Case no 2300423/2016

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **MS F LAWRENCE** **CLAIMANT**

AND

NEWLAW LEGAL LIMITED **RESPONDENT**

ON: **23 – 25 January and 2nd February 2017**

Appearances

For the Claimant: Mr I McCabe, counsel

For the Respondent: Mr J Heard, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i) The Claimant was unfairly dismissed but contributed to her dismissal.
(ii) The Claimant was wrongfully dismissed.
(iii) The issue of remedy will be heard on 24th July 2017. The appropriate amount of any deduction to reflect Polkey/contribution will be considered at that date.

REASONS

1. The Claimant is a solicitor. She worked for Respondent as a senior solicitor in the Serious Injuries Team from 26 April 2011 until she was summarily dismissed on 6 November 2015. She claims that she was unfairly and wrongfully dismissed. In particular, her case is that from early 2014 she had been targeted for removal and that the Respondent was looking for a reason to dismiss her as part of a cost saving exercise and because they no longer wished to employ homeworkers. The Respondent says that the Claimant was fairly dismissed for gross negligence, that this is a reason relating to conduct and is a potentially fair reason for dismissal. It is the Respondent's case that the decision to dismiss was within the range of reasonable responses. The Respondent also says that, as the Claimant was dismissed for gross misconduct, she was not entitled to notice and was not wrongfully dismissed.

2. I had two lever arch files of documents. For the Respondent I heard evidence from Pauline Lewis, solicitor and the Respondent's Compliance Director, from Ms Susan Cotterell, HR director, from Ms Edwards, solicitor and head of the Serious Injuries Team and from Mr Pardon, Commercial Director who heard the Claimant's appeal. For the Claimant I heard evidence from a former colleague, Grace Kirenga and from the Claimant herself.

Findings of relevant fact

3. The Respondent is a limited company carrying on the business of solicitors. It practices predominantly in personal injury and has offices in Cardiff and Bristol. (An office in Basingstoke was closed sometime in early 2015). I understand that at the time that the Claimant was employed the Respondent had about 450 employees including 72 solicitors.

4. Most of the Respondent's clients were backed by a legal expenses insurer (LEI). Each LEI had a number of notification and reporting requirements. Failure to notify a provider of a reporting trigger event could invalidate the client's insurance and jeopardise recovery of the Respondent's fees. The Respondent kept an LEI information pack which detailed the reporting requirement of each LEI. All the providers had a reporting trigger upon receipt of an offer to settle under Part 36 of the CPR.

5. The Claimant joined the Respondent in April 2011 as a senior solicitor with the Serious Injuries Team (SIT). She was engaged to work predominantly from her home in Putney, attending the office in Cardiff 2 days a week. She had been engaged to work on cases where the clients were based in London and the South East and, for a large part of the week, worked remotely using the Respondent's online case management system, Solcase. Although the

Respondent maintained paper files the Claimant was allowed to operate using an electronic file only.

6. At the end of the Claimant's 6 month probation, her line manager Ms Roth identified a number of concerns arising from the Claimant's file handling, including that she was not sufficiently proactive, that clients were not contacted regularly for updates and that many tasks had not been done. Her probation was extended for three months after which Ms Roth reported that the Claimant's performance had improved significantly and that she was good on technical issues. She passed her probation.

7. The Respondent's Disciplinary Policy gives a number of examples of matters which may warrant summary dismissal for a first offence. This includes "serious negligence which causes or might cause unacceptable loss, damage or injury" and "gross negligence in carrying out your duties". (92)

8. In 2013 the Claimant sent one client another client's medical report by mistake. Ms Lewis felt that the Claimant did not take the matter seriously enough and had let the case assistant phone the client to apologise. No action was taken at that stage.

2014 warning and capability process

9. By April 2014 the Claimant's manager Elizabeth Roth and Ms Lewis, (then the Claimant's departmental manager), had concerns about the handling of the Claimant's files. They felt that she left everything to the last minute. The Claimant for her part felt that she needed more assistance to cover her work. The notes of the Claimant's PDR in April record that "ER has concerns over quality of work/late issuing" and "ER very concerned about FL not being able to prepare properly for issuing".

10. Following her PDR in April 2014 Ms Lewis sent an email to HR (155) not copied to the Claimant. In that email Ms Lewis comments that the Claimant's income target was lower than for her counterparts and yet the Claimant believed she had too many files. *"That can only make it more difficult for us to target her any higher in the future. That will mean that she will always underperform in comparison with her peers. We need to address that". "I may need to refer back to this meeting if performance does not improve."*

11. In June 2014 the Claimant was required to go through a disciplinary process. The charges were that she had (i) commenced annual leave without arranging cover for a case management conference on a file; (ii) sent privileged documents for a client to the opposing solicitor; and (iii) sent a medical report to the wrong client.

(This latter related to the 2013 error.) In relation to the first allegation the Claimant said that she had been unaware of that the case management conference had been scheduled when she left to go on leave. The notice of the CMC had never been emailed to her nor scanned onto the case management system. However she accepted the allegations at (ii) and (iii) which were inadvertent errors caused by lack of support as a home worker. Ms Lewis chaired the disciplinary hearing and concluded that the Claimant had been notified of the CMC by the other side and had not been careful when sending documents out. The Claimant was given a written warning to remain live on her file for 6 months. (195)

12. The Claimant did not appeal this outcome but asked it to be put on record that she felt that the Respondent had "not addressed the real cause but a symptom of the cause, namely that I have made errors because I have insufficient support." In August, the Claimant was advised that Amy Bills, a paralegal, would be allocated to work exclusively for her and for Grace Kirenga (212/213).

13. At a performance development review with Ms Roth on 16th July 2014 the Claimant was told that she was behind on her income target and her hours and would almost certainly be the subject of performance management (200).

14. On 20 August 2014 the Claimant was invited to a stage 1 capability hearing with Ms Lewis to discuss underperformance in meeting her income targets for the 1st 2 quarters. Similar invites were issued to other members of the team. By the time the first capability meeting took place on 3 September 2014 (3/4 of the way through the year) the Claimant had achieved nearly £125,000 in billings which was 50% of her target for the year. There were follow-up capability meetings on 28th October and 5 November 2014. At the 3rd meeting Ms Lewis told the Claimant that she believed that the Claimant was likely to achieve her target by the end of the year. The Claimant reported that admin support was better and that Amy Bills who had been allocated to her work was good, if quite junior. Ms Lewis told the Claimant that for 2015 she proposed to align the Claimant to another team under Mark Gayler "which will give you better access to grade Cs".

15. On 28th November 2014 Ms Lewis emailed the Claimant ending the formal capability process. *"I just wanted to say that I have seen real progress with your income in the last couple of months and I note that in fact your YTD deficit is now only just over £7000. I do not feel we need to meet further at this stage although I will continue to monitor progress informally. Thank you for your hard work and well done on bridging the gap." (*241).

16. In August 2014 Ms Lewis reported to the department that she had reviewed 99 audit reports of the files. She said that at NewLaw there was room for significant

improvement. A number of files had failed the audit because the funding checklist had not been completed, a failure to follow reporting triggers to insurers, disbursement clips not reconciled with the ledger. She said that a failure to report triggers to insurers could lead to disciplinary action.

17. In December 2014 Ms Lewis conducted a review of some 70 files across the whole department. On 17 December 2014 Ms Lewis emailed the Department (249), as follows

"Too many cases had been identified where there were funding, financial and compliance issues. A file WILL fail if: –

a. *There is no completed funding checklist on file.*
b. *There is no evidence that funding is in place.*
c. *There is no evidence that all reporting triggers to insurers have been complied with.*
d. *There any discrepancies between the ledger the disb clip and the disb spreadsheet.*
e. *There is no up to date case plan on the file.*
f. *There are no signed Ts and Cs on file.*

These are vitally important processes which have been put in place to protect against ACR's and leakage and to ensure that our procedure for supervision is met. They are processes that are being ignored wholesale. Disciplinary action will now follow for repeat offenders. You have been warned and you will find yourself in a disciplinary hearing if you continue to ignore the processes in place."

<u>1st 2015 disciplinary</u>

18. The Claimant moved to Mr Gayler's team at the beginning of 2015. Ms Lewis briefed Mr Gayler as to HR issues and contacted HR to find out if the warning for the Claimant had expired. I do not consider this suspicious. Mr Gayler as the new Team Leader was entitled to this information. HR confirmed that it had expired and this was passed on to Mr Gayler.

19. Mr Gayler reviewed files for new team members including the Claimant. I accept that it was standard practice at the Respondent for the Team Leader to conduct reviews of the files of those who reported to them to become familiar them with the caseload of the fee earners who reporting into them. During that process issues with the Claimant's files started to emerge. A number of emails in the bundle attest to issues of concern which Mr Gayler raised with the Claimant at the time, including a concern that she was over recording her time and issues with her timekeeping. Mr Gayler told the Claimant that to assist her with "timekeeping, witness statement drafting, note completion and schedule

completion, Rhys will work exclusively on a number of your cases to release you to ensure that the required work is done on your other cases". These were the lower value cases.(Rhys Williams was trainee in the Department and Amy Bills had left).

20. Ms Lewis met with the Claimant informally on 28 January to discuss her time management and time recording (263). By then the Claimant felt that there was a hidden agenda at play. She was upset and told Mr Lewis that she didn't know if NewLaw was somewhere for her and that she would hand in her notice. Ms Lewis denied a hidden agenda and told her she could not ignore where fee earners had made significant mistakes that opened the firm up to risk. The Claimant was told others were billing more than she was and the Claimant could not be given a lower target.

21. Further emails to the Claimant from Mr Gayler about specific files followed (269, 270, 272, 273, 279, 281, 283, 288, 290.) In particular Mr Gayler stated that he was becoming increasingly concerned about her time recording in that her attendance notes were inadequate to successfully recover the sums she was entering and in some cases there was no justification for the times that she was entering. Numerous examples were given and he recommended that the Claimant attend a time recording course. Ms Lewis forwarded all those emails and the note of her meeting with the Claimant to HR with an instruction that they be kept on the Claimant's file. It was Ms Cotterell's evidence, which I accept, that it was the Respondent's standard practice to note issues of concern about an employee on that employee's HR file.

22. On 13th February Ms Lewis emailed Mr Gayler with information about the Claimant's performance in previous years. In the email she noted that the firm had had to take on board the Claimant's criticisms of how she was being managed and supported "*and we try to ensure the blame could not be levied at the firm in the light of her suggestions. Even with support though it would appear that the quality of her work is not improved if we look at your findings."* She told him that the Claimant's financial input performance had improved via performance management *"but I think we are now facing a different issue in relation to conduct, in that she is just not putting in the hours and therefore potentially time dumping."* Mr Gayler responded that there were consistent issues from the audits including not reporting a part 36 offer to the LEI insurer and failure to do case plans to settlement. He identified specific areas to watch (277).

23. On 18th February 2015 Ms Lewis emails Ms Rowley of HR as follows "*we are collating evidence and keeping it centrally before we meet with Fiona later this month. I have had a chat with Sue about where we are potentially taking this but I*

am waiting for a debrief after a meeting takes place on 25th February before any decisions are made."

24. On 5th March the Claimant was informed that she would be required to attend a disciplinary hearing to consider file handling errors, incorrect time recording, failure to comply with client care SLAs, potential negligence and failure to follow the reasonable instructions of a manger. In summary the allegations were that the Claimant had failed to follow Mr Gayler's instructions as set out in the numerous emails sent between 30th January and 18th February and that she had made errors on 7 named files. The Claimant is critical of this process in that the letter inviting her to attend a disciplinary hearing came out of the blue, and there was no prior investigatory meeting. The Claimant objected to the charges against her being heard by Mr Gayler and so the meeting was chaired by Ms Lewis.

25. At the disciplinary hearing the Claimant accepted some of the criticisms but said that she had too many cases and a lack of support. In particular she said that she had to carry out a lot of the donkey work herself because of the lack of accessible assistance from junior fee earners. That explanation was rejected by Ms Lewis on the basis that her caseload was less than that of other grade A fee earners.

26. The outcome was that the Claimant was given a final written warning to remain on her file for 12 months. (335 to 338).

27. The Claimant appealed and raised a grievance related to a lack of support (339). Her appeal and grievance was heard by Mr Thomas, a solicitor at the Respondent. The outcome of the appeal was that Mr Thomas reduced the type of warning given to the Claimant from a final warning to a written warning and also reduced the length of the warning to 9 months. The basis of the reduction was that Mr Thomas found that while the Claimant could have addressed the shortcomings identified by Mr Gayler in his various emails, she had not had a significant amount of time to do so prior to receiving notice of the disciplinary hearing. He also accepted that the letter inviting her to the disciplinary hearing and the resultant notes of that hearing were not as specific as he would have liked to enable the Claimant to fully address the allegations of potential negligence. He recommended that she receive support to assist her run her files efficiently for 9 months. The grievance was not upheld.

28. Following the disciplinary process the Claimant met Mr Gayler to agree a task list and timeframes in respect of her files (398 - 405). Mr Thomas also met the Claimant on 30th June , 28th July and 28th August to go through the task list to assist her to meet the relevant deadlines. (512)

29. Ms Phipps, Head of Development of the Serious Injury Team in Cardiff conducted the Claimant's quarterly PDRs. In May she graded the Claimant's Q1 financial performance as 5 (the top mark) and her behavioral performance as 1 (the lowest mark), the latter reflecting the fact that the Claimant had been given a warning. Ms Phipps felt that the Claimant lacked insight into how Solcase worked and did not have a visible method of keeping track of her work and her cases (what needed to be done and when). Ms Phipps provided Solcase training to her in May. She was also given some additional Word training.

30. It is apparent from internal emails that Mr Gayler continued to have concerns about the Claimant's work and was of the view that the Claimant's case load was less than the caseload that other senior fee earners were expected to run. (411) By September the Claimant was behind with her target.

2nd 2015 disciplinary

31. On 3rd September 2015 another issue arose on one of the Claimant's files. It appeared to the Respondent that the Claimant had not taken a witness statement from an important witness and that this omission would require a trial to be adjourned.

32. On 9 September the Claimant was informed that she was being suspended pending an investigation into an allegation of gross negligence "namely the AMB case – the alleged failure to convert a questionnaire into a witness statement and serve it prior to trial and events surrounding the adjournment". The Claimant was also told that the Respondent would review all her current files and reserved the right to change or add to the allegations in the light of their investigation. The Claimant's access to the IT system was suspended.

33. The Claimant was advised that Jo Darlington, Team leader of the Bristol Serious Injury Team, had been nominated to undertake an investigation into the allegations of gross negligence made regarding the AMB case and to undertake a review of her other files.

34. On 10th September Ms Edwards sent Ms Darlington a list of 7 files for her to consider. (It was Ms Edwards evidence that that was a random selection of approximately one third of the Claimant's files.) In addition Mr Gayler reported to Ms Edwards that there was a concern on the file of PBA in that it appeared that neither the client not the LEI had been notified of a Part 36 offer. Ms Edwards passed that information to Ms Darlington.

35. In the end Ms Darlington decided to focus only on 2 files, AMB and PBA. By 18th September she had taken witness statements from several other fee earners as follows

a. Rhys Williams. He was assisting on AMB until he moved seats in July (though it was not one of the cases he was working on exclusively)
b. Mark Gayler,
c. Kirsty Hier, case assistant (in training for a legal executive position) who took over assisting on AMB in July
d. Elizabeth Phipps; and
e. Robert Thomas.

36. Emails sent by Ms Darlington to Ms Cotterell and Ms Edwards during her investigation indicate an unhealthy eagerness to please. In particular Ms Darlington sent both of them a list of the questions that she proposed to ask the Claimant in relation to each file, asking for their comments on those questions and saying that she was open to making any changes that they requested. Neither replied.

37. The Claimant attended an investigatory meeting with Ms Darlington on 24 September. The Claimant quite reasonably objected to answering questions as she had not had access to her files during her suspension and she had not been told what the allegations were. Initially it was suggested that she be given access to her files for 2 hours prior to the investigatory meeting. Ultimately however Ms Darlington agreed to postpone the investigatory meeting which was rearranged for 1st October 2015. The Claimant was allowed access to the files on Solcase between those dates.

38. On 28th September Ms Cotterell emailed the Claimant a summary of the allegations which Ms Darlington proposed to discuss with her at the investigatory meeting (473). These related to 2 files, AMB and PBA and were that

"AMB

i. The alleged failure to ensure the witnesses TC and AC completed CPR compliant witness statements; and the alleged failure to comply with the order for exchange of lay statement on 03.07.15 (which led to a need to apply to vacate the trial listed for 16. 09. 15 and incurred an adverse costs order).
ii. An alleged failure to properly case plan to avoid the situation.
iii. An alleged failure to advise our client about the P20 claim; and an alleged failure to advise the client about the Nationwide policy that would possibly have covered a P20 claim and costs if he failed wholly or in part at trial.

iv. The alleged lack of supervision of junior staff – particularly in the run-up to the trial – when FL was the named solicitor on the file and a grade A, and junior staff were either a trainee or a Grade D.

PBA

i. Alleged very poor recording of information on crucial topics such as liability and offers made by the Defendant Insurer.
ii. An alleged failing to adequately advise the client of the cost consequences of failing to beat a P36 offer (which was very near the amount counsel had said was the value of the case).
iii. Alleged failing to notify PBA's legal expense insurer of the P36 offer as required under the terms of the contract.
iv. FL making a P36 offer without following the NewLaw P36 policy and drafting it so costs were not explicitly catered for.
v. An alleged failing to appreciate the need to comply with deadlines for acceptance or rejection offers which had serious cost implications.

39. The Claimant attended an investigatory meeting with Ms Darlington on 1st October (474). By that time she was aware of the issues to be discussed. The Claimant was asked questions about both files. Ms Darlington's findings were brief. (488b) as set out below.

a. AMB
   i. Accepts as fee earner with conduct 2 Court deadlines missed – one of utmost importance being the failure to serve CPR compliant statements from witnesses TC and AC (by 3rd July 2015) – and the lesser one of failure to serve a locus report (by 29th May 2015) – the former breach not rectified by FL at all – led to the trial being vacated with adverse cost consequences for NL.
   ii. Accepts did not ensure junior staff completed important legal tasks – a basic failure of supervision.
   iii. Accepts no signed notice of funding on the file-and when pointed out to her she did not rectify this.
   iv. Did not tell client of the potential risk of him being personally liable for the P20 claim and costs; and
   v. Did not investigate if the client had insurance cover for that claim. (NB he does have it in fact – the question is as to whether it is too late to persuade the insurer – Nationwide – to indemnify).
b. PBA

i. Did not take instructions on a P36 offer in a timely fashion for no good reason exposing NL/the client to a cost risks.
ii. Did not seek an extension of time on the P 36 offer from LV – and can give no explanation as to why.
iii. Made own P36 offer – but entirely failed to include legal costs.
iv. Did not inform LEI of the P36 offer in March 2015 although accept she is aware of the fundamental importance of this."

40. The investigation report is so shorthand that it gives a misleading impression of the Claimant's responses. Having read the notes of the interview, the findings do not accurately represent the answers the Claimant gave. While the Claimant had accepted that the fact of (i) and (ii) she had not accepted that she was at fault and the report fails to make that clear. As for (iii) the Claimant said that "someone had signed the Notice of Funding and she thought a copy was put on the file as she was not herself in the office". It is not clear if Ms Darlington accepted that there was a signed notice of funding in existence—simply not on the file-and whether the charge against the Claimant was a failure to get the Notice of Funding signed or just a filing error.

41. In respect of PBA the Claimant did accept that she had not told the client about the part 36 offer until 18 days into the 21 day period for acceptance, and then had not advised him either of the deadline for acceptance or of the costs implications of not accepting the p36 offer. She also accepted that she hadn't told the LEI.

42. On 9th October the Claimant was given the findings of the investigation and copies of the 5 witness statements. She was asked to attend a disciplinary hearing on 16 October to discuss allegations of gross negligence. The charges simply repeated Ms Darlington's findings. She was told that the outcome could include dismissal.

43. On 7th October Ms Lewis emailed Mr Dicken, another member of the Executive Board, (490) to bring him "up to speed". She says this *"There will now be a disciplinary hearing at dismissal stage (albeit cannot be a foregone conclusion but is likely….)"* and later *"I am sure Sue and Nic will update you following the disciplinary and before dismissal…."*

44. The Disciplinary Hearing took place on 16th October. Ms Cotterell, HR adviser and Ms Edwards comprised the panel. Ms Cotterell is not a solicitor and therefore had to rely on Ms Edwards for her assessment of the gravity of the charges and the acceptability in professional terms of any explanations given by the Claimant.

45. In respect of the first two AMB allegations, (missing of court deadlines for filing witness statements and a locus report and failure to supervise junior staff) the Claimant said that it had initially been unnecessary to get witness statements. This was because they had been expecting to get, and did get, judgment in default. When that judgment was set aside she understood that Rhys Williams was to be responsible for compliance with directions. She could have applied for an extension of time but the file was not referred to her so she was not aware.

46. She did not fail to supervise junior members of staff. Mr Gayler stated that Rhys was to ensure the directions were complied with and he was giving instructions. Rhys had drafted the witness statement but had not followed it up. The Claimant said she had an awful lot of other jobs which she was focusing on the time and she relied on Rhys to let her know if there was a problem. She was not the only one involved in the case. "*What I'm trying to say although I'm the FE with conduct of the file other people were involved in working on the file including Rhys, Kirsty and Mark. Mark is in the office and I'm not most of the time.… Whilst I accept I, on the face of it, have conduct of the file there are also other people involved and Rhys and Kirsty were running things past Mark on a day-to-day basis."*

47. The Claimant said that she had not missed a deadline to disclose the locus report. The locus report was only a recommendation of counsel and not an order of the court. It was not in existence on the date for disclosure. There was no deadline to miss.

48. The third allegation was that there was no signed notice of funding on file. The Claimant said that she completed the notice at home and provided it to Rhys Williams to get signed and served with the other documents for service. The papers had been served. Rhys had provided it to the process server as and she would have thought he would have filed it then. She did not have access to the paper file so she did not know if there was a signed notice on file. However there should be a copy with the court. Ms Cotterell said they would check.

49. In relation to point 4 the Claimant accepted that she did not tell the client about the potential risk of him being liable for the part 20 counterclaim and the costs implications. She said that the counterclaim was a "try on". (In the Tribunal the Claimant accepted that she didn't take an active decision not to tell the client because the claim was hopeless – simply that it didn't occur to her to inform the client).

50. As to point 4 the Claimant accepted she had not investigated if the client's insurance covered a part 20 claim or notified the insurer of the claim. However,

she said that the part 20 claim was in any event a hopeless claim, out of time and statute barred and the client did have insurance to cover the part 20 claim. There was no suggestion that the insurers would not cover it. She had so much to do she could not pick up everything.

51. In respect of the PBA, the first allegation was that the Claimant had not taken instructions on a part 36 offer in a timely fashion.

52. The Claimant said that the offer had arrived the day after she had been notified that she would be subjected to a disciplinary process (the first 2015 disciplinary process) and she had other important matters to attend to. It was below the bottom line that counsel had advised and acceptance was never a real issue. She accepted that she had not formally told the client about the implications of the part 36 offer or the 21 day deadline for acceptance but said that the client had previously been advised of the costs risks on p36 offers so he was already aware of the implications. Her plan was to negotiate and then settle. She said she had not tried to get an extension of time for a reply to the offer. In any event the offer had not been withdrawn and the case was likely to settle for more than had been offered.

53. It was clear from the notes of the investigation interview that the Claimant had told the client of the p36 offer 18 days into the 21 day period for acceptance (but not of the costs implications) — hence the reference to not taking instructions in "a timely fashion". At the disciplinary hearing Ms Edwards was clearly under the impression that the client had not been told of the p36 offer until after 21 day deadline for acceptance had expired. She told the Tribunal that she had done this and had "not been corrected" and that she had not checked the dates on the file. She said however that she had reviewed her findings after the disciplinary hearing and established then the offer had been put on the 18th day, but that evidence did not have the ring of truth and as there was no rationale in the dismissal letter and no contemporaneous evidence to support this, I do not accept that.

54. The Claimant did accept that she had not notified the LEI insurer of the part 36 offer. She said that she was not the only person to have done that occasionally and that none of it justified allegations of gross negligence.

55. The Claimant said that her own p36 offer was a negotiating offer made to a professional insurer and unlikely to be accepted. "*The court have the discretion to overlook an oversight like that."* The risks of not including legal costs had been grossly exaggerated.

56. Ms Edwards now says that after the hearing she checked whether the court had a signed notice of funding for the AMB case and the court told her that no notice of funding had been served. This is not referred to in the dismissal letter nor have I seen any cotemporaneous document recording that check. Ms Edwards did not explain whether she considered how the claim could have been served without the signed notice of funding. I do not accept that such a check was done.

57. The Claimant was told by telephone on 6th November that she had been dismissed. The outcome letter was emailed to her ten days later on 16 November 2015. Despite the delay it was not very informative. The panel concluded that the Claimant's conduct "in particular in relation to the highlighted points above constituted gross negligence" and that she was summarily dismissed. (The highlighted points are those set out at para 39a (iv) and (v) and 39b above.)

58. The dismissal letter is entirely devoid of reasoning. It refers to the fact that a live written warning was active on her file but does not state if that factor was important to the decision to dismiss. No attempt is made to explain why the points that the Claimant made to explain her conduct have been rejected. It did not explain why the highlighted points were more important than the ones not highlighted or to what extent, if any, the points not highlighted formed part of the decision to dismiss. In her witness statement Ms Edwards gives a detailed explanation of her thinking on each of the points and states why she had rejected the Claimant's explanation, but that thinking was not reflected in the dismissal letter. In the absence of a clear rationale for the decision the Claimant would have been unable to mount an effective appeal or properly to understand the reasons for her dismissal.

59. In the Tribunal Ms Edwards did give evidence about their reasoning. She said that in relation to the first three allegations they felt that the Claimant was the primary file handler and should not have assumed that others should take overall responsibility. However there were others who had worked on the file and the witness deadline was still missed so the panel accepted that her actions, while lacking, were not grossly negligent.

60. Ms Edwards considered that the other matters were however negligent. It was not for the Claimant to pick and choose the information to pass to a client. It was not for her to decide not to tell a client about a counterclaim. It was no answer to the PBA charge that the client had been made aware of the implications of a part36 offer some time previously. P36 principles should have been explained every time an offer came in.

61. She said that she considered that each of the allegations highlighted in the dismissal letter would on their own, and taken singly, have merited a dismissal for

gross misconduct in the absence of any mitigating circumstances — and the Claimant had admitted the majority of the charges with no mitigation. Ms Edwards considered that there had been "multiple failures" in the provision of relevant information to the client in fundamental breach of the Claimant's client care obligation and that this combined with "a reckless disregard to their funding arrangements" amounted to gross negligence.

62. It was also Ms Edwards evidence that while she was aware of the written warning, it played no part in her decision to dismiss and that she would have dismissed any employee with no prior history or errors if she had made a single error of the kind for which the Claimant was dismissed in the absence of mitigating circumstances. Ms Edwards also said that had they not concluded that the errors were so grave as to amount to gross negligence on their own then they would have "in all likelihood" dismissed the Claimant for continued misconduct. Ms Cotterell for her part said that they concluded that the matters before them were so serious to amount to gross negligence for which the Claimant should be summarily dismissed but that had that not been the case then having regard to the live warning, they would still have dismissed the Claimant based on her repeated misconduct.

63. The Claimant appealed. The basis of her appeal was that the disciplinary process was a sham and that the firm had been looking for a reason to dismiss her. She referred to the performance management process and to the earlier disciplinary. She also referred to the fact that the reasons for her dismissal were inconsistent with the reasons for her original suspension, which related to not having taken and served a witness statement (537).

64. An appeal was initially fixed for 1st December 2015 in Cardiff before Mr Pardon the Commercial Director. He is not a lawyer but had been involved in the personal injury claims sector for some time including acting as a defendant claims handler for Aviva.

65. A meeting was scheduled in the Cardiff office. It was Mr Pardon's unchallenged evidence that the Claimant declined to travel to the Respondent's offices either in Cardiff or Bristol for the appeal or would only attend if NewLaw paid her travel expenses. (The Claimant does not complain about this and it was not clear whether payment was refused). In the end the parties agreed to an appeal by conference call.

66. When the call did take place it lasted a few minutes. The notes taken by the Respondent do not indicate that Mr Pardon approached the appeal with an open mind. When the Claimant sought to say that there were no adverse consequence from her failure to put the part 36 offer to the client in a timely fashion, Mr Pardon

responds ""I don't know the current position on the file. I'm not a solicitor. The 5 points on AMB and PBA are clear on why there is negligence".

67. Mr Pardon asked no questions. He told the Tribunal that he did not do so because the Claimant had raised nothing of substance. "It was her appeal and she hadn't said anything". That was not an accurate summation. The Claimant said that she had been taking advice from a senior employment counsel since March and no-one would say that the allegations amounted to gross negligence. What she was saying is that there was no negligence. Mr Pardon did not ask her to elaborate or to be more specific. Instead within a minute or so he tells her that she had not robustly challenged the decision that had been made and the decision stood.

68. Mr Pardon's decision was confirmed in a short email simply stating that the Claimant had failed to present any evidence or information that "disproved" the firm's previous decision to dismiss.

The Law

Unfair dismissal

69. In a case where an employee has been dismissed it is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is a potentially fair reason for dismissal.

70. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

71. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.) The Claimant must also be given a fair hearing.

72. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. What it must consider is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. It is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances. (see *Post Office v Foley* 2000 IRLR 827). The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.)

73. When considering the relevance of earlier warnings the focus is upon the reasonableness of the employers act in treating conduct as a reason for dismissal. If the earlier warning was not issued for an oblique motive and was not manifestly inappropriate i.e. provided it was issued in good faith with prima facie grounds that warning will be valid. (see *Davies v Sandwell Metropolitan Borough Council* 2013 IRLR 374 and restated in *Wincanton group plc v Stone* 2013 IRLR 178 and *Bandara v BBC* UKEAT/0335/15.)

74. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out 6 steps which and employer should usually follow in disciplinary situations. This includes that employees be provided with an opportunity to appeal and an unreasonable failure to do so risks incurring an uplift to any compensatory award.

Wrongful dismissal

75. Where an employee is contractually entitled to a period of notice, an employer who dismisses an employee without giving her notice will be in breach of contract. An employer is entitled to dismiss an employee without notice where there has been repudiatory conduct by the employee justifying summary dismissal. The degree of misconduct necessary for the employee's conduct to amount to a repudiatory breach is a question of fact for the Tribunal to decide.

76. In *Briscoe v Lubrizol Ltd* 2002 IRLR 607 the Court of Appeal approved the test in Neary v Dean of Westminster where the Special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in that particular contract that the employer should no longer be required to retain the

employee in his employment". Many factors may be relevant to this assessment including the employee's past conduct. (*Pepper v Webb 1969 1WLR 514)*

77. In *Adesokan v Sainsbury's Supermarkets Ltd 2017 EWCA* Civ 22 the Court of Appeal said that misconduct may be serious enough to justify a summary dismissal even though it was neither willful nor dishonest. In an appropriate case an act of gross negligence could amount to misconduct. The issue was whether the negligent dereliction of duty was "so grave and weighty" as to amount to a justification for summary dismissal. The focus is on the damage to the relationship between the parties. In determining whether an act has been negligent or grossly negligent it is not necessary to consider whether there was any actual detriment caused. In the determination of what is negligence the risk of detriment occurring is the proper consideration.

Submissions and conclusions

78. Mr McCabe for the Claimant submits that the Claimant was the victim of a plan to terminate her employment. He submits that, from early 2014 the Respondent had targeted her for removal and contrived reasons to do so. She was not genuinely dismissed for conduct and the Respondent conducted a search of her files in order to find a reason to dismiss her. They did so because they did not wish to continue to employ home workers and because the Claimant had lower targets than her peers. (In evidence the Claimant had also said that she believed that she was targeted because, following the closure of the Basingstoke office the Respondent was seeking to reduce its client base in the south-east.)

79. In support of this proposition Mr McCabe submits that:

    a. The performance management process to which the Claimant was subjected in 2014 was entirely unjustified. The Claimant had exceeded her target in 2013 and not been given credit for that. If some of the fees which were paid in December 2013 had in fact been paid in January she would have exceeded her target and Respondent would have been aware that payment of fees could be "lumpy". There was never any serious risk that the Claimant would not make her target.
    b. The Respondent subjected the Claimant to an unfair disciplinary process in March 2015 with no investigatory meeting where the charges were unclear and the sanction was predetermined.
    c. The audit of her files in January and February 2015 was part of an evidence gathering plan.
    d. The Respondent suspended the Claimant unnecessarily on 9 September,

e. The investigation that followed was not impartial. It was masterminded by Ms Edwards and Ms Cotterell. Jo Darlington was subservient to and "doing the bidding of" Ms Edwards and Ms Cotterell.
f. the email sent on 17th December (see para 14 above) demonstrated that the sort of errors for which the Claimant was disciplined occurred wholesale across the firm, yet the Claimant was singled out.

80. Mr Heard, on the other hand, unsurprisingly, submits that the Claimant was dismissed for conduct and that there was no preconceived plan to target the Claimant.

81. Despite considerable evidence about the earlier warnings and the capability process, I do not accept that the Respondent had targeted the Claimant for removal irrespective of her performance. In respect of the 2 previous disciplinary processes there were genuine issues which had arisen. While it was not best practice to take action in 2014 for a failure that occurred in 2103 (the DPA breach) I do accept that the Respondent took disciplinary action in response to genuine issues which concerned them. I do not accept that the earlier warnings were issued for an oblique motive or were manifestly inappropriate.

82. As for the capability process, I accept Ms Lewis' evidence that their standard process was to invite employees to a capability hearing if they were behind target at the end of Q2 and that similar invitations had been issued to four other members of the department on the same date. At the end of the 2nd quarter 2014 the Claimant was £80,000 behind for the year. While it is true that by the end of July the Claimant's performance against target was improving, that does not indicate that the Claimant was being unfairly targeted by the capability process. While this was undoubtedly an uncomfortable and difficult process for the Claimant to go through, the evidence suggests that this is an employer which is very focused on income targets and that this was a standard process applicable to all the fee earners in the same way. I do not accept that Ms Lewis' email (155- see para 10 above) suggested that the Claimant was being targeted for dismissal. It did mean that the Respondent was, by then, concerned about her performance and was keeping a close eye on her. Uncomfortable as it may have been the Respondent was entitled to set targets for its fee earners and would be concerned if a fee earner could not achieve targets commensurate with her seniority.

83. It is apparent that by the beginning of 2015, and possibly earlier, the Respondent was keeping a close eye on the Claimant. No doubt Ms Lewis had it in mind that matters could progress to a dismissal and then to the Employment Tribunal – hence the copying of emails to HR. However, I am satisfied that the instruction to keep a clear paper trail was because there were genuine concerns about the

Claimant's file handling and the Respondent's perception that further poor performance was likely to result in disciplinary action and not because they were seeking to build an unjust case against her. After the first 2015 disciplinary process both Mr Thomas and Ms Phipps had sought to provide support in helping the Claimant to become more organised.

84. I do not accept Mr McCabe's submission that the email from Ms Lewis at p490 (see para 42 above) is clear evidence that the disciplinary process was a sham and that by then Ms Lewis knew there would be a dismissal. Ms Lewis clearly thought that dismissal was likely following the findings of the investigatory report but she did not take the decision to dismiss and I am satisfied that Ms Edwards and Ms Cotterell heard what the Claimant had to say in explanation and mitigation and made up their own minds.

85. I find that the reason for the Claimant's dismissal was the Respondent's genuine belief that the Claimant was in breach of her professional obligations. This is a reason which relates to conduct and is a potentially fair reason for dismissal.

86. Did the Respondent have reasonable grounds after reasonable investigation to conclude that the Claimant was guilty of gross negligence? (Mr McCabe was keen to stress that there is no concept of gross negligence as opposed to negligence simpliciter, but that was a semantic question and it was clear that what the Respondent meant by that concept was exceptionally serious negligence).

87. I had concerns about the investigation. As I have said Ms Darlington in her investigation showed an unhealthy desire to please. However, I do not accept that she was simply doing Ms Edwards and Ms Cotterell's bidding or that the emails sending them the list of questions for approval of themselves rendered the process unfair. She reviewed the AMB and the PBA files because it was these files that had been drawn to her attention as showing file handling errors.

88. The report itself was in my view flawed. It did not set out the Claimant's proper position and was not in neutral terms. A good investigation report should weigh up the allegations against the evidence and the employee's explanations and make findings. It did not do that.

89. I considered whether this made the decision to dismiss unfair and I concluded that it did not. Looking at the process leading up to the dismissal as a whole I am satisfied that the Claimant understood the allegations against her and that at the disciplinary hearing itself she was given a fair opportunity to say what she needed to in denial, explanation or mitigation.

90. I am satisfied that the Respondent did have reasonable grounds for its belief that the Claimant had failed to comply with her professional obligations in a number of respects. The Claimant accepted that she should have notified AMB and his insurer of the P20 claim. She also accepted that she had not informed PBA's insurer of the offer and had not informed PBA of the deadline for acceptance or of the costs implication of the offer P36 offer and that she should have done so.

91. The Claimant's case was really that such errors were not serious. Such oversights were "the sort of thing that happens every day in practice" and that the Respondent had grossly exaggerated the risks of those errors having any significant consequences. It was her case that the risk of adverse consequences were minimal.

92. Given these admissions, the real issues were whether the Claimant has been afforded a fair process and whether the sanction fell outside the band of reasonable responses—although the two are interlinked.

93. At the hearing the Respondent (i) failed to establish if there was a signed notice of funding served on the court and (ii) failed to realise that Claimant had notified the client of the P36 offer 18 days into the 21 day period. Neither failure however was critical to the decision of the Respondent. I accept that the Claimant was not dismissed for the fact that there was no Notice of Funding on file. This was not a matter highlighted in the dismissal letter. I also accept that the critical failures in respect of the part 36 offer were the failures to inform the client of the deadline for acceptance, and the consequences of the offer and the failure to inform the LEI.

94. How serious were the breaches? The Claimant refers to Ms Lewis email of 17 December 2014 (249) to support her contention that many others made such errors. In my view the email does not suggest that the Respondent believed that these errors were acceptable. On the contrary it is clear that "disciplinary action will follow for repeat offenders". The same message was given in an email of 15th August (210) when the department was told that failure to follow reporting triggers to insurers could lead to disciplinary action.

95. On the other hand I also do not accept Ms Edwards' evidence that any single one of these matters would, with no prior history of failures, have merited a summary dismissal for gross negligence. Although the email sent to the department make it clear that the Respondent viewed failure follow reporting triggers as unacceptable, it gives the lie to Ms Edwards evidence that each of the charges against the Claimant were so serious that on their own the Respondent would have dismissed any employee guilty of any one of such matters. The Claimant

herself had missed a P36 reporting trigger in late 2014 and not been dismissed. (277)

96. I do however accept that Ms Edwards and Ms Cotterell reasonably regarded the cumulative effect of the Claimant's errors as very serious and as exposing the Respondent to risk of negligence claims. Ms Edwards did not accept the Claimant's explanation that informing the client was "unnecessary" in the circumstances, and in her view it was the Claimant's duty to keep the client informed. Ms Edwards was also reasonably of the view that the Claimant showed lack of insight in that she did not regard what she had done as serious and that this on its own was of serious concern. Both Ms Edwards and Ms Cotterell said that had they not concluded that the Claimant's actions were so serious as to amount to gross misconduct they would still have dismissed the Claimant having regard to the live warning.

97. I am satisfied that in all the circumstances, including the live warning, the decision to dismiss the Claimant was at that stage within the band of reasonable responses.

98. However the dismissal is unfair as the Respondent failed to provide the Claimant with a proper appeal process.

99. In the first place, as I have said, the dismissal letter was devoid of reasoning and quite inadequate as to the panel's reasons to enable the Claimant to challenge their conclusions. Secondly Mr Pardon did not approach the appeal with an open mind and the notes show a shockingly brief hearing. Mr Pardon says that the Claimant had not robustly challenged the decision that had been made but he had not been given the chance to do so The Claimant was thereby denied the opportunity to show that the Respondent's reason for dismissing her could not be reasonably regarded as sufficient. I therefore find that the Claimant was unfairly dismissed.

100. However, given my finding that the initial decision was not unfair, and subject to further submissions from the parties, there are likely to be substantial reductions to any award to reflect Polkey and contribution issues.

<u>Wrongful dismissal</u>

101. The Respondent submits that each of the six findings highlighted in the dismissal letter amounted individually to gross negligence and hence to gross misconduct. I do not accept that. Each were clear failures but I do not accept that any of them individually was so grave and weighty as to amount to gross negligence singly.

Errors were made but the Respondent was not entitled to dismiss summarily for each and every error.

102. Did the Claimant's file handling failures amount to a fundamental breach of contract or repudiatory breach of contract entitling the employer to dismiss her without notice? As was said in *Adesokan*, gross misconduct is not limited to cases of intentional wrongdoing. The issue is whether there was negligent dereliction of duty "so grave and weighty" as to amount to justification for summary dismissal. As the Court of Appeal said in *Adesokan* in considering this it is not necessary to consider whether there was any actual detriment caused –it is the risk of such detriment occurring that is the proper consideration. There are no hard and fast rules as to what this looks like but the employee's past conduct and the background may be relevant as would be the standards of conduct clearly set by the employer.

103. I have found this issue difficult. On the one hand there were clear failures against a background of previous failures, in circumstances where the Claimant had been given support. On the other hand it was not suggested that these failures were deliberate and as Elias LJ said in *Adesokan* "It ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitute such a grave act of misconduct as to justify summary dismissal." In other words the bar is set slightly higher in such cases.

104. Weighing up all these matters I conclude that the Claimant's file handling failures were not so grave and weighty as to entitle the Respondent to dismiss her without notice.

Remedy

105. The case is listed for a remedy hearing on 2^{4th} July 2017. The Claimant will be entitled to three month's net pay in respect of her successful wrongful dismissal claim.

106. Unless the Claimant seeks reinstatement or re-engagement, at that hearing I will consider the loss flowing from the unfair dismissal. I anticipate that Polkey issues will arise as will the extent of the deduction to be made to the basic and compensatory awards under sections 122(2) and 123(6) of the Employment Rights Act 1996. Although I have heard all the evidence relevant to those matters I have concluded that the parties should be given a further opportunity to make submissions on these matters in the light of my specific findings.

107. There may also be issues as to whether there should be an uplift for breach of the ACAS code of practice and issues of mitigation of loss.

108. The parties should liaise to agree a list of issues relevant to the remedy hearing to be sent to the Tribunal not later than 3rd July 2017. If either party intends to call witness evidence at the hearing additional to the evidence set out in the witness statements provided for the liability hearing, those witness statement should be exchanged on or before 10th July 2017.

109. If the parties are able to agree terms of compromise as to remedy in advance of the hearing they should inform the Tribunal at the earliest opportunity so that the date may be vacated.

Employment Judge Frances Spencer
13th April 2017