



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs C Agbaje

v

Santander UK Plc

Heard at: Cambridge

On: 7, 8, 9, 10, 11, 14 and 15 January 2019
2 April (no parties in attendance) and 24
April (no parties in attendance)

Before: Employment Judge Ord

Members: Mrs A E Brown and Mr T Chinnery

Appearances

For the Claimant: In person

For the Respondent: Miss C McLaren, Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The claimant was unfairly dismissed.
2. The claimant was dismissed in breach of her Contract of Employment.
3. The claimant's remaining complaints are not well founded and are dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 21 April 2008 until 31 March 2017 as a Customer Support Advisor, latterly working at the Bexleyheath branch of the respondent company which is a large and well known bank operating in the United Kingdom and internationally. On 31 March 2017 the claimant was dismissed for gross misconduct as a result of events which took place on 7 March 2014.

2. The claimant began Early Conciliation on 12 June 2017 and her Early Conciliation Certificate is dated 12 July 2017. She presented her claim form to the tribunal on 10 August 2017 bringing complaints of unfair dismissal, dismissal in breach of contract, discrimination relying on the protected characteristic of pregnancy / maternity and automatic unfair dismissal on the ground that the reason, or principal reason for dismissal was pregnancy, maternity or child birth.
3. The respondent denied all the claims.

Hearing

4. The claimant gave evidence and the respondent called evidence from Jackelyn Daley (Branch Director, Bexleyheath); Andrew Briggs (Managing Director Portfolio Management and the Dismissing Officer) and Christopher Fallis (Head of Specialist Sectors Group, who heard the claimant's appeal against dismissal). Reference was made to an extensive bundle of documents. Counsel for the claimant had prepared a helpful chronology and cast list as well as submitting an opening note. Both sides submitted written submissions in closing to which they added orally.

The Facts

Based on the evidence which we have heard, we have made the following findings of fact.

5. The claimant worked at the Bexleyheath branch and Ms Daley became the Branch Director of that branch in December 2013.
6. The claimant had previously been the subject of disciplinary action at work. On 13 November 2012, she received a 12 month 'Stage 2' written warning. In accordance with the respondent's policies the period of that warning was extended to 6 May 2014 due to the claimant being absent from work through sickness during the currency of her warning.
7. In the letter to the claimant advising her of the outcome of that disciplinary hearing, the respondent confirmed that the claimant was,

"suffering under the considerable stress and pressure of depression, IVF and drug treatment".
8. The claimant was anxious to add to her family. She and her husband had one child through IVF treatment. She made arrangements to visit Guy's Hospital on 5 March 2014 to be considered for further IVF treatment. As she had previously undergone IVF treatment she would be required to pay for this as a private patient. On 3 March 2014 the claimant advised Ms Daley that she had an appointment for this purpose on 5 March 2014.

9. In fact, at the same time the claimant had conceived naturally. She undertook home pregnancy tests which were positive but did not at that early stage of her pregnancy inform the respondent. She wished to wait until she had a 12 week scan.
10. Prior to this, on or about 13 February 2014, the claimant had an altercation with another member of staff (Amy-Louise Grant).
11. The following day, the claimant contacted Ms Daley saying she had,
“some issues and concerns to share with you”.

She had not contacted Ms Daley on 13 February as on that day Ms Daley was on her normal day off. The claimant herself was on her day off on 14 February but that day asked for a one to one meeting with Ms Daley the following day (15 February). She said she was,

“...burdened with loads of work related issues which I feel very difficult to cope with, not just what happened yesterday but ongoing burdens which I feel I should lay down before you”.

She confirmed that she knew Ms Daley was on holiday the following week (15 February was a Saturday), and asked,

“ [please] have a space in ur diary to allow me to chat with u because I desperately need to talk to you”.

This was sent by text message on 14 February.

12. At 1409 hrs that day, Ms Daley replied saying,
“Of course my love we’ll speak tomorrow x”.

However, no such discussion took place.

13. The claimant was absent from work from 17 – 27 February. She self-certified part of her absence advising Ms Daley that she was absent due to,
“...concerns, issues and so much stress at work and a lot of things that have happened to me at work”.

Her GP fit note for the period 24 – 27 February records her as being absent from work due to *‘anxiety and depression with work stressors’*.

14. On 3 March 2014 the claimant advised Ms Daley in writing that she was to commence fertility treatment and that she had an assessment session at Guy’s Hospital on 5 March 2014 which she duly attended.

15. Around this time, on a date which no one could state with precision, Amy-Louise Grant submitted a written grievance to Ms Daley regarding the incident on 13 February. The grievance is undated and is typed but is not signed. Ms Daley said she received this grievance on – she thought – 3 March, but she was not sure. We find as a fact that it must have been obvious to Ms Daley that this was *“the other side of the coin”* from the claimant’s issues on 13 February which she referred to in her text of the following day and in her subsequent communications.
16. Ms Grant’s complaint related to the way she said the claimant had reacted to her on 13 February when she asked the claimant to move because she was trying to speak to a customer whom was being served by another member of the bank’s staff. She said that the way the claimant reacted, *“was [not] the right way”* and that Ms Grant was concerned that the claimant might react to other colleagues in a similar way in the future.
17. Having received this document, Ms Daley did still not seek to speak to the claimant.
18. The claimant then, on 6 March 2014, raised a grievance against another colleague, Helen Grace. This grievance was submitted on the respondent’s (optional) form G1 as a formal grievance. In the grievance the claimant complained that Ms Grace had referred to the claimant’s clothes as *“stinking”*, that she had told other members of staff to move their clothes away from the claimant’s because of the smell and catalogued a series of related incidents between 27 November 2013 and 5 March 2014 (when on the claimant’s account, in the respondent’s staff kitchen, Ms Grace reacted to the claimant’s presence by indicating that there was an unpleasant smell and then squirted her perfume all around the room). The claimant said that she,

“suffered from low self-esteem, obesity and infertility and that Ms Grace’s behaviour caused her to feel very depressed and I am ashamed to be in work”.

She said that she was suffering sleepless nights and her self-confidence was further affected. She asked for the matter to be investigated formally.
19. On receipt of this form, Ms Daley did not take any steps in relation to the grievance for many months. She said that as the incidents complained of pre-dated her presence in the branch then the previous manager should deal with it but that because of the events of 7 March, she did not progress the matter at all.
20. The following day 7 March 2014, the claimant was working normally. As she approached the time for her lunch break she was asked by Ms Daley to go to the Market Place branch (another branch in the same town), to speak to Toni Moore (the Branch Manager). She was not told why.

21. On arrival the claimant was told by Ms Moore that the meeting was a formal investigation to discuss the incident of 15 February 2014.
22. The claimant said that she felt “*ambushed*” by the meeting. She had no warning of what it was about and was unaware that Ms Grant had raised any grievance. She of course had been endeavouring to speak to Ms Daley about the matter since the day after it had occurred. The meeting was also held in the claimant’s lunch hour and she felt hungry and asked for time to go and take a break which Ms Moore agreed to.
23. During that lunch break the claimant says that she felt uncomfortable with stomach pains. She went to use the lavatory in British Home Stores as she had felt abdominal pain and felt that she was having light vaginal bleeding. She found that was in fact occurring which gave her some concern.
24. The claimant returned to speak to Ms Moore after her lunch break. She said that she was stressed so she could not continue the meeting. She asked for minutes of the meeting and that Ms Moore should put the reasons for the meeting in writing but did not receive anything until after the termination of her employment. She returned to her own branch at approximately 3 pm.
25. We accept all this evidence. No evidence was given by Ms Moore or any other person to contradict it.
26. The claimant says that she was told to return to her till by Ms Daley who was, “*not interested*” in talking to her.
27. Ms Daley’s evidence was that the claimant was asked by another member of staff if she was returning to her till and said, “*ask her*” indicating Ms Daley. It is common ground, however, that the claimant returned to the customer area to open her till and recommence work.
28. The claimant says that at this time, however, after logging on to the computer she felt worsening pain in her abdomen. It is common ground that the claimant said that she could not continue to work and that Ms Daley required her to balance her till. It is also common ground that the claimant refused to do so. The claimant says that she said that she ‘could not do so’.
29. The respondent’s normal practice is that a Customer Service Assistant must balance their own till. This is for obvious reasons of security and to ensure that the till as handed in has the correct amount of money in it. However, it was not disputed that in circumstances where an employee is unable to complete that task it can be carried out by two other members of staff working together to avoid the risk of any security breach or theft so that the till can be balanced. The claimant says that she asked Ms Daley to balance the till and we accept that she did so. However, Ms Daley on her own evidence requested the claimant to balance her till “*at least six*

times". The claimant did not balance the till and we were not told what subsequently happened. Ms Daley did not explain why two other members of staff could not carry the function out or if they later did.

30. The claimant had by this time left the customer area and had gone to the staff kitchen. She had called her husband to explain what was happening. She says she asked Ms Daley to speak to him but she refused, whereas Ms Daley's evidence was that the claimant simply held the phone out for her without saying anything and that by this stage the claimant was unwilling to speak to Ms Daley at all. We accept and find that by this stage the claimant had become uncommunicative.
31. The claimant was then sitting in the kitchen with her head on the table. Ms Daley and Ms Moore both sought to encourage the claimant to balance her till. Ms Daley says that at no time did the claimant say that she was miscarrying and we accept that evidence. We have found that the claimant was simply uncommunicative at this stage. We accept the claimant's evidence that she was in considerable pain and discomfort.
32. Up to this point the evidence of the claimant and Ms Daley is consistent in parts but not in others. There was no evidence obtained from other witnesses for more than two years after the incident.
33. According to the claimant's evidence she was in pain whilst in the kitchen. She said that she told Ms Daley that she was pregnant, suffering from abdominal pain and bleeding which Ms Daley ignored. Ms Daley's evidence was that at this time the claimant was uncommunicative and we accept her evidence on that point.
34. We find that the claimant did not tell Ms Daley that she was pregnant or miscarrying. We make that finding having seen Ms Daley give her evidence and consider it inconceivable that she (a lady who had, we were told, been through difficulty relating to conceiving a child herself), would have ignored any such explanation of the claimant's difficulties or condition and would not have obtained help if she was aware of the true situation.
35. The sequence of events thereafter was, according to the claimant, that:
 - 35.1 she was in the kitchen with Ms Moore (who had come to the branch for reasons which were not clear to us), in pain and crying;
 - 35.2 she told both Ms Moore and Ms Daley that she was fearful of suffering miscarriage if she did not get medical attention;
 - 35.3 her husband called her to say he had telephoned for an ambulance;
 - 35.4 she was in "*excruciating pain*" crying out in agony and asking for medical help;

- 35.5 she then moved to the toilet as she felt increased vaginal bleeding. She described packing rolled up toilet paper into her underwear to prevent blood staining her trousers;
- 35.6 she was crying and left the toilet to go to Ms Daley's office to again ask to be allowed to go home;
- 35.7 she then collapsed in the corridor outside Ms Daley's office and lost consciousness (this being witnessed by, on her evidence, Lisa Abreo);
- 35.8 she was subsequently attended to by the police (whom she says brought her round), and then left in an ambulance;
- 35.9 she was taken to Darent Valley Hospital. The hospital records show under the section 'Investigatory Comments' that the claimant suffered "*PR (per vaginum) bleeding in pregnancy*" and the 'Diagnosis Comments' read, "*threatened miscarriage*".
36. According to Ms Daley:
- 36.1 the claimant did not appear to be in pain, she believed the claimant was angry with her;
- 36.2 when the claimant refused to communicate with both herself and Ms Moore, Ms Moore suggested calling Human Resources;
- 36.3 whilst on the telephone to Human Resources she heard a loud noise, shouting and screaming. She was later told by Ms Moore that the noise was the claimant throwing a chair out of the way as she left the kitchen (Ms Daley's evidence was that Ms Moore also told her that the claimant, as she entered the toilet, kicked a door and shouted and screamed. Ms Daley was not present to witness this, she was on the telephone to Human Resources but noise could be heard by Human Resources down the telephone line at some stage);
- 36.4 Ms Daley said that two members of the public had asked to come into the secure area of the bank because of the noise. We find that implausible and we reject it because the noise was coming from that area, noise which is described as "*hysterical screaming*";
- 36.5 Ms Daley decided to close the branch and asked Ms Moore to deal with that;
- 36.6 Ms Daley said that she felt scared and did not know what was going to happen next and feared "*for her safety and that of the team*";
- 36.7 Ms Daley says the claimant then came out of the toilets into the corridor area preceding to "*scream, shout and thrash against the*

wall and the fax machine, threw herself on the floor kicking out her legs, wailing and flailing her arms”;

36.8 her telephone call was then passed by Human Resources to David Moore, Head of Health, Safety and Wellbeing. Mr Moore told Ms Daley to call the police and ambulance. On his evidence subsequently prepared (18 September 2015), Mr Moore had concluded that the claimant was suffering *“an extreme mental health breakdown”;*

36.9 Mr Moore also reported the call he had taken by way of an email on 7 March 2014, within 40 minutes of the call. He sets out in that email that the claimant had a history of mental ill health. The email is timed at 1709 hrs and refers to the call being *“about 40 minutes ago”*. In his report of 18 September 2015, he referred to hearing,

“almost continual shouting and some banging in the background and, from the information provided from the Branch Manager, I concluded that [the claimant] was having an extreme mental health breakdown”;

36.10 Ms Daley was advised to ensure that all staff and customers were safe. They apparently congregated in the banking hall;

36.11 Ms Daley then rang the emergency services, a London ambulance service record of the calls confirmed that a call was received from the branch at 4:41 pm. It refers to the claimant as *“not alert and haemorrhaging”*. It also refers to *“police requested for psychotic illness – significant risk of danger to themselves or others, ...35 [year old] female having a MH [mental health] breakdown, violent”* (this entry was timed at 1641 hrs), and returns to the claimant *“having MH breakdown – thrashing on floor – stated violent – not responding”;*

36.12 in the meantime, either during or after her discussion with Mr Moore, Ms Daley photographed the claimant lying on the floor. This photograph is timed at 4:19 pm, more than 20 minutes before she telephoned the ambulance. Ms Daley also took a short video of the claimant at the same time. The video, although it formed part of the information provided to the disciplinary officer, was not shown to the claimant at any stage and has not been shown to us. It showed, according to Ms Daley, the claimant lying perfectly still on the floor. The photo / video were taken on a mobile telephone. There was no explanation given as to why there was such a gap between the taking of the video and photograph and the calling of the ambulance.

37. It is then common ground that the police and ambulance arrived, that the claimant was able after attention to stand and leave the branch with her husband who had also arrived. The claimant was then taken to hospital.

38. We are required to conclude what did in fact happen on 7 March 2014. Based on the evidence which we have had presented to us we are satisfied on the balance of probabilities that the events were as follows:
- 38.1 the claimant was suffering from abdominal pain and, initially, vaginal spotting;
 - 38.2 on her return to the Bexleyheath branch she was recommencing work when her pains became worse. Knowing her history, and aware that she was recently pregnant, she was fearful of miscarrying;
 - 38.3 she felt unable to continue work and although Ms Daley asked her to do so, she said that she was unable to balance her till. She was requested several times to carry out this work, refused to do so and said she was unable to do so. She asked Ms Daley to carry out that work for her but she in turn refused;
 - 38.4 the claimant's pains became worse. She was in the staff canteen, in considerable distress. She was uncommunicative;
 - 38.5 the claimant felt increased bleeding and increased abdominal pain. She hurried to the toilet. In doing so she knocked over a chair;
 - 38.6 the claimant, whilst in the toilet, realised the extent of her problem. She was distraught. She was in pain and distress. She was seeking to staunch her bleeding and avoid blood stains on her outer garments by stuffing toilet paper inside her underwear. Her reaction, both verbal and physical to her situation and the combination of pain and distress and anger was extreme. She was physically and mentally not in control of what she was doing;
 - 38.7 this resulted in noises both banging and screams or cries of distress being heard outside the area where the claimant was including in the banking hall;
 - 38.8 when the claimant left the lavatory she collapsed in the corridor. She remained there, immobile, for some time before she was aided by the police, thereafter paramedics whom arrived in an ambulance.
39. On 10 March 2014, solicitors instructed by the claimant wrote to the respondent asking for the CCTV footage of the day (which would show the banking hall and thus the reaction of customers and staff to the events – although no sound would be available), to be retained.
40. Throughout these proceedings, up to and including this hearing the respondent has maintained that they had no record of receiving this letter but during the course of the hearing, after an email search was requested by the tribunal, they found an email which both confirmed receipt of an

email from the solicitors on 10 March at 4:58 pm and a reply sent by the HR Helpdesk at Santander the following day at 3:31 pm. The letter from the solicitors was sent by email, on its face, and the respondent has – whilst they could recover the email itself – apparently been unable to recover the enclosure. On the balance of probabilities, we conclude that it was the letter which we have seen from the claimant’s solicitors requiring retention of the CCTV footage, which has not been retained.

41. The claimant’s next day at work would have been 10 March but on that day, she rang Ms Daley to say that she was unwell. She was told by Ms Daley that the business required her to remain away from work.
42. According to Ms Daley that was Mr Moore’s decision. He does not mention that in either his contemporaneous note or his later report. He does say on 18 September that he told Ms Daley that the claimant “*should be regarded as unfit for work and asked not to attend the following Monday morning*”. But he does not say more than that.
43. The claimant was unfit for work and submitted fit notes for her absence (as she was required to do). Those fit notes also have not been part of the bundle before us, nor have they been part of the disclosure in the proceedings, but the claimant was able to recover a copy of an email sent by her to Ms Daley on 27 March 2014 enclosing a fit note bearing that date. Only part of the fit note is visible but it refers to “*miscarriage*” and “*dizziness*”.
44. The Human Resources record which forms part of the bundle before us does not include the period 7 – 17 March 2014 as a period of absence but then refers to the claimant’s absence from 17 March to 13 October 2014 as “*pregnancy related*”, which phrase is repeated for the period 20 November – 24 November 2014.
45. The claimant in due course became pregnant again. She advised Ms Daley of this on 3 November 2014, she commenced maternity leave on 18 January 2015 and returned to work at the end of her maternity leave and holiday entitlement on 2 March 2016.
46. In the meantime, the claimant had attended work on 13 October 2014 which the respondent described as “*unexpected*”. Ms Daley told her to leave work and to return on 15 October which was a Monday. She duly attended on that date and was suspended from work. We have seen an email from the respondent’s Human Resources to Ms Daley enclosing a script for her to use on that date.
47. On 20 October 2014 the claimant was sent a letter by the respondent advising her that the respondent was investigating a disciplinary allegation against her. That disciplinary allegation was:
 - 47.1 “*that you have behaved in a manner with [sic] can be seen as verbally abusive to other members of staff under the disciplinary*

policy". No further information was given as to the allegations against the claimant including no information about the date of the alleged incident.

- 47.2 The claimant was also told in that letter, after the investigation was completed, one possible outcome was a disciplinary hearing at which her employment *"could be terminated with notice"*.
- 47.3 The identity of the investigating officer was not disclosed and no other details were given to her.
48. On 25 October 2014 Ms Daley submitted a management report of the incident to Human Resources. Her report of the incident is consistent with her evidence as given before us. She referred to the decision to suspend having been taken by Simon Lloyd (Head of Human Resources). According to the respondent's policy suspensions must be approved by the relevant Regional Manager and we have seen no evidence that any such approval was given in this case.
49. On 18 November 2014 the claimant was sent a letter from the respondent's Human Resources department which said that they were, *"still in the process of investigating the allegations made against [her] at Stage 3 of the disciplinary policy as they represent potential gross misconduct"*.
50. Other than to receive Ms Daley's management report, no investigation had taken place at that stage whatsoever.
51. The letter of 18 November 2014 gave no details at all of the allegations against the claimant. The claimant was told that one possible outcome of the process was dismissal without notice. No one explained to her why, or on whose authority, the decision was taken at this early stage – before any investigation other than the receipt of the management report – that the matter was potentially gross misconduct as opposed to misconduct, as previously stated.
52. The claimant was invited to an investigation meeting with Mr Andy Smith which took place on 20 November, two days after the date of the letter. He was said to be *"investigating your grievance and your Stage 3 allegations as they are linked"*. The claimant's grievance related to the actions of Helen Grace. It was not explained either then, or subsequently how that was linked to any of the events of 7 March for which the claimant subsequently faced disciplinary action (although at this stage the claimant had not been specifically told that she was facing disciplinary action as a result of the events of that day). It is noted that the claimant had already been interviewed regarding the grievance lodged by Amy-Louise Grant on 7 March.

53. The meeting of 20 November 2014 did not take place because the claimant was unwell.
54. No further meetings were held with the claimant until 10 March 2016. The respondent did seek consent to have contact with the claimant's General Practitioner for a report on her condition but the wording of that referral could not be agreed and no consent was ultimately given. At no time did the respondent seek to refer the claimant to Occupational Health.
55. Mr Smith subsequently left the respondent's employment. We were not told when. It appears, as no evidence to the contrary has been provided, he did nothing to investigate either the disciplinary charge against the claimant nor her grievance. No witnesses were interviewed and no other enquiry took place.
56. In late 2015 (according to Ms Daley in either November or December of that year), Mr Vikram Basavarajaiah was appointed as Investigation Manager in his place. However, Ms Daley spoke to him and said that in her view it would be better if Mr Richard (known as Dennis) Aye-Kumi took on the role of Investigating Officer. By this time the investigation was limited to the disciplinary matter, the claimant's grievance was not being investigated by either Mr Basavarajaiah or Mr Aye-Kumi.
57. Ms Daley said that the reason for this decision was because Mr Basavarajaiah would need to travel to interview the various witnesses. By contrast Mr Aye-Kumi was about to join the branch where the incident occurred. He was new to Santander. Ms Daley considered that made him independent and impartial but Mr Aye-Kumi reported directly to her in his new role. The respondent's disciplinary policy and guidelines are silent as to who should appoint the Investigating Officer. Mr Basavarajaiah wrote to Ms McMenemin (People Consultant) on 16 December saying that Ms Daley had "*correctly suggested*" that it would be better for Mr Aye-Kumi to carry out the investigation and she would ask Mr Aye-Kumi to contact Ms McMenemin saying that he was new to the branch "*hence will be independent*". Ms McMenemin's reply five days later was simply to say, "*thanks for letting me know*" and said that she would call Mr Aye-Kumi on 7 January as she in turn was leaving on holiday on 9 January.
58. It was Ms McMenemin who had contacted Jonathan Rees (Regional Manager) to instigate the investigation. She said that they were not able to find statements from witnesses anywhere, neither within HR nor within the branch. In fact, we have seen no evidence that any witness statements were taken. She asked that the business nominate "*someone to finish off this investigation*" suggesting that Ms Daley (notwithstanding that she was the prime witness), would be appropriate. She went on to list the individuals who were in the branch on the day, (but did not refer to Lisa Abreo as being in the branch). All that the Human Resources team had at that time was the management report from Ms Daley (in respect of which Ms McMenemin said that she "*does not need to be interviewed again*" and a statement from Ms Moore. The copy statement from Ms Moore which

was used in the disciplinary hearing appears to have been created on the 8 January, or 1 August 2015 (the dating system on the fax sending that document is unclear as to whether it identifies the first day of the eighth month or the eighth day of the first month). It was Mr Rees who asked Mr Basavarajaiah to deal with the investigation, he said he could deal with it between 23 and 28 December 2015, it was before then that Ms Daley suggested to Mr Basavarajaiah that he should not pursue the matter and that Mr Aye-Kumi should deal with it instead.

59. It does not appear to have concerned or occurred to Ms McMenemin that Ms Daley, the principal witness against the claimant, was selecting the identity of the Investigating Officer and chose, was an Investigating Officer who reported to her.
60. The respondent's disciplinary policy and guidelines which set out the procedures to be followed in disciplinary matters are clear. The most relevant and essential points are as follows:
 - 60.1 A disciplinary action register must be completed. That traces the history and progress of the disciplinary action. In a case at Stage 3 HR Consultancy would update the pending / action indicator. No such register has been completed in this case as far as we are aware.
 - 60.2 Allegations of misconduct must be fully investigated before disciplinary action is taken.
 - 60.3 The Investigating Manager, charged with the responsibility of investigating potential disciplinary matters must (inter alia):
 - 60.3.1 identify any witnesses, carry out interviews and take witness statements from them (using form DP4);
 - 60.3.2 gather any other relevant evidence;
 - 60.3.3 provide written conclusions summarising their findings and justification for the case to proceed or not to a full disciplinary hearing;
 - 60.3.4 decide whether a formal disciplinary hearing is required;
 - 60.3.5 complete form DP5 (Disciplinary Investigation Report template) where a formal disciplinary hearing is to take place;
 - 60.3.6 consider any mitigating circumstances;
 - 60.3.7 where the matter proceeds as an investigation under Stage 3 *'additional support and guidance will be*

provided to the Investigating Manager by HR Consultancy;

- 60.3.8 the outcome of any disciplinary hearing under Stage 3 must be recorded on form DP8 *'disciplinary hearing outcome summary'*.
- 60.3.9 any appeal against the Stage 3 outcome must be heard, where practical, by a person more senior than the Chair of the disciplinary hearing.
61. The claimant was ready to return to work on 10 March 2016. She remained suspended. Mr Aye-Kumi interviewed her on 17 March 2016 as part of his investigation.
62. At that meeting the claimant told Mr Aye-Kumi that she was concerned that her grievance had not been investigated. She set out the events of 7 March 2014 in essentially the same terms as her evidence before us. She referred to being told by another member of staff a few days before the incident of 7 March that she would not last in the branch because she was black. She referred to CCTV evidence and also advised Mr Aye-Kumi that Lisa Abreo was present in the branch and witnessed her collapse in the corridor. The claimant also said that she did not think that the investigation taking place was independent because Mr Aye-Kumi worked for and reported to Ms Daley. She told him that her behaviour on the day was because she was frustrated and it was,
- "when I was in the toilet and saw the blood that I screamed and I was crying. I did not want to lose my baby. My behaviour was due to me thinking I was miscarrying"*.
63. Mr Aye-Kumi did not seek to interview Ms Abreo. He said that the CCTV was unavailable.
64. The investigation into the claimant's grievance included an interview of the claimant by Mr Greasby on 24 May 2016. It is not clear, and has not been shown to us, when he was appointed to carry out this investigation, by whom, and when he undertook other interviews. Mr Greasby was asked by the claimant if Ms Daley had made a decision that her grievance had not been investigated previously which Mr Greasby declined to answer saying that it was a different matter. The claimant had, as early as 28 October 2014 emailed Mr Franz McCoy (Senior Regional Manager Bexleyheath Region) identifying that she had raised a formal grievance against Helen Grace on 6 March 2014 which had been neither acknowledged nor actioned asking for a prompt response from him. No reply has been brought to our attention.
65. On 25 May 2016, the day after his interview with the claimant, Mr Greasby sent the grievance outcome to the claimant. That identified that he had interviewed Vicky Wells, had statements from Lexy Connell and Helen

Grace. He did not say when those people had been interviewed and that has not been made known to us.

66. The grievance outcome confirmed that the complaint of unwanted comments made towards the claimant with reference to the odour of her clothes and food was upheld. Whilst Mr Greasby did not find that the claimant was *“continually harassed”* he did say that he did find that,

“some comments do seem to have been made which I can understand would could [sic] some discomfort and upset”.

He accepted that because the incidents were so long ago recollection from some witnesses were sketchy.

67. He also upheld the claimant’s complaint that there was a failure to deal with this problem promptly and to escalate it to a formal investigation. He said that there was a failure in the hand over from Ms Wells to Ms Daley when this issue should have been specifically dealt with and attributed fault to Ms Wells, the Manager at the time,

“who should have taken care to ensure your concerns and the ongoing apology were remedied”.

68. Notwithstanding the finding that Ms Grace had behaved as she had towards the claimant, he did not recommend any disciplinary action be taken against her, but recommended mediation between the claimant, Ms Grace and Ms Daley.

69. No appeal was made against the outcome of that grievance.

70. On 23 May 2016 (two and a half months after Mr Aye-Kumi had interviewed the claimant) Ms McMenemy contacted him asking for his investigation summary.

71. Notwithstanding the terms of the respondent’s policy, it does not appear that any HR support of any sort was given to Mr Aye-Kumi in his investigation and no disciplinary register was kept.

72. The email from Ms McMenemy was headed ‘Urgent – your summary of your investigation’ and said,

“sorry to have to chase, but I need this report urgently from you? When can I see this please?”

73. Mr Aye-Kumi’s reply of the following day said,

“Sorry if I have missed your request, can you please enlighten me on this summary of investigation please as I am not aware I had to complete one. I email about it, I thought it was about the outstanding statement from Toni [Ms Moore]. I am confused with my position in this process because I was

told from the start of this process to take statements and that is what I have done. I did not know I had to complete a summary of investigation as I have not completed an investigation on anyone so far. If there is anything to be completed please send me a template as I do not have much detailed information to complete an investigation”.

74. Ms McMenemy’s reply did not refer to the policy or procedures, nor did it refer to the templates. In fact, it said this,

“Dennis

It is a summary of your findings – there is no template because Jackie has already written the report, but because she hasn’t completed the investigation as we didn’t think it was wise for Jackie to take the statements but of course the Chair will need to see something in relation to a summary from you as the Investigation Manager taking the statements.

So, I just need a summary of who you spoke to, how you conducted the investigations, ie you met with them all, how the statements were signed and drawn up and then a summary of your findings of what occurred on that day based on what you heard from the witnesses”.

75. On the same day Mr Aye-Kumi forwarded *“My summary of the fact find”* and asked if Ms McMenemy needed any amendment.

76. Sixteen minutes later on 24 May Ms McMenemy said by email,

“Sorry this is a summary of your meeting with Chi [the claimant], but I am looking for a summary of your whole investigation ie when you became involved, who you interviewed, how you took their statements, and your summary from what you found after interviewing all the witnesses and Chi. You have given me a summary of your conversation with Chi, but I already have those notes I just require a summary of the whole thing? Happy to talk through if you prefer?”

77. 58 minutes later Mr Aye-Kumi forwarded *“the updated version”* saying that he hoped he had covered all the areas. Eleven minutes later Ms McMenemy thanked him for the enclosure saying, *“That’s just about what I needed”*, saying that she had amended the last paragraph just to explain the date he met and that it was rearranged (the claimant’s original interview date with Mr Aye-Kumi being 10 March which was rearranged to 17 March) and asked him to confirm his agreement with the amendment to which Mr Aye-Kumi replied one minute later saying *“That’s ok by me. Thanks”*.

78. The Management Report was added when compared to that prepared in October 2014 and was sent on 20 September 2016. It enclosed statements from Vicky Wells, Toni Moore, Dave Moore, Katy Plummer, Dorothy Hernandez, Helen Grace, ‘Dawn’ (Dawn Power) and Jackie Wiltshire.

79. Those statements are notable for not complying with the requirements of the respondent's investigation process. In particular,
- 79.1 the statement from Victoria Wells was an email dated 17 October 2015 to a Maxine McMenemin. There is no evidence that she was interviewed by the Investigating Officer;
 - 79.2 the statement from Toni Moore which is dated either 1 August or 8 January 2015 is a typed statement signed by her. There is no evidence that she was interviewed by Mr Aye-Kumi;
 - 79.3 the witness statement from David Moore is unsigned but dated 18 September 2015 and is a typed statement. There is no evidence that he was interviewed by Mr Aye-Kumi;
 - 79.4 the statement from Katy Plummer has with it a form DP4. It refers to the witness "*interviewed by me as part of a disciplinary investigation*". The name of the investigator is said to be Mr Aye-Kumi. The witness signature is obliterated but Katy Plummer's name appears. There is no record of interview. There is a typed statement relating to two incidents (incident 1 has been obliterated). In relation to the events of 7 March 2014 Ms Plummer's statement begins with these words,

"This incident is very vague in my head".

There is no evidence that Ms Plummer was interviewed by Mr Aye-Kumi.
 - 79.5 the statement from Dorothy Hernandez also is attached to a form DP4 which again indicates that Mr Aye-Kumi has interviewed the claimant as part of a disciplinary investigation. However, the attached statement is headed "*This is the first incident I witnessed*", the remainder of the typed statement is obliterated. Underneath that someone has written "*Dorothy was not in on 7 March 2014*". There is no evidence that that witness was interviewed by Mr Aye-Kumi. Like Ms Plummer her signature has been obliterated from the form DP4;
 - 79.6 the statement of Helen Grace is also a typed document which begins with the words "*In relation to the incident which involved our branch I can confirm the following: ...*" There are then a series of lines which have been obliterated. She then talks about hearing raised voices from behind the counter quite late in the day. Her signature has been obliterated on form DP4 and although that form states that the witness has been interviewed by Mr Aye-Kumi as part of a disciplinary investigation there is no evidence of any such interview taking place;

- 79.7 the statement of Lynn Smith amounts to three lines of typed statement. The signature on form DP4 is obliterated. There is no evidence that this is the result of any interview with Lynn Smith;
- 79.8 the statement from Dawn Power relates to '*Incident 1*' which has been wholly obliterated and then '*Incident 2*' (the events involving the claimant on 7 March). There is no DP4 form. There is no evidence of any interview having taken place with that witness;
- 79.9 finally, a statement from Jacqueline Wiltshire is a typed statement from her. There is no DP4 and there is no evidence of any interview having taken place.
80. The Management Report also encloses a second statement from Ms Moore said to have been prepared during a meeting with Mr Aye-Kumi on 17 May 2016. Ms Moore said that when she interviewed the claimant on 7 March 2014 (about the grievance brought by Amy-Louise Grant), it was she (and not the claimant) who asked for a break. Ms Moore denied that the claimant at any stage said that she was pregnant, miscarrying, in pain or bleeding. She said that she would not speak. When asked if the claimant had identified that she was having a miscarriage and bleeding heavily Ms Moore replied,
- "No she would not speak to me, the words she was speaking were not audible because they were not in English".*
- There is no form DP4 with this statement.
81. The summary of the investigation is brief. It confirms that Mr Aye-Kumi joined the branch on 7 January and that he was told by Ms Daley to complete an investigation into an incident on 7 March 2014. Ms Daley had explained that she could not conduct the interview as it was a conflict of the investigation process as she was Manager of the branch and was also involved in the incident. It is said that he interviewed members of staff in particular Dorothy Hernandez, Katy Plummer, Lynn Smith, Dawn Power, Helen Grace and Sharon Jones. It is said that he did an interview with Toni Moore over the telephone. He says he obtained statements between 18 – 22 February 2016 and that Sharon Jones did not provide a written statement. He says that the statements were taken on a one to one basis in the Bexleyheath branch (save with Ms Moore over the telephone) in February 2016 (with Ms Moore, May 2016).
82. There is no evidence of those interviews taking place. There are no notes. All of the statements are in typed form relating to, in some cases, more than one incident. We have unanimously concluded that Mr Aye-Kumi did not conduct interviews, he merely asked people to provide written statements.

83. His summary says that the witnesses were “*consistent and coherent*” in relation to what they heard. He does not mention any witnesses indicating that their memory was vague, notwithstanding that they were being asked about something more than two years earlier and one of the witnesses had volunteered that her memory was vague.
84. He concluded that the members of staff were “*all frightened and distressed and felt intimidated and felt she (i.e. the claimant) was out of control on the day*”. None of those witnesses, other than Ms Daley, say that they were frightened or distressed. They do refer to other people saying that they were frightened or distressed or that they felt other people were frightened or distressed, but no one says that they themselves were.
85. Mr Aye-Kumi says that he “*felt*” their observation of the claimant was that “*she is unstable and the staff are not willing to work with her any longer*”. None of the witnesses say that they were unwilling to work with the claimant.
86. It is notable that the witness statements which are accompanied by form DP4, those forms DP4 are not signed by the Investigating Manager.
87. The disciplinary summary does not suggest that any further disciplinary action is required. It does not give any justification for the case to proceed, or not, to a formal disciplinary hearing. There is no evidence that Mr Aye-Kumi decided whether a formal disciplinary hearing was required and he did not complete form DP5 which is required where a formal disciplinary hearing was to take place, nor did he complete Letter 2 indicating that no formal action was required following an investigation.
88. One of the duties of the Investigating Officer is to gather any other relevant evidence which may include computer records and data and training records. Mr Aye-Kumi did not, on the evidence we have heard and seen, collect any evidence. All the evidence was gathered by the Human Resources department. Ms Daley told us that the amendments to her Management Report had not been seen by her prior to the disciplinary hearing.
89. Ms Daley said that it was not her decision that the matter should proceed to a disciplinary hearing. There is no evidence that Mr Aye-Kumi directed a disciplinary hearing to be held following his investigation. No one was able to advise who had recommended that a disciplinary hearing should take place, nor that the scope of the hearing should be that the claimant was charged with gross misconduct.
90. On 10 August 2016, Mr Drake met the claimant to discuss her grievance against Ms Daley which had been raised in the grievance investigation in the meeting with Mr Greasby. His grievance outcome letter of 16 September 2016 upheld the grievance in part. His findings in so far as they are relevant are these:

- 90.1 The claimant had complained about an incident on 4 February 2014 which Ms Daley said due to the time lapse since the incident, she was not able to recall. There was no corroboration of the specific allegations which the claimant made.
- 90.2 The claimant was complaining of a “*Bexleyheath clique*”. Mr Drake did not disagree that there were strong relationships between long standing branch members and believed that the hand over between the two branch Directors (Ms Wells and Ms Daley) was not robust enough and more could have been done to engage the claimant with other branch members and that part of the grievance was upheld.
- 90.3 The element of the claimant’s grievance which dealt with the failure by Ms Daley to speak to the claimant following the messages on 14 February 2014 was not upheld. Mr Drake concluding that she had made “*every effort to make some time to speak with [the claimant]*” and did not believe that she was avoiding tackling the situation. The jurisdiction for that conclusion is lacking.
- 90.4 The complaint that the return to work process following the claimant’s absence for work related stress was partially upheld because Mr Drake concluded that given the nature of her sickness it should have been completed sooner than it was.
- 90.5 The claimant had complained that she had been expected to work on 29 March 2014, a Saturday, which was her day off. Although Ms Daley had recalled “*confusion*” on Saturday 29 March she could not recall dealing directly with the claimant about it “*due to the time lapse*”.
- 90.6 The complaint that Ms Daley had not allowed the claimant to eat or leave the branch when she had requested and her feeling “*discriminated against because of her colour*” was dealt with by confirmation that Ms Daley was unaware of any medical condition that required the claimant to eat urgently and (without indicating what enquiry had been made), Mr Drake said that he could find no evidence of any discrimination against the claimant.
- 90.7 The complaint that Ms Daley had not completed any one to one meetings with the claimant was upheld. It was said that this should be carried out by the Customer Services Manager (Carol Reed) who was the claimant’s Line Manager.
- 90.8 The claimant complained that she had raised a grievance against Ms Grace on 6 March 2014. Mr Drake concluded that the matter had now been fully investigated with a communication of the outcome on 25 May 2016 therefore he makes no further comment. The issue of delay was not addressed.

- 90.9 The claimant had complained about the way she was asked to attend the Market Place branch on 7 March saying she had felt ambushed. Mr Drake's findings (which he did not disclose) indicate that HR guidance was sought before Ms Moore spoke with the claimant and that *"this was positioned with the view that Toni wanted to provide you with an opportunity to respond to the concerns that had been raised by your colleague Amy"*. He concluded that Ms Moore acted appropriately in her role as Investigator of Amy Grant's grievance. No mention was made of the fact that the claimant had been endeavouring to speak to Ms Daley about this same matter for some time.
- 90.10 The claimant complained about how the incident on 7 March 2014 had been dealt with, saying that she felt distressed, abandoned and racially discriminated against by Ms Daley. That part of the grievance was not upheld because Mr Drake said that he considered that Ms Daley had taken measures to deal with a very difficult situation and was not abandoning or discriminating against the claimant.
- 90.11 The final element of the claimant's grievance was of an allegation of a breach of Company Control and Risk Procedures of the Customer Service Adviser from the High Street branch (Chris Plummer) had cashiered in the branch whilst his sister was in charge of control and risk. This had been confirmed by Regions Operations and Control not to be a breach of Control and Risk Procedures. The outcome letter enclosed meeting notes from meetings with Jonathan Rees, Toni Moore, Jackie Daley, Vicky Wells and Carol Reeves and the statement provided by David Moore on 7 March 2016. Those interviews were carried out between 28 June and 6 September 2016.
- 90.12 Mr Drake recommended that Ms Daley's Regional Manager should ensure that if a hand over needs to take place sufficient support is provided to make sure that this is robust, Mr Rees should encourage the use of the 'Inspire' system to record one to one meetings and a review should take place of the sickness process within the branch with consideration into the reason for the absence when looking at how soon a return to work should be completed.
- 90.13 We were not given any evidence to indicate that those steps had been taken.
91. The claimant appealed against the outcome of the grievance against Ms Daley. That appeal hearing was postponed first because the claimant's father-in-law passed away, then because the Chair of the hearing required an emergency operation, then because the manager was *"unexpectedly unavailable"*, then because the claimant's daughter was unwell. Notwithstanding that two of those reasons for postponement were at the respondent's instigation, the claimant was informed on 23 January 2017 that the hearing would take place on 2 February and that if she did

not attend the respondent would take this to mean that she did not wish to proceed with her appeal. On 2 February 2017 the appeal was treated as withdrawn because the claimant did not attend and was uncontactable. On 2 February 2017 at 8:46 pm the claimant emailed Louise Moore within the HR team (who was providing HR support at the grievance appeal hearing). She was involved in an incident and was taken to hospital whilst on her way to the grievance appeal and had only recently returned home. We were not told that this caused any response or review by the respondent.

92. On 20 September 2016 the claimant had been sent notice of an invitation to a Stage 3 disciplinary hearing to be Chaired by Mr Andy Briggs. The allegation which the claimant faced was,

“It is alleged that you have behaved in a manner which can be seen as verbally abusive and aggressive to other members of staff under the disciplinary policy”.

It was said that this was a serious breach of Company Policy which if proven could amount to gross misconduct. She was advised that one of the potential outcomes was dismissal without notice on the ground of gross misconduct. The letter was sent by Ms McMenemy. It enclosed the disciplinary report and additional report and guidance notes for employees.

93. The disciplinary report, so called, was the Management Report prepared by Ms Daley (and amended without reference to her, on her evidence), and various appendices. As well as the witness statements which we have referred to above, the appendices were: the HR record of the telephone calls between Ms Daley and the Human Resources department about the claimant; a report from ‘HR Online’ setting out some of the claimant’s absences; the script notes from the claimant’s suspension on 15 October, including the letters sent to her thereafter; a copy of the photograph taken of the claimant lying on the floor; copy letters to the claimant from Human Resources regarding an investigation meeting; the notes from the investigation meeting with Mr Aye-Kumi; a copy of the report of the information regarding the call to the emergency services and the video of the claimant lying on the floor (which was said not to be included with the bundle but was subsequently provided to Mr Briggs). There was then an additional Manager’s Report. It bears no name or date and it is not clear who prepared it but it is designed to *“explain why there has been a delay with arranging this Stage 3 hearing and further evidence that came to light”*. There is a timeline as part of the report. It is partial, for example, the period 8 March – 13 October 2014 includes this information, *“she called in sick and was then signed off sick for 7 months”* without reference to the fact that she was told not to attend work for that period, her suspension only being identified on 15 October. On reading the report it states, *“we have continually tried to obtain medical consent...”* which suggests that the document was prepared by an unknown member of the Human Resources team.

94. Other documents relate to the claimant's return to work on 6 March 2014, her fertility treatment and the attempts made to obtain medical information from the claimant. In addition, there are notes of telephone calls between the claimant and Mr David Moore in June 2016 about medical consent and advice given to Ms Daley from Mr Moore. None of that relates to the disciplinary charge which the claimant was facing but the terms of the additional report are critical of the claimant.
95. The disciplinary hearing was then postponed until the claimant's appeal against the grievance which she had lodged against Ms Daley took place. Eventually the disciplinary hearing took place on 22 March 2017. By letter of 24 February 2017 the claimant was called to that meeting. She was told that Ms Daley would attend and "*present her report*" and answer any questions about "*her investigation*", although she was not the investigating officer.
96. The claimant replied to say that she would attend the hearing and would be accompanied. On 6 March the claimant was asked to identify who would be attending with her. No reply appears to have been sent and on 14 March Ms McMenemin pursued that query, again without response.
97. On 21 March at 12:47 am the claimant sent an email to Ms McMenemin saying she was unable to attend the hearing the following day due to sickness. She sent a fit note from her doctor dated that day saying that she was suffering from "*headaches severe*".
98. Ms McMenemin replied saying that as the hearing was a rearranged hearing it would go ahead despite her absence as only one rearrangement was the Santander Policy. She asked the claimant to provide a written statement or dial in or to help get a representative to attend on her behalf.
99. Jessica Wardle, HR Manager, said she had no objections to the matter proceeding in the claimant's absence.
100. On 22 March at 1017 hrs Mr Briggs held the disciplinary hearing. He confirmed that the allegation was that,

"It is alleged that you have behaved in a manner which can be seen as verbally abusive and aggressive to other members of staff under the disciplinary policy".

His findings were that the claimant had refused to balance her till and,

"in simple terms, you had a serious outburst in branch".

Her actions were described as "*wholly inappropriate*" and Mr Briggs said that the claimant,

"seemed to lose control of your emotional state and acted aggressively in front of staff and customers".

101. He further said that the claimant was “*screaming, shouting and kicking furniture and walls*” which led to Ms Daley calling the HR Helpline. He said that there was insufficient evidence to support the claimant’s claim that her actions on that day were as a result of her belief that she was in the process of suffering a miscarriage. He referred to the fact that the IVF treatment she was to undergo had been identified to the respondent on 3 March, that there was an appointment on 5 March. It is said that Ms Daley was unaware on 7 March that the claimant was pregnant or may have been suffering a miscarriage. He concluded that,
- “Whilst I accept that notwithstanding your commencement of IVF treatment two days earlier, you could have been pregnant on the day of the incident and may have thought you were suffering a potential miscarriage, there is no evidence to support this as mitigation. Moreover, it is my reasonable belief that it will be possible to obtain such evidence from the medical professionals, but you have declined these requests”.*
102. The fit notes which the claimant had submitted confirming that she had suffered a miscarriage had not been provided to the disciplinary hearing. The disciplinary officer did have before him the ambulance report which confirmed vaginal bleeding and threatened miscarriage.
103. Mr Briggs concluded that it was his reasonable belief that the claimant’s behaviour on 7 March “*was both verbally abusive and aggressive and wholly unacceptable and constitutes gross misconduct*”.
104. In his outcome letter Mr Briggs did not identify what she had said which was verbally abusive or aggressive to other members of staff, which other members of staff she was allegedly verbally abusive and aggressive towards, nor any other specifics. Whilst he referred to screaming, shouting and kicking furniture and walls, that is not verbal aggression towards another member of staff. He then referred to her,
- “hysterical screaming, continual shouting, shouting at your manager, kicking doors, furniture and walls, lying on the floor screaming, ‘chanting’, customers being able to hear you kicking and screaming from the toilet all the way through to the banking hall. Your colleagues were also crying in fear. This supports the allegations that you were both verbally abusive and aggressive”.*
105. There was no evidence at all of colleagues “*crying in fear*”. She faced a disciplinary charge relating to the customers in the branch.
106. When Mr Briggs was asked during the course of the hearing what specific conduct of the claimant he had found which amounted to verbal abuse or aggression towards other members of staff, his answer was that it was simply the “*whole event*”.

107. In answer to questions before us, Mr Briggs also confirmed the following:
- 107.1 He accepted that the HR Officer in her report of 21 April 2018, described the case when she inherited it as “a mess”.
 - 107.2 He did not know whether Ms Daley was in fact the claimant’s Line Manager or not (she was not).
 - 107.3 He was not sure as to whether he had been made aware that the claimant had submitted a fit note saying she was unfit to attend the hearing on the day he held it.
 - 107.4 That he accepted that none of the witnesses said that they were frightened.
 - 107.5 Producing statements two years after the event was “not ideal”.
 - 107.6 That, “it may have been better for more independence to have been brought to bear in this case”, which had “jumped out” to Mr Briggs when he read the disciplinary pack and saw that Ms Daley put together the report that should have been done by an independent Manager.
 - 107.7 That Ms Daley had not provided any witness statement but had set her findings out in a Management Report.
 - 107.8 That there is no reference to a “Management Report” in any part of the disciplinary policy.
 - 107.9 That he was not aware that Ms Daley had appointed the Investigating Manager and that he reported to her.
 - 107.10 That he had seen the video of the claimant lying on the floor which showed her to be immobile. He also confirmed that that video had not been seen by the claimant in any stage of the disciplinary process.
108. Whilst in his evidence Mr Briggs was at pains to explain why neither Ms Moore nor Ms Daley knew the claimant was pregnant at the time or knew that she had miscarried at the time, he did not address the fact that by the time the matter came before him two years later the respondent had ample evidence that the claimant had miscarried. There was the report from the ambulance which he had seen and the fit notes which the claimant had submitted (which had not formed part of the Management pack put before the disciplinary hearing, for reasons which no one has explained to us).
109. Mr Briggs said that the “customer complaints” which had been made were in his mind when considering whether the claimant was guilty of gross misconduct but accepted that he had not seen any customer complaints.

He had merely been told that a complaint had been received and some compensation paid to a customer, but why and for what he could not say.

110. Mr Briggs told us whilst Ms Daley did not in her Management Report say that the claimant had shouted at her, his view was that the claimant must have done. He had *"no idea"* why Ms Abroe was not interviewed and said that his only role was to Chair the hearing (and not, therefore, to question the fullness of the investigation). He said he would not normally identify who had indicated that the case should be referred to a disciplinary hearing at Stage 3 (but made no comment regarding the lack of form in the referral save to say that the pack *"looks unusual"* and that his job was to *"get on with it"*). He had not seen the suspension letter. He was unaware that there had been an alteration to the branch layout since the incident, accepted that obtaining evidence more than two years after the incident might affect people's memories and said that it would have been helpful to have seen the CCTV. When asked if he thought that would have made any difference, his reply was *"who knows"*. He accepted that the video did not show any shouting and banging or thrashing around. It was put to him that another witness Sylvia Bracha was still in employment at the time and could have been interviewed but he said he did not know who she was.
111. Mr Briggs confirmed that the reason for dismissal related solely to the conduct of the claimant on 7 March. He said that even if she was suffering a miscarriage, that was not enough to justify her behaviour, including by reference to her pre-existing mental health difficulties. Mr Briggs said he was aware of the grievance against Ms Daley and had asked Human Resources if there was any cross over between it and the disciplinary issue and was told that there was a *"small element"* of cross over but made no further enquiry. He had asked if there was anything he needed to know arising out of the grievance and was told that it was of little consequence.
112. Mr Briggs said that he relied on Ms Daley's evidence because she was the Branch Director. By contrast he also said the fact that she was senior or junior to anyone else made no difference. She was the prime witness to what had happened and he relied on her as the prime witness. He understood that the Investigation Manager was suspended at the time of the disciplinary hearing.
113. Mr Briggs did not raise any query as to the way in which the witness statements had been obtained, the lack of forms DP4, the fact that none of the forms DP4 were signed by the Investigating Officer and that there was no recommendation from the Investigating Officer as to the next steps. He confirmed that the disciplining officer can ask for more investigation, but he did not. He considered the delay to be *"at best unfortunate"* and said that *"it is what it is"* and that it would have been *"better if the process had been tighter given the severity of the issues"*.
114. Mr Briggs concluded his evidence by telling us that he formed the view that the claimant lost control of her emotions on 7 March but was in control

of what she was doing. He said that he believed that her actions were deliberate.

115. The claimant appealed against this finding of gross misconduct and the appeal hearing took place on 22 May 2017, Chaired by Mr Fallis.
116. The claimant's letter of appeal was lengthy. It was divided into sections namely,
 - 116.1 That the allegations against her were not and never had been particularised (in particular to whom or which member of staff was the claimant verbally abusive, to whom or which member of staff was she aggressive, what were the words she used which are construed as abusive or aggressive and what body language did she use which was abusive or aggressive?).
 - 116.2 The investigation was in her words "*not independent*" and "*...a gross travesty of justice and common sense*", (in particular that Manager whom presented the investigation report had a prominent role in the incident (Ms Daley). The Investigator was appointed by and worked under Ms Daley, persons not present in the branch were interviewed but one member of staff (Lisa Abreo) was not interviewed despite the claimant pointing this out. Two other members of staff present on the day (Ms Bracha and Ms Jones) were not interviewed. Ms Daley was not interviewed and was provided access to all the statements provided by other staff members. None of the witnesses made any statement to suggest that they were unwilling to work with the claimant.
 - 116.3 The claimant described the disciplinary hearing as a sham, criticised the role of Ms Daley and noted that the Disciplining Officer had not taken account of the grievance that she had raised against Ms Daley.
 - 116.4 Under the heading 'Management Complicity' she referred to the absence of CCTV despite it being requested three days after the incident, the fact there are no notes of the Regional Manager's visit to the branch on 10 March (that day Mr McCoy spoke to all members of staff who were present on the day) and set out at length her version of events on the day including her miscarriage.
117. The claimant attended her disciplinary appeal. Mr Briggs was present as was a note taker. Although Mr Fallis reviewed all of the information available to him, he did not have copies of the fit notes which confirmed that the claimant had suffered a miscarriage. Mr Fallis had said that information was needed from the GP which the claimant had refused to give, but the claimant said that as she had submitted fit notes, what more

proof was required? Mr Briggs confirmed that the absence of other medical evidence had an effect on his decision.

118. Neither Mr Briggs nor Mr Fallis took note of the failure to follow process in the Investigation Report, the way or by whom (unknown) the decision was then to advance the matter to a disciplinary hearing and the record of the outcome of both the investigation and the disciplinary hearing.
119. The claimant was told that Ms Daley had not been interviewed because the Investigating Officer could not interview his superior. She said that further questioned of the independence of the investigation.
120. The claimant complained that the investigation did not start until two years after the incident, she questioned the reliability of people's memories, questioned the absence of any notes or interviews that were made after the visit of the Regional Manager and pointed out that an allegation that there was a small boy in the bank in distress had not been mentioned until the day of the appeal.
121. Mr Fallis did not consider that the complaint the claimant had raised against Ms Daley was relevant to her appeal.
122. The outcome of the appeal was sent on 6 June 2017. Under the different headings Mr Fallis concluded that,
 - 122.1 Whilst the claimant, *"may not have directed specific comments to individual members of staff, there is evidence to support that her actions, (eg shouting, screaming, chanting) on 7 March 2014 were in general, considered aggressive."* He said that they frightened *"both...members of staff and also customers"*. He did not consider the absence of CCTV footage to be something of impact upon the decision.
 - 122.2 While accepting that the discharge notice referred to the claimant suffering bleeding in pregnancy, he went on to say that there was no evidence of the claimant being *"abandoned"* or *"left to die in a pool of blood"*.
 - 122.3 He did not consider whether the claimant was suffering a suspected miscarriage or miscarriage would mitigate against criticism being made of her behaviour.
 - 122.4 In relation to the criticism of the investigation, this occupies only five lines of the outcome letter. The appointment of Mr Aye-Kumi was described as, *"not outside policy"* and referred to there being, *"no evidence... which would suggest the investigation was not undertaken fairly and impartially"*. No comment was made regarding the various procedural failings.

- 122.5 Mr Fallis considered that Mr Briggs had behaved appropriately when proceeding with the disciplinary hearing in the claimant's absence.
- 122.6 He accepted that it would have been "*helpful*" if witness statements had been taken after the incident, ignored the question of whether Mr McCoy's visit was recorded in any notes or statements, but said that he did not believe it would have changed the emphasis of the witness statements (if they had been taken earlier). He said there was no evidence of collusion. He confirmed that the absence of a medical report had been a factor in reaching the original decision and that the company had taken all reasonable steps to obtain that medical report.
- 122.7 He described the claimant's actions on the day as "*wholly unacceptable and regardless of whether you considered you needed medical attention, this could have been handled in a professional manner which would have avoided this incident*".
- 122.8 The appeal was therefore refused.
123. It is against that factual background that the claimant brings her complaints.

The Law

Unfair Dismissal

124. Under Section 94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.
125. Under Section 98(1) it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is a reason falling within sub-section (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.
126. Under Section 98(2)(b) the reason which relates to the conduct of the employee is a potentially fair reason for dismissal.
127. Where the employer has fulfilled the requirement to show that the reason, or if more than one the principal reason, for the dismissal was a potentially fair reason, then the question of whether the dismissal is fair or unfair, having regard to the reasons shown, depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the

case. In relation to the question of fairness or unfairness, the burden of proof is neutral.

128. The well known case of British Home Stores Ltd. v Burchell [1980] ICR 303, established the questions the Tribunal should ask when determining the fairness or unfairness of a conduct dismissal were as follows:

128.1 Did the employer have a reasonable belief in the guilt of the employee of that misconduct?

128.2 At the time, did the employer have in mind reasonable grounds upon which to sustain that belief?

128.3 At the stage at which the belief was formed on those grounds had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

128.4 Did the employer act reasonably in treating the conduct found as sufficient to justify the termination of the employee's employment?

129. The Tribunal has reminded itself of the dictum in Foley v Post Office; HSBC Bank Plc v Madden [2000] ICR 1283, that we must not substitute our view for that of the employer. The test is whether the respondent behaved in a way which fell within the range of responses open to a reasonable employer.

Wrongful Dismissal

130. An employer is entitled to terminate an employee's contract of employment, without notice, if that employee is guilty of a repudiatory breach of contract.

Automatically Unfair Dismissal - pregnancy

131. Section 99(1) of the Employment Rights Act 1996, an employee is dismissed shall be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is of a prescribed kind, or the dismissal takes place in prescribed circumstances.

132. The prescribed reasons and circumstances include pregnancy, childbirth and maternity under Section 99(3).

133. In the case of Abernethy v Mott, Hay and Anderson [1974] IRLR 213, a reason for a dismissal is a set of facts known to the employer, or of beliefs held by him, which cause him to dismiss the employee.

Discrimination on the Grounds of Pregnancy

134. Under Section 18(2), of the Equality Act 2010 confirms that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably because of the pregnancy or because of an illness suffered by her as a result of it.

135. Under Section 18(6), the protected period begins when the pregnancy begins and ends, if she has the right to ordinary and additional maternity leave at the end of the maternity leave period or (if earlier) when she returns to work after the pregnancy and if she does not have that right at the end of the period of two weeks beginning with the end of the pregnancy.
136. Under Section 18(5), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period even if the implementation is not until after the end of that period.
137. In Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, it was held that pregnancy need not be the only or the main reason for any unfavourable treatment. An employee must show that her pregnancy had a significant influence on the decision and the important question is to determine why the alleged discriminator acted as they did.

Conclusions

138. Applying the facts found to the relevant law we have reached the following conclusions.
139. Prior to the events of 7 March 2014, the claimant had suffered some difficulties at work. She had been the victim of unpleasant conduct at the hands of a colleague, Helen Grace, which led to her raising a formal grievance on 6 March 2014. Miss Grace had referred to the claimant's clothes as "*stinking*" and told other members of staff to move their clothes away from the claimants because of the smell and reacted to the claimant's presence by indicating there was an unpleasant smell and squirting perfume around the room.
140. There had also been an altercation of sorts between the claimant and Amy-Louise Grant on 13 February 2014. The claimant had, promptly thereafter, sought to discuss the matter with her Branch Manager Miss Daley. A promised discussion with Ms Daley which was due to take place on 15 February, did not occur and Ms Daley gave no explanation as to why not. Thereafter the claimant was absent from work, self-certifying her absence as being due to "*concerns, issues and so much stress at work and a lot of things that have happened to me at work*" and thereafter being certified as unfit for work by her General Practitioner due to "*anxiety and depression with work stressors*".
141. Not only did Ms Daley fail to have her promised discussion with the claimant, she also failed to take any steps whatsoever as regards the matters raised by the claimant, the stated reasons for her absence from work and the formal grievance raised on 6 March.
142. It was not clear from the evidence given by the respondent's witnesses whose responsibility it was to progress these matters. Ms Daley took the view, but on what basis we do not understand, that because the

complaints which the claimant brought related to matters which occurred before as she was the Branch Manager, the former Branch Manager should be responsible for any investigation into them. What role Human Resources / Employee Relations Team had in this matter was not explained. The abject failure, which lasted for a lengthy period of time, to deal with concerns and complaints raised by a member of staff who identified wholly inappropriate conduct towards her from another member of staff, work related stress causing her to be absent from work and related matters in correspondence and in a formal grievance simply cannot be explained.

143. The claimant has had some difficulty conceiving naturally. She had one successful treatment through IVF and was embarking on another course of treatment (for which she would be obliged to pay) when she found that she had in fact conceived naturally. Given her previous difficulties it is wholly understandable that she did not wish to advise her employer of her pregnancy at the very earliest stage. She was waiting until she was 12 weeks pregnant and after her first scan before disclosing her condition to her employer.
144. We are entirely satisfied however, that by 7 March 2014 the claimant was pregnant. We reached that conclusion because of the subsequent medical information provided by the London Ambulance Service and by the claimant's General Practitioner.
145. Notwithstanding the fact that the claimant's own complaints had been ignored and not progressed, the respondent acted very promptly to investigate a complaint against the claimant brought by Amy-Louise Grant. Ms Grant had apparently submitted a written complaint regarding the incident on 13 February 2017 between her and the claimant. It must have been obvious to Ms Daley when she received this document that this was Ms Grant's version of the events of 13 February about which the claimant had been trying to speak to her since 15 February. The grievance document is undated, and is typed but unsigned.
146. The document is not dated and Ms Daley could not say when it was received other than to say that she thought that it would have been on or about 3 March 2014.
147. It is surprising to us that at that stage Ms Daley did not seek to speak to the claimant or invite further information from Ms Grant about the incident. Rather, she requested another Manager, Ms Moore, to hold an interview with the claimant about the incident. There was no suggestion that Ms Moore should interview the complainant Ms Grant and nor was Ms Moore advised, as far as we have been told, that the claimant had raised issues which had yet to be investigated about the incident on the day.
148. The claimant was sent to speak to Ms Moore but was not told why. She did not know what the meeting was about and was wholly unaware that Ms Grant had raised any grievance.

149. It matters not whether the meeting was delayed because of a request by the claimant that she be allowed to have her lunch or whether it was at Ms Moore's request. What matters is that during that break the claimant felt abdominal pain and believed that she was suffering from some vaginal bleeding. She visited British Home Stores where she was able to use their public lavatory and realised that she was suffering some mild vaginal bleeding. Given her gynaecological history she was understandably concerned and distressed. She told Ms Moore that she was unable to continue with the discussion and therefore was sent back to her own branch.
150. We have concluded on the balance of the evidence before us that what subsequently occurred was that on her return her pains, when she was recommencing work, became worse. She was fearful of miscarrying. She then indicated that she felt unwell and could not continue work. Ms Daley does not appear to have challenged that in principal but told the claimant to balance her till.
151. It is not clear whether the claimant had actually recommenced work and/or done anything more than prepare to return to work. It was not made clear to us that the till had been opened, nor whether any transactions had been carried out or not.
152. The claimant said that she could not balance her till. She said that she was unable to continue work at all. Ms Daley made a number of requests or demands that the claimant balance her till.
153. It is not clear why Ms Daley did not use the procedure available to her to require two other members of staff to carry out the balancing of the till. That must have occurred subsequently (if the till required rebalancing at all) because the claimant did not carry it out. In any event, the claimant was asked to do so on a number of occasions and said that she was unable to do so.
154. The claimant had moved to the staff canteen area. She was uncommunicative and in considerable distress. She felt increased bleeding and increased abdominal pain and hurried to the toilet.
155. In doing so she knocked over a chair. This was subsequently described as her throwing furniture. This is but one example of what we find to be a hyperbolic response and description of what occurred on the day prompted in the main by Ms Daley and Ms Moore. The claimant was in substantial pain and distress. Their concern appears to have been solely directed towards the technicality of having the till balanced by the claimant.
156. As we have previously found the claimant realised, when she was in the toilet, the extent of her difficulties. She was in pain and distress, she was distraught and seeking to staunch her vaginal bleeding to avoid blood stains on her outer garments. She was stuffing toilet paper into her underwear to do so.

157. We have found, and unanimously conclude, that by this stage the claimant was effectively not in control of what she was doing. She was suffering physical pain and mental anguish. This resulted in her screaming or crying out in distress, those noises being heard outside the area where the claimant was, including within the banking hall.
158. The claimant left the lavatory and collapsed on the floor. She lay there for some time. Indeed, Ms Daley took time to both photograph and record a short video of the claimant lying immobile. She did this some twenty minutes before taking any steps to call for medical help.
159. We pause there to note that the video was shown to the disciplining officer as part of the misconduct case brought against the claimant for her conduct on 7 March but was not disclosed to her or seen by her at any time. We further note that it shows her immobile and inactive, prone on the ground (according to those who have seen it, which does not include the claimant nor the Tribunal), as does a photograph which the claimant did see and which was part of the Bundle before us.
160. By the time the claimant was prone and lying on the ground the episode of shouting / screaming / banging and her period of distress and anguish was over. It was during that period that Ms Daley took time to speak to Human Resources and ultimately to Mr Moore, Head of Health, Safety and Wellbeing. It was Mr Moore who concluded that the claimant was suffering an extreme mental health breakdown as he recorded in his note of the discussion. Thus, the discussion between Ms Daley and Human Resources / Mr Moore took place at about the same time as Ms Daley photographed the claimant lying on the floor. That photograph is timed at 4.19pm. The call to London Ambulance Service did not take place until 4.41pm and Mr Moore's report of the call recorded in an email at 5.09pm as being "*about 40 minutes ago*".
161. We are satisfied that throughout this period, none of Ms Daley, Ms Moore, nor Mr Moore were aware that the claimant was pregnant. She was uncommunicative. She did not explain, perhaps because she felt unable to explain, her condition. However, it cannot be said that any of the actions which Ms Daley took on that day, about which the claimant complains, were because of her pregnancy. There is no doubt that the events occurred during the protected period. We are unable to state when the protected period began because the claimant, having miscarried, there is no evidence to indicate how far advanced her pregnancy was save that we know – because this was at the very early stage before any scan had taken place – that the pregnancy was in the early part of the first trimester. The protected period ended two weeks after the end of the pregnancy and that pregnancy ended on 7 March when she sadly miscarried.
162. The claimant's unchallenged evidence was that the Police arrived before the Ambulance, that they revived her and that her husband arrived and she was able to be taken to the Ambulance. She was able at that stage to walk.

163. In the meantime, the branch had been closed.
164. No evidence has been produced either to the claimant or to the Tribunal to suggest that any of the customers complained about the matter or that they were suffering from fear. The closed circuit television of the banking hall, which would show at least the physical reaction of the customers, was requested by the claimant's solicitors within three days of the incident. Although the respondent initially denied receipt of that letter, it was sent by an email, the covering email is still available and the response was provided during the course of the hearing. No explanation has been forthcoming as to what happened to the solicitor's letter or why no action was taken upon it, but the CCTV was not retained.
165. Thereafter, the claimant was unfit for work. The fit notes which the claimant submitted have also not been provided by the respondent, but the claimant was able to recover a copy of an email sent to Ms Daley on 27 March enclosing a fit note bearing that date. Whilst only part of the note is visible it refers to miscarriage.
166. Equally, the report from the London Ambulance Service refers to the claimant as *"not alert and haemorrhaging"*.
167. Thereafter, the claimant remained unfit for work for a period of time, fell pregnant again and carried a child to full term taking maternity leave. Her maternity leave began on 18 January 2015 and she returned to work at the end of her maternity leave and holiday entitlement on 2 March 2016.
168. Prior to this, at the end of a period of absence certified by fit notes, the claimant returned to work. The respondent described this as *"unexpected"* when it occurred on 13 October (a Saturday). The claimant was advised to return to work on 15 October and on that date, she was suspended from work. Thereafter, she was advised that she was under investigation regarding possible disciplinary offences, the allegation being,

"That you have behaved in a manner [which] can be seen as verbally abusive to other members of staff under the Disciplinary Policy".
- She was advised that one possible outcome was a disciplinary hearing at which her employment could be terminated with notice.
169. That letter did not identify even the date upon which the alleged incident was said to have occurred. It did not identify which members of staff she was alleged to have been verbally abusive towards, nor what it was she had apparently said which amounted to verbal abuse. We note this is the case notwithstanding that seven months and thirteen days had passed between the date of the incident apparently under investigation (as it subsequently transpired) on 7 March 2014 and the date of the letter, 20 October 2014.
170. Five days after that suspension letter, Ms Daley prepared and submitted a 'Management Report' of the incident to Human Resources. But other than

for her to set out her comments in that report (which, on the face of the respondent's disciplinary policy is a document which has no part to play in the respondent's disciplinary process), no investigation had taken place at all. There had been a visit to the branch on 10 March 2017 by the Regional Manager who had spoken to all members of staff present on the day. That visit and the discussions he had with the members of staff are undocumented. No attempt was taken to obtain contemporaneous information from any witnesses, including Ms Daley, no Investigation Officer was appointed and no independent investigation took place at all.

171. On 18 November, the respondent's Human Resources department told the claimant they were *"still in the process of investigating the allegations made against [her] at stage 3 of the disciplinary policy as they represent potential gross misconduct"*.
172. Quite how this could be the view of anyone within the respondent's Human Resources department is beyond our understanding. No one had taken any steps to investigate the matter at all other than the fact that Ms Daley had submitted a Management Report of the incident. Further, even on 18 November, eight months and eleven days after the incident apparently under investigation, the claimant was given no details as to what she was under investigation for.
173. Further, neither at this stage nor at any subsequent stage, has anyone been able to advise either the claimant or the Tribunal who took the decision that the matter amounted to potential gross misconduct rather than simply misconduct, when or on what basis.
174. On 20 November the claimant attended an investigation meeting conducted by Mr Smith. This was said to be an investigation into the claimant's grievance and the Stage 3 allegations against her as they are linked. The claimant's grievance related to the actions of Helen Grace. It has not been explained to her nor to the Tribunal at any stage how that was linked to the events of 7 March for which the claimant subsequently faced disciplinary action. On receipt of the letter, the claimant might reasonably conclude that the Stage 3 allegations related to matters concerning Helen Grace for that was the matter about which she had raised a grievance. She had already been interviewed regarding the grievance lodged by Amy-Louise Grant, on 7 March. No steps had been taken to investigate her grievance at all. The meeting did not take place because the claimant was unwell.
175. These matters rested until March 2016 when the claimant met Mr Aye-Kumi. In the meantime, Mr Smith left the respondent's employment (although nobody could tell us when) and there was no evidence that he had done anything to investigate either the disciplinary charge against the claimant, nor her grievance to which it was apparently *"linked"*. No steps were taken to interview any witnesses.
176. The next action appears to have taken place one full year later, when in either November or December 2015, Mr Basavarajaiah was appointed as

a new Investigation Manager. His appointment was extremely short lived because Ms Daley (notwithstanding her role as principal witness in this matter) decided that Mr Aye-Kumi should take on that role. Mr Aye-Kumi was a new employee who reported directly to Ms Daley.

177. A decision had clearly been taken, although by whom, when and on what basis was not evidenced at all, that the investigation should now relate solely to allegations of misconduct against the claimant. No investigation into her grievance was taking place at all.
178. On the face of it, the proposal that Mr Aye-Kumi would be geographically better placed to conduct the investigation has some merit. He was about to be on site at Bexley Heath Branch where the incident occurred and thus, as Ms Daley indicated, he would not be required to travel to interview witnesses. In our view, however, the independence of his investigation is clearly damaged by virtue of the fact that the principal witness, Ms Daley, not only chose him as the Investigating Officer but was his line Manager. He was new to the company. He was therefore, we concluded, effectively doing Ms Daley's bidding.
179. Why the Human Resources department, when they were advised of this proposal, did not raise the issue of independence nor question having a matter, in which Ms Daley was the primary witness, investigated by her junior was not something which the respondents sought to explain in any way. In any event, to compound matters further, Mr Aye-Kumi appears to have had no regard whatsoever for his role as Investigating Manager as set out in the disciplinary policies and procedures of the respondent. We have concluded that he did not carry out witness interviews, he did not take witness statements using the appropriate form, he did not gather other relevant evidence (which would have included fit notes and other medical evidence which related to the claimant's condition), he provided no written conclusion summary summarising his findings, he did not give any justification for the case to proceed or not to a full disciplinary hearing, he did not decide whether a formal disciplinary hearing was required, he did not complete a disciplinary investigation report template in the event that a formal disciplinary hearing was to take place and did not consider any mitigating circumstances.
180. Mr Aye-Kumi interviewed the claimant on 17 March 2016, two years and nine days after the incident. She related to him her concern that her grievance had not been investigated, referred to having been told a few days before the incident of 7 March that she would not last in the branch "*because she was black*", referred to the CCTV evidence that had been requested and identified another member of staff (Lisa Abreo) who was present in the branch, and witnessed her collapse in the corridor. She also challenged the independence of the investigation because Mr Aye-Kumi worked for and reported to Ms Daley.
181. She also told Mr Aye-Kumi that when she was in the toilet and saw the blood she "*screamed... and was crying... I did not want to lose my baby... my behaviour was due to me thinking I was miscarrying*".

182. Mr Aye-Kumi did not seek to interview Ms Abreo and neither the Disciplining Officer nor the Appeal Officer considered this to be a relevant omission in the investigation.
183. In the meantime, the claimant's grievance was eventually investigated. Mr Greasby (who appointed him, when and with what remit we have not been told), interviewed the claimant on 24 May and the very next day sent the claimant his grievance outcome. He had apparently interviewed three individuals (Vicky Wells, Lexy Connell and Helen Grace) but did not say when they had been interviewed and no notes of those interviews had been seen. Mr Greasby upheld the grievance that the claimant had been the victim of unwanted comments referencing the odour of her clothes and her food. He found that *"some comments do seem to have been made which I can understand would, could (sic) some discomfort and upset"*.
184. No disciplinary action was recommended against the maker of those comments and the possibility that they had some discriminatory overtones appears not to have occurred to Mr Greasby whatsoever. The matter was to be concluded by mediation between the claimant, Ms Grace and Ms Daley and the failure to investigate the problem promptly was said to be due to a failure in hand over from Ms Wells to Ms Daley when Ms Daley became the Branch Manager who it was said, *"should have taken care to ensure your concerns and the ongoing apology were remedied"*.
185. At or about the same time, on 23 May 2016, Mr Aye-Kumi was asked for his investigation summary. We note that notwithstanding the terms of the respondent's policy which says that where the matter proceeds as an investigation under Stage 3 additional support and guidance will be provided to the investigating manager by HR consultancy, no HR support was given to Mr Aye-Kumi whatsoever. Mr Aye-Kumi was not aware that he had to complete an investigation summary, he said he was confused as to his position in the process because he had simply been told to take statements and he had done so. He said he did not know he had to complete a summary of investigation and said he had not carried out an investigation on anyone. He asked for a template as he did not have detailed information to complete an investigation.
186. The Human Resources Officer, Ms McMenemin, replied by asking for a summary of findings and advised that Ms Daley had *"already written the report"* but had not completed the investigation.
187. In the light of the exchange of emails which we have seen, we have concluded that Mr Aye-Kumi was not properly advised as to his role as Investigating Manager, did not conduct what could properly be called an investigation and did not reach the conclusions, one way or the other, which he was obliged to reach by virtue of the policies and procedures (which, in the absence of the proper HR support which he should have been receiving, we have no evidence to suggest he was aware of).
188. There was no evidence that he interviewed any of the witnesses, where witnesses have produced some statements the witness signature is

unclear or missing and there are redactions which are unexplained. We conclude from the materials produced by Mr Aye-Kumi and the correspondence in which he was involved, that he was unaware of and not advised what it was he was actually meant to be investigating.

189. Thereafter, the matter progressed to a disciplinary hearing. It progressed notwithstanding the fact that no recommendation for progress to a disciplinary hearing made by Mr Aye-Kumi or, as far as we have seen, anyone else. Someone somewhere must have been directing this process but it is not clear who. There is nothing to indicate that the Investigating Officer (or anyone else on his behalf) considered the contents of the investigation and concluded that the claimant should face a disciplinary hearing at Stage 3 (or at any other stage). The disciplinary summary does not suggest further disciplinary action is required, gives no justification for the case to proceed or not to a full disciplinary hearing and the formalities for completion are also ignored.
190. Further, the disciplinary report (so called) was the Management Report prepared by Ms Daley and amended without, as she confirmed to us, any reference to her.
191. The claimant was sent a copy of this disciplinary report on 20 September 2016 inviting her to a Stage 3 disciplinary hearing. The allegation being that,

“You have behaved in a manner which can be seen as verbally abusive and aggressive to other members of staff under the Disciplinary Policy”.

This was said to be an act of potential gross misconduct.
192. Even at this stage, the respondent did not advise the claimant, with any precision, what it was she was exactly charged with. It was not said, in the charge, what it was she actually did, or to whom she was verbally abusive or aggressive.
193. What the respondents called the Disciplinary Report (the Management Report prepared by Ms Daley, amended without reference to her and the various appendices) included a number of extraneous items relating to the claimant’s absences which were partial in their analysis. The period 8 March to 13 October 2014 carries the description that the claimant *“called in sick and was then signed off sick for seven months”*. Yet throughout this period she was told by the respondent not to attend work. The name of the author is unknown.
194. The disciplinary hearing was postponed pending the outcome of the claimant’s appeal against the decision on the grievance she had lodged against Ms Daley. By letter of 24 February the claimant was called to the rescheduled hearing to take place on 22 March. We note that she was told that Ms Daley would attend to present her report and answer any questions about her ‘investigation’ although she was not the Investigating Officer.

195. On 21 March, the claimant contacted the respondent saying she was unable to attend the hearing the following day due to sickness and submitted a fit note from her Doctor confirming she was suffering from severe headaches. Notwithstanding that, the hearing proceeded in her absence, Ms McMenemy of the respondent's Human Resources team saying that as the hearing was a rearranged hearing it would go ahead because only one rearrangement was the Santander policy. It is not clear whether that applies to rearrangements at the company's own instigation but we conclude that it was unreasonable for the respondents to proceed on that date in the claimant's absence given that they knew that she was unwell and that this was supported by a General Practitioner's fit note. The earlier postponement had been for reasons of internal procedure. To proceed in the claimant's absence was clearly prejudicial towards her and in the circumstances of this case this, we conclude, was the first rearrangement at the claimant's instigation.
196. Mr Briggs proceeded with the disciplinary hearing notwithstanding the claimant's absence and his conclusions were that the claimant had a "*serious outburst in branch*", described her actions as "*wholly inappropriate*" and said that she "*seemed to lose control of [her] emotional state and acted aggressively in front of staff and customers*", saying that she was "*screaming, shouting and kicking furniture and walls*".
197. Mr Briggs concluded that Ms Daley was unaware that the claimant was pregnant or may have been suffering a miscarriage, but went on to say that whilst he accepted that the claimant could have been pregnant on the day of the incident and may have thought she was suffering a potential miscarriage there was no evidence to support this as mitigation. Mr Briggs had not been given copies of the fit notes submitted by the claimant's General Practitioner which confirmed that she had suffered a miscarriage. No explanation has been provided as to why those important documents were not part of the investigation into the events. Mr Briggs clearly failed to have regard to the Ambulance report which confirmed vaginal bleeding and threatened miscarriage.
198. Mr Briggs concluded that it was his reasonable belief that the claimant's behaviour was "*both verbally abusive and aggressive and wholly unacceptable and constitutes gross misconduct*". But he reached no conclusions about what verbal abuse or aggression the claimant disclosed towards other members of staff which was the charge she faced. He did not identify what she had said which was verbally abusive or what she did which was aggressive to other members of staff, which other members of staff she was verbally abusive and aggressive towards, nor any other specifics.
199. Further, he reached conclusions that were not supported on any of the evidence before him. He referred to colleagues "*crying in fear*" when there was no evidence at all of that occurring. He referred to the impact on customers in branch, but that was not part of the disciplinary charge the claimant was facing. Indeed, when asked during the course of the hearing before us what specific conduct of the claimant he had found which had

amounted to verbal abuse or aggression towards other members of staff, his answer was that it was simply “the whole event”. He did not identify a single specific incident or action of the claimant’s.

200. Further, Mr Briggs accepted that he could not recall whether he had been advised that the claimant had submitted a fit note saying she was unable to attend the hearing on the day he held it, accepted that none of the witnesses had said they themselves were frightened and described the delay of over two years before any witness statements were taken as “*not ideal*”. He further accepted that when he saw that it was Ms Daley who had put together the report which should have been done by an independent manager, that had “*jumped out*” at him and he accepted that it would have been better for more independence to have been brought to bear in the case. He further accepted that Ms Daley had not provided any witness statement but had set out her findings in a Management Report, that there was no reference to any “*Management Report*” in part of the disciplinary policy and was not aware either that Ms Daley had appointed the investigating manager nor that the investigating manager had reported to her.
201. Mr Briggs also confirmed that he had seen the video of the claimant lying on the floor which showed her to be immobile and confirmed that that video had not been seen by the claimant at any stage of the disciplinary process.
202. We accept that neither Ms Moore nor Ms Daley knew, at the time of the incident, that the claimant was pregnant or that she was miscarrying. However, in the intervening period of three years the respondent was fully aware that the claimant had suffered a miscarriage. The fit notes confirming this were not put before Mr Briggs and the Ambulance report did not receive any attention from him.
203. Mr Briggs also said that customer complaints were “in his mind” when considering whether the claimant was guilty of gross misconduct. No customer complaints were provided to him, no customer complaints had been provided to us. Mr Briggs said he had been told a complaint had been received and that some compensation had been paid to a customer. He could not say which customer or why, nor by whom he had been told. That was not, in any event, put to the claimant.
204. In his evidence before us, Mr Briggs accepted that Ms Daley did not say that the claimant had shouted at her but his view was that “*she must have done*”. He could not explain why Ms Abreo had not been interviewed and said that it was not within his function to question the investigation and his only role was to chair the hearing on the basis of the evidence before him.
205. He accepted that it would have been helpful to have seen the CCTV evidence, accepted that the disciplinary pack looked “*unusual*” but said that his job was “*to get on with it*”. He said that he had not seen a letter suspending the claimant from work, was unaware that there had been an alteration to the layout of the branch and accepts that obtaining evidence

more than two years after the incident might affect people's memories. He accepted that the video and photographic evidence that he saw did not show any shouting and banging or thrashing around. He was asked why Sylvia Bracha had not been interviewed and he said he did not know who she was.

206. Mr Briggs did, however, say that even if the claimant was suffering a miscarriage that was not enough to justify her behaviour, including by reference to the claimant's pre-existing mental health difficulties.
207. Mr Briggs also identified substantial issues with the investigation. He did not however raise any query as to how the witness statements had been obtained, the lack of forms DP4, the fact that no forms were signed by the Investigating Officer and an absence of any recommendation from the Investigating Officer. He accepted that he could, as Disciplining Officer, ask for more investigation, but did not.
208. Mr Briggs' conclusions were that the claimant had lost control of her emotions on 7 March but was in control of what she was doing and believed that her actions were deliberate. Precisely which actions he considered deliberate and amounting to gross misconduct he did not say. His evidence was throughout that it was the "*whole event*".
209. We have concluded that the investigation was substantially flawed. It was sufficiently flawed to render reliance upon it unreasonable. The flaws have been set out in detail in this judgment but can be summarised as follows:
 - 209.1 Reliance upon a management report which plays no part in the disciplinary procedure as set out;
 - 209.2 The appointment by the chief witness and author of the management report of the Investigating Officer, a subordinate to her;
 - 209.3 The failure by the Investigating Officer to understand, or be told, precisely what it was he was supposed to be doing and what it was he was investigating;
 - 209.4 A failure to take witness statements, to have those witness statements presented in the appropriate form and to have them signed by both the Investigating Officer and the author of the statements. Such statements as there were appeared on their face to have been simply prepared, ad hoc, by (presumably, although there is no evidence of this) the individuals concerned;
 - 209.5 The substantial delay, wholly unexplained, in taking any statements or information from the witnesses to the event. The obvious concern is that individuals will have discussed, over a period of time, the events of the day. That this may not only corrupt their individual recollections but also lead to inadvertent or deliberate collusion;

- 209.6 There was no recommendation for disciplinary action, yet disciplinary action was taken. No one has been able to say who authorised it and on what basis.
210. In addition to the flaws in the investigation, we have concluded that the disciplinary hearing itself was unfair, because:
- 210.1 The claimant was unwell on the day. She had not sought a previous postponement; a previous postponement was arranged by the respondent pending the outcome of the claimant's grievance appeal. In those circumstances given the passage of time it could not be said that a short further delay was unacceptable. We conclude that to continue with the hearing in those circumstances when the claimant was unable to attend, particularly in the light of the problems with the investigation which Mr Briggs said, "*jumped out*" at him was outside the range of reasonable responses.
- 210.2 The disciplinary conclusions were also unreasonable. Not only did the claimant not face any precise charges, but there were no precise findings against her. Matters which were wholly irrelevant to the events of 7 March 2014, and which were couched in terms which were prejudicial to the claimant, formed part of the information put before Mr Briggs. He even had in his mind, as he told us, complaints made by customers when there was no evidence of such complaints but he was simply "*told*" that a customer had complained and been paid compensation. What they had complained about and why they had been paid compensation was not disclosed to us, and Mr Briggs did not know.
- 210.3 Further, and most importantly, Mr Briggs focused on whether Ms Daley and Ms Moore knew at the time of the events that the claimant was suffering a miscarriage. He ought to have had in front of him the fit notes signed by the claimant's General Practitioner confirming that the claimant had suffered a miscarriage. He did not have regard for the Ambulance report which confirmed that the claimant was suffering from suspected miscarriage when she was taken to hospital. The fact that the claimant was suffering miscarriage, coupled with her previous medical history, ought to have been considered as substantial points of mitigation in relation to any behaviours actually found. That was not done.
211. The claimant then appealed the decision and set out her lengthy grounds of appeal, including:
- 211.1 A lack of particularisation of the charges against her;
- 211.2 The lack of independence of the investigation, carried out by a subordinate of the principal witness at her instigation; failure to interview or obtain information from a member of staff whose evidence the claimant said was relevant (Lisa Abreo) whilst two other members of staff not present on the day (Ms Bracha and Ms

Jones) together with the failure to interview Ms Daley who was, in addition, provided with copies of all of the statements given to other staff members; the failure by the disciplining officer to take account of the grievance she had raised against Ms Daley; and what she described as management complicity, the absence of CCTV, the lack of notes of the Regional Manager's visit to the branch on 10 March when Mr McCoy spoke to all members of staff present on the day.

- 211.3 The claimant also set out at length her version of events on the day including the fact of her miscarriage.
212. The claimant attended the Disciplinary Appeal hearing.
213. Mr Fallis, like Mr Briggs before him, did not have all of the relevant information in front of him. The claimant had set out, at length, her version of events on the day, including her miscarriage. But the fact that she had miscarried, as corroborated by not only the Ambulance report but also the General Practitioner fit notes did not come to Mr Fallis' attention. Plus, he had the Ambulance report, the fit notes, for reasons which are inexplicable to us, were not before him.
214. On that basis, Mr Fallis had said that more information was needed. The respondent was asking the claimant to obtain a report from her GP, but during the appeal hearing she said that she had submitted fit notes so what more proof was required? Although Mr Briggs said that the absence of "*other medical evidence*" had an effect on his decision, he had not seen the fit notes.
215. In his decision letter, Mr Fallis failed to have any regard to the fact that Mr McCoy's visited the branch the day after the incident and spoke to all members of staff on duty, yet there were no notes or records of that visit. Alternatively, if there were, they were not produced to him and he did not seek any information from Mr McCoy.
216. Although Mr Fallis said that there was no evidence of collusion, he did not appear to have had any regard, or given any consideration to the fact that it was inevitable that in the very lengthy period of time between the incident and witness statements being taken, those witnesses would have discussed the matter between them. That could very well lead to the inadvertent coalescence of information so that after discussion individuals who may well have seen or heard different things, effectively repeated the same story after discussion amongst themselves.
217. The obvious failings in the investigation do not appear to have concerned Mr Fallis at all.

218. Mr Fallis did conclude, however, that,
- “regardless of whether [the claimant] needed medical attention, this could have been handled in a professional manner which would have avoided this incident”.*
219. The claimant has previous mental health issues, has had difficulties in conceiving a child and was suffering a miscarriage. None of those matters appeared to have played in Mr Fallis’ mind at all and the Tribunal have found it difficult to understand how a woman in those circumstances can be criticised for not behaving *“professionally”* when suffering a miscarriage.
220. We are satisfied, however, that neither Ms Daley nor Ms Moore, on the day in question, nor Mr Briggs when he conducted the disciplinary hearing, nor Mr Fallis when he conducted the Appeal Hearing, were aware that the claimant was in fact pregnant and was suffering a miscarriage.
221. Conscious that they must have that in their mind as the motivating feature behind any actions about which the claimant complains, it cannot be said that the claimant suffered detriment or dismissal because of her pregnancy or the miscarriage itself.
222. It is inexplicable and, we find, unreasonable, that whoever was in charge of this disciplinary process (it is absolutely unknown to us who was behind it), failed to provide to Mr Briggs and Mr Fallis all of the relevant information. It is also utterly unacceptable that after an incident deemed subsequently so serious as to warrant a charge of gross misconduct against an individual absolutely no investigation took place for a lengthy period of time. The claimant’s absence from work (under suspension and then through illness, pregnancy and on maternity leave), is no excuse for the failure to take statements from and conduct a proper investigation with other members of staff. The role of Human Resources in this matter, notwithstanding the terms of the Disciplinary Policy promising additional HR support to the Investigating Officer, amounts to virtual invisibility. The creation and distribution of correspondence appears to be the limit of the involvement of the Human Resources team.
223. As a result, an inappropriate person was instructed to investigate the matter, far too late in the day; his investigation was hopelessly flawed and he was not even told what he was supposed to be investigating. It is not clear how a decision was taken, or by whom, that the investigation warranted the presentation of a disciplinary charge against the claimant and it is not clear who determined that that charge should be at the level of gross misconduct.
224. In addition, there was important information which was not presented to the Disciplining Officer nor the Appeal Officer, the Disciplinary Officer had before him material which was not shared with the claimant, “had in mind” customer complaints which he had no evidence about and which were not raised with the claimant and failed to identify at the stage of calling the

claimant to the disciplinary hearing, or at any stage thereafter, precisely what it was she was said to have done and indeed made no findings in that regard.

225. Mr Briggs took the view at one stage in his evidence that it was not within the scope of his role as Disciplining Officer to question the investigation report, although he later accepted that he could require further investigation to take place. To do so if required and to question the investigation report are important parts of the disciplinary process as is the collation of information which is missing. Both he and Mr Fallis were told of individuals who had not been interviewed about the day in question and they took no steps to obtain further information.
226. The investigation process was so flawed that no reasonable employer would rely upon it. The disciplinary hearing was flawed and the conduct of it did not fall within the range of responses open to a reasonable employer. It was wholly unreasonable for the claimant to be faced with imprecise charges and to be dismissed for an imprecise finding. The Appeal Hearing failed to rectify the errors of the investigation and disciplinary stages of the process and compounded them.
227. Mr Briggs referred to colleagues "*crying in fear*" when there was not one single shred of evidence to suggest that any colleagues were so affected by the incidents.
228. Accordingly,
- 228.1 the claimant's complaints that she was the victim of discrimination on the protected characteristic of pregnancy or maternity and that she was automatically unfairly dismissed are not made out.
- 228.2 the claimant was unfairly dismissed and her dismissal took place in breach of contract.

Employment Judge Ord

Date: 18 June 2019

Sent to the parties on: ...21.06.19

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For the Tribunal Office