

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 150
3209179

BETWEEN

ANNA WILLIAMS
Applicant

AND

THE LEARNING STAIRCASE
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Mathews, advocate for the Applicant
Ros Lugg for the Respondent

Investigation Meeting: 5 September 2023 and 28 November 2023 in Christchurch
and by AVL

Submissions Received: 4 December 2023 and 14 December 2023 from the Applicant
11 December 2023 from the Respondent

Date of Determination: 15 March 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Anna Williams was employed by The Learning Staircase Limited (TLS) as an Education Adviser and Business Development Manager from 2 August 2021.

[2] During the time that Ms Williams worked for TLS, TLS had concerns about her performance. However, TLS did not raise these concerns at the time due to various circumstances arising both in their business and for Ms Williams personally.

[3] In June 2022 TLS discovered a number of documents that had been uploaded to its system by Ms Williams. These documents were not TLS documents and they contained a large amount of personal information. TLS was concerned about breaches of privacy and the

impact this might have on its business. It raised these issues and the performance concerns with Ms Williams and then suspended her pending further investigation.

[4] For various reasons Ms Williams chose not to participate in both the investigation and the subsequent disciplinary meeting that TLS conducted. She did provide some information to TLS through her advocate. In the end TLS completed its process and terminated Ms Williams's employment.

[5] Ms Williams raised personal grievances based on both the suspension and her dismissal. The parties were unable to resolve these grievances and Ms Williams lodged a statement of problem in the Authority, raising claims for unjustified disadvantage and unjustifiable dismissal.

[6] It is Ms Williams's claims for unjustified disadvantage arising out of her suspension and unjustifiable dismissal that I have investigated and this determination resolves.

The Authority's investigation

[7] I investigated Ms Williams's claims by receiving written evidence and documents, and by holding an investigation meeting on 5 September 2023 and 28 November 2023. In my investigation meeting the witnesses answered questions about their written evidence. I also received written submissions from the parties after the investigation meeting.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

Unjustified action causing disadvantage

[9] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act. This section provides that an employee may have a personal grievance where the

employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[10] The questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

[11] In this case Ms Williams complains that her suspension was not justified.

Unjustifiable dismissal

[12] The issues for the unjustifiable dismissal grievance are:

- (a) Was the employee dismissed; and
- (b) If so, were the actions of the employer in deciding to dismiss the employee, justifiable?

[13] In this case there is no dispute over the fact that Ms Williams was dismissed. TLS gave her notice of termination on 20 July 2022, after completing a disciplinary process; this was a summary dismissal taking immediate effect.

[14] The question I must answer in order to determine the unjustifiable dismissal claim is, was the dismissal justifiable.

[15] The test for justification is set out in s 103A of the Act. Applying this to Ms Williams's claim the question is whether TLS's actions in coming to the conclusion to dismiss her were what a fair and reasonable employer could have done in all of the circumstances at the time.

[16] This question applies to both the steps taken to reach the decision and the justification for the decision.

[17] Whether TLS acted as a fair and reasonable employer could in the steps it took to come to the decision to dismiss is informed by s 4(1A) and s 103A(3) of the Act. I must be satisfied that TLS acted as a fair and reasonable employer could whilst meeting the requirements of the Act. This breaks down as:

- (a) Did TLS investigate what occurred in terms of the concerns it had about Ms Williams's conduct?
- (b) Did TLS set out these concerns, provide relevant information and explain the possible implications of an adverse finding, for Ms Williams so that she could consider all of this and respond?
- (c) Did TLS give Ms Williams a reasonable opportunity to respond to its concerns, before it made its decision on what had occurred and what sanction should be imposed?
- (d) Did TLS consider the explanations given by Ms Williams before it made its decision on what sanction should be imposed?

[18] The justification for TLS's decision to summarily dismiss Ms Williams is assessed by considering:

- (a) Were TLS's conclusions as to what Ms Williams did, conclusions that a fair and reasonable employer could come to in all of the circumstances?
- (b) Based on TLS's conclusions about what Ms Williams did, was the conclusion to summarily dismiss Ms Williams one that a fair and reasonable employer could come to in all of the circumstances?

What happened?

Background

[19] TLS is an educational software company. Its main product is an online literacy teaching program called StepsWeb. Whilst TLS operates a successful business it is not a large undertaking and it does not have a significant turnover.

[20] At the start of 2021 TLS had five employees. These employees included Ros Lugg the CEO, Mrs Lugg's husband Mike Lugg the CFO, and that their two adult sons David and Andrew Lugg. It was during 2021 that TLS decided it needed to add business development staff and an educator with some commercial experience. It was this that ultimately lead to TLS employing Ms Williams.

[21] In the course of the application, interview and offer stage of employing Ms Williams, Ms Williams's CV and statements she made indicated that she was an experienced senior manager and showed that she had several previous roles that were relevant such as school principal of an international school.

Performance concerns

[22] It is clear to me from the evidence that I heard that after a period of Ms Williams employment TLS began to have concerns about Ms Williams performance at work. There was also a specific meeting between Ms Williams and David Lugg which Ms Williams says caused Mr and Mrs Lugg to effectively turn against her.

[23] From my perspective it is not necessary for me to establish any facts around these two areas which were fully canvassed in the evidence in my investigation meeting. This is because having heard all of the evidence I find that performance issues and the matters that arose from the specific meeting in question did not inform TLS's decision to suspend and then dismiss Ms Williams.¹

¹ There is however a related ground, that TLS believed Ms Williams had misled it over her experience and ability that I address later in this determination.

Discovery of documents on TLS's system

[24] Ms Williams was absent from work from 16 May 2022 to 13 June 2022. During this period of time Ms Williams initially worked from home then took bereavement leave and also had a period of sick leave.

[25] During this period of absence Mrs Lugg tried to find a file containing TLS's testimonials in TLS's documents stored on its network. The documents should have been in the marketing folder in TLS's shared directory. When Mrs Lugg could not find the testimonials in the marketing folder, she searched the term testimonials in TLS's shared directory. This search returned a number of documents that Mrs Lugg did not recognise. On closer analysis these documents appeared to be job applications, testimonials and performance reviews of Ms Williams former colleagues. This review also showed that the various documents included personal information about children and previous work colleagues of Ms Williams; this information was clearly private and confidential, particularly as that related to children.

[26] Mrs Lugg told Mr Lugg about her discovery of these documents and he took a closer look at the documents in the shared drive. In addition to the information that had already been discovered Mr Lugg found that the documents included several documents relating to Ms Williams employment as a school principal of an international school. Other documents that Mr Lugg found included class lists of children's names, ages, religion, addresses and other information. There were also records of disciplinary action Ms Williams had taken against staff at the international school.

[27] Given the nature of the documents it was clear that Ms Williams had uploaded these documents to TLS's shared drive.

[28] Mr and Mrs Lugg were very concerned about this discovery. As would be readily apparent to most people involved in early learning and childhood education, privacy of children's data is a significant issue. The presence of this information, which did not belong to TLS and TLS did not have permission to have, in documents on TLS's shared drive was probably a breach of privacy and other obligations.

[29] The concerns that arose for Mr and Mrs Lugg included that Ms Williams either did not understand the privacy and confidentiality attached to the information - despite her experience - or she had ignored that and chosen to take this information from her previous employers and had for some reason uploaded the documents to the TLS system.

[30] In this regard TLS had been working towards attaining two new international standards in relation to the privacy and confidentiality of information – ST4S and ISO 27001. Ms Williams had been involved in discussions with Mr Lugg about these standards and TLS's plans to achieve accreditation. It therefore seemed more likely that Ms Williams had ignored obligations of privacy and confidentiality and decided to keep documents belonging to her former employer which contained information belonging to children and other third parties. And that she had decided to upload these documents to the TLS shared drive.

[31] In the course of reviewing the documents Mr Lugg also discovered documents that related to Ms Williams departure from her role as principal at the international school. These documents indicated that Ms Williams departure was for reasons that were different to those that she had explained in the interview for her position at TLS.

Meeting on 22 June 2022

[32] After assessing the extent of the documentation and the potential ramifications for TLS, Mr and Mrs Lugg decided that they needed to tell Ms Williams about the documents that they had discovered and give her an opportunity to explain.

[33] Mr Lugg was also concerned that the documents appeared to have been downloaded by Ms Williams from her previous employers and that this indicated that Ms Williams may have downloaded some of TLS's documents or that she might do so in the future. Mr Lugg thought the only way to protect TLS in this regard was to remove Ms Williams's access to the TLS server (and the documents contained on the server) and for TLS to review her laptop.

[34] Ms Williams was not due to return to work until 13 June 2022 and this was a time when Mrs Lugg and David and Andrew Lugg were due to leave to Australia for an education conference. So, Mr Lugg decided that they would not raise the issues that they had about the documents they had discovered with Ms Williams until 22 June 2022.

[35] On this basis Mr and Mrs Lugg prepared for a meeting with Ms Williams on 22 June 2022. They decided that the meeting would also be used to address concerns that they had about Ms Williams performance and then they would tell Ms Williams about the documents they had discovered and the issues that arose for them. They would then move to discuss suspension of Ms Lugg, with that taking effect immediately so that they could take her laptop from her and prevent her from accessing the TLS network whilst they investigated their concerns further. They would then invite Ms Williams to attend an investigation meeting on 27 June 2022 where she would be given the opportunity to explain.

[36] Mr and Mrs Lugg did not give Ms Williams any prior information about the meeting on 22 June 2022. They were concerned that giving Ms Williams information in advance of the 22 June meeting would also give her an opportunity to download its documents, if that was what she intended to do, or delete documents if there was other documentation on her laptop that might be relevant.

[37] Late in the day on 22 June 2022 Mr Lugg approached Ms Williams told her that he would like to have a discussion with her after her afternoon break.

[38] At around 4:00 pm on 22 June 2022 Ms Williams went to the meeting room where Mr and Mrs Lugg were waiting to speak to her. Mrs Lugg began the meeting by explaining to Ms Williams that they had had some concerns about her performance and they would like to discuss some of the issues with her. Mrs Lugg then went through a list of concerns and then invited Ms Williams to respond. There was some discussion about issues raised and Ms Williams perceptions of how she had been treated after she had returned from her period of absence.

[39] Mrs Lugg then explained to Ms Williams that there was another situation that they wish to discuss with her. She explained what had been discovered in terms of the documents and confidential information on the TLS server and the concerns for TLS.

[40] There was some discussion about these issues with Ms Williams explaining that the documents were documents from her previous employment that she had copied and taken, as she considered this to be normal and appropriate. She also explained that she did not know

how the documents had got onto the server and that Andrew Lugg may have done this when there had been some issues with her laptop and the TLS network.

[41] Mrs Lugg explained that they were concerned that it was illegal for her to have taken the documents (and therefore the information), and it was illegal for TLS to have the information on that system – this represented a huge confidentiality issue for TLS and potential breaches of data privacy.

[42] Mr Lugg then explained that it was an extremely serious issue that TLS needed to investigate thoroughly because of the potential data breaches. TLS had no choice but to suspend her on full pay so that it could investigate further including looking at her laptop which she would not be able to take with her.

[43] Mr Lugg then explained that the next step would be for them to hold an investigation meeting with Ms Williams where they would present the findings of their investigation so she could respond. Ms Williams was invited to attend the investigation meeting on 27 June 2022.

TLS investigation

[44] Following the meeting on 22 June 2022 Ms Williams took some time to get some employment advice from a specialist employment advocate. On 28 June 2022 Ms Williams's advocate sent an email to TLS stating:

We understand that you wish to meet our client. The time suggested is not possible at our end; however, we can accommodate a meeting next week.

Please provide all the material that you are proposing to consider when you make your decision as to the appropriate outcome following this meeting.

Please provide any documentation relied upon with respect to your suspension of our client.

[45] Mrs Lugg responded to the email on 29 June 2022. In addition to asking for a day and time when Ms Williams and her advocate would be available for the investigation meeting Mrs Lugg set out various aspects of the investigation they were undertaking. This included explaining that they had discovered documents in the shared folder on the company server. Mrs Lugg explained further that the documents were from other organisations and contained private and confidential information which would put TLS in breach of the Privacy Act.

There was particular concern about documents listing children's names and dates of birth religion and contact information.

[46] Having explained what TLS had discovered in terms of the documents and the concern regarding breaches of privacy Mrs Lugg then stated:

... The questions we want to put to Anna are:

- Why did you have this private and confidential information in the first place?
- Why did you keep copies of it?
- Why did you upload it to the share drive on our server
- Have you downloaded any similar information from [TLS]?

[47] Mrs Lugg's email then set out that there were other documents which related to the termination of Ms Williams employment at the international school. Mrs Lugg then set out the concern for TLS as follows:

... At the initial job interview, [Mr Lugg] asked [Ms Williams] the reason her employment had come to an end and she said that contracts at international schools are often short and hers had simply concluded, and that it was not renewed because of low enrolment numbers. The documents appear to say that the reason [Ms Williams] left [the international school] are materially different to this. Had we known this when we first interviewed [Ms Williams]'s, we may well have come to a different decision about offering her employment. Questions we want to put to [Ms Williams] are:

- Why did your employment at [the international school]'s come to an end?
- Why is this not the same as what she said to us at the interview?

[48] This Mrs Lugg concluded her email by advising that there were trust and confidence issues that arose which were potentially very serious and she explained why that was so in relation to access to private and confidential records for children and their customers. And she advised the advocate that they were not able to email copies of the documents in question because of the privacy and confidentiality concerns that they had. However, Mrs Lugg advised that Ms Williams would have copies of all of those documents that her advocate could review.

[49] Ms Williams's advocate then responded by email on 29 June 2022. He advised in this email that "the sensible thing would be to simply delete the files from your server." He went

on to state that this was hardly a matter of serious misconduct. He then concluded his email by advising that Ms Williams was raising a personal grievance for unjustified disadvantage because she had been suspended without consultation and without any substantive grounds.

[50] Mrs Lugg then responded stating that the comments had been noted and asking the advocate to confirm when they would be available for the investigation meeting.

[51] Ms Williams's advocate then responded by email on 1 July 2022; he stated that because TLS had not replied to the personal grievance raised and had not lifted Ms Williams suspension she would have no confidence in a process that appears to be predetermined particularly while she remained unlawfully suspended. He also requested Ms Williams personnel file.

[52] This email prompted a further response from Mrs Lugg on 4 July 2022 (noting that this email was sent to Ms Williams directly). Mrs Lugg noted that they had postponed the investigation meeting at Ms Williams request and since that time had made several requests for an alternative time with none being offered. On that basis TLS was scheduling the meeting for 3:00 pm on 6 July 2022. Mrs Lugg also clarified that the purpose of the meeting was to share with Ms Williams the results of the investigation and give her an opportunity to respond to the questions they had posed. From that point TLS would consider whether further action such as a disciplinary meeting was required.

[53] The advocate for Ms Williams then responded stating that they had raised an unlawful suspension of Ms Williams and that had not been addressed at all. He went on to state that they would now file a matter with MBIE and that Ms Williams was not prepared to participate in an investigation meeting until all documentation TLS intended to rely on was provided and TLS either justified or lifted the suspension.

[54] Mrs Lugg then send further email to Ms Williams's advocate on 4 July 2022. In this email she stated:

As we have already explained to you, the documents in question are private and confidential. Further, [Ms Williams] already has copies of all the relevant documents; it was she who uploaded them to our server. For now, you need only ask [Ms Williams] for copies of them. In the meantime, we are starting to reach out to the organisations who own these documents (her previous

employers) to both let them know that they have been uploaded to our server, and to ask their permission to disclose to third party.

Again, as we've all explained to you, the documents we have found are private and confidential and [Ms Williams] role involves access to our private and confidential information, including the details of school-aged children. It would be considered to be highly irresponsible if we didn't suspend [Ms Williams] until we had concluded our investigation.

You are, of course, perfectly entitled to raise a personal grievance with Employment New Zealand. However, as you are no doubt aware, the first thing they will require [Ms Williams] to do is to have a meeting with us to discuss the matter. This is exactly what we are trying to do, and you seem to be determined to prevent.

Can you please confirm that you and [Ms Williams] will be attending the meeting on Wednesday.

[55] Ms Williams advocate responded to this email on 6 July 2022. He stated:

I will repeat for clarity:

- a) [Ms Williams] can have no confidence in any process that you engage and while you continue to stand by a suspension that is simply not justifiable. There was no consultation prior to her suspension. That alone makes it unlawful. Further, your supposed justification is simply not substantive. Suspension is meant to be a last resort.
- b) We are not requesting the information on the server that belongs to a third party. We have already stated that it should simply be deleted. We have requested all documentation that you intend to rely on. For instance, you've made the claim that [Ms Williams] mislead you during the interview process. Please send the related documentation. We request [Ms Williams] personnel file.

[56] Ms Williams did not attend the investigation meeting on 6 July 2022 and TLS completed its investigation without her input, other than the input directly from Ms Williams in the 22 June 2022 meeting and Ms Williams's advocate submission that the potential breach of privacy was not a matter of serious misconduct and that the documents should just be deleted.

Disciplinary process

[57] As a result of its investigation TLS concluded that Ms Williams should be subjected to a disciplinary process.

[58] On 8 July 2022 Mrs Lugg sent an email to Ms Williams's advocate advising that TLS had completed its investigation and it was inviting Ms Williams to attend a disciplinary meeting. In the email Mrs Lugg attached a sample of the documents TLS was concerned about and gave Ms Williams and her advocate access to a secure drop box where all of the documents could be located. Mrs Lugg also attached a letter, 8 July 2022, that set out the invitation to the disciplinary meeting and matters that would be addressed.

[59] The 8 July 2022 letter included, amongst other things, the following:

- (a) That TLS had concluded there were a number of issues to be addressed by Ms Williams and she was invited to a disciplinary meeting on 13 July 2022. She was entitled to bring a representative or support person with her and that the outcome of the meeting could be dismissal.
- (b) TLS was concerned about a large number of documents from Ms Williams's previous employers that had been found on TLS's system. These documents included information that was proprietary to other companies and a large amount of confidential information about students and former colleagues. The letter then set out the type of information that the documents contained. The letter went on to explain the concerns that TLS had as a result of the documentation including that it was illegal for Miss Williams to have taken and retained the information, it was illegal for them to have the information on its system and it put TLS at risk of breaching the Privacy Act, it showed a lack of understanding on her behalf about confidentiality and privacy and raised considerable concern about her judgement.
- (c) TLS was concerned that Ms Williams had misled it by misrepresenting certain aspects of her previous employment in the job interview she had with Mr and Mrs Lugg. The letter then set out what it was that TLS believed or recalled that they had been told in the interview and then what the documentation showed in relation to her employment at an international school and the basis on which she left that school.

(d) TLS was concerned about her abilities and that she may have misrepresented her skills as evidenced by the performance concerns it had raised with her. The letter set out the reasons for this.

(e) TLS was concerned about what appeared to be a lack of understanding by Ms Williams about TLS's core product. The letter set out the reasons for this.

[60] There was no response to the email from Mrs Lugg of 8 July 2022 except for a one-line email from Ms Williams's advocate which requested the meta data of a particular document.

[61] Ms Williams did not attend the disciplinary meeting on 13 July 2022 and did not send any information in relation to that meeting to TLS.

Dismissal

[62] TLS completed the disciplinary meeting without Ms Williams attending.

[63] On 15 July 2022 Mrs Lugg sent an email to Ms Williams's advocate that had a letter dated 15 July 2022 attached. This letter:

- (a) Had the heading "invitation to respond to proposed disciplinary action".
- (b) Recorded that Ms Williams had not attended the disciplinary meeting which was to discuss potential serious misconduct.
- (c) Noted that the issues to be discussed were very serious matters and TLS wanted to hear Ms Williams's point of view.
- (d) Recorded that having carefully reviewed all of the evidence and information TLS had decided on balance that it no longer had trust and confidence in Ms Williams. This was even more so given that Ms Williams's role was a senior one which required a high degree of leadership and integrity.
- (e) Recorded that TLS proposed that it would terminate Ms Williams's employment without notice.

(f) Invited Ms Williams to provide her views on the proposed termination of her employment.

[64] Ms Williams responded to the 15 July 2022 letter through her advocate who sent an email to Mrs Lugg on 19 July 2022. This email reiterated Ms Williams request for information that related to suspension and traversed in detail the reasons why Ms Williams considered the suspension to be unjustified. The email then addressed the proposed dismissal by referring to the dismissal not being based on the issues for TLS arising out of the third-party documents on its system; concluding again that the documents just needed to be deleted. The email then addressed the allegation that Ms Williams had misled TLS and stated that it was ironic that in relation to this TLS were relying on personal information belonging to Ms Williams. The email concluded with a reference to performance concerns and stated these concerns were not a basis on which TLS could dismiss Ms Williams.

[65] TLS then sent Ms Williams a notice of termination without notice on 20 July 2022.

Did TLS act unjustifiably in suspending Ms Williams?

TLS suspended Ms Williams

[66] There is no dispute that TLS did suspend Ms Williams on 22 June 2022.

The suspension caused a disadvantage

[67] Suspending an employee does cause disadvantage to that employee's employment, so the action is the basis for a personal grievance.²

Was the suspension justifiable?

[68] The key issue in Ms Williams's claim about TLS acting unjustifiably is, was the suspension justifiable?

[69] TLS's actions in suspending Ms Williams were not justifiable. TLS did not follow a fair process as Ms Williams was not given an opportunity to consider the proposed suspension and respond to it before a decision was made.

² *Virginia Henry v South Waikato Achievement Trust* [2023] NZEmpC 20.

[70] In essence, TLS says it could not give Ms Williams a full opportunity to do this as it had concerns. Whilst I accept TLS had valid concerns about protecting its own documents and private information and concerns about what Ms Williams might do, it could still have afforded her an opportunity to respond to suspension. TLS could have explained the situation and taken Ms Williams's laptop at the end of the day. And then TLS could have reconvened the next day to discuss suspension.

[71] It was also clearly evident to me that the decision to suspend Ms Williams was predetermined – TLS had decided she had to be suspended in order to protect its business. This was not justified in all of the circumstances.

[72] I conclude that TLS acted unjustifiably in suspending Ms Williams and this caused disadvantage to her employment.

Did TLS act unjustifiably in dismissing Ms Williams?

The process adopted by TLS and Ms Williams's concerns

[73] Before I consider the steps TLS was required to take in the process it adopted (as set out in paragraph [17]) I will outline the specific concerns Ms Williams has raised. I will consider these concerns when I work through the process elements of Ms Williams's dismissal. The specific issues are:

- (a) The process was not fair and justified because she did not participate. Ms Williams points in particular to the suspension and allegations that a document relating to the suspension (notes) were falsified, which amplified her concerns.
- (b) Ms Williams was not provided with all of the information, particularly relevant documents. This meant Ms Williams did not know what the specific concerns were that ultimately ended in her dismissal
- (c) Ms Williams states in her written evidence that TLS was not willing to learn the truth and its actions were predetermined.

(d) TLS did not consider her response to the proposed dismissal set out in the email of 19 July 2022 sent by her advocate.

Did TLS investigate what occurred in terms of the concerns it had about Ms Williams's conduct?

[74] Mr and Mrs Lugg investigated the third-party documents that had been placed on the system and the concerns raised by the action including breaches of privacy and confidentiality, misrepresentation about Ms Williams leaving the international school and her abilities, and about Ms Williams's understanding of her obligations. And then specifically what this meant about the trust and confidence they had in her.

Did TLS set out these concerns, provide relevant information and explain the possible implications of an adverse finding for Ms Williams so that she could consider all of this and respond?

[75] Mr and Mrs Lugg were unable to provide all of the information TLS had because Ms Williams did not participate in any part of the process. A complaint about not receiving all of the necessary information for an investigation and then a disciplinary process is simply not credible if the reason for not getting the information is because the employee chose not to participate in the process; as was the case here, especially where there was in my view no valid basis to decide not to participate.

[76] To be clear, Ms Williams's concerns about the process being that she believed her suspension was unjustified is not an acceptable reason to not participate. Ms Williams and her advocate could have addressed any process concerns as and when they arose, if they did at all. The same applies for the documents and information – had Ms Williams attended the investigation meeting she would have received the information and access to the relevant documents – and crucially she would have been told what documents TLS did not have that she appeared to want, such as notes of her interview for the role.

[77] I also do not consider that concerns about possible falsification of the notes relating to the 22 June 2022 meeting was a sufficient reason to not participate. It is not uncommon for parties to disagree about what was discussed in a meeting and as a result suggest either

directly or indirectly that one party's notes of the meeting are therefore wrong. It does not follow that the notes were falsified, rather it is evidence that a party remembered events differently. The reluctance in this case to not provide meta data relating to the notes has taken too much significance in informing Ms Williams's view of how fair the subsequent meetings or the overall process might be. It appears to me that she was looking for reasons to verify her decision not to participate.

[78] Effectively it appeared to me that TLS were in a no-win situation with Ms Williams as they were being asked:

- (a) To withdraw the suspension, which they were not prepared to do and were entitled to maintain in the circumstances.
- (b) To provide various documents, including the meta data for notes, when they had already explained why they could not provide them and when they would.

[79] Yet, notwithstanding complaints about documents and Ms Williams not attending the meetings, TLS set out clearly its concerns and the basis for them. This is particularly so given the comprehensive correspondence (letters and emails which I have set out in some detail) that Mrs Lugg exchanged with Ms Williams's advocate:

- (a) The meeting on 22 June 2022 and the email Mrs Lugg sent on 29 June 2022 clearly identified the concerns about the documents that had been uploaded to the TLS system. This included a possible breach of privacy and implications for TLS and its business and the possible misrepresentation of Ms Williams's departure from the international school. The 29 June email even set out specific questions that TLS wanted Ms Williams to respond to on these two aspects.
- (b) The 4 July 2022 email that Mrs Lugg sent explained TLS's position and made it very clear that TLS wanted to meet to discuss the concerns.
- (c) The 8 July 2022 letter from TLS to Ms Williams inviting her to a disciplinary meeting was also very comprehensive and set out clearly the two main concerns as well as two other concerns:

- i. The letter identified the documents found on the TLS system contained personal information including of students (children). It then addressed the concerns being that keeping the documents was illegal and it was illegal for TLS to have them on its system, this showed a lack of awareness by Ms Williams about privacy and raised concerns about Ms Williams's judgement.
 - ii. The letter identified the concern about Ms Williams misrepresenting her departure from the international school. It clearly set out what TLS believed Ms Williams had stated in her interview and the contrary position that was evident from documents (with those documents being identified). On this part the letter concluded with the overall concern that TLS would probably not have employed Ms Williams if it had known all of the circumstances relating to Ms Williams's employment at the international school.
 - iii. The letter identified the concerns TLS had about Ms Williams misleading it over her previous employment and her abilities.
 - iv. The letter identified the concern TLS had that Ms Williams did not know enough about its core product.
- (d) The 8 July 2022 letter also set out clearly the consequences if the matters raised were proved to be true.
- (e) The 15 July 2022 letter sent by TLS to Ms Williams set out the conclusion from the disciplinary meeting – that TLS no longer had trust and confidence in Ms Williams and it proposed dismissal.

[80] I am satisfied that Ms Williams knew what the concerns were because of how they were set out and also because she had the assistance of her advocate to help her understand the concerns and her ability to respond.

Did TLS give Ms Williams a reasonable opportunity to respond to its concerns, before it made its decision on what had occurred and what sanction should be imposed?

[81] Ms Williams had numerous opportunities to respond to the TLS concerns but chose not to – as I have stated, I do not accept that having concerns about suspension or documentation is a credible basis to refuse to participate in an investigation and disciplinary process – the duty of good faith is reciprocal. These opportunities were apparent from the outset and included the 22 June 2022 meeting (in which some responses were given), the two meetings which Ms Williams chose not to attend and the correspondence where concerns and even direct questions were set out.

[82] For Ms Williams to complain that TLS did not want know the truth is not sustainable in circumstances where she did not participate in the process and explain to TLS what she says the truth of the situation was.

Did TLS consider the explanations given by Ms Williams before it made its decision on what sanction should be imposed?

[83] I am satisfied that TLS did consider what information it did have from Ms Williams when it made decisions about what had occurred and the dismissal.

Conclusion on the process adopted by TLS

[84] Firstly, I am not satisfied that TLS had predetermined the outcome as Ms Williams suggests.

[85] And secondly, in terms of the process adopted by TLS, I am satisfied that it acted as a fair and reasonable employer could in the circumstances, particularly in light of Ms Williams's decision not to be involved in the investigation or the disciplinary process.

TLS's decision to dismiss and Ms Williams concerns about the substantive justification

[86] Before I consider the substantive justification for Ms Williams's dismissal I will outline the specific concerns Ms Williams has raised:

- (a) The breach of privacy as it relates to the documents uploaded to TLS's system was not sufficiently serious to justify dismissal. Any action by Ms Williams was inadvertent and the solution was to simply delete the documents.
- (b) TLS has relied on discussions at mediation in coming to its decision to dismiss. Given the confidentiality and without prejudice requirements of mediation this is a considerable fault.
- (c) It appears from the dismissal letter that Ms Williams was dismissed for matters that were either not raised fully or were not a basis for dismissal such as concerns around performance.

Did TLS act as a fair and reasonable employer could in all of the circumstances when it concluded that dismissal was the appropriate sanction?

[87] The first and obvious point I will make on this aspect is that TLS's reasons for dismissal cannot be taken from the notice of dismissal only – there was a clear and connected history of communications that set out the concerns of TLS and the conclusions that TLS might draw from them. The notice of termination clearly showed the conclusion and it follows that that arises from all of the matters raised by TLS.

[88] Based on all of the evidence I received, I set out below what I have concluded that TLS found as a result of the process it undertook and my conclusion on whether a fair and reasonable employer could have found this in all of the circumstances

- (a) TLS found that Ms Williams had uploaded documents to the TLS server and these documents contained information that could have been a serious breach of privacy (an illegal action) which in turn could have serious ramifications for the TLS business. Her response (including the lack of response) showed a lack of understanding about confidentiality and a lack of judgement particularly that a potential breach of privacy was resolved by simply deleting the information.

To suggest that the issues raised by the documents being uploaded to TLS's system were not serious and could be fixed by simply deleting them is too simplistic and if Ms Williams genuinely believed this then that only reinforces

TLS's view that she did not understand her and TLS's obligations and she had poor judgement. I find that a fair and reasonable employer could have reached these conclusions.

- (b) TLS found that Ms Williams had misrepresented the basis on which she had left the international school.

I find that a fair and reasonable employer could have reached this conclusion.

- (c) TLS found that Ms Williams had misled it about her abilities.

I find that a fair and reasonable employer could have reached this conclusion.

- (d) TLS found that Ms Williams did not have a sufficient understanding of her actions and the implications for the TLS business – evident in her actions in the first place and her lack of engagement to try and resolve the concerns TLS had.

That TLS may have considered events that occurred in mediation to inform this view is problematic but given the circumstances I believe this had little effect. TLS did not rely on specific admissions or discussions, rather the overall impression that Ms Williams did not want to take responsibility and assist in resolving matters, this was reinforced by the approach she took in mediation. I find that a fair and reasonable employer could have reached this conclusion without reference to matters discussed at mediation.

- (e) TLS found that all of these actions and resulting conclusions meant it had lost trust and confidence in Ms Williams.

Again, I find that a fair and reasonable employer could have reached this conclusion in these circumstances.

[89] I am also satisfied that a fair and reasonable employer could conclude, in these circumstances, as TLS did, that a loss of trust and confidence meant that summary dismissal was the appropriate sanction. This is particularly so in relation to an employee having access

to and retention of children's personal and private information and misrepresenting aspects of her employment history.

[90] I am not satisfied that TLS relied on other reasons for dismissal. I accept that the dismissal letter of 20 July 2022 taken in isolation might be unclear on the basis for dismissal but given the circumstances – that is all of the communication that comprehensively set out concerns (as I have set in detail) – and Ms Williams' failure to engage in the process, this is not problematic. Ms Williams must have been aware of the basis of her dismissal given the correspondence and because she had the assistance of an experienced advocate. If she was not, then participating in the process would have meant this was clear.

Conclusion on unjustifiable dismissal

[91] I conclude that Ms Williams was not unjustifiably dismissed by TLS.

Remedies

[92] As Ms Williams has been successful with her unjustified disadvantage claim, I must consider what remedies she may be entitled to.

Compensation

[93] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an employee suffers as a result of the unjustified acts (in this case suspension) and is made pursuant to s 123(1)(c)(i) of the Act.

[94] When assessing compensation my task is to quantify the harm and loss caused by any humiliation, loss of dignity and injury to feelings arising out of the unjustified actions (suspension).³ In this case I must consider the effect of the dismissal on Ms Williams and establish what that shows in terms of the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss. This is done by assessing that harm and loss

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

against others who have been unjustifiably dismissed and establishing where that sits compared to the range of compensation awarded.⁴

[95] There is little direct evidence about the effect of the suspension on Ms Williams. Much of Ms Williams evidence on this point is tied up with evidence about the impact of the dismissal on her. However, I take from the evidence that, as result of the suspension and the way it was effected, Ms Williams:

- (a) Was shocked by what occurred and became anxious and concerned.
- (b) Felt she was being treated like a criminal and considered she was being called a liar.
- (c) Was embarrassed.

[96] This is evidence of harm and loss manifesting in diminished self-worth and harm to her emotional health through embarrassment and anxiety .

[97] Comparing this loss and harm to other cases of unjustified disadvantage and the amounts of compensation awarded, I quantify Ms Williams's loss and harm at \$6,000.00.

Reimbursement

[98] Ms Williams did not lose any remuneration as a result of her suspension so therefore she is not entitled to any remedy for this pursuant to sections 123 of the Act.

Contribution

[99] As I have awarded a remedy to Ms Williams, I must now consider whether she contributed to the situation that gave rise to her grievance.⁵ This assessment requires me to determine if Ms Williams behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.⁶

⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁵ Section 124 of the Act.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[100] The grievance is based on, and was successful because, TLS did not carry out the correct process when it suspended Ms Williams. Ms Williams did not contribute to this failing and therefore there cannot be any contribution on her part. This means I do not need to reduce the remedy I have awarded.

Summary

[101] The Learning Staircase Limited unjustifiably disadvantaged Anna Williams. In settlement of this grievance The Learning Staircase Limited must pay Anna Williams \$6,000.00 for compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[102] Costs are reserved.

[103] The parties are encouraged to resolve any issue of costs between themselves.

[104] If they are not able to resolve costs and a determination on costs is needed, Ms Williams may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum TLS will then have 14 days to lodge any reply memorandum.

[105] If I am asked to determine costs, the parties can expect me to apply the Authority's usual daily rate for costs unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁷

Peter van Keulen
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.