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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr G Eleftheriou		Clydesdale Bank Plc

Heard at: London Central **On**: 8, 9 and 10 August 2017
11 August 2017 (In Chambers)

Before: Employment Judge Glennie

Representations
For the Claimant: Ms R Wedderspoon, Counsel
For the Respondent: Ms C Aldridge, Solicitor

JUDGMENT

The judgment of the Tribunal is as follows:

1 The complaint of unfair dismissal is well founded.

2 The Claimant contributed to his dismissal to the extent of one third, and any basic or compensatory awards should be reduced accordingly.

3 The complaints of failure to pay a redundancy payment and breach of contract are dismissed on withdrawal.

4 The issues as to remedy will be determined at a further hearing on 11 January 2018.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Eleftheriou, indicated that he was making complaints of unfair dismissal, non-payment of a redundancy payment and other payments. At the outset of the hearing the claim was clarified as being one of unfair dismissal only. I have therefore taken it that the recorded complaints of failure to pay a redundancy payment and breach of contract should be dismissed on withdrawal.

2. The Respondent by its response disputed that complaint.

3. In advance of the hearing the parties agreed with the Tribunal that the hearing would be confined to the issues as to liability only as it was considered that the time allocated would be insufficient to allow for a determination of remedy, if arising. It was agreed that the issues as to liability would include the potential issues as to contributory conduct, the ACAS code and the principle in **Polkey**.

4. At the conclusion of the evidence and submissions on liability I reserved judgment.

The Issues

5. The issues to be determined at this hearing were the following:

(1) What was the reason for the dismissal? The Respondent relied on the potentially fair reason of a reason related to conduct. The Claimant disputed this reason.

(2) Whether the dismissal was fair or unfair having regard to the reason shown by the Respondent.

(3) Whether any basic or compensatory award to the Claimant for unfair dismissal should be reduced by reason of his conduct.

(4) If the dismissal was unfair whether following a fair procedure would have made a difference to the outcome.

(5) Whether any award in the Claimant's favour should be the subject of an uplift because of a failure to follow the ACAS code of practice.

The Evidence and findings of fact

6. Evidence was given on behalf of the Respondent by the following witnesses:

7.1 Mr Brian Colquhoun, current UK Head of Commercial Banking but at the time Regional Director for the South Region and the Claimant's line manager.

7.2 Ms Lesley Beattie, Head of Transactional Banking in the Customer Value Division.

7.3 Ms Kathryn Morgan, Head of Customer Banking Enablement in the Customer Banking Division.

7.4 Dr Claire McCormick, Head of Tax.

7. The Claimant gave evidence on his own behalf.

8. There was an agreed bundle of documents and page numbers in these reasons refer to that bundle.

9. Given the nature of the evidence about the actions and behaviour of individuals who are not witnesses, it was agreed that four of these would be referred to in the course of the evidence by the initials of their first names, which were respectively N, I, S and C. It was noted during the hearing that the use of the initial "I" could create apparent confusion with the personal pronoun "I". This did not give rise to any difficulty in the course of the hearing. However in these reasons it will be necessary to make extensive reference to the individual "I" and to avoid confusion or seemingly incongruous statements I shall refer to this individual by the letter Z.

10. Other individual employees who were not the subject of criticism as were N, Z, S and C, were interviewed in connection with the events under review. Given the nature of those events and what the various individuals said about them I shall refer to them by their initials rather than their full names.

11. The Respondent has a code of personal conduct, a copy of which was at page 260. This included the following:

> "Employees must maintain a high standard of personal conduct and courtesy and must act with honesty and integrity in all personal and business dealings to ensure that the Bank cannot be brought into dis-repute.
>
> "The Bank is committed to promoting a good and harmonious working environment, where all employees are treated with respect and dignity at work, and in which no form of discrimination, intimidation or harassment will be tolerated. Therefore, it is important that you treat all those who you come into contact with (be they other employees or members of the general public) with dignity and respect.
>
> "Employees are also expected to behave in an appropriate manner outside of office hours in relation to work related activities.
>
> "Concealing, ignoring errors or omissions, or attempting to protect fellow employees who have breached the bank's regulations or the law is viewed very seriously and you may face disciplinary action including dismissal …."

12 I was also referred to the Respondent's disciplinary policy at pages 49-75. On page 51 the policy set out the disciplinary stages which were: at Stage I a formal verbal warning said to be appropriate for minor offences; Stage 2 a first written warning for repeated misconduct within the duration of a previous warning or misconduct of a more serious nature; Stage 3 a final written warning for serious misconduct or cases of a repetition of a minor offence within the duration of a previous warning; and Stage 4 termination of employment for repeated

misconduct within the duration of a previous warning or a gross misconduct offence.

13 On page 52 the policy stated that in exceptional circumstances it might be appropriate to issue a Stage 3 final written warning in conjunction with one or more of the following as an alternative to dismissal; then listing freezing or reduction of salary, suspension without pay or transfer to a different role with or without a reduction in salary.

14 The Claimant joined the Respondent in November 2010 as a Managing Partner in the Private Banking division. Before this he had worked for Barclays Bank as a Regional Director for 18 years. He was promoted to Head of Regional Business and Private Banking Centre in 2012, based in London, and in January 2015 his role was extended to cover three other centres at Gatwick, St Albans and Bury St Edmunds. He spent about two or three days a week in the London office and the remainder of the week visiting the other centres.

15 The Claimant's direct line manager was Mr Colquhoun. The Claimant had six direct reports including S, the Head of Private Banking in London. Z and N, who both worked in the London Office, reported directly to S.

16 On the evening on Friday 22 April 2016 a leaving party for a member of the Respondent's commercial team took place at a bar named "Dirty Martini's". The Claimant did not attend this function. There came a point in the course of the evening when Z, who is male, and N, who is female, were both in the ladies' lavatory at the same time. Both were told to leave the bar by the security officer. What the Claimant said that he knew and what he did about this incident became the subject of a disciplinary investigation and process which I will set out in greater detail later in these reasons. At this stage I will simply record that on Monday 25 April Z approached the Claimant and told him something about what had happened.

17 On 6 May 2016 Mr Colquhoun received at home an anonymous letter, at pages 262-263. This said that it had been sent by a group of employees and that they wished to bring to his attention a number of serious code of conduct breaches involving persons including the Claimant. The letter referred to the provision in the code of conduct about behaving in an appropriate manner outside of office hours in work related activities. The letter then read as follows:

> "George Eleftheriou is aware that some time ago Z and N were engaged in sexual activity in open view of others in a public house on a team night out. At the time George told people that the matter was dealt with and would not happen again. It is also public knowledge within London that George was also sexually involved with N in the office and was caught in the act on CCTV! Did you know about this?"

The letter then continued with reference to the incident at Dirty Martini's as follows:

> "Once again it is common knowledge within London that Z and N were caught in the ladies' toilet actively engaged in a sexual activity. Z and N were forcibly ejected (in full view of the public) from the premises by security. Prior to this happening Z had spent £150 on a bottle of champagne to toast Private's H1 success. Do you think that: (a) CB staff should be seen in public drinking expensive champagne in light of the adverse public view on banker excesses; and Z and N are doing anything to enhance our image from their disgusting behaviour in public? It would be interesting to see who signed off the expense claim for the drinks that evening."

18 The letter continued with an allegation about P allowing his partner to attend after work drinks session and allegedly taking the Claimant, S and Z out for lunch as thanks for her 2015 performance appraisal and bonus; and CD resigning because he was disgusted with the behaviour of "this clique of untouchables". The letter concluded with an invitation to Mr Colquhoun to investigate these matters and to "stamp out" this behaviour "otherwise we feel obliged to bring to the attention of David Duffy" [the Respondent's CEO].

19 Mr Colquhoun consulted Ms Justina Stringer of HR. His evidence was that he had not previously been aware of any allegations or rumours regarding Z or N or indeed of any unhappiness within the Claimant's team. Then on 12 May 2016 Mr Colquhoun attended the London office and spoke to various people. His evidence was that he did not select any particular individuals to approach, but that he simply spoke to those who happen to be there at the time.

20 In summary, Mr Colquhoun spoke to the following individuals. NA, who was a manager at the same level as S, had not been at the event at Dirty Martini's, but said that she had heard rumours about N's behaviour on that occasion. She said that she was not aware of any rumours about breaches of the expenses policy and when asked about whether CD's resignation had been affected by the actions of others, NA replied that it could have been, and that the rumoured behaviour of others was not acceptable. AA had not been present at the event at Dirty Martini's, but said that she had heard talk about it in relation to the behaviour of Z and N and that she had heard other rumours about N's behaviour in terms of sleeping with other members of staff.

21 AH referred to intimacy between two people that was inappropriate and said that he felt uncomfortable talking about this. Mr Colquhoun asked whether it would be easier if he asked the questions and AH replied that it would. Mr Colquhoun asked directly whether he was talking about N and Z, which he confirmed that he was, and said that he had heard talk about what had happened at Dirty Martini's. He also said that he had heard of an occasion when a security guard had surprised N and the Claimant in a compromising situation in the office.

22 Mr Colquhoun proceeded in a similar way with CS, who also said that he was uncomfortable about discussing matters. Mr Colquhoun asked whether he had heard any rumours about N and Z being familiar with each other and he said that he had, but that he had only heard about it; he had not witnessed it. CS

said that there was a rumour that someone else in the office had a relationship with N. Mr Colquhoun asked whether he meant the Claimant and CS replied "yes but I only heard rumours". He added: "There is a clique and it is unhealthy". Mr Colquhoun asked whether the clique consisted of the Claimant S, MA, Z and N and CS said that this was correct.

23 Mr Colquhoun also spoke to HL, who had one time been the Claimant's personal assistant. She said that she had heard talk about Z and N's behaviour at a function at Champagne Charlie's and that subsequently she saw them flirting at the Christmas party and at a later leaving party. She was not present at Dirty Martini's, but had heard about Z and N's behaviour and the purchase of the champagne. She said that she had no reason to believe that this had been paid for by the Respondent. Mr Colquhoun asked HL whether anybody else was involved with Z or N and HL replied that the Claimant had been involved with N. She said that she had spoken to him about the rumours and he told her not to listen to gossip.

24 Finally, on this occasion, Mr Colquhoun spoke to TC who said he was worried about the drinking culture among some of the people in the office. He said that he had heard about the Dirty Martini's incident and that he had heard of N being involved with the Claimant. TC said that CD was unimpressed with the sort of behaviour that he had been describing and said that he himself would regard this as a contributing factor if he were to leave the Respondent. He added that in his view it would have been impossible for there to be impartiality in the award of bonuses and annual review given the relationships between members of staff that he had identified.

25 On 13 May 2016 Mr Colquhoun carried out investigation meetings with the Claimant, Z, S and N. These were attended by Ms Justina Stringer, HR Case Consultant and Ms Kim Mace, note taker. The notes of the Claimant's interview are at pages 85 to 88 and his amendments to those notes are at page 106A. Mr Colquhoun asked the Claimant whether he was aware of an allegation of inappropriate sexual behaviour within the team. The Claimant replied that he was aware of this and that he understood this to be a reference to an incident that happened when he was working in St Albans, i.e. the Dirty Martini's incident. The Claimant said that Z had approached him to speak privately and continued as follows:

> "We went into an office and he said he needed to tell me about something that happened at LE's leaving do. Z said: 'We had a good evening. I followed N into the ladies' toilets. I was only there for a moment, talked to her and then left the toilet but then the bouncers ejected me for being in the ladies toilet, so I left the pub'. So I gave him a bit of a lecture about the brand and leadership and said you need to think about what happened. Z then said to me he had been childish but that nothing had happened in the toilet. I said: 'You need to go to your desk and carry on as normal.' It seemed like a storm in a teacup. I was going to be seeing S later so could talk to him. N sits close to me and she seemed normal."

26 Mr Colquhoun asked the Claimant about S, to which the Claimant replied:

> "S said that at the lunch that she (N) mentioned what had happened and was embarrassed. So this is 2 to 3 pm on day 1, so I said to S if it was something childish and a one-off, ok. But if something does come up you must take it seriously, could grow arms and legs. So S said Z had said nothing happened and N said she was embarrassed but nothing happened. She was not making a complaint about harassment or anything like that."

27 Mr Colquhoun asked whether anything like that had been brought to the Claimant's attention previously, to which he replied "absolutely not" and that he had had a very hectic week at that time. The Claimant continued that on the Thursday of that week someone (C) had asked to speak to him confidentially and told him that Z and N had been in a cubicle in the ladies toilet and both were kicked out of the pub. The Claimant said that if that was true he would look into it, and that after this he went to speak to S. He continued that he said to S that if the version of events he has been given on Thursday was correct, that was different from what he had previously understood, and that S should go to Z and find out everything that had gone on, and tell him that he must be truthful about it, or there could be consequences.

28 Following this, the Claimant said that on the Friday of the same week S had told him again that nothing had happened in the ladies' lavatory, and that Z and N had not been in a toilet cubicle together. The Claimant then said to Mr Colquhoun that at this point "all seems low key, there had been no harassment, no one had complained about it. N had not complained about it so I did not escalate it".

29 Mr Colquhoun asked the Claimant whether he had been made aware of other incidents involving the same people. He said that no one had ever come to him about this, although C did say that he thought that the Claimant knew about these matters. He said that CM said that it was not the first time, but that this was news to him, the Claimant. He said to Mr Colquhoun that he knew that Z and N were friends, but he wanted to try to deal with facts not rumours.

30 Mr Colquhoun then said that there had been an allegation about the Claimant and N engaging in sexual activity in the office, to which the Claimant replied "absolutely not, I am staggered". Then Mr Colquhoun said that there was an allegation of expensive champagne being claimed on expenses and being signed off by the Claimant following the Dirty Martini's evening, to which the Claimant said that he was aware there was champagne but it was not on expenses. Mr Colquhoun asked whether S brought his partner to events held by the Bank and the Claimant said that he had not met him at work events.

31 Mr Colquhoun then passed to the allegations of the existence of a clique asking: "So there is no atmosphere in the office. You are not aware of any clique?" To which the Claimant replied "No, or I would deal with it". Mr Colquhoun asked whether there was anything else to mention and the Claimant said that he wanted to reiterate the point about how busy he had been the previous week. He said:

> "I have the intention to look into this situation, MA's Dad had died. I was off-site with commitments. I wanted to sort but just did not have the time. I would have spoken to everyone to try and deal with it."

32 Mr Colquhoun then said:

> "I have been asking all these questions because we have been given as I mentioned before overwhelming information that this is just the icing on the cake and the straw that broke the camel's back, that this isn't the first time this type of behaviour and other concerns have been brought to your attention and no action has ever been taken. This may go to disciplinary action if that is appropriate course after the investigation is concluded".

The Claimant asked: "For me?" to which Mr Colquhoun replied "I don't know for whom. That is what the investigation is for". The Claimant said "no one has ever approached me. This is a total shock", to which Mr Colquhoun said "It is to us too, we will be asking a number of question throughout the office". The meeting then concluded.

33 The meetings with Z, S and N on the same day can be dealt with more shortly. Z gave his account of the incident at Dirty Martini's, saying that he followed N to the ladies toilet, that she was in a cubicle, there was a bit of banter between them and he walked out. The security officer then told him that he had to leave the bar. He denied any sexual relations between himself and N then, or at any other time. He said that he spoke to S and the Claimant about the incident at Dirty Martini's so that they would know the truth. He said that he bought a £180 bottle of champagne by mistake and paid for it himself.

34 When S was interviewed he related what Z told him about the Dirty Martini's incident, which was substantially the same as the account given by Z himself, and he said he did not have any concerns generally about the behaviour of Z and N. He denied the existence of a clique. Later in the interview S said that on the Monday following the Dirty Martini's incident Z told him what had happened and said that he was going to speak to the Claimant about it; and that subsequently S himself had spoken to the Claimant who said that he had told Z to keep his head down. He said that he and the Claimant agreed that if there was no victim and no complaint, no action was required. He then referred to the Thursday of the following week when the Claimant informed him of what CM had told him and told S to go and ask Z for the full details again. S did this and there was no change to Z's account.

35 N gave an account of the Dirty Martini's incident that was consistent with Z's version and gave a similar account about the purchase of champagne by mistake. N denied any sexual relations with the Claimant. When Mr Colquhoun asked her whether there was a clique she replied: "I get on with MA, A and S get on, there are several cliques, different people get on with each other." It seemed to me that at this point N was not agreeing to the existence of cliques in any pejorative sense, but rather understanding it as referring to friendships among

people in the office. Mr Colquhoun asked whether the cliques caused problems and N replied that perhaps people thought that she and MA were favoured. N stated that she was upset about the gossip that had gone on since the Dirty Martini's incident. She accepted that she and Z had flirted, and that this was not appropriate when representing the Respondent.

36 Mr Colquhoun spoke to other individuals on 13 May 2016. He received a variety of responses about the Dirty Martini's incident. For example, KB stated that she had not been there but had heard rumours about the behaviour of Z and N; LC was there and saw Z following N into the lavatory, and had heard rumours about the Claimant and N; while MM had been at Dirty Martini's but had not witnessed anything.

37 Mr Colquhoun interviewed the Claimant again on 16 May 2016. Again, there were notes kept on which the Claimant later made his own observations (pages 89-90). Mr Colquhoun asked the Claimant about the perception that he was closer to N than he was to some other relationship managers. The Claimant said that he and N had worked together previously, that subsequently they had both transferred to London, and that they would go out socially about once a month as they did not know anyone else in London. He denied any favouritism.

38 Mr Colquhoun carried out further investigatory meetings with individuals on 16 May 2016. It is not necessary to set out the content of these in any detail, but by of example S largely reiterated what he had said previously but added a further incident at another bar named "The Lyric" involving Z and N. FW said there were lots of rumours about Z and N and that she was pleased that the investigation was happening. She said that she had previously witnessed inappropriate behaviour between Z and N and that she believed that something had been going on between the Claimant and N. She alleged that N got favours. She suggested that there was a clique of the Claimant, Z, MA, S and N. Other individuals stated that they had heard about what was said to have happened at Dirty Martini's.

39 On 20 May 2016 Mr Colquhoun interviewed CM. The notes of this meeting, which were heavily redacted, were at pages 120-125. CM said that he was not at Dirty Martini's but he had heard about what had happened. He said it was not the first time that there had been gossip about Z and N but in answer to the question whether the Claimant had heard about this before this incident he replied "I am not sure".

40 The Claimant and Mr Colquhoun spoke again by telephone on 26 May 2016, there being a note of this conversation at pages 91-92. Mr Colquhoun asked why it was that the Claimant took no action after Z had spoken to him to which the Claimant said:

> "In hindsight I now think that every morning. As Head of Centre I am paid to make decisions, there is no intention to suppress issues. To me the fact that there was no complaint is key. In people's social lives and work

you were going to hear lots of things. I am already concerned and it has made me now escalate lots of things to you."

41 Mr Colquhoun then said that in the course of investigation the instant messages sent within the team had been reviewed and he raised a particular one from the Claimant to N on 27 April offering to help her as a friend. The Claimant said that N had been quiet for a couple of days and he wanted to make sure that all was well with her. Mr Colquhoun then asked about a message of the same date that stated "Please don't. Things will blow over. If you want to talk you know where I am. X" and he asked whether it was appropriate to put the "x" on the end. The Claimant said that he was trying to be supportive.

42 Mr Colquhoun then said that from his discussions with the Claimant and others he had a feeling coming across that there was a clique, to which the Claimant said that he tried to be balanced and that this was feeling like a witch hunt. The meeting concluded with the Claimant saying that perhaps he had made a misjudgement but it was not a conduct issue and that he would never cover something up.

43 This conversation was followed on 27 May by a meeting at the Claimant's request with Mr Colquhoun (pages 93-95). The Claimant said that he wanted to add to the discussion of the previous day and he began by confirming the sequence of events. He then said that he wanted to address the clique issue, which he understood as meaning working together and excluding others. He said that his relationships with S, Z and N were not like that. He said that he had known N from before moving to London but had been careful with their friendship in the office. The Claimant then repeated what he said about his knowledge of the Dirty Martini's incident, saying that he had now wished that he had spoken to Mr Colquhoun and that if he was aware of misconduct from anyone he would deal with it.

44 On 1 June 2016 Mr Colquhoun produced an investigation report (pages 79-84). His findings and conclusions were at page 83 and in summary were the following:

(1) With regard to the Dirty Martini's incident the Claimant took Z's account as true and took no other action beyond speaking to S. Mr Colquhoun would have expected the Claimant to take action such as investigating further or raising it with him or with HR.

(2) Mr Colquhoun did not consider it credible that the Claimant was unaware of the rumours about the behaviour of Z and N.

(3) There was evidence of a clique operating to the exclusion of others within the private banking team and Mr Colquhoun believed that the Claimant had not investigated the Dirty Martini's incident because of his friendships with those involved.

(4) There was no corroborating evidence of a sexual relationship between the Claimant and N and Mr Colquhoun recommended no further action on this.

(5) There was no evidence of expenses being misappropriated.

(6) There was no conclusive evidence of CD resigning because of concerns about the behaviour of others in the team.

45 Mr Colquhoun recommended that a disciplinary hearing should take place in respect to the Dirty Martini's incident and in respect of the existence of a clique which was affecting good harmonious working relationships.

46 Following this, Ms Beattie sent a letter of 13 June 2016 (pages 76-78) inviting the Claimant to attend a disciplinary hearing on 21 June. This was accompanied by a copy of the investigation report and 22 sets of notes of Mr Colquhoun's meetings with the various people involved.

47 The letter stated that the Claimant would be expected to respond to three allegations. These were expressed in the following terms:

(1) Breach of the personal conduct section of the code of conduct. On Monday 25 April 2016 you were made aware of the inappropriate behaviour of two employees who report to you (Z and N) during a night out with other Bank employees at the Dirty Martini bar and you did not take any action. It is understood that you are aware of previous incidents between the above named employees and did not take any action regarding their conduct.

This has impacted on Private Banking employees, whereby an anonymous complaint letter was submitted expressing dissatisfaction with the working practices and employee behaviours. It is believed that your failure to address some Private Banking employees' behaviour has allowed a segregated and inharmonious working environment to exist to the detriment of other employees in the team [there was then a reference to the code of conduct].

(2) A breach of the personal conduct section of the code of conduct. An anonymous complaint letter was submitted expressing dissatisfaction with the working environment and practices within the Private Banking team. It is believed that you allowed a segregated and inharmonious working environment to exist within the team for which you are responsible. Specifically it is alleged that you have not taken steps to prevent employees in your team feeling isolated and disadvantaged as a result of friendships/relationships that you have developed with some team members. [There followed another reference to the code of conduct].

The letter continued "if either of the above allegations is proven your alleged failure to meet the Bank's standards would constitute

misconduct in accordance with the disciplinary procedure and a warning under the disciplinary procedure may be imposed".

(3) Breach of the code of conduct. If both misconduct allegations are established I will consider whether there has been a fundamental breakdown in trust and confidence in you as the Head of Centre. If I consider that to be the case the outcome could be the termination of your employment with notice."

48 The proposed meeting did not in fact take place on 21 June because on 16 June the Claimant was signed off as unfit for work by reason of stress.

49 On the same day the Respondent announced that a review of roles, including in the Private Banking team, was underway.

50 The Claimant was referred to the Respondent's occupational health team and a telephone assessment was arranged for 25 July 2016. Before this on 21 July Ms Beattie again wrote to the Claimant stating that she wished to reschedule the meeting for 2 August 2016, although in the event it did not take place then as the Claimant was not well enough to proceed. The letter repeated the three allegations of breach of the code of conduct. There were also attached to the letter an extract of notes of Ms Beattie's discussion with S in the course of the disciplinary process relating to him. These show that S had on this occasion said that he and the Claimant had discussed with Z his behaviour on an occasion at "Champagne Charlie's" and that Z was remorseful about what had occurred there. This was an incident that was said to have taken place before that at Dirty Martini's.

51 Thereafter on 10 August 2016 an announcement was made about proposed redundancies and a letter was sent to the Claimant (page 273) which together with its enclosures made it apparent that his role was likely to be affected by the proposals. The documents included a severance quotation and role profiles for alternative employment roles.

52 Then on 1 September 2016 an anonymous complaint was received by the Respondent's CEO. A summary of this was provided to Ms Beattie (page 336) and was also sent to the Claimant on 5 September with an invitation to a rescheduled meeting on 13 September. The summary suggested that the same material as in the first anonymous letter had been repeated, coupled with a complaint that nothing had happened about the first letter.

53 The meeting in fact took place on 14 September, when the Claimant said that he was ready to take part. He was assisted by Mr Sean Williams, an employee representative. The meeting was conducted by Ms Beattie, assisted by Ms Julia Smith, HR Case Consultant, and Ms Sarah Thompson, who took notes (pages 339-345) which were signed by the Claimant. At this point, all involved believed that Ms Beattie was going to make a decision about the disciplinary allegations. As I shall describe, in the event that proved not to be the case and therefore it is not necessary to look at what was said at the meeting in

the same detail as would have been appropriate in the event that Ms Beattie had made a decision.

54 The Claimant gave his account of what he had heard about the Dirty Martini's incident from Z and the discussion about it that he had had with S. He denied that he, Z and S had discussed an incident at Champagne Charlie's and stated that if this sort of thing had happened more than once than he would not have tolerated it. The Claimant denied a sexual involvement with N and said that he believed that the anonymous letter was malicious. The Claimant said that he did not at the time think that he ought to advise Mr Colquhoun of the events at Dirty Martini's, but that he would do so if he had his time again. He agreed that his first port of call about the matter was S, and said that he was the line manager of Z and N. The Claimant said that he had made some mistakes in his decisions and that with hindsight he would have asked S to fully investigate the Dirty Martini's incident. The Claimant reiterated that no one had approached him with any concerns, that N was not treated differently to anyone else, there was no clique and no one was isolated or disadvantaged.

55 By this point Ms Beattie had concluded the disciplinary processes in relation to Z, N, S and C. The outcomes of these were as follows:

(1) Z was given a final written warning under Stage 3 of the Disciplinary Procedure.

(2) N was summarily dismissed.

(3) S was given a Stage 3 final written warning coupled with demotion.

(4) C was summarily dismissed.

56 The question of the significance, if any, of these outcomes will be addressed later in these reasons.

57 Ms Beattie made some further investigations after the meeting on 14 September. She looked at the Respondent's internal survey known as "My Voice" which showed no obvious complaint about the Claimant's management style. She spoke to Mr Colquhoun about those he had interviewed, as the Claimant had said that he felt these were cherry-picked. Mr Colquhoun said that he had interviewed people on the basis of who was in the office at the time.

58 Then on 22 September 2016 Ms Beattie interviewed MA, HL, SR and SZ. MA suggested that the Claimant N, M and sometimes S and Z would socialise together and appeared to be closer to one another than to others. She said that she had heard a lot about behaviour of team members at events but had not witnessed it for herself. She said that it would be hard to believe that the Claimant did not know about the rumours about Z and N, but that she could not confirm the position.

59 HL said that there was a lot of gossip about Z and N and about the Claimant and N, and she said that various people were complaining that there

was favouritism and that nothing was being done about it. She said that she had mentioned this to the Claimant. However, when asked specifically what she had raised with him she replied that people were talking about him and N, that she had asked if there still something going on, and he said that there was not, although he said that there had been a time when the relationship with N had gone a bit too far. HL said that after that the Claimant had told her off for gossiping and then did not speak to her for a period of about three months, all of this happening some time in 2014. HL said that she believed that there was a clique and that N, Z and MA were favoured.

60 SR said that he did not believe that there was a clique, and that he knew the rumours about Z and N but never saw anything himself. SZ said that the team was divided in two, one part of it doing whatever they wanted. She identified the members of that part as being the Claimant, N, Z, S and MA. She referred to the rumours about Z and N and was asked whether the Claimant knew about the rumours. She replied: "100%" but when asked why she was so convinced she asked whether she could say this off the record. What she then said was not recorded and no evidence has been given about what it was.

61 On 27 September 2016 (pages 352-353) Ms Beattie invited the Claimant to a reconvened meeting to take place on 4 October. It was still intended that Ms Beattie would make the decision about the disciplinary process and communicate it at this meeting.

62 On 29 September, however, Ms Beattie was told of a text message that HL had received from the Claimant. This was at page 559 and read as follows:

> "Questioned: 'Thanks. Sorry didn't respond. No signal on train. Sorted things with work wife. Thanks for putting up with my crap yesterday. Important that we keep it between us only'.
>
> "Removed a question mark from … [then the same message as before from Thanks onwards.]"

63 On 3 October 2016 HL provided a document headed "Investigation Statement" at pages 555-557 in which she said that she had received the message from the Claimant on 28 September at 9.45 pm and that she thought that this had occurred because the Claimant had received a copy of the notes of the meeting recently held with her. She agreed that the message appeared to be a copy of a previous message and said that her recollection was that the Claimant had sent this to her after he had told her that something had happened between him and N.

64 HL said that the Claimant would call N his "work wife" and that she understood the message to be making sure that she did not tell anyone what he had told her. She said that since receiving the message she had been very upset and emotional, was worried for her future outside of the Respondent and felt anxious. HL said that she did not feel like she wanted to be at work or to continue to talk about this. She had previously said that when she received the message she felt sick, worried, scared and upset because she had betrayed

the Claimant's trust and he would have known exactly what she had said, that she was worried about what else he would do or send and she was on her own that night. Although not absolutely clear from the record of her statement, it seemed to me that HL was at all times referring to how she felt the second time that she received the message in September 2016.

65 The planned meeting between Ms Beattie on 4 October 2016 proceeded, a note of it being at pages 537-543. The Claimant was again assisted by Mr Williams. Ms Beattie began the meeting by stating that the allegations and possible outcomes remained unchanged for now. There was discussion of the statement that HL had given and which had been disclosed to the Claimant (not the statement about the text message). There was also discussion about whether there was a clique and favourable treatment of N.

66 Then on page 540 Ms Beattie stated that she had been informed of the text message and said that in the light of this new information her role within the disciplinary process had changed and she was reverting to being investigation manager. She said that she would investigate the text message as a new allegation and that if disciplinary action were recommended, an independent hearing manager would take a decision on that and the previous allegations that had been discussed.

67 The Claimant was shown a copy of the text. He said that he was trying to download his old texts because he was looking for some to copy as evidence, but in doing so had accidently deleted all messages. He bought a recovery programme to try to get the texts back but did not at this point send the text in question. He said he could go through his texts. The Claimant said that HL used to call N his work wife and he went along with that description. He said that it was possible the text referred to a time when he was telling her things about the relationship between him and his wife.

68 Ms Beattie said that HL was extremely upset and the Claimant questioned why he would send her the text to incriminate himself and said that it must have been an old text that had been sent inadvertently. Ms Beattie then said that the Claimant was suspended on full pay to enable the Bank to investigate the allegation of sending the text message. The Claimant repeated the point about software to recall his messages and said that the system must have sent the message, not him.

69 The suspension was confirmed by Ms Beattie in the letter of 4 October 2016 (pages 544-545). The Claimant sought a further opportunity to explain matters to Ms Beattie and a telephone conference took place on 5 October 2016 in which he explained in some detail how he had checked his phone and how it could have been that he had sent the text to HL inadvertently.

70 Then on 7 October 2016 Ms Morgan sent a letter to the Claimant (pages 549-551) stating that she had been appointed as hearing manager and inviting him to a reconvened disciplinary hearing on 14 October. The letter included the previous three allegations, now numbered 2, 3 and 4 and a new allegation at number 1 as follows:

> "Gross misconduct - breach of the personal conduct section of the code of conduct. On Wednesday 28 September 2016 at 21.45 a text message was received from your personal mobile phone by HL's personal mobile. The text stated [and it quoted the text].
>
> "On Tuesday 27 September 2016 you were issued interview notes from HL following your initial disciplinary hearing held with Lesley Beattie on 14 September 2016. The message was received on Wednesday 28 September 2016 late at night to HL's personal mobile phone. It is alleged that you have acted inappropriately as you have not been open and truthful when preparing information to submit within the disciplinary investigation. You later submitted on 4 October 2016 as evidence to be considered by Lesley Beattie at a reconvened disciplinary hearing [sic]. Specifically it is alleged that you are attempted to conceal, amend and manipulate the records from your message log as the messages no longer exist on your mobile phone. Notably the content of the message refers to a relationship you have been questioned about.
>
> "Due to the timing and content of the messages received you have caused HL great distress as she feels vulnerable and unsettled. This is because the message referred to your inappropriate relationship with a junior colleague and your request to keep the relationship private."
>
> [There was then reference to the code of conduct].
>
> "If proven your alleged failure to meet the Bank's standards would constitute an act of gross misconduct in accordance with the disciplinary procedure and your employment may be terminated without notice."

71 The letter was accompanied by Ms Beattie's investigation summary, HL's statement about the text, a letter about it from Mr Colquhoun and copy of the text. Ms Beattie expressed her conclusion in the following terms:

> "Based on the investigation conducted I do not consider George willingly sent the text to HL and I do not believe he wished her harm and was visibly saddened that this went to HL. The test shows that the original message would not have been deleted in being sent to HL on 28 September 2016. The evidence suggests that the reason for clicking on the message was not to copy but to delete the message. This is my conclusion based on that the text was not submitted in evidence, was not referred to by George prior to it being brought to his attention, and the content does not support George's assertions of the situation.
>
> "It is my view that based on the facts from the investigation the incident being investigated is not proven, with no malicious intent by the sending of the text. That said, the content of the text and the actions that led to the unintended sending of the text do give rise to question the evidence George has put forward and I believe should form part of the wider investigation."

72 The disciplinary hearing with Ms Morgan took place on 17 October 2016. Ms Stringer attended as HR representative and Ms Beth Westmorland was the note taker. The Claimant was again assisted by Mr Williams. There are notes at pages 570-577, again signed by the Claimant. The meeting began with Ms Morgan reading out the content of the allegations. The Claimant said that he needed to understand allegation 1 more (this relating to the text message) and he asked what the Bank was alleging. The Claimant stated that the expression "work wife" had been used in 2013 before he was aware of people talking about him. He said that he would use the term: "it is like being married at work". He said that he told HL not to spread rumours and gossip. He said that the text message had originated from 2013 when he had a conversation with HL over a drink, had spoken about what it was like being away from home during the week in connection with work, and said that things had been bad at home.

73 The Claimant further explained that he had seen that HL said in her interview that he had not spoken to her for three months. He said that this was not true and he therefore thought of checking his phone. He was trying to copy and paste a text but some how managed to delete everything and then had to recover his texts with the software that he had purchased. The Claimant stated that he could see that the text was involved in the case as Ms Morgan stated, but that Ms Beattie had accepted that it had gone to HL's phone unintentionally. He pointed out that he had handed over his phone to Ms Beattie at the previous meeting. On page 574 the Claimant was recorded as saying this:

> "I want to summarise. How was I concealing when I turned over my phone or hiding a relationship which I disputed when telling HL to stop gossiping. I could have denied knowledge of the text to Ms Beattie but didn't so wasn't concealing anything. It makes no sense and I find it upsetting and don't see how I can be dismissed on this."

74 The discussion then turned to the other allegations and the Claimant again set out his account of the events following the Dirty Martini's incident. He asserted that neither he nor Mr Colquhoun had known about any previous incidents. He disputed the existence of a clique and said that he was being made a scapegoat. He referred to a risk of redundancy and said that when he contacted HR about this he was told that he would not receive notice of redundancy as there was a crossover with the present process, and redundancy could not be dealt with until the disciplinary process had concluded. On page 576 the Claimant said that he was facing a misconduct process but S was still in the business when Z and N were his direct reports, to which Ms Stringer replied that as Head of Centre he was expected to conduct himself in a more professional manner and to display a higher level of conduct than was expected from a more junior employee. The Claimant replied that there should be the same expectation as they all adhere to the same code of conduct.

75 The meeting was adjourned for about 1 hour and 20 minutes after which Ms Morgan gave her decision. In relation to allegation 1, regarding the text, she said that she accepted that there was no "intent of malice in the sending of the text". She referred to the content in terms of the expression "work wife" and

asking for things to remain between the Claimant and HL and said: "However historic I do not consider appropriate between a senior and leader and junior member of staff. Also your text message caused HL great distress due to the content and timing". For this she decided that a Stage 2 first written warning was appropriate.

76 On the second allegation concerning Dirty Martini's, Ms Morgan stated that she was confident that the Claimant did know about the inappropriate behaviour and chose either by design or incompetence to do nothing about it. She decided that this allegation merited a Stage 3 final written warning. With regard to allegation 3 Ms Morgan stated that she believed that a clique did exist within the team and that the Claimant's personal friendships were central to this. She said: "As a senior leader this is unacceptable. It was your responsibility to create an inclusive and healthy culture. It is my belief that you failed to do so". For this Ms Morgan awarded a Stage 2 first written warning. She then said that, given her findings on the three allegations, she was exercising the Respondent's right to take the warnings together, and the overall decision was therefore dismissal with notice. She referred to the right to appeal.

77 Ms Morgan confirmed the outcome in a letter of 20 October 2016 (pages 578-581). In relation to the text message Ms Morgan repeated that she accepted that the Claimant had no malice towards HL, recorded that nonetheless HL was extremely upset and she repeated her concerns about the content of the message and the Claimant asking HL to keep the matters concerned secret. In relation to allegation 2 (Dirty Martini's) Ms Morgan said that the Claimant should have instructed an investigation into the incident and escalated it appropriately. She stated that although the Claimant had denied knowledge of any previous incidents of inappropriate behaviour, she was confident that he knew about this and chose to do nothing about it. She further stated that the Claimant's instant messages showed relationships with a select group of team members to the exclusion of others which had led to him making the decision not to sufficiently investigate their inappropriate behaviour. Ms Morgan stated that rumours of the team's inappropriate behaviour were well known across the business and that the Claimant's lack of action demonstrated poor decision making and a lack of implementation of the Respondent's values.

78 In relation to allegation 3 Ms Morgan said that she had concluded that the Private Banking team was operating in a segregated way; that individuals had resigned at least in part because of the working environment; and that the anonymous complaint letter to Mr Colquhoun suggested that people were not comfortable escalating issues to the Claimant. Ms Morgan did not reach any conclusion on the fourth allegation of a breakdown in trust and confidence as she had concluded that dismissal was the only appropriate outcome given the findings on allegations 1, 2 and 3.

79 In her oral evidence Ms Morgan stated that she believed that the Claimant had deliberately sought to delete the text message. She said that there was a contrast in what the Claimant and HL were saying and that the message supported HL's account in that did it show that he had confided in her. She accepted that the text was historic and repeated that she believed that the

Claimant had originally tried to delete the text and then had inadvertently sent it to HL. Ms Morgan said that she was aware of the structural changes and that the Claimant's role had disappeared, but said that employees had the right to apply for different roles and/or redeployment. She agreed that it was true that the dismissal meant that the Respondent did not have to pay a redundancy package to the Claimant but firmly denied that this was a factor in her decision.

80 Ms Morgan denied the suggestion that allegations 2 and 3 amounted to a single allegation that had been split in two, saying that in her view they were entirely different. She said that if the Claimant's account of what Z had told him initially about the Dirty Martini's incident was correct, this should have sounded warning bells. The Claimant should have asked himself why Z was telling him about this and should have investigated what had happened.

81 The Claimant raised an appeal against the decision on 27 October (pages 585-591). He set out again an account of the text message allegation. He contended that the findings in respect of allegation 2 were unjustified, saying that he had taken some action and that there were mitigating factors that prevented him from going further and speaking to colleagues about the alleged incident. He said that there was no evidence he had been aware of any earlier inappropriate behaviour and pointed out that Mr Colquhoun had been unaware of that as well. With regard to allegation 3 he contended that, whether or not the team was operating in a segrated way, there was no evidence to show how his actions or leadership had led to this or what he should have done differently. He then set out 12 alleged procedural failings.

82 The Claimant concluded his appeal by referring to inconsistency of treatment, saying that the Respondent had not taken any action against MA, who had admitted being aware of alleged behavioural concerns, and that S and Z had both remained in the business and apparently had not been required to respond to allegations of allowing an inharmonious environment to exist. He asked how it was consistent that he had been dismissed yet they had not.

83 Dr McCormick was appointed to hear the appeal. On 14 November 2016 she spoke to Mr Colquhoun (notes of this meeting being at pages 597-601). With reference to the allegation that the Claimant had engaged in sexual activity with N in the office, Dr McCormick asked Mr Colquhoun whether there had been any attempt to review the CCTV records or to trace the security guard alleged to be concerned. Mr Colquhoun said that he looked into the claims but there was no evidence. Dr McCormick expressed concern about whether the instant messages that had been reviewed showed breaches of confidentiality. Dr McCormick and Mr Colquhoun discussed the Claimant's reaction to the Dirty Martini's incident and the allegations about the existence of a clique. Mr Coquhoun referred to the suggestion that N had been favoured in terms of the deals that she was invited to undertake but said that he could not find anything to substantiate those claims. He said in relation to the Claimant's team "they always seemed a harmonious bunch. There was a theory you couldn't speak about certain people".

84 Later in the meeting Dr McCormick expressed the opinion that the instant messaging record contained comments that seemed highly inappropriate and asked why this had not been raised with the Claimant. Then she asked, what did Mr Colquhoun think the consequences would be for the team if the Claimant were allowed back, to which he replied "unthinkable, I'm not sure what it would say about the Bank and its culture".

85 The Claimant was unwell for a period and in the event the appeal meeting took place on 11 January 2017. The amended version of the notes of this meeting is at pages 636-643. Dr McCormick conducted the hearing. Ms Kay King was the HR case consultant, Mr Aidan Davison was the note taker and once again Mr Williams assisted the Claimant.

86 There was a fairly brief discussion of the text message to HL. The Claimant then once again set out his account of the sequence of events following the Dirty Martini's incident. With regard to motivation for dismissing him, the Claimant said (at page 639) that he had sought a pay increase when deputising for Mr Colquhoun and had been told that the Bank would be happy to see some people "walk" as that way they would save money. This he relied on as suggesting that the Bank might view the disciplinary process as a way of saving the need to pay him a redundancy package. The Claimant repeated the point that S and Z had remained in the business while he had been dismissed.

87 The meeting was adjourned for about an hour and a half following which Dr McCormick gave her decision, which was not to uphold the appeal. She said, making a mistake, that the text message had been sent during a period of suspension. That was corrected by Ms King and Dr McCormick began again saying that contact had been made during the course of disciplinary process whilst on authorised absence. Dr McCormick also referred to allegations 2, 3 and 4.

88 The appeal outcome was dealt with in greater detail in the outcome letter of 19 January 2017 (pages 621-626). In connection with the text message (allegation 1), Dr McCormick wrote this:

> "I accept your assertions that:
>
> (i) The text was sent in error; and
>
> (ii) that you did not intend to cause harm, but the fact remains that you did so. Causing such hurt is a breach of the personal conduct section of the code which states that no form of discrimination, intimidation, or harassment will be tolerated.
>
> I share the concern of the hearing manager (letter 20 October 2016) that your actions that resulted in deletion of the relevant text may have been an attempt to conceal matter connected with the investigation. You denied that this was the case saying that you were attempting to collect evidence. It is my view that tampering in any way with a thread of electronic communications …. whether on a

> personal or corporate device knowing they were connected with a matter being investigated was at best a serious error of judgment and at worst an attempt to conceal the facts. In either case it represents a breakdown of the Bank's trust in you."

89 In relation to allegation 2, Dr McCormick observed that allegations 2 and 3 were in certain respects similar. She said that she had separated them and treated allegation 2 as relating to personal behaviours of specific employees N and Z and the Claimant's actions on learning of them, and allegation 3 as a complaint of general disharmony and the existence of a clique.

90 On allegation 2 Dr McCormick said that she found that the Claimant did not take adequate action in relation to the reported behaviour of N and Z, and that given the potential seriousness of the matter, he should have instigated a thorough investigation earlier. Dr McCormick recorded a finding that the Claimant's behaviour towards N was significantly different from that towards other members of the team, referring to his use of an X as a kiss in an instant message, and the expression of the view that matters would blow over. Dr McCormick said that the Claimant's style in office communicator messages was excessively intimate, in particular with N, but in addition coarse and unprofessional language was used, and she gave some examples. She stated that there was a widely held perception of a clique, that the Claimant did in fact have a different relationship with some employees, and that he had used the office communicator system in a wholly inappropriate way.

91 With regard to allegation 3 Dr McCormick said that she found that the Claimant had allowed a segregated environment to exist and that his excessively familiar relationship with N was likely to have contributed to this. She said that a segregated environment contravened the code in terms of the commitment to promoting a good and harmonious working environment where all employees are treated with respect and dignity. Like Ms Morgan, Dr McCormick made no further reference to allegation 4. Dr McCormick then went through point by point the 12 procedural items that the Claimant had raised in his appeal letter.

92 In relation to the question of inconsistency of treatment, Dr McCormick said that she was aware of the wider situation and the impact on other individuals but was unable to divulge confidential information. She said "from the information that I know however I am comfortable that you have been treated in a consistent and appropriate manner".

93 In her oral evidence Dr McCormick said that her understanding was that she had to determine whether Ms Morgan's decision had been within the range of reasonable responses. It was put to Dr McCormick that she had originally allocated only two hours for the appeal meeting, which she denied, saying that she had booked a train for 2.30 but eventually caught one at 4.30. Dr McCormick did not think that there was anything in allegation 3 that was not also to be found in allegation 2. She said that she took the instant messages and their content into account in considering whether the code of conduct had been breached.

The applicable law and conclusions

94 Section 98(1) of the Employment Rights Act 1996 provides that:

"…….it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

95 The Respondent's case was that the reason for the dismissal was the findings made against him by Ms Morgan and upheld by Dr McCormick, and that this was a reason within subsection (2), being a reason related to conduct. The burden is on the Respondent to prove that reason: the Claimant does not have to disprove it, or prove any different reason. That said, in arguing that the Respondent had failed to prove the reason relied on, the Claimant contended that the true reason, or principal reason, for his dismissal was a wish to avoid paying a redundancy payment.

96 Certain arguments advanced by Ms Wedderspoon caused me to give thought to the question whether the Respondent had indeed proved the reason on which it relied. In particular, the finding that the Claimant should have preserved messages on his mobile phone might be seen as an attempt to bolster the case against him, when Ms Beattie had accepted his explanation of how the text in question came to be sent to HL. The fact that the Claimant was dismissed but S and Z were not (to be discussed further in these reasons) might be seen as suggesting some further reason beyond the Dirty Martini's and "clique" allegations for dismissing him.

97 Ultimately, however, I was satisfied that the Respondent had proved that at least the principal reason for dismissing the Claimant was the one on which it relied, namely the findings made against him, for the following reasons:

97.1 Mr Colquhoun's investigation of the Dirty Martini's and "clique" allegations was triggered by receipt of the anonymous letter and began on 12 May 2016. The announcement about redundancies was not made until 10 August.

97.2 There was no obvious reason why any of Mr Colquhoun, Ms Beattie, Ms Morgan or Dr McCormick should want to deprive the Claimant of a redundancy package.

97.3 There was no evidence of anyone else giving instructions to dismiss the Claimant, for whatever reason.

97.4 Conversely, the evidence gathered about the allegations was extensive, and those involved spent a considerable amount of time apparently making decisions about them.

97.5 It was plausible that the subject matter of the allegations would cause an employer such as the Respondent to be concerned: whether or not the decision to dismiss the Claimant was a reasonable one, it did not seem to me to be implausible that the decision was taken because of the view reached about the allegations.

98 I therefore found that the Respondent had proved that the principal reason for the decision to dismiss the Claimant was the one on which it relied. I also found that this was a reason related to conduct and so a potentially fair reason.

99 Section 98(4) of the 1996 Act provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *(a) 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*
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

100 Guidance on the application of this test was given by the Employment Appeal Tribunal in **British Home Stores Limited v Burchell [1978] IRLR 379** in terms that the Tribunal should ask itself whether the Respondent had a genuine belief, based on reasonable grounds, that the Claimant had committed the misconduct concerned, and whether such investigation as was reasonable had been made.

101 In **British Leyland UK Limited v Swift [1981] IRLR 91** the Court of Appeal stated that there is a band of reasonableness within which one employer might reasonably dismiss the employee whilst another might reasonably keep him on. The dismissal is unfair only if no reasonable employer would have dismissed. Subsequently in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**, the Court of Appeal emphasised that the objective standards of the reasonable employer applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

102 As stated above, I have found that at least the principal reason that Ms Morgan had for dismissing the Claimant, and Dr McCormick had for upholding the dismissal, was a reason related to conduct. I therefore also find that each had a genuine belief that the Claimant had committed the conduct in question.

103 Were there reasonable grounds for that belief? In relation to allegation 1 (regarding the text message received by HL), Ms Morgan found (and Dr McCormick essentially upheld the finding) that the Claimant had been attempting to delete the text when he inadvertently sent it to HL. Although the Claimant denied this, I find that there were reasonable grounds for believing that this was what he was doing. His account was that he had inadvertently deleted his texts and was trying to retrieve them: but it involved deletion. It was not difficult to see

why the Claimant might have wanted to delete the text concerned, involving as it did a reference to N as his "work wife" and a request to HL to keep the matters discussed to herself. Conversely, his explanation that he wanted to retrieve it in order to show that he had been in communication with HL at a time when she said he was not speaking to her, seemed less convincing.

104 It does not appear to me that the Claimant was under any formal obligation in relation to the disciplinary process to preserve or disclose evidence that might be unfavourable to himself, in the way that would apply in litigation. However, I consider that Ms Morgan and Dr McCormick were acting reasonably in concluding that it was misconduct on the Claimant's part to try to dispose of a text message that was potentially inconvenient to his disciplinary case while seeking to compile evidence in support of it.

105 I also find that (although the text had originally been sent in September 2016 and so was somewhat historic) it was reasonable for Ms Morgan to take the view that it was inappropriate for the Claimant to have a conversation of this nature with HL and then to ask her to keep it confidential. To the extent, however, that Dr McCormick may have taken a more serious view of this aspect because the text concerned matters that were the subject of investigation, that seems to me to be inconsistent with her acceptance that the Claimant sent it to HL on the second occasion in error. On that finding, he cannot have been attempting to persuade her to suppress the conversation in connection with the disciplinary investigation, if that is what Dr McCormick intended to mean.

106 The first part of Ms Morgan's finding on allegation 2 was essentially that the Claimant did not take any action in relation to the Dirty Martinis incident (again upheld by Dr McCormick). It might be said that the Claimant in fact took some action, in that it was apparent from what he, S and Z told Mr Colquhoun that he had asked S to speak to Z about the matter twice. It seems to me, however, that a fair reading of what Ms Morgan found was that the Claimant took no action in terms of a formal investigation into what had happened. Understood in this way, her finding was undoubtedly correct.

107 Ms Morgan assessed the failure to take action as involving "a lack of judgement" and "poor decision making and a lack of implementing the Bank's values" (both expressions used in the outcome letter at page 580). These words did not seem to me to sit very comfortably with a finding of misconduct, which is generally understood to involve an element of intentional wrongdoing, or at least of serious negligence.

108 I have also concluded that it was reasonable for Ms Morgan to find that the Claimant was aware of previous rumours concerning the behaviour of Z and N at social functions, in spite of his denial of this. There was evidence from FW, CM, HL and SZ about such rumours, with the last-named saying that she was sure that the Claimant knew about these. MA spoke in similar terms. S had spoken to Mr Colquhoun about an earlier incident.

109 In a similar way, I consider that it was reasonable for Ms Morgan to conclude that the Claimant was closer to Z and N than to other members of the

team: although not everyone interviewed supported the notion of a clique, FW, MA, HL and SZ did so, to varying degrees.

110 To the extent that allegation 3 added anything of substance to allegation 2 (and, like Dr McCormick, I doubted that it did), I consider that it was reasonable for Ms Morgan to find that the Claimant had allowed something like a clique to evolve in the Private Banking team, for the reasons given in the preceding paragraph.

111 I therefore concluded that, subject to the point I have made about whether lack of judgement or poor decision making should be regarded as matters of conduct, there were reasonable grounds for the belief that Ms Morgan held about the Claimant's conduct.

112 So far as the reasonableness of the investigation is concerned, Ms Wedderspoon made a number of criticisms of the procedure followed, which largely reflected points made in the "agreed list of issues" placed before the Tribunal. Ultimately I found this list to be rather too detailed to be of real assistance, and some of the points made seemed to me to be close to an invitation to me to substitute my own views for those of the Respondent. As examples of this, Ms Wedderspoon's first point was that the Respondent failed to treat the allegations in the anonymous letter with caution; the fifth was that the Respondent failed to consider the credibility and consistency of the Claimant's evidence versus that of other witnesses; the seventh concerned the weight to be given to certain facts; and the tenth concerned Mr Colquhoun's questioning style.

113 I considered that a rather broader approach should be taken to the reasonableness of the investigation. The test to be applied is that of whether what was done fell outside the range of investigations that an employer could reasonably undertake in the circumstances.

114 I found that there were some slightly curious features to the procedure followed. For example, it might be thought surprising that Mr Colquhoun decided to speak to the individuals who happened to be in the office when he visited, rather than deciding to speak to those who were most likely to be able to give relevant information; or that Ms Beattie began her second meeting with the Claimant as if nothing had changed, and then part of the way into the meeting announced that she would no longer be deciding the matter, but would be investigating the allegation about the text message.

115 Ultimately, however, I did not consider that these features took the procedure followed out of the range of that which was reasonable. Mr Colquhoun's random sample of individuals produced some who supported the idea that there was a clique and some who did not: interviewing others would not have changed that. Ms Beattie could have told the Claimant about the changed situation at the start of her second meeting, but again, doing so would not have made any material difference to what followed. Viewed as a whole, I found that the investigation was within the range of what was reasonable. I found that a reasonable number of witnesses were interviewed, the Claimant was given a reasonable opportunity to put his case, and there was the opportunity to appeal.

116 There remains the question whether dismissal was within the range of reasonable responses. I have again reminded myself that the test is whether no reasonable employer, acting reasonably, could have dismissed the Claimant in the circumstances; and that I must be careful not to substitute any view of my own for that of the Respondent, if the latter was acting reasonably. It is quite possible for situations to arise where one employer would (reasonably) decide to dismiss the employee and another would (reasonably) decide not to do so.

117 It seemed to me that the essential point about the view that the Respondent took about the Dirty Martini's incident was that expressed by Ms Morgan in her oral evidence in terms that the Claimant should have asked himself why Z was telling him about the matter, and that this should have led him to investigate what had happened. That said, I consider that any reasonable employer would recognise the following in relation to this incident:

117.1 The Claimant had not been present at the bar and was not in any way implicated in what occurred.

117.2 What to do when told about the incident was a matter of judgement, and not an easy question to answer. Different people might legitimately take different approaches. At the time that the Claimant took this judgement, there had been no complaint from anyone, including of course N. The first complaint was the anonymous one to Mr Colquhoun.

117.3 It was not the case that the Claimant did nothing at all. He spoke to S (who was Z's direct line manager) and effectively asked him to monitor the situation, in case it "grew arms and legs". When C spoke to him about the incident, he asked S to speak to Z again. S did so, and reported back that he had again been assured that nothing had happened in the lavatory.

118 I also consider that the reasonable employer would have in mind the sanctions applied to the others involved when considering how to deal with the Claimant's case. N and C were both dismissed. In the former's case, apart from the incident at Dirty Martini's and other occasions involving Z, there were found proved allegations of engaging with C in obscene communications via instant messages, and of breaching the confidentiality of Mr Colquhoun's investigation. In C's case, the findings concerned the obscene communications with N. Their cases were therefore somewhat different to the Claimant's.

119 The finding against Z was that he had behaved inappropriately with N at Dirty Martini's and on 3 other occasions. He was given a final written warning. Four allegations were found against S. One was failing to act in respect of the conduct of Z and N at Dirty Martini's and on one previous occasion. The second was colluding with Z over what to tell the Claimant about the incident; the third was breaching the confidentiality of Mr Colquhoun's investigation; and the fourth was using offensive and derogatory language in instant messages. The sanctions in S's case were a final written warning coupled with demotion.

120 It is not necessary to make a line-by-line comparison of the cases of the Claimant, Z and S, nor would one expect the reasonable employer to do so. However, I find that no reasonable employer could regard the Claimant as more culpable than either Z or S as regards the Dirty Martini's incident. It might be said that the more senior a manager is, the more responsibility they take for ensuring that employees behave appropriately. Nonetheless, I consider that no reasonable employer could take the view that the Claimant's seniority meant that his failure to investigate precisely what Z (and/or N) did was more blameworthy than Z's conduct in actually doing what he did, or S's conduct in not only failing to act on the incident, but also colluding with Z and breaching confidentiality.

121 There were also the findings in the Claimant's case that he had allowed a segregated working environment to arise, and in relation to the text message to HL. As indicated earlier in these reasons, there was room for debate as to whether the former added anything of substance to the findings in relation to the Dirty Martini's incident, which Ms Morgan concluded merited a final written warning, were it to stand alone. The findings regarding the text message added a further element of misconduct by the Claimant.

122 Ultimately, I have concluded that dismissal was not within the range of reasonable responses, and that the reasonable employer would have found that the following features of the case meant that the sanction was not open to them in the circumstances:

122.1 The Claimant's decision about how to respond to the Dirty Martini's incident was essentially a matter of judgement.

122.2 The Claimant did not send the text to HL intentionally.

122.3 Z had not been dismissed, although he was responsible for what happened at Dirty Martini's.

122.4 S had not been dismissed, although he also had not acted in respect of the incident, had in fact gone beyond a failure to act, and had committed other misconduct.

122.5 The Claimant had no previous disciplinary record.

123 The complaint of unfair dismissal therefore succeeds.

124 I next considered whether there should be any reduction in the basic or compensatory awards by reason of the Claimant's conduct, reminding myself of the provisions of sections 122(2) and 123(6) of the Employment Rights Act 1996. This is a different exercise from that of assessing the reasonableness of the conclusions reached by the Respondent. I have to make my own assessment of the Claimant's conduct.

125 Based on the evidence that I have set out at length above, I concluded that the Claimant had contributed to his dismissal by his own conduct in allowing

a working environment to arise in which there was at least the perception of the existence of a favoured clique, and then failing to undertake a more formal or rigorous investigation of an incident that involved two members of the perceived clique. The same is true of his conduct in seeking to delete the text message to HL, although not in accidentally re-sending it to her.

126 Setting these matters against my finding that, nonetheless, dismissal was outside the range of reasonable responses, I find that the basic and compensatory awards should both be reduced by one third. This assessment is necessarily largely a matter of impression, but it reflects my conclusion that the Claimant made a substantial contribution to his own dismissal, but not one that should be regarded as accounting wholly or mainly for the decision.

127 The principle in **Polkey** does not arise for consideration in the sense that I have not found any procedural unfairness. The more general questions of the Claimant's losses, and what would have happened if he had not been dismissed, are to be addressed at the remedy hearing.

128 There remains the issue as to the ACAS Code of Practice. Ms Wedderspoon submitted that there were breaches in that the Respondent (i) failed to look for evidence that supported the Claimant's case and (ii) unfairly singled him out as a scapegoat.

129 The first of these points is derived from the Guide rather than the Code of Practice and so does not have the same potential impact under section 207A of the Trade Union and labour Relations (Consolidation) Act 1992. The second point seems to be a more general allegation of unfairness, and does not reflect any particular aspect of the Code. I did not therefore find any breach of the Code.

130 The issues as to remedy will be determined at a further hearing on 11 January 2018. The parties should consult each other in order to ascertain whether any further case management orders are needed in connection with that hearing, and should inform the Tribunal accordingly.

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Employment Judge Glennie on 10 November 2017