EMPLOYMENT TRIBUNALS

Claimant: **Mr G Cole**

Respondent: **Wootton Academy Trust**

HEARD AT: **Bedford** **ON**: **12th September 2016**
13th September 2016
28th November 2016
29th November 2016
9th January 2017 (In Chambers)
10th January 2017 (In Chambers)

BEFORE: **Employment Judge Adamson**

REPRESENTATION

For the Claimant: **Mr F Wildman, Lay Representative**

For the Respondent: **Ms C Urquhart, Counsel**

RESERVED JUDGMENT

1. The complaint of unfair dismissal does not succeed and is dismissed.

REASONS

1. By a claim presented to the Tribunal on 1 July 2015, the Claimant began these proceedings complaining of unfair dismissal and unlawful disability discrimination. At a Preliminary Hearing on 25 September 2016 the complaint of disability discrimination was dismissed following its withdrawal.

2. The complaint remaining is brought pursuant to S:98 of the Employment Rights Act 1996 (the Act) following an express dismissal of the Claimant by the Respondent within the meaning of S:95(1)(a).

3. In complaints of unfair dismissal it is for the Respondent to establish a potentially fair reason for dismissal, ie a reason contained or referred to in S:98(1) of the Act. As identified by Cairns LJ in *Abernethy -v- Mott, Hay and Anderson 1974 ICR 323 at paragraph 13*, "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence at any rate as against him as to the real reason but it does not necessarily constitute the real reason …"

4. Where an employee positively asserts that there was a different and inadmissible reason for his dismissal to the one produced by the Respondent, he must produce some evidence supporting that positive case. It does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has a burden of proof in establishing that different reason, it is sufficient for him to produce some evidence of that alternative reason. A Tribunal having heard evidence of both sides relating to the reason for dismissal has to consider the evidence as a whole, make relevant findings and then decide what was the reason or principle reason for the dismissal, as was made clear in the Judgment given by Lord Justice Mummery in *Kuzel -v- Roche Products Limited 2008 EW CA Civ 38, paragraphs 57 to 59*. In this case the Respondent asserts that the reason was one relating to the Claimant's conduct, thus a potentially full reason as such a reason is identified at S:98(2)(a) of the Act.

5. When an employer establishes its reason for the dismissal of the employee was a potentially fair reason, it is then for the Tribunal to determine whether the dismissal was fair or unfair within the criteria prescribed at S:98(4) of the Act. In the well known authority *British Home Stores Ltd -v- Burchell 1980 ICR 303 EAT* (given in respect of the law as it then was) guidance was given that there are three elements: an establishment of the fact of the belief is relevant for the determination of the issue as to the reason for dismissal; whether the employer in his mind, had reasonable grounds upon which to sustain that belief; and also whether the employer at the stage at which he had formed the belief on those grounds had carried out such investigation into the matter as was reasonable in all the circumstances.

6. Should the claim succeed, the issue becomes one of remedy. I did not hear any evidence as to remedy and thus I do not describe the law in that respect in these reasons.

7. In this case as agreed, the legal issues are as follows:

   i) The reason (or if more than one the principal reason) for the dismissal;
   ii) Whether the reason was potentially fair under S:98(2) of the Act?
   iii) Whether the Respondent had a genuine belief in the misconduct?

iv) If so, did the Respondent hold that belief of misconduct on reasonable grounds?
v) Was there sufficient investigation into the misconduct?
vi) In the circumstances (including the size and administrative resources of the employer's undertaking) did the Respondent act reasonably in treating it as a sufficient reason for dismissal?
vii) In accessing fairness in all the circumstances, did the Respondent act within the range of reasonable responses, specifically was dismissal a fair sanction or should the Respondent have imposed a lesser penalty?
viii) Whether the Respondent followed a fair procedure?
ix) Should the Tribunal find that the dismissal was procedurally unfair, would the Respondent have subsequently dismissed the Claimant using a fair procedure and if so how long would it have taken for that to happen?
x) If the dismissal is found to be unfair, did the Claimant nevertheless contribute to his dismissal by his conduct?
xi) Was there a failure to following the ACAS Code?

8. In addition to the legal issues there were a considerable number of factual issues raised within the claim some of which were withdrawn at the beginning of this hearing. For the sake of completeness I identify all the factual allegations as initially arose but identifying those which were withdrawn. I do not make any findings of fact in respect of those which have been withdrawn.

1) Safeguarding allegations connected to the withdrawn complaint about pornographic images were continued even though that complaint had been withdrawn (para 5);
2) The disciplinary hearing was rescheduled at a day's notice to allow the head teacher to withdraw for his convenience (para 7) **WITHDRAWN**
3) The Respondent continued with this hearing in the Claimant's absence, breaching the Respondent's rule that required the meeting to be rescheduled (para 7);
4) The Claimant was invited to an informal meeting to hear the outcome of the disciplinary process and this was converted into a reconvened disciplinary hearing (para 7);
5) The Respondent committed 17 major failures of its own disciplinary procedures for misconduct (para 8) **WITHDRAWN**;
6) The investigating officer for the disciplinary hearing was incorrectly appointed (para 9) **WITHDRAWN**;
7) During the disciplinary hearing this officer presented selectively from evidence and misrepresented facts to the disciplinary meeting (para 9);
8) During the disciplinary hearing this officer presented evidence supporting unstated allegations (para 9);
9) This led the panel to erroneous conclusions (para 9);
10) Much of the misrepresentations/selection related to the unreasonably retained safeguarding allegations (para 9) **WITHDRAWN**;
11) The disciplinary panel unreasonably accepted selective/misrepresented evidence despite contrary evidence being presented by the Claimant (para 10);

12) The appeal panel dismissed clear evidence of selection and misrepresentation (para 10)
13) The Respondent upheld 19 findings of misconduct which had not been put to the Claimant so were undefended by the Claimant (para 11);
14) The appeal panel unreasonably considered that the misconduct findings were rewording of the original allegations (para 11);
15) The disciplinary panel unreasonably and disproportionately elevated two minor technical breaches of the Data Protection Act and unreasonably aggregated those with a wide range of unproven and theoretical breaches of safeguarding guidelines to create an overarching charge of gross misconduct (para 12);
16) The Respondent unreasonably considered this, the Claimant's first disciplinary offence, amounted to a loss of trust so great it merited the Claimant's dismissal (para 12);
17) The Respondent ignored the Claimant's work record and disciplinary record when deciding to dismiss him (para 13);
18) The Respondent initially refused to hear the Claimant's appeal (para 14) **WITHDRAWN**;
19) The Respondent unreasonably delayed hearing the appeal for nearly three months (para 14);
20) The Respondent attempted to delay the appeal findings so that it would be too late for the Claimant to bring an employment tribunal claim (para 14).

9. The Tribunal heard evidence on oath or affirmation from: The Claimant; Martin Kilkie, an IT Consultant; Mark William Charles Thompson formally Vice Principle of Wooton Academy; Alan Metcalf, a Trustee of the Respondent; Simon Gerard O'Toole, the Chair of the Respondent; and Kate Russell, Human Resources Consultant employed by the Respondent. All witnesses had taken the oath or affirmed and their statements were taken as read. I was presented with a bundle of documents and had regard to all documents within it to which I was referred. Both parties provided prepared detailed thorough written submissions, which they supplemented orally. I do not refer here to all of those submissions, however, I took them all into account.

10. The Respondent has two schools and employs, according to its response form (ET3) which was not challenged, 249 people in Great Britain. The Respondent has a number of policies relevant to these proceedings, some of which derive from the Local Education Authority who was responsible for running Wootton Upper School until 2012 until it became an Academy and run by the Respondent. The Claimant had begun his continuous employment with the Respondent before the transfer of the school to the Trust.

11. 11.1 I was referred a number of policies relevant to these proceedings.

11.1.1 The Data Protection Act and ICTU Use in Schools – January 2003 which described the Data Protection Act

1998 as stating that “anyone processing personal data must comply with eight enforceable principles of good practice which stated that data must be: fairly and lawful process; processed for limited purposes; adequate, relevant and not excessive; not kept for longer than necessary; and secure (among other things).

11.1.2 The policy later continued:

“Data Protection and Monitoring the use of ICT in Schools

The use of the internet and e-mail raises issues when organisations wish to monitor its use by individuals. Essentially, an organisation has a right and even a duty to monitor the use of the internet and e-mail systems to prevent it being used inappropriately, for unlawful purposes or to distribute offensive material. However, an individual has a right to privacy. It is the duty of any organisation that provides access to the internet and email to balance these two separate rights. The fist data protection principle states that data should be processed fairly and lawfully. Therefore, an organisation should be open on the subject of monitoring and also establish a code giving guidelines on the use of the internet and e-mail and when individuals may use such systems for private communications. In a school, this can be achieved through the development of an acceptable use policy (AUP).

With regard to e-mail, a school’s stated policy could be to limit or prohibit the use of e-mail for private purposes. However, it is almost impossible to monitor or enforce the use of e-mail for private purposes without randomly reading e-mails which is time consuming, legally dubious, and very difficult to guarantee fairness. E-mail can be automatically scanned against words, phrases and addresses but this would not normally allow detection of private use.”

11.1.3 The Bedford Borough Council’s – June 2009 - Safer Working Practice for the Protection of Children and Staff in Education Settings (in which staff included not only teachers but support staff such as the Claimant) referred to a number of matters including the Children Act 2004 when the following was specifically stated and which identified a number of underpinning principles including;

"Underpinning Principles

- Staff are responsible for their own actions and behaviour and should avoid any conduct which would lead to any reasonable person to question their motivation and intentions.
- Staff should work and be seen to work in an open and transparent way.
- Staff should discuss and/or take advice promptly from their line manager or another senior member of staff over any incident which may give rise to concern.
- Staff should be aware that breaches of the law and other professional guidelines could result in criminal or disciplinary action being taken against them.

11.1.4 Considerable other guidance was also provided within the policy under a paragraph heading "Propriety and Behaviour Policy", it was provided that all staff had a responsibility to remain public confidence in their ability to safeguard the welfare and best interests of children and not behave in an amount which would lead any reasonable person to question their suitability to work with children or act as a role model. This latter was emphasised to staff including the Claimant by the Respondent's, then Headmaster, subsequently when at a training session the Claimant and others were informed that "staff are responsible for their own actions and behaviour and should avoid any conduct which would lead any reasonable person to question their motivation and intentions.

11.1.5 The Respondent has a data protection policy which again referred to the data protection principles referred to before.

12. The Claimant began his period of continuous employment with the school in March 2002 managing the school's ICT resources. During this time the IT resources grew in both size and complexity, the number of staff also increasing until 2012 when both staff and budgets were cut. In 2014 the Respondent opened a second school. As part of the Claimant's duties, he was required to monitor devices being introduced to the Respondent's network to ensure that no viruses or malicious software entered the system. The Claimant had been informed that the Respondent had a concern that pupils may send each other inappropriate images which could ultimately be [inappropriately] used either by each other or end up on the wider internet. The Claimant was provided with guidance in the form of a flow chart prepared by Bedfordshire Police.

13. As part of the Claimant's role he was required to: ensure the Respondent's network was running effectively; provide the Respondent's senior management with any technical advice for IT project developments; manage the IT Technician team including being responsible for their training and professional development, provide support and technical advice. As part of his duties the Claimant was required to set up the Respondent's hardware systems which included documenting and filing of installation and configuration procedures; maintenance schedules and other procedures required for effective network management. In order to carry out his duties the Claimant had full access to every part of the Respondent's network including access to all staff files and student information the Respondent was obliged to retain on its information management systems. Because of the Claimant's access the Respondent considered that a person in the Claimant's position must exhibit behaviours which were beyond reproach, demonstrate a high degree of awareness of safeguarding issues as they related to digital media and social networking sites, and that trust between him and the Respondent be maintained.

14. The Respondent's computer systems began to suffer through the requirements imposed upon it, its age, and reduction in resources. This placed increasing pressure upon the Claimant. The Claimant had a number of short periods of ill health and then beginning on 24th September 2014 was absent from work onwards with symptoms of stress and anxiety. Following a consultation on the 5th November an Occupational Health Advisor reported to the Respondent that the Claimant attributed his ill health to work based pressures (which he described in that report). The advisor opined that they saw no reason to consider that the Claimant would not be able to return to work and sustain his role as an ICT Network Manager with the Respondent. On 3rd December of 2014 while the Claimant remained absent from work, one of his subordinates, Christopher Dwyer, sought out license information necessary for a project such information being held by the Claimant. In order to locate the information Mr Dwyer searched a number of administrator accounts. The Claimant habitually used a particular machine. Using the general administrator login details, which only the Claimant and others in the IT department could use, Mr Dwyer accessed "the Claimant's machine" while searching for the licence information. Mr Dwyer found a folder marked 'TEMP' within which contained images of students. One such folder contained a number of pictures of a former pupil who had left the school about 2 years before. A number of pictures of the ex-pupil were of her in a bikini. In total there were approximately around 7,000 photographs, the majority being of pupils or ex-pupils of the school and while, as Mr Dwyer put it "A lot of these were tame and contained nothing particularly worrying" he did not understand how or why the Claimant would have acquired them as a lot were dated 2013/2014. Mr Dwyer contacted Mr Thompson, who, together with Ms Russell who conducted an investigation into the matter. In a subsequent written statement dated 24th February, Mr Dwyer informed that the machine on which the photos were found (referred to above as "the Claimant's machine") was one which was rarely used by anyone other than the Claimant as its monitor functioned badly; that there had been an occasion in October 2014 when the Claimant had attempted to

remotely access the Respondent's IT system; that between early 2014 to the summer of that year the Claimant had resisted an upgrade to the computer he used (and in which the file of photographs was contained) informing that he needed to take some data off it. When the machine was upgraded subsequently little data was found on it other than CCTV recordings.

15. Two other statements attributed to the Claimant were also reported.

16. 16.1 A statement was taken from Gareth Freemantle (Assistant Principal and Head of ICT with the Respondent) on the 15th January 2015 which supported the content of Mr Dwyer's statement about the Claimant remotely accessing the Respondent's system whilst absent from work, not only on the occasion Mr Dwyer reported but other occasions.

16.2 Jeanette McPherson (an ICT Technician with the Respondent) provided a statement on 10th February 2015 in which she stated that the Claimant used one particular machine which hardly anyone else used, regarding the Claimant's use of a particular machine.

16.3 Mr James Constant, a Network Manager for Kimberley (another school run by the Respondent) employed by the Respondent, also produced a statement on the 24th February 2015 which corroborated the content of Mr Dwyer's statement regarding his activities on the 3rd December and also of the Claimant's refusal to allow "his" machine to be upgraded. Specifically Mr Constant stated that he confirmed that the Claimant was one of those who drew up the 2013 Acceptable Network and Internet Usage Regulations for staff.

17. A Mr Richard Peake was instructed to examine the computer in question which he did. In a "preliminary outline report" dated 23rd December 2013 (2013 being a clerical error for 2014) Mr Peake reported that the Claimant's computer had been in regular use between the 17th May 2013 and the 9th December 2014 on which latter date he understood it was quarantined. Mr Peake found and recovered 7,000 live JPG files together with 95,000 unallocated such files, in both categories there being a great many photographs of young women who were identified by Mr Dwyer as current or ex-pupils of the Respondent's school. Mr Peake emphasised the he did not find any photographs of pupils or ex-pupils that could be considered indecent. In addition Mr Peake recovered a small number of pornographic images from an unallocated space on the computer which material appeared to him to be internet material from one particular website, but because of their location on the computer he did not know anything about when they arrived or from which site they came from, albeit in the first instance as they were on the Claimant's desktop computer and he was said to be the only person who had the login credentials, in the absence of any other explanation he opined, they were attributable to him. A final report was subsequently provided on 11 March 2015.

18. On the 9th January the Claimant was informed that: he was suspended; must not access the Respondent's IT or network systems; and invited to a investigatory meeting to take place on the 15th January. Coincidentally the same day the Claimant met with the occupational health consultant to whom he reported that he felt able to cope with the demands of his role and was keen to return to work. The consultant sent a report to the Respondent on the 12th January in which a phased return to work over a 6 – 8 week period was advised.

19. The investigatory meeting ultimately took place on the 29th January, the Claimant being accompanied by a solicitor. The Claimant was interviewed by Mr Thompson and Ms Russell. During that interview the Claimant informed: that he was unaware of its rules relating to the storage of images; and, described the procedure, referred to the "RM Monitor", which enabled him to upload images from mobile storage devices being used on the Respondent's network. The Claimant explained that he downloaded the images for security, loading them from memory sticks to protect the interest of students or to facilitate future investigations thinking they may be damaging to the student and that there could be harassment or cyber-bullying. The Claimant further informed that he did this on a random basis as part of his role, had not seen any policy and did not know what happened to the memory sticks. In particular, the Claimant specifically informed that he understood he should have deleted these images but due to pressure of work had not done so. The discussion continued the Claimant informing that no-one else used the particular computer, it was mainly used by him and although other colleagues had access to it, it was for his use. The Claimant denied a number of photographs on the site were his or that he was aware of the images on the site. In respect of particular photographs that were shown to him, the Claimant denied having seen them before. In respect of the particular ex-pupil referred to before, the Claimant informed that: they were pictures that were within the public domain; he was interested and curious about her, she being both a bright and beautiful girl and because she had curvature of the spine. During the meeting the notes were read back to him and change was made at his request. The Claimant informed that he could not remember if any of the images he had stored had ever been asked for as part of an investigation.

    19.1 On the 25th February 2015, Ms Russell wrote to the Claimant informing him that there would be a disciplinary meeting on the 6th March which he was required to attend. The disciplinary allegations were:

        1) That you captured and stored images of pupils, both past and present on your work computer. These images were taken without the knowledge and consent of the data subjects.
        2) That you stored pornographic images on your work computer.

19.2 Ms Russell referred the Claimant to the Data Protection Act 1998 and stated that principle one meant that the Claimant must;

- Have legitimate grounds for collecting and using the personal data;
- not use the data in ways that have unjustified adverse effects on the individuals concerned;
- be transparent about how you intend to use the data, and give individuals appropriate privacy notices when collecting their personal data;
- handle people's personal data only in ways they would reasonably expect; and
- make sure you do not do anything unlawful with the data.

19.2.1 Ms Russell informed that the capture and storage of images of pupils broke the 2009 Safer Working Practice Guidelines, identifying the specific guidelines breached as 20.3/20.5/20.8.

- 20.3 Using school or college equipment to access inappropriate or indecent material (including adult pornography) will give cause for concern, particularly if, as a result, pupils might be exposed to inappropriate or indecent material and may result in disciplinary action.
- 20.5 Copying and downloading inappropriate images from the internet or mobile telephones is an offence. Staff should not put themselves at risk of having inappropriate images or material on their mobile telephone or computer equipment.
- 20.8 Where staff are found to have inappropriate images or material on mobile telephones or computer equipment this will require investigation, probably in accordance with the disciplinary procedures adopted by the school. Adults should follow the school policy on the use of IT equipment.

19.2.2 By reference to the above guidelines at paragraph 20.9 of those guidelines, which was said to be a requirement was then set out as follows:

"This means adult should:

- Follow their school's guidance on the use of IT equipment
- Ensure that children are not exposed to unsuitable material on the internet

- Ensure that any films or material shown to pupils are age-appropriate."

19.3 Finally Ms Russell referred to the Respondent's Acceptable Network and Internet Use Regulations for Users (Staff) which provided;

- Personal Security, point 6: Files that contain unsuitable language, images or discrimination of any kind should not be kept on the network.
- Log on policy: When users log on to the system they may be presented with a policy statement on their screen. Users must agree to this statement in order to use the computer.
- Example policy statement, point 3: Any use to the detriment of the school, staff, students or visitors, which includes sexually explicit, pornographic, suggestive, confidential or illegal material transmitted, received or created on this computer will be captured and stored as evidence of such abuse.

19.4 The Claimant was informed that 7,000 images of pupils had been found on his computer and that the investigation lead Ms Russell and Mr Thompson to consider there was a case to answer. At the same time the Claimant was sent a copy of the investigation report and a memory stick with images. Subsequently a short statement written by Mrs Denise Fleure (dated 27th February 2015) was obtained and provided to the Claimant in which she stated that between the period September 2006 and August 2015, she could only remember having cause to request information from the Claimant to assist her with concerns about children on two occasions.

20. 20.1 On the 28th February the Claimant wrote to the Respondent with a response to the content of the notes of the investigatory meeting he had attended in which he made a number of responses to the allegations that had been put to him. Within that response the Claimant asserted: that he did not know what the Respondent's rules were relating to the storage of images of pupils; that as far as he knew there were no specific rules that applied to him; and that skimming files of students was a normal part of his and any other network manager's role.

20.2 On 4th March 2015 the Claimant wrote to Ms Russell with his defence case and associated witness statements.

21. Following receipt of the Claimant's response to the Respondent's allegations the disciplinary hearing was postponed, no objection being raised.

22. 22.1 Mr Kilkie was representing the Claimant. As preparation for the hearing, Mr Kilkie was informed by the Respondent that it did not intend to call any witnesses. As a consequence Mr Kilkie obtained

and provided statements from two IT Managers in other schools. Suzie Ralph, Head of IT at City of London School for boys, wrote that: she had known the Claimant for over 15 years in a work capacity; the school at which they were both employed had Research Machine computers; at that school the Claimant was responsible for monitoring staff and pupil's computer usage; that school used a program "Websense" which logged inappropriate computer use and triggered an alert; and the Claimant was responsible for reporting and keeping records (including screen dumps) of misuse (and as part of this process the Claimant would have to copy files). Mr Frank Springall, a retried Network Manager at another school, informed that; he did not know the Claimant, however, in his school there was a blacklist of programmes which were not allowed to be used for images/videos; where there was a reason information from memory sticks would be copied to track down the source of any unsuitable material being loaded onto the system; that once a file had been downloaded onto his school's system, the Network Manager was responsible for the file; and looking for unsuitable files was part and parcel of implementing safeguarding.

22.2 These reports were presented by Mr Kilkie to the Respondent. The Respondent did not deny the Claimant the opportunity to present live evidence at the disciplinary hearing leaving that for him to decide. Following discussions between Mr Kilkie and the Chair of the forthcoming disciplinary panel (Mr O'Toole), during which Mr O'Toole accepted that the Claimant had not downloaded the pornographic images found on the computer he used, that allegation was withdrawn. In consequence Mr Kilkie no longer wished to ask any questions of Mr Peake albeit questions to the other witnesses remained relevant. It was however, further agreed that the hearing would proceed on the basis that witness statements could be read and no witnesses from either side need attend. Further as the parties agreed (as described in the subsequent disciplinary meeting notes) a number of facts namely;

i) 7,000 Photographs stored on Mr Cole's school supplied computer used only by him.
ii) [the former pupil of the Respondent's school referred to before in these reasons] Photographs stored on Mr Cole's school supplied computer only used by him.
iii) There was no evidence that there had been any inappropriate contact or behaviour between Mr Cole and the past or present students in the photographs.
iv) The Trust accepted that in principle it was part of Mr Cole's job to capture information from memory devices used on the school computer network but it was for the panel to decide whether Glenn was entitled to capture the data which is the subject of the first allegation.

v) The Trust would not call any witness, and would accept the evidence of Mr Cole's witnesses.

23. Following the agreement, on the 10th March, Ms Russell sent an amended invitation to the disciplinary hearing referring to the first allegation only. The notification informed that the disciplinary meeting would take place on the 18th March and that the Claimant could be accompanied by Mr Kilkie.

24. During the early evening of the 17th March, Mr Kilkie wrote to Mr O'Toole informing that the Claimant had become increasingly stressed and in his opinion was not capable of coping with the hearing the following day. Reference was made to the Claimant being under a sickness certificate. Mr Kilkie declined a subsequent invitation to attend and represent the Claimant in his absence stating that the facts were as in his case for the defence and that the Claimant's view was that there was no need for mitigation as there was no case to answer. Mr O'Toole informed Mr Kilkie that he would take advice the following day as to whether the hearing should proceed in the Claimant's absence.

25. Neither the Claimant nor Mr Kilkie attended the disciplinary hearing on the 18th at the appointed time. Following receipt and consideration of advice from an independent HR Advisor, Ms Paula Grayson, and the Respondent determined to proceed in the Claimant's absence. In so doing the disciplinary panel, chaired by Mr O'Toole had regard to: the communication exchanges the previous day; the lack of any medical evidence that the Claimant was unable to attend the disciplinary hearing (it was fully aware that the Claimant had been signed off since 24th September the previous year and continued to be signed off until 6th April; Mr Kilkie's stated view referred to above; that the facts were as in his case for defence and the Claimant was of the opinion that there was no need for mitigation as there was no case to answer. The Claimant had previously been represented by a solicitor and now by Mr Kilkie and there had not been any suggestion of medical evidence to support the Claimant's non-attendance. The Claimant had been absent from work since September 24th the previous year (he himself had previously expressed concern to Ms Russell about the adverse effect of his absence on the workload of his colleagues and of the urgent need of an upgrade to the IT network). The Respondent considered that it had the material facts, that it had a duty of care towards the Claimant, that the "implicit" request not to hold the disciplinary hearing was not a reasonable adjustment bearing in mind the disciplinary panel could not reconvene for at least a further 4 weeks, the deterioration of the Respondent's network, and that one of the Claimant's subordinates Mr Constant, had had a serious health scare brought on by stress of shorthanded working and was at that time absent on ill health. In addition Mr Dwyer in the IT team had also been off work for 2 days due to stress. The Respondent further considered that there was no indication when the Claimant would be in a position to attend the disciplinary hearing. In the circumstances the Respondent considered that it would not prejudice the Claimant to proceed in his absence. The Respondent then conducted a thorough consideration of the information it had before it

(relevant part of the disciplinary meeting minutes pages 314 to 320 of the Tribunal bundle).

26. 26.1 The disciplinary panel considered: Mr Peake's "preliminary" report; The panel considered that: the identity of many of the students could be indentified; Mr Cole, that the Claimant had been an IT professional for 28 years and worked for the Respondent for 13 years. The panel accepted: the Claimant's own description of his job set out at paragraph 25 of those minutes; that it was part of the Claimant's responsibility to monitor students' compliance with the Respondent's acceptable use policy; and how the Claimant identified and copied the 7,000 images which was summarised by the Respondent as follows;

1) The computer system watches for insertion of USB memory sticks and alerts Mr Cole when this takes place.
2) Mr Cole is informed of which computer has had a memory stick attached and the name of the user involved.
3) Mr Cole then assesses whether the
   a) user is a student or teacher (and generally ignores it if it is a teacher);
   b) computer is in a classroom during lesson times (in which case Mr Cole generally ignores the alert)
   c) computer is in an open access area of out of lesson times (in which case Mr Coles takes action).
4) If it looked as if the student was doing anything that breached the student Acceptable Use Policy (AUP) then Mr Cole took appropriate action.
5) If Mr Cole saw that the use included student images that might be against the AUP then he would look at their USB stick.
6) If Mr Cole was very busy then he would copy their whole stick or a suspicious folder for later study.
7) When or if Mr Cole got time, he would look at them and if they were innocent then he would move on, otherwise he would report the incident.
8) Finally Mr Cole would delete the folder.

27 27.1 The Respondent found that "the Claimant had not produced any evidence in the form of log or screenshot that might demonstrate that at the time he downloaded the contents of the memory devices (7,000 images) he had a reasonable belief that the students' use of the computer or access to the data on a memory device was in breach of the Respondent's AUP policy, or likely to be, or that he had taken any action to refer the matter to a colleague or his manager:

27.2 The Claimant did not assert that he had systematically or otherwise reviewed the folders he had copied, indeed he had informed that he had not seem them before, admitted that he should have deleted them (in the investigation meeting):

27.3 In the Respondent's opinion: the Claimant demonstrated lack of insight about the storage of images saying that he would review them "when, or if" he got time; if there was a legitimate suspicion that the student's use of the computer or memory device was inappropriate, it was imperative that action was promptly taken and his actions were not in accordance with the Data Protection Act.

27.4 The Respondent further concluded that the images being stored on a personal computer as opposed to one of the Respondent's servers, exposed the data to a greater risk if that computer was removed or stolen the information on it could be accessed by an unauthorised party.

28. The Respondent considered that the storage of the photographs of the particular pupils amounted to misconduct as it breached the Underpinning Principles for Safer Working Practice, as it amounted to behaviour which would lead a reasonable student or parent to question the Claimant's motives or intentions but those photographs taken in isolation was not serious misconduct. On that basis the Respondent took no further account of them in determining the seriousness of the Claimant's conduct in respect of the breaches of the Data Protection Act. The Respondent did not find that the Claimant had breached paragraph 20 of the Safer Working Practice or the AUP supplied to staff. The disciplinary panel did consider, however, the remaining actions of the Claimant amounted to a breach of the Data Protection Act and thus amounted to misconduct.

29. The Respondent had taken into account all the information it had before it and considered that the Claimant's conduct raised serious safeguarding issues over and above the breach of the Data Protection Act. The matters which caused the Respondent particular concern in this regard were: what the Respondent considered to be the Claimant's secretive behaviour surrounding his colleagues access to his computer and the statement he had made that he could not be guilty of safeguarding policy offences for storing images brought to the school by students "collected and stored as part of [his] job". In arriving at this conclusion the Respondent had regard to Mr Constance's evidence that the Claimant had changed the password for the system administration account; that Mr Constance and Mr Dwyer had informed that the Claimant had refused to let either of them have access to the school computer for essential maintenance the reason being given that there were things on the hard disc which he needed to transfer first: that the Claimant accessed his work computer from home whilst signed off work through ill health without any reasonable explanation: the excessive length of time the images were on the computer (which pre-dated his then illness); the lack of any serious personal insight as to the extent of which he had breached student's privacy and confidentiality, (including his assertion that the students and staff had agreed to the integration of the files without good reason when they accepted the AUP on the computers they used); the Claimant failed to demonstrate that he understood that he needed a reason before he could access student's memory devices and considered no specific rules applied to him; and that

in it's opinion the panel considered that the Claimant's behaviour was "deeply unprofessional and unexpected of a Network Manager in a school.

30. The disciplinary panel considered the Claimant's explanation for his actions, including that the Claimant's capture and storage of 7,000 photographs would lead a reasonable student or parent to question his motivation and intentions, and the Claimant having not worked in an open and transparent way was in breach of the Underpinning Principles of Safer Working Practice. The Respondent did not draw any inferences about the Claimant's motives but only considered his behaviour. The Respondent considered the Claimant's conduct amounted to gross misconduct but did not immediately dismiss him instead inviting him to a meeting on the 26th March to hear the panel's reasons personally.

31. At the 26th March meeting, Mr O'Toole provided the reasons for its decision and invited the Claimant to make comments. The Claimant attended with his representative Mr Kilkie, both of whom were taken aback by this procedure (not having been forewarned) expecting only to hear the Respondent's decision. On enquiry to him, Mr O'Toole informed that although it had made a decision on the Claimant's conduct, the panel had not decided on any penalty and sought any information from the Claimant on mitigation that he wished to give. At the end of this procedure the Respondent determined to dismiss the Claimant, the reason being set out in a letter the following day (pages 325 to 328 of the bundle). The Respondent's decision was to dismiss the Claimant without notice. The effective date of termination of the Claimant's employment with the Respondent therefore within the meaning of S:97 of the Act was 26th March 2015.

32. On 31st March the Claimant wrote to the Respondent appealing against his dismissal on the following grounds:

    i) he wished to challenge the way the disciplinary action was taken against him;
    ii) he wished to challenge the evidence on which the Respondent based it's decision;
    iii) he wished to challenge the decision the Respondent took in considering the "allegations gross misconduct"; and
    iv) he wished to give new evidence or reasons why disciplinary action should not be taken.

    The Claimant sought to provide full details of his case in accordance with the Respondent's procedures.

33. 33.1 The letter was received during the Respondent's Easter break and acknowledged on the 14th April. Three days later the Respondent wrote to the Claimant seeking further information about the Claimant's appeal; whether he intended to call any witnesses; and whether needed any reasonable adjustments. The Claimant responded stating that there was no provision within the

Respondent's rules for such a request, that once informed of the date of the appeal hearing he would exchange documents with the Respondent at least 5 working days prior to that hearing date at which time he would provide any new evidence, supporting documents and lists of witnesses. The Claimant sought information from the Respondent at the same time.

33.2 Further correspondence took place between the Respondent and Mr Kilkie regarding the procedure to be adopted at the appeal, references being made to ACAS, the ACAS Code and other matters. The appeal hearing was fixed to take place on the 23rd June. During the course of these communications the Respondent, informed that, for the purpose of the disciplinary process it was relying only on the 1,774 images which had been previously copied and placed onto the memory stick provided to the Claimant. The Claimant's representative Mr Kilkie prepared an appeal document (pages 345 to 382 of the Tribunal bundle) together with a number of attachments sent by Mr Kilkie to the Respondent on the 4th June.

34. The appeal took place on the 23rd June 2015. Following some discussion concerning who was to present the Respondent's case, Ms Russell did so albeit she did not represent the Respondent's disciplinary committee. There was a full discussion and both parties were able to make all the points they wished. The appeal panel offered to provide the decision to the Claimant in person but, through his representative, the Claimant its delivery be by mail or e-mail. This the Respondent did on the 30th June having met again on the 25th June.

35. The Respondent thoroughly addressed the Claimant's appeal. The Respondent:

35.1 Considered that the disciplinary panel had not viewed selective evidence, rather it had viewed sample of images, which were innocent in nature. The issue was the question of capturing personal images created by students, their storage by the Claimant for almost a year without which the Claimant had not carried out the processing for limited purposes as required by the Data Protection Legislation and the Respondent's policy;

35.2 Accepted that there had been misrepresentation of some of the witness evidence, albeit it did not consider that the discrepancies altered the fairness or unreasonableness of the decision.

35.3 The Respondent did not accept that there had been a misrepresentation of the Data Protection Act and it considered that the Claimant had broken it; accepted that the Respondent's disciplinary panel had not considered the Respondent's Data Protection Policy, but had considered the Act itself and as part of the appeal process, the Respondent had considered the policy and found no conflict between that policy and the principles used in the disciplinary hearing;

35.4 Did not accept that the Respondent had added new allegations during the hearing but in fact had deleted allegations and considered the case against the remaining one. It did not uphold the Claimant's view that there was orchestration of the aggregation of minor technical contraventions of the Data of Protection Act legislation. Mr Kilkie had himself stated that the facts were as in his case of the defence and that the Claimant's view was that there was no need for mitigation. The Respondent did not accept that the finding of gross misconduct unfairly arrived at upheld the decision to summarily dismiss the Claimant.

36. Although the Claimant asserted that the reason for his dismissal was manufactured to avoid the Respondent's responsibility to him regarding his ill health which had led him to be absent from work since 24th September 2014, he did not provide evidence to support that matter. There is no complaint of disability discrimination pursued, while the Claimant's absence was causing operational difficulties for the Respondent, I am not persuaded that the Respondent was acting other than pursuant to information which had been brought to it by the Claimant's subordinates as described before.

36.1 In investigating its concerns, the Respondent conducted an investigation (as described before), which included: having the Claimant's computer forensically examined; obtaining statements from other staff; allowed the Claimant to attend the investigatory meeting with a solicitor; considered the Claimant's information. I am satisfied that the investigation was sufficient and within the range of reasonableness. Similarly the Respondent considered all that the Claimant put forward at the disciplinary and appeal hearing.

36.2 The Claimant agreed that 7,000 photographs were stored on the computer used by him at work. The Claimant did not, in the Respondent's view, which was one within the range of reasonableness, provide a reasonable explanation as to why he had done so and done so without taking any action. Similarly the Respondents' conclusions were within the range of reasonableness regarding the Claimant's explanations regarding cyber bullying and provocative selfies not making sense in the context.

37. The nature of the Respondent is important in all Employment Tribunal cases. In this case the Respondent is a school and the conduct being considered the downloading and retention of photographs of pupils for a lengthy period without system or action. It could not be said that the photographs were in line with the Data Protection principles, of being processed for limited purpose, or not being kept for longer than necessary, as the Claimant had not looked at them. Although the Claimant had been very busy at work and the Respondent's IT system needed work and investment, the Claimant's own position was that he had simply downloaded information randomly, and thus to no effect. There was no log or record of what was kept. In particular if there was suspected cyber

bullying or provocative selfies taking place, the Claimant, by not looking at the information, was not in a position to do anything about it, nevertheless the information was retained. There was no information before me to indicate that the workload and the Claimant's health prior to the 24th September explained these actions

38. The Claimant was the Respondent's most senior IT Manager but his evidence showed that he did not understand that he needed a reason before accessing student's memory devices. The Claimant did not recognise that his action impacted on safeguarding, informing the disciplinary hearing that safeguarding was not engaged and during the appeal hearing informed that he was not familiar with safeguarding guidelines. The Claimant had demonstrated secretive behaviour in the way he dealt with his colleagues using the computer in his office which he regularly used. The length of time which documents were stored, the lack of record keeping (an audit trail) for the documents and of insight into the student's privacy, all I accept reasonably indicated to the Respondent that the Claimant did not understand safeguarding issues while the Claimant's conduct engaged with them.

39. It is imperative that the Respondent had trust in the person in the Claimant's position.

40. The Respondent considered the sanction. Although the procedure was informal the Claimant was provided with the opportunity to provide submissions as to why he should not be dismissed. If that in itself was unfair (and I do not find that it was) as he was not informed that he would be given that opportunity rather it was an additional opportunity to have an input , that procedural defect was overcome by the thorough consideration of the Claimant's appeal which subsequently took place.

41. I am satisfied that the Respondent's reason for the dismissal of the Claimant was one relating to his conduct, namely, the collection and retention of images of pupils at the Respondent's school as more fully described in the Respondent's letter to the Claimant dated 27th March 2015 (Tribunal bundle pages 325 – 328). This was a potentially fair reason.

42. I find that the Respondent's procedure, including its investigation (with the findings the Respondent made and conclusions it drew) and also the penalty for the misconduct that it imposed, i.e. dismissal, to be in within the range of reasonableness for an employer of this nature and size.

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Employment Judge Adamson, Bedford

Date: 6TH March 2017

Sent to the parties on: .....

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For the Tribunal Office