Appeal No. UKEAT/0298/11/DM
UKEAT/0299/11/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 21 & 22 February 2012
Judgment handed down on 25 May 2012

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR M CLANCY

MR T MOTTURE

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(1) MRS G CHRISTOU
(2) MS M WARD — APPELLANTS

LONDON BOROUGH OF HARINGEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the First Appellant	MR RICHARD O'DAIR (of Counsel) Instructed by: Neumans LLP 10-12 Little Trinity Lane London EC4V 2AR
For the Second Appellant	MR JOHN KING (of Counsel) on 21st February 2012 (Instructed by Neumans LLP as above) & MR RICHARD O'DAIR (of Counsel) on 22nd February 2012
For the Respondent	MR BRUCE CARR (One of Her Majesty's Counsel) Instructed by: London Borough of Haringey Corporate Legal Services 9th Floor, Alexandra House 10 Station Road Wood Green London N22 7TR

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Appellants, the social worker responsible for the care of Baby P and her team manager, were held not to have been unfairly dismissed by Haringey for their respective failures in dealing with this case. The Employment Tribunal did not err in concluding that the Respondent was not precluded from conducting second formal disciplinary proceedings against them when a different view was taken of the seriousness of their defaults than that of the previous senior management. It was thought that the previous record keeping and procedural charges against them which were dealt with using a Simplified Procedure, under which the maximum penalty was a written warning which they received, did not adequately reflect the seriousness of their failings. The previous proceedings were rightly taken into account in determining the fairness of the dismissals. **R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales** [2011] 2 AC 146 and **Sarkar v West London Health NHS Trust** [2010] IRLR 508 considered.

The ET did not misdirect themselves or come to a perverse conclusion in deciding that the delay between the events which formed the basis of the complaints against the Appellants and the second disciplinary proceedings did not cause them prejudice or render the dismissals unfair. **A v B** [2003] IRLR 405 and **Slater v Leicestershire Health Authority** [1989] IRLR 16 considered.

The ET did not err in law or come to perverse conclusions in dismissing the Appellants' claims for unfair dismissal.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. The Appellants appeal from the dismissal of their claims for unfair dismissal by a judgment of an Employment Tribunal ('ET') sent to the parties on 20 October 2010 ('the judgment'). The Appellants were dismissed following the tragic death of Baby P on 3 August 2007. At the time of the events giving rise to their dismissals, the First Appellant, Mrs Christou, was a team manager in the Safeguarding Team of the Children's Service Department of the Respondent and the Second Appellant, Ms Ward, was a social worker responsible for the care of Baby P.

2. At the two day hearing before us, Mrs Christou was represented by Mr O'Dair of counsel. Mr John King of counsel represented Ms Ward on the first day of the appeal. Thereafter she was represented by Mr O'Dair. Mr Bruce Carr QC represented the Respondent.

Relevant Facts

3. The death of Baby P on 3 August 2007 and the trial of his mother, and the two men charged with her with causing or allowing his death have received considerable press attention. So too has the dismissal of and subsequent litigation brought by the Respondent's former Director of Children and Young Peoples' Services, Sharon Shoesmith. We set out below a summary of the facts relevant to the appeals before us. That summary is taken from the findings made by the ET supplemented, where necessary, by reference to documents referred to but not set out in their judgment. References below to paragraph numbers are to the judgment of the ET unless otherwise indicated.

4. Mrs Christou was employed by the Respondent from 3 September 2003 to her dismissal on 9 April 2009. She was responsible for the supervision and management of a number of social workers including Ms Ward. Amongst the functions of the Respondent is the safeguarding and protection of children resident in the borough. For this purpose it has power in appropriate circumstances to make applications to court to place children into its care.

5. Ms Ward began working for the Respondent in December 2005 as an agency worker. At the time of events which led to disciplinary proceedings against her Ms Ward had not yet become a permanent employee. She was taken on as a permanent social worker on 1 October 2007, a post she held until her dismissal on 9 April 2009.

6. At the time of events which gave rise to the Appellants' dismissals, Baby P's name was on the child protection register. A child protection plan was drawn up for him. Baby P's mother had been arrested on suspicion of causing injuries to Baby P. On 1 June 2007 he was seen to be bruised. From 2 February 2007 Ms Ward was the nominated social worker with specific responsibility for his case.

7. Following the death of Baby P on 3 August 2007, the Respondent's Local Safeguarding Children Board ('LSCB') conducted a Serious Case Review overseen by Sharon Shoesmith, then Director of Children and Young Peoples' Services. She was also Chairman of the LSCB.

8. On 28 April 2008 Ms Ward attended an investigatory interview with Clive Preece, the head of service and investigating manager. She was asked about events in June and July 2007 when Baby P's mother had told her that she was going to stay in Cricklewood taking Baby P and her other children with her. Ms Ward had not asked where she was to stay or verified that

she had gone. Ms Ward had not seen Baby P between 20 June and 10 July 2007 when under the Child Protection Plan she was to see Baby P every 14 days. The mother had been 'off the radar' in that no contact had been made with her for twelve days.

9. At some time in April 2008 Ms Shoesmith assured Ms Ward that she would not lose her job over the death of Baby P.

10. On 6 May 2008 Miss Walsh-Jones, also titled head of service and investigating manager, conducted an investigatory interview with Mrs Christou. Miss Walsh-Jones discussed the requirements of the Child Protection Plan as well as the mother not going to Cricklewood contrary to what she had told Ms Ward (the Cricklewood absence).

11. The ET found that on 7 May 2008 there was a meeting between Mr Preece and Ms Ward held under the Respondent's Simplified Disciplinary Procedure as agreed between the parties. Three specific allegations concerning Ms Ward's handling of Baby P's case were considered. The ET held at paragraph 15.23:

> **"These were lack of recording, failure to put records onto the 'Framework I' database in a timely manner and failure to call a legal planning meeting following child protection concerns in relation to [Baby P]. Mr Preece declared that, after careful consideration of the relevant evidence, he found those allegations to be substantiated and they amounted to misconduct. He issued her with a written warning which would remain live for 12 months. He noted that under the simplified process there was no right of appeal. A copy of the letter was to be provided to the General Social Care Council."**

12. As for Mrs Christou, the ET held at paragraph 15.24:

> **"Mrs Christou was also given a written warning, by Teresa Walsh-Jones. …In Mrs Christou's case she had received no assurance about the likely outcome, but Miss Walsh-Jones also referred to a meeting, this time on 19 May (for which no notes were provided) and which had been held under the council's simplified disciplinary process. The allegations in Mrs Christou's case were: lack of recorded supervision, lack of documented management direction and no management knowledge of social work tasks that were incomplete. She found that the allegations were substantiated and that they amounted to misconduct and she gave particulars of what constituted the breach of conduct she had found proved. Mrs Christou was given a written warning which would remain live for 12 months. As in Ms Ward's case, there was no right of appeal as the warning had been given under the simplified process and a copy of the letter was to be provided to the General Social Care Council."**

13. Thus the action taken in respect of both Appellants was referred to their professional body, the General Social Care Council.

14. Baby P's mother pleaded guilty to causing or allowing Baby P's death. On 11 November 2008 Stephen Barker and Jason Owen were found guilty of that charge.

15. There was widespread public concern and anger expressed in the media over the circumstances of the death of Baby P. The ET observed that the anger was particularly directed at the Respondent and their staff involved in Baby P's case including the Appellants.

16. On 12 November 2008 the then Secretary of State for Children Schools and Families announced that he had asked a number of bodies to conduct an investigation into child protection and child welfare services in Haringey.

17. Both Appellants were placed on leave from 12 November 2008. The report was published on 1 December 2008. The ET recorded at paragraph 15.30 that:

> **"The inspection identified a number of serious concerns, and stated that safeguarding services within Haringey were inadequate and were in need of urgent and sustained attention."**

18. As a result of those findings the Secretary of State directed the Respondent to appoint Mr Coughlan as interim Director of Children's Services in Haringey until 31 December 2008. A further direction required the Respondent to appoint Peter Lewis to that position from January 2009. The ET held:

> **"15.31 At the same time the Secretary of State confirmed that he required John Coughlan to consider staffing issues arising from the [Baby P] case. Mr Coughlan asked Stuart Young to arrange for an investigation to be carried out regarding the actions of council staff. At this time, Mr Young discussed with Mr Coughlan what the direction of the Secretary of State might mean. They regarded it as a broad remit, which could include training and transfers of staff between positions but it could include also staff communications, action plans and improvements, including commissioning. Mr Young and Mr Coughlan agreed that this**

> **requirement meant that a fresh look should be taken at all the issues involved in [Baby P's] case, including matters arising from the involvement of Ms Ward and Mrs Christou. That was the case even though they had been subjected to earlier disciplinary proceedings.**
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> **15.32 Mr Young appears to have been aware of the imposition of warnings on Ms Ward and Mrs Christou, although he was not directly involved in that matter, and appears to have given some consideration to the possibility of unfairness arising from the fact that they might be disciplined for a second time in relation to matters arising from the [Baby P] case. However, he then examined the disciplinary process conducted in April and May 2008, and reached the view that a fresh investigation should consider matters that had not been considered at the earlier hearings even though the underlying facts may have been evident at the time."**

19. Mr Young and Mr Coughlan appointed Paul Fallon, an experienced Director of Children's Services, to conduct the necessary investigation. Amongst other matters, Mr Fallon was to 'Review …the employment actions taken to date in relation to [the Appellants].' The ET held that he was to:

> **"…examine whether the current disciplinary sanctions in place were sufficient in the light of the evidence available at the time of disciplinary proceedings in April and May 2008 and the evidence now available from the later criminal proceedings, SCR and JAR reports…"**

20. Mr Fallon was also to provide written advice on whether sufficient grounds exist to warrant the consideration of further or separate disciplinary proceedings.

21. On 10 December 2008 both Appellants were issued with interim suspension orders by the General Social Care Council.

22. Mr Fallon interviewed Mrs Christou on 3 February 2009. The Cricklewood absence was discussed. The ET recorded at paragraph 15.36:

> **"…Mrs Christou expressed the view that she thought that it was strange that the mother had left her home to look after an uncle in Cricklewood and that she had instructed Ms Ward to go and see the family, since one of her concerns was that there were older children who needed to attend school."**

23. Mr Fallon interviewed Ms Ward on 5 February 2009. During the course of the interview the ET recorded at paragraph 15.37 that:

> **"…there was a discussion as to whether or not Ms Ward had informed those present at the Legal Planning Meeting (convened to discuss whether or not care proceedings should be instituted) that the family had left the family home and gone to Cricklewood."**

24. Mr Fallon produced his investigation report on 10 March 2009. Whilst he made criticisms of actions of the Respondent before the Cricklewood absence the ET held at paragraph 15.38:

> **"…he was in no doubt that if Child Protection Procedures and sound professional judgement had been applied consistently following an injury which occurred on 1 June 2007, the situation might have been recovered. He regarded the earlier disciplinary proceedings as unsafe, unsound and inadequate. He took issue with the use of the simplified procedure and said that although the more serious matters which he proposed should now be investigated were known at the time, they were not properly investigated earlier and, as a result, the allegations put to the claimants related to administrative or process issues and were regarded as relatively minor breaches of conduct. He was of the view that grounds existed to justify the consideration of further or separate disciplinary proceedings and he identified five separate charges."**

25. On 13 March 2009 Mrs Christou and Ms Ward were formally suspended from their duties. Mr Young conducted investigatory interviews with Ms Ward on 18 March and with Mrs Christou on 23 March 2009. The purpose of the interviews was to give the Appellants the opportunity to respond to the allegations in their suspension letters.

26. Four allegations were considered at the investigatory interviews with Ms Ward and Mrs Christou. These were:

- Child Protection Procedures were breached in relation to visiting frequency between 1 June and 11 July 2007;
- Child Protection Procedures were breached in relation to following up the bruise reported by the child minder on 15 June 2007;
- Poor professional judgement was evidenced by the failure to recognise the importance of the breaches of the Child Protection Plan in the period around 28 June (Cricklewood); and
- Failure to inform the legal planning meeting on 25 July on information held at the time, including the Child Protection Plan breaches identified in the first two charges.

27. Of the investigatory interview with Ms Ward the ET recorded at paragraph 15.43 that:

> **"Ms Ward said that there were two visits to the family completed in June and two in July. She understood that it was said that there was a breach of the Child Protection Plan because the visits were not strictly at fortnightly intervals but she contended that the department was told that the Child Protection Plan consisted of recommendations which were not set in stone. She said that she had 19 cases, some of which were very complex and that her case load was difficult to manage or 'unmanageable'. Ms Ward said to Ms Brazil that she made it clear that she had been struggling with the workload. …there is a discussion about the mother's apparent move to Cricklewood and Ms Ward gave her account there of what she understood had happened. This began with her having received a message from a colleague to say that the mother had gone away because it was her birthday and was taking the children away, that she then contacted the mother who told her that she had been visiting an uncle in Cricklewood, that she had said to the mother that she may need to come and visit her there and that the mother did not object and that she discussed the matter with her team manager Mrs Christou. It is clear that, at this meeting, Ms Ward did not have access to her case papers because she said on more than one occasion that she was having to try to remember what had happened."**

28. At her investigatory interview, Mrs Christou's representative submitted 'that the matter had been investigated and dealt with and that it was legally unsound for the respondent to seek to reopen the case.' Mrs Christou was given the opportunity to answer the allegations against her.

29. Following the investigatory interviews, the Respondent decided to proceed to disciplinary hearings in both cases. Ms Ward faced the four charges which formed the basis of the allegations considered at the meeting with Mr Young.

30. Ms Ward's disciplinary hearing chaired by Peter Lewis, the new Director of Children's Services, took place on 7 April 2009.

31. By letter dated 9 April 2009 Mr Lewis informed Ms Ward that all four allegations against her were substantiated and gave his reasons for so finding. The letter was before the ET but not in the material before us. The ET's summary of the letter is not challenged. At paragraph 15.53 the ET recorded that Mr Lewis set out the mitigation put forward by Ms Ward and his conclusion that

> **"…there was a material failing in the way in which Ms Ward had worked, resulting in the risk to [Baby P] not being properly managed."**

Ms Ward was told that her failings constituted gross misconduct for which she was dismissed with immediate effect.

32. The four allegations against Mrs Christou were reduced to three charges with the removal of the allegation relating to following up the report by the child minder on 15 June 2007 of a bruise to Baby P. She was told that these allegations taken separately or together if substantiated could lead to her dismissal.

33. Mrs Christou's disciplinary hearing took place on 8 April 2009. The panel was chaired by Ian Bailey, Deputy Director of Children and Young People's Services.

34. By letter of 9 April 2009, Mr Bailey informed Mrs Christou that the three allegations against her were upheld. These amounted to gross misconduct for which she was dismissed with immediate effect. Mrs Christou's dismissal letter was placed before us. The responses by Mr Bailey to points made on her behalf were as follows:

> - **"That a previous disciplinary process had involved consideration of the facts relating to the case at the centre of these allegations and that it is therefore unreasonable to hold the current hearing. I acknowledge that this was highly unusual, but concluded that the council accepts that the previous process was seriously flawed and that it would be unreasonable not to consider such serious allegations. We noted that the matters addressed in the previous disciplinary process were not being considered in the present hearing.**
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> …
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> - **That the events in question took place in 2007 and therefore memories were likely to be unreliable. I noted this point and concluded that any evidence must be weighed up by the panel on its merits; the time is not in itself a reason to invalidate the hearing."**

Mr Bailey wrote in relation to Allegation 2:

> **"You accepted that the management note on Framework-I did not represent all the action you took on hearing of this absence. However, it was also clear that actions specifically set out in the London Child Protection Procedures were not followed nor did you advise that they**

should be. Your representative asked what could and should have been done in the period you were aware of this absence. In evidence, Eleanor Brazil [an experienced child protection practitioner] was specific, clearly explaining the reasons why it would be necessary to contact the Police and the relevant local authority and visit the home to see if in fact the family had gone away. On the latter point, you did tell Paul Fallon that you had asked Marie Ward to visit, though there is no evidence that you checked if this had happened."

He concluded that:

> **"…the three allegations which I found to be proven, taken together, constitute gross misconduct. I was satisfied by the evidence provided to the panel that there was sufficient known to you and in the Child Protection Plan to demonstrate that this was a case where a high degree of risk was apparent and which would ordinarily attract a heightened level of vigilance. It is therefore my decision that your employment with this Council should be terminated with immediate effect. Consequently your last day of service will be 9 April 2009."**

35. Both Appellants appealed against their dismissals. The panel hearing Ms Ward's appeal was chaired by Councillor (as he then was) Dodds, Councillor Dogus and Councillor Oatway. Mr Dodds chaired the panel hearing Mrs Christou's appeal. The other members were Councillor Dogus and Councillor Whyte. The appeals were a re-hearing.

36. The first part of Ms Ward's appeal hearing took place on 16 and 19 October 2009. The hearing resumed on 1 February 2010. Ms Ward was represented by counsel, Mr Toms. The ET held:

> **"15.63 The appeal panel reached its conclusions in relation to Ms Ward's case and set them out (briefly) in a letter to her dated 4 February 2010. The reasoning emerged from Mr Dodds evidence that Ms Ward had visited the family on 1 and 19 June and on 11 and 30 July. It was their view that the required visiting frequency had not been adhered to. That was sufficient in our view for them to find the allegation proved, but they commented that Ms Ward was dealing with a very young child, that there was unexplained injury, that the parent had been arrested and that one further visit would have ensured compliance. The first allegation was found proved. In relation to workloads, the panel acknowledged that Ms Ward had been under pressure, and did not dispute that she had been 'struggling'. In Mr Dodd's view, that did not excuse her failure.**
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> **15.64 The panel did not find the allegation that Ms Ward had failed to follow up the report of bruising made by the child minder on 15 June to be proved.**
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> **15.65 The panel found that Ms Ward had shown poor professional judgment in her failure to recognise the importance of the breaches of the Child Protection Plan around 28 June 2007. In support of this conclusion, they cited the bruising noticed on 1 June and the restrictions put in place at that time, the requirement for fortnightly visits, the message left on 28 June, the message left by the child minder, the discussion with Mrs Christou, the absence of any home visit, the fact that Ms Ward did not have an address for the family when they were allegedly in Cricklewood and that there had been no contact with the local authority for the area into which they had apparently moved, or the police. This was also found proved."**

37. Ms Ward's appeal against her dismissal was dismissed. She was notified of the decision by letter dated 4 February 2010. Before the ET, Mr Carr QC did not rely on the allegation regarding the Legal Planning meeting which was found proved in Ms Ward's case as justifying dismissal. By the time of Mrs Christou's appeal it was known that on 17 June 2007 a written warning had been given to the line manager of the lawyer to whom Baby P's case had been referred.

38. The hearing of Mrs Christou's appeal commenced on 21 July 2009. It was adjourned to take legal advice on the issue of the principle of double jeopardy and the second disciplinary proceedings, raised by her counsel. It took some time to obtain the advice and the panel reconvened on 18 November 2009. The hearing began on that day and was to resume on 30 November. Mr Toms, Mrs Christou's counsel, wanted to introduce a DVD of a filmed interview between Sue Gilmore, Mrs Christou's manager and Baby P's mother. Permission to do so had to be obtained from family court. Also Councillor Dogus was ill. The appeal hearing was adjourned until 15 March 2010, the earliest date convenient to all the parties.

39. At the hearing of Mrs Christou's appeal on 15 March 2010, Councillor Dogus told Mr Dodds that she was upset and could not make a decision that the case against Mrs Christou was not proven. She spoke to the leader of the Council, Councillor Kober. The ET made findings of fact that Councillor Dogus told Mr Dodds that Councillor Kober had agreed that she could not make a decision that did not involve the dismissal of Mrs Christou. Mr Dodds gave evidence to the ET that he spoke to Councillor Kober and she told him that she had not sought to persuade Councillor Dogus to reach a particular decision. Councillor Kober gave evidence to the ET to similar effect. The ET had no hesitation in accepting Councillor Dodd's evidence. However they observed that it was 'clear …that Councillor Dogus herself felt under pressure to reach a

decision to find against Mrs Christou'. The appeal panel resumed its deliberations on 25 March 2010.

40. Mrs Christou was informed by letter dated 26 March 2010 that her appeal was dismissed. The allegation that child protection procedures were breached in relation to visiting frequency between 1 June and 11 July 2007 was found proved and constituted misconduct. The second allegation that

> **"…poor professional judgement was evidenced by the failure to recognise the importance of the child protection plan in the period around 28 June 2007" (the Cricklewood absence)**

was found proved and constituted gross misconduct. The third allegation regarding the legal planning meeting on 25 July 2007 was found not proven. The dismissal was therefore upheld on the charge relating to the Cricklewood absence.

41. Formal proceedings were taken for misconduct against both Appellants before the General Social Care Council. These were heard on 24 to 26 May 2010. Ms Ward and Mrs Christou admitted the allegations against them. Both Appellants were suspended for these matters. By the time of the hearing before the ET the periods of suspension had or were about to expire.

Conclusions of the Employment Tribunal

42. The ET held at paragraph 17:

> **"It seems to us that there were four potential drivers for the dismissals. These were the actual conduct relied upon by the employer, the death of [Baby P], media pressure and political pressure."**

The ET found that the political pressure

> **"…amounted to a direction to investigate staffing issues. There was no specific direction to take disciplinary action against these employees."**

and that

> **"There is no doubt in our minds that, whilst there may have been media pressure and political pressure and those involved had in mind the tragic death of [Baby P], the facts and beliefs which led them to dismiss the claimants' appeals against their dismissals were, in Ms Ward's case, the failure to maintain the required visiting frequency and, in both cases, the poor professional judgment (as the appeal panels expressed it) demonstrated by both claimants in relation to the Cricklewood absence. It is not in our view the case that those involved in the appeal panels bowed to the pressure to which we have referred. The appeal panels were presented with the claimants' respective appeals against their dismissals and had to deal with them. They showed us, in the way in which they gave their evidence, that they reached their own decisions. We were impressed by the independence that they demonstrated. There is no question in our minds that the reasons given for the rejection of the claimants' appeals were anything other than the reasons they gave.**
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> **18. These reasons relate to the conduct of the claimants."**

43. Mr Carr QC for the Respondent had submitted that if it was right to dismiss the Appellants for their misconduct when they were dismissed 'then it must be right to undertake that action through a second disciplinary process.' He contended that it would follow in those circumstances that the first disciplinary action was inadequate. Accordingly the ET considered first whether dismissal of the Appellants fell within the range of reasonable responses. They did so on the assumption that it was proper to undertake the second disciplinary action against both claimants and that 'sufficient investigation was undertaken by the employer in relation to these two claimants.'

44. By majority the ET decided that the dismissals of Ms Ward for the charge relating to visiting frequency and unanimously that the dismissal of both Mrs Christou and Ms Ward in relation to the Cricklewood absence were within the range of reasonable responses.

45. The ET were divided in their views about whether it was appropriate to undertake a second set of disciplinary proceedings against the Appellants. The ET recorded the view of the minority member in paragraph 26:

> **"Mrs Brodie is of the view that it was not appropriate to undertake a second disciplinary process against these claimants. She is of the view that it was an unfair decision. She notes that the decision at the first stage to use the simplified procedures was the decision of the employer and not that of the claimants. It was the employer's view, not the claimants', that the**

> **misconduct was not sufficiently serious to justify any further action. Second, there was no written rationale produced for revisiting the actions of these claimants. Thirdly, no new information was revealed nor was there evidence of concealment by the claimants or corruption on their part. Further, it was open to the respondent to discipline the claimants, in the way in which they ultimately did discipline them, in May 2008. The claimants have cooperated with the disciplinary process at every stage. Although the Secretary of State required the respondent to look at staffing issues, there was, in Mrs Brodie's view, no specific mandate to review the individual disciplinary cases. Lastly, Mrs Brodie is of the view that, if it were to be said that a risk to the public justified reopening the enquiry, it is clear that the respondent did not regard Maria Ward as a risk because they employed her after the facts were known."**

46. The majority of the ET held at paragraph 27:

> **"The majority view is that, in this case, a risk to a member of the public was clearly identified. We have already indicated that the misconduct found justified dismissal. Where that is the case and there is a risk to members of the public, then we consider that an employer is entitled to bring a second disciplinary action. That is because the circumstances show that the originally [sic] disciplinary action was inadequate, having regard to our finding that dismissal was within the range of reasonable responses for these matters. Here there was, in effect, a change of management, which took a different view about the seriousness of the matters involved. For the majority, this aspect distinguishes this case from Sarkar. For those reasons, the majority say that it was fair for the respondent to undertake a second disciplinary process against these claimants."**

47. The ET considered whether delay rendered the dismissals unfair and gave their decision on this issue at paragraph 37. They held:

> **"We also considered the matter of delay. There is no doubt that there was a substantial delay between the events the subjects of the allegations and the disciplinary action taken against the two claimants. The delay was in the order of 18 months. It might reasonably be expected that prompt disciplinary action would have occurred in the autumn of 2007 but the claimants were not dismissed until April 2009. In this case the delay arose from the decision to conduct a second set of disciplinary proceedings, which in turn arose after the end of the first criminal trial, concluded in November 2008. Both claimants had access to all the relevant documentation by the time of the disciplinary and appeal hearings. Apart from the fact that the claimants were subjected to disciplinary action for a second time (dealt with above), there was no obvious prejudice caused to the claimants by the delay. Nor could we see that the delay, of itself, made the investigation unreasonable. We therefore reject Mr Toms' submission base [sic] on A v B."**

48. The ET considered the scope of the investigation. The ET held at paragraph 18:

> **"In particular there was no evidence presented to us that it was impossible for Ms Ward to undertake the necessary home visits. There was evidence based on her workloads that it was difficult for her to undertake those visits but it was not suggested that it was impossible for hr to undertake the visits, even if it was necessary to prioritise other work differently."**

However, the member in the minority was of the view that 'there was in this investigation insufficient focus on the broader picture.' She noted that Councillor Kober stated that the

Children's Services in Haringey was 'utterly broken'. Paragraph 42 of the judgment records of the member in the minority:

> **"She acknowledges however that this argument applies only to the question of visiting frequency. The absence of a broader focus does not in her view affect the reasonableness of the investigation, insofar as it concerns the Cricklewood absence."**

By majority the ET held that the investigation was reasonable.

49. The majority view of the scope of the investigation is set out at paragraph 43:

> **"A wider investigation would not, in the view of the majority, have disturbed the findings which the employer made in relation to the two specific charges where we have held that it was within the range of reasonable responses to dismiss for those matters. It is the view of the majority that a wider investigation had the potential to suggest that the visiting frequency was not regarded as being all important in every case but, having regard to the particular circumstances of this case, a wider investigation would not have undermined the particular charge and its significance. The majority of the tribunal is therefore of the view that the absence of a wider enquiry is not sufficient to undermine the validity of the conclusions the employer reached in relation to these specific matters."**

50. By their majority decision the ET held that the Appellants were not unfairly dismissed and their claims failed. It was her decision that it was not appropriate to undertake a second disciplinary process against these Appellants which led to the minority member's dissent on the fairness of the dismissals.

The Submissions of the Parties

51. The first ground of appeal advanced on behalf of both Appellants was that the majority of the ET erred in failing to hold that the dismissals were unfair because the matters for which they were dismissed had been dealt with in the first disciplinary proceedings by way of written warnings. This argument was advanced in a number of ways.

52. Both Mr O'Dair and Mr King contended that the ET erred in rejecting what was described as the 'double jeopardy' argument. Reliance was placed on the judgment of the Supreme Court in **R (Coke-Wallis) v Institute of Chartered Accountants in England and**

Wales [2011] 2 AC 146. It was submitted on behalf of the Appellants that as in the **ICA** case, the factual basis of the complaints dealt with in the first disciplinary proceedings was the same as that for the allegations pursued in the second disciplinary proceedings. The Supreme Court in the **ICA** case held that *res judicata* applied to preclude pursuing a second complaint before the disciplinary committee of the ICA which was based on the same facts as an earlier complaint which had been dismissed.

53. Mr O'Dair contended that the doctrine of *res judicata* applies to an employer's internal disciplinary proceedings as it does to proceedings before a regulator. He relied on the fact that the simplified procedure under which the first proceedings were conducted against the Appellants was contractual. The procedure under which the first disciplinary proceedings were conducted could not have been used without the consent of both the Appellants and the Respondent. The Appellants, by agreeing to the simplified procedure, gave up any right of appeal and the Respondent any right to dismiss for the matters of which complaint was made. Mr O'Dair contended that the following passages in the speech of Lord Clarke in **R (Coke-Wallis) v ICA** show that cause of action estoppel applies to internal disciplinary proceedings. Lord Clarke observed:

> **"30. Indeed, even if the byelaws created only private rights as between the institute and its members, I see no reason why the principle of cause of action estoppel should not apply. In Meyers v Casey (1913) 17 CLR 90 114, where the High Court of Australia was considering a decision of the committee of the Victoria Racing Club, Issacs [sic] J said this of objections considered by the committee:**
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> > **'They are, by reason of the committee's decision, res judicatae, as much as if instead of the committee it had been the Supreme Court unappealed from, that had so held. That rests on the well known rule that a competent court or other tribunal has jurisdiction to give a wrong judgment, and if there is no appeal in the strict sense, then its decision, whether right or wrong, must stand, and cannot be questioned in any subsequent proceedings elsewhere.'**
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> **31. See also *Spencer Bower & Handley, Res Judicata* , 4th ed, at para 2.05, where the editors say:**
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> > **'Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside.'"**

54. If the principle of *res judicata* did not apply to the circumstances under consideration in these appeals, Mr O'Dair contended in reliance on **Johnson v Gore Wood** [2002] 2 AC 1, that the ET should have held the second disciplinary proceedings in the Appellants' cases to be an abuse of process.

55. In addition to contending that the Respondent should have been precluded by *res judicata* from conducting the second disciplinary proceedings as an abuse of process, Mr King submitted that the decision of the Respondent 'to undertake the second investigation and bring further disciplinary charges was unlawful as it was based on the unlawful decision to dismiss Sharon Shoesmith and replace her with Peter Lewis'. It was contended in the skeleton argument for the Second Appellant that:

> **"It is inconceivable that Ms Shoesmith would have ordered second disciplinary proceedings against the Second Appellant. She had given an assurance [that] the Second Appellant would not lose her job over the P case and no new facts had emerged."**

56. Further it was contended on behalf of the Appellants that a body corporate is bound by the decisions of its duly authorised agents and is not freed from that commitment by a change of management. It was said on behalf of the Appellants that the ET wrongly relied upon a change of management to distinguish these cases from **Sarkar v West London Health NHS Trust** [2010] IRLR 508.

57. Both Mr O'Dair and Mr King relied upon the dictum of Lord Clarke in paragraphs 48 and 49 of the **ICA** case that a public interest exception to the strict application of the doctrine of cause of action estoppel was a matter for Parliament and not for the courts. The ET accordingly erred in holding that where misconduct justified dismissal and the misconduct gave rise to a risk to the public, an employer is entitled to revisit disciplinary action if the sanction imposed is considered inadequate.

58. Further or alternatively Mr O'Dair contended that the ET erred in that it did not address the question of why the Respondent decided to take the second set of disciplinary proceedings. The ET stated why they considered the Respondent was entitled to bring the second disciplinary proceedings. However they made no finding as to why the Respondent did so.

59. Related to this point is a perversity argument which was advanced by Mr King that the ET should have held that it was political and media pressure which led to the decision of the Respondent to take the second set of disciplinary proceedings and to dismiss the Appellants.

60. Mr O'Dair contended that the ET erred in accepting the reasoning advanced by Mr Carr QC that if dismissal of the Appellants was within the band of reasonable responses it was reasonable for the Respondent to undertake the second disciplinary proceedings. He submitted that just because dismissal is within the band of reasonable responses of an employer in the circumstances, it does not follow that the warning administered to the Appellants in the first disciplinary proceedings was outside the range of reasonable responses. It was said that this approach had the effect of making the existence of the prior disciplinary proceedings irrelevant in the mind of the ET.

61. Mr O'Dair pointed out that the only allegation of gross misconduct found established against Mrs Christou by the appeal panel was:

> **"Poor professional judgment …evidenced by the failure to recognise the importance of the breaches of the child protection plan in the period around 28th June 2007."**

The alleged misconduct was that when Baby P's mother was thought to have taken her children to Cricklewood for a few days in July 2007 Mrs Christou failed to ensure that Ms Ward made

an unannounced visit to her home to check whether she had gone. It was contended that the ET erred in failing to test the reasonableness of the Respondent's view of this failure by reference to whether Mrs Christou's actions would be considered negligent. Mr O'Dair contended that the ET should have considered whether Mrs Christou had failed to act in accordance with a practice 'accepted as proper by a responsible body or opinion in the particular field'. Mr O'Dair submitted that the ET should have directed itself in accordance with this well known test for negligence of professionally qualified practitioners in **Bolam v Friern Management Committee** [1957] IWLR 582 in determining whether the dismissal of Mrs Christou was within the range of reasonable responses of a reasonable employer. It was contended that if the ET had directed themselves in accordance with **Bolam** and accepted the evidence of an independent social work expert, Ms Liz Davies, rather than that of an employee of the Respondent, Ms Brazil, the Respondent would not have concluded that Mrs Christou had been guilty of gross misconduct.

62. By amendment at the hearing of the appeal before us to which Mr Carr QC took no objection, Mr O'Dair on behalf of Mrs Christou contended that the ET came to a perverse decision in concluding that her dismissal was within the range of reasonable responses in that at the time of their actions Mrs Christou and Ms Ward did not know that his mother and Baby P had been at home all the time and had not gone to Cricklewood. There was no basis for concluding that they ought to have known this not did the appeal panel so find. The approach of Mrs Christou's manager, Sue Gilmore, had been to deal with the protection of Baby P with 'family support therapy'. At the time it was not appreciated that the mother was as later described 'a skilled and manipulative liar intent on deceiving any agency and anyone assessing her parenting skills'. Mr O'Dair contended that the ET came to a perverse conclusion in accepting that the Respondent reasonably formed the view that Mrs Christou had shown poor

professional judgment by her failure to recognise the importance of breaches of the child protection plan around 28 June 2007. It was said that it was not 'common sense' to have required Ms Ward to check on the family home if it was thought that the mother and Baby P were away. It was submitted that the Respondent's view of the Appellants' handling of Baby P's case was based on hindsight.

63. These arguments were also relied upon on behalf of Ms Ward. Further, it was contended that the ET failed to take into account in assessing the reasonableness of her dismissal Ms Ward's belief that the mother and Baby P had gone to Cricklewood, and that her superiors had regarded the mother as co-operative.

64. On behalf of Ms Ward it was submitted that in deciding that the Respondent acted reasonably in treating her failure to adhere to the visiting frequency specified in the child protection plan the majority of the ET failed to have regard to the evidence that visiting frequency was a recommendation and was not set in stone. Ms Ward had informed her manager, Mrs Christou that the mother told her that she was going to Cricklewood with her children. Mrs Christou knew that Ms Ward did not know the address where the mother was to be staying.

65. On behalf of both Appellants it was submitted that the ET failed to take into account the circumstances in which their work was carried out. It was Haringey not Hampstead Heath. Further it was said that the ET failed to have regard to Ms Ward's workload. It was also said that the ET failed to have regard to the fact that some documentation was not made available to the Appellants in their investigatory interviews.

66. On behalf of Ms Ward it was submitted that the ET took into account an irrelevant consideration in determining the fairness of her dismissal, the absence of an expression of contrition in the closing submissions to them made by counsel on her behalf.

67. Mr O'Dair and Mr King contended that the ET erred in law and came to a perverse conclusion in deciding that the Appellants were not prejudiced by the delay before the commencement of the second disciplinary proceedings. The events about which they were questioned by Mr Young in March 2009 occurred nearly 2 years earlier in June 2007. Mr O'Dair relied upon the decision of Elias P in **A v B** [2003] IRLR 405 at paragraphs 65 and 67 in which he held:

> **"65. In certain circumstances a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair.**
>
> **…**
>
> **67. Where the consequence of the delays is that the employee is or may be prejudiced, for example, because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of delay on fading memories, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process."**

68. Mr O'Dair submitted that the absence of minutes of the first disciplinary meeting affected the ability of the Appellants to establish the similarity of the matters which underlay the first and the second disciplinary proceedings. This evidence would have assisted in establishing the unfairness of the second disciplinary proceedings.

69. At her disciplinary interview with Mr Young on 23 March 2009, Mrs Christou repeatedly said that she could not remember the events very clearly. A similar point was made in relation to Ms Ward's interview with Mr Young on 18 March 2009. Ms Ward had no recollection of what the child protection plan was for Baby P in June 2007. When questioned about not following up the report on 15 June 2007 by the child minder of bruising, Ms Ward said that if there were no record in the case records or her notebook she couldn't remember the

details of a discussion with her senior case manager about this. When asked by Eleanor Brazil how she felt when the mother said that she was back home after the Cricklewood absence she could not say because it was too long ago.

70. In addition to delay affecting the Appellants' memory of relevant events, it was submitted that because of the delay the second disciplinary proceedings took place after the media storm over the death of Baby P. It was suggested that this had adverse consequences for the Appellants.

71. Mr O'Dair and Mr King both originally contended that the ET erred in failing to consider and decide that the hearings of the appeals of both Mrs Christou and Ms Ward were tainted by apparent bias and were therefore unfair. Mr Carr QC drew attention to paragraph 3(3)(a) of the Respondent's Answer in the EAT:

> **"It was not suggested to the Tribunal that any principle of apparent bias rendered the dismissal of [Mrs Christou] unfair, as evidenced by the fact that the point did not appear to be taken in the original notice of appeal."**

The facts relied upon as giving rise to an appearance of bias, the concern of a member of the appeal panel, Councillor Dogus, that she felt under pressure not to reach a decision favourable to Mrs Christou, had not occurred at the time of the hearing of Ms Ward's appeal. Ms Ward's appeal was dismissed on 4 March 2010. The incident which was said to give rise to the appearance of bias occurred in the course of the adjourned hearing of Mrs Christou's appeal on 15 March 2010.

72. Counsel for both Appellants and counsel for the Respondent prepared written closing submissions for the ET. The written submissions for the Appellants did not raise the argument that the decisions of the appeal panels in either Ms Ward's or Mrs Christou's case were tainted

by apparent bias. There is no reference in the judgment to such an argument being raised nor was it included in either of the ET1s.

73. In the EAT Mr O'Dair sought to advance an argument on apparent bias based on the finding that Councillor Dogus felt under pressure to decide the case of Mrs Christou in a particular way. He did not suggest other than that before the ET the Councillor Dogus question arose in the context of determining the reason for the dismissals. It did not form a basis of challenge to their fairness. Having referred to the judgment of the EAT in Scotland in **Watson v University of Strathclyde** [2011] IRLR 458, Mr O'Dair submitted that applying the proper legal analysis, the ET erred in failing to find the dismissals unfair. By the time of his Reply to Mr Carr's submissions, Mr O'Dair suggested that counsel then acting may not have put the case in a particular way because **Watson** was decided after the judgment of the ET in these cases. Mr O'Dair agreed that he was seeking to advance on appeal an argument on bias which was not taken in the ET.

74. Mr O'Dair originally submitted that the judgment of the EAT in **Watson** changed the law from that decided in the Court of Appeal in **Slater v Leicestershire Health Authority** [1989] IRLR 16. In **Slater** the Court of Appeal held at paragraph 34 that '...the rules of natural justice …do not …form an independent ground upon which a decision may be attacked', although they would be important in considering the fairness of a dismissal. Mr O'Dair submitted that **Slater** should not be followed because it predated the development of the law relating to the implied term of trust and confidence upon which the reasoning of the EAT in **Watson** depended. After objection from Mr Carr QC and questions from the Court, Mr O'Dair did not persist with the change of law argument.

75. Mr O'Dair agreed that whether a point which was not taken in the ET should form the basis of the decision on appeal was in issue.

76. Mr Carr QC submitted that the internal disciplinary process which was said to give rise to a *res judicata* estoppel does not have the status necessary to have that effect. He contrasted the decision of a manager conducting an internal disciplinary process with the disciplinary tribunal set up under bylaws in the **ICA** case and the other example referred to by Lord Clarke in paragraphs 29 to 31 of his speech. Mr Carr QC contended that the proper approach to consideration of the double jeopardy argument is to consider it in determining the fairness of the dismissals under ERA Section 98(4). The ET did not err in failing to hold that the Respondent was precluded from pursuing the second disciplinary proceedings by *res judicata* or double jeopardy.

77. Mr Carr QC submitted that the ET did not ignore the first set of disciplinary proceedings. That they considered the matter carefully is illustrated by their difference of view about whether it was appropriate to undertake a second set of disciplinary proceedings against the Appellants. Mr Carr QC referred to the framing of the allegations for which written warnings were given to the Appellants following the first disciplinary proceedings to contend that they never got to grips with the complaint against the Appellants: that nobody knew where Baby P was for a significant period of time. The allegations were of procedural rather than substantive default.

78. Mr Carr QC contended that the majority of the ET were entitled to conclude that a reasonable employer could take the view that the Appellants' actions or lack of action led to a risk to a member of the public, a child. The Respondent was entitled to conclude that the

misconduct found justified dismissal. The Cricklewood absence was a missed opportunity and if it had been properly dealt with, the mother would have been shown to be untrustworthy and a different view may have been taken as to whether Baby P should be taken into care. The ET did not err in finding that the original disciplinary action was inadequate.

79. It was said that there was no error in law in the ET's reference to a change of management as a justification for taking a different view of the Appellants' conduct.

80. Mr Carr QC contended that the submissions made on behalf of the Appellants amounted to a 'threshold perversity appeal'. In effect they were a challenge to the conclusion of the ET that the dismissals were fair in all the circumstances. Mr Carr QC referred to the high hurdle which has to be overcome by an appellant seeking to establish that the decision of an ET is perverse.

81. As for the ground of appeal that the ET erred in failing to hold that the dismissals were unfair because of the delay between the events in June and July 2007 of which complaint was made and the disciplinary hearings which led to the Appellants' dismissals, Mr Carr QC contended that this ground did not raise an error of law but was a perversity challenge to the decision of the ET.

82. Mr Carr QC submitted that in the course of the investigatory interview with Mrs Christou on 23 March 2009 there was a lengthy discussion about the Cricklewood absence. Although Mrs Christou said that she could not remember certain details about the incident, the key facts relating to the complaint against her were recorded by her in case notes she made on 4 July 2007. Mrs Christou recorded:

> **"Maria consulted me about extending her stay with her uncle, who lives in Cricklewood and who is seriously unwell and refusing treatment. T seems to be wanting to support her uncle and her cousin. Pointed out that there was probably little T could do and that as a mother of 4 children she should prioritise their needs. Asked Maria to point this out to T and encourage her to return home with a view to visiting her uncle at the weekend."**

83. Mr Carr QC submitted that the note demonstrates what Mrs Christou and Ms Ward did about the Cricklewood absence. They accepted the mother's word about where she and Baby P were which resulted in them being 'off the radar' for twelve days. Mr Carr QC referred to the written submissions made by counsel on behalf of the Appellants before the ET. At paragraph 45 he wrote:

> **"Cricklewood**
>
> **Ultimately, Cricklewood concerned a judgment made by the C's to accept [the mother's] explanation (whether with misgivings or because she appeared plausible) and not to take further steps to determine the exact location of PC prior to the family's return."**

Their professional body found that the Appellants had been guilty of misconduct in relation to the Cricklewood absence.

84. Mr Carr QC pointed out that Ms Ward made a detailed 149 paragraph written statement for her appeal hearing on 16 October 2009. That statement contains an account of relevant events between Ms Ward seeing Baby P with his child minder on 19 June 2007 and when she next saw him on 11 July 2007. Ms Ward's statement shows that she had no direct contact with the mother from 20 Jun to 2 July 2007. Mr Carr QC submitted that delay in holding the disciplinary proceedings had not affected Ms Ward's ability to recall these material events which she put in her statement.

85. The ET considered and rejected the argument that the reason for the Appellant's dismissal was media pressure following the convictions.

86. Mr Carr QC submitted that it cannot be said that the material before the ET did not support their decision that the Appellants had not been prejudiced by any delay in pursuing the second disciplinary proceedings. It was not perverse for the ET not to hold the dismissal to be unfair by reason of any delay in pursuing such proceedings.

87. Mr Carr QC submitted that the ET did not err in its treatment of the Councillor Dogus incident and Mrs Christou's appeal. The ET made findings of fact and were satisfied that the councillor's original concerns and the pressure she felt under did not affect the outcome of the appeal.

88. Mr Carr QC submitted that the 'Dogus point' was rightly viewed in the context of the reason for Mrs Christou's dismissal. There was no basis for contending that the ET did anything other than to follow the path mapped out for them by counsel for the Appellants. The ET found that Councillor Dogus was not put under pressure to dismiss Mrs Christou's appeal and that there was no taint to the appeal process.

89. Mr Carr QC submitted that the ET did take into account those matters which Mr O'Dair contended it failed to consider. He pointed out that the ET in paragraph 33 noted that there was no detailed investigation of Ms Ward's workload. The ET were aware of the reference to the statement of Councillor Kober that Children's Services in Haringey were 'utterly broken'. However the member of the ET who considered that the investigation into the complaints against the Appellants placed insufficient focus on the 'broader picture' agreed that this argument only applied to the charge of insufficient visiting frequency. It did not affect the reasonableness of the investigation into the Cricklewood absence. A similar point could be made about the contention that the ET failed to take into account that the Appellants were

working in Haringey not Hampstead Heath. As for the complaints that the ET failed to take into account the denial of documentation to the Appellants at their investigation interviews Mr Carr QC stated that paragraphs 40 and 41 show that the ET considered and decided upon this allegation. The ET held that the documentation referred to related to the charge related to the Legal Planning Meeting which did not form the basis of the decision to dismiss the Appellants.

90. In response to the contention that the ET erred in taking into account the fact that no contrition was expressed in closing submissions on Ms Ward's behalf, Mr Carr QC submitted that paragraph 23 makes it clear that the ET considered this point in the context of the risk of such failure of performance recurring.

91. Mr Carr QC referred to a recent comment by Mummery LJ in **Fuller v London Borough of Brent** [2011] IRLR 414 at paragraph 29:

> **"The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing an error of law or reaching a perverse decision on that point."**

He pointed out that all members of the ET agreed that the dismissal of both Appellants for their conduct in the Cricklewood absence was within the range of reasonable responses of a reasonable employer. Unanimously they held that a reasonable investigation had been conducted into this matter. The ET made no finding for which there was no basis. Accordingly the appeals should be dismissed.

Discussion and Conclusion

The Second Disciplinary Proceedings

92. Did the decision taken to discipline the Appellants by way of a written warning preclude, whether by estoppel, double jeopardy or abuse of process, the taking of the second disciplinary proceedings?

93. Both the simplified procedure under which a written warning was given and the full procedure which led to the Appellant's dismissals were contractual. The simplified procedure is conducted by a manager employed by the Respondent. The Disciplinary Procedure provides:

> **"8.1 This simplified procedure will be used where an investigation or fact finding interview has taken place and there is a case to answer and the likely sanction will be a verbal or written warning and both sides agree short hearing is appropriate. This could mean that the manager details the case to the employee and, having heard his or her response decides on the sanction. This approach would usually suit the initial stages of dealing with wilful poor performance at work or relatively minor breaches of conduct."**

There is no power to dismiss under the simplified procedure and no right of appeal from a sanction imposed.

94. Under the full procedure a disciplinary hearing takes place. The disciplinary hearing is chaired by a manager of 'appropriate level'. They may be assisted by an adviser or advisers. Documentation to be used in the case should have been exchanged in good time before the hearing. A manager presents the case against the employee and may call witnesses. The employee or their representative has the opportunity to ask questions of the witnesses and the manager presenting the case. The Chair and advisers may ask questions of the manager presenting the case and any witnesses who have been called. The manager has the opportunity to re-examine the witnesses. Then the employee and/or their representative presents their defence, including calling any witnesses. The manager presenting the case against the employee and their adviser have the opportunity to ask questions of the employee or their representative and any witnesses that may have been called. The Chair and advisers may ask questions of the employee and/or their representative and any witnesses who may have been called. The

employee or their representative has the opportunity to re-examine their witnesses. Each side is given the opportunity to summarise their case.

95. If a sanction of a written warning or above is imposed under the full procedure there is a right of appeal. Appeals against dismissal, relegation or permanent demotion will be heard by a Member panel. The appeal will be a complete rehearing of the case. At the appeal, the parties will present their cases, call witnesses and sum up. The appeal panel on a rehearing can confirm or overturn the original decision by either increasing or decreasing the sanction imposed.

96. Paragraph 3.1 of the Disciplinary Procedure provides that:

> **"The principles of natural justice underpin this Disciplinary Procedure. All those involved in disciplinary action must act in good faith and with common sense."**

97. The majority of the ET who held that the bringing of the second disciplinary proceedings was justified did so on the basis that the first disciplinary action was inadequate. A risk to the public had been identified and there had been a change of management which took a different view of the seriousness of the matters involved. It is clear from the judgment of the ET that if new facts had emerged since the first disciplinary action all members of the ET would have held that the Respondent would have been justified in taking the second disciplinary proceedings. We therefore consider whether the Respondent was precluded from taking the second disciplinary proceedings which was based on the same material facts as the first although different allegations based on those facts were pursued. The allegations considered in the second disciplinary proceedings were substantive in failing to ascertain where Baby P was in the Cricklewood period whereas those considered in the first proceedings were of a default in record keeping.

98. Counsel have not sought to categorise the species of estoppel advanced on behalf of the Appellants as either issue or cause of action estoppel. However, since it was contended that the first disciplinary proceedings created an absolute bar to the second we treat the *res judicata* contented for as cause of action estoppel (see **Coke-Wallis** paragraph 26). In **Coke-Wallis** the ICA did not challenge the applicability in principle of cause of action estoppel to decisions of their disciplinary tribunal which was set up under bye-laws.

99. The first constituent element in a case based on cause of action estoppel was stated in paragraph 1.02 of *Spencer Bower & Handley, Res Judicata* (4th Edition) referred to by Lord Clarke in paragraph 34 of **Coke-Wallis** to be:

> **"(i) the decision, whether domestic or foreign, was judicial in the relevant sense…"**

As to the determination of whether a decision is 'judicial', Lord Clarke referred to paragraph 2.05 of *Spencer Bower* (4th Edition) in which the editors said:

> **"Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside."**

100. Under the Respondent's Simplified Procedure, a short hearing with the employee will be conducted by a manager. There is no specified procedure for conducting the hearing. The procedure does not require the attendance of the Respondent, the presentation of evidence or the making of submissions. This 'simplified approach' is contrasted in the Disciplinary Procedure with the 'more formal' approach under the Full Procedure.

101. The decision of a manager under the Simplified Procedure is not an adjudication of a dispute between parties so as to be judicial in the relevant sense, which is the first condition set out by Spencer Bower for cause of action estoppel. In our judgment no cause of action or issue

estoppel arose in these cases which would have precluded the Respondent from taking the second disciplinary action.

102. Nor, in our judgment did the ET err in law in failing to hold that pursuing the second disciplinary proceedings against the Appellants was an abuse of process. Mr O'Dair relied on **Johnson v Gore Wood & Co** [2002] 2 AC 1 in support of this argument. Internal disciplinary proceedings are not litigation so as to found a 'process' within principle of abuse of process. As is illustrated by **Sarkar v West London Health NHS Trust** [2010] IRLR 508, an employer who takes second disciplinary proceedings against an employee is not precluded from doing so by principles of *res judicata* or abuse of process. However the fairness of such action will be considered under ERA section 98(4).

103. All members of the ET considered the question of whether the Respondent should have taken the second disciplinary action against the Appellants under ERA section 98(4) not as *res judicata* or abuse of process. The ET did not err in doing so.

104. Both the minority and the majority members of the ET referred to **Sarkar**. The minority member considered the Appellant's case on the second disciplinary action similar to that in **Sarkar** whereas the majority distinguished that case from that before them.

105. Dr Sarkar's misconduct was considered under his employer's Fair Blame Policy ('FBP') which applied to relatively low levels of misconduct. At the final meting under that procedure he was to be given a formal written warning. For the first time a requirement was made that he be reported to the General Medical Council. This was unacceptable to Dr Sarkar, the FBP came to an end and he was dealt with through formal disciplinary proceedings. He was found guilty

of gross misconduct and summarily dismissed. The ET took into account in assessing the fairness of the dismissal under section 98(4) the initial adoption by the employer of the FBP in dealing with Dr Sarkar as indicating the employer's view that his misconduct did not amount to gross misconduct. After a reversal in the EAT, the Court of Appeal restored the decision of the ET that Dr Sarkar's dismissal was unfair. In the Court of Appeal, Mummery LJ considered whether the ET had erred in their approach to the question of the fairness of the dismissal under ERA section 98(4). He held:

> **"25. Though it was relevant, the fact of the earlier decision to use the FBP procedure did not fetter the Trust in its disciplinary options, or prevent the Trust from relying on the earlier incidents as part of Dr Sarkar's overall course of conduct, or restrict the range of reasonable responses to that conduct. In the context of a disciplinary process the Trust was entitled to revise its approach to the misconduct following a detailed assessment of the evidence of the continuing course of his conduct and its impact.**
>
> **26. I am unable to accept Mr Sutton's submission that the ET erred in law on the reasonable responses point. The misconduct found by the disciplinary panel consisted of matters that were covered by the initial investigation and those matters were the basis of the FBP discussions. The ET were entitled to regard the agreed use of FBP as an indication of the Trust's view that the misconduct alleged against Dr Sarkar was relatively minor and that it was prepared to deal with it under a procedure that could not result in his dismissal. In my judgment, the ET did not err in law in concluding that it was inconsistent of the Trust then to charge Dr Sarkar with, and find gross misconduct based on, the same matters and to dismiss him. That was a factor to which the ET were entitled to attach weight in applying the range of reasonable responses test."**

106. The ET in the appeals before us rightly considered the question of the second disciplinary proceedings as one of fairness under ERA section 98(4) and not of *res judicata*. **Sarkar** is an example of an ET taking into account the fact that a respondent initially considered it appropriate to take disciplinary action against an employee under a procedure designed for less serious cases before pursuing formal proceedings which led to dismissal. Assessing the fairness of a dismissal in all the circumstances is a paradigm of a fact specific decision. In our judgment **Sarkar** does no more than establish that previous disciplinary proceedings are to be taken into account in assessing the fairness of dismissal following second disciplinary proceedings based on the same facts. There is no rule of law which establishes that it will be fair to take such proceedings if the first disciplinary proceedings are shown to be inadequate or that they came about after a change of management. Conversely there is no rule

of law that dismissal following second disciplinary proceedings brought on the same facts as had been relied upon in a procedure appropriate for misconduct of a minor nature would be unfair. In each case the fact that a view had previously been taken by an employer that the misconduct was not serious and was to be dealt with under a procedure which could not lead to dismissal is to be taken into account in determining the fairness of the dismissal.

107. The fairness of taking the Appellants through the second disciplinary procedure was to be assessed in the light of the Respondent's reason for doing so.

108. We have considered carefully the submission of Mr O'Dair that the ET erred in failing to

> **"address the question of why this employer decided to take the second set of disciplinary proceedings."**

109. On a fair reading of the reasons of the ET the majority make a finding of fact in paragraph 27 that the reason why the Respondent took the second disciplinary proceedings was because new management considered the actions and defaults of the Appellants to be considerably more serious than was reflected by the maximum sanction which could be and was imposed under the Simplified Procedure used in the first proceedings. Such a conclusion was open to the ET on their earlier findings including paragraphs 15.31, 15.32 and 15.38 set out earlier in this judgment.

110. Mr King on behalf of Ms Ward had submitted in his skeleton argument that:

> **"The decision to undertake the second investigation and bring further disciplinary charges was unlawful as it was based on the unlawful decision of the Secretary of State to dismiss Sharon Shoesmith and replace her with Peter Lewis."**

In **R (Shoesmith) v Ofsted and others** [2011] ICR 1195 Maurice Kay LJ held at paragraph 125 that there was no need for the Respondent to move swiftly to dismiss Ms Shoesmith after receiving the Secretary of State's direction to do so as someone else was already acting as Director of Children's Services pursuant to his directions and Ms Shoesmith was under suspension. There was no suggestion that the appointment of the acting Director of Children's Services was unlawful. The Fallon report which recommended the second disciplinary proceedings against the Appellants was commissioned by the acting Director of Children's Services, Mr Coughlan, together with Mr Young. The remedy Ms Shoesmith obtained was compensation. Her employment had come to an end on dismissal. The dismissal was held unlawful because it was based on the Secretary of State's direction requiring her dismissal which was issued in breach of the requirements of procedural fairness and because there was no genuine urgency to dismiss her summarily. The legal proceedings in her case did not affect the lawfulness of the second disciplinary action against the Appellants.

111. Whilst we agree with counsel that a body corporate is bound by the decisions of its duly authorised agents, in this case the Respondent acted through their employees and members. It was their employees or office holders who decided on the first and then the second disciplinary proceedings. The majority held that the new management of the Department in which the Appellants worked took a different view of the seriousness of the matters involved. On a fair reading of paragraph 27 the ET held it was for that reason that the Respondent took the second disciplinary proceedings. The majority of the ET held that the different view of seriousness which they found was taken by the new management was that the charges and sanction imposed in the first disciplinary proceedings did not adequately reflect the risk to a member of the public, Baby P, and the gravity of the Appellants' conduct. They are to be taken as holding that

such a view was reasonable as they had found that dismissal for such conduct was within the range of reasonable responses.

112. The circumstances in which it may be held to be reasonable for an employer to change their view as to the appropriateness of a disciplinary sanction previously imposed and to embark on second disciplinary proceedings on the same facts are likely to be extremely rare. In such rare circumstances, depending on the particular facts and law applicable to the employment relationship, the decisions taken by an employer on disciplinary action may not, as a matter of law, preclude them from subsequent disciplinary proceedings on the same facts. These observations are not to be taken as any encouragement to do so. However in the circumstances of these cases, the ET did not err in failing to hold that the Respondents were precluded from conducting the second disciplinary proceedings by the first disciplinary action.

The reason for the dismissals

113. The ET correctly directed themselves to consider the reason for the dismissals of the Appellants by reference to the reasons why the appeal panels dismissed their appeals. The ET considered the four potential drivers for the dismissals: the conduct of the Appellants relied upon by the Respondent, the death of Baby P, media pressure and political pressure. The ET stated in paragraph 17 that there was no doubt in their minds that the reasons for the dismissals of the Appellant's appeals was in Ms Ward's case her failure to maintain required visiting frequency and, in both cases, poor professional judgment in relation to the Cricklewood absence. W reject the contention by Mr King that the ET came to a perverse conclusion in failing to hold that it was political and media pressure which led to the decision to dismiss the Appellants. The ET considered these arguments. They held that political pressure amounted to a direction to investigate staffing issues. They concluded that there was no specific direction to

take disciplinary action against these employees. By contrast it is to be noted that the Secretary of State at a press conference on 1 December 2007 stated that he had removed Ms Shoesmith from her office (**R (Shoesmith)** paragraphs 46 and 47). The ET considered and acknowledged the media pressure and concern over the death of Baby P but concluded that the reason for the Appellants' dismissals was their conduct. In our judgment their finding cannot be said to be perverse. It is clear that the ET gave careful consideration to other possible reasons for dismissal. There was ample evidence to support their conclusion.

The fairness of the dismissals

114. After reaching a conclusion on the reason for the dismissals, the ET considered the fairness of the dismissals. We do not accept Mr O'Dair's contention that the ET accepted the reasoning advanced by Mr Carr QC that if the dismissals of the Appellants was within the band of reasonable responses it was reasonable for the Respondent to undertake the second disciplinary proceedings. All members of the ET held that it was reasonable to dismiss the Appellants for their conduct in relation to the Cricklewood absence. That the first disciplinary proceedings were taken into account in assessing the fairness of the dismissals is established by the fact that there was a difference of view as to their effect on the fairness of the dismissals. The minority member who considered dismissal for the conduct over the Cricklewood absence was within the range of reasonable responses nonetheless held in paragraph 26 the dismissals to be unfair for reasons which included in large part her view that it was unfair to undertake a second disciplinary process against the Appellants. Notwithstanding her view that dismissal was within the range of reasonable responses for the Cricklewood absence the minority member held the dismissal to be unfair taking account amongst other matters her view that it was unfair to take the second disciplinary action.

The Bolam test and perversity in concluding that dismissal was within the range of reasonable responses

115. The gross misconduct found by the appeal panel to be proved against Mrs Christou was poor professional judgment by failing to ensure that she or Ms Ward were aware of where Baby P was in July 2007: the Cricklewood absence. The charges found by the appeal panel to be proved against Ms Ward were that she had not adhered to the visiting frequency, every 14 days, required by the Child Protection Plan. She had visited the family on 1 and 19 June and on 11 and 30 July 2007. One of the defaults was failure to visit Baby P for 21 days during the Cricklewood absence and not being in contact with his mother for 12 days. Secondly the appeal panel found gross misconduct established against Ms Ward by her poor professional judgment in her failure to recognise the importance of the breaches of the Child Protection Plan around 28 June 2007: the Cricklewood absence.

116. The evidence in support of the charges of gross misconduct found proved against the Appellants was uncontroversial. Mrs Christou and Ms Ward were dealing with a toddler 17 months of age who was on the Child Protection Register in respect of whom a Child Protection Plan was in place which required a specified visiting frequency of every 14 days by a social worker, Ms Ward. This was not adhered to by Ms Ward. Bruising to Baby P had been seen on 1 June. The mother had been arrested on suspicion of causing injuries to Baby P. Ms Ward had been told that the mother was taking Baby P and her other children away. The mother had first told a colleague she was going away for her birthday and then said to Ms Ward that she was going to Cricklewood to stay with a sick uncle. The mother did not give an address in Cricklewood where they were to stay nor did Ms Ward find this out. Ms Ward did not see Baby P between 19 June and 11 July 2007 nor did she or Mrs Christou know where he was.

117. On about 2 July 2007 Ms Ward met Mrs Christou to tell her about her concern regarding the mother's departure to Cricklewood. Mrs Christou discussed the Cricklewood absence with her. She considered it strange that the mother had left home to look after an uncle. Mrs Christou said that she asked Ms Ward to make contact with the mother but did not check that she had done so. Mrs Christou and Ms Ward were subsequently disciplined by their professional body for their handling of the Cricklewood absence and other matters.

118. Mr O'Dair's proposition that the ET erred in law in failing to hold that the dismissal of the Appellants was unfair because as Mrs Christou and Ms Ward are professional social workers they could not be held to be guilty of gross misconduct by reason of poor professional judgment unless they were negligent within the test formulated in **Bolam v Friern Hospital Management Committee** [1975] IWLR 582 is unsupported by authority.

119. The expert evidence of an independent social work professional, Ms Liz Davies, was relied upon by Mr O'Dair to support his **Bolam** argument. Ms Davies gave a statement for Mrs Christou's appeal. The charge relating to Mrs Christou which the appeal panel considered to amount to gross misconduct and which was the basis of upholding the decision to dismiss her was the allegation that she exercised poor professional judgment in failing to recognise the importance of the breaches of the Child Protection Plan for Baby P in the period around 28 June 2007 (the Cricklewood absence). The only passage in the statement of Ms Davies relevant to Mr O'Dair's **Bolam** argument was:

> **"The conference on 8th June 2007 did not specify, as it should have done, what should happen if the parent did not comply with the protection plan. As throughout this case, the emphasis at the June conference was on family support …**
>
> **When [Maria Ward] learnt [sic] that the mother had taken the children including [Baby P] to Cricklewood she informed Gillie Christou who advised her to obtain the address and make a visit.**
>
> **When Gillie Christou was off sick, the responsibility fell to her manager, Sue Gilmore, who also did not inform any other agency at this time.**

It is a matter of judgment as to whether to act immediately or not.

…

In all the circumstances, including the timescale when Gillie Christou had notice of this incident (2nd-4th July), her response was reasonable."

120. The appeal panel also heard from Ms Brazil, a social worker employed by the Respondent. Mr O'Dair suggested that the ET erred in law in failing to hold that the Respondent acted unreasonably in that the appeal panel accepted the evidence of an employee about social work practice rather than that of an independent expert.

121. The notes of the appeal hearing (page 31) record that Mrs Christou stated that she was very concerned when Ms Ward told her that Baby P's mother had gone to look after a sick uncle and was understood to have taken the children with her. She said:

"I think I didn't know where they'd [sic] gone so I asked Maria [Ms Ward] to establish that and find out.'

Mrs Christou told the appeal panel that Ms Ward told her it was Cricklewood and that the mother had said to her she was coming back on a day 'either the Wednesday or the following'. She could not remember which day it was. She thought she resolved to wait and asked Ms Ward to get the mother to come back as quickly as she possibly could. She understood Ms Ward was in telephone contact with the mother. The note of the appeal hearing shows that Mrs Christou referred to a document on which she recorded her conversation with Ms Ward. Mrs Christou said that the fact that she made a record she thought was because she was 'very concerned about it'; she 'didn't want it just to lapse'. The conversation with Ms Ward took place on a Monday. Mrs Christou was off sick on the Thursday and Friday. When asked by her counsel, 'why not make a home visit?' Mrs Christou replied, 'they weren't 'missing' – she told us where they were… there didn't seem to be anything to be gained from making a home visit'.

122. Mr O'Dair contended that the ET acted perversely in holding that the view of the Chairman of the appeal panel, Mr Dodds and another member of the three person panel, Ms Whyte, that Ms Christou was at fault in not ensuring that an unannounced visit to the mother's home was made, because Ms Ward had been told by the mother that she was going to Cricklewood although they had no address for her there and had not verified her story,

123. The Employment Judge's notes of evidence record that the Chairman of the appeal panel, Mr Dodds, gave evidence in cross-examination that:

> **"Given the circumstances the fact that the child was uncontactable for 12 days required an unannounced visit…**
>
> **The key thing was that no-one [sic] knew where this child was – could have been anywhere – nothing was done to ascertain where he was …This is an 'at risk' child – ref to taking them out for a birthday [a previous reason for absence given by the mother] ref to sick uncle, the mother could have been anywhere. There was no address in Cricklewood. A mobile phone can be used anywhere."**

124. Mr O'Dair referred to a passage in the Employment Judge's notes of evidence in the cross-examination of Ms Whyte as being crucial:

> **"MW She had three days before going off ill [to act] just because he is with his mother doesn't mean he isn't missing.**
>
> **MW There should have been an immediate …**
>
> **NT [Mrs Christou's counsel] Making an unannounced home visit is not mentioned at [page ref]**
>
> **MW You come to it by common sense. We didn't make a comparison with other children. Its [sic] common sense to do something. On 1/6 child had bruises not accounted for. Other issues. If you don't know where the child is – there is [listing?] in Haringey – you do something about it. Pop round the house press for an address, not unreasonable [page ref]."**

Mr O'Dair contended in his skeleton argument that the only explanation for Ms Whyte's view was that

> **"he [sic] was relying on facts not known to the Appellants at the time, namely that the mother was there [at home]."**

He observed that

> **"the GSCC seems to have fallen into much the same trap."**

125. The decision of the conduct committee of the General Social Care Council shows that the allegations against Mrs Christou included:

> **"6. Did not ensure:**
>
> **…**
>
> **(b) that you or the allocated Social Worker were aware of the precise location of PC for a period of time in July 2007."**

The Committee noted that Mrs Christou admitted a series of shared (with Ms Ward) and individual allegations concerning the care of Baby P and had admitted that her actions, or lack thereof, amount to misconduct. The Conduct Committee of the GSCC considered that

> **"The fact that the Registrant was unaware of the precise location of [Baby P] for a period of time in July 2007 amounts to a serious failure in the management of [Baby P's] case."**

The Committee considered that Mrs Christou's was a serious case of misconduct and imposed a suspension from practice of 4 months which took into account that Mrs Christou had been suspended for 16 months under an interim suspension order.

126. Mr O'Dair contended that as at the time no-one was aware that Baby P was not in Cricklewood and no reason was advanced to the appeal panel as to why Mrs Christou should have known the mother and Baby P were not there, a decision of the ET that the conclusion of the appeal panel that Mrs Christou was guilty of gross misconduct in not checking or having Ms Ward check that she was not at her home was perverse. The Respondent was depending on a case based on hindsight.

127. When he took over her representation, Mr O'Dair adopted for Ms Ward the submissions made on behalf of Mrs Christou.

128. Miss Davies did not give evidence for Ms Ward. The only evidence before us relating to the allegations against Ms Ward which could have a bearing on the **Bolam** submission was that visiting frequencies in a Child Protection Plan are not always adhered to. They are not 'set in stone'.

129. As in the case of Mrs Christou, allegations of misconduct against Ms Ward arising out of the Baby P case were found by the Conduct Committee of the GSCC to be proved. Her right to practice as a social worker was also suspended.

130. With regard to the perversity challenge to the decision of the ET to hold the conclusion of the Respondent's appeal committee to be reasonable, it was contended by Mr King, although not adopted by Mr O'Dair when he assumed representation of Ms Ward, that with regard to Cricklewood

> **"it was [Ms Ward's] responsibility to share the information she had about P being away with her manager and to carry out action resulting from this discussion. The manager is ultimately responsible for what action is to be taken."**

131. For both Appellants it was contended that the ET erred in failing to take into account their working conditions: workload, character of the population of Haringey 'not Hampstead Heath' and 'broken' state of the Respondent's social services department. However neither Appellant had suggested to their appeal panels that any of these factors were the reason why they had not acted as it was suggested they should. In the skeleton argument on behalf of Ms Ward it is expressly stated that:

> **"…the Second Appellant has never suggested that the real reason for her dismissal was the broken state of the Department."**

And:

> **"The Second Appellant has not suggested that the real reason for her dismissal was that working conditions made it impossible to carry out her professional duties."**

It was submitted by Mr O'Dair in his skeleton argument for Mrs Christou that:

> **"…even if the workload and work circumstances of the 1st Appellant was not relevant to the reasonable belief in gross misconduct they were still relevant to whether dismissal was within the band of reasonable responses."**

132. As for the submission that the majority of the ET took into account 'the Second Appellant's lack of contrition' in deciding whether the Respondent's decision to dismiss was within the range of reasonable responses, the ET did not did not find that the Respondent took any such factor into account. The ET noted the absence of such an expression in the closing submissions of Ms Ward's counsel and observed that she denied that her acts amounted to gross misconduct. The ET observed that 'the council were not being assured that she would not fail in the same way in the future.'

133. We reject the submission that an ET erred in law in holding that an employer has acted within the band of reasonable responses by dismissing an employee for gross misconduct in exercising poor professional judgment unless the employer can satisfy the ET that they based their decision to dismiss on a **Bolam** finding of negligence. The proposition that as the Appellants were professional social workers they could not be guilty of gross misconduct by poor professional judgment unless they were negligent is unsupported by authority. In any event the decisions to dismiss in these cases were taken on the particular facts.

134. Whilst evidence of generally accepted professional practice may be considered by an employer in deciding whether to dismiss a professionally qualified person for a failure in their professional duties, in this case where there is no contractual, regulatory or statutory requirement to do so, it is not an error of law for an ET to hold a decision to dismiss to be within the band of reasonable responses if an employer does not do so. In any event the evidence of Ms Davies, relied upon by Mr O'Dair in Mrs Christou's appeal, does not support a

contention that if the appeal panel had accepted her evidence the outcome would have been different. Her evidence on the allegation against Mrs Christou which was found proved and to constitute gross misconduct was based on a premise which did not apply in this case: a child being dealt with under a family support model in respect of whom there was no cause for concern. On the evidence, Mrs Christou was concerned about Baby P as a result of her discussion with Ms Ward on 2 July 2007. In our judgment the ET did not err in failing to hold that it was necessary for the Respondent to have expert evidence that in the circumstances it would have been usual practice for a social worker to check whether the family had indeed gone to Cricklewood before they could conclude that the Appellants had shown poor professional judgment in their respective failures in dealing with the Cricklewood absence.

135. Nor was it perverse for the ET to hold that dismissal of the Appellants for their respective failures in dealing with the Cricklewood absence was within the range of reasonable responses. This decision was unanimous. The ET heard the evidence of the Chairman of the appeal panels, Mr Dodds set out above. They also had evidence that Ms Ward had seen the injuries to Baby P on 1 June 2007 and that the mother had been arrested on suspicion of causing him injury.

136. We do not accept Mr O'Dair's submission that the Appellants' actions were judged in hindsight. The ET properly directed themselves that the Respondent's actions were to be judged by reference to the state of knowledge at the time of the Appellants' actions, June and July 2007. At paragraph 20 they held:

> **"We all agree that these matters are properly to be regarded against the background of the events which we have set out as the appeal panels' factual conclusions above. Their actions are to be judged against the background of what was known at the time and not with the benefit of knowledge of [Baby P's] death."**

The evidence given by Mr Dodds to the ET was that the appeal panel's decision was based on the concern that no-one knew where Baby P was at the material time. His evidence was not that the Appellants should have known that he was at his home address. Since the home address was the only one the Appellants had for Baby P, in our judgment Ms Whyte, a member of the appeal panel, cannot be criticised for considering that it was 'common sense' to check whether he was at that address. In our judgment it was for the appeal panel to assess whether the Appellant's actions or inaction showed a falling short in their duties. In our judgment neither Appellant has surmounted the high hurdle of establishing that the unanimous decision that dismissal of both Appellants for their roles in the Cricklewood absence was within the range of reasonable responses was perverse.

137. The fact that the ET were divided on the question of whether dismissal of Ms Ward for failure to maintain visiting frequency was within the range of reasonable responses shows that the ET gave careful consideration to the issue. In light of the requirement in the Child Protection Plan for fortnightly visiting of Baby P by a designated social worker, at the material time, Ms Ward, the recent injury he was seen to have suffered, the arrest of the mother, the fact that he was on the 'at risk' register and the length of the intervals between visits: 17 days between 1 and 19 June, 21 days between 19 June and 11 July and 18 days between 11 July and 30 July, in our judgment the conclusion of the majority of the ET that Ms Ward's default in maintaining the required frequency of visits in the light of the known circumstances of Baby P was not perverse.

138. In our judgment the ET did not err in failing to hold that it was unreasonable for the appeal panel to decide that Ms Ward was at fault over the Cricklewood absence because her manager was ultimately responsible for what action was taken. Whist Mrs Christou was

responsible for supervising her, Ms Ward was employed as a qualified social worker with responsibility for carrying out the steps required by the Child Protection Plan. It was Ms Ward's responsibility to visit the family and to know where they were. The meeting between Mrs Christou and Ms Ward on 4 July 2007 illustrates their roles and their respective responsibilities. Mrs Christou's was to ensure that Ms Ward knew where Baby P was so that she could visit him. Ms Ward's responsibility was to find out that information and make the necessary visit. The fact that it was Ms Ward who was directly responsible for carrying out visits to Baby P was the reason why the appeal panel held that Mrs Christou's default in relation to visiting frequency constituted misconduct but not gross misconduct.

139. In our judgment the ET did not fail to take into account the 'broken' state of Children's Services in Haringey. This was expressly dealt with by the ET when considering the scope of the investigation into the allegations against the Appellants. The nature of the population, the Haringey not Hampstead Heath submission, and the workload are in our view understood to be included in the minority member's view that there was in the Respondent's investigation 'insufficient focus on the broader picture'. However she acknowledged that a wider investigation as to the context for the actions of the Appellants applied only to the allegation of failure by Ms Ward to maintain the required visiting frequency. The absence of a broader focus did not, in her view, affect the reasonableness of the investigation as it concerned the Cricklewood absence. Whilst it was submitted that the Respondent should have judged her conduct taking into account her other work and working conditions, it was stated on behalf of Ms Ward that she had not suggested that working conditions made it impossible for her to carry out her professional duties.

140. In our judgment the ET did not fail to consider whether the conditions under which the Appellants worked should have been taken into account by the Respondent in considering the allegation against them. They did consider this issue in the context of the reasonableness of the Respondent's investigation into the allegations against the Appellants and came to a conclusion which was open to them on the evidence.

141. The minority member of the ET rightly observed that a wider investigation as to the context of the actions of the Appellants would not have affected the reasonableness of the investigation into the Cricklewood absence. This was the only allegation against Mrs Christou found to constitute gross misconduct. We therefore reject Mr O'Dair's submission for Mrs Christou that workload and work circumstances were relevant to the decision by the ET as to whether the sanction of dismissal in her case was reasonable in all the circumstances.

142. Whilst the ET referred to 'no contrition' expressed on Ms Ward's behalf when Mr Toms, her counsel, made his closing submissions at the end of the appeal hearing, the ET observed in paragraph 22 that:

> **"There was no apology for her failure to meet the visiting frequency requirement and the council were not being assured that she would not fail in the same way in the future."**

Even if the majority of the ET took into account lack of contrition in deciding on the reasonableness of the Respondent's view of Ms Ward's conduct it is clear from their judgment that this could only have related to the visiting frequency allegation and was only one of a number of matters referred to by the majority ET in the context of considering the reasonableness of dismissal for that matter. In any event the dismissal of Ms Ward was held to be within the range of reasonable responses in respect of the Cricklewood absence. This was a

unanimous finding on which the observation regarding lack of contrition by Ms Ward played no part.

143. In our judgment the ET did not err or come to a perverse conclusion in deciding that dismissal of both Appellants was within the range of reasonable responses.

Reasonableness of the investigation

144. It was contended on behalf of Ms Ward that the ET came to a perverse conclusion in holding that the decision to dismiss her was unreasonable in the light of the evidence of Sue Gilmore. A DVD of an interview of Baby P's mother by Sue Gilmore, a senior manager, was seen by the appeal panel considering Ms Ward's case. The ET record in paragraph 15.62.20:

> **"The panel viewed the DVD, prepared in connection with a project called 'Brief Therapy Project' in which Sue Gilmore had interviewed [Baby P's mother] and showed her saying to [the mother] words to the effect: 'what does Maria Ward have to do to assure you that we will not take your children away.''**

145. The finding of fact by the ET shows that the appeal panel viewed the DVD of Ms Gilmore interviewing Baby P's mother. The final decision makers had that material before them.

146. The ET considered whether it was reasonable for the investigation into the allegations against Ms Ward not to have had a broader focus. The ET considered in paragraphs 30, 33, 42, 43 and 44 the breadth of the investigation by the Respondent into the actions of the Appellants. The judgment shows the thought given by the ET to this issue on which they were divided. The contention relating to the scope of the investigation was also relied upon to challenge the finding of the ET that dismissal was within the range of reasonable responses. Our conclusions are the same.

147. It was also submitted on behalf of Ms Ward that the ET erred in failing to hold that there was a reasonable investigation into the allegations against her because documentation was withheld from her for the investigatory interview and the disciplinary hearing. The ET considered these matters in paragraphs 32, 36, 39, 40 and 41. The ET held:

> **"40. As regards the denial of documentation to the claimants at their investigatory interviews, we have mentioned above that, by the time of the disciplinary and appeal hearing, they had all the documentation available to them.**
>
> **…**
>
> **In our considered judgment, and given the processes that followed the investigation interviews, this matter does not, in the view of any of us, render the investigation an unsafe one.**
>
> **…**
>
> **41. We do not consider that Mr Young's decision not to release the written warning letter [to Leslie Davies, the lawyer to whom Baby P's case had been referred on 17 June 2007] until he was required to do so, affects the fairness of the investigation as the matters ultimately held to be acts of misconduct by the two claimants. This matter related narrowly to the Legal Planning meeting and the alleged failure of Ms Ward and Mrs Christou to inform Leslie Davies of the Cricklewood absence. In the end this was not a matter on which the respondent relied upon in relation to Mrs Christou and Mr Carr said that the respondent does not seek to rely on that in relation to Ms Ward. Accordingly since it is confined to that particular matter, we hold that Mr Young's decision did not render the investigation unreasonable."**

148. The challenge to the unanimous finding of the ET that the scope of the investigation into the Cricklewood absence and to the majority finding in relation to that into the visiting frequency allegation against Ms Ward was reasonable relied upon by the Respondent was one of perversity. The judgment shows that the ET considered the matters raised on behalf of the Appellants and came to a conclusion which was open to them on the evidence.

The role of Sue Gilmore

149. The ET judged the reasonableness of the actions of the appeal panel considering Ms Ward's case on all the material before them. The appeal panel heard evidence that Ms Ward was concerned enough about the Cricklewood absence to bring it to the attention of and discuss it with Mrs Christou, her line manager. The attitude of Ms Gilmore towards Baby P's mother at an earlier time cannot be said to render the decision of the ET perverse.

Delay

150. It can be seen from paragraph 37 of the judgment that the ET considered whether the Appellants had been prejudiced by delay. The Appellants complain of delay between the events of which complaint was made and the conclusion of the criminal trial against Baby P's mother and others on 11 November 2008.

151. Notes of the Appellants' investigatory interviews, the second disciplinary and appeal hearings were before the ET.

152. Whether there was any prejudice caused to the Appellants by delay fell to be assessed by the ET in relation to the allegations against them upon which the Respondent relied to show that the dismissals were reasonable. In Mrs Christou's case these were her failures in relation to the Cricklewood absence. The note of the investigatory interview held with her by Ms Walsh Jones on 6 May 2008 shows that Mrs Christou then had no difficulty in recalling her actions in relation to the Cricklewood absence. The note of the interview records:

> **"TWJ About 29 June Ms A says going to Cricklewood**
>
> **GC I think, by 4 July she was encouraged to come back.**
>
> **I thought it was around school holiday**
>
> **On one (occasion) told it was about a birthday, another to look after sick uncle**
>
> **I have recollection that she extended stay from holiday.**
>
> **I did know and M told me about sick uncle.**
>
> **I didn't know it was Cricklewood- I kept saying to M to find out where as she could visit. I remember saying to M not right as she was putting her kids' education in jeopardy. It didn't seem in character- I remember pressurising M to follow up and find out about sick uncle. Made manager's note.**
>
> **Pretty certain I didn't know what area she was in.**
>
> **TWJ Did you advise M to find out where they were in order to let other borough know there were children on register?**

GC Yes, initially it was about finding out where she was. The story didn't add up, I was I quite concerned about that."

153. The conduct of Mrs Christou over the Cricklewood absence formed the basis of the written warning given to her in the first disciplinary proceedings.

154. Mrs Christou was asked about the Cricklewood absence in the investigatory meeting on 23 March 2009 in the second disciplinary proceedings. She told Mr Young that she was perturbed when told by Ms Ward that Baby P's family were not at home and had gone away for the weekend but they stayed for longer. Mrs Christou commented that the mother had not mentioned an uncle previously and the story about visiting a sick uncle did not ring true. The note records that Mrs Christou said:

"I told Maria [Ms Ward] to contact the mother and find out what was what."

She said that she made a manager's note recorded on the system. The note continues:

"So you asked Maria to go and next thing you heard was that the mother was back?

That's what I remember."

Mrs Christou commented regarding notes of the meeting she had with Ms Ward:

"I didn't recall Cricklewood but now that I've seen the paper…"

implying that she then recalled the discussion. It appears that at the investigatory meeting she saw the note she made of the meeting. Mrs Christou stated:

"I was pressing Maria to identify where they were. We didn't know obviously."

Mrs Christou said that the fact that she made the notes showed that she was quite concerned.

155. The notes of the dismissal appeal hearing show that Mrs Christou said in relation to the Cricklewood absence:

> **"I was very concerned …She didn't strike me as the sort of person that would go and look after a sick uncle …So I didn't let it drift, I certainly, I didn't know where they'd gone. I struggle to remember these conversations but I think I didn't know where they'd gone so I asked Maria to establish that and find out."**

Again Mrs Christou said that the fact that she made a record of the discussion with Ms Ward showed that she was concerned about the situation. She said:

> **"I was trying to indicate something needed to happen."**

156. Whilst it seems that Mrs Christou had some difficulty in recalling a few details of her involvement in the Cricklewood absence the evidence before the ET showed that she had a recollection of material features relating to that incident.

157. So far as Ms Ward is concerned, the material facts relating to the first allegation of failing to carry out visits to Baby P at the required visiting frequency were not in dispute. The dates of the visits were a matter of record. Ms Ward did not contend that her workload made it impossible to visit Baby P in accordance with required frequency but she could not remember how she prioritised her time bearing in mind that she had another 18 child at risk cases to deal with.

158. When asked by Mr Young in the investigatory interview on 18 March 2009 about the Cricklewood absence Ms Ward gave an account of what she had been told by a colleague about the mother going away for her birthday taking her children with her. Then Ms Ward contacted the mother and was given the story about visiting the sick uncle in Cricklewood. Ms Ward gave her recollection of her discussion with Mrs Christou. She said:

> **"I reported that to the team manager, it does get a bit hazy around this one, I can only say what I can remember, I think there are gaps but I just can't remember…"**

However Ms Ward had sufficient recollection of events to give evidence to the appeal panel on the material features of her actions in relation to the Cricklewood absence.

159. It was also contended that delay in instigating the disciplinary proceedings which led to the Appellant's dismissals took place after what was described as the 'media storm' following the convictions of Baby P's mother and others. The ET held that there was a delay of some 18 months between the events the subject of the allegations and the disciplinary action against the Appellants. The ET held that:

> **"Apart from the fact that the claimants were subjected to disciplinary action for second time (dealt with above) there was no obvious prejudice caused to the claimants by the delay."**

The ET had considered whether media pressure influenced the decision of the Respondent to dismiss the Appellants. The ET recognised that although there may have been media pressure and political pressure it was not their view that those involved in the appeal panels bowed to such pressure. In light of that finding of fact which was open to the ET on the evidence, in our judgment the delay which meant that the second disciplinary proceedings took place after the criminal trial and a sustained media campaign did not cause prejudice to the Appellants.

160. Although there was substantial delay before the second disciplinary proceedings, as explained by Parker LJ in **Slater v Leicestershire Health Authority** [1989] IRLR 16 at paragraph 34:

> **"The rules of natural justice in this field do not in my view form an independent ground upon which a decision may be attacked, although a breach will clearly be an important matter when the IT consider the question raised in s57(3) of the Act."**

Since the ET did not err in concluding that delay did not cause any prejudice to the Appellants it was not an independent ground to support a challenge to the fairness of the dismissals which

otherwise may have been the case as explained by Elias P in **A v B** [2003] IRLR 405 at paragraphs 66 and 68.

Bias

161. Mr O'Dair rightly did not dispute that whether a point which was not taken in the ET should form the basis of any decision in the EAT was an issue for us. As set out in paragraphs 72 and 73 above, he agreed that before the ET the fairness of the dismissals was not challenged on the grounds of the appearance of bias and as set out in paragraph 74, he did not persist in a change of law argument before us. The appearance of bias challenge was not made in the original Grounds of Appeal. It was introduced by amendment. If the appearance of bias argument had been raised before the ET, the Respondent may have wished to adduce additional evidence. In any event, on the findings of fact, Councillor Dogus' concerns on 15 March 2009 about the decision in Mrs Christou's case could not have given rise to an appearance of bias affecting Ms Ward's appeal which had been determined before that date. Two members of the three person panel hearing Mrs Christou's appeal gave evidence at the ET. The ET made findings on the reasons the appeal panel dismissed the appeal. On the findings of fact made by the ET it cannot be said that they came to a perverse decision in failing to find that the informed observer would have concluded that the decisions of the appeal panels were tainted by an appearance of bias.

Overall fairness of the dismissals

162. The majority of the ET did not fall into error of law or reach a perverse conclusion in deciding that the dismissal of each Appellant was fair.

Conclusion

163. Most of the grounds of appeal in these cases challenged the decision of the ET as perverse. As is well established and explained in **Yeboah v Crofton** [2002] IRLR 634 an appellant seeking to establish that a decision of an ET is perverse has a high hurdle to surmount. The Appellants in these appeals failed to do so. The ET heard the cases of Mrs Christou and Ms Ward over 8 days. The Appellants were represented by counsel. In concluding that the dismissals were within the range of reasonable responses of a reasonable employer in the circumstances the ET addressed the right questions of law and reached a conclusion open to them on the evidence. In concluding that all the elements required to be considered in a case of dismissal for misconduct explained in **British Home Stores Ltd v Burchell** [1980] ICR 303 were satisfied and that the dismissals were fair taking into account all relevant matters including the fact that the second disciplinary proceedings were pursued and that they took place some 18 months after the relevant events, the ET did not err in law or come to perverse conclusions. These appeals are dismissed.