Case No: 3324310/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr Werner Nel**

Respondent: **Brockhurst and Marlston House Preparatory Schools Limited**

Heard at: **Reading** **On: 11, 12, 13, 14 and 15 September 2017**

Before: **Employment Judge Gumbiti-Zimuto**
Members: Mrs C M Baggs and Ms H T Edwards

Representation:
Claimant: Mr Alex Robson: Counsel
Respondent: Miss Helen Wolstenholme: Counsel

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was wrongfully dismissed.

3. The claimant's complaint of unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

4. The claimant's complaint that he was subjected to detriment because he made a protected disclosure is not well founded and is dismissed.

5. The respondent is ordered to pay to the claimant the sum of £**33,856.91** in compensation for wrongful dismissal and unfair dismissal.

REASONS FOR JUDGMENT

1. Brockhurst and Marlston House Preparatory schools Limited (the School) is privately owned school under the ultimate control of the J. F. Park family settlement and the Headmaster. David Fleming is a family member.

2. The School has 320 pupils, a core staff of 65 with about 150 after taking into account peripatetic teachers, etc. HR issues are dealt with by the Registrar, Rachel Harper and the Headmaster.

3. In the period since 2002, when Mr Fleming became headmaster, no member of the teaching staff has been dismissed.

4. The claimant was employed by the School on 4 February 2010 as Assistant Sports Coach / General Assistant on an hourly paid contract. On 10 May 2014, he was offered and accepted a resident teaching post as Form Teacher, General Subjects Teacher, and Assistant Boarding Master commencing 1 September 2014 at an annual salary of £21,804. In addition, he was provided with offsite School accommodation rent-free. The claimant was responsible for council tax and household bills. The claimant was a member of the School pension scheme.

5. The claimant also taught Information & Communications Technology classes ("ICT"). The School has an ICT and E-Safety Policy. The Head of ICT is Mr. Mark Templeman.

6. On Friday 22 April 2016, the claimant was giving a class of 6 and 7 year old girls an ICT class, teaching them how to use the Google search engine on computers. There were 11 girls in the class. The room has 2 computers per table and so the girls were able to see each other's screens.

7. The claimant told the girls to conduct a search on Google and suggested cats, dogs and guinea pigs. The school contends that the claimant allowed the girls to carry out a free search; the claimant contends that the search was within parameters it was limited to animals. As well as these searches, searches were also made for 'naked boys', 'the queen underwear', 'Peppa Pig', 'Facebook' and 'fat people'.

8. The school contends that the claimant failed to properly supervise the class and relies on the evidence of what are said to be inappropriate searches carried out by the girls in a ten-minute period, from 11.46am (Peppa Pig) to 11.56am (fat people), on different computer terminals.

9. The claimant states that having given the girls the initial instructions, he suggested they search for images of *"dogs"* and *"cats"* and then proceeded to walk around the classroom, supervising the class and providing assistance where necessary.

10. The claimant noticed two girls giggling went over to investigate, saw the screen briefly and noted that it showed images of the "naked human form" and closed the window down.

11. The school contends that later forensic computer investigation detected that immediately after closing the offending window, the claimant searched for a way to delete the search history record. The school has produced screen prints which appear to show that a search was made. The claimant denies that he made any such search.

12. The Claimant resumed the lesson for the last minutes, having explained to the girls about inappropriate use of school computers. At the end of the lesson he returned the pupils to their Form Teacher, Mrs Middleton-Reid, informed her of the incident; and told her that he would report the matter to Mr Templeman.

13. Mrs Middleton-Reid spoke to her class about use of the computer and in the discussion the children mentioned seeing people in "pants and were quire giggly". The reference to seeing people in pants comes from the students not the claimant. The claimant used the "naked" and mentioned "inappropriate images" when he reported the matter to others.

14. At about 12:35 the claimant sought and found Mr Templeman eating his lunch in the dining hall. The claimant's account is that he told Mr Templeman that *"there has been an incident of children seeing naked images on one of the computers. What do you want me to do?"* To which Mr Templeman replied: *"Don't worry about it. These things happen. Just send me an email."*

15. Mr Templeman's account of this conversation is different. He states that the claimant said: *"Mark, I think our filtering system isn't working"* and then went on to talk about the girls seeing inappropriate images leading Mr Templeman to believe that the images were of people in underwear. Mr Templeman says that the claimant introduced the topic with focus on the failure of the technology rather than the content of what the girls had seen. "He was very casual and relaxed and about it. I got the impression that it was not a big deal."

16. The parents of the girls concerned went to the School office later that day to complain. They spoke to Mrs Middleton-Reid who said they should speak to Mrs Harper. They spoke with Mrs Harper who apologised reassured them and said that the school would investigate.

17. Mrs Harper approached Mr Templeman saying she wished to have a full report about what had happened. Mr Templeman approached the claimant and asked if there were any sexual scenes or penetration on the computer. The claimant said that there were not. Mr Templeman asked that he put that in an email which the claimant did.

18. At about 17.30 Mr Templeman printed out the search history for computer terminal 13 and at about 18.27 he printed out the history for terminal 17.

19. The claimant alleges that by 17.30 the School would have been aware that the girls had seen pornography, however it is the School's position that it took what the claimant said at face value and was under the impression that the girls were exaggerating about what they saw. Nobody at the School was aware of the graphic images seen by the small girls.

20. On the following morning, Saturday 23 April, at 08.12 Mr Stuart Raeburn-Ward, Deputy Head Pastoral and Designated Safeguarding Lead, and Mrs Harper looked up the browsing history for computer 13 and clicked the link to 'naked boys'. On doing so they saw multiple images of hard core pornography.

21. The Claimant spoke with Mr. Raeburn-Ward and Mrs Harper. He was told to print out the search histories for all of the computers used in the ICT lesson and to draw up a floor plan of where each pupil sat showing the computer they used. The Claimant logged on to the computer at 09:35 printed out a search history and gave the results to Ms. Harper at about 9.40.

22. Ms Harper noticed that the search history presented to her by the claimant differed from what she had seen. The history in respect of Terminal 13 did not to show a search for *"naked boys"* at 11:50 but instead showed a search for *"dogs".*

23. The search histories handed over by The claimant showed that the search for 'naked boys' had been replaced by 'dogs' and 'the queen underwear' had been replaced by 'queen birthday'. Mrs Harper recalls that when she pointed out that the search for naked boys did not appear on the history the claimant said that someone must have deleted it.

24. The evidence before the Tribunal, and the position throughout the respondent's investigation into this matter, is that between Mr Raeburn – Ward and Mrs Harper logged on at 8.12 and then nobody else logged on to the relevant computer until the claimant did so after 9.35. No third party logged on in the intervening period.

25. On Monday 25 April 2016, Mr Fleming had a meeting with the claimant. Mr Fleming asked the claimant to explain what had happened in the ICT lesson. Mr Fleming heard the claimant's account and then "expressed incredulity" about the claimant's account that he had taken the mouse to click off the site and yet had not seen the images clearly. Thereafter Mr Fleming describes how he "started to drill down" into what the claimant was saying. When Mr Fleming asked the claimant about the search histories Mr Fleming did not believe that the claimant was being honest with him. After bringing up the images on the screen Mr Fleming expressed disbelief by saying *"are you seriously trying to tell me that you did not see what was in front of you?"* Mr Fleming states that he "simply did not believe him". Mr Fleming decided to begin the disciplinary process against the claimant. Mr Fleming states that he considered the claimant was lying to him and that his lying was a safeguarding issue.

26. The Claimant was requested to attend an investigatory hearing on Friday 29 April 2016. He was advised that the hearing was to discuss disciplinary allegations of misconduct, which might include gross misconduct. The

points to be discussed were set out as: (i) Conduct during the lesson: supervision, lesson plan; (ii) Breach of Safeguarding - including his actions following the inappropriate content being seen, the immediate action he took to safeguard the pupils, what he said he saw, and what he stated in his email to Mr Templeman, the time he took to respond, and the actions he took to verify the content of the web searches; (iii) Actions in relation to the search histories - the erasing of search history between 08:45 and 09:45 on Saturday 23 April and the insertion of false searches; (iv) Bringing the School into disrepute - including misleading colleagues as to the seriousness of the contents seen.

27. The claimant was advised that he could be accompanied and that he and his companion would be able to comment on the witness statements and raise any questions for further investigation or consideration as appropriate. He was told that the hearing would be conducted in accordance with the disciplinary procedure and the investigatory hearing may turn into a disciplinary hearing. Mr Fleming accepted that in fact in this matter he decided to depart from the respondent's disciplinary procedure.

28. On 29 April 2016, the Claimant raised a formal grievance about his treatment over the incident and procedural unfairness. On 1 May 2016 the claimant wrote to Mr Fleming with further details of his grievance. The Headmaster suspended the disciplinary process pending the outcome of the grievance.

29. The claimant's grievance hearing took place on the 4 May 2016 and on the 9 May 2016. On the 9 May 2016, the meeting began with a discussion about the claimant's grievance. When Mr Fleming said that the grievance had been discussed he asked the claimant if he was willing to move straight to the investigatory meeting. The claimant was told that he was entitled to 48 hours to consult with advisors. The claimant agreed "to get this over and done with".

30. Mr Fleming and the claimant discussed the incident on the 22 April 2016 and the events on the 23 April 2016. In the course of an exchange about the changing of the histories Mr Fleming is recorded to have said to the claimant: "*my problem is that there is such a narrow window when the searches were altered and I am struggling to find another explanation"*. To which the claimant is recorded as having responded: *"I categorically deny doing it."*

31. The hearing was adjourned and resumed on the 16 May 2016. The hearing was now a disciplinary hearing. The minutes of the meeting record the following being said by Mr Fleming:

> "What is clear to me, on all the evidence, is that you were not frank and honest to MT and by extension, to Caroline and I. Indeed, you

> were misleading unclear in your emails. As a result of that It was believed that we were dealing with one level of issue when in fact the situation was extremely serious which is why I was not informed until 8.30 in the evening when parents emails started coming though and it blew up. I believe you are culpable in that. Search histories – I do not believe you when you say you did not tamper with them and there is no other possible explanation for the deleted/ altered histories. This is then, in my view, a case of gross misconduct. I believe I understand how this happened and that your motivation to behave this way started with your conduct in class. You then compounded your error in the e-mail reports and then compounded it again altering the search histories. I think that you did not think that we would be able to show what happened as unbeknownst to you we had printed the search history ourselves on the night before and that you thought we would ne unable to prove the search histories had been altered. I can understand how you came to this situation but it is a very serious error of judgment on your part. I do not believe that you have been frank or honest with me or acted professionally in regard to the school or colleagues. If I were to dismiss you it would likely be the end of your career – it would possibly not be possible to get another job in education. Anyone can make a cock up but I have to ask if I can trust you given the serious nature of the safegaurding breach. In most schools I believe you would be out of the door. I think I understand the rationale of how your mind worked but you have been crassly stupid. However, I take into account that you have worked hard for the school done good things, and it is for that reason that I [am] minded to give you a final written warning. This would remain on the file for the prescribed period set out in your contract – I would need to check this. You would of course have the right to appeal."

The claimant responded as follows:

> "Well I don't agree with any of that. I am an honest person and it upsets me that you would think of me in that way. I do not have the knowledge to alter the search histories.

Mr Fleming then stated:

> "Ok. In that case your response changes things. I am therefore going to refer this case to an independent person."

Mr Fleming further stated:

> "I am saying that if you so completely disagree with what I have outlined to you then I will pass it on to an independent person. So I am putting it on record that I have not reached a decision."

32. The following day Mr Fleming wrote to the claimant saying that he had been in error to say that he was passing the case to an independent person and confirming that he would be dealing with the claimant's case himself. The claimant was told:

> "I will give you my decision at 1.15 am on Monday 23 May. Please come to the drawing room."

33. On the 19 May 2016, the claimant was sent an email inviting him to attend "a disciplinary meeting at 3.30 pm on Monday 23 May in the drawing room."

34. On the 20 May 2016, the claimant sent Mr Fleming an email in which he set out a few points about his case. He set out his comments on the failure to properly supervise the class, the failure to properly notify the school of the extent of the breach of the IT security, inappropriate disciplining of a pupil, seeking to cover up that happened in the class by falsifying browsing histories and procedural fairness. Included in the comments made by the claimant was the observation that:

> "Moreover, had you sought expert advice, you would know that it was technically impossible for me to have altered the search history, thereby undermining any allegation against me in this regard. If, however, you have access to anything other than the weak and circumstantial evidence you have produced to date, I now formally ask that you grant me access to the relevant material at the next meeting."

35. On the 26 May 2016, the disciplinary hearing was reconvened by Mr Fleming. The claimant met with Mr Fleming from 9.10am to about 10.10am and then Mr Fleming took time to consider his decision before resuming at 12.45pm. When the meeting reconvened on the second occasion Mr Fleming informed the claimant that he was being dismissed on the grounds of gross breach of trust and gross breach of profession duties in relation to safeguarding. The claimant's dismissal was with immediate effect. The decision to dismiss the claimant was confirmed in a letter dated the 26 May 2016. The claimant was informed that he had a right to appeal the decision.

36. In his letter of dismissal Mr Fleming found that the claimant had deliberately underreported the incident on the 22 April 2016 and then changed the internet history in order to hide the extreme nature of the content viewed.

37. The Claimant appealed. The Appeal was heard by Mr Calderini. Mr Calderini is a non-executive Director of the School. The first part of the hearing took place on the 6 June 2016. This was adjourned to the 30 June 2016. On the 30 June 2016 hearing some computer information was

produced. Mr Calderini wrote to the claimant on 4 July 2016 confirming the decision to dismiss the claimant.

38. During the appeal process, the school instructed two computer experts. The first instructed was "?Answers Investigation". In a letter dated 23 June 2016 "?Answers Investigation" stated: "We are leaning towards a chrome bug that doesn't show history and not editing which surely would have been to remove record completely." The letter concluded with the passage: "In any event, the indications are that your suppositions are correct." Understanding of this latter comment is hampered by the fact we have not been shown any record of the instructions given to the computer experts. This document was not provided to the claimant. They also provided a report on the chrome history which included the following passage:

> "However there is no reason to see it as having been altered manually as understanding the search parameters to be tweeked to hide the real search terms requires deep understanding of the technical aspects of google searching while editing entries in history is non trivial and not possible in chrome itself but simply deleting individual entries is easy to do for a computer user. I would suggest that when first viewed the brockhurst URL showed the real search term from the active chrome session and after a logout and login or reboot, chrome history showed the first search term dogs after reading the history back in from the history database."

This also was not provided to the claimant.

39. The second computer expert instructed by the school was FMS their analysis report was sent to the respondent on the 20 July 2016. There had been email contact with the school about their findings relating to 'churning' on the 4 July 2016. The analysis report included the following passage:

> "The records above and printed history submitted by the school indicates that the web page title in the **internet history records was modified on 23 April 2016 before 9.35AM (BST)**."

This email of the 4 July and the analysis report were not provided to the claimant.

40. In his conclusions following the appeal Mr Calderini stated that the claimant "altered the terminal history evidence and ... lied throughout the disciplinary process and appeal process."

41. The claimant and respondent have provided written submissions which we have considered in arriving at our decision in this matter.

42. Section 98 of the Employment Rights Act 1996 provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

43. Where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer), depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

44. The Respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; and at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

45. It is not necessary that the tribunal itself would have shared the same view of those circumstances.[1]

46. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"[2]. The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

47. An employee who is dismissed is regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.[3]

48. A protected disclosure means a qualifying disclosure. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: that a criminal offence has been committed, is being committed or is likely to be committed; that a

[1] British Home Stores Limited v Burchell [1978] IRLR 379
[2] Iceland Frozen Foods v Jones [1982] IRLR 439
[3] Section 103A Employment Rights Act 1996

person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; that a miscarriage of justice has occurred, is occurring or is likely to occur; that the health or safety of any individual has been, is being or is likely to be endangered; that the environment has been, is being or is likely to be damaged; or that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. The disclosure must be made to the employer.

49. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done because the worker has made a protected disclosure.[4]

50. In considering wrongful dismissal, we are required to decide whether the misconduct actually occurred.

51. In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily.

52. An employer may dismiss summarily if the employee is in breach of contract and that breach is repudiatory - that is where the employee "abandons and altogether refuses to perform" the contract. For example where the employee does an act of gross misconduct.

53. All contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is bound by the term that the employee is to provide loyal service to the employer.

54. If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. If an employee is guilty of repudiatory conduct then except perhaps in the most exceptional circumstances an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination.

What was the reason for the claimant's dismissal?

55. The claimant contends that the principal motivation of the school was to exclude the claimant because he made protected disclosures. The

[4] Section 48 Employment Rights Act 1996

respondent contends that the reason for the claimant's dismissal was his conduct.

56. The claimant's dismissal letter set out the reasons for his dismissal and they clearly relate to conduct. Mr Fleming stated in the dismissal letter: "This falsification of records was a deliberate attempt to hide the extreme mature of the content viewed by the girls. This amounts to a fundamental breach of trust and is gross misconduct."

57. The Tribunal had the opportunity of considering the evidence given by Mr Fleming as to why he acted as he did. He explained that he was involved in the investigation of the claimant's case once it was clear that the matter involved a safeguarding issue. We are satisfied that once the full nature of the incident became clear it was inevitable as a safeguarding matter that Mr Fleming would get involved. His involvement led him to reach conclusions that the claimant had been guilty of gross misconduct.

58. We are satisfied that the reason for the claimant's dismissal was not because he reported the incident to the school. The fact that the claimant reported the incident to the school was not the reason for criticism. It was the failure to report the matter fully that was criticised. It was not the information he disclosed but the information it was considered that he failed to disclose that was the reason for the criticism of the claimant that led to the disciplinary matters and the conclusion that the claimant had attempted a cover up.

59. We conclude that the claimant was dismissed because of conduct. We reject the contention that the claimant was dismissed because he made a protected disclosure. The reason for the claimant's dismissal was a potentially fair reason.

Did the respondent have a genuine belief that the claimant was guilty of gross misconduct?

60. The claimant's actions were open to question once the description he gave of the 'inappropriate images' was matched with the actual content. At an early stage the respondent could properly have considered that the claimant's actions included altering the search history. This would give rise to serious concern about the claimant. Mr Fleming formed a view, early on in the process, that the claimant's attempt to cover up his own failings in supervision of his class is what led to the claimant's actions, which it was believed included altering the search history on the computer.

61. We are satisfied that Mr Fleming's view was genuinely held at the point that the claimant was dismissed on the 26 May 2016.

62. The Tribunal do not consider that the respondent could have had an honestly held view of the claimant's culpability in respect of altering the search history at the point that the claimant's appeal was concluded. Mr

Calderini was shown the report from the computer expert "?Answers Investigation". This report provided an innocent explanation for what appeared to be the claimant's deceitful act of altering the search history. The Tribunal was unable to understand how Mr Calderini could justify his conclusions that the claimant "altered the terminal history evidence", in the light of the information that was available to him from the expert which had been obtained for the purposes of his appeal.

63. While the Tribunal can understand how Mr Fleming reached the conclusion that he did on the 26 May 2016, that the claimant had change the internet history, the position was not reasonably sustainable at the appeal stage. Mr Fleming still had an involvement in the progress of the case at the appeal stage. He had met with the computer experts instructed to produce the analysis report on at least two occasion. Mr Fleming was present with Mrs Harper when she received a report from the computer experts. When asked why Mr Fleming was there her evidence was: "I wanted a second pair ears. I was asking him to listen to evidence from the computer expert." This expert was saying that there was a bug in chrome which would have exonerated the claimant and should have shown to Mr Fleming that his conclusion that the claimant had altered the history was wrong or at least maybe wrong. Mr Fleming did nothing. The expert report was not provided to the claimant. The respondent subsequently went on to instruct another expert for reasons which are not clear.

64. The respondent did not have genuine belief in the claimant's guilt at the appeal stage. The claimant's guilt was substantially based on the conclusion that that the claimant had altered the search history and then lied about it. The report received before the appeal outcome showed that there was another explanation. An innocent explanation which undermined the basis of the respondent's conclusions against the claimant.

65. The claimant's explanation about what he saw on the screen, why he reported the matter the way he did all rely on the claimant's account and his credibility. There was in our view no reasonable basis for impugning the claimant's credibility from his denial of altering the search history once the expert report was received.

Did the respondent carry out a reasonable investigation by the time it formed its belief?

66. The respondent failed to carry out a reasonable investigation. Mr Fleming's involvement in the investigation into events was justified in so far as it related to a safeguarding matter. In so far as it related to a disciplinary investigation Mr Fleming who had formed a view early on, that the claimant had lied, should not have been involved in both the investigation and the disciplinary hearing.

67. The claimant had signalled the need for exert evidence forensic analysis in his email of 20 May 2016. The respondent did not seek expert assistance until during the appeal process, after the claimant had been dismissed. The respondent had their own internal It expert who was not involved in the investigation.

68. The claimant's standing among other staff was not taken into account in the investigation. The claimant maintained his honesty but there was no effort to ascertain, for example from his line manager who viewed him as an honest man, any evidence relating to his likelihood of telling lies.

69. The respondent deliberately failed to follow its own disciplinary procedure. There was no investigation by an impartial person even though there were candidates available in the school, including the head mistress of the sister school Mrs Riley and members of the oversight board.

70. The claimant's grievance raised issues about the process followed by the school, this was rejected. When the claimant sought to raise issues with Dr O Kane they were rejected and then ignored. Mr Fleming played a role in these decisions. The matters sought to be raised related to how Mr Fleming was conducting the investigation.

Was the dismissal procedurally fair and the sanction of dismissal within the range of reasonable responses?

71. The view that Mr Fleming expressed at the meeting on the 16 May 2016 was initially that he was minded to give the claimant a final written warning. This was in the light of having concluded that: that claimant was not frank and honest; that the claimant had deliberately underreported the incident; the claimant tampered with the search histories and then lied about it; that it was a case of gross misconduct.

72. In light of the above we do not consider that a reasonable employer would have dismissed in circumstances where they have stated that they will not dismiss and there are no relevant changes in the situation. The fact that the claimant maintained his denials adds nothing in circumstances where the claimant has already been found to be lying.

73. The respondent had evidence which showed that the claimant was not responsible for altering the search history and did not provide it to him during the appeal. When the expert report tended to show that there was an innocent explanation the respondent turned to another expert whose report although provided after the claimant's dismissal showed for different reasons that the claimant could not have been responsible for altering the search history.

74. The respondent's approach was to look for evidence of guilt and there was a deliberate suppression of information that pointed to the claimant's innocence. Having obtained the expert report, following the claimant's

suggestion, to fail to disclose it to the claimant is inexplicable. When set against the fact that the respondent sought a further expert report for reason not clearly explained we consider it possible the reason was because the respondent did not like the content of the report which gave an innocent explanation for the altered history. We reject any suggestion that it was an oversight and consider that it must have been deliberate suppression of the report.

75. The conclusion of the Tribunal is that the claimant was unfairly dismissed.

76. The Tribunal has gone on to consider whether the claimant has contributed to his dismissal. We do not consider that the claimant has contributed to his dismissal. We accept that the claimant has been honest in his account to the tribunal and was honest to the respondent about what he thought he saw on the screen. We are not persuaded that the claimant's teaching of the class was such that he should be criticised for a lack of control or proper supervision. We noted the comments made by the respondent about the searches on the computer showing that there was a lack of proper supervision. We consider that the description given of the class falls short for us to conclude that there was not proper supervision of the class.

77. We obtain no assistance from the fact that there was a search about deleting search history. The claimant denies he did so. The search history in fact was not deleted. The claimant reported the fact that searches were made using the word naked. We do not consider that the existence of an apparent search about deleting search history indicates any blameworthy conduct on the part of the claimant meriting a finding of contribution.

Was the claimant wrongfully dismissed?

78. The Tribunal understand the respondent's case to be that the claimant was guilty of a repudiatory breach because he deliberately under reported the incident and then altered the search history. The Tribunal reject both these points.

79. The claimant reported the incident in the first instance by giving an account that did not seek to hide the fact that there was a search for "naked" and a also a reference to "inappropriate images". This in our view is clear indication that there was a serious issue that required further investigation. The claimant is in our view not be criticised for the school's inaction prior to the involvement of the parents.

80. The Tribunal is also of the view that the evidence produced has shown that the claimant was no responsible for altering the search history. The two expert reports for different reasons exonerate the claimant. The foundation of the respondent's case against the claimant is that he altered the search history. The only evidence from experts shows that he did not do it as alleged by the respondent. There has been no alternative basis

established to allow a conclusion that the claimant did alter the search history.

81. It has not been established that the respondent was entitled to summarily dismiss the claimant without notice. The claimant was wrongfully dismissed.

Whistleblowing

82. The Tribunal do not consider that the claimant has been able to show that he suffered a detriment because of whistleblowing. The respondent was unconcerned about the reporting of the incident. It was the supposed failure to report the full nature of the matters viewed by the children that was the subject of criticism. There was no detriment to the claimant because of making a protected disclosure. This whistleblowing complaint is not well founded and is dismissed.

Remedy

83. The ACAS Code of Practice provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. In this case the investigation and disciplinary stage were carried out by Mr Fleming. It was reasonably practicable for them to be carried out by different people as stated above. The respondent failed to allow the claimant a fair appeal. The respondent deliberately kept from the claimant information that was relevant to his appeal namely the "?Answers Investigation" report. The Respondent has failed to comply with the ACAS Code of Practice and we consider that the appropriate increase in the relevant awards for the breach in this case is 15%.

84. The claimant date of birth was 15 September 1980 he started employment with the respondent on the 4 February 2010, he was dismissed on the 26 May 2010. His gross weekly pay at the date of dismissal was £461.54. The claimant gross annual pay at the date of his dismissal was £24,000.00.

85. The claimant is entitled to a basic award in the sum of 2769.24.

86. The claimant is entitled to notice of one term. We have taken this to be a period 18 weeks. The claimant net weekly pay was £385.25.

87. The claimant has given evidence that he earned the sum of £3250 in relation to bar work. The period when this was earned has not been specified by the claimant. The Tribunal has given credit for the sums earned by the claimant in the notice period relating to bar work in the sum of £853.47. In the absence of any dates when this money was earned the Tribunal apportion this over the period from date of dismissal until 30 August 2017.

Damages for wrongful dismissal	
Loss of earnings Damages period (18) x Net weekly pay (385.25)	6,934.50
Less sums obtained, or should have been obtained, through mitigation	-887.01
Earnings	887.01
Bar Work (27/05/2016 to 29/09/2016)	887.01
Plus failure by employer to follow statutory procedures @ 15%	1,040.18
Total damages	7,087.67

88. The claimant's net weekly earnings were £385.25 the claimant has loss of earning of 50 weeks (starting after 18 week notice period). We make an award for to the claimant for loss of statutory rights in the sum of £500. The claimant claims a loss of benefits in the sum of £14,908 and pension loss in the sum of £2746.15. We give credit for the sum of £9189.15.

Compensatory award (immediate loss)	
Loss of net earnings Number of weeks (50.1) x Net weekly pay (385.25)	19,301.02
Plus loss of statutory rights	500.00
Less payment in lieu	0.00
Plus Benefits	14,908.00
Pension loss	2,746.15
Pension loss	2,746.15
Loss of occupational pension	2,746.15
Less sums obtained, or should have been obtained, through mitigation	-9,155.61
Earnings	9,155.61
Teaching 2 (30/08/2017 to 08/09/2017)	700.00
Teaching1 (28/03/2017 to 28/06/2017)	2,985.80
Gardening (30/06/2017 to 25/08/2017)	3,106.82
Bar Work (30/09/2016 to 28/08/2017)	2,362.99
Total compensation (immediate loss)	**28,299.56**
5. Adjustments to total compensatory award	
Plus failure by employer to follow statutory procedures @ 15%	4,244.93

Compensatory award before adjustments	**28,299.56**
Total adjustments to the compensatory award	**4,244.93**
Compensatory award after adjustments	**32,544.49**

89. In this case the cap on the claimant's award of compensation for unfair dismissal is £24,000.

90. The award of compensation is therefore.

Basic award	2,769.24
Wrongful dismissal	7,087.67
Compensation award including statutory rights	32,544.49
TOTAL	**42,401.40**
AFTER COMPENSATION CAP OF £24,000.00 (GROSS ANNUAL PAY)	**33,856.91**

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Employment Judge Gumbiti-Zimuto
Dated: 22 September 2017
JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS