EMPLOYMENT TRIBUNALS

Claimant: Tracie Shearwood

Respondent: Lean Education and Development

Heard at: At Birmingham, via CVP **On: 14,15,16 December 2021**

Before: Employment Judge J Jones (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr M Cameron (Senior legal advocate)

JUDGMENT having been sent to the parties on 10 January 2022 and written reasons having been requested by the Claimant on 21 December 2021 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. The claimant was employed by the respondent in a variety of roles from 7 September 2011 until dismissal with effect from 28 September 2018. By a claim form presented on 11 February 2019, following a period of early conciliation from 19 December 2018 to 19 January 2019, the claimant brought a complaint of unfair dismissal. The claim is about the claimant's alleged conduct. In summary, the respondent claims that it fairly dismissed the claimant for gross misconduct due to her responsibility for some serious administrative irregularities. The claimant says that the real reason for dismissal was capability and that it was unfair in a number of respects.

2. When the claimant commenced her claim, she included some correspondence from her solicitors in which the allegation was made that she had been dismissed because she had made a protected disclosure. At a preliminary hearing on 25 November 2020 the claimant confirmed that she did not wish to pursue a claim based on an alleged protected disclosure but claimed purely "ordinary" unfair dismissal.

3. The claim was due to be heard in October 2019 and again in November 2020. On both occasions it was not possible to proceed due to health issues on the part of the Respondent's witnesses and, in relation to the second of these proposed hearings, health concerns and bereavement unfortunately linked to the current pandemic. The Tribunal made it clear that, in view of the considerable delay in this case already, it was imperative that the parties were both ready to proceed at the next available hearing date. Both parties were happy for the hearing to be conducted via CVP to facilitate this.

4. The issues between the parties which fell to be determined by the Tribunal were as follows:

Unfair dismissal

a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

c. If the claimant was unfairly dismissed and the remedy is compensation:

i. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604]; ii. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

iii. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the

amount of any compensatory award, pursuant to ERA section 123(6)?

5. The Tribunal considered the issue of merits first.

6. At the preliminary hearing (case management) that took place in this case on 25 November 2020 the Tribunal explained that the joint bundle that had been prepared for use at the hearing required attention in the form of re-ordering, repaginating and re-scanning legibly. The respondent agreed to carry out this task. Unfortunately, however, the bundle that was submitted to the Tribunal by the respondent for use at this hearing was still in a poor state of preparation and many of the documents were unreadable or photocopied in such a way that the dates were omitted. Further, the respondent's witness statements had gone through a number of iterations and had page numbers changed manually. Time was spent on the morning of the first day of the hearing seeking to resolve the issue of version control regarding the respondent's witness statements and during the hearing the respondent submitted a number of further copies of previously illegible pages of the bundle. There were some documents, however, that remained difficult to read or undated and the respondent's representative asserted that his client was unable to provide better copies. By the time the evidence closed, the bundle ran to 311 pages. References in these reasons to page numbers are references to the pages of that bundle, unless otherwise stated.

7. The respondent called two witnesses – Laura Weston, the former regional Team Leader/IQA Manager for the respondent and Brian Hanslow, former Operations Manager. A witness statement was submitted from Mark Thomas, former Interim Director, but he was not called by the respondent to give evidence. The respondent's representative told the Tribunal that the reason for this was that the circumstances within which he left the respondent caused it to believe he might be a hostile witness.

8. The claimant gave evidence in support of her claim, calling no further witnesses.

9. Based on this evidence, the Tribunal made the following findings of fact.

9.1 The respondent is an owner-managed business providing apprenticeship training. At the time of the events that are the subject of this claim, the respondent had 48 members of staff and three directors. The majority shareholder and managing director was Maxine Jones. Gary Cooper was also a director overseeing quality who worked out of the company's sole office based in Hagley, West Midlands. Mr Phil Walters was the third director.

9.2 The respondent's staff were split between those working from the office and those out on site engaging with learners to deliver training and assessment. This latter group were known as

trainer/assessors or “coaches”. The staff in the office covered finance, compliance and sales.

9.3 The respondent provided apprenticeships on a subcontract basis to a number of colleges including Eastleigh College and Basingstoke College of Technology. With the introduction of the apprenticeship levy in about 2017 the respondent obtained its own levy contract which enabled it to receive a direct grant from the government to provide apprenticeships direct to employers. This development came with an added burden of compliance and regulation.

The respondent was directly responsible for record keeping and could be audited by the EFSA (Education and Skills Funding Authority). Failures in record keeping could theoretically entitle the EFSA to recoup funding provided for the delivery of training if it was not satisfied that such training and assessment had been delivered in accordance with the levy contract. The value of the respondent’s contract to provide apprenticeships in the first year was £750,000.

9.4 The claimant began working for the respondent on 7 September 2011 as a trainee assessor. This was a field-based role and was the first time the claimant had worked in the education sector. She had a history of lengthy employment in a manufacturing company where she had been successful and promoted to a management position. Her previous role did not involve the use of computer equipment to any great degree and so, when she commenced working for the respondent, she taught herself the basics of word processing and email.

9.5 The claimant was successful in her role for the respondent and was promoted to Screening and Enrolment Officer on 11 January 2013 (page 61). This was again a field-based position involving the claimant meeting with learners to carry out the necessary checks and complete paperwork to enrol them on apprenticeship programmes.

9.6 On 7 September 2015 the claimant was promoted again to Operations Enrolment Officer (page 63).

9.7 In 2017 the respondent’s then Head of Compliance left the business. The Managing Director, Maxine Jones, approached the claimant to take over this role on an interim basis from 9 October 2017. This represented a promotion for the claimant whose salary increased with the provision of a £3000 car allowance to £39,000. This was an office-based position which was attractive to the claimant who had spent a number of years travelling extensively for the respondent in her previous roles. In an email of 9 October 2017 to the claimant (page 74) Ms Jones described the role as “a massive challenge” because the compliance department was

lacking process. Ms Jones recruited Claire Derbyshire (her sister-in-law) to take on the claimant's position of Enrolment Officer and the claimant spent a significant amount of time training Mrs Derbyshire, to support this recruitment.

9.8 After the claimant had been in her new role as interim Head of Compliance/Compliance Manager for a few weeks, Ms Jones offered the position to her on a substantive basis. Prior to the hearing, this fact was in dispute but it was clear from the documents in the bundle that the claimant did achieve the substantive position and commenced it from 1 November 2017. For example, at page 75 in the bundle was an email from Maxine Jones to the claimant dated 1 November 2017 which read as follows:

"Good morning Tracie hope you are well,

Please take this as your formal job offer of compliance manager, based in Hagley, as discussed yesterday you will also be required to carry out enrolments if needed and continue to support Clair with her development. Your salary will be £36,000 with £3,000 car allowance, start date will be 1st Nov 2017.

Congratulations and keep up the good work."

9.9 Mr Walters, director, congratulated the claimant on her appointment and, in an email of 1 November 2017 (page 79) remarked that "*we have already seen such a difference with you and the team. It's a pleasure to come into our offices again. Thank you*."

9.10 In March 2018 an issue arose with the paperwork that had been completed in connection with a group of learners at Basingstoke College of Technology who were taking a break in learning. It transpired that the incorrect paperwork had been created for them at the start of their apprenticeships, being the paperwork applicable to learners at Eastleigh College. When this administrative error came to light, the claimant rectified the problem manually instead of recreating the relevant folders to show the learners as Basingstoke apprentices on Basingstoke paperwork. The claimant acknowledged and apologised for the error and wrote to Maxine Jones on 21 March 2018 (page 81) that this had been her first time dealing with a break in learning and she was "*still understanding processes that have not been taught to me fully*".

9.11 Other than this issue, the claimant understood that she was performing to the required standard in her role as Head of

Compliance/Compliance Manager. She was line-managed directly by Maxine Jones who did not provide any feedback or appraisals to indicate otherwise to the claimant.

9.12 However, on or about 8 April 2018 (page 88 – undated document in bundle) Maxine Jones sent an email to the claimant which read as follows

[sic]:

"Last week I interviewed for the past of senior compliance administrator. There were two people who are very experienced, have worked for the ESFA which I have made a job offer to.

Paul Baker is leaving therefore we have to replace him, they will both be office based.

My intention would be to move you out of compliance, (we do not need a compliance manager just experience) you would still be based in the same office but doing a very different role, picking up a lot of Mandy's responsibilities and more

Hotel booking
New staff induction
Due diligence
HR which is non existent at the moment (there's a lot of work that needs doing here) processes

Just give a bit of thought to anything else that sits outside of compliance that needs picking up.

We can discuss this tomorrow, but my aim is to recruit very experienced people to build our reputation back quickly with the college and awarding bodies.

That said the yellow folders will have to be worked on all next week to get them lo a reasonable stale.

I am In tomorrow we can discuss more then.
Kind Regards Maxine Jones
Managing Director"

9.13 This email came as a body blow to the claimant who received no explanation from the respondent for the sudden removal of her from her new role. She was extremely upset and her confidence was damaged but she nevertheless continued at work. The following day she had a meeting with Maxine Jones who advised her that her responsibilities would be changing and that she would now be responsible for checking the printing of the numerous packs of documents that were produced in the office in hard copy

form to be sent out to clients and learners. Examples of these documents were enrolment forms and portfolios which ran to 200 - 250 pages each, containing PowerPoint presentations, forms, letters and learning materials. The claimant saw her new duties as very much a demotion.

9.14 In the week commencing 23 April 2018 the respondent had an OFSTED inspection. The claimant was told by Maxine Jones via text message to stay away from the office for two days during the inspection. Gary Cooper told the claimant to "take a back seat in the OFSTED audit" (page 58). The claimant was sent the following email on or about 22 April 2018 (page 90 – undated document in bundle):

> *Good morning Tracie*
>
> *When the ofsted inspection is over this week we will need to look at your role.*
>
> *I have spoken to Gary Cooper and feel that there is an urgent need in the business at the moment for operation/centre support.*
>
> *This will be things like*
> *Batch header system*
> *Printing of right first time packs for site*
> *Hotel booking*
> *Exam support*
> *DBS*
> *Due diligence*
>
> *We need to completely remove Luke from any responsibility immediately, this will fall to you.*
>
> *The idea is to get all operational and centre support processes robust and working right first time.*
>
> *Laura will go through the batch header system tomorrow.*
>
> *Gary and I will draw up a job description for you.*
>
> *For next weeks activities can you continue with the archive process please.*
>
> *Kind Regards*
> *Maxine Jones*
> *Managing Director*

9.15 The reference to “Luke” was a reference to the respondent’s apprentice whose responsibility it was to print the many documents issued from the office.

9.16 The claimant had a discussion with Maxine Jones following this email when she was informed that she would be carrying out the printing in place of Luke and overseeing the transportation of printed material to site by courier. The claimant not only felt upset and demoralised but was worried about how she would cope with these new job duties as she was not confident of the tasks involved. However, her financial commitments as a lone parent meant that she felt she had no choice but to do her best with what was required of her.

9.17 Maxine Jones confirmed the discussion in an email on 27 April 2018 (page 91-2) which stated (as printed in the bundle):

> *Importance; High*
> *Good afternoon Trace just to confirm and clarify the points of our discussion today.*
> *As from next Monday 30 April your job role and responsibilities will change*
>
> *Your tills* [assume: title] *will Operations/centre support*
>
> *We spoke this morning about the role which Gary Cooper will write a job description for .*
>
> *Brian will work with you next Monday going through the job description and the priorities.*
>
> *Kind Regards*
> *Maxine Jones*

9.18 A job description was then produced for the claimant (p93-94) which showed her line manager as Brian Hanslow. Mr Hanslow was, as indicated above, in the role of Operations Manager at the time. He told the Tribunal that this was a role that involved him being out on site and managing the coaches in the field who were delivering training and assessment. By the time he gave evidence to the Tribunal Mr Hanslow’s role had changed and he was now purely delivering training himself as a lead coach.

9.19 The job description produced covered two main functions – printing and resourcing. The printing was the production of all the documentation required by the business for the learners – enrolment documentation, portfolios, workbooks, learning materials and exam invigilation documents. The resourcing part of the role covered the ordering of stationery and other resources required for delivery.

9.20 The process for printing that had been developed by the respondent before the claimant took up this new role was as follows. A folder existed which contained template documents known as “print masters”. Mr Hanslow was responsible for creating and amending these print masters. Indeed, he told the Tribunal that there was no one else in the business who could do so because he was the only person with the right software. Sometimes the creation of a print master involved the collation of a number of documents into one PDF that could then be printed in one go. Many of the documents were bespoke, including from the point of view of branding, for different college clients. This meant that, as Mr Hanslow was based on site, if amendments needed to be made to the print masters before a print run, it would have to wait for him to attend the office or get home from site and access his computer from home to make any relevant changes.

9.21 There was an acknowledgement by the respondent that this printing process was not working smoothly and that the print masters were often in need of amendment. This was reflected in an email dated on or about 1 May 2018 (page 95 – undated email in bundle) from Gary Cooper to Laura Weston and the claimant. In this email Mr Cooper acknowledged that the printing process was “chaotic” and that he and Mr Hanslow were looking at “developing and improving the printing process” to ensure that “Tracie and Luke… can simply click and print [document packs] on request”.

9.22 After the apprentice Luke returned to work, the claimant’s role was to check the accuracy of the printing he produced from the print masters before it was sent to site. This was a page turning exercise and with some documents such as portfolios running to 200 – 250 pages required extensive attention to detail. This was particularly so because the claimant found many errors in the printing due to the state both of the print master and the printer that was in use in the office which, the respondent accepted, malfunctioned not infrequently no doubt due to the volume of printing that it was producing. The claimant found the role of printing and print checking in this context, and following her demotion, extremely stressful. Additional stress was felt because of an increasing pressure building in the business for everything to be 100% correct in view of the looming spectre of an EFSA audit.

9.23 In light of the anticipated EFSA audit Maxine Jones approached Laura Weston, Head IQA/Regional Team Leader to take over the role of Head of Compliance for a period of time. Maxine Jones indicated that there were several problems with compliance processes and poor quality record keeping and she was plainly concerned about the potential impact on the business.

9.24 On or about 25 May 2018 (page 97 – undated email in bundle) Laura Weston wrote to the staff stating

> *“Just wanted to give you an overview of the changes that are coming over the next couple of months with regards to office processes. I have*

> *seconded to the office for a minimum of 2 months where I have been tasked with managing the office/compliance team and their processes.*
>
> *My objectives are to implement structure and standard procedures into al! processes at the office and allocate clear responsibilities for each element."*

9.25 Laura Weston encountered poor quality filing paperwork early into her role as interim Head of Compliance. She raised one issue with the claimant in an email of 6 June 2018 (page 225) relating to where certificates had been filed in the individual learner files. She implemented a process that ensured that only certificates that had been fully processed (meaning for learners whose apprenticeships had been completed and signed off on the database Sunesis) should be filed and they should all be put together in the certificate file for printing out later. In her email she added

> *"All processes that I either discuss or document must be fully adhered to moving forward and any amendment to these must be agreed through me only and not changed because you think it makes it easier. Any actions outside of this will result in disciplinary processes as I need to ensure all are followed to reduce errors, queries and non payments."*

By the time the claimant received this email she was in a different role which did not involve her filing certificates on the Sunesis system. She therefore read this as an email explaining Laura's wishes going forward but not of direct consequence to her.

9.26 The Tribunal found that the tone and content of this email from Ms Weston, less than two weeks after she took up the position, was confirmation that the compliance role was indeed extremely challenging and pressured and that the directors were in a heightened state of concern about whether their business could withstand inspection from the ESFA.

9.27 A further issue was identified by Laura Weston after taking up the compliance position and this related to compliance with GDPR and the security of learner personal data. She sent an email to all staff on 27 June 2018 stating that all original learner ILPs (individual learner plans) were to be secured at the office and no copy sent to site. Learners were to provide contact details on enrolment and give consent for those to be used for contact. (page 124).

9.28 By mid-June 2018 Laura Weston had identified problems with the accuracy and quality of the printed material being produced by the office. This was raised with the claimant who explained the problems she was having with the print master and also explained her own lack of training and understanding in relation to digital print mechanisms.

9.29 A meeting took place between Laura Weston and the claimant on 2 July 2018 following which the claimant felt that her training needs had been understood. Laura Weston produced a document headed 'three-month performance review and training plan – job description update" (p108). Ms Weston included the following statement "*the training plan will cover a three month period with a view to signing off full understanding of this at the review date in September*". In the "agreed actions" section at the end of the meeting minutes, Laura Weston included as an action for herself to agree a suitable date to review the training plan on or before 13 July 2018.

9.30 The performance/training plan review was neither scheduled nor held prior to the claimant's dismissal on 28 September 2018.

9.31 In preparation for the anticipated ESFA audit, the respondent commissioned a trial audit from Eastleigh College. This was scheduled for 19 July 2018. On 18 July 2018 Maxine Jones wrote to the senior managers, including Laura Weston, expressing her disappointment that the business was not ready and prepared for the audit the following day. She reminded them that the respondent has to assume that "at any point we can go through with the ESFA audit with no prior warning". She added that the situation was "simply not good enough". (Page 103).

9.32 The audit from Eastleigh College did not go well. A number of errors were found in the respondent's record keeping and the pressure within the respondent business mounted. On 20 July 2018 Gary Cooper wrote to all staff (page 121) a rather dramatic email explaining that the outcomes of the Eastleigh compliance audit "starkly confirmed that compliance quality and standards were far worse than we envisaged". He explained that the direct levy funded learner files in their current state would result in the respondent having to pay back approximately £750,000 of funding to the ESFA which would "force us to close down the business". He went on to add that it was well understood what needed to be done to rectify and repair the errors in the files and there was now a 10 day period to get all levy files compliant. In his summary section Mr Cooper added that there would be a "zero tolerance" approach to compliance processes and procedure errors.

9.33 One of the main recommendations following the Eastleigh audit was that the learner contact logs be reviewed because they contained inadequate evidence that the training and assessment provided at induction and enrolment had been completed. If the ESFA was not satisfied with the evidence then this could lead to a recoupment of levy funding. This information appears to have sent the business into something of a tailspin. A process was put in place whereby each learner was asked to sign a "Declaration Form" retrospectively to confirm that they had indeed received the training that had been claimed and paid for. This was a simple form which was to be countersigned by a representative of the company. The intention was that coaches would gather the signatures, countersign the declarations and submit them to the office who would file them on the levy funded files in

time for the audit. This was a big job in view of the number of individual learners involved. As the coaches were out on site they used software on their phones known as 'Camscanner' to scan and send documentation to the office.

9.34 On 1 August 2018 Laura Weston was advised by a member of staff who was auditing the files that she had found some of these declarations placed on the file by the claimant with another learner's information on the rear side of the page with a line through it. The concern was that this would be a breach of GDPR. When asked about this, the claimant explained that the way the documents had come into the office because they had been scanned on Camscanner meant that they were double-sided and she did not know how to print them single-sided. This problem was rectified by the claimant once it was drawn to her attention.

9.35 On 2 August 2018 Laura Weston spoke to the claimant about what she described as "serious errors made in printing yesterday" and advised that she would be taking the claimant off printing duties completely. The claimant became upset and stated that she was not good at printing and felt that she was getting nothing right. Laura Weston said that she would be reviewing the claimant's job description and training plan with her when the audit was completed.

9.36 At 07.27 Laura Weston sent an email to the claimant (page 127) which stated that "following on from yesterday's repeated compliance and printing errors… I have made the decision that you must no longer be involved in any compliance-related processes. We have a stringent deadline of 9th August to ensure all of the compliance errors and audit actions are complete".

9.37 Following this meeting and follow-up email Laura Weston took advice from the company's external HR consultant, Graham Drew. She followed this with an explanation of the issues she had been having with the claimant in an email to Mr Drew (page 128). On Mr Drew's advice, Ms Weston suspended the claimant the same day and sent her an invitation to a disciplinary hearing on 13 August 2018. The undated invitation letter (page 129) read as follows:

> *Dear Tracie*
>
> *Disciplinary Hearing*
> *Following our recent discussions, I confirm my intention to hold a formal hearing to discuss your recent actions which have contributed to the company having to rework several hundred documents, deploying extra resources and seriously jeopardising the business.*
>
> *Your initial response to my questioning you was not satisfactory, particularly as I have raised many of the relevant issues with you previously.*

Please attend Worcester Warriors in the Lead box on Monday 13th August at 2pm when we will discuss the following:

Allowing documents to be printed which contained personal data not related to the individual learner files, putting the company at risk of breach of GDPR regulations.

Failure to achieve the minimum standard of compliance. Examples of this include storage of documents in files, incorrect dates on paperwork not matching learner data management systems, incorrect sign off dates for completion of learning aims. Dispatching sub-standard print copies to file/operations by not completing full quality checks of paperwork and printing.

Your recent actions appear to fly in the face of Gary Cooper's email of the 20th July in which he expressed importance of getting it right first and every time and in particular, the possible consequences of not doing so.

Depending on your response to the allegations disciplinary action, up to and including dismissal, may be appropriate.

You may elect to be accompanied by a work colleague or a trade union representative and should you choose a work colleague, please let me know and I will make the necessary arrangements.

In the meantime I confirm that with immediate effect you are removed from all duties affecting the completion of compliance documentation and the audit of Levy compliance folders.

You are to be placed on suspension on full pay until further notice and I ask that you do not make contact with members of staff during this period.

Yours Sincerely

Laura Weston

9.38 The claimant was extremely upset by this turn of events. Having taken advice she lodged a grievance on 9 August 2018 in these terms (page 130):

Good morning
Whilst working for LEAD for 7 years I have noticed a change in employer relationship towards me from the Directors and certain members of the management team, and I feel I need to pursue this in the below grievance email.

Since Changing and accepting a Compliance role to accommodate the business the below issues have been highlighted. No probation period, meetings, training plans, including lack of support and guidance given to me during the Compliance role - Maxine Jones and Laura Weston.

Being removed and replaced from the Compliance role through a Sunday night email with no consultation - Maxine Jones.

Singled out by receiving a text to stay at home the night before an Ofsted Audit - Maxine Jones.

Several complaints to Maxine Jones and Laura Weston for the poor comments from Gary Cooper - making me feel intimidated and upset daily within the workplace, airing his views and opinions about me to others and many other employees regarding my work and home life, these issues were raised and requested them to go on file.

Holidays not being granted over a 2-year period - Phil Walters and Laura Weston.

Questioned and humiliated on a car park on why new staff have reported poor treatment towards me - Gary Cooper.

Not treated equal to Clair Derbyshire to claim weekend travel and nightshift time comment 'you're on enough money to accommodate this' Laura Weston.

Being blamed for the non-collection of post
Improper tone of emails before investigation- Maxine Jones, Gary Cooper and Laura Weston.
Accused of wrong EAL claims without checking audit trails, shouting at me in front of members of staff- Gary Cooper

Given out of date materials and wrong formatted systems to work from causing errors in printing - Laura Weston
Snapped at daily for asking questions - Laura Weston
Asked not to talk to new members of staff or support them if they ask for any help - Laura Weston.
Being told by a director 'if you lose weight do you think you will find it easier to find a boyfriend' - Phil Walters.
Not being treated equal in the office by observing comments over 'who's the best in the office' and 'star pupil' and 'my favorite compliance person' (Matt) – Laura Weston.
Observing activity changes to contact logs to retain funding, questioned concerns to be snapped at 'get on with your job' — Laura Weston
There has been no duty of care in my wellbeing, seeing me upset and

nervous throughout the compliance role, seeing other members of staff taking sick leave for the same issues and also leaving due to harassment within LEAD.
The above scenarios have affected my work life at LEAD making me doubt myself constantly on a daily basis. I would like you to asses the above and arrange for a grievance hearing at your earliest.
Regards
Tracie Shearwood

9.39 Ms Weston again took advice and, having done so, decided to "cancel" the disciplinary hearing and revoke the claimant's suspension in light of this grievance, which she did by email of 9 August 2018 (page 132).

9.40 The following day, 10 August 2018, Maxine Jones became angry with the claimant and two other members of office staff, Lisa Yeomans and Martina Archer, with whom the claimant was friendly because they were seen at lunchtime leaving site together in the claimant's car. Ms Jones held a telephone conference call with all three members of staff and also Laura Weston. Ms Jones remonstrated with all three members of staff for going on a lunch break together as "three members of the compliance team". The staff replied that there had been no agreement for staggered lunches and that this was to be implemented the following week. Maxine Jones made statements such as "can you confirm that you understand this is not acceptable especially considering that the company is going through such a critical ESFA audit?" She added that "if any of you feel that you are [not] fully committed and focused on your job and getting the ESFA audit successfully completed then I suggest that you are not suitable for this job and you seek alternative employment" (page 135).

9.41 After this incident, although the grievance investigation had not taken place, Laura Weston reinstated the claimant's suspension (page 139).

9.42 Mr Drew was appointed to investigate the claimant's grievance. He interviewed a number of members of staff including the claimant, who he saw on 29 August 2018. Having done so he completed a report with findings and conclusions which he issued on 15 September 2018 (page 158). Mr Drew found a number of the claimant's grievances had merit. These included her complaint that the manner of her removal from the position of Head of Compliance had been inappropriate. He agreed that this had been a "shocking way to inform re loss of job role". He agreed that the claimant had been upset on a number of occasions in the office over the changes to her job role and that management had not done enough to resolve the issue and should investigate further. Mr Drew also found a number of the claimant's grievances were unfounded and warned of the risk of a libel claim if she pursued suggestions that there were concerns about possible fraud in relation to the documentation supporting levy claims or safeguarding issues involving young learners.

9.43 Having received Mr Drew's report on 17 September 2018 Maxine Jones sent an email to the claimant (page 173) which simply stated that "the company accept all findings and will be taking action on all recommendations made. Brian Hanslow will be replacing Laura Weston re chairing your disciplinary meeting".

9.44 The respondent called no evidence to suggest that any steps were taken to implement the findings of the grievance investigation, however, prior to the claimant's dismissal.

9.45 Laura Weston told the Tribunal that she then ceased to be investigating officer in relation to the claimant's disciplinary issues and passed over this role to Mr Hanslow. Mr Hanslow did not hold an investigatory meeting with the claimant but instead sent her an invitation to a disciplinary hearing immediately on 21 September 2018. The Tribunal was told by both management witnesses for the respondent that they had not been provided with any management training by the respondent although, in Mr Hanslow's case, he had received some training in a previous employment.

9.46 Mr Hanslow stated in his witness statement that, having received the "disciplinary evidence pack and grievance hearing outcome notes" on 20 September 2018 he quickly found there were several more issues he needed more information about. He stated that "I then collected additional evidence to support a disciplinary hearing". It was not clear to the Tribunal at this stage whether Mr Hanslow viewed himself as investigating the issues or occupying the role of an objective decision maker assessing the evidence gathered by others. In the invitation to disciplinary hearing (page 178) he stated the issues to be discussed as follows:

> *1. Allowing documents to be printed which contained personal data not related to the individual learner files, putting the company at risk of breach of GDPR regulations.*
> *2. Failure to achieve the minimum standard of compliance and Printing. Examples of this include incorrect dates on paperwork not matching learner data management systems, incorrect sign off dates for completion of learning aims, substandard and incorrect amounts of material being sent to the field*
> *3. Incorrect information being inserted into individual learner plans either by incorrect marking of assessments or not inserting the correct information provided."*

He added in the letter that "I intend to rely on documentation available to me, to include the key documents attached (1A – 3D). I will be bringing supporting documentation to the hearing".

9.47 The respondent referred to the manuscript numbers littered throughout the bundle on the top right hand corner of documents that in places stated 1A or 2C and so on as evidence that these documents were included with Mr Hanslow's letter. However, the respondent was not able to provide the

Tribunal with a definitive statement of what documents were sent to the claimant prior to the disciplinary hearing. What was clear was that some documents were held back, again it seems on the advice of Mr Drew, who took the view that sending them to the claimant could be a breach of GDPR if they contained learner's personal data.

9.48 The disciplinary hearing took place on 27 September 2018. The claimant was accompanied by Martina Archer. The meeting was chaired by Mr Hanslow who explained at the outset that there were three points to discuss, which he summarised as "GDPR, Printing and Incorrect info on ILPs".

9.49 The GDPR point related to the double-sided printing of declarations placed on learner files. The document which the respondent said was material to this issue which was shown to the claimant at the hearing was a Declaration Form (page 304). This was a document signed by the learner on 25 July 2018 and countersigned by a representative of the respondent. It shows that it was sent back to the office by Camscanner. There is a line diagonally through the rear side of the document which the claimant said she drew to show that it was not relevant to that particular file. The claimant's initials are shown where she has drawn a line through it and the name of the learner on that side has been redacted.

9.50 The claimant said in evidence that she had redacted the learner's name on the rear side of the document. This fact was not discussed at the disciplinary hearing. The respondent's representative suggested that the claimant had redacted the document before placing it in the Tribunal's bundle and that it was unredacted at the time of the disciplinary hearing. He advised, however, that the respondent had put the document in the bundle, not the claimant. On the balance of probabilities, the Tribunal concluded that the learner's name was not redacted by the claimant when she placed the document on the file. There is no evidence that the fact of its redaction was referred to by the claimant or anybody else and, bearing in mind that it was being suggested that this photocopying/ filing error had caused a breach of data protection legislation, in the tribunal's judgment it is unlikely that the redaction of personal information would not have been noticed at the time the document was under discussion.

9.51 The printing issue that was put to the claimant at the disciplinary hearing related to the incorrect recording of the timing of completion of modules of the apprenticeship on the Sunesis system. There was also discussion about the error in paperwork for the break in learning cases from March 2018.

9.52 The third issue relating to individual learning plans (ILPs) apparently related to the problem of claiming fees for learners who had not been correctly assessed. The claimant said this related to an issue when she had been required to carry out paper-based assessments at DHL and that she had had her approach signed off by the then Curriculum Manager, Helen Aymes.

9.53 At the end of the disciplinary hearing the question was raised about trust and confidence. The notes (page 198) suggest reference being made to the grievance raised by the claimant. She was asked "how do you think those people feel?" referring to those who had been "criticised" by the claimant in her grievance. Mr Hanslow ended the meeting stating that he needed to speak to people and would make a decision over the weekend.

9.54 On 28 September 2018 Mr Hanslow sent a letter of dismissal to the claimant which he said was drafted by Mr Drew based on his instructions as to what had transpired at the disciplinary hearing. The letter (p201) read as follows:

Ms T Shearwood
18 Burnham Close
Kingswinford
DY6 8LX
28th September 2018

Dear Tracie

Thank you for attending yesterday's meeting where you were accompanied by Martina Archer.

I have considered the additional documents you have sent me and I have used these in conjunction with the key documents (1a-3d) that were sent through to you on the 21st September 2019. Additionally, we went through supporting papers.

I have since spoken to a number of staff at your request relating to your input during the meeting. My decision is as follows...

1. Allowing documents to be printed which contained personal data not related to the individual learner files, putting the company at risk of breach of GDPR regulations.

Despite receiving instructions/training you printed and published documents containing learner personal information which was combined with other learner personal information. Thereby creating a serious breach in terms of GDPR. Not only that, you then proceeded to file the information knowing it to be incorrect. This would have caused a significant problem during any audit including a risk to funding from the ESFA. This is a breach of data contamination that cannot be excused.

2. Failure to achieve the minimum standard of compliance and Printing. Examples of this include incorrect dates on paperwork not matching learner data management systems, incorrect sign off dates for completion of learning aims, substandard and incorrect amounts of material being sent to the field.

Numerous mistakes have been made by yourself and accepted as being made by you. These included closing down aims incorrectly on Sunesis, claiming certificates incorrectly and sending paperwork to the wrong college. This complete lack of attention to detail is pure negligence on your part.

3. Incorrect information being inserted into individual learner plans either by incorrect marking of assessments or not inserting the correct information provided.

You have accepted that you have signed off paperwork that has incorrect levels inserted which causes funding errors that puts the company at a serious risk. Whilst you state it was not your entry, I have checked with CD who has also stated it is not her entry. As your signature is on the document I have no option but to hold you responsible.

It was put to you regarding the possibilities of the difficulties arising to relationships should you return to work.
I believe that the allegations you have made against several senior staff within the company have created a total breach of trust and confidence.
In view of the above I consider your actions amount to gross misconduct leading to summary dismissal. The termination of your services from the company is effective immediately. Your salary will cease at the end of September. I will arrange for any outstanding holiday pay and expenses to be paid as soon as possible.

Should you wish to appeal my decision you should write to Mark Thomas (MarkThomas@leadlimited.co.uk).

You should appeal within three working days of receipt of this letter. The appeal should contain one or more of the following reasons.
- *That the Company's procedure had not been followed correctly.*
- *That the resulting disciplinary action was inappropriate or not warranted.*
- *That new information regarding disciplinary action, has arisen.*

Should your appeal be successful you will be reinstated with effect from your termination date

I will put a copy of this letter in the post for your convenience.

Yours Sincerely

Brian Hanslow

9.55 The claimant appealed against her dismissal and the appeal was heard by Mark Thomas, interim Finance Director. The claimant accepted that she had had an opportunity to put her points forward to Mr Thomas but the Tribunal was not able to satisfy itself of the independence of Mr Thomas' consideration of the matter in his absence as a live witness at the hearing. The Tribunal read his

witness statement and noted that it stated at paragraphs 35 and 36, "*I had no faith that imposing lower sanction would result in improved performance*". He went on to state that he had felt that the matters were to be considered as gross misconduct because they were actions that the claimant took knowingly despite having been informed of the correct requirements.

The law

10. The law relating to unfair dismissal is to be found in the Employment Rights Act 1996, as follows:

98 General.

(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 the dismissal, and

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3) …

(4) Where the 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 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.

11. It follows from these statutory provisions that where, as here, the employer admits dismissing the employee, the burden is on it to satisfy the Tribunal with credible evidence of its reason for doing so and to show that it is one of the potentially fair reasons falling within section 98(2). As Cairns LJ said in *Abernethy v Mott Hay and Anderson [1974] IRLR 213*, *[1974] ICR 323*: 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. An employer who fails to cross this hurdle will not be able to satisfy a Tribunal that its dismissal of the claimant was fair.

12. If the Tribunal is satisfied that the employer has established a potentially fair reason, the Tribunal must then go on to consider whether the dismissal was fair or unfair applying the test in paragraph 98(4) above. The Tribunal should consider whether dismissal was "within a range of reasonable responses open to a reasonable employer"[1], recognising both that there is often more than one reasonable position to take in response to a set of facts and that it is not for the Tribunal to substitute what it might have decided if faced with those facts in place of the employer.

13. In a case such as this one, where an employer relies on "gross misconduct" as its reason for dismissal, the test set out by Arnold J in *BHS v Burchell [1978] IRLR 379, EAT* is relevant. He said: 'First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.'

14. It is also relevant to consider the higher courts' guidance where the reason for dismissal is said, as here, to be serious or gross negligence such as to justify summary dismissal. This was considered by the Court of Appeal in *Adesoken v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22* when Elias LJ said the following:

> 23. The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will

[1] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT*

obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.

24. The question for the judge was, therefore, whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal.

…

The determination of the question whether the misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment."

Conclusions

15. Considering first the reason for dismissal, the Tribunal examined closely the respondent's evidence. The letter of dismissal of 28 September 2018 summarised Mr Hanslow's thinking. He concluded that the claimant had indeed made 3 significant errors in her work which he described as the "GDPR issue, the printing issue and the incorrect information on ILPs issue". Issues with the claimant's performance, including filing and printing mistakes, had been identified by Laura Weston back in June 2018 and this had led to a meeting between her and the claimant on 2 July 2018 and the creation of a 3 month training plan, which had not been followed through by the respondent. What happened instead was that the Eastleigh mock audit was conducted on 19 July 2018 and, as a result of the outcome, the business went into something of a tailspin as the Directors began to fear that an EFSA audit would soon be upon them which they would fail, leading to the potential for considerable financial loss.

16. It was amidst this atmosphere that three things happened in quick succession. First, on 1 August 2018 Laura Weston was advised that the claimant had printed and filed one or more declarations double-sided thereby potentially showing personal learner data on the wrong file (later called the "GDPR issue"). As a consequence of this, in the Tribunal's judgment, Laura Weston decided that the claimant was doing more harm than good in helping to get the files repaired and audit-ready so she took advice from the company's HR consultant which led to the claimant being suspended and a disciplinary hearing being convened. The Tribunal observed that tempers were frayed and patience with mistakes was in short supply in the respondent's business at this time. The belief of the Directors was that if the considerable job of getting every learner to sign a declaration to say they had received training at induction was not completed satisfactorily by the deadline of 9 August 2018, they might lose their business altogether.

17. The second thing that happened was that the claimant lodged a grievance on 9 August 2018 criticising the way she had been treated by management such as the summary removal of her from her new role as Compliance Manager/Head of Compliance. This did not land well, as reflected by the reasons for dismissal given by Mr Hanslow that "*I believe that the allegations you have made against several senior staff within the company have created a total breach of trust and confidence."*

18. Thirdly, on 10 August 2018, the claimant and 2 colleagues angered Maxine Jones, the Managing Director, enormously by going out for lunch together at the height of what she saw as a crisis within her business. This was seen by her as a disloyal act which showed that the claimant was not fully engaged in the struggle and was not "committed". The fact that the claimant was then suspended again, having had her suspension lifted on submission of her grievance, was very telling. The Tribunal found that Ms Jones did not want the claimant on the premises.

19. In light of all the evidence the Tribunal concluded that the reason for the claimant's dismissal was a combination of her poor performance in making mistakes in printing and filing documents and her conduct in lodging a grievance against the respondent's managers and going out for lunch with colleagues on 10 August 2018. It was not, as the respondent alleged, her gross misconduct in making mistakes deliberately and of such magnitude as to be potentially responsible by herself for creating the risk of financial ruin to the respondent. The reason for dismissal put forward by the respondent not having been proved, then the Tribunal found that the claim for unfair dismissal was well founded.

20. If the Tribunal had accepted the respondent's reason for dismissal, it is worth recording that it would have found that the dismissal was unfair. The claimant certainly made mistakes in printing and filing which were understandably frustrating for the respondent, especially at the time when they occurred. This was a performance issue and the claimant had raised training needs which were legitimate. She had been summarily removed from her new role and thrust into a new one. There were also acknowledged to be contributory problems from the systems in place at the time, such as the creation and updating of the print master. These training needs had been correctly addressed by Ms Walton by the development of a training plan. A reasonable employer would have addressed the claimant's performance issues in the Compliance Manager role through a fair process allowing time for improvement. A reasonable employer would have completed the claimant's training plan and reviewed the position before moving to consider whether the claimant's performance was of the required standard in the new role to which she had been moved.

21. The facts proved by the respondent did not show either that there was such a grave dereliction of duty by the claimant as to justify summary dismissal for gross misconduct or that the claimant had deliberately failed to do her work tasks in accordance with the instructions given to her/ to the best of her ability. On the contrary, the evidence tended to show that she was a diligent member of staff who was genuinely struggling with the tasks assigned to her.

22. It is seldom fair for an employer to take offence when faced with a grievance criticising management actions towards an employee. It is a time for investigation and reflection with an open mind. Mistakes can be made and grievances provide what should usually be viewed as a welcome opportunity to put them right. Here, the respondent's own HR Consultant found that the claimant's grievances were in a number of respects well founded and Ms Jones was on record as indicating that she would accept those findings. For Mr Hanslow to conclude as he did that the claimant

had destroyed her relationships with management irreparably by raising these issues was not reasonable.

Remedy

23. Following the Tribunal's delivery of its judgment orally, it went on to deal with remedy. Thanks to the common sense approach of the respondent's representative, much of this was agreed, at least in mathematical terms. There was a detailed schedule of loss in the bundle at page 271-274.

24. The following was agreed:

24.1 Basic Award for unfair dismissal - **£5,334**

24.2 Compensation for loss of statutory rights - **£500**

24.3 Net loss of earnings from dismissal (1.10.18) to new employment with Provident (21.10.18) - **£1,724.52**

24.4 Net partial loss of earnings during employment with Provident (21.10.18 to 20.12.18) - **£1,839.72**

25. This was the point in time at which the respondent said that the claimant's losses should end. First, the claimant was said to have failed to have mitigated her loss. The respondent said that she ought to have been able to have found a job at an equivalent salary within 3 months of her dismissal. Secondly, the respondent argued that the claimant's performance "may not have improved" and she may have been dismissed for poor performance in any event.

26. The claimant argued that she had been deprived of a lucrative £39,000 per year role with the respondent and that her partial loss of earnings would continue for a long time to come. She gave evidence that she had worked hard at finding another role despite the fact that her confidence had been severely knocked by her experience with the respondent, that she was happy and felt supported in her current position (as Enrolment Manager with a training provider called LetMePlay) and that she did not foresee being able to improve on her salary, which had increased to £27,500 in June 2019 and was £28,500 at the time of the Tribunal (claimant's witness statement paragraph 20).

26. The claimant commenced work for LetMePlay on 7 January 2019 and was made permanent on 7 May 2019. She had been in the post for nearly 3 years by the time of the Tribunal, was happy, successful and settled. There is no travel associated with this post and the claimant works from home, managing 2 other people.

27. The Tribunal did not find that the claimant had failed to mitigate her loss. She found alternative employment very quickly and has sustained and improved her earnings since then. She has always worked and there was no evidence of jobs she could have applied for but did not. Having said that, there were a number of reasons why the Tribunal found it hard to predict what would have happened to the claimant's work with the respondent had she not been dismissed when she was. There were indeed issues about the claimant's performance, and the role she had been moved

to was not a role likely to continue to sustain a salary of £39,000 per annum. The Tribunal concluded that the claimant's claim for continuing loss of earnings could not be sustained beyond the date when she became permanent in her current role, 7 May 2019. She was awarded an additional **£2,487.38** for partial ongoing loss of earnings, based on the calculations in her schedule of loss, which the respondent did not disagree with.

28. The claimant was therefore awarded compensation for unfair dismissal totalling **£11,885.62.**

Employment Judge J Jones
14 February 2022

Sent to the parties on:

Kamaljit Sandhu …17.02.2022…….

For the Tribunal:

……..