Appeal No. UKEATS/0040/12/BI
UKEATS/0041/12/BI
UKEATS/0042/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16, 17 May & 15 November 2013

Before

THE HONOURABLE LADY STACEY

MR P PAGLIARI

MRS A E HIBBERD

UKEATS/0040/12/BI

SOUTH LANARKSHIRE COUNCIL APPELLANT

(1) MR ALEXANDER MILLER BURNS
(2) MR EDWARD KENNEDY
(3) MR STEPHEN MARTIN RESPONDENTS

UKEATS/0041/12/BI

MR ALEXANDER MILLER BURNS APPELLANT

(1) SOUTH LANARKSHIRE COUNCIL
(2) MR EDWARD KENNEDY
(3) MR STEPHEN MARTIN RESPONDENTS

UKEATS/0042/12/BI

MR EDWARD KENNEDY APPELLANT

(1) SOUTH LANARKSHIRE COUNCIL
(2) MR ALEXANDER MILLER BURNS
(3) MR STEPHEN MARTIN RESPONDENTS

JUDGMENT

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APPEARANCES

For South Lanarkshire Council	MR STEPHEN MILLER (Solicitor) Simpson & Marwick 144 West George Street Glasgow G2 2HG
For Mr Burns and Mr Kennedy	MR DAVID HAY (Advocate) Instructed by: Digby Brown LLP 2 West Regent Street Glasgow G2 1RW
For Mr Martin	MR A HARDMAN (Advocate) Instructed by: Harper Macleod LLP Solicitors The Ca'd'oro 45 Gordon Street Glasgow G1 3PE

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Reason for dismissal including substantial other reason

Unfair dismissal; apparent bias; improper conduct by Employment Judge.

The employer dismissed three Claimants for gross misconduct. The Employment Tribunal found that the first and second Claimants had been fairly dismissed and that the third had been unfairly dismissed. The first and second Claimants appealed arguing that their dismissals had been unfair, and that the ET had substituted its judgment for that of the employer, and had made findings for which there was no factual basis. The Respondent appealed arguing that the third Claimant had been fairly dismissed and the ET had substituted its view for that of the employer.

Separately the Respondent argued that the EJ had the appearance of bias. His daughter was and is a partner in the firm which represented the third Claimant, but he had not disclosed that to parties. If he had done so, the Respondent might have asked him to recuse himself. Further and separately, the EJ had interrupted one of the Respondent's witnesses when giving evidence and had thereby prevented her giving all the evidence she wished to give.

Held: the appeals are all refused. The ET looked at the investigation carried out by the Respondent, the decision made by it at first instance and the appeal which followed in great detail. It was entitled to decide as it did that the investigation was not of the best quality, and the first instance decision was flawed; but that the appeal cured the defect. It was entitled to find that the Respondent had before it sufficient material to find the first and second Claimants guilty of gross misconduct. The ET was entitled to find the investigation into the third Claimant was inadequate and that his dismissal was unfair.

The allegation of apparent bias was not made out. Neither was the allegation of improper conduct.

THE HONOURABLE LADY STACEY

1. This was a set of appeals from the decision of an Employment Tribunal in which the Claimants were Mr A Burns, Mr E Kennedy and Mr S Martin and the Respondent was South Lanarkshire Council. The ET decided that Mr Burns and Mr Kennedy had not been unfairly dismissed and they sought to appeal that decision. The ET decided that Mr Martin had been unfairly dismissed and the Respondent sought to appeal that decision. We refer to the parties as, Mr Burns, Mr Kennedy, Mr Martin and the local authority, or "the Claimant" and "the employer" or" "the Respondents" as the context requires. We heard part of the case on the merits of the appeals on 16 and 17 May 2013. On the second day, one of the counsel became ill and the Tribunal had to adjourn. We reconvened on 15 November when the case was completed. We invited counsel to give a summary of the arguments that they had made at the previous sitting, on the merits, and to complete their submissions.

2. There are two broad areas of dispute in this case. The first relates to apparent bias and improper conduct. We deal with it first, as it was argued before us. The second relates to the merits of dismissal and the arguments concern substitution, perversity and lack of reasoning. It was submitted to us that the judgment was "incomprehensible" and while we have not found that to be so, it is very long and convoluted. We did not find it easy to ascertain from the judgment whether there was substitution by the ET and in these reasons we quote parts of the judgment to enable our decision to be seen in context. Our decision is that the appeals fail and we uphold the ET's decisions.

3. The first ground of appeal on behalf of the local authority numbered 7.1 in their grounds of appeal was that of apparent bias. The basis of this ground of appeal was that the

Employment Judge who chaired the Tribunal panel is the father of a partner in the firm of Harper Macleod LLP, which represented Mr Martin. The Employment Judge did not tell parties of the connection, which came to be known to the Respondent only when counsel was instructed in connection with the appeal. The matter having been raised in grounds of appeal, directions were given that an affidavit be lodged from the Employment Judge and we have had the benefit of reading that together with notes from the members of the Tribunal. An affidavit was also lodged by the solicitor for Harper Macleod LLP and an affidavit was lodged from Ms Karen Bain who was the local authority HR professional responsible for the conduct of the disciplinary hearings prior to the dismissals and who was involved in instructing the solicitor who carried out the Employment Tribunal hearing.

4. Mr Miller, solicitor for the respondent began by stating that he required to amend his grounds of appeal in that he had stated "had that connection been revealed to the appellant, then the appellant would have asked the employment judge to recuse himself". He sought to insert the words "been likely to have" between "have" and "asked". That amendment accorded with the affidavit of Ms Bain and no objection was taken. We allowed the amendment.

5. Mr Miller began by referring to the well-known case of **Porter v McGill** [2002] 2 AC 357 and to the test there set out by Lord Hope of Craighead. At paragraph 103 his Lordship expressed his view that the test formulated in earlier cases should be amended by removing the words "or a real danger" from the definition of the test. The test ought to be as follows:

> **"the question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."**

Counsel also referred to paragraph 104 for the proposition that the fears of the person complaining of apparent bias are relevant at the initial stage when the court has to decide whether the complaint is one which should be investigated but thereafter they lose their importance and the test is that of the objective fair minded and informed observer. Counsel then referred to the case of **Lawal v Northern Spirit Limited** [2003] ICR 586 and in particular paragraph 14. He noted that Lord Steyn said this:

> **"The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Porter* v *McGill* [2002] 2 AC 357 has at its core the need for 'the confidence which must be inspired by the courts in a democratic society': *Belilos* v *Switzerland* [1988] 10 EHRR 466, 489, paragraph 67; *Wettstein* v *Switzerland* [application no.33958/96], paragraph 44; *In Re Medicaments and related classes of goods (No.2)* [2001] ICR 564, 591, paragraph 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnston* v *Johnston* [2000] 201 CLR 488, 509, paragraph 53 by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'".**

Counsel submitted that the informed bystander would adopt a balanced approach. He then considered the case of **Jones v DAS Legal Expenses Insurance Co Ltd** [2003] EWCA Civ 1071 in which he addressed us firstly on the facts. The allegation of apparent bias arose in the course of an employment tribunal in which the employment judge at the outset of the case indicated that her husband had a certain degree of involvement with the respondents. There was a dispute about exactly what she did say and the Court of Appeal having reviewed the varying versions came to the view that a note taken at the time which stated that the chairman indicated that there was a possible conflict because her husband, a barrister, occasionally was instructed by the respondents was the likeliest version. In the Court of Appeal the appellant submitted that it must be assumed that husband and wife are members of the same household and therefore there was a closeness of economic interest which should bring into play the rule that if a judge has a personal interest in the outcome of the issue which he is to

resolve, he cannot act as a judge. The argument put against that was that presumed bias is established only if the interest is direct and in that case it was argued that the employment judge had no direct interest in the earnings of her barrister husband. Mr Miller referred us to paragraphs 16 to 19 and paragraphs 24 and 27. He noted that the Court of Appeal traced the cases on the matter to the case of **Dines v Proprietors of Great Junction Canal** (1852) 3 HL CAS 759 in which it was clearly decided that no man should be a judge in his own cause and that that is not confined to a cause in which he is a party but applies to a cause in which he has an interest. In the case of **R v Bow Street Magistrates, ex parte Pinochet (No.2)** [2000] 1 AC 119 Lord Browne-Wilkinson developed this concept. He noted that the fundamental principle that a man may not be a judge in his own cause has two similar but not identical implications:

> **"If a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome, then he is indeed sitting as a judge in his own cause. In that case the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial. At paragraph 18 of the case of *Jones* the court stated the following:- 'what is important in our judgment, is the fact that the judge must have the relevant interest in the party whose cause is before him. In this matter before us, Mr and Mrs Harper had no interest at all in DAS. Mrs Harper herself had nothing whatsoever to do with this insurance company. Her husband may or may not have stood to gain from a favourable decision. But the interest he may have had and the indirect interest Mrs Harper may have had was in their own wellbeing, not in the fortune of the party to the cause before the tribunal. This case in our judgment falls into the second category identified by Lord Browne-Wilkinson, being one where the judge is not normally himself benefiting, but possibly providing a benefit for another by failing to be impartial. On the ground of appeal being advanced to us this appeal fails'".**

The Court of Appeal went on to consider **Porter v McGill** and Lord Hope's speech in that case and noted in paragraph 25 that any doubt should be resolved in favour of disqualification as set out in the case of **Lochabail (UK) Limited v Dayfield Properties Limited** [2000] IRLR 96. The court noted the remarks quoted above of Kirby J that the hypothetical observer should be "neither complacent nor unduly sensitive or suspicious" and as was said by Lord Buckmaster in

Sellar v Highland Railway Co (1919) SC 19:

> **"the importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the following duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."**

The Court of Appeal then considered the facts of the case before them and noted at paragraph 28 that the following facts would materially influence the decision:

> **"(i) The fact that it would have been inconceivable for Mr Harper (who we are told is a part time chairman of the Employment Tribunal) to have sat to hear complaints against his client, both direct and lay client, does not of itself determine the issue of his wife's impartiality.**
>
> **(ii) She has no direct financial interest in the work he does for DAS. There is no evidence as to how they organise their financial affairs as between themselves. Some indirect benefit to her may be a permissible inference to draw, but no more than that.**
>
> **(iii) A wife would ordinarily wish to advance and not hinder her husband's career.**
>
> **(iv) Having some knowledge of the way a barrister earns his living, she would know that just as cases are won and lost so solicitors come and go. The volume of work done by Mr Harper could fairly be described as 'occasional'. It was certainly not a case where all his eggs were in one basket. There would be no reason to think that the loss of DAS related work would materially affect his practice or his income to any substantial extent. It simply released him to do other work for other solicitors.**
>
> **(v) If the informed observer is informed enough about modern vernacular, he would conclude that the chairman could fairly think that having DAS as a client was 'no big deal' for her husband.**
>
> **(vi) Without being complacent or unduly sensitive or suspicious, the observer would appreciate that professional judges are trained to judge and to judge objectively and dispassionately. This does not undermine the need for constant vigilance that judges maintain impartiality – it is a matter of balance.**
>
> **In *Lochabail*, paragraph 21, the court found force in these observations of the Constitutional Court of South Africa in *President of the Republic of South Africa and others* v *South African Rugby Football Union and others* 1999 (7) DCLR 725 (CC), 753:**
>
> > **'The reasonableness of the apprehension [for which one must read in our jurisprudence "the real risk"] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions …at the same time it must never be forgotten that an impartial judge is a fundamental pre-requisite for a fair trial…..'**
>
> **(vii) Moreover in this particular case the charge of impartiality has to lie against the tribunal and this tribunal consisted not only of its chairman but also of two independent wing members who were equal judges of the facts as the chairman was. Their impartiality is not in question and their decision was unanimous".**

6. At paragraph 29 the Court of Appeal found that the fair minded and informed observer would not conclude that the chairman herself, still less the tribunal, as the decision making body was biased. It therefore found that that ground of appeal must fail.

7. Turning to the facts of the present case Mr Miller stated that the Employment Judge had told no one of his connection. He said that that was out of step with practice as there were two employment judges sitting in Glasgow who are married to partners in law firms and that they do not hear cases connected to those firms. He argued that it was wrong not to disclose the connection as it would give rise to a question in the mind of the informed observer. Counsel stated that the Employment Judge in his affidavit said that he did not know at the start of the case that the firm of Harper Macleod LLP was involved at all as that firm's name was not given on the form given to him and while he accepted that there was an Inventory of Productions which bore that name his attention was not directed to that at the beginning of the case. He very frankly said in his affidavit that even if he had known he still would not have made the connection known to the parties. Counsel argued that if his ground of appeal was accepted then the decision must be quashed altogether. He argued that the Employment Judge's affidavit was of relevance to the appeal only insofar as it related to fact and that his own view as to the question of bias was not relevant to our decision making.

8. It may be useful to consider the arguments made against the respondent's ground of appeal at this stage as it is correct to say that if this ground of appeal is upheld then the whole case will require to be remitted. Mr Hardman appeared for the third Claimant and addressed us before counsel for the first and second Claimants. He agreed that the test is an objective one and that the Employment Judge's own view is not relevant before us. He made reference to paragraph 104 of the case of **Porter v McGill** and said that the test could be broken down into

two parts: (1) what are the relevant facts? (2) what would a fair minded and informed observer conclude, having considered those facts. He argued that the answer to the first question was that the relevant facts are these:-

1. The Employment Judge's daughter is a partner in the firm of Harper Macleod LLP and has been so for 2 years.
2. The third Claimant was represented by a solicitor from that firm, Miss Nicol who has been with the firm for 5 years.
3. The Employment Judge's daughter did not have any involvement in the matter whatsoever.
4. The case was funded by insurers. The firm would receive a fee, whether their client won or lost his case. The firm and consequently the Employment Judge's daughter would be in no financial benefit from a favourable decision in the Tribunal.
5. The hearing was before a panel consisting of the Employment Judge and two members. The decision on the merits in the third Claimant's case was reached by all three panel members and they were unanimous.
6. Neither of the Employment Judge's colleagues in the Tribunal detected any indication of bias and accordingly two independent parties to the whole proceedings without any interest in the outcome, whom counsel said we were entitled to consider as fair minded and informed observers, could detect no indication of bias.

9. In discussion counsel argued that matters such as the fee arrangement and the view of the members of the Tribunal were relevant, though of course were matters which could not be known to the Respondent at the start of the case. He argued that the test does involve a degree of hindsight. He argued that judges should recuse themselves only when there is good cause and that the familial relationship between the Employment Judge and the partner in the firm

was not such as to cause the Employment Judge to have a direct interest in it. He also argued that the case was one of many dealt with by a busy firm of solicitors and thus any benefit caused by being successful in the case was not significant. Counsel referred to the case of **Lochabail** and in particular to paragraph 25. He noted that the court recognised that it would be "dangerous and futile" to attempt to define a list of factors which may or may not give rise to a real danger of bias. They then set out a number of circumstances in which they could not conceive of an objection which was soundly based. These included matters such as religion, ethnic or national origin or the judge's social or educational or service or employment background or history, nor that of any member of the judge's family. They then list situations in which a real danger of bias might well be thought to arise such as a personal friendship or animosity between the judge and any member of the public involved in the case and thirdly they give a "catch all" in the following terms:

> **"or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him."**

Mr Hardman argued that the situation in the present case was not in either the first or second set of circumstances mentioned in **Lochabail** and therefore the question was whether or not it came within the third, catch all, category. He argued that it did not. He argued that the connection was not close enough.

10. Mr Hay, counsel for Mr Burns and Mr Kennedy, adopted Mr Hardman's submissions.

11. It had been suggested by Mr Miller, solicitor for the local authority that there were two separate duties. The first was to declare a connection such as that in this case and the second was then to consider whether or not that required the judge to recuse himself. As we

understood him he suggested that the judge should declare an interest in order that parties might have an opportunity to make their submissions and also would be aware of the connection. If the judge decided not to recuse himself then they would at least be aware of the facts of the matter and thus alert to any actual bias that might take place.

Discussion and decision

12. We considered carefully the submissions that were made to us and we took note of the cases to which we were referred. We took the view that the family connection was not such as to require the judge to recuse himself. We did not find that there was the requisite interest in the outcome of the case, as described in the case of **Jones v DAS** above, to lead the informed and impartial observer to decide that there was a real risk of bias. We were not fully addressed on the matter of practice in employment tribunals. We noted Mr Miller's submission that certain Employment Judges do not sit where their spouses are members of firms. We also noted from Ms Nicol's affidavit that she was aware of the connection but did not expect it to be declared. We heard no evidence on the subject. We are not therefore in a position to state what current practice is. In light of all the submissions made to us we did take the view that it might be best practice for any judge to advise parties of a family connection such as offspring in the current situation. We do not however hold that the current situation is one in which recusal is required. We have taken the view that recusal would be required only if there was something more, such as for example involvement by offspring in the case, before the informed and impartial bystander would be concerned about a real risk of bias.

13. Mr Miller's second ground of appeal, numbered 7.2, was that of improper conduct. He advised at the outset of his submissions that he did not intend to argue the second part of this ground. He asked us to delete from the ground the separate ground concerning the judge

convening a case management discussion in the course of the hearing. He wished to argue only that the judge prevented a witness, Gail Robertson, from giving a full explanation of the matters taken into account by the internal appeal panel. In order to make that argument he referred us to the affidavit given by Karen Bain and the responses to that affidavit from the Employment Judge and from Ms Nicol. He referred to Karen Bain's affidavit at paragraph 12 which is in the following terms:

> **"Gail explained that this was not how the service schedules demonstrated Stephen Martin's knowledge of misuse; she said 'the panel thought it was reasonable that the documents show vehicles going on particular days but Stephen Martin said they went every night'. Judge Murphy at that point interrupted Gail. In my notes I have written 'judge stopped' after I had noted this answer. I have written that the judge then said something about holding numbers in his head with the only conceivable explanation and he said 'I struggled to see how they moved from that'. I have then written in brackets Gail trying to explain numbers didn't add up. My notes are not verbatim at that point but she must have been saying something about the number of vehicles not adding up to Stephen Martin's claim of every day for me to have noted that."**

14. Mr Miller referred us to the Employment Judge's response to that affidavit in which he states in a paragraph referring to paragraphs 11 and 12 of the affidavit

> **"again I accept – broadly speaking – the accuracy of these paragraphs. My only comment relates to the fact that I was endeavouring to clarify the basis upon which it was suggested that the third claimant could see that vehicles were being used for an improper purpose."**

Mr Miller submitted to us that the affidavit from Karen Bain showed that the witness Gail Robertson had been prevented from giving all the evidence that she wished to give and that the judge accepted that was so. He argued that the judge's comment relating to what he was endeavouring to do was irrelevant. In discussion Mr Miller was constrained to accept that the affidavit from Karen Bain does not say that the witness was prevented from giving evidence. It says that she was interrupted and asked the question by the judge and that she went on to say something in answer to it. Mr Miller stated in terms that he was not in any way linking his first ground of appeal, that of apparent bias, to his second ground, that of improper conduct. He

made reference to the case of **Docherty v SRC** [1994] SC 395 at page 397. He took from that case that the test is an objective test. The question is whether an informed and reasonable observer present at the hearing who was not a party or associated with a party would gain the impression of bias. The question is not whether the parties themselves felt that they gained an impression of bias. Mr Miller referred us to the case of **Peter Simper & Co Ltd v Cook** [1986] IRLR 19 as authority for that proposition. He then referred to the case of **Facey v Midas Retail Security Limited** [2001] ICR 287 paragraph 36. From that case he took the proposition that any comments that the judge may make about whether or not he was biased are not relevant. He made brief reference to the case of **Jiminez v London Borough of Southwark** (2003) IRLR 477 as illustrative of his point. In referring to the case of **Peter Simper** he pointed out that a litigant cannot be expected to object at the time to improper conduct. He argued that in the present case the Employment Judge interrupted and prevented the witness speaking. He anticipated the argument from others that objection could have been taken to the judge's course of action. He argued that it was not to be expected that counsel would do that.

15. In response to Mr Miller's argument, Mr Hardman argued that the factual basis on which the argument for the Respondent was based was not made out. He argued that from the affidavit and the response to it one could see that the Employment Judge interrupted Gail Robertson's evidence but did not stop it. There is no suggestion that his demeanour was bullying or aggressive. The solicitor appearing for the Respondents did not take issue at the time with what was done and perhaps more importantly did not seek to re-examine. He argued that it could not be said that the Employment Judge had restricted or had sought to restrict the evidence of Gail Robertson. In contrast he had sought to clarify her evidence in a manner common in the inquisitorial style adopted by employment judges in employment tribunals. The

nature of such tribunals permits questioning by the Employment Judge or any member of the Tribunal in order to clarify their understanding of issues. Mr Hardman argued that the panel members' notes were relevant as were the assertions and denials made by Ms Nicol in her affidavit.

16. We took the view that the factual basis on which we had to decide was that set out in the affidavits and the responses thereto and the notes. We had however to filter out the subjective parts of that. We were not therefore persuaded that we should consider the Employment Judge's own view as to whether he was stopping evidence coming out but we did feel entitled to take from his affidavit that he was asking questions in order to understand the witness's evidence. The subjective nature of Ms Bain's affidavit also required us to filter out her own personal view, she being one of the officers of the local authority who are the Respondents. The views expressed by the lay members were not views that we felt we should rely on as they were essentially supportive of the Employment Judge but in a non-factual way.

17. We therefore took the view that the Employment Judge had asked questions of a witness and while that might have stopped the witness in the middle of an answer he did not stop her giving evidence. Had there been any real difficulty in the witness giving her evidence at that time then she should have been re-examined. We therefore found that this ground of appeal is not made out.

The merits of the appeals

18. This case is about unfair dismissal. The three Claimants were employed by the Respondent in the roads department, in different functions. Mr Burns had taken on the informal role of transport manager; Mr Kennedy was a road operative; and Mr Martin was the depot

manager. Their dismissals arose out of arrangements for travel between depots. At the time of dismissal the Respondents had a depot at Hawbank, East Kilbride and a depot at Forrest Street, Blantyre. They had in the past had premises at Lesmahagow. Mr Martin was the most senior person based at Hawbank. Mr Kennedy worked at Hawbank as did Mr Burns. There was a further employee, Mr V. Fitzgerald, who was the subject of disciplinary proceedings at the same time as the three Claimants and who was given a final written warning. He was the most junior and worked as a road operative. Mr Fitzgerald and Mr Kennedy had previously worked at Lesmahagow; when the depot there closed they had been transferred from there to the depot at Forrest Street, in 1998. They had then been transferred around 2003 to Hawbank. The local authority had a provision in the employment contracts under which they employed the Claimants and their other road workers that if an employee was moved to a depot further away from his home address he could obtain the cost of the increased travel, known as "excess fares" or alternatively could obtain use of the Respondents' vehicles to travel the extra distance, which was known as "excess travel". Whichever was chosen, the arrangement was meant to last for 4 years after the transfer. The controversy which arose in this case and which led to the disciplinary proceedings evolved around arrangements for transport.

19. On 30 October 2007 Mr Martin sent an email to Mr Darroch who was then the Respondents' road contracting manager in the following terms:-

> **"Jim,**
>
> **I had a wee delegation in today namely H McGlinchie and J Reid, they were complaining that 'some men' were still getting transport to come to their work and that their expenses had stopped.**
>
> **I advised them that I was unaware the 4 years were up and that I would look into the situation. I did point out to them that the present arrangement suited me operationally and that I would be recommending it continue.**
>
> **I offered that if the transport were to continue they were welcome to take advantage of it if they would assist in taking vehicles for services, they said that did not suit them and they**

would rather use their own transport. The undernoted personnel opted for transport rather than expenses when moved from Forrest Street depot to East Kilbride depot.

During this time the transport has been used for callouts.

Below is a list of number of callouts per man and estimated expenses saved assuming return journey for each callout for 1 year only April 2006 to April 2007.

J Druggan	43	244.22
D Gillespie (J)	79	474
D Gillespie (S)	83	431.60
V Fitzgerald	66	122496 (sic)
E Kennedy	108	1728
Total unpaid expenses for 1 year	£4102.78	

The pickups used have also proved invaluable for response to emergency incidents as they usually carry small tools and sand.

Setting aside the obvious savings in expenses, all the above personnel drop off and uplift ALL vehicles to and from Forrest Street for service/repair on their way home and to work thus avoiding cost of two men shunting vehicles through normal working day or on overtime. Last night I had three vehicles for service, without the use of the present arrangement I would have had to use four men for the return journey which would take at least 1 hour and I doubt if it would have had a lot of volunteers especially any of the above if the arrangement stops."

Mr Darroch acknowledged that email on 1 November saying that he wanted to think about the matter and on 12 November replied in the following terms:-

"Stevie

The arrangements should continue as long as it suits the service. The arrangements should however be available to any Hawbank operative, provided the vehicles have the capacity and the users are prepared to take and recover vehicles from the workshop when required.

Jim."

These emails became known in the Employment Tribunal as "the Darroch emails". The Tribunal found as a fact that one of the line managers of Mr Fitzgerald and Mr Kennedy told them that the arrangement whereby they had enjoyed free transport between Hawbank and Lesmahagow would finish at the end of December 2007. Mr Fitzgerald and Mr Kennedy had been using vehicles belonging to the Respondent to travel to their place of work firstly when they were transferred from the depot at Lesmahagow to Forrest Street, Blantyre in 1998 and thereafter from Forrest Street to the Hawbank depot, East Kilbride, in September 2003. Mr Fitzgerald and Mr Kennedy were dissatisfied with the discontinuation of their free transport

and on or about 6 December 2007 they wrote to Mr Darroch in terms that included the following:-

> **"Eddie and I have been informed by our line manager that the transport we are currently using from Hawbank Depot to Lesmahagow Depot will cease at the end of December.**
>
> **We would like to make the following points:-**
>
> **1. Both Eddie and I have, on many occasions, taken vehicles to Forrest Street at the end of our shift for servicing and have then travelled back to Lesmahagow yard in our own time.**
>
> **2. On our journey to work, we have picked up vehicles from servicing and have returned them to Hawbank yard for starting time.**
>
> **3. We have never received any travelling expenses for our callouts or any other duties due to having this transport.**
>
> **4. With the transport being at Lesmahagow yard, we have responded to our callouts well within the recommended time.**
>
> **5. There are operatives whose work base is Carnwath and Lesmahagow but do work for Hawbank Yard. These operatives leave their depot travelling to and from their workplace in council time. Eddie and myself are travelling to and from Lesmahagow in our own time.**
>
> **We would be grateful if you could reconsider your decision with regard to the transport situation and look forward to hearing from you in the near future."**

Mr Darroch replied to that letter on 7 January in the following terms:

> **"It is customary for the Council to provide means of transport or excess travel payment for 4 years after an employee has been asked to transfer to a new reporting point further from their home.**
>
> **The vehicle you refer to was provided after you were asked to transfer to Forrest Street when we lost the lighting maintenance contract in Clydesdale. The use of the vehicle was further extended in 2003, as a gesture of goodwill, when you were asked to transfer to Hawbank along with the rest of the Forrest Street workforce.**
>
> **The use of the vehicle should have ceased 4 years thereafter but continued in oversight.**
>
> **I cannot justify the continuation of this subsidy. There are insufficient operational grounds. Furthermore it could now be considered as favouritism and sets a precedent which cannot be provided for the rest of the workforce. As previously advised provision of this transport will now terminate."**

The letter of 6 December and the reply of 7 January became known in the Employment Tribunal as "the Darroch correspondence". The reply was copied to Mr Martin.

20. The Employment Tribunal found that on or about 4 November 2009 Mr George Wells, a senior manager, wrote to Mr Graham Milne, manager of Mr Martin in the following terms:-

> **"As part of the disciplinary case where an employee used a vehicle for personal use whilst taking it to Forrest Street, Blantyre, my recollection is we undertook to stop routinely parking vehicles at Forrest Street and to only take vehicles there that required servicing. If you have sound operational reasons for continuing to park vehicles at Forrest Street could you detail them to me and also how we will control the use of those vehicles in future."**

Mr Milne spoke to Mr Martin who advised him that vehicles were only sent from Hawbank to Forrest Street for service or repair and in a handwritten note appended to the letter quoted above Mr Milne noted the following:-

> **"Discussed with Steve Martin. I was advised that vehicles only went to Forrest Street for servicing or repair. Therefore there was no requirement to contact George as no control measures were required."**

After that Mr Milne sent an email to the depot supervisors, on 12 March 2010, reminding them that vehicles should only be taken to Forrest Street if there was a business need, such as servicing or repair. No instruction was ever given to cease the transport of vehicles for maintenance purposes at the beginning and end of each day.

21. On or around 2 March 2010 the local authority received an anonymous letter in the following terms:-

> **"How can a cash strapped Council sanction the use of a Council vehicle for the personal use of two individuals after working hours???**
>
> **This is the case at Hawbank depot concerning Edward Kennedy and Vincent Fitzgerald and this had been sanctioned by Mr Graham Milne on Friday 19 February. You may like to know these two have been covertly using a vehicle for about the last 12/13 years at tremendous cost to the taxpayer.**
>
> **Last year a man was suspended for a week without pay for using a Council vehicle after work for one night only.**
>
> **I hope you will look into this and get it stopped."**

The same day, 2 March 2010 the Respondents also received a petition signed by 18 employees in the following terms:-

> **"We are writing in the hope that you could assist us with the problem we have at our roads depot in Hawbank, East Kilbride. There are two employees who are being given what can only be described as preferential treatment, namely Vincent Fitzgerald and Eddie Kennedy. Both men are being given a works vehicle at the end of their shifts which should be taken to Forrest Street depot for maintenance. Thereafter they should pick up their own private vehicles to travel home. Vincent stays in Lanark and Eddie stays in Carluke.**
>
> **Previously they were allowed to take vehicles home but after complaints from the workforce this was changed to the above.**
>
> **We have made our feelings known to our depot supervisors. They in turn brought this to the attention of Graham Milne who overturned the supervisor's decision to stop this practice.**
>
> **There are several other men who stay closer to Forrest Street and could take the vehicles for repair but are not being given the chance.**
>
> **The reason we are bringing this to your attention is that we have no confidence in Graham Milne or those in our own department who should sort this out.**
>
> **We have attached a signed petition in the hope that you can get this situation resolved".**

22. The Respondents decided to investigate the allegations and appointed Mr Wells to carry out the investigation. Mr Wells interviewed by telephone two of the people who had signed the petition. He also viewed CCTV footage of part of the site at Forrest Street. He invited Mr Kennedy to a fact finding meeting, telling him that he was carrying out an investigation into "alleged vehicle misuse".

23. The fact finding meeting took place on 23 March 2010. It was conducted by Mr Wells. Mr Kennedy was present and accompanied by a Trade Union representative. It was explained to Mr Kennedy that there had been an allegation that he and Mr Fitzgerald had been using the Respondents' vehicles for personal purposes. He was asked if he used a Council vehicle for personal use after working hours and he stated that he did not. He was asked how he had travelled to work that morning and said that he had delivered a vehicle to the Forrest Street depot the previous evening and picked it up that morning. He was asked how he normally travelled to work and he stated that he would take his car to Forrest Street and pick up one of the Respondents' vehicles that required to be returned to Hawbank but that if there was no vehicle to be returned from Forrest Street to Hawbank he would use his own car. He said that he would sometimes get a telephone call from Mr Burns on his way to work asking him to pick

up a particular vehicle at Forrest Street and bring it to Hawbank. Mr Wells asked him how often vehicles were taken to Forrest Street and he said that they required to be taken every night. He said there was always vehicles in need of repair or servicing. He was asked if vehicles had to be taken to Forrest Street for any other reason and he said that gritters were sometimes taken there as were other vehicles hired by the Respondents and that he had on occasion taken a "Hiab" vehicle to Forrest Street. The Respondents had viewed CCTV of 19 February 2010 and had seen two local authority vehicles leaving Hawbank at about 3.30pm. They were not booked into Forrest Street for repair and they had not returned to Hawbank by 4.59pm. They asked Mr Kennedy if he knew anything about it and he stated that he did not. Mr Kennedy's position was that previously he had been allowed to report to Forrest Street and pick up a vehicle to take him to Hawbank rather than claim excess travel expenses having been compulsorily transferred. That situation had however changed and he was asked by his supervisors to deliver vehicles to and from Forrest Street for servicing and repair.

24. The Respondents held a fact finding meeting with Mr Burns on 1 April 2010. Mr Burns' position was noted as being that he had used Mr Kennedy, Mr Fitzgerald and another worker to take vehicles that required to be serviced or repaired to Forrest Street at the end of a shift and to collect vehicles that had to be transported from Forrest Street to Hawbank. He said this happened nearly every night except Thursdays on which day Mr Kennedy and Mr Fitzgerald would use their own vehicles to travel to Hawbank. Mr Burns said that he used Mr Fitzgerald and Mr Kennedy to do this because they had taken excess travel in preference to excess fares. Mr Burns said that he was not aware of the letter written by Mr Darroch on 7 January 2008. He did not know anything about two vehicles being taken from Hawbank on 19 February 2010 and not returning by 4.59pm. He could only conclude that they had been taken for service or repair. He said that the arrangement whereby employees ferried vehicles to and from Forrest Street at

the beginning and end of shifts was of considerable benefit to the Respondents. Mr Burns was sent a copy of the minute of the meeting of 1 April and replied adding comments which were noted by the Employment Tribunal as including the following:-

> **"Having thought about the questions further I would like to add with regards to other employees who have taken and collected vehicles to/from Forrest Street and were paid overtime:-**
>
> **Tam McGhee**
>
> **Martin Donnelly**
>
> **Graham McNeill**
>
> **'Gully men' were also used during working hours before or after going to the coupe.**
>
> **John McGarvey had stopped this practice due to intimidation of certain members of the workforce on more than one occasion.**
>
> **I would like to emphasise I was continuing a practice authorised by management".**

25. On or around 6 April 2010 Mr Burns sent to Mr Kennedy a text message which read "Get Vinnie at FS". CCTV footage for 28/29 March and 6 April relating to Forrest Street premises was made available by the Respondents and viewed by the Tribunal. On 29 March 2010 at 16.45 a vehicle belonging to the Respondents arrived at Forrest Street and was parked near the perimeter fence. At 16.46 a man left the vehicle and walked across the depot and at 16.50 a car belonging to Mr Fitzgerald left the depot. On the CCTV footage recorded on 6 April 2010 a black car was parked within the confines of the Forrest Street depot at 07.29 when another car arrived. Mr Fitzgerald left one of the vehicles and Mr Kennedy the other. Both then entered a pickup belonging to the Respondents and left. Neither of them carried out any check on the pickup. Both men were paid from 07.30. The significance of this was that workers were paid to carry out safety checks on vehicles at the start of their shift. There was no safety check carried out. There was no record of the vehicle that they picked up having been serviced. There was a vehicle which had to be picked up from Forrest Street on 6 April 2010 and that was done by another worker at about 08.40.

26. The Respondents investigated the fleet day book maintained by them at the Forrest Street depot for the period 19 February 2010 to 8 April 2010. From that they discovered that vehicles were not booked into Forrest Street every night and that vehicles were not picked up there every morning. They found that more than half of the vehicles booked into Forrest Street for service or repair were delivered during the working day.

27. An investigative meeting relating to the third Claimant, Mr Martin, took place on 15 April 2010. Mr Wells took the meeting and told Mr Martin that reports had been received to the effect that Mr Kennedy and Mr Fitzgerald had been using Council vehicles for personal use after working hours. Mr Wells told Mr Martin that Mr Kennedy had said that he and Mr Fitzgerald had sometimes been authorised by Mr Martin to deliver vehicles for service and repair from Hawbank and to collect them in the morning. Mr Martin confirmed that that was correct and said that Mr Kennedy, Mr Fitzgerald and another person used to take vehicles for servicing and bring them back. He explained that the arrangement suited the three men. He was asked if any other workers participated in this practice and he replied that the first Claimant, Mr Burns was the one who organised the movement of vehicles for servicing and repair. He said that between 40 and 50 vehicles required to be serviced each month and that while they used to be taken to Forrest Street during the working day, since he had started in his post it was more economical to deliver vehicles at the end of the day. He sometimes allowed Mr Kennedy and Mr Fitzgerald to leave 15 minutes early. Vehicles were taken every day. He said that since he had returned to work following a period of illness between November 2009 and the end of March 2010 only Mr Kennedy and Mr Fitzgerald had participated in the practice. He said that others had previously participated in it but now that there was an inquiry going on, it seemed that people did not wish to do it. He said that he had been in conversation with

Mr Darroch about 2 years previously and it had been suggested that he should speak to all of the men and ask them if they wanted to take vehicles to and from Forrest Street but no one had been interested in doing so. He accepted that Mr Milne had spoken to him in or around November 2009 and had stated that vehicles should only be taken to Forrest Street if there was a business need such as servicing or repair. It was suggested to Mr Martin that if no vehicles had to be taken to Forrest Street for servicing Mr Kennedy and Mr Fitzgerald would take a Council vehicle to Forrest Street because their own vehicles were parked there. Mr Martin did not accept this and stated that to his knowledge, there was always some vehicle which required to go down to Forrest Street for servicing. It was suggested to him that this could be seen as favouritism towards Mr Fitzgerald and Mr Kennedy and he replied that everyone else had been given the opportunity to participate but they did not wish to do so.

28. The Respondents held second investigative meetings in relation to all three of the Claimants, during June 2010. All three men were suspended at that time. Mr Wells produced reports on each Claimant setting out findings. As a result of the reports the Respondents summoned Mr Burns to a disciplinary hearing by letter. That letter stated the following:-

> **"The reason for the hearing is, it is alleged that:-**
>
> - **You were negligent in your duties as supervisor by failing to adhere to and contravening Council policies in relation to the driver's handbook**
> - **You were complicit in the fraudulent use of Council vehicles in that you allowed and deliberately deceived management regarding the personal use of Council vehicles by two employees**
> - **Your actions have brought the reputation of South Lanarkshire Council into disrepute**
> - **You have contravened the Council's Code of Conduct for employees."**

Then Mr Kennedy received a letter telling him that disciplinary proceedings were to be instituted for the following reasons:-

- **"You used Council assets for personal gain in that you fraudulently used a Council vehicle to travel to and from your place of work and that this was also in your employer's time.**

- **You contravened the Council's policies in relation to the Code of Conduct and driver's handbook.**

- **Your actions have brought the reputation of South Lanarkshire Council into disrepute.**

- **You failed to follow a direct instruction."**

A letter was sent to Mr Martin telling him that disciplinary proceedings were to be initiated against him for the following reasons:-

- **"You were negligent in your duties as depot manager by failing to adhere to and contravening Council policies in relation to the driver's handbook.**

- **You were complicit in the fraudulent use of Council vehicles in that you allowed and deliberately deceived management regarding the personal use of Council vehicles by two employees**

- **Your actions have brought the reputation of South Lanarkshire Council into disrepute**

- **You have contravened the Council's Code of Conduct for employees**

- **You failed to follow a direct instruction."**

29. At the disciplinary hearings the Respondents took up the same position as regards each person, set out in full by the ET at paragraph 174 in the following terms:-

> **"An anonymous complaint was received regarding a vehicle being taken from Hawbank Depot on 19th February. Internal Audit investigated the matter part of which included Richard Brown, Auditor and me viewing CCTV footage from Hawbank and records at Forrest Street. This shows that that 2 vehicles left Hawbank at approximately 3,30 p.m. but neither was booked in to Forrest Street nor returned to Hawbank by the end of the day. It appears to be Edward Kennedy, Vincent Fitzgerald in one of the vehicles and the supervisor Alex Burns said he assumed it would be them. When interviewed on 23rd March VF/EK said they knew nothing about the vehicles seen leaving Hawbank.**
>
> **17 employees based in Hawbank Depot signed a petition regarding VF/EK's use of a Council vehicle. Internal Audit and corporate personnel instructed the Resource to carry out investigation into this alleged misuse of Council assets.**
>
> **VF/EK originally had an arrangement to use Council vehicles as an alternative to excess fares when they transferred from Lesmahagow to Forrest Street in August 1998. This was continued when they moved from Forrest Street to Hawbank in September 2003. This arrangement suited the service since these employees also sometimes dropped off vehicles at Forrest Street on their way home. Also leaving a vehicle at Lesmahagow at night saved the service time and money in responding to call outs. The arrangement in terms of excess fears justification should have ceased in August 2007. Due to an oversight it continued and when discovered in October/November 2007 employees asked the then Contracting Manager Jim Darroch (J D) if the arrangement could continue. The Depot Manager Stevie Martin (SM) advised the contracting manager that he could justify this as a means of delivering vehicles to**

Forrest Street for service and repair. In January 2008 the contracting manager instructed the employees and the depot manager that the arrangement should cease as there was insufficient operational justification to continue this subsidy and it could be seen as favouritism towards these 2 employees.

All involved appear to have understood the meaning of this instruction as when questioned about the use of Council vehicles all said that the previous arrangement of subsidised home to work transport had ceased and that they now only took vehicles when they needed to go to Forrest Street for service or repair. The employees, supervisor and depot manager all said that these employees took vehicles to Forrest Street almost every day and witnesses said they had yet to see these employees arrive at work in anything other than a Council vehicle.

Forrest Street records were examined to establish how often vehicles were delivered at the end of the day and collected at the beginning of the day. Records were examined for a period of 7 weeks from the 19th of February. This shows that vehicles are not booked in to Forrest Street for a service or repair every night nor is there one picked up every morning. Indeed more than half the vehicles booked in for service or repair during this period were booked in during the working day. At this point employees were suspended from duty as there appeared to be no plausible explanation for them leaving/arriving at Hawbank every day in a Council vehicle."

30. On 8 July 2010 a disciplinary hearing took place in connection with Mr Fitzgerald at which his union representative summed up by saying that Mr Fitzgerald had alluded to using a vehicle which was not for service or repair. That however was not a dishonest act or a wilful breach of trust. Rather it was a liberal interpretation of a system within the workplace which was clearly to Mr Fitzgerald's benefit but it benefited the organisation too, and was a *quid quo pro* arrangement that was countenanced by his managers. He said his supervisor was satisfied. The Employment Tribunal found as a fact that Mr Fitzgerald had Mr Burns in mind when he said that his supervisor was satisfied and he did not have Mr Martin in mind at that time.

31. The result of the disciplinary hearings was that all three men were dismissed and Mr Fitzgerald, the fourth man, was given a final written warning. In the course of outlining his reasons, Mr MacKay, the dismissing officer said [at page 70 of the ET judgment]

"He advised the at (*sic*) consequently he had then had to rely upon his assessment of the differing accounts he heard yesterday. Three of those interviewed continued to maintain that vehicles were taken to Forrest Street only for servicing and repair. One said that this was not the case and acknowledged that occasionally Council vehicles were taken on a two-way journey solely for personal transport. This was described as a '*quid pro quo* arrangement whereby the operative benefited occasionally from their willingness to assist with servicing vehicles."

Mr MacKay said that after consideration he had taken the view that the latter is the more credible version of events.

32. Thus it can be seen that Mr Fitzgerald was the only one of the four men to state that he knew that he was getting transport, as was Mr Kennedy, as a benefit rather than because vehicles needed to be taken for service or returned after being serviced. The other three did not admit that. Each of the three who were dismissed were given letters stating the reasons for their dismissal.

The first Claimant's letter was in the following terms:

- **" You were negligent in your duties as supervisor by failing to adhere to and contravening Council policies in relation to the driver's handbook.**
- **You were complicit in the fraudulent use of Council vehicles in that you allowed and deliberately deceived management regarding the personal use of Council vehicles by two employees.**
- **Your actions have brought the reputation of South Lanarkshire Council into disrepute.**
- **You have contravened the Council's Code of Conduct for employees."**

The second Claimant's letter was in the following terms:

- **" You used Council assets for personal gain in that you fraudulently used a Council vehicle to travel to and from your place of work and that this was also in your employer's time.**
- **You contravened the Council's policies in relation to the Code of Conduct and driver's handbook.**
- **Your actions have brought the reputation of South Lanarkshire Council into disrepute.**
- **You failed to follow a direct instruction."**

The third Claimant, Mr Martin, received a letter in the following terms:

- **"You were negligent in your duties as depot manager by failing to adhere to and contravening Council policies in relation to the driver's handbook.**

- **You were complicit in the fraudulent use of Council vehicles in that you allowed and deliberately deceived management regarding the personal use of Council vehicles by two employees.**
- **Your actions have brought the reputation of South Lanarkshire Council into disrepute.**
- **You have contravened the Council's Code of Conduct for employees.**
- **You failed to follow a direct instruction".**

33. The Tribunal found at paragraph 264 that in reaching the decision to dismiss, Mr MacKay ignored the spreadsheet which was a record of vehicles which were booked in for service at Forrest Street and did not take into account its contents for any purpose. Similarly he ignored the CCTV footage relating to 6 April 2010. They found at paragraph 265 that the Respondents did not interview any of those named by the Claimants as having been involved in the arrangement for ferrying vehicles or in the Darroch emails or in the course of the investigative or disciplinary proceedings. They did not interview any of the supervisors at Hawbank. Mr MacKay treated the issue before him as essentially one of credibility, that is of choosing between the version of events given by Mr Fitzgerald and what he thought to be the version of events given by the Claimants. They also found, at paragraph 267 that while Mr Martin had a satisfactory working relationship with Mr Fitzgerald and Mr Kennedy it was not established that their relationship was particularly close.

34. The positions taken up by the Claimants are recorded by the ET in paragraphs 270 onwards. Mr Burns' position was that vehicles were taken to Forrest Street only when they were needing to be serviced or repaired. He was continuing a previous practice and had done nothing wrong. Mr Kennedy stated that the Forrest Street records were not accurate and that vehicles were only taken they are for service or repair and under instructions. Mr Martin's position was that he never had a direct instruction not to shunt vehicles to Forrest Street at the end of the day. The practice of taking vehicles at the beginning or end of the day was instigated

purely for operational reasons. He had no motive to show any favouritism to Mr Kennedy or Mr Fitzgerald. Further he was off sick during the time when investigation had been carried out.

35. All of the Claimants appealed and appeal hearings were heard on 26 and 27 October and 11 November 2010. CCTV footage of 6 April 2010 was played and evidence was led. Mr Wells accepted that his investigation had not been as thorough as it might have been. Mr Fitzgerald again implicated Mr Burns but stated that he was not aware if Mr Martin knew. He said that he had never been asked if the second Claimant, Mr Kennedy took vehicles for personal use. Mr MacKay gave evidence and said that the CCTV footage of 6 April made it clear that the second Claimant, Mr Kennedy, was using one of the Respondents' vans for a lift to work and was getting paid for it. His evidence was to the effect that Mr Martin was aware that vehicles were being taken between Hawbank and Forrest Street that did not require service or repair. At the end of the proceedings on 11 November 2010 the appeals panel announced that the appeals had been unsuccessful. They did not give reasons for their decision.

36. The ET then narrated the submissions made by those appearing in front of it.

37. From p82 onwards the submissions of the parties at the ET are given. Mr McCann said this was a case for application of the **Burchell v BHS** principles, and that the Council had carried out a reasonable investigation; the council reasonably believed that all three of the workers had been involved in misusing council transport, or authorising its misuse. Thus the employer's confidence in the employees had been fatally undermined. The fraud they were said to have participated in was at paragraph 284, being "personal use of the respondents' vehicles under the pretence of taking them for service and repair, by using vehicles for part of the journey to work."

38. Mr Milvenan who appeared for Mr Burns and Mr Kennedy said that the witnesses lacked credibility, and the dismissal was procedurally and substantively unfair because there had been an excessive delay in dealing with the appeal. He argued that Mr Fitzgerald did not implicate Mr Kennedy. As far as Mr Burns was concerned, the Respondent should have recognised that Mr Fitzgerald was trying to mitigate his own position. There had not been a reasonable investigation. Dismissal lay out with the band of reasonable responses. These Claimants got no benefit from what had been happening. Also Mr Kennedy had not had a chance to deal with Mr Fitzgerald's evidence against him. Mr Fitzgerald had been treated inconsistently.

39. Ms Nicol criticised the extent of the investigation of the petitioners who should not have been allowed to remain anonymous, and criticised the use of the spreadsheet. She said the local authority had not established that they had a reasonable belief in the misconduct and that dismissal was not a reasonable response. She referred to the ACAS code to show that the investigation had not been adequate as it covered only a 6 week period when Mr Martin had been off work.

40. The ET set out the issues which arose in the case at paragraph 306 as follows: –

- **"Whether the claimants were unfairly dismissed;**
- **Whether, esto there had been some defect in the decision to dismiss such as to render the initial decision to dismiss unfair, any such defect had been cured as a result of the appeal;**
- **Whether, esto any of the claimants were unfairly dismissed, they had contributed to their dismissal;**
- **What was the likelihood that, esto any of the claimants were unfairly dismissed, they would have been retained in employment, had the respondents acted fairly;**
- **Whether, given that the claimants, or any of them, were unfairly dismissed they should be reinstated."**

That direction by the ET to itself of the issues in the case is not criticised.

41. The ET reasons then consist of a long discussion. The ET correctly directed itself in terms of the case of **Abernethy v Mott, Hay and Anderson** (1974) ICR that the reason for dismissal is "the set of facts known to the employer, or it may be of beliefs held by him, which caused him to dismiss the employee." The ET narrates at considerable length the evidence which it heard and its view of it. It directed itself correctly at paragraph 395 on the case of **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23, to the effect that the test of a reasonable investigation is that of what the reasonable employer would do. It also accepted a submission made to it by the solicitor for the Respondent to the effect that an employer may take into account in determining whether or not to dismiss the attitude of the employee to his conduct, under reference to the case of **Paul v East Surrey District Health Authority** [1995] IRLR 305. The ET eventually came to the view that the investigation in respect of the first and second Claimants was insufficient. That was a majority view, the minority taking the view that the failure to investigate was "grossly reprehensible and the decision to dismiss wholly disproportionate to the perceived fault. There was reason to believe that the Respondents' witnesses were not truly as indignant about the conduct of the Claimants as they would have had us believe, and did not believe that continuing with the excess travel arrangement was truly reprehensible, or, if they did, could only have reached that conclusion as a result of not giving the matter proper thought."

42. The ET however decided that the appeal rendered the whole process fair. The vital finding is at paragraph 422 where the ET found that the appeal panel took into account evidence which enabled it to decide that that bearing in mind the contents of the spreadsheet, vehicles did

not go to be serviced in number sufficient to justify 2 men making that journey each day in Council vehicles.

43. At paragraph 439 the ET made the vital finding again by a majority that the Respondents had material from which they could reasonably draw the conclusion that the second Claimant had committed the equivalent of a "clocking on" offence in that he had claimed payment for the period from 7.30 a.m. until his arrival at the depot on 6 April 2010 when he was not working but was travelling to work. They also found that there was sufficient to find that the first Claimant connived at that state of affairs. In paragraph 440 the ET found that the Claimants were given a fair opportunity to meet the charge but could give no satisfactory explanation. At paragraph 441 they ET state as follows: –

> **"In these circumstances, the majority are satisfied that the dismissals of the first and second claimants were fair despite the many imperfections in the process. An employer must be able to trust his employees and the conduct of the first and second claimants destroyed that trust. The respondents could not reasonably be expected to continue to employ the first and second claimants."**

44. The question before us was whether the ET had erred in law in coming to the decisions described above. The ET explained its reasoning at length. It set out at paragraph 316 the Respondents' position on the facts, which was that Mr MacKay had reached the conclusion that the scheme had been put in place whereby employees of the Respondents, including particularly Mr Kennedy and Mr Fitzgerald continued to receive the benefit of the travel after the period during which they were entitled to it had expired and that he decided to dismiss all of the Claimants, although all 3 had played different parts in the scheme. At paragraph 317, the ET noted that two issues were before them, namely whether Mr MacKay truly reached the conclusion that he claimed to have reached and whether if he did reach such a conclusion, that conclusion caused him to dismiss the Claimants. The ET then explored that. They noted that

Mr MacKay said that he treated the issue before him as essentially one of credibility. While there was a spreadsheet before him, which purported to show the movement of vehicles Mr MacKay had said that it could not be relied upon and he therefore put it to the side.

45. The ET noted (at paragraph 322) that the representatives of the Claimants argued that the position taken by Mr MacKay at the appeal hearing was inconsistent with the position that he took when he decided to dismiss. They argued that what he said at the time gives a more reliable guide to his thoughts and reasoning then evidence he gave much later. They noted that the spreadsheet could not have been in his mind at the time. They argued, however, that he had said in evidence before the ET that while he did not regard the spreadsheet as reliable for the purpose of determining the identity of people who had delivered vehicles he had relied on it for the purpose of establishing the total number of vehicles which had been sent for servicing and repair.

46. The ET noted that Mr MacKay realised that he was taking an important decision in the lives of four men. The ET decided that Mr MacKay simply concluded that Mr Fitzgerald was telling the truth and saw no reason to go further. The Tribunal, for reasons which they explain, came to the view that Mr MacKay did not rely on the CCTV footage. They found, however, at paragraph 327 that Mr MacKay modified his position for the appeal. The Tribunal went on to find however that they did not accept the argument that the Respondents had not established the reason for dismissal. The ET decided that if the local authority witnesses were to say that they believed that the Claimants were guilty of gross misconduct, then the reason for dismissal would be precisely that conclusion, and that would hold even if the conclusion was based on inadequate grounds.

47. The ET then went on to consider the reasonableness of the local authority's decision to reject the evidence of the Claimants. The first point that they tackle is the submission that the reasonable employer would not have preferred the word of Mr Fitzgerald to others. They set out the arguments that were put to them in that regard, including that Mr Fitzgerald had changed his position late in the day when he was fighting to save his job and had every incentive to load the blame onto other people. It was argued that Mr Fitzgerald was contradicted by Claimants who had given many years of loyal service and that that service ought to have counted for something in deciding what weight should be given to the testimony. Further, it was suggested that as Mr Fitzgerald had lacked credibility at the Employment Tribunal, he must have lacked credibility at the Respondent's investigation. It was also argued that Mr Fitzgerald's own position had not been properly investigated. It was described by the trade union representatives as a "quid pro quo arrangement", but Mr Fitzgerald had not said that and he would not even know what that expression meant.

48. The ET noted that Mr MacKay rejected the word of the first and second Claimants to the extent that their word conflicted with Mr Fitzgerald's word for reasons which he gave as follows: –

1. Mr Fitzgerald's version fitted the surrounding facts
2. The first and second Claimants gave awkward improbable versions of events.
3. The first Claimant knew about the movement of vehicles.
4. The first Claimant produced a diary at a late stage in rather suspicious circumstances.
5. The second Claimant lacked credibility because he changed his position.
6. The second Claimant produced a diary in even more suspicious circumstances.
7. There was no explanation given for the sending of the text.

8. Mr MacKay knew that Mr Fitzgerald had an axe to grind, and gave that due consideration and weight.

49. At paragraph 331, the ET find that they do not accept that no reasonable employer would have preferred Mr Fitzgerald's word to that of the Claimants. They correctly directed themselves that they can interfere with that assessment only if no reasonable employer could have made the assessment. They note quite clearly that they might have their own view about certain elements but that that is not a matter for them.

50. In paragraph 333 the ET considered the band of reasonable responses tests, insofar as they relate to considerations relevant to all of the cases. It was suggested to the ET that an arrangement whereby workers would ferry vehicles between depots and get free travel between these points in return, even if there was no business need for it, was self-evidently gross misconduct. The fall-back position was that such an arrangement was self-evidently gross misconduct when parties had received a direct instruction not to do it. It was argued that even if it was not misconduct in the first example given above, then it was misconduct once it had been prohibited.

51. The ET appeared to give their own views in paragraph 338 and 339 where they state that it would be gross misconduct to do such a thing if it had been expressly prohibited, but that such a worker would act innocently if he had his employer's agreement that he may do so, or even if he genuinely believed that he had his employer's permission to do so. In order to resolve the situation in the sense of looking at the facts found proved, the ET looked at the emails and correspondence involving Mr Darroch. They set it out in a number of paragraphs and by paragraph 355 stated that the test was that the Respondents had to conclude that no

reasonable employee placed as were the Claimants could in good faith have thought that the emails gave permission. The ET came to the view that the emails were not clear enough to allow the reasonable employer to decide that any employee who thought that they give permission must be fraudulent. The ET noted that the local authority's position was that there had been a direct instruction after the emails and that was found in the correspondence. That correspondence affected Mr Kennedy and Mr Fitzgerald because it was sent to inform them but it was not according to the ET reasonably to be constructed as a direct instruction to Mr Martin, or as an instruction to Mr Burns. The ET came to a view about this in paragraph 364 where it stated as follows: –

> **"We cannot agree that the Darroch correspondence is to be construed as the respondents would have us construe it. It cannot be disputed that that correspondence was as plain as an instruction as can be that the practice of allowing free travel to said Fitzgerald, and the second claimant… had to stop, but we do not see how it can reasonably be interpreted as recalling any permission contained in the Darroch emails."**

52. The ET came to consider the position of the first Claimant in paragraph 378 onwards. They make criticism of Mr MacKay in paragraph 381, but in paragraph 382 it is noted that the majority of the ET found that Mr MacKay genuinely believed the first and second Claimants both participated in a scheme whereby certain employees were allowed to use Council vehicles in exchange for agreeing to ferry vehicles at the beginning and end of shifts whether there was a business need to transport the vehicles or not. They also found that he believed that these actings amounted to gross misconduct. They also found, in paragraph 383 that those genuinely held beliefs caused Mr MacKay to dismiss the first Claimant. The minority view was that the failure of the Respondents to investigate the activities of other employees who had been named as being involved in activities similar to those to which the first and second Claimants were said to have been involved was a strong indicator that considerations other than those to which the local authority's witnesses admitted were present.

53. The ET then considered at paragraph 385 the second requirement, namely, whether, at the point in time when the decision to dismiss was taken, the Respondents had evidence sufficient to support the belief that they formed. They found that it could not seriously be disputed that there was material sufficient to support the belief that the first Claimant had participated in the arrangement described. Mr Fitzgerald's evidence was very clear. They then came to look at the application of the third requirement. They stated that Mr MacKay saw it as a matter of credibility and they say at paragraph 390 that they themselves might not have seen it as one simply of credibility. They note at paragraph 392 that the crucial question relates to whether no reasonable employer placed as were the Respondents would have neglected to make further enquiries in order to establish whether the word of the first Claimant could be preferred to that of Mr Fitzgerald. They noted that it was suggested that the Respondents could have questioned the people who signed the petition. At paragraph 394 the ET noted that the Claimants had given long and satisfactory service and that dismissal was likely to have devastating effects on their lives. They find that a reasonable employer would make what simple, inexpensive enquiries that he could without too much trouble and inconvenience. The ET found that it would have been a simple matter to speak to other employees. At paragraph 395 the ET directed itself on the case of **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23 as authority for the proposition that before the ET could find any dismissal unfair due to unreasonable investigation, it must be satisfied that no reasonable employer would have neglected to make the investigation said to have been lacking. They state at the end of paragraph 395 that they are satisfied that no reasonable employer would have neglected to interview those named in the email and the supervisors. The minority went further and thought that this was evidence that the employer did not want to get to the bottom of things.

54. At paragraph 397 the ET went on to consider whether, even assuming that the Respondents could reasonably conclude that the first Claimant had continued to operate the excess travel arrangement after the expiry of the relevant period, dismissal fell within the band of reasonable responses. They note at paragraph 399 as follows: –

> **"The problem arises from the fact that none of the claimants unambiguously adopted the position that they simply continue to operate an arrangement akin to that of the excess travel arrangement in the belief that he had permission to do so. Had they done so, their position (in connection with this issue) might have been impregnable."**

55. At paragraph 406 they ET state: –

> **"We are all satisfied that, even on the basis of the facts said to have been accepted by the respondents, no reasonable employer would have dismissed the first claimant. We accept that a reasonable employer could draw an inference of consciousness of guilt on the part of the first claimant in consequence of his change of position and subsequent actings, and we recognise that the respondents could conclude that the first claimant had fabricated evidence, but the change of position and subsequent actings did not absolve the respondents from considering carefully whether there was truly evidence to suggest that the first claimant must have known that what he was doing was wrong, and, had they considered the Darroch emails and correspondence with reasonable diligence, they could only have concluded that there was a good deal of doubt about the matter."**

56. The ET turned its attention to the second named claimant, Mr Kennedy, at paragraphs 413 onwards. It found that Mr Kennedy was implicated by Mr Fitzgerald, even though he had not named him directly. However, the Tribunal found at paragraph 415 that the evidence of Mr Fitzgerald, which was said to implicate Mr Kennedy was not put to Mr Kennedy before he was dismissed. The Tribunal found, however, at paragraph 417 that that did not render the dismissal unfair. They found that Mr Kennedy could not have been ignorant of the nature of the allegation made against him and that he was given a fair opportunity to meet the allegation to the extent that he could. They note also that he had every opportunity to deal with Mr Fitzgerald's allegation at the appeal hearing. They find however at paragraph 418 that the initial decision to dismiss Mr Kennedy was unfair for the reasons given already in respect of

Mr Burns. Once again the minority of the Tribunal was of the opinion that the employer had not shown the reason for the dismissal.

57. At paragraphs 421 onwards, the Tribunal considered the appeal as it affected the first and second Claimants and directed itself correctly that the case of **Taylor v OCS Group Limited** [2006] IRLR 613 showed that it is the overall process with which the Tribunal had to be concerned. They found that the appeal used the evidence of the spreadsheet and of the CCTV. The ET found that it was fair for the appeal to do so. It was alleged at the hearing that even if it was fair to use the spreadsheet, it was unreliable. The ET considered that carefully between paragraphs 426 and 432 and came to the view that the spreadsheet could be described, by the Respondents, as giving a fairly accurate picture of the number of vehicles going to and from the depots. Nevertheless, the ET found at that it was not a reliable guide to the number of vehicles travelling legitimately between the 2 depots. However, in paragraph 437 the ET noted that the appeal took a radically different view of the significance of the events of 6 April 2010 from that taken by Mr MacKay. The appeal body found that Mr Kennedy got into a car that morning and had no explanation why he was at that depot at all. At paragraph 439 the majority find that it was indisputably the case that the Respondent had material from which they could reasonably draw the conclusion that the second Claimant had committed the equivalent of a "clocking on" offence. That led the Tribunal to find that both Claimants were given a fair opportunity to meet the charge, but could not do so. Thus the majority was satisfied that the dismissals of the first and second Claimants were fair, despite there being many imperfections in the process. Essentially, the Tribunal found that the first and second Claimants were complicit in charging the employer for time spent in travelling to work when they were not entitled so to do. The minority was not persuaded that the employers had shown the real reason for dismissal.

58. The ET found that despite the long service of the first and second Claimants, a reasonable employer could dismiss because dishonesty was involved. The submission was made to the ET that there was no comparative justice when Mr Fitzgerald was not dismissed. The ET disposed of that argument by noting that there were differences in that Mr Fitzgerald was the most junior, he had not maintained a false defence, nor put forward fabricated documents and he had not sought overtime that he was not entitled to.

59. When it came to the case of the third Claimant, the parties were agreed that the case was suitable for the application of the guidelines set out in the **Burchell** case. The ET looked carefully at the material available to the employer. The Tribunal noted at paragraph 458 that Mr MacKay could have material sufficient to support the belief that Mr Martin was guilty of complicity in a fraud only if there was material capable of supporting a belief that Mr Martin believed that other employees were using the system of taking vehicles to disguise the fact that local authority vehicles were being used for part of their journeys to and from work. They set out at paragraph 460 the way in which the Respondent tested it. They found that Mr MacKay saw it as a matter of credibility and then considered whether it was reasonable for him to do so. They found that the only statement made by Mr Fitzgerald, which was said to implicate Mr Martin was at his own disciplinary hearing and was as follows: –

> **"VF confirmed that the practice was condoned by his line managers."**

It was pointed out by the representative of Mr Martin at the ET that either the Respondent believed that the expression "line managers" included Mr Martin, or they did not so believe. If they did not believe that, then the dismissal must be unfair. If they did believe that included Mr Martin, then it was hard to see that the position was any better because there was the possibility that the expression equally referred to other managers from whom Mr Fitzgerald took

instructions. It was also argued that in the situation of the Respondent, when they were dealing with Mr Martin, who had 31 years service, it would be only reasonable to ask Mr Fitzgerald who he had in mind when he used the expression “line managers”. The tribunal looked at the evidence to see if Mr MacKay could reasonably have thought that Mr Martin was implicated. They noted that in evidence before them, when Mr MacKay was asked why he had not asked Mr Fitzgerald whom he meant, Mr MacKay said that he did not think Mr Fitzgerald would tell the truth and that Mr MacKay thought that the third Claimant Mr Martin was involved. The Tribunal came to the view that no reasonable interpretation of what was said by Mr Fitzgerald would include the interpretation that Mr Fitzgerald was referring to Mr Martin. The ET realised that the employer did not purport to rely solely on the word of Mr Fitzgerald. They also relied on assertions that Mr Martin would be able to see Mr Fitzgerald and Mr Kennedy arrive and depart in a Council vehicle every day; that he would be aware of vehicles that were being serviced; and that he had sanctioned overtime for Mr Fitzgerald and Mr Kennedy. Thus he would know what was going on. It was argued that the third Claimant was evasive and lacking in credibility. The Tribunal did not accept the submissions. They found at paragraph 483 that there was no evidence to support them. The Tribunal correctly directed itself at paragraph 495 that their own view of the credibility of Mr Martin was not what was in issue. They understood that they could not go behind the Respondent’s conclusion in that connection. However, at paragraph 497 they found that when finding Mr Martin to be lacking in credibility, the Respondents took into account factors that no reasonable employer would have taken into account. They noted that Mr MacKay purported to believe Mr Fitzgerald and to find that he could not therefore believe Mr Martin. The ET thought, however, that there was no conflict between the two versions of evidence. They found at paragraph 520 that no reasonable employer would have failed to question Mr Fitzgerald concerning the identity of those whom he had in mind when he used the expression “line managers”. They found that Mr MacKay had

not truly applied his mind to the proper question before him, which was whether Mr Martin had received an instruction to discontinue the excess travel arrangement.

60. The Tribunal then considered whether or not the appeal had cured matters as regards Mr Martin's case. They noted that the appeal was not a full rehearing but rather a review in which the investigative and disciplinary procedures were looked at in order to determine whether they had been properly carried out. The ET found at paragraph 526 that it is difficult to see how such an appeal could cure the unfairness because the central problem, that the Respondents failed to prove the reason for dismissal, remained unsolved. It was suggested in evidence to the Tribunal that the appeal body had proceeded by way of regarding it as a question of credibility and they find at paragraph 527 that that was not appropriate and that the appeal proceedings cured nothing.

61. The Tribunal then went on to consider the question of contribution by the Claimants to the dismissal. The vital finding is at paragraph 532 when the Tribunal find that if the decision to dismiss the first and second first Claimants was truly unfair, they contributed heavily to it. They found that the Respondents had evidence from which they were entitled to conclude that the second Claimant had claimed an overtime payment to which he was not entitled, and that the first Claimant aided and abetted him in his enterprise. They therefore found that the contribution was 100%.

62. The Tribunal then considered a reduction in terms of the case of **Polkey** in the case of Mr Martin. They dealt with this very shortly, in paragraph 533 where they state that they had no reason to suppose that Mr Martin would not have continued in the employment of the Respondents indefinitely if they had acted fairly. They therefore made no reduction.

Submissions before EAT

63. Mr Miller on behalf of the local authority argued that the ET had erred in law by substituting its own assessment of the evidence instead of analysing the local authority's reasoning. He further argued that it erred in law by taking into account the length of service at the stage of looking at the reasonableness or otherwise of the investigation. He argued that the ET had ignored and misunderstood relevant evidence. The points taken were that the ET did not seem to understand that at least 2 vehicles needed to be serviced each day if the transport arrangements had a legitimate explanation. He argued further that the Tribunal in its detailed interpretation of the Darroch emails and correspondence made a conclusion that no one had argued it should. That was categorised as perverse as regards the correspondence. As regards disposal, Mr Miller argued that the finding of unfair dismissal as regards Mr Martin should be quashed with an order remitting the claim to be reheard by a freshly constituted tribunal or alternatively that the EAT should proceed on the basis of unchallenged facts to dismiss the claim.

64. On behalf of Mr Burns and Mr Kennedy, the grounds of appeal were to the effect that in deciding that the appeal panels reasoning formed the real reason for dismissal the Employment Tribunal erred because it did not appreciate that the onus lay on the employer and that it was always for the employer to show why it had dismissed the employee. It was argued that the ET had arrived at a conclusion in relation to the dismissal that was not advanced by the employer. The appeal panel had not given reasons for its decision thus the ET had been wrong in deciding that the appeal panel had "a radically different approach" because there was no evidence to that effect. It was further argued that in any event the defects in the dismissal procedure were not cured on appeal. Counsel argued that if a fair reason for dismissal could be established by the

employer then the ET had to look at the terms of section 98(4) of the **Employment Rights Act 1996** and had to decide whether or not in all of the circumstances the dismissal was fair. At that stage there was no onus. The Employment Tribunal had to decide, looking at it from an objective stand point, the decision was fair or unfair. Counsel argued that the ET had proceeded properly in terms of their consideration of the first instance decision of the employer. He argued that thereafter they had gone wrong. He put it graphically by saying that he wanted to "keep the patient alive, but amputate the limb of the appeal." Mr Hay addressed us on what he proposed as the correct construction of the Darroch emails and correspondence and argued that the ET had reached a wrong conclusion about these matters. According to Mr Hay the emails and correspondence properly construed did not make it clear to Mr Kennedy that he was not to use Council vehicles for personal benefit. Taking on points made by Mr Miller for the local authority, counsel argued that length of service was mentioned as a relevant matter when considering the investigation. As we understood Mr Hay, he accepted that even those who do not have long service are entitled to have a reasonable investigation but he argued that the effect of long service can be something that should be borne in mind. Counsel considered the reasons of the ET in some detail. He argued that when they were considering the first instance decision they did not substitute their own view as can be seen from their reasons where they frequently state that they considered the reasonable range of responses open to an employer.

65. In his argument that the ET had erred in law when deciding that the dismissals of Mr Burns and Mr Kennedy were in the end fair, counsel argued that the ET had forgotten that the employer had the onus of showing why there had been a dismissal. He further argued that the decision was perverse because there was not sufficient evidential basis for the ET to decide what the appeal panel had thought. His fallback position on that was that in any event the Employment Tribunal had erred because what was done by way of appeal was not enough to

redress the shortcomings in the first instance decision. His argument was that the ET decision that there had been a "clocking on offence" was something that was not put by the employer as the reason for dismissal and had been decided by the ET on its own. He argued that the appeal panel had not given their views in any reasoned fashion. Thus he argued it was perverse on the part of the ET to decide that the appeal panel had cured the defects found at first instance.

66. Counsel argued that the dismissals were unfair and that the matter ought to be remitted to the ET to determine remedy.

67. Mr Miller, on behalf of the local authority, argued in response to counsel's submissions that there was no contradiction between the emails and the correspondence and the ET was entitled to take what it did from it. He was of course constrained to argue that the ET had erred in law as regards Mr Martin. On the question of the relevance or otherwise of length of service Mr Miller sought to argue by reference to the case of **<u>DS v Dundee City Council</u>** [2013] CSIH 91 that length of service was not always automatically relevant. That case concerned dismissal in the circumstances of ill-health and we did not find the reference particularly helpful. Lord Drummond Young did say at paragraph [33] the following:-

> **"In misconduct cases length of service will often be relevant, because if the employee has worked for a long time without misconduct that may be a strong indication that either he is unlikely to have done anything seriously wrong or what he has done can be treated as a temporary aberration."**

That was not in point in the decision his Lordship was making as he was concerned with ill-health. He went on to say the following:-

> **"The critical question in every case is whether the length of the employee's service and the manner in which he worked during that period yields inferences that indicate that the employee is likely to return to work as soon as he can."**

It was argued that in the present case the tribunal did not address this question; they merely treated length of service as a factor that in itself was automatically relevant. In our opinion that is not the correct approach. Our own opinion is that we respectfully agree with his Lordship that it must be necessary to look at the particular circumstances of each case and that long service is not automatically relevant but that it may be relevant depending in the nature of the case and the arguments.

68. On behalf of Mr Martin, Mr Hardman, counsel, argued that while the Tribunal's reasoning was lengthy and convoluted it was comprehensible. He reminded us that the EAT should not interfere with the decision of the ET unless it was properly said to be perverse, under reference to the well-known cases of **Mellon v Hector Powe Limited** [1981] ICR 43 and **Hollister v NFU** [1979] IRLR 238. Mr Hardman argued that the reasoning of the ET in respect of Mr Martin was quite clear. They did not find that the hearing at first instance was satisfactory because the dismissing officer did not clarify from Mr Fitzgerald whether Mr Martin knew of any unauthorised travel by staff. In those circumstances the local authority had not discharged the onus of showing that they had genuinely dismissed him because they thought that he was involved. Mr Hardman argued that the ET had not substituted their own view on the issue of credibility for that of the reasonable employer as the Tribunal had reminded itself several times during the course of its written reasons that it must not do so. According to Mr Hardman the position was relatively simple in that a reasonable employer would have considered in far more detail the position of Mr Martin before it decided to dismiss him. While Mr Hardman accepted that the fact that Mr Martin had a relatively senior position and had worked for the Council for more than 30 years did not mean that he was entitled to a reasonable investigation and others were not, he argued that the length of service had not been an essential part of the ET's decision making. Thus they had not taken into account an

irrelevant matter. As to disposal Mr Hardman submitted that if the appeal against the decision so far as it related to Mr Martin was allowed then it should be remitted to a fresh tribunal to consider all matters of new.

69. We mean no disrespect to the arguments put up by Mr Miller, Mr Hay and Mr Hardman if we do not narrate them in their entirety. We found that their arguments on the question of apparent bias and improper conduct were extremely helpful and enabled us to consider fully that part of the case. When it came to the matter of dismissal we were inclined to agree with all three appearing before us that the written reasons of the ET were very complicated and convoluted. We have come to the view that that may have been necessarily so because of the way in which the evidence was led at the local authority first instance and appeal hearings and thereafter at the ET. We do not think that the ET can be said not to have directed itself properly on its function. It is abundantly clear from the judgment that it reminded itself on several occasions of the necessity not to substitute its own view. We have come to the view that when the judgment is looked at as it should be, that is with all of it in mind and without any unnecessary over-analysis, what the ET has found is that there was material before the local authority in respect of Mr Burns and Mr Kennedy which entitled the local authority to find that both of them had misused the employer's transport in such a way as to destroy the necessary trust between employer and employee. In respect of Mr Martin, the ET was entitled to come to the view that there had not been sufficient in the evidence to show that Mr Martin was implicated in those activities. They were entitled to hold that the evidence was left in too vague a fashion to show that Mr Martin was implicated.

70. We are concerned in this judgment not to impose our own view of the matters. Our function is to consider whether or not the ET has erred in law. We are very conscious that the

ET had the advantage that we do not have of hearing the evidence from the witnesses as it was led. We can see that the investigation was not carried out in an optimal manner, as found by the ET and we can see that the reasoning of the appeal panel requires to be ascertained from oral evidence as there were no written reasons. We find however that the ET was entitled, in light of all the evidence that was before it, to find that the local authority had evidence before it from which it was entitled to take the decisions that it did. We have set out some of the reasoning of the ET to show that it gave long and detailed reasons in which it examined carefully the reasoning of the local authority and tested that reasoning against the evidence which had been led before the local authority in the disciplinary process. We are conscious that the facts appear to be very complicated and the reasons are convoluted. That is frequently so at the end of a case before the ET when the parties perfectly properly have gone over in detail all that was said and done at a disciplinary process. The ET requires to set out the arguments before it and it has done so. Its function is to decide if the dismissals were fair or not. It must not substitute its own view, but rather must decide if the local authority made decisions which are within the range of reasonable decisions open to a reasonable employer. We have decided that the ET was entitled to find that there was evidence as regards Mr Burns and Mr Kennedy which entitled the local authority to dismiss; and as regards Mr Martin to find that there was not.

71. As we are not satisfied that there was any error of law, we refuse the appeals.