EMPLOYMENT TRIBUNALS

Claimant: **Mr D Madaras**

Respondent: **Citibank NA**

Heard at: **East London Hearing Centre**

On: **8, 9, 10, 11 and 12 May 2017**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Mr A Robson (Counsel)**
Respondent: **Mr T Linden QC (Counsel)**
Miss D Sen Gupta (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

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

2. **The dismissal was fair in accordance with section 98(4) of the Employment Rights Act 1996.**

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

REASONS

1 By a Claim Form presented on 23 April 2015, the Claimant brought a claim of unfair dismissal which was resisted by the Respondent. By agreement, the issues to be determined are:

1.1 What was the reason for the Claimant's dismissal? The Respondent relies upon conduct pursuant to section 98(2)(b) ERA.

1.2 Did the Respondent act reasonably in treating the Claimant's conduct as sufficient reason for dismissing him pursuant to section 98(4) ERA? The Claimant asserts that the Respondent acted unreasonably for the reasons set out in paragraphs 28 and 29 of his Grounds of Complaint.

1.3 Did the Respondent follow a fair process in dismissing the Claimant? In particular, at the stage at which the respondent formed its belief that the Claimant had committed an act of misconduct, had the Respondent carried out as much investigation as was reasonable in all the circumstances of the case?

1.4 Should there be any reduction in the basic award pursuant to section 122(2) ERA?

1.5 What a loss has been sustained by the claimant in consequence of the dismissal section 123(1)? In particular, would he have been dismissed in any event? If yes, when?

1.6 If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event? If so, when? Alternatively what percentage reduction should be applied to reflect the chance dismissal would have occurred in any event?

1.7 Has the claimant mitigated any loss as required by section 123(4) ERA?

1.8 Did the claimant cause or contribute to his dismissal? If so, to what extent and should there be a reduction in compensation on a just and equitable basis, Section 123 (6) ERA?

1.9 What compensatory award should be awarded to the claimant on a just and equitable basis, having regard to paragraph above?

1.10 Should any award of compensation to the Claimant the uplifted due to a failure by the respondent to comply the ACAS code and, if so, by how much?

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

3 The Tribunal heard evidence from the Claimant and was provided with, on his behalf, a witness statement from Ms Carly McWilliams. Mr Linden had no questions for Ms McWilliams although she was prepared to attend for cross-examination if required.

For the Respondent I heard evidence from Mr Timothy Gately (EMEA Head of Equities); Ms Deborah Garlick (Employee Relations Operations Specialist); Mr Ranjan Patwardhan (MD of the XVA Business), Ms Julie Wiggan (Employee Relations Senior Operations Specialist) and Mr Julian Phipps (FXLM and Regional Sales Compliance Director). I was provided with an agreed bundle of documents and I read those pages to which I was taken in the course of evidence and submissions.

4 Having reached findings of fact and conclusions on liability as set out below, the Claimant's claim failed on the merits. As such, it was not necessary to make findings of fact or reach conclusions on remedy and therefore I have not done so.

Findings of fact

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

6 The Claimant commenced employment on 7 September 2010 as a Forex trader. He reported to Mr Giles Page, who in turn reported to Mr Anil Prasad, the Managing Director and Global Head of FX and Local Markets. The Emerging Markets desk was located next to the G10 desk and both fell within Mr Prasad's area of responsibility.

7 As part of his job, the Claimant was required to have extensive knowledge of economic activity, news and political developments and the state of market conditions and flows. He was encouraged to obtain market colour and to exchange information about recent market trading activity and developments with third parties, including traders at other banks. One means of communication used was Bloomberg chat rooms. As well as news, data and analysis, the chat room facility permitted real time direct messaging between members of the room. The Claimant was encouraged by his managers to use chats, however such encouragement is not the same as encouragement to share confidential information in those chats.

8 There were no specific rules about what could be said in the chat rooms but existing policies about confidentiality applied to chat rooms as they did to any medium of communication. Explicit training and guidance about use of chat rooms was not given until 2012. In his statement, the Claimant describes a workplace in which chats were widespread and that it was common for traders and sales staff to take a relaxed approach to what could be shared such that it was not uncommon for traders to be able to infer from general market knowledge the identity of clients being discussed or for thinly veiled terminology to be used. The Claimant's case in this hearing is that managers were aware of the sharing of information between banks and that strict confidentiality applied only to a limited number of specific clients. This is not the case which he advanced in the internal disciplinary hearing.

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

> "**You shall not, either during your employment (save in the proper performance of your**

duties) or after the termination of your employment, make use of or communicate to any person or organisation, and shall use your reasonable endeavours to prevent the unauthorised use, publication or disclosure of any trade secrets or other confidential information of or relating to the Company or Associated Company which you may have acquired whilst in the employment of the Company or any Associated Company.
For the purposes of this Contract, confidential information shall include, but shall not be limited to:-

(i) the identity of potential clients and/or customers, including confidential information relating to any such potential clients or customers;
(ii) the identity of customers, agents, vendors, distributors, suppliers, investors, issuers, clients, distributors or employees dealing with or through the Company and/or any Associated Company, including any confidential information relating to any of them;
(iii) …
(iv) terms of trading, costings, prices, pricing structures of or relating to the Company and/or any Associated Company;
(v) confidential information relating to commercial relationships and/or negotiations of the Company and/or any Associated Company;
(vi) confidential financial information relating to the Company and/or any Associated Company;
(vii) information relating to confidential transactions of the Company and/or any Associated Company."

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

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

- **The identity of potential clients and/or customers, including confidential information relating to any such potential clients or customers;"**

11 The Claimant was also subject to the Respondent's Code of Conduct which is issued annually. Employees must attest that they have read and completed online training in respect of the same. The 2009 Code of Conduct included provisions regarding privacy and security of client information; it required employees to safeguard all personal and confidential information about clients by ensuring that client information is only shared with authorised individuals. Employees were expressly advised that:

"**If a competitor or client tries to discuss subjects with you that raise concerns about anti-competitive conduct, you should refuse to do so and ask the person to stop immediately. If necessary, you should leave or otherwise terminate the conversation and promptly report the matter to your business unit's internal legal counsel or to the Corporate Law Department."**

12 The obligation to safeguard personal, proprietary and confidential information included using it only in the performance of assigned job duties and not using, or

permitting, it to be used for unauthorised purposes. Such information must not be shared outside of Citi, except where permitted or required by law or a relevant legal authority.

13 The same provisions of the 2011 Code differed slightly in terminology but contained the same requirement that employees safeguard all personal and confidential information about clients by ensuring that it was only used for authorised purposes relating to the employee's job and shared only with authorised persons. Again the 2011 Code prohibited sharing of information outside of Citi, except where permitted or required by law or a relevant legal authority. The same advice was given to deal with a situation where a competitor tries to discuss subjects which give rise to concerns about anti-competitive conduct. In cross-examination, Mr Robson sought to suggest to Mr Gately that he had wrongly applied the 2011 Code to the Claimant's conduct which occurred when the 2009 Code was in place. I am not persuaded either that Mr Gately made such an error or, even if he did, that it was in any way material given that the requirement upon the employee remained the same in both.

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

12.1 A Confidential Material Non-public Information policy. This defined confidential information generally as non-public information belonging to the Respondent or its clients. Client information was defined to include information relating to a client's business activities or strategies; it should be treated as confidential unless publicly available.

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

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

12.4 Electronic Communications Policy 2009. This was stated to cover US Institutional Clients Group (ICG) employees. It provided that all electronic communications must be created with care and transmitted in accordance with regulatory and Citi requirements.

15 Employees of the Respondent, including the Claimant, received annual training in compliance matters. Initially only a small part of the training dealt with confidentiality and then at a very general level. After the regulatory investigations began in 2013 and 2014, the training on confidentiality became more focused and detailed.

16 The Claimant accepted that he had read the confidentiality term in his contract, had been given a copy of the Handbook when he joined and had attested to reading

the Code when issued. The position was not so clear with regard to the other policies. The Claimant's evidence was that he understood the policies as implemented at the time but considered that they permitted use and discussion of sensitive information with a third party so long as there was a legitimate business reason. One such reason, according to the Claimant in his evidence to this Tribunal, was where he held a position on behalf of the Respondent for which he needed to offset the risk. To do so, he needed to trade with another counterparty, to whom he may have to disclose economic details such as whether he was a buyer or seller, size and price in order to make that counterparty feel sufficiently comfortable to trade. The Claimant maintained that the price of a trade would be shown to clients of the Respondent (and some other banks who were also clients) via a trading system called Velocity. It was common ground, however, that Velocity would not identify the client who had just execute a trade, only the price which was information publically available to help determine the trend in the market. The Claimant accepted in cross-examination that it would be wrong to tell a competitor that he had traded with a client, at a certain price and to suggest a price at which the competitor should also trade with the same client.

17 The Claimant's evidence to the Tribunal about confidentiality was more nuanced than his acknowledgement to Mr Gately that he understood the policies and the requirements of confidentiality in place at the time of the chats. At times, it appeared that the Claimant was not prepared to accept the fact that in the disciplinary hearing he had confirmed such an understanding. He sought instead to answer questions about what he said in the disciplinary hearing by emphasising what he now claimed to be his understanding, broadly that he was permitted to use confidential information even with third parties as long as it was for the purposes of doing his job. To this extent it appeared that the Claimant was seeking to rely upon his current understanding of confidentiality, developed in light of the criticisms made by the FCA in its final notice and issues arising from the other cases of a similar nature in which he was a witness, to justify his conduct at the time. On balance, I find that the Claimant's understanding of confidentiality as expressed in his evidence to me was not reliable and I could attach little weight to it.

18 Mr Gately's evidence was given in an open and straightforward manner. He accepted that the identity of the client *per se* was not necessarily confidential, it would depend upon the context and what other information was disclosed with it. He considered it clear that information about a particular trade with a particular client was absolutely understood to be confidential information which should not be shared with a competitor such as an external trader. The fact that the Claimant was properly seeking to offset risk and so perform his job did not entitle him to disclose such information or deprive it of its confidentiality. I accept that this was Mr Gately's genuine understanding of the duty of confidentiality both at the time and during his evidence to this Tribunal.

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

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

21 On 11 November 2014, the Financial Conduct Authority published its final notice imposing a financial penalty of £225,575,000 on the Respondent in respect of its G10 Spot FX trading business. The Final Notice did not expressly consider the conduct of the Emerging Markets FX trading business in which the Claimant worked. The FCA found that use of chat rooms was common practice and, whilst not of itself inappropriate, it increased the risk of collusive activity and sharing confidential information such that it was especially important that there were appropriate controls and monitoring. Whilst the Respondent had policies in place, these were high-level in nature, applied generally across business divisions and did not give specific guidance on chat rooms or differentiating confidential information from generic market information. In summary, the Final Notice concluded that:

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

outside London had inappropriately shared confidential client information in a chat room with a trader at another firm.

22 On 11 November 2014, the Commodities Future Trading Commission in the United States fined the Respondent $310m for, amongst other things, lacking adequate internal controls to prevent its FX traders from engaging in improper communications with FX traders at other banks and having inadequate policies and oversight of FX traders' use of chat rooms or other electronic messaging. The same day, the US Controller of Currency issued a Cease and Desist Order in respect of certain of the Respondent's Spot FX traders' disclosure of confidential bank information in chat rooms, including customer order flows and FX rate spreads. It noted that the Respondent had already began to take necessary and appropriate steps to remedy the deficiencies and unsafe practices. On 20 May 2015, the Respondent entered into a plea agreement with the US Department of Justice in respect of one charge of violation of anti-trust laws. The same day, the Respondent paid a $342m fine to the Federal Reserve in respect of deficient policies and procedures which had prevented it from detecting and addressing unsafe and unsound conduct by FX traders, including communications in chat room which disclosed confidential customer information.

23 As part of the Respondent's internal investigation, the Claimant was asked to attend an interview on 21 October 2014 to discuss certain of his Bloomberg chats. The Claimant was not permitted to retain a copy of the chats at the conclusion of the meeting. Minutes of the meeting were not provided to the Claimant or later to either of Mr Gately or Mr Patwardhan. They are legally privileged and have not been disclosed in these proceedings.

24 On 27 November 2014, the Claimant was suspended. A letter of the same date confirmed that the reason for suspension was allegations that he had inappropriately shared client confidential information and misused the Bloomberg chat facility.

25 On 1 December 2014, the Respondent invited the Claimant to attend a formal disciplinary hearing on 5 December 2014, chaired by Mr Tim Gately, supported by Ms Deborah Garlick in her capacity as Employee Relations Specialist. The allegations were set out in an appendix to the letter; in summary that in two chats in November 2010 and April 2011, the Claimant had inappropriately shared client confidential information with traders at other banks (the Client Identity Disclosures). The appendix listed the various policies said to have been breached, copies of which were enclosed with the letter. The Claimant was also provided with copies of the chats although the relevant parts were not highlighted for ease of reference. The Claimant was advised that he could submit any additional information or documentation to Mr Gately but that he could not discuss the information provided with anyone other than his chosen companion. The Claimant was advised that the allegations potentially constituted gross misconduct which may result in dismissal.

26 On 4 December 2014, the Claimant was provided with a copy of a third chat, in April 2012, which was also to be discussed at the disciplinary hearing.

27 In advance of the hearing, Ms Garlick prepared a draft script which she provided to Mr Gately. It contained a list of 13 proposed questions, some dealing with background and some specific to the content of the chats. Three of the questions

relate to the Claimant's understanding of confidentiality. Albeit split into three in the draft script, the questions essentially cover the same issue: was the Claimant aware of his obligations under the policies included in the disciplinary pack about disclosure and safeguarding of client confidential information.

28 Mr Gately had chaired five previous disciplinary hearings and understood that he should consider the chats, the information provided by the Claimant in the disciplinary hearing, undertake any further investigation he felt was required to reach a decision, decide whether the allegations were proven and, if so, what sanction was appropriate. Mr Gately was provided with copies of the chats and relevant policies, which he read in advance. He had previously read the FCA Final Notice and was aware of its contents regarding the G10FX trading desk. Mr Gately had not worked on the FXLM business but had over 21 years' experience in finance. I accept that Mr Gately had a good general understanding of the way in which trades are carried out and markets made by traders from his previous jobs as Head of Credit Trading and Head of High Yield and Distress trading.

29 The three chats to be discussed were:

1. 12 November 2010

The Claimant told the other participant to the chat ("T") "**leftie coastie gave me some tom fix 1cy cny**", before adding later "**fun!**".

2. 8 April 2011

At 08:37:46, the Claimant asked T whether he needed any usdbrl (a currency pair). From 08:42, the following exchange took place:

08:42:17 T: one guy is asking 10 usdbrl
08:42:26 T: what do u wanna show an offer?
08:42:27 C: fking hell
08:42:32 C: I know exactly who it is
08:42:39 T: [name of client A]
08:42:41 C: he's a seller
08:42:44 C: fking a
08:43:06 T: may 3?
08:43:14 T: that's bmf date
08:43:18 T: where do u see the px [price]?
08:43:23 T: I will make him nice
08:43:32 C: he gave me at 5820
08:43:42 C: show him 5770/20
08:44:46 T: I will make him
08:44:53 T: what ahole
08:45:22 T: this is bad…
08:46:02 T: nothing
08:46:05 T: what ahole
08:46:32 C: jackazz
08:47:06 T: I hate these guys
08:47:09 T: seriously
08:47:12 C: especially them
08:47:22 C: they are terrible"

Later that morning, C tells T that the "**same idiot back in usdbrl…heads up";** there is a gap in chats of about an hour before T replies "**oik ok**".

3. 2 April 2012

There was a chat exchange in which the phrase "**frank the tank**" was used by another trader and the Claimant replied "**35/50 ntg"**.

30 Despite the relatively short period of 4 days between invitation and hearing, the Claimant attended the disciplinary hearing on 5 December 2014, accompanied by a colleague, Mr Mike Lawrence. He did not request a postponement. He did not suggest that he had not had sufficient time to prepare. He did not suggest that he did not understand the allegations against him. The hearing lasted one hour, it was recorded and a verbatim transcript appears in the bundle. After Ms Garlick's initial introductions, the following exchange took place:

> "**Tim Gately: Have you had time to go through the pack? Have you read all the - is it fair to say that you understood at the time, and had participated in, all the normal Compliance refreshers and protocols that we had to follow round the firm?**
>
> **David Madaras: Yes.**
>
> **Tim Gately: So, you're comfortable that you were fully aware of the requirements within the firm about client confidentiality, about discussing trades and information with competitors and/or anybody really outside your immediate team?**
>
> **David Madaras: I am."**

31 Mr Gately then discussed each of the chats in turn with the Claimant. The Claimant provided satisfactory responses for the November 2010 and April 2012 chats. During the course of which, the Claimant discussed the general culture of sharing information as market colour, including size and flow of transactions, but was emphatic that this would not include client names. In the context of the November 2010 chat, Mr Gately indicated that he understood the Claimant's need to talk to other dealers to offset risk, his concern even for that chat was whether information specific to a client was shared with a trader at another bank to work against the client.

32 The Claimant's position on the third chat was that client A had approached him for a price on a large transaction in usdbrl outside of the normal trading hours for that market. This could be a risky trade for the Claimant as he would have fewer options to offset the risk and so was reluctant to trade at the level proposed. Instead he agreed to show a price on a smaller amount with the assurance that client A would not go elsewhere to fill the remainder of the intended order. That was why the Claimant asked T if he wanted usdbrl. The subsequent exchange arose because client A then approached T and the Claimant realised that the client was seeking to trade elsewhere, apparently in breach of its assurance to him. The Claimant explained that it was T who had given client A's name and that this was in the course of a series of quickly sent chats. In other words, the Claimant's chat should read "**I know exactly who it is" "he's a seller**" rather than the seller chat being a response to T giving the name of client A. Mr Gately was concerned that the Claimant had gone on to give T further client

information about the price at which he had dealt with client A and even suggested a price which T should show to client A. In other words, it was not only the seller comment but the continuation of the chat with further information provided. The Claimant's defence was that he only gave T the price he was showing generally on the market.

33 The Claimant accepted that he should have raised the chat to compliance at the time. I find that this was an acknowledgement of his own mistake in continuing to chat to T and not, as Mr Linden sought to suggest, an attempt to blame only T for disclosing the name and/or client A for market abuse.

34 At the end of the disciplinary hearing, the Claimant was asked if he had anything else he wished to discuss. He said no.

35 Following the disciplinary hearing, Mr Gately considered the chats and the Claimant's explanations. He was satisfied that there was no wrongdoing in the chats 1 and 3, but that there had been in chat 2. In deciding that the Claimant's conduct in that chat amounted to misconduct, Mr Gately accepted that the identification of the client as a seller came before the naming of the client by T, but nevertheless considered the disclosure of the price of the trade once the client had been identified by name and as a seller to be confidential information. In other words, if the Claimant had stopped the chat after the seller comment, there would not be misconduct as it was T who had disclosed the name; the misconduct arose in the further information provided by the Claimant once it was clear that both the Claimant and T knew that they were discussing the same client.

36 Mr Gately considered the Claimant's defence that he was acting in the Respondent's best interests and in the course of his job requiring him to offset risk when dealing with a predatory client, but did not accept that this permitted the disclosure of confidential information. He relied upon the Claimant's assertions that he understood the duty of confidentiality in place at the time of the chat. Having concluded that this was an act of gross misconduct, Mr Gately considered the Claimant's clean disciplinary record, acknowledgement of wrongdoing and cooperation with the investigation as mitigating factors. Mr Gately struggled with what he considered was a difficult decision; he was "**gutted**", as he put it, that this one chat out of so many, so long ago, could lead to dismissal. Nevertheless he concluded that summary dismissal was the appropriate sanction given the severity of the disclosure of confidential information. As there was no dispute that the Claimant had attended the usual training and was a "**good guy"** (as Mr Gately described him), Mr Gately did not consider it necessary to speak with his line manager, Mr Page, or to check his appraisals.

37 I found Mr Gately to be a credible and reliable witness who had approached his duties as dismissing officer in a considered an impartial way. He was not unduly critical of the Claimant and accepted his explanations of chats 1 and 3. I reject the Claimant's evidence that Mr Gately conducted the disciplinary hearing in an aggressive manner or that the Claimant was in any way inhibited from setting out his explanation of the chat in full.

38 In reaching his decision, Mr Gately was not referred to the Respondent's Global

Disciplinary Review Policy. The Policy applies to disclosure of confidential information and is stated to apply to all Citi businesses globally. The Policy did not form part of the Claimant's contract of employment and was not included in the disciplinary pack, consistent with Ms Garlick's evidence that it is not in fact applied in the UK business. Rather than the three business reviewers envisaged by the Policy, Mr Gately alone made the decision to dismiss the Claimant, although it was later confirmed as appropriate by Mr Nicholas Childs in Compliance. Appendix C includes a list of factors to be considered when assessing disciplinary issues, although these are stated to be subject to the requirements of local law and processes. Whilst not referring explicitly to each in reaching his decision, I find that Mr Gately did take into account the matters set out therein when considering the mitigating features which he identified as above.

39 The decision to dismiss the Claimant was communicated to him by letter dated 19 December 2014. In the letter, Mr Gately set out his conclusion that there was a breach of confidentiality in relation to chat 2, acknowledging that he had not disclosed the client name, but stating:

> "**You validated the other trader's disclosure of the client's name by stating that the client was a seller and disclosing the price at which you had traded with that client."**

The finding of inappropriate sharing of client information was then supported by three paragraphs of reasons; (a) motivation of the disclosure of the price traded with client A and suggestion of a price to T were irrelevant; (b) disclosure of the price traded with client A and identifying it as a seller went beyond market colour; and (c) the price disclosed to T was not common knowledge. In conclusion, Mr Gately found that the disclosure of confidential information about the price at which the Claimant traded with a client active in the market as a seller was a material breach of the obligation of confidentiality.

40 This was not the first time Mr Gately had heard a disciplinary case alleging disclosure of confidential information by an employee. On 8 May 2012, he had issued a final written warning to another employee, Ms Natasha Good. The allegation related to a single disclosure in a telephone conversation where a former colleague asked whether a client (whom they named) had bought and Ms Good replied "**uh – yes**" without providing any further information. In the contemporaneous letter confirming the warning, Mr Gately concluded that this amounted to gross misconduct however the employee's admission of wrongdoing, mistaken belief that the information was already in the public domain and clean disciplinary record were mitigating factors which warranted a sanction short of dismissal.

41 The Claimant appealed against his dismissal by letter dated 26 December 2014 on grounds that: (a) the seller chat was part of the earlier chat, not a response to T's identification of the client by name; (b) the prices he showed generally were similar to those shown to T and were part of an attempt to hedge the risk; (c) disclosure of past prices dealt is not confidential in FX markets as transaction details are made publically available on-line. The Claimant acknowledged his errors of judgment in not escalating the breach by T and his failure to exit the chat sooner.

42 On 14 January 2015, solicitors for the Claimant wrote to the Respondent setting out their interpretation of the fairness (or otherwise) of dismissal. Points raised were

that the Claimant did not disclose the client's name, that the seller chat was not a response to the name, that a traded price is not confidential and that the culture of the bank was very different at the time of the chat. In particular, the letter stated:

> "**It is highly likely that conversations of the sort which our client engaged in via Bloomberg on 8 April 2011 were commonplace (but for the other trader's disclosure of a client name which our client recognises was inappropriate). As our client did not confirm the name disclosed by the other trader and in a scenario where the client is common to both traders, we cannot see how our client can be said to have disclosed information of a confidential nature."**

As for the FCA Final Notice, the solicitors suggested that dismissal was opportunistic. In context, on balance, I find that to be an allegation that dismissal was designed as a response to the FCA Final Notice and not an argument that the Claimant had not appreciated that he had committed misconduct because of the wider conduct identified in the FCA Final Notice.

43 Mr Patwardhan was appointed to hear the appeal, supported by Ms Wiggan from Employee Relations. Mr Patwardhan was a more senior manager than Mr Gately. Mr Patwardhan's role was to review rather than reinvestigate the disciplinary case, although he could ask for further investigation of any point raised in the appeal if appropriate. The Claimant's appeal was one of three being heard by Mr Patwardhan which arose from historic chats in the FX business (the other two were Stimpson and McWilliams). On 8 January 2015, in connection with one of these appeals, Mr Patwardhan asked Ms Garlick for details of sanctions in other cases where disciplinary action had been taken for disclosure of confidential information. She stated that there had been two similar cases in the last two to three years; one had resulted in dismissal and the other in a warning because the information was disclosed inadvertently. On 9 January 2015, he asked Ms Garlick and Ms Wiggin whether there had been other cases of a similar nature where conduct had been detected but not pursued. There were not as far as the two women were aware, although it appears that neither checked any records but rather relied upon their own knowledge and experience. Mr Patwardhan upheld the dismissals of both Mr Stimpson and Ms McWilliams.

44 The appeal hearing took place on 19 January 2015; it lasted 45 minutes and was recorded. The Claimant was accompanied by Mr Lawrence. The Claimant had prepared 5 and a half pages of notes for his appeal which he presented to Mr Patwardhan. In summary, the Claimant's case was that (a) he had not disclosed confidential information in chat 2; (b) Mr Gately was wrong to find that the "seller" comment was a response to the disclosure of the client name; (c) traded price is not confidential; (d) his reputation had been damaged by dismissal; (e) dismissal was not consistent with the Global Disciplinary Review Policy.

45 In developing his points, the Claimant maintained that T's disclosure of the client name had put him in a difficult position as he would be compromised even if he had closed the chat (although in something of a contradiction he then referred to two further chats later in the day where T had again disclosed a client name and the Claimant had not responded). The Claimant asserted that he had been poorly trained and had not known what to do at the time. Fairly read, I find that this is a complaint that he had not been trained in how to respond to a breach by a third party, not a complaint that he had not been trained sufficiently to understand his own duty of confidentiality. The

Claimant addressed each of the points set out in appendix C of the Global Review Policy. Whilst raising the FCA Final Notice, the Claimant's point about standards in FX at the time was to assert that "**I strongly suspect**" that others who made similar mistakes and were disciplined in 2010-12 would have received a lesser sanction, if any at all. He was not, I find, asserting that there would have been no misconduct to have disciplined in 2010-12 merely that the sanction would have been lighter.

46 During the hearing, Mr Patwardhan explored with the Claimant the part of chat 2 which dealt with the price to be shown. The Claimant maintained that his use of "**him"** did not refer to the client whom T had named earlier, rather that he (the Claimant) was making a price to T. Mr Patwardhan relied upon the natural interpretation of the words used and rejected as implausible this suggestion. I find that this was not an unreasonable view for him to form, not least as the Claimant accepted in evidence that he could see the ambiguity in how it read and that it was open to multiple interpretations. Mr Patwardhan invited the Claimant to identify any particular cases where other employees had been treated more leniently; he was not able to do so but instead referred to a strong suspicion and asked Employee Relations to look through disciplinary action or failure to discipline for such conduct in the preceding four years.

47 Mr Patwardhan considered the Claimant's points but was not persuaded. Mr Patwardhan concluded that even after the "seller" chat, the Claimant had disclosed the price at which he had traded with a named client and that this amounted a disclosure of confidential information. Whilst he accepted that the price levels of transactions may be available on a public website, the crucial difference was that such prices were not accompanied with disclosure of the identity of the client in the transaction. By letter dated 12 February 2015, the Claimant was informed that his appeal had failed.

48 As part of his appeal, the Claimant had complained that the fact of his suspension had leaked to the press. Mr Patwardhan said in the appeal hearing that he would investigate. In fact, all he did was refer to Ms Wiggan who was told by the Corporate Affairs Officer that the Respondent had not issued any statement to the press. No further investigation was undertaken into treatment of similar confidentiality cases in the preceding four years as Mr Patwardhan considered that the information already provided by Ms Garlick and Ms Wiggan was sufficient.

Law

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

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

50 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to

determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

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

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

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

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

55 The reasonableness of the investigation should be looked at as a whole and it is not necessary for the employer to investigate every point made by the employee in his defence, **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399.

56 The test for the range of reasonable responses is not one of perversity but is to

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

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

56.1 the importance of framing charges with precision. Where care has been taken to frame a charge formally and put it formally to an employee, normally only the matters charged can form the basis for dismissal, **Strouthos v London Underground Ltd** [2004] IRLR 636, CA.

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

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

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

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

Police Authority UKEAT/0205/08. Mr Linden did not expressly take any point on what was meant by "*senior management*" in this case, but rather submitted that the weight to be attached to this factor depended upon the extent to which the employee knew or ought to have known better.

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

59 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47. This requires the Tribunal to take into account evidence which emerges in the course of an internal appeal, **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112, HL.

60 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case (paragraph 5) and that any invitation to a disciplinary hearing contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare (paragraph 9).

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

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

Conclusions

A genuine belief in misconduct?

63 The Claimant does not dispute that the genuine reason for dismissal was conduct, albeit there is an issue about the precise conduct for which he was dismissed. I have accepted that the conduct for which the Claimant was dismissed by Mr Gately was disclosure of confidential information, specifically the traded price of a client who had been identified by name and as a seller. Read fairly, I conclude that the letter of dismissal is consistent with Mr Gately's acceptance in the disciplinary hearing that the

seller chat was a continuation of the Claimant saying that he knew who had asked T for usdbrl. In other words, I conclude that the use of "**and"** in the formulation of the dismissal letter referred to the combined effect of disclosing first that the client was a seller and then, knowing that both he and T knew who the client was, disclosing the price at which he had traded. In this context, I find that Mr Gately was not using "**and"** to refer to the seller and price as two separate, individual acts of misconduct as Mr Robson sought to suggest. Nor have I found that the Claimant was dismissed for attempting to shade the market. The Claimant's comment to T about the price to be shown caused both Mr Gately and Mr Patwardhan concern, not least as it caused them to doubt the credibility of his explanations. To that extent it was part of the context of the chat just as much as the other exchanges which tend to suggest that the Claimant was unhappy with a particular client and was not simply sharing information with T in order to offset risk on the market as the Claimant suggested.

Was such belief reasonable, based upon reasonable investigation?

64 As this is an unfair dismissal, it is not for me to conclude whether or not the Respondent's decision was objectively right but to consider whether or not Mr Gately, and later Mr Patwardhan, formed beliefs which were reasonable and based upon a reasonable investigation at the time when they reached their decisions. The Claimant's case in this Tribunal was that Mr Gately's belief was not reasonable because there had been insufficient investigation of evidence which could exculpate as well as inculpate. This, Mr Robson submitted, was particularly important where the Respondent is well-resourced and the Claimant is deprived of access to documents and potential witnesses through suspension. I do not disagree with Mr Robson's submission as a matter of principle, but it must always be balanced against the requirement to assess the extent of investigation reasonably required by reference to the position adopted by the employee in the internal hearings including any admissions given.

65 As for Mr Robson's submission that there should have been a preliminary, separate investigation stage, the ACAS Code accepts that this is not always required. Here the internal review and the subsequent disciplinary process were treated as being separate, albeit that the later arose from the former. The Claimant, Mr Gately and Mr Patwardhan did not have the benefit of any information obtained in the internal review beyond copies of the chats. As Mr Gately could not rely upon an earlier investigation, the duty to undertake a reasonable investigation rested upon him at disciplinary stage and he could reasonably be expected to investigate any relevant points raised by the Claimant or other matters which might reasonably be expected to be necessary.

66 Applying those considerations to this case, the Claimant accepted that he had known and understood his duty not to disclose confidential information at the time of the chat and that the disclosure by T of the client's name was wrong. His defence was not then, as it has become now, that he did not believe that he acted in breach of confidentiality at the time because the culture was different. The Claimant admitted an error of judgment in not escalating the matter further. Both Mr Gately and Mr Patwardhan had the entirety of the chat which showed that even after client A's identity was disclosed, the Claimant continued to chat and to disclose further information. Whilst the price on an executed trade may be publicly available on websites, the crucial distinction drawn by both Mr Gately and Mr Patwardhan was that the client's identity

did not accompany the price. This was a point so obvious that it was conceded by the Claimant in evidence and was not something which reasonably required further investigation at the time. As the Claimant's solicitor recognised in its letter on appeal, the distinction between this and other typical chats was that the client's identity had been disclosed (even if not by the Claimant). Insofar as Mr Robson's submissions suggest that one should consider entirely independently the disclosure of direction of trade and the disclosure about price, both in a vacuum ignoring the admitted disclosure of the client's name, this is an artificial distinction and one which both Mr Gately and Mr Patwardhan were reasonably entitled to refuse to draw.

67 Here the clear, undisputable evidence in the chat was that after the Claimant knew that T was talking about a particular client, and was considering trading with that client, the Claimant chose to give T the specific price at which he, the Claimant, had already traded with the same client. By continuing the chat and providing the price, the Claimant had confirmed the identity of the client named by T.

68 It is of note that the Claimant has placed significantly greater reliance on the FCA Final Notice in this Tribunal than he ever did internally. Indeed, Mr Robson identifies 12 background circumstances which required at least some investigation; each of which appears to relate to conduct on the EM FX desk at the relevant time. The Claimant's defence in the disciplinary process was not that he did not understand what was meant by confidentiality because of what he saw in the behaviours of others on the desk. This was not a case like Mr Stimpson or Ms McWilliams where the defence was that the employee did not believe that the information was confidential as by reference to the conduct of their peers they believed it sufficiently 'anonymised' to amount to market colour. Even though the Claimant did not rely upon the culture/condonation argument at the time, in such circumstances, should Mr Gately reasonably have been expected to investigate the same? I conclude that it would not be within the range of a reasonable investigation to require an employer to do so given the Claimant's admissions.

69 As for the length of the disciplinary hearing and the extent of follow up investigations, the mere time spent is not determinative of reasonableness, rather the issue is whether there were matters raised which reasonably required further investigation. I do not accept Mr Robson's submission that there was insufficient investigation of the Claimant's understanding of the policies on confidentiality or what was required of him. Even if the draft script was not followed, in the sense that the Claimant was not asked essentially the same question in three different ways, Mr Gately put a simple question to the Claimant about his understanding. The Claimant had a proper opportunity to raise any areas of doubt or lack of training. He did not say that he was confused by the question nor did he say that he was unsure about what was meant by confidentiality in the course of his duties. A reasonable employer is entitled to take an employee at their word in such a situation.

70 The Claimant had a full opportunity to set out his case before Mr Gately, indeed he confirmed at the conclusion of the hearing that he had nothing further he wished to discuss. Despite being suspended, the Claimant understood that he could ask for further information to be provided to Mr Gately and he exercised this right in respect of an additional chat which, in the event, he did not refer to in the hearing. The Claimant did not suggest in writing or in the hearings that there were any other people to whom

Mr Gately should speak. As such, I am not satisfied that the failure to have a separate investigation stage renders Mr Gately's subsequent belief in misconduct unreasonable.

71 With respect to the careful construction of the "proper performance of duties" point advanced by Mr Robson in cross-examination and submission as a means of suggesting that there had been no breach of confidentiality, this was not a defence advanced during the internal process. I have found that Mr Gately was aware of and understood the trading environment from his own extensive experience. The Claimant's job and its proper performance, for example in hedging risk, was discussed in the disciplinary hearing. The motive in disclosure (to protect the Respondent's position) is not the same as whether or not the information may properly be disclosed. Mr Gately considered both points. The Claimant did not take the position that Mr Gately did not understand the FXLM desk sufficiently well to understand the need to hedge risk or suggest that further investigation was required. The Claimant's case to this Tribunal is that disclosure of client information was permissible where required for the Respondent to effectuate and risk manage transactions. He relies upon the Terms of Dealing which state that the Respondent may use the economic terms of the transaction *but not the counterpart identity* to source liquidity or execute risk-mitigating transactions. This argument, not advanced internally, takes the Claimant no further as it was precisely because the identity of the client was known that the use of the economic terms of the trade was confidential. The Claimant refers to "nuanced complications" in the chat; Mr Gately and Mr Patwardhan formed a reasonable belief formed upon reasonable investigation that there was nothing nuanced about it.

72 Nor do I accept that the Claimant's manager, Mr Page, was "*excluded"* from the investigation as Mr Robson suggests; certainly he was not interviewed but there is no relevant evidence which he could have given relevant to the case then being advanced by the Claimant, beyond confirming what was already known, namely that he was a good employee with a clean disciplinary record.

73 For the reasons set out above, I have concluded that Mr Gately formed a reasonable belief in misconduct based upon an investigation which fell within the band of what was reasonable in the circumstances of the case. Was there investigation required at the appeal stage, in light of the grounds of the Claimant's appeal, which was not undertaken such as to render the process overall unfair? To some extent this elides the stages of the **Burchell** test with the later consideration of fairness within s.98(4). At this stage, I limited myself to considering whether the belief formed by Mr Patwardhan was reasonable based upon reasonable investigation. By the appeal, the Claimant's defence was that he had not disclosed the client's name, he had shown prices to hedge risk, traded prices were publicly available and the Global Disciplinary Review policy had not been followed. Insofar as the Claimant's solicitor's letter had referred to the FCA Final Notice it was not, I have found, an assertion that the Claimant had not appreciated that he had committed misconduct because of the culture. As such, I am not satisfied that any further investigation was reasonably required.

74 At paragraph 42 of his submissions, Mr Robson addresses the relevance of the Global Disciplinary Policy. This policy was not contractual, not provided to the Claimant and not relied upon by the Respondent. This is an unfair dismissal case only and, therefore, it appears to me more relevant to consider whether, having regard to the process actually adopted, there is anything in the Global Disciplinary Procedure

which renders it contrary to section 98(4). In other words, whether a failure by the Respondent to meet a standard of fairness to which it aspires globally renders this dismissal unfair within the Employment Rights Act statutory scheme. In the context of investigation, Mr Robson relies upon the failure to adhere to the requirement for input from the line manager and/or to have only one rather than three business reviewers. I consider that this is a technical argument rather than one of substance on the facts of this case. There is little if anything which Mr Page would have added even if involved. As for the two other reviewers, Mr Gately confirmed his decision with Compliance who agreed that it was appropriate. The matters listed in appendix C were broadly considered by Mr Gately and on review by Mr Patwardhan (where the policy was part of the grounds of appeal). Overall, I am not satisfied that any failure to comply with the Global Disciplinary Policy was such as to render the beliefs of Mr Gately and/or Mr Patwardhan unreasonable or that the investigation underpinning such beliefs was unreasonable either.

75 As for the criticisms of the investigation of consistency of treatment, as set out with the condonation/culture points above, this was not a defence identified by the Claimant in the disciplinary hearing. To the extent that consistency of sanction was raised on appeal, Mr Patwardhan had taken some steps to investigate and appears disappointed with the lack of concrete information provided to him by Employee Relations. There is some merit to his disappointment as the Respondent, with its extensive resources, could and should ideally have conducted a proper search its records for comparable cases. A reasonable investigation is not a counsel of perfection. Whilst it would have been better to investigate further, the failure to do so was not of such magnitude as to deprive Mr Gately and Mr Patwardhan of a reasonable belief in the misconduct based upon reasonable investigation.

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

76 The Claimant submits that the sanction of summary dismissal was outside of the range of reasonable responses. In his submissions at paragraphs 58 to 61, Mr Robson raises a number of factors which he says were given insufficient weight, if considered at all, by way of mitigation. I have found, however, that Mr Gately struggled with this decision and was well aware of the fact that this was a single act of misconduct, without aim for personal profit but to protect the Respondent by an employee who had a good record, had not disclosed the actual client name and had co-operated. It may well be the case that I would not have found in such circumstances that the Claimant's conduct was a deliberate, knowing breach of confidentiality such as to amount to a repudiatory breach of contract. However, it is not for this Tribunal to substitute its view for that of the employer. Confidentiality is at the heart of banks' relationships with their clients. Having regard to the nature of the Claimant's conduct, even with all of the powerful mitigation which Mr Gately properly took into account, I do not accept that the sanction of summary dismissal fell outside of the range of reasonable responses as suggested.

77 Mr Robson raises a number of challenges to the procedural fairness of the dismissal. The first is lack of clarity in the charge, asserting that the invitation to the disciplinary hearing did not identify sufficiently clearly the misconduct alleged. A disciplinary invitation does not require the precision of a legal pleading (even if here it was drafted with legal input). As the ACAS Code makes clear it need only provide

sufficient information for the employee fairly to know and be able to answer the allegations for which he might be dismissed. Whilst there is no definition of the particular client confidential information disclosed and whilst the relevant passages in the chat were not highlighted, I do not accept Mr Robson's submission that the logical inference was that the allegation related only to disclosure of the identity of a client. That conclusion is supported by the fact that the Claimant equally does not appear to have been so confused either in the days before the disciplinary hearing or during the hearing itself. On a related point about the allegations, I have not found that the Claimant was dismissed for "shading the market" but for the disclosure of the traded price for an identified seller client.

78 As for the context of the Claimant's understanding of the rules and policies at the time of the chat, prior to this Tribunal claim it was not the Claimant's case that he was being held to a standard of confidentiality not in place at the time of the chats or that he was confused about what was permitted, see by contrast the cases of Stimpson, McWilliams and Hoodless in particular. Many of the challenges to the fairness of the dismissal now advanced appear to draw more from the criticisms of the Respondent's procedures in those cases than to the Claimant's specific circumstances and conduct at the time. For example, the Claimant adopts Ms McWilliams' evidence about an alleged instruction by Mr Prasad in connection with a predatory client. The Respondent has denied that such instruction was given. In any event, it was no part of the Claimant's case in the disciplinary hearing or appeal hearing that he knew of such an instruction, far less that he relied upon it. The same applies in respect of Mr Ramchandani's dismissal. Even accepting that Mr Gately and Mr Patwardhan were aware of broader problems in the FX business, both from the FCA Final Notice and the disciplinary cases against other employees with which they were involved, I am satisfied that the equity and substantial merits of the case did not require them to suggest the culture defence to the Claimant or to consider it independently of him raising the same.

79 As set out above, I have accepted that the Respondent could have investigated more assiduously the circumstances in which the Claimant's name was leaked to the press. This was a leak which was damaging to the Claimant's reputation in circumstances were there was yet any misconduct to be found. Given the Respondent's repeated insistence upon the Claimant's obligation to keep the facts of the disciplinary process confidential, under pain of further disciplinary charges, it was rather a mealy mouthed response to simply say that there had been no official statement. Be that as it may, I do not consider that such a failure is relevant to the merits and equity of the dismissal overall.

80 The Claimant relies on two types of **Hadjiannou** inconsistency. First that the Respondent treated certain conduct as permissible; I have considered and rejected this submission for reasons set out above. The Claimant's conduct was materially different to that of the other employees where the key issue was whether information was treated as confidential. The combination of client name, direction and disclosed sale price in this case did not apply to other cases nor, I find, did it properly fall within the areas of uncertainty raised in the culture of the FX desks. Second, that the Respondent treated an employee in a similar position (Ms Good) differently to the Claimant. I have found that Ms Good was disciplined and found by Mr Gately to have committed an act of gross misconduct for confirming the identity of a client who was

named by the external party to a conversation. So far, there is no disparity of treatment even though the conduct of Ms Good occurred in 2012, a period when the Claimant now asserts that different standards applied. The difference was the sanction. I accept Mr Gately's evidence explaining the reason for the difference: unlike the Claimant, Ms Good did not go on to disclose, unbidden, further information such as an actually traded price. This difference is sufficiently weighty to render the circumstances of Ms Good and the Claimant not materially the same.

81 For all of these reasons, I find that the dismissal was fair in all the circumstances of the case, having regard to the size and administrative resources of the Respondent and the equity and substantial merits of the case. The claim fails and is dismissed.

Employment Judge Russell

26 May 2017