Case Number: 2301921/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Ms L Charles **Claimant**

AND

Health and Safety Executive **Respondent**

ON: **8 – 10 January 2018**

Appearances:

For the Claimant: Mr S Marsh, Counsel

For the Respondent: Mr B Adams, Counsel

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant was unfairly dismissed.

2. The matter will be listed for a remedy hearing on application by either of the parties.

Reasons

1. By a claim from presented on 5 October 2016 the Claimant brought to the tribunal a claim of unfair dismissal. The Respondent resisted the claim.

2. The hearing was eventually listed for three days commencing on 8 January

2018. The Respondent had three witnesses, the dismissing officer Annette Hall, the Respondent's Head of Operations, Samantha Hall, now Director of Field Operations who dealt with the Claimant's appeal and Kari Sprostanova, who has now left the Respondent's employment but was at the relevant time the Claimant's line manager.

3. The Claimant called five witnesses in addition to giving evidence on her own behalf. Her witnesses were two union representatives, Simon Hester and Sarah Stranks, two former colleagues and health and safety inspectors Wendy Garnett and Dominic Long and a union full time officer, Jeremy Stewart. There was a bundle of documents of 185 pages to which a small number of additions was made during the course of the hearing. References to page numbers in this judgment are to page numbers in that bundle.

4. I heard evidence over two days and Counsel made their comprehensive and very helpful submissions on the morning of the third day. I then reserved my decision and I apologies to the parties that they have had to wait longer than I anticipated for the outcome. It also became clear as the hearing progressed that it would be preferable from the point of view of time, to deal with liability only at this stage. As the Claimant seeks reinstatement or reengagement, sufficient time would be needed at a separate remedy hearing to deal with the issues that those applications present.

The law and the issues

5. The issues in the case were those that arise in any unfair dismissal case brought under s98 Employment Rights Act 1996 and had been succinctly set out in an agreed list.

6. It is for the Respondent in an unfair dismissal case to establish that it had a potentially fair reason to dismiss. In this case the Respondent relied on the Claimant's misconduct. Misconduct is a potentially fair reason to dismiss under section 98(2)(b) Employment Rights Act 1996 ("ERA"). The question of whether the Respondent is entitled to rely on the alleged misconduct to dismiss the Claimant fairly involves consideration of the test in ***British Home Stores v Burchell [1980] ICR 303*** that is whether the Respondent at the time of the dismissal had a reasonable belief in the employee's guilt based on reasonable grounds after conducting such investigation as was reasonable in the circumstances. The standard to be applied to the investigation carried out by the Respondent in a misconduct case is also a standard based on what a reasonable employer might have done (***Sainsbury's Supermarkets v Hitt [2003] IRLR 23***).

7. In accordance with the case of ***Iceland Frozen Foods v Jones [1982] IRLR 439*** the Tribunal must not in reaching a decision on the reasonableness of the Respondent's decision to dismiss substitute its own view as to what it would have done in the circumstances but must instead consider whether the Respondent's response fell within a band of responses which a reasonable employer could adopt in such a case.

8. Further issues then arise under section 98(4) ERA, which provides that the question of whether the dismissal was fair or unfair involves considering of whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case. The Claimant made no complaint of wrongful dismissal, so that it was not for that purpose necessary for me to determine whether she actually did the misconduct for which she was dismissed, but it was necessary for me to consider whether the penalty of summary dismissal was one that a reasonable employer could have decided upon on the facts of the case. It was also necessary for me to consider whether the Claimant had in any material way contributed to her own dismissal, for which purpose I would need to be satisfied that there had been some misconduct on the Claimant's part.

9. In order to meet the test in section 98(4) the Respondent must also follow a procedure that is fair in all the circumstances. That will ordinarily involve compliance with the provisions of the ACAS code of practice on grievances and discipline and with the Respondent's own written procedures.

10. In a case in which a dismissal is found to be procedurally unfair consideration must also be given to the principles in the case of ***Polkey v A E Dayton Services [1988] ICR 142*** and if it appears that the Claimant would have been fairly dismissed in any event had a fair procedure been followed then any compensation awarded must be reduced to reflect the percentage chance of that being the case.

11. In a case in which the Claimant is found by the Tribunal to have been unfairly dismissed for misconduct the Tribunal must, if it has found that the Claimant has to any extent caused or contributed to her own dismissal, reduce any compensation by such amount as the Tribunal considers just and equitable having regard to that finding (section 123(6) ERA). A finding of contributory fault can only be made if the Tribunal forms the conclusion that the Claimant has on the balance of probabilities been guilty of misconduct alleged.

Findings of fact

12. Based on the pleadings, the witness statements and the oral and documentary evidence presented during the course of the hearing I make the following findings of fact.

13. The Respondent is the UK's national regulator on health and safety matters with responsibility for the regulation and enforcement of health and safety throughout the UK. It employs health and safety inspectors to carry out its regulatory, monitoring and enforcement activities.

14. The Respondent has a set of policies applicable to health and safety

inspectors who, like the Claimant, were carrying out site visits. At page 81 was the Respondent's general policy on visits to sites which covers the hazards faced by visiting staff when traveling on official business, lone working or visiting non-HSE premises. It is described as "Mandatory for all visiting staff to apply the general precautions set out in the visiting essentials section of this supplement to mitigate any risk to their health and safety". At page 83 there is a requirement to carry as a minimum the specified items of personal protective equipment ("PPE") on every visit to ensure the ability to respond to a range of hazards during site inspections. The list includes hi-visibility jackets. I was presented with no evidence about how these policies are communicated to the Respondent's employees.

15. There was evidence before me from the Claimant and her witnesses that inspectors are trusted to exercise their judgment, discretion and expertise in risk management in carrying out all aspects of their duties. They work alone and are relied upon for their experience and professional expertise. They are expected to make sound judgements and decisions. There is a general expectation that PPE will be worn on construction sites as in most situations that is an obvious and easily implemented means by which risk can be reduced. I say more about the evidence of the Claimant's witnesses later in this judgment.

16. The Respondent also has a policy of what was referred to during the hearing as 'dynamic risk assessment'. The following statement appeared at page 83:

> **"HSE cannot predict every hazard to which you may be exposed during a site visit; to address this staff are required to take responsibility for their own health and safety on site by continually identifying, assessing and mitigating the risk posed by any potential hazard. Further information is provided in the FOD Dynamic Risk assessment paper.**
>
> **As a minimum staff should:**
> - **Discuss the site hazards with the duty holder**
> - **Comply with any site rules or procedures designed to ensure the health and safety of staff, eg use of PPE, designated pedestrian routes etc…..**
> - **Leave site if at any point you feel uncomfortable or threatened by the behaviour of dutyholders or their employees"**

The guidelines on dynamic risk assessment appeared at page 87O-P. It is described as "risk assessment on the go", arising from the difficulty of fully assessing risks in advance. The inspector is required to use "their training knowledge and experience to assess the risks associated with the changing hazard profile they encounter in their environment". The policy states:

> **"This is not to say that only dynamic risk assessment should be used. It is not a substitute for effective preparation and generic risk assessments, which will usually achieve a significant amount of risk reduction".**

17. The Respondent also has a disciplinary policy (pages 30-65) and a disciplinary procedure (pages 66-76). There is also guidance for managers on how to assess the level of misconduct (pages 77-80). The disciplinary policy (page 40).required a manager conducting disciplinary proceedings to

use this guidance to assess the level of seriousness of a particular act or course of misconduct prior to commencing disciplinary action. The document distinguishes between minor misconduct, serious misconduct and gross misconduct. Examples of serious and gross misconduct are listed at page 79-80. At page 77 there is a list of factors to consider before deciding the level of misconduct. These are: the degree of the misconduct, the impact on others and the HSE, damage to property value, culpability, intent and breach of the Civil Service Code (a copy of which was at pages 86-87).

18. Serious misconduct is defined as conduct requiring "formal management action but is not of itself serious enough to amount to gross misconduct in the case of a first offence". Examples include, "failure to follow HSE policy/procedure, for example serious insubordination", "some breaches of the Civil Service Code", "failure to follow HSE policy/procedure, for example serious insubordination" and "certain instances of bringing HSE into disrepute, for example being drunk and disorderly outside working hours in a situation where HSE may be identified".

19. Examples of gross misconduct include "physical violence or threatening behaviour", "significant breach of security", "significant breach of health and safety rules", "certain instances of bringing HSE into disrepute, for example posting defamatory comments or unauthorised information about HSE/colleagues/customers/ministers on social media sites", "gross negligence", "insubordination resulting in significant impact, for example, reputational damage", "repeated or persistent failure to follow reasonable instructions", "significant or repeated breaches of the Civil Service Code" and "very offensive behaviour".

20. The part of the Civil Service Code that was germane to these proceedings was section 6 (page 86) which reads as follows:

> **"You must:**
> - **…**
> - **Always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings;**
> - **…**
> - **Keep accurate official records and handle information as openly as possible within the legal framework…"**

21. The Claimant, Loraine Charles, was employed by the Respondent as a health and safety inspector from 11 October 1999 until her dismissal for gross misconduct on 27 April 2016. Since 2009 she had concentrated on construction sites and construction activities and, more recently, the investigation of serious and fatal accidents and related prosecutions She was dismissed after she had entered a construction site adjacent to the BBC Worldwide Building on Wood Lane in London at the initial stages of an investigation into a fatal accident without wearing PPE.

22. The Claimant did not have an entirely clean disciplinary record but I am satisfied on the basis of the evidence I heard that her disciplinary history was spent and played no part in the decision to dismiss her.

23. The events leading to the Claimant's dismissal are largely undisputed and I make the relevant findings based on the Respondent's investigation documents at pages 95 to 134, including the Claimant's own account and the supplementary investigation that was conducted by Jane Lassey at the behest of Ms Peace, once the Claimant had submitted her grounds of appeal against her dismissal.

24. The initial investigation was conducted by Simon Longbottom. During the course of it he interviewed the Claimant herself, the Claimant's manager Kari Sprostranova, DC Cherrington, a police officer who had had initial conduct of the investigation into the accident , Carlos Ruiz, a Wilson James traffic marshal who was working on the site at the time of the Claimant's visit (and unbeknown to the Claimant at the time, was the marshal who had given the instruction to reverse to the refuse lorry that had caused the fatal accident). Mr Longbottom also interviewed Tadhg McMahon, who was not on the site at the time but was a Keltbray Piling Manager, responsible for a team of piling rig operators and who received a phone call from the men on the site about the Claimant's visit and St John Cordingley who had been in the vicinity of the BBC loading bay at the time of the Claimant's visit and was the site manager for the principal contractor, MACE. The Claimant would later complain that he should also have interviewed two traffic marshals to whom the Claimant had spoken, Hayden Matthews, the BBC manager who had given the Claimant access to the site and Mike McHale, a manager from MACE, the principal contractor, who later contacted the Respondent about the Claimant's visit.

25. At the appeal stage Ms Lassey supplemented this investigation by interviewing Mr Matthews and Mr McMahon. She also received confirmation from Ms Sprostranova that the material in Mr Longbottom's report was an accurate reflection of her conversation with him on 18 March and confirmation of the accuracy of his account from DC Cherrington. She also reviewed the evidence obtained by Mr Longbottom from the remaining witnesses and considered whether there were any discrepancies between his report and his written notes that had rendered the report unsafe (she concluded that there were not). She also reviewed the extent to which the statements of the various witnesses were corroborative of each other.

26. The events had begun on 22 February 2016, when a fatal accident occurred on the access road to the loading bay of the BBC Worldwide offices. I was shown a plan of a large construction site divided into sections variously described as plots or blocks with a perimeter road divided into corresponding loading zones. The road was within the boundary of the construction site, which I find as a fact was known to the Claimant at the time of her visit. The accident had occurred when a refuse lorry, which was attempting to collect refuse from the BBC Worldwide building loading bay, was cleared to reverse down the access road by a traffic marshal working on the site and struck and killed another traffic marshal.

27. The incident was initially handled by the police and the first visit by the

Respondent to the site was conducted by one of the Claimant's colleagues. The Respondent took over primary responsibility for the investigation once the police had decided that no criminal prosecution was warranted. The Claimant was then nominated by Ms Sprostanova, to take the investigation forward. In order to do so the Claimant contacted the police and arranged to attend Hammersmith police station on 24 February to meet the relevant officers and collect CCTV footage of the incident. The footage was being held at the BBC Worldwide offices and the Claimant proceeded there with DC Cherrington. DC Cherrington suggested to the Claimant that she could also have a look at the accident scene whilst they were there. The claimant told him that she did not intend to enter the site as she did not have PPE with her, having not planned to visit the site when she left for work that morning. I find that the Claimant was aware that the normal expectation was that if she was attending a construction site she would wear PPE.

28. On arrival at the BBC Worldwide building the Claimant and DC Cherrington were met by Hayden Matthews, Head of Global Operations and Property at BBC Worldwide. They were then able to view the accident site from a balcony on the BBC Worldwide building. They viewed the scene of the accident and whilst they were doing so did not observe any traffic using the road. The Claimant then asked Mr Matthews if the road was closed and he said that it was and had been so since the accident. He added that there were no collections or deliveries being made to the BBC Worldwide loading bay. The Claimant asked whether on that on that basis she and DC Cherrington could go down and view the loading bay. DC Cherrington told Mr Longbottom that at that point the Claimant had made what he described as a dynamic risk assessment and decided that it would be acceptable to exit the BBC building to enter the site. Mr Matthews took them both through the BBC building and let them out unaccompanied through a door entry security system to the refuse area loading bay. There was no sign to say that they would be entering a construction site. The Claimant was able to see both up and down Lower Road from the loading bay. As she looked towards the construction site she could see two traffic marshals. There was no traffic on the road and the Claimant could not see any activity on the site itself save for an excavator some distance away.

29. She had been informed by colleagues who had attended the site previously that the practice of construction site traffic was to drive forward down Lower Road and use an area at the top of the slope to turn forward onto the site. The Claimant wanted to know more about this arrangement before there was any change to the layout and decided to approach the two traffic marshals to seek confirmation that her understanding was correct. She did not intend to enter the actual site. The Claimant and DC Cherrington proceeded down Lower Road to speak to the marshals. They explained their presence and identity to the marshals, who were co-operative and started answering their questions. DC Cherrington described one of the men as having challenged them about their lack of PPE and the Claimant having responded that she had made her own assessment and did not need it. However they were soon afterwards approached by several other men, some of whom were in Wilson James PPE, and some in Keltbray PPE. One

of the men was recognised by DC Cherrington as Carlos Ruiz. Some of the men were shouting that the Claimant and DC Cherrington could not be there. The Claimant had therefore explained her presence and recalls showing her warrant. DC Cherrington described the two of them as having been "mobbed" by the men who were in his view being quite aggressive and hostile and ordering them to get off site as they were not wearing PPE. He recalled the Claimant showing her warrant to St John Cordingley, who was more polite but still somewhat hostile. He himself had taken the Claimant's guidance on the question of PPE and thought that her approach seemed reasonable. He told Mr Longbottom that he considered that the staff on the site had behaved appallingly and recalled Mr Ruiz physically shoving the Claimant. He later commented that it was unusual even for a police officer to experience behaviour of that nature.

30. Mr Ruiz told Mr Longbottom that he had received a radio call about two people walking on the main construction site roadway leading from the BBC refuse area, without wearing any PPE, contrary to company policy. He was concerned about a repetition of the fatal accident. He decided to close the site gate to construction traffic. He approached the Claimant and DC Cherrington and told them they had to have PPE whilst on the site. According to him the Claimant had said that she was from the HSE and could do what she wanted. He then called Mr Cordingley.

31. Mr McMahon, Keltbray piling manager, told Mr Longbottom that he had received a phone call from the men on site about an HSE inspector who was not wearing PPE as was standard practice for the site. He added "The lady inspector reportedly said that she did not need to comply with the site rules, that she was from HSE and could do what she wanted". He did not witness this at first hand. However Ms Lassey later formed the view that even if the Claimant had not actually used the words "I can do what I like" there was sufficient evidence that she had given the impression to those on the site that she did not need to have regard to the rules about PPE because she was an HSE inspector and could make her own judgement.

32. Mr Cordingley told Mr Longbottom that had been on the site, at the BBC loading bay at around 4pm and was approached by one of the marshals who appeared to be stressed and was asking why there were people on the ramp without PPE – the Claimant and DC Cherrington had been seen on the roadway where the fatal accident had occurred. He was concerned as there were construction vehicles using the road all day. Whilst deliveries to the BBC had been stopped, the main road through the site was still open. He approached the Claimant and DC Cherrington to "get the facts" and was shown ID cards. He explained that the site personnel were really concerned as vehicles were coming through on a regular basis and there were vehicles at the gate waiting. He ascertained that the Claimant and DC Cherrington needed only two minutes to finish what they were doing and he kept the site gate closed whilst they did so. They then returned to the BBC building. He formed the view that there had been a heated discussion between the Wilson James marshals and the Claimant and DC Cherrington.

33. Ms Sprostranova had attended the site on 22 February 2016 and had then assigned the investigation to the Claimant. Following the Claimant's site visit Ms Sprostranova was contacted by MACE whose operations director Mike McHale left what the investigation report described as a message "regarding concerns following an inspector site visit." No number was left to return the call and in fact there never was a conversation between Mr McHale and Ms Sprostranova. Ms Sprostranova asked the Claimant for Mr McHale's number and the Claimant replied that she had spoken with MACE and resolved the issue. Nevertheless Ms Sprostranova left a message on Mr McHale's answer phone.

34. The Claimant then disclosed to Ms Sprostranova on 26 February during a car journey following a visit to the deceased traffic marshal's family, that there had been a heated exchange during her site visit two days earlier about the fact that she was not wearing PPE when she had been to collect the CCTV. Ms Sprostranova did not deal with this in her evidence to the tribunal, but a chronology she prepared in or around April 2016 from notes that she kept contemporaneously, records the Claimant as having emphasised an "overreaction" on the part of the site personnel to the fact that she had not been wearing PPE. The Claimant observed that PPE had not saved the deceased traffic marshal but confirmed that she had not said that whilst on the site. She said that she had carried out her own risk assessment and judged that PPE was not necessary at the time.

35. Ms Sprostranova made a note of the conversation on her return to the office and reported her concern to Ms Hall. The next day Ms Sprostranova developed further concerns that the Claimant's conduct during her visit to the site could compromise the investigation into the fatal accident. On 29 February she requested by email to the Claimant a written account of what had occurred. The email itself was not in the bundle, but it was reproduced at page 107 in Ms Sprostranova's chronology. It included this passage:

> **"In the event that this incident may be raised by any of the contractors at a later stage of the investigation or in the event of any legal proceedings please can you send me a written account of the days (sic) visit to the site including the area that you visited, how you accessed the area, who if anyone escorted/accompanied you and your dealings with each of the contractors on site".**

The Claimant replied:

> **"What legal proceedings do you have in contemplation?"**

36. Ms Sprostranova spoke to two colleagues Andy Gay (who suggested the possibility of gross misconduct) and Sarah Chaker. Both advised Ms Sprostranova to persist in obtaining a response from the Claimant. Ms Sprostranova emailed again and gave the Claimant a deadline of Friday. The Claimant replied on 3 March:

> **"It may not be an unusual circumstance in your experience to be asked for a written account of a site visit at this stage, but it is an entirely novel one in my**

> **experience. Is there a suggestion that I have done anything dangerous or contrary to procedures or otherwise blameworthy?"**

37. Ms Sprostranova responded with a more explicit request on 4 March to which the Claimant replied the same day saying that she found the way in which the incident was being responded to both odd and stressful. She expressed a willingness to provide a written account but wanted a clear indication of the way in which the Respondent intended to use it.

38. On 8 March Ms Hall wrote to the Claimant (page 123) to inform her that her conduct and its potential to compromise the fatal accident investigation was so serious that another inspector would be asked to take over the investigation from the Claimant. The letter also informed her that Simon Longbottom had been asked to undertake an investigation into the Claimant's conduct, which was being regarded as potentially serious or gross misconduct.

39. Mr Longbottom's investigation report was at pages 111-122 and includes the text of an account prepared by the Claimant. It also includes a detailed report of the discussion that ensued between the Claimant and Mr Longbottom. It was clear from that discussion that the Claimant's view was that it was a matter for her to determine the level of risk in a given situation and in this instance she had determined that there was no risk.

> **"SL – asked LC what awareness she had of HSE's H&S policy for visiting staff?**
>
> **LC - Said she was aware of it and that recollection was that it required visiting staff to follow site rules imposed by duty-holders intended to protect them from risk, and that she had determined that there was no risk. She believes that she was competent and is competent to make that determination.**
>
> **LC – Said it was her view and the view of the law that PPE is the protective measure of last resort and its use should be based on risk. She explained that she had determined to stay on the road and ask questions and that it was a considered decision to do this.**
>
> **SL – Asked that as a representative of the regulator, did she not think how this would be viewed?**
>
> **LC - Replied yes, but HSE's message is about sensible risk management. She said the deceased was wearing PPE but it did not prevent him from being knocked over. LC explained that she assessed the risk and there was no danger, which she believes is the right message for the regulator to send. Her view is that the worth of PPE is devalued if it is worn when there is no risk.**
>
> **SL – Asked if LC considered contacting the principal contractor to ask to be accompanied by a representative.**
>
> **LC – Said no, because she had no intention to go into any construction areas".**

The Claimant also stated that with the benefit of hindsight she would not have acted differently if placed under the same circumstances again.

40. Mr Longbottom decided that there was a disciplinary case to answer for the

reasons set out at pages 121-122. In summary he concluded that there was no dispute that the Claimant:

a. Visited the scene of a transport related fatal incident on a construction site without contacting the site managers first;
b. Entered the construction site via the BBC building and walked up and down the site access road unaccompanied by construction site personnel;
c. Having made enquiries with a BBC manager (but not construction site management) about anticipated vehicle movements, made a conscious decision based on her assessment of actual risk and regardless of likely site rules, that she would not use PPE;
d. Continued to speak to workers on the site after she had been told by other workers that the site rules required all persons to wear PPE;
e. Was aware of the requirements of HSE's H&S policy, which require staff to carry a minimum of 6 pieces of PPE on site visits, decide on its use based on dynamic risk assessment, comply with any site rules and discuss site hazards with the duty holder.

The Claimant's approach in his view failed to take account of changes in circumstances such as unplanned or unknown vehicle movements once on the site and demonstrated a lack of awareness of the sensitivities prevailing after the fatal accident. Moreover it would be likely to send conflicting messages to site workers about the importance of PPE and potentially undermine site leadership.

41. Following the investigation report Ms Hall invited the Claimant by letter of 1 April (page 124) to attend a disciplinary meeting on 11 April although the meeting was subsequently postponed until 20 April. The Respondent's notes of the meeting were at page 151a and were a manifestly inadequate account of a disciplinary hearing that had lasted two hours. A set of agreed notes was not in fact arrived at until August, when the Claimant's appeal was dealt with by Ms Peace. I consider that this state of affairs falls well below the standard that could reasonably be expected of a substantial public sector employer such as the Respondent. There was a separate more detailed note, prepared by the Claimant's representative and incorporating the Claimant's statement at pages 146-151. It was clear from the note that having read the investigation report Ms Hall was in no doubt from the outset that the Claimant was guilty of some form of misconduct and that the task that fell to her was whether the misconduct was properly characterised as either "serious" or "gross". I considered whether this suggested that the outcome of the disciplinary hearing was predetermined and I return to that point in my conclusions.

42. Ms Hall did not make a decision at the meeting but wrote to the Claimant on 27 April informing her of her decision that the Claimant's employment would be terminated summarily for gross misconduct.

43. The specific acts of misconduct for which she decided that dismissal was the appropriate penalty were set out in the dismissal letter at page 125-126.

The matters she relied on were as follows:

a. Failing to comply with health and safety rules in that the Claimant had entered the construction site without PPE and not through the main site entrance. She should also have spoken to those responsible for creating and managing risk before entering the site. Site personnel had considered that there was a risk to the Claimant and had had to arrange for the site gate to be shut to prevent vehicles entering the site whilst the Claimant was present. The Claimant's assessment of risk had been flawed and there were no exceptional circumstances justifying the Claimant's actions within the terms of the HSE health and safety policy.

b. Bringing HSE into disrepute and a breach of the Civil Service Code (she did not specify which aspect of the Code had been breached). Ms Hall relied on the fact that:
    i. the Claimant had not reported immediately that she had entered the site without PPE or that site personnel had raised concerns;
    ii. the Claimant had believed it appropriate to agree with Mr McHale, the MACE health and safety operations director that what happened would not be mentioned again;
    iii. When asked to provide an account of what had happened the Claimant failed to provide one within the timescales required;
    iv. Although Ms Hall accepted that the Claimant had remained professional at all times during the incident and it was not proven that she had given the impression that "she could do what she wanted" by the Claimant's own admission one of the personnel on site, allegedly Mr Ruiz, "said your actions were shameful and you have failed to accept this".
    v. In Ms Hall's view the Claimant's opinion that "it seems illogical for Simon Longbottom to conclude that you should comply with a set of site rules that had demonstrably failed" was flawed, as was her assertion that it was the investigation of her actions by HSE managers that brought the Respondent into disrepute rather than a combination of her actions on site and her failure to accept and acknowledge them.

44. Ms Hall's oral evidence was that what had operated on her mind in reaching the decision to dismiss was firstly the fact that the Claimant had breached the Respondent's health and safety requirements, secondly that she had failed to acknowledge any wrongdoing, thirdly that she had failed to produce in a timely fashion a report of her actions when called upon to do so and fourthly that she had breached the Civil Service Code. She also gave evidence that the Claimant's failure to acknowledge any wrongdoing had been to her mind fatal to the ongoing employment relationship and that a lesser sanction such as training would have been ineffective in the face of the Claimant's failure to acknowledge responsibility for her actions. She pointed out that the Claimant was an experienced officer. She reiterated the need for the Respondent's employees to above reproach in the context of a fatal accident and regarded the Claimant's failure to have done so as having

breached the second paragraph of section 6 of the Civil Service Code (cited above at paragraph 20). She also maintained that the Claimant's slowness to produce a written explanation of the incident on 24 February in the context of a fatal accident investigation amounted to a breach of the Code in that it had a tendency to undermine the confidence of those with whom the Claimant was dealing at the time. The Claimant's record as a very good investigator was not, in Ms Hall's view relevant in light of these considerations.

45. Ms Hall was also questioned about her approach to the evidence available at the disciplinary hearing about two other employees of the Respondent - Wendy Garnett and Dominic Long - who were, in the Claimant's submission, in similar circumstances, but had not been subjected to any disciplinary sanction. Ms Hall's evidence was that at the time she reached her decision she did not consider the two other situations to be comparable with that of the Claimant. It is not clear from the dismissal letter however whether and to what extent Ms Hall actually took into account the Claimant's assertion that she was being subjected to a disparity in treatment. I return to the issue of Ms Hall's letter and the question of disparate treatment later in this judgment and in my conclusions.

46. The Claimant appealed against the decision to dismiss her and her letter of appeal, dated 16 May 2016 was at page 127. Her grounds of appeal were in summary:

    a. That the decision to discipline her at all was disproportionate;
    b. The decision to characterise her actions as gross misconduct warranting summary dismissal was also incommensurate with the facts as Ms Hall found them;
    c. The sanction of summary dismissal was unreasonable and out of all proportion to the circumstances of the case.

    These points were supplemented by a series of further submissions that were set out in the letter:

        a. There had been no informal approach to her before the decision to instigate formal disciplinary proceedings;
        b. No allegations had been put to her to which she could have responded at the outset;
        c. Her actions had involved a proper assessment of risk and there had been no actual risk- the Respondent espouses a risk based rather than "rules for rules sake" approach to managing health and safety;
        d. Her actions had placed neither herself nor anyone else at risk;
        e. She had adopted a rational and reasonable approach to making her own risk assessment by speaking to the BBC manager, observing the site from the balcony in the BBC building and viewing the road before progressing along it;
        f. She had dealt appropriately with the suggestion by site staff that she ought to be wearing PPE;

g. If she had breached the health and safety procedure her breach was minor and technical in nature and could not be said to be a flagrant disregard of the rules; any culpability was low and no-one was exposed to harm;
h. Mr McHale had contacted the HSE because of his concern about site staff's conduct towards the Claimant, not the other way round;
i. Other members of staff had been in comparable situations without being subjected to disciplinary sanctions.

47. The appeal was submitted to Ms Peace. On 6 June a meeting took place between Ms Peace, the Claimant and her trade union representative Jez Stewart (pages 152-158) as a result of which Ms Peace decided that it was appropriate to reopen the disciplinary investigation, having heard, in particular the representations made by the Claimant and Mr Stewart about the investigation undertaken by Simon Longbottom. Their concerns were that not all of the individuals to whom the Claimant had spoken on her visit had been interviewed and there was a lack of clarity about the reason for MACE having contacted the Respondent as well as a reference to a Mr Burke, who was not mentioned in the investigation report. Mr Stewart repeated the Claimant's concerns about the severity of the sanction imposed and alluded to the document referred to above at paragraphs 18 and 19 that gave guidance to managers on how to assess the correct level of disciplinary sanction.

48. The Claimant also complained that the dismissal letter appeared to base the decision in part on a breach of the Civil Service Code, but at the same time seemed to accept that it was not proven that she had told the workers on the site on 24 February that she could "do what she liked". There had been evidence that her conduct on the site had in fact been exemplary. She also submitted that the notes of the disciplinary hearing, which by this stage had still not been agreed, were insufficient to demonstrate an adequately reasoned decision to dismiss an individual with as long a career in the Respondent as that of the Claimant. The Claimant also called into question various aspects of the dismissal letter: the allegation that she had been in breach of the Civil Service Code and the allegation "By your own admission Mr Ruiz said your actions were shameful", which the Claimant denied having said. Mr Stewart ended by suggesting that the Claimant's dismissal was incompatible with the Respondent's approach of a sensible and proportionate approach to risk management and a sent a mixed message to the workforce. He repeated the submission that dismissal for gross misconduct was disproportionate.

49. Ms Peace appointed Jane Lassey, Deputy Director of Field Operations, to conduct a further investigation and gather further information. Ms Lassey met with the Claimant on 1 August and the minutes of that meeting were at pages 159-165. There was a question at that point about whether the Claimant and Mr Stewart would want a further meeting with Ms Peace before she finalised the outcome of the appeal. Ms Lassey noted that the timetable was tight as Ms Peace intended to give a response by no later

than 5 August. At page 134A there was an email exchange between Ms Peace and Mr Stewart dated 2 and 3 August in which Ms Peace confirmed:

> **"We discussed a further meeting but agreed that as you did not anticipate any change to the grounds of appeal, having been through the additional evidence, it would be better to make sure the decision is made as soon as possible.**
>
> **I did confirm that we have followed due process, which does not require a further meeting on the basis you have explained in depth the grounds of appeal and the additional evidence, upon which you have had opportunity to comment, has not altered these. As I cannot predict the outcome at this time the only options were to defer a decision until we had met again or go ahead now. We both agreed the latter was the better choice for individual involved.**
>
> **I appreciate that you have not seen the final additions to the report and are sending further comments on the chronology".**

Mr Stewart replied:

> **"This is an accurate reflection of our discussion. I have discussed it with Loraine and she is comfortable with this approach".**

50. During the meeting on 1 August Ms Lassey confirmed that she had been asked to obtain further evidence of the vehicle movements on the site on 24 February and the status of the road. She also confirmed that she would confirm with Ms Hall that a note from her meeting with the Claimant had been agreed, clarify an issue about wording in the dismissal letter, identify whether dynamic risk assessment had been considered in the initial investigation report, review and consider the relevant policies on dynamic risk assessment, review the witness evidence collated by Mr Longbottom and discuss this with him, identify any further witnesses to be contacted and review Mr Longbottom's handwritten notes. Ms Lassey also had matters she wished to raise with the Claimant about whether she had kept a "notebook account" of the incident (the Claimant confirmed at the meeting that she had not) and certain aspects of the information provided by Ms Hall, notably the chronology prepared by Ms Sprostranova.

51. Following the meeting Ms Lassey produced the report at pages 166-175 and sent it to Ms Peace. Ms Peace reviewed the report, the original investigation report, the trade union agreed version of the disciplinary hearing notes and the evidence produced in mitigation at the disciplinary meeting, the note of the appeal meeting of 6 June and the notes of the meeting between Ms Lassey and the Claimant on 1 August. She sent the appeal outcome report to the Claimant (pages 176 – 185) on 8 August. I find as a fact that at the time of the email exchange with Mr Stewart at page 134A, Ms Peace had not made up her mind about the outcome of the appeal and was open to meeting with the Claimant again before making her decision, although in the event the Claimant opted for a speedier decision over a further meeting. Having given detailed consideration to each of the Claimant's grounds both as related to the process and the actual decision reached, she did not uphold the appeal.

52. At pages 178 -180 Ms Peace identified 16 separate points of appeal arising

from the appeal letter and the meeting on 6 June. On pages 179-182 she addressed in detail all of the points raised and on pages 183-185 she explained why she upheld the original decision. I do not propose to set out all of Ms Peace's conclusions in this judgment but I make the following points:

a. She introduced some considerations that did not form part of Ms Hall's decision – notably her conclusion at page 179 that there had in fact been an external complaint about the Claimant. I find that that assertion was incompatible with the evidence available to Ms Peace and also with a statement in Mr Longbottom's investigation report (page 121) that there had not been an external complaint about the Claimant. Mr Longbottom had told the Claimant at the investigation meeting that the contact made by Mace was "because they were concerned about the reception LC received from site staff". It had emerged as a result of Ms Lassey's further investigation, which involved a conversation with Mr McHale, that Mr McHale had in fact had concerns at the time although he did not in fact speak to anyone at the Respondent save for the Claimant herself. Hence Mr McHale's concerns had not been communicated to the Respondent at the time Ms Hall made her decision and it was therefore not correct to say that there had been an external complaint at the time of the dismissal. Ms Lassey's note of her discussion with Mr McHale was at page 163. It is clear from that note that Mr McHale told Ms Lassey that he had been "disappointed" that the Claimant had entered the site without presenting herself to MACE, the principal contractor and that she had given site staff the impression that because she was from the HSE she did not need to wear PPE - a position that was undermining to MACE which was obliged to follow regulations. The Claimant had the opportunity during the meeting with Ms Lassey to comment on Ms Lassey's conversation with Mr McHale - there is a detailed note of their discussion at page 163 – 163a. However it is clear that there had not in fact been an external complaint from Mr Mc Hale to the Respondent at the time and it was plainly unsatisfactory that he was not in fact interviewed until five months after the incident occurred.
b. Ms Peace also alludes to the fact that the Claimant did not use or record anything in her notebook (page 180), but did produce her warrant when called upon to identify herself, an action that Ms Peace considered to have been confrontational: "It is not unreasonable to assume that showing her warrant, even if intending only to prove identity, would be received by others as an assertion of power and an unreasoned response to a legitimate challenge". This was not a factor relied on by Ms Hall when she decided to dismiss the Claimant. Nor was it an issue raised in the Claimant's meeting with Ms Lassey – what Ms Lassey focused on was the Claimant's failure to make a note of the incident in her notebook. The Claimant had not therefore had the opportunity to comment or make representations on the fact that the issue of the warrant was on Ms Peace's mind when she arrived at her decision.
c. Ms Peace also observed (page 180) that when the Claimant had said

to the MACE employee (presumably Mr McHale) that he was "free to stand where he wanted" that the tone of her reply was dismissive. This was not a matter relied upon by Ms Hall and was not put to the Claimant either by Ms Peace herself at the meeting on 6 June or Ms Lassey at the meeting on 1 August.

d. Ms Peace also observed that the Claimant had placed DC Cherrington at risk by her actions. Ms Peace explained in her oral evidence that the fact that the Police had only a matter of hours beforehand had conduct of the investigation did not discharge the Claimant of her duties towards DC Cherrington and in particular her duty not to place him at risk. However this was also a matter not relied upon by Ms Hall when she took the decision to dismiss.
e. I considered the extent to which Ms Peace had relied on these new factors in reaching her decision to uphold the Claimant's dismissal and whether the overall fairness of the outcome was vitiated by inclusion of new material. I considered in particular whether the Claimant might have reached a different decision about meeting with Ms Peace had she appreciated that these factors would form part of Ms Peace's decision. I deal with these points in my conclusions below.

53. Ms Peace concluded her letter with a passage dealing with the characterisation of the Claimant's conduct as gross misconduct. Ms Peace described the decision to dismiss as having been based on two things - a failure to comply with health and safety rules and a breach of the Civil Service Code. I have set out some examples from the Respondent's guidelines on the categorisation of misconduct at paragraph 18 and 19 above. Ms Peace said:

> **"The Decisions Makers (sic) assessment is that the Inspectors actions constituted a significant breach of health and safety rules. I share the view that the actions amounted to more than a failure to follow HSE's policy or procedure, which would characterise serious misconduct.**
>
> **It is clear that the inspector was aware of the policies, but used the application of dynamic risk assessment to justify her actions after the event. She made a conscious decision not to take PPE because of the original purpose of the visit. She made it clear to the Police Officer that this precluded her visiting the scene of the death, yet took an unorthodox route onto the site, without the justification that would support a view that there were exceptional reasons for doing so. She walked onto a construction site where there was a risk from transport movements without informing those in control of the risk that she was present and without donning her appropriate PPE. In doing so, aware that the Police Officer would stay with her, she placed not only herself, but another person at risk.**
>
> **When challenged about her lack of PPE and failure to follow site rules, she asserted her right to be there, failing to recognise and appropriately respond to the impact her behaviour was having on others. Contrary to her belief, her approach undermined the sensible risk management approach to prevent harm both generally and in connection with the death that had occurred on that site.**
>
> **This incident contrasts sharply with the others introduced in mitigation. It is important that each case is judged on its merits".**

In relation to the Civil Service Code she said:

"The second issue was bringing the HSE into disrepute and a breach of the Civil Service Code. The Decision Maker did not articulate in full the ways in which the Code was breached. Careful consideration leads me to conclude that the Inspector committed a significant breach of the Civil Service Code.

Integrity and Honesty

The Inspector fell far below the standard of behaviour by failing to follow well defined policies that set out mandatory actions, with which she was familiar, designed to safeguard her safety and ensure the confidence of duty holders. This meant she did not fulfil her duties and obligations responsibly.

Before the incident occurred she failed to engage with those in control of the risk and in effect used her authority and position to ensure others provided her with unorthodox access to the site…..

It was not professional to fail to react with appropriate sensitivity to the evident concerns of the worker, concerns reflected in the description the Inspector provided of their prolonged challenge to her. Instead she showed her warrant, an action that conveys authority and power and a determination to continue despite legitimate challenge. This meant that she did not deal with the workers sensitively, left them with the impression that their concerns were dismissed and that by virtue of her position as an inspector she could do as she wished and in particular ignore the site rules. The contractors clearly felt very strongly about her actions on the day and sufficiently moved to contact HSE about her behaviour.

During the incident, or in its immediate aftermath, the Inspector did not keep accurate official records in her notebook of the actions taken in connection with the fatal incident. Keeping accurate official records is not only a requirement within HSE, but an explicit requirement under the Code.

After the visit the Inspector failed to give a prompt account of the visit in response to a reasonable request by her managers, an inappropriate response that could be construed as insubordinate behaviour. Her arguments on appeal are characterised by attempts to qualify her actions, exemplified by her assertion that the site was not 'the site proper'. She sought out examples of poor practice to justify a more lenient response to her actions. The Inspector's representatives also asserted that HSE had brought itself into disrepute, by drawing attention to her actions through the investigation of her behaviours. These assertions are accompanied by no indication of any acceptance of personal responsibility or any wrongdoing or sensible self-reflection.

The Inspector's action did bring HSE into disrepute with the workers and companies on site and does create a risk that could impact of the regulator's ability to hold duty holders accountable for the death under investigation. It also has the potential for wider impact given that the Inspector publicly effectively stated that she could choose whether or not to follow site rules and adopt well known sensible precautions. These are actions we do not want others to copy. The Inspector did not act in a way that is professional in the context of her role as a regulator, or that retained the confidence of external workers and HSE managers, with whom she had dealings.

It is this combination of behaviours, so directly contrary to the standards laid down in the Civil Service Code and so serious and sustained in nature, that led the Decision Maker to conclude that the Inspectors actions were serious enough to destroy the working relationship between her and the HSE.

> **For these reasons I conclude that the Decision Makers characterisation of the misconduct as gross is reasonable….In considering whether the penalty of dismissal was reasonable I have taken into account the mitigation presented at the meetings with the investigators , the formal disciplinary meeting with the Decision Maker and the appeal meeting and which I have dealt with above."**

54. In her oral evidence Ms Peace described her role as having considered whether Ms Hall's conclusions and the penalty imposed had been reasonable. Her task was not to take the decision afresh she said, but she would have upheld the appeal if she personally would have reached a different view on the evidence. She accepted that she had not discussed alternative sanctions with the Claimant, but that she "did the thinking". Mr Stewart had made representations about alternative sanctions at the appeal meeting so those thoughts had been on her mind. She accepted that they did not form part of her outcome letter. She also elaborated on her thinking about the issue of the warrant and the fact that in her view it had been an inflammatory action on the Claimant's part to show her warrant in a situation in which she had already put herself in the wrong by entering the site through an unorthodox route and without wearing the appropriate PPE. As regards dynamic risk assessment, she explained that it should only be applied in situations in which normal risk assessment cannot be carried out. It was not good enough, she said, for an experienced inspector to fail to manage risk and to make assumptions. The context was a site on which someone had been killed two days beforehand. There needed to be no risk, she said, and the risk could easily have been controlled if the Claimant had entered the site through the normal entrance. The roadway was part of the construction site (and I have found as a fact that the Claimant was aware of that fact) and there was no reason to be exposed to any risk at all. It is really important, she said, that a very experienced inspector follows the policies and does not take unnecessary risks and set an example as a representative of the national regulator on health and safety.

55. Ms Peace went on to characterise as a question of integrity the Claimant's failure to act in accordance with her professional training in carrying out her responsibilities, applying policies and adhering to procedures. She said that to seek to justify obviously mistaken actions is not an entirely honest approach. She was the face of the organisation so to Ms Peace's mind discharging the duties of the office was a question of integrity.

56. I return to Ms Peace's decision in my conclusions. Before setting out those conclusions however I will also deal with the evidence of the Claimant and her witnesses. The impression the Claimant herself gave in her oral evidence was that she was resistant to recognising that her decision to enter the site as she did might have been perceived negatively by the individuals already on the site. She focused on justifying her actions and did not accept that she might have approached the situation differently. Her answers to questions about why she had not given a written account when called upon to do so were evasive. She maintained that "slavish" adherence to the rules does not achieve good health and safety outcomes. Her oral evidence to the Tribunal was consistent with the evidence of the manner in which she

conducted her self during the disciplinary proceedings.

57. It was clear from the evidence of her witnesses that the Claimant's dismissal was badly received by her colleagues and came as a shock to a number of people. It seemed to me correct to pay some attention to this state of affairs as the Claimant's colleagues were evidently perplexed and concerned that her actions had resulted in her dismissal. By the same token I treated this evidence with considerable circumspection as none of the Claimant's witnesses had been present at the time of the incident itself and all were therefore reliant on the account of the incident given by the Claimant herself.

58. I heard from Dominic Long and Wendy Garnett, both of whom described incidents during which they had departed from the rules and procedures for site visits. To my mind these examples were clearly not comparable to the Claimant's situation and I am satisfied that the Respondent did consider them and was entitled to reject them as a basis on which the penalty imposed on the Claimant should be mitigated. The Claimant entered a large, professionally managed construction site in which there was already a prohibition notice in place following a fatal accident only two days beforehand. The context in which she made her decisions was entirely different from those in which Mr Long and Ms Garnett found themselves. Their departures from the Respondent's written guidelines were clearly justified by the particular situations in which they found themselves, where full compliance was incompatible with the particular characteristics of the sites they were visiting. The Claimant on the other hand could have achieved the outcome she sought without departing from the Respondent's guidelines at all.

59. Mr Long also gave evidence that he had not really read the guidelines on visiting sites and that the Respondent expected inspectors to use their judgment and knowledge in making decisions. He used his discretion as to what was needed and would tend to wear a high visibility jacket and hard hat on a construction site. He would not have expected to be penalised for not doing so unless he was taking an obvious risk. He had not had formal training on completing notebooks and personally left many gaps in his own notes. Inspectors, he said, used the notebooks as they saw fit. Ms Garnett said that she had not received formal training on completing notebooks although as a matter of personal practice she did keep detailed notebooks – unlike, she said, anyone else she had worked with. Nor had she been trained to follow the site rules – she would have been given the policy and told to read it.

60. I also head from Mr Hester and Ms Stranks, both of whom had been employed as Inspectors and both of whom had acted in their capacity as union representatives during the disciplinary process, Mr Hester in the earlier stages and Ms Stranks in the latter. All of the Claimant's witnesses gave evidence about the manner in which they conducted their duties. This suggested to me that there was in some instances a difference of perception between the Respondent's managers and some of the inspectors about the

realities of the role and the practicability of fully complying with policies and procedures applicable to them. Mr Hester, who worked as an inspector for 18 years put it like this:

> **"On a few occasions I have also found myself in a position that did not comply with HSE's written procedures. It would be very hard to find any HSE inspector who has not also been in such a position. An inspector, during inspections or investigations, usually works alone. The simple process of carrying out a workplace inspection is unpredictable. When you knock at the gate of a construction site or the door of a factory you often do not know what, or who, you will face on the other side. The process of inspection and investigation is invariably difficult for the persons and dutyholders being scrutinised. HSE depends on inspectors who are highly self-sufficient, good communicators who can manage and defuse potential confrontations and who are capable of making decisions about potential risk quickly and effectively. In the initial stages of an investigation into a serious accident there is always the worry that you might miss something that later becomes critical to the investigation. There is a real incentive to quickly gather as much evidence as possible and to understand the entire accident location".**

61. Similar evidence was given by Ms Garnett, who said that whether and to what extent to use PPE depended on the hazards and other circumstances prevailing at the site. Mr Hester, Ms Garnett and Mr Long also gave evidence that the use of a warrant by an inspector as a means of self-identification was not unusual, particularly on construction sites and that its power and gravitas would not be understood particularly well in the construction industry.

62. I considered this evidence carefully in light of my observation at paragraph 3 of this judgment that the Respondent's inspectors are expected to work independently and exercise good judgement in carrying out their duties, often in dangerous, unpredictable or fast moving environments. The impression given by the Claimant's witnesses is that inspectors are trusted to make sensible decisions when visiting sites. They are not micro-managed and are given a great deal of latitude in deciding how a particular situation should be approached, assisted by the concept of dynamic risk assessment. I regarded their evidence of the culture in which inspectors work as credible and consistent. I bore in mind however that the Claimant's witnesses had not been present during the incident that led to the Claimant's dismissal and I treated with caution their evidence of what they would have done in the Claimant's shoes. To my mind their evidence cut both ways – the fact that they are required to work independently meant that the Respondent trusted in their ability to make sound judgments and to conduct themselves with insight and sensitivity to the context in which they found themselves. Evidence that an inspector's judgement was flawed in this respect would be likely to seriously undermine the trust the Respondent felt able to place in the individual concerned.

Submissions

63. Both Counsel provide me with helpful written submissions, supplemented by oral submissions, which I took into account in reaching my conclusions.

Conclusions

64. I remind myself of the issues in the case. The Respondent relies on the Claimant's conduct, a potentially fair reason for dismissal and specifically the manner in which the Claimant conducted herself on 24 February 2016, which it regarded as misconduct so serious as to warrant dismissal without notice or pay in lieu of notice. The test that I am applying in a misconduct dismissal case is whether the decision to dismiss one that a reasonable employer could have reached. The fact that the Claimant's colleagues were incredulous at her dismissal does not make the dismissal unfair and nor does any view I have about whether I would have dismissed in the circumstances.

65. Both parties presented a potentially credible analysis of the events on 24 February 2016. Their perspectives however differ markedly as to the nature and implications of the Claimant's conduct. The fact that the Claimant had an alternative perspective does not itself render the dismissal unfair - the dismissal is only unfair if the position adopted by the Respondent is not one that a reasonable employer could have adopted.

66. A Respondent must follow a fair procedure in dismissing an employee. The size and administrative resources of the employer are relevant to the standards it is expected to reach. A large public sector employer with its own policies and procedures is expected to adhere to them. Looking at each stage of the process in turn, I have considered whether there were procedural defects and whether in each case these were serious enough to render the procedure unfair overall.

67. By way of preliminary observation I consider that a significant influence on the sequence of events in this case was the fact that the Claimant seemed to go on the defensive at an early stage by querying, rather than responding to Ms Sprostranova's request for a written account of the incident on 24February (see paragraphs 35 and 36). That gave her managers the impression that she had something to hide and is likely to have established a sceptical mind-set amongst those dealing with the disciplinary process from the outset, potentially influencing the manner in which the Respondent went on to characterise some of her actions. In my view the Claimant has no-one to blame for that state of affairs but herself. Ms Sprostranova's request was a reasonable one and the Claimant should have complied with it promptly. As she had already volunteered an oral account to Ms Sprostranova during the car journey on 26 February her reluctance to do so is perplexing.

68. Mr Longbottom was charged with the task of investigating the incident. In my view his investigation was reasonable overall. The Claimant later criticised the fact that he had not interviewed Mr Matthews or Mr McHale, but it is clear from his report that he reached the conclusion that there was a case to answer on the basis of the Claimant's own account of her actions. I refer to paragraphs 39 and 40 of this judgment in which I set out an exchange between the Claimant and Mr Longbottom during the investigation meeting

and a summary of Mr Longbottom's reasons for concluding that there was a case to answer. The Claimant's own responses led him to conclude that the Claimant:

a. Visited the scene of a transport related fatal incident on a construction site without contacting the site managers first;
b. Entered the construction site via the BBC building and walked up and down the site access road unaccompanied by construction site personnel;
c. Having made enquiries with a BBC manager (but not construction site management) about anticipated vehicle movements, made a conscious decision based on her assessment of actual risk and regardless of likely site rules, that she would not use PPE;
d. Continued to speak to workers on the site after she had been told by other workers that the site rules required all persons to wear PPE;
e. Was aware of the requirements of HSE's H&S policy, which require staff to carry a minimum of 6 pieces of PPE on site visits, decide on its use based on dynamic risk assessment, comply with any site rules and discuss site hazards with the duty holder.

Any additional information provided by Mr McHale, Mr Matthews or the traffic marshals would not have affected those conclusions and nor would the provision to the Claimant of any written statements prepared by the witnesses to whom Mr Longbottom did speak. I find that the investigation undertaken by Mr Longbottom was reasonable in the circumstances.

69. I reached a different view about the disciplinary hearing and Ms Hall's conclusions at the end of it. By any measure the minutes of the meeting were inadequate, given the seriousness of the situation for the Claimant and the fact that agreed minutes were not available until August was in my view a serious procedural defect in this case. I have observed earlier in this judgment that Ms Hall approached her task on the basis that there was admitted misconduct and I considered whether that resulted in a predetermined outcome that was unfair. But there can be no doubt that any beliefs held by Ms Hall on the basis of the Claimant's own admitted conduct were reasonably held, in which case the issue should simply have been the reasonableness of the sanction imposed. The dismissal letter should have addressed that clearly. However Ms Hall complicated the picture by producing a dismissal letter that was problematic in a number of ways and in respect of which the inadequate minutes provided little by way of clarification. The matters relied on by Ms Hall were set out at paragraph 43 above and I set them out again here for ease of reference with my comments as to the reasonableness of Ms Hall's position:

a. Failing to comply with health and safety rules in that the Claimant had entered the construction site without PPE and not through the main site entrance. She should also have spoken to those responsible for creating and managing risk before entering the site. Site personnel had considered that there was a risk to the Claimant and had had to arrange for the site gate to be shut to prevent vehicles entering the site

whilst the Claimant was present. In my view Ms Hall had reasonable grounds for these conclusions, based on the Claimant's own admissions and Mr Longbottom's report.

b. The Claimant's assessment of risk had been flawed and there were no exceptional circumstances justifying the Claimant's actions within the terms of the HSE health and safety policy. This conclusion was more problematic because Ms Hall was not specific about the manner in which the Claimant's assessment of risk had been flawed. If she was referring to the fact that the road had in fact been open, this was only established with certainty later, during Ms Lassey's further investigation. If she was referring to the Claimants general approach to the assessment of risk, which is illustrated by the passage quoted at paragraph 39 then there was in my view an ample basis from which she could reasonably conclude that the Claimant's approach to risk did not accord with the Respondent's policies and expectations. I am prepared to give Ms Hall the benefit of the doubt, because although her letter should have been better expressed, the passage at paragraph 39 provided a reasonable basis from which the Respondent could draw the conclusion that the Claimant's approach to risk was flawed in the sense of not being in accordance with its expectations and written guidelines.

c. Bringing HSE into disrepute and a breach of the Civil Service Code. Ms Hall relied on the fact that:
    i. the Claimant had not reported immediately that she had entered the site without PPE or that site personnel had raised concerns. I do not think that this was a reasonable conclusion for two reasons; the Claimant had openly raised the issue with Ms Sprostranova a few days after the incident and there was no reasonable basis for the conclusion that site personnel had raised concerns – that was not established until Ms Lassey's investigation and was contrary to what Mr Longbottom said to the Claimant during the investigation meeting.
    ii. the Claimant had believed it appropriate to agree with Mr McHale, the MACE health and safety operations director that what happened would not be mentioned again; the Claimant admitted that, although Ms Hall did not explain how that represented a breach of the Code.
    iii. When asked to provide an account of what had happened the Claimant failed to provide one within the timescales required; that was a reasonable conclusion on the information available to Ms Hall but again the relationship to the Code was not explained.
    iv. Although Ms Hall accepted that the Claimant had remained professional at all times during the incident and it was not proven that she had given the impression that "she could do what she wanted" by the Claimant's own admission one of the personnel on site, allegedly Mr Ruiz, "said your actions were shameful and you have failed to accept this". This was a

confused conclusion that conflated something said to the Claimant by an individual on the site, with the Claimant's own attitude to her conduct and apparent lack of remorse. It was not reasonable of Ms Hall to fail to express herself more clearly on a matter of such fundamental importance to the Claimant.

v. In Ms Hall's view the Claimant's opinion that "it seems illogical for Simon Longbottom to conclude that you should comply with a set of site rules that had demonstrably failed" was flawed, as was her assertion that it was the investigation of her actions by HSE managers that brought the Respondent into disrepute rather than a combination of her actions on site and her failure to accept and acknowledge them. These were in my view reasonable conclusions for Ms Hall to reach and were based on statements made by the Claimant herself that indicated an attitude to risk that was not in accordance with the Respondent's policies as well as an attempt to deflect blame onto the Respondent rather than accepting responsibility. The Claimant's own evidence and statements during the process also showed a lack of insight into the way in which her actions might have been perceived in the particular circumstances, where a fatal accident had occurred and the Respondent needed to be seen to be adopting an attitude to site safety and site rules that were appropriate to its position as the national regulator.

The difficulty with Ms Hall's letter is that it did not go into sufficient detail about her thought processes so that it is not possible to determine to what extent her decision was based on matters for which there was no basis for a reasonable belief. The lack of explanation as to which elements of the Code were being referred to also made the basis of her decision unclear. Ms Hall gave a compelling account of her thought processes in her evidence to the Tribunal, but the Respondent fell short of the standards required by s98(4) ERA in failing at the time to communicate clearly the nature of and basis for their concerns.

70. There were two further problems with Ms Hall's outcome letter – it failed to address the Respondent's guidance on the appropriate level of penalty (see paragraph 17) and why therefore she had considered it necessary to dismiss summarily. It also failed to make any mention of the Claimant's evidence in mitigation, namely the statements of Mr Long and Ms Garnett. Although I have found that their situations were not comparable to that of the Claimant, it was remiss of Ms Hall to make no mention of them at all.

71. In summary, had matters rested there, I would have found the dismissal unfair on the basis of the Respondent's failure to explain adequately the basis of its decision or to separate out the various strands of thought on which it based its conclusions, as well as its failure to who show it had followed its own penalty guidelines and how it had weighed the Claimant's evidence in mitigation.

72. Matters did not rest there however because the Claimant appealed. I find

that some of the Claimant's grounds of appeal were self-justificatory and lacked insight into the Respondent's perspective and concerns. But she raised three matters of real concern – the mistaken reliance by Ms Hall on the existence of a complaint from MACE, the inadequacy of the dismissal letter and hearing notes and the lack of clarity as to how the penalty had been arrived at.

73. Ms Lassey's reinvestigation went some way towards addressing the Claimant's concerns about the investigation and in particular the interviewing of witnesses. Whilst I have found Mr Longbottom's investigation to have been reasonable overall, Ms Peace thought formed the view that certain matters needed to be clarified before she could reach a decision on the Claimant's appeal. Whilst this was a laudable and thorough approach I find it very unsatisfactory that Mr McHale, the MACE manager, was not actually spoken to until some five months after the event, by which point there was no longer any assurance that he would give an account that was consistent with what he might have said at the time of the disciplinary investigation. Although no criticism can be levelled at Ms Lassey for that state of affairs, it does in my view amount to a defect in the procedure adopted. I find that in other respects Ms Lassey's additional investigation was thorough and conscientious and met the standards of a reasonable investigation.

74. Ms Peace also adopted a conscientious approach to her role. However her appeal outcome letter went considerably beyond the matters relied on by Ms Hall as I have examined in some detail in paragraph 52. Not only that, but she also relied on three matters that had not been put to the Claimant at any stage: the Claimant's production of her warrant when challenged; the suggestion that she had put DC Cherrington at risk and a remark to one of the personnel on site that Ms Peace characterised as "dismissive", . It is quite clear from the passages from Ms Peace's outcome letter that are reproduced at paragraph 53 that some of these matters formed part of her decision that the Claimant's dismissal should be upheld. This means that instead of clearly curing the defects arising at the first stage of the process, Ms Peace's decision added a further element of procedural unfairness.

75. I have considered carefully the evidence concerning a second meeting with Ms Peace. On the face of it the Claimant and her representative took an informed decision to dispense with a further meeting. The Claimant submitted however that the onus was on the Respondent to ensure that the appeal process was fair. In my view there is merit in this submission. It seems to me that Ms Peace was in fact under an obligation to warn the Claimant that there were matters on her mind that had not explicitly been relied upon by Ms Hall or formed part of the first stage of the process. Mr Stewart reached his view that no further meeting was required on the basis that the grounds of appeal were not going to change. He did not know and could not have known that Ms Peace would be basing her decision in part on matters that had not been raised in the meeting with Ms Lassey. Had he known he and the Claimant might have taken a different approach to the question of whether or not to ask for a second meeting.

76. Was the decision to uphold the original decision to dismiss within the band of reasonable responses? The first of Ms Peace's conclusions, set out at paragraph 53, was that the Claimant had breached the Respondent's health and safety policies and procedures. This conclusion was based on the Claimant's own account of her conduct and the basis of it was therefore reasonable, within the meaning of the test in ***Burchell.***

77. Ms Peace then goes on to draw conclusions about the Claimant's honesty and integrity, both of which are elements of the Civil Service Code. But in doing so, as I have already observed, she relied on some matters that had not been put to the Claimant and, in relation to the alleged external complaint, a matter that was not based on a reasonable belief. By contrast her reliance on the Claimants' failure to give a prompt account of her actions when asked and her attempt to deflect blame onto the Respondent were both reasonable, as was her conclusion that the Claimant's actions had brought the Respondent into disrepute with the individuals whom the Claimant had encountered on the site. The Claimant had in her view inexplicably departed from normal protocol and when challenged had reacted in a manner that Ms Peace reasonably concluded had given a negative impression of the Respondent at the start of a fatal accident investigation. The Claimant had then compounded her error by failing to demonstrate either insight or remorse during the disciplinary proceedings. These are matters that are likely to have seriously undermined the Respondent's trust in the Claimant's judgement and the Claimants' errors on visiting the site were of a kind the Respondent would have expected an experienced inspector not to make. These matters could clearly in my view have formed the basis of a reasonable decision to dismiss.

78. There are two problems however with Ms Peace's overall decision that render it unfair within the meaning of s98(4) ERA. Firstly, her decision to uphold the dismissal decision relies on a

> **"combination of behaviours so directly contrary to the standards laid down in the Civil Service Code and so serious and sustained in nature that led the Decision Maker to concluded that the Inspectors actions were serious enough to destroy the working relationship between her and HSE".**

The word "combination" is the critical word in this conclusion. I conclude that a reasonable employer would not have based a decision to dismiss summarily in part on matters that had not been put to the employee, or were not based on a reasonable belief (the external complaint issue) however compelling other elements of the evidence relied upon. Had the decision been limited to the matters that were properly put to or admitted by the Claimant, then taking into account her own lack of remorse and insight a dismissal decision would have fallen within the band of reasonable responses. As it was the fairness of the decision was vitiated by the inclusion of the untested and unsubstantiated matters in the decision maker's thought processes.

79. Secondly Ms Peace's letter does not explain adequately how precisely the Code had been breached or why the sanction of summary dismissal was appropriate taking into account how any mitigating factors had been weighed in the balance. Those factors included the evidence of Ms Garnett and Mr Long, and the Claimant's long period of employment and disciplinary record. Whilst I have accepted that the examples of potentially inconsistent treatment were of limited value, they should have been explicitly addressed. I also see the force of the Respondent's submission that long experience cuts both ways and places a higher duty on the Claimant to act appropriately and with good judgement. Ms Peace's oral evidence, referred to in paragraph 54, makes it clear that this is the view she took. But again the Respondent's thought process is not adequately explained in the outcome letter. Even more significant is the absence from the appeal outcome letter of any reference to the Respondent's guidelines for arriving at the appropriate penalty. In my judgement the absence of these important elements amount to procedural defects in the outcome of Ms Peace's appeal.

80. My overall conclusion is that whilst there were sufficient grounds in this case to form the basis of a fair dismissal, the defects in the Respondent's procedures and in the thought processes of the decision makers have rendered the dismissal unfair within the meaning of s98(4) ERA. I am clear however that a fair dismissal could have been effected in the absence of these procedural defects.

81. It will also be apparent from my reasons that in my view the Claimant made a material contribution to her own dismissal and any compensation will need to be reduced accordingly.

82. The matter will be listed for a remedy hearing should the parties require it in which case they should notify the Tribunal, indicating any dates to avoid.

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Employment Judge Morton

Date: 14 March 2018