EMPLOYMENT TRIBUNALS

Claimant: **Mr R Ramchandani**

Respondent: **Citibank N.A**

Heard at: **East London Hearing Centre**

On: **12, 13, 14, 15, 19, 20, 21, 22 November 2019 and 16 December 2019**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr J Alghazy, QC**
Respondent: **Mr S Devonshire, QC**

JUDGMENT

The judgment of the Tribunal is that:-

1. **The claim for unfair dismissal succeeds.**

2. **The application for reinstatement is withdrawn.**

3. **The application for re-engagement fails.**

4. **The Claimant is entitled to a basic and compensatory award.**

5. **If a fair procedure had been followed, there is a 100% chance that the Claimant would have been fairly dismissed by 15 October 2014.**

6. **The basic and compensatory awards shall be reduced by 75%.**

7. **There shall be a 25% uplift by reason of the Respondent's unreasonable failure to comply with the ACAS Code.**

8. **The complaint under s.92 Employment Rights Act 1996 fails.**

REASONS

1 By a claim form presented to the Employment Tribunal on 18 March 2014, the

Claimant brought a complaint of unfair dismissal from his job as Managing Director and Head of European Foreign Exchange Trading effective on 10 January 2014. He also complains that particulars of the reasons for dismissal were inadequate or untrue. The Respondent initially resisted all claims.

2 The claim was subject to a lengthy stay as there were ongoing criminal proceedings in the United States of America in which the Claimant was ultimately acquitted. The stay was lifted and a Preliminary Hearing took place before Employment Judge Warren on 24 January 2019 at which a List of Issues was agreed. At that hearing, the Respondent conceded that the Claimant was unfairly dismissed because it had not followed a fair procedure. The remaining issues to be determined relate to remedy. Employment Judge Foxwell subsequently granted leave for the Respondent to amend its Response to include allegations of misconduct discovered after the Claimant's dismissal.

3 On 15 August 2019, I heard the Claimant's application for specific disclosure and ordered disclosure of four categories of document. I also required the Respondent to provide further information identifying the person or people who made the decision to dismiss the Claimant. The decision makers were subsequently identified as Mr Ybarra and Mr Forese.

4 The first morning of this final hearing was converted to a further Preliminary Hearing to decide outstanding disputes about privilege, a Restricted Reporting Order, further disclosure, whether the Claimant should be permitted to claim re-engagement and whether the Respondent should be permitted to adduce 1,000 pages of evidence from the Claimant's criminal trial. For reasons given orally, I made the following decisions:

4.1 The evidence from the US criminal trial was not admitted. It was only disclosed on the previous Friday, there was no good reason for late disclosure, it was not relevant to the issues to be decided, Mr Gardiner (whose evidence it concerned) would not be attending Tribunal and I would have no opportunity to assess his credibility for myself.

4.2 There is a rule 50 Order to protect the anonymity of clients of the Respondent which continues to apply.

4.3 Copies of the additional documents were available at the hearing and so any application to admit them should be made at the point in the evidence where it was alleged to be relevant.

4.4 Although disappointed that it had not been identified sooner, I permitted the Claimant to include re-engagement in the list of issues. It is a primary remedy for unfair dismissal and the Respondent is not unduly prejudiced as it can put its case on the principle of why the remedy is not appropriate (which is the same as for re-instatement which was in the list of issues). If such an order were appropriate in principle, there would be a further hearing to consider whether it would be practicable in light of possible jobs to which the Claimant could be re-engaged.

4.5 Two and a half paragraphs were deleted from the Claimant's witness statement as I accepted the Respondent's submissions that they contained privileged material.

4.6 I allowed the Claimant to give evidence about his attempts to find work as it was relevant to the issue of the period for future loss.

5 I was provided with an agreed bundle of documents in electronic format comprising approximately 3,500 pages and I considered those to which I was taken in evidence. I attached little weight to documents which exceeded the scope of the issues in this hearing, for example correspondence between the Respondent and its insurers, inter-party correspondence, documents arising from the US criminal proceedings and some notes taken by a representative at Mr Stimpson's Employment Tribunal hearing.

6 I heard evidence from the Claimant and Ms Carly Hosler and Mr Peter Wells on his behalf. For the Respondent, I heard evidence from Mr James Forese, Mr Julian Phipps and Ms Helen Hale. In assessing credibility, I bore in mind the guidance given by Leggatt J in **Gestmin SGSP S.A. v Credit Suisse (UK) Ltd & another** [2013] EWHC 3560 (Comm) about the effect of litigation upon the reliability of oral evidence and the general tendency to believe one's memory to be more faithful than it is, particularly where an experience is strongly, vividly and confidently recollected. In fact, human memory is fluid and constantly re-written whenever retrieved and subject to influence by external information, such as the process of civil litigation itself, when a witness will often have a stake in a particular version of events. Leggatt J suggested that inferences drawn from contemporaneous documents and known or probable facts will be more reliable than oral evidence, which is more useful as an opportunity to apply critical scrutiny to the documents and gauge the personality, motivations and working practices of a witness. Above all, it is important to avoid the fallacy of supposing that because a witness has confidence in his/her recollection and is honest, evidence based on their recollection provides any reliable guide to the truth.

7 Generally, and for reasons more fully expressed below, I found Mr Forese to be an impressive witness whose evidence I mostly felt confident in accepting. By contrast, I found the evidence of the Claimant and Mr Phipps far less reliable. Both men gave evidence which I find that they genuinely believed and which they were adamant was accurate. Both men, however, have a stake in a particular version of events: the Claimant in restoring his career and reputation, Mr Phipps in showing why reengagement would not be practicable (in large part due to the consequences of the chats for the Respondent). This was particularly evident in their respective interpretations of the chats considered extensively in evidence. I accept Mr Alghazy's submission that, at times, Mr Phipps appeared to be trying to build a case after the event based upon his opinion and desire to interpret the chats in the worst possible light. However, I also accept Mr Devonshire's submission that the Claimant's evidence was fuelled by his conviction that he is a blameless victim and was based upon his interpretation of the chats following extensive litigation, including criminal prosecution, in which he has so convinced himself of the rightness of his position that he interprets every chat in the most exculpatory light possible and often fails to engage with the plain effect of the language that he and the other chat participants used.

8 The agreed issues are as follows.

Unfair Dismissal - Remedy

(1) Should the Claimant be reinstated and/or re-engaged?

(2) Should the basic award be reduced by reason of the conduct of the Claimant as alleged at paragraphs 13 to 18 and 35 to 37B of the amended Grounds of Resistance and appendices? If so, by how much?

(3) Is it just and equitable that the Claimant be awarded compensation for unfair dismissal? The Respondent relies on the conduct pleaded at paragraphs 13 to 18 and 35 to 37B of the amended Grounds of Resistance and appendices.

(4) What loss, if any, did the Claimant sustain in consequence of his dismissal?

(5) Has the Claimant taken reasonable steps to mitigate his losses?

(6) Should any compensation be reduced on the grounds of contributory fault and, if so, by how much? The Respondent relies upon the conduct pleaded at paragraphs 13 to 18 of the amended Grounds of Resistance.

(7) Should any compensation be reduced to reflect the likelihood, if any, that the Claimant would have been dismissed had a fair procedure been followed and, if so, by how much? The Respondent relies on paragraphs 13 to 18 and 35 to 37B of the amended Grounds of Resistance and appendices.

(8) Should an uplift be applied to any compensation awarded to the Claimant for failure to follow the ACAS Code of Practice on Disciplinary and Grievance procedures and, if so, what uplift?

(9) Does the Tribunal have jurisdiction to hear the Claimant's complaint under Section 92 Employment Rights Act 1996?

(10) If so, has the Claimant shown that the particulars of reasons given are inadequate or untrue?

(11) If so, to what remedy is the Claimant entitled?

Findings of Fact

9 The Respondent is a large financial institution with headquarters in New York and a branch in London. The G10 Spot FX Trading Business is part of its markets division. At the relevant time, London FX traders reported to Mr Jeff Feig (Global Head of G10 FX) and Mr Anil Prasad (Managing Director and Global Head of Spot FX and Local Markets). Mr Prasad reported to Mr Ybarra (Global Head of Market and Security Services Managing Director) who reported to Mr James Forese (then Chief Executive Officer of the Institutional Clients Group, one of the banks two operating units).

10 The Claimant commenced employment with the Respondent on 12 April 2004, with continuous service from 8 July 2002 due to his previous employment with Citi in America. He was very successful in his employment, being promoted to Associate in the summer of 2004, Vice President in January 2008 and Director in 2009. On 1 March 2010 he was promoted to the Head of the Spot FX Desk in London with approximately six or seven traders reporting to him. At the end of 2010, he was promoted to Managing Director a title which recognised seniority but which was not a Companies Act

directorship. On 5 October 2011, the Claimant was confirmed as "code staff" (somebody with a significant impact on the firm's risk profile) for which he received an additional payment of £550,000 per annum.

11 By the date of his dismissal, the Claimant was a member of the Bank of England London Foreign Exchange joint standing committee subgroup of chief dealers. On 30 April 2012, the Claimant, Mr Usher and Mr Gardiner discussed the contents of a Bank of England lunch where it was decided that there would be no central policy about the use of chat rooms in the FX market. In this chat, the traders expressed the unanimous view that they were minimising impact by offsetting flows and disagreeing with others at the lunch who had expressed concern about what at times appeared to be "cartel-ish" behaviour.

The FX Market

12 An appendix to the Financial Conduct Authority ("FCA") Final Notice dated 11 November 2014 describes the Spot FX Market. In summary, a Spot FX transaction is an agreement between two parties to buy or sell one currency at a price calculated by reference to another currency at a specified time. Such transactions can be executed directly via electronic broking platforms or booked through a voice broker. Traders rely upon the differences between the rates at which they sell and purchase the respective currencies in the pair to generate profit. Foreign exchange can be traded 24 hours a day. Counterparties do not need to be licenced in order to trade nor are they limited to using regulated exchanges to effect transactions. It is a very large market with approximately $5trillion of currency trades executed on a daily basis, much of it through London.

13 The major currency pairs usually involve the US dollar, for example Euro/Dollar or Dollar/Yen. For the Euro/Dollar pair, the Euro is the base currency and the dollar is the quote currency, the rate therefore indicates how many US dollars are required to purchase one Euro. Exchange rates for G10 currencies are normally expressed to four decimal places with the final two generally indicating the movement in the market. The relative currency valuations are often determined at a "fix" point. The two most commonly used for Euro/Dollar trading are the Reuters fix at 4pm and the European Central Bank fix at 1pm. At the relevant time, the Reuters fix was calculated by reference to trading activity on a particular electronic broking platform during a one-minute window at 4pm (30 seconds before and 30 seconds after). Trading and pricing was not limited to fix times.

14 Many different types of client order can be placed:

- A client could ask for a price on a pair of currencies without initially revealing whether they wished to buy or sell. If the quoted price was acceptable, a specific trade to buy or sell would be executed.

- A client could ask for a price specifically to buy (or sell) a currency and if accepted the trade would be executed at that price.

- A client could instruct that a particular transaction be executed at the best possible rate (for example, to purchase a specified amount of a particular currency). The trader would determine when best to trade, source and execute the transaction for the client.

- A stop loss order is a client instruction to trade (buy or sell) when the market

for the currency reached a specified price.

- A client could give an instruction for particular transaction (buy or sell) at the fix rate. The trader would then obtain sufficient currency to fulfil the order.

15 Every day, traders accepted multiple client orders to execute trades in a particular currency pair around the fix time. The trades could be booked by the trader or through a broker to reduce time spent on administration. An order to buy dollars for one client and an order to sell dollars for another client could effectively net out the risk of a loss to the trader. This netting (or matching as it was referred to in the hearing) could take place between traders at different financial institutions and was an effective and permissible way of managing risk.

16 The Respondent's May 2015 Spot FX Terms of Dealing which were provided to clients stated that protecting the confidentiality of counterparty information was important and that the Respondent had policies and controls designed to protect confidentiality. However, it expressly provided that the Respondent may use the economic terms of a transaction for a counterparty (client), but not their identity, in order to source liquidity and/or execute risk-mitigating transactions and that it may also disclose anonymised and aggregated information regarding executed transactions and other relevant market information as market colour.

17 Traders can make a profit or loss from client orders quoted by reference to the fix price by predicting the movement of the market and fulfilling the order at a better price than the one quoted to the client. A trader with net client orders to buy currency at the fix rate will make a profit if the average rate at which he buys the currency in the market to fill the order is lower than the fix rate at which he has agreed to sell it to the client. For example, a client wants to buy $100 worth of Euros at the fix price, the trader sees that the value of the Euro is increasing as the fix approaches and therefore buys at the current lower price but charges the client the higher fix price which has already been agreed.

18 The Respondent and other banks in the FX market subscribe to Bloomberg to obtain up to date market information through use of interactive terminals assigned to every trader and sales person. Bloomberg also offered a chatroom facility which permitted real time direct messaging between members of that chatroom who could be traders at many different banks or institutions. Part of the purpose of Bloomberg chatrooms was to encourage sharing of market colour, flow information and explore opportunities to trade with each other.

19 The Claimant was a member of several chatrooms, some bearing names such as "The Cartel" or "Bandits Club". Although in evidence the Claimant initially said that he could not remember chatrooms with those names, he admitted being a member of Bandits Club in an interview on 15 October 2013 and also referred to the US criminal proceedings where he had shown that neither were official names of the chatrooms. I do not accept that the Claimant could not remember whether he was a member of these chatrooms, given the Claimant's otherwise exemplary mastery of the facts of the case, and find that his evidence was indicative of a desire to avoid criticism of membership of chatrooms with names which indicated that the participants regarded themselves as working together for their own common interest.

Market Colour

20 It was common ground between the parties that traders could and should gather and share market colour from other banks to inform their own trading. As the Claimant's expert, Professor Melvin, said in the US criminal proceedings, the exchange of market colour is important as it gives traders a better view of what is happening in the market. Although the move to greater contact between banks and the encouragement of sharing market colour had started to develop before the introduction of Bloomberg chatrooms, such chats made communication more frequent. The question of where the line between market colour and confidential information is a key dispute in this case.

21 A report by Lord Grabiner QC published on 12 November 2014 following a Bank of England investigation into the FX market, found evidence that from at least 16 May 2008 concern was beginning to form about the sharing of information in inter-bank chat rooms and the regulatory implications. From 28 November 2012 there was concern that the sharing of information for matching purposes (which he accepted was not improper per se) could involve collusive behaviour but this was not escalated at the time. Lord Grabiner concluded that there was significant uncertainty amongst members of the Bank of England FX desk about where the boundary lay between the sharing of confidential client information and providing commentary or colour about the market. The voluntary Nips code published in November 2011 stated that it was a fundamental principle that a principal or broker should not without explicit permission disclose, discuss or apply pressure on others to disclose or discuss any information related to specific deals which had been transacted or are in the process of being arranged except to, or with, the parties directly involved. Lord Grabiner accepted that whilst the fundamental principle was on its face strictly worded, its application was a matter of interpretation.

22 The contrast between the strict wording of the rule and its practical application is evident in the parties' approach to market colour when interpreting the chats at the heart of this case. Many different definitions for market colour were considered in evidence but many, for example that set out in the EU Commission report, were created with hindsight after the conduct identified in the many investigations into the FX market and the LIBOR scandal. As such, I did not consider that they were a helpful standard against which to assess the Claimant's conduct many years earlier. The Nips definition was, however, in force from 2011 and before regulatory interest led to greater scrutiny of the FX market. In the circumstances, I consider that it is more likely to be a reliable description of the rule in place at the relevant time. The Claimant's claim to be unaware of the Nips code at the relevant time was not plausible given his experience and membership of the Bank of England London Foreign Exchange joint standing committee subgroup of chief dealers.

23 In an internal preliminary interview on 15 October 2013, the Claimant stated that he understood that flow information about amount, direction and rate of trades were all market colour. Information about stop loss and resting bids were also market colour as it was only indicative because bids would often be cancelled, whereas knowing about them helped him predict market movement and gauge supply, demand and dynamics. Whilst he would not have discussed a specific customer name, shorthand would be used which may lead to an assumption by others in the chatroom that it was a reference to a specific customer. This was not necessarily inappropriate if a customer was a central bank or was predatory as the traders would exchange sufficient information to identify the customer in order to be able to challenge them and to know that the market was more volatile. Mr Alghazy submitted that Ms Hosler's evidence was supportive of this understanding of

market colour and the position of central banks or predatory clients. However, the examples given by Ms Hosler appear to be generic, aggregated information about the activities of hedge funds, models, macro accounts and European real money and not references to specific, client trades.

24 Mr Phipps has no direct experience as an FX trader but has worked in the London financial markets for over 30 years, initially as a derivatives trader and since 2006 in compliance. I accepted as credible and reliable his evidence that whilst terminology may differ, the fundamental principles of market conduct and confidentiality were very much the same as these are basic understandings in banking. Mr Phipps' evidence was that confidential information is specific to the client, market colour is generic and non-specific. Whilst there were some grey areas about where the precise boundary line lay between the two, there were also clear bright lines about not disclosing information about the trades of a specific client (even if not named). By way of example, on Mr Phipps' understanding, a reference to "a hedge fund selling" would be problematic whereas reference to "hedge funds selling" would be market colour. Mr Phipps accepted that it was permissible to share size, direction and level if done to explore a legitimate trading opportunity but this depended on intent and an overarching duty of good faith as required by the Respondent's policies and the contract. Mr Devonshire submitted that whilst the boundary might have tightened up following regulatory scrutiny, it had always been the case that it was aggregated comment about the market and not information which would enable the recipient to identify specific client positions and trades.

25 In considering the dispute about the extent of market colour, I reminded myself that Mr Phipps was a witness of fact and not an expert. The same applies to the Claimant. On balance, I find that even at the time of the chats the Claimant knew, or should reasonably have known, that it was not market colour to disclose any information related to specific deals of the Respondent or related companies which had been transacted or were in the process of being arranged except to explore and execute matching transactions even if the identity of the specific client was not also disclosed. This is consistent with the content of the Nips code, the Claimant's position in the 15 October 2013 interview and the Respondent's contracts and procedures as set out below.

Confidentiality: Contract and policies

26 There were no separate rules about what could be said in chatrooms, rather the confidentiality obligations in the contract of employment, Employee Handbook, Code of Conduct and other policies applied to chat rooms as they did to any medium of communication.

27 The Claimant's contract of employment, dated 30 April 2004, required him to discharge his duties diligently and in accordance with the Respondent's Code of Conduct, policies and procedures. Clause 15 required that the Claimant should not use or communicate confidential information save in the proper performance of his duties and to use his reasonable endeavours to prevent the unauthorised use, publication or disclosure of trace secrets or other confidential information. The contract defined confidential information as including the identity and confidential information relating to clients and/or potential clients. Clause 16 of the contract provided that, without prejudice to any fiduciary duty or implied duty of fidelity, the Claimant must use his best endeavours to promote and protect the interests of the Respondent and associated companies. These obligations remained in force after the Claimant's promotions.

28 Mr Devonshire submitted that with each promotion the demands and expectation of loyalty increased, relying on **Imam-Sadeque v Bluebay Asset Management Services Ltd** [2012] EWHC 3511. Mr Alghazy submitted that Mr Phipps had confused a duty of fidelity and fiduciary duties. On balance, I do not consider it necessary to resolve this dispute and decide whether the Claimant owed a duty of fidelity. The express contractual obligations in clause 15 and 16 and the ordinary implied term of trust and confidence are sufficient to decide this case.

29 The Claimant was also provided with a copy of the Employee Handbook. The section of the Employee Handbook dealing with confidentiality provided that, as a general rule, an employee should presume that any information received during employment is confidential and should not be used for their own purposes or disclosed to any person at any time except as required whilst carrying out their job. Examples of confidential information given are the identity of actual or potential clients, terms of trading, costings, prices, pricing structures of or relating to Citi.

30 The Respondent's Code of Conduct applies to all employees and is issued annually. It imposes on employees an obligation to safeguard and not disclose confidential information about clients other than for authorised use in the performance of their duties. Stated examples of confidential information included non-public information about clients. The Code states that the Respondent is committed to promoting free and competitive markets and will not tolerate any attempt by Citi representatives to manipulate or tamper with the market or the prices of securities, options, futures or other financial instruments. Under the heading "Anti-trust and Fair Competition" it instructs employees that if a competitor or client try to discuss subjects which raise concern about anti-competitive conduct, the employee should refuse to do so, ask the person to stop immediately, if necessary leave or otherwise terminate the conversation and promptly report the matter. The Claimant accepts that he was aware of the confidential information rules in the employee handbook and contract of employment. On balance, I find that he was also aware of the contents of the Code of Conduct.

31 The Respondent's Confidential and Material Non-public Information policy, issued in 2005, provides further guidance on confidentiality. It provides that information received relating to a client's business activities or strategies should be presumed and treated as confidential unless publicly available, with particular care required for pending or executed orders and indications of interest. It states that the sales and trading teams should never, directly or indirectly, communicate to third parties information which would enable them to determine a client or Citi's trading position or activity. The policy permitted sharing of market colour but stated that it must not enable a third party to identify specific clients, positions and trades. The FX Trading Guidelines, issued by the Respondent in April 2008, reminded employees of the confidentiality policy and provide that on no account should there be inadvertent disclosure, directly or indirectly, of the identity, position or trading strategy of a client. Whilst it stated that confidential information should not be misused, the Guidelines stated that trades based on confidential information but to hedge risk are permissible. The Guidelines required that particular care be taken when trading as a principal not to do so in a manner that may prevent a client order from being executed or prevent the market from reaching the client's desired level.

32 The Claimant denied reading or seeing either of these two documents during his employment. There is no contemporaneous evidence to demonstrate that the documents

were provided to him, although I accept that they were available on the Respondent's intranet and were relevant to the work of the Claimant and the traders who reported to him on the desk. I accepted the Claimant's denial as plausible given the multiplicity of policies and procedures relating to confidentiality and the subsequent FCA findings that the policies were high-level in nature and applied generally. I find on balance that at the material times, the Claimant was not aware of the contents of the Confidential and Material Non-public Information policy or the FX Trading Guidelines.

33 On his own evidence, however, the Claimant was aware that the only two purposes for disclosing trading information about trades which had not yet been executed would be in order to match or if it were market colour. Just as with the finding above about market colour, I find that even at the time of the chats the Claimant knew, or should reasonably have known, that client identities should never be disclosed even for matching. The failure to make this concession was surprising as it was consistent with his position in a contemporaneous interview on 15 October 2013 that chatroom discussions did not involve disclosure of specific customer names. This is an example of an issue where, as Mr Devonshire described it in submission, the Claimant has so convinced himself of the rightness of his position that he is incapable of making any but the barest concession and sought instead to adopt a position in which practically everything fell to be interpreted in an exculpatory light. I also find on balance that the Claimant knew or should reasonably have known that specific transactions of the Respondent or related companies, rather than aggregated market colour, should not be disclosed unless for matching purposes.

Events leading to the Claimant's Dismissal

34 The Respondent also began to be concerned about the prolific use of inter-bank chatrooms by traders and the information shared in them. Following a discussion with Mr Feig about the possible removal of chatrooms, on 18 January 2013, the Claimant sent an email to the UK FX spot traders telling them to keep the chats to a minimum and suggesting the sort of generic information which was permissible (**"lose some Euro to good name"**) and which more detailed information they should avoid (**"get couple hundred cable from Macro")**. A transcript of the Claimant's conversation with Mr Feig was produced in the US criminal prosecution in which the Claimant said that it would be bad on a scale of 9 out of 10 if he were to be told that he could not have any more chats with market makers at other banks. Apparently joking, Mr Feig went on to say that he bet that if he went through the Claimant's chats from the previous year, he would be in trouble. The Claimant said he doubted it as nothing was ever specific and he denied trying to use codes. This is consistent with my finding that the Claimant knew at the time that it was not market colour to disclose any information related to specific deals which had been transacted or were in the process of being arranged except to explore and execute matching transactions.

35 On 31 January 2013, Mr Prasad instructed that daily chats with other bank traders should be closed due to the risk that they posed.

36 From spring 2013, regulators began to focus upon the use of Bloomberg chats between traders at different banks. In June 2013, the FCA confirmed that it was to investigate allegations that FX rates were being manipulated. As a result of the increased regulatory interest, on 1 October 2013, Mr Ybarra sent a message to all Citi markets employees identifying the regulatory interest in multiuser chatrooms, stating that "**communications in these forums tend to be very informal and abbreviated and can easily give a misleading impression, cause confusion, facilitate inappropriate commentary among the parties, or**

result in unintentional disclosure or sharing of client or firm information." Employees were no longer permitted to participate in or contribute to external multiuser chatrooms. Mr Ybarra's instruction is consistent with a contemporaneous understanding that specific client or firm information did not fall within market colour whilst acknowledging that the informal nature of the chatrooms could lead to traders taking insufficient care and thought about the information being shared.

37 On 9 October 2013, the FCA told the Respondent that they had seen preliminary evidence suggesting that there may have been serious misconduct in the FX market in the European time zone, asked that the Respondent monitor any relevant activity and, if any concerns were raised, to contact the FCA before acting. Particular conduct identified for consideration was the use of chatrooms and other communications to discuss client orders, proprietary trading positions, trading strategies and co-ordinate trading activity. The Claimant was copied into emails referring to the FCA involvement and warned his team to be very careful with communication with other financial counterparts as all activity was now being monitored.

38 Articles began to appear in the financial press identifying traders potentially involved in the investigation. By 14 October 2013, Mr Feig was discussing with the Respondent's press team whether this may include the Claimant.

39 On 15 October 2013, the Claimant was interviewed by the Respondent's lawyers about his chatroom use. A summary of the discussion was produced by the Respondent's external counsel; it is not verbatim and the Claimant was not given the opportunity to review it for completeness and accuracy. In the interview, the Claimant said that he had participated in chatrooms named "Bandits Club" and "One Team, One Dream" but denied being a member of a chatroom called "the Cartel". He identified other participants as Mr Usher and Mr Gardiner and said that the purpose of their chats was to share market flow information, including size and currency of transactions to be conducted at a particular fix with the aim of matching transactions to minimise risk. Whilst size and currency details of upcoming transactions were discussed, specific customer names were not and they trusted each other not to misuse the information disclosed. I find that this statement is consistent with the Respondent's case that it was a clear red-line, well-known to the Claimant, that the identity of a client should never be disclosed.

40 In the interview, the Claimant denied any wrongdoing and maintained that it was almost impossible to manipulate the Reuters fix as it would require trades in the region of $1 billion to achieve a move of a few base points and, given the size of the market, this could not be achieved by a small group of market participants. For the same reason, the Claimant maintained that a trader would not be able to "front run" a client order (activity to move the market and the fix rate to the benefit of the trader and detriment of the client) as it would not change the level of liquidity in the market and would be swiftly reversed. At the end of the interview, the Claimant was asked whether he had any information or concern about other employees of the Respondent engaged in manipulation of the Reuters Fix or other FX rates. The Claimant said that he had not. In summary:

> "**he re-emphasised that the chat room discussions did not involve disclosure of specific customer names, but that market flow information including the size and currency transactions to be executed during the WM/R fixing window were exchanged so as to execute trades for the purposes of avoiding brokerage fees. However, he added that there was no information exchanged which was not widely available to the market. Ramchandani further added that he has not observed any practices which would result in the interest of Citi's (or**

> **other banks) customers being harmed.**
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> **In addition, he did not believe there was any harm in sharing market colour on trades. The 4.00pm WM/R fixing window was the time of deepest daily liquidity and so the level of alteration to the supply and demand flow during this period meant that Ramchandani could not see how the WM/R rate itself could be manipulated without exposing those carrying out the manipulation to significant principal risk resulting from subsequent movements in the rate."**
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> …
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> **Ramchandani concluded by saying that he … was not aware of any attempts to, manipulate or collude in WM/R or other rates and that in 2010 there were no rules setting out that traders could not share market colour. Ramchandani added that, although regulators could now say that counterparties could not do so, there was no indication that flow information should not be shared at that time."**

At the conclusion of the interview, the Respondent's representative explained that they would contact him as and when any other issues or documents arose.

41 On 15 October 2013, the FCA informed the Respondent that it was one of several banks where FX fix misconduct may have occurred in Bloomberg chatrooms over at least the last five years. Possible misconduct included proposals to spread misleading information on trade activity in an upcoming fix, inappropriate sharing of trading strategies between firms in relation to trading on the fix, disclosure of customers' trading information and coordinated trading intended to influence fixes and squeeze clients. The FCA provided an interview protocol which the Respondent must follow if it wished to conduct interviews with employees as part of an internal investigation. By this date, the Respondent (including Mr Forese and Mr Feig) believed that the Claimant's name was likely to appear in press coverage of the FX investigation.

42 On 30 October 2013, the Respondent became aware that Bloomberg news were about to publish a story about the various regulatory probes into FX markets which would name the Claimant as a participant. On the same day, the Claimant was placed on three weeks' unpaid leave, which was expressly stated not to be a suspension but to allow time for an internal investigation and to protect the Claimant and the Respondent from media intrusion. The Claimant was told that no decision about wrongdoing had been made and the Respondent did not start internal disciplinary proceedings. The decision was swiftly picked up and reported by the financial media. The Claimant's evidence that he had not appreciated until this date that the news articles referred to chatrooms in which he was a participant and, alternatively that the press were misleading the public, was not impressive and suggested a lack of insight at best, and a lack of candour in his evidence at worst, about the gravity of the situation and the allegations.

43 On 4 November 2013, the Respondent informed the FCA that it had conducted a preliminary interview with the Claimant on 15 October 2013 and was in the process of collecting and reviewing his communications between 2007 and October 2013, prioritising Bloomberg chats. The letter said that the Respondent planned to hold a follow up interview with the Claimant and would discuss with the FCA enforcement team how such an interview should be conducted.

44 On 8 November 2013, the FCA required the Respondent to provide documents relevant to its own investigation, including the Claimant's Bloomberg chats and documents

related to him. The Respondent was told that it must not disclose the detail of the confidential FCA investigation to anybody other than those who needed to be involved to produce the documents and its legal advisers.

45 The financial press continued to report the story of potential misconduct within the FX market, including an article in the Financial Times on 12 November 2013 which named the Claimant and identified him as an employee of the Respondent and a member of the Bank of England chief dealers sub-group.

46 On 14 November 2013, the FCA invited the Claimant to a voluntary investigation interview. The Claimant was advised that he was not under any obligation to answer questions, could be accompanied by a legal adviser and that a recording of the interview would be subsequently provided. In an email sent to the Respondent on the same day, the FCA confirmed the agreement that any interview of the Claimant by the Respondent would take place after he had been interviewed by the FCA, having notified the FCA, and must follow the FCA interview protocol.

47 The Claimant declined to attend the voluntary interview with the FCA because, I accept, he had not been provided with copies of the chats in issues or made sufficiently aware of the nature of the allegations being investigated. Given that his answers at an FCA interview could be used in any subsequent legal proceedings, I find that this was a reasonable concern and do not find that the Claimant obstructed or sought to frustrate the Respondent's own attempts to investigate. In any event, the FCA did not exercise its statutory power to compel him to attend an interview.

48 On 19 November 2013, the Claimant's period of paid leave was extended. Although the Claimant was concerned that he was losing money by being out of the office, he said at the time that he completely understood the request to extend his leave and was happy to agree.

49 On 3 December 2013, the FCA wrote again to the Respondent confirming its intention to interview the Claimant and limiting the assistance the Respondent could provide to him.

50 On 18 December 2013, the financial press published an article which named the "One Team, One Dream" chatroom and the Claimant as subjects of the investigation.

51 On 9 January 2014, Ms Kathryn Skelton (Head of HR for EMEA Markets) sent an internal email confirming that the Claimant's employment would be terminated the following day for cause. By email dated 10 January 2014, the Respondent informed the FCA that it was going to terminate the Claimant's employment based on the review of communications stating that "**although there is not a specific finding, the aggregate is sufficient that Citi's management do not feel comfortable**."

52 On 10 January 2014, Mr Feig telephoned the Claimant and told him that he was dismissed with payment in lieu of three months' notice. Notice pay would not normally be given when dismissing an employee for gross misconduct, but was given to the Claimant because of the unusual circumstances whereby the Respondent was not able to follow a disciplinary procedure due to the FCA restrictions on interviewing the Claimant.

53 Contemporaneous handwritten notes of the call were made by Mr Feig. There is

no dispute about the broad accuracy of the first part of the notes. Mr Feig said that he had been shocked and surprised by what he saw in the review of the Claimant's chats and that he considered dismissal to be the right decision. When the Claimant said that he did not understand, Mr Feig told him that he would see that it was the right decision when he read the chats himself as they were "shockingly" different to other people's chats. The Claimant said that he had always stuck by guidelines but Mr Feig said that his chats completely and utterly violated trust. The content and tone of the notes are not consistent with Mr Alghazy's submission that Mr Feig was reading out a pre-prepared script, not least as Mr Feig's criticisms of the Claimant's chats are in part a response to questions and statements from the Claimant which could not have been scripted in advance. There is then a line drawn across the manuscript notes and a further entry underneath. I accept on balance that this is a note written by Mr Feig to record the announcement that would be made internally to tell the desk about the Claimant's dismissal. It was not part of the conversation with the Claimant. This is consistent with the reference to the Claimant in the third person.

54 During the dismissal call, Mr Feig said that he had been personally involved and the key decision maker. This was not entirely accurate. Mr Forese's evidence was that he and Mr Ybarra took the decision to dismiss after discussions with Mr Feig and Mr Prasad. He read the chats and found them troubling as they involved sharing more information than necessary to explore matching or as market colour. Mr Forese then spoke to Mr Feig to gain the latter's expertise in the market and Mr Feig agreed that the content of the chats was inappropriate. Mr Forese told Mr Feig that the Claimant would be dismissed as a result and Mr Feig agreed. There is no contemporaneous record of any such discussions but I accept as reliable and credible Mr Forese's evidence that they did take place in the terms described. This is consistent with Mr Feig's reference in the dismissal call to being personally involved, his statement that he had read the chats himself, considered them shockingly different and that dismissal was the right decision. Mr Feig's personal involvement in discussions about dismissal is also consistent with an email which he sent to the Claimant after they met in early April 2019, in which he stated:

> "**From everything I saw and heard there was rationale to dismiss you, but that there was nothing criminal in your intent or actions. However, as we agreed, I had never had the opportunity to hear you explain the chats. Still, in all the years I had worked with you, I had always seen you act with the highest of ethical standards and with a total regard for the interest of the bank, the clients and the people who worked for you.**
> **…**
> **If you think about the chats we discussed and some of the subsequent ones that Carly and Perry featured in, no matter your intent, Citi could argue that Citi policies were violated. The question for them will be can they prove that you broke a rule and thus were you properly dismissed. I don't think intent will be a factor they will consider**.
>
> **However, what is clear is that your intent was good**…"

55 In evidence, the Claimant would not accept that Mr Feig was stating clearly that he had seen and read the chats and believed that there was good reason for dismissal, even if they did not show criminal behaviour. The Claimant's interpretation of the email was that Mr Feig was saying that he was unable to come to any conclusion because he had not heard the Claimant's explanation and only that some of the tone and language used were uncomfortable. I did not find the Claimant's evidence plausible and consider that it was consistent with other parts of his evidence where he sought to avoid the clear and obvious point that it was not only Mr Forese and Mr Phipps who regarded his conduct in

the chats as giving the appearance of impropriety, irrespective of his intentions or whether there was in fact improper trading.

56 On balance, I find that the decision to dismiss was taken by Mr Forese and Mr Ybarra after consultation with Mr Feig, as well as input from Mr Prasad, the legal and HR teams. Mr Feig had seen the chats in question at the time and genuinely considered them to be unacceptable and in breach of the Respondent's policies. I accept that Mr Forese genuinely believed that the content of the Claimant's chats was inappropriate and in breach of his duties as an employee. I accept as credible and reliable Mr Forese's evidence that the Claimant was not dismissed as a scapegoat because of the unwelcome press coverage, rather the principal reason for dismissal was the conduct in the chats which then gave rise to regulatory scrutiny and adverse press coverage.

57 By the time of the decision to dismiss, the internal review had been completed. Having reviewed the Claimant's chats, Mr Forese and Mr Ybarra did not consider it necessary to await FCA approval nor the outcome of the regulatory investigation as this had no defined timescale and they had reached their own conclusion that their content caused a loss of trust and confidence.

58 The Claimant's dismissal was confirmed by a letter and email sent by Ms Skelton which stated:

> **"We have now completed a review of certain of your electronic communications between 2007 and 2013. Whilst we have not yet reached any conclusions about the matters being investigated, a number of your communications had been found to be wholly unacceptable.**
>
> **This behaviour has resulted in a breakdown of the trust and confidence necessary for our employment relationship to continue."**

59 The Claimant's dismissal was reported by the financial press later the same day. Contemporaneous emails between members of the press team show that they were aware that the reports were going to be made public and show apparent cooperation with journalists by providing a briefing which one member of the team described as being "a no fingerprints concept". The Respondent's press team regarded it as being better for the Respondent to be seen to confirm that they had taken a proactive step and were prepared to release a press statement as soon as the Claimant's former desk had been notified of his dismissal by Mr Feig. Mr Feig was unhappy as he had told the Claimant that the Respondent would merely confirm that he was no longer with the Respondent rather than state that he had been dismissed. Even if the press team were overly concerned with the appearance to be given to the press, I accept that Mr Feig and Mr Forese were not focused on the press coverage but the Claimant's conduct in the chats.

60 By the date of his dismissal, the FCA had provided the Claimant without about a dozen chats which it was considering. The Claimant's evidence was that upon review he did not see anything of concern but he remained concerned about a voluntary interview lest he give answers about the 12 disclosed chats which may appear to contradict as yet undisclosed chats, not least given that the nature of the chats could be confusing, misleading or even contradictory.

61 On 15 January 2014, the Claimant asked to be provided with copies of the communications which had caused concern. The FCA agreed that the Respondent could release some chats to the Claimant: six chats were provided on 5 March 2014 and a

further seven chats were provided on 15 April 2014. These were referred to as the "termination chats".

The Termination Chats and the Reason for Dismissal

62 The content of these chats and the evidence of the Claimant and Mr Phipps in respect of each is set out in a Schedule attached to this Judgment. I consider this relevant for a number of reasons.

- The purpose of information sharing between traders is a critical distinction at the heart of this case. It is permissible for a trader to reveal his side and then potentially the value of a trade if he is exploring a legitimate trading opportunity but it is not permissible to share information to coordinate trading or simply to help other traders. This was a key dispute between the parties on the interpretation of these and the later amended Response chats. The Claimant maintained throughout that his chats were permitted sharing of information to mitigate risk and/or generic market colour; Mr Phipps maintained throughout that they disclosed specific confidential information such as sides and amounts which could not have been for matching purposes and was instead to help the other chatroom participants.

- To get a sense of the tone of the chats and nature of the apparent relationship between the participants whilst bearing in mind that appearances can be deceptive. It was not in dispute that the content of the chat should not be taken literally and that the position portrayed by the traders in the chats was not always the truthful. There is no finding by the Respondent or by this Tribunal that there was any actual improper trading.

- To demonstrate the amount of interpretation required to discern any sensible meaning (either way) in the chats.

- To contrast the detailed and forensic analysis by both parties and their leading Counsel over many days of evidence with the quickfire, informal and abbreviated chats themselves (a risk identified by Mr Ybarra in his message on 1 October 2013 when prohibiting further participation in such chatrooms).

63 This is not a breach of contract claim where the Tribunal must decide whether there was in fact an act of gross misconduct, rather the content of the chats is relevant to the Respondent's belief at different times: the actual dismissal and the likely outcome of a notional fair procedure. It is also necessary for the Tribunal to form its own view of the content of the chats when considering re-engagement and contributory fault. These are matters better addressed in the conclusions section of the Reasons when analysing and drawing inferences from the contents of the chats, the contemporaneous documents and the parties' competing interpretations. However, part of the Claimant's case is that the Respondent has failed to show the real reason for dismissal and/or whether there would have been a fair reason to dismiss following a fair investigation. It is therefore necessary to consider Mr Forese's evidence about his reasons for dismissal at the time and what, if any difference, the Claimant's explanations might have made.

64 Despite being the dismissal decision maker, Mr Forese did not address the content of specific chats in his witness statement. I considered Mr Forese to be a

straightforward and reliable witness, prepared to accept that he could not be sure which, if any, of the chats now relied upon were considered by him at the time he decided to dismiss the Claimant. Nevertheless, I accepted as reliable his evidence that the chats which he did review at the time of dismissal caused him to believe that the Claimant was disclosing confidential client information to external traders including price, size and direction of client trades and apparently trying to coordinate trading activity with competitor traders in the same, or very similar, way to the content of the chats provided to the Claimant in March and April 2014. As he found the content troubling but lacked expertise, he consulted Mr Feig, who agreed. Mr Forese also accepted that he had not specifically compared the Code of Conduct with the content of the chats at the time of dismissal but I accepted his evidence that he was familiar with its contents at the time and of the general obligation of confidence owed by employees such as the Claimant.

65 In evidence, Mr Forese accepted that the chats may have been intended only as bluster, rather than actual coordination of trading, but maintained that those which he had seen at the time of dismissal (and in this hearing) left a strong appearance of impropriety and disloyalty which he had contemporaneously considered both unacceptable and more than a sufficient reason for dismissal. I find that this is consistent with the Respondent's high-level concerns from October 2013 about the nature of information shared in the multi-bank chatrooms, the areas of investigation identified by the FCA on 15 October 2013, Ms Skelton's email on 10 January 2014 that the review of the Claimant's chats left the Respondent's management feeling uncomfortable and the notes of Mr Feig's dismissal call which confirmed that the Claimant's chats were believed to be shockingly different and a complete violation of trust. I consider that Mr Forese's evidence as to the reason for dismissal was consistent with the contents of the dismissal letter: although no conclusion had been reached about the matters being investigated (which on balance I infer is a reference to the scope of the FCA investigation), the content of some of the chats was of itself wholly unacceptable and that it was this conduct by the Claimant which had caused the breakdown of trust and confidence.

66 Mr Forese candidly accepted that he made the decision to dismiss in January 2014 despite knowing that he could not follow the fair procedure required by UK employment law as the FCA instruction prevented the Respondent from interviewing the Claimant. Moreover, I have accepted Mr Forese's evidence that at the time of dismissal, the Respondent's concern was not the Claimant's activity around the fix but his violation of the Code of Conduct and employment obligations in terms of the information shared.

67 Ms Hale accepted in evidence that even if the Respondent could not have held an investigation or disciplinary hearing in January 2014 because of the FCA restrictions, the Claimant could have been offered the right of appeal once the FCA agreed to the release of some of the chats in March 2014. This is consistent with a contemporaneous HR reference to the possibility of reversing the Claimant's dismissal. Although, as Mr Forese noted, the Claimant did not appeal against his dismissal either in January 2014 or subsequently, he did object to what he regarded as the unfairness of the decision and the fact that it had been taken without giving him an opportunity to explain his chats.

68 When deciding to dismiss the Claimant, Mr Forese had not heard the Claimant's explanation of the chats. He had not read the notes of the Claimant's interview on 15 October 2013 although he had been told the Claimant's responses to the questions put. It was only in the course of evidence in this hearing, that Mr Forese heard the Claimant's full explanations of the relevant chats. Mr Forese did not accept that the Claimant had only

shared market colour and, having heard the explanations, he was certain that he would not have changed his mind about dismissal. From the manner in which Mr Forese gave his evidence, and given his readiness to make concessions on other points even where adverse to the Respondent's case, I find that he remains genuinely of the belief that the Claimant's chats contained confidential information disclosed in breach of his duties of confidentiality and demonstrated conduct which placed the interests of the chatroom above the implied duty of trust and confidence owed to the Respondent. Moreover, having now heard the Claimant's explanations, Mr Forese was concerned that the Claimant did not, and still does not, recognise that there was any possible inappropriate behaviour on his part in the chats. As he put it, even if each of his explanations were true, the Claimant should at least be able to appreciate that there are chats which on their face give rise to the appearance of impropriety.

69 On 20 January 2014, solicitors acting for the Claimant wrote two letters to the Respondent complaining that his dismissal was unfair, asking to be provided with copies of the communications believed to be wholly unacceptable and raising concern about the manner in which his dismissal had been handled. The second letter asked for an explanation of why the media had not been told that no conclusions had been reached in respect of the matters under investigation, referring to the contents of the dismissal letter, and required the Respondent to publish a correction and an apology. On balance, I do not find that it included a request for written reasons for dismissal; it was a request for the materials which led to the decision and for a public correction of the press record.

Post-termination chats

70 In February 2019, the Respondent was permitted to present an amended Response which introduced five appendices of additional chats relied upon as evidence of misconduct discovered after termination of employment. Some of the chats pleaded in the amended Response were not referred to in evidence and Mr Devonshire produced a helpful list setting out those which were in fact relied upon by the Respondent.

71 A considerable amount of time and effort was expended by Counsel analysing each of the chats, with the Claimant and Mr Phipps both setting out their interpretation of the content of the chats in detail. I intend no discourtesy to those efforts by finding that it is neither necessary nor expedient to set out content of each chat given their number and the fact that most raise the same or very similar issues as the termination chats.

72 The Claimant's response to the content of the chats was in essence that:

- The amount, rate and direction of transactions are not confidential and can be shared by reason of the Respondent's Spot FX Terms of Dealing where a legitimate attempt to secure a matching transaction to source liquidity.

- He was sharing general flow information which was market colour, for example on 30 June 2009 when he shared information about the amount and side of the Respondent's New York desk in Dollar/Yen market.

- Any alleged references to individuals or terms on the confidentiality schedule referred to groups of individuals and not a specific client.

- What the Respondent calls standing down was in fact him taking steps to

avoid the improper practice of front running through misuse of information legitimately shared for matching or sourcing liquidity.

- The size of the FX market was too large for he or any of the other chatroom participants to affect price by trading in a particular manner.

- A chat on 30 July 2019 shows that the Claimant's then line manager, Mr de Groot, was comfortable with the Claimant posting that "**we have load of stops 1.4125–60 … also Asia buying again this morning**", another participant saying that the term "Asian real money" was "**the code we're supposed to use**" and Mr Groot disclosing that he had "**just sold 100 usdjpy at 00 asia**" and "**another real money cust bot 50 usdjpy at 06**".

- Mr Feig was not concerned when the Claimant told an external party in an undated chat that he (Mr Feig) had "**sold 100 usdjpy establishing a tactical short**" or when the Claimant told Mr Feig in a chat dated 16 June 2011 that he had obtained information about the suspected predatory trading activity of client H from two other banks.

- This was consistent with his case that prior to 2013, sharing information about specific trades but which generally did not include information identifying a specific client, unless they were predatory, was widespread and known to senior managers. I attached little weight to Ms Hosler's evidence in support of this contention as she had little contemporaneous involvement in the Claimant's chat room activities and her evidence lacked detail.

73 Mr Phipps' interpretation of the chats was in essence that:

- The Claimant had disclosed the specific amount, rate and/or direction of transactions relating to live trades and specific clients. For example, on 8 November 2010 over a period of one hour and 20 minutes, the Claimant had updated the other traders about the amount and direction of a specific client's trading activity and orders (the "**buying ton passively**" chat).

- The Claimant improperly disclosed the trading strategy of colleagues and acted in a manner designed to harm or undermine colleagues, for example on 30 June 2009 when he told the other traders that "**nyk rhs in 100 usdjpy … but we 50 offered a ton".**

- There was no distinction between the duty of confidentiality owed to central banks and other clients. The duty of confidentiality applied to all.

- The Claimant's suggestion that he was referring to a group of clients in the appendix 1A and 1B chats was implausible as the information exchanged only made sense if read as a single client active in the market.

- Whilst on 30 July 2009, Mr DeGroot also appeared to have participated improperly in the use of code words to refer to a particular client in what he described as "not a great chat", if discovered whilst he was still employed it would have been investigated and did not give a green light to subordinates.

74 The overall impression which I formed was that both the Claimant and Mr Phipps were extremely keen to interpret the contents of chats which were mostly ambiguous to fit their case and neither appeared prepared to accept any other interpretation.

- Mr Phipps maintaining that the phrase "heads up" did not refer to the colloquial phrase for a warning but the suggestion that "heads" was a specific client and "up" referred to them being engaged in activity did not seem plausible.

- Mr Phipps asked the rhetorical question of why would the Claimant use a code (term A) if it referred only to a generic category. Given the speed with which the chats were typed and sent, using a shorthand phrase (such as term A) is more plausible than expecting the participants to type out "top tier Reserve Manager" each time they wished to refer to that category.

- Many of the chats referred to what the Claimant had heard generally, consistent with his interpretation of market colour and rumour being shared to discuss market movements, yet Mr Phipps interpreted them as the Claimant sharing specific information.

- The Claimant maintained that the reference to "nem" in a chat on 29 January 2009 was a descriptive characteristic of what the market would be like and was not a reference to a particular client, notwithstanding the repeated references over a five-minute period to "he", "hate him" and specific trading activity "**he dealt on 20 away this nmg** [*morning*]", "**when he gave us aud** [*Australian dollars*] **the other day … gave merrils same time**".

- On 5 August 2008, the Claimant posted chats about a large order that he was working and, after Mr Gardiner asked whether it came from "**your Paris**", the Claimant posted "**no glt** [*gilt*] **desk**", the Claimant's evidence that he was providing market colour and/or exploring matching was not plausible as the origin of the order was immaterial for matching and the identification of the gilt desk was specific rather than generic.

- In a chat on 31 January 2008, Mr Usher thanked the Claimant **"for saying u were same way helped me go early"** to which the Claimant replied "**well its awesome i think we are both helping each other out … its us versus the c .. *s**!" and Mr Usher then said that he had his best month ever and he owed it all to the Claimant. The Claimant's explanation that they were talking about being each other's lucky charms and helping each other out as counterparties providing each other with liquidity is not consistent with the clear meaning of the chat that it was his disclosure that he was the same way as Mr Usher which helped.

75 It was clear that the Claimant and Mr Phipps had very different views as to what was permitted and the nature of the chats. On balance, I find that both men genuinely believe the interpretation which they now place upon the chats. As Mr Alghazy put it in cross-examination, Mr Phipps had his interpretation and the Claimant did not agree. However, as Mr Phipps replied, if he was incorrect so were Mr Feig, Mr Forese and the regulators. That such diametrically opposed interpretations can both be genuine is due to the ambiguous and confusing nature of the chats in question and a desire to justify their

own positions: the Claimant, that he did nothing wrong and Mr Phipps, that he could not certify the Claimant as a fit and proper person if he were re-engaged.

Claimant's career and the Respondent's business following dismissal

76 In September 2014, the Claimant obtained a job with London Capital Group but this employment was terminated on 5 December 2014. LCG used the Respondent as its prime broker and had access to its electronic brokerage platform, Velocity. When the Respondent learned that the Claimant was employed by LCG as a trader, it was unhappy that he might be trading on Velocity given the reason for his dismissal. The Respondent expressed its unhappiness to Mr Wells and curtailed LCG's liquidity and trading access. The Claimant's case is that there was no discussion about any problem with him trading on Velocity and that the Respondent wanted to secure his dismissal for no good reason. I accept as credible and reliable Mr Wells' evidence that the Claimant did not use Velocity and that there was no need for him to do so. I find on balance that the Respondent did intervene in a manner which resulted in the Claimant's dismissal from his new job and I infer that it was because it did not want any link between its business and the Claimant whom they had dismissed for gross misconduct in the context of the ongoing FX investigation and adverse publicity generated. The Claimant has not been able to secure subsequent employment.

77 Since the Claimant's dismissal, the Respondent has restructured its FX G10 business in London and the Claimant's former job no longer exists. The leadership structure has changed significantly. The Claimant's former managers are no longer in those positions, Mr Feig and Mr Forese are no longer employed by the Respondent.

78 In the last six years, there has been a decrease in voice trading and consequent increase in e-trading. Whilst both involve trading, they are not necessarily interchangeable as greater technical and programming skills are required for e-trading. I accept Ms Hale's evidence that when recruiting e-traders the Respondent looks for candidates with either computer science or quantitative analysis experience but, as she conceded, these are skills which are potentially capable of being taught. Given the Claimant's successful employment history up to his dismissal and the high regard within which he was held, I find that he would certainly have been trained and succeeded in e-trading had he not been dismissed.

79 During his employment, the Claimant was not required to be an FCA approved person as the regime applied only to employees performing controlled functions of which FX was not one. Since September 2014, however, the Respondent has required that all traders in FX must be approved and registered with the FCA. Initially, the regulatory regime for approval was that the Respondent must submit an application to the FCA to assess whether the trader was a fit and proper person. When submitting an application, the Respondent was under a duty to provide full and frank disclosure of all possible relevant information. The FCA criteria in assessing fit and proper include (1) honesty, integrity and reputation; (2) competence and capability and (3) financial soundness. I accept that the Respondent's practice at the time was to carry out a due diligence assessment and only to put a person forward for approval if they were satisfied that they would meet FCA requirements for "fit and proper". If the Respondent was not satisfied that an individual was likely to meet the fit and proper test, they would not be put forward to the FCA for approval. Disciplinary proceedings are included as a relevant criterion in the FCA guidance. I accept that given the contents of the FCA Final Notice, the

Claimant's chats would have been regarded as conduct which required notification to the FCA and put his fit and proper approval in doubt.

80 Since 7 March 2016, the approved person regime has been replaced by the Senior Managers and Certification Regime. The key difference is that responsibility for approval is devolved from the FCA to the Respondent which must certify that the employee is fit and proper to perform their role. Mr Phipps would be the employee of the Respondent required to attest that the Claimant was fit and proper and, if here were to certify something which he did not genuinely believe, Mr Phipps would be placed in potential breach of the FCA rules. Even if Mr Phipps' interpretation of some of the chats as showing misconduct was not plausible, I accept that he genuinely believes that the Claimant's conduct in the chats called into account his honesty, integrity and reputation. This genuine belief is not irrational given that it was shared by the FCA, the very body to whom Mr Phipps would be making the certification. Moreover, in many of the termination chats, the Claimant's explanations are not plausible and the chats give objectively reasonable grounds for belief in misconduct. I find that the Respondent would not have put the Claimant forward for approval in September 2014 and could not approve the Claimant now if he were to be reengaged in an approved role.

Subsequent Regulatory Decisions

81 The Financial Conduct Authority issued its Final Notice on 11 November 2014, imposing a financial penalty of £225.575million (which reflected a 30% discount by reason of the Respondent's agreement to settle at an early stage). In the Final Notice, the FCA found that the Respondent had failed adequately to control its London voice trading operations in the G10 spot FX market and that there had been inappropriate sharing of confidential information with traders at other firms, including specific client identities and information about clients' orders. The FCA reasons stated that some of those responsible for managing the front office were aware of and/or at times involved in such behaviours. Whilst matching ahead of the fix and communications on chatrooms were not of themselves inappropriate, the FCA considered that the frequent and significant flow of information between traders of different firms increased the potential risk of traders engaging in collusive activity and sharing confidential information. Similarly, whilst the receipt and use of information about the size, direction and level of client orders could be legitimate for risk management, it created a risk of improper misuse. Whilst an automated communications monitoring system was introduced in London in July 2011, it did not detect the inappropriate communications described in the Notice.

82 At paragraphs 4.25 and 4.26 of its reasons, the FCA stated that:

> "**4.25 Whilst Citi had policies in place regarding risks of the types described in this Notice, they were high level in nature and applied generally across a number of Citi's business divisions. They did not adequately address how trading staff should handle confidential information, or adequately differentiate confidential information from other types of generic market information held by Citi. Citi did not have any policies applicable to its G10 spot FX trading business specifically regarding the use by traders of chat rooms or similar electronic messaging services during the Relevant Period. Limited guidance regarding the general use of chat rooms (including a series of "do's" and "don'ts" for using chat applications) was issued to employees in the EMEA region in March 2012. This guidance was not, however, specific to its G10 spot FX trading business and did not explain in sufficient detail the types of chatroom communications that Citi considered to be unacceptable.**

> **4.26 Citi failed to take adequate steps to ensure that general policies concerning confidentiality, conflicts of interests and trading conduct were effectively implemented in its G10 spot FX trading business**."

83 On 20 May 2015, Citicorp made a plea agreement with the US Department of Justice whereby it paid a fine of $925million for its participation in a conspiracy to manipulate the FX spot market between 2007 and 2013. As with the FCA, the level of the fine reflected a reduction for a guilty plea. The conduct concerned communications in electronic chatrooms named "the cartel" or "the mafia", was by one of its Euro/Dollar traders and was said to be a conspiracy to eliminate competition in that currency pair by coordinating trading around the fix and refraining from certain trading behaviour. In a letter sent to the US Securities and Exchange Commission ("SEC") the same day, a solicitor acting for Citi stated that the guilty plea was based on the isolated acts of one Euro/Dollar trader based in London of which no senior managers or directors were aware and, once they had become aware, they took prompt action to dismiss the employee. I find that this and the factual basis for the DOJ plea agreement was a clear reference to the Claimant and his dismissal. It is not necessary for me to decide whether the Respondent chose to settle based upon and admission that there was actual improper trading or whether it was because of the appearance of impropriety, nor whether it acted in good faith in doing so. These are matters which exceed the scope of the issues before this Tribunal remedy hearing.

84 In civil proceedings, the US Office of the Controller of Currency ("OCC") fined Citi $355million and in January 2017 charged the Claimant personally for alleged misconduct in the chat rooms. The OCC charge specifically cites some of the chats considered in this case, for example the chats on 28 April 2010 and 20 December 2011 (termination chats) and the chat on 31 January 2008 (a post-termination chat). The charges relate to alleged anti-trust violations, in other words allegations of actual wrongful trading and anti-competitive behaviour. The Claimant was acquitted in the US criminal courts of anti-trust violations and vigorously defends the OCC charges. The OCC charges were stayed pending the outcome of the criminal process and despite a year having passed since the Claimant's acquittal, no further action has been taken by the OCC. There is no allegation against the Claimant in these Tribunal proceedings that there was any actual wrongful trading.

85 On 16 May 2019, the European Commission published its own decision following investigation of alleged misconduct in the FX market and fined the Respondent €310million. At paragraph 4, the decision identifies concern about conduct in three Bloomberg chatrooms involving the Claimant, Mr Gardiner, Mr Usher and Mr Ashton. The decision asserts that as well as legitimate sharing of information to explore potential matching and as market colour, the participants agreed to exchange current or forward looking, commercially sensitive information about their trading activities on the tacit understanding that it could be used to their respective benefit, to coordinate trading and would not be shared externally or used against each other. In defining market colour, the commission relied upon the Bank of International Settlements report published in May 2016 which defined the term as "**a view shared by market participants on the general state of, and trend in the market.**" The commission decision referred to the expectation of a degree of reciprocity in the exchange of information as demonstrated by chats where participants expressed gratitude when receiving current or forward-looking information, indicated a willingness to coordinate their trading and apologised to each other when they may have departed from that underlying understanding.

86 The Claimant did not accept the conclusions reached by the FCA, DOJ, OCC or European Commission in respect of his chats, some of which are also relied upon in this hearing as termination chats. His case is that the Respondent had chosen to enter into settlement agreements resulting in criticism of his conduct without affording him any opportunity to make representations or explain the content of the chats. This was necessary, he said, because there was a fair amount of what he described as "puffery" between the various participants and the contents of the chats on their own could cause confusion and be misleading. Instead of entering settlement agreements, the Claimant's case is that the Respondent should have defended the allegations as it is doing in the case of another employee facing fraud charges in Australia.

87 On 2 October 2019, the Claimant filed a civil complaint in the United States accusing the Respondent of malicious prosecution by knowingly making material misstatements to the Department of Justice which in turn formed the basis of his criminal indictment. The Claimant alleges the Respondent "**quite literally fabricated**" an anti-trust case for the Department of Justice based upon knowingly false allegations of manipulation and collusion, it had a secret scheme to "**dirty up**" the Claimant and had manufactured the case against him which formed the basis of the plea agreement. This civil claim has not yet been heard.

88 The Claimant still strongly and sincerely believes that he was treated as a scapegoat by the Respondent. He admitted to having felt a degree of anger and bitterness but suggested that this was in the past and now he was trying to rebuild his life and career, was willing to put it all behind him and, if the Tribunal were to order re-engagement, would withdraw the malicious prosecution claim. I have no doubt that the Claimant is genuine in his desire to move forward and sees re-engagement as the best chance of restarting his career. However, I do not accept that the Claimant has moved beyond the anger and bitterness he describes. It was clear throughout his evidence that he still feels very badly treated, still believes that the Respondent acted in bad faith when entering the plea agreement and regulatory settlements and, in these proceedings, has tried to build a case against him after the event by deliberately casting unobjectionable material in a negative light, unsupported by any underpinning evidential basis.

Law and Submissions

89 In approaching remedy, the Tribunal must bear in mind that unfair dismissal legislation is not designed to enable complainants to re-establish their reputation or vindicate their reputation or anything of that kind. The Tribunal is concerned with whether they were fairly or unfairly dismissed and once a conclusion is reached that they were, the question is how reasonably and most sensibly to compensate the unfairly dismissed employee, **Nothman v London Borough of Barnet No2** [1980] IRLR 65 CA.

90 The relevant legal principles to be considered when deciding whether to make an order for reinstatement or re-engagement are summarised at paragraphs 21 to 27 of the judgment in **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513 as follows:

> **21. The ET's powers to make reinstatement and re-engagement orders are set out at sections 112 to 116 of the Employment Rights Act 1996 ("ERA"). Section 113 provides that orders may be made for reinstatement or re-engagement. Section 114 specifically defines reinstatement and section 115 re-engagement. By section 116 it is provided as follows:**

> **"116. *Choice of order and its terms***
> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement ...**
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
> **(3) In so doing the tribunal shall take into account -**
> **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."**

22. It is common ground before us that an ET is to determine the question of reasonable practicability as at the date it is considering making a re-employment order; at which stage, it has to form a preliminary or provisional view of practicability (per Baroness Hale at paragraph 37, McBride v Scottish Police Authority [2016] IRLR 633 SC). The Respondent has a further opportunity (section 117(4)) to show why a re-engagement order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3).

23. More generally, Mr Ohringer has helpfully summarised the principles relevant to an ET's approach to a re-engagement order at paragraphs 16 to 23 of his skeleton argument:

> **"16. Under s.112 of the Employment Rights Act 1996 … a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or reengagement in preference to compensation.**
>
> **17. In ss. 113 and 116 of the ERA 1996, the tribunal is given a broad discretion as to whether to order reinstatement, reengagement or neither and directed to take into account various factors. In relation to reengagement, those factors are:**
> **(a) any wish expressed by the complaint [sic] as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer … to comply with the order for reengagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether to make an order for re-engagement, and if so on what terms.**
>
> **18. Reinstatement and reengagement are the 'primary remedies' for unfair dismissal (*Rao v Civil Aviation Authority* [1992] ICR 503, unsuccessfully appealed to the Court of Appeal on other grounds [1994] ICR 495 and *Central & North West London NHS Foundation Trust v Abimbola* (UKEAT/0542/08), para. 14).**
>
> **19. A Tribunal has a wide discretion in determining whether to order reinstatement or reengagement. (… *Valencia* … para. 7)**
>
> **20. If the employer maintains a genuine (even if unreasonable) belief that the employee has committed serious misconduct, then re-engagement will rarely be practicable. (paras. 10-11 citing *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680).**
>
> **21. However as stated in *Timex Corporation v* [*Thomson*] [1981] IRLR 522, cited with approval by the Supreme Court in *McBride* … the Tribunal need only have 'regard to' whether reengagement is practicable and that is to be considered on a provisional basis only.**
>
> **22. Simler J stated that contributory conduct is relevant to whether it is just to make an order. She emphasised that contributory fault, even to a high degree, does not necessarily mean it would be impracticable or unjust to reinstate. (*Valencia*, para. 12, citing *United Distillers & Vintners Ltd v Brown* (UKEAT/1471/99), para 14).**
>
> **23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the *Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] principle) is irrelevant. This was the conclusion of the EAT in**

> ***The Manchester College v Hazel & Huggins*** **(UKEAT/0136/12, para. 40) which was upheld by the Court of Appeal [2014] ICR 989, para. 43)."**

24. In this case, the ET's approach to the question of trust and confidence and how this might impact on its discretion to order re-engagement has been key. This has put the focus on the test that an ET is to apply in determining practicability, which was addressed by the EAT when overturning an order for re-engagement in Wood Group v Crossan [1998] IRLR 680:

> **"10. … we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."**

25. Before us, the parties have approached the test of practicability at the first stage as one in respect of which there is a neutral burden of proof. They see the burden shifting to the employer if and when it seeks to avoid the making of an additional award of compensation under section 117 ERA. That said, where an employer is relying on a breakdown in trust and confidence as making it impracticable for an order for re-engagement to be made, the ET will need to be satisfied not only that the employer genuinely has a belief that trust and confidence has broken down in fact but also that its belief in that respect is not irrational (see paragraph 14 United Distillers v Brown UKEAT/1471/99).

26. In the case of Valencia Simler J revisited the question as to how an ET was to undertake its task on the making of a re-engagement order, giving the following guidance:

> **"7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer *shall* treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.**
>
> **8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.**
>
> **9. Practicable in this context means more than merely possible but 'capable of being carried into effect with success': *Coleman v Magnet Joinery Ltd* [1974] IRLR 343 at 346 (Stephenson LJ).**
>
> **10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:**
>
> **'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy**

of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'

11. Similarly in *ILEA v Gravett* [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:

> **'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'**

12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: *United Distillers & Vintners Ltd v Brown* UKEAT/1471/99, unreported, 27 April 2000 at paragraph14."

27. Although we have just cited passages from two cases in which different divisions of the EAT overturned ET orders for re-engagement, more generally we note as follows: (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see Clancy v Cannock Chase Technical College [2001] IRLR 331 EAT); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08, at paragraph 15)."

91 As may be seen from the above, at this first stage of deciding whether reinstatement or re-engagement are practicable, the Tribunal is expressing only a provisional determination. However, the Tribunal cannot simply leave proper consideration of practicability to the next occasion; it must determine it at this stage also.

92 In deciding practicability, the Tribunal must scrutinise the rationality of any belief relied upon by the Respondent as a bar to practicability. Other relevant factors in considering practicability may include the effect on trust and confidence of any finding of misconduct or contributory fault, an employee's long experience, past good record and professional commitment, see **Farren**.

93 If neither reinstatement nor reengagement is appropriate, section 123 ERA provides that the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The award should compensate the employee for loss and is not intended to penalise the employer.

94 In deciding what is just and equitable in all the circumstances, the Tribunal may reduce compensation if satisfied that the employee could have been fairly dismissed by reason of pre-termination conduct which came to light after his dismissal, **W Devis & Sons Ltd v Atkins** [1977] ICR 662, HL. It is not, however, just and equitable to take into account conduct known to the employer at the time of the dismissal but which it chose not

to rely upon, **Devonshire v Trico-Folberth Ltd** [1989] ICR 747, CA. When considering any reduction, the Tribunal must not lose sight of the overall question of fairness and a proper consideration of what would have happened applying the **Burchell** test, **Panama v London Borough of Hackney** [2003] IRLR 278, CA.

95 Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

96 The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

97 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

98 The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on disciplinary and

grievance procedures).

99 The appropriate order for deductions is as follows:-

(i) Calculate the total loss suffered;
(ii) Deduct amounts received in mitigation and payments made by the formal employer other than excess redundancy payments;
(iii) Make any **Polkey** deductions;
(iv) Make any adjustment for failure to follow statutory procedures;
(v) Make any deduction for contributory fault;
(vi) Apply the statutory maximum.

100 Section 92 of the Employment Rights Act 1996 provides that an employee is entitled to be provided with a written statement giving particulars of the reason for dismissal. The statement must be provided within 14 days of the employee making a written request. Section 93 provides that the employee may make a complaint to the Tribunal if the employer unreasonably fails to provide a written statement or if the particulars of reasons are inadequate or untrue.

Conclusions

The Reason for Dismissal

101 Although in the list of issues, re-engagement is the first issue to be decided, both Counsel chose to address the reason for dismissal first. This is sensible as the findings and conclusions on the reason for dismissal will necessarily inform the decision on re-engagement and I am content to adopt the same approach.

102 Mr Alghazy submitted that there had been such a seismic shift in the reason relied upon at the time of dismissal in January 2014 (breakdown in trust and confidence but where no conclusions had been reached) and that relied upon in these proceedings (gross misconduct), that the Respondent has failed to discharge the burden of showing the real reason for dismissal. Instead, the evidence pointed to a media-driven decision caused by the need to be seen to be doing something. In what he described as unique or unusual factors, Mr Alghazy identified a number of points said to be relevant to the reliability of the Respondent's case and from which I understood him to submit that adverse inferences could be drawn.

102.1 The failure to call any FX trader to give evidence about the practices at the relevant time, Mr Phipps' failure to investigate contemporaneous practices when preparing his witness statement, failure to consider the lack of contemporaneous training about confidentiality, failure to look at the trading data to see whether there had in fact been "skulduggery" by the Claimant as alleged, the failure to interview the Claimant or consider the notes of his interview on 15 October 2013, the Respondent's apparent liaison with the press to announce the dismissal.

102.2 The delay in identifying the actual decision makers, Mr Feig incorrectly claiming that he was the key decision maker, the absence of evidence to show meaningful consultation with Mr Feig, Mr Feig's use of a script, the failure to call Mr Ybarra to give evidence, Mr Forese's inability to identify

> the actual chats seen at the time of dismissal, the absence of any non-privileged contemporaneous document with Mr Forese and, as he put it, the changing nature of the Respondent's case at the various points of suspension, dismissal, initial Response, amended Response, witness statements, cross-examination and submission.

103 By contrast, Mr Devonshire did not accept that there had been any such seismic shift and submitted that the reason for dismissal was accurately captured in the letter of dismissal, namely that the content of the chats was wholly unacceptable and caused the breakdown of trust in confidence. This inappropriate behaviour in the chats, irrespective of whether there was actual trading impropriety, was the gross misconduct for which the Claimant was dismissed. This was, and always had been, a conduct dismissal.

104 Having considered the above, I do not accept that the Respondent's case has undergone the seismic shift described by Mr Alghazy. I have found as a fact that the decision to dismiss was because Mr Forese and Mr Ybarra genuinely believed that the content of the Claimant's chats was inappropriate and in breach of his duties of confidentiality and trust and confidence. The Claimant was not dismissed as a scapegoat because of unwelcome press coverage, rather the principal reason for dismissal was the conduct in the chats which then gave rise to regulatory scrutiny and adverse press coverage. The substance of the dismissal call with Mr Feig was the content of the Claimant's chats and their appearance. On an objective reading, the dismissal letter makes clear that it is the content of the Claimant's chats which was wholly unacceptable and which resulted in the breakdown in trust and confidence. In the Response and the amended Response, the Respondent advanced conduct and/or some other substantial reason as the reason for dismissal, namely that the Claimant had breached the obligations set out in his contract and relevant policies by reason of the information shared by him in his chats. Whilst there was some refinement of the chats relied upon as the hearing progressed, I did not consider it to change materially the nature of the Respondent's case.

105 The factors which refer to the failure adequately to investigate various issues will be relevant to the **Polkey** issue but I have also considered whether the total failure to follow a fair procedure, and particular points raised by Mr Alghazy, call into question the reliability of the Respondent's case to show a potentially fair reason for dismissal. I do not in the unusual circumstances of the case. I accept that no procedure was followed because of the FCA investigation and the limits it placed upon the Respondent, not because there was any doubt about the conduct reason for which the Claimant was being dismissed.

106 Nor do I consider that it is safe or appropriate to draw any inference from lack of initial clarity about the decision maker, the absence of contemporaneous evidence or the absence of Mr Ybarra as a witness at this hearing. Whilst these are matters which may be relevant, I have accepted Mr Forese's evidence for the reasons given. Where a decision is taken jointly, as I have found that it was, there is nothing suspicious in a party deciding only to call one of them to give evidence. Moreover, it does not appear that the Respondent was put on notice that if Mr Ybarra were not called, the Tribunal would be asked to draw an adverse inference. The content of the dismissal call by Mr Feig is consistent with his contemporaneous consultation even if there is no other documentary record of the discussions and I have not accepted that this was a scripted conversation.

107 For all of these reasons, I conclude that the Respondent has proved that the reason for dismissal was conduct, a potentially fair reason within section 98(1) and (2) of the Employment Rights Act 1996.

Re-engagement

108 In considering re-engagement in this remedy judgment, I am required to make a provisional determination of the practicability (not possibility) of re-engagement. Whilst the burden of proof is neutral, the Tribunal must be satisfied that the employer genuinely believes that trust and confidence has broken down and that such a belief is not irrational, see **Farron**.

109 Mr Alghazy candidly acknowledged that allegations of conspiracy by an employee against his former employer would not ordinarily make a promising start for the consideration of a re-employment order, but he submitted that it was nevertheless practicable because the key protagonists are no longer employed by the Respondent, save for Mr Ybarra who operates at a substantially higher level than the Claimant would if re-engaged. Mr Alghazy submitted that it was not enough for the Respondent simply to say that trust and confidence had broken down, even if it genuinely believed that to be the case, where the breakdown is the consequence of the employer's own actions. Although not explicitly put in this way, Mr Alghazy's submissions about the Respondent's interpretation of the chats also appeared to call into question the rationality of any belief that the content of the chats had caused a break down in trust and confidence. In support of re-engagement, Mr Alghazy prayed in aid the harsh effect of the allegations and dismissal upon the Claimant and his young family such that re-employment by the Respondent, even for a short while, would rehabilitate the Claimant's reputation in a way that a finding of unfair dismissal cannot. Advancing what he described as a creative, novel but ultimately just result, Mr Alghazy suggested that the provisional determination of practicability be couched in conditional terms, allowing a period of time for the parties to put in place a scheme to permit a re-employment order and associated withdrawal of the malicious prosecution complaint, as well as address the regulatory obstacles identified by Mr Phipps.

110 Mr Devonshire was not attracted to the solution proposed by Mr Alghazy, describing the claim for re-engagement as a non-starter. The Claimant has not identified any vacancy that he could or would like to fill and the Tribunal is being impermissibly asked to create a bespoke job in legal, risk or compliance which does not exist and for which the Claimant would not be qualified. Mr Devonshire submitted that re-engagement does not necessarily impose a duty on the employer to find or create a suitable job, citing **Lincolnshire County Council v Lupton** [2016] IRLR 576.

111 Mr Devonshire submitted that there has been a total collapse of trust and confidence on both sides. The Claimant believes that he has been a victim of a high-level conspiracy, is suing for malicious prosecution, has demonstrated open hostility and resentment against individuals who remain employed by the Respondent and if re-engaged would be required to work with Mr Phipps whose interpretation of the chats he strongly refuted during this hearing. The Respondent has no trust and confidence in the Claimant believing him to be guilty of misconduct in his chats. Mr Devonshire submits that the fair inference to be drawn from the many regulatory settlements and the guilty plea to criminal anti-trust misconduct is that the Respondent had formed an adverse view of the Claimant's chats. Such a belief was not irrational as it was shared by the regulators and

the DOJ. Re-engagement would not be practicable in circumstances where the Respondent could not in good conscience certify the Claimant under the Senior Manager's Certification Regime. The Claimant was guilty of contributory fault which rendered re-engagement not practicable.

112 On balance, I do not conclude that re-engagement is practicable in this case. I accept Mr Alghazy's submission that a finding of unfair dismissal will not enable the Claimant to rebuild his career and reputation in a way that employment with the Respondent could do. This is regrettable but it is not a reason to make an order for re-engagement where on the facts of the case the relationship of trust and confidence has broken down to such an extent and on both sides of the working relationship. The Claimant may genuinely believe that if re-engaged by the Respondent, he could move forward and put the past behind him, but based upon his evidence during this hearing and his very clear sense of being the blameless scapegoat used by the Respondent to take all of the blame, I do not consider that such a belief is realistic. The decision to issue the malicious prosecution claim as recently as 2 October 2019, only six weeks before this Tribunal hearing, is indicative of the strength and currency of the Claimant's feeling that he has been severely wronged by the Respondent.

113 As for the chats themselves, I have found that both the Claimant and Mr Phipps are genuine in their interpretation of the chats. The diametrically opposed interpretations that each held, and their general unwillingness to concede that the other's interpretation may be equally valid, shows the impracticability of re-establishing a working relationship. As Mr Forese put it, how can there be trust and confidence when, even now, the Claimant is not prepared to accept that his chats could reasonably be interpreted in a manner contrary to his explanations? This is not a case of finding that trust and confidence has broken down just because an employer says so or even because of that employer's own wrongdoing. Looked at objectively, I conclude that the Respondent's belief that the Claimant had engaged in serious misconduct in his chats and that the misconduct was sufficiently serious to cause a breakdown in trust and confidence was both genuine and not irrational. Finally, re-engagement is not practicable in circumstances where Mr Phipps could not in good conscience certify the Claimant under the Senior Manager's Certification Scheme without breaching his own regulatory obligations.

114 The novel and creative solution proposed by Mr Alghazy may appear just but it is not in any realistic sense practicable.

The Claimant's conduct and its effect on any award

115 The issues about reduction of the basic award, whether it is just and equitable to make any compensatory award and whether there should be a contributory fault reduction each require me to reach findings and conclusions about the culpability and effect of the Claimant's conduct in the chats. In deciding what would have happened if a fair procedure had been followed, it will be necessary to consider what view a reasonable employer could have reached following a reasonable investigation.

116 Mr Alghazy submitted that the Claimant's chats had been misunderstood, that the Respondent's suggested "codes" were shorthand and at times risible, that many of the allegations of misconduct were vague and/or relied upon unclear terms. The chatroom participants were not putting their interests first, above their own branches, rather they were seeking to prevent the latter from misusing information disclosed for legitimate

matching purposes and/or engaged in what he described as "puffery", seeking to make themselves seem useful or important. Trading data would show that the Claimant had not in fact traded to help the others as appeared to be suggested in some of the chats. It would also show whether the Claimant's chats were colour after the event or comment on a live trade. The suggestion that the three, later four, chatroom participants could affect a market of such size as Spot FX was untrue and unreliable. It was not appropriate to consider the chats cumulatively to "get a feel for them" as Mr Phipps suggested or to rely on the plain effect of the language given the insight required to understand their context or to simply say that they look bad, not least as the Respondent did not ask the Claimant at the time for his explanation. Nor should the chats be given a sinister gloss by reference to contested evidence in the US criminal proceedings or the various Regulators decisions when no conclusions had been reached at the time of dismissal and the Regulators did not have the Claimant's explanation about the context of the chats. Overall, the burden was on the Respondent and there was no reliable and cogent evidence of culpable conduct by the Claimant.

117 I accept Mr Devonshire's submission the findings reached by this Tribunal in the other FX trader cases, including that of Ms Hosler, have very limited relevance as the Claimant was not a party to them. Insofar as Mr Devonshire then sought to rely upon the decision of another Tribunal in a claim brought by Mr Ashton against his employer, I consider that the same reasoning must apply. In the circumstances, I decided this case on the evidence which I have heard and I drew little, if any, assistance from any of the earlier cases.

118 Mr Devonshire submitted that the Claimant's evidence was riven with internal inconsistencies, was obviously unrealistic and/or simply failed to engage with the plain effect of the language that he and the other chat participants used. The Claimant's stance was that he was the only person who could understand and explain the content of the chats, and if the Respondent or the Regulators took a different view, they were all simply wrong. The lack of candour in the Claimant's stance and determination to vindicate himself was evident in his unrealistic explanations and his reluctance even to concede that there were red lines about disclosing client confidential information, so much so that by the end of his evidence the Claimant's position seemed to have become entirely binary: there was nothing he could not legitimately reveal because it was all either to explore a trading opportunity or it was market colour. The contemporaneous documents, such as Mr Feig's views and the content of the Claimant's interview with the lawyers on 15 October 2013, permitted the inference that the Claimant knew that he had been trespassing outside of permitted boundaries and that disclosure of client identities were a red line.

119 Even if each of the termination chats were capable of innocent explanation, Mr Devonshire submitted that they looked dreadful and that the very names of the chatrooms indicated that the participants regarded themselves as a team, independent of their respective employers, with a mutual expectation of reciprocal loyalty and information sharing which they would not even disclose to their own teams. The chat on 20 December 2011 was a clear signpost to the true purpose of the chatroom and the clear words of the chats provided ample evidence to support the inference that the common understanding of the chatroom participants was that they would cooperate and assist each other in their trading.

120 For reasons set out in my findings of fact above, I found the evidence of the Claimant and Mr Phipps about the interpretation of the chats to be genuine but unreliable. Applying **Gestmin**, their evidence was materially affected by the fact that both men have a stake in a particular version of events: the Claimant in restoring his career and reputation, Mr Phipps in showing why reengagement would not be practicable (in large part due to the consequences of the chats for the Respondent). Where Mr Phipps at times appeared to be trying to build a case after the event based upon his opinion and desire to interpret the chats in the worst possible light, the Claimant's evidence was fuelled by his conviction that he is a blameless victim and was based upon his interpretation of the chats following extensive litigation, including criminal prosecution, in which he has so convinced himself of the rightness of his position that he interprets every chat in the most exculpatory light possible and often failed to engage with the plain effect of the language that he and the other chat participants used. The Claimant's desire to interpret the chats in the most exculpatory light was consistent with his evasive evidence about the very names of the chatrooms which suggested that the participants regarded themselves as working together for their own common interest. In considering the post-termination chats, I have found that both the Claimant and Mr Phipps were extremely keen to interpret the contents of chats which were mostly ambiguous to fit their case and neither appeared prepared to accept any other interpretation.

121 I have found that even at the time of the chats, the Claimant knew, or should reasonably have known, that it was not market colour to disclose any information which related to specific deals of the Respondent or associated companies which had been transacted, or were in the process of being transacted, except to explore and execute matching transactions, even if the identity of the client was not also disclosed. This was based upon the content of the Nips code, the contract of employment, employee handbook and Code of Conduct and is consistent with his contemporaneous position in the 15 October 2013 interview. In accepting that the Claimant genuinely believes that his chats did not show improper behaviour, I had regard to his consistent view expressed contemporaneously when he rejected the suggestion that the chats showed "cartel-ish" behaviour, see the chat on 30 April 2012 with Mr Gardiner and Mr Usher, or that Mr Feig would find something improper in his chats if he looked.

122 In reaching my conclusions on the content of the chats, I accept Mr Alghazy's submission that it is not sufficient to say that, considered cumulatively, the chats look bad. Mr Alghazy submits that only the Claimant can know what the chats meant and whether there was misconduct; Mr Devonshire submits that the Claimant's explanations fail to engage with reality. On balance, I conclude that the Tribunal is entitled to have regard to the objective meaning of the language used, the contemporaneous material, the current explanation of the Claimant and the current interpretation of Mr Phipps, when considering any permissible inferences and conclusions about the culpability of the Claimant's conduct in the chats.

123 As set out above and in the Schedule attached, a very considerable amount of time was spent by Counsel exploring in great forensic detail the possible meaning of hastily typed chats which had scant regard to grammar or spelling. As with the post-termination chats, many of the chats could reasonably be interpreted in the way contended for by the Claimant just as much as they could equally reasonably be interpreted in the way contended for by Mr Phipps. Some of the chats, however, demonstrated the unreliability of the Claimant's case to such an extent that I accepted Mr

Devonshire's submission that by the conclusion of his evidence, the Claimant was so determined to vindicate himself that his position on each of the chats was entirely binary and he could not see anything apparently wrong in any of the chats. Overall, I concluded that there was clear and objective evidence of culpable conduct by the Claimant in the following termination chats:

123.1 28 April 2010. The content of the chat is not consistent with the Claimant's evidence that his annoyance was because Mr Gardiner had misused information legitimately shared to explore a match opportunity. There is no mention of a match or misuse of information in the chat. The Claimant's complaint is that Mr Gardiner had not checked the chat before the fix as he should have done and, as a result, had traded in a manner harmful to the Claimant. This is more consistent with Mr Phipps' interpretation, namely that the Claimant was annoyed with Mr Gardiner for acting in a way which was not helpful to him and that information was shared not to match but to collaborate to avoid trading against each other when they were taking different positions. Similarly, Mr Gardiner's offer to cancel his trade once he realised that he had traded against the Claimant is consistent with the common understanding that information was shared to help each other more broadly than to explore matching. This gave the impression of improper interference with an open market and the impression that the participants were putting their interests before doing their jobs properly. It was a breach of the Respondent's commitment, expressed in the Code of Conduct, to promoting free and competitive markets.

123.2 26 August 2010. The Claimant is sharing information specifically about the position and size of the New York desk. I do not accept that this was either market colour or to explore matching. The Claimant was not trading Dollar/Yen that day and had no trades to match in that pair. The Claimant's explanation of the phrase "**don't give em any**" as a warning not to misuse information lacked plausibility, and I find that it was a clear instruction not to trade in a way which would help the Claimant's colleague in New York. In other words, the Claimant was instructing a trader from a competitor bank to act in a way harmful to a colleague within his own organisation. This was in breach of his contractual obligations to discharge his duties diligently and was a communication of confidential information which was not in the proper performance of his duties. Moreover, it was a breach of his obligation to use his best endeavours to promote and protect the interests of the Respondent and its associated companies.

123.3 8 September 2010. The Claimant's case is that he was showing his colleague in New York "tough love" to teach him not to ignore his advice in future. In doing so, he tried to use the traders at competitor banks to make his colleague lose money. Whether or not they did trade in that way and whether the Claimant really thought that they would, the instruction and intention were culpable and in breach of his obligation to use his best endeavours to promote and protect the interests of the Respondent and its associated companies. The information that the New York desk were right hand side in 50 was disclosed by the Claimant to help Mr Usher and

to harm the Claimant's own colleague. This was not a diligent discharge of his duties and was in breach of his obligations at clause 15 and 16 of the contract of employment.

123.4 20 December 2011. I infer from the clear and unambiguous meaning of the words of this chat, that the existing chatroom members are concerned about whether Mr Ashton can be trusted to behave in the way in which they did. The need to be sure that he would protect them in the way that they protect each other cannot plausibly be a reference to matching, as the Claimant suggested, given the following clarification that it was protection against their own branches which they sought. I consider it safe to draw the inference, as did Mr Phipps, that the participants knew that they were sharing inappropriate levels of information. I conclude that the content of the chat is more consistent with the appearance of an understanding that they will trade in a way which supports each other, even if their branches are acting otherwise. The Claimant's evidence that the word "cartel" was a reference to a punk rock band lacks plausibility; Mr Usher is clearly and explicitly asking whether Mr Ashton will add value to "this cartel", namely the chatroom and its existing participants. The Claimant's acknowledgement that the chats could give a misleading impression was as close as he came to a concession that the clear meaning of the words used suggested impropriety. The FCA may not have interviewed the Claimant before reaching its conclusion, but having now heard the Claimant's explanation in this hearing, I am satisfied that their concern about this chat were well founded and that it gives a strong appearance of impropriety and conduct in breach of the Claimant's obligations as an employee, as set out in the contract, employee handbook and Code of Conduct.

123.5 22 February 2012. The Claimant's denial of acting in the market to get a better price for Mr Gardiner is not consistent with his statement in the chat that he "**hit the 34 offer to get them 1 pip lower for you :-)**". The Claimant accepts that he often sought to take credit for getting the other chat room participants a good deal. I consider that whether or not the Claimant had achieved the price for Mr Gardiner, and whether he even had the ability to do so given the size of the FX market, this chat gave the strong impression that he had done so or sought to do so. The Claimant's suggestion that it was only a reference to the Respondent's standard method for calculating a price was first made in cross-examination and, I conclude, was simply an attempt to avoid the clear meaning of the language in the chat in order to exculpate himself from any blame. The chat gives a strong appearance of impropriety and conduct in breach of the Claimant's obligations as an employee, as set out in the contract, employee handbook and Code of Conduct.

124 As for the second batch of chats provided on 15 April 2014, these largely concerned alleged use of code. I do not accept that the Claimant is entitled to rely upon paragraph 50 of my Judgment in Ms Hosler's case as a finding that the terms identified in the confidentiality schedule were generic references to other financial institutions in the country for which the specific client was the central bank. Quite apart from the fact that the Claimant was not a party to that litigation, paragraph 50 does not contain any finding

as to whether (or not) the term referred to a specific client or a broader group of which the client formed part. Read properly, paragraph 50 is no more than a finding that Ms Hosler had used the terms at her disciplinary hearing to refer more generally to the country and that her agreement to the confidentiality schedule used at the Tribunal hearing (which identified the term as a reference to a specific client) was not a material inconsistency. There was no finding as to the actual meaning of the term used, simply Ms Hosler's belief as to its meaning.

125 Overall, I conclude that it is not possible to make any finding of misconduct by the Claimant in these chats. Mr Phipps' evidence on the confidentiality chats was more consistent with a desire to interpret the chats in the worst possible light rather than an objective interpretation based upon the content. By way of example, the chat on 1 September 2010 says "**[*term C*] sold 50 eur at 65**". This makes just as much sense if read as a generic reference (for example, High Street retail) as it does if read as a specific shop (for example, British Home Stores). Similarly, "our fathers" could be a reference to a single country (through perceived shared nationality) or a reference to an entire sub-continent (as the Claimant and Mr Thiagarajah did not share the same nationality). Mr Phipps' rejection of the Claimant's explanation that term A and term B referred to generic groups of Reserve Managers (if so, why not use that reference rather than the term in question) failed to engage with the self-evident nature of the chats and their reliance on speed of communication and tendency to abbreviation. The suggestion that the Claimant ask Mr Stimpson to explain term A, could equally be a reference to a code for a specific client or a particular shorthand term in common use which refers to a generic group. Whilst the chat on 19 May 2010 ("**cant say here**") may suggest impropriety, I do not consider it sufficient material from which an inference of impropriety can be safely be drawn.

Calculation of loss and mitigation

126 The Claimant has produced a schedule of loss which was not challenged in evidence. Other than his brief employment by London Capital Group, the Claimant has not been in paid work since his dismissal. The Respondent does not ask me to find that the Claimant has unreasonably failed to mitigate his losses.

*Should there be any **Polkey** reduction and, if so, how much?*

127 Citing **Compass Group v Ayodele** [2011] IRLR 802, EAT, Mr Alghazy submitted that whilst it is for the Claimant to prove his loss, it is for the Respondent to adduce appropriate evidence to support any **Polkey** reduction. Care should be taken in applying **Software 2000** as there will be some cases where the evidence is so unreliable that the Tribunal cannot conclude on the balance of probabilities that dismissal would have occurred. There will also be cases where what went wrong was fundamental such that it will be difficult to envisage what would have happened and one cannot sensibly reconstruct the world as it might have been, **King & Others v Easton Ltd No2** [1998] IRLR 686 CS. Mr Alghazy asks me to conclude that the Respondent's procedural failures are of the worst kind, infecting the substantive fairness of the dismissal such that the **Burchell** test could not be satisfied and rendering it quite impossible to say with anything like the degree of certainty required, that the Claimant would ever have been fairly dismissed. The allegations of misconduct were vague and unclear, relying on untrue or unreliable factual allegations.

128 I have concluded for the reasons set out above, that the Respondent has provided that the reason for dismissal was conduct. It is not enough, however, for the Respondent to have a genuine belief in misconduct. In order for the dismissal to be fair, it must also be a reasonable belief, based upon a reasonable investigation, and fair in all of the circumstances of the case, applying s.98(4) ERA.

129 In his submissions, Mr Devonshire conceded that, with the benefit of hindsight, the Respondent could have held a disciplinary hearing by the end of March 2014. Mr Alghazy has listed 10 areas which he submits would have required investigation in order for the process to be fair. I consider that a fair procedure would have required an initial investigation which would have included a meeting with the Claimant. Whilst I do not find that a fair investigation would have required consideration of each of the matters identified by Mr Alghazy (such as an interview with internal counsel, the head of compliance or monitoring data over the five-year period in question), it would have required interviews with Mr Feig, consideration of the Claimant's training and/or the acceptable practice for sharing information at the time of the chats.

130 As the misconduct involved alleged breach of the duty of confidentiality rather than allegations of actual impropriety in trading, a reasonable investigation would not have required general investigation of trading data for each of the termination chats. However, where the Claimant's explanation was that there was no disclosure of confidential information at all (rather than an explanation that information had been shared but for matching), then investigation of trading data would have been relevant. For example, in the chats on 19 March 2008 and 22 February 2012, the Claimant's explanation was that he was taking a position for his own speculative trading and that there was no customer trade referred to in the chat; trading data would have supported or undermined that explanation. Similarly, for the chats with Mr Thiagarajah on 5 July 2010, 1 September 2010 and 14 March 2011, the trading data would have shown the client for the trades referred to and, consequently, whether terms A, B and C were references to a specific client or to generic categories of client.

131 When could and would such an investigation have taken place? I was not persuaded by the Claimant's assertions that the Respondent could have interviewed him before receiving the FCA instruction to desist from doing so. The Respondent had undertaken an initial interview with the Claimant on 15 October 2013. At that stage, the review of the chats had not reached a conclusion about whether there should be disciplinary action. Once the FCA told the Respondent on 15 October 2013 that it was being investigated, any internal interview would have required great care. I do not consider it determinative that the FX business is not regulated and the Claimant was not an approved person. The Respondent conducts other regulated business and there is an expectation by the FCA that banks keep them apprised of significant reputational issues and potential market misconduct. The regulator had begun an investigation into the Respondent's conduct in the FX market and had required the Respondent's co-operation. It is not realistic to suggest, as the Claimant does, that the Respondent could or should have disregarded the instruction and interviewed him in any event.

132 There was a brief period when the Respondent could have used the FCA interview protocol but the email on 4 November 2013 makes clear that the Respondent was still collecting and reviewing the Claimant's communications following which it planned to interview him. It was within the range of reasonable procedures to want to finish this review before holding the interview and to put the Claimant on unpaid leave for

a period before deciding whether or not there should be a disciplinary process.

133 From 8 November 2013, it was not reasonably possible to interview the Claimant due to the involvement of the FCA and the express agreement that the FCA interview must take place before a further interview with the Respondent. The involvement of the FCA gave rise to a procedural impasse. I do not accept that it is a fair inference that the Claimant would not have attended an investigation meeting if invited, he had after all agreed to attend the interview with Cleary Gottleib. On balance, I conclude that the Claimant would have been keen to attend an interview and provide his explanations but that both he and the Respondent would have been reluctant to do so before the FCA position was resolved. This, I conclude, would have been shortly after 15 April 2014 when the FCA agreed that the second set of termination chats could be provided to the Claimant.

134 Mr Alghazy submitted that the Respondent has failed to adduce evidence as to when it is asserted that a notional fair hearing would have taken place or that the Claimant could fairly have been dismissed for the content of the termination chats which taken at their highest did not establish gross misconduct. As Mr Forese gave no evidence as to what he would have done in that hypothetical scenario, it was quite impossible to say with anything like the degree of certainty of required for a **Polkey** reduction to be applied that the Claimant would ever have been fairly dismissed.

135 By contrast, Mr Devonshire submitted that if there had been an investigation and disciplinary hearing, the Claimant's explanations would have been no more persuasive or satisfactory than they were at this Tribunal hearing. If there had been a disciplinary process, it was extremely likely that it would have resulted in a fair and lawful summary dismissal within a month and dismissal was inevitable once the second batch of termination chats were authorised for released on 15 April 2014.

136 In conclusion, I am satisfied that the Respondent has adduced sufficient evidence to enable me safely to reach a decision as to what is likely to have happened if a fair disciplinary process had taken place. Such a process would have started with an investigation shortly following release of the second batch of chats on 15 April 2014. The extent of the investigation would have been as set out above and would, I conclude, be likely to have taken at least three months. I consider that this period is not unreasonable given that it took approximately the same amount of time for the Respondent to carry out its internal review (October to end December) and a fair investigation would have needed time to interview all relevant witnesses and interrogate relevant trading data.

137 Following the conclusion of the investigation, some time would have been required to finalise a report and make a decision on whether or not there would be a disciplinary hearing. Given the nature of the allegations and the ongoing regulatory investigations, this would not have been a quick or simple process. On balance, I consider that it would have taken at least six months from the date that the chats were provided on 15 April 2014 to have concluded the disciplinary hearing.

138 If there had been investigation meeting with the Claimant and a subsequent disciplinary hearing, he would have provided the same or substantially similar explanations as provided in this the Tribunal hearing (market colour and matching). On balance, I conclude that Mr Forese would have considered it and, for the reasons given at the Tribunal hearing, rejected it as implausible. For reasons set out above, I have found

that Mr Forese genuinely believed that the Claimant's chats viewed at the time and those reviewed in the course of this hearing left a strong appearance of impropriety and disloyalty which was more than a sufficient reason for dismissal. I accept his evidence, and Mr Devonshire's submission, that even with the Claimant's explanations and further evidence before him, he would still have decided to dismiss him.

139 For there to be a **Polkey** adjustment, any dismissal would have to be fair. Mr Devonshire relies upon the fact that several regulatory bodies and the US Department of Justice shared Mr Forese's view that the content of the Claimant's chats was inappropriate. I do not consider it necessary to rely upon the findings of any of those regulators or to draw any inference from the Respondent's decision to enter into settlement and plea agreements and, indeed, it would exceed the scope of this remedy hearing and trespass into the arena of the malicious prosecution claim. I have set out all of the termination chats and the Claimant's explanations and have concluded that there was misconduct and breach of his employment obligations in several of them. Mr Feig contemporaneously believed that the chats were shockingly different to those of other traders and would have said so if interviewed as part of the disciplinary process. Even if Ms Hosler had given the same evidence at a disciplinary hearing as she has done in these proceedings, I do not consider that the outcome would have been different. Consideration of the Claimant's training would not have made a material difference given that he was aware of his obligations in his contract, employee handbook and Code of Conduct and, I have found, even at the time of the chats he knew or should reasonably have known that it was not market colour to disclose any information related to specific deals except for matching purposes, even if the identity of the client was not also disclosed.

140 Despite the fundamental wrong of failing to follow any disciplinary process, I am satisfied that the nature of the conduct in the chats is such that even following a fair disciplinary process, Mr Forese could and would have fairly decided to dismiss the Claimant. The Claimant had engaged in multiple breaches of the obligations owed to the Respondent and, as in the interview with Cleary Gottleib and in evidence, refused then and refuses now to accept that there was anything wrong in his chats. The Claimant was in a position of some seniority, the effect of his misconduct meant that he could not be certified as a fit and proper person. Despite his length of service and excellent career to date, I conclude that dismissal would have fallen within the range of reasonable responses and was, as Mr Devonshire submitted, inevitable.

141 The Claimant's employment would have been fairly terminated by 15 October 2014. I do not consider that there was any chance, based on the evidence before me and my findings and conclusions above, that the Claimant might not have been fairly dismissed.

Should the basic award and/or compensatory award be reduced by reason of the Claimant's conduct?

142 In deciding contributory fault, the focus is solely on the employee's conduct and not that of other employees or the employer. I have concluded that the Claimant had committed culpable acts of misconduct in breach of his contract of employment in his chats on 28 April 2010, 26 August 2010, 8 September 2010, 20 December 2011 and 22 February 2012. This was foolish, blameworthy behaviour which caused his dismissal. There is, as Mr Devonshire accepted, no deduction for contributory fault arising out of the post-termination chats as these did not cause dismissal. It is appropriate that there should

be a reduction to the compensatory award. It is also just and equitable to reduce the basic award and neither party has submitted that there should be different levels of reduction. I reject Mr Alghazy's submission that there was no reliable and cogent evidence of culpable conduct.

143 Having regard to the nature and content of the chats, I consider it just and equitable that there be a 75% reduction to both awards. This reflects the Claimant's personal culpability whilst recognising, as the FCA found, that the Respondent had not provided sufficient clarity in its policies and the existence of chats involving Mr Feig and Mr de Groot which suggested some confusion about the difference between shorthand terms and codes and market colour. This reduction also reflects my conclusion that there was not culpable conduct in the second batch of termination chats relied upon by the Respondent and which caused in part its decision to dismiss.

Subsequently discovered misconduct

144 The additional chats included in the amended Response are relied upon by the Respondent as cause for a further reduction in the awards in two ways: first, they render it unjust that the Claimant should receive any compensation and second, once they became known they would have caused the termination of the Claimant's employment. Mr Alghazy submits that the Respondent is not entitled to rely upon these further chats as they arose from the review which concluded in late December 2013 or early January 2014 and so were known at the time of dismissal. In any event, Mr Alghazy submitted that they did not show misconduct which would enable the Respondent fairly to have dismissed. Mr Devonshire's response was that mere knowledge of other alleged misconduct at the date of dismissal did not prevent the Respondent from relying upon subsequently discovered information and this was new material arising from further investigation following dismissal.

145 For reasons set out in my findings of fact, I do not consider that the further chats add materially to the case against the Claimant. Both the Claimant and Mr Phipps were extremely keen to interpret the content of the chats, which I considered mostly ambiguous, in a manner which best fit their respective cases. There is some material in the further chats which is consistent with misconduct by the Claimant, for example the discussion about the specific trading activity of a client on 29 January 2009 and of mutual support within the chatroom. Equally, many of the chats are consistent with the Claimant sharing what he has heard by way of market colour. Having concluded that there was sufficient misconduct in the termination chats for the Claimant to have been fairly dismissed by 15 October 2014, I do not need to consider whether the Claimant could and would have been fairly dismissed once these chats were properly considered in October 2018. Nor do I consider that the nature and content of the chats is such that it is not just and equitable for the Claimant to receive any compensatory award when they are no more than a few further examples of the conduct for which the Claimant was dismissed in any event.

Unreasonable failure to comply with the ACAS Code

146 The Respondent has substantial resources including specialist employee relation support and had undertaken extensive investigation in the regulatory context. Having put the Claimant on paid leave in October 2013, it could reasonably have been expected to wait a further period of time to instigate a disciplinary process. It failed to undertake any disciplinary process at all and dismissed the Claimant on 10 January 2014 without any

prior warning to him that it was even contemplating such action.

147 Whilst the Respondent's ability to follow the requirements of the Code was restricted prior to April 2014 due to the concurrent FCA investigation, this was not the case after April 2014. The Respondent could have reasonably complied with the Code from this date. Alternatively, as Ms Hale conceded, it could have offered him an appeal once the FCA restrictions were eased and the termination chats disclosed yet it did not do so. For those reasons, I consider that there was an unreasonable failure to comply with the ACAS Code of Practice. The appropriate uplift is 25% for such a complete and utter failure.

148 The safeguard of a fair disciplinary process is a fundamental requirement of employment law and a fair dismissal, even where the employee has committed an act of gross misconduct. I am not persuaded by Mr Devonshire's submission that the Claimant's conduct is such that it is not just that there be an ACAS uplift in the circumstances of this case.

Section 92 reasons

149 Mr Alghazy submitted that the Respondent has failed to show the reason for dismissal. The Claimant's case is that in the dismissal call and in his solicitor's letter sent on 20 January 2014, he requested written reasons for his dismissal. He submits that there is nothing in section 92(2) which requires the request to be in writing. Mr Devonshire disputed that there had been a relevant request but in any event submitted that the particulars given in the letter of dismissal were and are true.

150 I have found that there was no request for written reasons included in the solicitor's letters sent on 20 January 2014. The request was for clarification and an apology to be printed in the media. Even if a request for written reasons were made in the telephone call with Mr Feig on 10 January 2014, the Claimant received those written reasons by letter sent the same day. The reasons provided were not untrue or inadequate – the Claimant was dismissed because of his inappropriate communications even though no conclusion had been reached on the allegations being investigated by the FCA. The claim fails.

Employment Judge Russell
Date: 14 July 2020

Schedule of Termination Chats

Chats provided to the Claimant on 5 March 2014

1 The participants to the chats regularly used shorthand and slang terms, often typed inaccurately. This reflected the speed with which chats were shared and the informal nature of the communication. This makes them difficult to read at times. References to being "given" or being "right hand side (rhs)", means that the trader needs to buy EUR/USD at the fix (base currency being bought in the quote currency). Conversely, where the chat refers to "losing" or being "left hand side (lhs)", the trader needs to sell EUR/USD at the fix (base currency being sold in the quote currency).

19 March 2008 – Claimant, Gardiner and Usher

2 Between 13:07:40 and 13:16:53, the following chats took place:

13:07:40 Usher: this fix aint gonna be easy
13:07:48 Usher: more than 200 again now
13:08:07 Ramchandani: gd luck buddy
13:08:13 Gardiner: shall I just buy 50 somewhere for when you need 'em?!
13:08:20 Usher: hahah
13:11:39 Ramchandani: we got given eur in nyk
13:11:40 Ramchandani: tough
13:13:40 Ranchandani: just got given 90
13:16:53 Ramchandani: apparently ubs bought some for the fix.
…
13:19:13 Ramchandani: I got a bid at 65 for a hunje [*€100m*] .. just between us
13:27:19 Ramchandani: great info ruggie
13:27:22 Ramchandani: pat pat.
13:27:25 Usher: great info ruggie
13:27:28 Ramchandani: hahahaha
13:27:33 Usher: was just about to type it
13:27:37 Ramchandani: nah
13:27:38 Ramchandani: one team
13:27:47 Ramchandani: u helped me with my 90 euros
13:28:05 Ramchandani: made 2 mins before fix
13:28:08 Ramchandani read em way down
13:28:13 Ramchandani: cause I knew you were gonna trashed it
13:28:14 Ramchandani: got em
13:28:17 Usher: good boy

3 In his witness statement, the Claimant said that the "hunje post" was disclosing only that he needed to buy €100m when the rate on the market reached 65 without saying whether it was for a customer or his own speculative trading position. He was allowed to share this information as the Respondent's Terms of Dealing permitted him to use the economic terms of transaction (the amount and rate to be bought or sold) in order to source liquidity and/or to execute risk-mitigating transactions. The remainder of the chat was similarly a permitted use of counterparty information better to manage risk. In cross-examination, the Claimant accepted that both Mr Gardiner and Mr Usher were telling him that they were left-hand side but maintained that this could still be exploration of a matching opportunity. The Claimant denied that he was disclosing information about the trading activity of the New York desk, maintaining that it was just market colour and that the New York desk had finished its trade and so was out of its risk position. As for the

post suggesting that he deserved a pat on the back for the information shared going into the fix, the Claimant said that this was for providing useful market colour that it was difficult to sell Euros because of the activity of New York and Mr Usher. He denied that the reference to "one team" or to being helped by Mr Usher suggested that they were coordinating their trading. The Claimant maintained that the reference to being given 90 was not related to the fix, the timing of the chat being simply a coincidence. As for "**read em way down because I knew you were going to trashed it**", the Claimant said that he knew that it was more difficult to sell than to buy given that Mr Usher was also selling but that this information did not affect the price as volumes were not affected and the market was too large to be significantly affected by the activities of himself and Mr Usher.

4 In his witness statement, Mr Phipps said that the parts of the chat which caused concern were the disclosure that the New York desk had been given Euros, that the Claimant had just been given 90 and the disclosure that the Claimant had a bid to buy €100m at 65. He maintained that the exchange only made sense if read as the Claimant sharing confidential, specific details of Respondent's live trading activity and the activity of a single client in the market (what was being bought and for how much) which would help the others, in particular Mr Usher, to improve their own trading strategy. Mr Phipps did not accept that the participants were exploring legitimate trading opportunities for three reasons: first, the activity of the New York desk could not be a trading opportunity for the Claimant; second, given the price disparities referred to, the Claimant would have known that neither external trader would trade with the Respondent for that order at that price; and third, there was no information from the other participants about resting bids or offers which might be matched. In cross-examination, Mr Phipps said that the Claimant's use of "**I got**" suggested that he was not trading on his own account but on a client order and that the Claimant's statement that the information be "**just between us**" was also a cause for concern. The Claimant could not have been exploring a legitimate opportunity where the market was above 65 at the point of which the chat was made. The Claimant had disclosed to Mr Usher that the New York desk was a seller, knowing that Mr Usher was also a seller. This would allow Mr Usher to sell ahead of the New York desk and make a profit at the expense of the Respondent's New York desk, hence the Claimant's subsequent reference to providing "**great info**".

28 April 2010 – Claimant and Gardiner

5 This was one of the chats provided by the FCA. It was agreed by the parties that the times on this chat need to be adjusted by one hour to reflect British Summer Time. Between 12:04:43 and 12:21:34 the following chats took place:

> **12.04:43 Ramchandani: I lose 210 skandi citi bench related**
> **12.12:18 Gardiner: paid n dead**
> **12.15:38 Gardiner: fk sorry, totally missed the above**
> **12.15:58 Gardiner: if you overbought I'll cancel**
> **…**
> **12.17:21 Ramchandani: I overbought by 150million**
> **12.17:24 Ramchandani: you killed me officially**
> **12.18:00 Gardiner: im so short it was pure instinct**
> **12.18:04 Gardiner: you ok**
> **12.18:07 Ramchandani: to be fair Matt**
> **12.18:08 Ramchandani: no**
> **12.18:13 Ramchandani: u should be checking before ecb**
> **12.18:14 Ramchandani: wmr**

12.18:16 Ramchandani: its standard
12.18:24 Ramchandani: and I put 10mins in advance
12.18:28 Ramchandani: not 1
12.18:29 Gardiner: ok ntg done then
12.18:31 Ramchandani: no
12.18:33 Ramchandani: leave it
12.18:40 Ramchandani: ive sold em back out at 37
12.19:07 Gardiner: well I did say straight away
12.19:14 Gardiner: but I apologised
12.19:30 Ramchandani: im not gonna cekct this chat instantly
12.19:31 Gardiner: but this was too fkg busy to check chats,, lost 250 at 10
12.19:35 Ramchandani: i was selling the 140 i overbought out
12.20:01 Gardiner: so clearly neither am I
12.20:08 Ramchandani: yeah
12.20:10 Ramchandani: but 10 mins matt
12.20:11 Ramchandani: im sorry
12.20:13 Ramchandani: u have no defence
12.20:16 Ramchandani: that's fking shiiit
12.20:20 Ramchandani: ecb
12.20:20 Gardiner: nate .. i got ripped from then
12.20:21 Ramchandani: and wmr
12.20:23 Ramchandani: 10 mins before
12.20:40 Gardiner: I didn't do it deliberately and said I'd cancel as soon as I got your name
12.20:50 Ramchandani: but I have sold them out so leave it
12.21:07 Gardiner: so if you are going to end me for not reading ahead of a fix & losing 400K on the way up then FINE
12.21:34 Ramchandani: im not .. im just saying if I said it a minute before fine .. but 11mins before and every day we check ecb and wmr

6 In his witness statement, the Claimant said that it was legitimate to share information about the fix for the purpose of matching and that he was also aiming to forecast supply and demand around time of the fix. The Claimant said he was upset because he had believed that Mr Gardiner was a trusted counterpart but had then unethically used the information disclosed by the Claimant to explore a possible match, for his own benefit to the Claimant and Respondent's expense. He explained that the information provided in the chat was that he was looking to sell €210million to a colleague at Citi and, therefore, was in the market to purchase the volume of Euros required to be able to make that sale. Mr Gardiner had misused this information in breach of market etiquette by also buying Euros and selling at the moment when the Claimant had expected to sell to his Citi colleague. The US Treasure Department Office of the Controller of the Currency relied upon this chat as demonstrating the collaborative behaviour of traders when they accidently traded against each other. The Claimant's evidence was that the regulator was wrong. The Claimant said that he did not leave the chatroom as a result of Mr Gardiner's behaviour because he eventually accepted that it may have been a mistake.

7 Mr Phipps's evidence was that the chat showed the Claimant telling Mr Gardiner his trading intention some ten minutes before the fix and then admonishing him for not checking the contents of their chat before the fix as was their standard practice. In cross-examination, Mr Phipps accepted that there was nothing wrong with the Claimant telling Mr Gardiner his trading intention if it was for the purpose of matching. He rejected this explanation however because there was no evidence of any trade to be matched and Mr Gardiner and the Claimant were both buyers (which was what had caused the Claimant to over buy). Further concern was that the Claimant was effectively telling off Mr Gardiner for being active in the market (buying) at the same time as him. This, said Mr Phipps, was

inconsistent with an open market and each trader making independent trading decisions in their employer's best interest. The impression given by the chat was that the members of the chatroom were putting their interests before doing their job properly and expected each other to check the chat to avoid trading against each other. This, and Mr Gardiner's offer to cancel his trade, gave the impression of an improper interference with the open market.

26 August 2010 – Claimant, Gardiner and Usher

8 Between 14:43:33 and 14:57:51 the following chats took place:

14.43:33 Usher: rug what are ure NYK doing rice [*Dollar/Yen*] **at fix**
14.43:43 Ramchandani: they are RHS
…
14.54:24 Usher: citn going v early rice
14.54:32 Ramchandani: dont give them any
14.54:58 Usher: at the fix
14.55:01 Usher: I wont
14.55:08 Ramchandani: in the window
14.55:11 Usher: I wont
14.57:23 Usher: but everyone talking about it
14.57:34 Ramchandani: its only 350
14.57:38 Usher: cool
14.57:47 Usher: why on earth he bidding it like this now
14.57:51 Ramchandani: no idea

9 In his witness statement, the Claimant said that he was protecting the interest of the Citi New York office as he believed that Mr Usher was looking to match a trade with them at the fix price for Dollar/Yen. His subsequent chat of "**don't give them any**" (misquoted in the statement as "don't give them away") was not an attempt to deny liquidity to his New York colleagues but a warning to Mr Usher not to misuse the information as to which side New York would be in the fix and to avoid additional trading volatility which could disadvantage his New York colleague. In cross-examination, the Claimant maintained that he disclosed the direction of the New York desk because he thought that Mr Usher was looking to match with them and he was trying to flatten risk. The Claimant denied that his chats were discouraging Mr Usher from trading with the New York desk and, when asked to clarify further what he was saying should not be given and to whom, said that the chat meant that Mr Usher should not give Dollar/Yen on the electronic platform.

10 Mr Phipps relied on this chat as an example of intention to harm or undermine colleagues. The Claimant had told Mr Usher that the New York desk would be buying Dollar/Yen going into the fix and the subsequent "**its only 350**" chat disclosed that the amount that they would be looking to buy. By saying "**don't give them any in the window**", the Claimant was telling Mr Usher not to sell Dollar/Yen to the Citi New York desk in the fix window. This would reduce the amount of Dollar/Yen available on the market for New York to buy and thereby harm the Claimant's New York colleague. In cross-examination, Mr Phipps described the Claimant's explanation that he was exploring a matching opportunity and warning Mr Usher not to misuse that information as defying any logic: there was no need to share the value of the New York desk position (350) when there was no indication of any interest to match.

8 September 2010 - Claimant and Usher

11 It was agreed by the parties that the times on this chat need to be adjusted by one hour to reflect British Summer Time. Between 12:06:15 and 12:11:37 the following chats took place:

12.06:15 Ramchandani: im selling 22 on citi bench.
12.06:17 Ramchandani: I'll go early!
12.06:21 Usher: hahah
12.10:16 Usher: are you nyk rhs
12.10:22 Usher: theyn give us 50 for the fix
12.10:51 Ramchandani: no they are rhs in 50
12.10:52 Ramchandani: hahah
12.10:55 Ramchandani: its not usual guy
12.10:56 Ramchandani: honestly
12.10:59 Ramchandani: I'm never gonna say it again
12.11:02 Ranchandani: but squash em
12.11:06 Ramchandani: I even told him give it away
12.11:09 Ramchandani: he was rhs in 56!
12.11:34 Usher: ok say nothing else to em please
12.11:37 Ramchandani: I wont.

12 Later in the chat, the Claimant told Mr Usher that his New York colleague was not happy, Mr Usher said "**hahahaha man alive … without me u r nthg**", the Claimant then said that the colleague was not talking to him and shared chats from the colleague complaining that the Claimant had acted unprofessionally.

13 The Claimant's evidence was that this was a legitimate sharing of information. He was trying to help his New York colleague by advising him to get rid of his position but that colleague did not accept his advice and acted to increase his risk exposure. In that context, the Claimant says he told Mr Usher to squash him. The Claimant described this as "tough love", hoping that his colleague would lose money that day to learn to follow the Claimant's advice in future. The Claimant maintained that there was no detriment to the Respondent as held an opposite position to his New York colleague, in other words he would gain where his colleague lost. In cross-examination, the Claimant said that his disclosure that he was selling "22 on citi bench" and was willing to take some risk was legitimate as he was looking to match. He had told the others that he was going early, he had not said how early. He denied setting up his colleague for a fall and maintained that as the colleague and Mr Usher were trading on an electronic platform, they would not know who was their counterparty until after the trade was finished (in other words that you cannot chose with whom to trade on the EBS platform). The Claimant denied giving generic market information to his New York colleague whilst giving specific information about their trading direction to Mr Usher.

14 In his statement, Mr Phipps said that Mr Usher's chats "**are you nyk rhs … theyn give us 50 for the fix**" were asking the Claimant whether the New York desk would be buying at the fix and the Claimant's answer "**no they are right hand side in 50**" was confirmation that they would be buying 50 million. Mr Phipps interpreted the "squash em" chat as a suggestion that Mr Usher should act against the Claimant's New York colleague. This is context that with the Claimant's subsequent chats sharing the annoyance of his New York colleague with Mr Usher, an external trader. In cross-examination, Mr Phipps relied upon earlier chats on the same day where the Claimant had told his New York colleague only

that there were few people buying and not sharing his knowledge that Mr Usher was selling 250 million; whereas he had told Mr Usher exactly what trading the New York desk were doing. It was not credible that the Claimant was exploring a matching opportunity as he did not tell his New York colleague that Mr Usher was selling 250 million at the fix. Knowing the New York position, Mr Usher was able to trade more aggressively and use his volume against the Claimant's colleague in such a way as to impact the market even though Mr Usher would not know whether he was actually trading with the Claimant's New York colleague. The Claimant and Mr Usher were keeping the Claimant's New York colleague in the dark and sharing information between themselves as part of, he said, a trading club.

20 December 2011 – Claimant, Gardiner and Usher

15 This was one of the chats provided by the FCA. Between 07:49:19 and 07:56:34 the following chats took place in which the participants discussed, and ultimately agreed, Mr Ashton's membership of the chatroom, including the following:

> **07.49:19 Gardiner: seriously tho**
> **07.49:55 Gardiner: are we ok with keeping this as is .. i.e. the info lvls and risk showing**
> **07.50:27 Ramchandani: well …**
> **07.50:30 Gardiner: that is the qu**
> **07.50:32 Ramchandani: you know him best obv**
> **07.50:34 Ramchandani: Matt**
> **07.50:39 Ramchandani: if you think we need to adjust it**
> **07.50:43 Ramchandani: then he shouldnt been in chat**
> **07.50:54 Usher: yeah that is key**
> **07.51:00 Usher: simple question Matt**
> **07.51:08 Usher: I trust you implicitly Matt**
> **07.51:13 Usher: and your judgement**
> **07.51:16 Usher: you know him**
> **07.51:21 Usher: will he tell rest of desk stuff**
> **07.51:26 Usher: or god forbid his nyk** [*New York desk*]
> **07.51:28 Usher: or Drysie** [*another trader*]
> **07.51:46 Ramchandani: yes**
> **07.51:51 Ramchandani: thats really imp qns**
> **07.52:02 Ramchandani: dont want other numpty's in mkt to know**
> **07.52:17 Ramchandani: but not only that**
> **07.52:21 Ramchandani: is he gonna protect us**
> **07.52:33 Ramchandani: like we protect each other against our own branches**
> **07.52:46 Ramchandani: i.e. if you guys are rhs.. and my nyk is lhs.. Ill say my nyk lhs in few**
> **07.53:52 Gardiner: what concerns me is that I know he'll never tell us when at risk.. he's very much a "sold ton, lost lump" kinda guy.**
> **…**
>
> **07.54:30 Gardiner: i trust him with info**
> **07.54:33 Usher: but u think he will learn when he sees us**
> **07.54:43 Gardiner: totally**
> **07.54:58 Usher: well look here what i suggest**
> **07.55:06 Usher: why dont we leave as it is for now**
> **07.55:13 Usher: and if he stays doing euro we bring him in**
> **07.55:21 Usher: cos i like him**
> **07.55:36 Usher: otherwise he wont add huge value to this cartell doing gbp**
> **07.56:34 Gardiner: or stick him in for chrimbo / jan .. if it all works & he stays doin eur, then cool ... if anything we don't like then we run doen this chat & just start a fresh with us 3**

07.57:21 Usher: ok im happuy with that
07.57:57 Gardiner: you have the admin reigns
07.58:01 Gardiner: rug?
07.58:06 Ramchandani: im cool with it

16 In his statement, the Claimant said that in a market where trust is extremely important between counterparties, these chats were an attempt to ensure that a proposed new participant (Mr Ashton) would be trustworthy and not misuse information shared in the chats. The reference to telling the others about the Citi New York desk trading activity (after the chat referring to protecting each other against their own branches) was to facilitate possible matching and a discussion about having access to complete information for risk management purposes. In cross-examination, the Claimant initially denied that the chat demonstrated concern that Mr Ashton may share the information with his New York desk, simply that they were concerned that he should not share it too widely. At other times in his cross-examination, however, the Claimant accepted that he, Mr Gardiner and Mr Usher were trying to prevent information being unnecessarily shared with their own New York teams who may misuse the same and that this reflected their high standards in order to maintain the integrity and ethical standards of the market.

17 The Claimant rejected the FCA's concerns about this specific chat and its use of the word "cartel", as set out in the Final Report, on the basis that it arose from a settlement agreement in a process where he had had no opportunity to make representations. The informal nature of the chats could give a misleading impression and neither the Respondent or the FCA could truly know what the words meant; only he could provide the explanation. For the same reason, the Claimant also completely disagreed with the criticism of this chat expressed by the US OCC. In response to a question from the Tribunal about his reaction to Mr Usher's reference to a cartel, the Claimant said that he had not given in much thought at the time and thought that it was a joke referring to a punk rock band of that name.

18 In his statement, Mr Phipps said that the Claimant's reluctance to allow Mr Ashton to join the chatroom if it required them to change the level of information shared was a clear indication that the participants knew that they were sharing inappropriate levels of information. The Claimant's comment "**if you guys are rhs.. and my nyk is lhs.. Ill say my nyk lhs in few**" was an admission that he would share information with the others about the trading intention of the Citi New York desk to help them with their own trading strategy. This, said Mr Phipps, placed the interests of the chatroom participants above those of the Respondent. Even if made facetiously, the reference to the chat being a "cartel" was a concern. In cross-examination, Mr Phipps accepted that there was nothing wrong *per se* in discussing who to admit to a chatroom but the red flags were the discussion about whether it may affect the level of information shared, the concern that information from the chatroom may then be passed to internal colleagues and the reference to protecting each other against their own branches. The combined effect was to suggest that the Claimant, Mr Gardiner and Mr Usher knew that they were inappropriately sharing too much information. The Claimant's explanation that their concern was misuse of information legitimately shared to explore matching opportunities did not, as he put it, "stack up". Whether considered in isolation or in the context of the other chats, this chat gave a strong appearance of impropriety by suggesting that they were acting to protect each other and add value to their cartel by sharing information. This, he said, was a view also taken by the FCA and US OCC.

22 February 2012 – Claimant, Gardiner, Usher and Ashton

19 Between 10:57:09 and 11:02:23 the following chats took place:

10.57:09 Gardiner: showin offer lump
10.57:44 Gardiner: lose 250
10.58:39 Ramchandani: gd luk
10.58:49 Gardiner: at 33
10.58:56 Claimant: how many u buy?
10.59:04 Gardiner: 70 pre
10.59:11 Gardiner: 3 after
10.59:27 Ramchandani: get 20 on Citi bench
10.59:28 Usher: oh bro gd lk
10.59:20 Ramchandani: in 30 secs
10.59:30 Ramchandani: you want
10.59:37 Gardiner: sure
10.59:40 Ramchandani: cool
11.00:02 Gardiner: ta
11.00:09 Ramchandani: hit the 34 offer
11.00:13 Ramchandani: to get em 1 pip lower for you
11.04:14 Ramchandani: :-)
11.01:39 Usher: I'll bid anything that comes in till you say donmt
11.02:07 Ramchandani: should I put that 20 through elmo matt?
11.02:11 Usher: 18 yours matt
11.02:23 Gardiner: sure

20 In his witness statement, the Claimant said that there was no customer trade referred to in this chat rather he was taking a position for his own speculative trading. He, Mr Gardiner and Mr Usher were trading with each other and he was asking for a mid-market rate to sell Euros ("**get 20 on Citi bench**"). He denied influencing the market to help Mr Gardiner achieve a better purchase price and had no influence on the market at all given that he had done virtually no trading in the three minutes prior to the 11.00am fix. All of this, he said, would be supported by the trading data if it had been disclosed. He accepted, however, that he was taking credit for Mr Gardiner getting a good deal. In cross-examination, the Claimant said that this was an example of matching with Mr Gardiner by agreement to trade at the market rate, whatever it would be. The Respondent's standard method for calculating a Euro/Dollar offer price was unit price, minus one, so that if they were bought on the bench at 34, Mr Gardiner would get them for 33 (one pip less). The chat "**hit the 34 offer to get em one pip lower for you**" was simply saying that Mr Gardiner had got a good deal which he may not otherwise have achieved if they had not agreed in advance. He and Mr Gardiner then legitimately agreed to use Elmo, a broker, to book the trade once executed.

21 In his witness statement, Mr Phipps agreed that the initial chats were the legitimate exploration of a trading opportunity between counterparties. However, in saying "**hit the 34 offer to get em one pip lower for you**", the Claimant had gone further than permissible and helped Mr Gardiner to the detriment of the Respondent's interest by trading to move the price in the manner beneficial to Mr Gardiner. Mr Phipps did not accept the Claimant's explanation that this was simply a reference to the way in which the Respondent trades (buy at 34 and get them at 33) and that this could not have been the Claimant trading on his own behalf as clients use the bench price as reference whereas traders use the fix to the fill such orders. The Claimant's language and the smiley face emoji suggests that he has done something in the market to get the price one pip lower for

Mr Gardiner.

Chats provided to the Claimant on 15 April 2014

22 These are drawn from a chatroom in which the Claimant and Mr Thiagarajah, a trader at another financial institution, were the only participants. The Respondent alleges that in these chats, the Claimant inappropriately shared client confidential information by using code names to identify the Respondent's client and/or was put on notice that one of his direct reports (referred to in the chats as Perry/Pez) had been actively using code names to refer to Respondent clients.

19 May 2010

12:09:20 Thiagarajah: [*term A]* - eur
12:09:31 Ramchandani: ??
12:09:34 Thiagarajah: haha
12:09:35 Thiagarajah: ask perry
12:09:37 Ramchandani: i just heard rumour 1:15 press conf
12:09:38 Thiagarajah: sorry
12:09:39 Thiagarajah: he will tell u
12:09:47 Thiagarajah: cant say here
12:09:51 Ramchandani: ah ok

21 May 2010

07:10:23 Thiagarajah: u 10 in 100 today?
07:10:28 Ramchandani: yup
07:19:29 Thiagarajah: [*term a]* + eur
07:19:41 Thiagarajah: u know what that means now right?!
07:19:51 Ramchandani: hahaha
07:20:48 Thiagarajah: if u dont ask pez again

26 May 2010

15:29:28 Ramchandani: [term A] + sniffing to buy eur
15:29:46 Thiagarajah: ah getting with the lingo
15:29:47 Thiagarajah: sliick
15:29:48 Thiagarajah: haha
15:29:50 Thiagarajah: thanks dude

5 July 2010

09:32:28 Ramchandani: just bought 100 eur at 1.2530
09:32:31 Ramchandani: [*term B]*

7 July 2010

13:51:33 Ramchandani: u see [*term A]* -- eur?
13:51:57 Thiagarajah: sorry yes ... i forgot to tell u
13:51:57 Thiagarajah: hahaha
13:52:02 Thiagarajah about 5 mins ago
13:52:05 Thiagarajah: pez tell u?
13:52:09 Thiagarajah: put it in that chat room
13:52:18 Ramchandani: ah ok

13:52:25 Thiagarajah: its bid

1 September 2010

09:24:54 Ramchandani: [*term C*] sold 50 eur at 65
09·25:25 Thiagarajah: [*term C*] being our fathers?
09:25:41 Thiagarajah: our people ... our kind ... our you know
09:26:51 Ramchandani: yes
09:27:56 Thiagarajah: ah ok ta. .hope ur still long
09:28:05 Thiagarajah: Im sure they were taking profit
09:28:07 Thiagarajah: good on them
09:28:16 Thiagarajah: pakistan dealt today? id be careful
09:32:14 Ramchandani: hahahahah

14 March 2011

12:09:09 Ramchandani: lost 100 usdjpy to [*term A*] .. v difficult to buy
12.09.35 Thiagarajah: ah that was u
12:09:38 Thiagarajah: 85 bid
12:09:40 Thiagarajah: ok ta

23 The Claimant's case was that terms A, B and C were abbreviations of the generic term categories of client and not specific clients. Term A meant top tier Reserve Manager; Term B meant second tier Reserve Manager and term C referred to a group of institutions within an entire sub-continent. There was nothing within the chats or their context to indicate reference to a specific client. The Claimant relied upon paragraph 50 of the Tribunal's Judgment in the claim brought by Ms Hosler (sub-nom McWilliams) in support of his case that the terms were broader than a specific client.

24 As the terms used referred to a general segment of clients rather than an actual client, the Claimant's evidence was that he was providing permissible market colour with appropriate caution. His chats said nothing about whether, or in what number, clients within the category of Reserve Manager were trading with the Respondent. The activities of central banks and reserve managers were discussed more than other market participants due to the risk of predatory trading behaviour. The Respondent's case that he used code words was a clear acknowledgment that the Claimant knew that his chats were monitored and yet, says the Claimant, there is no evidence that he attempted to conceal any of the conduct in the other allegations 2 to 5.

25 Mr Phipps' evidence was that each of term A, B and C referred to a specific client and this was known and understood by the Claimant and Mr Thiagarajan. In the 19 May 2010 chat, the Claimant had not understood what was meant by the term and was told to ask Mr Stimpson, his subordinate. Mr Phipps placed particular emphasis on the chat "**cant say here**" as evidence that both were aware that they should not have been sharing the information in question, even if he accepted in cross-examination that he could not know what Mr Thiagarajan meant or even if the Claimant had misunderstood. Mr Phipps accepted that it was permissible to use general terms for certain categories of client and that, taken in isolation, the Claimant's chats on 19 May 2010 did not disclose wrongdoing. However, he maintained, taken together the chats showed the Claimant's participation in the use of code to refer to the trading activities of a particular client. For example, on 5 July 2010 the Claimant disclosed confidential information about an executed trade for a specific client. Mr Phipps' position was that if term B simply meant second tier reserve

manager, why was there any need to use a term at all? In cross-examination, Mr Phipps did not accept that it was relevant that the trade had been executed as the client may not have finished all of its intended trading; indeed, it was never open to a trader to share the details of a trade executed by a specific client even a year later.

26 Mr Phipps did not accept, when put to him in cross-examination, that the Claimant had done anything wrong when he had requested information, not shared it, in his chat on 7 July 2010. Mr Phipps' evidence was that even that would be inappropriate as it was inviting Mr Thiagarajah to breach his own client's confidentiality. Reading all of the term A chats together, they strongly suggested use of a code to share confidential information about the trading activity of a client who they believed to be predatory. For example, in his reply on 7 July 2010 referring to a specific trade done five minutes earlier, it was clear that the Claimant and Mr Thiagarajah knew that they were discussing a particular client and not discussing sales of Euros by a generic group of Reserve Managers. He also relied on the chat on 1 September 2010, where he described Mr Thiagarajah as asking questions to work out what was meant by term C as consistent with a code as otherwise he would simply have asked what group was being discussed and the chat "**[*term C*] sold 50 eur at 65**" must refer to one specific client and not a broader group.