



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Burke

**Respondents:** 1. Thomas Contracting Limited  
2. Thomas Plant Hire Limited

**Heard at:** Liverpool

**On:** 14 January 2019  
30 January 2019

**Before:** Employment Judge Robinson  
(sitting alone)

## REPRESENTATION:

**Claimant:** Miss R Owusu Agyei of Counsel  
**Respondents:** Mr J Chambers, Solicitor

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal succeeds.
2. The claimant's claim for wrongful dismissal succeeds.
3. The application for costs by the claimant fails and is dismissed.
4. The name of the proper respondent in this matter is Thomas Contracting Limited.
5. There will be a remedy hearing on **13 March 2019 at Liverpool Employment Tribunal, 3<sup>rd</sup> Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** starting at **10.00am**.

# REASONS

1. The claimant started work in October 2011 for a company called Anglo Plant Limited which was taken over by Thomas Contracting Limited, a company owned by Mr Wyn Thomas. The company carried out civil engineering groundworks and plant hire business from the main site in North Wales and at the Widnes site where the claimant worked.

2. The claimant received an undated letter dismissing him on 23 April 2018 which is the effective date of termination.

### **The Facts**

3. The claimant worked as a diesel fitter and initially worked off site until January 2017 when he moved to working on site. He was told at that point to bring all his equipment from his van into the workshop. He had permission from Barry Swift to bring metal drums filled with various oils and diesel onto the premises.

4. Mr Wyn Thomas would not have allowed that if he had known. However, Mr Burke did have permission from his site manager to bring those drums onto the premises. There were various oils in those drums including diesel oil, engine oil, etc. The claimant worked from the Widnes site maintaining the company's vehicles.

5. The claimant was also a self-employed DJ and on Friday and Saturday nights used his van, which he brought into work, to carry out that business. He often carried in his van expensive sound equipment.

6. The claimant's position at the company was happy one until in April 2017 a Mr David Fleming became the depot manager. According to the claimant Mr Fleming took against the claimant and started bullying him.

7. Although Mr Thomas suggested that he did not know much about that issue, Mr Burke emailed management about his upset at being bullied but nothing was done.

8. There were a number of spats between the claimant and Mr Fleming culminating in Mr Fleming telling the claimant that he could not work overtime from 5 February 2018 onwards. Mr Fleming did not think the claimant was putting his heart and soul into his job because he (the claimant) had asked, on a couple of occasions, to go home early in order to do his DJing work.

9. On 9 April 2018 in an "off the cuff" conversation Mr Fleming told the claimant that his employment was not working. He then told the claimant that if he did not leave, Mr Fleming would go down another route and accuse him of taking diesel from the company and putting it in his own van.

10. I have not heard from Mr Fleming.

11. A week later Mr Thomas had a word with the claimant in a McDonalds. Again, it was an "off the cuff" meeting. He offered the claimant redundancy and asked him to leave immediately. The claimant refused and said he had done nothing wrong. It was at this point that allegations of theft came to the fore. Those allegations were never reported to the police. It was alleged that Mr Barry Swift had seen the claimant take fuel and had made a statement to that effect. Mr Swift refused to sign it. There was a suggestion that Mr Swift had been intimidated by the claimant so that he would not sign such a statement.

12. The process that then followed was shambolic. Mr Thomas accepted in evidence before me that the company had not followed its own disciplinary policies and processes. Photographs and statements were not handed to the claimant at the

appropriate time and, despite requesting a copy of the company's disciplinary procedure, he never received such a policy.

13. Initially the investigating officer, Mr Ceirion Davies thought the accusation was that the claimant had taken red diesel fuel but then that changed in time into an accusation that the claimant was taking white diesel from vehicles imported from Germany (Wacker Neuson machines) which were delivered with white diesel fuel in them. It was alleged that Mr Burke became upset when that white fuel was taken out of the vehicles by another employee. The suggestion being that that meant the claimant could not, so easily, take the fuel.

14. However, it cannot have been clear to Mr Thomas of what wrongdoing the claimant had actually been guilty.

15. Ultimately the claimant was brought to the investigative hearing with Mr Ceirion Davies on 19 April 2018 accused of:

- (1) taking diesel fuel belonging to the company to use for his own purposes without permission or consent, which amounted to theft;
- (2) knowingly storing diesel fuel in cans in non-designated areas without the company's knowledge or consent, which was a serious breach of health and safety and a dangerous hazard in the workplace; and
- (3) the claimant knowingly brought diesel fuel in cans into the workplace and stored them in a non-designated area without the company's knowledge or consent.

16. The substances in the cans that the claimant stored at his workbench contained gas oil, engine oil, hydraulic oil, water and antifreeze.

17. There was never any testing of the claimant's vehicle to see what fuel was in his van. Indeed, Mr Fleming refused to test the oil in the claimant's van when the claimant asked him to do so. No-one ever saw the claimant put fuel, that he had taken out of any machines in the Widnes yard, directly into his van. All that could be said is that he was seen putting fuel from cans into his vehicle immediately outside the office. Photographs were taken of him doing so. Mr Fleming, who took the photographs, did not immediately challenge the claimant.

18. It is not clear whether the respondent's managers knew whether the meeting on 19 April was an investigatory hearing or the actual disciplinary hearing. Mr Ceirion Davies was not an employee of the respondent (he seemed to be an agent) and ultimately Mr Thomas issued the letter dismissing the claimant. The claimant was given the impression that there would be another meeting with Mr Thomas, but Mr Thomas never met with him after the 19 April meeting with Mr Davies.

19. Having noted that the accusations came from Mr Fleming, who had secretly taken the photographs referred to in clause 17 above, it is noteworthy that the statements accusing the claimant of wrongdoing are all signed by Mr Fleming. They are at pages 39 and 40 of the bundle. Mr Fleming's note on 9 April 2018 at page 39 suggests that he was informed by Barry Swift of the allegation that he (the claimant) was stealing company fuel, but no statement was taken from Mr Swift which Mr Swift

signed confirming that that was the case. The second statement at page 40 is signed by Mr Fleming and confirms, according to Mr Fleming, that Barry Swift refused to sign any statement on the grounds that "he feared for his home".

20. After that meeting on 19 April a further statement was taken from David Deviney, from whom I heard evidence, dated 20 April 2018 which suggests only that he saw Mr Burke filling 20 litre containers from the brand-new Wacker Neuson machines and storing the drums in the corner. Mr Deviney, however, confirmed that he did not see the containers moved "to Brian's vehicle" (the claimant). It is in that statement, signed by Mr Deviney, that Mr Burke allegedly "went mad" at Jonathan Deviney (Mr David Deviney's cousin) because he [Mr Jonathan Deviney] had already filled up a new machine with red diesel before the claimant had taken out the white diesel. That was not investigated.

21. Mr Burke gave an explanation for having diesel drums on the site and why they had white diesel in them. He produced some Sainsbury's receipts from 2017 and not 2018. He told Mr Davies that Mr Malcolm Guest had filled the drums for him. Mr Guest had a vehicle dismantling company.

22. Neither Mr Davies nor Mr Thomas or anybody else at the respondent company interviewed Mr Guest or telephoned him to ask if that was true. They had Mr Guest's statement stating that he had provided the fuel to the claimant in the following terms:

"I gave Brian Burke white diesel as a thank you gesture in return for his help and his advice regarding my machinery."

23. Mr Thomas dismissed that explanation out of hand, on the basis that Mr Guest was the claimant's friend.

24. Mr Thomas did not ask his managers, at Widnes, whether Mr Burke had permission to have the drums on site but they were not hidden. They could be seen next to the claimant's workbench. The claimant explained that he needed those drums near his workbench to carry out his work efficiently.

25. I saw a number of pictures of the claimant's workbench showing various drums in place, but those photographs were never shown to the claimant during the process. The claimant told me that some of the drums were not his, in particular the plastic jerry can.

26. Mr Thomas' own evidence, with regard to those drums, suggests confusion. He says that after speaking to Mr Ceirion Davies he went to the Widnes site, checked what was in the jerry cans and found that some of them contained a mixture of white and red diesel. The only source of red diesel was the fuel kept on site. However, it seems that the claimant was never accused of stealing red diesel but only white diesel.

27. Without speaking to the claimant or giving him the opportunity to have a full disciplinary hearing, Mr Thomas then took the word of Mr Ceirion Davies that Mr Ceirion Davies thought the claimant was stealing fuel, and wrote a letter dismissing the claimant. Mr Thomas' said that Mr Davies was not an employee of the respondent and therefore could not dismiss the claimant. Therefore, it fell to Mr Thomas to dismiss him. However, Mr Davies' involvement was only as an investigator.

28. In that letter Mr Thomas suggested that he was not convinced by the claimant's explanations. But he had not given the opportunity to Mr Burke to answer the allegations directly at a meeting with Mr Thomas.

29. Mr Thomas told me that he was satisfied that the claimant had been taking fuel from company excavators, storing it in drums on site and then filling his own vehicle from the same drums.

30. Mr Thomas dismissed the claimant for gross misconduct without considering any other sanction, and without considering the claimant's unblemished record.

31. With regard to the storage of the drums, I find that both Mr Davies and Mr Swift gave permission to the claimant to place the drums in the area where the claimant was going to work so that he had ease of access. There was no designated storage area on the site for fuel drums to be placed. Mr Thomas had little idea what was being stored at the Widnes site because he was based at Holywell.

32. The respondent's health and safety regime was not a strict one. For example, the management allowed the workers to smoke on site in an area where fuels were stored.

33. The meeting on 19 April 2018 was described by Mr Ceirion Davies as an "informal meeting". At no time was the CCTV checked in order to see whether there was further evidence of Mr Burke taking fuel.

34. There were no dates given to Mr Burke as to when he was supposed to have taken the fuel and Mr Deviney could not remember any dates, and indeed only suggested that he had seen the claimant put fuel in the cans. Mr Deviney had left it for a few weeks before he told management about what he thought he had seen.

35. The trainee who worked next to the claimant was not interviewed, although Mr Thomas suggested in evidence to me (although it was not contained in his witness statement) that he had spoken to the trainee and the trainee did not want to get involved. If that were the case, he never told the claimant that.

36. Mr Thomas' final explanation as to why he dismissed the claimant was that everybody knew that the claimant was taking fuel. That statement was not backed up by specific dates and times when these things were alleged to have happened. Finally, Mr Deviney accepted that he never saw the claimant put diesel from the drums into his vehicle. He only saw the claimant put diesel from machines into the drums and those drums were not hidden. Those are the facts.

### **The Law**

37. With regard to the wrongful dismissal claim, I have to be convinced, if the respondent is to successfully defend this claim, that the employee actually committed the offence, namely stealing fuel and/or storing fuel without consent on the balance of probabilities.

38. With regard to the unfair dismissal claim, the burden is, initially, upon the respondent to prove that they have dismissed for a potentially fair reason as set out in section 98(1) and (2) of the Employment Rights Act 1996. In particular that they have

dismissed for redundancy, capability, some other substantial reason or, as in this case, conduct.

39. If I find that the burden has been satisfied and that the respondents have shown that they have dismissed for gross misconduct then I have to go on to consider the issues as set out in section 98(4) of the Act, and go on to consider whether the dismissal is fair or unfair. In that regard I have to consider the size and administrative resources of the undertaking and whether the employer acted reasonably or unreasonably in treating the circumstances as a sufficient reason for dismissing the employee, and I must determine that in accordance with equity and the substantial merits of the case.

40. I must also consider whether the sanction of dismissal is a sanction within the band of reasonable responses, accepting that the band is very wide.

41. I must not substitute my views for the views of the dismissing officer.

42 If I think that there were procedural flaws under the principles as set out in the case of **Polkey** and consider, despite the procedural difficulties, the claimant would have been dismissed in any event, or there was a percentage chance the claimant would have been dismissed if a proper procedure had been followed, then I must reduce the level of compensation accordingly.

43 I have not received submissions from either party with regard to contributory fault, but I have considered it.

44 However, applying the law to the facts of this case, I came to the conclusion that the process followed by the respondents was so woefully inadequate I could not, firstly, find that the claimant would have been dismissed in any event or secondly, that his conduct would require me to reduce his compensation for contributory fault.

45 Indeed, the respondents' errors in dealing with this matter are so serious that it would be improper of me, when considering the equity of the case and the substantial merits of the case, to find that the claimant had been fairly dismissed.

46. There was clear evidence that Mr Fleming did not think much of the claimant as an employee and that much of the evidence produced to both Mr Davies and Mr Thomas came from Mr Fleming.

47. None of the people who accused the claimant of wrongdoing were interviewed by Mr Thomas, who ultimately turned out to be the dismissing officer. Explanations that Mr Burke gave were not considered by Mr Thomas and compared with what Mr Fleming and Mr Deviney had said.

48 All that happened was that Mr Davies had an informal meeting with the claimant where there was a discussion as to allegations being made. Mr Davies then told Mr Thomas that he thought the claimant had stolen fuel. Mr Thomas, without further ado, wrote to the claimant telling him that he was dismissed. The claimant was shocked by his dismissal because he thought he would have a full disciplinary hearing before Mr Thomas so that he could properly defend himself.

49. The health and safety issues were make weight accusations to bolster the case against the claimant. There was no attempt to seek evidence that might support the claimant's version of events by Mr Davies. The company's health and safety processes were inadequate. Mr Burke had permission from members of management to store fuel. Indeed, he could not do his job without storing those fuels yet he was criticised for doing so. That action was, in part, another reason for dismissing him. That was unfair.

50. Mr Swift's allegations were not set out in a signed written statement. The allegation by Mr Fleming that Mr Swift had told him (Mr Fleming) that he was fearful of retribution from the claimant was not investigated by the respondents in order to check whether the claimant had put pressure on Mr Swift so that he refused to sign a statement. The evidence for that came, solely, from Mr Fleming.

51. Mr Deviney's accusation, which occurred after the meeting of 19 April, that he had seen the claimant fill up cans from the Wacker Neuson machines does not inevitably mean that the claimant was stealing fuel. Much more investigation needed to be done, either by Mr Davies or Mr Thomas. No investigation took place.

52. In those circumstances Mr Thomas may have had a belief of the claimant's guilt and that belief may have been genuine but he could not have held that belief on reasonable grounds as there was no reasonable investigation. Mr Thomas acted on rumour and supposition which were never fully looked into.

53. When it came to the appeal by Sally Mannion, she considered the paperwork, looked at the letter from Mr Burke appealing the decision to dismiss and then rubberstamped Mr Thomas' decision.

54. None of the issues that had gone wrong in the initial investigation and dismissal process were put right by Sally Mannion. Moreover, Mr Burke's clean disciplinary record and relatively long service was not taken into account by either Mr Thomas when dismissing or Ms Mannion on appeal. All the above means that the dismissal was unfair.

55. Turning now to the wrongful dismissal claim, I could not come to a conclusion, on the balance of probabilities, that Mr Burke was guilty of theft. There were too many confusing aspects to the evidence for me to arrive at that conclusion. The claimant's claim succeeds in that regard.

56. Because this matter took two days and because there was the potential for an adjournment application having to be made by the respondent, application was made by counsel for the claimant for costs thrown away in this matter on the basis that the respondent and/or its solicitor had acted unreasonably.

57. However, having considered all the issues relating to the preparation of this case, including the late service of the witness statements by the respondents' solicitors and the late consideration that the case may not be completed in the one day initially allocated to it, I concluded that this claim was always going to take two days to hear. Thankfully we have been able to deal with the matter within a relatively short period of time because the first hearing date on 14 January 2019 was followed very quickly by a second day on 30 January 2019 to complete the liability hearing.

58. In those circumstances no costs have been wasted nor has either party been put to extra costs with regard to this case. It would be wrong, exercising my discretion, to order the respondents to pay the claimant's costs.

59. I therefore dismiss the cost application.

60. The matter will now move on to the remedy hearing. If the parties settle this claim, they should inform the Tribunal Administration as soon as possible, but if there is no settlement then there will be a hearing on 13 March 2019 as set out in the header to this judgment.

61. I direct that fourteen days prior to the remedy hearing the claimant shall lodge with the Tribunal and serve upon the respondent an updated Schedule of Loss and seven days prior to that hearing a counter Schedule of Loss shall be lodged with the Tribunal and served on the claimant if the respondents are so advised.

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Employment Judge Robinson

Date: 21 February 2019

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

1 March 2019

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