THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms Samantha Turner	Clever Clogs Day Nurseries Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 13th-15th February 2018
EMPLOYMENT JUDGE GARNON MEMBERS Ms L Jackson and Mr P Curtis

Appearances
For Claimant: Mr K Morgan Solicitor

For Respondent: Mr A Webster of Counsel

JUDGMENT

1. The claim of unfair dismissal is well founded. We award compensation of £ 2385, being a basic award only, to which the Recoupment Regulations do not apply.
2 The remaining claims are not well founded and are dismissed.

REASONS(bold print is our emphasis unless otherwise stated)

1 Issues

1.1 At a preliminary hearing Regional Employment Judge Reed defined the claims as unfair dismissal, breach of contract , direct sex and/or pregnancy discrimination and compensation for untaken annual leave. The last claim is not pursued Under the Equality Act 2010 (the EqA) the parties agreed all the acts complained of, if proved, would be covered by s18 not s13.

1.2. The parties agreed the issues are

(a) What were the facts known to, or beliefs held by the respondent which constitute the reason, or if more than one the principal reason, for dismissal?

(b) under section 99 of the Employment Rights Act 1996 (the ERA) was the principal reason for dismissal of a prescribed kind or did the dismissal take place in prescribed circumstances relating to pregnancy maternity or childbirth?

(c) If not, did it relate to her conduct?

(d) If the latter, did the respondent act reasonably in all the circumstances of the case:

i) in having reasonable grounds after reasonable investigation of its beliefs,
ii) in following a fair procedure, and
iii) in treating the reason as sufficient to dismiss ?

(e) If the respondent acted fairly substantively but not procedurally, what are the chances it would still have dismissed if a fair procedure had been followed?

(f) Has the employee, by her culpable and blameworthy conduct, caused or contributed to her dismissal, and if so by what, if any, amount should compensation payable be reduced

(g) in the wrongful dismissal claim, was she in fact guilty of gross misconduct?

(h) Did the respondent in dismissing the claimant treat her less favourably because of her pregnancy or as a result of her seeking to exercise her right to maternity leave?

i) Was the claimant subjected to the detriment pleaded in paragraph 34 of the Particulars of Claim contrary to Reg 19 of The Maternity and Parental Leave Regulations 1999 (MAPLR)?

2. Findings of Fact

2.1. We heard the claimant and read the statement of her one witness, Ms Barbara Ann Sowerby, who was not well enough to attend . For the respondent we heard the investigating officer, Ms Vicky Davison, the person who took the decision to dismiss, Ms Sharon Lewis, the note taker at all the meetings, Ms Melanie Andrews, a colleague of the claimant, Ms Kerri Ann Corner, and the director and owner of the company who rejected the claimant's appeal ,Ms Andrea Townsley.

2.2. The claimant was born on 23rd September 1983 and was latterly Deputy Manager of the Bowburn Nursery near Durham. The respondent operates another at Belmont Durham about 15 minutes drive away. On 1st July 2007 her continuous employment began. It ended on 10th March 2017 when she was dismissed without notice for alleged gross misconduct.The claimant informed the respondent of her pregnancy with twins in September/October 2016. Her babies were due on 26th June 2017. She intended to start maternity leave on 2nd May but take accrued annual leave before that so her last day of work would be 31st March.

2.3. The problem with all the witness statements, in particular those of the respondent, is the lack of specifics. The conduct of which the claimant was accused by the time of the disciplinary hearing related to specific incidents on identifiable days, but no dates are given in any witness statements. This is not just criticism of style but raises the question of whether what was put to the claimant during the investigative and disciplinary stages was as vague as that initially put to us.

2.4. In 2016 Ms Lewis became the claimant's line manager. Her previous line manager was Lauren Straughair, with whom she got on well. The claimant was trusted and had no previous disciplinary record, as such. However, she had been "spoken to" in the last two years about claims for mileage expenses and timekeeping, especially longer lunchtimes being taken. Ms Townsley regarded the claimant with a great deal of affection and trust. The feeling was mutual.

2.5. The security arrangements at the Bowburn premises were changed to be the same as at Belmont. Entrance to the nursery was by a fingerprint sensor placed outside the main door. If more than one person arrived at the same time, several could enter on the fingerprint of one of them . There may be fewer fingerprint entries than there were staff in the building.

2.6. There was a signing in sheet to be completed when a member of staff attended for work, on which staff's names are pre-printed. The first column reads "time due in" , the second reads "time in". Columns for time in and time out are repeated three times. If any member of staff left the building for only a short period of time they would tend not to sign out and back in . The recorded start and finish times were the basis for salary. Although no mention was made of this in her statement, Ms Lewis confirmed they serve another function as evidence of the nursery operating with the employee to child ratio required in this highly regulated sector.

2.7. Ms Straughair left to go on maternity leave in August 2016. Ms Lewis, based at Belmont, was to oversee both premises until Ms Straughair returned from maternity leave .Ms Lewis visited .Bowburn in September 2016 and after a couple of weeks the claimant was told Ms Lewis would be staying there and the deputy at Belmont, Ms Davison, would be promoted to temporary manager there. This was a decision made by Ms Lewis and Mr Townsley based in part on the fact the claimant's performance was being "managed" and Ms Davison was regarded as more reliable.

2.8. Prior to this the claimant had a few dealings with Ms Lewis and did not get on with her. Ms Lewis did not like the way Ms Straughair had run the Bowburn nursery and was determined to change things. Ms Lewis volunteered in oral evidence she had imposed upon the claimant a rota similar to the senior and ordinary nursery staff. The claimant would be expected to start and finish at fixed times and take fixed breaks. Ms Straughair had allowed the claimant far more leeway to come and go as she pleased.

2.9. Ms Lewis decided Ms Corner would take over the claimant's role during her maternity leave. Ms Lewis gave the impression of preferring her to the claimant. With regard to the changes introduced by Ms Lewis, the claimant paid lip service to accepting them . We find she never "bought into" the change of style in which Ms Lewis was far more determined to "do things by the book".

2.10. In mid February 2017 Ms Lewis, before going on leave, asked the claimant to raise at the staff meeting that some paracetamol tablets, albeit covered in dust and out of childrens' reach had been found in the children's toilets during re-decoration . The claimant did so and recorded it in the minutes.

2.11. While Ms Lewis was on leave, the person in charge at Bowburn was the claimant. Ms Corner was being "trained up " and was next in rank . Ms Kayley Smith was one of several "seniors". During oral evidence Ms Corner explained that what happened on 21st February caused Ms Smith to monitor the claimant's attendance going forward .

2.12. The busiest times of day are when the children arrive and when they leave. Young children and babies will remain in the nursery all day. Older children may go to the "Fun Club" from which some may be taken to school by nursery staff. All start to be brought in by their parents from about 7:30 am. The first room after the entrance door which is secured

by the fingerprint lock is the manager's office. Outside that is the signing in book. There is then a corridor passing the baby room which has a very large window. The details were not agreed upon by all witnesses but the other rooms, which are on two floors, are laid out in such a way it is unlikely the claimant could be in the premises and no member of staff notice her presence. On arrival in the morning, she would normally put her coat and bag in the office then either deal with parent queries outside that office or go around the building to check all was well.

2.13. On 21st February the claimant was due to start at 7:45 am. The fingerprint operated door was malfunctioning. Joanne Redfern, a nursery worker who would normally have been working in the Fun Club, was assigned to man the door from 7:20 am. Although we will deal later with the evidence gathered by Ms Davidson during the investigation, our finding is that the claimant did not arrive until approximately 8:20 am. She had her seven-year-old daughter Jessica with her. Ms Redfern signed Jessica into the Fun Club at the recorded time of 8:25. The signing in book for that day completed in the claimant's own handwriting shows her claiming to have arrived at 7:40. The claimant's case throughout the internal proceedings, **and here**, is that she did arrive at 7:40 and spent time talking to Ms Redfern about the problems with the door and to parents as they came in. On balance of probabilities, we do not find the 45 minutes between her claimed time of arrival and the time attributed to it by witnesses can be explained in this way.

2.14. On 24th February the claimant was due to arrive at 8 am. Her entry in the signing in book is that she did arrive at that time. Ms Kayley Smith was also due in at 8 a.m. but arrived at 7a.m. and signed in at 7:15. Just before 8 a.m. a child ("IG") was brought in by his mother. The giving of all medication has to be documented and authority given by a manager. That morning IG needed antibiotics which had been prescribed. A form had to be signed for that. The claimant was not present when IG was brought in. However, she still was not present when the medication was due to be given at 8 am. Ms Smith looked for the claimant first in her office then in another room. She also asked several members of staff if they had seen the claimant, but none of them had. Again we will deal in more detail with the facts when we consider the investigation, but our finding is that on that day the claimant arrived not before 8:15. When a manager is not present to sign medication authorisation, three senior staff may take the decision to administer the medication and all of them sign the medication form. That is what happened on that day at 8:10.

2.15. On 1st March Ms Lewis returned from leave. The claimant said she was quite angry the paracetamol incident was recorded in the minutes because Mr Townsley and OFSTED may not approve. She wanted it removed from the minutes .She threw the documents on the table and told the claimant to get them re-typed Ms Lewis and Ms Corner deny the mood attributed to Ms Lewis but not the content of the exchange. This was the first event of a significant day.

2.16. What happened on 24th had caused Ms Smith, with Ms Corner's support, to decide to inform Ms Lewis on her return of what they believed was the claimant in their words " taking the Michael" (ie not working as and when she should) during Ms Lewis' absence. After lunch on 1st March, both ladies separately spoke to Ms Lewis about the claimant's acts **on 24th February only** . The only mention of this in the respondent's witness statements is a cryptic passage in paragraph 16 of Ms Lewis' statement which reads *"On 1 March 2017 I was approached by the **senior practitioner** who opened the nursery **that morning** and who had been looking for Samantha to sign medication form. An allegation was made that*

Samantha had not been recording her working hours correctly as she was not in when she was supposed to be in. When asked by the Employment Judge she confirmed the senior practitioner was Ms Smith, that Ms Corner gave the same information, "*that morning"* was 24th February but neither of them mentioned at that time any incident on 21st February.

2.17. At approximately 4 pm that day Ms Lewis came into the room where the claimant was with Ms Corner, closed the door and told the claimant to leave the building because she was being suspended on full pay to deal with an investigation into discrepancies in her hours. The claimant was given no details. Ms Davidson was to be the investigator.

2.18. On 2nd March Ms Davidson rang the claimant saying she was to come to a meeting on 3rd March at 9:30 am . She asked the claimant if she would want someone from the trade union or a colleague with her. The claimant was not in a trade union and could not think of a colleague to take. The claimant was not told what the meeting was to be about.

2.19. She arrived at the appointed time. Ms Davison handed her two letters one dated 1st March signed by Ms Lewis suspending her "*pending an investigation regarding discrepancies in your working hours. An investigation is to take place and you will be updated when an outcome is reached*." The other, dated 2nd March, confirmed she had been invited to a meeting on the 3rd and offered a companion.

2.20. On 2nd March Ms Davison had interviewed Ms Corner about 24th February. Her shift was due to start at 9 am but she had arrived at about 8.45. The notes include
Did you have a conversation with KS in regards to looking for part of the management team about IG medical form? What was the conversation?
Yes ***KS said that she nearly rang me because ST didn't arrive at work on time*** *and there was no management in the building to sign off the medication form as he needed it administering at 8 am*
We asked KC if there was any other information she would like to add
KC mentioned that KS had been monitoring ST arrival since Tuesday morning because there had been a problem with the front door when opening the nursery. JR monitored the main entrance from 7:30 am. ST arrived approximately just before 8:30 am." The Tuesday referred to was 21st February.

2.21. On 2nd March Ms Davison interviewed Ms Smith about 24th February. She had arrived at about 7:00 a.m. The interview notes include:
Tell me about IG's medical form
IG came in ***just before 8*** *His mam said he needed his medication and inhaler. He already had a form for an inhaler so he only needed one for his antibiotics. I went to see ND (*Nicola Dean) *and we looked at the box and all checked information. We all agreed to sign that IG could have the medicine . We didn't want to wait any longer as it had already gone past the time he was supposed to have it. IG had his medication around 8:15.* ***I think ST arrived at around 8:30.***
Did you look for management at any point?
Yes ***I looked in the office. I also saw JR and ND and they both said ST wasn't in the building yet***
ST came into the room at around 8:30 AM *and I told her about the medication form*
At any point previously have you noticed ST being late for her shifts?

Tuesday morning we had a problem with the main door. JR monitored the door from 7:30 AM as ST wasn't in the building yet . ST was due in at 7:45 a.m. but didn't arrive till around 8:30 a.m.
Where in the building did you search for a member of management?
I came along from the baby room to the office, I didn't notice ST's bag. It would normally be on top of the desk if she is in . I asked the other girls as I walked around the building if they had seen ST this morning. I went into the office around 8:05 and the medication was given to IG around 8:10.
Did you go upstairs and check for ST?
No I didn't go upstairs I caught JR from the Fun Club and asked her if she had seen ST. JR said she hadn't
Kerri came round the rooms first, ***the last time I looked at the clock it was 8:30 and I seen ST just after that***
On Tuesday morning there was an issue with the front door. You placed JR there to monitor it. Do you know how long she was there?
I asked JR to man the door until ST arrived as she was due in for 7:45, I went up to check to see if she had arrived at this time. She hadn't. I'm not sure what time JR was there until.

2.22. Ms Davison on the same day interviewed Catherine Mann. The notes include:
Tell me about IG medical form
Mam brought in medication and an inhaler . He needed the medication at 8 a.m. there was no management in so myself KS and ND all checked the medication form and signed it and gave IG the medication around 8:15 a.m.
At any point did you look for a member of the management team?
KS looked a couple of times but couldn't find any management
Can you remember what time ST signed the medication form?
It was after 8:15 am when we gave him the medication but I can't remember what time she signed it. It was after that though

2.23 Ms Davison on the same day interviewed Nicola Dean who gave a consistent account about IG's medication on 24th February

2.24. Michelle Cummins was interviewed by Ms Davison on 3rd March .She said her shift started in the Fun Club at 7:30 on 24th February. The last entry in the notes is "*MC then informed me later that she can remember ST coming into the Fun Club* ***at around 8:30 am*** *as she had passed messages on about couple of the children".* The messages would have been from parents about children attending and likely to have been taken shortly before they were passed on. The statements show the claimant's likely time of arrival was after 8:15 but before 8:30 on 24th February.

2.25. On 3rd March there was an interview with Joanne Redfern who had been manning the defective door on 21st February . She was at the front door from 7:20 a.m. and *"I'm unsure of the time I was there until.* The note continues
I asked JR if she signed JS ***(***Jessica the claimant's daughter) *into the building and if so what time*
JR said she had signed JS into the building ***as she was still manning the door****. I confirmed that she arrived at 8:25 a.m. and checked the signing in sheets.* ***ST arrived with JS at the same time and was wearing her coat and carrying her bag.***
The statements show the claimant's likely time of arrival was 8:25 - 8:30 on 21st February.

2.26.1. On 3rd March Ms Davison interviewed the claimant. The meeting lasted about 20 minutes. The typed account is about one page. Extracts follow with our comments in non-italic print :

Last Friday 24th of February can you remember what time your shift started and what time you signed in for?
No not off the top of my head . I go day by day
VD showed ST the rota and the signing in sheet to confirm her start time

According to the thumbprint system you entered 9:03 a.m., can you explain that?
No I can't explain that at all. I did not come in at 9 a.m. Definitely not

2.26.2. Ms Davison agreed the thumbprint records were useless as proof in any case where people arrived together. However, she had searched 100 or more and put them to the claimant as evidence upon which she wanted her explanation. On 24th staff had seen her in the building at 8.30 so the fingerprint entry at 9.03 must have been her second entry to the building .

2.26.3. Ms Davison continued

We have a number of witnesses *that state you were not in the building for the time you signed in for?*
VD showed ST the medical form to confirm this
ST didn't comment on this

The medical form was useless as proof of her time of arrival but the witness interviews were not . **The notes do not reveal any witness interviews shown to the claimant** .

2.26.4. Ms Davison continued

Can you explain why ***all of these occasions (showing all thumbprint records)*** *you signed into the building at times before you actually entered according to the fingerprint system?*
I know I would not sign in one hour early and click an hour . ***I go to get the post nearly every morning***
VD talked ST through the sheets and pointed out examples of her signing in differently from when she entered.

Ms Davison had agreed the fingerprint records were useless, so why put them again? Her answer was she thought the claimant's showed a greater differences between first fingerprint times and signing in times than other staff. No such evidence was produced because, as will be seen later, Ms Davison, in discussion we believe with Ms Lewis , decided no pattern could be proved. As the claimant said *I do believe you have the proof but this doesn't mean I haven't been back out of the building to get the post to let/help a parent . Like I said there would be a valid reason, there is always someone here. SL or another member of staff. I am in and out of the building all the time for visitors, post or even the school run. I would never click hours like that. I've already been told off about my hours.*

2.26.5. The claimant then said:

I came in early last Monday when SL is not here. I'm in charge and that is ***the reason I came back on Tuesday****. I know KC is getting trained up and is always in the office, but in my eyes coming back to work was best for the business.*

This is the first of three indications the claimant might hold the view that if she does work above and beyond the call of duty without being paid for it, it is in order for her to make false entries on the time records. That is not the case she has run before us, nor was it the case she ran in the internal proceedings.

2.26.6. The meeting finished thus
VD then said that what SL told ST off for in regards to ST working hours was a completely different reason for this investigation. This investigation is about discrepancies in your hours
Have you got any questions or anything you would like to add?
No
VD said once this meeting has been completed we will be back in contact.

2.27. The reference to her having come back on Tuesday is to the 21st February when she had an ante-natal appointment at about 1.30 p.m. in Durham Hospital to which she would drive in about 15 minutes. This was a matter covered in evidence which would have been relevant to all the claims if the claimant's assertion that Ms Lewis insisted upon her attending ante natal appointments in her own time and the claimant's belief that Ms Lewis resented her taking time for such appointments, which were more frequent and lengthy due to her expecting twins, were well founded .We find they were not, so will deal with it now.

2.28. The claimant was unable to give any example of herself or anyone else being denied the right to attend ante natal appointments in work time. Ms Lewis credibly explained that with a staff all of whom are women many had been pregnant in recent years , so all matters relating to maternity , including ante natal appointments and maternity pay , were things the respondent "took in its stride". Documents at pages 106-107 support that . We see plenty of examples of other employers, women as well as men, who view pregnancy and maternity as a nuisance because it interrupts the normal pattern of work and causes administrative "hassle". The whole culture of this respondent is alien to such views. Everyone in the business, management and staff, are dedicated to caring for children. As Ms Townsley explained, the administration side is so familiar to the respondent that it is no "hassle", indeed the government pay 4% extra to the respondent for making statutory maternity payments . Ms Lewis did not resent the claimant going to as many ante natal appointments or staying as long as they took . However, in respect of the claimant and others, she had two practices **which are not discriminatory in any way**, but may well not be what the claimant was used to under the management of Ms Straughair.

2.29. First, if any employee went to an ante natal appointment, and was well, they must come back to work after it. Second, if they had another appointment close in time to the antenatal one for which the respondent had no obligation to give time off during work(as the claimant did once when she had to attend a County Court appointment) they could not have time off during work hours for that unless they took it as leave. These practices are lawful and reasonable. The way in which the claimant put it tends to show that under the management of Ms Straughair, she would have expected to be allowed to do the opposite,

so viewed her "coming back" as if she was doing something above the call of duty, when it was in fact a lawful and reasonable requirement for her to come back.

2.30. At the meeting on 3rd March, the claimant only recalls being asked about 24th February and being shown by Ms Davidson an extensive bundle of fingerprint data sheets with a number of entries highlighted and asked questions about different days and times. Ms Davison says 21st February was also discussed. She says the claimant was sitting next to her and what had been said in the interviews of the other members of staff about 21st February was **put to** the claimant. We do not accept it was, though the day may have been **mentioned in passing**. There is no sign of it being mentioned at all in the minutes. That may be because Ms Davison confined herself to what she had been told to investigate which was 24th, or it may be Ms Andrews took a very bad note. The claimant appreciated the basic allegation being made was that she had falsified a timesheet, but in the meeting she was shown no statements from any staff. After the investigation but before the disciplinary hearing the respondent decided not to rely upon the fingerprint printouts but no one told the claimant that. She could not reasonably have been expected to foresee how much the 21st February would figure in her disciplinary hearing or that the fingerprint times would not figure at all.

2.31. Later that day, which was a Friday, Ms Davidson rang the claimant and asked her to attend another meeting on Monday 6th March. The claimant initially agreed. The claimant later texted Ms Davison to ask if the meeting could be postponed. Ms Davison told her to ring the following morning when she was at work.A postponement to 8th March was agreed

2.32. Prior to attending the meeting the claimant did not receive any documentation at all. A letter page 70 dated 3rd March, which the claimant denies receiving, reads
I am writing to inform you that you are required to attend a disciplinary meeting on Monday, 6 March at 9:15 am which is to be held at Clever Clogs Day Nursery Ltd. At this meeting the question of disciplinary action against you will be discussed, in accordance with the company disciplinary procedure regarding discrepancies with your working hours. You were offered to extend this date to give you more time to prepare.
You are entitled if you wish to be accompanied by another work colleague or trade union representative. If you require a member of staff from the nursery to attend with you, please can you let me know so this can be arranged. If you will be accompanied by a trade union representative can you please inform us of the details in advance so we can check accreditation.

2.33. The letter does not tell the claimant she is at risk of being dismissed. It offers her a trade union representative even though it was known she was not a trade union member. There is a dispute between the parties in that Ms Davison says the claimant asked her to be the companion whereas the claimant says Ms Davison volunteered to be. Which is correct matters little. The respondent telephoned ACAS to find out whether it was all right. No one could reasonably think the person who had recommended disciplinary action was a suitable person to be the claimant's **representative**. However, Ms Davison's view of being her companion was simply to offer "*support"* , which she says she did by offering the claimant a glass of water and tissues if she needed it.

2.34. Whether the claimant received the letter of 3 March or not, it is common ground it did not contain any details of the charges or any of the supporting evidence. Mr Morgan quite properly cross examined on the basis this was in breach of the ACAS Code of Practice.

The respondent was regularly in touch with ACAS throughout but they need only have read their own disciplinary procedure at page 46
Step Two Employer informing the Employee
The employer's/manager will notify the employee in writing . This notification will contain ***sufficient information about the alleged conduct****/characteristics or other circumstances which lead him/her to contemplate dismissing or taking disciplinary action against you. The employer/manager will inform you, in the written statement of* ***the basis on which they have made the allegations against you and its possible consequences*** *to enable you to prepare to answer the case at a disciplinary meeting.* ***If necessary*** *the employer/manager will* ***provide you with copies of any relevant evidence against you****.* "

2.35. As a preliminary investigation what Ms Davidson had done was acceptable . Apart from digressing into irrelevant matters during her interview of the claimant, she had spoken to everybody she needed to speak to and taken their evidence down albeit in scant note form .**The problem was none of it was given to the claimant**. It was all given to Ms Lewis who would make the decision. She thought what the other staff had said must be correct. The claimant does not allege any of them had a motive to lie or bore her any ill will. However, witnesses may be honest, credible but mistaken. Their recollection, especially as to times, may not be accurate and reliable. Had the claimant firstly been told the only two days to be discussed were 21st and 24th February and been given the notes of her colleagues interviews, her own recollection of events less than two weeks earlier **may** have enabled her to recall some detail which would explain the apparently irreconcilable differences between her signing in times and the observations of others. **We heard no evience that Ms Lewis herself spoke to any of them to check their recollections**.

2.36.1. The disciplinary meeting started at 9.15 and ended at 9.35. The typed account is two pages , double spaced . Extracts follow with our comments in non-italic print.

2.36.2. Ms Lewis explained how the meeting would be conducted thus :

I will outline the case and briefly go through the evidence which has been gathered. I will then give you the opportunity to state your case and answer any allegations that have been made .

Outline the evidence

We believe *that you have fraudulently completed your signing in sheets, where you have been paid for the hours, when you were not actually in work. This according to our company disciplinary procedures comes under the heading of gross misconduct. We are considering taking action against you which may lead to dismissal.*

Who was meant by "We"? Ms Lewis said it was the respondent as a company. She is a director as are Ms Townsley, who owns the company, and Mr Townsley who played no part in any of this. Mrs Townsley was supposed to be keeping out of the decision making so she could hear any appeal. If the "we" included Ms Davison , she was now supposed to have finished "wearing the investigator's hat " which is what Ms Lewis had told ACAS when asking if she could be the claimant's companion . Even if the "we" was a slip of the tongue and meant "I" , she announced her view **before** outlining the evidence to the claimant, let alone seeking a response. It is natural and reasonable that the claimant believed Ms Lewis' mind was made up so, whatever the claimant said, Ms Lewis would dismiss her.

2.36.3. The evidence she "outlined" is noted thus:
SL explained that on Tuesday the 21st February ST had signed into the building ***at 7:40 am.*** *SL asked ST to confirm it was her who signed in. SL then offered ST to look at and explain witness statements and the Fun Club signing in sheet. ST refused for her opportunity to look at the witness statements*

The 21st February was the starting point which the claimant could not have anticipated. She remembers Ms Lewis reading from witness statements but not being shown them. She certainly does not accept she ever declined copies.

2.36.4. The notes continue "*Ask if ST has an explanation for this"* which is clearly part of a pre-prepared script because the next line reads
SL asked ST if she had an explanation for this
ST then says, as I have had said in the last meeting just because people can't find me doesn't mean I'm not in the building . I might be getting post, paper seeing a parent into the building

SL said a ***number*** (sic) *of Fun Club staff met you at the door (we had a problem with the door so a member of staff was manning it) they signed your daughter into the building at 8:25. You were wearing your coat and carrying your bag .How can you explain this?*

ST replied that doesn't mean I wasn't in the building

SL said the staff signed you in at the door

ST replied this is not proof in my eyes . They don't search the whole building for me

SL said according to the statements this was proof

Either the word " number" is a mistype of "member" or it is an untrue statement by Ms Lewis. There was only one person-Joanne Redfern. The claimant says she was given no opportunity of considering her reply but expected to give an answer straight away. She did not feel in a good frame of mind was very nervous and frightened. Ms Lewis and the others present say the claimant was in a defiant mood and 'stroppy" in her answers to Ms Lewis. In our judgment, the claimant was upset and frightened but because she was being "ambushed" with evidence she had not seen before, hid her feelings and came across as defiant. She probably did not accept copies of documents because she formed the impression Ms Lewis had already made up of mind she would be dismissed. That was a reasonable conclusion for her to form in the circumstances of this unfair hearing.

2.36.5. Ms Lewis then turned to 24th February
SL said on Friday 24th you signed into the building at 8 am. During the investigation you stated you were in the building but was upstairs in Fun Club . Fun Club staff confirmed it was after 8:30 am. ST refused again to look at the statements. Ask ST if she has an explanation for this

*Like I have said I have parents talking to me all the time asking me questions about my condition .****I was in the building when I said I was*** *.I would not click hours like this from the business.*
Again it is clear the claimant's case was she was in the building.

2.36.6. However she then continued :
What about all the times I've come in on a weekend to let decorators in or when the carpets were getting fitted or fun days .I work above and beyond my hours. if I wanted more hours I would have asked to be paid for all these times .I work hard for this company and I've worked here a long time and ***know what has happened in the past.***

The claimant in a reply to Mr Webster said this was a reference to the fingerprint log never having been used in the past because it was unreliable **not** a suggestion that staff habitually signed a time which was untrue. **This was the second of the three indications the claimant might hold the view we mentioned in paragraph 2.26.5 above**

2.36.7. Ms Lewis properly returned to the relevant point:
SL said this is not about that Sam, this is about these two occasions

if you have a camera then fair enough that is proof but you only have a couple of people that have said I wasn't in the building to me that is not proof I could have been anywhere

This shows the claimant taking a defiant line rather than being too upset to answer

SL asked ST if she had anything further to say
ST replied no.

2.37. Ms Lewis said she was going to "***adjourn the meeting to make a call***" and for Ms Andrews to type up the minutes .The claimant decided to stay in the building and wait with Ms Davison rather than go home and come back. Ms Lewis made a telephone call to ACAS. Shortly after, she and Ms Andrews came back with the minutes which they asked the claimant to sign. Without reading them properly, the claimant did. **She only then was given the documents in support of the allegations against her.** From a separate room she made a telephone call to her father and later took advice from Mrs Sowerby, his mother-in-law who had been an HR officer. She probably advised the claimant to ask for more time to consider her responses. With the respondent's agreement the claimant left.

2.38. After the signatures on 8th March there is then some manuscript
Following the meeting Samantha asked for some more time to which we agreed to resume on Thursday, 9 March 2017 at 4 pm.
Mrs Sowerby advised the claimant to write the email of 9th March at page 75 which is in terms that the claimant believed a decision to dismiss had been reached and she wanted to appeal. Before this hearing, Employment Judge Shepherd had decided certain passages in the claim, response and documents should be redacted to exclude inadmissible evidence . Our Employment Judge had some concern Mr Webster at one point in cross examination risked drawing a reply from the claimant in which she would "blurt out" matters she had been instructed not to mention. She did not. We need make no finding on whether the "adjourned" disciplinary hearing was to resume at 4 pm on 9th March. The claimant accepts she knew there would be a meeting on 10th March to complete whatever was left of the disciplinary hearing , if anything. By this time we believe Ms Lewis had made her decision and it was probably only intended to announce it to the claimant .

2.39. The claimant sent a further email, which Ms Sowerby helped draft, to the respondent on 10 March saying she was unfit to attend any meeting. She visited her GP and was given a sick note for four weeks. Her mother delivered it to the respondent on 10 March but

not early that day. At 1:30 pm the claimant received a hand-delivered letter to her house saying she was dismissed for gross misconduct.

2.40. The claimant lodged an appeal by e-mail on 13th March . The grounds were mainly unfairness of procedure specifically Ms Lewis being biased threatening and pressurising Ms Townsley did investigate those grounds and accepted the word of the others who were there that the claimant had not been treated badly in the process. An appeal hearing was arranged for 16th March. The claimant was still feeling unwell and wrote an email on 15th March at 7:52 saying she would not be able to attend the appeal. At 11:13 she received an email saying the appeal would be dealt with in her absence. She did not object to that.

2.41. One ground of appeal was " *During my ten years of unblemished employment with the company practices which were hitherto accepted as the norm were subjects of my disciplinary hearing* "**This was the third of the three indications the claimant might hold the view we mentioned in paragraph 2.26.5 above.** Ms Townsley's reply was that it had never been the norm to falsify records.

2.42. The claimant received a hand-delivered letter on 16th March saying the appeal had been unsuccessful. The claimant's complaint about the appeal is that Ms Townsley simply accepted whatever Ms Lewis said. Ms Townsley certainly did not probe very much. She too held the view the evidence against the claimant was strong and, though she admitted some procedural failings (an understatement in our view), felt a rehearing would inevitably reach the same conclusion.

2.43. The claimant feels she was dismissed in a hurry on 10th March just more than 15 weeks before her expected date of confinement so her employers did not have to pay statutory maternity play themselves. We can see why she felt the process was rushed , but neither Ms Lewis nor Ms Townsley knew of the 15 week cut off point Also , as said earlier, with so many staff being pregnant in recent years , all matters relating to maternity pay caused this respondent no administrative "hassle". As Ms Townsley explained, the government pay 4% extra to the respondent for making statutory maternity payments . We are certain it played no part in the respondent's decisions.

3. The Relevant Law

3.1. Section 98 of the ERA provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."

3.2. In Abernethy v Mott Hay & Anderson, Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The reason must be established as existing at the time of the initial decision to dismiss and at the conclusion of any appeal hearing.

3.3. In ASLEF v Brady it was said:

Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that.

Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so.

3.4. Automatically unfair reasons include those in s 99 which says:
(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.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) ***pregnancy,*** *childbirth or maternity,*

(b) ***ordinary, compulsory or additional maternity leave,***

and it may also relate to redundancy or other factors.

MAPLR adds detail in Reg 20 saying an employee shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is her pregnancy that she took, or sought to take, ordinary maternity leave

3.5. Section 98(4) of the ERA applies only if conduct was the true reason. It says:
"Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.6 An employer does not have to prove, even on a balance of probabilities, that the misconduct it believes took place actually did take place. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald. Stephenson LJ in Weddel v Tepper gave invaluable guidance on the "Burchell Test"

Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have

regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."

3.7. Also in A v B [2003] IRLR 405 Sir Patrick Elias said:

"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

Where the investigation is defective, it is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact that it may have caused no adverse prejudice to the employee goes to compensation."

When His Lordship refers to "*the investigation"* we believe he means the whole process up to and including the disciplinary hearing

3.8 As for fairness of procedure Lord Bridge said in Polkey v AE Dayton
in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation

3.9. Khanum v Mid Glamorgan Area Health Authority, held there are basic requirements of natural justice which have to be complied with during an internal disciplinary enquiry. An employee should know the nature of the case against her and be told the important parts of the evidence upon which reliance is placed. Thereafter she must be given an opportunity to state her case and the decision maker must act in good faith

3.10. In Strouthos v London Underground Pill LJ said

It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.

.. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.

His Lordship cited Spink v Express Frozen Foods [1990] IRLR 320, per Wood P*:*

"It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case."

3.11. Linfood Cash & Carry Ltd v Thomson the case concerned a situation in which, for fear of reprisals, witnesses refused to be identified. That is not the case here but the following is applicable to any situation in which a "live" witness will not be present:

1. The information given by the informant should be reduced into writing. …..

2. The following are important in taking statements: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence, such as knowledge of a system or arrangement or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hand of the accused or has any other reason to fabricate.

6. ……, it is desirable that at each stage the member of management responsible for the hearing should himself interview the informant and satisfy himself that weight is to be given to the information.

3.12. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process, so that if she persistently lies, that can be a factor in deciding to dismiss . An employee aying things like " *You can't prove it* " may reasonably have the same effect.

3.13. When considering the sanction, previous good character and employment record is always a relevant mitigating factor. However, if the misconduct goes to the heart of the employment relationship, dismissal for a first offence may be fair

3.14. Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, we must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

3.15 In all aspects substantive and procedural the rule in Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt, is we must not substitute our own view for that of the employer unless its view falls outside the band of reasonable responses.

3.16. Gross misconduct is defined in Laws v London Chronicle (Indicator Newspapersas conduct which shows the employee has fundamentally breached the employer/employee contract and relationship. Dishonesty towards the employer is the paradigm example of gross misconduct. Another is wilful failure to obey lawful and reasonable instructions. Such instructions may be in the form standing orders made known as essential for employees to follow. The main differences between unfair and wrongful dismissal are that in the latter we may substitute our view for the employer's and take into account matters the employer did not know about at the time (see Boston Deep Sea Fishing Co –v-Ansell). Unless the respondent shows on balance of probability gross misconduct has occurred, dismissal is wrongful and damages are net pay for the notice period less sums earned in mitigation .

3.17. Conduct is dishonest in circumstances explained in John Lewis v Coyne [2001] IRLR 139. The EAT said:
"*. The test of dishonesty is not simply an objective one. What one person believes to be dishonest may, in some circumstances, not be dishonest to others. Where there may be a difference of view as to what is dishonest, the best working test is that propounded by Lord Chief Justice Lane in R v Ghosh. In summary, there are two aspects to dishonesty, the objective and the subjective, and judging whether there has been dishonesty involves going through a two stage process. First, it must be decided whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If so, then secondly, consideration must be given to whether the person concerned must have realised that what he or she was doing was, by those standards, dishonest."*

3.18.. The EqA in s39 includes

(2) An employer (A) must not discriminate against an employee of A's (B)—

(c) by dismissing B;

(d) by subjecting B to any other detriment.

3.19. Section 18 includes

(2) 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,

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

3.20. In any case where one is seeking the" reason why" treatment was afforded to the claimant Glasgow City Council –v- Zafar shows unreasonableness of treatment does not show the reason why something was decided ,neither does incompetence of treatment, see Quereshi-v- London Borough of Newham The EAT said in Law Society –v- Bahl :

99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable…

100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations…

101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility.

3.21. The statutory provisions have changed since Bahl. Section 136 says

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

3.22. Reversal of the burden of proof was explained in Igen-v- Wong and Madarassy –v-Nomura International but .Ladele-v-London Borough of Islington gives the best overall guidance at paragraph 40 . For this case the most important parts are

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial:

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen *test: see the decision of the Court of Appeal in* Brown v Croydon LBC *paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.*
(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 esp.para.10.

3.23. As explained in Anya-v-University of Oxford, a finding a respondent would behave equally unreasonably towards others should not be based on the hypothetical possibility that he might , but on evidence that it does.

4.Conclusions

4.1. On the EqA claims the claimant's case is that the respondent, knowing she would be taking maternity leave and it would have to pay maternity pay if she remained employed for longer, seized upon an excuse to dismiss her. The primary facts proved **could** sustain the inference that was so. The respondent's explanations, which we accept, discharge the reversed burden of proof and show the claimant's pregnancy and her forthcoming right to maternity pay played no part whatsoever in the decision to dismiss, or its timing, and did not cause the detriment of her not receiving statutory maternity pay or any other detriment.

4.2.1 On the wrongful dismissal claim, we find on a balance of probability the claimant made false entries in the record of her hours of work on 21st and 24th February. Virtually all the witnesses made frequent use of the word "obviously" before describing matters which were anything but obvious to us. However, when we appreciated the layout of the premises and the working practices, it is more likely than not (which is what balance of probability means) that had she been in the premises when she claimed to have been on 24th, someone would have seen her . On the 21st, it is highly unlikely she had been in the premises at 7.40, exited and re-appeared at the entrance wearing her coat, carrying her bag and with her child at about 8.25. It is **possible** she was in by 7:40, but unlikely

4.2.2. We accept she loved her job , and did not see what she did as stealing from the respondent. The view we postulated she may have held, which is not what she put either at the internal stages or here, that extra work she did meant she was not depriving the respondent unjustly may explain why she cannot admit what she did, **even to herself**. Making false entries in the record would by the standards of reasonable honest people by seen as dishonest. The claimant admits she knew it would be dishonest. At the least, she knew it was contrary to the lawful and reasonable instructions of her employer as to how records should be kept. This was gross misconduct, so her wrongful dismissal claim fails.

4.3.1. The answers to the unfair dismissal issues are
(a) the facts known to, and beliefs held by the respondent which constituted the **only** reason for dismissal are that the claimant on two occasions falsified records
(b) that reason related to her conduct
(c) the respondent acted reasonably in treating that as sufficient to warrant dismissal.
(d) although what Ms Davison did was a reasonable investigation, and based upon it the respondent had reasonable grounds for its beliefs, everything which followed , especially the disciplinary hearing. was nothing resembling fair.

4.3.2. We have cited above Khanum, Strouthos , Spink and Linfood Cash & Carry. We have said enough in our findings of fact to show why no reasonable employer could have adopted such a procedure . If the claimant had had an explanation to give , she had no chance to understand what she had to explain, was provided no evidence in support of the allegations she could be expected to answer and insufficient time to consider such evidence as she was belatedly given. As Lord Bridge said in Polkey
If an employer has failed to take the appropriate procedural steps in any particular case, the one question the ..Tribunal is not permitted to ask in applying the test of reasonableness .. is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true

construction .. this question is simply irrelevant….. In such a case the test of reasonableness ..) is not satisfied …

4.3.3. So bad was the middle stage, it could not be cured by any appeal and certainly was not by this one. We do not believe the respondent's officers set out to be unfair. They kept ringing ACAS but in their eagerness to check compliance with individual steps in the process, forgot fairness is not just going through the motions, but about natural justice.

4.4. There are two elements to compensation: the basic award which is an arithmetic calculation set out in s 122, and the compensatory award explained in s 123 which is such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

4.5. What is commonly called a Polkey reduction is made where if fair procedures had been used, dismissal would or may have occurred anyway. If updated to take account of legislative change, paragraph 54 of the EAT judgment in Software 2000 Limited v Andrews 2007 ICR 825, is an good summary of the principles. We find dismissal would definitely have occurred when it did if the respondent had told the claimant exactly what she was charged with, sent her all the supporting evidence and had a longer properly minuted hearing on 8th or 10th March at which she was properly represented. She had no answer to the evidence of her colleagues before us, even with time to think, and expert help from Mr Morgan . She would have had no answer then, because there is none. We, therefore, make no compensatory award.

4.6. Section 122(2) empowers us to reduce the basic award on account of the conduct of the claimant before the dismissal, if we think it just and equitable to do so. Basic awards like protective awards , are not linked to loss. The claimant's conduct certainly did not cause the respondent to use such a bad procedure, but it does not need to in order to enable us to make a reduction. However, we think it is neither just nor equitable to refuse the claimant a full basic award in all the circumstances. The unfairness of the procedure itself took a heavy toll on her in the later stages of her pregnancy.

_____

Employment Judge Garnon

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 19th FEBRUARY 2018