EMPLOYMENT TRIBUNALS

Claimant:	**Miss M Shaw**	
Respondent 1:	**Cornerstone Care Management Limited**	
Respondent 2:	**Mr M Moomba**	
Heard at:	**Sheffield**	**On: 7 to 10 January 2020 and 31 January 2020 (in Chambers)**
Before:	**Employment Judge Little**	
Members:	**Mr M D Firkin**	
	Mr D W Fields	

Representation

Claimant:	In person
Respondent 1:	Mr M Moomba (Director)
Respondent 2:	In person

RESERVED JUDGMENT

1. The complaint of pregnancy discrimination fails.
2. The complaint of automatically unfair (pregnancy) dismissal fails.
3. The Tribunal has jurisdiction to determine the 'ordinary' unfair dismissal complaint because the Claimant had sufficient length of service to qualify for the right.
4. The complaint of unfair dismissal succeeds.
5. The Claimant contributed to her dismissal to the extent of 25%.
6. Remedy will be determined at a hearing on a date yet to be fixed.

REASONS

1. **The complaints**

Miss Shaw presented her claim to the Tribunal on 26 September 2018. The claim form indicated that the claimant was complaining of unfair dismissal and pregnancy discrimination. Following case management hearings on 6 June 2019 and 16 August 2019 it was confirmed that the precise complaints which the claimant was bringing were as follows:-

- Pregnancy discrimination – contrary to Equality Act 2010 section 18.
- Automatically unfair dismissal – Employment Rights Act 1996 section 99
- Unfair dismissal – on ordinary principles.

2. **The procedural history of this case**

This has been somewhat complex. In addition to the case management hearings referred to above, there were two other preliminary hearings for case management. At a hearing on 21 November 2018 the claimant did not attend – although it was subsequently discovered that she had been waiting in a different court building. A preliminary hearing fixed for 5 March 2019 resulted in neither party attending. For these and various other reasons, these proceedings have seen the claimant struck out and then reinstated and also on a different occasion the response being struck out and then reinstated.

3. **The issues**

These had been identified and defined at the 6 June case management hearing before Employment Judge Rostant and were also discussed at the subsequent 16 August case management hearing before Employment Judge Brain. We considered that it would be helpful for the parties who were all unrepresented if we reminded them of those issues at the beginning of our hearing and we set them out for them as follows –

<u>Pregnancy discrimination</u>

3.1. Was the disciplinary process and the claimant's subsequent dismissal because of her pregnancy or an illness suffered as a result of it?

<u>Automatically unfair dismissal</u>

3.2. Was the reason, or principal reason, for the claimant's dismissal her pregnancy?

<u>Unfair dismissal – ordinary</u>

3.3. Did the claimant have at least two years' continuous service as of the date of her dismissal?

3.4. In particular had the claimant's employment with Bliss Support been terminated prior to a relevant transfer under the Transfer of

Undertakings Regulations between Blue Support and the first respondent (that transfer taking place on 21 August 2017)?

3.5. If the Tribunal does have jurisdiction to hear the unfair dismissal complaint, can the first respondent show the potentially fair reason of conduct?

3.6. If so, was it actually fair as per the provisions of the Employment Rights Act 1996 section 98(4) and in particular:-

- Did the first respondent carry out a reasonable investigation including an interview with the service user PL and with another employee, Gayle Leishman.
- Did the first respondent have a genuine belief in the claimant's guilt and was there evidence to support that belief?
- Was it fair to convert a keeping in touch meeting into a disciplinary investigation meeting and was the claimant given sufficient notice of that?
- Was the decision to dismiss within the reasonable band?

3.7. If the claimant was unfairly dismissed for conduct, did she contribute to that dismissal and if so to what extent and how should that be reflected in terms of remedy?

3.8. If the claimant's dismissal was procedurally unfair (for conduct) would a fair procedure have made any difference and if so what? How should that be reflected in terms of remedy?

4. **Evidence**

4.1 The claimant had prepared a witness statement. She had decided that this should be distributed through her documents so that pages of the statement were interleaved with what she considered to be the relevant documents. We found that to be not particularly user friendly and so we extracted the relevant pages and put them together so we had a witness statement running to 21 pages. The paragraphs are unnumbered. The claimant's partner, Mr T J Pearson also gave evidence and his statement ran to 11 pages. We also heard from Ms Gayle Leishman, a former colleague of the claimant's. Her witness statement was in the form of an undated email which she had sent to the claimant. That ran to two pages. The claimant also provided us with statements or emails from four other individuals, none of whom in the event could attend the Tribunal. At the beginning of our hearing, none of those statements were signed and we explained to the claimant that we would not be able to consider any unsigned statements. During the course of the hearing the claimant was able to obtain signatures to the statements made by Katherine Cullen and a very brief statement from a Rachel Twell. Both these individuals were former colleagues of the claimant. The Tribunal did not read the two unsigned statements.

4.2 For the respondents, Mr Moomba gave evidence in his capacity as a director of the first respondent and as an individual respondent. His statement ran to two and a half pages and again the paragraphs are unnumbered. There were signed statements from Hannah Lloyd, formerly

the first respondent's office manager and the person who decided that the claimant should be dismissed and Paul Richardson formerly employed as a support worker by the first respondent. In circumstances where the first respondent had ceased to trade in October 2018, with the result that Miss Lloyd and Mr Richardson were no longer employees of the first respondent, on the first day of the hearing Mr Moomba was uncertain whether either would attend. We indicated that we would refrain from reading their statements until the position was clearer. If they were not to attend we would invite comments from the claimant as to whether we should read the statements and then give them such weight as we felt appropriate. We stressed to Mr Moomba the importance of these witnesses attending in person if at all possible particularly the dismissing officer. The uncertainty as to whether they would attend continued until the last day of the hearing when Mr Moomba explained that they would not be attending. In those circumstances we heard the claimant's objection to our reading the statements but decided nevertheless that it would be appropriate to read those statements and then give them such weight as we felt appropriate. We had of course taken a similar approach in relation to the claimant's two non attending witnesses. We should add that on day two Mr Moomba mentioned for the first time that Miss Lloyd was pregnant and that that might inhibit her attending the hearing. This has never been mentioned previously and the respondent has therefore never made any application to adjourn on that basis.

4.3 We should also add that on the first day of the hearing Mr Moomba had failed to bring copies of any of his or the other two's witness statements with him. This necessitated Mr Moomba having to go home to collect that documentation whilst the Tribunal read the claimant's witness statements and her documents. The claimant on the first day contended that whilst she had received copies of Miss Lloyd and Mr Richardson's statements she had not received a copy of the claimant's statement. Mr Moomba was adamant that a copy had been sent although when we asked him to provide a copy of the email or letter which had enclosed it or had it attached he was unable to do so. In the event as his statement was relatively brief and as the claimant had ample time to read and consider this and prepare her questions whilst we did our reading (the first day of the hearing being given over to reading and these housekeeping issues) we took the view that the claimant was not unduly prejudiced.

4.4 However on day two the claimant produced to us what appeared to be a different witness statement by Mr Moomba. This was a three page undated document and the claimant believed that she had received it in March 2019. She was now suspicious that the statement which the claimant had brought in on day one was something he had prepared either that day or at least in response to her own witness statement. She also indicated (although we had not read the earlier statement at that stage), that the two statements contradicted each other. Mr Moomba was somewhat confused and could not recollect sending the earlier statement to the claimant. We explained to the parties that as that earlier statement had been served the claimant would be in a position to ask Mr Moomba questions about it, particularly if, as the claimant alleged, there was a contradiction between the two statements. In the event, when the Tribunal had the opportunity to read both statements it appeared to us that there were not any particular

contradictions albeit the statements were set out in different ways. During her questioning of Mr Moomba we reminded the claimant to raise any issues about any alleged contradiction, but she did not do so.

5. **Documents**

5.1 This has been another not entirely straightforward topic in this case. Despite case management orders which required the parties to agree a joint trial bundle, they have chosen to bring along their own documentation separately. The claimant's documents ran to 91 pages but during the course of the hearing the claimant put in a further five pages which were bank statements. The respondent have brought a bundle which initially ran to 40 pages but two additional documents were added during the course of the hearing.

5.2 We should add that during the course of his evidence on the last day of the hearing Mr Moomba, in answer to various questions from the Judge, suggested that there was other relevant documentation. For instance on being asked why the respondent had apparently not interviewed service user PL, Mr Moomba said that she had been interviewed and a statement had been taken. This of course was not in the bundle. Reference had also been made to a log which would have been relevant to the same issue relating to £40 belonging to the same service user. Again when asked about this Mr Moomba said that the log was in existence although not in the bundle. Further Mr Moomba believed that Miss Lloyd had tried to obtain a statement from Ms Leishman and whilst she had refused to give a statement Miss Lloyd had apparently made a note about her contact with Miss Leishman. This too was missing from the bundle. In each of these cases Mr Moomba said that the documents were in storage. He had not previously mentioned this nor explained why he could not simply have got this documentation from wherever it was stored, disclosed it and placed it in the bundle during the lengthy life of these proceedings .He had not put the alleged approach by Ms Lloyd to Ms Leishman when she was giving evidence.

6. **The Tribunal's findings of fact**

6.1. The claimant's employment with Bliss Support Limited commenced in March 2015. The claimant was employed as a care worker and the service provided by Bliss was domiciliary care to elderly or vulnerable individuals – service users.

6.2. Whilst the first respondent contends that at some point in 2017 prior to 21 August, the claimant was either dismissed by Bliss or resigned from their employment, on the balance of probabilities we find that not to be the case.

6.3. Neither party has called any evidence from the director or proprietor of Bliss, a Mrs Millington, and nor do we have any documentation such as a letter of dismissal or letter of resignation. Whilst Mr Moomba contends that a due diligence exercise was carried out prior to the business transferring to the first respondent, he has not been able to provide any documentation such as a schedule of employees transferring that one might expect from such an exercise.

6.4. Instead the first respondent relies upon the timesheets at pages 1 to 5 in it's bundle (we will in hereinafter refer to the claimant's documents prefixed with a 'C' and the respondent's prefixed with an 'R'. In particular on page R3 the respondent relies upon the claimant having written for the week commencing 19 August "no working" and "left Bliss". However the claimant has explained that when she wrote the latter comment it was in recognition of moving to the first respondent and should not be taken as her having been dismissed by or having resigned from Bliss. The respondent also relies upon what may be the first payment made by the first respondent to the claimant set out in a document at page R9 but the claimant has been able to counter this by showing us her bank statements which record that for the transition period she was getting some payments from Bliss and others from the first respondent or another company operated by the second respondent.

6.5. At most the claimant accepts that she may have on one occasion left Bliss in the heat of the moment and in response to what she considered to be the poor way in which that business was being run latterly. However she subsequently returned to work. We accept that that heat of the moment reaction should not be regarded as a true resignation.

6.6. The respondent has also sought to rely upon one of the documents put on during the course of this hearing which is an email dated 29 August 2017 from a Mrs Toni Poynor, a former employee of Bliss Support Limited. The email is to the second respondent. The email is primarily about Mrs Poynor's own employment by Bliss but she mentions in passing that she knows that "Mel has recently left Bliss Support Limited". As we have not heard from Ms Poynor and as she was not a manager with Bliss, we do not place great weight on this.

6.7. Although it has largely been ignored by both parties until we brought it to their attention, there is a statement of main terms of employment (pages C5 to C8) which was issued to the claimant by the first respondent and signed by the claimant on 12 September 2017. This statement includes the following at Clause 2.1:

"*Your employment began on 21/8/17 and no previous employment counts as part of your continuous period of employment".*

The date has been added in long-hand. We do not consider that this can be definitive and we believe that it stems from a not uncommon mistake when unrepresented employers are in a TUPE situation. What is in that statement cannot override the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 in respect of relevant transfers. It is also significant that that claimant was apparently invited to a meeting held at the Icon Church on or about 10 August 2017 to be informed of the transfer and given the document which appears at pages C9 to 10 described as "Record of conversation for TUPE transfer process".

6.8. It is for these reasons that we find that when the undertaking of Bliss Support Limited was transferred to the first respondent on 21 August 2017 the claimant was one of the employees who transferred with

the result that her employment which had commenced in March 2015 continued.

6.9. We find that the claimant had two roles with the first respondent. She worked as a care co-ordinator which involved some office work and also continued as a care worker. This has been referred to as 'working on the road'.

6.10. <u>The £40 issue</u>

6.11. On 7 November 2017 the claimant made a routine visit to a service user who we have referred to as PL. There has been a dispute as to whether the claimant was accompanied by a colleague, Gayle Leishman. The claimant's evidence was that although Ms Leishman was off duty that day she had offered to help the claimant and so the claimant had collected her on her way to PL's house. We have heard from Ms Leishman herself who confirms that she attended and she says that she was a relatively new employee at that stage and was shadowing the claimant. The respondent disputes that Ms Leishman could have been present and suggests that she was not paid for this day, although we have not seen any documentation about that. However we find that that could be explained if Ms Leishman was simply helping the claimant out. Mr Moomba told us, for the first time, that during the subsequent investigation into what we will refer to as the £40 incident on this day, Miss Lloyd had tried to contact Ms Leishman but she had allegedly refused to make a statement on the basis that she had not been present on 7 November 2017.As we have noted, this was not put to Ms. Leishmen by Mr Moomba and we were not aware that this was the respondent's case at the time Ms Leishman was giving evidence. Miss Lloyd in her witness statement makes no reference to this. Mr Moomba went on to say that there was in existence a note in which Miss Lloyd had referred to her conversation with Ms Leishman. However that note had not found its way into the bundle. Accordingly on the balance of probabilities we find that Ms Leishman did attend both of the visits which the claimant made to PL on that day.

6.12. It is common ground that PL during the first visit on that day asked the claimant if she would purchase an item from Argos which was intended to be a Christmas gift for one of PL's friends. To that end PL gave the claimant the sum of £40. To record that the claimant prepared the note which appears on page R31. It reads:

"I PL have asked Mel (the claimant*) to get me something from Argos for my friend if they have it. 7-11-17*".

That note is then signed by the claimant and by PL. It is not countersigned by Ms Leishman. The claimant's evidence is that that note was then placed in a safe which was in PL's home and it was from the safe that the £40 had been taken.

6.13. The claimant's evidence is that either she did not have time to go to Argos, or that the item in question was out of stock. Before us the claimant sought to address the slight inconsistency between these

two statements by saying that she may have checked the availability online rather than actually going into the Argos shop.

6.14. In these circumstances the evidence of the claimant, corroborated by Ms Leishman is that on their evening visit to PL on the same day the £40 was returned. In her witness statement (page 12) the claimant says that "the money was signed for again and put back in the safe with the promise I would pass the request to the next staff member". The claimant also refers to "all logs was filled in and signed for".

6.15. The Tribunal have not seen any documentation whereby PL acknowledges the return of the £40 on 7 November. One might think that the most obvious step would have been simply to annotate the earlier note to confirm the return. Nor have we seen what the claimant describes as the logs. We were told that there were two types of log. One would log visits by carers with a brief summary of the care and work they had undertaken on that visit. We were told that the other was a "transaction log" which would record such matters as the £40 issue. The logs are within the category of documents which Mr Moomba when giving evidence indicated were still in existence but were in storage. They had not therefore been disclosed within these proceedings.

6.16. We have not been shown any policy of the respondent, that is a written policy, for the handling of service user's money. It is to be noted that the claimant felt it necessary to prepare a note for PL to sign rather than being able to use some type of proforma. The claimant kept no copy of the note and we were told that the logs would be left at a service user's house during the week only to be collected and taken back to the office at the end of the week. There seems to be the obvious risk that if there is only one copy of a receipt and it is in possession of a vulnerable and possibly confused service user it may be misplaced or lost. That being said, it is common ground that PL was compos mentis albeit with mobility issues.

6.17. The respondent alleges that, although unaware of the £40 issue at the time, they were subsequently (in March 2018) informed that PL had been making requests to the claimant for return of the £40 which PL believed the claimant still had. The claimant denies this to be the case.

6.18. <u>The Dog issue</u>

6.19. In January 2018 the claimant advocated for another service user, M, to have a companion animal, a dog. In fact a puppy was purchased by M, at a price of £450, on or about 27 January 2018. The position however was not satisfactory. It transpired that M could not look after the puppy properly and its barking kept him awake. The claimant was also concerned that the puppy may have been harmed by M. It is common ground that it was decided, and M agreed, that things were not working out and that the puppy should be removed. As an interim measure the claimant took the puppy home but she then found someone, in fact one of her sisters, who was prepared to take the puppy long-term.

6.20. On 14 February 2018 the claimant sent a text to Mr Moomba and a copy is on page C37. The claimant reported that her sister had offered to give M £300 for the puppy. The claimant wrote that she had asked M and he had said he didn't want the money "but I've told him that isn't going to happen. He just wants the dog to be happy". There proved to be some difficulty about this payment although the respondent would not be aware of that until May 2018. Although ultimately the dog issue would be one of the disciplinary matters considered by Miss Lloyd, in the event, as will be seen, Miss Lloyd did not uphold those allegations.

6.21. It is common ground that on or about 30 January 2018 the claimant told Mr Moomba that she was pregnant. Mr Moomba's evidence was that he was happy for the claimant and her partner and did not consider that this would have adverse consequences for the claimant's employment. On the basis of questions asked by the Employment Judge he explained that at the same time, another employee was pregnant (Rachel Twell who has made the very brief statement we have referred to). He also told us that prior to setting up the Cornerstone business he had been the registered care manager for a residential home and was used to dealing with employees who were pregnant.

6.22. The Employment Judge asked Mr Moomba whether, on learning that the claimant was pregnant, he carried out a risk assessment. His answer was that this had been done but the documentation was not in the bundle. We should add that there is no reference in Mr Moomba's witness statement to a risk assessment having been done.

6.23. The particular need for a risk assessment in the claimant's business arises from the physical work which a care worker would be undertaking within a service user's house. There would often be the need to lift, move or support patients, some of whom were heavy.

6.24. On or about 11 February 2018 the claimant found herself visiting a service user without a colleague to help. At page 6 of the claimant's witness statement she refers to the difficulties she encountered in trying to move the service user and says that she injured herself "it felt like I had ripped my side, I was in pain and had to leave the service user in bed". In her witness statement the claimant says that she telephoned Mr Moomba and informed him of the problem and that he subsequently phoned back and said that the claimant should ask her partner, Tom, who had driven her to the service user's house, to help her. However in a text which the claimant sent to Mr Moomba on what we think is the same day, 11 February 2018 (page C21), the claimant complains about the difficulties she was having moving the service user and goes on to write:

"*Tom been so upset and angry that I'm having to move Pat on me own that he's having to help me otherwise she would have no care".*

6.25. Shortly after this the claimant had to attend her doctor and had what she describes as an emergency scan which disclosed a bleed "at the side of my baby".

6.26. The claimant was then absent from work from approximately 14 February to 27 February 2018. The respondent has produced what is described as a staff leave and sick and absence record which is at page R7. This confirms the absence referred to but indicates that there was a further absence from 27 February to 12 March. It is agreed that the claimant returned to work for a few days in March after, she says, being told that she would be on lighter duties in the office. However the claimant commenced a further period of absence on 29 March 2018 and this continued until the date of her dismissal. The claimant accepted that the document at R7 was broadly accurate.

6.27. <u>The £40 issue again</u>

6.28. On 28 March 2018 Mr Moomba received a telephone call from a care worker employed by the first respondent. This was about the service user PL. Mr Moomba then immediately sent the claimant a text and a copy is at page C46. It indicates that Mr Moomba had just received a call from Yvonne (the care worker) who had visited PL earlier that day. PL had enquired when her money would be given back and she had informed Yvonne that she would be calling Citizenship First, who managed her money if the claimant did not return her money to her by tomorrow. Mr Moomba went on to urge the claimant, if she had got any money from PL, to give it her back by 11am the following day. He suggested that it could be brought into the office and given to Hannah or the claimant could take it directly to PL with someone accompanying her. Mr Moomba said that he wanted it sorting otherwise Citizenship First were likely to involve the police.

6.29. The claimant's response is at pages C47 to C48 and it reads as follows:

"Wow this is horrendous. When I had another staff member with me when she asked me to do her a favour but if that's what she thinks I'll get some money off my dad and then I'll be taking this further myself … I'll be happy to speak to the police. This is utter rubbish .. her auntie even knows about it ect (sic) … how much more rubbish am I ment (sic) to take from this company accusing (sic) and been let down! I'm no thief. This is disgusting! Infact she even signed a note in her safe why she asked me to do her a favour! I do t want nothing to do with Pat now so I'll send Tom with it tomorrow to the office! Everything that is going on in black and white I'll be taking further NOW!"

6.30. Mr Moomba replied to this text (pages C48 to C49) saying that he was not accusing the claimant of stealing or taking money and, perhaps rather strangely, saying that this had nothing to do with Cornerstone.

6.31. In Mr Pearson's witness statement (pages 5 to 6) he states that in early May the claimant told him that he needed to take £40 out of the parties' joint bank account and take it to the respondent's office in Eckington. When giving evidence to us Mr Pearson accepted that the date could not have been early May and that it must have been

29 March 2018. That is because at page C57 in the bundle there is a text of that date from the claimant to Ms Lloyd which reads:

"Tom is on his way with the phone sick note and money I've ment (sic) to of had! (sic)".

6.32. Mr Pearson's evidence was that the claimant did not explain to him why he had to take this money to the respondent's office and it was only when he arrived there that he says he was told by Ms Lloyd that the claimant had been accused of taking £40 from a service user and not returning it. Mr Pearson asked Ms Lloyd and also a Bronwyn Sprague, care service manager, who was investigating that issue. Mr Pearson says that he asked Bronwyn if she had checked whether there was a receipt and he says that she replied saying that she did not know there were any receipts. Mr Pearson says that he then made an enquiry as to whether the respondent had looked in the service user's safe and Mr Pearson says Bronwyn's reply was that she didn't know that service users had safes. Mr Pearson says that whilst he handed over the £40 he explained to Ms Lloyd that that was on condition that the matter would be fully investigated before the money was handed to anybody else and that he wanted the money returning "in the same form its given to you" when the matter had been investigated. Mr Pearson suggested to Ms Lloyd that 48 hours would be sufficient time for the investigation to take place.

6.33. It appears that later on 29 March 2018 the sum of £40 was returned to PL by the respondent. There is a handwritten note at page R32 which bears that date and reads as follows:

"*£40 that was removed from Patricia's home has now been returned".*

That note is signed by PL and also by Ms Sprague.

6.34. Although in Mr Pearson's statement (page 6) he refers to a few weeks passing before he chased up Mr Moomba as to the investigation into the £40, it was not in fact until the end of May 2018 that this occurred.

6.35. <u>The dog again</u>

6.36. On 27 April 2018 Mr Moomba received an email from a Jillian Eland a social worker. A copy is at pages R21 to 22. Ms Eland informed Mr Moomba that she had been to visit M the day before and he had raised the issue of payment for the dog which was now in the possession of the claimant's sister Jane. Ms Eland explained that whilst with M she had telephoned Jane who said that she was waiting for her husband to be paid his benefit money and would then make a payment to the claimant on 4 May of £150 and a further payment on 11 May. This presumably with the view to the claimant bringing those payments to M. Ms Eland's email goes on to state that M was not happy at being paid £300 for the dog and that the agreement had been £450. Jane however had told her that the price of the dog was £300. Ms Eland asked Mr Moomba to deal with it because the claimant was his employee.

6.37. In the event, eventually Mr Moomba felt obliged to make the payment of the £450 to M out of his own or the company's funds. His email to Ms Eland of 5 July 2018 confirming this is at page R26.

6.38. The 'Keeping in touch' meeting

6.39. On 15 May 2018 Mr Moomba wrote to the claimant. A copy of that letter is at pages C65 and C66. The heading to the letter is "Private and Confidential – Notification of "keeping in touch" meeting". The first page of that letter explains to the claimant that a keeping in touch meeting is an essential part of the respondent's "well-being" approach to employees. It was noted that the claimant had been absent since February 2018. A date of 21 May 2018 was suggested for a meeting. It was proposed that that would be at the respondent's office but the possibility of a home visit was also mentioned. The penultimate paragraph of the letter reads as follows:

"The meeting on 21 May is not formal, nor a disciplinary meeting, and we will include a discussion about your return to work and how we can assist. We will also use this opportunity to discuss recent social media messages which have come to our attention".

When giving evidence, Mr Moomba said that the social media messages to which he was referring were comments which the claimant and possibly other employees had been making on social media which were derogatory of the first respondent. The claimant's evidence was that she thought that this might be a reference to her telling a pregnant colleague (presumably Ms Twell) that she didn't need to lift a heavy service user on her own.

6.40. In the event the claimant requested a home meeting and the date arranged for that was 29 May 2018.

6.41. The meeting on 29 May was conducted by Hannah Lloyd. The claimant had not been offered the opportunity of a companion at this meeting although her partner Mr Pearson was at home. However we understand that Ms Lloyd indicated that he could not participate in or be present during the meeting. The claimant's evidence is that during the meeting Ms Lloyd asked the claimant if she was prepared to answer some questions about what the claimant describes as the previous accusations. The claimant says that Ms Lloyd told her that this was just to show that they had settled the issues if anyone questioned them. It appears that during the course of this meeting Ms Lloyd was using two proformas. One of those is headed "Fact Finding Notes – Conduct" and it appears at page C78. The other document, which is headed "Keeping in touch meeting" is at pages R35 to R37. The latter includes pre-prepared questions and typewritten answers and these cover the areas one might expect a keeping in touch meeting to deal with.

6.42. The fact finding notes document (which appears to be wrongly dated 28 May as this meeting we understood took place on 29 May) again has a series of pre-prepared questions. The first four questions are about the PL £40 issue. The first reads as follows:

"You and Pat signed to say you had taken some money to buy something from the shops. According to our SU monies and pensions policy upon returning all money should be detailed and entered into the receipt book, signed and dated by both you and the client. Why was this not done?".

We should add that we have not heard anything about a receipt book from the respondent in its evidence. The next questions are about what was purchased with the money, were there receipts and when had the claimant intended to return the money? The fourth question refers, erroneously we believe to the claimant paying the full amount back on 29 March and in those circumstances why did she not follow the correct procedures and sign the money back in with the correct receipts. Of course it is common ground that the sum of £40 was brought by Mr Pearson to the respondent's office and not directly to PL. It was paid to PL by the respondent. The fourth question reads:

"Taking money from an SU without signing it back in immediately upon your return is against our company policies. Have you taken money and not followed the correct procedure before?"

Mr Moomba told us that these questions had been prepared for the respondent by an HR company (Trivolition).

6.43. What appear to be the claimant's replies to these questions appear in handwritten form. Those notes read:

"Before money sheets in care plan and new plans in place. Before incident with (illegible) Gayle with her all day. Asda/Argos wanted gift set for friend. Not in stock Argos. Rushed for time due to the rota".

In reply to the question 'when had the claimant intended to return the money', the written reply is *"Back to Pat's for 6pm call put back in safe. Piece of paper, green pen in safe on top of envelopes under papers."* The answer to the question 'have you taken money and not followed the correct procedure before was' No' followed by – *"been in contact with Pat's auntie. Previously banked money with Bliss*".

6.44. The next three questions concern the puppy issue. It appears that the claimant gave the answer that she had informed M that he might not get the full money back but his response had been "take the bloody dog". As to the delay in payment the claimant's reply was that she had not been in contact with her family and somebody had asked to borrow money from the claimant's other sister. There had been a problem because a benefit had been stopped. The claimant said that her other sister, Jane would pay for the dog once she had the money.

The fact finding notes are signed by both the claimant and Ms Lloyd.

6.45. Ms Lloyd's witness statement makes no reference to the 29 May 2018 meeting, save for the passing reference to "Cornerstone began to investigate through fact finding to which Melanie and her partner Tom became very defensive and difficult towards myself and the company". Ms Lloyd's statement goes on to state that "based on the outcome of the investigation alone, this progressed to a disciplinary

hearing held with myself. Which later resulted in dismissal from Cornerstone Care Management in June 2018".

6.46. On 31 May 2018 Ms Lloyd wrote to the claimant. A copy of that letter is at pages C70 to 71. The heading to that letter is "Private and Confidential – Invite to disciplinary hearing". The letter begins by referring to the meeting on 29 May 2018, which is now described as a fact finding meeting. The claimant is invited to a disciplinary hearing on 4 June which it is proposed will be at the claimant's home. The letter goes on to state:

"The reasons for this disciplinary hearing are regarding your conduct and the specific points we will discuss at the hearing are:

- *Non-compliance with the company procedure regarding handling service user monies and recording all transactions;*
- *Bringing the company into disrepute, most recently with Social Services and CQC having to get involved due to a failure to pay agreed monies to a Service User;*
- *Breaching the company and Service User's data protection rights; and*
- *Failure to follow reasonable management instructions."*

Mr Moomba explained to us that the first matter above was in relation to the PL issue, the second (bringing the company into disrepute) was about the puppy and the third, breaching data protection rights was apparently because the claimant had allegedly told her partner Mr Pearson about PL's money, probably in the context of Mr Pearson bringing the sum of £40 in to the office in March 2018. Mr Moomba explained that the reference to failing to follow reasonable management instructions was again in connection with the puppy and in particular the payment due from the claimant's sister to M. The letter goes on to explain that the claimant has the right to be accompanied by a work colleague or union representative. The claimant is warned that the outcome of the disciplinary hearing could include the claimant's dismissal.

It appears that during May 2018 Mr Pearson had been making enquiries of Mr Moomba as to when the £40 could be returned to him. There is an email in the bundle at page C53 dated 31 May 2018 which appears to be towards the end of an exchange between those two parties on this topic although we have not seen the other emails. Mr Pearson is confirming that he will attend, presumably at the respondent's office and went on to write that he appreciated that Mr Moomba was "rightfully returning money that shouldn't of (sic) been handed over in the first place, especially after it hadn't even been investigated". In apparent response to that email, Mr Moomba wrote to Mr Pearson on the same day (C55) saying that the respondent was only returning Mr Pearson's money which he had brought in to the office and they could not comment about anything else.

6.47. Mr Pearson's evidence is that he visited the claimant's office on 1 June 2018 but that Mr Moomba required him to sign a receipt for the money. Mr Pearson suggests that the receipt said something to the effect "this hasn't yet been investigated and by the money being returned it would mean Mel was liable for the money not being returned". As no receipt was in the bundle we asked the parties about this and during the cross-examination of Mr Pearson on day 3 Mr Moomba produced a document which is now at page R42. This is a handwritten receipt which simply refers to the £40 and does not make any of the comments which Mr Pearson suggests were in it. However whilst that form is signed by Mr Moomba and dated 1 June, it is not signed by Mr Pearson. Mr Pearson denied that page 42 was the receipt that was proffered to him.

6.48. In the event Mr Pearson would not accept the money back on the alleged terms that it was offered. He subsequently sent an email to Mr Moomba which is at page 56. He explained that he was not happy "at how you was more than happy to discuss the matter of Pat with me whilst I was handing money over, yet supposedly unable to until I'd signed a receipt. My reason for not accepting money is based on the fact that you could not give me sufficient evidence that it had been fully investigated as I had been led to believe. Upon confirmation it has been fully investigated and there's been no wrong doing from Mel I will be more than happy to sign the receipt and accept my money back".

6.49. The disciplinary hearing duly took place on 4 June 2018. As far as we were aware, there appeared to be no notes of this meeting, however when we raised this issue with Mr Moomba on day 3 he produced the notes which are now at pages C71A to C. At this meeting in addition to the claimant and Ms Lloyd was a Paul Richardson who is described as note taker. Whilst there is a one page witness statement from Mr Richardson before us, this makes no reference to the 4 June meeting at which he was present and instead deals solely with the puppy issue. For that matter Ms Lloyd makes no specific reference to the 4 June meeting in her witness statement apart from the passing reference we have already mentioned to "this progressed to a disciplinary hearing held with myself."

The disciplinary hearing notes are in the same format as the earlier notes with a column for pre-prepared questions and a column for responses which in this case are handwritten. In respect of the question whether the claimant had taken money from PL on 7 November 2017 and how much the responses are "For a gift Forty pounds. The response goes on to say that the sum was returned at 6pm that night.

The next question is to the effect that the respondent has a receipt to show the money was taken but no written evidence to state that it was returned and the service user denied that it had been returned. The claimant's recorded response to this is – "Receipt was left and signed. Why wasn't Gail asked regarding…". There is no record of any response from Ms Lloyd as to whether or not Gayle Leishman

was interviewed although we have noted the respondent's position on it as explained at this hearing.

The next question is as to why the claimant's partner had brought £40 into the office on 29 March 2018 and what was that money for? The answer recorded given by the claimant is "Muetti demanded £40 to be dropped off. I wasn't well enough to drive to Eckington".

The next question is whether the claimant has ever received money from other service users in the past and not returned it correctly. The claimant's answer is "Own money had been used when service users had nothing. Staff's fuel were being payed (sic) by me". There are then some questions about the puppy and the claimant states that Mr Moomba had told her to remove the dog and "Sharon and Tracey (we are not sure who these two individuals are) have no clue about the dog. Don't blame myself for this".

The next question is whether it is acceptable for the claimant to share any information about a service user with another person who does not work for the company. It goes on to refer to Mr Pearson contacting the company on several occasions "with knowledge of our service users and data and information about the company". The claimant's recorded response to this is "Yes. You had my boyfriend working for you". This is a reference to what Mr Pearson told - that for approximately three days in August or September 2017 he undertook some driving for the respondent both in terms of driving carers to service users homes but possibly also transporting service users. There was also the occasion of course when Mr Pearson assisted the claimant lifting a service user although as we have noted there is a dispute as to whether this was on his own initiative out of necessity or whether it was sanctioned or instructed by the respondent. We should add that whilst there appears to be a dispute about Mr Pearson not being paid for those three days, other than being reimbursed petrol money, that is not a matter which is before us.

6.50. Whilst we understand that Mr Pearson was also at home on the day of the disciplinary hearing, he was not present during it. The claimant's evidence is that she told Ms Lloyd that she had the right to ask her own questions in her defence. The claimant says that the questions that she asked were not answered and that appears to be borne out by the inconclusive reference to why Ms Leishman had not been interviewed.

6.51. No decision was taken on the day of the meeting but on 8 June 2018 Ms Lloyd prepared a letter of dismissal. A copy appears at pages 72 to 73 in the bundle. Ms Lloyd makes no specific reference to this letter in her statement other than the passing comment about "dismissal from Cornerstone Care Management in June 2018." The letter refers to "a full investigation of the facts surrounding the concerns raised" but it does not explain what that investigation has involved other than "taking your explanations into account". It continues (because of) "the strict levels of compliance we are mandated to adhere to through CQC and Social Services I have

concluded that your actions can be classed as misconduct and therefore you are dismissed". The letter goes on as follows:

"*The issues discussed at the hearing were:*

- ***Non-compliance with the company procedure regarding handling Service User's monies and recording all transactions*** *– there is no evidence supporting your explanation that you returned the money on the day. The Service User was asking for the money and your partner returned the money on your behalf to the company when you were asked to return it. We consider your conduct in this respect to be in breach of Company policy and a serious breach of trust put in you by the company and the service user, for which a sanction will be applied.*
- ***Bringing the company into disrepute*** *– although social services were involved due to a failure to pay agreed amounts to a service user following you arranging a sale of a puppy to your sister, following the evidence and the explanation you provided during the hearing, we consider this is a civil matter and therefore no employment sanction will be applied for this issue.*
- ***Breaching the company and service user's data protect rights*** *(the next part of this letter in the copy we have is illegible but it seems that it refers to the claimant suggesting that her partner was an employee of the respondent. The letter goes on "this does not enable any sharing of service user information which you did in relation to returning the money you took and did not return … (illegible) as your partner had no legal basis to know about the details of the service user in this respect which breaches our company policies, for which a sanction will be applied.*
- **Failure to follow a management instruction** (illegible) "we do not consider you to be in breach of this policy and no sanction will be applied".

The claimant is then informed that because of the serious nature of the allegations which have been found to be proved the claimant had been dismissed. The letter concludes with the reference to a right of appeal which should be directed to Mr Moomba.

6.52. The claimant contends that she did write a letter of appeal and post this to the respondent's office in Eckington but received no response. Unfortunately she did not keep a copy of this letter. The claimant also says that she subsequently prepared another letter of appeal which she says she delivered by hand to the office. Again she did not keep a copy. Mr Moomba denies receiving any letter. He said that as all previous correspondence had been via email or text it was odd that the claimant should post a letter to him. Mr Moomba also pointed out that when writing to the claimant on a separate matter on 11 June 2018 (R40) the claimant was reminded of her right of appeal

which, he said suggested meant that the respondent had not received a notice of appeal by that date.

6.53. The claimant sought ACAS early conciliation on 15 June 2018 and an ACAS early conciliation certificate was issued on 14 July. As we have noted, the claim form was presented on 26 September 2018.

7. The parties' submissions

7.1. The claimant's submissions

Miss Shaw said that the respondent's evidence had not been correct. She was due to go on maternity leave on 6 June. Mr Moomba had not been truthful. The claimant had nothing more to say.

7.2. The respondent's submissions

Mr Moomba said that it was clear that the claimant had taken the £40. He said that the timesheets in August 2017 showed a clear gap and the claimant was not able to show timesheets in-between. He also referred us to the payslips in the bundle. Mr Moomba had been trying to ensure that the money for the dog was paid. He had also had to reimburse the £40.

He denied that his attitude towards the claimant had changed on learning that she was pregnant. There were no emails or texts showing any argument. There had been no appeal although this had been chased up. It was odd that it was not sent by email. Ms Leashman had not been on duty on 7 November 2017.

There was a discrepancy in the claimant's witness statement in terms of the explanation for not being able to buy the gift from Argos – had the claimant not had time to go or was it out of stock? The claimant had not been accused of the theft of the £40.

The claimant was incorrect in giving the date of her maternity leave as starting 6 June. On page 5 of her witness statement she had referred to her intention to work until the last week before her due date which was 14 September 2018.

8. The relevant law

8.1. Pregnancy discrimination

The Equality Act 2010 at section 18(2) provides as follows:

"*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, or

(b) Because of illness suffered by her as a result of it".

The Equality Act goes on to explain that the initial burden of proof (the job of proving the case) rests with a claimant but can then pass to the respondent. The relevant provision is section 136 which provides:

"*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision*

concerned, the court must hold that the contravention occurred … (unless) A shows that A did not contravene the provision".

8.2. Automatically unfair dismissal

The Employment Rights Act 1996 at section 99 provides as follows:

"*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –*

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances".

In subsection 3, a reason or set of circumstances which comes within the prescribed description includes pregnancy.

If the reason or principal reason for dismissal is pregnancy that will be regarded as automatically unfair. To bring such a complaint an employee does not need to have the usual two year qualifying period.

8.3. Ordinary unfair dismissal

Section 94 of the Employment Rights Act 1996 gives the right to employees who qualify not to be unfairly dismissed. An employer defending a claim of unfair dismissal must show that the dismissal was for a potentially fair reason. Those reasons are set out in section 98(1) and (2) of the Act. These include one which relates to the conduct of the employee.

Whether such a potentially fair reason is actually fair in the circumstances of the case will depend upon the Tribunal determining whether the statutory test of fairness is met. This is set out in section 98(4) of the Act which is in these terms:

"Where the employer has (shown a potentially fair reason*) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) shall be determined in accordance with equity and the substantial merits of the case".

In a case where the potentially fair reason is conduct, the Tribunal must be satisfied that the employer has carried out a reasonable investigation and that that has produced material/evidence which supports a conclusion that the employee has been guilty of the alleged conduct.

It is not for the Tribunal to decide whether or not *it* would have dismissed. Instead the Tribunal must consider whether the employer's decision to dismiss can be said to come within a reasonable band of decisions open to a fair employer.

8.4. Contribution

If a Tribunal finds that a dismissal was unfair but nevertheless considers that the employee contributed to their own dismissal, the Tribunal can assess that contribution with the result that the employee will only receive a proportion of the compensation which she would otherwise have received. At this stage in the process it is for the Tribunal to reach it's own conclusions on the basis of the evidence which it has heard and on the balance of probabilities.

9. **The Tribunal's conclusions**

9.1. Pregnancy discrimination – was the disciplinary process and the claimant's subsequent dismissal because of her pregnancy or an illness suffered as a result of it?

Clearly being subjected to a disciplinary process and then dismissed is unfavourable treatment. The crucial question is what was the reason for that treatment.

It is common ground that both respondents were aware that the claimant was pregnant from 30 January 2018 or thereabouts.

Because of the statutory provisions that we have referred to above, the initial task of showing facts which could lead the Tribunal to the conclusion that the disciplinary process and dismissal were because of pregnancy is the claimant's task. It was recorded at the 6 June 2019 preliminary hearing that the claimant would seek to show that pregnancy was likely to be the reason because Mr Moomba's attitude towards her changed when she announced that she was pregnant; he then insisted on the claimant working whilst she was on pregnancy related sickness absence and the coincidence of the date of the dismissal and the alleged date when the claimant's maternity leave would have begun was significant.

As the claimant is a litigant in person the Tribunal asked questions of Mr Moomba during the course of his evidence as to what his reaction to the claimant's pregnancy was and whether it caused any inconvenience to the business. The answers which we received were that Mr Moomba was happy for the claimant that she was pregnant and that he was used to dealing with a workforce that included young female employees who were likely to get pregnant. Whilst the claimant was absent from work for a lengthy period after announcing her pregnancy, although specifically after apparently possibly injuring herself at work, Mr Moomba did not express any concern about the claimant's absence in so far as it affected work. He was of the view that the claimant's duties could be covered by others.

The claimant complains that her mobile phone number or possibly landline had been given as the default number if Cornerstone received telephone calls out of hours. Mr Moomba indicated that there would be a limited number of such calls because Cornerstone did not provide a 24 hour service. It seems however that there would from time to time be calls from other agencies who needed to know how to get access to a service user's home. Whilst no doubt it was

inconvenient and an irritation for the claimant to get these calls for, we think, a fairly brief period of time, there is no evidence to suggest that Mr Moomba had arranged things in this way because the claimant was pregnant or because she was off work with a pregnancy related illness. It seems instead to amount to nothing more than carelessness which, we regret to say, is symptomatic of this employer's approach to its employees and indeed its administration generally.

Other than this we have not been offered any evidence to suggest that Mr Moomba was badgering the claimant to return to work. Indeed it seems that despite concerns for her unborn child the claimant was also anxious to work if she could because she needed the money. We note that on page C26 the claimant is complaining to Mr Moomba that "my hours have been take off me I'm gonna lose my house with 2 children … where has my job gone.".

We do have concerns that there is no documentary evidence to show that the respondent carried out any risk assessment once it became aware of the claimant's pregnancy. Our concern is particularly by reason of the injury which the claimant sustained when trying to move a service user on her own – this being the occasion when the claimant's partner was obliged to assist her on 11 February 2018.

However, whilst the respondent may have been failing in its duty of care to the claimant, we do not find that this supports the case that the disciplinary process of dismissal was because of the pregnancy. Instead it is again a symptom of the first respondent's failure to have a proper and documented system in place.

As far as any proximity between the date of dismissal and the claimant's maternity leave beginning, it needs to be borne in mind that at the date of dismissal the claimant had already been absent from work for the better part of four months and so whatever the date maternity leave was to commence, the reality was that that would not alter the fact that the claimant would not be at work as she had not been at work for many months prior. We also note Mr Moomba's comment that in the claimant's witness statement she states that it had been her intention to work until the last week before her due date which was 14 September 2018. It follows therefore that it seems that the claimant, dismissed in June 2018, would not otherwise have commenced her maternity leave for another three months. However for the reasons we have explained above this is somewhat academic.

In assessing what was the real reason for the disciplinary process and ultimately the claimant's dismissal, we also have to give consideration to the nature of the allegations against the claimant and the evidence on which those allegations were brought. Whilst below we have adverse comments to make about the fairness of the procedure, we find that in relation to both the £40 issue and the dog issue there were significant matters of concern which any reasonable employer would want to investigate and potentially take action about. The case before us is not one where the employer seeks to rely upon flimsy grounds for dismissal or where the employer has gone trawling

for anything which might justify a disciplinary process and dismissal. The £40 issue came to the respondent's attention via another care worker, Yvonne and the particular difficulties with the payment for the dog came to the respondent's attention through the social worker Jill Eland.

For all these reasons we conclude that the claimant has not discharged the initial burden of proof and accordingly the complaint of pregnancy discrimination fails.

9.2. Automatically unfair dismissal – was the reason or principal reason for the claimant's dismissal her pregnancy?

Whilst the burden of proof differs here, our conclusions in relation to the pregnancy discrimination complaint must also inform our decision in respect of the automatically unfair dismissal complaint. In particular our conclusion that the disciplinary charges against the claimant cannot be described as sham. We therefore find that this complaint also fails.

9.3. Ordinary unfair dismissal – does the Tribunal have jurisdiction?

The question is whether the claimant's employment had only commenced in August 2017 or whether it had been continuous since March 2015. As we have noted, the respondent contends that there was a gap in the employment because the claimant had either resigned from her employment with Bliss Support Limited or had been dismissed by Bliss prior to the transfer of the Bliss undertaking to the first respondent in August 2017. For the reasons which led to our conclusions in paragraphs 6.2 to 6.8, we have already found that there was no break in employment with the result that the claimant was one of the employees of Bliss who transferred to the first respondent under a relevant transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. It follows that the Tribunal does have jurisdiction to entertain the complaint of ordinary unfair dismissal.

9.4. Can the first respondent show a potentially fair reason to dismiss?

The first respondent seeks to show the reason of conduct – in fact gross misconduct - so as to justify summary dismissal. As we have noted, conduct is one of the potentially fair reasons which Parliament has set out in the Employment Rights Act 1996. We find therefore that a potentially fair reason for dismissal has been shown.

9.5. Was that reason actually fair having regard to the provisions of the Employment Act 1996 section 98(4)?

It is likely to be difficult for a respondent to properly deal with this crucial aspect of an unfair dismissal complaint if the Tribunal does not have the benefit of hearing from the dismissing officer. Whilst the Tribunal have a signed statement from Ms Lloyd, the dismissing officer in this case, it is a very brief statement and so it does not include anything like the detail that we would like to have had before us. The position is aggravated by reason of the minutes of the

disciplinary hearing also being brief, although the dismissal letter is more detailed.

9.6. Did the first respondent have a genuine belief that the claimant had committed misconduct?

On the basis that they had been notified in the circumstances that we have found about the £40 issue and the dog issue, we are satisfied that any reasonable employer would have been concerned. There were two serious allegations which needed to be investigated and which the claimant had to offer an explanation for.

9.7. Was there a reasonable investigation?

We conclude that there was not. We find that it was unfair for the claimant to be misled into thinking that Ms Lloyd's visit to her home on 29 May 2018 was nothing more than a keeping in touch meeting. It seems that the claimant was further misled by Ms Lloyd during the course of that meeting when she explained that the questions she went on to ask about the £40 issue and the dog issue were just a formality. In those circumstances, not appreciating that this was at least after the event something described as a disciplinary investigation, the claimant did not have a proper opportunity to defend her position and offer her explanation.

There were further serious omissions with regard to the investigation in that there is no proper evidence that PL or Ms Leishman were interviewed by Ms Lloyd, or for that matter anybody else at the first respondent. Latterly whilst giving evidence to us Mr Moomba suggested that PL had been interviewed and there had been an attempt to interview Ms Leishman, Ms Lloyd makes no reference to this in her witness statement. We have not seen any notes of an interview with PL, nor have we seen a note from Ms Lloyd as to her alleged attempt to speak to Ms Leishman about the matter. We think that it is significant that as late as the disciplinary hearing on 4 June, the claimant is recorded as asking "Why wasn't Gail (sic) asked regarding…" and that question by her is neither completely recorded nor answered at all in the note at page C71A.

We conclude that these failings in terms of the investigation are sufficient to render the dismissal unfair. There was procedural unfairness because the claimant was not adequately put on notice that there was a disciplinary process against her until after what turned out to be a disciplinary investigation meeting. The dismissal was also substantively unfair because we find that no reasonable employer could have been satisfied on the evidence and on the balance of probability that the claimant had been dishonest in relation to the £40 issue.

9.8. The other disciplinary charges

We note that the failure to obey a reasonable management instruction and the dog issue were, according to the dismissal letter not matters taken into account when deciding to dismiss the claimant. We observe that the decision that the claimant apparently had no responsibility for the dog issue because it was a "civil matter" is

perhaps a rather odd conclusion and may suggest that there was confusion between the rights which M may have had to pursue a claim against the claimant's sister for payment of the dog with the claimant's duties as an employee who had taken it upon herself to broker that deal and then it seems distance herself from the difficulty in M receiving payment from her sister.

We should add that we do not think that any reasonable employer would have concluded that there had been a breach of confidentiality or data protection when the claimant's partner Mr Pearson became privy to information about the £40 issue. We consider that any reasonable employer would have accepted that Mr Pearson had had some role as a driver previously with the employer and there had been no objection to him being a courier in respect of the £40 returned to Cornerstone. He was not therefore an 'arms-length' third party. Further it appears that employees of the first respondent were not inhibited in apparently explaining to Mr Pearson what the £40 was for.

9.9. Did the claimant contribute to her own dismissal?

Here it is for the Tribunal to make its own assessment on the basis of the evidence which was before the respondent at the time and evidence which we have heard during the course of this hearing. Whilst the claimant was not responsible for the lack of an appropriate procedure by her employer for dealing with service user's money, we consider that it is significant that whilst the claimant went to the trouble of getting PL to sign a document to record the receipt by the claimant of the £40, she then failed to take similar steps when she allegedly returned the money to PL on the same day. We would expect in these circumstances that either the claimant and PL would have agreed to destroy the earlier note now that the money had been returned or that the original note would be endorsed to the effect that the money had been returned.

We were also struck by the alacrity with which the claimant agreed to provide £40 to the first respondent so that that sum could be returned to PL. We appreciate that at the same time she described the suggestion that she had retained the money as 'horrendous'. However on the timings as we now have them it is clear that the claimant raised no further objection for several months until the disciplinary process was intimated.

Although it was not a matter for which the claimant was ultimately dismissed, if the dog issue had not developed as it did that would not have been one of the reasons which led the first respondent to pursue a disciplinary process. As we have noted above, we consider that the claimant clearly had some responsibility and there were shortcomings. She had brokered the deal between M, who is a vulnerable person, to her sister – a transaction which could hardly be described as arm's length - and then apparently turned a deaf ear to the concerns of M and his social worker that the claimant's sister had not met her side of the bargain.

Having given the matter careful consideration, we conclude that the claimant contributed to the extent of 25% to her own unfair dismissal and accordingly in due course she will only be awarded 75% of the compensation that otherwise would have been payable.

Employment Judge Little

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Date 12th February 2020

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