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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr B Ozkaptan**

**Respondent:** **Citibank N.A.**

**Heard at:** **East London Hearing Centre**

**On:** **8 September 2017**

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

**Representation**
**Claimant:** **Mr M Lee (Counsel)**
**Respondent:** **Mr T Linden QC & Ms D Sengupta (Counsel)**

## JUDGMENT

**The judgment of the Employment Tribunal is that:-**

**(1) The application for reinstatement and/or reengagement is refused.**

**(2) The compensatory award shall be reduced by 20% by reason of Polkey.**

**(3) Even if not fairly dismissed for misconduct, there was a 60% chance that the Claimant would have been fairly dismissed for some other substantial reason by 1 July 2015.**

**(4) The basic and compensatory awards shall be increased by 10% as the Respondent unreasonably failed to comply with the ACAS Code of Practice.**

**(5) The basic and compensatory awards shall be reduced by 25% by reason of contributory fault.**

**(6) The Claimant is entitled to a basic award of £5,878.13 (15 x £475 = £7,125 + 10% - 25%).**

**(7) The Respondent shall pay to the Claimant compensation for unfair dismissal in the sum of £78,335 (the statutory cap).**

**(8) The Respondent shall pay to the Claimant compensation for wrongful dismissal in the sum of £25,000.**

## REASONS

1 By a Judgment sent to the parties on 21 February 2017, the Claimant's claims of unfair and wrongful dismissal succeeded. The reasons included the following paragraphs relevant to assessing remedy:

(i) Paragraph 15: to some extent the Claimant's evidence to the Tribunal differed from that given to Mr Davis in the disciplinary hearing as to his understanding as to what was required for information to be confidential. However, the Claimant's evidence did not appear evasive and I was not satisfied on balance that any difference in specific articulation of his understanding in the course of detailed cross-examination was inconsistent with his broad understanding as disclosed to Mr Davis or Mr Cogolludo during the internal hearings.

(ii) Paragraph 41: Mr Davis accepted that Mr Page's comments suggested that he considered that what mattered was what could be done with the information and that it was significant whether a trade had been completed, consistent with the Claimant's understanding.

(iii) Paragraph 43: the cumulative effect of the use of the term B in a number of chats meant that it was not unreasonable for Mr Davis to believe the Claimant had been referring to a specific client and that the Claimant's answers had been confusing and at time inconsistent.

(iv) Paragraph 45: Mr Davis was an impressive and credible witness. He did not consider this a black and white situation but maintained that there was disclosure of information in the chats.

(v) Paragraph 73: Mr Davis genuinely believed that the Claimant's conduct in the chats amounted to an act of misconduct.

(vi) Paragraph 79: a reasonable investigation required the Respondent to explore the central element of the Claimant's defence with his line manager who was already being interviewed and whose evidence may exculpate the Claimant if he agreed that in the EM FX environment a two way price request was not regarded as confidential.

(vii) Paragraph 81: Mr Davis' belief in misconduct was genuine but not reasonable based upon reasonable investigation.

(viii) Paragraph 86: when considering sanction Mr Davis and Mr Cogolludo accepted that there was no evidence that the Claimant had engaged in further misconduct in the two years since the change in regulatory

environment. Mr Davis took into account the Claimant's length of service, that he was not acting for personal gain and that he had been co-operative. Nevertheless the sanction fell within the range of reasonable responses open to an employer.

(ix) Paragraph 91: the Claimant's conduct was foolish, particular with regard to the additional information disclosed in chat 8.

(x) Paragraph 94: the contents of the FCA Final Notice support the Claimant's case and suggest a widespread systemic problem why information sharing of this sort was the norm amongst traders and was tolerated by at least some managers.

2 At this hearing I heard evidence from the Claimant and on behalf of the Respondent from Mr Julian Phipps (Head of Foreign Exchange and Local Markets and Regional Sales Compliance Team in London). I was provided with an agreed bundle of documents and read those pages to which I was taken in evidence.

**Findings of Fact**

3 The Claimant was 39 years old at the effective date of termination.

4 The parties agreed that at dismissal the Claimant's net weekly pay of £2,243.10; weekly pension allowance of £272.95 and the cost of replacement benefits at £120.96 per week. The Claimant would also have received a bonus in 2015 (the figures for which are agreed at £68,900 for 2015 and by extension 2016). The only disputed element of remuneration was whether the Claimant was also entitled to compensation in respect of his variable pay for 2015 and onwards. Neither bonus nor variable pay is claimed for the 2014 financial year.

5 The variable pay element is referred to as Weighted Average Code Allowance. The Respondent's case is that this allowance was stopped for all employees in the Claimant's area from January 2015. It relies upon an email from HR dated 7 September 2017 confirming that if not dismissed, the Claimant would not have received a code allowance for 2015 or subsequent years.

6 The Claimant's case is that the code allowance was introduced to deal with banking Regulations limiting the relative size of bonus to basic pay. The effect of the removal of the code allowance would have been a 20% salary reduction for the Claimant. Where the code allowance was removed for employees it was replaced with some other form of remuneration. This is consistent with the HR email which refers to a role based allowance for a limited number of individuals but which, it says, would not have applied to the Claimant. There is no further evidence from the Respondent as to the nature of the allowance, the criteria for entitlement or the numbers who did get the new allowance.

7 On the balance of probabilities I prefer the Claimant's case and find that the relative size of the code allowance in his overall remuneration means that it is likely that there would have been an agreement to replace it by some other means. As such, I find that the variable pay element should be included in the calculation of his losses.

8 The Claimant expressed a desire for reinstatement or re-engagement.

9 The Respondent has not recruited somebody to fill the Claimant's seat and as such his previous job is still available. There are also seven further job advertisements posted by the Respondent online for which the Claimant says that he is suitable. Five of those advertisements are for the roles of Trader on the Investment Management Desk FX Councillor, Turkish Relationship Officer and Capital Markets Multi-Asset Trader and FX e-Trader. It is not suggested that the Claimant does not have the skills and expertise to fulfil those roles. There are also two further vacancies which I have been asked to consider, namely Business Unit Manager and Market Surveillance Team Lead. These are part of the compliance and control function involving key regulatory and compliance responsibilities. The Claimant has no experience working in either area.

10 I accept the Claimant's evidence that his long service with the Respondent and the specialist nature of his experience, limit his opportunity to find suitable alternative employment elsewhere. Whilst the Claimant was not involved in the FX rigging scandal and was not dismissed for market manipulation in FX, his prospects of finding another similar job have been harmed by the stigma attached to his dismissal. On the Claimant's own evidence, more than one potential opportunity has been dashed by the intervention of the compliance team of the potential new employing bank. Given these problems, I accept that the Claimant's desire to be reengaged or reinstated by the Respondent is a genuine desire to re-establish his career. I find that if reinstated, the Claimant could and would put the events of his dismissal behind him and move on to the benefit of both him and the Respondent.

11 Whilst the Respondent accepts that there are jobs available for which the Claimant has the required skill and experience it maintains that it would not be practicable to appoint the Claimant to any of these (including his former job) as the relationship of trust and confidence has broken down due to his misconduct. In essence, even if the dismissal were unfair and even if a lesser sanction may have been appropriate, the Claimant still conducted himself in a way which would preclude his appointment due to regulatory concerns.

12 The Claimant's job at the time of his dismissal required him to be approved by the FCA because he traded certain financial products. The Respondent's practice was to carry out initial due diligence and only to put a person forward for approval if they were satisfied that they would meet FCA requirements for "fit and proper". The FCA criteria in assessing fit and proper include (1) honesty, integrity and reputation; (2) competence and capability and (3) financial soundness. Mr Phipps would have been the person responsible for conducting the fit and proper assessment for the Respondent and I accept his evidence that if he were not satisfied that an individual in question was fit and proper he would not advance them to the FCA for approval.

13 Where the Respondent became aware of information which called into doubt the fitness and propriety of a person who had already been approved, it would notify the FCA. Disciplinary proceedings are included as a criterion in the FCA guidance and, I accept, would have been something requiring notification. On balance, I accept Mr Phipps's evidence that had the Claimant not been dismissed on 1 May 2015, he would

have been required to maintain his approved person status in order to continue to perform his or any other role in the FX line of business. Even if not an act of gross misconduct, the Claimant's chats were misconduct and his behaviour was worthy of notification to the FCA which would put his fit and proper status at risk.

14 Since 7 March 2016, the approved person regime was replaced by the senior managers and certification regime. Whereas previously the Respondent put forward employees to be approved by the FCA, the senior manager's regime devolves responsibility to the Respondent which must certify the employee as being fit and proper to perform their roles. This requires a personal attestation by the employer, here again it would be Mr Phipps. I accept Mr Linden's submission that were Mr Phipps to certify something which he did not genuinely believe, he would be placed in potential breach of the FCA rules.

15 Mr Phipps' evidence was that by reason of the findings made in the liability Judgment and also his own understanding of the requirements of client confidentiality, he would not have certified the Claimant as a fit and proper person. His rationale was that even if not gross misconduct, the Claimant had been disciplined for acts of misconduct in connection with the chats and had behaved in a manner worthy of censure. Mr Phipps' understanding of the requirements of client confidentiality is stricter than that expressed by Mr Davis and does not accord with the culture in FX at the time. Nevertheless, I found him a reliable witness and accept that he was not taking an unduly harsh position merely for the purposes of the litigation. Mr Phipps' role is in compliance and, therefore, is understandably more risk averse. Insofar as the Claimant suggested that Mr Phipps or compliance would not have the final word on practicability, I disagree. The compliance view is not only important but critical in this sector, as demonstrated by the Claimant's experience of seeking employment in other banks where compliance have effectively overruled the business unit.

16 Mr Phipps would have been reaching a decision on fit and proper in 2015 when the problems in the FX market were well known and the FCA Final Notice had made clear the importance of client confidentiality. A FCA decision on 29 March 2017 concerning client confidential information shared by an individual at another bank emphasises the point. There the employee, Mr Niehaus, shared via instant messaging client confidential information received during the course of his employment with a personal acquaintance and a client who was also a friend. The information was not disclosed so that the recipients could use it, but as Mr Niehaus wanted to impress them. The FCA found that there had been a breach of the principle requiring the employee to act with due skill, care and diligence and imposed a fine of £37,198. In the circumstances, I conclude that there were rational reasons why Mr Phipps would have considered the Claimant not fit and proper in the circumstances of the case in 2015 and, based upon the findings of the Judgment, it is not practicable now to require the Respondent to attest to the FCA that the Claimant is a fit and proper person.

17 I find that if a sanction short of dismissal had been imposed by either Mr Davis or Mr Cogolludo in 2015, on the balance of probabilities, Mr Phipps would reassessed the Claimant's status as fit and proper and his concerns about the Claimant's honesty, integrity and reputation would have led to the removal of his approved person status. Before reaching this decision, there would have been an internal process by which the compliance team would carry out their own investigation. This process would include

review of the transcripts of the internal hearings and the chats, consultation with the Claimant's line manager and, very likely, an opportunity for the Claimant to make his own representations. I attached little weight to Mr Phipps' evidence at this hearing about Mr Page's current view about the Claimant's conduct, not least as it suggests a hardening of position from the evidence given by him to Mr Page at the time of the dismissal and he has still not seen the chats in question.

18 On balance, I accept the Respondent's evidence that this compliance process would have taken one month to conclude.

19 If the Claimant lost his approved person status, he would be at risk of dismissal for some other substantial reason as he could no longer carry out his substantive role. Before such a dismissal could fairly occur, there would be a further internal process involving HR to consider whether there were other suitable alternative roles into which he could be redeployed. The Claimant would also have had the right of appeal against Mr Phipps' decision but the appeal process would take place concurrently with the internal HR redeployment process. Mr Phipps suggested that the internal process to consider dismissal for some other substantial reason and redeployment would have taken a further two weeks to complete. I accept Mr Lee's submission that this is unduly optimistic. Pressure of work upon the HR department, which led to delays in the original disciplinary process, was likely to delay this process as well. Also, there would need to be a sufficient period of time during which there could be a search for alternative employment. Given the Claimant's long employment history, two weeks would have been unduly short. Taking all of this into account, I consider it more likely that this second internal process would have taken a further month to complete fairly.

20 Having regard to the Claimant's experience and previous working history and the extent to which approved person status was required in the Respondent organisation, I am satisfied that it is highly unlikely that alternative employment would have been obtained for him and conclude that there is a high chance that he would have been dismissed on 12 weeks' notice at the end of that two month period.

21 The Claimant has made significant attempts to find alternative work since his dismissal but has been unsuccessful to date. There is no suggestion that he has failed to mitigate his losses.

**Law**

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

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

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

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

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

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

> **23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the *Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] principle) is irrelevant. This was the conclusion of the EAT in *The Manchester College v Hazel & Huggins* (UKEAT/0136/12, para. 40) which was upheld by the Court of Appeal [2014] ICR 989, para. 43)."**

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

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

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

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

> **"7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer *shall* treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.**
>
> **8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.**
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> **9. Practicable in this context means more than merely possible but 'capable of being carried into effect with success': *Coleman v Magnet Joinery Ltd* [1974] IRLR 343 at 346 (Stephenson LJ).**

> **10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:**
>
> **'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'**
>
> **11. Similarly in *ILEA v Gravett* [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:**
>
> > **'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'**
>
> **12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: *United Distillers & Vintners Ltd v Brown* UKEAT/1471/99, unreported, 27 April 2000 at paragraph14."**

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

23 As may be seen from the above, at this first stage of deciding whether reinstatement or re-engagement are practicable, the Tribunal is expressing only a provisional determination. However, as Mr Linden submits, this does not mean that the Tribunal can simply leave proper consideration of practicability to the next occasion but must determine it at this stage also.

24 In deciding practicability, the Tribunal must scrutinise the rationality of any belief relied upon by the Respondent as a bar to practicability. Other relevant factors in considering practicability may include the effect on trust and confidence of any finding of misconduct or contributory fault, although as relevant will be an employee's long

experience, past good record and professional commitment, see **Farren**.

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

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

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

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

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

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

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

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

29 It is open to a Tribunal to reflect the possibility of fair termination in any event by either applying a percentage reduction or to award full loss for a certain period with a percentage reduction thereafter, see **Zebrowski Concentric Birmingham Ltd** UKEAT/0245/16/DA.

30 A **Polkey** deduction will not apply to the basic award, **Market Force (UK) Ltd v Hunt** [2002] IRLR 863.

31 If there is evidence of a realistic chance that the Claimant would have been fairly dismissed before the date of obtaining an equivalent job this must be factored into the calculation of loss; see **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290. This will include where the employer is able to show that the employee would have been dismissed for some other reason, **O'Dea v ISC Chemicals Ltd** [1996] ICR 222.

32 The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on discipline and grievance procedures). Where there is a concurrent claim of wrongful dismissal, the Tribunal has a choice whether to start at the expiry of the notice period or calculate the total sum due by way of loss of earnings from dismissal and then give credit for any sum due as notice pay. Whether the ACAS uplift will apply only to unfair dismissal may be a relevant factor in deciding which method to adopt, **Shifferaw v Hudson Music Co Ltd** UKEAT/0294/15/DA.

33 It was agreed that the appropriate order for deductions is as follows:-

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

**Conclusions**

34 Whilst the Claimant genuinely wishes to be reinstated and has powerful reasons for doing so and where his former job remains open, the key issues in dispute are whether it is practicable for the employer to comply and whether it would be just to order reinstatement given that I have found that the Claimant caused or contributed to some extent to his dismissal.

35 I have found Mr Phipps to be a reliable witness as to his genuine concerns about his ability to certify the Claimant as fit and proper. The legal issue is not whether I agree with his belief, or indeed whether it is reasonable, but whether his belief

properly scrutinised is rational. The fit and proper test bears directly upon the integrity and judgment of the individual. Even if the parties were willing to try to work forward constructively, this is not capable of being carried into effect with success as the Respondent would not be able to certify the Claimant to undertake controlled functions. It is not practicable to make an order which would essentially require the Respondent to certify something which it does not believe. Mr Lee says that the evidence of Mr Phipps is a hypothetical paper based exercised which disregards certain of the Tribunal findings. To some extent that observation is true. However Mr Phipps is entitled in his professional judgment as a compliance officer to disagree with the findings which I have made and to reach his own judgment on whether, in good conscience, he could certify that the Claimant as fit and proper. It is inevitable that that is to some extent hypothetical but it is also based upon Mr Phipps analysis of the primary evidence and the findings in the liability Judgment which were critical of the Claimant and his judgment.

36 Even taking into account the Claimant's long experience, past good record and professional commitment, I prefer Mr Linden's submissions and find that it would not be practicable to reinstate the Claimant due to the regulatory regime change and the need to have approved person status. The Claimant's own experience of job searching shows that other employers shared the view of Mr Phipps. The compliance regime is tighter and ultra-cautious. This corroborates the rationality of Mr Phipps' assessment and I conclude that reinstatement or re-engagement to a job requiring certification are not practicable.

37 The Claimant also suggests re-engagement to two jobs which do not require fit and proper status (Business Unit Manager and Markets Surveillance – Team Lead). Both require key regulatory and compliance responsibilities of which the Claimant has no experience. The circumstances leading to the Claimant's dismissal in which he behaved in a manner which was at the very least foolish render him unsuitable for such posts. For the same reasons, I accept Mr Phipps' evidence and am satisfied that re-engagement to either of these jobs is not practicable either.

*Basic award*

38 At the effective date of termination, the Claimant had completed 15 full years of service, all aged under 41 years old. The maximum rate of a weeks' pay was £475. As such it is agreed that he is entitled to a basic award, subject to any deduction for contributory fault, of £7,125.

*Compensatory award*

39 I started by determining the period for which financial loss should be compensated. It is not suggested that the Claimant has failed to mitigate his loss. It is inevitable that in the circumstances of a case such as this, with niche employment experience and some damage to reputation, the Claimant will find alternative employment harder to obtain. The Claimant has made significant efforts and I am satisfied that he should be awarded financial loss not only to the date of the hearing, as Mr Linden contended, but also for a period into the future. As at the date of the hearing, the Claimant does not have a job and it is clearly going to take him some time yet to find one. I accept as just the period proposed by the Claimant and therefore find

that the period of loss shall be from 1 May 2015 until 7 March 2018. Based upon my findings as to salary that would give a loss to date of £561,497.99 and future loss to 7 March 2018 of £117,659.65.

40 I considered next what would have happened had a fair procedure been followed in the disciplinary proceedings. I do not accept that there is a 100% chance that Mr Davis would have dismissed if the additional information was available from Mr Page. As set out above, I have attached little weight to Mr Phipps' evidence about Mr Page's current view of the chats as I consider it unreliable, not least as he has still not seen the chats in question. Mr Davis accepted a number of points made on the Claimant's behalf during the course of the disciplinary hearing, regarded the Claimant as "a good guy" and struggled to reach his decision to dismiss. Had a fair procedure been followed, I consider that there was a 20% chance that the Claimant would have been fairly dismissed in any event.

41 If the Claimant had not been fairly dismissed by Mr Page on 1 May 2015, I accept the Respondent's submission that even a lesser disciplinary sanction would have required it to commence a consultation period in which its compliance team would reassess whether to allow the Claimant to continue to perform a controlled function and to maintain his approved person status. As I have found above, the compliance process would have taken one month and that it is more likely than not that the recommendation of Mr Phipps would have been to remove the Claimant's approved person status thereby placing him at risk of dismissal for some other substantial reason. Thereafter, there would have been an internal process lasting a further month before the Claimant could fairly have been dismissed for some other substantial reason. As for the prospects of an outcome other than dismissal following the internal redeployment process, I do not accept that this is a case in which one can be 100% certain that the Claimant would have been dismissed fairly in any event. The Respondent has adduced no evidence of jobs which were or could have been available in that time which would not require approved person status. Given the size of the Respondent but also the nature of its business and the limited niche experience of the Claimant to date, I consider that appropriate reduction is 60% to reflect the possibility of fair dismissal in any event for some other substantial reason.

*ACAS uplift*

42 As set out in the liability Judgment, the investigation undertaken by the Respondent was limited and deficient in material respects. The Respondent has substantial resources including specialist employee relation support, it had undertaken extensive investigation in the regulatory context and yet failed to undertake basic investigations in the disciplinary context. For those reasons and the detailed criticisms set out more fully in the liability Judgment I consider that there was an unreasonable failure to comply with paragraph 5 of the ACAS Code of Practice in respect of the investigation.

43 In determining the appropriate level of an uplift I took into account the substantial extent to which the Respondent did comply with other requirements of the Code: the allegations were made known to the Claimant, he was suspended, there was a disciplinary hearing and he was offered the right of appeal which he exercised. Nevertheless investigation is an important step in the Code; here it was critical to the

Claimant's ability to obtain a proper and fair consideration of his mitigation and his explanations about his conduct. Weighing these relevant factors I consider the appropriate uplift to be 10%, both on the basic and compensatory awards.

*Contributory fault*

44 Neither Counsel submitted that there should be different reductions to the basic and compensatory award and, therefore, the same level of deduction will apply to both. I took into account the findings and conclusions in the liability Judgment as set out above about the nature of the Claimant's conduct. In deciding contributory fault, the focus is solely on the employee's conduct and not that of other employees or the employer. The Claimant's conduct was foolish as opposed to deliberate or wilful. He held a genuine belief as to the extent of his confidentiality obligations. The Claimant's explanations to Mr Davis were not materially different from those advanced in the Tribunal hearing, Mr Page's evidence and the contents of the FCA Final Notice supported to some extent the Claimant's understanding of whether he was acting improperly in the chats but, in respect of B, the Claimant's answers to Mr Davis were confusing and at times inconsistent; his conduct was foolish, particularly in chat 8.

45 Taking all of these matters into the round I am satisfied that the appropriate reduction for contributory fault is 25%.

46 In addition, the Claimant is entitled to compensation for loss of statutory rights which I assess at £350.00.

47 Having regard to the ACAS uplift and compensation for wrongful dismissal, I consider that the appropriate approach is to calculate loss overall and then to give credit for £25,000 by way of damages for breach of contract in respect of notice pay. But for the failure to follow the Code, the Claimant had a high chance of not being dismissed. As such, I consider it just that the uplift be applied in full.

48 Applying all of these calculations therefore, the Claimant would be entitled to:

(a) A basic award of £5,878.13 (15 x £475 = £7,125 +10% -25%)
(b) Compensation from 1 May 2015 to 1 July 2015 of £27,900.38 (8.7 weeks @ £4,859 = £42,273.30 -20% **Polkey** + 10% ACAS - 25% contributory fault)
(c) Compensation from 2 July 2015 to 7 March 2018 of £179,588.64 (140 weeks @ £4,859 = £680,260 – 20% **Polkey** – 60% SOSR dismissal + 10% ACAS – 25% contributory fault)
(d) Damages for wrongful dismissal of £25,000 (credit for which to be given against the compensatory award prior to application of the cap).
(e) Loss of statutory protection of £350
(f) Grossing up as relevant.

49 Although the precise calculations are set out above in the interests of completeness, the statutory cap set out in section 124(1ZA) Employment Rights Act 1996 will apply in any event. As at the effective date of termination, the relevant limit was £78,335. In the circumstances, the compensatory award will be limited to £78,335. It is understood that this sum will include the award for loss of statutory

protection.

50 In the event that either party has any proposed corrections to the calculation of the sums awarded, they are kindly asked to make submissions in writing within 28 days of this Judgment. Any submissions in response should be received by the Tribunal within 28 days thereafter. The Tribunal will then consider whether and what extent (if at all) the calculations require correction.

Employment judge Russell

19 October 2017