# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Elizabeth Paraskos

**Respondent:** East Sussex County Council

**Heard at: London South (Ashford)**

**On: 27, 28 & 29 June 2018**

**Before: Employment Judge John Crosfill**

**Representation**

Claimant: Mr R Denman Counsel of Holden & Co

Respondent: Mr D Piddlington Counsel instructed by the Respondent

# REASONS

1. The Claimant having requested full written reasons at the conclusion of the hearing I provide the following reasons.

2. The Respondent is a Local Authority. Amongst its functions is the provision of the registration services for births, deaths and marriages. The Claimant was employed by the Respondent from 1999 in their registration service rising to the position of 'Team Leader Life Events'. The Claimant was summarily dismissed and the decision communicated to her by letter dated 27 April 2017. In these proceedings she challenges the fairness of that dismissal.

3. The parties had prepared an agreed bundle of documents and written witness statements in compliance with earlier directions of the Employment Tribunal. The parties agreed that the only remaining claim that the Tribunal was required to decide was a claim of unfair dismissal claims for discrimination having been withdrawn.

4. The morning of the first day was taken up with the Tribunal reading the witness statements and the documents referred to by those witnesses.

5. In the course of the hearing the Tribunal heard from:

    5.1. Mr Mike Bendell, latterly the Claimant's line manager, as 'Life Events Manager'

5.2. Steve Quayle the 'Team Manager- Registration'

5.3. Lorna Peters, a Training Officer

5.4. Lucy Corrie, Head of Communities who presented the Management Case at the disciplinary hearing

5.5. Nick Skelton, the 'Assistant Director Communities' and the person who took the decision to dismiss the Claimant

5.6. on behalf of the Claimant, David Birchenough, the Manager of the Hastings Crematorium

5.7. the Claimant herself.

6. The Claimant had served a witness statement from her trade union representative Mr Alex Knutsen. He had been expected to give evidence on the third day of the hearing. Unfortunately, due to the health of his wife he was unable to attend. The Tribunal was able to read his statement and to give his evidence as much weight as the circumstances permitted.

7. At the outset of the hearing, it was agreed that the Tribunal would deal with liability, and any issue relating to 'Polkey' and/or contributory fault but would reserve all other issues relating to any award that might be made until the broad questions on liability were determined.

8. At the conclusion of the evidence I heard submissions from both Counsel. Those submissions are not set out in full but the arguments raised are addressed below. In the course of submissions, I referred to authorities supporting the principle that, where dishonesty is alleged against an employee, that should be clearly set out. I invited Counsel to make any further representations but neither chose to do so.

## Findings of fact

9. The Claimant has had a career in local government that started in 1994 and she started work for the respondent on 14th June 1999. She was successful and gradually promoted to a role as an Office Manager and then, by around 2010/201, Principal Registrar.

10. Michael Bendell had a significant role in this case. He started work for the respondent in March 2013 when he was initially appointed as a casual registration officer. Initially, he and the Claimant (to whom he reported) had a good working relationship. She trained and encouraged him. He had made a good impression on senior management and was soon made a permanent member of staff.

11. In 2015, there was a substantial reorganisation in the department in which the Claimant and Mr Bendell worked. The senior employees were invited to apply for new posts. Both the Claimant and Michael Bendell applied for an available role as 'Life Events Manager' and they were in competition with each other. The conclusion of the interview and selection process was that Michael Bendell would be appointed. This meant that the Claimant would report to him. Clearly, this would have come as a significant blow to the Claimant who demonstrated her feelings when she questioned why she had not been appointed given her

greater experience. Initially in these proceedings, she suggested that that it a factor in that decision making might have been her age or her gender. She initially brought discrimination claims but she has not pursued those claims before me and I have not been required to make any findings. The evidence given by Steve Quayle, which I accept, was that Mike Bendell was the best performer at a competitive interview and was appointed on merit. The fact that he had less local government experience than the Claimant did not count against him.

12. The fact that Mr Bendell was promoted effectively leapfrogging the Claimant, was compounded by the fact the Claimant first heard that Mike Bendell would be her new line manager from him rather than hearing it independently from her own manager at the time Steve Quayle. That was inadvertent as Steve Quayle had at least intended to inform the Claimant by email. That was, in the circumstances, a little insensitive but again has no bearing on the actual outcome of this case.

13. Any change in any organisation is unsettling and this is clear that the Claimant and other employees were deeply unsettled by the reorganisation. The Claimant in particular had a period of sick leave which although unfortunate did mean that she did not have the awkwardness of line managing Mr Bendell until his appointment (whereupon he would take over and line manage her). Her diagnosis in this period was that she was suffering from stress and anxiety.

14. The Claimant returned to work in early October. As her new role had more of an operational element to it, she requested some refresher training. I found Lorna Peters who was given the responsibility of training to be a straightforward and credible witness. In the light of her evidence I make the findings set out below.

15. The Claimant was given some 8 days training which was conducted in exactly the same manner as if she had been a new starter. New starters were given 8 days training from a running start in order to become registrars. Quite plainly, the Claimant had brought a considerable number of years of experience to the role and her training was completed with Lorna Peters being entirely satisfied that she knew how to do the job and to do the job well.

16. Whilst the Claimant has suggested before me that she was quite rusty on some elements of the job, in particular, the registration of deaths, the evidence was that the Claimant had retained managerial responsibility for checking the work of others. This essentially involved doing the task over again to make sure it had been done correctly. This was a matter known to the Respondent and which they were entitled to have regard during the disciplinary process.

17. The relationship between the Claimant and Mr. Bendell was very strained from the moment the Claimant returned to work. On 20th October 2015, Mr Bendell sent out an email to all staff in which he referred to a planned visit to new offices by all the staff as being a ('Beano'). The email was informal but quite positive in its tone.

18. The Claimant replied saying that, in her view, it was unfortunately far from a 'Beano' and she then listed a number of concerns. Unwisely, in my view, she made that email a 'Reply All' and it went out to all of the team members. That prompted at least one employee to contact Mike Bendell and refer to being

some employees being 'a little' embarrassed.

19. That led to a meeting between her and Mr Bendell on 21 October 2015. Mr Bendell kept some notes of that meeting which I find were written no later than the following day. After the meeting Mike Bendell sent the Claimant an email in which, in quite modest terms, he suggested that it was unwise to raise concerns in such a public forum without raising them more privately with him first.

20. The Claimant has suggested that she found the meeting of 21 October 2015 threatening. I find she does so with the spectacles of hindsight. I do not accept that there were any physical threats made in the meeting because if there had been, I would have expected that to have been reported immediately. I fully accept that the Claimant would have felt uncomfortable during the meeting. She had sent a challenging e-mail to Mike Bendell and given the recent reversal in management responsibility the meeting was bound to be difficult. The Claimant bore a significant responsibility for that. I consider that Mike Bendell's subsequent e-mail was appropriate and measured and that gives me sufficient confidence to accept his evidence that his behaviour during the meeting strayed no further than being appropriately firm.

21. The Claimant's husband has multiple sclerosis and as a consequence he is entitled to use a blue badge, this means that he is permitted to use special parking bays and, as I understand it, in some car parks, he might have the benefit of reduced parking fees.

22. On 3rd November, Mike Bendell saw the Claimant's car parked in a disabled parking bay. He believed that it was unlikely that she had either dropped off or picked up her husband and believed that she ought not to have parked where she did. He reported this to Steven Quayle who in turn reported it to Human Resources. In turn they return reported it to the Respondents' 'Blue Badge Team', which was the team for the criminal enforcement of the regulations under which Blue Badges were issued.

23. The Claimant has described this and a subsequent report as malicious. I do not accept that the report was malicious. Quite plainly, reasonable questions could have been asked as to why a disabled parking bay was being used when there was no sign of the disabled person benefitting from it. However, in fairness to the Claimant, I do find that Mr Bendell had been extremely irritated by the Claimant only a number of days earlier and no doubt, was in the frame of mind to find fault if he could legitimately do so.

24. Mr Bendell was later interviewed by the Blue Badge Team and it was suggested that at that stage nothing more would be done apart from keeping an eye on the situation but it was suggested that if he was aware of any further acts of parking infringements he should let the Blue Badge Team know.

25. I make the following findings in respect of the registration process and in particular, the process that must be followed where a death is to be registered. The process is as follows:

    25.1. It is necessary for an informant to obtain from a medical practitioner a 'medical cause of death certificate'. The informant will then attend at the Respondents' offices and ask for the issue of two documents. The first being a death certificate and the second being a green form, which is one of the documents that is necessary for both a burial and a cremation but it

is of particular importance where there is to be a cremation.

25.2. The medical certificate of cause of death ('MCCD') is a simple form: the principal parts are on a single side of A4 with guidance on the opposing side. It is entitled 'medical certificate of cause of death' and underneath those printed letters are the words 'for use only of a medical practitioner' in bold capitals 'who has been in attendance during the deceased's last illness and to be delivered by him forthwith to the registrar of births and deaths'. It has the 'name of the deceased', the 'date of death as stated to me', the 'age as stated to me', the 'place of death' and then a line that says 'last seen alive by me' with space for a date. There are then two columns and the certifying doctor must select one item from each column as follows: (1) The certified cause of death takes account of the information obtained in post mortem; (2) The information from post mortem may be available later; (3) The post mortem not being held; (4) I have reported this death to the coroner for further action; the second column (a) seen after death by me; (b) seen after death by another medical practitioner but not by me; (c) seen after death by a medical practitioner. There is then a box in which the cause of death must be set out and any other significant conditions must be listed. At the bottom there is a space for certification and certification reads as follows: 'I hereby certify that I was in medical attendance during the above name's deceased last illness and that the particulars and causes of death above…' – I suspect that must say 'is correct' but the bundle contained no complete un-cut-off version of the form.

25.3. When the informant attends at the registration office, the registrar will initially take the MCCD and check the details upon it. They will then invite the informant into the room and record the details from the cause of death certificate onto a computer. In the course of entering those details, they are prompted to enter the date that the deceased was last seen by the medical practitioner. Once that is done, then a death certificate and green form can be produced.

25.4. In parallel with that process, at the time of death, a doctor, the same doctor that fills in the MCCD, should fill in a form known as a CREM4. That is a form that is used to authorise the cremation of the body. It includes the cause of death and it also includes the date that the deceased was last seen by the medical practitioner and is signed by the doctor. That is backed up in some circumstances at least by a further form which a second medical practitioner certifies that the details in the first form are correct – that is a CREM5. Before any cremation takes place, the green form, CREM4 and CREM5 must be submitted to the crematorium where they are checked by a medical referee or a deputy medical referee before any cremation can take place. Where there are any queries, then the matter must be referred to the coroner.

26. On 4th April 2016, the Claimant had an appointment with representatives of a deceased individual and she was provided with a medical cause of death certificate which was completed by a doctor who duly certified that he was in medical attendance during the deceased's last illness. However, in the box where he should indicate last seen alive by me, he entered the letters 'N/A' or not applicable. Quite plainly, if he had been in attendance of the deceased's last illness, he would have seen the deceased whilst she or he was alive and therefore the entry of the words 'N/A' (would) could never be appropriate.

27. I heard a great deal of evidence about the work of a registrar and I am told, and I accept, that it is not uncommon for doctors signing the MCCD to forget to enter a date when the patient was last seen alive. Registrars are used to dealing with this and the documents in the bundle disclosed that this had happened nearly 4 times in the fortnight surrounding these events. The procedure that is followed in that instance is to ring the doctor's surgery speaking either to the receptionist or the doctor themselves in order to ascertain the date the deceased was last seen alive. If that is given, and the certificate is duly certified, then it is usual to act upon it. I have not heard of any other case where those inquiries reveal that in fact the doctor has never seen the patient alive, as happened in this case. The process of checking with the GP surgery was described by Michael Bendell as the being 'the bread and butter' of a registrar's work and given the examples I have seen; I accept that it was well known that this is a matter that a registrar should check.

28. On 6th April 2016, Mr Bendell received a telephone call from the coroner. He says, and I accept, the coroner was in some state of agitation because the MCCD of the 1st April 2016 had been sent to the crematorium and as had the CREM4. The medical referee had noted that in both the CREM4 and the MCCD the doctor had stated 'N/A' against the question when did he last seen the patient alive. The medical referee had, unsurprisingly, come to the conclusion that that was inappropriate and that something had gone wrong. Having made inquiries, had discovered that the doctor had been an inexperienced locum and had in fact never seen the patient alive and, as a consequence, was not entitled to sign the MCCD. The crematorium had then alerted the coroner who in turn contacted Mr Bendell because the funeral arrangements had been made to hold the cremation the following day. Some urgent action was required to be taken. Mr Bendell describes the coroner as being agitated and I am unsurprised that that was the case and accept his evidence on that point.

29. In order to rectify the position, or at least allow the funeral to go ahead, what was necessary was for Mr Bendell to made a formal referral to the coroner who opened what he had himself described using inverted commas as an "investigation" that allowed him to issue a form called a (CREM6) which in turn allowed the funeral to proceed. It does appear that this was unorthodox albeit with the best intentions and certainly at some point it appears that the coroner spoke to a treating doctor who was able to make assurances that the cause of death gave no reason for concern.

30. After these events, Mike Bendell informed Steve Quayle who in turn informed Nick Skelton that there may be an issue. I accept the evidence of Nick Skelton that he was informed in fairly broad terms that there had been an error in the statutory registration process and was so informed principally for the purposes of avoiding embarrassment of the respondent. Steve Quayle also, as he was required to do, so made a referral to the General Registrar Office (the 'GRO') which is effectively the supervision body for the registration service.

31. On the 7th April 2016, Mr Bendell sent the coroner an email in the following terms. He said: 'Hi Alan, I am sorry to be a further drag on your time. Please can you clarify some points for me? I am trying to establish the seriousness which we should treat the situation yesterday. He then asks a number of questions. The coroner responds the following day and suggested that it was somewhat fortuitous that it was possible to avoid postponing the funeral. He describes it as this being where luck was on 'our side' because there was no

reason to doubt the cause of death, the accuracy of which was confirmed by another doctor in the same practice who had seen the deceased. Had that not been the case, the funeral may have been delayed for a considerable period.

32. I considered it surprising that Mike Bendell thought it appropriate to ask the coroner to establish the degree of seriousness of the error. I conclude that Mike Bendell was not unenthusiastic in painting this as a grave error and was seeking support for that view.

33. Following this, Steve Quayle referred the matter to the human resources department and consideration was given as to whether or not any disciplinary proceedings were appropriate. I find that this was unsurprising. Steve Quayle explained to the human resources department that the situation or the error was in his view a serious error. That report led to Mr Bendell being instructed to conduct an investigatory meeting with the Claimant. He initially invited the Claimant to a meeting that was to take place on 14th April 2016. His invitation letter gave no particular detail of the allegations that were made, referring only to an incorrect registration of death on 1 April 2016. Mr Bendell says, and it was accepted, that he told that the Claimant that he had identified the material death certificate in the register by putting a post-it note. The Claimant has said it fell out and she could not be sure which death certificate had been referred to.

34. The meeting did not in fact take place until 22 April 2016 due to the availability of the Claimant's Trade Union representative Charlotte Wall. One of the issues I had to determine is that the state of the Claimant's knowledge prior to the meeting with Mr Bendell. She has suggested that she was essentially in the dark as to the nature of the person involved and in particular the nature of the error. I do not accept that. The Claimant has said that on 1st April 2016 the date she was given in the letter, there were only 4 or 5 registrations of death that took place. That has significantly narrowed the field and the possibilities of identifying the error. It is also plain that she spoke in advance of this to Doctor Chinery the referee at the crematorium. That is clear from his notes where he indicates he spoke to the Claimant. I find it inconceivable that he did not speak as to the nature of the error that had been made. As a consequence of that communication between the Claimant and Dr Chinery he wrote a letter broadly supportive of the Claimant. He suggested that she should have not gone behind the certification of the doctor on the certificate. The Claimant then went to collect the letter from the crematorium. It seems to me fairly obvious that she would have been aware that the issue at stake was the eligibility of the doctor to sign the certificate, the eligibility not in the sense of his qualifications but his eligibility to sign the certificate having attended the deceased in his or her last illness.

35. The letter from Dr Chinery I find was prompted by knowledge of the fact that there may be disciplinary proceedings because within it he asks Mike Bendell, to whom the letter is addressed, for the details of the results of the deliberations. I therefore conclude that the Claimant was well aware of the nature of her alleged error and that she went to the meeting with Mike Bendell prepared to argue that any error by her was understandable.

36. On 19th April 2016, there were two significant events: the first being that for the second occasion, Mr. Bendell saw the Claimants' car parked on the street in the disabled parking bay. On that occasion, he took photographs and observed the Claimant drive away without a passenger on board. He reported that to the

Blue Badge Team.

37. The second matter which took place on that day was that there was a meeting between the Claimant and Mr Bendell amongst which the matters discussed were the quarterly returns necessary in respect of registrations. Each registry office was required on a quarterly basis to submit details of all registrations that had been made. Before the registration could be finalised, it had to be checked by a second registrar. The second registrar would initial the first registrar's certificate to indicate that the check had been made. The requirements of the legislation make it plain that the checking process should be done by a person other than the person that did the registration in the first place. It is the Claimant's case that Mike Bendell told her in the course of that meeting that, given her experience, there would be no difficulty checking her own work. I shall return to that below but I do not accept that the Claimant's evidence was accurate in this respect.

38. On 21 April 2016, the day before the fact finding meeting was due to take place, and I find almost certainly as a consequence of Mike Bendell reporting the second parking incident, the Claimant was approached at work by a police officer and a member of the Blue Badge Team. She was informed that a complaint had been made against her and that she was expected to attend a formal interview in due course under caution. I have no doubt that that was highly distressing for the Claimant. She spoke to Mike Bendell about what had happened but he informed her that he was unable to discuss the matter with her.

39. On 22 April 2016 the fact finding meeting took place. The meeting was attended by Mike Bendell, a human resources advisor, Catherine Jeffrey, the Claimant and her trade union representative, Charlotte Wall. The Claimant has suggested that that following the fact-finding meeting Charlotte Wall had described as being analogous to a 'Nazi interrogation'. The Claimant herself has described the meeting as being accusatory. I accept that for the Claimant because it must have been a very difficult and stressful meeting. Her subjective feelings are I find informed by the difficulties in the relationship with Mike Bendell and the events of the day before. Looking at matters objectively and having read the notes of the meeting taken by the Respondent, there is no doubt in my mind that the questions and the answers given were quite proper and restricted to the issues that needed to be explored. Secondly, I have had a copy of the notes of Charlotte Wall who has made private notes of what occurred at that meeting and some of the consequences of it and I note that she does not criticise the manner or style of questioning in any significant way. Whether she, as the Claimant says, later described it as a Nazi interrogation, I do not know. She may have done so but if she did so, I'm sure it was out of sympathy for the Claimant rather than an apt description of what happened.

40. In the course of the meeting, Mr Bendell started by running through the Claimant's experience and then turned to the requirements of processing a medical certificate for cause of death. He established that the matter should be checked quite carefully and then he gave her a copy of the particular death certificate at the heart of the complaint. He had already named the deceased and the Claimant acknowledged before being handed the death certificate that she knew the name of the deceased. That further undermines any suggestion that she had no adequate information about what was being investigated. She was then asked what it meant to her that the doctor had written not applicable

against the question *'when did you last see the deceased alive?'*. The Claimant's immediate response was as follows: '*That they did not see the individual within 14 days but I checked the certificate and the individual was seen after death. I sought advice from the GRO to clarify this.'* She was asked whether she made a note of any conversation she had with the GRO, as that would have been normal and she said that she had not. It was then suggested to her by Mike Bendell that he could check that to make sure that that was correct. She said she was aware of it.

41. The meeting then turned to the question of the practice of double checking of registers. Mike Bendell says this: '*During my investigation into this matter I noticed that all of the completed registrations since January 2016 except for a few odd days had been superintendent registrar checked, been signed as checked by you, including your own entries. Is it right that a registration officer should be quality checking their own work?'*. The response was recorded as follows: '*Ideally, in good practice, when we are not so busy, it would be best for other people to do it but I did this run past you to say that I would be quality checking all of the registers as per our conversation two days ago. I have now put in place a system of checking.'* Mr Bendell is recorded as saying '*I refute this Liz. I have not authorised you to check your own entries. When I used to be a registrar at Hastings, I asked you to check my entries or Philippa and after this, it was circulated to other staff to check.'* The Claimant says *'I don't recall this'*. When Mr Bendell said *'why should someone not check their own work?'*, the Claimant is recorded as saying *'It doesn't make any difference as long as the checks are made'.* The Claimant was then asked about the consequences and rational behind the process of double checking. Her stance was that as she was a professional it made no difference.

42. The meeting then proceeded with and further questions were asked. Mr Bendell says having talked about other registrations, *'this is the same for registering deaths – you need two people. Since our one-to-ones in December I've asked you to put a system in place to ensure checks are made.'* The Claimant is recorded as saying *'We have discussed this. I want to point out that we moved offices which put added pressure on me and the team and I was away in January when no checks were done and I have a lot to catch up on.'* Mr Bendell says: *'Is it not your role as team leader to ensure these checks are made as statutory duty?'* The Claimant says *'I am aware it is my duty to make sure quarterly checks are made.'*

43. The matter then returns to the question of the registration and the Claimant is asked by the representative from human resources, Catheryn Jeffrey, she asked: *'on reflection would you have done anything differently?'* The Claimant is recorded as saying *'no I took advice from the GRO".*

44. I am satisfied that the notes of the meeting of 24 April 2016 record what was said by each party with reasonable accuracy. In particular, I am satisfied that in putting forward her explanation for why she had proceeded to issue a death certificate despite the apparent issue on the face of the MCCD the Claimant suggested that she had relied upon advice from the GRO.

45. Following that meeting, a letter was sent by the Claimant's trade union official to Mr Skelton. Whilst it is in general terms, it suggests that the meeting had not been handled in a fair and unbiased way and made a request that it was set aside and that an independent investigative officer should be appointed. Shortly

after the meeting on April 24th 2016, the Claimant brought a grievance against Mr Bendell. That grievance focuses exclusively on the fact that the Claimant says Mr Bendell had failed to speak to her about the Blue Badge incident before reporting her to the police. She says that there has been *'harassment and victimisation under the equalities act of 2010'*. She says that it has made any professional working relationship with Mr Bendell completely untenable.

46. On 25th April 2016, the Claimant sent an email, page 292 of the bundle, to her union representative in which she says this: *'After our meeting on Friday morning with Mr Bendell and Katherine from personnel, I made some further checks on my records. I discovered that although at the time, I believed I had called GRO to confirm the details of the MCCD for 'V', my records showed this was not correct. I believe this was due to the fact that the clues that (Mr Bendell) left for me to "find" were ambiguous and I was very confused. The post-it note that he referred to in the original conversation fell out of the register and wasn't retrieved in the safe. Also, I was under a great deal of stress Friday morning due to the fact that my husband was not well when I left early in the morning. This was due to the police visiting the previous morning and I was very worried about him.'*

47. On 26th April 2016, Mr Bendell sent an email to Steve Ralph, who I understand is an individual in the GRO – with a subject heading 'incorrect death registration'. He says this:

> 'As you know I'm currently investigating how a death came to be registered based on an incorrectly completed MCCD…… I thought you should know that the main part of the Registration Officer in question's defence is that they phoned the GRO and were told that they should register. I informed them that I would check with the GRO for the phone log of this call and within a day they had changed their story. The registrar also made no inquiries before registering.'

The letter ends with the following sentence, having asked for information: *'This will assist me in establishing to my superiors the case here to answer. There is a more serious issue than being a mere oversight.'*

48. The letter ends with the following sentence, having asked for information: *'This will assist me in establishing to my superiors the case here to answer. There is a more serious issue than being a mere oversight.'*

49. It is quite clear from the tenor of that last sentence that Mr Bendell at that stage had adopted what could be described as a prosecution mindset and was searching for information that would make matters worse for the Claimant rather than considering whether she had reasonable excuses for her conduct. That said I find that he had reasonable cause to believe that the Claimant had endeavoured to mislead him about speaking to the GRO.

50. Following the request from the trade union and the intervention of the union, a decision was taken to appoint Lucy Corrie who is the Head of Service for Communities in order to lead the investigation. In addition, it was further decided, that she would not undertake the investigation herself but would delegate that to an external human resources professional.

51. Lucy Corrie met with the Claimant on 28th April 2016. The purpose of the meeting was to communicate that she had made a decision that in the light of

the allegations that had been made, the Claimant should be suspended from work. The Claimant at that meeting was represented again by Charlotte Wall. The notes from the meeting essentially record an acceptance by both parties that the grievance that the Claimant had made against Mr Bendell, and the issue of whether the Claimant has misused her husband's blue badge were inextricably intertwined and should be determined at the same time. The Claimant understood from that meeting that nothing was to be done in respect of any allegations pending the outcome of the Blue badge inquiry. Whilst I have accepted that that was her subjective understanding this was a matter of crossed wires rather than anything that was expressly communicated.

52. Pursuant to the request of the trade union, an outside human resources professional was appointed to investigate only the registration issue. In its letter, the trade union had asked that Mr Bendell's investigation be "set aside". There had been no discussion as to whether this actually might mean. In particular, any recommendation that disciplinary action was necessary should be disregarded or whether indeed any material he gathered should be disregarded. It seems that the Claimant and her trade union believed that the latter course was appropriate.

53. The Claimant was formally told of the appointment of the independent investigator on 20th July 2016 and by a letter dated 25th July 2016, Jeanette Ray, who was the human resources professional appointed wrote to the Claimant setting out the allegations that she was to investigate. She said that these were as follows: *'1. That you incorrectly registered a death on 1st April which breached legal requirements; 2. That you did not follow GRO procedure when conducting checks on registrations.'* She sets out: '*I'm aware that you previously met with Mike Bendell, the Life Events manager, to discuss these allegations in more detail and I have received a copy of the notes of that meeting. However, I would like you to meet with me again so I can go through the discussion that you had with Mike and clarify some points for my investigation. You will also have the opportunity to inform me of anything else you deem relevant to the investigation.'* A meeting is proposed for 28th July 2016 at 10am in County Hall.

54. The Claimant replied by email a few days later on 26th July 2016 and she said this: *'Dear Jeanette, Thank you for your email. I confirm that I have just received a letter from Mrs L Corrie confirming that you will be conducting an independent investigation which I am very pleased about. As you have spoken to Mr Bendell, I am sure you will be aware currently being investigated by the police for allegations of fraud which were reported to them by Mr Bendell and Mr Quayle the registration manager. At my last meeting with Mrs Corrie she suspended me and told me that nothing would go forward until this matter was resolved.'* She then refers to her husband and the stress that this is causing on them both and says this: *'I feel that given the above, we really need the police matter to be resolved before continuing with the disciplinary hearing. Can I ask whether this is still going ahead, given that you are now conducting a further investigation?'*

55. The reply came on 28th July 2016: *'Thank you for your email below. This is to confirm receipt and acknowledge that you will not be attending the meeting this morning. Just for clarification, my role is purely to investigate the allegations concerning the death registration. I have no details relating to the allegations of fraud and the meeting I am inviting you to is not a hearing. It is a fact-finding*

*meeting to enable you to discuss matters concerning the registration of death and to ensure I obtain your perspective in this regard. I have raised the matter with Lucy Corrie and will come back to you again to confirm a full response to your points.'*

56. On 5 August 2016 Jeannette Ray sent an e-mail to the Claimant in the following terms*: 'Further to the below, I have liaised with John Williams, HR manager who has spoken to both Lucy Corrie, Head of Service, and Amanda Parks, your Unison representative. I can confirm that it was agreed with Amanda Parks and Nick Skelton, assistant director, that the two issues would be investigated and treated separately. On that basis, the investigation into the registering of the death does not depend on the outcome of the investigation of fraud. I would like to make a date that you can attend a meeting regarding the registration of death'*. A date is then proposed being 11th August 2016.

57. On 7 August 2016 the Claimant responds as follows: *'Dear Jeanette, Thank you for your email. I have been advised that since my employer has made allegations of fraud against me which may result in me attending court and receiving a criminal conviction, I should not enter into any dialogue or interview regarding the matters until this is resolved. This was indeed the reason that Mr Bendell was not able to continue as investigating officer in the death investigation as he may be called as a witness as quoted by Mrs Corrie on 28th April 2016. I will be able to be in contact with my union representative and I have been instructed to contact you with updates.'*

58. Jeanette Ray replied on 16th August 2016 as follows: *'Thank you for the below email. Whilst I understand that there have been allegations of fraud raised against you, as explained in my previous email, the matter is not being investigated by me and therefore does not form any part of my agreement for my investigation. On this basis, it is not unreasonable to expect you to attend an internal investigations meeting to discuss allegations concerning an entirely separate matter and as such I must advise you that the investigation into the allegations against you concerning the registration of a death will continue. With this in mind, I am inviting you again to attend an investigation meeting to be heard on 25th August at 10am. Should you choose to not attend this meeting, the investigation will proceed without any further input from you and the decision will be made based on the evidence available, which whilst is [sic] not ideal for either party, will be necessary if you choose not to cooperate with this part of the process.'*

59. At this stage the Claimant sent in a statement of fitness for work and accompanied that with a letter from her General Practitioner which stated in terms that she was not only unfit for work but she was unfit to attend any meeting. That certificate expired on 17th September 2016 and no further certificate at that point in time was provided. I find that there was no medical reason why the Claimant could not have attended further meetings with her employer.

60. At that stage a decision was taken by the Respondent to wait and see what would happen at a plea hearing to which was due to take place in the magistrate's court on 11th November 2016. At that hearing, the Claimant pleaded not guilty to the charges of Blue Badge fraud and elected a crown court trial.

61. In the light of that Lucy Corrie took the decision that the internal matter should proceed with all of the allegations both relating to registration errors and to blue badge misuse. She explained her reasoning and I find that she took into account the following matters: the fact that the Claimant had been suspended since April; the fact that that had been on full pay with a knock-on effect that the Respondent had to pay an individual to act up into the Claimant's role and someone to act up into the role that they vacated. She also took into account that there was no clear date when the trial date was fixed. She did not say specifically, and I find she probably did not, consider that the Claimant might be prejudiced against the decision to proceed because she was unwilling to discuss the matter of the Blue Badge fraud in advance of her criminal trial as it would interfere with her right to silence and it would mean that she was effectively setting out her defence in advance of the trial to the Respondent who was the prosecutor in that case. However, she did consider the fact that the Blue Badge team documentation was separate and that the investigation could be conducted by Jeanette Ray entirely from scratch.

62. Jeanette Ray was instructed to expand her investigation and to include the allegations that the blue badge had been misused. She then took a number of statements from various members of the team asking them various questions about the Claimant's parking, her husband's health and any occasions when they might have thought that the Claimant was abusing the Blue Badge. Having commenced that process, Jeanette Ray wrote to the Claimant on 1st February 2017, announcing the fact that she was now investigating the additional allegations in respect of the misuse or alleged misuse of the blue badge and she invited the Claimant to an interview to discuss these matters.

63. I was not shown any response to that email. On 9th February 2017, there was a second email from Jeanette Ray to the Claimant that says this: *'Dear Elizabeth, I have this morning received a voicemail message from a gentleman named Kieran Loch advising me he is your solicitor and he has advised you not to attend a meeting to discuss the blue badge incident on account of the case progressing to the Lewes Crown Court in October. Can you please advise me by return whether you will be attending the meeting tomorrow to discuss the other allegations that are unrelated to the blue badge case? Again, if I do not hear from you, I will assume that you will not be attending and will assume that you do not wish to participate in this part of the investigation.'*

64. Then there is a further email dated 13th February 2017 again from Jeanette Ray which says this: *'I am writing further to my recent email communications requesting that you attend an investigative meeting to discuss allegations being raised against you. As you know, I asked you to attend the investigations meeting on numerous occasions and in response to my most recent request, I received a message from your solicitor informing me that you had been advised not to attend a meeting to discuss the Blue Badge case. On this basis, I asked whether you would attend to discuss the other allegations unrelated to the Blue Badge case but I have had no response from you and I advise that if you do not respond, I'll have to assume that you do not wish to cooperate in this internal process. As a final attempt to enable you the opportunity to respond to the allegations against you and ensure that I'm able to include your responses in my investigation, I have attached a document with questions for you to provide me with a written response to the allegations.'* Attached to that email was a list of questions with blank spaces for the answers. The first three pages of which concern the registration issue. Thereafter, the next two pages concern

the question of whether the blue badge was misused.

65. The Claimant did not respond to that questionnaire as such and on 17th February 2017 sent an e-mail which said: *'Dear Miss Ray, I have been advised by my legal team not to enter into any dialogue with East Sussex County Council or any of their representatives until the County Court [sic] case in October. I would like to point out that Mrs Lucy Corrie had plenty of opportunity to investigate the malicious and false allegations made against me by Steve Quayle and Mike Bendell in April (a) when the allegations were reported to her by them and (b) at the meeting on 28th April when she took over as investigating officer from Mike, suspended me without allowing me to speak – she chose not to. Please do not contact me again on this private email address, direct all correspondence to my legal team'* – she gave the address of her solicitors.

66. Jeanette Ray concluded her report and drew up a disciplinary investigation report. The material conclusions of that report were that she recommended that the Claimant face disciplinary proceedings. Such a recommendation is one that is envisaged by the council's disciplinary policy. In respect of the first allegation, and under the heading of her conclusions, paragraph 44b, Miss Ray refers to the suggestion by the Claimant that she had contacted the GRO for advice and then had later suggested that that was not the case. What she says is: that these actions *'potentially called into question her honesty and integrity'*. She then sets out her conclusions as to the second allegation, a failure to conduct the proper checking procedure and also recommends that the Blue Badge issue proceeds to a disciplinary hearing and in respect to that says that *'any alleged misuse of the Blue Badge reflects heavily on the ESCC, the registration services reputation. Elizabeth was in a position of authority and it was inherent in her role that she lead by example.'*

67. At that stage, Lucy Corrie who was in receipt of that report was the person in charge of putting forward the management case. She did so by way of a document which was to be presented at the disciplinary hearing. I find that from the language of that document she largely adopted Jeanette Ray's conclusions and indeed, quite large parts of her language.

68. The Claimant was invited to a disciplinary meeting by a letter dated 29th March 2017 by which set out the allegations as follows: (1) she incorrectly registered a death on 1st April 2016 which breached legal requirements; (2) she did not follow GRO procedure when conducting checks on registrations and (3) illegally and therefore fraudulently used a blue badge whilst parking your car. The first of those two allegations made no express reference to dishonesty either as an element of any offence or as an aggravating feature.

69. A few days later, on 31st March 2017, the Claimant was sent a copy of the management case. In the interim, a letter was sent to the Claimant dated 7th April 2017, following a telephone call made by the Claimant's solicitors to the legal department. The letter notes that the Claimant had legal advice to the effect that she was unable to be interviewed or questioned in respect to the blue badge allegation. It says that this position was therefore completely understood. It went on to say: '*It was confirmed to your solicitor however that of course it is open to them to advise you whether there is any documentation that could be provided by you without prejudice to the criminal matter'*. It then said *'In terms of the non-Blue Badge allegations, (Holden & Co) confirm that these allegations are unconnected to the criminal matter and they are not*

*representing in this regard.' I understand that they have not advised that you are unable to address these allegations. If therefore you are concerned about attending the hearing where the Blue Badge allegations will also be dealt with, I confirm the hearing can be organised with a view that you will still be able to attend. In this regard, I can confirm that Lucy Corrie, head of service for communities, will present the management case to the chair including the witnesses in relation to the non-blue badge allegations followed by you presenting your case including any witnesses in respect to these allegations. You could then leave the hearing and Mrs Corrie will present the management case in relation to the blue badge allegations. Mrs Corrie will then sum up the management case in relation to all of the allegations during which you could be present if you wished. You could then if you wish to do so submit your case just in relation to the Blue Badge allegations. The chair would then adjourn the hearing and you could attend if you wished to hear the chairman's decision on all of the allegations.'*

70. That then prompted a somewhat robust response from the Claimant's then trade union representative, Alex Knutsen who wrote a long email on 11th April, setting out his dissatisfaction with that proposal. He says this, and I quote only parts of this email:

70.1. '*I will be clear at this point and it is my very clear opinion that the proposed hearing on 24th April must be postponed and I will explain my reasoning for this assertion.*

*70.2.* '*The employer, the ESCC, will be aware of the Employment Appeal Tribunal Case of Foster v Brighton and Hove City Council (2004) which has strong similarities for the situation that Elizabeth currently finds herself within. I draw particular attention to the findings of the EAT in that case, and you should be aware that I have some detailed knowledge of the content as I was the trade union representative mentioned in the text. In essence, they stated that an employer who was laying criminal charges against an employee should wait for the outcome of that process, before asking an officer of said employer to decide upon a disciplinary issue that might well involve dismissal.'*

*70.3. 'I am aware that both allegations are linked in Elizabeth's case in papers that will be presented as evidence to the court hearing in due course. Consequently, my advice to her, is exactly the same as her legal advisor, which she cannot comment or, indeed instruct me to do so on her behalf, in respect to either allegation.'*

*70.4. 'Elizabeth and myself as her advisor are being placed by the employer in an impossible situation. She can't provide any written or verbal evidence to the Hearing and I cannot do so on her behalf. On the other hand, the management case will be heard in full, with no opportunity for cross examination by ourselves.'*

70.5. *'If the chair, Mr Skelton, decides to proceed on that date, then Elizabeth and myself will attend but for me only to rehearse the points made above in greater detail. We will leave immediately after I have made that statement.'*

71. The Respondent responded to Mr Knutsen disputing the contentions that he

made. That gave rise to a further response but essentially the parties were at loggerheads with the Respondent insisting that the matter proceed and Mr Knutsen saying that it should not.

72. Mr Knutsen's e-mail was followed up by a letter sent by the Claimant's solicitors, Holden & Co), dated 20th April 2017, where what it is said is: *'I write with regards Mrs Paraskos and the disciplinary meeting of 24th April 2017. I can confirm that I have advised Mrs Paraskos not to answer any questions concerning the Blue Badge aspect of this meeting. This is because the matter is progressing through the criminal courts and Mrs Paraskos has been advised by her barrister not to discuss the Blue Badge allegations. Any insistence to interview regarding this issue will be utilised in criminal proceedings in an attempt to abuse the legal process, by which we mean interviewing a suspect about matters which they have already decided there is enough evidence for sufficient public interest to prosecute. We would like to confirm, as part of the defence case statement, we were requesting further disclosure regarding the two employment related issues that Mrs Paraskos is currently suspended for.'*

73. The management statement of case has a number of appendices but in itself is a fairly short document. The third section of that document repeats the allegations that the Claimant is expected to face. The first one being that she incorrectly registered a death on 1st April which breached of legal requirements, second, that she did not follow GRO procedure when conducting checks on registrations, and lastly that she fraudulently used a blue badge. Again there is no express reference to dishonesty in respect of the first two charges other than saying at one point as part of the recommendations: *'given her experience and training in the role and on the basis of the evidence, I consider that Mrs Paraskos was aware that an N/A entry in respect of the last seen alive date would not meet the requirements. It is extremely concerning to me that Mrs Paraskos then appeared to deceive with respect to contacting the GRO about the last seen alive date. She later admitted she had not done. I consider that this is gross misconduct.'*

74. The disciplinary meeting took place on 24th April 2017 and opened with Alex Knutsen objecting to the proceedings. He effectively repeated an earlier request made in writing seeking reasons why the Respondent thought it could distinguish the Foster case from the facts of the present case. Mr Skelton declined to either give reasons or indeed elaborate or engage in any way in the legal arguments.

75. Mr Knutsen then indicated that, as he said he would do, he was going to leave the proceedings. The minutes of the meeting, which I accept as accurate record that shortly before Mr Knutsen did so, Mr Skelton said this: *'My understanding is that the Claimant could answer allegations 3.1 and 3.2.'* Mr Knutsen responded *'Okay I think we should leave'.* After a short adjournment, the same question is asked again by Mr Skelton: *'what about in relation to 3.1 and 3.2? Will you answer these points?'*. Mr Knutsen responded *'No. You've said that you will listen to all three. I therefore consider this whole process unfair and we will be leaving.'* The Claimant and her representative then left the hearing.

76. Mr Skelton proceeded to hear the evidence and it is clear from the notes that he periodically tested the evidence that was presented before him and asked some questions, and I particularly noted some questions in relation to the parking issue, where he asked questions which may have been thought to been

seeking to elicit answers from the witnesses which might have assisted the Claimant.

77. At the conclusion of the evidence, Mr Skelton deliberated for one hour and he told me in oral evidence and I accept that when he was deliberating, he had particular regard to the Respondent's disciplinary procedure, and in particular, the list of examples which constitutes gross misconduct under that procedure. He told me he identified three particular matters which he thought were in play in the present case. The first one he identified was being *'untruthful and engaging in deception in matters of importance'*. The second was *'negligent behaviour which seriously threatens the health and safety of a person and potentially causes unacceptable loss damage or injury'* and the last one was *'conduct which brings or has the potential to bring the county council into disrepute including criminal offences which make the employee unsuitable for the continued employment by the county council'*. He made a decision in the course of the hearing and then that was later confirmed in writing and a letter of dismissal sent – his decision was to dismiss the Claimant – his decision was sent to the Claimant by recorded delivery on the 27th April 2017.

78. He upheld the first two allegations but considered that he did not have sufficient evidence before him to conclude that the blue badge allegations were made out. His conclusions in respect to the first allegation were as follows: *'I conclude that you knowingly and therefore deliberating continued to register this death despite knowing that your actions went against legal requirements. In this regard, I concluded that you had attempted to mitigate your actions by misinforming your manager that you had sought and received advice from the GRO to continue with this process when you had in fact not done so. I therefore find this allegation to be proven. Due to the implications and the serious nature of your actions, I consider this to be an act of gross misconduct'.*

79. He reached a conclusion with respect to the second allegation that the Claimant had knowingly and deliberately carried out superintendent registrar checks and exercised extremely unprofessional judgement in doing so. He also concluded that that was gross misconduct.

80. Those were the reasons articulated in the letter of dismissal but I find as a matter of fact that those reasons in respect to the first allegation included and principally informed by a conclusion that the Claimant had behaved dishonestly when she had suggested that she had received advice from the GRO to continue with this process. I reach that conclusion because Mr Skelton told me that those were the matters that were in his mind when picking through the list of potential gross misconduct. I therefore find that a material part of his decision was based on a finding that the Claimant had acted dishonestly.

81. Following the hearing, the Claimant and her trade union representative, had protested in writing and shortly after that they wrote a letter of appeal. However, the Claimant's initial request was for the appeal to be adjourned until October whilst the respondent did not agree to that, the practicalities meant that it was to be heard in September or October. By the time it was possible to hear the appeal the Claimant had issued her claim before the tribunal, she decided not to proceed with her appeal.

**The law to be applied**

82. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

83. It is for the employee to show that there has been a dismissal. The statutory definition of dismissal for these purposes is set out in section 95 ERA 1996.

84. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". "Conduct" is a potentially fair reasons for dismissal listed in sub-section 98(2) of the ERA 1996.

85. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

86. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> '*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

87. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

88. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

89. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

90. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**.

91. A reasonable investigation will almost always entail giving the employee 'sufficient detail of the case against him to enable him properly to put his side of the story' ***Alexander v Brigden Enterprises Ltd*** **[2006] IRLR 422**. In the course of the hearing I referred to the principle that where the employer has framed disciplinary charges against the employee then it will not ordinarily act reasonably if it goes on to dismiss that employee for something falling outside of those charges ***Strouthos v London Underground Limited*** **[2004] EWCA Civ 402**.

92. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

93. Whilst the parties were in agreement as to the general law set out above they differed as to the proper approach to reasonableness where the employer faced concurrent criminal charges. The following authorities were cited to me dealing with that issue in ***Harris v Courage (Eastern) Ltd*** **[1982] IRLR 509** the employer had pressed on with internal disciplinary proceedings and dismissed the employees prior to a criminal trial. The employees had elected not to give any evidence in the internal proceedings. The Court of Appeal upheld the decision of the Employment Appeal Tribunal who had found rejected the employees appeal against a finding that the dismissal was fair. Expressly approving the following passage of Mr Justice Slynn, at in the EAT where he said:

> 'It does not seem to the majority of this Tribunal that there is a hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an alleged theft if the employee is advised to say nothing until the trial in the criminal proceedings. There may be cases where fairness requires that the employer should wait. In the judgment of the majority members of this Tribunal, all these circumstances have to be looked at. It is essential that the employer should afford the employee the opportunity of giving his explanation and he should be made to realise that the employer is contemplating dismissal on the basis of the matters which are explained to the employee. If the employee chooses not to give a statement at that stage, it seems to the majority that the reasonable employer is entitled to consider whether the material which he has is strong enough to justify his dismissal without waiting. If there are doubts, then no doubt it would be fair to wait.

On the other hand, if the evidence produced is, in the absence of an explanation, sufficiently indicative of guilt, then the employer may be entitled to act.'

94. In ***Harris (Ipswich) Ltd v. Harrison*** **[1978] IRLR 382** in the EAT it was said:

> *"In that case [Carr v Alexander Russell Ltd [1975] IRLR 49], both in the Industrial Tribunal and in the Court of Session, it is suggested to be improper after an employee has been arrested and charged with a criminal offence, alleged to have been committed in the course of his employment, for the employer to seek to question him when the matter of dismissal is under consideration. While we can see that there are practical difficulties, and that care is necessary to do nothing to prejudice the subsequent trial, we do not think that there is anything in the law of England and Wales to prevent an employer in such circumstances before dismissing an employee from discussing the matter with the employee or his representative; indeed, it seems to us that it is proper to do so. What needs to be discussed is not so much the alleged offence as the action which the employer is proposing to take."*

95. In ***Secretary of State for Justice v Mansfield*** **UKEAT/0539/01** one aspect of the employer's appeal concerned a finding by the Employment that the Dismissal was unfair by reason of lengthy delays in part caused by concurrent police investigation. In contract to the other cases it was the employee who had complained of the unfairness caused by the delay. The EAT held that an employer has a wide discretion whether or not to postpone a disciplinary hearing. However, the EAT considered that it had been open to the employer to have separated off matters which were the subject of the police investigation. Having regard to the delays as a whole and the inadequate explanations for them the EAT upheld the finding of the employment tribunal on this point.

96. The final case referred to on behalf of the Claimant both during the internal process and before me was ***Mrs G A Foster v Brighton and Hove City Council*** **UKEAT/0737/04/ILB**. That case had a similar factual matrix to the present case. Mrs Forster had been dismissed on the basis that she has colluded or known about her husband making false claims for benefits. At the time of the disciplinary process the Claimant was awaiting trial on a prosecution for the same alleged benefit fraud. Her employers were the responsible prosecuting body. When Mrs Foster elected trial by jury the employer decided to press on with the internal process in the face of opposition by Mrs Foster, her Trade Union Representatives (including Alex Knutsen) and her solicitor. Mrs Foster declined to attend a disciplinary hearing and was dismissed following the hearing in her absence. The Tribunal found that Mr Sharma, who had taken the decision to dismiss Mrs Foster would have been under some pressure to maintain the employer's position and could be presumed to be biased. The ET held the dismissal was unfair but held that had a fair procedure been followed Mrs Foster would have been dismissed in any event. Mrs Foster appealed to the EAT against a finding that the dismissal was not substantially unfair. In commenting upon the decision of the Council not to accede to Mrs Foster's request for a postponement of the internal process Mr Justice Rimer (as he was) said:

> *"We regard the tribunal's overall conclusion as unsatisfactory. Our major concern is with regard to the tribunal's reasoning in paragraph 18, which we*

*have quoted in full. As to that, we respectfully agree with the tribunal that the procedure favoured by the Council was flawed and unfair. It appears to us obvious that, whilst the Council's criminal prosecution against Mrs Foster was pending, it was unfair of the Council to expect her to submit to a disciplinary hearing. The Council's assertion that the issues in the criminal proceedings and disciplinary hearings were different was correct but missed the point. The point was that it was unfair to expect Mrs Foster to give evidence, and be cross-examined, about the same matters as those which were the subject of the criminal proceedings in disciplinary proceedings which were being brought against her by those who were also prosecuting her. The point is recognised in the Linnen case and one might have hoped that the Council would have understood its weight when Mrs Foster's solicitors asked in February 2003 for a postponement. The Council's refusal to agree to an adjournment appears to have been a somewhat arrogant manifestation of its omission to appreciate a really rather basic concept of fairness."*

97. The 'Linnen' case referred to in ***Foster v Brighton*** above is a reference to ***Scottish Special Housing Association v Linnen*** **[1979] IRLR 265**, a decision of the EAT where Lord McDonald said (my emphasis added):

> "When an employee is found in possession of goods which are suspected to have been stolen from his employer and the police are interested in the case, the position of the employer is a delicate one. He must take care on the one hand to act fairly so far as the employee is concerned, but he must be equally careful to do nothing which might cause prejudice in any subsequent criminal proceedings (Carr v Alexander Russell Ltd [1975] IRLR 220). Each case must turn on its individual circumstances. Where an employee reasonably appears to have been caught red-handed, dismissal without further investigation may be appropriate. In other cases, where the probability of guilt is less apparent the safer course may be to suspend pending the outcome of any criminal proceedings."

98. The Tribunal does not accept that the EAT in ***Foster v Brighton*** were laying down an invariable rule that an employer who is also a prosecuting authority can never proceed to an internal disciplinary hearing without the dismissal being unfair. The remarks heavily relied upon by the Claimant are not in my view any part of the reasoning in the decision but are very persuasive. I consider that Lord McDonald's words are consistent with the statutory test in Section 98(4) of the Employment Rights Act 1996 the issue of fairness will depend upon the factual circumstances of each case. These might include (and this is not intended as an exhaustive list):

98.1. whether the dismissing officer might be properly regarded as 'independent'

98.2. the degree of any prejudice caused by calling upon the employee to give their account

98.3. the likely delay that might be caused by a decision to wait until the conclusion or any criminal proceedings

98.4. the degree of overlap in the allegations

98.5. whether any charges could be separated out or whether having successive charges might itself be oppressive

98.6. the stance taken by the employee and whether any admissions had been made

98.7. the effect of any postponement if the employee remains suspended both in terms of cost and uncertainty.

99. Despite that general conclusion it is not hard to see that in many circumstances the only reasonable course would be to postpone the internal proceedings.

## Discussion and conclusions

Reason for the dismissal

100. There is no dispute that there was a dismissal in this case. It falls to the Respondent to show what the reason for the dismissal was and that it was a potentially fair reason. I find that the reason for dismissal in Mr Skelton's mind was that he believed that the Claimant had incorrectly registered a death and had not completed the checking procedure correctly. I have found above that Mr Skelton found, and was particularly concerned by, his conclusions that the Claimant had dishonestly suggested that she had sought advice when she did not. All of those matters can properly be described as conduct and I find that they are the only matters in Mr Skelton's minds. The Respondent has therefore satisfied me that it had a potentially fair reason to dismiss the Claimant.

Fairness

101. The next issue I must deal with is whether the dismissal was fair or unfair applying the test set out in Section 98(4) ERA 1996 and the law set out above.

102. Mr Skelton had evidence before him that was capable of supporting his findings. The was no real dispute that the Claimant had registered a death when she should not have done so without further inquiry. There was no dispute that the Claimant had checked her own work when it should have been done by a second registrar. There was evidence that the Claimant had claimed to have contacted the GRO when she had not. There was no explanation from the Claimant in respect of these matters, other than what she had said in the investigatory interview to explain or mitigate her actions. However, the real issue in this case was whether or not the Claimant had, by reason of the process that the Respondent decided to follow, been deprived of an opportunity to put forward her case. The core issue was whether the investigation (including the disciplinary hearing) was fair.

103. In respect of the investigation and procedure followed by the Respondent the Claimant relied upon some specific allegations of unfairness. I shall deal with generally rather than going through the particulars individually as there is a high degree of overlap in the allegations.

104. The first suggestion that is made by the Claimant but not pursued with any great vigour by her representative in final submissions was that Mr Bendell's interview with her on 22nd April 2016 should have been excluded entirely from the process and no reliance placed upon it. If that is right, of course, any evidence that she had misled anybody in respect to telephoning the GRO would have disappeared. I see no reason why fairness demands, or any reasonable employer would have considered that it ought to disregard what the Claimant herself had said in the course of that investigatory meeting. It seems to me that

a potential conflict of interest for Mr Bendell arose only when the Claimant indicated or made an assertion that Mr Bendell himself had instructed her to do exactly what she had been accused of doing wrong. In the light of that the respondent actually perfectly properly in accepting that Mr Bendell should not to continue to act as investigating officer. Had he done so, I would have taken a dim view of the fact that he, as I have indicated previously, appeared to be investigating only matters which further inculpated the Claimant rather than looking for matters which might excuse her behaviour – that is not the role of an investigator. Given that Mr Bendell was removed from the process and the decision to proceed taken only after the involvement of Jeannette Ray and a management decision by Lucy Corrie I do not consider it unreasonable or unfair not to exclude evidence gathered whilst Mr Bendell was involved. There was no evidence to suggest that Jeannette Ray would not have approached the investigation with an open mind.

105. The next issue was the argument that it was improper to proceed with a disciplinary hearing on 24th April 2016 prior to the conclusion of the criminal trial. In this regard, the Claimant places great weight on ***Mrs G A Foster v Brighton and Hove City Council***. It seems to me that this matter is somewhat more complex than ***Foster***. In this matter, the Claimant was facing three allegations. The third allegation was the subject matter of prosecution brought by her employer and in that respect, was on all fours with ***Foster***. I note from ***Foster*** that the employment tribunal drew an inference and made a finding that the disciplinary officer would be consciously or subconsciously biased in that he would be reluctant to make any conclusion inconsistent with the case put forward in prosecution.

106. It seems to me that every case must be decided on its individual facts. In the present case, Mr Skelton was not in the same department as the Blue Badge Team albeit all parties ultimately work for the same employer. It seems to me that in looking at whether it was reasonable or fair to proceed with any internal process, whether or not the person hearing the disciplinary hearing could be thought to be truly independent, would be an important factor.

107. A further point of difference between this case and ***Foster***, is in ***Foster***, the employee sought an adjournment when the trial was some three months hence. In the present case, the trial that was awaited was going to be some 6 or 7 months further down the line with Claimant suspended on full pay. I consider that the cost of postponing any internal process Is a matter for which an employer is entitled to have regard. Equally, factored into the same decision must be the risk of relationships souring further and matters being forgotten.

108. I do not take ***Foster*** as laying down an absolute rule that it will be always be unreasonable for an employer to proceed with a disciplinary hearing where some part of the disciplinary hearing concerned matters for which it was a prosecutor in a criminal court. It seems to me that if such a rigid rule was imposed, it would be inconsistent with a test in section 98(4) of the ERA 1996. What I take from it is that it depends entirely on the circumstances of the case.

109. In the initial stages it was recognised that the allegations against the Claimant were distinct and should not proceed to be investigated at the same time. Only when the Claimant entered a not guilty plea and the matter looked like it would not be decided for many months was a decision taken to join all allegations in the same process. I consider that there were good reasons for

deciding that the blue badge issue should not be held in abeyance for a further 7 or 8 months. There was a considerable cost to the organisation both in monetary and in organisational terms. The Claimant's work was being covered on a temporary basis and acting up payments were being made. There was uncertainty about when or if the Claimant would return. Subject to reasonable safeguards being put in place I would not have considered that the dismissal would necessarily have been unfair just because a decision to proceed with the internal process was taken in advance of the criminal trial.

110. Where I do find the Respondent acted unreasonably was in the later insistence that all matters be considered together. There was a failure by the Respondent to recognise that dealing with the Blue Badge allegations the Claimant was fighting with one arm behind her back. For very proper reasons, she had been advised that it was not wise or sensible to discuss her defence in the criminal proceedings. On that basis she had made it clear in advance of the disciplinary hearing that she would play no part in the proceedings. I consider that she might reasonably think there was a very real risk that any adverse findings or indeed adverse view of her with respect of the blue badge allegations allegations might cross in effect the other allegations. Given that Respondent knew that the Claimant has had advice from her solicitor and trade union that she should not take any part in discussing the blue badge matter it was in my view incumbent upon a reasonable employer to take steps to ensure that she was able to give a proper account of herself in respect of the allegations where she could be reasonably expected to answer.

111. I do not consider that the Respondent would have acted unreasonably or unfairly had it insisted that the Claimant answer to the registration error allegations. Whilst in some correspondence sent at the time it was suggested that there may be some link between the allegations that was not enthusiastically pursued before me. If the Claimant had wished to state that Mr Bendell or Mr Quayle had a vendetta against her in respect of those allegations, then she could have done so without any risk of prejudicing the criminal trial.

112. In the event Mr Skelton did not uphold the blue badge allegations nor did he dismiss the Claimant because of anything connected with those allegations. There can be no unfairness to the Claimant in that conclusion. I find that it was unreasonable and unfair to have a single composite meeting with one decision maker when it was known that the Claimant would walk out if the blue badge allegations were being considered.

113. The Claimant's argument was that the decision to proceed in her absence by itself was enough to make the dismissal unfair. I do not have to reach any concluded view on that because in the course of the evidence it emerged that one of the matters that prompted Mr Skelton to dismiss the Claimant was his conclusion that she had acted dishonestly. He acted on that conclusion in assessing whether her conduct reached the standard of the examples given in the disciplinary policy.

114. As I have set out above ***Strouthos v London Underground Limited*** reminds a tribunal that it an employer should not dismiss an employee for matters falling outside of the disciplinary charges. Whilst every case will turn on its own facts and it may not be unfair to alter or amend charges in the course of proceedings the essential procedural safeguard is that the employee knows the case they must answer. I consider that there is a material difference

between an allegation that an employee has failed to properly register a death and an allegation that the same employee had lied during the investigation of the first matter.

115. I would accept that the information presented in the management case supported and alluded to the possibility of dishonesty in relation to the Claimant's statement she had spoken to the GRO. That said, once the Claimant had withdrawn from the proceedings, and in circumstances where that withdrawal was explained, it was incumbent on a reasonable employer to ensure that the considerations strayed no wider than the charges that had been notified to the Claimant. Mr Skelton allowed himself to make a finding that went beyond the allegations specifically made.

116. Not understanding that dishonesty in respect of the first two charges would be actively considered were she to carry through her threat of not participating in the disciplinary meeting he Claimant might have quite reasonably thought that the first two allegations by themselves, if the blue badge allegation fell away, were insufficient for any reasonable employer to dismiss her in any event. She might have taken a different course had she appreciated the seriousness of her position.

117. Whether or not I would have found the dismissal unfair simply because the blue badge matters were progressed internally together with the other allegations and before the criminal trial was concluded is a moot question. I do conclude that, in circumstances where the Claimant had withdrawn from the internal proceedings, the Respondent's actions in dismissing her in part based on a finding of dishonesty, not squarely put to her, means that taking all of these matters together the dismissal was unfair. The actions of the Respondent fell outside a range of reasonable responses.

Polkey Considerations – Section 123 of the ERA 1996

118. Where there a dismissal is unfair the employee Section 123 of the ERA 1996 requires as the tribunal to make an award that is *'just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'.* That enquiry will include an assessment of what would or might have occurred had the Respondent employer acted fairly. The proper approach is set out in ***Software 2000 Ltd v Andrews & Ors*** **[2007] UKEAT 0533/06**. Elias P (as he was) set out the following principles (noting that paragraph 7(b) below has been modified by statute):

> *"The following principles emerge from these cases:*
>
> *(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee*

*himself. (He might, for example, have given evidence that he had intended to retire in the near future).*

*(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

*(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

*(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*

*(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

*(7) Having considered the evidence, the Tribunal may determine*

> *(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).*
>
> *(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.*
>
> *(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.*
>
> *(d) Employment would have continued indefinitely.*

*However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."*

119. It is necessary for me to make additional findings of fact in order to assess what might have happened. One aspect of unfairness that I have identified above was the failure to separate off the blue badge allegations, where the Claimant was constrained in what she might be able to say, from the other allegations where she had no reasonable basis to object to being required to explain herself. I accept the point made by Mr Piddlington that it is unlikely that even if the Respondent had volunteered to stagger the allegations as I have suggested would have been a fairer approach, it is unlikely that the Claimant would have accepted that invitation. I find that her position was heavily entrenched she was taking the stance that she would not answer any allegations until the conclusion of the criminal process. That went beyond the advice recorded in her solicitor's letters. Had the failure to separate the allegations been the only error in the process I would have found that the Claimant would not have attended and that the dismissal would have happened in any event.

120. I have held above that the Claimant was dismissed in part at least for a matter not formally included in the allegations against her. She told me that she would not have ever thought that she would have been dismissed for making registration errors. I accept that this was her state of mind (although I do not necessarily agree). Had the allegation of dishonesty been flagged up then it is at least possible that her union or her solicitors would have advised her that she should attend a separate hearing or at the very least give her explanation. Whether she would have followed that advice is uncertain.

121. However, that does not mean that I am that confident that had the other serious procedural defect that I have identified, failing to properly identify the allegations that the Claimant faced been properly flagged up, that would have made no difference – that involves a degree of speculation. If she had given her explanation, it is a matter of speculation whether or not that explanation would or would not have been accepted by her employer or provided sufficient mitigation to avoid a dismissal.

122. I have made my own findings below as to the Claimant's conduct where I deal with contributory fault. I have found that the Claimant made a serious error in respect of the issue of a death certificate and then when asked about it made a statement which was reckless in order to deflect blame. In respect of checking her own work I have found that the Claimant impermissibly cut corners but did so in circumstances where there were unusual levels of pressure. That is not an excuse as the decision to cut corners was conscious but it might provide mitigation. Taking those three matters together an employer acting fairly could have reasonably concluded that the conduct of the Claimant was such that it went to the heart of the employment relationship and amounted to gross misconduct. Whether or not that would have led to a decision to dismiss would involve a consideration not only of the Claimant's clean disciplinary record but also the position of trust which she occupied.

123. I am satisfied on the evidence before me that had the Respondent proceeded only with the 'registration allegations' and had it properly framed the allegation of dishonesty in respect of what the Claimant claimed she had done by contacting the GRO there was a 50% chance that she would still have been dismissed.

124. It will be of little comfort to the Claimant if I indicated that but for her reckless

attempt to deflect blame and her failure to give a prompt apology I doubt that the Respondent would have persuaded me that there was any significant possibility that she would have been fairly dismissed.

125. For these reasons any compensatory award will be reduced by 50% to reflect the possibility that the Claimant would have been fairly dismissed in any event.

Contributory fault

126. Sub-section 122(2) of the ERA 1996 provides:

> *(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*.

127. Sub-section 123(6) of the ERA 1996 provides:

> *(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

128. Having heard the evidence, I find that the Claimant did improperly accept the MCCD when any competent registrar would have recognised that they should not have done. I accept the evidence that it is the 'bread and butter' of the registrar's job to spot such errors. The Respondent's witnesses speculated that the reason for that error must have been because the Claimant had started processing the death certificate before she noticed the error and was too embarrassed to tell the person notifying the death. I have no evidence either way. I reject entirely the Claimant's suggestion that it was overwork or a lack of training. The Claimant knew how to do this very simple task and failed to do so. At best she was very careless.

129. I accept that this error was a very serious matter. Much focus has been made on the possibility of a funeral having to be postponed and the distress that might have caused. In fact, the consequences of a body being buried without the proper checks and balances being gone through can be much worse than that. It was fortuitous that the matter was picked up by a crematorium and it could have easily been that a doctor had completed the CREM4 in a way that would have not alerted the crematorium and those circumstances a body would have been disposed of in circumstances where the statutory safeguards had been completely overlooked.

130. I note the evidence that the medical registrar and latterly the coroner have taken a 'no harm done' approach to this incident. I accept that the Respondent was not bound to take the same stance and indeed I find it was right not to do so. When the Claimant failed to do her job properly she could not have known that the consequences would be so benign.

131. It was common ground that the Claimant initially claimed that she had sought advice from the GRO before accepting the MCCD. I have accepted that the notes of the investigatory meeting were accurate. Had the Claimant done

as she had claimed then her actions would have been far less serious. She must have known the effect of her claim and I find that it was an attempt to deflect blame. She later retracted that account. She says that confusion arose because she did not know which death was referred to. I reject her account of that. I have set out above my findings that she had approached the crematorium in advance of the investigatory meeting. I find that she was well aware of which death (and there were very few to choose from) was being referred to.

132. I do not go as far as to say that the Claimant was dishonest in her account during the investigatory interview. I do find that she may well have made other telephone calls in the past to the GRO. In this instance, at best, she made her claim that she had done so recklessly not knowing or caring whether she had or not. That was a wholly improper approach to the investigatory interview and not one excused by any conduct by Mr Bendell.

133. Finally, the Claimant had been checking her own work. When it should have been done by another registrar. The Claimant suggested that she did so under instruction from Mr Bendell. I must make my own finding in this regard. I consider that it is quite clear that the process of checking/countersigning any entry was expected to be done by another registrar. The purposes of that are self-evident. It is a far more robust process designed to eliminate human error. The Claimant accepted that that was the standard process. I accept that by the stage of the investigatory meeting there was no love lost between the Claimant and Mr Bendell. Each had a degree of animus. I have found that the Claimant has greatly exaggerated some accounts of her interactions with Mr Bendell. I have no doubt she bitterly resented his appointment. I doubt whether in those circumstances the Claimant would have accepted such an obviously improper instruction without protest. More likely that she was busy and cut corners. That is consistent with her other error identified above.

134. I consider the conduct of the Claimant to have been 'culpable or blameworthy'. All three of these matters were matters in the mind of Mr Skelton when he took the decision to dismiss the Claimant. As such her conduct did cause or contribute to her dismissal. I find that the reckless statements about contacting the GRO in an attempt to cover up an earlier error was very serious. It may very well have led to a fair dismissal taken in isolation. The Claimant was in a position of trust. On the other hand, I have found that the dismissal was unfair for the reasons set out above. There were significant procedural errors that affected the fairness of the process followed. Taking these matters in the round I consider that it would be just and equitable to reduce both the basic and compensatory awards by 60%.

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Employment Judge John Crosfill
Date: 12 October 2018