Case Number: 3202032/2015

EMPLOYMENT TRIBUNALS

Claimant:	**Mr B Ozkaptan**
Respondent:	**Citibank NA**
Heard at:	**East London Hearing Centre**
On:	**22, 23, 24, 29 & 30 November 2016 & 1 December 2016**
Before:	**Employment Judge Russell (sitting alone)**
Representation	
Claimant:	**Mr M Lee (Counsel)**
Respondent:	**Mr T Linden QC (Counsel)** **Miss D Sen Gupta (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:-

1. **The reason for dismissal was conduct.**

2. **The dismissal was not fair in accordance with section 98(4) of the Employment Rights Act 1996.**

3. **The Respondent breached the Claimant's contract of employment in failing to pay him notice.**

4. **The Claimant contributed to his dismissal. The amount of any reduction to the basic and/or compensatory awards will be determined at a remedy hearing.**

5. **There shall be a restricted reporting order in place in respect of clients of the Respondent, their names and any other identifying information to include code names as set out in the schedule which may be obtained from the Tribunal. The Order shall remain in force indefinitely.**

REASONS

1 By a Claim Form presented on 28 September 2015, the Claimant brought a claim of unfair dismissal and wrongful dismissal. The Respondent resisted all claims. By agreement, the issues to be determined relevant to liability are:

1.1 Did the Respondent dismiss the Claimant unfairly, contrary to sections 94 and 98(4) of the ERA? In particular:

a. Was the Respondent's finding that the Claimant was guilty of gross misconduct reasonable?

b. Was the investigation undertaken and the procedure followed by the Respondent reasonable?

c. Was the sanction of dismissal reasonable in all the circumstances?

1.2 Was the Claimant guilty of gross misconduct, thus entitling the Respondent to dismiss him without notice?

2 At the outset of the hearing the Respondent made an application for a restricted reporting order under Rule 50 to prevent identification of clients, whether by name or by use of code names used in this case. The Claimant did not oppose the application and it was agreed that the issues to be determined in the case and the evidence which would be heard did not require identification of clients in the public interest. I accepted that client confidentiality lies at the heart of the case and is a matter of great importance in the banking world. Accordingly I agreed to make the Order which will remain in place indefinitely. In order to prevent identification of those clients or the code names by publication of this Judgment, I have used initials where appropriate.

3 The Respondent made an application to exclude certain paragraphs of the witness statements for the Claimant, Mr Madaras and Ms McWilliams on grounds that they raised new allegations of wrongdoing not previously pleaded and which were not relevant to the issues to be decided. The application was resolved by consent between the parties and the witness statements redacted accordingly.

4 The Tribunal heard evidence from the Claimant and was provided with, on his behalf, witness statements from Mr David Madaras and Ms Carly McWilliams. Mr Linden had no questions for either, although both were prepared to attend for cross-examination if required. For the Respondent I heard evidence from Mr Conor Davis (Managing Director and EMEA Head of Investor Sales); Ms Deborah Garlick (Employee Relations Operations Specialist); Mr Jose Cogolludo (Managing Director and Global Product Head of Sales for Commodities) and Mr David Martin (Employee Relations). I was provided with an agreed bundle of documents and I read those pages to which I was taken in the course of evidence and submissions.

Findings of fact

5 The Respondent is a large financial institution, with headquarters in New York and a branch in London. It operates a foreign exchange and local markets business. A summary of the operations of the foreign exchange market, the types of transactions undertaken and its operation may be found in the summary provided by the FCA at Annex B of their final notice which I have adopted as accurate.

6 The Claimant commenced employment on 2 August 1999, initially working for Citigroup Istanbul. On 11 May 2009 he commenced employment with the Respondent in London as a Proprietary Flow Trader (later becoming a Director) on the Emerging Markets trading desk. He reported to Mr James Bindler and later to Mr Giles Page, both of whom reported to Mr Anil Prasad, the Managing Director and Global Head of FX and Local Markets. The Emerging Markets desk was located next to the G10 desk and both fell within Mr Prasad's area of responsibility.

7 As part of his job, the Claimant was required to have extensive knowledge of economic activity, news and political developments and the state of market conditions and flows. He was encouraged to obtain market colour and to exchange information about recent market trading activity and developments with third parties, including traders at other banks. One means of communication used was Bloomberg chat rooms. As well as news, data and analysis, the chat room facility permitted real time direct messaging between members of the room. The Claimant's appraisal targets included sharing information and Mr Bindler regularly asked the Claimant to improve his information gathering and sharing, including posting on chats. However encouragement to use chats is not the same as encouragement to share confidential information in those chats.

8 There were no specific rules about what could be said in the chat rooms but existing policies about confidentiality applied to chat rooms as they did to any medium of communication. Explicit training and guidance about use of chat rooms was not given until 2012.

9 The Claimant's signed contract of employment contained an express provision on confidential information which read:

> "**You shall not, either during your employment (save in the proper performance of your duties) or after the termination of your employment, make use of or communicate to any person or organisation, and shall use your reasonable endeavours to prevent the unauthorised use, publication or disclosure of any trade secrets or other confidential information of or relating to the Company or Associated Company which you may have acquired whilst in the employment of the Company or any Associated Company.**
> **For the purposes of this Contract, confidential information shall include, but shall not be limited to:-**
> **(i) the identity of potential clients and/or customers, including confidential information relating to any such potential clients or customers;**
> **(ii) the identity of customers, agents, vendors, distributors, suppliers, investors, issuers, clients, distributors or employees dealing with or through the Company and/or any Associated Company, including any confidential information relating to any of them;**
> **(iii) …**

(iv) terms of trading, costings, prices, pricing structures of or relating to the Company and/or any Associated Company;
(v) confidential information relating to commercial relationships and/or negotiations of the Company and/or any Associated Company;
(vi) confidential financial information relating to the Company and/or any Associated Company;
(vii) information relating to confidential transactions of the Company and/or any Associated Company."

10 The Claimant was provided with an Employee Handbook which was regularly revised and reissued. The Handbook is a lengthy document covering a wide range of topics in detail. The Handbook in place at the time of the relevant chats, which the Claimant confirmed he had read, included the following:

> "**As a general rule, you should presume that any information you receive during your employment is confidential and should not be used for your own purposes or disclosed to any person at any time (either during or after your employment) except as required while carrying out your job. You must safeguard all confidential information regardless of source. Examples of confidential information include, but are not limited to:**
>
> o **The identity of potential clients and/or customers, including confidential information relating to any such potential clients or customers;"**

11 The Claimant was also subject to the Respondent's Code of Conduct which is issued annually. Employees must attest that they have read and completed online training in respect of the same. The 2011 Code of Conduct included provisions regarding privacy and security of client information, a duty of integrity to put the interests of the client above personal interest or the interests of Citi, a duty to be aware of detailed policies specific to the employee's business, not to use the Respondent's equipment for any inappropriate or unauthorised purpose, and not to disclose client confidential information to any unauthorised person. Examples of such information were given and included:

> **"any system, information or process that gives Citi an opportunity to obtain an advantage over our competitors; non-public information about Citi's operations, results, strategies and projections; non-public information about Citi's business plans, business processes, as well as nonpublic information about Citi's workforce, supplier, client and distributor relationships; personal and confidential information relating to individuals, including clients, Citi's workforce and suppliers; nonpublic information about Citi's technology, systems and proprietary products; and information subject to regulatory or contractual restrictions.**"

12 In addition to these specific policies and procedures, the Respondent also had in place at the relevant time:

12.1 A Confidential Material Non-public Information policy. This defined confidential information generally as non-public information belonging to the Respondent or its clients. Client information was defined to include information relating to a client's business activities or strategies; it should be treated as confidential unless publicly available. Employees were warned to take particular care with information about clients' pending or executed orders, indications of interest, trades under consideration, existing securities positions or trading strategy. Sales and trading

personnel were obliged never directly or indirectly to communicate to third parties information which would enable those parties to determine a client's trading position or activity.

12.2 A Confidentiality of Information policy. It defined confidential information as non-public information deemed material to the Respondent or one of its clients.

12.3 FX trading guidelines dated April 2008, updated in August 2010, which outlined acceptable practices when transacting in FX markets. Employees are advised that the client's interest comes first and are warned that failure to ensure that their actions do not affect the interests of the Respondent's clients, or result in regulatory reputational or franchise risk, may result in disciplinary action up to and including dismissal. Under the heading "Communication and Disclosure", the guidelines state that on no account should an employee inadvertently disclose, directly or indirectly, the identity, position or trading strategy of a client.

12.4 Electronic Communications Policy 2009. This was stated to cover US Institutional Clients Group (ICG) employees. It provided that all electronic communications must be created with care and transmitted in accordance with regulatory and Citi requirements. An appendix set out prohibited uses of electronic communications and included disseminating proprietary documentation, confidential information or copyrighted material to external sources.

13 Employees of the Respondent, including the Claimant, received annual training in compliance matters, only a small part of which dealt with confidentiality. I accept his evidence that the training about confidentiality focused upon the use which may be made of any information disclosed.

14 The Claimant accepted that he had read the confidentiality term in his contract, had been given a copy of the Handbook when he joined and had attested to reading the Code when issued. The Claimant believed that he had received the FX Guidelines and something very similar to the Electronic Communications Policy. The Claimant's evidence was that he understood the rules about client confidentiality in general terms but considered that they were not specifically designed for the FX business and failed to consider confidential information in trading terms. The Claimant accepted that disclosing the side for the client or request (in other words whether they wished to be a buyer or a seller) would be confidential information. The Claimant also accepted that information which might hurt a client or help a third party was also confidential but maintained that this required disclosure of a client name and their position or strategy. The Claimant sought to suggest that in FX the concept of "dealing with" applied only where there was an actual trade. He also maintained that a client request for a price would not amount to "information" in the context of FX trading as long as the side was not disclosed, for example where the client was asking for a spread (namely the width of the bid between the sale price and purchase price).

15 To some extent, the Claimant's evidence to the Tribunal differed from that given to Mr Davis in the disciplinary hearing when he identified four elements to a FX transaction: the client; the transaction; the currency pair and the price. He maintained to Mr Davis that as long as any one element was absent, information was not confidential. In his evidence to the Tribunal, his case was that he understood that he

should not share any information which might hurt a client financially or be beneficial to a third party. As he explained, this meant that he should not provide information which, when taken together, identified a client and that client's strategy in a currency pair, whether or not a trade was ultimately executed. The Claimant was not confused by the policies, rather he understood from the policies and training that the defining feature for confidentiality was whether or not the information disclosed had a material value. This was broadly consistent with the trader specific obligations in the Confidential and Material Non-Public Information policy and the market commentary guidance in the G10 FX North America desk guide (albeit that the Claimant did not recollect receiving the latter) which also focused on whether information would reveal a client's strategy or position. The Claimant's evidence did not appear evasive and I was not satisfied on balance that any difference in the specific articulation of his understanding in the course of detailed cross-examination was inconsistent with his broad understanding as disclosed to Mr Davis or Mr Cogolludo during the internal hearings. This was not a case in which the Claimant "reverse-engineered" his understanding of confidentiality to justify his conduct in the chats.

16 Mr Davis' evidence was that the general rules regarding confidentiality were a matter of common sense but that specific policies were required to account for the fact that different businesses had different ways of transacting. He frankly accepted that whilst the confidentiality clause in the contract read literally prohibited any identification of a client to a third party, in practice this was unrealistic and that a degree of common sense was involved. As long as information was at a very high level and very generic level there would be no breach. He accepted that some of the policies focused upon the activity of the client rather than their identity, however, he consistently maintained that a client would not want their name revealed and that it was obvious to employees as a matter of common sense. Mr Cogolludo took a more restrictive view about confidentiality. Identification of a client's strategies would be a breach of the confidentiality obligations. Disclosing a client's identity would also be a breach unless both participants in the chat already knew who the client was and the context was social. This distinction between social and work context is not explicitly set out in the Code, Handbook or other policies.

17 Concerns about the content of Bloomberg chats began to emerge in or around 2012 in the context of what became known as the Libor scandal. Traders at a number of financial institutions were found to have unfairly manipulated market lending rates using Bloomberg chat rooms to facilitate their misconduct. As a result of the Libor scandal, regulators in a number of countries began to look into FX markets and reports of rate manipulation. In June 2013 the Financial Conduct Authority confirmed that it was to investigate.

18 In or around late summer 2013, the Respondent commenced its own internal review to identify and address any inappropriate conduct. The review was wide-ranging in nature and took place over an extensive period of time. It was conducted with the assistance of the Respondent's internal and external lawyers and is therefore protected by legal professional privilege. During 2014 a number of traders on the G10 Spot FX desk were subject to disciplinary proceedings and subsequently dismissed as a result of inappropriate chats discovered during the internal review.

19 On 11 November 2014, the Financial Conduct Authority published its final notice

imposing a financial penalty of £225,575,000 on the Respondent in respect of its G10 Spot FX trading business. The Final Notice did not expressly consider the conduct of the Emerging Markets FX trading business in which the Claimant worked. The FCA found that use of chat rooms was common practice and, whilst not of itself inappropriate, it increased the risk of collusive activity and sharing confidential information such that it was especially important that there were appropriate controls and monitoring. Whilst the Respondent had policies in place, these were high-level in nature, applied generally across business divisions and did not give specific guidance on chat rooms or differentiating confidential information from generic market information. In summary, the Final Notice concluded that:

> **2.5 During the Relevant Period (1 January 2008 to 15 October 2013), Citi did not exercise adequate and effective control over its G10 spot FX trading business. Citi relied primarily upon its front office FX business to identify, assess and manage risks arising in that business. The front office failed adequately to discharge these responsibilities with regard to obvious risks associated with confidentiality, conflicts of interest and trading conduct. The right values and culture were not sufficiently embedded in Citi's G10 spot FX trading business, which resulted in it acting in Citi's own interests as described in this Notice without proper regard for the interests of its clients, other market participants or the wider UK financial system. The lack of proper control by Citi over the activities of its G10 spot FX traders in London undermined market integrity and meant that misconduct went undetected for a number of years. Citi's control and risk functions failed to challenge effectively the management of these risks in the G10 spot FX trading business**.
>
> **2.6 Citi's failings in this regard allowed the following behaviours to occur in its G10 spot FX trading business:**
>
> > **(1) Attempts to manipulate the WMR** [*WM Reuters*] **and the ECB fix rates [***exchange rates for various spot FX currency pairs determined at a specific time***] in collusion with traders at other firms, for Citi's own benefit and to the potential detriment of certain of its clients and/or other market participants;**
> >
> > **(2) Attempts to trigger clients' stop loss orders for Citi's own benefit and to the potential detriment of those clients and/or other market participants; and**
> >
> > (3) **Inappropriate sharing of confidential information with traders at other firms, including specific client identities and, as part of (1) and (2) above, information about clients' orders**.
>
> **2.7 These failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in behaviours described above. They also occurred despite the fact that risks around confidentiality were highlighted when in August 2011 Citi became aware that a trader in its FX business outside London had inappropriately shared confidential client information in a chat room with a trader at another firm.**

20 On 11 November 2014, the Commodities Future Trading Commission in the United States fined the Respondent $310m for, amongst other things, lacking adequate internal controls to prevent its FX traders from engaging in improper communications with FX traders at other banks and having inadequate policies and oversight of FX traders' use of chat rooms or other electronic messaging. The same day, the US Controller of Currency issued a Cease and Desist Order in respect of certain of the Respondent's Spot FX traders' disclosure of confidential bank information in chat

rooms, including customer order flows and FX rate spreads. It noted that the Respondent had already began to take necessary and appropriate steps to remedy the deficiencies and unsafe practices. On 20 May 2015, the Respondent entered into a plea agreement with the US Department of Justice in respect of one charge of violation of anti-trust laws. The same day, the Respondent paid a $342m fine to the Federal Reserve in respect of deficient policies and procedures which had prevented it from detecting and addressing unsafe and unsound conduct by FX traders, including communications in chat room which disclosed confidential customer information.

21 In late December 2014 the Claimant's line manager, Mr Page, asked him to attend a conference call that afternoon. The Claimant knew that other members of the desk had been asked to attend a review and was aware that two traders on the desk had been suspended (although he was not aware of the reasons). The Claimant expected to be asked about compliance and chats. The other participants to the conference call were representatives from the Respondent's HR and external legal team. The conference call lasted for over three hours and the Claimant was asked to comment on 15 chats. A second conference call took place on 7 January 2015. Again it was lengthy but this time the Claimant was asked about the contents of eight chats. The Claimant was not permitted to retain a copy of the chats at the conclusion of either conference call.

22 On 7 January 2015, the Claimant was suspended. In a letter dated 8 January 2015, he was informed that the reason for suspension was allegations that he had inappropriately shared client confidential information and misused the Bloomberg chat facility. As part of the terms of his suspension, the Claimant was not permitted to contact any employees without prior written agreement and his access to work systems was suspended. The Claimant's name was deleted from Bloomberg in line with the Respondent's standard practice upon suspension.

23 On 16 January 2015, the Respondent invited the Claimant to attend a formal disciplinary hearing chaired by Mr Conor Davis (Managing Director and Regional Product Head of Sales), supported by Ms Deborah Garlick in her capacity as Employee Relations Specialist. The allegations were set out in an appendix to the letter; in summary that in eight chats between November 2011 and November 2012, the Claimant had inappropriately shared client confidential information with traders at other banks, including using code names to identify clients. The Claimant was provided with copies of the chats (and translations from the original Turkish into English), the various confidentiality policies relied upon and the disciplinary procedure extracted from the Handbook; he was told that he could submit further information to Mr Davis. The Claimant was advised that the disciplinary allegations potentially constituted gross misconduct which may result in dismissal. The Claimant was advised of his right to be accompanied by a colleague or trade union representative.

24 The Claimant asked for a postponement of the hearing for medical reasons, namely he had heavy pain and swelling in his knee following a recent operation. He had been advised by his doctor to rest and, as such, he was not able to seek legal advice. Ms Garlick refused to postpone the hearing, stating that the Claimant could seek legal advice by telephone and Mr Davis had no availability for a rescheduled hearing. Ms Garlick had not, however, spoken to Mr Davis about this decision or checked whether in fact the hearing could be rearranged to accommodate the

Claimant's request.

25 Ms Garlick prepared a draft script for the disciplinary hearing and sent a copy to Mr Davis. It contained a detailed list of 20 proposed questions, some dealing with background and some specific to the content of the chats. The script concluded with questions about the Claimant's understanding of client confidentiality and use of chats.

26 Mr Davis was not provided with any notes or detail of what had been discussed in the two conference calls. This was the first disciplinary hearing which Mr Davis had chaired and he understood that he should consider the chats, the information provided by the Claimant in the disciplinary hearing, undertake any further investigation he felt was required to reach a decision, decide whether the allegations were proven and, if so, what sanction was appropriate. Mr Davis' evidence, which I accept, was that he took his responsibility seriously and was aware that the decision which he might reach rested with him alone. Mr Davis was provided with copies of the chats and relevant policies, which he read in advance. He had previously read the FCA Final Notice and was aware of its contents regarding the G10FX trading desk. He had a good general understanding of the way in which trades are carried out and markets made by traders from his previous job with Deutsche Bank as a senior trader on the high-yield and distressed debt trading desks. Mr Davis assumed that the Claimant would have undertaken training on confidentiality and would have a general understanding of his confidentiality obligations (which Mr Davis considered largely amounted to a matter of common sense) even if the Claimant did not know the wording of the specific provisions of each of the policies. His immediate impression was that the Claimant had used code names deliberately to refer to specific clients where the Claimant and other participants in the chats (traders at another bank) understood to whom he referred.

27 The eight chats to be discussed were:

1. 11 November 2011

Two participants to the chat from other banks discuss a request received for a price and speculated whether the enquirer may be a seller. One of the participants says "**[B]?**" and receives the reply "**no...the previous [TC]**". The Claimant states that he is lost (does not understand what they are talking about). To which he receives a reply: "**ha, ha, do you get it now dude, check your phone"** and the Claimant replies: "**ha ha hah**".

2. 15 November 2011

The Claimant told the other participants that "**[c… guy] asked for 100 eur … probably the seller passed**". When asked what had been passed, the Claimant said "**100 pips** … **when spot was 95/35**". A pip is a unit of change in an exchange rate of a currency pair equalling 0.0001). There was then some discussion about whether the volume of the sale was 50 or 100 eur before the Claimant added "**ce3 guy did the same thing just now… I would have done it tighter perhaps … for 50… the guy left**".

3. 10 January 2012

The Claimant tells the other participants "**I bought 20 usd … this looks like the [c… guy] … the level he entered and all**". There was then some discussion about state of the USDTRY

(US dollar/Turkish lira currency pair) and speculation about the market.

4. 12 January 2012

The Claimant told the other chat participants "**guys … be careful … the [c… guy] clicked our machine … it looks like tp is coming … usdtry**".

5. 24 April 2012

After a number of chats about levels of trade generally and a comment about the Hungarian forint, the Claimant told the other participants: "**[k] asked in the morning, passed it to 50.**" Later in the chat, there is a discussion about "**hollande ipnesi**" which is translated as "**the Dutch prick**".

6. 16 May 2012

Another participant to the chats referred to the fact that he was selling, in response the Claimant asked "**is it the [c… guy]**" before going on to state that they had bought 5 usd and adding that "**[c… guy] asked for rub I passed**."

7. 18 July 2012

After referring to the fact that UBS were selling, the Claimant added "**guess it's [b]"**.

8. 16 November 2012

The Claimant refers to BNP Nomura buying. There then follows a series of chats when the Claimant is asked "**and who loves you is",** to which he replies "**[b] … spread**" and later adds again "**mine is [b]**".

28 The disciplinary hearing took place on 23 January 2015 and lasted an hour and 25 minutes. The Claimant was accompanied by Mr Graham Pilnik, the Head of EM hedge fund sales. The hearing was recorded and a verbatim transcript appears in the bundle. Ms Garlick followed the script in introducing those present and outlining the matters to be discussed. Mr Davis then broadly followed the order of the background questions set out in the script to explore the Claimant's background, current role and relationship with the other chat participants. Mr Davis and the Claimant then discussed the chats in turn, with the exception of chat 3 where Mr Davis indicated that he had no questions.

29 The Claimant's position was that the definition of confidential information in FX might differ from other products or markets, not least as the value of information was limited given the speed and volume of FX trading. Analysing the chats, the Claimant defined them into three broad groups: those where no client information is shared by him (chats 1, 5, second part of 6); those involving mere speculation (chats 3 and 7); and those where he used client nicknames (chats 2, 4, first part of 6 and 8). With the exception of chat 8, the Claimant maintained that he had not shared any information which referred to an actual trade or which disclosed a client's trading strategy. When asked by Mr Davis to whom "[**B**]" referred, the Claimant suggested that it could be one of three specific clients. Maintaining later, in connection with chats 7 and 8, that he did

not know which one of them he referred to.

30 The Claimant accepted that he had probably been sent a text message identifying to what [**TC**] referred, suggesting client E who was also a market participant.

31 The Claimant accepted that "[**c… guy**]" referred to an employee at client F but the information in those chats disclosed only a request for a spread, in other words that the client was checking the market rather than trading. The reference to the same individual 'clicking the machine' also referred to a price check about the state of the market. The Claimant maintained that he had not disclosed any information about the client's side, price or strategy. At one point, Mr Davis appeared to agree with the Claimant, stating "**You know, now you go through it I get there hasn't been a direction given. You know, the customer name is given up there, but there hasn't been a trade.**" Mr Pilnik confirmed that a client might ask for a market or other indication and the trader will assume the size of the trade in order to protect themselves on the spread offered.

32 The extract from chat 5 which was discussed in the disciplinary hearing was the section relating to "the Dutch prick". Mr Davis accepted the Claimant's explanation that the Turkish had been mistranslated and that the exchange referred to the effect upon the Euro of a comment by President Hollande. There was no discussion about the earlier part of the chat or the reference to [**k**] (the [**c… guy**]). The Claimant explained that chats 6 and 7 referred to other financial institutions in their capacity as market participants. It was common ground between the parties that such references would not amount to a breach of the duty of confidentiality.

33 The Claimant accepted that in chat 8 he did refer to an actual trade as he was trying to confirm with the other participants whether or not the same client had traded improperly with each of them (known as a multiple or splitting the order) in order to obtain a beneficial price. Although in the chat, the Claimant confirmed that his client was [**B**], in the disciplinary hearing he maintained that this could have referred to any one of three clients.

34 Towards the end of the hearing, the Claimant stated that they had not yet discussed the environment. He explained that at the date of the chats, in 2011 and 2012, the culture was different and trading was very different; adding that chats had since been banned by the Respondent. The Claimant referred to the regulatory pressures on the Respondent which I infer was a reference to the FCA investigation and Final Notice, although he did not cite it explicitly. Mr Davis did not challenge the Claimant on his statement nor was there any further discussion about the earlier culture and what may, or may not, have been regarded as permissible at the time. The Claimant did not give any specific examples to support his case that there had been a culture change, by contrast to the examples now relied upon in his evidence to this Tribunal. On balance, I find that at the disciplinary hearing the focus of the Claimant's case was to deny disclosure of confidential information; in other words, he denied wrongdoing rather than admitting breach but relying upon a defence that such conduct had been encouraged or condoned at the time.

35 Following the disciplinary hearing, Mr Davis and Ms Garlick held a case catch up discussion on 28 January 2015. In an email on 11 February 2015, Mr Davis chased information which he had requested be obtained. The same day, Ms Garlick emailed

Mr Page to arrange a briefing meeting with Mr Davis in connection with the Claimant's disciplinary hearing. I infer from the chronology that this was the additional information requested by Mr Davis. A computerised diary entry records that the meeting between Mr Davis and Mr Page took place on 12 February 2015, with Ms Garlick in attendance. Ms Garlick's evidence was that it was a very short meeting, possibly five to 10 minutes. The discussion took place by telephone and Mr Page did not have copies of the chats nor was he told what the Claimant's case had been at the disciplinary hearing.

36 On 20 February 2015, Ms Garlick emailed the Claimant to request his further representations on the reference to clicking the machine in chat 4, to the reference to [**k**] in chat 5 and surrounding discussions in chat 6 about a market participant. The email did not inform the Claimant that Mr Page had been interviewed nor provide the Claimant with details of the additional information sought by Mr Davis. The Claimant's reply was to explain that the "machine" referred to the Respondent's trading platform in respect of a request for a price, not an executed trade. As before, the Claimant maintained that he had commented only on price requests (including chat 5) and that there was no information about the price quoted or the side. These were limited comments on historic requests for prices which did not disclose material information.

37 A further case catch up discussion between Mr Davis and Ms Garlick took place on 26 February 2015 to discuss the additional representations provided by the Claimant. Another discussion occurred on 25 March 2015 when Ms Garlick wanted to clarify some points with Mr Davis. On 15 April 2015, Ms Garlick scheduled a meeting with Mr Davis to discuss a draft letter she had left with him. I infer that this was a draft letter of dismissal.

38 On 22 April 2015, Ms Garlick provided Mr Page with the summary minutes of the discussion held with Mr Davis on 12 February 2015. The delay in typing the notes arose because Ms Garlick worked only part-time and was busy dealing with a number of other issues in the business. The summary is a little over half a page of A4 paper. There are no contemporaneous handwritten notes. The summary records that Mr Page was asked about chats 2, 6 and 8. The content of the summary suggests that this was the additional information which led to the specific questions put to the Claimant on 20 February 2015.

39 Mr Page asked to spend some time with Ms Garlick putting the chats into context and they arranged to meet later on 22 April 2015. Despite the meeting being intended to consider context, Mr Page was still not provided with copies of the chats or the details of the Claimant's responses. The summary was amended following the meeting; in short, he believed that chat 8 was 'clubby' in nature, the participants likely understood what was being said and that the Respondent should look at whether it was specific to a client. As for chat 2, Mr Page wondered whether the Claimant had been guessing but had used code words to name clients and gave pricing information. He considered that: "**Conor needed to consider whether the information that Baris had given approaches the line or goes beyond it**".

40 Further information appears to have been provided by Mr Page, although it is not included in the summary. For example, at the subsequent appeal, Mr Cogolludo used a document analysing relevant evidence in connection with each chat. In respect of chat 4, the entry reads: "**Giles Page has suggested that when BO refers to the "the machine"**

he could be referring to "Velocity" (in which case BO could be revealing confidential information) or "AR Light", which customers use only to check prices (in which case BO would not have been revealing confidential information.)" Later in the note when considering chat 8, the entry reads: "**Giles Page has commented that it is completed trades that are being discussed in this chat, so the exchange of information will not have compromised the pricing.**" Mr Davis' evidence was that only Velocity was discussed in his meeting with Mr Page (although there is no reference to the same in the summary). Ms Garlick's evidence was that the additional Page comments were not made in her meetings with Mr Page and she had not seen the additional information before. As Mr Page recalls discussing Velocity and as one of the additional questions put to the Claimant on 20 February 2015 was to ask him which machine he referred to in chat 4, I consider it more likely than not that this additional information was provided by Mr Page in his meeting with Mr Davis and Ms Garlick. The summary of the conversation is not a complete record of the relevant matters discussed and Ms Garlick's evidence is not reliable due to the passage of time.

41 When asked about these additional comments in cross-examination, Mr Davis fairly accepted that they suggested that Mr Page considered that what mattered was what could be done with the information and that it was significant whether a trade had been completed. Both were consistent with the Claimant's understanding of what information was confidential. Moreover, Mr Davis accepted that Mr Page regarded disclosure of a client name and price check alone as information which 'could be' rather than definitely "was" a breach of confidentiality (even on Velocity). As Mr Davis put it, "**none of these are black and white, this is grey**".

42 The Page summary was sent to the Claimant at 17.28 on 24 April 2015. The Claimant was told that Mr Davis would be considering the information as part of his review. The Claimant responded in detail on 29 April 2015. He was concerned that Mr Page was unaware of his explanations and he provided some further representations, largely repeating his previous case that no information of value had been shared. A further case discussion took place between Mr Davis and Ms Garlick on 1 May 2015 at 1.30pm. An email from Ms Garlick to Mr Childs (compliance) sent that same day at 12.41pm states that Mr Davis had reached a decision of gross misconduct. The letter of dismissal confirming the decision was sent to the Claimant at 3:58pm that afternoon. From the chronology, I find that Mr Davis had reached his decision on or before 15 April 2015 when he and Ms Garlick discussed the draft letter of dismissal. I accept his evidence that before finalising his decision, Mr Davis decided that the Page summary should be sent to the Claimant and to provide him with an opportunity to respond. Mr Davis read the Claimant's response but concluded that it did not change his decision from that already reached two weeks' earlier. As the decision had already been made, and not changed on a review of the Claimant's response, Ms Garlick was able to tell Mr Childs of the gross misconduct finding before her final meeting with Mr Davis on 1 May 2015.

43 Taken overall, Mr Davis believed that the Claimant's answers at the disciplinary hearing suggested that he was aware that he was referring to a specific client when using code or nicknames in the chats. He did not accept that the Claimant was using "**[B]"** to refer to one of three possible clients. Given the cumulative effect of the use of that term in a number of chats, this was not an unreasonable belief for Mr Davis to form. I accept Mr Davis' evidence that he found the Claimant's answers about the use of this term to be confusing and, at times, inconsistent. He was also concerned about

the text message sent in chat 1, suggesting knowledge that client identities should not be shared on chats which the participants knew were monitored. By contrast, Mr Davis believed that the Claimant had been open about his use of the term "**[c… guy]**" and accepted in cross-examination that the Claimant had been 'up front' about his understanding of what was required by the duty of confidentiality and that he had been trying to do the right thing in chat 8 (albeit in the wrong way, in Mr Davis' view).

44 Mr Davis initially liked the Claimant and was not unduly hostile or sceptical about the Claimant's case to him, although he had some doubts about his credibility on particular points. Mr Davis did not accept that the Claimant did not understand that what he was doing was wrong. Based upon his own experience, Mr Davis was very firmly of the view that the value of information was not determinative and that the Claimant either knew or should reasonably have known that his conduct was in breach of his obligations of confidentiality. In reaching this conclusion, Mr Davis did not have regard to the contents of the FCA Final Notice, rather he considered that Mr Page had suggested that use of code names was not expected behaviour on the EM desk. Mr Davis rejected the assertion that the expectations about confidential information had not changed since 2011 and 2012, even if the regulatory environment had.

45 I found Mr Davis to be an impressive and credible witness, although at times his witness statement was more critical of the Claimant than was his oral evidence. I accept that it was his decision to dismiss and that he was not placed under undue influence by any other person. Mr Davis never doubted that there had been a breach of the obligation of confidentiality in chats 2, 4, 5, 6 and 8. The breaches were the combined effect of disclosure of client identity and details of client activity. The chats in which the Claimant identified a client in the context of speculation rather than activity were not identified as specific breaches of the policy. Mr Davis was particularly concerned by the "clubby" atmosphere of the chats suggesting that the Claimant had not been acting to the benefit of clients. In cross-examination, Mr Davis accepted that the two-way price quotes were a 'hint' about what the trader wanted to do rather than disclosure of side or strategy. Nevertheless, and whilst not black and white as he put it, Mr Davis maintained that there was a disclosure of information in the chats.

46 Mr Davis spent a long time considering the appropriate sanction. He considered the Claimant to be a good man, trying to do the right thing but who had stepped over the line. He took into account the Claimant's length of service, unblemished conduct record and the consequences of dismissal on his career. Nevertheless, he decided that summary dismissal was appropriate given the severity of the breaches.

47 The decision to dismiss the Claimant was communicated to him by letter dated 1 May 2015. Although drafted by Ms Garlick and/or the Respondent's legal advisers, I accept that it was based upon information provided by Mr Davis who then reviewed and signed it as fairly recording the reasons for his decision. In the letter, Mr Davis set out his conclusion that there was a breach of confidentiality as set out above, whilst accepting that the Claimant believed that he was acting in the best interests of the Respondent, he concluded:

> "**it seems to me that your relationship with the chat room participants who you described as "colleagues" and your desire to protect Citi has led you to blur the lines of acceptable communications with personnel outside of Citi and disregard the clear duties of**

> **confidentiality to which you were subject and of which you must have been or at least ought to have been aware. Clients would have the same expectation of confidentiality, regardless of their conduct in the market".**

48 The Claimant appealed against his dismissal by letter dated 26 May 2015. He repeated his case that none of the chats contained both client identities and information about trades of any value. In the appeal letter, the Claimant relied on the findings of the FCA Final Notice whilst repeating his understanding that he should not discuss with any external party any information which has client value. The Claimant complained that there was a failure to consider his written representations and that the sanction was excessively harsh.

49 Mr Cogolludo was appointed to hear the appeal, supported by David Martin from Employee Relations. Mr Cogolludo was a more senior manager than Mr Davis. Mr Cogolludo's role was to review rather than reinvestigate the disciplinary case, although he could ask for further investigation of any point raised in the appeal if appropriate. Prior to the appeal hearing, Mr Cogolludo met Mr Martin and the Respondent's in-house and external legal team to obtain legal advice about the appeal. That advice is privileged although it emerged in evidence that the lawyers produced notes for Mr Cogolludo's use at the appeal. These notes included the additional information provided by Mr Page as set out above. A copy of the notes was not provided to the Claimant, nor does Mr Martin recall seeing them. Neither Mr Cogolludo nor Mr Martin knew the source of the additional information attributed to Mr Page. Mr Cogolludo did not speak to Mr Davis before the appeal hearing.

50 Mr Martin provided Mr Cogolludo with an initial overview of the disciplinary decision, the grounds for appeal and copies of the relevant documents. Mr Martin prepared a framework for the appeal hearing, containing some suggested questions intended to bring focus back to proceedings if necessary. By way of example, in considering chat 2, the suggested question is whether the Claimant considers reference to a specific client to be inappropriate. Similar questions for other chats and when considering section 10.9 of the appeal letter suggest that the focus envisaged by Mr Martin was particularly concerned with disclosure of client identity per se as a breach of confidentiality.

51 The appeal hearing took place on 17 June 2015; it lasted approximately an hour and a half and was recorded. The Claimant was not accompanied. Near the beginning of the hearing, Mr Cogolludo said that, as he saw it, the whole case revolved around the Claimant's use of two code names or nicknames, although he understood that the Claimant's case was that the information shared was not confidential as it was not of client value. The Claimant complained about the provision of what he termed the poorly narrowed down transcript of the meeting with Mr Page, two and half months after it had taken place when Mr Page did not know and so could not comment on the Claimant's defence as expressed in the disciplinary hearing. The Claimant repeated his case that a price check from a client was not confidential where no side was disclosed. Mr Cogolludo suggested to the Claimant, who did not disagree, that the 'clicked our machine' referred to Velocity; there was no reference to AR Light. As for chat 8, the Claimant confirmed that he had disclosed an actual trade but that he had done so to check whether or not the client had improperly split the order, adding that this was a very common situation in FX. The Claimant drew Mr Cogolludo's attention

to some paragraphs of the FCA Final Notice, submitting that it applied to EM FX as well as it was the same business. He described the evolution of specific policies and how some things which had seemed normal then became unacceptable later, highlighting that Mr Page might have had relevant information had he been told what the Claimant's case was. In the appeal hearing, the Claimant did not give specific examples of others who had disclosed information but not been dismissed as he has sought to do in his evidence to the Tribunal.

52 By the end of the appeal hearing, Mr Cogolludo had formed the belief that the Claimant had breached confidentiality. He found the Claimant's answers about the meaning of "[**B**]" unconvincing and decided that it did refer to one particular client; furthermore, that the Claimant had not put forward any rational explanation for his use of code names. Mr Cogolludo formed a more critical view of the Claimant's credibility than had Mr Davis, believing that he appeared not to want to tell the truth and gave explanations which were confusing and evasive. Whilst I accept that this assessment of the Claimant's credibility was genuinely held by Mr Cogolludo, I find that it was borne out of his own certainty that reference to a specific client was a breach in its own right and failure to appreciate the Claimant's point that trading information (such as side, price or strategy, but not a two-way price check) was also required. Mr Cogolludo accepted in oral evidence that the identity of a client is not confidential in all circumstances, but will be in some; this more nuanced understanding was not reflected in his decision to reject the appeal.

53 Mr Cogolludo decided that the FCA Final Notice was not directly relevant to the Claimant's case as it was concerned with the G10 desk. Mr Cogolludo was satisfied that there had been a reasonable investigation by Mr Davis, although he did not address the Claimant's complaint about the adequacy of the Page evidence. Nor did Mr Cogolludo consider it necessary to ask Mr Page specifically whether price requests were treated as confidential or to investigate further his earlier comment that they "could" be if on Velocity. Instead, Mr Cogolludo relied upon his own view that a price request did amount to a disclosure of the client's interest. In his oral evidence, Mr Cogolludo said that there was no definition of trading strategy, rather it was a question of interpretation to some degree but that although not well defined, people in the sector would understand what was meant.

54 Mr Cogolludo decided to reject the appeal. His decision was confirmed in a letter dated 14 August 2015, drafted by Mr Cogolludo with the assistance of Mr Martin and the legal team.

Law

55 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer

carried as much investigation as was reasonable in all the circumstances of the case?

56 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

57 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

58 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, relevant circumstances include the gravity of the charges and their potential effects upon the employee. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case.

59 The gravity of the misconduct is not determinative in assessing the extent of investigation reasonably required. This will also depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee, **Stuart v London City Airport** [2013] EWCA 973. Where the employee makes admissions whether expressly or by implication and/or there is a core of irrefutable fact which justifies the dismissal of the employee and/or the basis on which the employee is dismissed is clear or will not be materially undermined by further investigations even if they reveal what the employee claims they will reveal, it may be reasonable not to investigate further; **Gray Dunn & Co Ltd v Edwards** [1980] IRLR 23 and **Scottish Special Housing Association v Linnen** [1979] IRLR 265.

60 The employer's duty of investigation is not strictly limited to the issue of guilt or innocence. In the great majority of cases that would be an adequate procedure but there may be cases where some aspect of the background needs to be investigated in order to put the misconduct into proper context, this may include investigation of points raised in mitigation by the employee, **Chamberlain Vinyl Products Ltd v Patel** [1996] ICR 113 per Smith J.

61 The reasonableness of the investigation should be looked at as a whole and it is

not necessary for the employer to investigate every point made by the employee in his defence, **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399.

62 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

63 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

60.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive. This includes whether an employer acting reasonably and fairly in the circumstances of the evidence during the disciplinary hearing could properly have reached a particular assessment of a witness' credibility, **Linfood Cash & Carry Ltd v Thomson** [1989] ICR 518.

60.2 disparity which may arise (i) where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352.

60.3 A finding of gross misconduct does not automatically justify a finding that dismissal was within the range of reasonable responses, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854.

60.4 Mitigating factors. These include length of service and disciplinary record, although length of service will not save an employee from dismissal in cases of serious misconduct, **London Borough of Harrow v Cunningham** [1996] IRLR 734. Another mitigating factor may be whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong. However, this is simply one potential factor and the weight to be attached will depend upon the extent to which senior management were aware of the practice, **Ashraf v Metropolitan Police Authority** UKEAT/0205/08. Mr Linden did not expressly take any point

on what was meant by "*senior management*" in this case, but rather submitted that the weight to be attached to this factor depended upon the extent to which the employee knew or ought to have known better.

64 The fairness of dismissal must be judged by what the decision-maker knew or ought reasonably to have known at the time of dismissal. The knowledge of others within the employment organisation is not imputed to him merely because he is employed by the same employer, **Orr v Milton Keynes Council** [2011] ICR 704. It may however be relevant to whether or not the employer has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

65 It will be unfair if the integrity of the decision to dismiss has been influenced by persons outside of the procedure, see **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 and **Ramphal v Department for Transport** [2015] IRLR 985 EAT. An investigating officer is entitled to call for advice from HR, but HR must be very careful to limit advice essentially to questions of law and procedure. They should avoid straying into areas of culpability or advising upon the appropriate sanction, beyond addressing issues of consistency. The employee being disciplined is entitled to assume that the decision will be taken by the appropriate officer without having been lobbied by other parties as to the findings he should make as to culpability. The employee should be given notice of any changes in the case he has to meet so that he can deal with them and also given notice of representations made by others to the dismissing officer that go beyond legal advice and advice on matters of process and procedure. The question for the Tribunal is whether the influence of an external source was improper and if so whether it had a material effect on the ultimate decision of each relevant decision-maker.

66 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

67 A dismissal may be fair notwithstanding a procedural defect, such as failure to provide information to the employee, relying upon **Fuller v Lloyds Bank plc** [1991] IRLR 336. However, as **Fuller** also recognises, it is normally desirable to make investigation information available to parties and it suggests that failure to comply with a specific obligation in a disciplinary procedure to provide information would be an insuperable barrier to fairness.

68 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

69 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a

percentage reduction to reflect the possibility of a fair dismissal in any event.

70 A basic and/or compensatory award may be reduced pursuant to s.122(2) and s.123(6) ERA respectively. In **Steen v ASP Packaging Ltd** [2014] ICR 65, the EAT advised Tribunals to address (i) the relevant conduct; (ii) whether it was blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

Breach of Contract

71 The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

72 In **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194, the Supreme Court considered a case in which a doctor was to be dismissed for gross misconduct after she had breached patient confidentiality by having patient documents clearly visible and dictating reports with patient confidential information whilst on the train. Dr Chhabra's defence was that at the time she had not appreciated that her practice compromised patient confidentiality. At paragraph 35, the Supreme Court considered that the facts as found in an internal report were not capable when taken at their highest of supporting a charge of gross misconduct as there was no evidence that they were deliberate breaches of the duty. The Supreme Court considered such non-deliberate breaches of duty to be qualitatively different from a deliberate breach of confidentiality such as speaking to the media about a patient.

Conclusions

A genuine belief in misconduct?

73 I have accepted the evidence of Mr Davis that he genuinely believed that the Claimant's conduct in the chats amounted to an act of misconduct. I have not found that Mr Davis was improperly influenced by any third party when he decided that the Claimant had breached client confidentiality. The procedural support and advice given by Employee Relations and legal advisers, whilst considerable, does not undermine the fact that the decision was taken by Mr Davis independently. Neither Mr Davis nor Mr Cogolludo adhered unduly to the scripts provided in advance of their hearings and I do not consider that such a framework amounted to improper influence or pressure when each independently reached their conclusions on culpability and sanction. This was a complex disciplinary situation, with several employees disciplined due to concerns which had arisen following the internal review and ongoing regulatory investigations. It is not improper for the Respondent's professional advisers to seek to ensure that the procedure adopted in the hearings and the areas to be considered were set out clearly, nor to assist with drafting the letter of dismissal.

74 Nor do I accept the Claimant's submission that this was a predetermined decision or a disciplinary process designed to secure his dismissal. Mr Davis and Mr Cogolludo both carefully considered the evidence provided by the Claimant and, in some cases, accepted his explanations. Whilst dismissal may have been perceived as the likely outcome of the process, not least as so many other traders had been dismissed for similar misconduct, it was not predetermined or a sham.

Was such belief reasonable, based upon reasonable investigation?

75 As this is an unfair dismissal, it is not for me to conclude whether or not the Respondent's decision was objectively right but to consider whether or not Mr Davis, and later Mr Cogolludo, formed beliefs which were reasonable and based upon a reasonable investigation at the time when they reached their decisions. The position adopted by an employee in the disciplinary process is relevant to the reasonableness of such belief and the extent of investigation required. Here, the Claimant admitted disclosure of client identities in the chats referring to the [**c… guy**] which was reasonable evidence to support the Respondent's conclusion that he had disclosed client identities in at least some of the chats. However, the Claimant's case was that disclosure of client identity *per se* was not a breach of confidentiality and that the other information in the chats could not reasonably be considered confidential either because it was speculation, or a simple price request or because the trade had already been executed.

76 In determining reasonableness, I bore in mind that the conduct for which the Claimant was dismissed by Mr Davis was two-fold: (i) the identification of clients by use of code names; and (ii) disclosure of further confidential information relating to potential trades which was not in the public domain. Mr Linden sought to persuade me that identification of clients by use of code names of itself was a breach of confidentiality. However, this was not the belief held by Mr Davis at the time of dismissal nor indeed in evidence at Tribunal. Whilst the policies read literally would include client identity alone, Mr Davis recognised that in practice this was unrealistic and breach depended on common sense and the nature of what else was disclosed. I consider that this is consistent with the letter of dismissal which also refers to both identity and further information. In other words, it must have been reasonable, following reasonable investigation, for Mr Davis to believe that the additional information shared was sufficient to create a breach when taken with the reference to a specific client.

77 The Claimant maintained then, as he does now, that a request for a two-way price was not confidential as it did not reveal a side or strategy and that there was no trade. Mr Davis did not accept this defence and concluded that it did, particularly in relation to chat 2. He reached this conclusion based upon his own professional view of what he regarded as obvious common sense. Yet, in the disciplinary hearing Mr Davis accepted the Claimant's point that no direction had been disclosed and again at this Tribunal hearing, accepted that the Claimant was giving hints rather than revealing strategy in an area which was not black and white.

78 The extent to which a two-way price request was additional information which, with the client name, would create a breach of confidentiality was an essential matter in forming a reasonable belief as to whether the conduct was established and also to any relevant sanction. That Mr Davis interviewed Mr Page shows that he was aware that

some context or understanding of the use of information in the EM FX team was relevant to the issues before him. In such circumstances, it was not reasonable to fail to provide Mr Page with copies of the chats or details of the Claimant's explanations for his conduct. On the limited information made available to Mr Page, he provided evidence which was consistent with the Claimant's understanding that confidentiality depended on what could be done with the information, that it was significant whether a trade had been completed and that a price check was only possibly a breach of confidentiality even on Velocity. Mr Davis fairly accepted in cross-examination that these were grey areas. As such, a reasonable investigation required that they be properly explored with Mr Page at the very least.

79 Although the Claimant did not face an allegation of a criminal offence, the nature of the allegation and its consequences upon the Claimant if proven were significant in terms of his career, reputation and the financial consequences of his lost bonus. I consider that any reasonable investigation required the Respondent to explore the central element of his defence with his line manager who was already being interviewed and whose evidence may exculpate the Claimant if he agreed that in the EM FX environment a two-way price request was not regarded as confidential. Also relevant would have been Mr Page's comments on the Claimant's assertion that in chat 8 he was trying to deal with a possibly predatory client and was acting in the Respondent's best interests. Mr Page was asked to comment on chat 8 in other respects, there was no objectively reasonable basis for not also investigating the norms of conduct for traders in such circumstances and whether the Claimant breached confidentiality. Mr Page may have agreed that this was commonplace or understandable and not a breach; he may have regarded it as entirely unacceptable and an act of gross misconduct; or indeed he may have regarded it as misconduct but no so culpable as to be worthy of dismissal. Each of those three positions would have been relevant to the decision which Mr Davis had to reach such that failure to investigate both parts of the Claimant's defence with Mr Page was a significant failing. Given the reliance placed by Mr Davis upon common sense, it was necessary for him to understand the context of the chats. Mr Page wished to put the chats into context but was deprived of the opportunity to do so by the failure to provide him with the full relevant information.

80 As set out above, at the disciplinary hearing the Claimant's defence was a denial of disclosure of confidential information based upon his understanding of what was confidential; his reference to the culture at the time of the chats was made without explicit reference to the FCA Final Notice, did not identify others said to have behaved in the same way nor did he suggest that managers had encouraged sharing of such information in the same way as he did in this Tribunal hearing. Whilst Mr Davis did not follow up the reference to environment or the regulatory investigation, nor did the Claimant seek to add further information. Whilst there is some force to the submissions of Mr Linden that the conduct of others was referred to almost as an afterthought and was not a central part of the Claimant's case before Mr Davis, for the reasons set out above this was a case in which context was important at least in the general sense of deciding whether the Claimant did know (or should reasonably have known) that his conduct was in breach of the duty of confidentiality.

81 Mr Davis relied extensively upon his belief that understanding of the extent of the duty was a matter of 'common sense', whilst accepting that there were grey areas

rather than being an absolute. The FCA Final Notice was evidence that there were problems on the G10 FX desk in the understanding and application of confidentiality. Mr Davis was aware of the FCA Final Notice at the time of the disciplinary hearing. In such circumstances, it was necessary for a reasonable investigation to consider what was regarded as 'common sense' and the understanding of confidentiality in the Claimant's working environment at the time of the chats. At paragraph 29 of his submissions, Mr Lee identifies a number of steps which could have been taken to investigate before reaching a conclusion that the Claimant had committed an act of misconduct. I accept Mr Lee's submission that a reasonable employer would not necessarily have taken each of those steps but that such a reasonable employer would not have failed to have taken any of them, particularly with the resources open to the Respondent. For these reasons, I conclude that Mr Davis' belief whilst genuine was not reasonable based upon reasonable investigation.

82 The Claimant also argues that in failing to investigate the precise identity of certain clients referred to in the chats (specifically "**[b]**" and "**[TC]"**), the Respondent's investigation was flawed. I do not agree. Whilst it may be that the former could have referred collectively to a group of three clients or any one of those three, as the Claimant submits, his own explanations to Mr Davis during the disciplinary about its use in chat 8 and the use of the same term in other chats were, I consider, sufficient to give Mr Davis reasonable grounds for believing that it was intended to refer to a particular client in chat 8. Nor do I accept the Claimant's suggestion that Mr Davis needed to identify whether or not the latter name was a client or a market participant in chat 1 in order to form a view on his credibility more generally. It was not in dispute that the client could act in either capacity. To require Mr Davis to investigate the capacity in which that financial institution was acting some five years ago in the course of that chat would be so onerous as to be unreasonable. Not least as the conduct in chat 1 which caused Mr Davis some doubt about credibility was the use of the text message on a mobile telephone. Whether a client or market participant, that conduct was reasonable basis for doubt about credibility generally without further detailed investigation.

83 The appeal did not correct the deficiencies in the investigation by Mr Davis such as to bring it within the range of reasonable investigations when the process was viewed overall. An added peculiarity of the appeal was that Mr Cogolludo was provided with further evidence from Mr Page which was not available to Mr Davis or the Claimant. Given that Mr Cogolludo accepted that there was no definition of trading strategy, it was a question of interpretation to some degree which was not well defined, rather than relying on his own belief that people in the sector would understand what was meant, it was essential that this grey area at the heart of the Claimant's defence be explored with his line manager.

84 At the appeal hearing, the Claimant relied explicitly on the FCA Final Notice and suggested that the contents of his chats was common market practice and encouraged by management. Mr Cogolludo did not investigate further as he considered that the Final Notice did not apply to the Claimant who worked on the EM and not G10 desk. Given the proximity of the two desks and the common senior management, this was not a reasonable ground for deciding that the contents of the FCA Final Notice were not relevant. Not least as Mr Cogolludo had recently heard another appeal which had also raised concerns about the common practice on the desk at the time of the chats.

Fair in all of the circumstances, having regard to equity and substantial merits?

85 The Claimant relies upon **Hadjioanou** on the basis that he was dismissed for conduct expressly encouraged by his managers, held to a standard of confidentiality not applicable at the time of the chats and failure by the Respondent to take action in respect of more serious misconduct of which it was aware. The difficulty with this line of argument is that it was not the basis of his defence at the disciplinary hearing, but was raised substantively for the first time at appeal and developed in the Tribunal hearing. To some extent the Claimant's reliance upon the culture argument at his appeal and again in this hearing (for example by reference to Mr Zanette) appear to be opportunistic and not something weighing at the forefront of his mind at the time of the initial disciplinary hearing. Nor do I consider that the findings of the American regulatory bodies take the matter any further. On balance, I am not satisfied that the alleged conduct of other employees such as Mr Zanette are truly parallel, not least as allegations of misconduct have not been upheld against him in the same way as they have been against the Claimant.

86 As for sanction, Mr Davis and Mr Cogolludo accepted that there was no evidence that the Claimant had engaged in further misconduct in the two years since the change in regulatory environment. Mr Davis took into account the Claimant's length of service, that he was not acting for personal gain and that he had been cooperative. In the circumstances, and accepting that a finding of gross misconduct does not necessarily justify dismissal, on the facts of this case I would have found that the sanction fell within the range of reasonable responses open to an employer.

87 I have dealt with the Page evidence above in the context of a reasonable investigation but it also gives rise to matters of procedural concern. Mr Davis recognised that Mr Page was a relevant witness who could provide necessary information about the chats and the content of the information shared therein. The Claimant was not able to ask Mr Page to provide evidence as he was prevented from contact with colleagues under the terms of his suspension. It was incumbent upon a reasonable employer to investigate for evidence which was exculpatory as well as supportive of guilt and/or relevant to sanction. Procedural fairness is not a counsel of perfection and not every breach of procedural requirements will be so serious as to render dismissal unfair. Nevertheless, it was a serious failure to investigate the central defence being advanced by the Claimant with Mr Page who was being questioned in any event and who had already supported the Claimant's explanations to a material extent. This was compounded by the lack of contemporaneous note of what Mr Page said which arose from pressure of work upon Ms Garlick. The Respondent is a large organisation with ample resource to support this disciplinary process as may be seen from the involvement of the legal team in a supporting capacity; there appears to be no good reason why this important interview with Mr Page could not be recorded (as indeed the disciplinary and appeal hearing were) or at least attended by a scribe or minute taker. Finally, there is the procedural irregularity that additional relevant evidence from Mr Page appears to have existed in the Respondent organisation, at least as much as was later provided to Mr Cogolludo, which had not been shared with either Mr Davis or the Claimant.

88 Although on its own a small point, the refusal of the Claimant's request for a

postponement was unreasonable given the age of the chats, the period over which the review was extending generally and the failure by Ms Garlick to ascertain directly with Mr Davis whether postponement was reasonably possible. These were serious allegations which could if proven have a significant financial and reputational impact upon the Claimant. It was not unreasonable that he should wish to obtain legal advice; if a short postponement was required, it was a matter for the Claimant and not Ms Garlick to decide whether this could properly be done over the telephone or in person.

89 I considered whether the appeal hearing remedied any procedural unfairness, bearing in mind the need to consider the fairness of the procedure overall. I accept that Mr Cogolludo was senior to Mr Davis and was an appropriate person to hear the appeal against disciplinary. As no further investigation was undertaken with Mr Page nor was there any investigation into the points specific to the FCA Final Notice, this fundamental failure was not corrected on appeal. When viewed overall, I conclude that the procedural failings are sufficiently serious as to render the dismissal unfair in all the circumstances of the case, having regard to the size and administrative resources of the Respondent and the equity and substantial merits of the case.

90 It may be that even if there had been no procedural unfairness and if Mr Page had been asked the additional questions, the outcome would have been the same and dismissal would have been fair. However, even without knowing the Claimant's central defence, Mr Page's statement that "**Conor needed to consider whether the information that Baris had given approaches the line or goes beyond it**" is reasonably capable of bearing the interpretation argued by the Claimant, namely that Mr Page himself considered it questionable whether the Claimant's conduct approached or actually crossed the line of what was acceptable. This is a matter to be considered in greater detail at a remedy hearing when considering any **Polkey** arguments.

91 Based upon my findings of fact, I am satisfied that the Claimant's conduct was foolish, particularly with regard to the additional information disclosed in chat 8. This conduct contributed to his dismissal. This is a matter upon which the parties will no doubt also wish to address me further in considering any reduction to the basic and/or compensatory awards for contributory fault.

Wrongful Dismissal

92 In this claim, I must decide whether or not the Claimant did act in repudiatory breach of his contract of employment and I bear in mind that the burden is upon the Respondent to adduce sufficient evidence to satisfy me that it was entitled summarily to dismiss without notice. Not all breaches of confidentiality will amount to a repudiatory breach, it is necessary to take into account the nature of the breaches and whether or not they were deliberate in the sense of being a wilful sharing of information, see **Chhabra**. I considered both the use of code names or short-hands to refer to clients and the additional information disclosed.

93 On balance I find that the Claimant knew at the time of the chats that the use of terms such as "**B**" and "**TC**" did or were likely to identify a specific client. That he was content to do so with the "**C… guy**" term renders it more likely than not that he was equally prepared to do so with these other clients, particularly where he considered one of them to be predatory and a possible risk to the Respondent in the transaction

considered in chat 8. However, I also took into account the Claimant's explanations for his conduct and the inadequacy of the Respondent's evidence in reply. I have found that the Claimant genuinely believed that he was not breaching confidentiality where specific trading information was not disclosed (i.e. with two way spreads) and where he believed it was permissible to protect the bank. His conduct was foolish and unwelcome to the Respondent, not least when it came under closer regulatory scrutiny, but I do not accept that it was wilful or deliberate in the sense now suggested.

94 The contents of the FCA Final Notice which I accept are relevant to the EM desk as well support the Claimant's case and suggest a widespread, systemic problem where information sharing of this sort was the norm amongst traders and was tolerated by at least some managers. The Claimant's evidence about what was regarded as acceptable at the time is supported by the evidence of Mr Madaras and Ms McWilliams. I took into account the fact that each were former employees aggrieved by their own dismissals and assessed their credibility with a degree of caution. However, I was satisfied that their evidence was credible and reliable. It had the ring of truth and was consistent with the findings of the FCA Final Notice.

95 On the balance of probabilities I am not satisfied that the Respondent has proved that the Claimant was guilty of an act of gross misconduct and find that he was wrongfully dismissed.

96 For the reasons set out above, the dismissal was procedurally unfair and the claim of unfair dismissal succeeds. The parties should provide dates to avoid for a one-day Remedy Hearing within 28 days of receipt of this Judgment. If Case Management Orders are required, a telephone Preliminary Hearing will also be listed.

Employment Judge Russell

21 February 2017