EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Lambert	**v**	**Amey Services Limited**
Heard at: Watford		**On**: 22 & 23 October 2018

Before: Employment Judge Bloch QC

Appearances

For the Claimant: Mr McLean, Counsel
For the Respondent: Mr M Humphreys, Counsel

RESERVED JUDGMENT

1. The claimant's claims for:

   a. unfair dismissal (contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA")) and
   b. wrongful dismissal

   are upheld.

2. Issues relating to remedy shall be determined by the Tribunal at a hearing to take place on the 20 November 2019.

REASONS

1. The claimant brought claims for:

   1.1 Unfair dismissal contrary to ss.94 and 98 of the ERA; and

   1.2 Wrongful dismissal.

2. The list issues agreed between the parties was as follows:

Claim for unfair dismissal

3. Was the claimant sufficiently put on notice by the respondent of its policy regarding the use of fuel, cars and vehicles? Did the respondent's dismissing officer, Mr. Van Dyk, believe that the claimant was guilty of the alleged misconduct?

4. If so, did Mr. Van Dyk have reasonable grounds to sustain that belief?

5. Did the respondent conduct an investigation into the claimant's conduct that was reasonable in all the circumstances?

6. In determining these issues: was sufficient investigation/consideration given to the claimant's explanation(s) of the deficit identified in his fuel records:

    a. Sharing of fuel cards with other employees; and/or

    b. Fuel thefts in the local area.

7. Was the decision to dismiss the claimant within the range of reasonable responses, including given the claimant's longevity of service and absence of outstanding disciplinary sanctions? Was the claimant treated consistently with other employees (including those identified by the claimant at the investigation meeting on the 8 June 2017 and also all employees identified by the respondent as having potentially misused fuel cards or participated in fuel card sharing including those employees identified by the respondent's solicitors in their letter of the 19 March 2018)?

8. Did the respondent offer the claimant a genuine right of appeal? If not, was this sufficient to render the claimant's dismissal procedurally unfair?

The claim for wrongful dismissal

9. Was the claimant guilty of the alleged misconduct?

10. If so was summary dismissal for such conduct in breach of the claimant's contract?

Issues relating to remedy

11. If the Tribunal finds that the claimant's dismissal was unfair because of some procedural defect, would or may the claimant have been dismissed fairly, if a fair procedure had been followed?

12. If so, to what extent should any compensation due to the claimant be reduced, following the rule in Polkey v A E Dayton Services Limited?

13. If the Tribunal finds that the claimant's dismissal was unfair, did the claimant contribute to his dismissal within the meaning of s.122(2) and/or s.123(6) ERA?

14. If so, would it be just and equitable to reduce any compensation due to the claimant (both for the basic and/or compensatory awards) and if so, to what degree?

15. If the Tribunal finds that the claimant's dismissal was unfair and that either the claimant or the respondent unreasonably failed to comply with the relevant ACAS Code of Practice, would it be just and equitable to adjust any compensation due to the claimant and if so in which direction and to what degree, within the meaning of s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

16. If the Tribunal finds that the claimant's dismissal was unfair, would it nevertheless be just and equitable to reduce any compensation due to the claimant by reason of the provisions of s.123(1) ERA, and if so, to what degree?

The facts

17. The claimant commenced working in 1995 with a predecessor of the respondent and was transferred under TUPE to the respondent in 2015. He had a clean record with no history of disciplinary proceedings or performance reviews. At the relevant time the claimant was employed as a "Trades Person". He was employed on the respondent's contract with Haringey Council for the provision of what is described as Total Facilities Management Service. He was responsible for carrying out routine repairs and maintenance to the council's properties.

18. The respondent is the employing company of the majority of employees who work for the Amey Group of companies. Amey is a business providing infrastructure and environment-related services to public authorities throughout the United Kingdom. The respondent employs approximately 21,000 employees at various locations across the United Kingdom.

19. Upon the commencement of his employment with the respondent the claimant was provided with a company van together with a company fuel card in order to purchase fuel for his van. The value of the fuel purchases was charged to the card.

20. The respondent's policy on the use of company vehicles and fuel cards is set out in the "Company Vehicle, Car Allowance and Fuel Card Policy and Guidelines" (the "Fuel Policy") which is accessible through the respondent's internal website.

21. The Fuel Policy states that company fuel cards may only be used for the specified vehicles. It also says that disciplinary action will be considered

against any employee misusing their fuel card and as part of this process CCTV footage maybe requested (e.g. if using their card for a vehicle not specified on the card …) and adds that repeated breaches could result in the removal of the fuel card.

22. In the Amey Driver Handbook (unsurprisingly) it is said that theft of fuel is considered gross misconduct and would result in disciplinary action being considered.

23. The respondent produces monthly reports on the use of all its company vehicles. The reports are completed on the respondent's "Masternaut" system which monitors driving behaviour such as miles driven, fuel consumed (calculated by taking into account a number of factors, including braking, gear changes, air conditioning and heating) and fuel purchased by the respondent's employees who are allocated company vehicles. Where there are significant discrepancies in the expected figures for a certain vehicle, the issue is flagged to the respondent's management for investigation.

24. In May 2017 the respondent's monthly report indicated that during the period 25 February to 5 May 2017 the claimant had purchased more fuel than his van had used during that period.

25. On the 23 May the claimant was called to what the respondent describes as an informal meeting but one which resulted in his being suspended on full pay pending an investigation into allegations that had been made against him regarding the misuse of the claimant's fuel card. This was confirmed by the respondent's letter to the claimant dated the 23 May 2017.

26. In the agreed bundle of documents appeared a document which seems to have been used for the suspension meeting as a script. One of the pre-prepared questions was:

> "Do you share the vehicle or fuel card with anyone else?"

to which the response was recorded as:

> "Yes – shared amongst all – Noel."

That was apparently a reference to Noel Thompson, the claimant's Line Manager.

27. There was a further question:

> "Have you ever been asked by anyone to fill another vehicle using your fuel card?"

to which the answer was recorded as:

> "Yes."

There was a further question:

> "Have you used your fuel card to fuel anything other than (the car which the claimant was using)?"

Again, the answer was recorded as:

> "Yes."

28. On the 8 June 2017 the claimant attended an investigation meeting to discuss the potential breach of the Fuel Policy and the misuse of the claimant's fuel card. The meeting was chaired by Steven Ridley (Senior Facilities Manager) with Jane Chilambe (HR Advisor) said to be present as a notetaker. In the notes of that meeting Mr. Ridley was recorded as asking whether the claimant used his fuel card purely for his own vehicle. He responded that he had used it to fuel other people's vehicles. Mr. Ridley asked whether the claimant had ever been issued with Amey's Drivers Handbook to which he replied that he could not remember but he and his colleagues were given bits to read every now and then. Mr. Ridley asked how often had the claimant been asked to fuel vehicles for others and he replied: "every now and then." He said that recently, someone had lost their card and asked for their vehicle to be topped up. That was about six weeks previously. Management had authorised fuel top up for other vehicles almost all the time but certainly more than once. The claimant's previous Line Manager used to authorise this and Noel Thompson had also done so.

29. Ms. Chilambe asked the claimant whether he recalled any employees that he could say he had definitely topped up their vehicles and the claimant said: "Robert Vivash, David Holness (spelling unclear), David Russell, Tara Oliver" and he also thought Robert Weber. Ms. Chilambe asked whether he ever recalled the times that he had topped up their vehicles and the claimant responded that he never made notes.

30. Following this meeting Mr. Ridley on the 9 June 2017 completed what the respondent described as a "Draft" Investigation Report. It is not clear on its face that it was in fact a draft. In his summary of the evidence in this document Mr Ridley recorded that during his time with Haringey the claimant did not recall ever being issued with or having explained to him the Fuel Policy. He did not deny using his issued fuel card to refuel other vehicles. Mr. Ridley continued:

> "It appears to be normal practice for the various drivers to use individual fuel cards to refuel other Amey drivers' vehicles due to various factors such as cards being lost, out of date or on stop."

He continued:

> "This also appears to have been previously sanctioned by the Department Managers, which is confirmed by statements from other drivers."

31. At a later part of the report he said that:

> "A total of ten statements have been logged from other drivers and six have stated that they have used their card to fuel other vehicles and one states they had fuelled their vehicle with the other person's card."

He accordingly made his recommendation as follows:

> "It is my recommendation that no further action be taken against Raymond."

32. In another version of the investigation report also dated the 9 June 2017 there was an addition made to the recommendation, namely, that there was a need to review the training/briefing of all drivers and the re-issuing of the drivers' handbook and all relevant policies. There was also a suggestion that a review of the way drivers log their mileage, journeys and refuel should take place to provide recorded evidence of drivers' use.

33. The bundle also contained a letter dated the 9 June 2017 from Mr. Ridley stating:

> "I am writing to inform you that the investigation is now concluded and the Chair has indicated there is not a case to answer to."

34. It appears that this letter was merely a draft which was not sent to the claimant. Given that the name of the claimant was not filled into the letter (it stated: "Recipients name") it is tolerably clear that this letter was not sent to the claimant.

35. By email dated the 9 June 2017 by Stuart Fisher, the Account Manager for the Haringey Account addressed to (amongst others) Paul Dove, the Principal Business Improvement Manager for Amey's Group strategy part of its business (with a copy to Jane Chilambe) he stated:

> "From an "Operational" POV (presumably meaning point of view) as this was this slant taken by Ray/Steven in the interview/meeting please note the following:"

There followed a number of bullet points including:

> "The statements taken from all the drivers do indicate historic issues and people filling other vehicles etc. but this was not this year but last year when the fuel cards were cancelled without the replacements being issued. Since I started (March) there has been no issue such as this."

In another bullet point he stated that:

> "No one stated on the investigation reports that Ray had filled their vehicles."

36. There followed a letter by Steven Ridley to the claimant dated the 29 June 2017 advising the claimant that following an initial

investigation/assessment there would be a formal investigation meeting. The purpose of the meeting was to discuss that the claimant had misused his fuel card to purchase additional/excess amounts of fuel between March 2017 and May 2017. This was considered as theft and was in breach of the Disciplinary Policy. He was advised that if disciplinary action was taken as a result of the investigation, one possible outcome of the disciplinary process was dismissal. The claimant would remain suspended on full pay.

37. The second investigation meeting was on 11 July 2017. Again, present at the meeting was the claimant, Steven Ridley and Jane Chilambe, again stated to be a notetaker.

38. At the meeting (as recorded in the notes) Ms. Chilambe (again somewhat inconsistently with her alleged limited role as notetaker) asked the claimant whether he could provide a date and whose vehicle had been fuelled using the claimant's card. The claimant responded that he could not, as he had not been told that he needed to report, so took no note of it. Mr. Ridley pointed out that the records showed that the claimant fuelled his vehicle very week to which the claimant responded that it might not have been his vehicle that had been refuelled - it might have been another person. He did not keep a record. Later in the meeting the claimant said that the only other reason he could think of as explaining the discrepancies was that fuel robberies had been taking place in his area. However, he was not saying that the vehicle was part of the robberies.

39. There followed an investigation report by Mr. Ridley dated the 11 July 2017. This referred to the Fuel Investigation Report from the Masternaut System showing that from the 25 of February 2017 to the 5 May 2017 the claimant had purchased 586 litres of fuel which when put against the amount of fuel consumed for the mileage driven showed a figure of a 133.95 litres in excess of the vehicle tank capacity of 80 litres. The report added that there was no physical evidence to show where the excess fuel as identified in the Fuel Investigation Report had gone and the claimant could not offer any reasonable explanation as to the large discrepancy as detailed in the Fuel Investigation Report. Accordingly, he recommended that the matter should proceed to a formal hearing. Mr. Ridley recommended that the case be taken to a disciplinary hearing, as even though the claimant was emphatic that he had did not know where the excessive fuel went, he should be accountable for the loss.

40. By letter dated the 26 July 2017 Leon Van Dyk, M&E (Mechanical & Electrical) Manager on Amey's contract with the London Borough of Camden, invited the claimant to attend a Disciplinary Meeting on 1 August 2017. The purpose of the meeting was to discuss the allegation of theft when the claimant had allegedly misused the company fuel card to purchase excessive or additional amounts of fuel between March 2017 and May 2017. This was considered as theft and was in breach of the Amey Disciplinary Policy and in breach of the Fuel Policy. Mr. Van Dyk was to be the Disciplinary Hearing Officer and David Newing (ME Co-

ordinator) would be in attendance as a notetaker. The letter included the following documents: Fuel Investigation regarding fuel usage, Investigation Report dated the 11 July 2017 and the meeting notes of the 11 July 2017. The claimant was told that the above could be deemed as constituting gross misconduct and that if the allegations were proven at the meeting, he might be summarily dismissed. The claimant was reminded of his right to be accompanied by a recognised Trade Union Official or work colleague. He was also given the right to request the attendance of relevant witnesses at the hearing, however, it was his responsibility to arrange for the witnesses to attend. He was asked to advise the respondent a minimum of 48 hours prior to the hearing if he planned to invite witnesses.

41. Given that the claimant was away on annual leave the disciplinary hearing was moved to the 8 August 2017.

42. The notes of the disciplinary hearing (which were not shown to or approved by the claimant) show that it took place between 10 and 11am on the 8 August 2017 with one or two breaks in between. At that meeting the claimant reiterated that there were various situations including where he had been given permission by the line manager or where engineers had lost their card in the past which had resulted in employees being advised to share cards until the new ones arrived. He again referred to a possible reason for the fuel discrepancy being that a lot of fuel had been stolen in Dagenham where he lived but when he was asked specifically how he could have used more fuel than the van could take, the claimant said that he could not give any explanation and was adamant that he was not sure where the fuel had gone.

43. Mr. Van Dyk is then recorded as saying:

> "In the investigation meeting and relate (sic) back to the minutes, he advised that he could not remember whose van he had filled up and what card he used."

The claimant is recorded as saying:

> "Confirms that is correct, he has asked the Line manager in the past and he has given him permission to fill the vans up where needs be. He had also rung the manufacturer of the van who confirmed that the van could be filled up more than the tank takes."

44. It is clear that this note was not a verbatim note nor was it intended to be such especially given that the language is often in the third person. It is in places grammatically difficult to follow. Further, there is an oddity in Mr. Van Dyk referring back to the minute of an investigation saying that the claimant could not remember whose van he had filled up when in fact he had identified the five names referred to in the investigation meeting note (of the first investigation on the 8 June 2017.) It also seems odd that the claimant should have confirmed that Mr. Van Dyk's statement in this regard was correct.

45. By letter dated the 9 August 2017 the claimant's dismissal with effect from the 8 August 2017 was confirmed by the respondent. The minutes of the meeting taken during the hearing were attached and it was stated that the claimant's dismissal was on grounds of conduct amounting to gross misconduct. It was sufficiently serious to entitle the respondent to dismiss the claimant without notice or pay in lieu of notice. Mr. Van Dyk added:

> "I consider that you alleged fuel might have been stolen from the van several times and you fuelled up other Amey vans."

He added:

> "I decided decimal (presumably meaning dismissal) was necessary as no proof was provided fuel was stolen on serval (sic) occasions. This was never reported and the vans had no signs of fuel theft."

He added:

> "Your (sic) wher (sic) unable to provide dates, van registration and Amey personal names of vans you have alleged to of (sic) filled up over the period of the missing fuel."

He added:

> "You have not been able to explain or provide any proof of the missing fuel while the Van and fuel card was in your possession."

46. The claimant was told of his right to appeal by confirming his intention to do so within five working days from receipt of the date of the letter. The grounds of appeal might be one or more of the following:

46.1 The procedure was not properly followed;
46.2 New information has become available;
46.3 The outcome is inappropriate for the offence.

47. By later dated the 14 August 2017 the claimant appealed against his dismissal. He stated that the outcome was inappropriate for the alleged offence and the allegation was unfounded and untrue.

48. By letter dated the 14 September 2017 the respondent wrote to the claimant to the effect that the appeal would be heard on the 21 September 2017 by Warren Colvin (Account Manager).

49. However, by letter by the claimant's solicitors (JWK Solicitors) dated the 18 September, they stated that the ACAS Code of Practice required that an appeal should be dealt with "without unreasonable delay". Their clients were of the view that an appeal set for the 21 September 2017 "is not a genuine right of appeal" and accordingly the claimant would not be attending.

50. There followed a letter by the respondent (undated) to the claimant apologising for the delay in arranging an appeal. It appeared that the delay was due to finding an appropriate, independent manager, which was compounded by existing leave commitments during the summer period. They had been in contact with ACAS who had advised that the claimant intended to take legal action. The respondent believed that that was premature and disadvantageous and that they had therefore arranged an appeal to take place on the 28 September 2017.

51. By letter dated the 26 September 2017 JWK Solicitors stated that it remained the claimant's position that this was not a genuine offer of a right of appeal and was in fact prompted by the initiation of ACAS Early Conciliation. The claimant maintained that he was unfairly dismissed without due process and as such would not be attending any further meetings with the respondent.

The witnesses

52. The claimant called two witnesses namely Paul Dove and Leon Van Dyk. Mr. Dove gave detailed evidence regarding the data which appeared in the agreed bundle regarding the Masternaut and Shell Reports. (The Shell Reports show the amount of fuel purchased by the claimant.) It is not necessary to refer to these documents in detail given that the Fuel Investigation Summary Document (Bundle Page 81) was not in contention. It was accepted that this document showed that there was a cumulative difference in fuel purchased compared with fuel consumed over the relevant period of 213.95 litres which when deducting an assumed full tank of 80 litres showed an access of a 133.95 litres purchased as compared with fuel consumed over that period. The claimant did not take issue with the contents of that document but sought to explain the discrepancy by reference to his having used his fuel card to fuel the vehicles of colleagues.

53. The claimant also did not take issue with the document (Fuel Purchased Report) emanating from Shell (Bundle Page 82). That showed that over the investigation period the claimant had made seven purchases at the same garage (Texaco, White Hart Lane) each on a Monday followed by a purchase on a Tuesday following a Bank Holiday followed by two further purchases on ensuing Tuesdays. (At Bundle Page 80 was a document entitled "Purchased Vs Consumed" showing an exercise of comparisons relating to the claimant and three other drivers). Mr. Dove found that the claimant had in fact been on the White Hart Lane premises on each occasion fuel had been purchased. That was information which he obtained from the Masternaut Tracker in the vehicle. He also stated that on the 28 June 2017 he received a call from Steven Ridley. Mr. Ridley had told him that he had not fully understood the findings of the Fuel Investigation Report and asked him to explain how the report worked, how the findings had been reached and how accurate the information was. Finally, Mr. Dove gave evidence regarding his investigation into two other employees in respect of which discrepancies regarding fuel usage had

been reported. In relation to one, (Mr. Holness) there was a discrepancy with the fuel usage for his vehicle for the final week of the reference period which showed that there was 25.04 litres of fuel missing for that period. Mr. Dove explained that the Fuel Purchased Vs Consumed Report flags vehicles that have a discrepancy of 20 litres or more so that it disregards instances where for example a driver may have filled his van beyond its intended capacity to the point at which the fuel pump "clicks". Mr. Dove took this information to Mr. Byrne, the Account Director (in relation to the Haringey Council Account) but it was ultimately decided that it was not appropriate to proceed to a formal investigation based on just one discrepancy in one week of the reference period. A longer period would be needed to determine whether there were any potential misconduct issues.

54. With regard to the second individual (Mr. Russell) Mr. Dove's investigation demonstrated that at least 141.43 litres of fuel had been purchased which could not be accounted for. He took that information to Mr. Byrne and disciplinary proceedings were commenced. However, Mr. Russell resigned before the disciplinary hearing took place.

55. Evidence was then given by Mr. Van Dyk. In his Witness Statement he stated that on the 18 July 2017 he had received a Case History Report which included the Fuel Investigation Report by Mr. Dove, the notes of two investigation meetings conducted by Steven Ridley, two Draft Investigation Reports dated the 9 June and the Final Investigation Report dated the 11 July 2017 but he did not recall receiving a copy of the respondent's Fuel Policy. He stated that he now understood that there were ten questionnaires completed by the respondent's employees who worked with Mr. Lambert. However, he did not have sight of those questionnaires during the disciplinary process. Prior to the disciplinary hearing he spoke to Ms. Chilambe who provided him with some background information on the claimant's case which was essentially an overview of what had happened during the investigation to date. Given that he was not clear how the conclusion had been drawn in the Fuel Investigation Report that there was fuel which had been purchased by the claimant on his fuel card that could not be accounted for, he spoke to someone from either/or the respondent's Fleet Team (who manage vehicle stock) but could not recall to whom he had spoken. He was told that the amount of fuel that was missing according to the data was far too high to be explained by (normal) driver behaviours. He also asked Ms. Chilambe to explain why Mr. Ridley had changed his mind between the Draft Reports and the Final Report. Ms. Chilambe explained that Mr. Ridley had initially decided that no further action was required when he had not understood or did not have the relevant information in order to allow him to make his decision properly. Mr. Van Dyk understood that following that meeting he received some additional information which resulted in him reviewing his initial decision.

56. In his witness statement Mr. Van Dyke explained that at the Disciplinary Hearing he told the claimant that he had read the notes of his Investigation Meeting and "… saw that he was unable to provide the names of the

colleagues who he had bought fuel for between March and May 2017; which he confirmed was correct." (Again, in his witness statement Mr. Van Dyk made no reference to the notes of the first interview in which the claimant had referred to five individuals). Mr. Van Dyk then said that the claimant did not provide any further details of the colleagues who had used his fuel card during the disciplinary hearing. The claimant also referred to another possible explanation for the fuel discrepancy being the fuel thefts which had been taking place in the Dagenham area and he also mentioned that he had spoken to the van's manufacturer who said that the van could be filled up above the tank's capacity. At 10:25am Mr. Van Dyk adjourned the hearing in order to speak to Ms. Chilambe and she suggested some further questions for him to ask the claimant. The meeting was adjourned for Mr. Van Dyk to speak to "Manager's Advice" (which may be or have the same function as Human Resources) in order to explain his findings. He told them it was his decision that the claimant should be dismissed, with which they agreed based on his findings. The meeting was then reconvened and the claimant was informed of Mr. Van Dyk's decision to dismiss him immediately for gross misconduct.

57. In coming to his decision to dismiss Mr. Van Dyk said that he considered the claimant's evidence that the fuel discrepancy could have been as a result of him having used his fuel card to fill up other Amey vehicles, however … "In the absence of any details as to when he filled up another vehicle, or the names of his colleagues whose vehicles had been filled up, I did not consider this to be credible." He also did not regard it as credible that the explanation for the fuel discrepancy lay in fuel thefts in the Dagenham area.

58. When he made his decision to dismiss Mr. Van Dyk was not aware of the claimant's employment service or disciplinary record, however, he did not consider that it would have made a difference to his decision. In his view, the claimant had committed a serious offence of misusing its fuel card in the way in which he did which warranted dismissal with immediate effect.

59. Turning to the oral evidence given before the Tribunal, Mr. Dove stated that when fuel cards were issued to the employees they were given a reduced version of the Fuel Policy. No such document was in the bundle and in view of the claimant's evidence, the lack of specificity by the respondent as to when the claimant was given what version of the Fuel Policy and the employee questionnaires of other employees completed in the course of the investigation showing that a number of them were not aware of the policy, I find (in so far as maybe relevant) that the claimant was not *au fait* with the details of that policy. That said, given the nature of the essential allegation (i.e. theft of fuel by the claimant) I do not regard that matter as particularly significant.

60. Turning to the oral evidence of Mr. Van Dyk, he said that as part of his investigation he did not refer to the respondent's Fuel Policy but he did have a memory of it. He accepted that it would have been useful for him to see the questionnaires completed by employees but it would not have

changed his perception because he believed they related to a different timeframe. Although the Investigation Meeting Notes including that of the first meeting on the 8 June 2017 had been provided to him (where the names of five employees had been provided by the claimant) he did not recall reading this. He was aware of Mr. Ridley in his Investigation Report saying that six of the ten drivers who had been asked to provide information had stated that they had used their car to fuel another vehicle and one stated that he had fuelled his vehicle with another person's card. He was also aware that Mr. Ridley had recommended that there should be a review of the training and briefing of all drivers and re-issuing of the Driver's Handbook and all the policies. He had not interviewed any of the five employees identified by the claimant at the first investigation meeting and was not aware if Mr. Ridley had made enquires of them. He accepted that sharing of fuel cards might have skewed the statistics on fuel purchasing. When asked whether it would have been of interest to interview the five individuals he responded that his part of the case did not involve investigation. He merely had to hear the evidence that was available. When asked what Ms. Chilambe had told him as to why Mr. Ridley had changed his mind he said that he thought that Mr. Ridley had had the data explained to him. He could not say what it was that Mr. Ridley did not originally understand or what further information had been given to him to give him a better understanding.

61. Mr Van Dyk accepted that Mr. Ridley's conclusion in the Final Investigation Report that there was no evidence to show where the excess went and the claimant could not offer any reasonable explanation was "odd" if Mr. Ridley had not followed up with the five individuals identified by the claimant. However, he did not think that he himself should have followed this up saying graphically "I was not in the Investigation Department". He accepted that at the Disciplinary Meeting he did not ask the claimant to identify who the individuals were whose vehicle or vehicles the claimant had fuelled. This was not recorded in the note of the meeting and he could not recall this. He accepted that 133.5 litres was less than two full tanks. In relation to his witness statement at paragraph 17 (where he said that he had told the claimant that he had read the notes of his Investigation Meeting and saw that he was unable to provide the names of the colleagues for who he had bought fuel between March and May of 2017) he said he meant to refer to what happened at the meeting rather than what was in the Investigation Notes and apologised for the inaccuracy.

62. In his witness statement the claimant referred to the respondent's investigation at the beginning of June when ten employees were asked to fill in a sheet asking whether they had previously shared their fuel card with anyone. Of that ten, six admitted to sharing their fuel card with another employee, five admitted to using someone else's card, five did not know the existence of a Fuel Policy and out of the remaining five, two did not know where to access it. Six of the ten shared a fuel card under management instruction, many under the instruction of Noel Thompson. He accepted that none of these employees had identified the claimant as someone whose fuel card they had used. However, no one had been

asked that specific question or indeed to identify anyone in particular. He referred to his having received on the 8 June 2017 an email sent to all employees by Stuart Fisher which asked employees to attend a meeting to discuss the Fuel Policy, highlight access to it and to sign a statement saying all employees would comply with the policy. From that day on (according to the claimant) – which was after the period under investigation – the sharing of fuel cards was strictly prohibited. He clarified he was not positively asserting that robberies were responsible for the fuel discrepancy. It was merely a possibility.

63. In cross-examination, when he was shown that David Russell had also purchased more fuel than consumed and therefore could not have been one of the employees who had used the claimant's fuel card, the claimant responded that Mr. Russell could have used his fuel card for someone else's van. In relation to the other colleagues whom the claimant had identified and who had completed the questionnaires, he accepted that what was more relevant than question 5 (which stated, "Have you ever used your fuel card to fuel another vehicle?") was question number 6 which said: "Has anyone ever used their fuel card to fuel your vehicle, if so whom and when?". Most said no and where they said yes, did not identify the claimant as someone whose fuel card they had used. For example, Mr. Hardware stated that Noel Thompson had in November/December/January used his fuel card to fuel Mr. Hardware's vehicle. In relation to question 5 Mr. Hardware said: "I may have used a fuel card to refill the mobile team vehicle a few times but I cannot recall the dates. November-March. (However, Mr. Thompson did not have his own vehicle, and he had apparently used a master fuel card on occasion to fill other vehicles). Mr. Vivash (one of those identified by the claimant at the first investigation meeting) responded positively to both questions 5 and 6 saying in relation to 5 that he had done so under management instruction and in relation to 6 that the Waltham Forest Manager had used his card to fuel Mr. Vivash's vehicle. Another, Mr. Holness, responded positively to question 6 stating that it happened in 2016 up to about November.

64. In relation to the fuel investigation documents identifying the claimant's vehicle is present at the filling station at all times identified in those documents, the claimant explained that he always accompanied anyone whose vehicle needed to be fuelled, driving in his own vehicle to that filling station, so that both his vehicle and the vehicle requiring to be fuelled would be there. The operator would not check to see whether the vehicle registration number on the card was the same as the registration number of the card which had been fuelled.

Claim of unfair dismissal

65. The law in this area is well known. It is for the employer to show that the misconduct was the reason for dismissal. According to the Employment Tribunal in British Home Stores Ltd v Burchell [1980] ICR 303, a three-fold test applies. The employer must show that:

65.1 He believed the employee to be guilty of misconduct;

65.2 He had in mind reasonable grounds upon which to sustain that belief, and at the stage at which that belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances. Accordingly, the employer need not have conclusive or direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested is required. The Burchell test was subsequently approved by the Court of Appeal in Weddel W & Co Ltd v Tepper [1980] ICR 286 CA and in a subsequent Court of Appeal case. However, it should be recollected that the onus on the employer to show reasonableness was removed by section 6 of the Employment Act 1980 and therefore it is only in relation to the belief of the employer that the onus of proof is on the employer. The remaining two matters are neutral as to burden of proof.

66. Mr Humphreys, who appeared on behalf of the respondent, submitted that it was clear from the evidence the claimant did in fact steal the fuel. While not accepting that the dismissal was unfair he submitted that a finding that the claimant had stolen the fuel would have a substantial effect on remedy, in particular, as to whether or not it was just and equitable for compensation to be granted, whether a *Polkey* deduction should be made and/or that any award fell to be reduced by virtue of the claimant's culpable contribution to his own dismissal. In relation to *Polkey* he submitted that even if Mr. Van Dyk had been given the completed employee questionnaires, they would have supported a decision to dismiss, not indicated the contrary. He added that it was unreasonable for the claimant not to engage in the appeal and that a deduction should be made in this regard. He made submissions as to why the comparators relied on by the claimant were not in fact comparable and in relation to Mr. Russell that he could not be compared with the claimant, since he had resigned during the disciplinary process relating to him.

67. Mr. McLean submitted on behalf of the claimant that the Fuel Policy had not been properly communicated to the employees, including the claimant. He referred to the forms filled in by the employees attesting to their lack of knowledge in relation the Fuel Policy and to the admissions of fuel card sharing. In relation to the answers to question 6, he noted how the employees tended to refer to instances of manager involvement, for example, Noel Thompson, or management instructions. There was no evidence regarding the circumstances under which the questionnaires had been completed, nor where and in which context the employees filled in the information. It may well be that the employees were somewhat inhibited about admitting fuel card sharing which had not been specifically sanctioned. He relied on the identification by the claimant of five colleagues whose vehicles he had or may have fuelled and to the absence of any specific question in the employee questionnaire as to whether the claimant had lent them his fuel card. He referred to the bare statistics contained in the Fuel Investigation Report without there being taken into account matters such as driver behaviour i.e. use of brakes and air

conditioning. No such external factors had been taken into account. He referred to the change of mind of Mr. Ridley and that no credible reason had been given for such change. He submitted that the Disciplinary Hearing by Mr. Van Dyk was unsatisfactory. He had not read the documents, in particular saying that the claimant had not offered an explanation when the claimant had named five individuals who had used the claimant's fuel card. He referred to the fact that the claimant had returned home on the Sunday evening before the appeal hearing and, therefore, could not have given 48 hours' notice of witnesses which he intended to call.

68. He went on to submit that the claimant's explanations had simply been swept aside. There were no reasonable grounds for the respondent's conclusion. In this regard he relied on:

68.1 "Holes' in the evidence;
68.2 That no one had asked a single question of the named employees as to whether they had used the claimant's fuel card;
68.3 They had not done a comparative exercise on the fuel records of the five named employees which might have supported the claimant's case; and
68.4 Mr. Dove had simply assumed that because the claimant's vehicle was at the fuel station at the time of the relevant purchases, he was guilty. He assumed that the claimant must have used eg a jerrycan to take fuel away from the station but there was no basis for this assumption.

69. In relation to the claim of wrongful dismissal Mr McClean submitted that bearing in mind the severity of the conduct alleged against the claimant, the respondent had not proved theft of fuel. There was no direct evidence of this. It was all based on inference and no account had been taken of the twenty years unblemished service of the claimant. He emphasised that none of the colleagues of the claimant whom he had identified has been specifically asked whether or not the claimant had lent them his fuel card.

70. I shall deal first with the unfair dismissal claim. In my judgment there is no doubt that the respondent believed that the employee had breached the Fuel Policy and committed acts of theft in relation the fuel. Indeed, there was no suggestion that there was some other belief which caused the respondent to dismiss the claimant. The more difficult question is whether the respondent had reasonable grounds upon which to sustain that belief having carried out reasonable investigations. In my judgment, the investigations leading to the conclusion that there was a substantial discrepancy between fuel purchased and fuel consumption were reasonable. Indeed, the results were not challenged. The real question is whether the respondent sufficiently investigated the claimant's proffered explanation for this discrepancy.

71. In my judgment it did not:

71.1 Mr. Dove appears to have jumped too readily to the conclusion that because the claimant was present in his vehicle at the time when the relevant purchases were made, that the fuel was purchased for his vehicle. I remind myself, however, that all Mr Dove was doing was seeing whether the matter should be fully investigated and he was, in my judgment, not wrong in that conclusion.

71.2 However, in my judgment the claimant's assertion that he had used his fuel card to purchase fuel for four and possibly a fifth colleague all of whom he identified at the first investigation meeting, was not properly investigated. These employees were not specifically asked whether they had used the claimant's fuel card to purchase fuel for their vehicles and there was no reason proffered why that enquiry had not been made. Further, I accept that there may have been reasons for these employees to refer only to occasions where management was involved when sanctioning or using fuel cards otherwise than for the vehicle to which the card was assigned. There may have been concerns on their part about admitting fuel sharing when management were not directly involved. The employee questionnaires made clear that their responses were required in accordance with the respondent's Disciplinary Policy and investigation into misuse of company fuel cards - even though it was stated that the individual employees being asked for the information were not the subject of the investigation. No evidence was led as to the circumstances under which the questionnaires were provided to the employees in question nor as to what was said to them at the time. It is not known whether they were simply received and filled in or whether they were completed in the presence of a manager.

71.3 More troubling is the admission by Mr. Van Dyk that he did not read the completed questionnaires and that despite having been given the investigation notes he was unaware that the claimant had identified five colleagues as having used his fuel card. Equally concerning is the fact that Mr. Van Dyk had no knowledge of the claimant's spotless disciplinary record.

71.4 There appears to have been a lack of "joined up" thinking between the investigation stage and the disciplinary meeting. In my judgment Mr. Van Dyk took far too narrow and fragmented view of his role. In my judgment he should have been aware of the identification of five colleagues and given the inadequacies (to which I have referred) in relation to those employee questionnaires, he should have considered interviewing them and asking them the specific question which ought to have been posed, namely whether they had used the claimant's fuel card during the time in question.

71.5 All of a piece with this overly limited view of his role is the impression created in the documents that Mr. Van Dyk was not independent in performing his role. Having seen him give evidence

there was a lingering doubt as to who was actually "calling the shots" in relation to the decision-making, even though he asserted that he was merely asking for confirmation of his own decision to dismiss. For instance, Ms. Chilambe's role seems to have been much more than that of an alleged note keeper as evidenced (for instance) by the questions which she was asking the claimant at various stages.

71.6 For all those reasons I do not regard the respondent as having carried out a sufficient investigation leading to reasonable grounds on its part to dismiss the claimant. In my judgment no proper consideration was given to the possibility of the fuel discrepancy having been caused by his using his card for fuelling the vehicles of colleagues.

71.7 Accordingly, (while I remind myself that it is not my function to substitute my judgment for that of the employer) in my judgment the inadequacy of the investigation, including the incuriosity of Mr Van Dyk, render the dismissal unfair.

71.8 That said, I reject the submission that the dismissal was unfair because of inconsistent treatment of other employees. For the reasons that are clear from this judgment (and as submitted by the respondent) there was no such inconsistent treatment.

72. Although not dealing with the remedies in detail at this stage, I shall deal with this topic in outline below.

Wrongful dismissal claim

73. This was a more difficult issue to resolve.

74. There was some discussion with counsel regarding the standard of proof appropriate for a claim of theft. Counsel submitted short written submissions on this point.

75. In Re B (Children) [2008] UK HL35 reference was made to the case of B v Chief Constable of the Avon and Somerset Constabulary [2001] 1 WLR 340 in which Lord Bingham of Cornhill CJ said about the standard or proof:

"The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters …"

76. Mr Humphreys referred me the recent decision in *JSC BM Bank v Kekhman & Others* [2018] EWHC 791 (Comm) from which I have referred in particular to paragraphs 46 -56.

77. Extracting paragraphs from the judgment in *JSC BM Bank*:

> "46 The burden and standard of proof in relation to allegations of fraud are well-established. The burden of proof is upon the claimant as in an ordinary civil claim. As to the standard of proof, the fact that fraud is alleged does not change the standard from being on the balance of probability – see In Re B (Children) [2009] 1 AC 11 at [13] per Lord Hoffmann.
>
> 47 In this regard Lord Nicholls stated as follows in In Re H (Minors) [1996] AC 563, 586E-G:-
>
> > "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. *When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. Fraud is usually less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established*."
>
> 48 In Re B (Children) the House of Lords emphatically re-iterated that there is only one civil standard emphasising that *any logical or necessary connection* between the seriousness of an allegation and its inherent probability is to be rejected; inherent probabilities are simply *something to be taken into account as a matter of commonsense* in deciding where the truth lies.

78. Accordingly, (as is clear in particular from the passages I have italicised) while applying the civil burden of proof, it is appropriate for me to take into account the seriousness of what has to be proved.

79. In my judgment bearing mind the seriousness of the allegation (and its implications for the claimant) I am not satisfied on the balance of probabilities that the evidence is sufficiently clear that claimant committed the thefts alleged. While there is clear and indeed uncontroverted

evidence of his purchasing a substantial amount of fuel in excess of what the records show the claimant used in his vehicle during the investigation period, there are deficiencies in the evidence as to whether the claimant's explanation should be disbelieved, for instance:

79.1 There is no direct evidence of the thefts by the claimant, for example, no evidence of his being seen to put petrol into a receptacle (for example a jerrycan) – no such evidence whether by a witness or by CCTV evidence. Such evidence must have existed at the time of the investigation because it is difficult to imagine that the Texaco garage would not have had such surveillance evidence of its forecourt. However, it appears that the claimant made no attempts to investigate whether such material could be obtained or indeed to instruct a private investigator to obtain such evidence;

79.2 I am not satisfied regarding the reliability the hearsay evidence represented by the completed questionnaires. The method adopted does not seem to me to be a safe or appropriate method of obtaining evidence regarding such serious allegations – and no comfort was provided by any sufficient evidence of the circumstances under which such evidence was obtained.

79.3 I am not satisfied regarding the quality of evidence obtained from the colleagues whom the claimant identified. They were never asked whether they had used the claimant's card to obtain fuel for their vehicles and I accept the claimant's submissions that without that question being specifically asked (and in any event) these employees might not have been forthcoming about that matter when it did not involve sharing of fuel cards without specific sanction of a manager.

79.4 The evidence regarding the change of heart by Mr. Ridley was not convincing and the explanation that he did not understand the Fuel Investigation Report sufficiently and thereafter changed his mind when he did, is difficult to understand. The matter which seems to have persuaded Mr. Ridley not to recommend disciplinary proceedings was the issue of fuel card sharing. That is plain from the initial report. This seems to have had nothing to do with understanding how the discrepancy in fuel payment and usage was calculated. That is (as submitted by Mr. McLean) a "black hole" in the evidence. The real reason was more likely that the card sharing was regarded by the respondent as having taken place at an earlier stage than the investigation period relating to the claimant. However, it is troubling that this was not the explanation relied on in the respondent's witness statements and oral evidence and there was no clear evidence put forward of a proper investigation in that regard leading to a conclusion that the practice had stopped before the investigation period.

79.5 While I accept that the explanation offered by the claimant was vague and that he did not at any stage identify which particular purchases shown on the documents were ones which he had made on behalf of colleagues, I cannot discount the claimant's explanation that it was difficult for him to recollect any such specific purchases, given that sharing of fuel cards was not uncommon (as evidenced by the completed questionnaires of certain of his colleagues) and no record was required to be kept of such instances.

80. In all the circumstances (and in particular given the authoritative judicial statements as to the correct approach cited above) of the relevance of the seriousness of the allegation in deciding whether the respondent has discharged the civil burden of proof (on a balance or probabilities), I am not satisfied that the respondent has discharged this burden.

81. Accordingly, the wrongful dismissal claim is upheld.

82. I have been asked (insofar as may be appropriate) to deal at least in principle with issues of remedy, although I have not yet had full submissions on this aspect of the case.

83. Although I was not persuaded that the respondent had proven that the claimant had committed the thefts in question, viewed from the perspective of management, the case against the claimant was a strong one. Even before this tribunal, the evidence of the claimant was vague and in my judgment, even if the disciplinary procedure followed by the respondent had not suffered from the defects which I have identified, in all probability the respondent would have come to the same conclusion as they did. In my judgment such a conclusion would have been within the range of reasonable management responses. Furthermore, having reached such a conclusion it would clearly have been within the range of reasonable management responses for the respondent to have decided to dismiss the claimant. I accordingly find that had those procedural defects not been present, the respondent would have decided to dismiss the claimant and that such decision would have been a fair one.

84. I also find that the claimant's refusal to engage in the appeal process was unreasonable. While there was a delay by the respondent in inviting the claimant to attend the appeal hearing, this provided no proper excuse for the claimant to refuse to engage in the appeal hearing. I find that the reasons given by the respondent for its delay were true and did not indicate that the appeal was not a genuine one.

85. It was submitted by Mr. Humphreys on behalf of the respondent that in all likelihood the defects would have been "cured" in the course of the appeal hearing, had the claimant cooperated with it. It is noteworthy (as submitted by Mr. Humphreys) that after his dismissal the claimant obtained legal representation and it may well be that (with the assistance of such legal assistance) the defects in procedure wouldπd have been cured at the appeal stage. However, given the nature and extent of the procedural

defects which had occurred at the dismissal stage, it may well be argued there was no certainty as to whether that could have been the case. At the remedies hearing I will need to hear submissions regarding the prospects of such appeal curing the defects in procedure and submissions on any other aspects which may result in deductions from the sums claimed by the claimant in his Schedule of Loss.

86. I accordingly upheld the claimant's claims of unfair dismissal and wrongful dismissal but with the reservations in relation to remedy referred to in the preceding paragraphs.

_____
Employment Judge Bloch QC

Date: 12 November 2018

Sent to the parties on: .....

.....
For the Tribunal Office