EMPLOYMENT TRIBUNALS

Claimant: **Mrs T. Lowthorpe**

Respondent: **LTE Group**

Record of an attended Hearing at the Employment Tribunal

Heard at: East Midlands Employment Tribunal

Heard on: 20 and 21 November 2024

Before: Employment Judge Broughton (sitting alone)

Appearances:

Claimant: In Person

Respondents: Mrs B. Davies, Counsel

LIABILITY AND REMEDY JUDGMENT

The claim of unfair dismissal is well founded and succeeds subject to a reduction in compensation for compensatory fault.

The respondent is ordered to pay the claimant the total sum, after the reduction has been applied, of: **£7,943.80**

The recoupment provisions do not apply.

REASONS

Background

1. The claimant presented her claim to the Tribunal on 19 December 2023 following a period of ACAS Early Conciliation from 19 October 2023 to 30 November 2023.

2. The claim is a complaint of unfair dismissal only. It does not include a complaint of wrongful dismissal (i.e. it does not include a separate claim breach of contract claim for notice pay).

Documents

3. The parties prepared a joint bundle numbering 543 pages including some late disclosure during the proceedings which the parties were in agreement should be admitted into evidence.

4. The case was listed to deal with liability and remedy. Ms Davies was concerned about her ability to deal with remedy given the claimant had not produced payslips from her new employment however those were produced during the course of the hearing.

5. The claimant prepared a witness statement and gave evidence under an affirmation and was cross-examined by the respondent. She did not call any supporting witnesses.

6. The respondent called three witnesses; Ms Lucy Mitchell, Local Education Manager, Mr Sam Weston, Local Education Manager and Ms Melanie Wheeler, Deputy Lot Manager. The witnesses gave an affirmation and were cross-examined by the claimant.

Summary

7. In summary, the claimant had been employed by Serco as a tutor to deliver training at the Lowdham Grange prison (**Prison**) from November 1997.

8. **Novus** is part of the **LTE Group**, a UK social enterprise who provide learning and skills to offenders.

9. The respondent, (LTE Group), took over the provision of training at the Prison from Serco on 16 February 2023 and the claimant's employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

10. Highfield is a qualification awarding organisation which design qualifications and on successful completion of their examination, learners are awarded a Highfield certificate. Highfield deliver their qualifications through approved trainers and are regulated by various bodies including Ofqual.

11. **By February 2023** it is not in dispute that the respondent was not a Highfield approved centre at the Prison and therefore was not authorised to conduct courses and examinations for the Highfield certificates. Nonetheless the claimant delivered the qualifications from February 2023 but left the examination papers undated, to be signed once the respondent had become an approved training centre at the Prison. The claimant was also at this time not an approved trainer for Highfield, her manager Kate Harrison was and the claimant used Ms Harrison's tutor identification number. The examination papers were dated after the date the respondent obtained approval.

12. More than 200 qualifications were carried out before the respondent became an approved centre on **21 April 2023**.

13. The claimant does not dispute that she carried out the examinations without approval however, her position was and remains, that her managers, Ms Kate Harrison, Curriculum Hub Manager and Ms Jayne Campbell, instructed her to do so and that although she left the papers undated she did not personally date the papers after the respondent became an approved provider.

14. Ms Kate Harrison was the claimant's main point of contact and lead the Highfield authorisation process for the Prison. The administration team's duties at the Prison included scheduling classes for the learners and tutors and they would order in the examination papers. However, the claimant and her fellow tutor, Sarah Vernon used leftover Highfield examination papers which had previously been supplied to Serco. Thus the administration team would not have been involved in ordering in the Highfield examination papers used prior to authorisation.

15. The claimant was suspended pending an investigation.

16. It is to be stressed, that a number of individuals named in these tribunal proceedings are not parties to these proceedings nor did they attend as witnesses and thus have not had an opportunity to provide their evidence in response to the allegations and circumstances which involve them. They include; Kate Harrison, Jayne Campbell and Sarah Vernon.

17. Both Ms Campbell and Ms Harrison were based at the Prison. Ms Mitchell thought there may have been around 20 tutors providing training at the Prison delivering qualifications through other awarding bodies, not just Highfield. The claimant disputed that there were 20 at the relevant time because they were short staffed but was not able to say what the figure was. The Tribunal find that the figure was likely to be on or around 20 in total.

Findings of Fact

18. All the evidence has been considered by the Tribunal but only the findings considered relevant to the determination of the issues are set out in this judgment. All findings are based on a balance of probabilities.

Emails

19. The respondent had its own email system called Novus. The claimant had no access to the emails on Novus from the date of her suspension.

20. The claimant whilst working at the Prison, also used the Prison's own internal secure email system called Sodexo. It is accepted that the respondent had no control over the Sodexo account and her access was terminated and her account deleted, following her dismissal after she was processed as a leaver.

Report of malpractice

21. It is not in dispute that on 8 June 2023, Ms Poole, centre contact for Highfield and Administration Manager, raised concerns to the Deputy Manager, Ms Coleman, about a number of learner compacts received with the same start date and end dates for 4 different

qualifications.

22. Ms Coleman, started quality checking and at 11:30 am on 9 June intercepted and opened a sealed exam package for submission to Highfield which revealed examination papers completed and dated for that day same but for examinations which were due to take place later that afternoon. These papers had all been processed and submitted by the claimant.

23. Highfield were notified and the respondent then started an investigation.

Suspension: 22 June 2023

24. The disciplinary policy provides that in respect of suspension:

"5.2.10: *All suspensions must be confirmed in writing immediately and the written confirmation letter* ***must be given to the individual at the point of suspension*** *clearly stating the reasons for the suspension (allegation/s) where possible, known times, and dates of any alleged incidents. If necessary,* ***further details will be given within five working days***…" (p.63).

25. The claimant was suspended on 22 June 2023.

26. The letter of suspension is dated 22 June 2023 (p.140-141) however the claimant complains that that it took about 2 weeks for her to get the suspension letter.

27. Ms Mitchell who was assigned to undertake the investigation, states in her evidence in chief that Ms Campbell provided her with an email address for the claimant however, this email address proved to be incorrect (p.148/w/s para 11).

28. Ms Mitchell then spoke with the claimant on the telephone and obtained her personal email address. Ms Mitchell was not aware of the delay in the receipt of the suspension letter. On balance the Tribunal accept that it is more likely than not, give the apparent confusion over the claimant's contact details that the suspension letter was received almost 2 weeks from the date of suspension and this was accepted by the respondent in its submissions.

29. The suspension letter stated only that the claimant had been suspended following allegations of gross misconduct for malpractice and fraud (p.153 -155).

30. The claimant was told her access to the computer network had been suspended and that she was not to contact any employees etc.

Investigation

31. Ms Mitchell, Local Education Manager carried out the investigation.

32. Ms Mitchell wrote to the claimant on 18 July to invite her to a meeting on 26 July 2023 (p.155).

33. This letter unfortunately still failed to explain the alleged wrongdoing, other than in the broadest terms, still referring to suspected malpractice and alleging falsifying of documents. This lack of information would not have been helpful to the claimant in terms of her ability to prepare for the investigation meeting.

34. Ms Mitchell then began to interview a number of people starting with those who had identified the anomaly with the examination papers.

Amanda Poole

35. Ms Mitchell interviewed Ms Poole on 26 July 2023 (p.278 -280).

36. Ms Poole explained how in April/ May she had noticed 4 learning compacts for the same learner dated the same morning and realised they could not have been completed in the same day and reported this to Ms Cook. (This allegation would not form part of the disciplinary case against the claimant).

37. Ms Poole explained that she did not report this to Ms Kate Harrison because she was absent on sick leave but that;"…*Highfield had emailed Kate before this, and Kate had not responded*."

38. Ms Poole also gave evidence that the claimant was left to her own devices and not really managed by Ms Harrison.

Tanya Coleman

39. Ms Coleman was interviewed on 26 July 2023 (p.284 -287).

40. Ms Coleman's evidence was consistent with Ms Poole in that she set out the preliminary investigation she had conducted and that she had identified that learners were studying several qualifications simultaneous when they should have only been studying one and because of her concerns she intercepted the package which included examinations dated for the afternoon of that same day.

41. Ms Coleman also gave evidence that Ms Kate Harrison was a contact for Highfield and:

"Kate Harrison, I think she is the IQA [Internal Quality Assessor] *and checks all the information before it goes to Highfields."*

Talia Cook

42. Ms Mitchell met with Talia Cook on 26 July 2023 (p.288- 290).

43. Ms Cook it is recorded, informed Ms Mitchell that she is not a contact for Highfield and does not process the examinations for this awarding body. She referred to being told by the administration office about the multiple contacts for the same learner and on checking realised the guided learning hours did not match the session.

Claimant

44. Ms Mitchell held one meeting with the claimant **1 August 2023.** This was minuted and although it does not capture what was discussed in full, notably Ms Mitchell and the claimant accept that there was some discussion about a subject access request for emails (SRA), the claimant does not dispute the accuracy of what is recorded (p.291-294). The claimant was accompanied by her union representative, Caroline Armstrong.

45. The claimant gave evidence (which is not challenged by the respondent), at this investigation hearing that previously when Serco provided the education programme at the Prison the claimant only provided the workbooks to the learners which were completed in the cells and the examinations were also undertaken by the learners in their calls. When Novus took over on 16 February 2023 she then had to deliver the qualifications in the classroom and she was told that she would be an assessor for the Highfield certificates which would be awarded on successful completion of the examination. The claimant complains that it had not been explained to her what being an assessor would involve and she been given only a 'little bit' of training with Anne Westcock – Walker (**AWW**).

46. The claimant denied being aware that not following the Service Level Agreement (SLA) with Highfield can have serious sanctions. However, she understood that putting the wrong date in an examination paper was a serious issue.

47. The claimant gave her account of the process she was involved in, namely that the learner compact form was completed by her, she gave that to Amanda or Talia Cooke or Amanda Poole who entered that information onto a database called Curious, which records education information about each learner.

48. The claimant then gave the learners course books in the morning, she carried out a power point presentation and tested them at the end of each unit then handed out sealed examination papers and the learners sat the examination in the afternoon. The claimant was also responsible for completed a seating plan which includes the date and the start and end time of the examination. The claimant completes the Highfield registration, collected the papers and sealed them in an envelope which she took to administration and puts in the outpost for posting to Highfield.

9 June 2023 incident

49. It was put to the claimant that on 9 June 2023 2 members of staff at 11:30am intercepted the sealed envelopes from the outpost tray and noted that the examination papers recorded the examinations has having been sat at various times that same day; 11am, 2:20pm, 2:30pm and 5pm. The times recorded on the papers were clearly incorrect. When asked to explain the reason for this, in this investigation meeting, the claimant merely stated that; "*I don't know, I do get mixed up sometimes*." (p.292). The Tribunal consider that it was not a plausible explanation for such an obvious error.

50. It was put to the claimant that there was an allegation of falsification documents. The claimant denied putting anything on the papers which was incorrect because; "*I'm not allowed to"*.(p.292).

200 plus examinations

51. However, the claimant then disclosed in the investigation meeting that from **16 February 2023 until April 2023**, they were delivering the qualifications for Highfield but not sending the examination papers off; "*… we left the date off, there were approx. 200 of these. Once we got course approval, we then started to put these exams through."*

52. The claimant it is recorded in the notes, was asked and agreed that she had thus falsified the examination papers but immediately stated that she had been told to do this by Kate Harrison and Jayne Campbell.

53. The claimant alleged that she had said to her manager Kage Harrison that this was "*not right*" but she was told it was fine and to "*stop pushing back*" . The claimant also mentioned that other tutor, Sarah Vernon was doing the same. The claimant alleged that she also raised concerns with Jayne Campbell, but was told it was fine to continue to deliver the examinations but leave the date off.

54. The claimant went on in this meeting, to describe how she could not work out the dates to put on the examinations (after the respondent had secured approval) and therefore Sarah Vernon inserted the dates for her. She alleged that she and Ms Vernon had been told in a meeting with Kate Harrison and Jayne Campbell that they "*needed bums on seats*" and it would be "*sorted"* once the course received approval. The claimant alleged that she had taken some holiday because she found it stressful.

55. The claimant therefore made it clear that her position was that she did not personally date the examinations although she was aware that this was being done and was the Tribunal find, clearly admitting to being complicit in it.

56. The respondent was now faced with an even more serious situation.

57. The claimant was asked for evidence of being instructed by her managers to do this but stated that she could not access her emails. It is common ground that there was some discussion at the end of the meeting which was not included in the minutes about accessing emails and that the claimant's union representative (who worked at the Prison) had agreed to try and obtain access to the claimant's Sodexo email account.

58. The claimant explained that she did not raise her concerns with regional management because of a previous incident where she raised a concern and was accused of lying.

59. Ms Mitchell confirmed that she had no idea about the 200 plus examinations until this meeting with the claimant.

60. The Tribunal find that conducting the examinations and redating the papers after the date of approval, was a serious breach of the Service Level Agreement (**SLA**) between the respondent and Highfield.

Assisting learners

61. It was put to the claimant that a learner had stated that she had given him the answers to an examination but the claimant denied this however, she mentioned at this hearing, that with foreign nationals they would take them into another room to read the questions to them and the possible answers and that Kate Harrison had told her and Sarah Vernon that they could do this as the learners could not read the questions.

62. The claimant was also asked about an incident where multiple learners had completed 2 qualifications in one session when each qualification required 20 guided learning hours. The claimant explained that she had been told by Ms Harrison that she could give the workbooks to learners to take and read and then come and sit the examination and if there were only a few lessons they could get through the work with them quicker, she thought the numbers of guided learning hours was only a guide.

Jayne Campbell

63. Ms Mitchell met with Ms Campbell on **1 August 2023** (p.281 -283).

64. Ms Campbell referred to Ms Harrison as the centre contact, that she had no training records but was aware the claimant had invigilation training in March 2023 and that Ms Harrison, the Hub Manager;

    "…*registers and claims learners and oversees the exam process, however its evident this process is not in place*." (p.281)

65. Ms Campbell referred to another tutor (Adam) and was asked whether he was following the same process as the claimant, she defended him and it appears from the notes, vociferously, vouched for his character:

    "No, absolutely not, he has integrity and professionalism." (p.282)

66. Ms Campbell denied any knowledge of knowing that staff were delivering the Highfield qualifications before approval but when asked whether she believed Ms Harrison had directed the claimant to deliver the examination before approval, she did not seek to argue against the possibility as she had with Adam, but merely stated;

    " *No idea, Kate didn't come to me with any issues."*

67. Ms Campbell denied that the claimant had raised concerns with her.

68. In terms of the suspension, Ms Campbell stated that she had told the claimant why she had been walked off site when she did suspended her however, Ms Mitchell in response to questions from the Tribunal could not recall whether she had asked Ms Campbell what she had said to the claimant. The minutes do not record that she had asked Ms Campbell this question (p.283) and Ms Mitchell explained to the Tribunal when giving her oral evidence that it: *"did not form part of the whole investigation – there were more pressing points…."*

69. The Tribunal find on balance, that Ms Mitchell did not ask Ms Campbell to explain what she had said to the claimant about the reason for her suspension and that on a balance of probabilities, given the content of the suspension letter, the claimant was not told anything other than in broad terms what the type of alleged wrongdoing was, which would be consistent with what was set out in the suspension letter.

Sarah Vernon

70. Ms Mitchell met with Sarah Vernon two days later on 10 August 2023 (p.295 – 298).

71. Ms Vernon's account was consistent with the claimant's. It corroborated the claimant's account of having been instructed by Ms Harrison to carry out the examinations and leave them undated until approval.

72. Ms Vernon stated that she and the claimant had been told by Ms Harrison to leave dates off the examination papers so they could be added once the centre had approval. She stated that she had not been happy about this and spoken to Ms Harrison on several occasions but went along with it because she wanted to keep her job. She went on to explain how the examination papers were in the claimant's room and left over from Serco.

73. Ms Vernon went on to disclose other matters she was not happy about and had been instructed to do, including having more learners then tables for them use and being instructed to deliver training in less hours and use power points presentations when she was unaware of some of the references in them.

74. Ms Vernon asked Ms Mitchell if she will lose her job for doing what her line manager had told her to do, to which Ms Mitchell replies:

    "*I'm not the disciplinary manager so I can't disclose that.* ***There are some mitigating circumstances****, but there is some accountability for your own actions*." Tribunal's own stress

    Ms Kate Harrison

75. Ms Harrison was absent on sick leave at the time of the investigation. The evidence of Ms Mitchell is that despite numerous attempts to speak with her, she did not speak with her and she left the respondent's employment on or about 9 August 2023.

76. Ms Mitchell in oral evidence, confirmed that she understood that the tutors received a fixed salary, their remuneration was not effected by the number of examinations or qualifications they delivered. There was therefore the Tribunal consider, no direct financial incentive for the claimant or Ms Vernon to do something which they both accepted they knew to be wrong.

77. Ms Mitchell informed the Tribunal that she had understood that Ms Campbell and Ms Harrison would have had key performance indicators they had to meet which would include service delivery. Ms Mitchell understood in the Yorkshire region the KPIs included delivering a certain class for a certain number of weeks but she did not know, and evidently had not checked what the service delivery requirements were for Ms Campbell and Ms Harrison and whether this included securing a certain number of; "*bums on seats"*.

78. Ms Mitchell did not the Tribunal find, take any steps to investigate whether there was an incentive for the managers to encourage this behaviour and what difference the 200 plus examinations may have had on their ability to meet their KPI/performance objectives.

79. Ms Mitchell explained to the Tribunal that considerations about the absence of any financial incentive for the tutors to carry out all this extra work was '*probably*' something she did not even think about.

80. The Tribunal find that Ms Mitchell did not apply her mind to what may have motivated either the tutors or the managers to deliver these qualifications and whether there was any reason why the managers needed to deliver a greater number of learners. Particularly given the dispute between the witnesses, the Tribunal consider that it was an obvious and important line of enquiry to consider the motive (or lack of motive) the parties may have had and to weigh this into the assessment of their credibility and plausibility. The two tutors were putting their jobs at risk by doing something which they were both candid enough to accept, they knew to be wrong and the obvious question to ask would have been why they would do that and what possible motive would the managers have for asking them to do it.

    Anne Westcock – Walker (AWW).

81. Ms Mitchell was asked in cross examination why AWW was not interviewed.

82. The claimant put it to Ms Mitchell that AWW was the deputy manager. Ms Mitchell thought that Ms Coleman was the deputy manager.

83. As the minutes confirm, Ms Mitchell had not asked Ms Campbell (or anyone else) about the management reporting structure and she was unsure whether AWW was at the Prison at the time, but the claimant put it to her that she was . Ms Mitchell believes that AWW could not have been listed as a centre contact otherwise she would have spoken with her.

84. Ms Mitchell gave evidence that the claimant had not mentioned AWW (other than in the context of training) to her and the Tribunal accept on balance that this is correct, given the absence of any reference to AWW in the meeting notes. However, Ms Mitchell went on to inform the Tribunal that if the claimant if had mentioned AWW she would have spoken to her as a key witness.

Ms Mitchell

85. Ms Coleman had told Ms Mitchell that she thought Kate Harrison was the contact for Highfield and Talia Cook because she processed the examinations. Ms Poole in her interview told Ms Mitchell that she was not fully aware of her responsibilities as the centre contact. Ms Campbell stated that Ms Harrison was the centre contact but she was unsure who the other key contacts were.

86. In cross examination Ms Mitchell accepted in part, that the senior management, namely Ms Campbell, did not know who were the contacts for Highfield and that no one was really sure who was in charge of what and that Talia Cook and Amanda Poole did not understand the process.

87. Ms Michell gave evidence that what she took from this was that training was needed on the process and that it had been a ‘ turbulent time’ following the transfer. It appears however that Ms Mitchell did not really take further steps to clarify what the management structure was.

Training

88. The claimant contends that AWW had only carried out a lunchtime training session with her but that it was not about the Highfield examination.

89. Ms Mitchell had not explored it seems with the claimant, in any detail her level of training and in cross examination she considered the points the claimant had made about lack of training to be irrelevant because the claimant had had to be approved by Highfield to be a tutor and she had received that approval.

90. The Tribunal find that the claimant was not approved at the time the 200 plus examinations were carried out, hence why she had to use Ms Harrison’s tutor number however, Ms Mitchell gave evidence under cross examination that the claimant had not disclosed this to her and the Tribunal accept on balance that this had not been raised by the claimant in the investigation meeting.

91. Nonetheless Ms Mitchell did reflect in her investigation report (p.313) that there was no evidence to suggest training had been administered.

92. There is a letter dated **3 April 2023** (p.204 - 206) from Highfield to Ms Harrison thanking her

for completing the application for the Prison to become a Highfield approved centre and asks Ms Harrison to confirm that the claimant has been validated and is suitably experienced and qualified to assess the qualifications.

93. An email dated 20 April 2023 to Ms Harrison and others from Highfield (p.196- 197) confirms the approval for the centre.

94. The claimant cross examined the respondent witnesses around her lack of training and while the Tribunal find that the evidence supports on balance the claimant's case that she had very little training on delivering the Highfield examination, the Tribunal find that she was fully aware at the time of delivering the 200 plus examinations that what she was doing in carrying them out before approval and not dating them, was wrong and that her understanding of this was made clear in the investigation meeting.

95. The claimant put it to Ms Mitchell that she had not admitted to doctoring the dates of the examinations however, she had agreed that she had falsifying dates (p.293) and went on to explain that Sarah Vernon had worked out which dates to put on the examination because she could not work them out, not that she had refused to be involved.

96. Ms Mitchell in response to questions from the Tribunal, gave evidence that she would expect Ms Campbell and Ms Harrison to potentially have had oversight over what training was being delivered but there were lots of 'issues' after the transfer; "*so potentially [they] may not have known."*

97. In the investigation report Ms Mitchell set out the following (p.174):

"unfortunately we were unable to provide Highfields with an accurate record of the learners possibly impacted from this malpractice due the fact Novus registers were not completed Both Tutors were utilizing CMS scheduling (prison system) as attendance record. In addition, both Tutors were allowed to store the exam papers, administer the exam papers and also submit and post to the awarding body. Therefore site have no tracking of learners being allocated through to accreditation. Admin confirmed that their involvement in the enrolment process was when the Tutors provided a learner compact which learners would complete on the date of delivery. Unfortunately, Sarah Vernon, also confirmed that the learner compacts would not match the exam documentation due to the fact they left the compass with the correct dates in order for it not be picked up by site."

98. Ms Mitchell gave oral evidence that her understanding had been that the day to day examination process is normally managed by the administration team or IQA, but believed that the Prison did not have internal verifiers for the Highfield examination. She does not address this in her report. However, the claimant put it to her in cross examination that the IQA for Highfield at the Prison was Ms Harrison and Ms Mitchell she did not seek to challenge that this may be correct and indeed Ms Coleman had flagged this up in her interview.

99. Ms Mitchell in cross examination accepted in cross examination, that the IQA should randomly check about 10% of examination papers. When asked about the process by the Tribunal, Ms Mitchell gave evidence that she was not entirely sure what an IQA would check and did not know how many IQAs were at the Prison.

100. Ms Mitchell the Tribunal find, failed to establish some rudimentary facts about the process and management structure which were potentially important in order to understand how

feasible it would have been for 200 plus courses and examinations to have been carried out in about 8 weeks without the managers in charge of the Prison being aware what was happening and to what extent were the manages involved in identifying the learners and allocating them to courses, what databases did the managers have access to and what information would this have given or should have given them access to and how were so many learners allocated to courses and rooms without someone enquiring why they were undertaking courses which the Prison was not yet approved to deliver.

101. It was put to Ms Mitchell in cross examination that Ms Campbell and Ms Harrison would normally have been expected to have access to data about learners via the Curious database, which tracks the education of the offenders. Ms Mitchell gave evidence that this system had only just been implemented at the Prison, and she believed that they would not necessarily have had access to it but this is not commented upon in her report. It appears that this is not something she looked into, to check whether this database was being used by the managers.

102. Under cross examination it was put to Ms Mitchell that while Curious was a new system, there had been since 1997 a database called CMS which will show which prisoners have applied for which courses and it is managers and not tutors who then decide what courses to deliver and the managers are told how many learners there are for each course. The administration staff schedule the examinations and courses. Ms Mitchell at first stated that she did not know what managers had access to and that CMS is a private prison system and then recalled and accepted that CMS was used to the Prison (as set out in her investigation report) and that there was also another system called NOMUS which is the main HMPCS system but Ms Mitchell did not explain and nor does she state in her report, who she found had been responsible for allocating the relevant learners to the courses.

Access to emails

103. The claimant asserts that she asked during the investigation hearing for access to her Novus email account to locate relevant emails. Ms Mitchell denies this but accepts that there was some discussion with the claimant's union representation about getting access to the Sodexo email account and that the union were going to support the claimant and provide Ms Mitchell with any relevant emails.

104. Ms Mitchell accepted that the notes of the investigation meeting did not record everything which had been said. The claimant in cross examination could not recall whether she and her union representative had only raised the Sodexo emails at this point.

105. Ms Mitchell in cross examination stated that had the claimant asked for access to her Novus account she would have facilitated access . In her evidence in chief (w/s para 35) she states that at not point had the claimant suggested that her Novus emails would show relevant communications with the managers. While the notes do not record the conversation, on balance Tribunal find that the evidence does not support a finding that at this stage the claimant had expressly asked Ms Mitchell to access her Novus account, there is no follow up email for example asking if this had been actioned.

106. As part of Ms Mitchell's investigation Ms Campbell was simply asked if she was aware if Highfield qualification had been being before approval, she was not asked what information and which databases she or Ms Harrison had access to and whether this included Curious

and what information this would or should include. There was no rigour in her interview with Ms Campbell despite stating in her evidence in chief that she would have expected management to know more "*but there was a lot going on at the time on site*" (w/s para 40).

107. The Tribunal find that Ms Mitchell did not look in any detail into how over 200 examinations could have possibly been carried out on site, with no one it seems aware that the tutors were doing this. She did not question Ms Campbell who did what, who registered the learners, who allocated them to courses, who was responsible for checking number of learners, what access to which databases they had and what information they would expect to have access to etc.

108. The Tribunal find that she appears to have simply taken Ms Campbell's word at face value probably because of her seniority, that she knew nothing about the 200 plus examinations.

109. Ms Mitchell informed the Tribunal that she did not consider checking the work emails of Ms Harrison or Ms Campbell during the relevant period. Ms Mitchell believed there may be an email policy but she did not know what it would say about the ability to access work emails and there was no copy in the bundle.

110. Ms Mitchell in re-examination, gave evidence that there was some sort of investigation by the respondent after hers, into processes and management issues, but she was unaware of what the outcome of it was.

111. Ms Mitchell when asked by the Tribunal how over 200 examinations could have been carried out without management knowing, gave evidence that there were lots of issues at the Prison but she personally had managed a site and gave evidence that

"is it believable they did not know ? Possibly. Would I have known, probably."

Outcome

112. Under cross examination Ms Mitchell stated that was not aware at the investigation stage that the claimant used a different tutor number and therefore did not investigate this.

113. The Tribunal find that the data supplied to the respondent at the time recorded different tutor number for the claimant and Ms Harrison (p.303-305) and therefore it was reasonable for them not to know that she had used Ms Harrison's tutor number.

114. Ms Mitchell then prepared her report (**p.171- 175**).

115. In terms of the claimant's allegations that they had been acting under instruction, Ms Mitchell dealt with this briefly:

"*Both Tracey Lowthorpe and Sarah Vernon claim it was at their manager's request, Kate Harrison but they cannot provide any evidence to support their claims."*

116. In the investigation report Ms Mitchell merely states that Ms Harrison was requested to attend an interview but has since left the organisation after a long period of sickness. (p.174) . There is no indication that Ms Harrison was being unhelpful however, Ms Mitchell in her evidence chief comments expressly on a perceived lack of cooperation which she did not relay in her report to (w/s para 43): " *unfortunately Kate decided not to attend an investigation meeting*

with me. I was disappointed ***she decided not to cooperate with the investigation****, but I could not force her to attend a meeting with me." Tribunal stress.*

117. The claimant was then invited to the disciplinary hearing. The letter (p.337) stated merely that the allegation as; " =*malpractice in relation to the falsification relating to exam practice."* It did however include the findings of the investigation.

Disciplinary Hearing : 3 October 2023

118. Mr Sam Weston, a Local Education Manager for the respondent, was appointed to conduct the disciplinary hearing. He was based at another prison and had never had contact with the claimant beforehand.

119. The respondent during these proceedings disclosed on the second day of the hearing the notes from the disciplinary hearing with Ms Vernon. The claimant had no objection to those being admitted not evidence (p.5490 – 543). Those notes relate to a disciplinary hearing on 3 November 2023, one month after the claimant was dismissed. Ms Vernon had by the time of the disciplinary hearing with her resigned and she was keen it seems in her words to just "*get it over with*" (p.540). Nonetheless she maintains her position in that hearing that she had been assured by Ms Harrison and by the claimant that it was alright to carry out the courses and examinations . She alleges she tried to voice her concerns with Ms Harrison. She does not allege that Ms Campbell was aware. Ms Vernon in this hearing refers to voicing concerns about Ms Harrison with Ms Coleman, including that she had falsified that someone had done a speaking and listening examination.

120. Given the claimant and Ms Vernon largely corroborated each-others account of Ms Harrison authorising the conduct, to make a decision on each independently, rather than conduct both disciplinary hearings and then make a decision, risks a situation potentially where one employee produces evidence at their hearing which supports the instruction, after the other employee has already been dismissed. It would also make it difficult for the disciplinary officer not to feel that they must dismiss for the same allegation regardless of what additional evidence of instruction may be adduced at the later hearing.

121. The letter inviting the claimant to the disciplinary hearing (p.336 – 337/349) referred to the allegation being ' malpractice in relation to the falsification of documents relating to exam practice'. Given what had been discussed at the last hearing, it would be unclear whether this related to the June exams and/or the 200 plus examinations.

122. The meeting was minuted (p.362 – 363) and the claimant does not challenge the accuracy of what is recorded.

Novus and Sodexo emails

123. The claimant in cross examination put it to Mr Weston that he did not arrange or her to have access to her company/Novus email account. Her account had been suspended from 22 June 2023 and she submitted a subject access request in about August 2023.

124. Ms Weston gave evidence that it was not 'particularly pressed' during the disciplinary hearing that the claimant wanted access to her Novus work email account, but accepted the notes do not record him clarifying what was being asked for and indeed it =appears he simply moved on immediately when this was raised and asked the claimant about the agreement

with Highfield for delivery and the expected procedures.

125. The Tribunal consider that it was unreasonable for Mr Weston not to have sought clarify from the claimant about what emails she wanted access to and what evidence she felt they may contain.

126. The Tribunal got the distinct impression from Mr Weston that he did not approach the hearing with an open mind, he read the investigation report and considered the claimant to be guilty of gross misconduct. He did not the Tribunal find consider with any degree of care, whether or not the claimant may have been told to carry out these acts. While in his witness statement he now comments on his thoughts about the claimant's credibility because she had initially denied wrongdoing, that was not his answer in response to the Tribunal's questions about the findings he reached and nor does he set this out in his outcome letter.

127. Mr Weston in his oral evidence told the Tribunal that;

" *I accepted what the investigation officer put forward, I knew Kate (Harrison) did not want to put forward evidence toward the investigation*."

128. Mr Weston however did not explain how he weighed up the evidence when deciding how likely it was that the claimant was acting under instruction.

129. In terms of whether Ms Harrison had told the claimant to leave the examination date blank Mr Weston stated that there was: *"No evidence to tell me that was the case."* However, there was evidence, there was the corroborating evidence of Ms Vernon, the reluctance of Ms Harrison to cooperate, the sheer feasibility of Ms Harrison being unaware of some 200 plus examinations being undertaken by tutors she was responsible for and the lack of motive for the tutors to do something they readily admitted they knew was wrong and which put their livelihoods at risk for no apparent reward or benefit.

130. There was an absence of any real consideration of this issue. When asked directly by the Tribunal to explain the weight he attached to such factors, the Tribunal find that he clearly had not applied his mind to doing so:

"Because there was no additional evidence the judgment was made most on their professional approach."

131. The Tribunal asked Mr Weston whether he had therefore actually reached a finding on whether the claimant had been instructed to carry out the courses and examinations before approval, by Ms Harrison and or Ms Campbell to which he responded:

"*I would not be able to tell you if true or false, I went with the investigation findings."*

132. Ultimately the Tribunal asked Mr Weston to confirm whether what he was saying was that he made no finding on whether the claimant had been acting under instruction, to which he stated merely: *"correct*". He stated that he had reached no finding on this issue because he considered that it was serious misconduct whether they had been telling the truth about being instructed to do it or not, however while that may be reasonable, the issue was whether it was relevant to mitigation.

133. Mr Weston also said he made no finding on whether the claimant had put in the later dates

in the examination papers; "*not personally no, only what the investigation report telling me*." Mr Weston does not ask the claimant about this according to the notes, in the meeting however, the Tribunal accept that it seems of little importance whether she physically wrote in the dates if she was complicit in the act of doing so, which she appeared to accept in the investigation.

134. What concerns the Tribunal most in terms of the conduct of the employer during this disciplinary process and the reasonableness of it, is the approach to the question of whether the claimant was acting under some pressure from her manager and whether this should be considered as mitigation. In terms of reaching a finding, the Tribunal consider that it is unreasonable to discount the claimant's evidence and the circumstantial evidence because there is a lack of supporting documentary evidence, in circumstances where it would be unlikely for such an instruction to be written down.

135. If it was considered to be irrelevant to mitigation whether the claimant had been acting under instruction, this was not explained to the claimant, quite the opposite, Mr Weston asked her what evidence she had about this instruction on a number of occasions in the hearing:

Mr Weston: " *Is there any evidence to support that …"* (p.370); and

"We have no tangible evidence of meetings, talks or instructions, is there anything ?"

136. When asked about the weight attached to the claimant's own evidence, Mr Weston merely raised that the claimant had had a couple of months to find emails from the Prison's email system and had not produced any. He had not however explored at this hearing, what stage the representative had got to in terms of being able to access those emails but in oral evidence stated that he suspected that she may have actually been still trying to get hold of them but he was not sure, because he never asked. He informed the Tribunal that if she had wanted to access her Novus emails that could be arranged via HR and that he could not think of a legitimate reason why that could not have been arranged, he did not however explain that during the disciplinary hearing to the claimant and did not, the Tribunal find, consider whether that should be arranged before he reached his decision whether to dismiss her.

137. The union representative also raised at this hearing, as is recorded in the notes, that malpractice is ingrained at the Prison within the management group and there is a need for a 'big overhaul.' According to the notes Mr Weston does not respond with any expression of concern or ask for further details or even who within the management team she alleges is/has committed acts of malpractice and of what type. He immediately, according to the notes, brings it back to the claimant. (p.371). There is again a distinct lack of interest in wider issues of potential management involvement in malpractice and the implications for the claimant's case in terms of whether thus supports a finding of a propensity by management to engage in malpractice.

AWW

138. In the disciplinary hearing the notes record:

Mr Weston: *"who did you speak to with your concerns*?"

Claimant: *Kate, Ann **[AWW],** Jane, Sarah Burnham" (P.370)* [it was established during cross

examination of the claimant that this was an error in the notes and should have read Sarah Vernon]

139. Mr Weston does not according to the notes, ask who AWW is, when the claimant raised her concerns with her and what she said to her. He exhibits a distinct lack of curiosity in the notes and it was clear in his oral evidence before the Tribunal that he had at the time in the disciplinary hearing not enquired into this,

140. The oral evidence of Mr Weston was that he did not consider speaking with AWW because he did not know who she was, he did not know what involvement she had and she was not mentioned in the investigation. He accepted in oral evidence that it was possible she may have been able to collaborate the claimant's account of being instructed to carry out the wrongdoing and of raising her concerns. AWW was potentially an independent witness, against whom no allegations were being made however, his evidence is that he did not see it as 'that big of an issue.'

Whistleblowing

141. The claimant raised in the disciplinary that she had not been provided with a copy of the respondent's whistleblowing policy and again, Mr Weston does not ask further about this or make enquires about whether steps were taken to make this available to the claimant. He does not explain who the claimant could have contacted under the policy, he does not comment further on the ability of the claimant to know about and access the whistleblowing policy and what it is appears is being said. He responds by adjourning the meeting for 15 minutes before reconvening and dismissing her.

142. The claimant informed the Tribunal however, that she had been provided with a whistleblowing policy while at Serco and understood about whistleblowing and does not allege that she asked for a copy of the respondent's policy during her employment. Nonetheless the lack of any interest in the failure to provide her with a policy which explains how she could have raised her concerns confidentially is the Tribunal consider, telling in terms of Mr Weston's approach and his predetermined view of the outcome based on the initial investigation report.

143. Mr Weston also informed the Tribunal that he did not consider that the allegation about Ms Harrison taking a learner into a room and reading possible answers to be something he should take into account, even though it may evidence a possible propensity to not comply with examination conditions, which may in turn indicate support for the claimant's contention that Ms Harrison was prepared to instruct her to carry out examinations without approval.

144. While he may have concluded that he would be unable, given Ms Harrison's absence to reach a finding on that allegation, he did not it seems even apply his mind to the possible relevance of it to the behaviours he was investigating.

145. In terms of the claimant signing the June examination before the examinations in the afternoon, Mr Weston confirmed that he had taken this into account as clear evidence of malpractice and that he considered it not as a separate offence of gross misconduct but he treated the offences collectively as gross misconduct.

146. However, there is no mention of the June incident forming part of the discussion at the disciplinary hearing and there is no reference to it in the outcome letter either. The outcome

letter clearly deals only with the pre authorisation examinations and using a different tutor number. Mr Weston alleges that the June issue was a reason why Highfield withdrew the Nominated Status of the claimant as a tutor and that it was contained in a statement from Highfield which he read out in the meeting and is referenced in the outcome letter, however the extract in the outcome letter makes no mention of the June examinations.

147. The Tribunal do not find on the evidence that this formed part of the reason at the time for the decision taken by Mr Weston to dismiss the claimant.

148. After a short adjournment of only 15 minutes, Mr Weston returned and dismissed the claimant. He did not set out what his findings about whether the claimant had been acting under instruction or had raised her concerns. However, it is clear from his language the Tribunal find, as recorded in the notes, that part of his decision making at that time was that there was no evidence of an instruction and that this formed part of his reasoning for dismissing;:

*"**As I have no additional evidence from you**, I am sorry , but I have no other option, as you admit that you took part in a malpractice processes you knew to be wrong". Tribunal stress*

149. When the claimant refers to appealing, she is told by Mr Weston; "*Then you need to get access to your emails and appeal."*

150. Regardless of what Mr Weston now tells this Tribunal i.e. that it did not matter whether the claimant had been instructed by managers to carry out the courses and examination without approval, the implications of what he says is clear , namely that if she finds emails to support what she says, it will be advantageous at the appeal.

Mitigation

151. Mr Weston in cross examination stated that he did not consider that if the claimant had been acting under instruction that would amount to mitigation. He however refers to mitigation in his outcome letter. Under this heading of 'mitigation' he states that there was no tangible evidence of her being instructed by management. The only reasonable inference to draw from the outcome letter, is that if there had been evidence of instruction, it would have amounted to mitigation which he would have taken into account.

Outcome letter

152. The outcome letter following of the disciplinary hearing letter (p.375) sets out the reason for dismissal, namely that the claimant:

25.1 Delivered qualifications without approval from Highfield

25.2 Did so under a different registered tutor number between February and April 2023

25.3 Following approval the claimant then dated the examinations.

153. The outcome letter did not refer to the misconduct in connection with the June examination and the Tribunal find that this did not form part of the reason for dismissal.

154. While the claimant alleges that she was not aware that part of the reason for dismissal was because of the use of another tutor's number, that is clearly set out in the dismissal letter and something which she had admitted to doing.

Appeal: 18 October 2023

155. The claimant appealed the decision, on the following grounds (p,.385);

- She was not allowed access to her emails
- She had not had any training or documents about procedures
- She was told by her managers it was ok to take the examinations and add the dates later and told by Ms Campbell to teach the qualifications before approval.

156. The hearing took place on 18 October 2023 before Ms Wheeler and the claimant was again accompanied by Ms Armstrong. The hearing was minuted (p.392-395).

157. The claimant raised at the appeal that she had not been allowed access to her emails, both Novus and Sodexo . She started that she had contact with Ms Harrison and Ms Campbell in both the Sodexo and Novus email system.

158. Ms Wheeler confirmed that she had spoken with Ms Mitchell and that although not in the notes, she had confirmed that the claimant had asked for access but that Ms Armstrong was going to look into access to the Prison/Sodexo emails (p.392).

159. Ms Armstrong explained that she had to obtain approval, the relevant person was on holiday at the time and she had not yet requested access but confirmed in this hearing that she would look into accessing the Sodexo email .

160. It appears that Ms Wheeler did approach this hearing with more of an open mind and was prepared to allow the claimant time to obtain potentially relevant emails.

161. The hearing was adjourned for steps to be taken by Ms Wheeler to allow the claimant to access her Novus emails and for Ms Armstrong to explore access to the Prison system. The claimant had also made reference to having her own notes of a meeting where she was told to undertake the examinations, but in the event states she could not locate them.

Novus emails

162. On the second day of these tribunal proceedings, the respondent produced emails relating to the claimant's request for access to her data. It refers to Ms Wheeler contacting the Data Protection Officer at the respondent on 25 October 2023 (Novus) to enquire if the claimant could have access to emails between herself and Kate Harrison and Jayne Campbell, this was authorised and a search conducted. The Assistant Data Protection Officer, Ms Rampling sifted the data and determined that there was no relevant emails.

163. On 13 November 2023, the claimant emailed Emily Rampling, Assistant Data Protection Officer at the respondent asking for all emails to her Novus and Sodexo account in the last two years. This was processed and uploaded to the secure file transfer system (Cerberus) and the link sent on 12 December 2023 and resent at the claimant's request on 14 December

2023 when the respondent received confirmation the files had been access that same day.

164. The claimant then emailed on 26 January 2024 asking for emails from 14 February 2023 to the end of September 2023 from Kate Harrison and Jayne Campbell. The emails were sent to the claimant on 26 February 2024 and the respondent received confirmation they had been accessed on 27 February 2024. The claimant later confirmed in cross examination that she sent the link to her solicitor because she only had a mobile telephone and accepted that her solicitor would have gone through the documents and they cannot have included documents to evidence that the claimant was instructed to carry out the examinations or these would have been disclosed.

165. The claimant accepted in cross examination that she had agreed with the scope of the first search for the Novus emails and had not told Ms Wheeler that she had made a second SAR request.

166. There is an email from Ms Wheeler to Ms Armstrong on 6 November 2023 asking for an update on the Sodexo email search. On the 20 December 2023, after being chased by Ms Wheeler again on 15 December 2023, Ms Armstrong reports that;

"*I have contacted out [our] IT dept and it appears that Tracey was processed as a leaver and this means all her accounts were closed and deleted* " (p.423)

167. It seems that had the claimant's union representative or the claimant, made a request prior to the disciplinary hearing and dismissal, they may have had been able to access copies of her Sodexo emails . However, while the Tribunal find that at the investigation stage, the union had taken on the responsibility of obtaining these emails, had Mr Weston adjourned to allow them an opportunity to obtain the Sodexo emails before dismissing, she could still it seems have obtained copies at that time.

168. During these tribunal proceedings the respondent resent the link to the claimant for Cerberus to access the circa 450 documents which had been disclosed by the respondent. The claimant briefly looked at them before the start of the second day of the hearing and confirmed that they included nothing that appeared relevant. However, the claimant accepted documents disclosed in the agreed bundle had been part of the disclosure from her Novus subject access request, and on balance the Tribunal accept, they had been put into the bundle by her trade union solicitors and that she had probably sent the link to her union. The Tribunal find that therefore the claimant's representatives at least had been able to access the Cerberus link at least and would have included within the bundle any relevant documents.

169. One of the documents the claimant had put into the bundle (p.464) appears to be an internal memorandum or minutes from a meeting from Ms Harrison but it is unclear who to, but which refers to carrying out the examinations following approval. This does not appear however to be a document sent to Ms Vernon or the claimant.

Letter 25 January 2024.

170. 3 months after the appeal hearing, Ms Wheeler contacted the claimant confirming that the respondent has not located any relevant Novus emails and that to date neither the claimant nor Ms Armstrong had provided evidence from her Sodexo emails and the claimant has not produced any notes. The claimant is informed that the information is now required by 1

February 2024. The Tribunal find that Ms Wheeler displayed considerable fairness in permitting the claimant this extended time, however unfortunately the Sodexo account had in any event been deleted..

171. Ms Wheeler gave evidence that she approached the appeal with an open mind and that the emails may have proven that the claimant had been instructed to carry out the wrongdoing and at the time, she did not consider whether or not it would have changed her view on dismissal but then went on to say it would not have made a difference to the outcome. However, the Tribunal take into account that this was never said to the claimant at any point during the several months during which Ms Wheeler was waiting for the claimant to produce any relevant emails and it seems implausible that Ms Wheeler would have adjourned the hearing and waited for so many months to see whether the claimant could establish whether she had been instructed by her managers, if she considered it to be of no relevance to the outcome for the claimant.

172. That Ms Wheeler considered the matter of instruction to be irrelevant is also not consistent with the contemporaneous documents, including the minutes of the appeal hearing and the outcome letter itself in which Ms Wheeler observes that;

"*The search of your Novus emails did not produce any evidence to support any of the claims of mitigation you have out forward ….I believe you have been aware of the importance of gaining access to your Sodexo emails as the early stages of the investigation*…"(p.453).

Outcome

173. Ms Wheeler than wrote on 16 February 2024 setting out the outcome of the appeal (p.451).

Training

174. Ms Wheeler in cross examination accepted that the claimant had not attended any training but had signed the invigilator declaration when she had invigilated examinations to confirm that she had read Highfields Procedures and invigilation in accordance with them (p.454).

175. However, the Tribunal take into account that the claimant had accepted that she knew she should not carry out the examinations before the centre had been approved and while the claimant in cross examination talked about the difference in how she had invigilated examination before, that was not relevant to the reason for dismissal, she was not being disciplined for invigilating students she had taught.

Was told by managers to take the examinations and date them later and teach the qualifications

176. Ms Wheeler in cross examination gave evidence that the claimant did not provide evidence to support her allegation that she had been acting under instruction and that she preferred the evidence of Ms Campbell; "*Given Jayne's experience and position in Novus, I find it unlikely that Jayne would have issued such an instruction whilst we were awaiting a centre number from Highfields."*

177. However, Ms Wheeler arrived at this decision on 16 February 2024. An investigation meeting had taken place with Ms Vernon on 10 August 2023 and Mr Weston had conducted the disciplinary hearing for Ms Vernon on 3 November 2023, in both hearings Ms Vernon

maintained the same account of both tutors having been given this instruction not by Ms Campbell but by Ms Harrison. Ms Wheeler informed the Tribunal that she was not aware of what Ms Vernon had said in her investigation meeting and in fact stated;

" I had no knowledge of Sarah Vernon."

178. The Tribunal asked Ms Wheeler whether she considered that it would have been helpful for her to have known about the evidence provided by Sarah Vernon, to which she responded simply "yes."

179. Ms Wheeler in her evidence in chief states that the first documents she received were the disciplinary outcome and disciplinary meeting minutes but she does not refer to the investigation meeting notes (w/s para 10: pages 369 – 373). It seems quite remarkable to this Tribunal that this information was not provided by HR or Mr Weston to Ms Wheeler and/or that she had not ensured she had copies of all the investigation minutes.

180. Ms Wheeler refers in her evidence in chief to the involvement of HR. She refers to being guided by Ms Nerini in the HR team about what she needed to do to progress the claimant's appeal (w/s para 7) and had asked for the "*outcome letter **etc…"*** (p.384). Tribunal stress

181. Ms Wheeler also it seems made no enquires of what if any investigation was to take place involving Ms Campbell, because she informed the Tribunal that she only became aware of an investigation after the appeal outcome, but she had no knowledge of what the outcome was.

AWW

182. The claimant did not mention AWW in the appeal hearing however, Ms Wheeler had the disciplinary hearing notes where the claimant states that she raised concerns with AWW about what she had been instructed to do . It is apparent from the notes that Mr Weston did not discuss that further and there is no mention of AWW in the outcome letter or any evidence of any follow up with AWW. An important ground of the claimant's appeal is that she had been told to do this by her managers but again this issue of who she said she had raised concerns with, is overlooked.

183. Ms Wheeler in response to questions from the Tribunal gave evidence that she knew AWW was ill from the business and then resigned so she was not available as part of the investigation. She believed AWW had resigned in August. However, there is no evidence from the respondent that any attempts were made to check out the claimant's account with AWW, whether she was on sick leave or no longer employed by the respondent. Ms Wheeler accepted that she did not discuss this with the claimant and;

" I did not know [AWW] did not meet her on site and I did not know the relationship… I did not know the structure at all at the [Prison] in reference to that."

184. Ms Wheeler infirmed the Tribunal that she did not discuss with Mr Wheeler or Ms Mitchell why they had not spoken with AWW.

185. The claimant in cross examination accepted that she left the date blank on the examinations undertaken for Highfield before the authorised date that she knew the incorrect date would be put in later and she signed the declaration (p.306) for the examinations.

186. The claimant accepted in cross examination that the contract of employment in place before the TUPE transfer, falsification of records is as an example of gross misconduct (p.52) and that she was aware of what was going on with leaving the date blank on the examination papers.

187. The claimant was taken to a training record (p.466.2) which records examination invigilation training on 31 March 2023, the claimant gave evidence that she could not recall the training but accepts that she had a basic understanding of invigilation. However, after being a tutor since 2010 she accepted she knew she should not put incorrect information on the examination papers. During cross examination, the claimant now said that she did not necessarily know that what she had been doing in carrying out the examinations for Highfield and leaving the dates blank was wrong, because she received ' conflicting information' but accepted she was not comfortable doing it. However, she had the Tribunal find made it clear during the investigation and disciplinary hearing that she had concerns about what she was being asked to do and her evidence was that she had raised her concerns with people but nonetheless had continued to deliver the examinations knowing she was falsifying documents.

Remedy

188. The claimant was out of work for 18 weeks and gave evidence under cross examination that although she applied for social security benefits, because she had been dismissed she was told she had to wait 6 months she therefore did not receive any benefits.

189. The claimant also gave evidence that save for February 2024, the first month after she stated her new employment, she now earns more than she did for the respondent however, this is because she is working overtime and has had to do so to repay money she borrowed while out of work.

190. The claimant had to work a month in advance, and her first pay was on 25 January 2024 (£1,545.20) (p.534) and thereafter she has been paid on the 22nd of each month. Her starting salary in her new employment was £25,500 and in April 2024 her pay was increased to £26,500 . She receives £14.50 per hour for overtime.

191. When working for the respondent the claimant was paid a salary £32,764.44 but there was no paid overtime, she received time off in lieu.

Submissions

Respondent

192. Counsel made quite detailed submission and they have been fully considered and a summary only is set out here.

193. Counsel referred to the authority of **British Home Stores Ltd v Burchell : 1980 ICR 303,** EAT and ***Taylor v OCS Group Ltd 2006 ICR 1602, CA*.**

194. It is submitted that the respondent genuinely believed in the claimant's guilt and had reasonable grounds to form that belief and carried out as much investigation as was reasonable.

Reasonable Belief

195. It is submitted that there is no scope for dispute that the claimant, as she accepted, delivered training under Kate Harrison's tutor number. The claimant also accepted that she delivered the training before the Prison had approval to deliver the training. The claimant accepts that she was involved in misdating the examination papers.

196. It is submitted that whether or not she did these things under instruction, does not go to the reasonable belief in her misconduct, it may only amount to mitigation. Mr Weston did not make a finding as to whether she acted on an instruction, his focus was on professional misconduct and counsel draws the analogy that if someone lies, whether they lie because they are told to do so, it is still wrong to lie.

197. Falsification of examination papers is listed as an act of gross misconduct in the disciplinary policy (p.71) and the claimant transferred under TUPE to the respondent under the Serco contract (p.52). It is submitted There is no scope for arguing that the respondent did not have a reasonable belief in the claimant's misconduct given the admissions at the time.

Suspension

198. It is accepted by counsel in submissions, that the suspension was not carried out in accordance with the respondent's disciplinary policy . It is submitted that while it was not 'ideal' that it was sent to the incorrect email address, this was an error and not done out of malice, it is accepted that this was an uncomfortable period for the claimant but there is no ascertainable unfairness in the delay.

Investigation

199. AWW was not mentioned at the investigation and it is submitted that it is not a question of whether the respondent could do more, and it is submitted that the investigation was reasonable. Ms Harrison could not be interviewed and the respondent could not force her to engage in the process.

200. The issue over the emails it is accepted was raised at the end of the investigation. Ms Mitchell gave evidence that it was her recollection that the union were to look into it and it is submitted she was a honest witness who was trying to assist the tribunal. The claimant had not requested access to the Novus emails or this would have been arranged. The claimant cannot recall conversation but the union representative did (p.329).

Disciplinary hearing

201. The June examination issue was not expressly dealt with in the disciplinary hearing. It is submitted however that Mr Wheeler gave evidence that it was part of general allegation of misconduct and not a 'stand- alone' allegation of gross misconduct. It is submitted that it was covered by reading out the statement from Highfields but it is accepted it is not in the notes.

202. It is submitted that there is no evidence that one allegation was the tipping point, it is plain the focus was primarily on the 200 plus examination.

203. In terms of AWW as a potential witness, it is accepted that she was mentioned but there is

no specific mention of the claimant speaking to AWW on a certain date, if she had it would be incumbent on the respondent to have investigated but it is submitted that it was not unreasonable for Mr Wheeler not to continue to investigate in the absence of any specific reference and Mr Wheeler's evidence is that it was not relevant to what the claimant actually did.

204. It is submitted that the evidence before the Tribunal is that in essentially the same case involving Sarah Vernon, the same sanction was applied.

Appeal

205. It is submitted that Ms Wheeler conduct of the appeal cured the defects in the disciplinary process.

Sodexo emails

206. It is submitted that Ms Wheeler dealt with each point of appeal (p.452).The claimant did not raise at the appeal, the issue about not interviewing of AWW, it was not part of the claimant's appeal. The claimant knew that AWW was: "*AWOL from the business and later resigned."*

Within band of reasonable responses

207. It is submitted that the fabrication of the documents engages dishonestly and goes to the core of the employment relationship. The claimant's role was to deliver examination and invigilate, it is submitted that trusting her integrity is central to her employment and this was not one or two papers but over 200 examinations which had been sat.

208. It is submitted that the claimant gave evidence that she "knew" it was wrong and plainly had a tangible impact on the respondent's relationship with the qualifying body Highfield. The respondent was suspended from delivering the qualifications and impacted on the prisoners with a risk that Highfield make take away their qualifications.

Mitigation

209. The claimant had long service but this worked against her, having worked for 13 years as a tutor she knew what was expected of her, this was not a highly technical aspect of misconduct, in her position and with her experience, she knew what she was doing was wrong. The claimant's evidence is that she did not feel that she had done the training as shown in the training record but the Tribunal is invited to find that it is unlikely that the respondent would have forged the record but in any event, it is not a technical area. The claimant accepted the declaration of each examination paper was clear and it is submitted she must have understood she should put the information on it. It is submitted that he raised concerns because she knew what she was doing was wrong.

210. There was consistency of treatment in that Ms Harrison left the respondent's employment. Ms Campbell was interviewed but an assessment was made that there was no evidence of her involvement.

Administrative staff

211. It is submitted that in terms of who may have had relevant knowledge, the administrative

staff deal with number of bodies however, it is submitted that there is no suggestion that the administrative staff would have known to collect dates if rooms had been booked for the examinations to be carried out without authorisation.

Polkey

212. It is submitted that if the dismissal is held to be procedurally unfair, it is evident that the claimant would have been dismissed in any event, and thus a 100% deduction should be made and if the Tribunal were to find it was more likely than not, it should attract a 70 % reduction.

213. A person, Sarah Vernon, who committed the same offence was also dismissed (albeit the Tribunal did not hear evidence about her case and what if any mitigation was considered).

214. It is submitted that the claimant admitted the misconduct and it was on a significant scale.

Contributory fault

215. Counsel referred to the case of Nelson v BBC and submits that the behaviour of the claimant was culpable and/or blameworthy, it caused or contributed to her dismissal and it would be just and equitable to reduce compensation. It is submitted that the claimant accepted her actions were wrong during the disciplinary and investigation hearings.

216. The Tribunal is invited to find that the claimant was **not** instructed by her managers to act as she did, the claimant informed the Tribunal she did not get a response to the SAR request and could not access her emails but then accepted during the hearing that she did and there are documents in the bundle from the SAR. The Tribunal is invited to find that it is more likely that had there been exculpatory emails in the SAR the union would put them in the bundle (p.264).

217. Counsel submits that it was be just and equitable to reduce any compensation by 100% based on contributory fault but clearly needs to be more than 50% and submits 70% should be the minimum.

Mitigation

218. The claimant accepts she is earning more that she did with the respondent. Counsel confirmed that the respondent is taking no mitigation point for the first 18 weeks or later as she is earning more.

219. The claimant was not cross examined on her job so counsel submits the mitigation points falls away

220. During period 3 October 2023 to Jan/February 2024 of 18 weeks, the claimant was out of work. The respondent takes no point in mitigation but the net figures in the counter schedule are not agreed.

221. From February 2024 the claimant earned more than she had when she worked with the respondent, counsel submits that over a period of 59 weeks, what she has earned should offset her losses during the 18 week period.

222. Counsel submits the pension sum is incorrect and the correct figure as set out in the payslip is £327.64 and not the £347.64 claimed.

Claimant's submissions

223. The claimant made brief submissions. She submits that respondent failed to follow its own procedures from when she was suspended and that Mr Weston could have looked into the investigation again and made further enquiries. She complains that she did not get a written letter of suspension, it was sent 9 days after her suspension, she did not know what the allegation of 'fraud' was and she thought the allegation was that she had stolen money.

224. The claimant submits that Mr Weston took the investigation as 'gospel' but should have considered doing his own further investigations/enquiries.

225. With respect to remedy, the claimant submits that she works Monday to Friday, every weekend and bank holiday, she sleeps at work and her work /life balance has changed.

226. During the period without employment, she had to borrow money and has had to do overtime to repay the money she owes.

227. With the respondent she worked Monday to Friday 8am to 5pm and now works 48 hours per week with overtime.

Legal Principles

228. The starting point is the wording of the relevant statutory provision under section 98(1) and (2) ERA which requires the employer to show the reason for dismissal and if it is a potentially fair one, namely that it is a reason which falls within the scope of section 98(1) and (2) of the Employment Rights Act ("ERA") and was capable of justifying the dismissal of the employee, the next step is to consider section 98 (4):

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—

(…

(b)relates to the conduct of the employee,

(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.*

229. It is the employer who must show that misconduct was the reason for dismissal: **British Homes Stores ltd v Burchell 1980 ICR 303, EAT.** As set out by the EAT in Burchell, a three-fold test applies; the employer must show that it believed the employee guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief, and at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

230. The burden of proof is however now neutral when it comes to reasonableness: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

231. The employer need not have conclusive direct proof of the employee's misconduct only a genuine and reasonable belief, reasonably tested.

232. The Court of Appeal has held that the 'range of reasonable responses' test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached*:* **J Sainsbury plc v Hitt 2003 ICR 111, CA.** The relevant question is whether it was an investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

233. It will not in general be possible for an employer to show that it acted reasonably in treating the conduct reason as sufficient reason to dismissal unless it has followed certain procedural steps : **Polkey v AE Dayton Services Ltd 1988 UCR 142, HL.**

234. The Acas Code of Practice on Disciplinary and Grievance Procedures (Acas Code) sets out the basic requirements for fairness. The Code is intended to provide the standard of a reasonable behaviour and while the Code is not legally binding, it is admissible as evidence before a tribunal. Tribunals must take its provision into account where they are relevant. The ACAS Guide emphasis that the more serious the allegations the more thorough the investigation ought to be.

235. Mr Justice Brown Wilkinson in ***Iceland and Frozen Foods Limited v Jones ICR 17 EAT*** set out the law in terms of the approach a Tribunal must adopt, as follows:

a) The starting point should always be the words in section 98(4) themselves.

b) In applying the section the Tribunal must consider the reasonableness of the employers conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.

c) In judging the reasonableness of the employers conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employers.

d) In many (though not all) cases there is the band of reasonable responses to the employees conduct in which the employer acting reasonably may take one view, another quite reasonably take another.

e) The function of the Tribunal is as an industrial jury, it is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair.

Appeal

236. It will affect fairness if there is a defect that renders the appeal process deficient in the sense that that process should or could have found a flaw in the original decision to dismiss.

237. It is however also the case that effects in the original disciplinary procedures may be remedied on appeal if the appeal is sufficiently thorough enough to cure the earlier procedural shortcomings (whether full rehearing or a review, the relevant consideration is how thorough the appeal is) :***Taylor v OCS Group Ltd 2006 ICR 1602, CA*.**

238. The EAT in **Khan v Stripestar Ltd EATS 0022/15** held that there is no limitation on the nature and extent of the deficiencies in a disciplinary hearing that can be cured by a thorough and effective internal appeal. **Polkey**

239. The Tribunal may make a 'just and equitable' reduction under section123(1) of the Employment Rights Act 1996 (ERA) on the grounds that the Claimant could have been dismissed fairly if a proper procedure had been followed: **Polkey v AE Dayton Services Lt 1998.**

240. ***King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)*,** the Court of Session held that, there are situations where what went wrong was more fundamental, and where the tribunal cannot be expected to 'embark on a sea of speculation'.

Contributory Fault

241. There is a distinction between considerations relevant to an investigation of fairness of dismissal on the one hand, and those relevant to an investigation of contributory fault on the other **: *Iggesund Converters Ltd v Lewis 1984 ICR 544, EAT*.** The latter requires clear findings of fact as to what (if any) blameworthy conduct on the employee's part the employer knew about at the time of dismissal. The question of fairness, on the other hand, entails the tribunal considering whether, in all the circumstances, the employer's decision to dismiss fell within the band of reasonable responses.

242. Section122(2) ERA gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any kind of conduc*t on the employee's part that occurred prior to the dismissal.

243. Section123(6) ERA applies where the conduct in question is shown to have *caused or* contributed to the employee's dismissal.

Conclusion and Analysis

The Reason for Dismissal

244. The burden is on the respondent to show the reason for dismissal: **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.**

245. The reason relied upon by the respondent is misconduct which is a potentially fair reason pursuant to section 98 (1)(b) ERA.

246. The outcome letter following the disciplinary hearing (p.375) sets out the reason for dismissal, namely that the claimant delivered qualifications without approval from Highfield, did so under a different registered tutor number between February and April 2023 and following approval the claimant then dated the examinations.

247. Mr Weston in his evidence stated that he did not make a finding about whether or not the claimant had personally dated the examination papers and did not make a finding on whether the claimant had been instructed by her managers to carry out the courses and examinations without approval, because he did not consider that it mattered whether she had or had not been instructed to do so and focussed on her professional obligations.

248. The outcome letter did not refer to the misconduct in connection with the June examination papers and the Tribunal have found that this did not form part of the reason for dismissal.

249. The claimant does not seek to argue that her conduct in connection with the Highfield courses and examinations was not the real reason for dismissal and does not suggest an alternative reason.

250. The respondent at this first stage, must only show that the reason for dismissal was capable of justifying the dismissal of the claimant, not that it did actually justify the dismissal (that is a matter to be assessed when considering the next stage of reasonableness). All that is required at this initial stage is for the respondent to establish that the reason relied on is not so trivial or unworthy that it could not have justified dismissal.

251. The claimant does not seek to argue that the alleged offence would not be capable of justifying her dismissal but argues that in her case, there were mitigating factors.

252. The burden of proving a potential fair reason for dismissal is clearly made out in this case.

Reasonableness

253. The next issue for determination is whether the Respondent acted reasonably in accordance with sections 98 (4)(a) and (b) ERA.

Suspension

254. The claimant received a suspension letter almost 2 weeks later which references only ‘fraud’. It did not explain what the actual alleged wrongdoing was.

255. The disciplinary policy was not complied in the following respects:

31.1 The claimant was not given a letter at the time of suspension confirming the suspension

31.2 The letter did not provide the requisite details of the alleged wrongdoing; and

31.3 The claimant did not receive further details within 5 working days from the date of suspension.

256. The respondent did not therefore comply with its own disciplinary policy and the claimant was left not knowing exactly what the allegations were. The claimant does not, other than the anxiety this caused, identify any way in which this prejudiced her ability to state her case during the investigation process or what further evidence she may have otherwise been able to provide had she understood what the allegations were. The claimant also does not allege that this was deliberate and done with the intention of prejudicing or upsetting the claimant.

257. It is a procedural failure, however in the circumstances not one which the Tribunal consider was sufficiently serious to undermine the fairness of the process. The claimant had trade union support throughout and did not request that the investigation hearing was adjourned for further clarification to be provided.

The Investigation

258. The Tribunal conclude however that there were flaws in the investigation process.

259. It was clear to the Tribunal that Ms Mitchell was having to speculate during these tribunal proceedings on what information the managers may have had access to rather than have taken steps to clarify the position as part of her investigation. Given the allegation that managers knew and had instructed the tutors to carry out these courses and examinations, the Tribunal find that it was outside the band of reasonable responses, not to have carried out a more thorough investigation to clarify the roles of all those involved in the provision of these qualifications and what information about the education of the learners the managers had access to, including whether they had access to the Curious database and what information was included on that and specifically what part Ms Harrison and Ms Campbell played in the process, rather than just focus on what involvement the administration team had. It remained it seemed unclear who had selected the learners and who had allocated them to specific courses and what oversight on a day to day basis the management team was required to have.

260. Ms Mitchell's only interviewed Ms Campbell once and there was no rigour in that interview. Ms Mitchell appears to have accepted at face value her rebuttal of having any knowledge without exploring with her what her role was, what her day to day involvement in the process involved and Ms Harrison's role, their oversight of the tutors and the courses and examinations, and how over 200 courses and examinations could have been conducted without the knowledge of either manager and how all those hours of paid tutor time was spent it seems without management knowing what courses the tutors were delivering . She did not explore what motive the managers may have had for instructing the tutors to carry out these courses and examinations. The claimant had said she had been told they needed 'bums on seats' but Ms Mitchell did not explore whether the management were meeting their targets at the Prison for learner numbers at the time.

261. Ms Mitchell was not sure what databases were in use or whether Ms Harrison was an IQA and consider the significance of that in terms of her knowledge about what was happening . Ms Mitchell's oral evidence was that she was; "*not entirely sure*" what the IQA would check.

262. The Tribunal find that there was a significant failure to investigate the process around how Highfield courses had been delivered at the Prison, the process from allocation of learners through to the arrangements for them to sit the examinations and the data that was recorded and the data available to the management team.

263. There was a failure to consider other examples of potential malpractice by Kate Harrison which may be supportive of the claimant's account of her instructions to the tutors (p.293). It was raised with Ms Mitchell that Ms Harrison took students in another room to read out questions and possible answers but that was never investigated. Ms Mitchell said in oral evidence; *"I did not do anything with that issue."* Such conduct may have established the propensity of Ms Harrison not to comply with proper procedures. The Tribunal to not consider that of itself however is outside the band of reasonable responses, in terms of the thoroughness of the investigation.

264. The Tribunal accept that the claimant and her union representative only raised the issue of the Sodexo account and accept counsel's submissions that while it may be said that another employer would have conducted their own search for the emails, nonetheless the approach of the respondent was a reasonable one.

265. Ms Mitchell also did not consider checking the Novus emails of the claimant, Jayne Campbell or Kate Harrison to see if there was evidence of an instruction to the claimant to carry out the examinations before April 2023. However, the claimant had not identified any specific email communication and again the Tribunal conclude that it within the band of reasonable responses for Ms Mitchell not to have carried out a search of the Novus emails of her violation in those circumstances.

266. The lack of rigour however in investigating the process for delivery of the courses and examinations and the day to day involvement in and the responsibility of the management team and how so many courses and examinations could have been delivered without management being aware, does the Tribunal conclude give rise to an investigation which falls outside the band of reasonable responses. The claimant admitted what she had done, the core of her defence was that her managers knew and had instructed her to do this. Any reasonable employer acting reasonably would the Tribunal consider, have been more thorough in its investigation into the process and the involvement of and knowledge of the relevant members of the management time.

Disciplinary

267. Counsel submits that with regard to the June examination, that this was covered in the disciplinary letter. The Tribunal find that this was not the case but have also found that the reason for dismissal was not anything to do with the June examinations, Mr Weston was, the Tribunal find concerned only with the 200 plus examinations and the conduct in relation to those. That was the real reason for dismissal.

268. At the disciplinary hearing, it was not clarified whether the claimant wanted access to her Novus emails. Counsel for the respondent submits that there was no specific request for the emails at the disciplinary hearing, although it is accepted that the claimant raised that she did not have access to them. It is submitted by counsel that; "*ideally he should have picked up on it, but there was no malice, he did not understand a direct request to have been made and notes show that the conversation moved on*" and that it is still within the *"permissible band given the confusion over which emails were being referred to"* but that the position as very different at the appeal and a fair appeal can cure unfairness at the disciplinary stage.

269. The Tribunal do not accept counsel's submissions that the failure by Mr Weston to 'pick up' on this issue of email evidence, is permissible. The claimant raised that she had received an

instruction, he was pressing her to provide evidence. It would have been obvious that other than a witness (and she had one in Ms Vernon) there was aside from emails, unlikely to be anything else. He did not explore with the claimant whether there may be email evidence but moved immediately on to other questions. The consequence was that the claimant was dismissed and her Sodexo email account deleted. The claimant accepted the email account may not have provided further evidence, however it may have, and the failure to engage with this issue meant that the claimant was deprived of the opportunity to possibly present some supporting email evidence. Even if there was no evidence of a direct instruction, there may have been some evidence of knowledge by the management team that the tutors were carrying out this work.

270. The Tribunal consider that the reason for Mr Weston not engaging with this issue is not that he was confused, but that he was not open mind in his approach.

271. Counsel for the respondent submits that in terms of AWW as a potential witness, it is accepted that she was mentioned at the disciplinary hearing but there is no specific mention of the claimant speaking to AWW on a certain date, if she had it would be incumbent on the respondent to have investigated. It is submitted that it was not unreasonable for Mr Wheeler not to continue to investigate in the absence of any specific reference and Mr Wheeler's evidence is that it was not relevant to what the claimant actually did. The Tribunal do not accept the respondent's submissions on this point.

272. The claimant's position throughout had been that she had been told to do this and she had raised her concerns. She was being pressed for evidence and when she provided it, it was ignored. Mr Wheeler despite asking for evidence, when the claimant put it forward, was not willing or interested in engaging with it. Mr Weston's approach was in all likelihood encouraged by the way in which Ms Wheeler had presented her report in terms of the possibility that the claimant was telling the truth. She did not express the sentiment she now does in her statement, that Ms Harrison was uncooperative with the investigation and nor does she comment on her experience of managing a site and her view that she probably would have known.

273. The claimant identified AWW as someone she had gone to at the time with her concerns and this was potentially powerful evidence to support her account (and that of Ms Vernon's), that they felt they were having to do what they had been told by managers or risk their jobs.

274. The fact that AWW was on sick leave should not have prevented the respondent from making contact when the livelihood and professional reputation of these two individuals were at stake. Ms Wheeler had contacted Ms Harrison while she was on sick leave, why was AWW not similarly contacted when she was mentioned as a witness? No satisfactory explanation was provided by the respondent.

275. It is telling that Mr Weston gave evidence that he made no finding about whether the claimant and had been told by her managers to undertake the examination and sign the forms. That is the Tribunal find, because he did not engage with the question despite pressing the claimant for evidence and despite setting out his reason for dismissal as including a lack of evidence to support the mitigation she put forward.

276. In terms of the whistleblowing policy, it was never established by Mr Weston whether the claimant was aware of the existence of a policy or had access to it, he never explored with

her whether she knew that she had a safe/confidential way in which to raise her concerns.

277. The Tribunal find that the way the disciplinary hearing was conducted was outside band of reasonable responses.

278. The Tribunal conclude that given the evidence available it was within the band of reasonable responses for the respondent to reach a finding that the claimant had carried out courses and examinations for Highfield before approval, that she had left the dates blank, that she knew that it was wrong to do so, that she was involved in dates being put in after the event and that she knew this was wrong and may be serious enough to warrant potential dismissal.

279. It was also within the band of reasonable responses to find that the claimant had carried out the examinations under someone else's tutor number. The claimant had admitted to this.

280. However, in terms of what she acted under instruction, there was a failure by Mr Wheeler to not only explore the further evidence the claimant mentioned at the hearing but failure to carry out a considered evaluation of the evidence to support her mitigation.

281. The Tribunal conclude that he took the denial by Ms Campbell and the lack of documentary evidence as definitive and the Tribunal consider that this approach was outside the band of reasonable responses. He failed the Tribunal conclude, to weigh into the balance a number of important factors; that although incriminating herself the claimant had volunteered this information without evidence of any ulterior motive for doing so, that Ms Vernon although incriminating herself collaborated the claimant's account at least as far as having been instructed by Ms Harrison, that there was no financial incentive for the tutors to carry out these courses and examinations, that there was a potential incentive for management, that Ms Harrison was not prepared to cooperate with the investigation, that Ms Campbell was not vociferous in her defence that Ms Harrison may have given this instruction and the sheer feasibility of over 200 course and examinations being carried out over a period of circa 2 months without management knowing anything about it.

282. By the stage of the disciplinary hearing, Mr Weston had failed to take any steps to check whether the claimant had indeed raised concerns with AWW, he simply the Tribunal find, failed to apply his mind to whether further investigation should be carried out by taking steps to try to corroborate the claimant's account with a seemingly independent actor or indeed in consider whether to allow the claimant time and/or facilitate the search for emails.

283. He appears, to have simply adopted what he understood the findings of the investigation to be and approached the hearing with a closed mind.

284. The decision to dismiss the claimant meant that her Sodexo account was then deleted after she was processed as a leaver and any chance to obtain that evidence was lost to her.

Appeal

285. It is submitted by the respondent that the appeal cured the defects in the disciplinary process. The Tribunal accept that Ms Wheeler adopted a more inquisitorial and open minded approach.

286. Ms Wheeler accepted there were no training records or evidence by the respondent that training had been given to the claimant. The claimant had one lunchtime session and signed

to say she had read the Highfields Qualifications Examinations and Investigation Procedure however, the Tribunal accept that it was within the band of reasonable responses to form the view that the claimant understood, after all her years of experience as a tutor and by her own admissions, that what she had done was wrong.

287. Ms Wheeler arranged for the search of the Novus emails, which Mr Weston had failed to do and in doing so rectified this flaw in the disciplinary hearing.

288. The Tribunal accept counsel for the respondent's submission that the fact that another employer may have approached the email search differently and allow the claimant to carry out the search, does not render the approach unfair or outside the band of reasonable responses. What is particularly relevant to the issue of fairness is that the search criteria were agreed with the claimant and her union representative. The claimant was invited to expand the search criteria and she did and no relevant emails were located. Ms Wheeler was manifestly patient and fair giving the claimant 4 months to provide exculpating evident.

Sodexo emails

289. It is submitted that the respondent had no control over the Sodexo emails and could not have searched for them. The union representative who was also an employee of the Prison and had agreed to take control of this search (p.392). She needed to make contact with someone who was on holiday which caused delay, this was unfortunate for the claimant but the union's inaction is not within the respondent's control and the fault lies with her union.

290. The Tribunal accept that the delay lies with the union and not the respondent, it was within the band of reasonable responses to accept the union's offer to make direct contact with the appropriate people and arrange for a search of the claimant's Sodexo emails however, because the claimant had been dismissed and processed as a leaver, her account had been deleted. Ms Wheeler could not therefore rectify on appeal the failure at the disciplinary stage, to allow the claimant more time in which to access possible evidence from her emails. Mr Weston had only raised the importance for the claimant of doing this and of locating any emails which may support her account, after he had told her of his decision to dismiss at the end of the hearing.

AWW

291. It is submitted by respondent's counsel that Ms Wheeler dealt with each point of appeal (p.452) and this is correct.

292. The claimant did not raise at the appeal, the issue about not interviewing of AWW. The claimant knew that AWW was: "*AWOL from the business and later resigned."* However, Ms Wheeler had the notes of the disciplinary hearing, it is obvious objectively, from a reading of those notes that another potential independent witness had identified. The defect in the disciplinary hearing, to act on this information and makes attempts to contact AWW, (as attempts had been mad with Ms Harrison who had been on sick leave) was not rectified on appeal.

293. By the time of the appeal Sarah Vernon had been dismissed. Ms Wheeler gave evidence that it would have been 'helpful' to have a statement from her. The Tribunal reasonably infer from this, that she was of the view that it may have made a difference to her decision, if this led to a finding that the claimant had been told by the managers to carry out the misconduct.

294. It is submitted by the respondent that it was not a question of what would be helpful, the only issue is whether it would render the process unfair to not have it. It is submitted that Mr Weston had made no finding about Ms Vernon when dismissing the claimant, it was not a basis for his decision to dismiss the claimant, that his decision to dismiss was not reliant on whether there had or had not been an instruction and it is submitted that there is no evidence that it would have changed the approach at appeal. However, it did not cure the defect at the disciplinary hearing to fail to weigh into the balance all the relevant evidence before deciding on the issue of whether there had been an instruction and thus whether there were mitigating factors to take into account. Ms Wheeler was not even aware of Sarah Vernon according to her evidence to the Tribunal and not aware that what she had said in her investigation corroborated the claimant's account and could not therefore consider the fairness of the decision that there was no evidence to support the mitigation the claimant had put forward.

295. The Tribunal conclude that the respondent at the time of the disciplinary and appeal stage, did consider that it may be relevant whether the claimant had been acting under instruction given the request for evidence to support her case, the time she was given at appeal to produce evidence and the wording of the outcome letter of both the disciplinary and appeal. The Tribunal do not accept their oral evidence before this Tribunal that it would have made no difference.

296. The respondent failed to consider how likely it was that there would be contemporaneous documents of an instruction to do something which was improper but that there was corroborating witness evidence of a fellow tutor and possibly another independent actor. In his evidence in chief Mr Weston (para 270) states that; " ***In the absence of any further additional evidence*** *(and given the Claimant admitted malpractice which she knew to be wrong), I decided to summarily dismiss*…" Tribunal stress.

297. Mr Weston also now states in his statement that "*on reflection*" even if she had produced emails which showed she had been instructed, it would not have changed his decision. However the Tribunal do not find this to be consistent with his approach at the time and with what was said during the disciplinary process. The Tribunal bear in mind that it is convenient for the respondent to state now that it would make no difference, given the defects in the disciplinary process.

298. The appeal the Tribunal find did not cure all the defects in the disciplinary process, and those defects render the process outside the band of reasonable responses.

299. While the respondent had a reasonable belief in the claimant's misconduct, the Tribunal conclude that with respect to the issue of mitigation, the respondent failed to carry out an investigation which was within the band of reasonable responses. The decision that the claimant had not been instructed to carry out the examinations and not date the papers, was not the Tribunal find a belief which was formed following an investigation which was within the range of reasonable responses that a reasonable employer might have adopted: **J Sainsbury plc v Hitt 2003 ICR 111, CA**

Compensation

300. The claimant does not include within the schedule of loss or raise in submissions, any claim for an uplift for a breach of the Acas Code.

Polkey

301. The Tribunal have gone on to consider whether it is appropriate to make a 'just and equitable' reduction under section 123(1) of the Employment Rights Act 1996 (ERA) on the grounds that the claimant could have been dismissed fairly if a proper procedure had been followed: **Polkey v AE Dayton Services Lt 1998.**

302. In this case this was not a matter of a mere procedural lapse or omission, the failures in the process were more fundamental and go to the heart of the issue of mitigation. Had a Sodexo email (or further investigation into the process of allocating learners to courses and the information managers had access to) indicated a direct instruction or some knowledge by the managers that the examinations were being undertaken, and/or had AWW been contacted and confirmed that the claimant had told her that she had been told she had to carry out the examinations and was concerned, what would the course of events have been? Would the respondent have issued a final written warning? The respondent witnesses now say it would have made no difference however, the Tribunal were no persuaded by their evidence on this point.

303. This is a case where what went wrong was more fundamental than a mere procedural error, it goes to the 'to the heart of the matter,' and it is difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. This is a case where the Tribunal consider that it would need to 'embark on a sea of speculation' and it does not consider it appropriate to do so: ***King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)*.**

304. The Tribunal do not therefore consider that it is just and equitable to reduce the compensation to reflect the prospect of the decision being something other than dismissal.

Contributory Fault

305. The Tribunal now turn to the issue of contributory fault.

306. There is a distinction between considerations relevant to an investigation of fairness of dismissal on the one hand, and those relevant to an investigation of contributory fault on the other **: *Iggesund Converters Ltd v Lewis 1984 ICR 544, EAT*.** The latter requires clear findings of fact as to *what* (if any) blameworthy conduct on the employee's part the employer knew about at the time of dismissal. The question of fairness, on the other hand, entails the tribunal considering whether, in all the circumstances, the employer's decision to dismiss fell within the band of reasonable responses.

307. Section122(2) *ERA* gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any kind of conduc*t on the employee's part that occurred prior to the dismissal.

308. Section123(6) ERA applies where the conduct in question is shown to have *caused or* contributed to the employee's dismissal.

Claimant's conduct : basic award

309. Given the language of section 122(2), the capacity to make reductions to the compensatory award is more restrictive than in respect of the basic award however the conduct stills needs

to be blameworthy conduct. In **Steen v ASP Packaging Ltd 2014 ICR 56,** the EAT held that the correct approach under section 122 (2) ERA is:

- *Identify the conduct*
- *Decide whether is it culpable or blameworthy*
- *Decide whether it is just and equitable to reduce the amount of the basic award*

310. The EAT in ***Sanha v Facilicom Cleaning Services Ltd EAT 0250/18*** stressed that the words 'culpable' and 'blameworthy' are synonyms, not *alternatives:* culpable *just means* 'deserving of blame'.

Claimant's conduct: compensatory award

311. The relevant test for deciding on reductions to the compensatory award are as set out in **Nelson v BBC (No.2) 1980 ICR 110, CA,** where the Court of Appeal said three factors must be satisfied:

- *The relevant action must be culpable or blameworthy*
- *It must have actually caused or contributed to the dismissal*
- *It must be just and equitable to reduce the award by the proportion specified*

312. What is blameworthy could include conduct which is 'perverse or foolish,' 'bloody minded' or merely ' unreasonable': **Nelson.**

313. The Tribunal conclude that the claimant's behaviour, in carrying out the examinations and not dating the examination papers, knowing that an incorrect date was to be added later and using another tutors number, was blameworthy behaviour. She knew it was wrong and she knew it could amount to a dismissible offence. It was dishonest and she accepted that in cross examination. Despite the minimal training the respondent gave the claimant, she was at the time, an extremely experienced tutor and she knew better.

314. Her behaviour directly led to her dismissal, it was the cause of her dismissal and therefore both section122(2) and 123 (6) ERA are engaged.

315. The Tribunal consider that in the circumstances, it would be appropriate to reduce the compensation to reflect the fact that the claimants blameworthy actions were what led directly to her dismissal a 70% reduction would be just and equitable to both the basic and compensatory award.

Remedy

316. The respondent suggested that there may be a need for a separate remedy hearing however, the parties were informed that this hearing would deal with both liability and remedy, evidence was heard on remedy and there is no real complexity to the losses claimed, the Tribunal therefore do not consider it necessary or proportionate to hold a further hearing.

317. The claimant provided a schedule of loss but failed to provide net figures for her salary loss

however, applying the salary of £32,764.44 the Tribunal calculate the next weekly wage to be **£513.58** for the tax year 2023/2024 (calculating national insurance at £38.84 and tax of £77.67 based on a 20% tax rate)).

Basic Award

318. The basic award is calculated as **£17, 642.52** which the respondent does not dispute.

319. This is calculated based on the claimant being 57 at the date of termination and having 25 years of service and weekly gross pay of £630.09.

Loss of statutory rights

320. Given the claimant's years of service, the Tribunal consider that it would be just and equitable to aware the compensation for loss of statutory notice rights claimed by the claimant of **£500.**

Notice Pay

321. There is no separate claim for wrongful dismissal and therefore any loss of earnings during what would have been the notice period, can only be claimed as part of the compensatory award.

Compensatory award

322. The claimant is earning more in her new employment than she earned with the respondent. While she seeks ongoing losses on the basis that she is only earning more because she is working overtime (paid overtime not being available with the respondent), the Tribunal consider that it is not just and equitable to award her ongoing losses where she is more than mitigating her financial loss, albeit by taking up the opportunity to work overtime rather than any extra hours accrued time off in lieu . The claimant did not give evidence that she does not intend to continue working overtime or cannot for health reasons or any other reason, and the Tribunal conclude that there is a reasonable expectation that this will continue to be worked: **Mullet v Brush Electrical Machines Ltd 1977 ICR 829, EAT**

323. The respondent argues that as she now earns more, the Tribunal should consider her losses over a period of 52 weeks and should offset the extra remuneration she earns as against the losses during the 18 week period when she was out of work. The Tribunal is not persuaded that it is just and equitable to do so and penalise the claimant for obtaining new employment which allows her to be remunerated for overtime (where she received a non-financial benefit for overtime with the respondent).

324. In the circumstances, the Tribunal consider that it is just and equitable to compensate the claimant up to the date that she started her new equivalent permanent employment.

325. The claimant's higher earnings will not offset the losses while she was out of work and looking for a new job (the 18 weeks) but also it is not just and equitable on that basis to compensate her for any difference in earnings for the initial period of her new employment.

326. The claimant suffered a period of loss during which her unchallenged evidence is that she had to borrow money which she is now having to repay. She mitigated her loss through working additional hours and the Tribunal consider that it is reasonable to compensate her

for the loss she suffered before she started work in her new commensurate employment.

327. The claimant was out of work 18 weeks from 3 October 2023 to 8 January 2024**.** The respondent does not seek to argue that she failed to mitigate her losses during this period.

328. For the period 3 October 2023 to 8 January 2024, the Tribunal calculate her losses to be **£513.58 x 14 weeks = £7,190.12 net**

329. The pension loss for the 14 weeks is £327.64 applying the pension figures on the payslips per month. This has been calculated as follows: £327.64 divided by 4 =£81.91 x 14 weeks =**£1,146.74**

330. **The total sum : £26, 479.38**

Deduction

331. Applying the 70% deduction for compensatory loss the amount the respondent is ordered to pay the Claimant is: **£ 7,943.8 net**

Employment Judge Broughton

Date: 20 February 2025

JUDGMENT SENT TO THE PARTIES ON

.....24/02/2025.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

"Recordings and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/"