EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4118269/2018

Held in Glasgow on 22, 23, 24 January and 26, 27 February 2019

Employment Judge: L. Doherty

Mr D Kinnaird	**Claimant** **Represented by:** **Mr A Baird - Trade Union Representative**
Toffolo Stirling Ltd	**Respondent** **Represented by:** **Mr. McGuire - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that;

(1) The claim of unfair dismissal is dismissed

(2) The claim of breach of contract is dismissed

(3) The claim of non-payment of holiday pay is dismissed.

REASONS

1. The claimant presented a claim of unfair dismissal, breach of contract and failure to pay holiday pay, on 5 September 2018.

Issues

Unfair Dismissal

2. The respondents accept that the claimant was dismissed but deny that the dismissal was unfair.

3. The issues for the Tribunal in connection with the unfair dismissal claim are firstly, whether the respondents have established the reason for dismissal, and secondly, if so, whether the dismissal was fair or unfair in terms of section **98 (4)** of the Employment Rights Act 1996 (ERA).

4. In the event the claimant succeeds in his unfair dismissal claim the Tribunal would have to consider the issue of remedy. The remedy sought his reinstatement.

Breach of contract claim

5. This is a claim in respect of the respondent's summary dismissal of the claimant without notice. The claim is for damages for the notice period. The issue for the Tribunal is whether the claimant was in fundamental breach of his contract of employment, justifying summary dismissal.

Holiday pay claim

6. The holiday pay claim relates to holiday pay which it is said by the claimant would have accrued in respect of leave he would have been entitled to during the notice period, had he been given notice of the termination of his employment.

7. The issue for the Tribunal is whether to the claimant is entitled to holiday pay on this basis.

The Hearing

8. For the respondent's evidence was given by Mr Kenneth Turnbull, the investigating officer, Mr William Smith, the dismissing officer, and Mr Harry Turnbull, who dealt with the appeal.

9. The claimant gave evidence on his own behalf.

10. The parties lodged a joint bundle of documents.

Findings in fact

11. The respondents are a company engaged in the manufacture of marble and granite for domestic and commercial purposes. The respondents are part of a wider group of companies, the Wallace Group, comprising of a number of companies. The group has a total of around 30 employees; the respondents have a smaller number of employees.

12. The claimant's whose date of birth is 11 December 1966, commenced working with the respondents on 1 March 1995, working in their marble factory. The claimant was promoted to the position of factory supervisor at some point between 1996 and 1997. This is a position of some responsibility and the claimant has first line management responsibility for the more junior members of staff in the factory.

13. When the claimant's employment came to an end his net salary was £469 per week, and his gross salary was £634 per week.

14. The respondent's Managing Director is Mr Kenneth Turnbull. His brother, Mr Harry Turnbull, is the Chairman of the Wallace Group of companies. Mr William Smith is the managing director of Stirling Stone, another of the companies within the Wallace Group.

15. The Wallace Group have been built up over the years by HK, who takes considerable pride in the culture of trust which he considers exists within the group of companies. The majority of the group's employees are of long standing, albeit the Group has experienced some employee issues over the years. The respondents have a number of policies and procedures in place, in particularly in connection with Health and Safety, but they do not have disciplinary policy.

16. The respondents, among other things, have a pick-up vehicle, which is used particularly for jobs which involve the delivery of materials.

17. The respondents also have a forklift truck, which is on occasion used to load the pick-up. The forklift truck operates on diesel. The respondents have a Drum in the yard, which is filled with red diesel, for use in the forklift. Red

diesel is less expensive than diesel purchased from a garage and can be used because the forklift is only driven internally within the respondent's premises.

18. Employees of the respondents working in the factory, including the claimant, were aware that the forklift was filled with red diesel from the Drum.

19. The claimant did not generally drive the pick-up. There was a strong odour of cigarette smoke and chemicals in the vehicle. The claimant has suffered from throat cancer, which meant that the smell in the pick-up was difficult for him to cope with. He complained about the condition of the pick-up on a number of occasions to management.

20. Employees have the use a company fuel card to fuel the pick -up when necessary. The claimant does not generally have use of the fuel card.

21. On the 19th of December 2017 the claimant did drive the pick -up. He had the company fuel card. He put fuel into the pick-up at the Shell garage close to the Respondents premises, and he also filled a container of fuel, which he paid for using the company fuel card. The claimant did not use the container of fuel to fill the forklift, as he subsequently claimed, or for any other legitimate business purpose.

22. Mr K Turnbull (KT) from time to time monitors the usage of fuel in the pick-up. There is a tracker in the pick-up which allows KT to ascertain exactly where it has travelled to, and the mileage it has completed. The receipts for purchase of fuel for the pick-up are submitted weekly with the timesheets, which are used to calculate staff's wages. In the event that fuel was purchased using the fuel card for use in the forklift or compressor washer in the factory yard, this would be marked up on the fuel receipt, when it was submitted along with the timesheets. The claimant was aware of this practice and had done this on previous occasions.

23. The respondents have a two-week Christmas shutdown, which commenced in 2017 on 22 December 2017. They were due to close at midday and go for a Christmas lunch.

24. On 22 December, two fuel receipts were given to KT along with the timesheets which had been handed in to the office. Both receipts were for fuel for the pick-up, purchased from a Shell garage close to the respondent's premises. The first receipt was dated 19 December, for the sum of £68.06; the second receipt was for purchase of fuel on 21 December, in the sum of £75.75.

25. KT was aware that the pick-up had not been used much between the 19th to 22nd December because of the type of work carried out during that period, and therefore he considered the two purchases of fuel of that value and in such close proximity was odd.

26. KT reviewed the tracking information between the two fuels purchases, which demonstrated that the fuel was being used at the rate of around 15 miles to the gallon. This was an extremely high level of fuel usage compared to the norm, and KT's suspicions were raised by this.

27. KT decided to go to the Shell garage and make enquiries, and he went there the at some point of the morning of 22 December, after he had received the receipts. He was told by the garage manager that there was CCTV footage of the transit being filled on 19 and 21 December, but that she was unable to let him see this. KT left without viewing the footage, however the garage manager phoned him a short while later when he was back in the office, to say that she had viewed the footage again, and she asked if he wished to see it. KT took up that offer and attended the garage and viewed the CCTV footage from 19 and 21 December.

28. KT was aware that on 19 December, the claimant and an employee, a Gary McCool, had driven to Glasgow, to drop off the pick- up with Tommy Wilson, another employee. KT knew that the pick -up had been loaded with materials and driven to Mr Wilson's house on the 19th so that Mr Wilson could commence work early the next morning. The claimant and Mr McCool had therefore both driven to Glasgow with the pick-up and the claimant's car. The pick-up was dropped off with Mr Wilson then both employees returned in the claimant's car.

29. The vehicles had followed each other to Glasgow, with the pick-up going first, as it was easier for the car to follow the pick-up This was the practice which was normally adopted by the respondent's when one vehicle was following the other, the slower vehicle going first.

30. KT expected that Mr McCool would have been driving the pick -up, but from the footage on 19th December he saw that it was the claimant who was driving the pick-up. He saw the claimant open the front door of the vehicle. He saw the claimant fill a container from the back of the pick -up with fuel and put it back into the pick -up.

31. KT also viewed the footage on 21 December, which showed Mr Wilson fill the pick -up with fuel.

32. KT was concerned about what he had discovered, and he went back to the office and discussed it with another director. He also took legal advice. This was at around 11.30 am. The respondent's premises were due to close for a two-week shutdown until 8th January at around 12 o'clock.

33. The claimant was at work on 22 December, but KT did not speak to him about what had happened on 19 December. He decided not to address the issue of 19 December with the claimant on 22 December, because there was little time before the premises closed for the Christmas shutdown, and he felt it would be callous to introduce it with the claimant just before Christmas. KT decided to leave matters until after Christmas, however he wanted the CCTV footage retained, and he had a letter typed to the manager of the garage asking that the CCTV footage was retained (page 102).

34. It was KT's intention to address matters with the claimant on 8 January, and having taken advice, he had a letter drafted dated 8 January, which advised that the claimant he was suspended, pending the company's investigation into an allegation of the misuse of the company fuel card.

35. The respondents reopened on 8 January 2018. The claimant attended the factory early that morning, and unfortunately stood on a nail while cleaning the yard. The claimant immediately went to hospital. He returned to the

factory after his hospital visit, by which time KT was on the premises. The claimant however was very unwell, and it was agreed that he should go home.

36. KT did not feel that he could address the issue of what had happened on 19th December with the claimant in light of his injury on 8th January 2018.

37. KT kept in touch with the claimant during his absence. He did this by speaking to the claimant and the claimant's mother. It transpired that the claimant's foot was infected, and at one stage, it appeared he was at risk of losing part of his foot, and he required an operation and a period of recuperation thereafter.

38. The claimant submitted fit notes for work, on 10 January to 29 January 2018, which cited the reason for his absence as post-operative recovery. He submitted a further note from 21 January to 3 March 2018, which cited foot infection, and a urine infection, as the reasons why the claimant was not fit for work (page 103 to 104).

39. KT knew that things had been difficult for the claimant, however by the beginning of February he formed the impression that the claimant was getting a bit better, and he decided to visit him. There were a number of things KT wished to discuss with the claimant, and he did not wish to leave the issue of the incident on 19 December any longer before addressing this.

40. KT contacted the claimant and asked if he could come to see him as he had a few things to discuss. The claimant agreed this. KT visited the claimant at his home, and at the commencement of the meeting, had a fairly relaxed discussion with him. Firstly, they discussed the claimant's health. They then discussed the contents of the Accident Book, and then discussed an issue about of a hire car.

41. After those discussions, KT then said to the claimant that unfortunately there was another matter which he had to discuss with him. KT told the claimant, that he was concerned that fuel had been going missing as the usage of fuel varied. He told them that just before Christmas, he was particularly concerned with fill ups of fuel on 19 and 21 December. He told the claimant it was obvious that the pickup could not have used so much fuel in three days. He

also told the claimant that he had asked the Shell garage to look at the CCTV footage of both fill ups; he was told by them that on the 19 December, the person filling up the vehicle had also filled a container with fuel and put it in the back of the pickup. KT told the claimant he assumed that it was Gary McCool who was driving the vehicle to go to meet the claimant at Tommy Wilson's house, but when he looked at the CCTV footage, he saw it was the claimant driving the pick -up. He told the claimant that he had seen him filling up the vehicle, and also taking a container from the cab, filling it up, and putting it back into the pickup. He asked the claimant for an explanation of this.

42. The claimant confirmed that he had been driving the pickup that day, and that he had filled up the pickup with fuel, but he said he could not recall filling up a container.

43. KT had checked the tracker of the pickup, from which he discovered that the pickup had gone to CTD Tiles on 19 December. KT knew the company did not have anything to collect from KTD Tiles, and he asked the claimant if he could explain this.

44. The claimant confirmed that he had collected goods from CTD, for his own use, not the company's use. He told KT that he had a receipt for the goods, and he offered to show this to KT, but KT said that was not necessary.

45. KT also told the claimant that the tracker had shown the pickup stopping for a short period at the car park at Corbywood Station and he asked the claimant for an explanation.

46. The claimant confirmed that he had taken the pickup and was due to meet with Gary McCool who was driving the claimant's car. He said that they swapped cars, and that Mr McCool then drove the pickup to Tommy Wilson's house in Glasgow, and the claimant drove his own car.

47. KT had asked the claimant why he had not driven his own car all the way, rather than arrange to meet at Corbywood, but the claimant did not give a reason for this.

48. At this stage, KT decided to suspend the claimant, and he amended the date of the suspension letter to 7 February and gave this to him (page 105/106). The letter advised that the company would carry out an investigation into the allegation of '*Misuse of the company fuel card'.* The letter stated; "*this is not a disciplinary sanction. During the period of your suspension, you will continue to be paid at the rate at which you would be entitled if you were not suspended in the usual way. The suspension is accordance with the company's disciplinary rules and procedures*." The letter of suspension also advised "*once the investigation is complete, you will be advised of the outcome and you may be invited to attend a disciplinary hearing in accordance with the company's disciplinary rules and procedure. We will write to you if we are going to call such a meeting. It is expected the investigation will take no more than 10 working days."*

49. The respondents did not have disciplinary rules or procedures.

50. The discussion of events on 19 December was a difficult one for the claimant and KT. KT's notes of his meeting with the claimant on 4th February are produced at pages 107 and 108.

51. After KT left, the claimant contacted him approximately 15 minutes later by telephone, as KT was driving home. The claimant was upset, and asked KT if the police were going to be involved. KT told the claimant to calm down, and that he had to go through a process and investigate matters, and that KT would come back and speak to the claimant and would have some questions for him. This conversation took place in the car and KT did not take notes of it.

52. When he got back to the office, KT interviewed Gary McCool, and Tommy Wilson. Notes of these meetings are produced at 109/110.

53. KT asked Gary McCool if he could recall the events of 19 December, when he accompanied the claimant to drop off the pickup at Mr Wilson's house in Glasgow. Mr McCool's response, which KT noted, was that the claimant had asked him (Gary) to take the claimant's car to Morrisons garage and put £20 worth of fuel into it, and the claimant had given him cash for this. Mr McCool

was then to meet the claimant at Corbywood Station carpark. Mr McCool said the claimant said he wanted to take the pickup, as he was going to CTD Tiles to collect goods for himself, and that having the vehicle with the company name on it could get him a discount. When he got to Corbywood Station, the claimant was already there waiting for him; the claimant then decided that he would swap vehicles and that he would drive his own car. Mr McCool said the claimant took goods which were quite bulky from the pickup, and put them into his own car. The claimant did not ask for assistance in doing this. They both travelled to Glasgow, dropped off the pick-up and travelled back together in the claimant's car.

54. Mr Wilson was asked if he could recall filling up the pickup on 21 December. He said that he could, and that it was almost empty when he filled it up.

55. KT had two further telephone conversations with the claimant, the first of which was on 12 February, and notes of this are produced at page 112. The second was on 13/2/18 and the notes are at page115. KT decided to contact the claimant by telephone, as he remained off work ill, and he considered that this was the best way proceeding, rather than ask the claimant to attend the respondent's offices. The claimant did not object to this.

56. KT asked the claimant for his explanation of what happened on 19 December. The response which he was noted was that the claimant said '*that day was bedlam. Tommy off, Martin off and lots of wee jobs needing completed then it was decided that we had to drive off the pickup. The forklift ran out of diesel and I bought £10-15 worth to keep it going*.'

57. The claimant was asked why he did not fill up with fuel for his own car at the Shell garage; he said that fuel was cheaper at Morrisons. He was asked what goods he collected at CTD. He responded that he just got prices.

58. KT put it to the claimant it did not come back to the yard. The claimant said that he did and that after dropping off up of the pickup in Glasgow, he brought the diesel back in his car for the forklift. He confirmed the purchase of fuel was made on the company card.

59. KT asked the claimant why he did not fill the forklift from the diesel from the Drum, to which the claimant responded that it was empty.

60. KT asked why the claimant swapped vehicles at Corbywood carpark, and the claimant said he had arranged to meet there, and he could not stand the smell in the pick-up, so he swapped over, and he drove the car to Glasgow, while Gary drove the pick-up.

61. KT asked the claimant about the fact that Gary had driven his car to Morrisons to put petrol into it, and the claimant said that was correct. KT asked why he did not just take his own car and let Gary drive the pickup. The claimant said Gary did not know where they were going, and it was considered easier to follow the pickup in the car and vice versa. KT asked the claimant why send Gary to Morrisons to buy fuel and then go to Shell for a rendezvous? The claimant said fuel was cheaper at Morrisons.

62. He was asked what he had collected from CTD, and the claimant said that he just got prices for things.

63. After this conversation, KT carried out further investigations with Mr McCool. He asked whether or not there had been a pre-arrangement to swap vehicles in Corbywood, and Mr McCool said no, that the claimant just said he wanted to take the car from there. He confirmed the claimant took something from the pickup and transferred it in his car, and that it was covered in a dust sheet. Mr McCool said the claimant that he told him he was collecting a type of floor cleaner from CTD Tiles.

64. KT asked Mr McCool if he was aware that the forklift ran out of diesel on and 19 December? Mr McCool said no. He was asked if the claimant had mentioned he was going to get diesel for the forklift? Mr McCool said no. He was asked if he saw the claimant take the diesel from his car, and fill the forklift? Mr McCool no, he did not see the claimant take the container out of his car or fill the forklift.

65. From his investigations, KT had ascertained that in accordance with the usual practice of ordering red diesel an order form had been put in to the office on

22 January for red diesel. He asked Mr McCool about this. Mr McCool confirmed that he made this order, and then he filled the Drum. KT asked had he filled out the forklift first on 22 January, or had he found the Drum empty? Mr McCool said he had filled the forklift with approximately a quarter of a tank which was left in the Drum, and then ordered a refill for the Drum. KT's notes of his meeting with Mr McCool were produced at page 113.

66. KT then contacted the claimant again by telephone on 13 February and notes of his discussion with the claimant were produced at page 114 to 116. Firstly, he put to the claimant, that he had initially said that he had collected goods from CTD Tiles, and he had a receipt for these, but then he said he only got prices, and asked which was correct. The claimant said he only got prices. KT asked the claimant why he took diesel to Glasgow in the back of his car rather than drop it off at the yard. The claimant said he did not know. He asked the claimant did he realise it was illegal to put fuel into a container which was not designed for this purpose and dangerous to carry that in his car? The claimant said he did not know.

67. KT put to the claimant that he told Gary that he was going to CTD to collect cleaning fluid and asked if he had any comment on that, as it was the third different explanation he had given for going to CTD. The claimant said that he did not know and could not remember; as far as he could recall, he only asked for prices.

68. KT asked the claimant if the Drum in the yard was empty on 19 December. The claimant said he did not check. He said he assumed the Drum was empty, as the forklift was empty. He said the forklift ran out of fuel at Bobby's hut and it would not start. KT asked him why he did not tell anyone that the Drum was empty or organise for it to be refilled? The claimant said he did not know. KT asked him where he got the container to fill the petrol; the claimant and said that Bobby's hut (a hut where materials are stored in the yard).

69. The claimant said that he filled up the forklift as soon as he came back from Glasgow, using a strainer. KT put to the claimant he had checked and no one else he had asked was aware that the forklift had been empty. KT asked the

claimant how he discovered this problem? The claimant he said that he discovered the forklift was empty because it wouldn't start. He said this happened before he left for Glasgow on 19th December.

70. The claimant said he put the container back in Bobby's hut. KT put to him that the container had not been seen by anyone since 19 December. The claimant reiterated that he put the container back in Bobby's hut.

71. KT told the claimant that he checked the records, and the Drum was only empty on 22 January and was refilled that day. He put to him that the Drum was not empty on 19 December and he asked if he had any comment. The claimant said he did not check the Drum; he found the forklift was empty.

72. KT asked the claimant why he used dust sheet. The claimant said this was to protect the car. The claimant said he only put £10-15 worth into the container and then put this the forklift.

73. After this telephone conversation, the claimant contacted KT later the same day, (notes of that telephone call were produced at page 117 to 118). In the second telephone call, the claimant told KT that he now remembered showing Gary McCool how to restart the forklift if it ran out of fuel. He said he was not sure if this was on 19 December, but he had definitely showed Gary how to do this. The claimant asked KT asked if he could check this with Mr McCool, which KT agreed to do so. The claimant made the point that this showed that the forklift had run out of fuel before and said that it had happened quite a few times. KT said he was unaware of this, but he would ask Gary and others if they recalled such events and he asked the claimant what the procedure was for refilling the forklift; the claimant described this.

74. KT asked the claimant how he paid for diesel on these occasions. The claimant said he did not know, but if he used the fuel card then he would detail this on the receipt as he always marked up receipts. He said he would have done that on Monday 8 January on his return from holiday, when he did his timesheets, but he stood on the nail and had to go to hospital and then go home.

75. KT told him that the timesheets and the receipt were in fact handed to him on 22 December before the shutdown, and there was nothing marked up on the receipts. He knew this as he had taken the receipts to the Shell garage to check the CCTV footage. The claimant responded that he did not know what had happened then.

76. KT carried out a further investigation with Mr McCool, and with Mr Begley, another worker in the respondent's yard whom the claimant had asked him to speak to. Notes of those meetings are produced at 119 to 120. Mr McCool was asked show KT how to prime the forklift, and he did this as described by the claimant. He was then asked if he was ever aware of the forklift running out of fuel, and said no, it was definitely not a regular occurrence and had possibly never happened. He was asked whether on 19 December, he was aware that the forklift had run out of fuel. He said no, that he had loaded the materials for the Blythewood Hotel job onto the pickup using the forklift just before they had left to diver the pick-up to Tommy Wilson's house in Glasgow.

77. KT asked Mr McCool to show him how to fill a forklift, with a five-gallon container using the strainer. Using the procedure which the claimant described he had used to fill the forklift, KT formed the view this would require more than one person, or it would at least be difficult and messy for one person to do, and he noted this observation on the foot of the notes of the meeting with Mr McCool (page 119).

78. KT also spoke to Gary Begley (page 120), who confirmed that the claimant had shown him how to prime the forklift if it ran out of fuel but could not say when this had happened. KT asked if it was before the Christmas holiday, he said no, it was before that. He was asked if the forklift running to fuel and responded this was not a regular occurrence and had only happened twice as far as he could recall.

79. At the conclusion of these investigations, KT formed the view that there was a disciplinary case to answer. He prepared notes of the reasons why he reached this conclusion, (page 121 to 123). Ultimately, he considered the claimant's explanation for events varied, were not logical, and there were no

witnesses to confirm any of his claims. His main conclusions from his investigation were that the claimant had put fuel in the pickup and filled a container of fuel on 19 December using the company fuel card. He noted that the claimant transferred the container of fuel from the pickup into his own van at Corbywood car park, and that was witnessed by Gary McCool, and therefore there was no question that the claimant put fuel into an unsuitable container and drove to Glasgow and then back to Stirling. He noted that the claimant claimed the forklift was completely out of diesel, and would not start, but that Gary McCool had loaded the pickup using the forklift just before he and the claimant left for Glasgow. He concluded the claimant did not tell anyone the forklift was out of fuel and did not ask anyone for assistance in filling it. KT noted it would not be impossible to fill the forklift on his own, but it would be difficult. He also noted that the claimant was not witnessed taking the container out of the car at Stirling and filling the forklift. The noted the container and had not been seen in the yard since 19 December when the claimant claimed to put it back into Bobby's hut. He noted the normal procedure in relation to filling the forklift, which was that Red Diesel from the Drum would be used, and that the claimant had given no satisfactory explanation as to why he had not followed that normal procedure. He noted that the records of diesel purchasing show that the Drum was not empty until 22 January. He concluded that this showed that the diesel was available in the yard on 19 December, which led him to question why the claimant would fill a container at the garage, take it to Glasgow and back, in order to refill the forklift. He noted that the claimant could not offer any satisfactory reason for this.

80. KT noted that the claimant stated the reason he was driving the pickup was that Gary McCool did not know the way to Tommy Wilson's house, it was for the car to follow the pickup. He noted that he considered this was reasonable, but did not explain then why there was a swap of vehicles at Corbywood carpark so that Mr McCool had to follow the car in the pickup. The claimant's reason for this was the smell of the pickup was too bad. This however lead KT to question why the claimant had driven the pick-up as opposed to his own car in the first place. KT offered the opinion it seemed likely to him that the

claimant had planned to use the company fuel card to obtain diesel and did not want Gary McCool to witness this.

81. Lastly, KT noted that the claimant always stated that he marks up any fuel usage for the pressure washer or the forklift on the fuel receipts, and that he said he would have done this on 8 January when he returned to work, had he not injured his foot. KT noted that the claimant had in fact completed and returned timesheets and had returned the receipts with nothing marked about refuelling the forklift on 22 December.

82. At a weekly manager meeting at some point in the beginning of February, KT raised the fact that there were potentially going to be disciplinary proceedings against the claimant.

83. Having taken advice, KT decided to conduct the disciplinary procedure in accordance with the ACAS Code. Mr William Smith, who is the managing director of Stirling Stone one of the Wallace Group companies, was asked to be the disciplinary officer.

84. Mr Smith was given all of the paperwork generated by KT which comprised notes of his discussions with the claimant and the witnesses and his report following his investigation.

85. The claimant was invited to attend a disciplinary hearing in a letter dated 14 February 2018 (page 124). The letter stated *inter alia* that;

86. '*The specific allegations made against you are;*

1. On 19 December 2017 you attended at the Shell Petrol Station at Kerse Road, Stirling in a Company Vehicle registration number E016Z TT. Whilst filling the vehicle with diesel you proceeded to take from the vehicle a container (not a portable fuel can) and did fill this was diesel. You thereafter paid for both lots of diesel using the Company credit card in a single transaction. Thus far you have failed to provide a plausible explanation for filling the continued with diesel and it is alleged that you filled this container for your own personal use and did not pay for this. If proven, this amounts to theft.

2. On 19 December 2017 you and Gary McCool were conveying the aforementioned Company Vehicle from the Company premises in Stirling to Tommy Wilson's home address, in Glasgow. Rather than have Gary follow you in your car whilst you drove the Company Vehicle, you arranged for Gary to meet you at the car park at Corbywood Stadium, Stirling. Thus far you have failed to provide a plausible explanation for this and it is alleged you did this so as to conceal your behaviour at the Shell Petrol Station at Kerse Road, Stirling. If proven, you acted dishonestly.

3. On 19 December 2017 you transported the container of diesel from Stirling to Glasgow and back to Stirling in a container which was not fit for purpose. In doing so it is alleged you acted in a careless manner and put yours, and Gary and other road user's health and safety at risk.

87. The letter of 14 February (pages 124 to 125) advised the claimant of his right to be accompanied at the disciplinary hearing, and of his right to call witnesses. That letter advised the claimant that the disciplinary proceedings would be conducted in accordance with the ACAS Code of Practice on disciplinary and grievance (ACAS Code).

88. The letter also advised that if there was anything which was unclear at the hearing, he should say so immediately and if he thought he does not have the opportunity to put his case as fully as he wished then he should say so. He was advised that the allegations were of a serious nature and if upheld may result in disciplinary action against him up to and including dismissal on the grounds of gross misconduct.

89. The claimant was sent KT'S notes of his meeting and telephone calls with the claimant, and KT's notes of his meetings with the witnesses, copies of the garage receipts, and KT's note, which sets out his conclusions upon his investigation. The witness statements were not signed by the witnesses.

90. On 6 March, the claimant emailed KT asking for a copy of the company disciplinary procedure to be emailed to him (page 152). KT replied on 7 March (page 156) advising as set out in the letter of 14 February, the

disciplinary process was to take place in accordance with the ACAS Code of Practice, and the claimant was sent a copy of the ACAS Code.

91. The disciplinary hearing did not take place on 20 February as planned; it was postponed on two occasions, firstly, because of the claimant's hospital appointment and secondly, because of adverse weather.

92. The hearing took place on 8 March. Mr Smith, the disciplining officer, was in attendance, and notes were taken by Mr G Raliegh. The claimant attended with his trade union representative, Mr Andrew Baird. The respondent's notes of the disciplinary hearing are produced at 157 to 165.

93. At the outset of the meeting, Mr Baird indicated there was a problem for the respondents as the ACAS guidelines that the disciplinary procedure should have been sent to the claimant in advance. Mr Baird also stated that the witness statements should have been signed, but they were unsigned, and therefore were not evidence. He stated that as the claimant had not received signed evidence from KT, it was not pertinent. It was Mr Baird's position that the respondent should abandon the whole disciplinary process. Mr Smith was not prepared to agree to this.

94. It was also Mr Baird's position that the claimant should have been present and allowed to ask questions when the respondents were interviewing the witnesses.

95. Mr Smith queried why these issues had not been raised in advance, and he instigated an adjournment, in order to consider how best to proceed.

96. Mr Baird also said there were discrepancies in the notes. He said that it was unusual to conduct an interview over the phone, as KT had done with the claimant. Mr Baird also raised the fact that he considered there was a failure to comply with the ACAS Code, as KT had not approached the claimant immediately after the incident on 22 December.

97. Mr Smith's position was that the incident only came to light on 22 December, before the Christmas shutdown, and thereafter the claimant had been injured on 8 January, and had been unable to return to work. Mr Baird's position

was that the decision had already been made by KT to suspend the claimant, and he was being punished by having his company vehicle removed from him.

98. At this stage in the hearing, Mr Baird submitted a letter of grievance against KT, and asked this to be looked at before proceeding further with the disciplinary hearing. The letter of grievance is produced at page 160 and it states;

99. '*On reflection I wish to submit a formal grievance in relation to K Turnbull.*

He called at my home on 7 February 2018 to [ ] my health. As he was starting to leave, he produced a letter of suspension dated 8 January 2018.

He made two statements that gave me cause for concern.

'There has been a lot of fuel going missing'.

'We may have to call the police in.'

This not only shocked me but cause me distress.'

100. Mr Baird said that KT had made two statements to the claimant on 7th February: the first was that fuel had gone missing, and the second that he may have to call the police in. His position was that if the company was investigating fuel losses then the claimant should have had access to this information.

101. At this stage, Mr Smith adjourned the meeting to consider what to do. He spoke to KT and decided to adjourn the disciplinary hearing to allow a grievance hearing to take place.

102. Mr Smith notes of his considerations and the subsequent discussion he had with KT and produced at page 161 to 162 of the bundle.

103. On resuming the meeting Mr Smith advised the claimant that the company car had been taken back by the company because they needed the additional vehicle at the time, the car was at the offices and available to the claimant, on the basis that he could confirm with a letter from his doctor that he was fit to drive.

104. Mr Smith confirmed that he was in a position to proceed with the grievance there and then. The same parties attended the grievance hearing, and the respondent's minutes of the hearing are produced at pages 163 to 165 of the bundle.

105. At the outset of the grievance hearing, Mr Smith asked the claimant to expand on what he had written in his letter of grievance. The points in the letter of grievance were to the effect that KT had paid a social visit to the claimant and waited until he was about to leave before producing the letter of suspension; and that he said, *'a lot of fuel was going missing'.* If there was other information, then the claimant was entitled to see it. The claimant also complained that KT said he had been suspicious of fuel going missing for a long time and if the claimant was involved then he will get the police to him. The claimant said he felt demonised but had done nothing wrong.

106. Mr Baird suggested the company had three options in connection with the disciplinary procedure – one was to abandon it, one was to set it aside, and start again, and third was to trundle on as it was. Mr Baird's position was that it was unreasonable to suspend someone in the manner which the claimant had been suspended, and it was unreasonable to speak to the claimant about what had happened on the telephone. It was Mr Baird's position that the allegations were unsubstituted, and the threat of the police being called caused duress and stress, and was designed to have that effect, and that the whole process should be set aside. His position was that KT's visit to the claimant was just 'window dressing'.

107. Mr Baird also made the point again, that the letter of suspension, stated that matters should be dealt with in accordance with the company's disciplinary procedures; part of the grievance was that the company disciplinary rules did not exist. The letter should not have been said the suspension was in accordance with the company rules, if this was not accurate. Mr Smith conceded in the course of the grievance meeting that this was a fair point but that he would make a decision based on everything that had been said.

108. At the conclusion of the meeting, Mr Smith reiterated to the claimant that the company car was available to him if he could produce a doctor's note saying he was fit to drive. The claimant was able to produce this at that meeting. The car was then made available to him.

109. After the grievance hearing, Mr Smith carried out further investigations with KT. KT confirmed that the visit to the claimant's house was arranged by telephone on 6 February and that he said to him that he had just wanted to talk to him. He said he was willing to listen to anything he had to say before committing to issuing the letter of suspension. KT said that he had held back from talking to the claimant on 8 January on compassionate grounds, as the claimant had injured his foot, and had gone to hospital before KT had an opportunity to speak with him. KT said he felt that the matter could not be postponed any longer, but he said hoped that the claimant could offer a satisfactory explanation, and that he would not have to issue the letter of suspension. He said that as the claimant offered no explanation he felt he had no choice but to carry out the investigation and suspend the claimant at that time as he needed to talk to others and did not want the claimant to be in contact with them.

110. KT said that if the claimant had offered a satisfactory explanation on the 6th of February then that would be the end of matters, so at this stage it was really just an informal chat to hopefully clarify matters. He said he also discussed his injury and the damage report for the car. KT said as the claimant offered no explanation for the events of 19 December, and he therefore explained to him that he would have to carry out an investigation. He said that he spoke with two other members of staff immediately on returning from his visit to the claimant. KT said the only facts he confirmed in this conversation with the claimant at his home were that he was driving the pickup on the 19th of December, and filled up with diesel using the company fuel card; this simply confirmed what KT already knew, so there was nothing from this conversation which was harmful to the claimants' case, and if he had offered a satisfactory explanation that would have been the end of the matter, and he would not have issued the letter of suspension.

111. Mr Smith also put to KT that the claimant stated that as KT was ready to leave he produced the letter of suspension. KT denied this and said that this was incorrect. He said the sequence of events was a chat mostly about his injury and subsequent health, and there was a discussion about the events surrounding the accident and the accident book, he said he then discussed a damage report of the claimant's car, and then said that unfortunately he had to raise another matter. He explained this was concerned about the events of 19th December. KT said he told him what he knew about that day and asked for his comments. He directed Mr Smith to the notes prepared for the disciplinary hearing.

112. KT said that as the claimant offered no explanation, he had no choice but to conduct an investigation, and he explained that he did not want him to have any contact with work colleagues while he was doing this and regrettably he needed to suspend him from work while this was happening. He then explained that he had to do this formally and in writing and it was then that he handed the claimant a letter explaining what it meant to be suspended on full pay. KT also said that he would have to talk to others and he would need to ask the claimant some questions, so he asked the claimant in the meantime to try to recall events and note what had happened, so he could hopefully clear matters up.

113. KT said that there was then discussion about a forthcoming hospital appointment and he denied that he had just handed over the letter as he left. KT also denied there was any acrimony in the visit or that the claimant was upset.

114. Mr Smith also put to KT that the claimant stated that KT had said that *'there has been a lot of fuel going missing'* and asked if that was correct.

115. KT responded that was not completely accurate. He said that he was concerned that some fuel may have gone missing as he had noticed fuel consumption on pickup was varying. He said more specifically he pointed out the fuel usage between the two fill ups on 19 December and the 21

December was very high and that was the only event he was really interested in.

116. Mr Smith also asked KT did he ever at any point say the respondents would have to call the police. KT categorically denied mentioning the police during his visit. Mr Smith asked KT if he thought the discussions were causing the claimant distress and having any other effect on him. KT responded yes, and he drew the discussions to an end as he could see the claimant was getting upset and he said he thought it was better for him to leave.

117. After the conclusion of the grievance hearing, Mr Baird emailed Mr Smith on 12 March (page 166). This email contained a repetition of the points which he had already made and raised some new points. These were that there were no signed statements; there was no indication that the people named in the statements were aware that there was a disciplinary investigation or consented to their statement being used; it was unclear which statements were specific to the allegations of 19 December; there were multiple entries of what KT's opinions were on matters; was unclear how many discussions were had and the Mr Baird asked that it was clearly detailed to the claimant which notes and sections were relevant to any future disciplinary procedures.

118. Mr Smith, having conducted further enquiries with KT, and having considered the points raised in the grievance, responded to the claimant on 15 March (page 169 to 170). He stated the purpose of his letter was to respond to the concerns raised by the claimant's trade union representative ahead of the reconvened disciplinary hearing. Mr Smith advised the claimant if he had any comment to make in response, then he would hear those comments at that reconvened hearing.

119. In relation to the delay in the procedure, Mr Smith stated that as previously explained, due to the timing of events on 22 December, there was a delay in the disciplinary investigation being intimated to him. Mr Smith stated he was comfortable with the approach taken in the circumstances. Mr Smith accepted that the ACAS Code should have been forwarded in advance of the disciplinary hearing, and stated that it was, and he was comfortable that the

claimant's TU representative was familiar with its terms and was properly able to advise the claimant.

120. In relation to the witness statements not being signed, Mr Smith's position was that there was no requirement for them to be signed. Mr Smith did not accept the claimant was entitled to be present when the witnesses were interviewed by KT and pointed out the claimant was at liberty to call witnesses if he wished to do so.

121. Mr Smith's position was that the investigations were conducted over the telephone with the claimant given that he had been injured, and this was the only means of conducting the interview. His position was that the claimant was given advance warning of when KT wished to speak to him, and that the claimant in fact had volunteered information to KT. He said the claimant had then been advised to take the weekend to think about things and the telephone call took place thereafter.

122. Mr Smith denied that removing the car from the claimant was a penalty. The car was removed because the company required it for business purposes, and the claimant had told KT that he had been advised by medical personnel treating him that he was not allowed to drive. Therefore, it was not appropriate to allow him to drive the company vehicle in all those circumstances.

123. Mr Smith also dealt with points raised by Mr Baird in his correspondence on 12 March. He denied that the investigation by KT had not been prompt; he dealt with the point raised about contact with Shell garage, and described the investigations carried out by KT, which had had all taken place on 22 December. In relation to KT's role, Mr Smith his position was that it was to establish facts, and to reach a conclusion which he did, as set out in the paperwork. It was for Mr Smith was to decide whether the allegations were upheld or not, and what was the appropriate sanction. Mr Smith confirmed that KT would take no part in that process. KT confirmed the witnesses were advised that their evidence was required in the context of the disciplinary investigation and they were content for this to be used. In relation to the

accuracy in the notes, Mr Smith stated that he was unable to comment further as no detail had been provided.

124. Mr Smith indicated he now wished to make arrangements to reconvene the disciplinary hearing. He forwarded copies of the minutes of the disciplinary and grievance meetings on 8 March, to the claimant and advised that if there were any inaccuracies, he should advise him by 19 March, failing which he would take it that the minutes were agreed.

125. The claimant appealed the outcome of the grievance, in a letter dated 21 March (page 185). In his appeal, the claimant complained about the manner in which the letter of suspension was handed to him by KT, and the fact that the letter of suspension stated it was in line with the company disciplinary rules and procedure and these did not exist; and complained about comments made by KT. The claimant claimed the whole process had been carried out in an unfair manner.

126. The grievance appeal was dealt with by Mr Harry Turnbull (HT). An appeal took place on the 29/March 2018 and notes of the grievance appeal hearing are produced at pages 189 to 191.

127. This hearing did not substantially advance the appeal, as HT concluded the claimant was not advancing anything that he had not already made representations about. HT decided to adjourn the meeting to allow the claimant an opportunity to make additional representations and wrote to him on 30 March confirming this (page 192).

128. It was agreed that the grievance appeal hearing should be scheduled for 5 April, which he re-arranged due to the claimant's hospital appointments on 16 April. Minutes of the meetings are produced at 195 to 200.

129. HT did not uphold the appeal against the grievance, and he wrote to the claimant on 23 April confirming his decision (202 to 204). In that letter, HT dealt with the points raised in the claimant's appeal letter of 21 March, and also the points which he raised in his letter dated 2 April, to the effect that he was off work with a serious injury and suffering from stress, and that the

respondents were aware of this. HT advised he had checked the fit notes of 15 January and 25 January, neither of which made any reference to stress; the respondents had not heard from any of the claimant's medical advisors to the effect that the claimant was suffering from stress and he concluded that the respondents had no medical opinion to the effect that the was suffering from stress at the point of the meeting on 7 February.

130. HT concluded that the suspension had been carried out in a reasonable manner. He did not accept that there was a need to give the claimant advance notice of the fact that there would be a meeting about his suspension.

131. In relation to the claimant's point that he did not consider KT had carried out a thorough investigation, HT's view was that this was part of the disciplinary procedure and did not accept the claimant's complaint that he did not have a full disclosure of the facts, which inhibited his ability to respond to the disciplinary charges.

132. At the conclusion of the grievance procedure, the claimant was re-invited to attend a disciplinary hearing in a letter dated 24 April (page 207).

133. The disciplinary hearing took place on 30 March, and was attended by Mr Smith, the claimant, Mr Baird and Mr Raliegh, who recorded the minutes of the meeting for the respondents. The respondent's minutes of the meeting are produced at page 208 to 217, and minutes produced by Mr Baird, produced at 218 to 246.

134. At the outset of the meeting, Mr Smith explained to the claimant that all the information he had about the disciplinary charges was information which the claimant also had. He told the claimant that the allegations were detailed in a letter calling him to the disciplinary hearing, and he wanted to go through the information which he had in order to get his comments. Mr Smith explained to the claimant that he wanted the claimant to tell him what had happened, and where the answers which had been written down as part of the investigation were not the answers he had given, them the claimant would need to tell him that.

135. Mr Smith said that he would like to go through all the details point by point. The claimant answered to the effect that he was on the verge of losing his job, and all that he had done was tell the truth. Mr Smith noted that but said that ultimately until he had gone through things, he could not form an opinion.

136. Mr Baird interjected at this stage of the meeting to make a number of points in relation to the logistics of arranging the hearing. A number of matters were then discussed, including the complaints which the claimant again made, via Mr Baird, about the manner in which he had been suspended' and about what KT was alleged to have said to him at the point when he was suspended.

137. At this point, Mr Smith asked the claimant if he preferred to go through the hearing question by question? Mr Baird suggested that if Mr Smith had a particular statement in mind, the claimant would answer it. Mr Smith said if that was the case, he would go through the events of 19 December step by step, or, if the claimant could recount the events, and they would go through it that way.

138. The claimant said he would go through his own notes, and he then recounted what he said happened on 19 December. That was, at the start of the day, Tommy Wilson (another employee) had to leave work and he left the pickup and made his own way home. The claimant explained that Mr McMillan, another employee, had told the claimant to drop the pickup at Tommy Wilson's house, which meant that he and Brian (who suffers from disabilities) were the only two left. He said it made no sense going back to Stirling and that Brian started '*kicking off*' because he didn't like being left on his own. The claimant said that he went to put the forklift away, but it was out of fuel. He then said that he grabbed a container. Gary McCool was going to take the claimant's car to follow the claimant in the pickup. The claimant said that he told Gary that he would drive the pickup and Gary should follow him. The claimant explained that his car did not have enough fuel, so he gave Gary £20 of his own money to get fuel. He said that he arranged to meet Gary at Corbywood. As there was no fuel in the forklift he took a drum from Bobby's and put it into the back of the vehicle. He then filled the container and the pick-up with fuel. The claimant said that he had done this in plain sight and

it was not disguised, and if he was going to steal anything, he could have just left it in the pick-up.

139. The claimant said that KT asked him if Gary was driving; the claimant told him that he filled the container and put it in the pickup. He complained that KT knew it was not Gary who was driving the pick-up before KT asked the question.

140. The claimant continued that he had gone to CTD Ceramics and asked them for information and a price. He said that that the ceramic tiles were still sitting out the back of the respondent's yard and he thought that if the claimant had done anything wrong, he should check CTD's CCTV footage, that he was in and out of the CTD in a minute.

141. The claimant then said that he swapped vehicles as the pick-up was making him physically sick. The claimant said he took the can out of the pick-up with a dust sheet and put it into his car in order to protect the car. There had been comments made previously to the effect that it was hoped that he was keeping the car, which was new, clean. He said this was the reason he used the dust sheet.

142. The claimant said that after they dropped the pick-up off at Tommy's, they came back to the yard, and Gary went back to work, and he went in to deal with Brian who was 'kicking off' even more because he had been in all day. He said he went to the car where it normally was parked and walked over with the container to the forklift to put the diesel into the forklift, and then got back to work.

143. Mr Smith asked the claimant how he loaded the pickup? The claimant replied that Gary loaded the pickup and would have done so using the forklift. The claimant said that the forklift had not moved when they returned from Glasgow. He said the forklift was out of diesel and that was carrying the container of fuel in full sight of everyone.

144. Mr Smith put to the claimant that according to Mr McCool the forklift had been used to load the pickup which had been driven to Glasgow, just before he and

the claimant left for Glasgow. He asked him if by implication he was saying Mr McCool left the forklift out of fuel.

145. The claimant said it was him or whoever else used it, it may have been Gerry. The claimant said that he knew the forklift was running low (of fuel) but he never checked it.

146. Mr Smith put to the claimant he would normally have gone to the Drum to check it. The claimant responded he knew the forklift was running low on fuel when he went to move the forklift, but he never checked the Drum. Mr Smith put to him that he would normally would check the Drum and asked why he did not on this occasion. The claimant stated that he had grabbed the container when they were leaving, and that he thought the Drum was empty, as the forklift was empty.

147. The claimant said that what he put into the forklift would have kept it running until Gary McCool put fuel into it.

148. The claimant queried why people were looking for the container, which was been noted as not having been seen from 19 December. He also said that he could not remember handing in the petrol receipts on Friday.

149. During the course of the hearing, Mr Smith asked the claimant if he was saying that Mr McCool and Mr Wilson were incorrect when they contradicted the claimant's account of events.

150. During the hearing, Mr Smith referred to a number of questions that he had to think about; why he had the claimant put the forklift away? Why he did not check the diesel Drum? Why all this' *faffing about'* with the pickup, and why change vehicles because of the smell? Mr Smith put to the claimant that he 'bucked the system' about the normal pickup procedures by swapping over. The claimant reiterated that he did this because the smell in the pickup made him feel sick.

151. During the course of the hearing the claimant stated that he had given an explanation as soon as he was suspended, and the rest of the investigations

had been done over the telephone, whereas other witnesses have been shown document.

152. At the conclusion of the disciplinary hearing, Mr Smith reached a number of conclusions about the claimant's conduct.

153. Firstly, Mr Smith was not satisfied that the claimant had provided a plausible explanation for filling the container with diesel on 19th December, and he concluded on balance that the claimant had filled the container with diesel for his own personal use, and did not pay for it, and this amounted to theft.

154. In reaching this conclusion, Mr Smith decided to ignore what the claimant had said in February when he was suspended by KT and did so because of the concerns raised by Mr Baird at the disciplinary hearing about how that meeting was dealt with.

155. The matters which Mr Smith took into account were that the forklift was normally refuelled from the Drum in the yard, and that on 12th February, the claimant had maintained that the Drum was empty. He had contradicted that however on 13 February and stated that he did not check the Drum, and he said he simply assumed the Drum was empty because the forklift was empty. The clamant was not able to explain adequately in Mr Smith's view why he had not checked the Drum. Mr Smith took into account that normal procedure, had the forklift run out of diesel, would have been to check the Drum, and if the Drum was empty, re-order fuel for the drum. That process would be arranged via an order form given to one of the admin staff, and Mr Smith concluded the claimant did not provide a satisfactory explanation for not following the procedure of checking the Drum.

156. Mr Smith also took into account that Gary McCool was not aware the forklift had run out of diesel on the 19th of December and that the claimant had not mentioned to him and had not mentioned to anyone else that the Drum was empty, and had not organised for it to be refuelled, and provided no explanation for not following that procedure.

157. Mr Smith also took into account that Gary McCool had confirmed that he used the forklift on 22 January, and there was still approximately a quarter of a tank of fuel in the Drum, which he used to fill the forklift.

158. Mr Smith took into account that there were other occasions the claimant had purchased diesel using the fuel card, and had marked this up on receipts, and on the occasions the claimant said he did this, but the fact he had not done so, and could provide no explanation for this.

159. Mr Smith also took into account that on 13 February, the claimant maintained the forklift had run out of fuel on a few occasions, but Jerry Begley confirmed he was only aware of the forklift running out of fuel once, and that was not on 19 December, and Gary McCool could not recall the forklift ever running out of fuel.

160. Mr Smith took into account that Gary McCool confirmed he used the forklift to load materials on the pick-up just before he and the claimant left for Glasgow on 19 December, and he was clear the forklift had not run out of fuel on 19 December. Mr Smith took into account the claimant maintained at the disciplinary hearing that when he went to put the forklift away before leaving for Glasgow on 19 December, he discovered it had run out of fuel, but on 13th February, the claimant stated that he went to use the forklift, and this is when he noticed it was out of fuel. Mr Smith attached some weight to the inconsistency on these accounts. He was also surprised that the claimant had chosen to put the forklift away in the middle of the day and he considered this impacted on the credibility of the claimant's explanation of matters.

161. Mr Smith did not accept that the Drum and/or the forklift were empty as asserted by the claimant and did not believe that the claimant had filled the container for the purpose of refuelling the forklift, or that he refuelled the forklift, as he said he did.

162. Mr Smith concluded there was no reason for the claimant not to follow the usual procedure, and he formed the belief the claimant had concocted an elaborate explanation as a means of trying to conceal his dishonest behaviour. Mr Smith concluded, on the balance of probabilities, that the

claimant saw an opportunity, and filled the container for his own use and did not pay for this.

163. Mr Smith also concluded on the balance of probabilities that the claimant had not provided a plausible explanation for meeting Mr McCool at the Corbywood Station on 19 December, and he believed that he had arranged this meeting to conceal his behaviour at the Shell petrol station, and his conduct in doing so was dishonest. In reaching this conclusion, he did not find the claimant's explanation as to why he deviated from normal procedure and allowed Gary to drive the claimant's car while the claimant drove the pickup. The claimant did not normally drive the pickup, and he had given Gary £20 to fill the claimant's car with fuel at Morrisons. Mr Smith concluded on the balance of probabilities that the claimant did not want Gary to be present at the garage, as the claimant knew he intended to fill the container for his own personal use.

164. Mr Smith also concluded on the balance that the claimant acted carelessly by transporting the container of diesel from Stirling to Glasgow in the back of the car in a container that was not fit for purpose and in doing so, he put himself and Gary McCool's and other road users' health and safety at risk.

165. Mr Smith decided that dismissal was the appropriate sanction. He considered that taking of the fuel, and not paying for it, was theft and was a serious matter which created a significant lack of trust on the part of the respondents in the claimant. This was particularly so, as the claimant was in a supervisor's position, which was a position of trust. Mr Smith had regard to the claimant's length of service, and the fact that he had a clean disciplinary record but considered in light of his conclusion that the claimant had acted dishonestly, that dismissal was the appropriate sanction.

166. Mr Smith wrote to the claimant, setting out his decision, and his reasons for his decision in a letter dated 1 May (page 247 to 249). In that letter Mr Smith upheld each of the three allegations made against the claimant in the letter calling him to the disciplinary hearing, and he provided his reasons for his decision under each heading in some detail. This letter was issued to the claimant the day after the disciplinary hearing.

167. The claimant decided to appeal against the sanction of dismissal and did so in a letter of 3 May 2018 (page 250).

168. HT heard the disciplinary appeal. The matters identified in the claimant's appeal were that written decision having been issued by Mr Smith so soon after the hearing created the impression that the outcome was predetermined, and that Mr Smith had failed to address many points submitted on the claimant's behalf in his outcome letter. The claimant also complained that Mr Smith failed to address points put forward regarding his written notes of the conversation with KT, and he failed to address the inappropriate visit of KT to the claimant's home on 7 February. He also made a point to the effect that in the disciplinary hearing on 8 March, Mr Smith told the claimant that he had a discussion with KT, in which he accepted that he said that fuel was going missing, and had confirmed that KT had referred to the police, not in the context which had been put forward by the claimant, but this had been subsequently denied. The claimant complained that during the disciplinary hearing, Mr Smith was asked to take the claimant to documentation he was depending on but he did not do so, and he complained that Mr Smith's outcome letter details what Mr McCool said at length, that he had failed to go through his statement in the course of the disciplinary hearing and when the claimant had raised Mr McCool's statement, Mr Smith said that there was no need to go through it. He also complained that during the course of the disciplinary hearing, Mr Smith had said that the questions he had asked had been covered, despite the fact he had not asked any questions.

169. The appeal hearing took place on 30 May, and was attended by the claimant, represented by Mr Baird, HT, and Mr Raliegh who again took notes. Minutes of the meeting are produced at 251 to 260. Towards the beginning of the meeting Mr Baird asked HT to clarify if the appeal was a review of the evidence, if it was a full appeal hearing or a rehearing, with a commitment that any issue raised would be investigated before a decision was made. Mr Baird said that he did not think Mr Smith had addressed the issues raised previously.

170. There was an adjournment of around 20 minutes, after which HT advised that the appeal was to be a review of Mr Smith's decision on the grounds of the appeal submitted by the claimant in his letter of 3 May. HT went on to say however that he was also prepared to listen to anything further that the claimant wished to say in his defence of the allegations. The appeal meeting lasted from 4pm until 6pm and the claimant was able to present his case, assisted by Mr Baird.

171. At the conclusion of the appeal, HT decided that it should not be upheld. He wrote to the claimant on 6 June (263 to 264) confirming the decision and confirming the reasons for it. Those were *inter alia* that;

1. HT did not believe that Mr Smith predetermined the outcome of the disciplinary process, and he considered that Mr Smith had ample time to consider the claimant's representations before reaching a decision, taking into account the fact that Mr Smith had been dealing with the disciplinary process since 20 February 2018. HK confirmed that Mr Smith's decision was his own decision, and not a collective decision.

2. HK reiterated that Mr Smith did not take into account the alleged inappropriate visit to the claimant's home on 7th February, albeit HK did not consider the visit was an appropriate, and this was addressed in the grievance.

3. HK did not accept that Mr Smith stated that had confirmed that KT referred to the police on 7 February on the basis that the minutes of the meeting did not support the assertion. HT pointed out that the evidence obtained on 7th February had in any event been disregarded.

4. HK confirmed he was satisfied the investigation and disciplinary process with fair and appropriate and the claimant was given the opportunity to present his case. He noted the claimant did not call witnesses, and when asked if you wish to question any the witness statements he did not do so.

5 .HK did not accept that the claimant had been treated inconsistently on the basis there was no evidence to support this

172. HK did not accept that Mr Smith had failed to take into consideration that the claimant admitted filling the container and that a lessor sanction was more appropriate. He was satisfied Mr Smith did take this into account, and that the severity of the misconduct justified the decision to dismiss. HT considered that the breach of trust created by virtue of the fact that the claimant had taken the fuel for his own use without paying for it, was such that it was untenable for him to remain in the respondent's employment and the dismissal was the appropriate sanction. He therefore upheld the decision to dismiss.

173. After the claimant's employment came to an end, he began to look for other employment, and he obtained Jobseekers Allowance. The claimant was successful in obtaining a job, similar to one which he had with the respondents, commencing on 26 July 2018. This employment was with a company by the name of South Stone and was based in Dorset.

174. The claimant's income from this employment was £35,000 a year. The claimant's employment with South Stone came to an end in September 2018, after he had worked for five or six weeks for them. The claimant's income from his employment with South Stone during his period of employment amounted to £5,184 gross. The claimant received notification from South Stone, while he was on a pre-arranged holiday in Mexico September, to the effect that his services were no longer required (C1).

175. The claimant has applied for a number of other jobs, including a number of jobs working in the granite industry.

176. The claimant had an interview in the week prior to the continued Tribunal hearing and is hopeful of obtaining an offer of employment with a company by the name of Mayfair Granite, to commence on 4 March.

177. During the periods when he has not been working the claimant has obtained job seekers allowance.

Note on Evidence

178. While there was no dispute on a considerable amount of evidence which the Tribunal heard there was some points which were in issue, and there was on the part of the claimant, an overall allegation that the decision to dismiss him was predetermined, which required the Tribunal to make an assessment of the credibility and reliability of the witness evidence which it heard.

179. In addition, as this is a breach of contract claim, the Tribunal is required to reach factual conclusions as to whether the claimant was in material breach of his contract of employment, and not just whether the respondents had reasonable grounds to conclude that he was.

180. For the respondents, the Tribunal heard from KT, Mr Smith, and HT. The Tribunal found all of the evidence of these witnesses to be generally credible and reliable. All of these witnesses gave their evidence in a straightforward manner; there were no significant material inconsistencies in their evidence; and in the main their evidence was also consistent with contemporaneous documentation.

181. The Tribunal did not form the impression from the evidence of the respondent's witnesses that they had pre-determined the outcome of the disciplinary procedure before it commenced.

182. Dealing firstly with KT, the Tribunal took into account that he had a letter of suspension drafted dated 8 January and took this with him when he went to see the claimant on 7 February. The Tribunal accepted KT's evidence that had the claimant given an explanation which he found satisfactory, he would not have issued this. It preferred KT evidence to the claimant's as to what was said at the 7th February meeting. The Tribunal did not draw the inference that KT had predetermined the claimant was to be dismissed by virtue of the fact that he had prepared this letter. By the time that the letter of suspension was prepared, KT had seen the CCTV footage, and checked the receipts, and it was not unreasonable for him to consider that a disciplinary investigation may be necessary, the Tribunal did not draw any adverse inference the fact

that KT had the letter of suspension drafted before meeting with the claimant on 7 February.

183. It was not an issue that KT did not advise the claimant in advance that the meeting of the 7th's February was to discuss the incident on 19 December. The Tribunal was satisfied that KT did not advise the claimant that it was a health and welfare meeting, as the claimant seemed to suggest. There was no reason for KT to do so, given that it was clearly his intention to raise concerns about the misuse of the fuel card.

184. The Tribunal was satisfied, indeed, that it appeared that both witnesses agreed that there was discussion about a number of things before KT raised his concerns about the misuse of the fuel card with the claimant. While not a great deal turns on this, the claimant said of the incident of 19th December was the last thing discussed. KT indicated that after a discussion about 19th December, there was a very brief discussion about the claimant's health Tribunal was satisfied that the issue of the misuse of the fuel card, was the last material matter discussion between the claimant and KT on 7 February albeit there was a brief discussion about the claimant's health.

185. There was an issue as to what was said in the course of the meeting of 7th February. The claimant claimed in his evidence that he said to KT that he accepted he filled the container, but could not recall what he had done with the fuel. It was KT's evidence that the claimant said he did not recall filling the container on 19 December. Ultimately again not a great deal turns on this, as in taking the decision to dismiss Mr Smith ignored what was said at the meeting of the 7th of February, however the Tribunal preferred KT's evidence and his evidence on this point, which was borne out by the contemporaneous notes of his discussion with the claimant. The Tribunal's impression of KT's credibility as to what was discussed about 19th December was enhanced in that when the claimant sought to suggest at the 1st disciplinary/grievance hearing that KT had told him that '*there had been a lot of fuel going missing',* KT made an appropriate concession, and accepted that he told the claimant that he was concerned that some fuel may have gone missing as he noticed consumption on the pickup was varying. He went on to

say that he specifically pointed out the fuel usage between the 2 fuel ups on the 19th and 21st of December. Given that KT's investigation was centred entirely around the purchase of fuel the 19th, the tribunal accepted that this is what he had said, and on balance concluded the claimant's evidence that he was told by KT that the issue was that a lot of fuel was going missing, and that he threatened to call police, was an embellishment of position on his part.

186. In relation to Mr Smith, the Tribunal did not draw the inference from the fact that he issued the dismissal letter shortly after the disciplinary hearing, that he had predetermined the outcome of the hearing. In reaching this conclusion, the Tribunal took into account that Mr Smith had been involved in this process for a considerable time, having conducted the grievance hearing, as well as the disciplinary hearing. By the time the disciplinary hearing concluded, matters had been protracted for a considerable period, and it was not unreasonable for Mr Smith to deliver his decision promptly. Furthermore, the detail which Mr Smith went into in his dismissal letter, explaining his reasoning for his decision, is inconsistent with the notion that the disciplinary process was predetermined.

187. In relation to HT, there was nothing to suggest that the decision to uphold the appeal was premeditated. The length of the appeal hearing was inconsistent with HT having prejudged the issue. Similarly, the extent of his reasons for his decision is consistent with the notion that the outcome is predetermined. The fact that the appeal was not upheld is an insufficient basis upon which to infer that the outcome was predetermined.

188. HT in the course of cross examination used unfortunate language to describe what he felt about retaining an employee in whom he had lost trust. He said, '*you cannot leave that, you cannot have a cancer within your body*'. The tribunal recognises that this language was particularly distressing to the claimant, as he had suffered from cancer, however the use of this unfortunate language did not, in the Tribunal's view, impact on the credibility of Mr Turnbull's evidence.

189. In making this assessment of the credibility of HT, and other witnesses for the respondent, the Tribunal took into account Mr Baird's submissions to the effect that the claimant had produced a document at the beginning of continued hearing (page 390) which made reference to the company's disciplinary procedure. Mr Baird's submission was that it was not credible that the respondents did not have a disciplinary procedure as they claimed.

190. Firstly, the document at 390 was not put to any of the witnesses or spoken to by the claimant. It appears to be part of a Drugs and Alcohol Policy at Stirling Stone, and it appears to be signed by HT. As the document was not spoken to by witness evidence, the Tribunal could not attach any significant weight to it. However, the fact that this document made reference to the company's disciplinary procedure, did not give rise to the conclusion that the respondent's witnesses lacked credibility in stating that the respondents did not have a disciplinary procedure. It clearly would have been easier for the respondents if they had had a disciplinary procedure which they could have followed, rather than them having to admit that they did not have one. There was no plausible reason for the respondents to say they do not have a Disciplinary Policy, when such a policy was existence, and instead to proceed with the disciplinary hearing on the basis of the ACAS Code.

191. The Tribunal did not find the claimant credible and reliable in all matters. It formed the impression that the claimant's sense of injustice at having been dismissed after such a long period of service, on occasion coloured his evidence on material points. The Tribunal's impression of the claimant's evidence was adversely impacted in that he was not always capable of making appropriate concessions; at times he was evasive in answering questions in cross examination; some of the positions he advanced lacked credibility; and occasionally he gave his evidence in a volatile, bordering on hostile manner.

192. An example of the this occurred in that it was one of the claimant's complaints that he was never taken to the statements during the disciplinary hearing. Mr Maguire asked the claimant about a part of Mr Baird's notes of the disciplinary hearing in which Mr Smith is recorded as asking the claimant if he wanted him

to go through the statements which been made so that he could comment on them? It was put to the claimant that this did not tie in with what he said. The claimant was evasive in dealing with this, responding that he could only tell Mr Maguire what happened at the meeting. Mr Maguire then asked if the claimant was he saying the notes were wrong, to which the claimant again responded no, he can only say what happened

193. It was the claimant's evidence that it was unfair for him to be asked questions on the telephone by KT. It was put to the claimant by Mr McGuire that there was no prejudice to him in him being asked questions over the phone. The claimant responded that of course there was, and that 'you don't give evidence over the phone'. He was then asked what he would have said differently if the interview had been conducted face to face, to which the claimant responded he had no idea, and that it was a hypothetical question. Mr McGuire then put to him that he gave full answers to the questions put to him over the telephone. The claimant responded that he answered to the best of his ability but said that Mr McGuire did not take into account that it was 100% different to talk on the phone than face to face.

194. The fact that the claimant was adamant that face to face conversation would have made such a significant difference to what he would have said, but was unable to suggest anything which he might have said differently lacked credibility, and the fact that the claimant was prepared to advance such a position with a great deal of conviction impacted adversely to a degree on the Tribunal's assessment of his credibility.

195. The claimant made an allegation that during the course of the disciplinary hearing that Mr Smith took the witness statements to one side, and indicated they were irrelevant. The Tribunal was not persuaded that this occurred. It was not put to Mr Smith in cross examination that he had done this, and there is no reference to Mr Smith having done this either in the minutes prepared by the respondents or by Mr Baird, and the Tribunal was not satisfied that this occurred as a matter of fact. Further in the minutes of the disciplinary hearing reference is made by Mr Smith to the witness statements in some instances. In addition, in the Tribunal's view it was highly unlikely that the disciplinary

officer conducting a disciplinary hearing would indicate that the evidence on which disciplinary charges was based was irrelevant. Taking these factors into account, the Tribunal was not satisfied that Mr Smith had intimated to the claimant during the course of the disciplinary hearing that the witness statements were irrelevant, as the claimant claimed in his cross examination.

196. As this is a breach of contract claim as well as an unfair dismissal claim, the Tribunal has to make findings as to whether the claimant was guilty of the conduct for which he was dismissed.

197. The Tribunal accepted the evidence of KT about what he was told by Mr McCool, and accepted KT's evidence that he had received timesheets and the receipts for the purchase of petrol on 22 December, and that this receipt had not been marked up to show that fuel been purchased for the forklift truck.

198. The Tribunal considered that the claimant's version of events, provided at the disciplinary hearing, which is recorded in the findings in fact, and which he reiterated at the Tribunal hearing. It considered that version of events against the fact that Mr McCool said he used the forklift just before he and the claimant departed for Glasgow and there was no suggestion that it had run out fuel; that the claimant had not provided a reason for not following the standard procedure of filling the pick-up with red diesel from the Drum in the yard, beyond saying he assumed the Drum was empty because he said the forklift was empty; the fact that the claimant had driven the pickup, a vehicle which he said he regularly complained about to management and which he normally did not drive because of the smell in the vehicle, and at the same time had asked Mr McCool to drive to a different garage in the claimant's own car and to fill it with petrol; and the fact that when he had previously purchased fuel for equipment, the claimant had marked this on the fuel receipt, but did not do so in this case. Taking these factors together and taking into account is assessment of the claimant's credibility generally, on balance the Tribunal was satisfied on the balance of probabilities that the claimant had purchased fuel for his own use using the company credit card on 19 December.

Submissions

Respondent's submissions

199. Mr McGuire produced written submissions, which he supplemented with oral submissions. He took the Tribunal to the facts which he submitted it should find and addressed it on the law. He referred to the test in the case of British Home Stores Limited v Burchell 1980 ICR and he reminded the Tribunal that the burden is on the respondents in establishing the reason for dismissal, the burden of proof as to reasonableness, is neutral. He also cautioned the Tribunal against substituting its own view for that of the employer and referred to the cases of *Foley v Post Office, Midland Bank PLC v Madden 2000 IRLR 82,* and the decision of *Sainsburys Supermarkets v Hitt 2003 IRLR.* Mr McGuire also referred to the case of *Taylor v OCS Group Limited 2006 ICR* 1602, where the Court of Appeal held that the test should not be whether an appeal was to be regarded as merely a review of the decision or a complete rehearing, but rather whether the disciplinary process as a whole can be regarded as giving the employee a fair hearing. Mr McGuire submitted that the case law established that in approaching the question of alleged procedural unfairness, the overarching consideration is any procedural defect's impact upon the substance of the reasonableness or fairness of that process and the decision reached as a result (*Taylor).*

200. Mr McGuire also referred to *Westminster City Council v Cabaj 1986 ICR 960,* where it was held for a procedural defect to the effect that fairness for dismissal had to be shown that the alleged defect denied the dismissed employee an opportunity of showing the employer's reason for dismissal was an insufficient reason for the purpose of section **98(4).**

201. Mr McGuire referred the Tribunal to the ACAS Code of Practice at paragraph 5 to 29, and the six overarching principles entitled '*Keys to Handling Disciplinary issues in the Workplace'*. He submitted that the respondents had complied with those principles, and the Tribunal should find the dismissal fair.

202. In the event that the Tribunal was not with him on that, Mr McGuire submitted that the Tribunal should not order reinstatement. It would be not practical for

the respondents to comply with such an order. The respondent's witnesses gave unchallenged evidence, because of the nature of the allegations against the claimant, their trust in him had gone. The claimant's evidence supported this, in that he said several times that the process was a foregone conclusion. This showed a lack of trust on the part of the claimant in the respondent's senior employees, and it was impossible to see how the claimant could return to work.

203. Mr McGuire also submitted that there should be reductions in compensation and the principles outlined in *Polkey v AE Dayton Services Limited 1987 ICR 142,* and on the grounds of contributory conduct.

204. Mr McGuire submitted that there should be no award for breach of contract on the basis that the respondents were entitled to summarily dismiss the claimant.

Claimant's submissions

205. Mr Baird submitted that the claimant was unfairly dismissed and should be reinstated. He pointed out the claimant's length of service and unblemished record. He referred to the language used by HK in giving evidence and suggested that the respondents had not acted fairly towards the claimant. There had been numerous instances of employees being treated more leniently than the claimant, when they had committed offences which were much more serious, including failure of the drugs and alcohol policy. Mr Baird referred to evidence given by HK in this connection.

206. Mr Baird submitted that it was incredible that the respondents did not have a disciplinary policy, and he referred to document 390.

207. Mr Baird submitted that it was not correct that the respondents had no information about the claimant's health. KT had accepted he had been in contact with the claimant's mother, and the claimant since his accident and had been well aware of his state of health. The process adopted by the respondents was not fair in that KT visited the claimant on 7 February for what

the claimant understood to be a health and wellbeing visit, but then suspended him at the end of that meeting.

208. There was no fair process. It could not be right that employers could be allowed to use the ACAS Code in substitution of a disciplinary policy in order to avoid the obligation of having such a policy in the first place. It was unfair that KT did not approach the claimant on 22 December. Had he done so then matters would have been fresh in the claimant's mind. KT had sufficient time to take legal advice, but not to approach the claimant.

209. In relation to the grievance hearing, Mr Baird complained that Mr Smith could have carried on dealing with the disciplinary hearing, but took legal advice, and decided to deal with the grievance, thus halting the disciplinary hearing. He could have dealt with them at the same time.

210. Mr Baird submitted that Mr Smith failed to address and accept the fact that there were only three people in the yard and it was unreasonable for him not to take this into account and to attach weight to the fact and accept that that the claimant refilled the forklift. The claimant had admitted that he filled the container with fuel, and the only thing he was unable to answer on 7 February was how he used the fuel. Mr Baird submitted that KT had said to the claimant on 7 February '*I am glad you said that'* and the claimant accepted that he had filled the container, and Mr Baird submitted this was not reasonable. From the ACAS Code, and information which would have been available to the respondents, it should have been apparent to them r that an investigation should be even handed, and not just there to establish negative facts.

211. Mr Baird's submitted the appeal was a review, but HK did not consider that HK gave any proper consideration to the points which were put forward at the appeal either in writing or by oral representation. He referred to the fact that in letters of appeal, it was said that Mr Smith said during the course of the disciplinary hearing that all the questions he had, had been answered, despite the fact that he had not raised any questions. The outcome letter at page 263 did not reflect the contents of what was put forward. He noted that at

point 5 of that letter, HK had stated the claimant offered no evidence of how he had been treated inconsistently in comparison with other colleagues, but there was evidence of other employees being rehabilitated, and it was not fair that this opportunity was not afforded to the claimant. It was not reasonable, for the respondents not to give the claimant the benefit of the doubt.

212. Mr Baird also referred to the fact that the witness statements were not signed, and the claimant never saw one signed witness statement. He also referred to the fact that there were no notes of the claimant's conversations with KT put to him for the claimant to verify, and it would be expected that this would be done. Mr Baird submitted it was not fair for KT to take the position that the disciplinary issue should not wait any longer than 7 February, and to deal with that meeting in the way in which he did, starting it with 'small talk'. Mr Baird submitted that fair process had not been followed, and that he would be seeking an uplift in terms of the ACAS Code as a result of that.

213. Mr Baird then addressed the Tribunal on the *Burchell* test. He submitted there was no misconduct, and there was no genuine belief in the claimant's misconduct on the part of the respondents. Mr Baird submitted that the respondents had made the decision to dismiss, which was premediated. Mr Baird submitted that there was no belief based on reasonable grounds that the claimant put forward an explanation, as soon as matters were raised with him, he did not deny that he had filled the container and he had denied acting for personal gain, and his evidence on this should have been accepted, taking into account his length of service, there was no reason why the respondents should not have accepted what the claimant said.

214. In relation to the third limb of the test, as to whether there would have been a reasonable investigation, Mr Baird submitted that there had not been. KT did not conduct a fair meeting with the claimant, carry out a fair investigation and had failed to follow the ACAS Code.

215. The claimant had taken immediate steps seeking employment, and was successful in obtaining a temporary job, with South Coast Stone. This job was temporary on the basis that it was on a trial period, and Mr Baird asked

the Tribunal to accept that the job came to an end in the manner explained by the claimant in evidence. The claimant was hopeful to obtain new employment in the near future.

Consideration

216. In terms of section **94** of the ERA, an employee has the right not to be unfairly dismissed by his employer. Section **98** provides;

217. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

……...

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

218. The reason for dismissal in this case is conduct. In considering the reason for dismissal (and the reasonableness of the dismissal), the case of *British Home Stores Limited v Burchell 1980 ICR 303* referred to by both parties is relevant, and it sets out a threefold test which the Tribunal has to apply. That is that the employer must show that it believed the employee was guilty of misconduct, that it had in its mind reasonable grounds on which to sustain that belief, and at the stage in which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

219. The *Burchell* test is relevant to establishing the employer's belief in the employee's guilt, and therefore the reason for dismissal, but it also applies the question of whether it was reasonable for the employer to treat the reason as a sufficient reason to dismiss in the circumstances. (Section **98(4)** of the ERA).

220. The Tribunal reminded itself that the burden of proof rests with the employer to establish the reason for dismissal, but thereafter the burden in considering the reasonableness of the dismissal under Section **98(4)** is neutral.

221. The Tribunal also reminded itself that the range of reasonable response tests applies in a conduct case both in a decision to dismiss, and the procedure which was adopted by the employer in reaching that decision.

222. The Tribunal began by considering the third step of the *Burchell* test, which was whether at the stage at which belief in the claimant's guilt was formed, the respondents had carried out as much of an investigation into the matter as was reasonable in the circumstances?

223. In this regard, the Tribunal took into account the provisions of the ACAS Code of Practice on Discipline and Grievance Procedure, which sets out the basic requirements for fairness to be applied in most conduct cases. The ACAS Code section on handling disciplinary issues sets out the steps which would normally must be followed, namely:

    a. carry out an investigation to establish the facts of each case.

    b. inform the employee of the problem.

    c. hold a meeting with the employee to discuss the problem.

    d. allow the employee to be accompanied at the meeting.

    e. decide an appropriate action.

    f. provide employees with an appropriate appeal.

224. A number of points were taken by the claimant as to the adequacy of the investigation. Firstly, issues taken with the manner in which the claimant was suspended. It was suggested that KT should have approached the claimant on 22 December, when he first discovered that there was an issue, and that it was unfair for him to wait until 7 February. It was also suggested that it was unfair for him to raise the issue on 7 February, as the clamant was unwell, and for KT do so in the manner in which he did, at the end of what was a relaxed discussion.

225. In relation to KT's decision not to approach the claimant on 22 December, the Tribunal has to apply the subjective test of reasonableness. In doing so it takes into account that KT had only just discovered the issue, on the morning of 22 December, and that the company was due to close around lunchtime for a two-week Christmas shutdown. Applying a subjective standard of reasonableness, and it was not unreasonable for KT to attach weight to these factors, and to take the decision not to approach the claimant by 22 December, but to wait until the respondent's premises reopened on 8 January.

226. Thereafter, after an unfortunate set of circumstances intervened, over which neither claimant or the respondent had any control. Again, applying a subjective test of reasonableness, it cannot be said that it was unreasonable for KT to raise the matter with the claimant when he did. KT accepted that he knew the claimant was going through a difficult period, but he believed that the claimant was getting better. There was no medical evidence before him to suggest the claimant was not fit to deal with this issue. The claimant did not advise he was not fit to meet with KT when he asked to meet with him on the 7th February, albeit KT did not advise the claimant he intended to raise potentially disciplinary matters. It was not unreasonable for KT to raise the potential disciplinary issue with the claimant on 7 February in order to avoid further delay. In terms of the ACAS Code, an employee requires to be informed of the complaints against him and the supporting evidence before a disciplinary meeting, but not before a suspension meeting. The fact that the claimant was not advised that one of the purposes of the meeting on 7 February was to raise this issue, and that the issue was not raised until the later part of the meeting, was not capable of rendering the investigation one which fell out with the band of reasonable responses.

227. Thereafter, issue was taken with the fact that the claimant was spoken to on the telephone by KT. Again, judged against an objective standard of reasonableness, it was not unreasonable for KT to adopt this approach to speaking to the claimant, in the circumstances where he was not at work. The claimant could have asked for a meeting, but did not, and indeed he himself telephoned KT on at least two occasions to provide information.

228. The claimant also complains that he was not given copies of his statements, however he was given copies of all notes which KT took of the telephone conversations which he had with him (other than the second telephone conversation initiated by the claimant on 7 February, of which no notes were made) in advance of the disciplinary hearing.

229. Furthermore, the claimant received this information about a week after the investigation began. KT visited the claimant on 7 February, and the claimant was invited to attend a disciplinary hearing in a letter dated 14 February, in

which he was sent the notes of his discussion with KT, notes of KT's discussion with other witnesses, and the other material which the respondents intended to rely on at the disciplinary hearing. The claimant complains that other witnesses were shown documents, and he was not shown documents to prompt him. It was not clear what this referred to, and there was no specific identification of what documents were shown to witnesses to assist them in providing statements, which were not shown to the claimant. In any event, as indicated above, the claimant had all the material which the respondents had gathered as part of their investigation in advance of the disciplinary hearing.

230. The claimant also complains, that he was advised in the letter of suspension, this was being done in compliance with the respondent's disciplinary policy, and it transpired that there was no such policy. The Tribunal again has to apply a subjective test of reasonableness. The claimant is reasonably entitled to know the policy under which the procedure was being carried out. The letter of suspension contained an error in that the respondents did not have a disciplinary policy. This however was corrected at the point when the claimant was asked to attend the disciplinary hearing, and he was advised that the procedure was being carried out under the ACAS Code of Practice. The claimant was sent a copy of the ACAS Code of Practice in advance of the hearing taking place, and while it is unfortunate that the letter of suspension contained an error, that error was not sufficient to render an investigation, or the conduct of the disciplinary procedure, one which fell out with the band of reasonable responses, in circumstances where the error was acknowledged by the respondents, and they had informed the claimant they were proceeding under the ACAS Code, and provided him with a copy of that document.

231. The disciplinary hearing forms part of the investigation, and the claimant complains that he was not taken by Mr Smith through the witness statements and told what part of the witness statements he was relying upon. Again, the Tribunal has to consider whether what the respondents did during the course of the disciplinary hearing was objectively reasonable.

232. In advance of the hearing the claimant had a letter setting out the charges against him; he had all the witness statements; and further, and he had KT's investigation report, which set out the reasons why he concluded there was a disciplinary case to answer.

233. KT's notes made reference to the evidence given by Gary McCool to the effect that he had witnessed the claimant transfer the fuel at Corbywood station (which the clamant in any event accepted), and that Gary McCool's evidence was that he had used the forklift to load the pickup just before it was driven to Glasgow. Furthermore, during the course of the disciplinary hearing, there was discussion about what was said in the witness statements, and the claimant was afforded an opportunity, which he took, of giving his version of events. This approach on the part of Mr Smith was not unreasonable, and the Tribunal was satisfied that the claimant knew the charges against him and knew what evidence the respondents were relying upon in bringing those disciplinary charges against him.

234. The claimant complained during the course of the grievance hearing that the witness statements were not signed, and the witnesses did not know they were giving evidence to be used as part of a disciplinary process.

235. The respondents produced signed witness statements at the commencement of the Tribunal hearing, but these were not available to the claimant during the course of the disciplinary process.

236. Firstly, the Tribunal accepted the evidence of KT as to the investigations which he undertook and accepted that he accurately recorded his discussions with the witnesses. The Tribunal found KT to be a credible witness, and there was no reason to conclude otherwise in relation to the witness statements. Support for this conclusion is found in that when the claimant suggested to KT that he interviewed Mr. Bigley, KT did so. The fact that he did so is inconsistent with the notion that he was making the statements up, or as suggested, that he had predetermined the outcome of the investigation.

237. In any event, the fact that the witness statements were not signed by the witnesses did not lead the Tribunal to conclude that these were not the

statements which the witnesses had given. Nor did the fact that the witness statements were not signed, applying the objective test of reasonableness, render it unreasonable for the respondents to use the witness statements taken by KT, in the course of the disciplinary hearing.

238. The steps which the respondents took in carrying out the investigation are set out in the findings in fact. The claimant was advised of the allegations against. He was asked questions by KT and given the opportunity by him to provide other information beyond the answers to those questions, and he was given notes of those discussions. KT carried out investigation with other witnesses, one of whom he interviewed at the specific request of the claimant, and the claimant also provided with the notes of those meetings which set out out what the witnesses had to say. The claimant was provided with the garage receipts, and KT's investigation report. This report sets out KT's conclusions, and the basis upon which he had reached those conclusions. All of this was provided in advance of the disciplinary hearing. The claimant was given notice of the disciplinary hearing, told what the specific charges were and advised of the potential consequences of them being upheld; and was provided with a copy of the disciplinary procedure which would apply. He was accompanied by his trade union representative, and he had the opportunity of presenting his version of events at the disciplinary hearing. He was afforded the right of appeal.

239. The claimant complained that the appeal was a review, rather than a rehearing, however there was no evidence before the Tribunal on which it could conclude that there were matters which the claimant wished to advance at the appeal, which he was prevented from advancing. The Tribunal was not taken to anything in HT's cross examination which supported the conclusion that there was any material omission in his letter setting out his reasons for not upholding the appeal, which impacted on the fairness of the process. HK's outcome leter dealt with points made at the appeal. Applying the objective test of reasonableness, the fact that it was said by HT at the commencement of the appeal hearing that it was a review rather than a rehearing, or that every detailed point made during the lengthy appeal hearing was not recorded and

responded to, was not something which was capable of rendering the dismissal procedure, or the investigation, one which was out with the band of reasonable responses.

240. In considering the fairness of the investigation, the Tribunal also took into account the delay which was occasioned by virtue of the fact that the respondents dealt with the claimant's grievance and appeal against the grievance outcome, before concluding the disciplinary hearing.

241. The respondents took the decision to defer the disciplinary process until such times as they had dealt with the grievance, and thereafter the grievance appeal. In the circumstances where the grievance was intimated on the morning of the disciplinary hearing, and went to matters connected to the disciplinary process, and Mr Baird requested that the disciplinary hearing was put on hold to allow the grievance to be dealt with, it cannot be said that such a decision was unreasonable on the part of the respondent.

242. On the basis of the facts which the Tribunal found, and applying the range of reasonable responses test to the steps which the respondent took in carrying out the investigation, the Tribunal was satisfied that the respondents met the third stage of the Burchell test, and at that at the point where they formed their belief in the claimant's guilt of the misconduct for which he was dismissed, the respondents had carried out as much investigation into the matter as was reasonable in the circumstances.

243. The Tribunal went on to consider whether when he took the decision to dismiss, Mr Smith had in his mind reasonable grounds with which to sustain that belief. In considering this, once again the Tribunal has to apply the objective standard of a reasonable employer.

244. The first allegation was that the claimant had filled a container with diesel for his own personal use, and did not pay for it, and this amounted to theft. Mr Smith found this allegation to be upheld and found on the balance of probabilities that the claimant had failed to provide a plausible explanation for filling the container with diesel on 19 December. In reaching this conclusion, as a result of the concerns raised about the KT's meeting with the claimant,

Mr Smith ignored the conversation between the claimant and KT on 7 February where KT had recorded the claimant saying that he did not recall filling the container. This was not an unreasonable approach for Mr Smith to adopt in forming his belief, in light of the concerns raised.

245. Thereafter, Mr Smith made his decision on the basis of the information which he had in his witness statements, the claimant's explanation, and the normal operational practices in the factory, which were filling the forklift with red diesel taken from the Drum in the yard and refilling the Drum by placing an order with the respondent's admin, for new diesel. The claimant accepted these were normal operational practice.

246. Mr Smith ultimately rejected the claimant's explanation that he used the container of diesel to refill the forklift. In reaching that decision, he attached significant weight to a number of factors which included that forklift was normally filled using red diesel from the Drum in the yard, that the claimant had given inconsistent statements on whether he checked the Drum, saying that on 12 February that it was empty, and saying on 13 February that he did not check the drum but simply assumed it was empty as the forklift was empty, and Mr McCool had used the forklift just before he and the claimant departed for Glasgow on 19 December, and Mr McCool was clear that it had not run out of fuel then. Mr Smith attached weight to the fact that the claimant had said on 13 February that he went to 'use' the forklift and noticed that it was out of fuel, and that at the disciplinary hearing, the claimant said he went to put the forklift away before leaving for Glasgow, and that was when he discovered it was out of fuel. Mr Smith attached some weight to the fact that there were inconsistencies in these accounts, and he also considered that it lacked credibility that the claimant decided to put the forklift away in the middle of the day. Mr Smith also attached some weight to the fact that the container could not be found, and neither could the strainer which the claimant said he used to fill the forklift.

247. Mr Smith also attached weight to the fact that receipts had been submitted on 22 December for the purchase of fuel on 19 December, which had not been marked up as showing the purchase of fuel for the forklift. The claimant said

that he marked up receipts on other occasions when he had used the fuel card to purchase diesel for the forklift or the pressure wash. In submission it was said that the clamant has never been shown the timesheets. However, it was not unreasonable for Mr Smith to conclude that the receipts had been submitted. He physically had the receipts, and he had KT's evidence that the receipts had been submitted to him on 22 December, and he was reasonably entitled to accept that evidence.

248. Mr Smith undertook an exercise of balancing what the claimant said, against the other evidence which he had, and he reached the conclusion, on the balance of probabilities that the forklift was not empty as the claimant said, and that claimant had not filled the container for the purpose of refuelling the forklift as he claimed, and Mr Smith formed the belief that the claimant had on the balance of probabilities filled the container with fuel for his own use, and had not paid for the fuel.

249. Mr Smith was reasonably entitled to reach the conclusions which he did in on the basis of the evidence of Mr McCool, the respondents' standard operational practices, the receipts, what was said by the claimant in his defence. It was not unreasonable for him to carry out a balancing exercise, and to reject the claimant's explanation, on the basis that set against the other factors which he was reasonably entitled to find, it lacked credibility, and therefore there were reasonable grounds on which Mr Smith could conclude that the claimant had filled the container for his own personal use, and not paid for it, and that this amount to theft.

250. The second allegation was that on the balance of probabilities, the claimant had failed to provide a plausible explanation for meeting Mr McCool at Corbywood on 19 December, and that he done this in order to conceal his behaviour at the Shell petrol station, and that his conduct was dishonest. Effectively, this was a branch of the first allegation, and Mr Smith rejected the claimant's explanation as to why he initially drove the pickup, with Mr McCool driving his car. Again, Mr Smith was reasonably entitled to exercise his judgment, and the factors which he attached weight to in reaching this conclusion were that the claimant said he did not normally drive the pickup,

and that he gave Mr McCool £20 to fill his car up with fuel at Morrisons. Mr Smith was reasonably entitled to reject the reason advanced by the claimant for diving the pick -up on the basis that he considered it incredible that the claimant decided drive the pickup at the first instance, when he did not normally do so, and that he had asked Mr McCool to go to a different garage, and that he swapped vehicles at Corbywood. Mr Smith considered it lacked credibility that the claimant chose to drive the pick -up in the first place, because of his concerns about the smell in the vehicle. There were therefore reasonable grounds on which he could concluded that the claimant did not want Mr McCool to be present at the Shell petrol station, and that the claimant by that point had formed the intention to fill the container for his own personal use.

251. The third allegation was that on the balance of probabilities, the claimant acted carelessly by transporting the container of diesel from Stirling to Glasgow and back in a container which was not fit for purpose and in doing so he put himself and Mr McCool and other road users' health and safety at risk. There was no factual dispute that the claimant had transported the fuel from Stirling to Glasgow and then back to Stirling, this was a factual conclusion that he was entitled to reach.

252. The Tribunal was satisfied that the principle reason for the claimant's dismissal was that the claimant had filled the container of diesel for his own use, and did not pay for it, and this amounting to theft, and the Tribunal was satisfied that Mr Smith had reasonable grounds upon which to sustain the belief that the claimant was guilty of this conduct, at the point when he made his decision.

253. It follows from that, that the point when the claimant was dismissed, the respondents did believe that he was guilty of misconduct, and therefore the first leg of the Burchell test is satisfied.

254. In reaching this conclusion, the Tribunal then has to consider whether the decision to dismiss was one which fell within the band of reasonable responses.

255. In considering this question, the Tribunal took into account the guidance given in *Iceland Foods Limited v Jones 1983 ICR EAT.* What was said that case was that;

'(1) The starting point should always be the words of (section 98(4)) themselves.

(2) In applying that section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, (the members of the Tribunal), consider the dismissal to be fair.

(3) In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) In many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another could quite reasonably take another;

(5) The function of the Tribunal as an industrial jury is to determine whether in the particular circumstances of each 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 the dismissal falls outside the band, it is unfair.

256. The respondent's witnesses, in particular, KT and HT, gave evidence about the culture of trust within the respondent company, and the importance which they attached to that. The Tribunal found that evidence credible. Mr Smith concluded that the claimant was guilty of theft. The Tribunal was satisfied that Mr Smith did take into account the claimant's previous unblemished record, and his lengthy service, however he was are also reasonably entitled to attach significant weight to the nature of conduct which he had found, and the fact that the claimant was in a position of trust and responsibility, as the factory supervisor.

257. The Tribunal also takes into account the submission made about inconsistency of treatment. It was suggested in submission that others had

been treated more leniently over the years for misdemeanours, than the claimant has been for this offence. Mr Baird put to HT that one employee had been involved in drugs and had then been re-employed. HT's evidence, which the tribunal accepted, was that the individual was a subcontractor and not an employee. He denied involvement with other employees when it was put to him that others had been involved with theft. In any event a complaint of inconsistency in treatment is only relevant in limited circumstances. That is where the employer has led the employee to believe that certain conduct will not lead dismissal; where evidence of other cases been dealt with more leniently supports a complaint that the reason for dismissal given by the employer was not the real reason; or where the decision made by the employer in in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

258. None of those apply in this case. There was no evidence to support the conclusion employees had been told that he would not be dismissed for theft. The tribunal was satisfied that the respondents dismissed the claimant for the reason given. There was no evidence of employees been dismissed in truly parallel circumstances which indicated that the decision to dismiss the claimant was unreasonable.

259. Weighing the factors which Mr Smith took into account, it could not be said that his decision to dismiss was one which no reasonable employer would have taken, or fell out within the band of reasonable responses, and accordingly the Tribunal concluded that the dismissal was fair, and the unfair dismissal claim is dismissed.

Breach of contract claim

260. The claimant's claim for breach of contract is brought on the basis that he was wrongfully dismissed without notice. The claimant's notice period was agreed at 12 weeks. In an action for wrongful dismissal the reasonableness or otherwise of the employer's action is irrelevant. What the Tribunal has to consider is whether there has been repudiatory conduct on the part of the

claimant, which justifies summary dismissal (i.e. dismissal without notice of payment in lieu of notice).

261. That required the Tribunal to consider whether the claimant had been guilty of such repudiatory conduct, and whether the respondents had dismissed him in response to that breach. For the reasons given above, the Tribunal was satisfied that as a matter of fact, the claimant had filled the container with diesel for his own use on 19 December, and paid for this using the company fuel card, and had acted dishonesty in doing so.

262. The Tribunal was satisfied that this dishonest conduct on the part of the claimant was a repudiatory breach of the implied term of trust and confidence in the contract of employment and entitled the respondents to summarily dismiss the claimant without notice, and therefore this claim fails.

Holiday pay claim

263. At the commencement of the hearing, Mr Baird intimated that there was a holiday pay claim predicated on holiday leave which the claimant would have become entitled to during his notice period. No submissions were made in relation to this claim, and the Tribunal in any event found that the respondents were entitled to summarily dismiss the claimant, and therefore this claim fails.

Employment Judge **L Doherty**

Date of Judgment **18 March 2019**

Entered in register and copied to parties **19 March 2019**

264.