finding at paragraph 116 that Ms Woolley, the Occupational Health Nurse, in answer to a question (put in November 2014) about any concerns that the claimant was under non- prescription drugs or alcohol, had stated " *No concerns at all. James has never given any concerns that would warrant a Drug or Alcohol test being evoked"* is particularly significant in this context. While the justification defence related to a policy formulated to pursue a legitimate aim, the application of that policy to the claimant's situation could be seen, on the facts ultimately found by the Tribunal, to be rather tenuous.

33. What then had to be balanced against that absence of risk? The importance of the policy and the need to enforce it are said by the respondent to be self evident and that is undoubtedly so. However in a case where, for each of the three events identified, the employer either conceded or was found after an evidential hearing to have no basis for regarding the claimant's actings with the type of suspicion that would justify invoking the policy in a way that led to

dismissal, in my view the facts speak for themselves in the opposite direction to that contended for by the respondent. Further, , where the respondent had articulated no detailed justification other than that the dismissal was proportionate because of the policy and where the policy did not actually require dismissal where there had been a refusal to submit to a drugs test, it might well have been otiose for the Tribunal to embark on an artificial exercise of acknowledging again the need for enforcement of that policy. In other words, if the only factor to be weighed in the balance was the respondent's need to enforce the policy, but the facts had already illustrated that there was no basis for enforcement to the point of dismissal (an outcome not strictly required even had refusal to comply without good reason been established, the scales could never tip that balance in favour of justifying the dismissal and so a detailed balancing exercise would achieve nothing. In the particular circumstances of his case, the requirement to carry out a balancing exercise was, at best for the respondent, necessarily limited by its reliance on facts that were rejected by the Tribunal.

34. So far as reasonable adjustment was concerned, I accept the submission that where there were no reasonable adjustments that could be made the state of mind of the employer is not the relevant issue. Again on the basis of the facts found by the Tribunal, the only adjustment that could have been made was not to dismiss the claimant and so the duty had clearly not been met. The Tribunal's reliance on the evidence of the HR Manager that the claimant did not pose a health and safety risk at any time made no difference to the outcome.

34. It is important to note that the correct test on justification was put before the Tribunal not on behalf of the respondent but by the claimant who drew attention to the test in **Hampton v DES 1989 ICR 179** approved by HHJ Peter Clark in **Land Registry v Houghton** UKEAT/0149/14. The Tribunal records this at paragraph 293, stating;-

" In relation to justification, relying again on the *Houghton* case 8, Mr Woolfson submitted justification requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. Given Mr Muir's evidence, Mr Woolfson submitted that the justification defence must fail."

35. The reasonable needs of the respondent, referred to in paragraph 293 above, were well known to the Tribunal in the sense that the importance of the policy had been acknowledged throughout the hearing and the Tribunal had taken care to set out early in the Judgment the paragraphs on which the respondent sought to rely in relation to " with cause" alcohol and drugs testing In the absence of a submission that the need to enforce the policy outweighed the absence of risk posed by the claimant the Tribunal was entitled to infer that it did not. That is what the Tribunal appears to have done. While it is true that only a single piece of evidence is referred to, it is wrong to characterise that as simply what was in the employer's mind at the time. The concession by the respondent's HR Manager was simply the last piece of an evidential picture that illustrated that the respondent had been wrong to (1) reject the claimant's explanation for the events of 28th July, (2) fail to take account of the reasons for his refusal to take the test on 5th August and (3) regard him as having failed to submit to a test on 26th August. When the judgment is read as a whole, it becomes apparent that the reasons on the rejection of the justification defence and on the issue of reasonable adjustment, are to be read against the various findings on the ill-conceived way in which the respondent sought to apply their health and safety policy. Accordingly, I accept Mr Hogarth's submission that once the Tribunal had made those findings, there was effectively nothing left on which the respondent could mount a justification defence or answer the section 20 failure to make reasonable adjustment claim.

36. In the recent decision of the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145** (at paragraph 53) Underhill LJ reiterated that it is well established that in an appropriate context a proportionality test can, and should, accommodate a

substantial degree of respect for the judgment of the decision taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance. At the EAT stage of that case, (UKEAT/0051/15), HHJ Serota QC , in a part of the decision that was not the subject of the subsequent successful appeal made the following observation ;-

> **" There is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process. The task of an Employment Tribunal when considering section 15 is to use its common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate, as the Respondent maintains it was."**

I agree with those observations and consider that they have some force in looking at how the Tribunal in this case approached the justification defence. The respondent's purported application of their policy had, by the time the Tribunal came to deal with the matter of justification, been seen to have been evoked irrationally. The employer had been wrong to regard the circumstances in which the claimant was found in the toilets on 28th July as somehow suspicious and giving rise to a need to submit to a drugs test. There was, in particular on 26th August no basis at all for regarding the claimant as someone who had refused to take a drugs test. On the one occasion that he had so refused (5 August 2014) his reasons for doing so were accepted by the Tribunal as part of the context of the respondent having treated him unfairly as a result of his disability. In essence, by the time the Tribunal came to look at justification, there was really nothing to balance against the admitted absence of risk posed by this claimant. The respondent had been wrong to categorise him as someone who might be under the influence of alcohol or illegal drugs and so any reliance on the health and safety policy and the importance of it had simply flown away. Even if I had concluded that notwithstanding the particular circumstances of the case the Tribunal ought to have articulated clearly the carrying out of balancing exercise and had erred in failing to do so, I would not have regarded that as a material error such as to merit interference with the Tribunal's decision in light of the findings of fact that so clearly point away from there being any justification for the

dismissal. Not only was the decision on this point one that the Tribunal was entitled to make on the accepted evidence; it is difficult to see, with the Tribunal applying its common sense on the issue of proportionality, what other decision could have been made.

37. For all these reasons, I am not persuaded that the Tribunal erred in this case simply because of the shorthand way in which it expressed its reasoning either for the purposes of section 15 or section 20. It was aware of the need for an objective balancing exercise and there is sufficient within the judgment read as a whole to infer that the correct test, which had been correctly identified, was applied, albeit in the rather narrow way that the facts ultimately supported. Accordingly there is no need to address the cross appeal. The appeal falls to be dismissed.