mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Stower**

Respondent: **C & L Facilities Ltd**

Heard at: **East London Hearing Centre** **On: 8-10 February 2017 & in chambers on 3-4 April 2017**

Before: **Employment Judge C Hyde**

Members: **Mrs G A Everett**
Ms V Nikolaidou

Representation

Claimant: Ms C Whitehouse (Counsel)

Respondent: Ms P Hall (Consultant)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that

1. **The complaints alleging direct sex discrimination, direct maternity leave discrimination, and direct pregnancy discrimination were not well founded and were dismissed.**

2. **The complaint of ordinary unfair dismissal under section 94 of the Employment Rights Act was well founded.**

3. **The Claimant did not contribute to her dismissal, nor are any reductions to her award of compensation to be made by reason of the principles in the case of _**Polkey**_.**

4. **The Tribunal will reconvene on a date to be notified to the parties to determine remedy for the unfair dismissal; and the cross-applications for costs.**

REASONS

1 Written reasons are provided for the above judgment because the judgment was reserved. The reasons are provided only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost. Further they are only provided to the extent that the Tribunal considers it proportionate to do so.

2 All findings of fact were reached on the balance of probabilities.

Preliminaries

3 By a claim presented on 26 February 2016, the Claimant, also known as Ms Pullin but referred to in these reasons as Mrs Stower, complained that she had been treated less favourably by her employment being terminated just prior to her pregnancy following her recent marriage. She alleged that this constituted direct discrimination because of maternity leave under section 18(4) of the Equality Act 2010 ("the 2010 Act"); direct discrimination because of sex under section 13(1) of the 2010 Act; and direct discrimination because of pregnancy under section 19(2)(a) of the 2010 Act.

4 In addition, she complained that the notice of termination of her employment at a short meeting with Mr Mark Abel, Managing Director of the Group of which the Respondent was a part, on 29 October 2015 constituted unfair dismissal. This complaint was brought under sections 94 and 98(4) of the Employment Rights Act 1996.

5 By a response and grounds of resistance which were presented in early April 2016, the Respondent set out the grounds on which they intended to resist the claim.

Evidence and Documents Adduced

6 The parties agreed on the contents of a bundle of documents which consisted of approximately 170 pages to be used at the hearing. It was marked [R1]. In addition, at the commencement of the hearing the Respondent produced a list of issues [R2] with annotations. They also produced a cast list marked [R3].

7 The Claimant also produced a list of issues [C1] which was superseded by a revised agreed list of issues after discussions during the hearing, marked [C3]. Further, the Claimant produced a chronology marked [C2].

8 The Tribunal heard evidence from the witnesses on behalf of the Respondent first, pursuant to the parties' prior agreement to this effect. The witnesses were

8.1 Ms Jodie Douglas (née Covell) Office Manager for the Respondent from 7 September 2015, whose witness statement was marked [R4];

8.2 Mr Mark Abel, Managing Director of the CS Group, whose witness statement was marked [R5];

8.3 Mr Michael Gray, witness statement [R6], Director of the Respondent company. He commenced employment with the Respondent on 12 January 2015 as a Senior Maintenance Engineer.

8.4 Ms Billie Hardy, Accounts Assistant with the Respondent from 1 October 2013 to 12 June 2015, and then from 12 August 2015 she worked for another part of the Group, Cool Systems Holdings Ltd from 12 August 2015 in the role of HR Manager. Her witness statement was marked [R7].

9 The Respondent also relied on a witness statement from Ms Emma Brown, who worked in the Accounts department of Cool Systems from August 2011 the gist of which was that she had taken a period of maternity leave in the latter half of 2014. Her witness statement was marked [R8], and she did not give evidence live.

10 Mrs Stower gave evidence on her own behalf and relied on two witness statements marked [C5] and [C6] as her evidence in chief. She also relied on a witness statement from Mr Wayne Canfer her former line manager, witness statement [C7]. He did not give live evidence in the event.

11 It was not disputed that Mr Canfer had previously worked as Service Manager for CS Maintenance which was part of the Cool Systems Group from September 2009. He was the Claimant's manager when she commenced employment with the Respondent in August 2011. He left the employment of Cool Systems after it was purchased by C & L Facilities in December 2012, for personal reasons in May 2013. He was then re-employed by the Respondent in August 2014 as Operations Manager based in their Braintree office. In that capacity, he managed a team consisting of Wendy Rowley, the Claimant, and Emma Thearle. The Respondent terminated his employment on 14 August 2015 due to a loss of confidence in him by the Board.

12 Finally, the Claimant tendered a statement from Wendy Rowley a former colleague at the Respondent who gave notice of termination of her employment by retirement on 9 October 2015, to take effect some three months later. The statement was signed and dated 7 September 2017 (sic). The Tribunal marked it [C4]. Ms Rowley did not give evidence live.

13 An application was made at the beginning of 10 February 2017 for a witness order to be made to compel the attendance of Mr Canfer. The Tribunal considered the written application made by the Claimant and oral submissions. The thrust of the application was that Mr Canfer had previously voluntarily provided a witness statement in support of the Claimant's unfair dismissal complaint and that there had been no indication until shortly before the time when it was anticipated that he would be giving evidence that he would not attend the hearing. The Claimant was concerned that Mr Canfer may have been intimidated by the Respondent. She relied on the fact that Ms Rowley had communicated to them shortly before she was due to give evidence that she wanted to withdraw the use of her statement in the proceedings. It appeared to the Tribunal that the earlier communication from Ms Rowley of 23 October confirmed

that she had no objection to her statement being used but she ruled out attendance at court and described that she had "already got myself in a state" about this. It appeared that at best she was reluctant to become involved in this dispute.

14 The subsequent (9 February 2017) communication that she may no longer want to have her statement used in the litigation as communicated by email apparently from Ms Rowley to someone by the name of Yvonne Slaughter who then apparently forwarded the email to Mr Abel who in turn forwarded the email to his representative Ms Hall, appeared, Ms Whitehouse submitted, to be odd given Ms Rowley's earlier position of consenting to the statement being used. It was odd that she was now requesting that the statement was withdrawn.

15 By the time this document reached the Tribunal, the Tribunal had already read Ms Rowley's witness statement as part of the evidence. There was no action the Tribunal could take in relation to her request. Ms Rowley's indication that she did not now consent to her statement being used did not appear to the Tribunal to be a change of attitude. She had self-evidently been very reluctant to participate in the litigation since October 2016 at the latest.

16 The position in relation to Mr Canfer was that he had not responded to attempts on behalf of the Claimant to communicate with him. The Claimant was therefore concerned in these circumstances that agents of the Respondent may have intimidated or otherwise interfered with her witnesses. It was against this background that the Claimant asked for a witness order in relation to Mr Canfer.

17 The Respondent vehemently opposed any suggestion that they had interfered with any of the Claimant's witnesses.

18 The Tribunal considered that given Mr Canfer had produced a signed and detailed witness statement which the Tribunal had read on behalf of the Claimant and that the Respondent had not sought to call him to substantiate any of the allegations being made against the Claimant, it was not necessary or proportionate to issue a witness summons to compel Mr Canfer's attendance.

19 Indeed, in his evidence Mr Abel had confirmed to the Tribunal that as far as he was concerned he believed that the Claimant was a capable employee.

Closing submissions

20 At the end of the evidence, directions were given for the presentation of written closing submissions. Subsequently the dates for provision of the submissions were varied following application by the parties. In the event the Tribunal received written submissions from the Respondent on 16 March 2017 and in reply dated 31 March 2017. Submissions from the Claimant were similarly received on 16 and 31 March 2017. Ms Whitehouse appended the agreed list of issues to her initial submissions; and her submissions in reply to those of the Respondent were by way of annotations to the Respondent's submissions.

21 At the commencement of the hearing it was agreed that the Tribunal would address matters of liability first and in relation to the unfair dismissal would also address contributory fault and the effect, if any, on the award of compensation by reason of the principles in the case of *Polkey*. The Tribunal did not specifically address the issue of the ACAS uplift and took into account paragraph 67 of the Respondent's submissions in reply in which it was stated that this had not been included as a matter to be addressed. In those circumstances, therefore, that issue was not determined in this Judgment although both parties referred to this issue in their closing submissions. That issue can be dealt with at the remedy hearing.

22 The parties appeared to be making cross applications for costs. The Tribunal considered the most convenient way of dealing with this matter was to adjourn the costs applications to the remedy hearing in relation to the unfair dismissal.

Relevant law

23 The relevant law in respect of each of the complaints was set out in the Claimant's Counsel's written submissions. Ms Hall also set out some applicable law, but did not dispute any of the contentions of law in Ms Whitehouse's submissions. The Tribunal endorsed the statement of applicable law in Ms Whitehouse's written submissions as accurate. In those circumstances, it was unnecessary and disproportionate to repeat them in these reasons.

24 For the avoidance of doubt however in relation to the issue of comparators, the Tribunal records that comparators are not needed in relation to the pregnancy and maternity leave discrimination claims. The issue for the Tribunal in respect of those claims was whether the Claimant had been treated unfavourably because of seeking to exercise her right to maternity leave or because of her pregnancy. It was only in relation to the direct sex discrimination claim that the law required less favourable treatment than an actual or hypothetical man.

Findings of Fact, Issues and Conclusions

25 The agreed revised List of Issues is set out in full.

A. Direct discrimination because of maternity leave (section 18(4) Equality Act 2010);

B. Direct discrimination because of sex (section 13(1) Eq Act 2010);

C. Direct discrimination because of pregnancy (section 18(2)(a) Eq Act 2010);

D. Unfair Dismissal (section 94 Employment Rights Act 1996)

A. <u>Direct discrimination because of maternity leave (section 18(4) Equality Act 2010)</u>[1]

Did the Respondent treat the Claimant unfavourably because she was seeking to exercise her rights to maternity leave?

1. In the weeks/months surrounding her wedding on 5 July 2015, did the Claimant express an intention to become pregnant after getting married:

   a) In discussions with her colleagues about actively trying for a baby following her wedding in July 2015;

   b) Whilst discussing her rationale for giving up smoking with colleagues around the time she went to Italy in September 2015?

2. At a meeting on 19th August 2015:

   a) Did Mr Abel inquire as to whether the Claimant had any plans to become pregnant?

   b) Did the Claimant indicate any intention to exercise her right to maternity leave if she became pregnant whilst employed by the Respondent?

   c) Did Mr Abel advise that it would be difficult to replace the Claimant during her period of maternity leave?

   d) If so, was Mr Abel's enquiry prompted and/or hastened by the fact that the Claimant had got married in July 2015?

3. Was the Claimant treated unfavourably by the Respondent during or at any time after the meeting on or around 19 August 2015 by way of the following list:

   a. By asking her personal questions about her intention to exercise her right to maternity leave on 19 August 2015?

   b. By conducting a disciplinary meeting on 15th September 2015?

   c. By issuing a "verbal warning" (in writing) on 17th September 2015?

   d. By advertising for the Claimant's replacement on 13th October 2015?

---

[1] **"A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise or has sought to exercise, the right to ordinary or additional maternity leave"**

e. By conducting a second disciplinary meeting on 26th October 2015?

f. By issuing a written warning on 26th October 2015?

g. By failing to allow a sufficient period for the Claimant to appeal before instituting further disciplinary proceedings?

h. By dismissing the Claimant summarily on 29th October 2015 in circumstances that were both procedurally and substantively unfair? [see unfair dismissal below]

i. By refusing to accede to the Claimant's requests to be provided with the disciplinary procedure on or around 5th November?

j. By failing to adequately consider the Claimant's grounds of appeal?

k. By failing within a reasonable period to determine the Claimant's appeal?

l. By moving the Claimant's desk on 14 September 2015?

B. Direct Discrimination because of sex (section 13(1) Equality Act 2010[2]

Prior to the start of the protected period/pregnancy, did the Respondent treat the Claimant less favourably than it would treat others because of her sex?

4. When did the Claimant's pregnancy/the protected period commence? [The Claimant avers it was 22 October 2015]

5. In the weeks/months surrounding her wedding on 5 July 2015, did the Claimant express an intention to become pregnant after getting married?

   a. In discussions with her colleagues about actively trying for a baby following her wedding in July 2015?

   b. Whilst discussing her rationale for giving up smoking with colleagues?

   c. Around the time she went to Italy in September 2015?

6. At a meeting on 19th August 2015:

[2] **"A person (A) discriminates against another (B), if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"**

a. Did Mr Abel inquire as to whether the Claimant had any plans to become pregnant?

b. Did the Claimant indicate any intention to exercise her right to maternity leave if she became pregnant whilst employed by the Respondent?

c. Did Mr Abel advise that it would be difficult to replace the Claimant during her period of maternity leave?

d. If so, was Mr Abel's enquiry prompted and/or hastened by the fact that the Claimant had got married in July 2015?

7. Did the Respondent treat the Claimant unfavourably because of her sex:

a. By asking her personal questions about her intention to exercise her right to maternity leave on 19 August 2015?

b. By conducting a disciplinary meeting on 15th September 2015?

c. By issuing a "verbal warning" (in writing) on 17th September 2015?

d. By advertising for the Claimant's replacement on 13th October 2015?

e. By conducting a second disciplinary meeting on 26th October 2015?

f. By issuing a written warning on 26th October 2015?

g. By failing to allow a sufficient period for the Claimant to appeal before instituting further disciplinary proceedings?

C. Direct discrimination because of pregnancy (section 18(2)(a) of Equality Act 2010)[3]

During the protected period, did the Respondent treat the Claimant less favourably because of her pregnancy?

8. When did the Claimant's pregnancy/the protected period commence? The Claimant avers it was at the end of October 2015.

9. In the weeks/months surrounding her wedding on 5 July 2015, did the Claimant express an intention to become pregnant after getting married?

a. In discussions with her colleagues about actively trying for a baby following her wedding in July 2015?

[3] **"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably – (a) because of the pregnancy"**

b. Whilst discussing her rationale for giving up smoking with colleagues?

c. Around the time she went to Italy in September 2015?

10. At a meeting on 19th August 2015:

a. Did Mr Abel inquire as to whether the Claimant had any plans to become pregnant?

b. Did the Claimant indicate any intention to exercise her right to maternity leave if she became pregnant whilst employed by the Respondent?

c. Did Mr Abel advise that it would be difficult to replace the Claimant during her period of maternity leave?

d. If so, was Mr Abel's enquiry prompted and/or hastened by the fact that the Claimant had got married in July 2015?

11. Did the Respondent treat the Claimant unfavourably because of the pregnancy:

a. By dismissing the Claimant summarily on 29th October 2015 in circumstances that were both procedurally and substantively unfair? [see unfair dismissal below]

b. By refusing to accede to the Claimant's requests on 30 October 2015 and 3rd November 2015 to be provided with a copy the Claimant's disciplinary procedure?

c. By failing to respond and/or investigate the Claimant's appeal against dismissal dated 10 November 2015?

d. By failing to determine the Claimant's appeal?

The Respondent contends that this claim cannot succeed as the Claimant was not subjected to any less favourable treatment during her 'protected period' as the alleged less favourable treatment took place before the Claimant became pregnant

D. **UNFAIR DISMISSAL**

Was the Claimant unfairly dismissed contrary to the provisions of section 94 of the Employment Rights Act 1996?

The Claimant was employed between 30 August 2011 and 30 November 2015.

12. What was the reason for the Claimant's dismissal? [NB. The Respondent asserts that the Claimant was dismissed for the matters set out in the letter dated 30 October 2015].

Conduct

13. Did the Respondent have a reasonable belief in the Claimant's misconduct?

14. Was this belief based upon a reasonable investigation?

    a) What evidence was there of the Claimant verbally interfering with other members of staff and continually harassing work colleagues?

    b) What evidence was there for the Claimant's alleged unsatisfactory standard of work and poor performance?

    c) What evidence was there that the incomplete invoicing valued at £500,000 was the responsibility of the Claimant?

    d) What evidence was there the Claimant sent a photo of the family tree to Mr. Canfer?

    e) What evidence was there the Claimant was drunk on 29th October 2015 as alleged by the Respondent?

    f) What evidence was there the Claimant caused mayhem in the office on 29th October 2015?

    g) What evidence was there for the specific allegations made at the disciplinary meetings:-

        (i) No respect for the new management regime?

        (ii) Disobeying management instruction?

        (iii) Bad attitude?

        (iv) Creating a bad atmosphere in the office?

        (v) Making life uncomfortable for other members of staff?

        (vi) Failure to devote time and abilities in normal working hours?

        (vii) Poor or little communication and withholding information to and with management, other members of staff and clients?

Capability

15. If (which is unclear), the Respondent relies on capability in dismissing the Claimant:

    a) What evidence was there for the Claimant's alleged unsatisfactory standard of work and poor performance?

    b) What evidence was there that the incomplete invoicing valued at £500,000 was the responsibility of the Claimant?

    c) What evidence was there for poor or little communication and withholding information to and with management, other members of staff and clients as per the disciplinary meetings?

16. Was the Claimant given adequate time to rectify any poor performance?

17. Did the Respondent follow its own capability procedures?

General

18. Did the Respondent act reasonably or unreasonably treating the conduct/poor performance as sufficient reason for dismissing the Claimant?

19. Did the Respondent carry out a fair procedure when disciplining/dismissing the Claimant? The Claimant complains that the Respondent's procedure was unfair by[4]:

    a. Instituting fresh disciplinary proceedings on 29th October 2015, before the deadline had passed for the Claimant to appeal a disciplinary sanction imposed on 27th October 2015;

    b. Unilaterally and without warning, calling a disciplinary hearing without giving any notice to the Claimant;

    c. Failing to notify the Claimant that she had the right to be accompanied at the disciplinary hearing;

    d. Effectively preventing (by lack of notice – see above) the Claimant from being accompanied at the disciplinary hearing;

    e. Failing to set out the allegations made against the Claimant at the disciplinary hearing;

    f. Failing to take minutes of the disciplinary meeting so that the Claimant could launch an effective appeal;

[4] Non-exhaustive list

g. Failing to give the Claimant an opportunity to address the Respondent's allegations either:

- In the meeting;

- After the meeting (if capability is being averred as the reason for the dismissal);

h. Failing to consider any mitigation that the Claimant might have;

i. Unreasonably taking into account (recent) prior disciplinary action that was to be the subject of an appeal;

j. Conversely, unreasonably failing to take into account a prior unblemished disciplinary record prior to the recent disciplinary action;

k. Unreasonably failing to take into account the Claimant's length of service;

l. Failing to follow the ACAS Code of Practice;

m. Failing to follow its own disciplinary policy:

A> In respect of misconduct;

B> In respect of capability;

n. Failing, unreasonably on two occasions, to provide the Claimant with a copy of its disciplinary policy following her dismissal;

o. Failing to consider, adequately or at all, the Claimant's grounds of appeal against dismissal.

20. Did the decision to dismiss the Claimant fall within the band of reasonable responses available to the Respondent?

21. Did the Respondent consider any alternative sanctions open to it other than dismissal?

22. Is the Claimant entitled to a 25% uplift for the Respondent's unreasonable failure to follow the ACAS Code of Practice?

23. If the dismissal is held to have been unfair, should any compensation be reduced:

a. Did the Claimant contribute towards her dismissal? If so, by what %?

b. Would the Claimant still have been dismissed if a proper procedure had been followed? (i.e. *Polkey* reduction)

Outline chronology

30 August 2011	The Claimant commenced employment with CS Maintenance, a part of Cool Systems Group ("CS Group") as Maintenance Coordinator based in the West Horndon office. Her line manager was Wayne Canfer.
December 2012	Cool Systems Group purchased the business of C & L Facilities based in Braintree, Essex.
April 2014	C S Maintenance and C & L Facilities merged into one company, the Respondent, located in Braintree.
15 July 2015	Claimant got married.
Circa 14 August 2015	Wayne Canfer was dismissed.
19 August 2015	Conversations between Claimant and Mark Abel – contents disputed.
3 September 2015	Claimant sent welcoming message to Jodie Douglas her new manager about to start (p.71).
7 September 2015	Jodie Douglas commences employment with Respondent as office manager.
8, 9 & 10 September 2015	Jodie Douglas has meetings/"induction" with Mark Abel.
7 & 11 September 2015	Claimant on annual leave.
14 September 2015	Claimant returned to work - desk had been moved so she was facing the wall.
8.50am	Jodie Douglas to issue Claimant with verbal warning (p.73).
15 September 2015	Jodie Douglas had disciplinary meeting with the Claimant (pp.74-75).
17 September 2015	Letter handed to Claimant by Mark Abel recording "verbal warning" in relation to misconduct (pp.78-79).
9 October 2015	Wendy Rowley gave Respondent written notice of intention to retire on 31 December 2015 (p.83A).
13 October 2015	Respondent advertised for three positions online (p.85A).

26 October 2015	Mark Abel in management committee meeting noted that he would be hiring “Rachel to replace” the Claimant.
26 October 2015	Disciplinary meeting held with Claimant re misconduct (pp. 88-89).
27 October 2015	Claimant received written warning dated 26 October (p.90).
29 October 2015	Claimant dismissed on notice in brief meeting with Mark Abel.
30 October 2015	Claimant requested copy of Respondent’s disciplinary procedures by email (p.30) indicating that she was going to appeal against her recent disciplinary. Respondent offered Claimant’s job to Rachel.
31 October 2015	Letter confirming dismissal dated 30 October sent to Claimant (p.93).
3 November 2015	Claimant requested disciplinary procedures again (p96) in letter addressed to Mr Kelly, CEO. Indicated that she intended to appeal.
4 November 2015	Respondent indicated on social media that all 3 advertised positions had been filled (p97).
5 November 2015	Respondent (Mr Kelly) refused to provide copy of disciplinary procedures to Claimant (p.98) and told her her appeal was not duly presented and out of time.
10 November 2015	Claimant sent in grounds of appeal against dismissal (pp.99-100).
23 November 2015	Claimant chased appeal against dismissal.
4 December 2015	Claimant started ACAS EC procedure.

26 It was confirmed in closing submissions on the part of the Respondent that they justified the dismissal on the basis that it was by reason of conduct and that was a potentially fair reason under section 98(2)(b) of the 1996 Act. However, it was also asserted that the reasons for the Claimant’s dismissal were those matters set out in a letter dated 30 October 2015 (p.93), matters which fell in the potentially fair categories of conduct and capability.

27 There was no dispute that the Claimant was dismissed on notice by the Respondent on 29 October 2015. It was equally not disputed by the Respondent that this was done orally by Mr Abel. The dismissal was confirmed to the Claimant by a letter dated 30 October 2015 (pp93 - 94) which was a Friday. The Respondent relied

on the factual matters set out in that letter. In particular, the second paragraph of the letter stated:

> "*Despite a verbal and written warning and several minuted discussions with your line manager and senior management your standard of work remained unsatisfactory, as set out in your contract and accompanying employee handbook. You continued to fail to carry out all reasonable instructions and follow our rules and procedures that are set, you also failed to devote your whole time, attention and abilities to the business during normal working hours and you continued to harass other employees.*
>
> *At the hearing you offered little response to these points.*"

28 The letter continued that as per the Claimant's statement of main terms of employment she was entitled to one month's notice from the company to terminate her employment, and that her final salary would be paid on Monday 30 November 2015 which was the normal monthly pay run date. The letter also stated that that would be the date on which her employment with the Respondent officially terminated.

29 The fifth paragraph of the letter informed the Claimant that she had the right to appeal against Mr Abel's decision and that if she wished to do so she should write to Steve Kelly, CEO within five working days giving the full reasons why she believed the disciplinary action taken against her was too severe or inappropriate.

30 In assessing whether this was a fair dismissal the Tribunal had regard not only to the statutory test in relation to fairness which was set out in section 98(4) of the 1996 Act and the ACAS Code of Practice on Disciplinary Procedures but also to the admitted circumstances of the dismissal and to our findings of fact.

31 The first stage of the process was to determine whether the dismissal was for the reason relied upon by the Respondent, the burden of proving the reason for dismissal lying on the Respondent. It is well established that the reason for the dismissal of an employee is "*a set of facts known to the employer, or it may be of beliefs held by him, which caused him to dismiss the employee*": <u>Abernethy v Mott, Hay & Anderson</u> [1974] ICR 323 CA. For this reason, therefore the Tribunal had to decide what the reason for dismissal was and to make that determination in relation to the discrimination claims brought by the Claimant.

32 There was in fact a considerable degree of agreement about the background facts although that did not have a mitigating effect on the level of contention between the parties.

33 The Claimant's case was that in the run up to her wedding in July 2015 and thereafter before conceiving, she talked about and shared with her colleagues her intention to have a baby. Whilst there was dispute between the parties as to whether Mr Abel was aware of this prior to September 2015, he certainly accepted that by very early September 2015 he was aware of this intention. In particular, the Claimant argued that during a conversation with Mr Abel a week or so after her previous manager Mr Canfer's employment was terminated, Mr Abel asked her to inform him as soon as she could if she became pregnant and needed to take time off for pregnancy.

Mr Abel initially denied having had this conversation. The Tribunal considered that he subsequently partly accepted that this issue had been discussed at about that time.

34 We considered that it was likely that the Claimant would have had a clearer recollection of this conversation than Mr Abel. However, even accepting the Claimant's evidence about the conversation, the Tribunal did not consider that the effect was that Mr Abel indicated that he did not want the Claimant to take time off or that he had a negative approach to a possible pregnancy or maternity leave. He simply asked to be given as much notice as possible.

35 In assessing the evidence, the Tribunal took into account the general background which was not in dispute that at about this time the Respondent was facing various financial and organisational challenges which had in part led to the termination of the employment of Mr Canfer. Indeed, his replacement was not someone with an engineering background like Mr Canfer's, but was an Office Manager in the form of Ms Douglas.

36 It was also relevant and it was not disputed that Mr Abel recruited Ms Douglas as Mr Canfer's replacement knowing that she was due to get married by the end of 2015. To that extent therefore there was no difference materially between the position of the Claimant and of Ms Douglas. Indeed, Mr Abel recruited Ms Douglas to a more senior position as the Claimant's Manager.

37 It was also relevant and it was not disputed that one other member of staff Ms Brown, had taken maternity leave. In her witness statement, she described that this had taken place from the very end of 2014 and that Mr Abel had been supportive and flexible about her return to work. The Tribunal also noted that the other female witness that we heard from as an employee of the Respondent, Ms Hardy, was also a young woman, apparently, like Ms Douglas and the Claimant, of child-bearing age.

38 Finally, in this context, the Tribunal ascertained in hearing evidence about the 29 October termination of the Claimant's employment that Mr Abel had been at home on that day away from the office looking after his young children.

39 The picture therefore in the background was not one which tended to point towards discrimination because of maternity leave or pregnancy. Indeed, the only direct evidence that the Claimant relied on in support of her contention that there was a negative approach towards maternity was the question by Mr Abel in relation to when she proposed to take maternity leave. The other matters relied on by the Claimant as background tending to point to discrimination were arguments that there had been a breach by the employer of the statutory code of practice of the EHRC (para 8.22); and other matters relating to the manner in which the Respondent dealt with the Claimant's employment from September to October 2015. These were characterised by the Claimant as unanswered or evasively answered questions. The Claimant similarly relied on the Respondent's conduct during the proceedings and accused the Respondent of having given unsatisfactory disclosure.

40 The Tribunal fully accepted that the Claimant had discussed her wishes to become pregnant with friends in the office and that she had also given up smoking around the time of her wedding again with a view to facilitating a healthy pregnancy. It

was also not disputed that the date of commencement of the pregnancy was taken as 22 October 2015. However, the Claimant did not have this pregnancy confirmed until attendance at her doctors' surgery for a pregnancy test in the first week of December 2015. She indicated that she had taken a home pregnancy test before that. The Tribunal accepted that it was likely that if the last monthly period was on 22 October 2015 the home pregnancy test was unlikely to have occurred until shortly before the expiry of notice of termination of the employment. The Claimant had not therefore established that she was pregnant before being given notice of termination of her employment on 29 October 2015, and certainly not that the Respondent was aware of her pregnancy during the employment which ended on 30 November 2015.

41 At the time that she was recruited, Ms Douglas planned to get married in December 2015. Whilst accepting that the Claimant had given up smoking and had either stopped drinking altogether or greatly restricted her consumption of alcohol, the Tribunal did not consider that this was a matter which would necessarily have been noticed by Mr Abel, at least not immediately. Indeed, however unfair and erroneous it was, the tribunal found that Mr Abel's belief on 29 October 2015, her last day in the office, was that the Claimant had consumed alcohol that day.

42 Also, there was evidence that the Respondent let other members of staff go at about the same time as Mr Canfer lost his employment (Claimant's witness statement para 16). There was no suggestion that any of those dismissed members of staff was pregnant or anticipating taking maternity leave. The evidence painted a picture of reorganisation and financial challenges for the Respondent at the material time. The Tribunal also took into account that this sort of a background can be consistent with, but not determinative of discrimination on grounds of sex and/or in relation to maternity/pregnancy.

43 The Claimant placed considerable emphasis on the discussion about her prospective pregnancy with Mr Abel on 19 August 2015. She argued that it was only after this meeting that the first of the disciplinary proceedings took place on 15 September 2015 when previously the Claimant had enjoyed an unblemished disciplinary record. The Tribunal accepted that the Claimant's disciplinary record was unblemished up to that point. However, the other new, and in the Tribunal's view, material element was the recruitment of Ms Douglas. It was not in dispute that the Claimant had had no difficulties when managed by Mr Canfer. However, it was apparent as already noted that Ms Douglas had a very different background not being from an engineering background and her relationship with the Claimant professionally was not a good one. The documents which were produced relating to discussions between management showed that from the start of her employment Ms Douglas found it challenging working with "the girls in the office" and described the Claimant and her colleague Ms Thearle in particular as making comments and deliberately making life difficult for her. She reported this in a management meeting on 14 September 2015.

44 It was apparent also from the chronology as set out above which was also effectively agreed that the Claimant was not at work when Ms Douglas started on Monday 7 September. The Claimant had known that Ms Douglas would be starting work then. For this reason, the Claimant, who had previously worked with Ms Douglas, sent her a text message on 3 September 2015 congratulating her on being appointed

to the job and welcoming her to the team. She also explained that she was sorry that she would not be there to meet Ms Douglas on her first day as she was going on a weekend break to Italy. She stated that she was looking forward to meeting Ms Douglas on Tuesday 8 September.

45 Prior to Ms Douglas' arrival, the only evidence of any difficulties for the Claimant at work was a note in the minutes of a management meeting held on 2 February 2015 at which Mr Kelly, Mr Canfer, Mr Paul Jackson a Director, and Mr Abel were present. Notes (pp63 – 66) were taken by Ms Brown. One of the issues that was discussed was about the delineation of roles in relation to the work planner and scheduling, and a lack of communication around it. A comment was made by Mr Jackson that the planner should be run by Emma Thearle "without the involvement" of the Claimant. In another part of the discussion in the same meeting it was noted that communication in the C & L office needed to be better and that the Claimant needed "to be kept under control". This latter comment was made by Mr Abel. Mr Jackson commented that it helped to be blunt with the Claimant and Mr Kelly indicated that he believed that she had the "wrong attitude".

46 The Tribunal considered that it was apparent from the evidence that the Claimant was rather more outspoken and apparently confident than were her colleagues who gave evidence. However, this did not mean that she was doing anything wrong in terms of her job performance. Rather, the evidence suggested very strongly that the Claimant used her initiative and dealt with matters promptly rather than leave them for someone else. This is considered an asset in the workplace in many contexts. Sadly, she was criticised later for using her initiative in this way, and indeed the discussion in the management meeting in February 2015 about her involvement in the planner also seemed to be see this quality as a failing.

47 Mr Canfer confirmed that at some point he was asked by the Board to speak to the Claimant about her verbally interfering with other members of staff. It was likely that this related to the management discussion in February 2015 just referred to, although Mr Canfer was unable to specify when this request was made of him. His witness statement indicated that he did not agree with the other managers' interpretation of the apparent interfering. His perception was that the Claimant was a capable employee who had a good grasp of the systems and processes in place. His perception was that she conversed with other team members to offer assistance and training with the new system in performing their functions. Nonetheless in his witness statement Mr Canfer indicated that he had complied with the Board's instruction and spoken with the Claimant about her approach. He stated that he also spoke with the other team members to assist them with their concerns. This merely constituted evidence of ordinary management interaction with a member of staff.

48 Mr Canfer noted that there was constant tension within the office. However, he attributed the tension to other factors partly related to the changing structure of the business and the difficulties of integration and management. These observations corresponded with contemporaneously documented perceptions of others, and they appeared to the Tribunal to be accurate.

49 On the other hand, the examples of alleged misconduct by the Claimant relied on by the Respondent did not amount to such, in the Tribunal's view. Further, as is set out below, given the many failures to identify and give details of the alleged misconduct to the Claimant, the Tribunal also considered that the managers had no adequate or proper basis for concluding that the reports of misconduct by the Claimant were accurate.

50 Mr Canfer's assessment that the Claimant was the most familiar with the processes was somewhat confirmed by the evidence we heard about the invoices. The Respondent incorrectly believed, at about the time that Mr Canfer's services were dispensed with, that there was a backlog of some five months in relation to invoices. Up to that point the Claimant, Ms Rowley, Ms Thearle and Ms Brown had all been responsible for chasing invoices, with the Claimant, Ms Rowley and Ms Brown each being responsible for chasing 27% of the invoices, and Ms Thearle who was a more recent and less experienced member of staff, being responsible for chasing 19%.

51 It was then not disputed that shortly after Ms Douglas was recruited the Claimant was asked to deal with all or virtually all the invoices. Thus, the responsibility given to her in this respect was greatly increased. The management records show that in the meeting with Ms Douglas on 15 September 2015 (pp.74 and 78) the Claimant indicated that she did not understand the allegations being levelled against her and was unsure of the priorities and importance of the duties within her role. She was recorded as stating that she thought there had been too many changes in one week and she requested help with invoicing. She was not given the clarification she requested at that meeting.

52 It was next recorded that the issue of invoices and invoicing was raised again at a meeting with Ms Douglas on 23 October 2015. Ms Douglas indicated that the Claimant needed to get invoicing numbers down to single figures by the following Friday. The Claimant responded that the invoicing had gone down and that in a couple of days "they" would have it done. Ms Douglas challenged her as to why there was more than one person working on it and told the Claimant that it was her task to complete and asked why she had asked Emma Brown to help. Ms Douglas asked about who had done invoicing before Ms Brown and indicated that she wanted the invoicing done by the Claimant only and that Ms Hardy would not be helping her after 23 October the date of the meeting.

53 There was some further discussion about the fact that the Claimant was still getting communications and demands on her time in relation to other tasks which she had previously done and not just invoicing. Ms Douglas expressed the view, in relation to Emma Brown helping, that the Claimant was doing things "behind her back". When this was raised with the Claimant she indicated that she did not realise that this was a problem and she thought that it was legitimate for Ms Brown to have helped. In this context, Ms Douglas referred to what she had been told by others. She had no direct evidence of the concern. The Claimant indicated a reluctance to get involved in what she described as: "he said/she said".

54 Ms Douglas referred to the fact that the Respondent was currently interviewing and that they needed people who worked as a team. The question of working as a team had come up also earlier in this conversation. The conversation reverted to a

discussion about the invoicing and the need to complete it or at least reduce it to single figures by the following week.

55 During the conversation, the Claimant referred to the difficulty of getting accurate information in support of the invoices previously dealt with by her colleague Wendy Rowley. This was relevant in relation to the subsequent incident which occurred between the Claimant and Ms Rowley in which it was said by the Respondent that the Claimant had harassed Ms Rowley. The only witness who was directly involved in that incident or witnessed it who gave evidence to this Tribunal was the Claimant. The Respondent had no evidence from Ms Rowley about the episode, nor did the member of management (Mr Kelly) who was said to have witnessed this make a written record contemporaneously or subsequently. Nor did he give evidence to the Tribunal about what was alleged to have occurred.

56 In all the circumstances, the Tribunal accepted the Claimant's account of the incident, namely that she had merely been trying to get information from Ms Rowley in order to render the correct invoices. Ms Rowley had been resistant but the Claimant had had to insist that the information she required was produced. This was consistent with the contemporaneous evidence about the Claimant being under some pressure to clear the backlog of invoices. This exchange was overheard by someone who reported the matter to another member of management of the Respondent and in due course Ms Douglas was given the responsibility of asking the Claimant about this. The meeting at which this was discussed took place on 26 October 2015 (pp.88-89).

57 Once again after Ms Douglas had reported to the Claimant that the managers wanted an update on the meeting of the previous Thursday, and that they were not happy, Mrs Stower questioned whether this related to invoicing. She was told that Mr Kelly had seen the Invoice and Work In Progress figures and that he was not happy. The Claimant protested that she had got down to six jobs. This appeared to be consistent with the target that she had been asked to achieve the week before.

58 It then appeared that there was some misunderstanding between the Claimant and Ms Douglas as to the exact scope of the task that she was supposed to be completing. However, when the matter was brought to her attention, the Claimant indicated a readiness to comply with Ms Douglas' now enlarged request. During the conversation, Ms Douglas referred to having sent out an email to the Claimant on the Thursday night to which the Claimant had not responded. The Claimant indicated that she did not realise that a reply was warranted. The email referred to did not form part of the bundle.

59 Ms Douglas then again referred to Mr Kelly getting annoyed and that he wanted to make money and was not doing so. She then referred to it having been brought to her attention that the Claimant had been harassing Ms Rowley that day about a call out. She asked the Claimant to speak to her (Ms Douglas) in future. The Claimant explained that she had asked her colleague as she did not want to be criticised in relation to not having that information. Ms Rowley had then apparently got annoyed. The reference to call out was about an invoice for a past call out. It therefore appeared to the Tribunal that the Claimant was simply seeking to carry out her duties as requested by the Respondent.

60 The matter was not pursued by Ms Douglas. It did not appear that she had any more or direct or specific information about the circumstances of the alleged harassment than she put to the Claimant.

61 Among other matters which were raised, Ms Douglas referred to concerns from management about staffing in the office after 5pm. She then continued that if the Claimant got the invoicing down to single figures by Friday, the next question would be why could she not have done this before. It appeared to the Tribunal that the Claimant's response to this was fair, namely that she was now doing only this task. Ms Douglas then asked for reassurance that the Claimant would be able to keep up to date in the future.

62 She then moved on to say that it had been "mentioned" that the Claimant took a photograph of the Respondent's "family tree". This was a reference to a structure chart showing the management and hierarchy within the Respondent. No details of this allegation or its source were put to the Claimant. It was also not apparent to the Tribunal that Ms Douglas knew any more about the allegation than she put to the Claimant as set out above. The Claimant asserted her innocence of this charge and offered her phone to Ms Douglas to check. Ms Douglas did not take up the opportunity but then pursued the question about whether the Claimant was still in touch with Mr Canfer (p.89).

63 The Tribunal has referred in some detail to the notes of the conversation because it appeared to the Tribunal that the way in which matters were being dealt with by the Respondent and through them by Ms Douglas was extremely unsatisfactory. It was necessary to review these matters because the Respondent relied on this as forming the history which led to the notice of termination of the employment on 29 October.

64 As is apparent from the Tribunal's findings, especially having regard to the Respondent's admissions in relation to the lack of procedure in relation to 29 October, the dismissal was, in this Tribunal's view, certainly unfair both procedurally and substantively because the way in which it was dealt with by the Respondent meant that they were not in a position to assess fairly whether the Claimant's employment should be terminated. The Tribunal also had to consider the question of whether reductions needed to be made to the award either by reason of the operation of the principles in the case of *Polkey* or because of contributory conduct. Thus, it was necessary to reach a view about the conduct on the Claimant's part that was criticised.

65 The Tribunal considered that the notes of this meeting also indicated that the Claimant was being asked to complete tasks but then was being criticised when she attempted to perform them. She was accused of harassing a colleague but there was no detail provided to her and when she gave what appeared to be a valid answer she was not told whether that explanation was satisfactory.

66 The witness statement prepared by Ms Rowley and adduced by the Claimant was the subject of some controversy. The Respondent cast doubt on its authenticity. In particular, they pointed to the date as set out above on which it purported to have been signed. It was neither proportionate nor possible for the Tribunal to have resolved this issue within a reasonable time. The Tribunal however had regard to the

uncontroversial letter in which Ms Rowley notified the Respondent of her intention to retire on 31 December 2015. While she referred to this having been a decision which she had pondered for some time, she made no reference in it to the Claimant, or to her colleagues having caused or contributed to this decision.

67 The Claimant's evidence to the Tribunal which was consistent with her account of the incident just prior to the meeting on 26 October 2015 just referred to, was that Ms Rowley found certain aspects of the job challenging. Indeed, the Tribunal noted that when Ms Thearle was also interviewed in a disciplinary context by Ms Douglas on 15 September 2015, she also referred to there being problems with Ms Rowley and that she made mistakes. She protested that the Respondent was giving Ms Rowley special treatment.

68 The note of Ms Thearle's perception also corroborated Mr Canfer's and the Claimant's picture of there being difficulties in terms of a general management view about the C & L staff (p.77). It appeared that the C & L staff were aware of that negative perception.

69 There was thus evidence of alternative reasons for Ms Rowley's supposed discontent with her job. There was no adequate reason on the evidence to consider that the Claimant was the cause of any dissatisfaction on Ms Rowley's part.

70 In relation to responsibility for invoicing and the reorganisation of duties, there was evidence of an email dated 24 September 2015 (p.82) from Ms Douglas in which she informed everyone about the change to responsibilities and arrangements in the office.

71 It was also relevant in relation to the allegation of the Claimant harassing Wendy Rowley that there was no contemporaneous or subsequent evidence from Wendy Rowley describing any harassment. The Tribunal concluded that the exchange between the Claimant and Ms Rowley had been overheard in part and then misconstrued.

72 Nothing further was discussed with the Claimant about having photographed the family tree (organisation chart) other than Ms Douglas's comments referred to above in the 26 October 2015 meeting. No basis for the suspicion was put to the Claimant contemporaneously or indeed in the Tribunal hearing. In the Tribunal hearing, there was some difficulty on the Respondent's part in describing what the issue was about this. Indeed, it was interesting that Ms Douglas who questioned the Claimant about this in the meeting in October 2015 was not able to explain what was wrong with what the Claimant had done. As stated above Ms Douglas declined to inspect the Claimant's mobile phone at the time.

73 At the end of the meeting on 26 October Ms Douglas told the Claimant that the result of the meeting would be a formal written warning on her records. The reason for the warning was unclear and indeed the Claimant had not been given proper notice that this was to be a disciplinary meeting.

74 The meeting with the Claimant which took place at 3pm on 26 October 2015 had to be understood in the context of the management meeting which took place earlier that day at 9.30am and which was attended by Mr Kelly, Mr Abel, Mr Gray and Ms Douglas. Notes of that meeting were made (pp87A – 87C).

75 As part of her report as Office Manager Ms Douglas told her colleagues that she had spoken with the Claimant in the presence of Ms Hardy the previous Thursday and that another warning had been issued. At the Tribunal hearing, it was not suggested by the Respondent that a warning had indeed been issued at or following the meeting which had taken place with the Claimant on 23 October 2015 (pp.86-87). This report was therefore incorrect.

76 The Tribunal considered these minutes indicated again that there was a considerable lack of clarity and/or understanding on the part of the Respondent's managers as to normal management processes and disciplinary procedures. The notes recorded that Ms Douglas continued that she had told the Claimant that she needed to perform, that she was not doing her job, and that she should not involve and try to "dump on" others. It was noted that minutes of the discussion with the Claimant had been made. However, as already stated, the minutes of the previous discussion between the Claimant and Ms Douglas did not confirm this report.

77 Finally, Ms Douglas was minuted as saying that the Claimant had been warned that this was her last chance and that there would be no more warnings. As set out above in fact the disciplinary warning was given at the meeting which occurred later on 26 October 2015. There was no warning given at the meeting which took place on 23 October and indeed it was common ground during the Tribunal hearing that the note of the meeting on 23 October was headed "Disciplinary" in error (p.86).

78 Further, Mr Abel was noted as having made reference to his observations about the Claimant's apparent lack of work the previous week, and saying that there should be "*NO excuses this week. NP has been warned. Single digit figures by Friday 30th or contract termination*". This background informed in part, his perceptions and actions on 29 October.

79 It further appeared to the Tribunal that the meeting that took place later that day between Ms Douglas and the Claimant was an attempt on Ms Douglas' part to put this management approach into effect.

80 Further still, in the meeting in the morning of 26 October 2015, Mr Abel was noted as having reported back to his colleagues about the recruitment process, among other things. The recruitment process was being undertaken ostensibly to find a replacement for Ms Rowley. Her notice of termination had been handed in on 9 October. Advertisements had been placed by 13 October 2015. However, the Respondent had placed advertisements for three positions, one of which bore a strong resemblance to the role which the Claimant was performing. She saw it and wrote to Mr Abel (p.85A) on 15 October 2015 to ask why the Respondent was advertising that three positions were available. Mr Abel's prompt response was to the effect that the replacement for Ms Rowley "may mean we have to change things around, so we are looking at all three options as the replacement". The Claimant appeared to accept his explanation in her response. She explained in turn that she had read the advertisements as meaning that the Respondent was recruiting to three positions.

81 That background was also relevant when considering the notes of Mr Abel's contributions when he was reporting to his colleagues on 26 October 2015 at the 9.30am management meeting (p.87B). He indicated that he would be making an offer to someone called Holly to replace Ms Rowley and that Holly was on one week's notice. He then continued that another interviewee, Rachel, had a second interview the following day and that if all was agreed they would hire Rachel to replace the Claimant. They indicated that the prospective new recruit Rachel was on a month's notice.

82 The Tribunal found that Mr Abel had no valid explanation for this entry. The Claimant had not indicated an intention to leave the Respondent. There was no process underway by which her performance was being fairly or properly monitored, nor had she committed any act of misconduct which would jeopardise her employment. She had certainly not been given notice of termination of her employment at this point. It was therefore completely inappropriate for the Respondent to be in the process of hiring someone to replace her. At most at that stage, Mr Abel had been incorrectly told that the Claimant had been given a warning.

83 The Respondent's position in relation to why the three posts were advertised remained the same at the hearing as had been given to the Claimant.

84 The Tribunal also considered that the management meetings gave a distinct picture of the disciplinary action being predetermined in relation to the Claimant on each of the occasions. The outcomes had been identified even before the meetings had taken place (apart from in relation to the dismissal) and it was consistent with the Tribunal's finding that the Respondent had not really put any matters of substance clearly to the Claimant and had not taken on board any responses that she made before finding that warnings were appropriate.

85 The first management meeting which took place during the time that Ms Douglas was Office Manager was noted as having been on 14 September 2015 (pp.72-73).

86 The Claimant complained that there were no minutes of the meetings between Ms Douglas and Mr Abel during the first week. The Tribunal did not consider that on the balance of probabilities it was appropriate to draw adverse inferences from this. Ms Douglas was in a loose sense being inducted in that week and the Tribunal would have expected there to have been quite a considerable number of discussions with her in order to put her in the position to take up the reins of her new post.

87 In addition, the Tribunal considered that such minutes as had been disclosed (and were made) sufficiently established on the balance of probabilities the argument that the Claimant wished to make in relation to predetermination of outcome in respect of the disciplinary action of the verbal warning and then the written warning on 26 October 2015.

88 The Tribunal has already quoted some of the points being made by Ms Douglas in the meeting of 14 September 2015 (p.72).

89 During the management meeting of 14 September 2015, the managers discussed the Office Manager's report. Ms Douglas gave examples of incidents which she considered were illustrative of the Claimant and Ms Thearle deliberately making life difficult for her. The first was in relation to contacting IT. This criticism is only comprehensible (although not substantiated) if one accepts the Claimant's case that she was the most familiar with the IT systems that were being used and which had been introduced shortly before.

90 In her witness statement Ms Douglas indicated that the training that she was given on the IT systems was very basic and not very helpful. She criticised the Claimant for being defensive when she asked other members of the team for some insight on how they ran things day-to-day. She also indicated that the Claimant told her that she (Ms Douglas) had done some entries on the system "all wrong". She then described contacting the in-house system support centre on Friday of her first week and that they ran her through the system and how to run reports etc. As a result of this, she believed that the Claimant's criticism of her running of the report was not justified and that she had indeed done the reports correctly and also the support centre showed her how to do the invoicing. It was as a result of this that she believed that she had discovered that the Respondent was "months behind" in relation to invoicing which included a lot of air conditioning invoicing.

91 By the time of the Tribunal hearing it was accepted by the Respondent that this was not actually the correct position. Although there was some backlog, only some of it was the responsibility of the department the Claimant was in; and within that, only some of it was the Claimant's responsibility. The Tribunal also took into account that all the members of staff were working on a new system.

92 What was missing however from Ms Douglas' account of being obstructed by the Claimant was any discussion with the Claimant subsequently to try to clarify matters. It appeared to the Tribunal that it was quite possible that there had been misunderstandings in communication especially as Ms Douglas was unfamiliar with the system. The Tribunal considered it was also highly material that the Friday of the first week that Ms Douglas described was a day on which the Claimant was absent and on the previous Tuesday, Wednesday and Thursday although the Claimant was present it was agreed that she and Ms Douglas had had very little to do with each other because Ms Douglas was busy acquainting herself with and being inducted into her new position.

93 Further, in relation to the criticism about the Claimant contacting IT, it was apparent that the Claimant had no idea either at the time or subsequently, what Ms Douglas had taken umbrage about. In her witness statement, she addressed the possibility that she was being criticised for contacting IT support without telling Ms Douglas. Whatever the criticism was in this respect, it was apparent that Ms Douglas had not raised this issue with the Claimant at any point during the employment.

94 Another reason for Mrs Stower (the Claimant) being the most familiar with the system was that apparently, she had been the only person sent on the training course about it by Mr Canfer.

95 Throughout the case there was an insinuation that the Claimant and Mr Canfer were not just good working colleagues but "good friends" with the implication being that they were friends outside of work. The Tribunal considered that even if they were, there was nothing about that that should have threatened or undermined the Claimant's employment. However, the Tribunal accepted the evidence of both the Claimant and as set out in Mr Canfer's statement that their relationship was purely professional. There was no evidence to substantiate the insinuation. The Tribunal considered that it was very likely that Mr Canfer being more experienced and potentially more confident in his role than Ms Douglas was, had managed the Claimant in such a way as to exploit attributes which he considered to be positive, but which were seen as negative by other managers. This was a perfectly credible explanation for the better relationship between himself and the Claimant at work than was the case between the Claimant (and others) and Ms Douglas.

96 It was also clear from the account of Ms Thearle's reaction when she was brought in for a disciplinary discussion at the same time as the Claimant was on 15 September which led to verbal warnings, that she felt that her efforts on behalf of the Respondent were being misconstrued and that from then onwards she would "not say anything just do as she was told" and not go out of her way for management (p.77A).

97 At the management meeting on 14 September, the next example of the Claimant making life difficult for Ms Douglas was a reference to the "Jeans for Genes Day". This was a reference to a charity event which the Claimant had organised the previous year with the permission of Mr Kelly the CEO. Against that background the Claimant approached Mr Kelly in September 2015 and asked if the Respondent would support the charity again and Mr Kelly declined. The Claimant subsequently learned from Ms Douglas that the view was that the Claimant should have spoken to Ms Douglas first before asking Mr Kelly. The Tribunal considered that any reasonable employer would have seen the Claimant's actions as an indication of the Claimant using her initiative, as opposed to being an example of an employee trying to undermine her new manager.

98 The situation was compounded by the fact that this matter was not raised with the Claimant at the time. It appeared to the Tribunal that at the very most Ms Douglas could simply have raised this matter with the Claimant in a positive way and explained to the Claimant that she wished such enquiries to come through her in future.

99 In assessing fairness under section 98(4) of the 1996 Act, the Tribunal also had regard to the size of the Respondent. The Respondent employed only 16 members of staff (p.20). A strict chain of command approach was somewhat surprising in that situation.

100 The next example of misconduct relied upon by the Respondent was of the Claimant not passing on messages from Mr Abel and from an engineer called Dean Currie. There was similarly no dispute about the general factual background of the issues of not passing on the messages.

101 Mr Abel had called the office (the Claimant believed this was from the nearby public house where he was meeting with Paul Jackson). He had asked for the phone calls from Mark Harris' company mobile phone to be directed to Mr Jackson. Mr Harris had just resigned from the company and had left his phone on his desk. The criticism of the Claimant was that Mr Abel had asked for this task to be carried out by Ms Douglas, and that the Claimant had done the task herself. The Claimant used to manage the company mobile phones but earlier that day she had passed them over to Ms Douglas. At the time of the telephone call from Mr Abel, Ms Douglas was in a meeting and it was nearly the end of the day so Mrs Stower decided to handle the request herself. She then rang Mr Abel and Mr Jackson back and told them that she had completed the task. She did not inform Ms Douglas about the exchange or leave a note for her about this before the Claimant left later that day. She indicated that it had slipped her mind. There was no evidence that the failure to notify Ms Douglas of what she had done that evening caused any difficulty to her or to the Respondent.

102 Once again, the Tribunal considered that this was a simple administrative task which the Claimant was clearly capable of carrying out and that many an employer would have considered that this was an example of an experienced member of staff using their initiative appropriately in the circumstances.

103 The matter was noted as having been raised with the Claimant at the disciplinary meeting which took place on 15 September 2015, along with the issue relating to Dean Currie.

104 The final example given by Ms Douglas of having her life made deliberately difficult by the Claimant was about not passing on messages from Dean Currie. This was another instance of the Claimant carrying out a task which she had previously had responsibility for and as far as the Tribunal could see on the date that it occurred she still had responsibility for logging on absences in relation to engineers. It appeared that she had forgotten to notify Ms Douglas so she could log this on to the human resources record online but that she had made a note of the engineer leaving early on the service planner where jobs for the engineers were logged. This was one of the matters which then featured in the round robin email which Ms Douglas subsequently sent on 24 September 2015. She made it clear that other than in relation to supervisors, sickness should be reported to her. She confirmed that the members of the team would still be organising the engineers' monthly planner (p.82).

105 The Claimant's case was that she had spoken to Ms Douglas about this prior to the management meeting on 14 September and that she had apologised for not informing Ms Douglas about this and that they had agreed to move on.

106 The minutes of the 15 September meeting between the Claimant and Ms Douglas confirm (at p.75) that this had been discussed and that Ms Douglas had "*let* [the incidents relating to both Mr Harris' phone and Dean Currie] *go*" and that they needed to start working together. It was clear to the Tribunal that the verbal warning letter on 17 September which followed the meeting did not then accurately reflect this outcome at least. Part of the content is set out below.

107 In a different context, it was noted as part of Ms Douglas' report that the Claimant and Ms Thearle were not happy with the idea of a "bible". The reference to a bible was to a document setting out the procedures to be followed. Here also, there was a dearth of evidence suggesting that this was actually discussed with the Claimant at the time. Her case to the Tribunal was that she was perfectly happy with such an approach.

108 The Claimant's case, which appeared credible, was that it was not she who was unhappy about this but Ms Rowley and Ms Thearle. She indicated that she was perfectly happy with a record of procedures and that she had already written detailed job steps of her role at the time for the new junior member of staff Ryan Emery as Mr Canfer had just the left the company and she was going on holiday. This evidence was not contradicted by the Respondent.

109 There was no dispute that when the Claimant returned to work on Monday 14 September 2015, her desk had been moved and that it now faced a wall. This was a matter which was discussed in the meeting with Ms Douglas on 15 September 2015 and the minutes record that Ms Douglas apologised and understood Mrs Stower's perspective on this.

110 The minutes of the management meeting of 14 September noted that Ms Douglas needed to make contact with engineers and talk to her team and discuss issues and job roles. Despite that implicit acknowledgment by the management team that the position in relation to job roles had not been made clear up to that point, it was still decided that Ms Douglas would issue verbal warnings the following week.

111 The Tribunal considered that this was consistent with and supported the finding that the outcome of the meeting the following day with Claimant was predetermined and that Ms Douglas did not actually take on board the points made by the Claimant.

112 In particular, at the meeting on 15 September 2015 when the Claimant was challenged about having a bad attitude towards work and towards Ms Douglas, the Claimant indicated that she did not understand what this perception was based on and that she believed that she came into work and "put her head down" and got on with work. She asked if the perception about her related to the lunch chart.

113 This was another instance of the Respondent not making it clear to the Claimant at the time what their criticism of her was. Indeed, it seemed to the Tribunal that the issue of the lunch chart illustrated yet again a positive aspect of the Claimant's approach to her work. Ms Douglas had indicated to her team that she did not want all the lunch breaks to be taken together. The Claimant had therefore volunteered to prepare a chart allocating lunch times. The Tribunal could see absolutely no reason to criticise her for that. It was obvious however that this was not appreciated by her manager.

114 There was no dispute that taking of lunches together was something that Ms Douglas did not want to happen because she subsequently wrote an email to the Claimant and Ms Thearle on 5 October 2015 which she copied to Mr Gray, Mr Abel and Mr Kelly in which she reminded them that it was agreed that they would not have lunches together. She indicated that she considered that what they had done was disrespectful to both herself and Mr Gray as their managers (p.83).

115 The Tribunal considered that it was noteworthy that Ms Douglas had referred to an episode which had caused difficulties in relation to the taking of lunch which had occurred in August. The Claimant's evidence was that Ms Douglas had not accurately reflected or recorded what had happened in relation to the incident. In August 2015 Ms Douglas had not yet started to work for the Respondent therefore she must have heard about the incident from someone else. The Tribunal considered that her reaction to the joint lunches if this is what had actually occurred, appeared to be somewhat extreme.

116 The issue of overlapping lunches came up again when on 17 October 2015 the Claimant asked Ms Douglas if she, Emma Thearle and Wendy Rowley (the team) could go to lunch together as it was her birthday. She asked if Ms Douglas would cover for them. Ms Douglas refused to do this. Ms Rowley said that she did not want to go to lunch and that she would cover for them so that Ms Thearle and the Claimant could go. Ms Douglas refused this request too. Mrs Stower and Ms Thearle complied with the refusal.

117 After the meeting on 15 September, Ms Douglas wrote a letter to the Claimant dated 17 September 2015 indicating that she was giving the Claimant a verbal warning (pp.78-79). Although she referred to the meeting on 15 September as a disciplinary hearing, there was no suggestion by the Respondent that any advance notice had been given to the Claimant and/or that she had been given advance notice of the disciplinary issues which the Respondent considered needed to be discussed, or any documents or written detail. These were itemised apparently for the first time in the letter confirming the verbal warning. Thus there was six bullet points as follows:-

117.1 No respect for the new management regime.

117.2 Disobeying management instruction.

117.3 Creating a bad atmosphere in the office.

117.4 Bad attitude.

117.5 Making life uncomfortable for other members of staff.

117.6 Poor or little communication and withholding information to and with management, other members of staff and clients.

118 In the letter Ms Douglas summarised the points which have already been cited above which were made to her by the Claimant. Without explaining her rationale for doing so, Ms Douglas noted that she had decided that a verbal warning was the appropriate sanction. This would be disregarded after six months for disciplinary purposes provided the Claimant's conduct/performance improved to a satisfactory level.

119 She then identified in four bullet points the improvements which were required:-

119.1 To work with respect and follow management instruction regardless of whether you feel this is the correct procedure or instruction.

119.2 Significant improvement in attitude.

119.3 Working with your colleagues in an appropriate manner.

119.4 Improvement on all forms of communication whether written or verbal to management, colleagues and clients.

120 The Claimant was warned that if there were any repeat of this “misconduct”, she would be liable to further disciplinary action. She was told that she had the right to appeal and that she should write to Ms Hardy, Human Resources within seven days of receiving this letter giving the reasons for appeal.

121 A letter in a similar vein was sent to Ms Thearle, Ms Thearle having had a similar meeting. Ms Thearle was also given a verbal warning. The Tribunal considered that the summary of her points also indicates that Ms Thearle was unclear what the criticism was and that she was being demotivated by the Respondent’s actions in relation to the disciplinary charges. One of the disciplinary matters was said to be “always seem to have an opinion regarding Nikki”. In the notes of how Ms Thearle had responded to this, Ms Douglas said that Ms Thearle believed that she was not allowed to be friends with the Claimant. Ms Douglas also recorded that Ms Thearle had expressed the view that the fault lay in part with management. Once again without addressing these issues Ms Douglas issued a six-month verbal warning and gave Ms Thearle similar targets to those which had been outlined for the Claimant.

122 The Tribunal considered that it was relevant to set out some detail about Ms Thearle because to a certain extent she was a comparator in relation to the Claimant’s discrimination complaints. There was no suggestion that Ms Thearle was pregnant or anticipating being pregnant or taking maternity leave.

123 After the disciplinary meeting with the Claimant on 26 October Ms Douglas wrote a letter of the same date informing the Claimant that a written warning was the appropriate sanction and that this would be disregarded for disciplinary purposes after six months provided her conduct/performance improved to a satisfactory level.

124 Once again there had been no advance notification of this disciplinary hearing and the Claimant had certainly not been told in advance what the disciplinary charges were.

125 The Respondent accepted that they had not carried out any investigatory meetings or investigatory process at all at any stage. This applied both to the internal disciplinary and the final dismissal. The misconduct allegations were said to be:

- No respect for the new management regime
- Bad attitude
- Disobeying management instruction

- Making life uncomfortable and harassing other members of staff
- Unsatisfactory standard of work
- Failure to devote time and abilities in normal working hours.

126 The Tribunal has already referred to the Claimant's responses to these. For the purposes of the *Polkey* and contributory fault findings, the Tribunal did not consider that any of these disciplinary matters taken separately or together constituted adequate grounds for a written warning in the circumstances. There was no adequate investigation and the process did not comply with the ACAS Code on Disciplinary procedures. Despite that, in the letter informing the Claimant of the sanction she was warned that if there were any repeat of this misconduct or indeed any misconduct in general during this six-month period during which the warning would not be disregarded for disciplinary purposes, the Claimant would be liable to further disciplinary action in accordance with disciplinary procedure which in this case "will result in dismissal". The Tribunal did not consider that there was any basis for such a warning and that the most that the Respondent could have said to the Claimant was that it might result in her dismissal. It appeared to the Tribunal that the Respondent wished to move inexorably towards the termination of the employment.

127 Finally, in relation to the appeal the Claimant was indeed informed that she had a right of appeal against the decision but she was given a very abbreviated timeframe of three days to present her grounds of appeal. The disciplinary procedure which was in the employment handbook (p.110) provided for a right to appeal against disciplinary action but did not state a timeframe within which this should be done. The only reference to a timeframe was at paragraph 6, and this was to the time for notification of the outcome of the appeal which was normally five working days after the hearing.

128 The Tribunal also took into account at page 106 of the bundle under 'Capability Procedures', the provision that if there were concerns about performance the Respondent would try to ensure that the employee understood the level of performance expected and that the employee receive adequate training and supervision. It also provided that concerns regarding an employee's capability would normally first be discussed in an informal manner and that the employee would be given time to improve. This was in the Tribunal's view consistent with normal employment practice but was not followed in this case.

129 The procedure continued that if the standard of performance was still not adequate, the employee would be warned in writing that a failure to improve and to maintain the performance required could lead to dismissal. Importantly it also provided that the Respondent would also consider the possibility of a transfer to more suitable work if possible. There was no evidence that this latter course was ever considered by the Respondent prior to the dismissal.

130 The procedure further provided that if there was still no improvement after a reasonable time and transfer was not possible or if the level of performance had "a serious or substantial effect on our organisation or reputation", the employee would be issued with a final warning that they would be dismissed unless the required standard of performance was achieved and maintained.

131 The Tribunal found that the Claimant's conduct did not reach this threshold, and given the lack of proper investigation, the Respondent did not have reasonable grounds for believing the threshold had been reached.

132 If the letter of 26 October was intended to be a final written warning because it stated that the Claimant would be dismissed, the Tribunal considered that it was not an accurate implementation of the capability procedures at page 106 or indeed consistent with the requirements of the ACAS Code. In any event the Respondent's procedure then went on to provide for a stage whereby if such improvement was not forthcoming after a further reasonable period, the employee would be dismissed with the appropriate notice.

133 The Respondent also had disciplinary procedures which were consistent with normal employment practices and the ACAS code (p.107). These provided for example for the entitlement for an employee to be accompanied at any disciplinary hearing. Once again because the Claimant was not given any prior notice of any of the meetings this was not complied with by the Respondent.

134 The Respondent also totally failed, at every stage of disciplinary action, as their procedure and normal employment practice required, to carry out "a careful investigation of the facts and to give the employee the opportunity to present their side of the case".

135 The Tribunal considered that given the absence of any timeframe in the Respondent's own procedures, their attitude to the Claimant's appeal was even more troubling. The fact that the Respondent's procedure provided that they retained the discretion in respect of the disciplinary procedures to be followed to take account of the employee's length of service (p106) and to vary the procedures accordingly did not, in the Tribunal's view, give them the entitlement in law to follow a procedure which was patently unfair. In any event, it was not argued by the Respondent that this was a valid course open to them and the Claimant was not in any event an employee with short service in respect of whom the Respondent retained the discretion to vary the disciplinary procedure.

136 The statement of terms and conditions shed no further light on this (p.47, para 15).

137 There was a further management meeting on 21 September 2015 and notes of the discussion were in the hearing bundle (pp134 – 136). Ms Douglas reported that since the "*fall out*" of the previous week warnings were issued, and that this had caused more problems but that as of Friday of the past week "*all seems to be better*". She reported that the mood and attitude of the Claimant and Ms Thearle was now okay and that although there were still issues with workload etc, the atmosphere was good. The Tribunal cited this evidence because it undermined the Respondent's case that the Claimant failed to heed warnings. The Tribunal considered that the Claimant was highly motivated to retain her job and therefore did not present an appeal against the verbal warning and was prepared to take the criticisms made on the chin albeit they had not been explained clearly to her, and she did not agree that they were valid.

138 Despite that generally positive report to the managers, Ms Douglas also indicated that she believed that the Claimant and Ms Thearle were still not doing what needed to be done, for example, on contracts lists and little details which needed improving. She continued that things were being hidden or kept from her and she did not know why.

139 Once again, the Tribunal saw no evidence whatsoever that Ms Douglas broached these issues with the Claimant and Ms Thearle as would have been appropriate in a normal manager to employee discussion. Ms Douglas appeared to have drawn very negative conclusions about their conduct without having examined any explanations or indeed shared her concerns with them.

140 It was also clear that she was reporting back difficulties with the "girls". There were three female members of staff in the team that she managed (p.135). This indicated that her perceived issues were not solely with the Claimant.

141 In his report to the managers, Mr Abel indicated that they needed back up and support from the computer company and that there was "*too much reliance on*" the Claimant. He also reported back that the Claimant and Ms Thearle had apologised for the previous week's behaviour and that they hoped to move on (p.135). The issue of invoicing and jobs being signed off was still said to be very poor and that this needed urgent improvement.

142 As described above, this was a responsibility which was given solely to the Claimant in due course and indeed the minutes of the next meeting on 28 September 2015 noted that when Ms Douglas gave an update she reported that invoicing was much better and that there were fewer than a dozen outstanding (p.138).

143 There was then a discussion about a change of desks which was to take effect on Wednesday 7 October. This was a further move, following the one which had taken place on 14 September.

144 A further relevant note from the management meeting minutes of 12 October 2015 (pp139 -140) was that after Ms Rowley gave notice of her retirement dated 9 October, it was noted in the management meeting minutes that she had resigned and she would not change her mind. Mr Kelly's suggestion at that meeting was that the Respondent should announce that she was retiring not leaving. The Tribunal considered that this was an indication that the managers at that meeting did not understand or appreciate that in fact Ms Rowley had stated (p83A) she was retiring not resigning.

145 There was also a note in those minutes about another member staff Geoff Bowles who was due to leave at the end of February 2016; and yet another member of staff Nikki Broomfield who was to have her contract terminated. Once again in relation to outstanding invoices the numbers were in single figures.

146 Mr Abel repeated his concerns that there was too much reliance on the Claimant and that they needed back up and support and training from the computer company.

147 At the same meeting Mr Kelly the CEO questioned whether Ms Hardy could cover the Claimant's work and learn the job and Mr Abel assured him that this was possible and that he would speak to Ms Hardy (p.140).

148 A further management meeting took place on 26 October 2015. Mr Kelly, Mr Abel, Mr Gray and Ms Douglas attended it. Notes of the meeting were taken by Mr Abel (pp87A – 87C), and the matters discussed have been described above.

149 At the next management meeting on 2 November 2015, Mr Abel reported that the Claimant had been dismissed the previous Thursday for misconduct with one month's pay. He conveyed his understanding that she had the right to appeal against his decision but needed to do so within seven days in writing to Mr Kelly explaining the reasons. He took the notes of this meeting (pp141 – 143). Only Mr Abel, Mr Gray and Ms Douglas were in attendance. Although the meeting was called by Mr Kelly he gave his apologies. The managers appeared to be confident that based on advice from their employment law advisors there should not be a problem if the Claimant appealed because there was "*plenty of evidence going back at least six months*". Mr Abel referred to the Respondent having records of many meetings which had been minuted on (sic) comments for Mr Canfer to talk to the Claimant about performance.

150 The Tribunal did not share that perception. The evidence of any criticisms of the Claimant was that which has been outlined in these reasons. It was minimal.

151 At that point also the Respondent was anticipating that the replacement for Ms Rowley would start on 2 November and have a period of handover until Ms Rowley left at the end of December. Interestingly the Respondent's plan was that Ms Thearle not Ms Rowley would train the replacement (p.142). Ms Douglas then reported that Rachel Mellor, to whom Mr Abel had made reference in earlier meetings, had been offered the Claimant's job the previous Friday 30 October and that she had accepted and was due to join the Respondent on 30 November.

152 In relation to invoices it was reported that there were none outstanding.

153 Even against the background of the procedurally and substantively defective disciplinary processes which preceded it, the dismissal occurred suddenly and was decided upon by Mr Abel, not Ms Douglas on 29 October 2015. The letter sent to the Claimant on Friday 30 October purporting to set out the process which led to the dismissal and the reason for it was somewhat misleading.

154 The true picture about the dismissal emerged from the Respondent's evidence as follows: On 29 October neither Ms Douglas, Mr Kelly, Mr Gray nor Mr Abel was working from the Respondent's premises. Mr Abel was working from home as he had child care responsibilities over the school half term. As set out above by reference to, among other things, the management meeting minutes, Mr Abel was party to the discussions about concerns about the Claimant's performance – concerns which the Tribunal has found above to be unjustified, not least because they were not properly discussed with the Claimant or investigated. Further, the Respondent's managers including Mr Abel were implementing a pre-determined plan to replace the Claimant because of these erroneous perceptions about the Claimant's conduct and/or performance.

155 In the absence of the senior managers, no more junior member of staff had been left in charge. That course might have been expected in a well-ordered office.

156 The Respondent's case (paras 29 - 34 of Mr Abel's witness statement) was that the Claimant "*..took this opportunity with no senior management in the office to cause mayhem and disruption and decided she was in charge. She took several members of staff to the pub for lunch…*". The statement continued "*In the afternoon, her behaviour was reported to me as 'uncontrollable and frightening' by BH the HR manager. Once again, WR asked to leave early as she was getting upset with the atmosphere and attitude of NP towards her.*"

157 Mr Abel then described driving in to work, leaving his young children at home, and calling the Claimant (NP) into a meeting. By now Ms Douglas had apparently returned to the office, and Mr Abel asked her to attend the meeting also. He did not seek her input into the reported events which had led to his return to the office. There were no formalities observed in the calling of the meeting, such as giving notice of the nature of the meeting or inviting the Claimant to be accompanied.

158 At the meeting the Claimant was subjected to a brief dressing down, Mr Abel told her he had had enough of her behaviour, and he terminated her employment, on his account, "*with immediate effect*". He later confirmed to her before she left the premises that she would be paid one month's notice. The Claimant understood the position to be that she had been put on gardening leave for one month and that her employment would terminate on 30 November 2015.

159 The Respondent failed to establish any proper factual justification for Mr Abel's actions, on the balance of probabilities. Ms Hardy who Mr Abel cited as the source of the information about the Claimant being 'uncontrollable and frightening' did not corroborate this either in her witness statement or in her oral evidence to the Tribunal. There was also no contemporaneous record of the events of 29 October which were supposed to have led to the dismissal.

160 Ms Hardy, who had recently been given responsibility for Human Resources in the Respondent described the events of 29 October in para 13 of her witness statement. Apparently, the Claimant questioned with her the appeal process in relation to the written warning issued by Ms Douglas a few days earlier, and timings, which she explained to the Claimant. She then stated that she did not sit in the same office as C&L facilities staff, but that Ms Rowley came to her on 29 October and asked if she could leave early "*because she was getting upset with the atmosphere in the office. I telephoned MA and informed him that I had let WR go early*".

161 No-one who was said to have witnessed the Claimant's allegedly poor conduct on 29 October 2015 in the absence of the managers gave evidence.

162 The Claimant vehemently denied that she had taken colleagues to the pub, and the Respondent had no evidence to support that assertion either at the time of the decision to dismiss or at any point up to the date of termination on 30 November.

163 At the Tribunal hearing an attempt was made to persuade the Tribunal to admit evidence from Mr Abel of a recent communication with a member of staff at the pub about the events of 29 October 2015. No witness statement had been prepared addressing this evidence and no disclosure about any relevant documents about this issue had taken place. The Tribunal considered that it was inappropriate to admit the evidence as it was hearsay and unlikely to be reliable given the nature of the circumstances – it was unlikely that a member of staff at the pub would have had a clear or accurate recollection of these events so long afterwards, and it was not in dispute that the Respondent's staff regularly used the nearby pub for their lunch breaks and meetings (eg the Harris phone issue above). Importantly also, this was not said to have been evidence which was considered by the Respondent at any time during the Claimant's employment or in the context of any appeal.

164 The Tribunal accepted the Claimant's case on this which was effectively uncontested on the evidence. It was also consistent with our findings above about her compliance with Ms Douglas' instructions about not going to the pub with a colleague on her birthday, and with the evidence that she volunteered to draw up a lunch rota.

165 There was thus no direct evidence available to Mr Abel when he decided to dismiss or indeed to the Tribunal about the alleged misconduct on 29 October.

166 The statement in the letter of 30 October 2015 that "*At the hearing you offered little response to these points*" was in the Tribunal's view, disingenuous. No proper hearing was held on 29 October. Mr Abel himself described the meeting in his office as very brief. He did not invite a response from the Claimant to any of the allegations subsequently relied on, and the Tribunal found that the Claimant was in a state of shock. Despite that, the Tribunal accepted that the Claimant asked if she could retrieve personal data from her work computer before she left, and she offered to be supervised by Ms Douglas while she did this.

167 In the event, despite the Claimant's attempts to submit an appeal, the Respondent would not entertain one. They thus deprived themselves of the opportunity to revisit the dismissal decision in the cold light of day.

Summary of Conclusions

168 In short, having made findings of fact, the Tribunal's task was to decide what was the reason for the dismissal and the various detriments complained of.

169 The Claimant alleged breaches of section 18(4) of the 2010 Act – direct discrimination because of the Claimant seeking to exercise the right to ordinary or additional maternity leave – in the respect of the detriments and the decision to dismiss her as set out in paragraph 3(a) to (l) of the List of Issues. For the reasons set out above in relation to causation of the Respondent's acts, the Tribunal did not consider that the Claimant had established facts from which we could conclude that the Claimant had been subjected to this type of discrimination such that the burden of disproving it passed to the Respondent. The dismissal of Mr Canfer in mid-August 2015, and the recruitment of Ms Douglas at about that time undermined the

undermined the likelihood of section 18 discrimination. Further, the similar treatment of the Claimant's co-worker, Ms Thearle who was not on maternity leave or anticipating being on maternity leave, also pointed to other non-discriminatory reasons for the treatment complained of. Further the background matters relied upon by the Claimant which related to the manner in which the litigation was conducted by the Respondent did not in this Tribunal's view tend to support a likelihood of discriminatory treatment.

170 The Claimant pointed to a failure to comply with the EHRC Code of Practice, and indeed with the ACA Code of Practice on disciplinary processes. The Tribunal accepted, as Ms Whitehouse submitted, that Ms Douglas presented in evidence "as wholly ill-equipped and inexperienced.." to have been tasked with disciplining the Claimant. There was clearly no culture within the Respondent of taking the necessary time to investigate perceived employee weaknesses with an open mind, and then to take appropriate and proportionate action. Mr Abel's actions in dismissing the Claimant exemplified this. The Tribunal did not consider that the admitted breaches of the Code – no equal opportunities training or policy or knowledge of these – were sufficient to get the Claimant over the initial burden of proof in all the circumstances in relation to this section of the 2010 Act.

171 The Claimant also relied on the evidence about the Respondent advertising for a replacement for the Claimant and others as early as 13 October 2015; and the steps to replace the Claimant with Rachel before the Claimant had even been given a written warning. The Tribunal has criticised the Respondent's actions as an employer in this and other respects. There was no evidence before the Tribunal about the new recruit Rachel's age or her circumstances in relation to pregnancy. There was insufficient basis for concluding even provisionally that there was any correlation between the Respondent's actions and the Claimant's hoped-for maternity leave.

172 In all the circumstances, those complaints were not well founded and were dismissed.

173 The Claimant next alleged direct sex discrimination under section 13(1) of the 2010 Act in relation to the detriments set out at paragraph 7(a) to (g) of the List of Issues. The Claimant relied on her submissions in relation to the section 18(4) complaints.

174 There was some overlap between the complaint at paragraph 7(a) and the complaint in paragraph 3(a) under section 18.

175 The Tribunal considered that by reason of the effect of section 18(7) of the 2010 Act, this complaint was probably only a complaint under section 18(4), but in any event could at most be considered in the alternative. The section 13 complaints were considered by reference to the protected characteristic of the Claimant's sex, not her pregnancy or prospective maternity leave.

176 The Tribunal had made findings of fact above which addressed the overarching issue here also as to causation. There was no evidence of the treatment of an actual comparator, nor was a hypothetical comparator defined.

177 As to the background, the manager with whom the Claimant had the difficulty was female. This did not exclude the possibility of sex discrimination, but was relevant. Further, there was background evidence of Ms Douglas and indeed the Respondent's managers in general taking different approaches to different female members of staff in relation to criticisms of their performance. The Tribunal also had in mind that there was really no background evidence about less favourable treatment relating to sex.

178 In relation to the section 13(1) complaints also, the Tribunal considered that the Claimant had not established facts from which the Tribunal could conclude that there had been direct sex discrimination. Even if the Tribunal was wrong on that issue, the Tribunal's findings above as to the reason why the Claimant was treated as she was, were unrelated to grounds of sex.

179 The next set of complaints was brought under section 18(2)(a) of the 2010 Act, alleging direct discrimination because of pregnancy. The Respondent can only be liable under this section for acts or omissions done during the woman's protected period as defined in section 18(6). The starting date of the protected period was taken in this case as 22 October 2015.

180 The Claimant complained about the dismissal on 29 October 2015 and the detriments set out in paragraph 11(b) to (d) in relation to the failures in the procedure from 30 October and the denial of the appeal.

181 In her closing submissions, Ms Whitehouse again relied on her submissions in respect of the maternity leave claim in support of this complaint, and also on the submissions in respect of the unfair dismissal.

182 As it turned out, these failings by the Respondent all apparently occurred during the statutory protected period. However, it was not in dispute that the Claimant did not receive confirmation of her pregnancy until early December, after the effective date of termination on 30 November 2015, and that a home pregnancy test shortly before that (on an unspecified date) had indicated that she may be pregnant.

183 In the circumstances, there were no good grounds for concluding that the treatment complained about was due to the Claimant's pregnancy. The managers had scant appreciation of good employment practice, and there was no adequate basis for concluding that the possibility of the Claimant's pregnancy was the reason for the treatment the Claimant received.

184 The section 18(2)(a) complaint was therefore not well founded and was dismissed.

185 Having disposed of the discrimination complaints, the final complaint to be determined was of unfair dismissal under section 98(4) of the 1996 Act.

186 The first issue was the determination of the reason for the dismissal, the burden resting on the Respondent, and whether it was a potentially fair reason for dismissal under section 98 of the 1996 Act?

187 The Tribunal was satisfied that the reason for the dismissal was that the Respondent believed that the Claimant was undermining and failing to work constructively with her new manager, Ms Douglas, and acting outside of her authority, and then on 29 October committed the acts of misconduct alleged. These matters fall within the category of conduct and are thus a potentially fair reason for dismissal.

188 The next question was whether the dismissal for that reason was fair under section 98(4), having regard also to the now trite authority of *BHS v Burchell* [1978] IRLR 379. For the avoidance of doubt, the Tribunal noted that the burden of proof as to fairness was neutral, the wording in section 98(4) having changed since the judgment in the *Burchell* case. Reference has already been made to the ACAS Code in this context.

189 The Tribunal concluded that the Respondent acted unfairly in finding that the Claimant had been guilty of the acts of misconduct alleged between early September and 29 October 2015. The inadequate investigations at all stages meant that the Respondent acted totally unreasonably in concluding that the Claimant had done what was alleged. Indeed in many instances, both Ms Douglas in the run up to the dismissal, and Mr Abel in deciding to dismiss the Claimant, relied on unsubstantiated vague reports of misconduct.

190 The Respondent admitted to some of the procedural breaches, as set out in Ms Hall's closing submissions. The Tribunal found that the procedural breaches helpfully set out in paragraph 65(b) to (h) and (j) to (o) of the Claimant's main submission were established. This dismissal was overwhelmingly procedurally unfair.

191 In the circumstances, the Tribunal had little hesitation in finding substantive unfairness also due to the lack of investigation and of evidence to substantiate the allegations; and due to the Claimant's credible responses to the disciplinary background matters and to the matters she was alleged to have done on 29 October.

192 In her closing submissions, Ms Hall sought to rely on matters which had not been adduced in evidence and were not agreed e.g. under para f on page 3 of the main submission. Such matters were disregarded for those reasons.

193 Having concluded that the decision to dismiss was unfair for the reasons relied upon by the Respondent, in circumstances where the Tribunal found also that no reasonable employer would have found that the conduct alleged had taken place as alleged, the sanction of dismissal could not be justified.

194 Further, the Respondent's inability to adduce any or any cogent evidence of the misconduct alleged to have occurred on 29 October could not support a *Polkey* finding that this was merely a procedurally flawed dismissal which would have occurred in any event if fair procedures had been complied with.

195 Finally our findings as to the conduct alleged being unsubstantiated also led the Tribunal to conclude that there was no proper basis for concluding that the Claimant had caused or contributed to her dismissal under section 123 of the 1996 Act.

196 The unfair dismissal was therefore well founded and no reductions were to be made to the award of compensation or to be taken account in respect of remedy on the basis of the effect of the *Polkey* principles, or on the basis that there had been contributory fault under section 123 of the 1996 Act.

……………………………………………………………..
Employment Judge Hyde

8 August 2017