EMPLOYMENT TRIBUNALS

Claimant: **Mr K Y Choo**

Respondent: **Citigroup Global Markets Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **1- 4 & 7 September 2020; 14 – 15 October 2020**

Before: **Employment Judge Gardiner**

Representation

Claimant: Mr Mukhtiar Singh, Counsel

Respondent: Mr Simon Devonshire QC

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's unfair dismissal claim is not well founded and accordingly is dismissed.

REASONS

1. Until his summary dismissal on 19 March 2019, Mr King Yew Choo was employed by Citigroup Global Markets Limited as a junior trader, with the job title "Associate". He was based in the Respondent's London office, in Canary Wharf. He had worked for the Respondent since 26 August 2014, joining as a graduate trainee. The reason for his dismissal given by the Respondent was gross misconduct. The Respondent contended that his market interaction on three separate dates was said to be improper market manipulation, known as "spoofing".

2. Mr Choo's case before the Employment Tribunal is that this was an unfair dismissal. In these proceedings he does not allege his dismissal was a wrongful dismissal, in that he does not claim for his contractual notice pay. I was told he wished to reserve his right to claim his notice pay in other proceedings.

3. For convenience, in these Reasons, I refer to the parties as the Claimant and the Respondent.

4. The Final Hearing was conducted remotely on the Cloud Video Platform (CVP) to enable the Hearing to be heard on its original listing dates. It lasted a total of seven days. Mr Choo was represented by Mr Mukhtiar Singh of counsel. The Respondent was represented by Mr Simon Devonshire QC. Both Mr Singh and Mr Devonshire had submitted Opening Notes setting out their client's positions.

5. The relevant documents were contained in four lever arch files and were also accessible electronically. The Respondent called three witnesses in support of the fairness of the dismissal. These were:

   a. Mr Christopher Blore, who conducted an investigation into alleged misconduct by the Claimant;

   b. Mr Sam Hewson, who conducted the disciplinary hearing and who took the decision to dismiss the Claimant;

   c. Mr Marc Pagano, who conducted the Claimant's appeal against dismissal, and who upheld the dismissal decision.

6. A supplementary witness statement from Mr Pagano had been served very shortly before the start of the Final Hearing, namely at the end of the last working day. It commented on the explanations provided by the Claimant in his witness statement for his trading behaviour, which had not been provided previously. It also attached documents in connection with those comments. Because this evidence was responding to the contents of the Claimant's witness statement, it could not have been included in the Respondent's witness statements when statements were simultaneously exchanged.

7. Mr Pagano's supplementary witness statement was admitted in evidence on the understanding that Mr Singh would have sufficient time to take instructions on its contents by the time it was Mr Pagano's turn to give evidence.

8. By the end of the five days listed for the Final Hearing, the evidence from all witnesses had concluded, but there was insufficient time for closing submissions. Two further days had already been reserved a few weeks after the liability hearing to consider the issue of remedy, if the Claimant succeeded. Accordingly, it was agreed between the parties and the Tribunal that these two days would be used for the parties' closing submissions, for Tribunal deliberation time, and, if time permitted, for the delivery of the Judgment. If the Claimant was successful, then directions would be given at that point to enable a Remedy Hearing to take place in the future.

9. In advance of the resumed hearing, the parties exchanged written closing submissions. The Claimant's submissions were 34 pages in length. The Respondent's submissions were 51 pages.

10. In the event, much of the two further days original allocated for remedy was spent with the parties, leaving little time for deliberation. As a result, judgment was reserved. It took longer to complete closing submissions for two reasons. Firstly, when the hearing resumed on what was day 6, on 14 October 2020, Mr Singh made an application to introduce a spreadsheet of data and analysis. This had been sent to the Respondent at 2.50pm on the previous working day. Part of this spreadsheet contained data that had been in both parties' possession since January 2020 to which reference was made in the bundle index but was not included in the documents in the Final Hearing bundle. This was due to an oversight by both parties. Part of this spreadsheet contained new information, namely the Claimant's analysis of that data.

11. The Claimant's analysis had not been exchanged when documents were exchanged. Nor had it been included or appended to the Claimant's witness statement, or cross referred to in that witness evidence. As a result, it was not an analysis that had been explained by the Claimant in his evidence. It had not been tested in cross-examination and had not been referred to by the Respondent's witnesses in their evidence. Mr Singh clarified he was not asking for any witness to be recalled so that evidence could be given about the analysis. Rather he contended that the document should be included and that I should give whatever weight to the document that I considered appropriate.

12. Having heard submissions from both parties on this point, I decided to exclude this analysis in its entirety. There was no good reason why the Claimant's analysis could not have included in evidence in advance of, or at the same time as, the exchange of witness statements; and why the Claimant's explanation of the data could not have been included in his witness statement. It would not be fair to the Respondent or in the interests of justice for potentially significant evidence to be introduced into evidence at this very late stage.

13. However, I did grant the Claimant permission to rely on an electronic spreadsheet labelled Appendix B. This document appeared to replicate information already in the bundle, but in a more user-friendly format, so that trading and pricing patterns could be more easily understood.

Factual findings

(1) Overview of the Claimant's role

14. At the time of his dismissal, the Claimant was employed as a trader on the Emerging Markets Credit Trading desk, part of the Global Spread Products sector of the Respondent's business. He was the most junior trader on the desk. He reported in practice (whatever the formal line management position) to Mr Tom Clarke, Head of CEEMEA Flow Credit Trading. Mr Clarke in turn reported to Marc

Pagano, Global Head of Emerging Markets Credit Trading, who was based in New York.

15. Part of the Claimant's role was to trade in Government bonds issued by emerging economies, such as countries in Eastern Europe. The alleged misconduct for which the Respondent says he was dismissed was his pattern of trading in Slovenian Government Bonds, due to mature in 2035. During the course of this case, these Bonds have been referred to as SLOREP 35s. However, SLOREP 35s were only one of 14 Slovenian Bonds that the Claimant would trade, with different maturity dates.

16. SLOREP 35s are traded on an electronic trading platform known as the Euro MTS platform. This is provided by MTS, an external third-party provider. The consequence is that the Respondent did not have a record of the price adjustments made by its traders on this platform, although it did have information about the particular trades they had undertaken. Pricing data is held and controlled by MTS.

17. The Respondent was a primary dealer in Slovenian Bonds. This means that it had an agreement with the Slovenian Government that it would maintain a two-way quote at any given time – a 'bid' quote referring to the price at which it was prepared to buy the bond, and an 'offer' quote referring to the price at which it was prepared to sell the bond.

18. There were two ways in which the Claimant would interact with the Euro MTS platform in relation to Slovenian bonds. The first was by setting and then adjusting the bid/offer spread for each bond. This is sometimes referred to as "market making". He did this manually. Several other participants in the market used an algorithm to adjust their prices automatically. Prices, including algorithmically generated prices, would fluctuate depending on the prices offered by other market participants for the same bond. These would be influenced by movements in related markets or by significant news events.

19. The second way in which the Claimant would interact with the Euro MTS platform was by executing trades on behalf of particular clients, by buying or selling bonds for them on the MTS platform.

20. All financial trading in the UK is regulated by the Financial Conduct Authority (FCA). However, the FCA relies to a large extent on financial institutions conducting their own surveillance and reporting any suspicious trading activity. All market participants have an obligation under the Market Abuse Regulations to report any suspected market abuse to the relevant financial regulator. A report of suspicious activity is known as a Suspicious Transaction and Order Report (STOR).

21. Traders, such as the Claimant, are required to be certified to the FCA on an annual basis to confirm they are fit and proper for their roles. The standards by which financial institutions should hold individuals to account are known as Individual Conduct Rules. There were five that applied to the Claimant. Relevant to the

present case are numbers 1, 2 and 5. Number 1 is "You must act with integrity". Number 2 is "You must act with due skill, care and diligence". Number 5 is "You must observe proper standards of market conduct". In addition, the Claimant was subject to the Respondent's own Code of Conduct, setting out the behaviour that it expected from its employees during their employment. I will return to the contents of that Code later in these Reasons.

(2) ***The Claimant's performance***

22. When the Claimant started his employment, he started in the role of graduate trainee. In mid-2016 he completed the graduate programme and was assigned to the Emerging Market Credit Trading desk. At that point he was promoted to the role of Junior Trader. In relation to the second half of 2016, he was assessed as performing badly and given a rating of 4. His failings were considered to centre around attitude and lack of hunger. As a result, he was not promoted to the role of Associate at the end of 2016 as would ordinarily be expected. He was awarded a bonus of £10,000. This was low in comparison to the bonus he would have received had his performance been considered satisfactory. He was set performance targets which identified the improvement that the Respondent expected.

23. By May 2017, the Respondent considered that there had been a significant improvement in the Claimant's performance. Mr Clarke pushed for the Claimant to be promoted at the midyear stage and he was in fact promoted in about July 2017. It was relatively unusual to promote someone outside the annual promotion cycle, and therefore his performance remained under closer scrutiny thereafter. Given the Respondent's assessment of his underperformance in the second half of 2016, and its consequences for him in terms of pay and promotion, the Claimant would have been particularly keen to ensure his trading performance was at the expected level for the rest of 2017.

24. At the end of 2017, the Claimant had his annual appraisal. He was noted to have exceeded expectations in most instances from the beginning of the year. By the following year end, at the end of 2018, his appraisal was more negative. His performance was described as "left wanting" and he needed to be "more proactive with clients and sales".

(3) ***The FCAs concerns***

25. On 6 February 2018 the FCA emailed the Respondent noting it was conducting a preliminary review into trading activity on 5 and 6 December 2017 in SLOREP 35 Bonds, and requesting details of all "Orders and Executed trades" and all "Quotes streamed electronically" on those dates, as well as the name of the trader [99]. The email emphasised that this was not a formal investigation, but rather a "review of dealings". It stated that the request should be treated confidentially and not discussed with anyone outside the Respondent's Compliance Department. It therefore could not be discussed with the Claimant at that point. The request was

considered by Chris Blore, who was the Head of Global Spread Products and Investor Sales Compliance for Europe, Middle East and Africa. He was assisted by Andrew Fernandez, an Assistant Vice President and part of Mr Blore's team.

26. This was an unusual request. As Mr Blore stated in evidence, the Respondent would receive around 20 or 25 such requests a year, which represented a tiny percentage of all the Respondent's trading activity. The Respondent provided the FCA with such information as it could. It was unable to provide the FCA with price changes as this information was held by MTS.

27. On 19 March 2018, the FCA asked the Respondent for further information. By this stage, their review was also focusing on trading activity on 9, 10 and 13 November 2017, as well as 4 December 2017 [132]. Further information was provided by the Respondent to the FCA, which included Requests for Quotes (RFQs). RFQs are enquiries from potential customers asking for a quotation to buy or sell a particular quantity of the financial instrument. The information provided included the times of the trades, but did not include the actual quotes and prices that the Claimant had placed on the Euro MTS platform, because this was information retained by MTS and not available to the Respondent.

28. The FCA made a further request for additional information on 24 May 2018. By this point, the scope of the request had widened further. They were asking for details of all executed trades in any financial instrument between 1 January 2018 and 18 May 2018 which had been placed by the Claimant. Given the scope of this latest request, Mr Blore chose to inform his colleagues in the litigation department. He considered that this request could be a precursor to some sort of formal action. The Respondent provided the data that the FCA were requesting.

29. On 23 July 2018, the Respondent's Compliance Team received a four-page letter from the FCA [153]. This set out various adjustments that the Claimant had made to the Respondent's prices for SLOREP 35s on 10 November 2017, 5 December 2017 and 6 December 2017 at particular times, together with his trading in the same bonds. It asked six questions in relation to trading and market activity on those dates, and asked for answers to be provided on a voluntary basis. It stated that the FCA had no objections to the Respondent speaking to the Claimant in order to respond to this information request. The letter again emphasised that the FCA was not conducting a formal investigation but merely a "review of dealings". The pattern of dealings identified by the FCA appeared to show that the Claimant had adjusted his prices in one direction but then executed a trade in the opposite direction.

30. In response to the letter, Mr Fernandez spoke to the Claimant. This is likely to have been an informal conversation with the Claimant at his desk, as there is no record of any scheduled meeting, and no contemporaneous note. On occasions, Mr Fernandez or others working in the compliance team would speak to traders at their desks about particular trades. This was not unusual and would not it itself have indicated that there was an FCA review underway. The Claimant says he does not

recall the details of any such conversation, although he does recall Mr Fernandez speaking to him in very general terms around August/September 2018 about trades on the three dates in question. Mr Fernandez has not been called to give evidence in this Final Hearing.

31. Although there is no specific note of a conversation between Mr Fernandez and the Claimant, there is an email sent by Mr Fernandez to his colleague Cathal McKenna on 13 August 2018, which makes six numbered points that correspond to the six questions asked by the FCA [157]. These answers were then provided by Ms McKenna to the FCA on the same date [167]. The answers read as if they are explaining the Claimant's thought processes behind his pricing decisions on the three days to which the questions relate. I find that they were derived from the answers that the Claimant had provided to Mr Fernandez in the course of his enquiries. Because there is no other record of what was said by the Claimant, no evidence from Mr Fernandez and no recollection of the detail on the Claimant's part, it is very possible that the wording of these six points did not accurately reflect what was said by the Claimant. I do not find it necessary to reach a conclusion on this point.

32. Further responses were requested by the FCA on 15 August 2018. It noted that, in its view, the responses to questions 1, 3 and 5 either failed to fully answer the question or factually disagreed with the Respondent's activity in relation to the bonds in question. Further answers were provided by Mr Fernandez in an email on 6 September 2018. His email started by apologising for the delay and saying he needed to speak to the Citi trader who made markets in Slovenian Government bonds. This was a reference to the Claimant. It is likely that there was a further conversation between the Claimant and Mr Fernandez to inform the content of his email of 6 September 2018. The email included the following passage:

> "When the Citi trader had a position that he wished to recycle in the market, he did not want the market to know which way he was axed (and either be the best bid/offer) as this would severely disadvantage his position and he would likely get a worse price for these bonds. Instead he tried to speak to clients throughout the day and execute off EURO MTS so he could get the best price possible for the bonds"

33. On 9 October 2018, the FCA wrote a further letter to the Respondent, which is of some significance in relation to this case. It was written by Jonathan Baker, Senior Manager for Secondary Market Oversight. It was addressed to Ms Lee Mann, Senior Compliance Director at the Respondent, with responsibility for EMEA Markets Compliance. The relevant sections of the letter are as follows:

> "I am writing to inform you that the FCA has decided not to take any further action in this instance. However, taking into account all the circumstances in this case, we consider it appropriate to explain to you some concerns that we have about the behaviour of your trader, King Yew Choo, during the period we reviewed.

> Whilst the FCA understands that firms have quoting obligations as Primary Dealers, we are also mindful that the steps that firms take to ensure that they comply with those obligations include the automation of their quotes on the relevant platforms. Where Primary Dealer obligations include requirements for a firm to maintain a quote at or within close proximity to the best bid or offer, this is likely to result in other Primary Dealers automatically adjusting their quotes when a new best bid or offer is established by a particular participant.
>
> We therefore consider it to be suspicious when a particular trader manually adjusts their firm's quote to establish a new best bid and then shortly afterwards the same trader sells a much larger quantity of the same instrument (and vice versa where the offer is improved and a large purchase is then executed) appearing to have taken advantage of other primary dealers whose automated quotes have tracked the newly established best bid or offer.
>
> Where we observe this fact pattern, it is likely that we will carry out of [sic] review of the relevant incident(s)."

34. Pausing there, it has been argued by Mr Singh on behalf of the Claimant that this letter evidenced a fundamental misunderstanding by the FCA about the Claimant's trading. As he put it in the Claimant's opening skeleton "It is apparent that it did not have the full picture as it did not understand that the Respondent was operating on the Euro MTS manually, which was a fundamental miscomprehension". I disagree. Whilst the FCA's wording notes that some firms automate their quotes on the relevant platforms, it does not imply that this was the Respondent's general practice for Slovenian bonds. The reference to "manual adjustment" simply referred to the fact that on these three dates the Claimant was deciding on his prices for himself.

35. The FCA letter then listed nine factors before continuing:

> "In relation to [the Claimant] we considered many of these factors. In our view, [the Claimant] does appear to have received an improved execution price as a result of buying or selling relatively soon after manually adjusting Citigroup's quotes to achieve a new Best Offer or Bid on Euro MTS.
>
> We consider that some of [the Claimant's] explanations are not only inconsistent with the quotes he made on Euro MTS but in fact completely contrary to his quoting behaviour. For instance, in relation to the conduct on 10 November 2017, [the Claimant's] explanation is that he changed [the Respondent's] bid to reduce the risk that the bid was hit by other participants. What [the Claimant] actually did was to repeatedly increase [the Respondent's] bid, incrementally improving the best bid on Euro MTS, making it more likely that other participants would hit [the Respondent's] bid.
>
> Absent any legitimate explanation, we remain concerned that [the Claimant's] intentions may have been unconnected to [the Claimant's] quoting obligations and may have been carried out for the purpose of encouraging other participants to improve their bids or offers in order to influence the price at which he was then able to execute a transaction.

> Notwithstanding this, and as explained above, taking all the information you have provided into account, we do not consider that it is appropriate to take any further action in relation to this particular event. We may revisit this decision if we identify further relevant information.
>
> Please note the Final Notice against [a named trader]. We strongly encourage you to carefully consider the risks arising when a trader manually amends [the Respondent's] quote and then trades in the opposite direction, benefiting from any price improvement.
>
> We expect you to discuss the contents of this letter with [the Claimant] and with other relevant parties at [the Respondent] including but not necessarily limited to the head of the relevant business area and Internal Audit."

(4) The Respondent's investigation

36. In the light of this letter, the Respondent considered what action, if any, to take, given the way in which the letter was worded. In order to meet the FCA's expectations, the Respondent had, at the very least, to discuss the contents of the letter with the Claimant and with the head of his business area. This was Thomas Clarke. He was the Head of CEEMEA Flow Credit Trading.

37. Mr Clarke considered the FCA's letter. He spent what he described as "roughly 48 hours over the course of maybe three or four business weeks" trying to understand why the Claimant did what he did. He told Mr Cohen, who conducted the first part of the Claimant's disciplinary appeal, that he did so in order to build a case for the Claimant, but without discussing the trading with the Claimant. This was not part of the Respondent's disciplinary investigation, but rather was his own consideration of the implications of the FCA's letter. Although he prepared a written record of his analysis, I accept this was effectively a 'note to self' and was not shared with those involved in the subsequent disciplinary process.

38. It was Mr Bloor and his team in the compliance department that had been communicating with the FCA in relation to its review. Mr Bloor discussed the FCA letter with his line manager, David Flowerday. It was decided that the Respondent should conduct its own investigation into the Claimant's trading patterns, as well as considering the wider implications for the Respondent's procedures for monitoring trading, and whether further training was required. This is confirmed by a letter drafted by Mr Bloor for Mr Flowerday to send to his line manager, Gary Rosen, which was emailed on 10 October 2018 [174]. It indicated that one step that the Respondent was considering was "discipline for [the Claimant]".

39. The Respondent's investigation involved taking the following steps:

    a. On 10 October 2018, Mr Fernandez asked a contact at MTS to provide the prices that the Respondent had been streaming on the Euro MTS platform for SLOREP 35s on the three relevant dates, whether the Respondent was

the best bid/offer and information about how many other dealers were actively streaming two-way prices on these days [182];

b. On 17 October 2018, Mr Fernandez made an internal request for details of the Respondent's opening and closing positions on these three dates, in relation to SLOREP 35s and also in relation to SLOREP 27s. Data on the latter bond was requested because, based on information apparently provided by the Claimant, the answer previously provided to the FCA's fourth question had referred to the Respondent's "large short position in another Slovenian bond (2027s) …. in order to cover this short position, [the Claimant] bought the Slovenian 2035 as it was the closest comparable EUR Slovenian bond";

c. Mr Fernandez contacted the Compliance Monitoring team to obtain the Claimant's Bloomberg chats for the three days in question;

d. MTS provided Mr Fernandez with the Respondent's prices as set by the Claimant for the days under analysis, but said in an email on 16 October 2018 "we normally do not provide any market data including the activity of other participants". Subsequently MTS agreed to confirm when the Respondent was the Best Bid/Offer on the three dates, and did so;

e. Mr Fernandez looked at an internal system, called TPS, and extracted data relating to the Claimant's executed trades on all platforms in SLOREP 35s and SLOREP 27s for October 2017, November 2017 and December 2017, which was put into a spreadsheet.

40. During the course of the investigation, regular updates were provided to Thomas Clarke, Richard Lancaster (Managing Director, Head of the Structuring Desk), Amit Raja, EMEA Head of Credit Trading and Marc Pagano, who was Global Head of Credit Trading.

41. Around the end of October 2018, Mr Fernandez prepared a summary of the investigation so far [193.1]. It noted that the pattern of trading could be perceived as "spoofing" and included several questions to ask the Claimant. It was decided to hold a formal investigatory meeting with the Claimant and have a member of the Employee Relations team present. It was sent to Mr Pagano on 1 November 2018. It appears from the wording of Mr Pagano's response that he was scheduled to discuss the contents of the report the following day.

42. On 9 November 2018, the Claimant was emailed an invitation to attend an investigatory meeting on 14 November 2018. The letter told him that the purpose of the meeting was to discuss three instances of trading activities which "may have amounted to a breach under Section 2 of Citi's Prohibited Sales and Trading Activities Policy". He was told that this was not a disciplinary hearing, but the record of the meeting was likely to form the basis of the investigation and may form part of the evidence at any subsequent disciplinary hearing. The letter attached extracts

from the FCA letter of 9 October 2018, although did not attach the full letter. The extracts recorded the timeline of his quoting and trading patterns on the three dates.

43. The Prohibited Sales and Trading Activities Policy contained the following wording:

> "Generally speaking, market manipulation, distortion and disruptive trading is any conduct intended to create an artificial price, value, demand for supply of or market for a financial instrument. Trading that undermines the integrity of the market is impermissible and a violation of this Policy, even if there is no evidence that a market participant was harmed.
>
> The following are some examples of impermissible trading practices:
>
> False or misleading signals to the market
>
> This occurs when a market participant places an order (or orders), with the intent to cancel the order (or orders) prior to execution, and can create a false impression of market interest and/or activity. Placing orders with the intent to cancel the order prior to execution, even if for the purpose of price discovery or to identify algorithmic trading, is spoofing and is impermissible. Orders, modifications, and/or cancellations, even of partially filled orders, are not classified as spoofing if they are submitted with the intention of entering into a genuine transaction. Some common forms of this behaviour are listed below:
>
> ADVANCING THE BID: Entering orders which increase the bid (or decrease the offer) for a financial instrument in order to increase (or decrease) its price.
>
> LAYERING/SPOOFING: Submitting multiple or large orders often away from the market on one side of the order book in order to execute a trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed are removed.
>
> PLACING ORDERS WITH NO INTENTION: Entering of orders which are withdrawn before execution, thus having the effect, or which are likely to have the effect, of giving a misleading impression that there is demand for or supply of a financial instrument at that price."

44. The Respondent's Code of Conduct contained an introductory message from Mike Corbat, the Chief Executive Officer. It includes the words "we all must hold ourselves to the highest standards of ethics and professional behaviour". This is then repeated in more detail in the section entitled "Our Responsibilities" under the sub-heading "Everyone's Responsibilities". Under the heading "Our Decisions", the Code states that "our decisions must pass three tests. In addition to complying with all applicable laws and policies, they must always (1) serve our clients' interests (2) create economic value (3) be systematically responsible. To help you determine whether a proposed decision comports with these three tests, you should stop and ask yourself the following questions". The questions to be asked include "Would it

cause harm to Citi's or my reputation?"; "Would my decision, action, or failure to act result in even the appearance of impropriety?"; "Would I feel comfortable if it was made public?".

45. On 14 November 2018, the investigatory meeting took place. It lasted about 50 minutes and was conducted by Mr Blore. Jennifer Irwin, from Employee Relations, was also present. A full transcript of the notes of what was discussed was prepared and subsequently sent to the Claimant for his agreement. With relatively minor changes suggested by the Claimant, the transcript was subsequently agreed.

46. During the course of the meeting, the Claimant asked Mr Blore what he was being accused of. In response, Mr Blore stated that "there was no kind of accusation yet" and the Respondent was "just trying to get his explanation". Ms Irwin added that the purpose was "fact finding" and went on to say that there were some concerns that "there may be a breach of our core policies, specifically the Prohibited Sales and Trading Activities Policy".

47. The following features of the Claimant's explanations are of potential significance in relation to the fairness of the disciplinary outcome that the Claimant was guilty of spoofing and therefore should be dismissed for gross conduct:

    a. He would generally receive a Request for Quote every 45 or 50 seconds and would have executed 1,000 plus trades over a five-week period. He had tried to figure out what he was doing in relation to SLOREP 35s on the days in question, but he could not do so because of the extent of the bonds he was expected to cover. He would try his best to think his trading pattern out further and provide possible reasons to explain the trading.

    b. The Claimant said he had been trading Slovenian bonds for about 10 months. Although he had an obligation as a primary dealer to provide quotes, he tried to use the minimal amount of resources or minimal amount of time to stay within the rankings, as "it did not really generate any revenue for us" [256]. He said he did not have the bandwidth to support the prices regularly. He would do so when he felt he needed to update it or when he had the time to look at it again.

    c. He would not say that he had a strategy behind his pricing on these bonds, but rather it was "literally just trying to roughly ballpark it at that point in time". He described the MTS system as a "bit of a chore". He would gain his sense of how the market was potentially moving by whether there had been a very busy flurry of bid requests or offer requests, or by how hard it was to win a certain trade in a particular direction.

    d. The easiest way of seeing why some things have moved would be "like a headline publication not just in Slovenia or Slovakia but anything around the EGB region will be a strong correlation of that … you will see the entire thing move in parallel anyway."

48. At the end of the investigatory meeting, the Claimant was warned that a decision would be made as to whether there was a case to answer and whether the investigation would proceed to a potential disciplinary hearing.

(5) Disciplinary proceedings

49. Towards the end of November 2018, a decision was taken to progress to a disciplinary hearing. This decision was taken by Employee Relations. Mr Blore had shared his view with Jennifer Irwin in Employee Relations that he did not consider the Claimant had provided a credible or clear explanation for his patterns of trading activity.

50. Mr Fernandez asked the Training Team to provide details of the relevant training that the Claimant had been given. He received this information on 27 November 2018. On analysis, this showed that the Claimant had completed seven hour-long training courses over the period from 2015 onwards at which reference would have been made to spoofing [269].

51. A draft invitation letter was prepared, inviting the Claimant to a disciplinary meeting. Before the letter was finalised, Ms Irwin asked for advice from Simon Wheeler on whether the proposed misconduct should be considered as potentially a matter of gross misconduct. Mr Wheeler was the Head of EMEA Equities Compliance. This was a senior position in Compliance in a different line of business. Such a check is standard practice to ensure that the potential sanction is considered reasonable before the disciplinary invite letter is sent. Mr Wheeler confirmed on 3 December 2018 that this type of allegation should be treated as potential gross misconduct [286].

52. On 5 December 2018, Ms Irwin emailed the Claimant attaching the letter inviting him to a disciplinary hearing [287]. The email attached several documents which were potentially relevant, including a full copy of the letter from the FCA dated 9 October 2018, the Prohibited Sales and Trading Policy, and the Disciplinary Procedure, as well as the Claimant's training records and the record of the investigatory meeting.

53. The disciplinary meeting invitation letter framed the allegations against the Claimant in the following way:

> "That the trading activities which you undertook on 10th November 2017, 5th December 2017 and 6th December 2017:
>
> - Amounted to spoofing; or
> - Could be perceived as amounting to spoofing."

54. The letter went on to say that these were potential breaches of Citi's Code of Conduct and Citi's Prohibited Sales and Trading Activities Policy. It stated that the conduct could amount to gross misconduct as action which may have constituted:

- A serious breach or non-compliance with [the Respondent's] rules, regulations, policies, procedures or your duties;
- Serious breach of the Code of Conduct;
- Bringing the name of [the Respondent] into disrepute or acting or omitting to act such that it is reasonably believed that [the Respondent's] name has been, is or will be brought into disrepute.

55. It added that the allegations may also potentially represent one or more Conduct Rule breaches and told him that the outcome may result in disciplinary action up to and including dismissal.

56. The letter had stated that the disciplinary hearing would be conducted by Jason Cohen, Managing Director. Because the original scheduled date clashed with the Claimant's two-week period of mandatory leave, the disciplinary meeting needed to be rescheduled to 20 December 2018. As Mr Cohen was not available on the rescheduled date, it was decided that Sam Hewson would conduct the hearing instead.

57. Mr Hewson is not a trader. The Claimant argues that, as a result, he was not an appropriate person to conduct his disciplinary hearing. I reject that criticism. In his role, Mr Hewson, had overall responsibility for the Respondent's electronic FX solutions for Corporate and Public Sector clients, including clients dealing on electronic connectivity networks. He has a knowledge of trading from foreign exchange trading.

58. In advance of the hearing, Mr Hewson asked Ms Irwin questions of clarification in relation to the allegations against the Claimant, and in particular whether spoofing was a generic term that encompassed advancing the bid, layering/spoofing and placing orders with no intention of executing them.

59. On 19 December 2018, the day before the scheduled disciplinary hearing, the Claimant sent an email to Ms Irwin which he claimed "disproved the allegations raised against me" [461]. In relation to each of the three dates, he provided a narrative and attached what he described as "supporting documents". The documents included an RfQ and screenshots evidencing the market for SLOREP 35s at particular points in time. This indicates that at that point he had access to some market data in relation to the dates in focus in the disciplinary proceedings. This is likely to have been derived from his ongoing access to Bloomberg, and reflect average market prices, rather than his own particular prices throughout the relevant days.

60. In relation to his actions on 10 November 2017, the Claimant's email stated that "as the day progressed, the flow we saw were increasingly bearish/negative". He said that the "build-up of net bearish flow consequently triggered him to shift his stance to sell IG bonds", including the SLOREP 2035.

61. In relation to his actions on 5 December 2017, he explained that his decision to sell SLOREP 32s did not support the thesis that he had always intended to buy more SLOREP 35s after decreasing the offer price.

62. In relation to his actions on 6 December 2017, he provided a similar explanation to that on 10 November 2017, namely that his decision to sell SLOREP 35s at 8:20am should not be seen in isolation; but rather as consistent with bearish trades on other bonds throughout the day, including Lithuanian bonds. In effect, he was saying that the bond market in comparable bonds was weakening throughout the day.

63. The Claimant did not claim in this email he was unable to remember why he traded in particular ways on each occasion. Nor did he claim he needed further market data in order to defend himself against the allegations.

64. The disciplinary hearing took place as scheduled on 20 December 2018. It lasted for around an hour. Ms Irwin from Employee Relations was also in attendance, as was a notetaker to ensure that there was an accurate record of what was discussed. The Claimant was advised at the outset of his right to be accompanied by a colleague or trade union member. He chose to proceed alone.

65. During the course of the disciplinary hearing on 20 December 2018, the following matters of potential significance were said by the Claimant:

    a. On average, he would update his prices on the Euro MTS platform a couple of times a day [545], and when he updated his prices he would "update all the Slovenian curve" ie each of the fourteen different Slovenian bonds. His explanation for the number of price adjustments to the SLOREP 35s made on the three dates in question in a short period of time was that he was "just toggling it as I get time". As a result, it was all one interaction [550].

    b. So far as his trading on 10 November 2017 was concerned, he repeated his explanation from the previous day, namely that there was a build-up of bearish flow. When pressed, he said that the trigger for his bearish view came after 13.51, as a result of the build-up of the RFQs he received.

    c. So far as his trading on 5 December 2017 was concerned, he rejected the suggestion that he had bought SLOREP 35s as a hedge against his position in relation to SLOREP 27s [549]. He said he could not remember why he had bought 14 million SLOREP 35s.

    d. In relation to 6 December 2017, he had decided at around 8.20am or maybe slightly before, that he was going to sell his IG risk, and consistent with his view of the market he also sold 47 million of Lithuanian 20s.

    e. He accepted that it was not just the action of spoofing, but the creation of events that could be perceived to look like spoofing that was also a potential

source of breach [552]. He confirmed he had received sufficient training to know what amounted to spoofing.

f. He said that looking at all the bonds that he was quoting and the adjustments that he made to the quotes on these dates, would show that there was no correlation between the price adjustments he made and the way he traded [553].

g. He did not have a clear answer to Mr Hewson's question as to why on the three days under consideration, he appeared to change one side of the price – either the bid or the offer – but did not make a corresponding change to the other side of the price at the same time [554].

66. The meeting concluded after around an hour with Ms Irwin saying that all the information provided by the Claimant in the meeting and in his email the previous day would be reviewed and Mr Hewson would decide what further information or further analysis may be required [554]. Nothing was said to indicate that the disciplinary hearing may be reconvened.

67. A couple of hours after the meeting had concluded, the Claimant sent a further email to Ms Irwin [536]. He said that in addition to his own 400 bonds he was backing up several colleagues' books over that five-week period. His guestimate was he was marking between 1,000 and 1,500 bonds over this period. He believed this bigger data pool "to analyse from … will help my case". Properly understood in the light of Ms Irwin's closing remarks, this was a request that, when concluding its analysis, the Respondent should see his trading within its wider context, rather than a specific request to be provided with further data before any decision was taken.

68. Following the disciplinary hearing, also on 20 December 2018, Mr Hewson asked Ms Irwin to provide "all bids and offers entered by the Claimant into MTS on the three days in question including the time stamp for each entry" [537]. It was not limited to Slovenian bonds.

69. On 24 December 2018, the Claimant was sent the notes of the disciplinary hearing on 20 December 2018. He responded on 3 January 2019 with further comments but no suggested changes to the notes of the disciplinary hearing. In his comments, he said that he stood by his written submissions on 19 December 2018, and added:

"I do not recall the details to these dates (as it has been over 1 year ago), so I believe a quick analysis on the full set of bonds I market make (or at least the bonds I was market making over the 5-week period) will dispel some, if not all, of the assumptions made against me"**.**

70. On 21 December 2018, the Respondent requested further data from MTS. What was requested was "all of our MTS CASH CMF data (orders via quote page including filled FAS)" for the three dates in question [575]. This request was for all pricing data for the Respondent's pricing, and was not limited to the Claimant's own

pricing. The initial response was that MTS do not provide historical quotes. Following a protracted series of email exchanges, Mr Blore emailed again on 18 January 2019 as follows:

> "My request, from 21st December, is for details of Citi's quotes and executed trades in Slovenian Government Bonds, for 3 separate trade dates. I had understood from our earlier correspondence that this was being worked on."

71. It appears that the Respondent had chosen to limit the scope of the request to Slovenian bonds, which I infer was done in order to persuade MTS to provide at least some potentially relevant data. This more limited information was finally provided by MTS on 22 January 2019. It related only to pricing in relation to Slovenian bonds [566].

72. On 29 January 2019, this further information was sent to the Claimant. He was asked to provide his comments by 4 February 2019. On 31 January 2019, the Claimant was invited to a further meeting with Mr Hewson on 12 February 2019 to discuss its contents [597]. This was subsequently changed to 13 February 2019.

73. On 6 February 2019, the Claimant wrote to Jennifer Irwin querying the second disciplinary allegation, namely that his trading "could be perceived as amounting to spoofing" [608]. He asked what the consequence would be if a finding was made that he had not been engaging in spoofing, but that his trading raised this perception. Ms Irwin told him to raise this during the further disciplinary hearing. He was dissatisfied with this answer, saying that he wanted to present his case as accurately as possible. He was told that the allegations had been drawn up by Employee Relations with input from Compliance; a decision in relation to the allegations would be made on the balance of probabilities; and that he had been given relevant training in advance of the trading. Ms Irwin concluded her email by confirming that the Claimant had already been provided with a copy of the Prohibited Sales and Trading Policy.

74. Throughout the investigation and subsequent disciplinary proceedings to this point, the Claimant had continued to trade, and had not been suspended. On 8 February 2019, he was granted a period of paid leave, which he was told was likely to extend until the ongoing disciplinary process was concluded. At that point, he was told he was not able to enter the Respondent's premises, was not able to contact customers and/or clients, and his access to the Respondent's systems would be suspended, save he would continue to be granted Bloomberg access for viewing purposes only. It was confirmed to him by Mr Clarke that he was able to use his Bloomberg access for viewing historic prices and archived chats [618].

75. Shortly before the meeting was due to start, the Claimant emailed through a one-page table that sought to draw distinctions between the particular features that applied on the three different dates in question [640].

76. The meeting on 13 February 2019 was again conducted by Mr Hewson, with Jennifer Irwin also present from Employee Relations. It lasted for about an hour and a quarter. At the outset, Ms Irwin said that Mr Hewson would be considering the Claimant's responses to the further information requested following the previous disciplinary hearing on 20 December 2019. Mr Hewson started by questioning the Claimant about his trading on 10 November 2017. He asked him why, when he had not updated any prices all morning, he became much more active in terms of his pricing adjustments only in relation to SLOREP 35s, as soon as he had almost $13 million in SLOREP 35s. In the same passage, he also asked why the Claimant was raising his bid, implying that he would prefer to buy rather than to sell a bond in which he was already long. Mr Hewson said that the pattern seemed strange. The Claimant responded "I don't disagree. You can definitely infer it that way, but", before he was interrupted by Mr Hewson. He went on to provide this explanation for his pricing:

> "Okay, I guess like if the question is like how strange is marking my – sorry, adjusting my quotes consecutively, if you just use like three days of samples and you strip out all the kind of the weird refreshing and timing, there's 14 instances where I made consecutive adjustments. Of which, four of those, it's like three times, at least three times. And then how many times did I amend just one side of the bid/offer, keeping one side the same in these three days? Its 25 instances, of which 13 of them is holding one side of the bid/offer, keeping one side the same in these three days? It's 25 instances, of which 13 of them is holding one side and then improving – you know, holding the bid and improving the offer or holding the offer and improving the bid. Then then, I guess, what I'm arguing is it's really not uncommon"

77. Mr Hewson pointed out that there was a similar pattern on the subsequent two dates, that there had been no interaction until the point in time at which he adjusted the price incrementally up or down, to become best bid or best offer, before executing a trade which was the opposite of what his pricing would suggest was how he was viewing the market. The Claimant did not provide a clear explanation for any of the three dates, saying on several occasions that his pricing was based on what he considered to be fair value. Towards the end of the hearing he said that he could not remember what his intentions were, because the events took place over a year and three months previously. He did not suggest he was missing vital data about market movements or his own pricing to enable him to defend himself.

78. The Claimant asked Mr Hewson about the second allegation, that his trading could be perceived as spoofing and there was a discussion about what was covered by that allegation. Mr Hewson said that "it's also what is fair, appropriate, reasonable and right from a client – in this case, those that you interact with on MTS – and the rest of the market".

79. On 19 February 2019, Ms Irwin prepared a draft outcome letter for Mr Hewson. This recorded Mr Hewson had found the second allegation proved, namely that the Claimant's trading created a perception of spoofing in relation to 10 November

2017 and 6 December 2017, but not in relation to 5 December 2017. It also suggested he did not find actual spoofing. The draft outcome letter did not suggest any particular sanction. Given the lack of detail as to the supporting reasoning, I infer from this draft that Mr Hewson had discussed his provisional view with Ms Irwin at this point but had not reached a concluded view. This is also supported by an email from Ms Irwin to Mr Hewson on 1 March 2019 in the following terms:

> "Tried you yesterday and was wonder how you have been getting on with the findings. I am getting pressure from the business etc about the outcome …. Can I do anything to assist you? Happy to set time up and draft as we go if that helps"

80. In a further email on 7 March 2019, Ms Irwin asked Mr Hewson for a quick catch up on the "detail of the findings" [683], at the same time as providing him with the Claimant's comments on the transcript of the second disciplinary hearing.

81. Earlier on 1 March 2019, Tom Clarke had emailed Jennifer Irwin and others, including Marc Pagano, asking if anything had been communicated to the Claimant in relation to the outcome. The email inferred that the proposed sanction was likely to be a warning, given it asked: "Would we receive a copy of the warning wording as the desk too?". Read in the light of Ms Irwin's email on the same day, this email reflected no more than Mr Hewson's provisional view as to the disciplinary sanction.

82. On 4 March 2019 Ruth Harrigan emailed Jennifer Irwin with the subject line "outcome letter". The email indicated that Marc Pagano was senior enough to receive the outcome letter [677]. On 8 March 2019, Mr Pagano met with Mr Clarke and Ruth Harrigan to discuss a business plan for communicating the outcome of the disciplinary process.

83. Mr Hewson's evidence, in cross-examination, was that he was unclear on the extent to which there needed to be direct evidence of spoofing for a finding of spoofing, and the standard of proof that applied to each of the disciplinary allegations. As a result, legal advice was taken on these points. He referred to this to explain why the contents of the disciplinary outcome letter sent to the Claimant differed from the draft originally prepared by Ms Irwin. His explanation was that, in the light of the legal advice about the extent of proof required, he had concluded that the Claimant was guilty not just of a creating a perception of spoofing but of actual spoofing.

84. Unsurprisingly, there are no documents in the bundle containing legal advice. Such advice would ordinarily be privileged. No adverse inferences fall to be drawn from the failure to waive privilege in relation to this advice, despite Mr Singh's submissions on this point. He has not contended that privilege has in fact been waived on this point. There is an email from Ruth Harrigan to Jennifer Irwin at 12:18 on 13 March 2019 recording that there was a legal call in relation to the disciplinary process scheduled for 2pm on that day. This confirms that legal advice was in fact taken, though not as to the contents of the legal advice. Following further

discussions between Ms Irwin and Mr Hewson, Ms Irwin sent Mr Hewson a draft outcome letter at 18:21 on 14 March 2019. This nine-page letter explained his findings, namely that on the three dates in question, the Claimant's trading activities amounted to spoofing, and were a fundamental breach of the clear standards expected of market traders. As a result, the disciplinary sanction imposed would be summary dismissal. There was a further discussion between Mr Hewson and Mr Irwin and minor changes were made to this draft letter, which were attached to an email at 15:30 on 15 March 2019.

85. I accept Mr Hewson's evidence as to the reason why he felt able to conclude that the Claimant was guilty of spoofing, notwithstanding the earlier draft outcome letter suggesting he was only finding that the Claimant's trading created the perception of spoofing. For whatever reason, his witness statement does not deal with the first draft of the outcome letter. Had it done so, then it is likely that Mr Hewson would have gone on to explain the reason why his conclusion had changed; and specifically, to explain he had taken legal advice as to the required standard of proof. I reject the Claimant's contention that Mr Hewson had altered his conclusions because he realised that creating a perception of spoofing was not a tenable disciplinary offence or did not justify dismissal. There is no direct evidence to this effect; and it is not a fair inference from the contemporaneous documents.

86. On Monday 18 March 2019, a conference call was held to provide "a top-level explanation" for the disciplinary outcome. Mr Pagano participated in that discussion.

(6) Disciplinary outcome

87. On 19 March 2019, the Claimant was sent the disciplinary outcome letter. It explained the Respondent's findings that the Claimant was guilty of gross misconduct and that, as a result, he would be summarily dismissed. He was given the right to appeal.

88. The following day, 20 March 2019, David Flowerday notified the FCA of the outcome of the internal disciplinary process. He wrote as follows:

> "The FCA expected [the Respondent] to review the trade with [the Claimant] and conduct an internal review. Following receipt of the 9th October letter Compliance conducted a more detailed investigation of [the Claimant]s' quoting and trading activity in Slovenian Government Bonds, in conjunction with [the Claimant's] management Tom Clarke, Marc Pagano and Amit Raja (Senior Manager for EMEA Credit). As a result of this investigation, Compliance and the business were unable to ascertain a plausible explanation for [the Claimant's]'s trading activity, and a disciplinary process was initiated. During the course of the investigation, [the Claimant] was placed on paid leave on 8 February 2019.

> At the conclusion of the HR disciplinary process, [the Claimant] was found to have conducted trading activity which amounted to spoofing on three occasions and thus dismissed effective 19 March 2019.
>
> As a response the ICRM Transaction Monitoring team have implemented spoofing sampling routines from January 2019 that incorporated MTS Cash and Brokertec reviewing manually placed orders against auto quote market making activities. Spoofing activities will also continue to be a key focus of training delivered to the business"

89. On 25 March 2019, Mr Flowerday wrote to the Claimant, noting that the Respondent had a reporting obligation to the regulator in relation to the Conduct Rule breaches arising from his conduct. He wrote that the Respondent had determined that he had breached Individual Conduct Rules 1, 2 and 5.

(7) Claimant's appeal

90. On 25 March 2019, the Claimant wrote to Ms Irwin appealing his dismissal. He listed three grounds of appeal, namely (1) that the disciplinary investigation was inadequate (2) that an unreasonable investigation had taken place and (3) that the disciplinary sanction was unfair and disproportionate [750]. He said that he could not remember why he adjusted the prices as he did on the three occasions, but he may have acted as a result of "real-time information flow" through Bloomberg, Request for Quotes (RFQs), and other sources of information; "changes noticed in real time in the price or the anticipated market direction of other comparable bonds"; and "other reasons", which he did not specify. He said that the Respondent had failed to investigate the activity of other traders, so as to place the three occasions into context. He alleged the bank should have analysed the 1000 to 1500 bonds that he was covering over this five-week period. He said that no account had been taken of his clean disciplinary record, and the fact that the FCA had decided to take no further action against him.

91. Jason Cohen was appointed to hear the Claimant's appeal. Mr Cohen was a Managing Director at the Respondent. His responsibility was to run the Euro Swaps business in G10 rates. An appeal meeting took place on 30 April 2019 and lasted around 35 minutes. The Claimant said that it was necessary to look at all the bonds he was marking to understand what was unusual and the context to see whether he would be marking other bonds that would be of that "peer group". Later in the meeting he said it was not necessary to look at this for the entire five or six weeks. He also said that he was spread thin quoting on bonds allocated to other members of the same team.

92. In addition, Mr Cohen held meetings with Chris Blore, Thomas Clarke and Sam Hewson. These took place in early to mid-May 2019. Mr Clarke confirmed that he had spent roughly 48 hours over the course of three or four business weeks trying to understand why the Claimant did what he did, as part of his own "small, independent investigation". He stated:

> "And again, I mean as the investigation found, yes, we might have been able to find reasons for two out of three; a third one was hard – very hard to try and rationalise and, indeed, I mean our findings were tempered with the conclusion that indeed we do understand why the FCA have come to the conclusion that they have but these are the things I might consider as relevant for this conversation. And it was at that point, given that there was no clear and cut [sic] 'This is flagrantly wrong', the letter, it was at that point that Ahmet looked to escalate it – Ahmet and Compliance looked to escalate it to the independent reviewer stage which has concluded with where we are today … it was inconclusive on two and the third one, yes, we felt the FCA's allegation was probably close to correct and it's hard to understand how or why he did what he did but then I think one needs to temper that with … we were left with question marks above his action and so therefore it's not in our – it seems unfair for us to make that judgment call and then have that potential compliance risk going forward and so therefore I think it was a collective decision to kick it up to Legal HR levels which were probably a more formal process and probably the right reaction to an FCA letter."

93. Mr Clarke discussed in general terms the movements in other bonds which might explain the Claimant's trading pattern. Specifically, that "on the last occasion there was a significant Bund sell-off" and "on a previous occasion there was a significant Bund rally and indeed that might have been the reason why the Claimant had changed his opinion and reversed the direction of his pricing".

94. From the interview with Mr Clarke, it is clear that Mr Clarke was keeping Marc Pagano abreast of his own investigations. I infer that Mr Clarke and Mr Pagano had been party to the decision that there should be a formal investigation carried out by the Compliance Department.

95. On 1 May 2019, the Claimant emailed Mr Cohen, saying he did not believe "a thorough enough investigation had been done into the circumstances of his trading in question. For example, around the market, events at the time, around what other traders were doing at that time, around the number pricing requests I received etc".

96. On 15 May 2019, Mr Cohen met with Mr Hewson. Mr Hewson told Mr Cohen he believed that two instances were conclusive of spoofing and one certainly had the appearance of spoofing.

97. On 17 May 2019, Mr Cohen asked Mr Blore whether he considered it relevant to consider the other bonds that the Claimant and his trading desk were marking during the five-week period under investigation in order to provide context. Mr Blore replied that although the rest of the Claimant's trading activity was informative as to context and background to the FCA's letter of 9 October 2018, it was not relevant to determine whether spoofing had in fact occurred in the SLOREP 35s.

98. On 22 May 2019, the Claimant was sent information confirming the extent to which team members were out of the office between 6 November 2017 and 31 December

2017. This was potentially relevant to the Claimant's argument that he had been required to cover for other team members, and therefore he was having to interact with a wider range of bonds.

99. On 29 May 2019, the Respondent received written representations in support of the Claimant's appeal [890]. The written representations were drafted by the firm of solicitors that the Claimant had instructed to act for him at that point. This letter followed the same structure of the Claimant's original notice of appeal and made representations in relation to each of the three grounds of appeal. It relied heavily on sections of Mr Cohen's interview with Mr Clarke, and specifically Mr Clarke's view that two of the three trading patterns could probably be explained by extraneous factors. The solicitor's letter asserted it was fundamental to determine the intention of the trader in carrying out the trades in question. In order to consider this "the bank has to know what the full circumstances surrounding the trades in question were so as to establish context", but asserted that the Respondent could not be remotely confident that it had the full circumstances.

100. The letter did not point to specific market movements or events to explain the Claimant's trading. Nor did it identify particular financial data that had not yet been disclosed which if the Claimant had the opportunity to analyse, might provide a plausible explanation for the pattern of trading. Rather in general terms, it said that Mr Hewson should have taken into account the curves for the 1000 to 1500 other bonds that the Claimant was marking on TWS and should have investigated the activities at the time of other traders on the desk.

101. On 13 June 2019, Mr Cohen requested further data. This was looking at the spread between France 5yr and 10yr versus Germany 5yr and 10yr yields. This was because "French bond markets seem to have a good explanatory factor of movement in Slovenia, Slovakia etc markets", over the period from 9 November 2017 until 7 December 2017. This was provided on 18 June 2019, and subsequently forwarded to the Claimant.

102. On 15 July 2019, the Claimant issued these Employment Tribunal proceedings alleging unfair dismissal.

103. On 18 July 2019, the Claimant was invited to a further appeal hearing on 26 July 2019. That meeting took place and lasted two hours with Priti Popat attending from Employee Relations.

104. During the meeting, Mr Cohen told the Claimant he had considered the position in relation to French and German bonds. The Claimant confirmed that changes in these bonds would affect the market movements, but this was not the only factor. Mr Cohen said that even though there had been little movement in the surrounding Slovenian bonds apart from the SLOREP 35, he had given the Claimant the benefit of the doubt, and looked at France and other markets, but he still could not find the reason for the price marking on these dates. He told the Claimant he had checked whether there had been any Central Bank meetings on 5 December 2017. There

had not been any, nor was this the date on which US non-farm payroll information was published. The Claimant asked Mr Cohen if he was willing to accept the possibility that there was some other reason other than spoofing intentions, to which Mr Cohen replied: "If you can show it to me, I'll be open minded". The Claimant repeated his request for disclosure of data in relation to the pricing on the 1500 bonds he was or was potentially marking, which he said was a critical part of his defence.

105. Following the appeal hearing on 26 July 2019, at Mr Cohen's instigation, Ms Popat requested "as much tick data as possible from Citi/Bloomberg or MTS systems for the 3 days in question. 11 Nov 2017, 5 Dec 2017 and 6 Dec 2017. The 20-year benchmark bonds for Poland, Latvia, Lithuania euro bonds" [1054]. This was requested from MTS but by the middle of September 2018 it was clear that this data could not or would not be provided [1059].

106. The Claimant compiled a 20-page document which he sent to Mr Cohen by email on 7 August 2019 [1005-1025]. It was titled "Proof of Innocence". This, for the first time, sought to support his pricing patterns on the three dates by reference to movements in Italian and Spanish bonds. He did not give a logical reason as to why the market for government bonds from those countries might move in a similar pattern to the pattern for Slovenia, even if there were not comparable movements in the price of bonds for other countries. He did not specifically request any further data which was required to justify his position.

107. This Proof of Innocence email was forwarded to Mr Pagano on 25 August 2019 by Ms Popat, together with other documents. I accept the evidence of Mr Pagano that this step was taken so he could comment on the contents from a technical standpoint. Mr Pagano's email response indicated he intended to provide his views during that week.

108. During August and September 2019 attempts were made to obtain further data from MTS in relation to trading in bonds issued by other countries on the relevant dates. It appears MTS were not able to supply some of the categories of data requested.

109. In about October 2019, as a result of an internal restructure, Mr Cohen was placed at risk of redundancy. He took no further part in the disciplinary appeal, and subsequently left the Respondent's employment. In December 2019, the Claimant was told that Marc Pagano would take over responsibility for the appeal. Mr Pagano spoke to Mr Blore on 17 December 2019 about his investigation. A further appeal hearing was initially fixed for 8 January 2020. The Claimant emailed he was unavailable on this date. As a result, it was rearranged for 22 January 2020.

110. The resumed appeal hearing on 22 January 2020 lasted around an hour and a half. By this point, Deborah Garlick had replaced Ms Popat as the Employee Relations representative providing support in relation to the appeal. So far as was relevant in relation to the contents of the appeal meeting on 22 January 2020:

a. The Claimant said he had been asking for a year and a half for his marking history held on the TWS system. He also asked for the trade logs and trade data for these three days. He said he needed this data in order to explain his actions. Mr Pagano said he would try to see if this information could be obtained;

b. At no point during the meeting did the Claimant ask for the marking or trading history of all the other traders on his team on those dates;

c. The Claimant explained his pricing adjustments on 6 December 2017 by reference to movements in German Bunds. Mr Pagano gave him every opportunity to share his thought processes given the fluctuation in Bund prices, whilst probing the logic behind the proposed link;

d. The Claimant did not reference movements in Italian and Spanish bonds as he had in his Proof of Innocence document. In fact, his position during the meeting appeared to be that he did not have enough data to provide a positive case, as shown by this exchange:

> "MP: So is there any information that you do have today that I could use in case we can get anything to change the rulings to date?
>
> KP: What I have right now – no
>
> MP: Okay. So without further information you don't have anything that could contradict the decisions that were made previously."

e. There was a discussion as to whether it was for the Claimant to prove that he did not spoof or whether it was for the Respondent, as the Claimant contended, to prove that there were no other explainable reasons for this action.

111. On 24 January 2020, the Claimant was emailed further information he had requested in the hearing as well as the minutes of the hearing [1226]. The information was an excel spreadsheet containing details of all the trades executed by the Claimant on six days. These were the trades executed by the Claimant on the day before and on the day itself of the disputed trading. In addition, he was supplied with the RFQs on these dates where he was listed as the pricing trader. In addition, he was sent a zip file showing marking changes for all securities he was responsible for marking during each of these six days. He was told that the appeal hearing would resume on 2 February 2020 to discuss the implications of this further data.

112. Initially, the Claimant had difficulty accessing the zip file containing this data, and it was resent on 27 January 2020. At that point if not before, the Claimant accessed the data. The Claimant emailed the Respondent on 28 January 2020 [1683] saying that the data that had been sent was incomplete. He requested the trading history,

RFQs and marking history for the entire desk. He justified this by saying that he would be seeing most, if not all, enquiries sent to the desk regardless of ownership, as he was the junior on the desk and was expected to help out. By way of emailed reply, Mr Pagano told him he did not see this as relevant or pertinent information in order to enable him to explain his trading behaviour.

113. On 30 January 2020, the Claimant added a further request – he wanted the German Government bond intraday data for the same dates. He concluded his email as follows:

> "The bank's haphazard procedure and the extraordinary length of time it has taken over these issues, causing delay to the Tribunal timetable, has caused me to lose faith in the bank's ability to give me a fair hearing at yet another appeal hearing. Accordingly, I cannot be attending a further appeal hearing with the bank and must put my faith in the Tribunal proceedings"

114. On 2 February 2020, Debbie Garlick wrote to the Claimant stating that "it would seem a reasonable inference from the fact that your response to this data is to ask for more data without providing further explanation, that the trading data does not offer an explanation for your trading activity which is at issue. Clearly if the data provided is at all helpful to you, it makes no sense that you would not then provide an explanation using this data". [1693]. The Claimant did not attend the scheduled appeal hearing.

115. On 11 February 2020, Mr Pagano sent the Claimant an appeal outcome letter. His conclusion was that the appeal should be dismissed. His letter addressed each of the grounds of appeal in turn. His conclusion was that it was reasonable, and remained reasonable, for all three of the allegations to be upheld. In relation to the decision not to provide him with trading data of other traders, he said that it would seem highly implausible that the trading data of another individual would disclose an explanation for your own trading patterns that you and the Respondent have not been able to discover from your own trading and price marking data.

116. On 18 July 2020, the Claimant emailed Jonathan Baker at the FCA. He stated that the FCA's letter on 9 October 2018 had been the trigger and the reason for his dismissal despite the FCA's decision not to take any further action. He said that "I initially did not comprehend why they could not understand my explanations until I was very recently told that your letter is essentially a firing order" [1729]. In evidence, the Claimant clarified that he had been told this by a friend who was a trader at another bank. In response, Mr Baker said that the FCA's letter set out the FCA's concerns but the FCA did not, either in that letter or in any other communication, instruct the Respondent to take any disciplinary action or to dismiss him. The Claimant emailed Mr Baker again on 23 July 2020, in which he said the original internal review/investigation actually found plausible explanations for his trading, but the decision to progress to a disciplinary investigation had been taken on legal advice in the light of the FCA letter.

117. Mr Baker's further response said that the FCA had not carried out an investigation into the Claimant's trading and had therefore not reached any conclusions as to whether the trading was improper. He added that the FCA had no involvement in initiating, directing or influencing the internal disciplinary process. He said the FCA stood by the wording of its letter of 9 October 2018 and had had no further correspondence in which it had given any instructions as to how the Respondent should respond.

118. The Claimant carried out these email exchanges in an attempt to gather evidence to support his Employment Tribunal case that the Respondent had decided to dismiss him because of the contents of the FCA's letter. It was initiated long after his dismissal and several months after the appeal outcome. It occurred around five weeks before the Final Hearing was due to start.

Legal principles

119. I have been referred to a substantial number of cases explaining the correct legal principles. I have considered all of these cases, even if they are not referred to in these Reasons. Notwithstanding this extensive consideration of caselaw, there has been a substantial measure of agreement between the parties as to the applicable law. The essential dispute in this case is the application of those principles to the facts.

A. Unfair dismissal

120. Section 98(1) Employment Rights Act 1996 provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason … for the dismissal …"

121. Section 98(4) provides:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

122. It is for the Tribunal to determine, on the balance of probabilities, the reason or the principal reason for the dismissal. Conduct is a potentially fair reason for dismissal. It has long been established that it is not the Tribunal's role in an unfair dismissal case to decide for itself whether dismissal was the appropriate sanction, given the

evidence presented before the Tribunal. Rather, the Tribunal has to decide whether the dismissal of this Claimant was a reasonable decision and whether it was taken after a reasonable procedure was followed. Where the reason for dismissal is alleged to be conduct, the correct approach was stated in the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379. This requires the Tribunal to consider the following issues:

a. Did the dismissing officer genuinely believe that the Claimant was guilty of the disciplinary charge alleged?

b. Was that a reasonable belief in all the circumstances?

c. Had the Claimant carried out a reasonable investigation before the dismissal decision was taken?

123. To be a reasonable investigation, the investigation has to be the type of investigation a reasonable employer would conduct, even if other reasonable employers might choose to undertake a more or less detailed investigation. In other words, it has to be within the band of reasonable investigations, given this particular employer's resources and the nature of the alleged misconduct (*J Sainsbury plc v Hitt* [2003] ICR 111 at paragraph 30). The amount of the investigation required to be a sufficient investigation will vary depending on the evidence:

"At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase." (*ILEA v Gravett* [1988] IRLR 497; para 15)

124. On behalf of the Claimant, reliance is placed on *A v B* [2003] IRLR 405, where Elias LJ gave the leading judgment, and in particular to paragraphs 60 and 61:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. 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, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."

125. Mr Devonshire has argued that these comments should effectively be viewed as limited to the "very particular factual circumstances in play in *A v B*", and not of general application. He relies on the recent Court of Appeal case of *Sattar v Citibank* [2020] IRLR 4 in which Mr Devonshire appeared for the Respondent, and Sir Patrick Elias commented on his earlier judgment in *A v B*. Sir Patrick emphasised the ratio of *A v B*, namely the proposition that an investigation will be unfair "if it is simply conducted with the objective of reinforcing the provisional case against the employee and ignores or unreasonably fails to pursue evidence which might support his or her case". This proposition is rather unsurprising. I do not read his comments as resiling from the need for a most careful investigation in cases where there are serious allegations of criminal misbehaviour.

126. What is more pertinent to the present case is the following passage from *Sattar v Citibank* (at paragraph 52) given that the essential facts, here as in that case, are undisputed:

> "By contrast, in this case there were no disputed facts as such, or none of significance and in so far as there might have been a simple answer to the concerns raised by the Bank that could have been disclosed at or shortly after the 8 July meeting … indeed if there was a simple and potentially convincing answer, one would naturally expect him to give it at that stage so as to allay the Bank's concerns"

127. A reasonable employer has to consider potential lines of defence identified by the employee but, depending on the facts, does not have to investigate each exhaustively. "As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the *Burchell* teste will depend on the circumstances as a whole" (*Shrestha v Genesis Housing Association Limited* [2015] IRLR 399 at para 23).

128. To be a fair dismissal by reason of conduct, dismissal has to be within the range of reasonable sanctions, given the dismissing officer's belief about the gravity of the Claimant's conduct, in the context of the Claimant's previous disciplinary record, and the Respondent's own policies ranking the comparative gravity of different disciplinary offences. If a reasonable employer with the dismissing officer's belief could have fairly dismissed for that misconduct, then it will be a fair dismissal, even if other reasonable employers with the same belief may have chosen to impose a lesser sanction.

129. Even if the dismissal decision falls within the band of reasonable responses, it may still be an unfair dismissal if the Respondent has not followed a fair procedure. The requirements of a fair procedure are set out in the ACAS Code of Conduct on Disciplinary Procedures, and considered in previous caselaw. The

Tribunal must evaluate the significance of the procedural failing, because "it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process": *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at paragraph 26.

130. The procedural issues should be considered together with the reason for the dismissal. This is because the two interact with each other. The Tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss. Where the misconduct is serious, notwithstanding some procedural imperfections, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. When considering whether the employer acted reasonably the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at paragraph 48, approving of dicta from Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 at 550). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

131. Looking at the matter as a whole includes looking at the impact of the appeal process on any earlier deficiencies in the Respondent's procedure. The Tribunal should consider the fairness of the whole of the disciplinary process. Where there has been a defect at an earlier stage, the Tribunal "will want to examine any subsequent proceeding with particular care" (*Taylor* at para 47). A defect in the handling of the appeal is in principle capable of rendering the dismissal unfair (*West Midlands Co-operative Society Limited v Tipton* [1986] 1 All ER 513).

132. The fairness of the process as a whole is not necessarily invalidated if the person conducting the appeal has been involved to some extent in an earlier stage of the procedure. The Tribunal must be realistic as to the extent to which this may be appropriate or necessary in the particular circumstances, in particular given the structure of the organisation and the expected extent of the information flow to the appeal officer if he has line management responsibilities for the area of the business in which the employee was working (see the discussion of this point in *Rowe v Radio Rentals* [1982] IRLR 177).

B. *Polkey* reduction

133. If procedural unfairness is the basis for a finding of unfair dismissal, in order to determine the appropriate remedy the Tribunal must go on to assess what would have happened had a fair procedure been followed. This requires a degree of speculation and requires the Tribunal to determine in percentage terms the likelihood that the result would have been the same. That percentage is then relevant in determining the appropriate compensatory award. This is referred to as making a *Polkey* deduction, after the House of Lords case in which this issue was considered, that of *Polkey v AE Dayton Services Limited*.

C. Contributory fault/Just and Equitable reduction

134. In addition, in appropriate cases, the Tribunal should consider whether the Claimant has contributed to his dismissal by reason of his conduct as a basis for reducing the amount of the Claimant's award. This issue is required by the wording of Section 123(6) Employment Rights Act 1996 in relation to the unfair dismissal compensatory award, and by Section 122(2) of the same Act in relation to the basic award. In order to be potentially capable of being contributory conduct, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of that conduct.

135. The Tribunal must decide whether the conduct is morally culpable. If so, then a percentage adjustment can be made to both the basic and the compensatory awards to reflect the extent of the Claimant's moral culpability as a contributory factor in his dismissal. The extent of the reduction will be the amount the Tribunal considers just and equitable. In some cases it will be appropriate to make a 100% reduction, such as where the Tribunal considers that the employee's misconduct was such that dismissal was wholly justified but nonetheless feels compelled to find dismissal unfair because of procedural flaws in the dismissal procedure.

136. An assessment of contributory conduct requires a different analysis to the determination of whether the dismissal was an unfair dismissal. It requires the Tribunal to assess whether, on the balance of probabilities, the Claimant was guilty of the misconduct for which he was dismissed, or morally culpable in other respects that contributed to the sanction of dismissal (see *Steen v ASP Packaging* [2014] ICR 56 at paragraphs 12-14).

137. In so doing, it is likely that there will be a judicial determination on a similar (though legal distinct) issue to the central issue in any future wrongful dismissal proceedings, namely whether the Claimant committed a fundamental breach of his employment contract, entitling the Respondent to dismiss without notice. If I determine that the Claimant was guilty of the alleged misconduct in the context of considering contributory fault, this may effectively preclude him from bringing a separate claim for wrongful dismissal in the civil courts. I raised this issue with Mr Singh, who accepted that this was a potential consequence of the issues that needed to be determined in these proceedings. Both parties have asked me to consider the issue of contributory fault even if I find that the dismissal was a fair dismissal.

138. In *London Ambulance Service v Small* [2009] IRLR 563 the Court of Appeal suggested that Tribunals should structure their reasons in such a way as to make it clear that the contributory fault analysis is undertaken separately from the different analysis as to whether the dismissal was unfair. I have attempted to do that in these reasons.

Conclusions

A. *Genuine belief*

139. I find Mr Hewson genuinely believed the Claimant was guilty of spoofing on each of the three dates for which this was the disciplinary charge. I accept his evidence that this was his considered conclusion, reached after he had taken legal advice as to the extent to which it was necessary for there to be direct evidence of spoofing, and the extent to which this could be inferred from the inadequacy of the Claimant's explanations. The fact that legal advice was being taken shortly before the dismissal letter was finalised shows that Mr Hewson was keen to ensure that his approach was the correct one. Contrary to the Claimant's argument, in finding that the Claimant was guilty of spoofing, he was focusing on the Claimant's trading intentions.

140. Mr Singh argues that the genuineness of Mr Hewson's belief in spoofing is undermined by the earlier draft of the outcome letter, suggesting Mr Hewson had concluded that there no spoofing on any of these three occasions, but only the perception of spoofing on two occasions. He points to the fact that no new evidence was gathered after this point. From this, he argues the draft letter must reflect Mr Hewson's genuine belief and that the outcome was altered for some ulterior reason that does not reflect his genuine belief. In particular, Mr Singh argues that a finding that there was only the perception of spoofing, rather than spoofing itself, would not be a sufficient basis for dismissal, and this is why the decision was taken to change the outcome so that the Claimant was found guilty of spoofing.

141. Having read the transcripts of the two disciplinary hearings conducted by Mr Hewson, and heard him give his evidence to the Tribunal, I reject Mr Singh's argument on this point. Mr Hewson took his responsibilities seriously throughout the process. He adjourned the initial disciplinary hearing to enable the Claimant to be provided with further data; so the Claimant had a full opportunity to explain his behaviour. Mr Hewson then carefully considered the correct outcome in the light of the evidence with which he was presented. Given the lack of direct evidence as to the Claimant's motives for this trading pattern, it was reasonable for him to take legal advice as to the weight of evidence required to find spoofing proved. The fact that he did so, rather than rush to a conclusion, is indicative of his methodical approach. His evidence on this point is not undermined by his failure to mention taking legal advice in his witness statement, nor by what he said to Mr Cohen when interviewed as part of the appeal process. Mr Hewson told Mr Cohen that the evidence was conclusive that there was spoofing on two occasions "and one certainly had the appearance of spoofing". Having heard Mr Hewson's explanations in evidence, I conclude he was satisfied on the balance of probabilities that the Claimant was guilty of spoofing on each of the three occasions – but felt the evidence was stronger on two of the three occasions.

B. *Reasonable belief*

142. Mr Singh has argued that "no evidence supporting a finding of spoofing" was obtained by the Respondent at any point after receiving the FCA letter of 9 October 2017. Implicit in this is a contention that there was no reasonable basis for believing that the Claimant had engaged in spoofing. He argues that the Respondent did not have a reasonable belief but rather it was "intending to justify disciplinary action as it wrongly believed it was obliged to do so in response to the FCA letter, and was obliged to reach what it (wrongly) believed to be the same conclusion as the FCA letter". I reject that submission.

143. My conclusion is it was reasonable for Mr Hewson to conclude that the Claimant was guilty of spoofing, given the unique pattern of pricing and trading for SLOREPs on each of the three occasions, which was not mirrored by pricing in other Slovenian bonds; given the Claimant's underlying position in holding SLOREP 35s on two of those occasions where it appeared his pricing changes had boosted his profit; and given the absence of a clear and potentially convincing innocent explanation from the Claimant.

144. The pattern of pricing and trading is a matter of record:

a. On 10 November 2017:

i. At 13:26.01, the Claimant had bought c.€ 13M SLOREP 35s from a customer at a price of 98.95;

ii. At 13:26:26 he had amended his bid on the Euro MTS Platform (so the Respondent became the best bid or buy price for SLOREP 35s, improving the previous best bid by 20 cents) to 98.96 (3M) – 99.94 (1M);

iii. At 13:40:54, he had increased his bid by a further 17 cents to 99.13 (3M);

iv. At 13:42:18 he had increased his bid still further by 1 cent to 99.14 (3M);

v. At 13:51:35 decreased his bid by 1 cent to 99.13 (3M) (but remaining at all times the best bid on the Euro MTS Platform);

vi. At 13:57:29 tried to sell the 13M SLOREP 35 to a Central Bank at what he described in the chat as *"a very good price*", without success;

vii. At 14:06:15 suspended his 2 way quote on the Euro MTS Platform and placed a 'fill or kill' order to sell notional 13M SLOREP 35s with a limit price of 98.98, and sold 12M at between 99.13 and 99.0320;

viii. During this period, he made no alterations to his posted offer (or sell) price.

(b) On 5 December 2017:

i. At 10:29:05, the Claimant placed a two-way quote on the Euro MTS Platform, becoming the best (lowest) offer to sell €1M SLOREP 35s at 99.70 (thereby improving/lowering the previous best offer by 33 cents);

ii. Reduced his offer by a further cent at 10:29:14;

iii. Reduced his offer by a further 2 cents at 10:41:22;

iv. Reduced his offer by a further 3 cents at 10:48:48 (to 99.64)

v. Increased his offer by 1 cent at 10:48:59 (to 99.65), remaining the best offer on the Euro MTS Platform;

vi. At 11:01:35-40 suspended his quote and entered a 'fill or kill' order to buy SLOREP 35s with a limit price of 99.97, resulting in the purchase of 14M SLOREP 35s at between 99.74 and 99.67;

vii. Throughout this time, made no alterations to his posted bid (or buy) price;

(c) On 6 December 2017:

i. At 07:39:20, the Claimant quoted the best bid (buy) price for SLOREP 35s of 100.41 (increasing the previous best bid by 91 cents);

ii. Increased his bid twice at 07:46:44 and 07:46:51, by 10 and 7 cents respectively;

iii. Increased his bid again at 07:50:53 by 7 cents (to 100.65);

iv. Suspended his two-way price at 08:20:27 and 2 seconds later entered a 'fill or kill' order to sell a notional 15M SLOREP 35s with a limit price of 100.39;

v. Sold 14.5M SLOREP 35s at between 100.58 and 100.49, thereby clearing the position he had acquired the previous day at a better price;

vi. Throughout this time, made no alterations to his posted offer (or sell) price.

145. Whilst claiming not to be able to remember why he adjusted his prices and traded in the way that he did, the Claimant gave several potentially inconsistent and incorrect explanations during the course of the investigatory process. For instance, the frequency of his pricing adjustments on each of the three dates was potentially inconsistent with the explanation he had given as to his general approach, that on average he adjusted his prices only twice a day. At different stages, he sought to explain his market making and trading in SLOREP 35s by

reference to his pricing on other Slovenian bonds, even though his pricing in these bonds had remained broadly static.

146. On the evidence before him, it was reasonable for Mr Hewson to infer that the reason for the Claimant's increases in his bid prices on the first and third occasion was to increase the market price for SLOREP 35s, and so increase the price at which he could sell the SLOREP 35s which he was holding at the time. In Mr Hewson's reasonable view, he was doing so in order to maximising the profit he achieved from buying and subsequently selling these bonds, by signalling to the market a view of the value of the bonds which was inconsistent with his true view.

147. On the second occasion, it was reasonable for Mr Hewson to infer on the evidence before him that the Claimant was reducing his offer price in order to lower the market price at which he could buy SLOREP 35s.

148. Mr Hewson did not unfairly focus on a snapshot of the Claimant's trading activities and ignore the relevant context. Given the picture presented by his price marking on the three days in question, and the lack of a cogent explanation from the Claimant, Mr Hewson was entitled not to look beyond the three days under investigation, nor to other bonds beyond the "Slovenian curve" of the other Slovenian bonds for which the Claimant was also providing bid and offer prices. On the evidence before him his belief in spoofing was a reasonable belief.

C. *Reasonable investigation*

149. Mr Singh criticises the Respondent's decision to instigate a disciplinary investigation at all, arguing it was triggered by the FCA's letter of 9 October 2018. In one sense, it was triggered by the FCA letter: before the FCA started its review of the Claimant's market interaction, the Respondent did not have real time data as to when the Claimant adjusted the bid and offer prices and to what extent. This was information held by the MTS, the third-party platform provider and was not available to the Respondent until it was communicated by the FCA. The scope of the FCA's review evolved over time. It was reasonable for the Respondent to wait until the FCA review had run its course before deciding to instigate its own investigation. Until the FCA's final letter of 9 October 2018, the conclusion of the FCA's process was unclear.

150. The FCA letter of 9 October 2018 did not require the Respondent to carry out a disciplinary investigation, but nor did it preclude this course of action. There was no misunderstanding of the letter by the Respondent. It asked for the Respondent to hold a discussion with the Claimant and with "other relevant parties". The Respondent did not assume that the FCA required a disciplinary investigation. Rather, it was a reasonable response, amongst other potentially reasonable responses, for the Respondent to instigate an internal investigation in the light of the letter's concerns, before discussing the matter with the Claimant in the context of a disciplinary investigation meeting.

151. As the Claimant's later email correspondence with the FCA showed, there was no further communication from the FCA encouraging the Respondent to proceed with an internal investigation, nor was there any feedback from the Respondent to the FCA about the progress of the investigation until it had concluded. Throughout its course, the Respondent's investigation and subsequent disciplinary action was independent of the FCA.

152. As an independent investigation, the fairness of the Respondent's subsequent disciplinary investigation was not tainted by the extent to which the Claimant had been invited to participate in the FCA's review. Initially, the FCA had prohibited the Respondent from discussing the pattern of market interaction with anyone outside the compliance department, including the Claimant. When this restriction was lifted, the Claimant was asked for his explanations. Whilst I do not necessarily find that the explanation provided to the FCA was exactly what was stated by the Claimant, neither do I find it was inaccurate in material respects. I have insufficient evidence to reach a conclusion on that point. I do not find any basis for criticising the extent to which the Claimant was involved in the FCA's review.

153. The sufficiency of the Respondent's investigation must be assessed by reference to the extent to which the facts were disputed. Here there was no dispute as to the Claimant's price movements as a primary dealer for SLOREP 35s on each of the three occasions or as to the trading he carried out in SLOREP 35s on each date. It was a matter of record. The only dispute was as to why the Claimant behaved as he did. Was there a plausible innocent explanation or was the Claimant attempting to manipulate the market price in order to achieve a greater profit on his own trading? In a situation such as this, where the pricing movements appear strange particularly in the light of the Claimant's subsequent trading, in practice the tactical onus lies on the Claimant to provide potentially innocent explanations - although the Respondent will want to test the plausibility of those explanations by checking them against the underlying facts. In that context, it is potentially relevant to consider whether the Claimant's marking patterns for SLOREP 35s could be explained by reference to his marking patterns for comparable bonds. The most comparable bonds would be the other Slovenian bonds he was trading.

154. The Claimant had several occasions on which he could provide an explanation for his conduct, as well as the opportunity to access market information to justify those explanations. He was initially asked about his pricing by Andrew Fernandez in August 2018. He was interviewed by Mr Blore in November 2018. He was then interviewed by Mr Hewson on two occasions – once on 20 December 2018 and again at the start of February 2019. Before the first disciplinary meeting, he knew the nature of the disciplinary allegations and he had access to all the historic market information that both he and his team would normally be able to view in the course of his work. This would not have included all the information as to the bid and offer prices for all his bonds throughout the three days, because this would be either by held by MTS or stored on the Respondent's TWS system and could only be accessed with specific permission.

155. He used the information he had to prepare the three explanations he advanced in relation to each occasion, which he forwarded to Mr Hewson on 19 December 2018. Having indicated to Mr Hewson at the first disciplinary meeting that he needed further data about his market interaction with related bonds, this was requested from MTS and the Respondent provided him in advance of the second disciplinary meeting with all the information it could reasonably obtain from MTS, namely the pricing on all the Slovenian bonds. The Claimant had been content to proceed with the second disciplinary hearing in the light of the further information with which he had been provided.

156. He then had a further opportunity to explain his trading behaviour to Mr Cohen at two separate appeal meetings. There was a third appeal opportunity in his first appeal meeting with Mr Pagano. He was subsequently provided with further TWS data in relation to his marking for the six dates that were potentially the most relevant to the disciplinary charges. These dates had become a particular focus during the first appeal hearing with Mr Pagano. Despite being provided with the information he had requested during the first meeting with Mr Pagano, he refused the further opportunity to share his analysis of this data before or during the proposed second appeal meeting with Mr Pagano. Rather he sought to broaden the enquiry yet further by reference to data concerning the whole desk without cogent explanation, and did not attend the proposed second appeal meeting with Mr Pagano.

157. It was within the band of reasonable approaches to the disciplinary process for Mr Hewson not to provide the Claimant with all of the TWS marking data during the course of the disciplinary proceedings. The relevance was not obvious, it was not specifically requested, and it was not a particular focus of the Claimant's defence at that point. It appeared, at least up until his suspension, that he would have access to much of this data in any event, albeit not all the pricing adjustments. Indeed, the Claimant had written Mr Hewson an email on 19 December 2018 at a point where he had full access to the Respondent's systems, explaining his actions. He had been provided with perhaps the most relevant data about his trading in other bonds, namely the quotes and trades in all 14 Slovenian bonds he was trading on the relevant dates, in advance of the second disciplinary hearing.

158. In any event, he was provided with the full TWS data for all his bonds in advance of the second appeal hearing with Mr Pagano. To the extent there was a procedural failing in not providing this data at an earlier stage (which I reject), it was remedied during the course of the appeal process.

159. It was reasonable for Mr Pagano not to provide the TWS data for the whole of the desk in relation to the dates in question. Given the way that the Claimant requested it at a late stage – when it had not been the Claimant's focus during the first Pagano appeal meeting – and in circumstances where he had not provided or promised any analysis of the data in relation to his own bonds, it was reasonable for Mr Pagano to regard this further request as prompted by an inability to explain

his actions by reference to the trading data in his own bonds. The potential relevance of this much wider data set was not explained by the Claimant with any degree of cogency.

160. On behalf of the Claimant, Mr Singh argues it was unfair to expect the Claimant to remember why he behaved as he did, given the passage of time in view of the number of bonds for which he was responsible. His own portfolio was more than 400 bonds and the total number of bonds traded by his desk (for which he had potential responsibility, particularly when other traders on the desk were away) was in the region of 1000 to 1500. However, the Claimant's pricing and trading behaviour was sufficiently unusual it was noted by the FCA and subject to a FCA review. In those circumstances, it was reasonable for the Respondent to turn to the Claimant for an explanation. It did so shortly after the conclusion of the FCA investigation, in circumstances where he had already given an explanation during the course of that investigation. Given the unusual yet similar market interaction on three occasions over a five-week period, in circumstances where his market making was not replicated on other Slovenian bonds, the Respondent could reasonably expect the Claimant to be able to remember the events or at least be able to reconstruct the events from the available market data.

161. I reject Mr Singh's criticism that the investigation was muddled and focused on the appearance of spoofing rather than spoofing itself. The discussion during the investigation meeting and the subsequent disciplinary hearings was sufficiently apposite to cover both potential disciplinary charges.

162. Mr Singh argues there was an unfair presumption of guilt requiring the Claimant to prove his innocence. I disagree. As part of the disciplinary process, Mr Hewson (and Mr Pagano on appeal) had to reach a conclusion about the Claimant's intentions when participating in the market for SLOREP 35s on the three dates in question. The agreed facts about the Claimant's market making fairly raised a potential inference of spoofing. Whether that potential inference should be accepted or rejected turned on an evaluation of the Claimant's explanations for his conduct. The Claimant was given many opportunities to explain his behaviour and, TWS marking data aside in relation to bonds traded by others based on the same desk, he was given the data he requested in order to do so. His TWS marking data was provided before the final appeal hearing with Mr Pagano.

D. *Reasonable procedure*

163. The Claimant's main criticism of the procedure followed was the failure to provide him with documents prepared by his line manager, Tom Clarke, as part of his own investigation. The Claimant argues that this was part of the overall investigation and therefore should have been disclosed. I reject that criticism.

164. As the Claimant's line manager, it was readily understandable that Mr Clarke would be one of the "relevant parties" with whom the FCA would expect the contents of their 9 October 2018 letter to be discussed. In that context, Mr Clarke would consider the implications of the outcome of the FCA's review; and any

necessary action points arising both for his team and for the Respondent as a whole. Attempting to understand why the Claimant traded as he did was a necessary part of his analysis, independent of any disciplinary investigation. Although Mr Clarke recorded his own thoughts in writing, this did not form part of Mr Blore's disciplinary investigation. I reject Mr Singh's argument that Mr Clarke's written record was buried "because it showed that spoofing was not the only explanation". In any event, Mr Clarke's approach was considered during the disciplinary appeal, in that Mr Cohen specifically asked Mr Clarke about his own analysis in a formal interview. This was shared with the Claimant, allowing him to provide his comments to Mr Cohen (and subsequently to Mr Pagano).

165. Mr Singh argues that the alternative disciplinary charge identified in the letter inviting the Claimant to a disciplinary meeting was an unreasonable one. This was the charge that the trading activities "could be perceived as amounting to spoofing". He says that this suffers from the same fault as was the position in *K v L* UKEATS/0014/18 – there is no room for a finding that something may have happened. Where a fact needs to be proved, it needs to be proved on the balance of probabilities. Mr Devonshire counters that this is a red herring – because the Claimant was dismissed for spoofing, rather than in relation to the alternative disciplinary charge. I agree with Mr Devonshire. There was no finding in the disciplinary outcome letter on this alternative disciplinary charge. In any event, in the *Sattar* case, the Tribunal, the EAT and the Court of Appeal all upheld the fairness of a dismissal for conduct that had been found by the Bank to give the appearance of impropriety.

166. Mr Singh criticises the length of time taken to conclude the Claimant's appeal against his dismissal. The appeal was lodged on 25 March 2019. Mr Pagano sent the Claimant an appeal outcome letter on 11 February 2020. It therefore lasted a little under 11 months. The length of time taken is partially explained by the need to change the appeal officer midway through the appeal as a result of Mr Cohen being placed at risk of redundancy. It is also explained by the extent of the enquiries initially undertaken by Mr Cohen in speaking to Mr Blore, Mr Clarke and Mr Hewson, and by the repeated opportunities given to the Claimant by him and by Mr Pagano to provide a sufficient explanation for his market interaction. The time taken does not render the dismissal unfair.

167. Finally, Mr Singh criticises the decision to replace Mr Cohen with Mr Pagano, given the extent to which he had previously been updated on the investigation and the disciplinary process and his prior involvement in the appeal as a technical expert on the Proof of Innocence email. I do not consider that this involvement constitutes an unfairness in the overall process. I apply the principle set out above from *Rowe v Radio Rentals* [1982] IRLR 177. There is no proper basis for inferring that Mr Pagano had already decided on the outcome of the appeal as a result of his prior involvement. The transcript of the appeal hearing he conducted and his subsequent involvement show he was giving the Claimant a fair opportunity to provide a convincing explanation, including further evidence in relation to his trading behaviour on the dates in question and the preceding days. Given his

seniority and his expertise in this area of credit trading, the Claimant ought to have welcomed Mr Pagano's role as Mr Cohen's replacement.

E. ***Reasonable sanction***

168. It was reasonable for Mr Hewson to conclude that the appropriate sanction for spoofing was dismissal. In the Respondent's reasonable view, the Claimant had engaged in conduct which was outlawed by the Respondent's policy, as well as inconsistent with the FCA's standards. During the appeal process, Mr Blore indicated he thought a warning might be sufficient punishment. Mr Clarke was expecting that the outcome would be a warning, rather than dismissal. These alternative views as to the appropriate outcome do not render Mr Hewson's dismissal decision outside the band of reasonable responses, in the light of the evidence that was available to him. Indeed, in cross-examination, the Claimant accepted that spoofing was very serious misconduct.

169. If the Respondent concluded that the Claimant had engaged in spoofing on three occasions, the Respondent would be obliged to inform the FCA of their conclusions and whether in their view the Claimant had breached the FCA's principles. Having so concluded, it would be rather surprising if the Respondent had decided to keep the Claimant in his role as an Associate, continuing to trade in financial products, albeit subject to a formal warning.

F. ***Unfair dismissal: conclusion***

170. Given my application of the legal principles as to unfair dismissal to the facts as found, I therefore conclude that the Claimant's dismissal was a fair dismissal. The Claimant's unfair dismissal claim fails.

Polkey reduction

171. I have found there was no procedural unfairness. Had I decided that the disciplinary process was procedurally unfair for the reasons advanced by the Claimant, namely not providing him with all the TWS marking data he was seeking at a sufficiently early stage, I would have needed to assess the percentage chance that having this information would have made a difference to the outcome.

172. Logically, this issue turns on addressing the following questions in sequence:

    a. If the TWS marking data had been provided to the Claimant at the outset, what use would the Claimant have made of this data in order to provide a more plausible analysis of his behaviour on those three occasions?

    b. What is the likelihood that such an explanation would have avoided any disciplinary proceedings at all?

c. If there had still been sufficient cause for concern to merit disciplinary proceedings, what is the likelihood that Mr Hewson at the disciplinary hearing or the appeal officer on appeal would have been persuaded by such an analysis to reach a different conclusion on the first disciplinary charge, namely the issue of spoofing?

d. In the event that the first disciplinary charge had been rejected, what is the chance that the second disciplinary charge would have been upheld, namely that the Claimant's market interaction created the perception of spoofing?

e. If the second disciplinary charge was upheld, what is the chance that the Claimant would have been dismissed for that reason?

173. If the Claimant had been provided with the TWS marking data at the outset, the likelihood is that he would have given Mr Blore the reconstruction he has given to the Tribunal in his witness statement at paragraphs 22 to 27. This reconstruction had two obvious weaknesses, which undermined its cogency. Firstly, the explanation was given in very general terms. Secondly the reconstruction did not specifically cross-refer to particular data but rather did so by reference to the data set as a whole, citing in support pages 1229 to 1654 of the bundle. As a result, had this reconstruction been given in these terms in the internal process, it would not have been convincing enough to have persuaded the Respondent to halt matters and not proceed to a disciplinary hearing. The Claimant would have faced the same charges at a disciplinary hearing. At some point, the Claimant may have sought to supplement his initial analysis with further detail (as he sought to do before the Tribunal, but which was excluded because of the very late stage at which he applied to introduce it).

174. In the Claimant's favour, had the TWS data been provided at an earlier stage and formed the basis for his explanations throughout, his explanations may have been more internally consistent than they in fact were. To that extent, his defence may have appeared more plausible. However, the likelihood is that it would have been subjected to rigorous analysis against the market data available. This is because such analysis would have been necessary in order to evaluate its cogency. It is also because ultimately the Respondent would have wanted to justify to the FCA any conclusion in the Claimant's favour, that his market interaction did not amount to spoofing.

175. The rigorous analysis is likely to have identified the problems set out in Mr Pagano's supplementary witness statement. For those reasons, the likelihood is that neither Mr Hewson nor the appeal officer would have been convinced by the Claimant's explanation. It would have been rejected and the outcome is very likely to have been the same, namely one of dismissal. However, given that Mr Hewson initially considered that spoofing was not proven, there is a chance the Claimant might have avoided a finding of spoofing. In such a situation, it is very likely that he would still have been found guilty of creating the perception of spoofing. In such a situation, the probability is he would have kept his job – given that this

seemed to be the potential outcome if only the lesser charge had been established, but there was still a significant possibility that he would have been dismissed for the lesser charge in any event, as occurred in *Sattar*.

176. Considering matters in the round, then had the issue of *Polkey* arisen for determination I would have found that there was a 75% chance that the Claimant would still have been dismissed when he was even if the TWS data had been provided to him in advance of the first disciplinary hearing. I reject the suggestion in the Claimant's closing submissions (at paragraph 101) that had a fair procedure been followed the dismissal would have taken at least one year longer.

Contributory fault

177. Although it is strictly not necessary for me to consider the issue of contributory fault, given my finding as to unfair dismissal, it is appropriate to set out my conclusion briefly on the points raised by the Respondent as potentially amounting to contributory fault. It was fully argued before me. This is appropriate in case the Claimant chooses to appeal against the outcome of his unfair dismissal claim.

178. The main respect in which the Respondent alleges that there has been contributory fault by the Claimant is this – in the Respondent's view, spoofing is the most likely explanation for the Claimant's conduct on the three days in question. I have to decide this on the balance of probabilities.

179. As to the correct approach to this issue, I have had regard to the guidance given by Lord Nicholls of Birkenhead in *Re H and others* [1996] AC 563, 586:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established".

180. In addition, both parties accepted I should apply the principle of Occam's Razor, as discussed by Lewison J in the case of *Ultraframe (UK) Limited v Fielding and others* [2005] EWHC 1638 at paragraph 18:

> "Faced with a mass of evidence, much of which is alleged to consist of deliberate, elaborate and persistent lies; and given a mound of documents, many of which are alleged to have been fabricated, backdated or forged, Occam's razor may be a useful tool. In its essence the principle of Occam's razor (or the principle of parsimony), formulated by the mediaeval schoolman William of Occam, is that where there are multiple explanations available for a phenomenon, the simplest version is to be preferred, because it requires the fewest assumptions. The principle must of course be used with circumspection and it is no more than a working tool. But it has its uses."

181. Unsurprisingly, each party contended that applying this same principle to the evidence before the Tribunal led to the opposite conclusion.

182. Whilst this issue has been argued at great length, my conclusion is that it can be answered by reference to two essential features:

    a. The strength or weakness of the inference of impropriety created by the Claimant's market making behaviour on these three dates; and

    b. The strength or weakness of the Claimant's explanations given to rebut any such inference.

183. As to the inference of impropriety created by the Claimant's market making activities, I consider that the data raises a strong inference that there was impropriety on the part of the Claimant. The strength of the potential inference is apparent from the sequence of events on the three days as recorded above, together with a consideration of the Claimant's opportunity to manipulate the market and potential motive for doing so.

184. The Claimant had the opportunity to manipulate the market given that there were relatively few participants in the market for Slovenian bonds and given that the Respondent's pricing was likely to influence the pricing of other participants, particularly where those prices would adjust automatically as a result of the operation of pricing algorithms. His pricing decisions would not normally be visible to the Respondent because this was carried out on a third-party platform. As with any trader, the Claimant had a potential motive to manipulate the market, given that this could boost the profitability of his trading and so improve the Respondent's perception of his performance. In the Claimant's case, he was concerned to ensure that the Respondent maintained its improved perception of his performance, given the Respondent's poor perception of how the Claimant had been operating less than 12 months earlier.

185. The strong inference is also supported by the attitude adopted by the FCA and by the Claimant's boss Mr Clarke:

    a. On three separate occasions in a five-week period, the combination of the Claimant's pricing and his trading in SLOREP 35s caused sufficient concern to prompt an FCA review. Given the evolution of the FCA's enquiries and eventual focus, it is likely the FCA would have viewed the Claimant's market making on those three dates in the light of the market as a whole, rather

than in isolation. That review led to the FCA's letter of concern dated 9 October 2018. I bear in mind that the FCA had reached no conclusions, as they clarified in subsequent correspondence. However, they were sufficiently concerned to draw the matter to the Respondent's attention and ask for it to be discussed with the Respondent's compliance department;

b. Whilst Mr Clarke had spent considerable time considering the picture himself trying to see if the Claimant's actions could be justified, he had not been able to find an innocent rationalisation on at least one of the three dates in question.

186. The Claimant himself accepted in the second disciplinary hearing with Mr Hewson that the pattern of pricing appeared strange, given his subsequent trading.

187. As to the Claimant's explanations for his conduct, they were at odds with the pattern of events and appear to have evolved during the course of the process. However, I disregard the initial explanations provided to the FCA [157], as I have not been able to find they accurately reflected what the Claimant said to Mr Fernandez:

a. His explanation to Mr Blore in the investigatory meeting in November 2018 as to the frequency with which he adjusted prices in the Slovenian curve – namely an average of a couple of times a day – was potentially at odds with the far higher frequency of his pricing adjustments on each of the three days under consideration;

b. His explanation in his email of 19 December 2018 suggested the market was weakening throughout 10 November 2017 and 6 December 2017, but failed to justify why he would be increasing his prices if this was the case;

c. When pressed by Mr Hewson in the disciplinary hearing the following day, he subsequently adapted his explanation for these two dates to suggest he had formed his bearish view of the market shortly before he decided to sell his holding of SLOREP 35s, but could not pinpoint a particular factor that explained his change of view;

d. He suggested to Mr Hewson on the same occasion that he would generally adjust all his prices across the entire Slovenian curve at the same time. Yet contrary to this explanation, he failed to do so on each of the three occasions under investigation;

e. He could not provide a cogent explanation for why he had adjusted his bid prices on these occasions but had not made a corresponding adjustment to his offer prices at the same time. That said, in his closing submissions, Mr Singh did highlight an instance where there had been price adjustments to one side of the spread but not to the other, on an Israeli bond (supplementary bundle, page 21);

f. In his detailed Proof of Innocence email sent on 7 August 2019, he sought to justify the changes in his view of the market by reference to changes in the price of Italian and Spanish bonds, but did not stick to this explanation

thereafter. By the time of the appeal meeting with Mr Pagano, his justification for his actions on 6 December 2017 had moved on to the movements in German bonds;

g. He asked for the TWS data for his pricing changes on the three dates (and the previous days), but when these were provided he did not provide a cogent explanation based on this data. Rather, instead he asked for more data, which had not previously been his focus and whose relevance was not clear;

h. He refused to attend the second appeal meeting with Mr Pagano, when he had an opportunity to explain his actions by reference to TWS data showing his own market interactions;

i. The explanations provided in his witness statement at paragraphs 22 to 27 were expressed in the most general terms and did not cross refer to specific documents to support his analysis. Indeed, he did not even ensure that the tranche of documents potentially containing supporting data to substantiate his explanations was included in the trial bundles;

j. The Claimant's explanation in his witness statement for his conduct on 10 November 2017 is that there was sharp selling in investment grade bonds in Saudi Arabia, Qatar and Israel after 13:51. This is the first time that such an explanation had been advanced. However, such an explanation is not consistent with the Claimant's own marking patterns in those bonds. He did not adjust his bid price for each of these bonds until the end of the afternoon UK time. It is also difficult to understand why movement in these bonds would have a specific impact on movement in Slovenian bonds. There was no evidence that the Claimant had sold other Slovenian bonds after 14:06;

k. The Claimant's witness statement explanation for his conduct on 5 December 2017 is that his decision to buy SLOREP 35s was a response to increases in bonds "such as Lithuania and Mexico". Again, such an explanation appears to be at odds with his own marking patterns in relation to Mexican and Lithuanian bonds, for the reasons given in Mr Pagano's supplementary witness statement. In relation to Lithuania, the Claimant left his prices unchanged all day for nine of the ten bonds;

l. The Claimant's explanation for his marking patterns on 6 December 2017 is by reference to changes in the Bund prices. This had been discussed during Mr Pagano's appeal meeting with the Claimant. Price movements in the Bund appeared to be relatively flat throughout the day and therefore does not provide a convincing explanation for his conduct on that date;

m. In cross-examination, Mr Pagano's critique of the Claimant's explanations was not even tested in relation to market movements on 5 December 2017;

n. During these Tribunal proceedings, the Claimant sought to introduce further analysis weeks after he had finished giving evidence and did not provide a convincing explanation as to why this analysis could not have been provided at an earlier stage.

188. Based on all these features, I find that the Claimant's attempts to rebut the strong inference of impropriety by advancing an innocent explanation have been extremely weak. On behalf of the Claimant, Mr Singh argues that there is an inherent improbability in the Claimant raising his prices at a time when he was looking to sell because the risk that his offers would be accepted forcing him to buy more of a position he was seeking to reduce. However, given the limited number of market participants, and the fact that his firm offers were only for 1 million of SLOREP 35s, this was a risk the Claimant would be willing to take if the result of increasing the price was to increase the profit on selling 13 million SLOREP 35s. As a result, I do not consider that this feature makes it less probable than not that the Claimant was engaged in spoofing.

189. I bear in mind that an allegation of market manipulation (as is the case with spoofing) is a serious one, requiring strong evidence if it is to be accepted. That strong evidence is supplied by the combination of a strong inference of spoofing created by the trading patterns, together with weak and implausible contrary explanations advanced by the Claimant. In addition, I did not find the way the Claimant gave his evidence to be wholly convincing. On occasions he sought to evade difficult questions by failing to address the question in his answer. His explanations were often lengthy and incoherent.

190. As a result, on the balance of probabilities, I consider that the Claimant's conduct amounted to spoofing on each of the three occasions. Given the seriousness of this conduct, it would have merited a 100% reduction for contributory fault. Market manipulation is particularly serious wholly justifying dismissal; and if (which I have rejected) the dismissal was unfair it was only for procedural failings.

191. Mr Devonshire argues that the Claimant's conduct also amounted to contributory conduct in the following respects:

a. Having insufficient regard to the impression that his quoting behaviour on the 3 days gave to the wider market (whatever his intentions), reflected in his very troubling comment in cross-examination that the issues being raised with him were "really insignificant"; and/or

b. The inconsistent and shifting nature of his explanations he provided throughout the internal process (which were wholly corrosive of trust and confidence in the reliability of the accounts that he was giving); and/or

c. His failure to make full use of the access to all his trading data up until his period of paid suspension in February 2019 and his continued access to Bloomberg Data thereafter (up until his dismissal) "for viewing historic prices and archived chats";

d. His failure and refusal to attend a further appeal hearing with Mr Pagano (in early February 2020).

192. Given my finding that there should be a 100% reduction for contributory conduct for engaging in market behaviour amounting to spoofing, I will deal with these further allegations very briefly. Mr Hewson did not make an express finding in relation to the second of the two disciplinary charges in his final outcome letter,

whatever may have been his view on this disciplinary charge when the appeal outcome letter was in draft. More specifically, Mr Hewson's witness statement is silent as to whether he concluded that the Claimant had "insufficient regard to the impression that his quoting behaviour gave to the wider market". There is no direct evidence from Mr Hewson that the second and third matters directly influenced his decision to dismiss. Furthermore, as the IDS Handbook on Unfair Dismissal notes at paragraph 17.158, the scope is limited for there to be a finding of contributory conduct in relation to some aspect of the Claimant's conduct during the disciplinary process. As to the fourth matter, this postdates the date of dismissal and therefore could not have been a contributing factor to his dismissal. For these reasons, I do not consider that there has been contributory conduct in the further respects identified by Mr Devonshire.

ACAS Code of Conduct

193. Had I needed to determine the point, I would have decided that the Claimant had failed to comply with the ACAS Code of Conduct as to Disciplinary Procedures in failing to attend the second appeal meeting with Mr Pagano to justify his market interaction and rebut the disciplinary charges. For this reason, there was a potential basis for making a reduction in the amount of any award under Section 207A(3) Trade Union and Labour Relations (Consolidation) Act 1992.

194. I do not consider that there was a corresponding failure on the part of the Respondent to comply with the procedures required by the Code of Conduct. The delay in relation to the timing of the appeal was not a failure to comply with the Code of Conduct, and is explained by (a) the thoroughness of Mr Cohen's initial involvement (b) Mr Cohen being placed at risk of redundancy and subsequent redundancy (c) the need to find a replacement (d) the opportunity given to the Claimant to provide his explanation by reference to the TWS marking data and (e) the offer of a second appeal hearing with Mr Pagano. The decision to appoint Mr Pagano was not a breach of the Code given the indirect extent of his prior involvement, and was a potentially appropriate choice, given his seniority and relevant experience.

Employment Judge Gardiner
Date: 14 December 2020