



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120218/2018

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Held in Glasgow on 15 and 16 January 2019

Employment Judge: Lucy Wiseman

10 **Mr Kryzstof Jamula**

**Claimant
In Person**

Springfield Properties plc

**Respondent
Represented by:
Mr G Miller -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on the 17 September 2018 alleging he had been unfairly dismissed. The claimant asserted there had been insufficient consideration of the circumstances leading to the dismissal and of the fact he had long, and blemish free, service with the respondent. The claimant's position was that he had not done what was alleged and that there had been a language barrier which the respondent failed to consider.

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2. The respondent entered a response admitting the claimant had been dismissed for reasons of gross misconduct, but denying the dismissal was unfair.

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3. An Interpreter, Ms Moore, provided interpretation services for the claimant.

E.T. Z4 (WR)

4. The claimant had been represented by a Mr Jablonski, but he did not appear for this Hearing. The claimant did not consider Mr Jablonski qualified to represent him at a Hearing. I questioned whether the claimant wished to proceed to represent himself, or whether he wished time to seek an alternative representative. The claimant, having ascertained it was not unusual for people to represent themselves at Employment Tribunal, confirmed he was content to proceed.
5. I allowed a period of 20 minutes for the claimant to familiarise himself with the file of documents produced for the Hearing.
6. I heard evidence from Mr Michael Reilly, Contracts Manager, who took the decision to dismiss; Ms Heather Henderson, Group HR Director; Mr Andrew Todd, Group Director and General Counsel, who heard the appeal; and from the claimant and his son.
7. I was also referred to a file of documents. I, on the basis of the evidence before me, made the following material findings of fact.
8. I considered it would be helpful if I made clear for the claimant, at this stage, that it is not my role to determine whether the claimant is guilty or innocent of the allegations against him. I understand the claimant's position is that he is innocent of the allegations, and I also understand this is of great importance to him. However, the question I must determine is not whether I would have dismissed the claimant, but whether the decision of the respondent to dismiss him was fair and reasonable in the circumstances.

Findings of fact

9. The respondent is involved in the building of houses on 24 active sites across Scotland. It employs approximately 625 employees.

10. The claimant commenced employment on the 30th August 2010 and was employed as a Telescopic Forklift Driver. The claimant earned £2658 net per month.
- 5 11. The claimant was working on a site known as The Wisp on Saturday 9th June. The site comprised a compound where the car park, canteen, facilities and office were based, and a building site where houses were being built.
12. The claimant's son arrived, by car, on site at approximately lunchtime to bring him some lunch. The claimant had also asked his son to bring some old oil filters and engine oil so he could dispose of them in the skip on site.
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13. A security guard, Mr Osman (who worked for a security company providing services to the respondent) noticed the claimant's forklift parked in the car park behind a silver car, and he noticed 3/5 black containers being moved from the forklift and put in the car.
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14. Mr Osman went to investigate and asked the claimant if he was stealing diesel. There is tank of red diesel on site (belonging to a sub contractor) for use with the machinery operated on site.
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15. The claimant thought Mr Osman was joking and so he replied "yes". Mr Osman asked to look in the boot. The claimant opened the boot. Mr Osman took a photograph and asked him where the diesel was. The claimant realised Mr Osman was serious about the matter.
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16. Mr Osman told the claimant and his son to wait whilst he went to phone the Police. The claimant and his son waited approximately 10 minutes and then the claimant told his son to leave the site.
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17. Mr Osman returned to take a photograph of the car and the mini skip which had been on the claimant's forklift.
18. Mr Osman tried unsuccessfully to stop the claimant's son leaving in the car.

19. The Police did not visit the site that day and have not ever spoken to the claimant about these events. The claimant continued working, finished his shift and left site.
- 5 20. Mr Osman completed the Daily Occurrence Book (page 53) noting that *“when I came I saw forklift driver carry big recycle bin and stop behind the offices near silver car and another guy. He took about 3 big black gallons and when asked him this is full he said yes and he said to me be quiet and not tell anyone. And when ask him to get the fuel back he said to fuck off and he tell the other guy to run away. When I try to close the gate he ran quickly and go. I took a picture of the registration of the car.”*
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21. Mr Scott Walker, Site Manager, completed an Incident Report (page 54) on the 12th June attached to which was a statement from Mr Osman. The statement (page 55) included an allegation that the claimant, when challenged to open the boot, had refused to do so, become angry and stated *“No you fucking black bastard”*.
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22. Mr Andrew Simpson, Contracts Manager, received an email from Mr Barry McGrory, Site Manager for a sub contractor, dated 12 June (page 58). The email reported that Mr McGrory had reason to believe that his diesel bowser had fuel removed from it over the weekend. He was not 100% sure of this and would check, but noted that no plant was needing fuel at the weekend because they had all been filled by close of play on the Friday.
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23. Mr Simpson interviewed the claimant and took a statement from him on the 13th June (page 59). The claimant’s position was that his son had come to the site to bring him lunch and also some old oil filters and old engine oil to get rid of in the site skip. The security guard had come over to ask if he was stealing diesel. The claimant had thought he was joking, so he answered yes. The guard had asked him to open the boot, so he had done this, and the guard took a photograph. The only things in the boot were the oil filters, the engine oil and other rubbish. The guard said to him *“where is the diesel you Polish bastard?”* The claimant did not reply to this. The claimant by this time realised
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the guard was not joking and that he was angry. The claimant thought the guard was angry because there had been an altercation on site two days previously when the claimant's son had dumped an old washing machine on site for his father to dispose of the next day. The claimant maintained that he had not stolen any diesel and had not made a racist comment.

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24. Mr Simpson and Mr Walker interviewed Mr Osman and took a statement (page 62). Mr Osman maintained his version of events and maintained he had only taken two photographs, one of the car registration and one of diesel in the bottom of the mini skip which the claimant had had on his fork lift. Mr Osman confirmed the claimant's son had dropped off a washing machine at the site on Thursday, but denied there had been any altercation.

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25. The claimant was suspended by letter of the 13 June (page 65).

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26. Mr Simpson interviewed Mr McGrory on the 19 June and an email confirming the questions put to Mr McGrory and his responses was produced at page 66. Mr McGrory confirmed he had been out working with some operatives on Saturday, and none of the machines had been filled from the bowser. The bowser was checked on Monday morning and found to have fuel missing. He had checked with the operatives whether anyone had used fuel from the bowser, and no-one had done so. Mr McGrory confirmed that at the time of reporting this matter to Mr Simpson, he had not been aware of the incident involving the claimant and Mr Osman.

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27. The claimant was, by letter of the 19 June (page 67) invited to attend a disciplinary hearing. The letter set out the allegations, which were that (1) the claimant was involved in the theft of fuel from The Wisp site on Saturday 9th June; (2) the claimant behaved in an aggressive and threatening manner towards a security guard on Saturday 9th June and (3) the claimant racially abused a security guard on The Wisp site on Saturday 9th June.

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28. The letter set out the basis for these allegations and included copies of all relevant paperwork (as above) and a copy of the CCTV footage.

29. The disciplinary hearing took place on the 21st June. The hearing was chaired by Mr Michael Reilly, Contracts Manager and Ms Diane Kemp, HR, attended to take notes. The claimant attended without a representative.
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30. Mr Reilly played the CCTV footage and stopped at various points to ask the claimant what he was doing and why he had, apparently, been making trips from the compound to the site. There was some confusion on the claimant's part about timings, where the oil filters and old engine oil were and when he had taken them to the skip. The claimant agreed he had been the only employee on site at the time. The claimant subsequently accepted both his son and step son (who is a youngster and who did not leave the car) had been on site.
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31. Mr Reilly also noted a pinky/reddish substance in the photograph of the bottom of the mini skip and concluded this was red diesel. The claimant's suggestion that it was from the oil filters or engine oil was not accepted because that substance would have been black.
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32. Mr Reilly asked Ms Kemp to email Mr Simpson and Mr Walker after the disciplinary hearing for clarification regarding (i) the time the security guard took the photo of the mini skip on the forklift and (ii) whether the security guard could recall what the claimant's son was wearing. Mr Reilly also wanted to know whether anyone had checked the compound and site large skips for the bag of oil filters and old engine oil that the claimant said he had skipped.
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33. The claimant sought to argue that 1000 litres of diesel had previously been stolen and that any recently missing diesel had to be seen in that context.
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34. Mr Simpson responded by email (page 73) to confirm the security guard was out of the country because of a family bereavement, so could not answer the questions. He also confirmed the skip had not been checked because they had not learned until Wednesday of the incident, and by then it was not possible to go through what was a very large skip.

35. Mr Reilly, in reaching his decision to dismiss, placed weight on the fact the claimant's version of events was not consistent: he had stated the oil filters and old engine oil were in the boot of the car when the security guard approached, but then said he had taken those items to the skip. The claimant had also not been able to adequately explain why, if he had items to skip, he had not used the skip in the compound. Mr Reilly noted the bowser was located on the site. Mr Reilly also felt the body language demonstrated on the CCTV footage did not support the claimant's position that the encounter with the security guard had initially been "jokey".
36. Mr Reilly notified the claimant by letter of the 26 June (page 74) of his decision to summarily dismiss. Mr Reilly set out fully the reasons for dismissal which included his finding the claimant had been unable to satisfactorily explain the reason for the number of forklift trips he had made, the evidence of the security guard and the CCTV footage.
37. The claimant's employment with the respondent ended on the 26th June 2018.
38. The claimant appealed against the decision to dismiss. The letter of appeal (page 77) referred to his long and blemish free service; the language barrier; the fact others could have stolen the diesel that day and the fact he was absolutely innocent.
39. Ms Henderson, Group HR Director, notified the claimant by letter (page 80) and by telephone, of the date of the appeal hearing and that an Interpreter had been arranged. An employee of the respondent who was a Polish speaker with excellent English, and who worked on a site in the North of Scotland, was asked to attend the appeal hearing and interpret for the claimant.
40. The appeal hearing was chaired by Mr Andrew Todd, Group Director and General Counsel. He, in advance of the hearing, was provided with copies of all relevant documentation and the CCTV footage. Mr Todd considered it

important, in circumstances where the claimant, in his appeal, stated he had not understood the original hearing, to re-hear the case.

41. A note of the appeal hearing was produced at page 83.

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42. Mr Todd ensured at each stage of the hearing that the claimant understood and asked whether he had any questions. Mr Todd went through the claimant's version of events and addressed any inconsistencies; he also viewed the CCTV footage with the claimant, stopping at appropriate places to ask questions.

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43. Mr Todd concluded there were still inconsistencies in the claimant's version of events, particularly with regard to what he had done and the purpose of the various trips he had made. Mr Todd took into account the statement of the security guard, the daily occurrence book, the photographs and the fact the Police had been contacted against the claimant's version of events which he found was inconsistent in places. Mr Todd concluded the statement of the security guard was stronger and supported by the fact diesel was missing.

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44. Mr Todd concluded the claimant had done what was alleged. Each of the allegations amounted to gross misconduct which would lead to dismissal. Mr Todd wrote to the claimant by letter of the 6th July (page 95) to inform him of the decision.

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45. The claimant has, since dismissal, been unable to find another permanent role. The claimant confirmed he had applied for many jobs, but he could not provide a reference from the respondent and accordingly his applications had not proceeded. The claimant has registered with a number of agencies and has been undertaking agency work. He estimated he has worked for approximately half of the time between the date of dismissal and this hearing.

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Credibility and notes on the evidence

46. The claimant told the tribunal that his partner had made pierogi for his lunch so he had phoned his son to ask him to bring some to work for him. The

claimant had also asked his son to bring some old engine oil and oil filters so they could be disposed of in the skip. His son duly arrived and parked in the car park area of the compound. He joined his son and had his lunch.

5 47. The security guard came over and asked “are you stealing diesel?”. The claimant thought he was joking and so he jokingly replied “yes”. The security guard said he was going to phone the Police, and went off to do that, returning a few minutes later. The claimant now appreciated the security guard was serious. The guard told the claimant to wait until the Police arrived.

10 48. The guard asked him to open the boot of the car, and he complied. The oil filters, engine oil and some rubbish were in the boot. The guard asked “where is the diesel you took you Polish bastard?” and the claimant said his response had been a joke.

15 49. The guard, who was a tall man, was annoyed and stressed, and pacing about. The claimant is not a big man and he found this a bit intimidating. The claimant decided that as the Police had not arrived, it would be better if his son left.

20 50. The guard stood behind the car as the claimant’s son was reversing. He put his hands on the boot and then took a photograph of the registration number. The guard tried to close the compound gate to prevent the car from leaving, but the claimant’s son managed to leave.

25 51. The claimant continued to work the remainder of his shift. He expected the Police to arrive but they did not do so.

30 52. The claimant told the tribunal that he had been making constant trips to the skip that day, and could not be accurate about the number of trips or the contents of the mini skip. The claimant raised a number of issues with Mr Reilly which he felt had not been considered: (i) 1000 litres of diesel had previously gone missing, and the circumstances of what had happened should be considered within this context; (ii) there was more than one camera in the compound/site and he had asked for the CCTV from these cameras to

be considered; (iii) there were other employees on site over the weekend who could have taken the diesel; (iv) the guard had taken a photo of the inside of the boot and the claimant questioned why this had not been provided; (v) how could Mr Reilly assess the claimant's language ability; (vi) the claimant had been with the respondent for 8 years and was a good employee: he questioned why he had not been given the benefit of the doubt and (vii) the Interpreter provided for the appeal hearing was an employee of the respondent so he was not independent and not professional.

53. I found the claimant to be an entirely credible and reliable witness. I accepted his explanation and, in particular, his explanation of why there were inconsistencies in his evidence. However, I must make it clear that the test is not whether I believe the claimant or whether I would have dismissed him. The test is whether the respondent's decision was reasonable in the circumstances and whether the respondent had reasonable grounds to sustain their belief that the claimant acted as alleged.

54. The claimant's son also gave evidence which supported what the claimant had said about bringing lunch to the site for his father, and also bringing the oil filters and engine oil to be put in the skip. The claimant's son also described the exchange with the security guard. The claimant's son was a credible witness.

55. I found the respondent's witnesses to be credible and reliable. They each gave their evidence in a straightforward manner and Mr Reilly and Mr Todd were able to explain the reasons for the decisions they made. I accepted that Mr Reilly satisfied himself that the claimant understood what was being said at the disciplinary hearing, however I balanced this with the fact the claimant's understanding was limited and he "lost the thread" of some discussions.

56. The respondent argued the claimant had failed to mitigate his losses in circumstances where there is a skills shortage in the construction industry. The claimant did not dispute that as a qualified and experienced forklift driver there were many jobs for which he could apply. Indeed, the claimant had

applied for many jobs, but his difficulty was that he could not produce a reference from the respondent. In those circumstances the claimant had been undertaking agency work and hoped he could rely on a reference from an agency (or placement) in the future.

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57. I was entirely satisfied the claimant had done all he could to mitigate his losses in the circumstances. I considered the respondent's submissions regarding this matter failed to address the fundamental point that without a reference, the claimant's job application would not be successful.

10 **Respondent's submissions**

58. Mr Millar submitted the claimant had been dismissed for reasons of conduct which was a potentially fair reason for dismissal in terms of section 98(2) Employment Rights Act. The respondent did not need to demonstrate the claimant was guilty of the alleged misconduct: they were required to demonstrate that the reason for dismissal related to the claimant's conduct.

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59. Mr Millar referred to the respondent's Employee Handbook which made clear the types of conduct regarded as gross misconduct and the disciplinary rules and procedures.

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60. The **British Home Stores Ltd v Burchell 1978 IRLR 379** test was applicable in this case. Mr Millar noted the claimant insisted he was innocent and had not done what was alleged, however, he submitted the question of whether the claimant was guilty or innocent was not relevant for the purposes of determining the fairness of the dismissal. The tribunal required to be satisfied that the respondent believed, and had reasonable grounds for believing, that the claimant was guilty of the misconduct at the time the decision to dismiss was taken.

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61. Mr Reilly and Mr Todd had both given clear evidence regarding their view that the claimant was guilty of the allegations. The respondent had had regard to the statement of the security guard Mr Osman, the fact he notified the Police and the fact the sub contractor, independently of these events, reported the

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fact diesel was missing from the bowser. Mr Millar submitted the respondent had carried out a reasonable investigation and, based on that investigation they had reasonable grounds upon which to sustain their belief. The respondent, it was submitted, was entitled to place weight on the fact there were a number of inconsistencies in the claimant's evidence.

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62. Mr Millar referred to **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439** where the Employment Appeal Tribunal set out that the question for the tribunal to ask is whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might adopt. If it does then the dismissal is fair: if it does not, then the dismissal is not fair.

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63. Mr Millar invited the tribunal to have regard to Mr Reilly's evidence that given the seriousness of the offences, he felt trust had been broken. He had considered a penalty of less than dismissal, but had not considered this appropriate in circumstances where each of the three allegations were instances of gross misconduct.

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64. The claimant did appeal against the dismissal and his appeal was largely based on the language barrier. The respondent provided an interpreter for the appeal, re-heard the evidence against the claimant and gave him an opportunity to present his defence. Mr Todd concluded there were inconsistencies in the claimant's version of events.

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65. Mr Millar invited the tribunal to find the dismissal was fair in all the circumstances, and he invited the tribunal to dismiss the claim. If, however, the tribunal found the dismissal to have been unfair, it was submitted any award of compensation should be considerably reduced on the basis of **Polkey** and contributory conduct. Mr Millar further submitted the claimant had failed to mitigate his loss in circumstances where there is a skills shortage on sites.

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Claimant's submissions

66. Mr Jamula confirmed he did not wish to make a submission. He had, during his evidence, covered the points he wished to make, and did not want to simply repeat them at this stage.

Discussion and decision

5 67. I had regard firstly to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) or (2); if the employer is successful at the first stage, the tribunal must
10 then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

15 68. Mr Millar referred to the *Burchell* case and it is helpful to set out that it is the employer who must show the reason for dismissal. The Employment Appeal Tribunal in the *Burchell* case stated a three-fold test applies. The employer must show that (i) it believed the employee was guilty of the misconduct; (ii) it had in mind reasonable grounds upon which to sustain that belief and (iii) at the stage at which that belief was formed on those grounds, it had carried out
20 as much investigation into the matter as was reasonable in the circumstances.

25 69. I asked whether the respondent had shown the reason for dismissal. I noted the respondent admitted dismissing the claimant and asserted the reason for dismissal was because of misconduct. I also noted the claimant did not suggest there had been any other reason for his dismissal. I, having had regard to the points set out below, accepted Mr Reilly and Mr Todd believed the claimant was guilty of the alleged misconduct and that this was the reason for dismissal. I was accordingly satisfied the respondent had shown the
30 reason for the claimant's dismissal was conduct, which is a potentially fair reason falling within section 98(2) Employment Rights Act. I must now continue to determine whether dismissal for that reason was fair or unfair.

70. There was no dispute regarding the fact an incident occurred on Saturday 9th June when the claimant and his son were approached on The Wisp site by the security guard who questioned whether diesel was being stolen. Mr Simpson, Contracts Manager, carried out an investigation into the incident. Mr Simpson interviewed the security guard Mr Osman; interviewed the claimant; obtained copies of the Daily Occurrence Book completed by Mr Osman at the time of the incident and the photographs taken by him and had a copy of the email from Mr McGrory and the questions and answers subsequently provided by him.
71. Mr Simpson did not investigate the skip to identify whether the oil filters and engine oil referred to by the claimant were in it. He explained the incident had occurred on a Saturday, and he had learned of it on the Tuesday, and by that time it was too late to go through the contents of a very large skip.
72. Mr Reilly identified some questions he wished to have clarified by the security guard, but Mr Osman was out of the country attending a family funeral and so the questions could not be addressed.
73. The one issue which was not investigated by either Mr Simpson or Mr Reilly was the claimant's (consistent) position throughout the disciplinary process that the security guard had taken a photograph of the inside of the boot of the car. Mr Simpson could have raised this matter with Mr Osman during the investigation. Unfortunately by the time of the disciplinary hearing Mr Osman was unavailable.
74. The claimant at this hearing raised a number of points regarding the investigation. He suggested there had been a previous theft of 1000 litres of diesel, and the missing diesel on this occasion ought to be seen in that context. The claimant did not elaborate on why this was relevant: there was, for example, no suggestion the same security guard had been involved. I could not in the circumstances accept it would have been reasonable for the respondent to investigate this matter, or view the incident in the context of the earlier incident.

75. The claimant suggested there were a number of security cameras on the site/compound, and he wanted to have the CCTV footage from all of the cameras viewed. Mr Todd, at the appeal, stated he would check this, but he did not come back to the claimant to confirm one way or another. The respondent's consistent position, however, was that there was only one camera. I considered, on the one hand, it may be surprising if there was only one camera on the site/compound. However, on the other hand, the CCTV footage which the respondent obtained was wide in its coverage and captured the claimant in the car park at the compound and on the forklift on site. I concluded, on the evidence before me, it was reasonable for the respondent to recover the CCTV footage from the one camera available to them.
76. The claimant suggested there were others on site who could have stolen the diesel. The claimant did not suggest who those others may have been, and he could not identify the one other person shown on the CCTV footage. I noted the claimant accepted he had been the only employee on site at the time. Clearly there may have been sub contractors on site, but without information from the claimant, the respondent could not investigate this matter.
77. The onus on the respondent is to carry out as much investigation as is reasonable in the circumstances of the case. I was satisfied the respondent had carried out a reasonable investigation inasmuch as they interviewed the relevant people involved, obtained relevant documents and obtained the CCTV footage.
78. I must next decide whether the respondent had reasonable grounds, based on the investigation, to sustain their belief the claimant was guilty of the allegations. The first allegation related to the theft of fuel; the second allegation related to behaving in an aggressive and threatening manner towards the security guard and the third allegation related to making a racist comment.

79. Mr Reilly was faced with a situation where he had conflicting statements from the security guard and the claimant regarding what had happened on the 9th June. The security guard's version of events was supported by the CCTV footage and the separate email from Mr McGrory advising the respondent of diesel taken from the bowser. Mr Reilly attached less weight to the claimant's version of events because there were a number of inconsistencies in his position. For example, the claimant initially told Mr Reilly (when viewing the CCTV) that at 12.45 when the forklift could be seen leaving the compound and going into the site with a mini skip on the end of the boom, that the oil and filters were in the skip at that time. However, the claimant subsequently stated that when the security guard, who came on site at 13.02 approached him and asked about stealing diesel and asked him to open the boot, the oil filters and engine oil were in the boot at that time.
80. The claimant was also unable to explain why he had not used the skip in the compound, and he was unable to identify a person in a hi-viz vest who appeared to be walking from the compound to the site and back again whilst the claimant was on the fork lift.
81. The claimant also maintained he had stopped to have lunch when his son arrived, but the CCTV showed him leaving his son twice to go into the site on the forklift.
82. Mr Reilly also placed weight on the fact the photograph of the skip showed a reddish/pinky colour on the bottom of the skip. The claimant explained this would have been from the engine oil. Mr Reilly could not accept that explanation in circumstances where engine oil would be black and the diesel used on site is a reddish/pink colour (red diesel).
83. Mr Reilly concluded, because of the above inconsistencies, that he preferred the security guard's version of events. He concluded he could not trust the claimant.

84. I was satisfied, based on the evidence before Mr Reilly, that he had reasonable grounds upon which to sustain his belief that the claimant had done what was alleged: that is, that he had taken diesel, he had acted in an aggressive manner towards the security guard and he had made a racist comment to the security guard. I acknowledged this was very much – particularly in relation to the second and third allegations – a case of Mr Osman’s word against the claimant’s word, but for the reasons set out above, I was satisfied it was reasonable for Mr Reilly to prefer Mr Osman’s version of events.

85. I must now consider whether it was fair or unfair to dismiss the claimant for these reasons. I referred to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the Employment Appeal Tribunal made clear that an employment tribunal should not substitute its own opinion for that of the employer. The test is not whether, in this case, I would have dismissed the claimant. My function is to decide whether in the particular circumstances of this case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if it falls outside the band it is unfair. This test recognises that, in similar circumstances, not all employers may dismiss an employee: some may dismiss whilst other employers may impose a warning. The test is whether the employer’s decision to dismiss falls within a band of reasonable responses which a reasonable employer might have adopted.

86. The claimant argued in this case that dismissal was not fair because he had not done what was alleged. In criminal cases (for example, if the claimant had been interviewed by the Police and charged with theft of diesel from the site) the prosecution would have to demonstrate to the Sheriff that it was beyond reasonable doubt that the claimant did do what was alleged. This does not apply in the employment tribunal. The respondent does not need to show the claimant did steal the diesel. I have set out above that the respondent must show they carried out a reasonable investigation and, based on that

investigation, they had reasonable grounds to sustain their belief (that is, their suspicion) that the claimant did steal the diesel.

5 87. I acknowledged the claimant will feel much aggrieved if he did not in fact steal the diesel. However, the claimant's guilt or innocence is not the question for this tribunal. I have set out the test above, and I was satisfied the respondent had reasonable grounds upon which to sustain their belief the claimant was guilty of the alleged misconduct.

10 88. The claimant also argued there had been a language barrier and he was concerned he had not understood Mr Reilly or been understood by him. The claimant explained that he thought at the time he had understood, but he had lost the thread of discussion points. I understood from the claimant's evidence that his point was that in a second language one may think one has
15 understood what one has been told, or read, but in fact that may be incorrect. So, when Mr Reilly asked the claimant if he understood, he said yes because he thought he had understood, whereas in fact he had not.

20 89. I was satisfied the respondent took this point on board and addressed it in the appeal hearing when they arranged for an interpreter to be present. The claimant was critical of the interpreter because he was an employee of the respondent and not a professional interpreter. The claimant did not, however, suggest things had not been properly translated or that things had been omitted. The claimant responded to that point by asking how he would have
25 known this, but the claimant was represented up until this hearing and I was satisfied he had had an opportunity to explore these matters with his representative if he wished to do so.

30 90. The case of **Taylor v OCS Group Ltd 2006 ICR 1602** made clear that an appeal process may cure earlier errors in procedure. I concluded that if there was an error in the procedure during the disciplinary hearing because of the language barrier, then this error was cured on appeal by the fact the respondent arranged for an interpreter to be present to assist the claimant.

91. I asked whether the decision to dismiss was fair in the circumstances. I decided the decision to dismiss did fall within the band of reasonable responses in the circumstances of this case. The respondent believed the claimant had acted as alleged and trust between the employer and employee was broken: in those circumstances I concluded the dismissal fell within the band of reasonable responses and was fair. I decided to dismiss the claim.

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**Employment Judge: Lucy Wiseman:
Date of Judgment: 31 January 2019
Entered in register : 01 February 2019
and copied to parties**

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