EMPLOYMENT TRIBUNALS

Claimant:	**Mr M A Stone**		
Respondent:	**HBOS Plc**		
Heard at:	**Sheffield**	**On:**	**22 May 2017**
			26 and 27 June 2017
Before:	**Employment Judge Little**		

Representation

Claimant:	Ms K Barry of Counsel (instructed by Clarke Wilmott LLP)
Respondent:	Miss I Ferber of Counsel (instructed by Eversheds Sutherland (International) LLP)

RESERVED JUDGMENT

1. My Judgment is that the Claimant was unfairly dismissed and so the claim succeeds.
2. Accordingly a hearing will be arranged to determine remedy.

REASONS

1. **The complaint**

   In a claim form presented on 23 January 2017 Mr Stone complained that he had been unfairly dismissed.

2. **The issues**

   On the first day of the hearing (in May 2017) I was given a list of issues by counsel which initially was thought to be an agreed list. In fact there was a significant omission from the list of issues because the Respondent contended that the claim had been presented out of time.

3. **The preliminary issue**

When the Claimant presented his claim he mentioned in paragraph 7 of the particulars of claim that his claim was out of time and that time had expired on 9 January 2017. The claim was not listed for a Preliminary Hearing on that point firstly because on receipt of the claim it was thought that the so called "clock stopping" provisions put the claim in time and secondly when the response was presented (on 27 February 2017) no jurisdictional point was raised at all.

Naturally as the point was now being raised by the Respondent before me it was a matter that I had to deal with. My provisional analysis which I shared with counsel was that the ordinary limitation date would have been 4 January 2017 because the effective date of termination was 5 October 2016. On the face of it the claim was therefore presented out of time on 23 January 2017. However the Claimant had applied for ACAS early conciliation on 9 November 2016 and the early conciliation certificate had been issued on 9 December 2016. Having regard to the Employment Rights Act 1996 section 207B(3) there were accordingly 30 days which were not to be counted, with the result that the limitation period was extended to 3 February 2017. On that analysis therefore presenting the claim on 4 January 2017 was in time.

Ms Ferber for the Respondent did not agree with my analysis. She contended that the Claimant was not entitled to rely upon section 207B(3) but only section 207B(4). On that basis the claim was out of time. Further Ms Ferber contended that the first instance decision in **Booth v Pasta King** was wrong and in any event, not binding on me. I was referred to the case of **Tanveer v East Lothian Bus Company** [2016] – which was a case on corresponding dates. It was the Respondent's contention that the provisions of section 207B(4) overrode subsection 3 of that section.

Ms Barry disagreed with that analysis and contended that the Claimant could choose whichever provision was most beneficial. Applying subsection 207B(3) Ms Barry agreed with my initial analysis.

Having heard these competing submissions the decision I reached was that the claim was in time because the Claimant could rely on section 207B(3) if that was the most beneficial. I considered that the decision in **Tanveer** was not of great assistance as it appears that the parties in that case had agreed, rightly or wrongly, that only section 207B(4) was in play and the ratio of the case concerned the corresponding date principle.

Whilst the case of **Booth** was not binding authority – perhaps it was of no authority at all in the strict sense of the doctrine - nevertheless it had not been appealed and it was a decision which had been promulgated some three years prior. Further it seemed that the issue of the interplay between section 207B(3) and (4) had not been the direct subject of any other appellate consideration. It has to be said that section 207B overall was perhaps not felicitously drafted. However nothing was said in subsection 4 in terms to the effect that it overrode subsection 3. It did impose a condition as to its own applicability namely that "a time limit set by a relevant provision would expire between days A and B". However here I consider that "a relevant provision" must include subsection 3. So if subsection 3 has already permitted an extension of time sufficient to take a claimant out of danger then in my judgment he is not to be put back in to that danger by restricting his choice to subsection 4 only.

Regrettably the time taken dealing with this in a sense unexpected jurisdictional point ruled out any possibility of the claim being heard within the one day which had been allocated. In fact it has required all of the two additional days which were given in June – hence the need for this Judgment to be Reserved.

4. **Evidence**

The Claimant has given evidence by reference to a 20 page witness statement. He has not called any other witnesses. The Respondent's evidence has been given by Mr R Morton, senior team manager – he was also the dismissing officer - and by Mr D Ditcher, senior manager – he was also the appeal officer.

5. **Documents**

I have had before me a bundle comprising initially 311 pages to which certain documents have been added during the course of the hearing.

6. **The facts**

6.1. The Claimant commenced employment with the Respondent in February 2010. That was in a role described as a "non advised mortgage sale colleague". In March 2014 he was promoted to the role of mortgage advisor and that was in a department known as the Halifax Contract Change Department. Towards the end of October or the beginning of November 2015 the Claimant moved to the Halifax transfer of mortgage property team (otherwise TOMP). That department would deal with cases where typically home owners who were separating or divorcing needed to make arrangements for the transfer of the matrimonial home subject to the mortgage.

6.2. The TOMPs team interacted with customers remotely – usually by telephone. The Claimant was not based in a branch and did not see customers face to face.

6.3. At the material time the TOMPs team leader and the Claimant's line manager was a Carol Parkin. I have not heard from Ms Parkin.

6.4. In the first quarter of 2016 the Respondent had some concerns about the Claimant's performance. As was the normal practice, various calls that he had with customers would be monitored. If the monitor deemed that there were failings in that exchange then those would be registered as either red, amber or green and the matter would be discussed with the individual mortgage advisor. In this regard it appears that Ms Parkin may have made the discussion record which appears at page 54 in the bundle. It is undated, unsigned and it can only be inferred that it is Ms Parkin's note. The document is headed "Discussion Record" but for the reasons explained it is not clear when that discussion was. Under the heading "Event" it was noted "second amber call in last 90 days" and also "Mark advised me he is feeling stressed/under pressure in his current role which is making him feel unwell". Under the heading of "Proposal/Actions" it was noted the Claimant would talk through any complex cases with "either me or an experienced colleague" to ensure the correct policy was applied. There is also a reference to the Claimant being given time to refresh his knowledge. Proposal 6 reads "I have devised a time plan for Mark to help him structure his day and ensure he makes time for his breaks and lunch (copy attached)". That document is

at page 55B. During working hours of 10am to 6pm it envisages that in the morning there would be one appointment with a customer with a time allocation of two hours followed by a break. There is then half an hour for administration work followed by half an hour for lunch. There is then a further period for the second appointment between 3 and 5pm and the latter part of the day involved a break followed by half an hour dealing with call backs – that is calling back customers who had made enquiries.

6.5. On 31 May 2016 there was an informal meeting between the Claimant and Ms Parkin. The notes of that meeting contained in a pro forma are at pages 56 to 59. The purpose of the meeting is described as "for line managers to outline shortcomings, understand issues, offer guidance and discuss how the required improvements might be achieved". However the next box is headed "Details of the misconduct including any evidence". Under this heading the first section appears to deal with matters which may have been discussed with the Claimant in April. The note then goes on to refer to a red call. This appears to have caused Ms Parkin to make enquiries about various other calls the Claimant had made in the relevant period. There were concerns expressed about the content of the voicemails which the Claimant was typically leaving when it had not been possible to contact a customer. Under the heading "Actions required to address the problem over the next 1 month" the Claimant was to manage his workload more effectively; proactively seek out call backs in a timely manner; fully evidence his productivity "with a full explanation for time not spent as per his appointment schedule" (page 55B). There was also the following comment:

> "Mark to demonstrate an immediate and sustained improvement in his performance and behaviours and should this not be evidenced then this will escalate to more formal action being taken which could ultimately result in disciplinary action".

The note concludes:

> "Action plan to be reviewed weekly over the next month (to 30/06/2016)"

Whilst the note has at the end a place for the employee's signature and that of the line manager, the copy in the bundle is unsigned and I am unaware that there is a signed copy.

6.6. In the Claimant's lengthy witness statement he does not deal with any of these matters. However in cross-examination the Claimant contended that he had not seen either of the notes to which I refer above until these proceedings commenced. He accepted that there had been the meeting on 31 May with Ms Parkin and he accepted that the schedule or time plan had been agreed. He knew the basis of that time plan but it is not entirely clear that he was given a copy of it. He was doubtful as to whether there had been a meeting with Ms Parkin in April. His recollection of the tone of the May meeting was that it was relatively amicable and he did not consider it to be disciplinary in nature. When asked to comment on the points raised in the May meeting note at page 58, the Claimant's evidence was that he could not remember it being put in that way (Ms Parkin having personally observed the

Claimant not being proactive; Ms Parkin not having seen an improvement in the Claimant's overall performance and attitude).

6.7. In any event it is common ground that despite the reference to there being weekly reviews after the 31 May meeting – that is throughout June – there were none. In those circumstances the Claimant concluded that he was now doing what was required and that Ms Parkin was content with his performance. During the latter part of his cross-examination the Claimant referred to a half yearly review with Ms Parkin where he says she expressed satisfaction and indicated that the Claimant could be in line for a bonus. However I have seen no documentation of any such review meeting.

6.8. In March 2016 the Financial Conduct Authority and the Prudential Regulation Authority introduced new rules – Senior Managers and Certification Regime (SMCR). The purpose of those rules was to introduce individual accountability for mortgage advisors in respect of any misconduct which fell within their area of responsibility. The Claimant was written to on 9 March 2016 advising him of the introduction of these rules. A related document was introduced on the second day of the hearing and is now at pages 55A(1) to 55A(3). At all times when the Claimant was performing a certification function he had among other things to comply with individual conduct rules. Those rules were summarised in the document at 55A(1) as :-

- You must act with integrity.
- You must act with due skill, care and diligence.
- You must be open and co-operative with the FCA, the PRA and other regulators.
- You must pay due regard to the interest of customers and treat them fairly.
- You must observe proper standards of market conduct.

The Claimant was aware of these rules.

6.9. During the period 13 July 2016 to 2 August 2016 a sample of the Claimant's calls to customers was monitored.

6.10. Without warning, on 29 July 2016 the Claimant was asked to attend a meeting with Laura Andrews – a colleague performance manager. Notes of that meeting were taken and a copy appears at pages 62 to 69. Although the version in the bundle is not signed, the Claimant confirms that he did sign these minutes or notes so as to acknowledge that they were a true and fair reflection of the discussion. The Claimant was not accompanied at this meeting. At the beginning of the meeting the Claimant was informed that it was an investigatory meeting but not part of the disciplinary process. The Claimant referred to "a spate of amber and one red call" and that there were messages he was leaving which were not to his line manager's liking. However he went on to say that his line manager was happy with the improvements. The Claimant was then referred to various allegations about specific dates and specific actions or failures to act on those dates. The Claimant was asked to explain what he was doing on various dates. No recordings of his calls were

played back to the Claimant nor was he provided with a transcript. The Claimant did not have access to his computer or diary or any other documents during the course of this meeting. It was put to the Claimant that on 27 July he had advised a customer that it would be quicker for them to make their application at the branch. The Claimant replied that if the customer had questioned which process was easier then he might answer branch was easier. He went on to say that he would need to check whether some other event happened that day and come back to Ms Andrews. He said that he did not think he would have said the branch was quicker unless the customer had asked. At this point Ms Andrews purported to read from a transcript of the recording but only the part where the Claimant had apparently said "I can't do that today, the branch is quicker". The Claimant was not actually shown the transcript. He accepted that if he had said that then it would have been an error of judgment on his part. Ms Andrews said that she would actually listen to the call subsequently to establish if the comments about it being easier in the branch were customer driven or not.

6.11. There was a further investigation meeting before Ms Andrews on 4 August 2016 and on this occasion the Claimant was accompanied by a work colleague – someone from his own team – Paul Dearlove.The notes are at pages 71 to 78. The topic of the 27 July meeting again featured and Ms Andrews informed the Claimant that he had not offered to key an application for a customer. The Claimant explained that he thought the reason for that was that there had been a complaint on another matter but now accepted that there wasn't. He was then asked whether there was any other reason. He replied:

> "I keep to my schedule and take my break and generally do have an application after 3pm. We've recently changed the way we do our business and Carol Parkin advised we must stick to our schedule. If I took the application I'd miss my break and if you work over the break you don't get the time back".

The Claimant was then asked by Ms Andrews whether he had been given a stipulation as to how he could manage his diary. The Claimant repeated that he was advised to stick to the schedule and take his breaks.

The Claimant was asked about call backs and explained that if he had two booked in and one application keyed there was no expectation to get another application done. He said that Ms Parkin had confirmed in his informal plan that he might not get two applications in a day and she was happy with one full to credit score. He went on to explain that there were morning and afternoon slots. There was one pre-booked appointment and the other is for call backs. If one application went to a full application there was no expectation to do another morning application. When asked why, the Claimant explained that that was because there was a schedule. He was not expected to do more. Ms Andrews queried whether that was simply because it did not fit into the schedule. The Claimant explained that there was a clear expectation set by Carol Parkin that it was a maximum of two applications per day irrespective of the call backs. Ms Andrews expressed concern over that practice for customers. She queried why it was no more than one

application per slot – "why no more? Is that just you". The Claimant explained that it was because of his hours and a TOMP took up to two hours due to the application, recommendation and after call work (page 74). It was not through lack of trying but it was the hand he had been dealt.

The Claimant was then questioned about calls he had made and work undertaken on 19 July. He explained that as he had two applications per day he did not want to start another application and only be able to do part of it. It was suggested to him that the Claimant had been free for an hour and 30 minutes that afternoon but he said that he was not expected to do an application in that time.

Ms Andrews went on to say that since the last meeting she had thought that she would listen to a few calls and she goes on to explain, at least in summary, what the Claimant had apparently said or done with various customers on 1 and 2 August. Again the Claimant had no access to his own records during the course of this meeting.

Towards the end of the meeting Mr Dearlove asks if the Claimant would have time to be able to look into some of the points and be able to respond. Ms Andrews is recorded as replying:

> "If the outcome of this is that formally disciplinary action is taken then Mark will have the opportunity to provide his own evidence and will receive copies of all documentation regarding what will be discussed".

Again although the signatures do not appear on the copy in the bundle, the Claimant confirms that he did sign these minutes as being again a true and fair reflection of the discussion.

6.12. The Claimant's evidence is that there was a third investigation meeting which took place on 15 August 2016 – again with Ms Andrews. The Claimant refers to this in paragraph 29 in his witness statement. There are no notes of this meeting and I have not heard from Ms Andrews. He describes this as another impromptu meeting. He was informed by Ms Andrews that the Respondent would be taking further action against him and that a disciplinary meeting was to be arranged. The Claimant says that he asked if he could review the allegations and provide clarity surrounding his answers given at the investigatory meetings. Further the Claimant says that Ms Andrews rejected this, saying that he would have an opportunity before any further meeting took place.

6.13. Ms Andrews prepared a document called "Factors for Consideration" which was in effect her investigation report. A copy of this is in the bundle at pages 80 to 85. Again it is a pro forma. One of the questions on the pro forma is:

> "Provide a brief summary of the alleged misconduct and how the incident came to light".

Ms Andrews has entered as her response:

> "Low productivity which is outside of the band-with of team. Calls listened to, by team manager (eg Ms Parkin) have highlighted behavioural issues which give cause for concern".

The response then goes on to refer to the various calls that had been listened to not it seems by Ms Andrews but just by Ms Parkin. There is a note that the Claimant had provided "conflicting information given in both investigatory meetings and colleague unable to provide clarity what he was doing when asked to clarify".

In answer to the question whether there were any live warnings related to any conduct matter, the answer given is 'no' but that there was an informal plan from the first quarter of 2016 in relation to what are described as "failed calls in line with regulation requirements, concerns around behaviours and concerns around productivity".

There is then a question as to whether the conduct was typical of the employee or totally out of character, to which Ms Andrews' reply is:

> "Behavioural concerns have been discussed previously by a line manager and discussions around reduced productivity documented on file from 31 May".

The response went on to record that discussions had taken place about required expectations "throughout May and June and documented on file" – although clearly this is wrong.

6.14. On 24 August 2016 the Claimant was called to a further meeting with Ms Andrews at which he was suspended. A note of what is described as an informal meeting appears at page 90. The basis for the suspension was under the disciplinary policy. Further investigation into what are described as allegations of gross misconduct might take place. Those allegations are described as:

> "The Bank has reasonable grounds to believe that you have breached conduct rules applicable to your role and your integrity and due regard to the interest and treatment of our customers has been brought into question. During your investigatory meeting it (sic) has brought to light that you have failed to display the expected behaviours by not being available for customers in line with expectations. This has caused unnecessary delays for customers wanting to transfer the names on their mortgage property which is one of our Moment of truth demands".

The note purports to summarise the Claimant's explanation of his actions as being:

> "You are aware of the correct procedures and you did not follow them on this occasion because your understanding was that you should adhere to your schedule as a priority rather than being available to speak with customers and your understanding was that you are only required to key a maximum of two applications per day which lead you to declining to progress some customers applications on the same day, causing them unnecessary delays. You were also unable to explain what you were doing in the time in which you should have been attempting to call customers".

On the same day a suspension letter was sent to the Claimant which, slightly more literately, expressed the same matters (page 87).

6.15. Within the bundle there is what has been described as the HR timeline or log. It appears at pages 172 to 181. It appears that this log was kept by Laura Flatres of the Respondent's HR department. On page 172 it records a call from Carol Parkin about the Claimant made on 28 July 2016. Ms Parkin is recorded as describing the Claimant as not displaying the right behaviours. She refers to having spoken to her senior manager who has suggested suspension. The recorded advice given by HR is that it would be necessary to hold an investigation meeting with the Claimant "before we can even look at suspension". As I have noted, there was in fact an investigation meeting on the day following. There is a further note relating to what it seems Laura Andrews told HR on 12 August 2016 and that is on page 174. She records that when the Claimant was supposed to be calling customers he was not making a lot of calls and there was a "big chunk of time" in the Claimant's day when he was not calling out. Reference was made to an informal meeting (presumably that on 31 May with Carol Parkin). It was also alleged that the Claimant was "referring the customers to the branch to not do the application". There was also reference to the Claimant not keying an application because he did not want to miss his break. The note goes on to reiterate that the Claimant was spoken to informally in May 2016 "about his behaviour and still concerns based on this agreed to proceed a disciplinary under misconduct".

There is also the record of what appears to have been a telephone conversation between Ms Andrews and HR on 24 August which referred to two further occasions when the Claimant was not making himself available for customers. There had also been a call back from a customer who had apparently been told by the Claimant that he was not willing to call him back until two weeks later. In those circumstances it had been agreed the Respondent would "take the colleague of (sic) the phones at the moment. Customer treatment and integrity brought into question". The rationale was that:

> "Have agreed suspension as no other role where the clg (colleague) is not able to speak to the customer. Also due to the severity of the allegation this will now be gross misconduct" (see page 175).

6.16. On 9 September 2016 Mr Morton wrote to the Claimant. A copy of this letter is at pages 97 to 99 in the bundle. The Claimant was invited to attend a disciplinary meeting on 16 September. The meeting was to determine whether disciplinary action should be taken. The allegations were set out. It was alleged that the Claimant had breached what was described as section 1.1 of the conduct policy in that he had failed to provide excellent customer service to customers and had failed to act with due care, skill and diligence between 13 July 2016 and 2 August 2016.

The letter then goes on to give the dates and summaries of the Claimant's alleged failings as gleaned from calls that had been monitored. The final allegation is described as:

> "Additionally in the investigatory meeting you failed to display expected behaviours, confirming you wouldn't progress

> customer's applications any further if you had already completed the expected two applications for that day".

The letter goes on to state that the potential risk impact of the Claimant's actions was that a higher number of calls would be handled by the Claimant's peers and poor customer service might cause complaints. That might lead to reputational damage. It was said that:

> "Your behaviours … have severely damaged the relationship of mutual trust and confidence which must exist between employer and employee".

It is to be borne in mind that that comment appears in a letter inviting the Claimant to a disciplinary hearing. It is couched not as an allegation but as a conclusion.

Although it had not been referred to before in that letter, towards the bottom of the second page there is a reference to what will happen to the Claimant if he is found guilty of gross misconduct.

6.17. The Claimant did not receive this letter until 15 September which left him insufficient time to prepare for a disciplinary hearing on the following day. Accordingly the Claimant telephoned Mr Morton and left a voicemail proposing a new date of 21 September 2016. However the Claimant did not hear back from Mr Morton until 20 September when it was confirmed that the meeting would take place the following day.

6.18. It duly did and what purport to be the Respondent's notes of that meeting are in the bundle at pages 104 to 111. The meeting is described as a final competence meeting. It was conducted by Mr Morton and the notes were taken by a Ms H Longdon. The Claimant was again accompanied by his work colleague Mr Dearlove. The note erroneously gives the date of the meeting as 20 March 2016. The meeting was not audio recorded. The written notes do not purport to be verbatim. The Claimant was not sent or given a copy of the notes until some 10 weeks later (when at the commencement of his appeal hearing it was realised that neither he nor the appeal officer had seen a copy). The Claimant had not been asked to sign the notes as being an accurate record and no copy signed by anyone else has ever been produced. The pro forma ending to the notes (at page 111) anticipates that all those present at that meeting would sign. The Claimant contends that the notes are inaccurate and that his responses have been paraphrased or otherwise in certain cases taken out of context. With that "health warning" the matters which the notes describe include the following.

6.19. At the commencement of the meeting Mr Morton explained that it's purpose was "to discuss the concerns raised previously around the colleagues competence and review their progress since the Initial Formal Review". Mr Morton enquired whether the Claimant had received a copy of the Lloyds Banking Group competence policy and the Claimant confirmed that he had.

6.20. Mr Morton goes on to ask the Claimant why he thinks he is there today and the Claimant replies:

> "There was an investigatory meeting around me doing no calls at specific times. Though I'm unable to provide evidence around exactly why not".

On being asked whether he received notice in a timely fashion the Claimant replied:

> "Yes but I have had no opportunity to review dates to confirm what I have been doing. I was told there would be an opportunity but there wasn't. There will have been something I was doing during that time".

The Claimant was then asked why he had not had time to prepare his case in the period of time between the first and second investigation meetings before Ms Andrews. The Claimant explained that he had not done so because he was told not to worry. He was then asked "so with the opportunity to talk through those today, are you prepared?".

The Claimant replies "no I need to get access to a desk". On again being asked why he was not prepared the Claimant replied that he was not given the opportunity. Mr Morton then asked him whether he felt that it was someone else's responsibility to which the Claimant replied it was to a degree. He was reminded that he had not been suspended immediately so why could he not have used some of his down time then. The Claimant's response was that there was not the luxury of down time anymore. The Claimant said that he could not make the checks during the time he was suspended because he had been told that he was not allowed back.

Later in the meeting the Claimant is asked if he had always put the customer first. He is recorded as replying "Potentially not, down to how I was working". When asked whose responsibility that was he apparently replied "It was down to me ultimately".

The Claimant was then asked about the specific instances, that is to say the calls sampled during the 13 July to 2 August period. In response to a question as to whether there was a reason that he would not action certain cases, the Claimant apparently replied "Due to inflexibility I wasn't doing them on my end". I thought I needed to stick to my schedule". The Claimant was then asked whether he had received instructions not to complete an application in the last two hours of his shift and he replied no, but referred to the schedule which he was following. When asked what impact he thought his actions had had on customers the Claimant apparently replied "They have had no opportunity to do what they want to do. It makes a bad impression and the customer feels like we aren't interested. It's a negative experience and it pushes them elsewhere".

The Claimant was then asked about the 14 July, when apparently he had made no calls from 4.30pm onwards. He was asked whether he remembered why. The Claimant's response was that he would have asked for call backs and if not he would have done something else but he went on to say "I would like time to go through so I can hopefully know more".

He was then asked what had happened after 3.47pm on 18 July. The Claimant responded "without time to look through I can't be sure".

In relation to the allegation that the Claimant had advised a customer that it would be quicker for him to go to a branch, Mr Morton – who himself had not listened to any of the recordings or read the transcript of any recordings - purported to quote the precise words that the Claimant had allegedly used in speaking to this customer. Here Mr Morton was relying upon the notes of the first investigation meeting conducted by Ms Andrews (the reference being at page 67). Mr Morton asked the Claimant why he had not taken ownership when the customer had expressed an intention to proceed there and then and the Claimant's response was apparently "Because I was working to my schedule and hadn't improved to be more flexible at that time". The Claimant was then asked whether the statement "I can't do that today" was true or false. The Claimant apparently replied "False in terms of the way in which I should have been working." Mr Morton was again quoting from what he believed to be the recording or transcript of it which he had neither listened to nor read. In the same way Mr Morton asked the Claimant what he had meant by "branch is quicker". At this point Mr Dearlove reminded Mr Morton that the Claimant had previously mentioned that this had been taken out of context. The Claimant repeated that it did depend upon the circumstances and context. The Claimant suggested that he would only ever offer branch where it would be quicker. Mr Morton then asked whether that would be consistent "if we listened to your calls for example?" The Claimant replied that it would. In fact no calls were listened to. Mr Morton then asked whether this could have been taken out of context by customers and the Claimant replied that it could.

Towards the end of the meeting Mr Morton asked the Claimant to describe his integrity. In the note the question is recorded in that way. However in paragraph 41 of the Claimant's witness statement he says that Mr Morton would say something along the lines of "if someone says A (where A is a statement that is categorically untrue) when in fact it should have been B (where B is true) do you agree that shows lack of integrity? The answer which the Claimant says he gave was along the lines of on the face of it it could be reasonable to assume that without further investigation. However the reply recorded at page 111 in the notes is "Until all of this was brought to a head I thought good. But clearly things are lacking which question if I have the right integrity and question if I value my job".

The Claimant is then asked whether he put his needs before customers. He replies that he didn't although he apparently went on to say that he did not feel that he had demonstrated that in the last month. He was then asked whether there is an example when he may have put himself first and apparently he replied "I wasn't working how the company wanted, looking back".

Finally he is asked whether "given all we have discussed have you always put the customer first". The Claimant apparently replies "Regrettably not." Mr Morton then asked the Claimant if there was anything else that he wanted to ask before the meeting closed. The Claimant's response is recorded as "Will I have a chance to access a computer so I can understand and explain what I was doing". Mr

Morton's response was that he would speak to HR for their advice and come back to the Claimant.

6.21. In the event the Claimant was permitted to return to the office on Saturday 24 August 2016 and spent some three hours with access to his work computer and other relevant documents. As a result on that day he prepared a lengthy email wherein he was able to deal in detail with each of the dates or calls that had initially been raised with him in the investigation process. A copy of that email, which was sent to Mr Morton with the subject heading "Information to assist with my disciplinary" is at pages 112 to 114 in the bundle. The Claimant referred during the course of that email to other emails that he had sent at the time of the various calls or dates to support his explanations. Towards the end of the email the Claimant explained that if Mr Morton required copies of the emails he had referred to Mr Dearlove could possibly send those to him as he had access to the Claimant's inbox. The Claimant concluded his email by writing "I look forward to learning of your decision as soon as you are able to make this".

6.22. Mr Morton's evidence in chief about the 24 September email is in paragraph 36 of his witness statement. He refers to being contacted by Mr Ditcher during the appeal process and being told by Mr Ditcher that the Claimant had told Ditcher he had provided information to Mr Morton in the 24 September email. Mr Morton's witness statement says this:

> "I do not recall receiving an email from Mr Stone on 24 September 2016. I checked my emails at the time and have checked them again as part of the Employment Tribunal process. However I cannot find an email from Mr Stone on or around this date with any further information".

However he then goes on to say that having seen the email as part of the Employment Tribunal process "I do now recall reviewing the email from Mr Stone during the disciplinary process and considering it prior to making my decision, however, this did not change my view that Mr Stone had failed to uphold the conduct expected of a colleague in his position". Mr Ditcher's email enquiry to Mr Morton is dated 1 December 2016 and is at page 138. Mr Morton's reply on the same page is

"Hi Dave, this was all sent off to the HR/SMCR consultant as part of the final handover. I don't have it saved unfortunately".

Mr Ditcher then continued his enquiries by sending an email on 8 December 2016 to Laura Flatres of HR and this can be seen on page 140. He wrote –

"I'm at a bit of a loss on the email Mark is referring to. I have asked for this from Ryan but he no longer has a copy. Is there any way of doing an email retrieval to find this?"

Ms Flatres reply, on the same page is-

"So am I (presumably at a bit of a loss) I don't remember seeing anything. I would expect that Ryan might need to speak to IT to see?"

During the course of cross-examination Mr Morton stated for the first time that there had been a telephone discussion between himself and

Laura Flatres and possibly someone from the conduct team when Mr Morton had allegedly talked them through what the Claimant had said in the 24 September email, although he could not remember when that discussion was. The HR timeline at page 177 has an entry for 27 September which reads:

> "HM (the hearing manager Mr Morton) has reviewed the colleague's points raised regarding the allegations and feels there is no mitigating circumstances that have caused the clg to not put customers first. Based on this he has agreed dismissal for the colleague".

As to Mr Morton's efforts to retrieve the email for the benefit of Mr Ditcher and the appeal, Mr Morton in cross-examination said that he had not spoken to IT about this and it was difficult for him to explain why now. Again in cross-examination he stated that he absolutely read the email at the time and spoke to Laura Flatres but felt that it did not answer many of the questions with regard to integrity. Mr Morton accepted that he had never acknowledged the Claimant's email nor had he taken up the Claimant's suggestion within that email that other emails could be obtained which would support the Claimant's case. The Claimant did not himself at the material time (the appeal) have a copy of the email of 24 September which he had written. It remained only on his work computer to which he continued to have no access after Saturday 24 September.

6.23. On 3 October 2016 Mr Morton wrote a letter informing the Claimant of the outcome of the disciplinary meeting. A copy is at pages 121 to 122. The outcome was that the Claimant was to be dismissed for reasons of gross misconduct without notice. The circumstances giving rise to the Claimant's dismissal were described as follows:

"

- You made false statements to customers around your ability to deliver their stated need within the required timescale.
- You have not acted with the best interests for customers when making false claims that it is "quicker" to conduct their business in branch rather than us in the moment.
- You have confirmed that you have not upheld the required standards set out in the Certification Regime, including not displaying the required level of judgment to pay due regard to the interests of our customers. Which could have led to customer detriment on several occasions, you have confirmed this not to be in the best interest of our customers (sic) "

The letter went on to refer to the Certification Regime under the Senior Managers and Certification Regime and Conduct Rules 1, 2 and 4. That is a reference to the document at page 55A(1).

Mr Morton gave his reasons for the decision as follows:

"

- You made false statements to customers around your ability to deliver their stated need with required timescale. Specifically,

you told customers you would not have time to complete applications for them, when you actually did have enough time to complete these. You admitted that this was because you wished to ensure you got a break when you wanted to have one.

- You accepted in our meeting that you have not acted with the best interests for customers by making false claims to customers that it is "quicker" to conduct their business in branch rather than with us in the moment. You admitted that you were aware that this was not true. You also admitted that you know that this was not in line with the expectations of your role.
- You have confirmed that you have not upheld the required standards set out in the Certification Regime, including not displaying the required level of judgment required to pay due regard to the interests of our customers. "

Whilst the invitation to the disciplinary hearing of 9 September 2016 (page 97 to 99) had set out six categories of offence, with some of those six themselves covering numerous points, the dismissal letter does not address those individual matters. However during the course of Mr Morton's cross-examination he confirmed that he had not, by reference to the bullet points in the invite letter, upheld the first, third or fourth offences. However for the reasons mentioned there is no indication that this was the case in the dismissal letter and it would appear that the Claimant only learnt of this when Mr Morton gave that answer in cross-examination. The letter makes no reference to Mr Morton having received or considered the Claimant's email of 24 September 2016.

6.24. On 19 October 2016 the Claimant wrote a letter of appeal to Mr Morton. It is a very comprehensive document and a copy is at pages 124 to 131. The Claimant sought a total re-hearing. He explained in detail his working practices and gave examples of when he considered he had done well. In section 4 of the appeal letter (pages 129 to 131) the Claimant set out full details as to why he considered that he had not been treated fairly throughout the process. That included not being able to refer to emails, calls, work logs etc that would have enabled him to provide a clear picture at the investigatory meetings; not being provided with minutes of the disciplinary hearing and not being aware of what was being investigated prior to the investigatory meetings taking place. The Claimant reminded Mr Morton that there had been six separate bullet points in the invite to the disciplinary and the Claimant believed that each of those was, at worst, a performance concern warranting at most a written warning. In contrast to the six allegations in the invite, it appeared from the dismissal letter that he had been dismissed for three totally different reasons. He also reminded Mr Morton that a dismissal for gross misconduct would have 'disastrous consequences', as he put it, for his future career, if any, in the financial services sector.

6.25. Mr David Ditcher was appointed to be the appeal officer and he wrote to the Claimant on 21 November 2016 (page 134) inviting the Claimant to

an appeal hearing on 1 December 2016. The Claimant duly attended on that day. In paragraph 6 of Mr Ditcher's witness statement he refers to asking the Claimant at the 1 December meeting whether he had everything he needed for the purpose of the appeal hearing and that the Claimant said that he did not have all the information required. As Mr Ditcher wanted the Claimant to have a fair hearing he agreed to reschedule the appeal hearing. What Mr Ditcher does not mention in his witness statement is that he did not have all the relevant information either. He did not have the notes of the disciplinary hearing in respect of which he was conducting an appeal. As mentioned above neither did the Claimant. During cross-examination Mr Ditcher admitted that he had told the Claimant on 1 December that this state of affairs was embarrassing.

6.26. It was also at the 1 December appeal meeting that the Claimant asked Mr Ditcher for a copy of his email of 24 September 2016, hence the enquiry to Mr Morton and HR referred to above. In the circumstances the appeal hearing did not proceed further on 1 December. There are no notes of this meeting.

6.27. In an email of 7 December (page 142 to 143) the Claimant reiterated his request to Mr Ditcher for a copy of the 24 September email. Mr Ditcher replied on 9 December (also page 142) saying that unfortunately the email had not been retained by Mr Morton and could the Claimant please include the key points he would like Mr Ditcher to consider within the appeal document. During cross-examination Mr Ditcher explained that he had not spoken to IT to see if they could locate the email but he had been told by Laura Flatres of HR that reasonable steps had been taken to retrieve it. However in cross-examination he also admitted that it was retrievable. When asked why he had not spoken to IT Mr Ditcher reiterated that he had been told by HR that "we had taken reasonable steps". He believed that the reasonable steps had been speaking to Mr Morton and HR.

6.28. The Claimant endeavoured to provide further details of his appeal (but without the benefit of the document he had prepared on 24 September) in his email to Mr Ditcher of 15 December 2016 (pages 144 to 146). The Claimant reiterated that he wished the appeal to be a total re-hearing. By this stage it appears that the Claimant and Mr Dearlove had had the opportunity to listen to some calls and the Claimant contended (page 145) that on neither occasion had he misled, made false statements or said that it was easier to go to branch. The Claimant also stated that he had not confirmed or admitted, as per the disciplinary hearing notes, that he had not upheld the required standards. He maintained that he had not breached Conduct Rules 1, 2 or 4 (see page 146).

6.29. The appeal hearing was reconvened for 19 December 2016 and notes appear at pages 152 to 158. The Claimant was again accompanied by Mr Dearlove. No one from management was present to put forward the management case. One of the matters dealt with at the appeal was the "quicker in branch" allegation. This is referred to at the foot of page 154. Mr Dearlove states that on the morning of Saturday 24 September he and the Claimant had listened to the relevant call and the Claimant's position was clear that the customer had got the best outcome at a convenient time for them. Mr Dearlove went on to say that on neither

occasion had the Claimant misled or made false statements that it was easier to go to the branch. During the course of Mr Ditcher's cross-examination he stated that he had accepted this explanation and therefore upheld this part of the appeal. Again this was the first that the Claimant had heard of that. There is no reference to it in the appeal outcome letter.

Mr Dearlove went on to comment that with regard to several points in the disciplinary letter (presumably the disciplinary invite letter) the Claimant had not in several cases had the opportunity to listen to those calls. The Claimant was then asked a specific question about a day when his calls had finished at 3pm but his shift had not finished until 6pm – how was he using his time? The Claimant explained that he could not recall now, although he referred to having sent a detailed email to Mr Morton – in other words the 24 September email. The Claimant went on to say that it was unfortunate that the email was now missing and could not be recalled. This reference in the Respondent's own document clearly contradicts what Mr Ditcher has said in his witness statement at paragraph 8. There he suggests that the Claimant had agreed that he would be comfortable with the approach of explaining what the content of the now missing email was – and this of course at an appeal hearing some three months after that email had been written.

6.30. There was subsequently a letter written by Mr Ditcher containing the outcome of the appeal. In fact there were at least two versions. The first version, which was sent to the Claimant and which is dated 4 January 2017, is at pages 164 to 165. It is a very brief letter. Mr Ditcher had concluded that the original decision was fair and reasonable and so the appeal had not been successful. His reasons were stated as:

"

- Issues regarding your productivity and call handling practices were identified by your line manager and you were supported through an informal action plan. Your improvement in performance was not sustained and you continued to deliver in a manner that was not in the best interest of customers.
- Your line manager provided appropriate support including offering the service of the employee assistance programme, when you raised your concerns regarding the level of pressure in the role on 22 April 2016.

  (*So that suggests that there perhaps was a meeting with the Claimant and Ms Parkin in April 2016*).
- Significant support was offered to you in the role to support your personal time management. This included scheduled time for appointments, call backs, administration and quality checking.
- It is regrettable that you did not have the opportunity to review the disciplinary hearing notes. However, once the appeal meeting was re-arranged to give you the time to review, there were no subsequent revisions that would constitute as a

> mitigating circumstance for the outcome of you (sic) disciplinary hearing. "

It follows that in this letter Mr Ditcher did not deal with the detailed allegations which had been put to the Claimant in the disciplinary invite letter. Nor did he refer to the at least one point that he had upheld on the Claimant's appeal. After the first outcome letter had been sent to the Claimant there was a discussion between two members of HR which is recorded at page 170B. That is an email from Anna Furness to Laura Flatres. Two changes are suggested to the letter which has already been sent to the Claimant. The first was "to include the wording on conduct rues (sic)/certificate" and the second was "legal advice – suggest we don't reference performance as it potentially confuses the dismissal reason". In the meantime it seems that a further copy of the outcome letter was sent, pretty much originally as drafted but this time dated 6 January 2017 and a copy is at pages 167 to 168. There is then a "tracked" version of the outcome letter which appears at pages 171A to 171B. This too was sent to the Claimant in a version which included the tracking comments and amendments that had been made. Accordingly in this version the reference to the Claimant's improvement in performance not being sustained was deleted and the tracking note which was also included in the version sent to the Claimant stated "Laura, I would advise (in my legal capacity, not CCMT) that we do not refer to performance. The issue here is conduct and we want to be clear on that so the reason for dismissal is clear". The final substantive paragraph has also been changed. The original version read:-

> "The sanction communicated to you in the letter dated 3 October 2016 will therefore continue to apply".

In the revised version this has been changed or at least prefixed with:

> "I consider that the original decision regarding the conduct rules breached was correct. The decision to remove your fitness and propriety certificate is upheld".

6.31. At page 291 in the bundle is what is described as "Example Regulatory Reference for Mark Alexander Stone". The "leaver reason" is given as "Dismissal – Gross Misconduct Dishonesty". The Claimant of course had not been dismissed for dishonesty – at least in the sense that the ordinary reader of that reference would understand that phrase.

7. The parties' submissions

7.1. Claimant's submissions

Ms Barry had prepared extensive written submissions and also addressed me at some length. In terms of assessing the actions of a reasonable employer in a conduct dismissal case I was referred to the leading case of **British Home Stores v Burchell** and also the case of **A v B** [2003] IRLR 405 and the principles set out therein. Accordingly the standard of reasonableness would depend upon the gravity of the charges and their potential effects – including those visited on the employee. A careful and conscientious investigation of the facts would be necessary and any enquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of

the employee. Further delay in conducting an investigation might of itself render an otherwise fair dismissal, unfair. Ms Barry went on to point out that a dismissal for gross misconduct in the financial services sector was likely to be career ending.

The Claimant had never been given a copy of his informal meeting notes of 31 May 2016 nor of his time plan. The Respondent had never taken a statement from Carol Parkin despite the Claimant stating that she had been happy with his improvement and progress since the May 2016 meeting. Further the Claimant had been disadvantaged by not having access to the necessary documentation when being asked to answer detailed questions during the disciplinary process.

The Claimant contended that his dismissal was both substantively and procedurally unfair. There had been no real or meaningful attempt to obtain the Claimant's response to the allegations. Whilst Ms Andrews had listened to the calls and considered documentation it was never felt appropriate to share that opportunity with the Claimant at the material time. Mr Morton had confirmed in his cross-examination evidence that to do so would be the norm. At the third undocumented meeting with Ms Andrews, the Claimant had been told that he would have a chance to put forward his case before any further meeting occurred but that had not been the case. It was astonishing that no statement had been taken from Ms Parkin if she genuinely believed that one of her direct reports was guilty of gross misconduct. Ms Andrews' report (Factors for Consideration) was incomplete and misleading and yet Mr Morton relied upon it heavily. There had been no need for the Claimant to be suspended. He had been allowed to work for some three weeks prior to the suspension. Ms Barry suggested that on the day of suspension it appeared that behind the scenes HR had decided that the allegations would now be categorised as gross misconduct. Mr Morton had approached the disciplinary hearing on the assumption that the records of the investigation meeting were the Claimant's account of the allegations. Again Mr Morton had made no enquiry with the Claimant's line manager as to what had happened with the anticipated weekly reviews during June.

Having regard to the description of the disciplinary hearing on 21 September 2016 (final competence meeting) it appeared that Mr Morton was approaching the matter on the basis of competence or capability rather than misconduct. Mr Morton had been critical of the Claimant for not preparing his defence but the reality was he had not had the opportunity and by the time of the disciplinary hearing could not explain without access to his computer and spreadsheets. Extracts from the transcripts had been put to the Claimant without the full transcript being available. Mr Morton had never bothered to ask for the transcripts or even listen to the calls himself. The notes of the disciplinary hearing had not been sent to the Claimant for his signature and indeed were not provided to him at all until some 10 weeks after the event.

Whilst the Claimant had prepared his response of 24 September 2016, Mr Morton had not acknowledged that and Ms Barry suggested that his evidence about receipt or knowledge of that document had been muddled, even in his own witness statement. In any event Mr Morton

had not explained in the dismissal letter why he had rejected the Claimant's defence or explanations. The reasons for dismissal as stated in the outcome letter ignored the explanations which the Claimant had offered. Mr Morton had not engaged with the Claimant's defence and proceeded on the basis that he could make the decision without access to primary sources of evidence. The Claimant's blemish free disciplinary record, length of service and the devastating effect of the dismissal had been ignored.

The appeal had not cured these matters. There was no evidence that anyone had made any attempt to retrieve the Claimant's email of 24 September 2016. Whilst by the stage of the appeal hearing the Claimant had been able to listen to some of the calls and was now able to contest Ms Andrews' view of them, Mr Ditcher made no effort to listen to the calls himself in order to make his own decision on the matter.

With regard to the appeal outcome letter, it appeared that after one version had been sent to the Claimant, HR or legal had then interfered with the process and suggested a new wording. They had realised that Mr Ditcher had referred to performance and they wanted that reference removing. Ms Barry suggested that that begged the question as to whose decision it was to dismiss the appeal and on what basis.

There should be no Polkey reduction if unfair dismissal was found. That was because the procedural failings had been so extensive that it was impossible to say that a fair procedure would not have made a difference.

In relation to contribution, Ms Barry contended that there was no satisfactory or credible evidence that any misconduct had occurred. At worst it was a performance issue which should have been dealt with on an entirely different basis using a different procedure. Whilst there appeared to be admissions towards the end of the disciplinary hearing (see page 111) the Claimant contended that those notes were not accurate.

7.2. Respondent's submissions

Ms Ferber addressed me by reference to the list of issues Counsel had prepared. The first question was was the reason for dismissal - conduct. Ms Ferber pointed out that conduct and capability can overlap. It was clear in this case that the Respondent was operating under the Colleague Conduct Policy (page 36). That included competence as one of it's elements (see page 40). Here the Respondent believed that the Claimant was being wilful. Ms Ferber acknowledged that there had been an amendment to the appeal outcome letter (171A) but HR had approved the earlier version which had been sent to the Claimant as well (page 169). The use of the word 'performance' could connote either conduct or capability.

As to whether the reason for dismissal was actually fair, the starting point was Burchell. In terms of reasonable belief, the Claimant had not contended that there was any ulterior reason for his dismissal. Mr Morton's evidence had been clear that it was the substance of the answers which the Claimant gave during the course of the disciplinary

hearing that were crucial to his decision. The Claimant had accepted that he had signed the notes of the first two investigatory meetings. In those notes he had made reference to concern about missing his break. To have done so, rather than have dealt with an application, showed the Claimant's bad attitude.

In terms of investigation Ms Ferber contended that there was no need for Mr Morton to go back to deal with the question of specific times and dates because what the Claimant had said during the course of the disciplinary hearing was sufficient.

In terms of procedural fairness the decision to dismiss had not been based on the Claimant's answers to questions regarding specific calls but rather on how he answered questions at the disciplinary hearing itself. The Claimant had been given the opportunity to look at his computer on 24 September. Ms Ferber suggested that it was plausible that Mr Morton would be able to recall the 24 September email when subsequently within these proceedings he saw it. His memory had been jogged. It may have been that Mr Morton took little heed of that document because the reason for dismissal was primarily the answers the Claimant gave to Mr Morton.

I suggested to Counsel that the Claimant had never been charged with what could be described as the 'demeanour issues' (hardly surprising as those had allegedly arisen during the course of the disciplinary hearing itself). Ms Ferber suggested that there were some references to the Claimant's approach in the disciplinary invite letter at page 97 and in any event it was not unusual for new matters to crop up at a disciplinary hearing. The Claimant's behaviour at the disciplinary hearing had merely underlined what the Respondent's concerns were.

In terms of general fairness Ms Ferber noted that there was a particularly high personal obligation for employees in the financial services sector. There was a high conduct obligation. That was witnessed by the document at 55A(1 to 3). That was by reason of the FCA's overview. The answers given by the Claimant at the disciplinary hearing had shown that he was not taking personal responsibility for how his way of working impacted on customers.

In terms of contributory fault if a finding of unfair dismissal was made Ms Ferber suggested that that should be significant - that is 75%. The Claimant had made admissions about his way of working to Ms Andrews.

In relation to Polkey the Claimant had not been dismissed in respect of specific calls but more in relation to his attitude. None of the Claimant's criticism of the procedure had an effect upon that that. It was his attitude as presented to Mr Morton at the disciplinary hearing. So it was very likely that the outcome will be the same. Any reduction should be at least 75%.

8. My conclusions

8.1. Can the Respondent show a potentially fair reason to dismiss?

The Respondent seeks to show the reason of conduct. That is of course one of the reasons permitted by the Employment Rights Act 1996 section

98(2). Accordingly I find that the Respondent has shown that potentially fair reason. The debate as to the conduct/capability overlap – or worse according to the Claimant's case – is a matter which I deal with below in terms of actual fairness.

8.2. Was the dismissal actually fair?

8.2.1. Was the reason one of wilful incapability or innocent incapability?

The important distinction here is that in the former case, where there is a wilfulness, the employee can do the job properly because they are adequately trained and sufficiently experienced but choose not to do it properly because, for example, they are lazy. In that type of case the reason for dismissal will be conduct. However in what I have described as the innocent case the employee is just not up to the job. That may be because of inadequate training, inexperience or lack of aptitude.

The distinction is important, not least because the reasonable employer will approach the matter in quite different ways depending upon what type of employee it has before it. If it is a wilful case then it would be appropriate for a reasonable employer to deploy it's disciplinary policy and in an appropriate case issue warnings or ultimately dismiss. In the innocent case a quite different approach is required. If it is perceived that further training is required then that must be given. If there is inexperience then perhaps mentoring. If the employee is just not suited to the particular work then consideration would have to be given to alternative employment. Performance management would be deployed but ultimately it may be necessary to dismiss.

The Respondent before me is adamant that the reason for dismissal was misconduct. Despite this I find that as of Spring 2016 the Claimant's performance was being considered informally by the Claimant's line manager Carol Parkin. I have not had the benefit of hearing from Ms Parkin, but the documents she produced (the undated note at page 54 and the note of the informal meeting on 31 May 2016 at pages 56 to 59) are couched in terms that clearly show that the Claimant was being treated as an employee who needed support in circumstances where the employee felt under pressure because of extra workload. Significantly Ms Parkin prepared the time plan (page 55B) to assist the Claimant in managing his time. According to her own document, Ms Parkin intended to conduct weekly reviews with the Claimant throughout June. Unfortunately that did not occur. I accept that there is a reference to the consequences of the Claimant not demonstrating an immediate and sustained improvement – described as "ultimately …. disciplinary action". Further at the beginning of the note there is reference to "details of the misconduct". There is it seems, an uneasy relationship between conduct and capability in the Respondent's approach. A further example of this is the reference to competence in the Respondent's Colleague Conduct Policy (see page 40).

As the Claimant was not spoken to, as far as I am aware, by Ms Parkin (regarding his performance) after 31 May meeting I accept the Claimant's evidence that he believed he had made an improvement and that that had been accepted by his manager. It appears that Ms Parkin took a different view insofar as the HR log or time line record at page 172 records. I have not heard from whoever it was in HR who received Ms Parkin's call on 28 July 2016. In that note Ms Parkin confirms that the Claimant's call outcomes have improved. It is not entirely clear whether the reference "he is not displaying the right behaviours" is a stand alone comment or whether it relates to the wording above – productivity and customer experience. Ms Parkin is also expressing concern about the Claimant's calls allegedly being 50% lower than his peers and comments that the Claimant is making it more difficult for the customers and not working in the same way as his peers. The somewhat radical step of suspension has it seems been suggested to Ms Parkin by her line manager. Of these concerns at that time I find that the Claimant was blissfully ignorant. Bearing in mind that there had been no reviews during June (despite the time line note referring to "we put a plan in place until end of June" I find that any reasonable employer that was harbouring those concerns would have approached the employee and followed up on the matters which had been discussed at the 31 May meeting. That is all the more so as there had not been the weekly reviews promised. Despite the comments in the log, the employer still did not approach the Claimant. Instead a process of what I assume was targeted monitoring of the Claimant's calls to customers was conducted, without his specific knowledge, during the period 13 July 2016 to 2 August 2016.

I find that this approach of the employer contributed to an underlying failure by the Respondent to adequately put the Claimant on notice.

I find that a reasonable employer would not have moved from the general tone and mood of the discussion on 31 May 2016 to the unannounced investigation meeting before Laura Andrews on 29 July 2016 which was the start of the disciplinary process. I take the view that a fair employer would have taken further steps directed at capability before invoking the disciplinary process. It might be assumed that an organisation of the size of the Respondent would have a capability procedure. Rather confusingly I was told that the Group Competence Policy or Competence Policy, both of which which are referred to in the Colleague Conduct Policy, did not exist.

The cracks between the capability approach and the conduct/disciplinary approach continue right up to the disciplinary hearing, which is described as a final competence meeting and even unto the appeal, as in the first iteration of the appeal outcome letter there is, with HR approval, a reference to performance. It is not until legal advice is given that references to

performance are deleted from the second version of the appeal outcome letter.

I find that there was a somewhat sinister mutation of what a reasonable employer would have treated as a competence/performance issue to what this employer, at least from the end of July 2016 onwards, decided to deal with as a conduct issue – moreover gross misconduct.

8.3. The ultimate reason for dismissal

Whilst I find that this employer unreasonably chose to treat capability as conduct, there is an additional element of unfairness in that, as per Ms Ferber's approach in the cross-examination of the Claimant and in her closing submissions, it is said that by the time of dismissal the Respondent had moved on from the specific incidents which were the subject matter of the monitoring and the two or three investigatory meetings with Ms Andrews. The Respondent now says that the true reason for dismissal was what Mr Morton deduced to be the Claimant's "behaviours" or approach to the work during the course of the disciplinary hearing. Whilst I accept that the invitation to that disciplinary hearing had made passing references to the Claimant's "behaviours", the main thrust of the allegations were the six bulleted points within that invitation. Having regard to the disadvantage to which the Respondent's approach had put the Claimant during the course of the disciplinary hearing (as to which see below) I find that a fair employer would not have drawn adverse inferences from the employee's replies, which were often replies to truly hypothetical questions or semi hypothetical questions as they were based on what the Claimant had told Ms Andrews when he was equally disadvantaged by lack of access to his computer, diary and other records.

8.4. The unfairness at the investigatory stage

Under the Burchell principles a fair dismissal for conduct requires there to be a reasonable investigation – that is one which is within the reasonable band. Whilst Ms Andrews had the recordings of the allegedly faulty calls and it seems transcripts of those calls, inexplicably she did not permit the Claimant to either listen to those calls or read the transcript. At best it appears that she quoted selective parts from the transcripts. As Ms Andrews was not called to give evidence, Ms Barry cross-examined Mr Morton at length on what he took from the investigation conducted by Ms Andrews. During the course of that cross-examination Mr Morton accepted that it would be normal in a case like this for the recordings to be listened to by the employee although he went no further than to say that potentially the Claimant should have had the recordings played to him. He also accepted that it was "potentially" unfair for the Claimant to have to try to deal with the questions that were being put to him without the transcript. I consider that any reasonable employer would have permitted that and so there is actual unfairness in this case not potential unfairness.

The other significant cause for concern – when assessed against the standard of the reasonable employer – is that despite being asked detailed questions about what he did on a particular date at a particular

time the Claimant was denied access to his computer, spreadsheets, diary or any other documentation which would have assisted his memory about calls which were now some weeks past. Again during Mr Morton's cross-examination he accepted that the first two investigation meetings could be described as flawed. However that had not occurred to Mr Morton when he was relying on the notes of those two meetings during the course of the disciplinary hearing. He of course did not listen to any calls or read any transcripts. He simply relied on the notes of the "flawed" investigation meetings.

Whilst the test for investigation remains the reasonable band, it is to be noted that the case of A v B to which I have been referred does explain that the standard of reasonableness will depend upon the gravity of the potential effect of dismissal. It seems to be common ground that a dismissal for gross misconduct in the financial services sector is likely to be career ending.

8.5. Were any of these defects cured at the disciplinary hearing?

Quite simply they were not. Because the Claimant had been suspended since 24 August 2016 he had no possibility of access to his work computer or other records which would have helped him prepare for the disciplinary hearing and to deal with the very detailed allegations contained in the invitation letter. It remained the case that the Claimant had not been permitted to listen to any recordings or read any transcripts. For that matter, Mr Morton had denied himself that opportunity as well.

When ultimately, and it seems somewhat grudgingly, the Claimant was permitted to come to the office on the Saturday morning to go through his records, the fruits of that work – the Claimant's email of 24 September were it seems more or less ignored by Mr Morton. Having reviewed the evidence around this issue (see paragraphs 6.21 above) I conclude on the balance of probability that the 24 September email was received by Mr Morton but only given cursory consideration. It seems that that was because in Mr Morton's mind there had been the radical change of emphasis so that he was now concerned with more general questions of the Claimant's behaviour and ethos rather than the minutiae of the matters set out in the disciplinary invite.

In this way there was a triple disadvantage to the Claimant. When those issues were highly pertinent – during the Andrews investigation – he could not answer them properly because he did not have the documentation. Then at the disciplinary hearing Mr Morton makes adverse findings against the Claimant in part on the basis of what he has or has not been able to say at the investigation stage. Then when the earlier unfairness of exclusion from the recordings and computer records etc is cured it serves little purpose for the Claimant because by now Mr Morton has moved on in his own mind to a different format of misconduct. It seems that Mr Morton's approach is that the mortgage advisor should always go the extra mile for the customer and if that means losing a break then so be it. Commendable as the Bank may think that approach is, it was not the arrangement that had been made for the Claimant under the time plan with Ms Parkin. She prepared the

plan for the Claimant, the Claimant works to it, thinks he is doing alright but then is criticised by Mr Morton for doing precisely what the plan required him to do.

8.6. The quality of the notes of the disciplinary hearing (or final competence meeting)

It is common ground that the Claimant did not see these notes until some 10 weeks after the meeting in question. It is worthy of note and concern that the appeal officer Mr Ditcher himself only realised that he had not got those notes either at the commencement of what was to have been the appeal hearing on 1 December 2016. It is questionable how seriously Mr Ditcher was taking the process if his preparation had not led him to that discovery before the day in question. It is clear that the disciplinary hearing notes are only a summary of what was said and it seems that there has been paraphrasing to the extent that the Claimant is recorded as saying some quite damming things about himself –

"it boils down to me ultimately"; "due to inflexibility I wasn't doing them (applications) on my end"; "clearly not enough (*feeling that it wasn't right*) to motivate me to change" and "I wasn't working how the company wanted, looking back".

The final question to the Claimant on page 111 is recorded as "Given all we have discussed, have you always put the customer first?" To which the Claimant is recorded as making the reply "Regrettably not". In my view these replies seem to have the flavour of what the Respondent wanted to hear rather than what the Claimant is actually likely to have said.

8.7. The quality of the disciplinary outcome letter

Even taking into account Mr Morton's apparent change of tack regarding the focus of the disciplinary matter, it is of concern that in the outcome letter very little reasoning is given and hardly any specific findings are set out on the numerous allegations in the invitation letter. As I have recorded, during the course of Mr Morton's cross-examination it became apparent for the first time that in fact he had not upheld at least three allegations against the Claimant that is to say allegations as contained in the invitation letter.

The appeal

Regrettably the same sloppy approach is evident in Mr Ditcher's appeal outcome letter where again, to everyone's surprise during the hearing it emerged that at least one of the grounds of appeal had been upheld. Whilst referring to the appeal outcome it is also significant that Mr Ditcher took no reasonable steps to try to obtain or retrieve the Claimant's 24 September email. Obviously that has been located one imagines with relative ease as it has found its way into the trial bundle. However at the time it's absence and Mr Ditcher's failure to do anything meaningful about that added a further unfairness to the process. The Claimant having gone to the trouble of preparing the 24 September email which remained on his work computer now did not have access to it and so is asked to try to remember what was in it. His position therefore has

become little better than it was at the investigation meetings and at the disciplinary hearing.

On the basis that Mr Ditcher did not have the 24 September email and did not listen to recordings of calls or the transcripts I find that the appeal in no way cured the unfairness which already had occurred in the disciplinary process.

8.8. Conclusion on fairness

For the reasons set out above my Judgment is that the dismissal was both substantively and procedurally unfair. The approach of the Respondent having regard to its size and resources and having regard to the consequences of dismissal on the Claimant acted well outside the reasonable band.

8.9. Polkey

Here I agree that the submission of Ms Barry that the procedural failings were so manifold that, even having regard to the unavoidable speculation which the Polkey exercise requires, no sensible conclusion can be reached that dismissal in any event was likely or even possible.

8.10. Contribution

Here it is for me to make a finding rather than to adopt the reasonable employer approach. On the material before me it is the case that the Claimant had legitimate replies and answers to the matters which were charged in the invitation letter. Over and above that, the allegations were not in my judgment of sufficient seriousness to register as conduct for which the remedy should be reduced. Because of the faulty approach of this employer to the 'revised' reason for dismissal I do not consider that any contribution applies there. Accordingly there should be no reduction to the Claimant's remedy.

Employment Judge Little

Date: 11th July 2017