# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mrs R Dhanda** | **v** | **TSB Bank Plc** |

**Heard at:** Cambridge **On:** 15, 16, 17 & 18 January 2018

**Before:** Employment Judge G P Sigsworth

**Appearances**
**For the Claimant:** Mr D Barnett, Counsel.
**For the Respondent:** Miss J Shepherd, Counsel.

## RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed.

2. The claim of wrongful dismissal/breach of contract is dismissed on withdrawal of it by the Claimant.

## RESERVED REASONS

**The Issues**

1. This is an unusual unfair dismissal claim. The Claimant was not in fact dismissed by the Respondent in the non-technical sense. She was demoted, because of her conduct (alleged by the Respondent to be serious or gross misconduct). As a preliminary issue at this hearing, I was asked to determine whether the right to take action short of dismissal, including demotion, as set out in the Respondent's disciplinary policy, was incorporated into the Claimant's contract of employment. I determined that it was not, and gave an oral decision to that effect. In those circumstances, the Respondent concedes that the Claimant's demotion amounts to dismissal as a matter of law. The Claimant continues to work for the Respondent as a lower grade bank manager.

2. The parties further agree that the reason for the Claimant's dismissal was conduct, a potentially fair reason. The Respondent therefore does not have to prove the reason for dismissal. The Claimant's case is that the dismissal (demotion) was unfair, on these grounds:

   2.1 There was an absence of reasonable grounds for the belief that that Claimant had committed an act of misconduct.

   2.2 There was no reasonable investigation.

   2.3 The sanction of 'demotion' (dismissal) fell outside the band of reasonable responses.

   The Claimant seeks reinstatement to her previous bank manager grade, if she is successful. The Respondent alleges contributory fault, in the event that the Claimant is found to have been unfairly dismissed.

   I am not asked to determine these remedy matters at this hearing. In the circumstances, this hearing proceeds as a liability hearing only. As the Claimant was summarily dismissed, in her claim form she claims wrongful dismissal and notice pay. I believe that I was asked to determine this matter at this hearing, but the Claimant's written submissions make it clear that she is now not pursuing a wrongful dismissal claim and she withdraws it. Therefore, I dismiss it on withdrawal.

3. The Claimant gave oral evidence on her own behalf, in accordance with her witness statement. The Respondent called three witnesses. They were: Mr Jonathan Ritchie, area performance operations manager for South Midlands, who conducted the investigation; Mr Gareth Lewis, senior manager, who was the dismissing officer; and Ms Michelle Jackson, area director, who was the appeal officer. The parties referred to an agreed bundle of documents of some 400 plus pages, as was necessary and appropriate. At the end of the hearing, there was insufficient time for the parties to make oral submissions. In the circumstances, it was agreed that they would provide written submissions and written responses to the other side's written submissions. These documents were due to be delivered, and were delivered, to the Tribunal on and before 19 February 2018.

**Findings of Fact**

4. The Tribunal made the following relevant findings of fact:

   4.1 The Claimant has been employed by the Respondent (or its predecessor, Lloyds TSB) since November 2004. Until the events with which we are concerned, and her demotion, she was manager of the Northampton branch of TSB Bank, a role she had been in since April 2013 – first at Bedford, and then at Northampton from January 2016. It is a small branch with three full time employees (including the Claimant) and three part time employees. The Claimant worked a five day week, and also most Saturday mornings. In

Northampton, the Claimant was a grade D bank manager. Her role and responsibilities included monitoring and leading a team, managing the day-to-day responsibilities of the Bank, from cashiering to coaching, and supporting front line staff. The Claimant was also responsible for ensuring compliance with internal procedures, which were designed to keep customers, partners and the Bank safe. She was expected to adhere to all internal policies. The Respondent has a set of procedures relating to branch waste. If an employee wishes to dispose of electrical equipment from a branch, all requests must be referred to the TSB property helpline. On calling the property helpline, an employee will be advised to label the electrical items to be disposed of and a team will be despatched to collect them. If an employee wishes to dispose of IT equipment, an employee must prepare a list of the IT equipment with the model and serial numbers and place a 'de-install request'. Members of the installations management team would then make arrangements to collect the items in question.

4.2 At the Northampton branch, there were two vacant rooms at the rear of the building, not occupied by staff, and mainly used for storage etc. A colleague of the Claimant was preparing to base herself at Northampton (as cluster manager), and the Claimant decided to clear out the rooms in preparation for her arrival. In the smaller of the two rooms there was what the Claimant considered to be rubbish – old light fittings, ceiling tiles and boxes etc. In that room or the other room were also two old TVs and an old radio, and some obsolete C & G IT equipment. On a small table, in the corner of the smaller room, which was really no more than a cupboard, was a computer – a server (box/tower), screen and keyboard – plugged in, wired and live, and attached by wires to sockets in the wall. That was in fact the branch server – containing confidential details relating to customer accounts – account numbers, account names and transaction values – stored on the server for 30 days. If that data had been lost, that would result in notification to the ICO. Additionally, there would be technical information on the server which would reveal, in the right hands, information on areas such as the Bank's backend connections, local password storage or application stack. It could also have led to a risk of the introduction of Malware into the network if the server had been tampered with and then reconnected. It is and was the Claimant's case throughout and at this hearing that she did not know what this equipment was, or of its importance. If that is the case, it indicates either an alarming gap in the training of the Claimant by the Respondent, or a failure by the Claimant to understand how the storage of data at the branch was achieved, or both.

4.3 On 20 July 2016, the Claimant left a message in the communications log for Mitie's contract cleaner, Mr Martin Turner. He came into the branch at around 5pm every day to clean as the staff were leaving. The Respondent's case is that the message from the claimant to the cleaner read as follows:

> "Hello (smiley face) please can you clear the two small tvs and rubbish
>
> in two rooms in the corridor. Thank you."

In the location box, the Claimant had written:

> "Corridor
>
> 2 rooms before the Kitchen
>
> Thank you (smiley face)"

4.4 The Claimant's case is that after the word 'rubbish' in the message box, she had written 'only' at the same time as the rest of the message. I am not asked to decide whether, as the Respondent alleges, the Claimant did in fact subsequently add this disputed word, and also disputed words in the next entry (see below). The Claimant was not charged with an offence relating to such alteration. The second entry, on 20 July 2016, was from Mr Turner and the message read:

> "Not sure what you want thrown away
>
> So I've put it all in Room by kitchen.
>
> Just take out what you need & then I will sort/dump rest on Saturday.
>
> I've hoovered them & left them open."

In the right hand column, under action taken, in answer to this message, the Claimant wrote:

> "Just TV + rubbish
>
> Thank you – please throw away xx" (per Respondent)

4.5 The Claimant's case is that she also wrote at this time before the word 'please' the words 'Do not yet' and after 'throw' she wrote 'TV'. That is disputed by the Respondent, who points to the way that the writing occurs in the box in the communications book and, on the basis of Mr Turner's evidence to the investigation, alleges that these words were added later in order to cover her tracks. The Claimant's case is also that she met Mr Turner by chance in the car park outside the premises as she was leaving and he was arriving, and they discussed the matter and she asked him to wait until Saturday to clear the rooms. That chance meeting was denied by Mr Turner in the investigation. However, it is the case that the Claimant made the entry of 20 July, asking Mr Turner to clear the rooms without seeing Mr Turner before he arrived, and if she had not (on her case) met him by chance she would have expected him to clear the rooms of TVs and rubbish – the rubbish including both the electrical and IT equipment (obsolete or otherwise), and the Claimant accepted in her evidence that that was

her expectation. She also accepted that she had not followed any Bank procedure for the disposal of waste, either IT or electrical.

4.6 The up-shot was that Mr Turner, on the evening of 21 July 2016, disposed of all items in both rooms, including the branch server on the table in the small room, by cutting the wires where it was plugged into the wall. Mr Turner dumped the server, with the customer information on it, into a skip located on the neighbour's premises. Fortunately, when it became clear that there was a problem with data access, and the engineer was called, the server was located and recovered, and in fact no data was lost. No one had removed or tampered with the server in the meantime. However, the service that could be offered to customers during Friday and Saturday morning was compromised. The server was got back up and running on Saturday 23 July, but the full activities of the branch could not be conducted in the meantime.

4.7 Mr Ritchie was appointed to investigate the incident as a potential misconduct issue, on 25 July 2016. He had conducted ten such investigations previously, supported by HR. He had not worked closely with the Claimant. Mr Ritchie first of all established the facts of what had happened on the date, then he interviewed the Claimant on 25 July. The Claimant had had a discussion with the IT helpdesk about the matter, and found that the server was not in fact in the communications room where she thought it was. The helpdesk sent an engineer to the branch. Fortunately, it was quiet on Friday, and only one appointment with a customer had to be re-arranged. The computers were down but customers could still pay money in using deposit points and withdraw money using the ATM. It was only when the engineer arrived and found that the server was missing and suggested that they look at the CCTV footage to see what had happened, that it was discovered that the server had been removed by Mr Turner and taken out of the branch. Mr Turner was contacted, and confirmed that the server had been put into the neighbour's skip. Mr Ritchie's view was that it was a serious oversight for the Claimant not to check the CCTV footage as soon as possible, when she had asked Mr Turner to throw away equipment and then found that IT functions did not work when she arrived at work that morning. The Claimant said that she had not referred to the Bank's retail procedures for the disposal of IT equipment because it was a standard TV and not IT related equipment that she had asked Mr Turner to dispose of. She had not referred either to any of the procedures relating to electrical equipment or other general waste disposal. The Claimant said that Mr Turner was supposed to wait until Saturday 23 July before throwing anything away so that she could give him better instructions, but he did not, and jumped the gun. The Claimant told Mr Ritchie that she always thought that the communications room contained the server. Before Mr Ritchie closed the meeting, he reminded the Claimant of the need for confidentiality and asked her not to contact any of the potential witnesses and, in particular, Mr Turner with regard to this investigation. The Claimant conceded in her next meeting with Mr Ritchie on

11 August 2016 that she had been told she should have no contact with Mr Turner and she should not tell him what they had spoken about.

4.8 Mr Ritchie then interviewed Mr Turner on 3 August 2016. Mr Turner was accompanied by his manager and there was a note taker. Mr Turner told Mr Ritchie that, as he was not clear what was to be disposed of, he added a note in the book asking for information on what should be thrown away. The following evening, 21 July, he looked at the communications book and the message from the manager read: "Just TV + rubbish. Thank you - please throw away xx.". He looked in the rooms, he found two TVs and an old radio which was not working, together with some lighting panels. There was a silver box that was heavy, some wiring and other bits including a keyboard (the server). He moved everything into one room and left a note saying that he would wait until Saturday – that was on the evening of 20 July. It was then that he came back the following day to find the note from the manager - "just TV + rubbish thank you please throw away". He was shown the communications book, with what the Respondent says was later wording added by the Claimant, and confirmed that he felt the note had been altered after he had removed the equipment. Mr Ritchie's view was that, on looking at the note, it appeared to him as if it had been amended retrospectively because of the way the additional words were arranged, the order they were written and the manner in which they apparently squeezed onto the page. Thus, Mr Turner took out the rubbish and put it in one room and found that he was unable to remove the 'silver box', as he described it. Rather than just untangling everything, he found it easier just to cut the wires. The silver box went into the skip next door because it was so heavy, and he did not want to walk all the way round to the Bank's bins.

4.9 Mr Turner also confirmed that he had received some text messages from the Claimant after 23 July 2016. He showed Mr Ritchie the text messages on his mobile phone, and they have been transcribed. On 30 July, Mr Turner said that he sent the Claimant a message and told her that he would say it was: "his silly fault". The Claimant then sent Mr Turner a message which read: "thank you – just need to add never done before and first time". She then sent a further text message saying: "plus that we spoke on the Wednesday evening and I agreed that I would let you know on Saturday exactly what was to be thrown. Just a mistake and keen to help." Mr Ritchie asked Mr Turner if he had spoken to the Claimant on the Wednesday about removing rubbish, and he said he had not. Mr Turner said the first time he saw her to talk to about the matter was Friday 22 July. He did not see her or speak to her on Wednesday 20 July. On 1 August, Mr Turner sent the Claimant a message which read: "just been told meeting is on Monday at Kingsthorpe and keep my fingers crossed." The Claimant replied quickly by text, saying: "me too all the best xxx" and "I think they know you were keen and wanted to surprise me early. Bless you. They have said we are not to talk. Xxx". When he was called to the branch on

Friday 22 July, Mr Turner was shown a picture of a little black box by the Claimant and he confirmed that he had not seen anything like that. He did not recognise the picture as being the 'silver box' that he had disposed of. Mr Turner told Mr Ritchie that he had done everything with the best of intentions. The room was full of junk, as far as he knew, and they had left him a message to throw things away. The only reason the wires were cut was because everything was entangled, so it saved time just to cut them.

4.10 Mr Ritchie had a further interview with the Claimant on 11 August 2016. As stated above, the Claimant confirmed that she understood that what had been discussed at the last meeting was confidential, and she should not have contact Mr Turner about it. She was asked by Mr Ritchie whether she had had any contact with Mr Turner in any way. She referred to coming into the branch, the communications book and her telephoning him about that book, that he had left a note saying that he was attending an investigatory meeting. She was asked whether she had had any other contact with Mr Turner, and she replied, "No". Then Mr Ritchie referred to some texts (see above) that he had seen between the Claimant and Mr Turner, to which she replied that they were to say all the best for the meetings and to tell him to be honest. She said good luck to him. She admitted to sending two texts, but said she deleted them daily. Mr Ritchie asked her whether there was any discrepancy between his stressing confidentiality and her contact. She replied that she did not discuss anything, just to wish him all the best and be honest. She was adamant that they had spoken on Wednesday night, despite Mr Turner saying that they had not, and that he was telling "a little lie". Mr Ritchie asked the Claimant whether she accepted that she had breached the principle of confidentiality of the meeting he had had with her, and his specific instruction not to have contact with Mr Turner. She replied: "But I didn't say anything but yes ok". Mr Ritchie asked her if she was absolutely sure that the entries in the communication book were all written at the same time, and the Claimant said, "Yes". Mr Ritchie told her that Mr Turner believed that only part of the message was present on the Wednesday and whether could this be correct, and the Claimant said, "No". The Claimant was asked whether she wanted to add anything to that, and she said, "No". The Claimant told Mr Ritchie that the reason she had not checked the skip personally was because she was told there was nothing else in the skip by Mr Turner. Mr Turner had also told her that nothing else had been thrown away and also that he had not cut any cables. It was only after Mr Turner's visit to the branch on 22 July that she had watched the CCTV footage and had seen him moving the IT equipment. Mr Turner then came back to the branch and the IT equipment was recovered from the skip. Mr Ritchie put to the Claimant that the engineer had checked the room from which the server had been removed and due to the heat mark on the wall from the fan and the presence of a network lead cable he believed that that was where the server was, to which the Claimant had said it definitely was not in that room, only an old TV the cleaner had taken the night before. The

Claimant agreed that this was correct. She had not checked the skips and secure bin where Mr Turner would dispose of anything taken from the rooms, but she had been looking for a 'tower' and a 'computer', and Mr Turner told her he had not thrown away any computers.

4.11 So, on 11 August 2016, Ms Linda Dunn of Risk interviewed the IT engineer, Mr Matt Evans. Mr Evans had gone to the room where the network lead cable was cut, and asked the Claimant whether the server was there. She had said: "No, just an old TV we had the cleaner take last night". It would therefore seem that the Claimant thought the server was an old TV, and she had asked Mr Turner to throw out the old TV. Mr Ritchie then took a break during which he considered the evidence that he had heard. There seemed to him to be two issues. The first issue related to the disposal of unwanted equipment which had led to a significant incident with the hardwired branch server being disconnected. It had ended up being thrown away in a skip, in an area accessible by the public. According to Mr Ritchie, given the Claimant's acknowledgement that she was responsible for ensuring procedures were followed and the fact that she had asked the cleaner to throw items away, contrary to TSB policy, there was potentially a disciplinary case to answer. The second issue for Mr Ritchie was that the Claimant had failed to adhere to his specific and reasonable instruction not to contact anyone else during the investigation. It was his view that there was potentially a case to answer in relation to that issue also. Thus, when he resumed the investigatory meeting he suspended the Claimant pending a disciplinary hearing. The three allegations that went forward to the disciplinary hearing were set out in the suspension letter that followed, dated 12 August 2016. They were as follows:

4.11.1 You failed to adhere to the TSB's disposal of IT equipment policy in that you authorised a Mitie representative to remove electrical equipment from your branch. Believing he was following your instructions, as part of this clean up the Mitie representative cut through the wires of the electrical branch server containing highly sensitive customer and business information and disposed of this in an open top skip outwith Bank premises.

4.11.2 In addition, despite the importance of confidentiality being stressed to you during your investigatory meeting on 25 July, after initially denying making contact with the Mitie representative you have then confirmed that you did contact him by text message on more than one occasion.

4.11.3 As well as breaching the TSB's disposal of IT equipment policy your actions also breached the TSB's personal integrity policy, specifically section 1.6 which states partners must ensure they observe the rules, regulations, policies and procedures of the Bank.

4.12 The suspension of the Claimant was on full pay, and said to be the most appropriate option so that further investigations into the facts/circumstances could be carried out. On 17 August 2016, the Claimant was invited to attend a disciplinary hearing on 24 August 2016, to be chaired by Mr Lewis. The letter set out the three allegations. The Claimant was told to be aware that if the allegations were substantiated they could amount to gross misconduct and one of the options open to the Respondent would be dismissal with or without notice. The Claimant was reminded of her right to be accompanied by a trade union representative or a work colleague. The Claimant asked for the hearing to be re-arranged because she was unable to get representation for that date, and the re-arranged disciplinary hearing took place on 5 October 2016, at another branch. The Claimant was accompanied by a trade union representative. She handed in a statement from Mr Turner, and also her own statement through her representative. Mr Lewis was not asked to read it then and there, and he read it later. He asked what the Claimant had to say and asked her questions. He then summarised the facts, which were agreed to be accurate by the Claimant and her representative, and they confirmed that they had nothing further to add. The minutes of the meeting were later sent to the Claimant for her to check and sign. At the conclusion of the disciplinary hearing, Mr Lewis had a teleconference with Mr Turner in the presence of Mr Turner's manager. Mr Turner confirmed that he had written the note shown to Mr Lewis by the Claimant at the disciplinary hearing. There was also a discussion about the communications book, and that Mr Turner thought that the message from 20 July 2016 had been added to. The writing seemed different, he said. It changed Mr Turner's mind that it was not all his fault. He went on – "If they didn't want me to throw stuff away they should have said as I had been in there and left the hoover there. They should have done it properly through Mitie and raised a request." Mr Turner's manager said that a bit of pressure had been put on Mr Turner, she believed.

4.13 Mr Lewis then completed a rationale for decision and sanctions form, and gave more detail for his thought processes which formed the basis of that form at this hearing. The Claimant did not adhere to the removal of IT equipment policy, in that she asked for TVs to be thrown out which resulted in the server being thrown out in the skip. The Claimant did not display any urgency in trying to deal with the problem when the branch systems were down, and she did not know where in the branch the server was located. It should have been checked under daily risk management process, and if it was checked every day, as the Claimant said, it was not checked thoroughly enough because the Claimant was unaware that the server was completely absent until an engineer attended and told her later that the same day. Mr Lewis found that the communications from the Claimant to Mr Turner regarding the disposal of the old unwanted equipment were poor. He believed that the Claimant showed poor judgment throughout the

incident, and should have been crystal clear in her instructions as she was asking for the removal of items from a room containing the branch server, and the same would be the case for any other Bank equipment. Leaving a vague message was entirely inappropriate. Despite her position as bank manager, the Claimant demonstrated a lack of ownership of the problem by repeatedly saying that it was not her fault and seeking to blame others. Despite the instruction not to contact anyone during the investigation, the Claimant had sent text messages to Mr Turner. These messages appeared to ask Mr Turner to say certain things during the investigation, including that the Claimant asked him to wait until Saturday. Mr Turner, however, had confirmed in the investigation meeting that he had not been asked to wait until Saturday.

4.14 Mr Lewis referred to the Respondent's disciplinary policy. The disciplinary policy states that it aims to provide a fair, consistent and effective method of dealing with instances where Bank standards have not been maintained. The policy gives examples of conduct, although stressing that the list is not exhaustive. It does include refusal or failure to carry out a legitimate management instruction, a breach of Bank's policies, rules, standards and procedures, and conduct likely to bring the Bank's name into disrepute. The policy also gives examples of gross misconduct, and again the list is said not to be exhaustive. Gross misconduct includes flagrant and unlawful disregard for company rules, policies and procedures, and also professional conduct that shows a reckless disregard for the best interests of the Bank, its customers and its partners. One example under this second category is negligent error or substandard performance with extremely serious actual or potential consequences. Under the section on sanction, the policy states that for the sanction of action short of dismissal, the reason this is taken is usually issued in response to gross misconduct or repeated misconduct where there are mitigating circumstances. Action short of dismissal is to be used only where dismissal is a potential option. One of these actions short of dismissal is said to be demotion with or without a change in terms and conditions including a pay reduction if appropriate. This is coupled with a final written warning. In his oral evidence to this hearing, Mr Lewis said that in cases of serious misconduct it was an option for a disciplinary manager to impose a sanction short of dismissal, where the circumstances indicate that this would be appropriate. Action short of dismissal can be used where dismissal is a potential outcome. Options under this heading include both demotion and transfer to another location, with or without a reduction in pay. This option is also available where the Bank can no longer certify that the partner is fit and proper to perform their role. In Mr Lewis' view, the Claimant's actions had been very serious and had had potentially disastrous consequences for the Bank. The Claimant's failure to communicate appropriately with the branch cleaner, and her failure to follow the Bank's policies and procedures had resulted in the Bank's server being disconnected and disposed of in a skip located in a public area outside Bank premises. The server had contained

confidential customer and Bank data. The disposal of it had also had a detrimental impact on the ability of the branch to properly serve its customers. Mr Lewis went on to find that, in the light of the serious nature of the incident, the consequences for the Bank and the Claimant's failure to accept any responsibility for the incident, he did not have any trust and confidence in her ability to discharge the role of branch manager going forwards. In his dismissal letter to the Claimant dated 17 October 2016, setting out the outcome of the disciplinary hearing, he upheld the allegations against the Claimant. Specifically, he said that the Claimant had breached the TSB's disposal of IT equipment policy and the TSB personal integrity policy. As a result, he had decided to remove her responsibilities and title of bank manager. With immediate effect she would take up the role and responsibilities of a local banker C. He went through his reasons for the decision. It included the failure to follow the policy, the failure to follow simple and clear management instruction not to communicate with Mr Turner following her suspension (even if she was not trying to influence Mr Turner), the failure of the Claimant to investigate the problems immediately and the only action taken was to call the IT helpdesk and wait for an engineer. Mr Lewis concluded that, although the Claimant had not set out to cause any problems, he felt that her communication and judgment throughout the situation had fallen short of the standards he would expect of a bank manager. The Claimant was also given a written warning for a period of twelve months.

4.15 In his evidence to the Tribunal, Mr Lewis said that even if the Claimant may have been charged under the wrong policy, and it should have been the waste procedure for disposal of electrical equipment policy, he believed the outcome would not have been any different had he in fact followed the electrical equipment policy. That policy clearly states that staff must contact the property helpline in relation to disposal of any electrical equipment. The Claimant failed to do this at any time prior to leaving the message for the cleaner. Thus, she failed to follow Bank procedures and that failure amounted to gross misconduct, said Mr Lewis. Mr Lewis was specifically asked whether he had received any briefing from anyone, as to how he should proceed and find. He confirmed in cross examination that he had not received any briefing from anyone before the disciplinary hearing. He had a conversation with HR who were supporting him before the disciplinary hearing. Mr Lewis said that he did not take any steps to find out if the server had in fact confidential data on it, but it was the potential of it having such that was key. He also did not know that there was no breach of security in fact, as no data was removed or tampered with. He also agreed that he had not spoken to Craig and Alysha, colleagues of the Claimant's, but they would not have added anything to what he already knew and found. Mr Lewis told the Tribunal that whether or not the Claimant had added words to the communications book later and retrospectively was not an issue for him to determine. He did not know why he had asked Mr Turner about it but it was not relevant to the decision on the allegations brought. Mr Lewis agreed in cross

examination that he did not think Mr Turner's actions were a foreseeable consequence of the Claimant asking him to throw away two TVs and some rubbish. He was taken through his rationale for decision, and he said that part of the reason for the decision was the Claimant's communication with Mr Turner after suspension. The fact that the Claimant failed to act urgently and decisively once the problem arose was a factor in the decision as to sanction, even though not an allegation. He agreed that the Claimant had delegated the risk management process check to Craig and was entitled to do that, and that the server was not on the hardware check list and so a daily check would not have prevented its removal not being noticed. The Claimant's poor communication with the cleaner and poor judgment generally was relevant to the issue of sanction. Mr Lewis was asked about mitigating circumstances, and said that he did not feel there were any. He was asked whether he felt 12 years' service was mitigation, and he said that if you have worked for 12 years you know where the server is. Mr Lewis indicated that he did not think a clean disciplinary record was a mitigating factor, or the fact that it was not foreseeable that the server would be thrown away. He looked at the matter as a conduct issue not a performance issue. If the Claimant had said that she knew it was her fault as the branch manager and she took responsibility, then that might have affected the decision as to sanction. However, the Claimant had avoided the situation rather than taking learning from it. For her part, the Claimant accepted in cross examination that Mr Lewis had given her a fair hearing and that she was able to put all relevant matters before him. It is clear from the notes of the hearing that the Claimant's representative did not want to read out the statement that the Claimant provided and was content for Mr Lewis to consider it in detail away from the hearing.

4.16 The appeal hearing was originally listed for 25 October 2016, but was ultimately re-scheduled at the Claimant's request to 19 December 2016 at the Bedford branch near the Claimant's home. The Claimant's trade union representative was in attendance. Ms Jackson, the area director, was in the chair. The Claimant's statement of appeal was read out by her representative. Ms Jackson noted that it included the following points. First, the Claimant had been found 'guilty' in relation to actions taken by a third party when she was guilty of a minor breach only. Second, televisions are electrical equipment, the disposal of which would not be covered by the TSB's disposal of IT equipment policy referred to in the original allegation. Third, in reference to the texts sent to the cleaner, Mr Lewis in the outcome letter changed the emphasis from one relating to an issue of confidentiality to one of not following a management instruction. It was a new allegation and could not now legitimately be introduced. Fourth, justifications given in the disciplinary outcome were not related to the original allegations. The Claimant had also set out all the action that she had in fact taken on the day that the server was not in operation. Ms Jackson submitted that the Respondent has a large number of internal policies and procedures, all accessible on the intranet and easily searchable.

These procedures include a set of policies covering all aspects of waste disposal. The error of providing the Claimant with the wrong policy was rectified during the appeal, said Ms Jackson, because she provided the Claimant with an opportunity to address the allegations and respond to the correct policy. The allegations themselves did not change, in that the Claimant was alleged to have failed to follow internal procedures. Indeed, the Claimant's response to the allegations did not change when provided with the correct policy. The only difference was that she argued at the appeal stage that she had every intention of adhering to the waste disposal policy but that the cleaner threw away the items before she looked at it. The Claimant accepted at the appeal hearing that she did not know the procedure for disposing of electrical equipment. The Claimant was given the opportunity to respond in writing by 3 January 2017 to the new allegation. In that written response, she stated that she had every intention of calling the property helpline before meeting the cleaner on the Saturday. This was apparently contrary to the evidence she had given at the appeal hearing, which was that she was unaware of the procedure to be followed when disposing of electrical equipment (which included a call to the property helpline).

4.17 Ms Jackson wrote to the Claimant on 19 January 2017 with the outcome of the appeal. She set out the Claimant's grounds of appeal, the investigations that Ms Jackson had conducted, and the evidence that she had viewed. She addressed each point of the Claimant's appeal in turn. Ms Jackson did not believe that the Claimant's response of her intention to call the property helpline and the reasons why she did not support her claim that she had intended to do so, as she had not referred to retail procedures at all to confirm what correct action she was required to take. At her disciplinary appeal hearing the Claimant had admitted that she did not know the requirements for the disposal of equipment and had failed to refer to procedures before engaging with the Mitie cleaner. As an experienced bank manager of five years, Ms Jackson said she would have expected the Claimant to have reviewed the procedure as appropriate. A failure to adhere to the waste procedures had significant actual consequences in relation to the functionality of the branch during the period in question and potential significant catastrophic consequences that could have resulted if data from the server had been extracted and/or got into the wrong hands. Further, the Claimant admitted to sending texts to Mr Turner despite having been told during the investigatory meeting of 25 July that the matter being investigated was confidential. Ms Jackson therefore upheld the disciplinary allegations numbers one and two, and also that the Claimant was in breach of section 1.6 of the Bank's personal integrity policy. Ms Jackson also found that she agreed with the original decision of action short of dismissal. The disciplinary allegations made against the Claimant amounted to gross misconduct and were upheld. Ms Jackson found no mitigating factors that would justify a lesser sanction, in her opinion. The decision made by Mr Lewis was appropriate given the circumstances and in the range

of potential outcomes available to him in line with the TSB disciplinary policy. The allegations the Bank made had been justified, in Ms Jackson's view. She was mistaken when she said in her appeal outcome letter that the branch had been closed on Saturday as a result of the server having been removed, but when asked about this in cross examination said that it would not have made any difference to her decision, as the Bank's functionality had been impaired. The outcome letter from Mr Lewis had provided justification for his decision. In the context of the appeal point 5, that there had not been proper consideration of the Claimant's explanations provided at the disciplinary hearing in her own defence, Ms Jackson pointed out that the disciplinary case was heard as gross misconduct and could have resulted in an outcome of dismissal. In applying a lesser sanction of action short of dismissal, Mr Lewis had demonstrated that consideration had been given to the case in that he had concluded that a dismissal outcome would have been too severe in the particular circumstances.

4.18 Ms Jackson told the Tribunal that she had viewed the communications book and Mr Turner's evidence about the alterations to it, and on balance she preferred Mr Turner's evidence on this point. In her view, the additional wording in the note did not appear to have been written at the same time, because the order of the words which read very oddly and the manner in which they had been squeezed onto the page. It appeared to Ms Jackson that the Claimant had, in fact, retrospectively tried to amend the instructions she had written to Mr Turner in the communications book in order to cover up her failure to follow the correct procedure. As such, Ms Jackson did not accept the Claimant's assertion that she intended to call the helpline. Mr Turner had been clear that he had not met the Claimant on 20 July, that she had not asked him to wait until Saturday 23 July, and that the note in the book only read, "Please throw away", at the time that he disposed of the items. Ms Jackson preferred Mr Turner's evidence on that point. In any event, regardless of what the Claimant had asked Mr Turner to throw away, she had not consulted any of the Bank's internal procedures prior to making the request, and did not contact the property helpline as she should have done – said Ms Jackson. This represented a clear beach of procedure, and it was unacceptable for a senior member of staff to ignore such procedure, and it was this failure that led to the server being disconnected and disposed of in a publicly accessible skip. Ms Jackson's view was that the policy for waste disposal was very clear and should not confuse someone holding the position of bank manager. In the course of her investigation, Ms Jackson herself called the property helpline and asked how to dispose of electrical equipment. She was told that she should label all unwanted items and book an appointment for them to be collected and disposed of by the appropriate team. It was clear to Ms Jackson that if the Claimant had called the helpline this was the advice she would have received, and therefore the server would not have been mistaken for rubbish and thrown away by the cleaner. It is a requirement that

bank managers adhere to the Bank's rules, policies, processes, security and fraud procedures and act responsibly at all times. It was unfathomable to Ms Jackson that a bank manager would not know where the server was located or even what it looked like. The server is vital to all IT functions in the bank. In her cross examination, Ms Jackson said that the alteration in the communications book did not influence her decision, which was in relation to the disposal of IT equipment. The lack of clear communication was the real cause for the sanction applied in that there was a failure to follow the Respondent's procedures. Ms Jackson admitted that she did not use the rationale form, because she did not know there was one, but her rationale is set out in the appeal outcome letter. She agreed that throwing away the server is not a foreseeable consequence of the Claimant's request, but pointed out that the Claimant had put Mr Turner into that position. She could not believe that the sanction of dismissal for gross misconduct was disproportionate. In any event, the Claimant was not dismissed because she had no intent. There was a lenient disposition of her case by Mr Lewis. She had not addressed all the things that the Claimant said that she had done following the disappearance of the server, as she would expect this to be the actions of any bank manager. Ms Jackson was aware that senior people were taking an interest in the case, namely Mr Armitage and Mr Mitchell. Mr Armitage was her line manager, but he never said anything to Ms Jackson about the case. The Claimant accepted in cross examination that Ms Jackson had given her a fair hearing, and that she had been able to put all relevant matters to her during that hearing, and that Ms Jackson had taken time to explain things to the Claimant.

**The Law**

5. The law relating to unfair dismissal is well established.

By s.94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

By s.95(1)(a), for the purposes of the unfair dismissal provisions an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

By s.98(1) and (2), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and in the context of this case that it related to the conduct of the employee. Conduct is the reason relied upon by the Respondent. In Abernethy v Mott, Hay and Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee.

By s.98(4), where the employer has shown the reason for dismissal, the determination of the question whether the dismissal is fair or unfair having regard to that reason;

(a) depends on whether in the circumstances (including the size and administrative resources the employers 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.

The law to be applied to the reasonable band of responses test is well known. The Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area; namely, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT; and Foley v Post Office; HSBC Bank Plc v Madden [2000] IRLR 827, CA.

The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well-known case of British Homes Stores Ltd v Burchell [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such an investigation as was reasonable and appropriate in the circumstances?

In Taylor v OCS Group Limited [2006] ICR 1602, CA, it was held that if at an early stage of a disciplinary process it is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. Their purpose in so doing will be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage.

In Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854, EAT, it was held that a finding of gross misconduct does not necessarily make a dismissal fair. Even in cases of gross misconduct, regard must be had to possible mitigating circumstances, such as, in this case, the Claimant's length of unblemished service and that dismissal would lead to her deportation and destroy her opportunity of building a career in the United Kingdom.

In Strouthos v London Underground Ltd [2004] IRLR 636, CA, it was held that length of service and a clean disciplinary record are factors which can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one.

## Conclusions

6. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the written submissions of the parties' representatives, I have reached the following conclusions.

7. The reason for dismissal is agreed by the parties to be conduct, a potentially fair reason. Although there is a burden on the Respondent to establish the reason for dismissal, such reason has been conceded by the Claimant. She agrees that the reason for her demotion (dismissal) related to her conduct, a potentially fair reason. Therefore, I do not need to deal with this issue further. That concession from the Claimant comes against a background of the unusual circumstances of the case. The Tribunal concluded that the right to demote was not in the Claimant's contract of employment. The Respondent accepts, therefore, that the demotion of the Claimant amounts to a dismissal for the purposes of this case.

8. Thus, I turn next to determine whether the Respondent conducted a fair procedure – investigation, disciplinary hearing and appeal hearing. I consider this matter, as with all matters, against the background of the parties' submissions on it. I do so by reference to the Claimant's list of points made in her counsel's closing submissions under the heading, 'lack of reasonable investigation', and Respondent's counsel's response to this.

    8.1 The failure to inform the Claimant that there was no data loss. When Mr Ritchie knew by 22 August 2016 that this was the case, he did not pass this information on to Mr Lewis (or to the Claimant). Further, Ms Jackson also knew that there was in fact no data loss but did not pass that information on to the Claimant. However, I conclude that that factor was not relevant to whether a proper investigation had taken place. The investigation would not be affected by whether the Claimant was told about the fact of no data loss. Whether or not there had been an actual data loss or malicious damage to the server was not an issue to be determined, and also was not a factor when determining the level of culpability. What was relevant was that there had been an opportunity for such data loss or malicious damage, because of the server being in the skip, not whether it had actually occurred. It was only good fortune that no data was lost and no malicious damage occurred.

    8.2 The use of the wrong disciplinary policy. The short answer to this is that there was no substantive difference between the two policies. Thus, it did not matter which policy the Respondent's managers referred to.

    8.3 The use of the wrong 'disposal' policy. I am not persuaded that Mr Lewis necessarily followed the wrong policy. Not only was the branch server thrown away (not intended by the Claimant), but also old and obsolete C & G IT equipment which the Claimant had intended to dispose of. The old TVs that the Claimant asked Mr Turner to dispose

of would have come under the electrical items policy. However, the fact is the Claimant did not follow any policy at all before the items ended up being thrown away. Further, the Claimant fully understood the case against her and was able to respond to it, as she conceded at this hearing, and Ms Jackson gave the Claimant the opportunity to comment further on the allegation brought under the electrical items policy. Thus, in so far as was necessary, any defect was cured on appeal. As the Respondent says, it is not a case of the Claimant following the wrong procedure, rather the Claimant not following any procedure at all.

8.4 Failing to disclose copies of texts between the Claimant and Mr Turner. The texts are set out in the meeting notes with Mr Turner, which the Claimant had disclosed to her before the disciplinary hearing. The Claimant did not disclose that communication with Mr Turner until confronted with the allegation by Mr Ritchie at the 11 August 2016 meeting.

8.5 The communications book. Essentially, the Claimant's case is that Mr Ritchie, Mr Lewis and Ms Jackson all admitted at the Tribunal hearing to believing that the Claimant had altered the communications book after her original instruction to Mr Turner – see above. The Claimant says that this was therefore a big part of the Respondent's case against her. Yet, it was not put to the Claimant in any meaningful way for her comments – save by Mr Ritchie, in his second interview with the Claimant. The Claimant argues that that belief by the Respondent's managers filtered through to the Respondent's findings and conclusions on matters that were part of their case against the Claimant. However, it is the case that the Claimant told Mr Ritchie that the entries in the communications book were written by her at the same time and that Mr Turner was wrong to say that only part of the message was present on the Wednesday. I conclude that putting the allegation to the Claimant again and in detail was unlikely to have elicited a different response. Thus, the Respondent had one person's word against another. The relevant managers believed Mr Turner and not the Claimant, and I conclude that they were entitled to do so. Mr Turner would not have known that what he had thrown away in the skip was the branch server – how could he if the Claimant herself did not know? It was in those circumstances that he apparently denied throwing away the server when first asked about it. Mr Turner's evidence to the investigation was that he had not spoken to the Claimant verbally before the rubbish was disposed of and denied having a conversation on Wednesday 20 July 2016, not seeing the Claimant again until Friday morning. On 20 July, Mr Turner's entry in the book is that he would wait until Saturday, and the Claimant relies on this as corroboration for the meeting on the Wednesday evening and her case that she asked him to wait until Saturday. However, it could be the other way around. The Claimant on seeing that entry by Mr Turner, may in effect have "borrowed" it and used it in her defence – which was that Mr Turner had been asked by her to wait until Saturday.

I conclude that the Respondent's managers were entitled, after seeing the entries in the communications book, to conclude that they preferred Mr Turner's version of events. I conclude from the statement Mr Turner gave to the Claimant that he had been willing to accept a large part of responsibility for the incident, before he saw those altered entries. This was in stark contrast to the Claimant, who from the outset attempted to divert any responsibility for what happened from herself. Craig and Alysha would have had very little to add, beyond what Mr Lewis already knew and accepted about the events on Friday morning. Mr Turner admitted cutting the wires, after initially denying that he had, possibly because cutting the wires seems more like vandalism than simply untangling the wires and unplugging the server. Although that may have weighed against Mr Turner on the credibility issue, it does not mean that the Respondent's managers should not have believed him about crucial and central matters to the investigation, such as the instructions for disposal given by the Claimant, and whether or not there was a discussion on the Wednesday evening in the car park.

8.6 Mr Lewis says that the Claimant ought to have done more. In other words, on the Friday, when the systems were down, she should have found out what the problem was, such as by viewing CCTV before being prompted to do so by the engineer when he arrived. This finding by Mr Lewis was relevant to his conclusion that the Claimant was not suitable to be in charge of a branch. The fifteen steps that she took – identified in the notice or statement of appeal – were accepted by Ms Jackson, but they were no more or less than any responsible manager would have done in the circumstances – and the Claimant no doubt knew on the Friday and Saturday that she had to fight to save her career. I pointed out to the parties during the course of the hearing the potential lack of training issue and the responsibility on the Bank itself for not ensuring that their manager was familiar with IT equipment and data storage. However, this was a conduct dismissal (as conceded by the Claimant), and the focus is on the allegations with which the Claimant was charged.

8.7 I find that there was no error in the investigation in the context of the additional points in the Claimant's submissions. There was nothing wrong in the initial investigation meeting being without formal notification of potential allegations, and the Claimant was not entitled to be accompanied at such a meeting. It was not of concern that Mr Ritchie had not looked at the documentation at this early stage, because until he had spoken to the Claimant he would not necessarily know what was relevant. Mr Ritchie was involved administratively after the investigation stage – to set up the disciplinary hearing with the right level of manager, to liaise with HR on the arrangements, and so on. However, he had no further decision making function, and that is the important point.

8.8 The alleged flaws at the disciplinary hearing stage. The Claimant had a copy of the notes of the second investigation hearing before the

disciplinary hearing, with an opportunity to amend them. The policies that the Respondent was relying on were available on the intranet, and it was not suggested at any time in the process that the Claimant was prejudiced by not having been sent a copy. The Claimant's representative had relevant extracts from the communications book ahead of the disciplinary hearing, and the Claimant had access to the book at the start of the disciplinary hearing. The Claimant accepted in cross examination that Mr Lewis had given her a fair hearing and she was able to put all relevant points to him.

8.9 The alleged flaws at the appeal stage. As the Respondent says, how could the Claimant have intended to ring the property helpline before the Saturday if, as she told Ms Jackson, she did not know that there was a procedure or of its requirements for the disposal of property? Ms Jackson accepted that she did not address the point that the Claimant did not instruct the cleaner to throw away the server or that Mr Turner's acts were not foreseeable. However, the Claimant agreed that, as with Mr Lewis, Ms Jackson gave her a fair hearing, and that she had the opportunity to put all relevant matters to Ms Jackson at the hearing. Ms Jackson may not have completed a rationale form, but the rationale for her decision was set out in the letter sent to the Claimant on 19 January 2017 with the outcome of the appeal.

8.10 In all the circumstances, I conclude that there was a reasonable investigation, satisfying the requirements of the Burchell test. Also, I conclude that the disciplinary hearing and the appeal hearing were, by and large, conducted fairly, and well within the band of reasonable responses. I deal with the 'scapegoating' issue below.

9. I turn next to consider reasonable belief in misconduct and reasonable grounds for that belief, again by reference to the parties' submissions ('lack of reasonable grounds').

9.1 First, the finding of fault in not following the waste disposal policy. In cross examination, the Claimant conceded that she had not checked what the IT/TV/electrical equipment was, and whether it was functional or obsolete, and she conceded that Mr Turner could not have said unprompted (as alleged by her in her witness statement) on the Wednesday evening when she says that there was a chance meeting in the car park – "I'll clear the rubbish on Saturday" – because he would not have seen the note left for him in the communications book until he got into the branch. The Claimant also agreed that it was extremely irresponsible of her to allow "rubbish" to be thrown away – without explaining exactly what she meant by the term. With the benefit of hindsight, the Claimant could see how it had all happened. The Claimant had not checked the rubbish so she did not know that the obsolete Cheltenham and Gloucester IT equipment was in it. She agreed with counsel that taking ownership as a bank manager is an important part of the role, and that her lack of ownership was a matter of concern for the Respondent, as to whether or not she could remain

in charge of a branch. The Claimant agreed that Mr Turner's role did not absolve her of how they got into that position in the first place. Mr Lewis's review of the IT disposal policy was said to be cursory. But, all he needed to know was that there was a requirement to contact installations management to make arrangements for the removal of all surplus equipment. The message to Mr Turner of 20 July (in the form found by the Respondent) indicated that the Claimant had no intention of checking or following procedures. She accepted that reputational damage to the Respondent could occur and the potential impact was significant for the Respondent. If the Claimant had followed procedures, the server would not have ended up in the skip – and so this was a direct (even if not foreseeable) consequence of her irresponsible actions, by leaving the note in the book without checking what the rubbish was or the process for its disposal.

9.2 The consequences of throwing away the server. The Claimant stressed that this was an unforeseeable consequence of her actions, as accepted by the Respondent. However, there was irresponsible and careless behaviour by the Claimant – and the disposal of the server was a direct result of failing to follow procedures, procedures which are designed to ensure that unforeseeable but potentially disastrous events do not happen.

9.3 The consequences: closing the branch. Mr Ritchie and Mr Lewis knew that the branch did not close. However, there was nevertheless a substantial impact on customers over a period of two days. Some were sent to another branch nearby, others were only able to undertake restricted transactions. Ms Jackson's erroneous belief that the branch was closed on the Saturday did not impact her decision on appeal.

9.4 The finding that the Claimant denied contacting Mr Turner. At the start of the second investigation meeting of 11 August 2016, Mr Ritchie asked the Claimant to remind him what they had discussed at the last meeting about confidentiality and contact with the cleaner. The Claimant answered – "You said no contact and don't tell him what we have spoken about". Mr Ritchie then asked the open question – "have you had contact with him in any way?" the Claimant restricted her answers to that question to Mr Turner coming into the branch, telephoning her and leaving her notes. "Any other contact?" asked Mr Ritchie. "No", answered the Claimant. It was only then that Mr Ritchie referred to the text messages that he had seen running between the Claimant and Mr Turner. When reminded of them, the Claimant said it was just to say "all the best" for his meetings and to tell him to be honest. When confronted with the allegation that she had in fact sent texts to Mr Turner, the Claimant had to admit that but sought nevertheless to play it down both in terms of the number of texts and the content of them. There were six texts in total, not just the two referred to by the Claimant, and rather more briefing of Mr Turner than was admitted to by the Claimant.

9.5 Mr Ritchie accepted that allegation two was wrong, according to the Claimant. I do not read allegation number two as contradicting or being different from the facts identified above in the context of what the Claimant admitted to in the second investigation meeting. The Claimant admitted to breach of confidentiality and to breaching Mr Ritchie's specific instruction not to contact Mr Turner. In cross examination, Mr Ritchie said that the Claimant did not reveal the nature of the text to Mr Turner. He gave her an opportunity to say that she had texted Mr Turner. From an integrity viewpoint, he said that this was important, as one of the values of the Bank is transparency and honesty. Again, Mr Ritchie recognised that he should have shown the Claimant the texts and did not, but I conclude that the Claimant knew what he was talking about. The contents of the texts were of course available to the Claimant at the disciplinary hearing (through Mr Turner's interview notes). Thus, I am not entirely sure what the Claimant's counsel is getting at here. The Respondent was entitled to conclude that the Claimant was in breach of Mr Ritchie's specific instruction not to contact Mr Turner, and knew that she was and so tried to cover it up at first by not admitting to the texts. The Respondent was also entitled to read the texts as trying to influence Mr Turner as to what he should say at the investigation meeting. For example, the third text (second from the Claimant) reads: "Plus that we spoke on the Wednesday evening and I agreed that I would let you know on Saturday exactly what was to be thrown. Just a mistake and keen to help." That reads as if the Claimant was briefing Mr Turner on what to say at the investigation meeting.

9.6 The allegation that the Claimant ought to have done more. In the context of not knowing where the server was, Mr Lewis's rationale number four (out of six) for the decision to uphold the allegations. Admittedly, it was not the Claimant personally who carried out the hardware check, as this was delegated to someone else. However, it is somewhat alarming that the bank manager does not know where the server (a vital piece of equipment) is located, relying on an assumption that it is in the communications room. Further, the Claimant told Mr Ritchie in the first investigation interview that she had been told not to touch the piece of IT equipment she later discovered to be the server, so (as the Respondent says) she must have known that it was a functioning piece of IT equipment that was neither obsolete nor 'rubbish'. These were no doubt factors in Mr Lewis's decision that the Claimant could no longer continue as a branch manager – presumably because of the risk to customers and the business.

9.7 I conclude that the Respondent had reasonable grounds for the belief that the Claimant had committed the acts of misconduct alleged. In so far as the first and third allegations are concerned, the Claimant failed to adhere to the Respondent's procedures concerning the removal of electrical and IT equipment from the premises. This was also a breach of the personal integrity policy, although that allegation added very little

(as the Respondent's managers conceded). Although the consequences were not foreseeable, it was an extremely irresponsible thing to do, as the Claimant admitted in cross examination. On the evidence they had, the Respondent was entitled to conclude, on the balance of probabilities, that the Claimant had altered the communications book retrospectively, and had not spoken to Mr Turner in the car park on Wednesday 20 July 2016. Thus, the Respondent was entitled to conclude that the instruction to Mr Turner was to dispose of items in the room containing the server, without waiting until Saturday – as in the un-amended version - and that Mr Turner believed that he was following the Claimant's instructions when he dumped the server into the skip. In so far as the second allegation is concerned, I refer to the conclusions above. It was clear that the Claimant was, and admitted to being, in breach of the instruction not to communicate with Mr Turner.

10. According to the Respondent's procedure, the gross misconduct list is not exhaustive; flagrant and unlawful disregard for rules, policies and procedures is said to be gross misconduct; so too is negligent error or substandard performance with extremely serious actual or potential consequences. Action short of dismissal is said to be used only where dismissal is a potential outcome. It is usually issued in response to gross misconduct or repeated misconduct where there are mitigating circumstances. Further down the sanctions part of the policy, it says that dismissal (with or without notice) can be issued in response to gross misconduct, including where the Bank is no longer able to certify a partner as fit and proper to form their role. Thus, the policy gives room for flexibility. I do not read it as meaning that the Respondent can only dismiss in response to gross misconduct, although clearly that is the usual case. Where there is no repeated misconduct, in any event, a negligent error or substandard performance can show disregard for the best interests of the Bank. Mr Lewis accepted that the disposal of the server was not necessarily a foreseeable outcome of the Claimant's instructions to Mr Turner, but the fact that she rushed headlong into equipment disposal without checking what it was, and without following the procedure, meant that she overrode the checks and balances that are in place, with no regard for the very serious potential consequences of the server disposal. Mr Lewis believed that such behaviour was in this case gross misconduct, because of the potential consequences – and the Claimant accepted it was extremely irresponsible action. Further, if that was not serious enough, the Claimant attempted to cover her tracks – by contacting Mr Turner in breach of an express instruction not to. This was also found to be gross misconduct by Mr Lewis and Ms Jackson. Thus, I conclude that the Respondent was entitled to find that gross misconduct was made out, such as to justify dismissal.

11. I turn to deal with sanction (allegations 1 and 3). If the Claimant had taken ownership of the incident, she would have shown that she had taken learning from it and had reflected, and that she might be trusted going forward. However, not only did the Claimant not take ownership, she sought to blame the cleaner. That was not an attractive approach to take, and one that the

Respondent believed showed that the Claimant was not prepared to take responsibility for the matter as branch manager, and so was not fit for the role. The Claimant also should have known where the server was located and what it was for. It is not sufficient to say, "I am not properly trained". She is in a senior position and if there are gaps in her knowledge she should recognise this and do something about it, and raise it with her managers. In essence, the Claimant's behaviour allowed the situation to occur, as the Respondent found.

12. Allegation 2 – I refer to conclusions above. Although Mr Ritchie did not ask the Claimant to sign the confidentiality declaration at the end of the first interview, he asked her at the beginning of the second interview to remind him of what was discussed at their previous meeting about confidentiality and contact with the cleaner. The Claimant replied – 'You said no contact and don't tell him what we had spoken about'. Thus, the Claimant knew that she was not supposed to contact or communicate with the cleaner about the matter, yet she took part in a series of text exchanges with him about it. Further, she did not admit to that text contact until it was specifically put to her by Mr Ritchie, and then she sought to play it down.

13. Mr Lewis admitted that he did not take into account mitigating factors such as the Claimant's length of service, clean disciplinary record and the fact that there was no data loss. He did take into account the Claimant's remorse (as far as it went) and her apology. In Mr Lewis's view, the Claimant's 12 years' service worked against her in that, with such length of service, she should have known where the server was. However, mitigation is only relevant to the decision on sanction. It does not have a bearing on whether the Claimant's behaviour amounts to serious/gross misconduct or not. In the context of the Respondent's conclusion that the Claimant was guilty of such conduct, then not in fact to dismiss her from her employment with the Bank, but instead to demote her by one grade, could be seen by the reasonable employer as a lenient disposal of the case. Thus, if Mr Lewis had taken into account the mitigation identified, then it is unlikely that a different outcome would have resulted. The point for Mr Lewis (and Ms Jackson) was that the Claimant could not continue as a bank manager in charge of a branch in the light of what had occurred. As Mr Lewis told the Tribunal, the Claimant did not display the necessary leadership, communication and judgment required of a branch manager on that particular occasion. The disciplinary procedure expressly provides for the situation where dismissal (or demotion in the alternative) for gross misconduct is permitted where the Respondent is no longer able to certify a partner as fit and proper to perform their role. That was the position here. I conclude that Mr Lewis could have dismissed the Claimant and remained within the band of reasonable responses. He decided not to, because she had not intended the consequences of her actions. I therefore conclude that the finding of gross misconduct by Mr Lewis, with the consequential right to summarily dismiss and the substitution of the sanction of demotion, together with a final written warning, was within the band of reasonable responses.

The scapegoating allegation

14. I accept Mr Ritchie's evidence that he did not discuss the case with Mr Neil Mitchell and that he did not know that Mr Mitchell viewed it as a case of gross misconduct. There was no instruction to him, no briefing of him or of Mr Ritchie, from the top. Mr Lewis made it clear that he had not had a conversation with Mr Andrew Armitage about the case, although others may have done so at a meeting at which he was present. If Mr Armitage expressed a view in an email that he hoped that the Bank were brave enough to dismiss, then he would have been disappointed by Mr Lewis's "lenient" disposal of the case. Mr Lewis clearly did not follow this steer if that is what it was supposed to be. There was no briefing as such of Mr Lewis. Any conversations that Ms Jackson had with Mr Lewis and Mr Ritchie was in the context of whether the allegation could be changed. The risk was associated with that of failing to follow procedure. Mr Ritchie looked for a hearing manager early on, but simply looked to find one a grade above himself, to cover all eventualities. I do not believe that indicates any pre-judgment.

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Employment Judge G P Sigsworth

Date: ……12 April 2018……..

Sent to the parties on: .26 April 2018.....

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For the Tribunal Office