Case Number: 1600741/2016

EMPLOYMENT TRIBUNALS

Claimant: **Ms Donna Llewellyn**

Respondent: **South Wales Fire Authority**

Heard at: **Cardiff** **On:** **27 & 28 February 2017; 28 April 2017 (in chambers)**

Before: **Regional Employment Judge B J Clarke (sitting alone)**

Representation:
Claimant: Mr Ashley George (solicitor)
Respondent: Mr Caspar Glyn QC (counsel)

RESERVED JUDGMENT

The claim of unfair dismissal fails. The respondent fairly dismissed the claimant.

REASONS

Introduction

1. This case is about whether the respondent, South Wales Fire Authority, fairly or unfairly dismissed the claimant, Ms Donna Llewelyn, for alleged fraudulent use of a fuel card for personal financial gain.

2. Prior to her dismissal the claimant had worked for the respondent for about 20 years. She was promoted during her career and eventually occupied the full-time position of "Senior Fleet Administrator", for which she received a gross annual salary of about £27,000. This role required her to manage the respondent's fleet of vehicles and to administer its fuel card scheme. This scheme, operated through an external company, enabled users to charge the cost of refuelling a vehicle to an account held by the respondent. The respondent had 19 such cards available for use by members of staff. The cards enabled users to obtain fuel for work use only, not private use.

3. Following an investigation and a disciplinary hearing, the respondent concluded that the claimant had fraudulently used such a card to obtain fuel for her personal use on four occasions during November and December 2015. The total value of the fuel was about £175. The respondent decided that this amounted to gross misconduct and it dismissed her with immediate effect on 24 May 2016. The claimant's unsuccessful appeal was followed by a period of ACAS early conciliation. This ended without resolution on 7 September 2016. By an ET1 claim form presented on 3 October 2016, the claimant alleges that her dismissal was unfair. The respondent resists the claim.

The law

4. The relevant legal principles that I must apply are, save in respect of one point, not in dispute.

5. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct, which is one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). Mr George, for the claimant, has properly accepted that the respondent genuinely believed that the claimant was guilty of misconduct. I therefore start from the position that the respondent has discharged the burden of proof in this regard.

6. My focus, instead, is on the general reasonableness of the dismissal under Section 98(4) ERA. This section provides that the determination of the question of whether the dismissal was fair or unfair depends upon whether, in the circumstances (including the respondent's size and administrative resources), the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissal. This is determined in accordance with equity and the substantial merits of the case. It is an objective test and the burden of proof is neutral.

7. In considering the question of reasonableness, I have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT, *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:

    7.1 When considering Section 98(4) ERA in a case where the genuineness of the respondent's belief has been conceded, I should focus my enquiry on whether there was a reasonable basis for that belief and test the reasonableness of the investigation.

    7.2 However, I should not put myself in the position of the respondent and test the reasonableness of its actions by reference to what I

would have done in the same or similar circumstances. It is not for me to weigh up the evidence that was before the respondent at the time of its decision to dismiss and substitute my own conclusion as if I were conducting the process myself. Employers have at their disposal a range of reasonable responses to the alleged misconduct of employees and it is instead my function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that range.

7.3 The range of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached, including the scope of the investigation.

8. The one point where the parties differ is in respect of the standards to be expected of this respondent's investigation. While the parties are agreed that it must be "reasonable", they disagree over what reasonableness required in these circumstances. Mr George's position is that this case is on a par with *A v. B* [2003] IRLR 405 EAT and *Salford Royal NHS Foundation Trust v. Roldan* [2010] IRLR 721 CA. Mr Glyn QC disagrees.

<u>The issues</u>

9. As was agreed at the outset of the hearing, and confirmed again during closing submissions, this complaint of unfair dismissal involves essentially two issues for determination:

9.1 The first issue is whether the respondent's investigation into the claimant's alleged misconduct was a reasonable one, capable in turn of sustaining a reasonable conclusion about her guilt. Mr George contends that, because fraud is a crime, the allegations against the claimant should have been the subject of much more careful and conscientious investigation. Applying *A v. B* and *Roldan*, he contends that the respondent should have placed as much weight on evidence that pointed towards her innocence as it did on evidence that pointed towards her guilt. Specifically, he says, the respondent should have obtained signed written statements from two external witnesses when enquiries made of them revealed inconsistent evidence, one of which appeared to provide the claimant with an alibi. For the respondent, Mr Glyn QC contends that the investigation in this case did not need to be assessed by any higher standard than usual: the issue is whether it was reasonable and, in his submission, it was. He says that the respondent reasonably decided that the claimant was guilty from a series of striking coincidences and the sheer implausibility of her alternative explanation.

9.2 The second issue is more straightforward: whether the respondent took adequate account of the claimant's lengthy service and her previously clean disciplinary record when deciding upon the sanction of summary dismissal.

10. If the claimant succeeds in her claim, she seeks reinstatement as her primary remedy. If she is not reinstated, she seeks compensation in accordance with a schedule of loss that values her claim at about £250,000 (mostly pension loss), but which would be capped at one year's gross pay.

The hearing

11. The claimant gave evidence in support of her claim. She also called evidence from Ms Helena Watson, a trade union representative who accompanied her to an investigatory interview and the appeal hearing. For the respondent, I heard evidence from four witnesses: Mr Andrew Smith (the investigating officer), Mr Mark Malson (the head of HR, who chaired the disciplinary panel), Mr Philip Haynes (an Assistant Chief Fire Officer who had a role in reviewing the claimant's suspension and the appeal hearing) and Mr Richard Prendergast (an Assistant Chief Fire Officer who chaired the appeal panel). Each witness was cross-examined. I was also provided with a bundle of documents comprising about 350 pages. I was asked to read a selection of its pages, which included lengthy transcriptions of the investigatory meeting, the disciplinary meeting and the appeal.

12. Based on this oral and documentary evidence, my findings on fact on all relevant matters are set out below. I shall concentrate my findings on the matters that are relevant to the two issues arising for determination.

13. I would like to observe that the case was well prepared by both parties. I had the benefit of clear witness statements, a helpful cast list, a well-ordered bundle and two advocates who took a sensible approach to the issues and confined their questions, which were measured and focused, to the relevant parts of the case. I apologise that I was not able to produce this judgment with the speed I would have liked; I have kept the parties updated and I take this opportunity to thank them for their patience.

Findings of fact

14. The claimant was absent from work because of ill health (involving a period of recovery from surgery) between 21 September 2015 and 1 February 2016.

15. A routine audit conducted on 21 January 2016 revealed that one of the respondent's fuel cards was missing. For each fuel card, there was an accompanying record confirming matters such as: the date and time of each

transaction; the name of the filling station where it was used on each occasion; the amount and cost of the fuel taken during each transaction; and, usually, the registration number of the car which was being supplied with fuel. As for the missing fuel card, the audit revealed that it had been used in four transactions that, on the face of it, were not associated with the respondent's vehicles. The four transactions were:

15.1 At 11.21 on Saturday 7 November 2015, 41.71 litres of diesel fuel, costing £45.02, was obtained at the Tesco filling station at Talbot Green near Llantrisant. The registration number recorded for the car was YE65 SXW. This was later confirmed to be a BMW Series 4, a diesel car.

15.2 At 14.45 on Saturday 7 November 2015, 64.88 litres of diesel fuel, costing £70.01, was obtained at the same Tesco filling station. The registration number recorded for the car was CV05 ENC. This was later confirmed to be a Honda Jazz, a petrol car.

15.3 At 14.06 on Tuesday 24 November 2015, 27.8 litres of diesel fuel, costing £30.00, was obtained at the Llantwit Main Texaco Service Station in Cross Inn near Llantrisant. The registration number recorded for the car was CE10 FOK. This was later confirmed to be a Mazda 3, also a petrol car.

15.4 At 11.08 on Friday 18 December 2015, 28.33 litres of diesel fuel, costing £30.00, was obtained from the same Texaco station. No registration number was recorded.

16. Mr Smith, a former police officer and now a full-time investigating officer for the respondent, was appointed to investigate possible misuse of the card. Although I was not shown the letter appointing him or his terms of reference, he gave unchallenged evidence that he was asked to investigate the first transaction involving the BMW and that he later expanded his investigation when it became apparent that other transactions were linked to the missing fuel card. During the hearing, there was reference to other possible transactions involving this card earlier in 2015, but these were not pursued. The focus started with the four transactions in November and December identified above and, by the end of the process, shifted back to the first transaction involving the BMW.

17. Mr White swiftly concluded that the records for the Honda Jazz and the Mazda 3 were unreliable on the basis that (a) as petrol cars, they would not have been filled with diesel fuel and (b) the amount of fuel taken for the Honda was bigger than its tank capacity. However, his enquiries into the BMW motor car were more fruitful. He established that its registered keeper was a Sytner BMW dealership in Cardiff. Mr Smith contacted BMW Sytner

and further established that this vehicle had not been booked out to the respondent; in fact, between 5pm on Friday 6 November 2015 and 1.30pm on Monday 9 November 2015, it had been booked out to the claimant. It was a courtesy car that she would be test-driving, entirely for personal purposes. Mr Smith cross-referred the claimant's home address to the location of the two filling stations concerned (Talbot Green and Cross Inn) and noted that they were, respectively, only 2.8 miles and 1.1 miles away from where she lived. He learned that no CCTV evidence was available at either station; such material was kept for a limited time and no longer existed.

18. The missing fuel card's records showed that it had last been signed out on Thursday 5 November 2015 for use in one of the respondent's own fleet cars. The car was booked out to a Mr Temby who used the card just after 3pm that day and then returned it. As noted above, the claimant had been off sick when the transactions took place. Mr Smith therefore checked the respondent's door entry information for the period in question. He established that she had attended work outside of her normal working hours on Friday 6 November 2015: the swipe card showed her entering the main barrier at 6.29pm, followed by the workshop service door, leaving about two minutes later. As noted above, the fuel card was used on 7 November, 24 November and 18 December 2015. It was noted as missing on 21 January 2016 and reappeared on 1 February 2016, being the same day that the claimant returned to work. This obviously gave rise to a suspicion that she had entered the respondent's premises surreptitiously with the purpose of removing a fuel card for personal use in the courtesy BMW.

19. The claimant was suspended from work by letter dated 7 March 2016. At this stage, the reason given was the allegation of "fraudulent use of a service fuel card(s) for personal financial gain". The letter made clear that suspension itself was neither a disciplinary sanction not a prejudgment of the outcome but that, if proven, the allegation would constitute gross misconduct. The person with the responsibility for reviewing the status of the claimant's suspension was Mr Haynes, Assistant Chief Officer (who, I should note, would later sit on the panel that heard the claimant's appeal against dismissal).

20. The claimant attended an investigatory interview with Mr Smith on 16 March 2016. She was represented at the interview by Ms Helena Watson, a branch chair of Unison. It was a lengthy interview and the hearing bundle contained a full and agreed transcript (44 pages). During this interview, the claimant made the following points:

    20.1 That she was unaware that a fuel card was missing until she had returned to work from sick leave. At that point the card had turned up in in a pile of unopened mail that was awaiting her on her desk.

20.2 She denied taking a fuel card with her when she went on sick leave.

20.3 She had indeed visited the respondent's premises while on sick leave. She could not remember the precise date. She went outside of normal working hours because she "didn't want to see people" following her recent operation. The purpose of her visit was to collect personal insurance documents from a box under her desk, to help her deal with a leak and water damage in her home.

20.4 She was driven by her partner when she visited the office. She would probably have used her own car (also a BMW) to do so.

20.5 She would normally use the filling station in Talbot Green and had also used the one in Cross Inn.

20.6 She accepted that she had obtained a courtesy car from the Sytner BMW dealership in Cardiff. She could not recall the registration number.

20.7 She denied using the fuel card to purchase fuel on 7 November 2015. She also denied using the fuel car in the other transactions on 24 November and 18 December 2015.

20.8 During a weekend in November 2015, she had visited Tenby. She used the courtesy BMW to travel there. She had travelled on the Friday and returned on the Sunday. She had visited a park in Saundersfoot where she and her partner kept a caravan, as they had been required to move it.

Ms Watson raised no concerns about the fairness of the process.

21. After the investigatory interview, and still on 16 March 2016, Mr Smith emailed Mr Haynes to state that the claimant had given a "not very convincing performance". Mr Haynes observed in his reply that, on a "balance of probabilities", there appeared to be a "common thread" to the narrative: the missing fuel card was used to purchase fuel for a courtesy BMW booked out by the claimant and which was used just after she had visited work outside normal hours. In response to this update, Mr Haynes decided to maintain the claimant's suspension from work.

22. Mr Smith continued his investigation by following up on the points that the claimant had raised during her investigatory interview. He established that she did indeed keep a box of personal effects under her desk. He also spoke to the manager of the Tesco filling station at Talbot Green, who informed him that the cashier generally relied on the customer to quote the

registration number of the car they were refuelling so that it could be entered on the receipt used with the fuel card. Mr Smith tried without success to obtain a copy of the original receipt.

23. The claimant provided some further documentation to Mr Smith on 15 April 2016. It included:

    23.1 First, a receipt from Mr Daryl Evans of the Leys Caravan Park in Saundersfoot near Tenby. The receipt was in the sum of £50 for both Friday 6 November 2016 and Saturday 7 November 2016. The receipt was important in this sense: if the claimant had been in Saundersfoot all day on the Saturday, she could not simultaneously have been in Talbot Green personally refuelling the courtesy BMW. Mr Evans was therefore the source of what might be called, rather loosely, an alibi for the claimant. I shall use that expression in the remainder of this judgment.

    23.2 Second, an unsigned loan/demonstrator insurance form issued by the Sytner BMW dealership, confirming that a vehicle had been signed out to the claimant from 5.01pm on Friday 6 November 2016 to 1.33pm on Monday 9 November 2016. One piece of evidence was compelling: the courtesy BMW had the same registration number as the one associated with the fuel card transaction at Talbot Green on 7 November. The form also showed that the vehicle had been collected with ¾ of a tank of petrol and returned with ¼ of a tank of petrol having travelled 291 miles. Although the agreement confirmed that all fuel used would be invoiced at £1.20 plus VAT a litre, the form confirmed that no charge was made.

24. On 21 April 2016, Mr Smith travelled to Saundersfoot, unannounced, to speak to Mr Evans. He subsequently typed up his notes of what Mr Evans had told him about the claimant's visit to the caravan park during the weekend in question. Mr Evans plainly already knew what the conversation would be about, because he volunteered the claimant's name. He said that she and her partner had arrived on Saturday and stayed just one night. (At the risk of stating the obvious, this was relevant because it would mean that she no longer had an alibi.) Mr Smith pointed out to Mr Evans that this contradicted the receipt he had just issued, which referred to two nights. Mr Evans' response was rather diffident: that "maybe" she and her partner had stayed two nights, that he could not remember them arriving on the Friday but did see them on the Saturday. The reliability of the receipt was also thrown into doubt by Mr Evans' confirmation that he had had only sent it to the claimant the week before his meeting with Mr Smith. Mr Evans said he would send Mr Smith further documentation of relevance but did not do so (at least not before he finalised his investigation report a few weeks later).

To be clear: there was no documentation confirming the claimant's actual arrival in Saundersfoot on the Friday.

25. I am satisfied that Mr Smith's notes of his meeting with Mr Evans accurately reflect the conversation he had with him. I have been presented with no reason why he should have embellished those notes save for a generalised assertion that he was biased against the claimant. A factor strongly pointing towards their accuracy is that they record Mr Smith challenging Mr Evans on a point that favoured the claimant: the contradiction between his own recollection and the receipt he had just issued. Also, the document's metadata showed that the typed note was prepared promptly (his original handwritten notes are no longer available); a contemporaneous document is more likely to be reliable than one prepared long afterwards, as is the case with Mr Evans' receipt.

26. Mr Smith also spoke to Mr Paul Bennett of the Sytner dealership, who told him that the fuel readings on the insurance documentation were meaningless. Mr Bennett's own checks suggested that the BMW courtesy vehicle had done over 1,000 miles in the claimant's possession and, as this was absurd, he deduced that the vehicle had not been properly booked back in after previous usage. He therefore manually altered the mileage to what he thought was reasonable. The figure of 291 miles was, to all intents and purposes, a guess.

27. On 28 April 2016, Mr Haynes wrote to the claimant to inform her that she was required to attend a disciplinary hearing on 20 May 2016. The letter described the allegation against her in the same terms as before: "fraudulent use of a service fuel card(s) for personal financial gain". Although more precise information could have been provided (for example, the letter could have referred to the precise details of the four transactions in November and December), the claimant accepted when cross-examined that she knew the essential details of the charge against her. She knew, for example, that the focus of the investigation had been on the courtesy BMW and she knew what she was alleged to have done and when. Mr Haynes' letter made clear that the allegation would, if proven, amount to gross misconduct and that a range of sanctions would result, which included dismissal. The claimant was also given an advance copy of Mr Smith's detailed investigation report. Mr Smith's report did not itself contain any disciplinary recommendations; it simply summarised his investigation and left it to Mr Haynes to decide whether a disciplinary hearing was required so that the allegations could be properly tested.

28. The disciplinary hearing proceeded on 20 May 2016. Once again, the hearing bundle contained a full and agreed transcript (50 pages). Mr Malson chaired the disciplinary panel, sitting alongside Ms Alison Kibblewhite (area manager and head of risk reduction) and Mr Geraint Thomas (head of

finance and procurement). Mr Smith acted as presenting officer. The claimant was supported by Mr Ian Buckley. Mr Buckley, along with the panel, was given an opportunity to question Mr Smith. The claimant was questioned by Mr Smith and the panel. Following an adjournment, Mr Malson confirmed that the panel's decision was to uphold the allegation of fraudulent misuse of the fuel card, which amounted to gross misconduct. The sanction was summary dismissal.

29. The transcript of the hearing shows detailed discussion about many aspects of the case. However, it is important not to lose sight of the key points insofar as they relate to the two main issues arising for determination in this case. Having read the transcript and the witness statements, I consider those key points to be as follows:

    29.1 The focus of the disciplinary panel's attention was, by now, on the use of the fuel card for the first transaction on 7 November 2015 at the Tesco filling station at Talbot Green: the one involving the courtesy BMW with the registration number YE65 SXW, which had been booked out in the claimant's name. There was much discussion about whether the other three transactions were falsely recorded because Mr Buckley contended that, if they were, the case against the claimant would weaken. The panel, by contrast, looked to the claimant to explain how the missing card was used to refuel a courtesy BMW in her possession. The closest the claimant came to providing an explanation was pure speculation on her part: that someone else had taken the fuel card, had then been fortunate enough to see her driving the BMW around on the Friday (or on her way to Saundersfoot), taken a note of the registration number of the BMW and then given that number to a filling station cashier the following day, close to where she lived, when refuelling a different car, with the intention of framing her. (She repeated this rather fantastical account when cross-examined by Mr Glyn QC.)

    29.2 The claimant again accepted that she had visited the respondent's premises while on sick leave, outside office hours, on the Friday. She maintained that this was to recover insurance documentation and she provided material corroborating the fact that she had experienced a water leak at home and had submitted a claim on her policy around the same time. However, the panel concluded that, regardless of this, the opportunity was available to her to take the fuel card.

    29.3 There was an extensive discussion about whether the Sytner dealership records were accurate or not (and whether Mr Bennett had described them as having "systematic failures"), particularly in terms of what they showed to be the claimant's total mileage during

the period she used the courtesy BMW. The panel viewed this as a red herring (although without using that phrase), because the undeniable fact was that the claimant had used the courtesy BMW during the weekend in question and because there was a clear record of the missing card being used to refuel it.

29.4 As for the alibi Mr Evans provided to the claimant – that she had been in Saundersfoot on 7 November 2015 and so could not have been at filling station near her home – the panel considered it unreliable. This was for three reasons. First, Mr Evans' receipt for a two-night stay was not issued contemporaneously. Secondly, Mr Evans' own account of the duration of the claimant's stay was inconsistent. Thirdly, Mr Evans was not considered to be an impartial witness because he had only become involved, later in the day, at the claimant's request.

30. Taking account of these factors, as well as the proximity of the Tesco filling station to the claimant's home and the implausibility of her alternative explanation, the panel upheld the charge of gross misconduct. There followed a detailed discussion about mitigation and consideration of character references. The panel concluded, nonetheless, that fraudulent use of a fuel card by the very person employed to administer the fuel card scheme had caused a "complete breakdown in trust and confidence", such that a sanction short of dismissal would not be appropriate. The chosen sanction was therefore summary dismissal. The panel's verbal conclusions were typed up and sent to the claimant with a covering letter from Mr Malson dated 26 May 2016. They included a conclusion that the claimant had, on the balance of probabilities, used the fuel card on the other three occasions as well (or that she had provided the card to someone else to use). The rationale for this conclusion seemed to be as follows: if the panel believed that the claimant had presented an untruthful account in respect of the courtesy BMW, it made it more likely that she had also presented an untruthful account in respect of the other usages of the fuel card while it was missing.

31. The claimant appealed the panel's decision to dismiss her by letter dated 2 June 2016. The basis of her appeal was that the panel's conclusion was unreasonably harsh. She criticised the disciplinary process and especially the failure to interview Mr Evans and Mr Bennett properly and the failure to obtain signed witness statements from them. She also said that she had new evidence pointing towards her innocence. This included the typed statement from Mr Evans referred to above (in which he complained about the way he was interviewed by Mr Smith, described as unprofessional and intimidating) and an email from Mr Bennett disputing that he had used a particular phrase ("systemic failures") to describe the dealership's record-keeping.

32. The appeal hearing took place on 6 July 2016. The hearing bundle contained a full and agreed transcript (44 pages). The appeal panel was chaired by Mr Richard Prendergast, the Assistant Chief Fire Officer. The other members of the panel were Mr Haynes (the Assistant Chief Officer whose earlier role had been to review the claimant's suspension) and Mr Chris Barton (the Service Treasurer). Mr Smith again presented the case against the claimant. The claimant attended with a colleague (Ms Kay Parsons) and her union representative (this time Ms Eleanor Watson rather than Mr Buckley). The same process was followed as before, with opportunities for questions.

33. Ms Watson contended that the best approach was for the respondent to reinstate the claimant and carry out a full investigation into what was described as a more widespread misuse of fuel cards. A common view had begun to emerge during this disciplinary process that there was a wider problem with the integrity of the fuel card system, but Ms Watson's submission rather overlooked the fact that it was the claimant's role to administer the system.

34. The claimant repeated her criticism that the respondent had not obtained witness statements from Mr Evans and Mr Bennett. I will concentrate on this aspect of the appeal, because it is the same point that Mr George continued to pursue at the tribunal hearing. Taking the two individuals in turn:

    34.1 As for Mr Evans, neither the claimant nor Ms Watson made sufficient efforts to secure his attendance at the appeal hearing – and the onus was on them, not the respondent, to do so. They had previously asked if the appeal hearing could be relocated to his caravan park, but Mr Haynes had refused this on the grounds of the logistical difficulties involved (including transportation arrangements, problems finding a venue and the cost to the public purse). His refusal was, in those circumstances, reasonable. Mr Evans was unable to take the day off to come to the appeal hearing himself, but neither the claimant nor Ms Watson asked for the hearing to be adjourned to a day he could manage.

    34.2 As for Mr Bennett, he had offered to join in the appeal hearing by telephone, given his attendance at other business meetings that day, should his assistance be thought helpful. However, the onus was again on the claimant and her representative to ask the panel to adjourn to a date when he could attend or to accept a telephone call from him. Neither the claimant nor Ms Watson made such a request.

35. After hearing Ms Watson's submissions, the appeal panel reserved their decision. In a letter to the claimant dated 8 July 2016, Mr Prendergast

upheld the dismissal for gross misconduct. The letter was accompanied by a detailed eight-page summary of the reasons. Like the disciplinary panel before them, the appeal panel focused on the first transaction involving the courtesy BMW; however, unlike the disciplinary panel, the appeal panel confined its conclusion to that single transaction.

Analysis and conclusions

36. As I noted above, it is common ground that the respondent had a genuine belief that the claimant had committed an act of gross misconduct through fraudulent use of a fuel card. The two main issues in this case are (a) whether the respondent's investigation into her alleged misconduct was a reasonable one, capable in turn of sustaining a reasonable conclusion about her guilt and (b) whether the respondent took adequate account of her lengthy service and her previously clean disciplinary record when deciding upon the sanction of summary dismissal. All parties accept that it has not been my function to hear the disciplinary process afresh.

37. Taking those two issues in turn. As I noted above, Mr George contends that the allegations against the claimant should have been the subject of a more careful and conscientious investigation. Applying *A v. B* and *Roldan*, he says that the respondent should have obtained signed written statements from Mr Evans and Mr Bennett because they had the capacity to exculpate her in respect of an allegation of misconduct that, in all but name, amounted to a criminal offence.

38. I agree with Mr Glyn QC that this case does not need to be assessed by any higher standard than usual. The case of *Burchell* is often mentioned in submissions to tribunals, but its facts are equally often overlooked. Mr George has relied on *A v. B* and *Roldan* in contradistinction to *Burchell* as if the latter case somehow involved a lesser form of misconduct and therefore required less robust investigation. It seems to have been forgotten that Mrs Burchell was dismissed for allegedly taking advantage of lax procedures to obtain an inappropriate discount for a pair of expensive sunglasses. Even if the tribunal in Mrs Burchell's case did not describe it as "fraudulent", her alleged behaviour – like in the case before me – involved an alleged deception intended to result in financial gain. The fact that it involves what Mr George described as alleged dishonesty and the potential commission of a crime is no reason to say that the investigation ought to have been to a higher standard. Unlike in *A v. B* and *Roldan*, the claimant was not a member of a regulated profession looking at the equivalent of disbarment or striking off and the loss of a vocation. With no disrespect intended to the claimant, she was an administrator employed to administer a fleet of vehicles and a fuel card scheme. She has not lost a vocation.

39. The standard required by the statutory wording, as consistently interpreted in case law over the years, is one of reasonableness in all the circumstances. The issue for me to decide is whether reasonableness required the respondent to obtain signed witness statements from Mr Evans and Mr Bennett – or, to put it another way, whether its failure to do so was outside the band of responses or approaches available to a reasonable employer. In that regard, I agree with the respondent that the recommendation in its internal guidance (that witnesses should be interviewed and then sign statements – see para 5, page 75) is aimed at <u>those it employs</u>, not third parties over whom it has no control. Mr Smith contacted these two individuals because it was appropriate for him to do so as part of his investigation, and because their evidence could (and indeed did) cast light on what the claimant had done and when. If the claimant considered that his notes of his discussion with them were inaccurate, it was incumbent on her to call them as witnesses at the disciplinary hearing, as the written policy stipulated (see para 5.9, page 80).

40. In any case, it is important to step back and look at the process as a whole, because reasonableness is assessed in <u>all</u> the circumstances. Take Mr Evans: the claimant's position was that further enquiries could have resolved the inconsistencies in his alibi evidence about whether the claimant had stayed in Saundersfoot for one or two nights. Mr Evans did, in the end, provide two short written documents (a handwritten letter seen by the disciplinary panel at page 42 and a typed letter seen by the appeal panel at page 50); and, ultimately, the panel decided that his evidence was inconsistent (because of what he had told Mr Smith in their first meeting on 21 April 2016) and therefore unreliable. It is inconceivable to imagine that the panel's decision would have been any different if his written document were in the form of a signed witness statement, or if he had attended the disciplinary or appeal hearing to be questioned. (I emphasise here that I am not myself casting any aspersions about Mr Evans' role in this matter or his integrity, because I have not heard any evidence from him. I am simply looking at how the respondent approached his evidence.)

41. It is true that the respondent did not turn over every stone in their investigation of his potential alibi; for example, neither the claimant nor Mr Evans were specifically questioned about whether she had sought to persuade him to manufacture the alibi even though Mr Malson suspected that there had been collusion to that end. I am again mindful, however, that the respondent was not conducting a criminal investigation. It is important to bear in mind, if I can express it in these terms, that Mr Evans' evidence was but one small piece of a jigsaw puzzle that had already been largely assembled, and which revealed a clear and emerging picture.

42. I remind myself what that picture showed, based on undisputed facts: the claimant was responsible for the fuel card scheme; the last recorded lawful

use of the fuel card in question, before it went missing, was on the Thursday; the claimant attended the respondent's premises outside office hours on Thursday, whilst on sick leave and wishing not to be seen; she booked out a courtesy BMW on the Friday; the fuel card was recorded being used with that same BMW on the Saturday; it was used at a filling station close to where she lived and which she frequented; and the fuel card reappeared on the day she returned to work from sick leave.

43. The same can be said about the respondent's alleged failings in respect of Mr Bennett. The precise amount of fuel that the claimant used, the precise mileage recorded and how that related to her pattern of travel during the weekend in question, and what additional light Mr Bennett could have cast on these matters, ultimately had no bearing on the clear and emerging picture I have just summarised. I understand why the claimant has chosen to focus on these small pieces of the puzzle, but they distract attention from the whole. As to that clear and emerging picture, it relieved the respondent of the obligation to spend time on corners of the investigation that were of little practical consequence. The respondent looked to the claimant to explain that clear picture, and she had no answer save to assert the fantastical account previously mentioned. That picture gave the respondent a reasonable platform on which to sustain a genuine belief that the claimant had acted dishonestly. In my judgment, stepping back and considering all the circumstances, its investigation was a reasonable one.

44. I can deal more quickly with the second issue for me to consider, which is whether the respondent took adequate account of the claimant's lengthy service and her previously clean disciplinary record when deciding upon the sanction of summary dismissal. The fact is that the respondent did take account of these matters; this is shown in the minutes of the disciplinary and appeal panel hearings. Mr Malson, for example, looked at her record and considered the character references she had supplied. He did not assume that dismissal was inevitable; he expressly considered alternatives. However, it was reasonable for the panels to have regard to the fact that the claimant was employed to administer the fuel card scheme. Having formed the view that she had used a fuel card fraudulently, dismissal was within the range of responses open to a reasonable employer.

45. There are a few additional points Mr George mentioned and which, for completeness, I will address:

    45.1 Mr George criticised the respondent for failing to make clear in advance of its investigation, in writing, the precise transactions under investigation. I reject this contention. The claimant countersigned the suspension notice to confirm that she fully understood it. In any case, while the matter was still being investigated and no disciplinary charges were brought, it was reasonable to describe the charges in

general terms. She was certainly fully aware of the details by the time of the disciplinary hearing, having had an opportunity to consider Mr Smith's lengthy investigation report. The process of the disciplinary hearing was exemplary, with a full opportunity given for questioning and submissions. It was like a tribunal hearing itself.

45.2 I mentioned in my findings of fact that, on 16 March 2016, Mr Smith emailed Mr Haynes to state that the claimant had given a "not very convincing performance". Mr George contended that this email exchange was inappropriate. In the case of Mr Smith, he contended that it demonstrated the sort of fact-finding that ought to have been the preserve of the disciplinary panel and which was contrary to his role as investigator. In the case of Mr Haynes, he contended that it showed a closed mind to the claimant's guilt in advance of the appeal hearing where he would sit on the panel (albeit not in the chair). I reject this contention: it was proper for Mr Smith to update Mr Haynes on matters so that he could review the claimant's ongoing suspension from work. Mr Smith was not fact-finding and nor was Mr Haynes reaching a concluded view about the claimant's guilt or otherwise. Their view that there was a "common thread" did not involve prejudgment about the claimant's guilt; instead, it was a statement of the obvious emerging from the investigatory interview.

45.3 Finally, Mr George suggested in his submissions that it was inappropriate for the disciplinary panel to conclude that the claimant had been involved in the further uses of the missing fuel card simply by way of an extension of its conclusion that she had used it in respect of the courtesy BMW. I agree that this conclusion was not fully thought through or explained in the reasoning of the disciplinary panel, but ultimately nothing of consequence turns on it because (a) there was ample evidence against the claimant in respect of the BMW transaction and (b) the appeal panel modified and confined the reasoning to that single transaction.

46. In all the circumstances of the case, my conclusion is that, for the purposes of Section 98(4) ERA, the respondent acted reasonably in concluding that the claimant had fraudulently used a fuel card and it acted reasonably in treating that as a sufficient reason for dismissal. The claim of unfair dismissal fails.

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Regional Employment Judge B J Clarke
Dated: 25 May 2017

JUDGMENT SENT TO THE PARTIES ON

26 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS