mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Ashton**

Respondents: **1. Barclays Capital Services Ltd**
2. Barclays Bank plc

Heard at: **East London Hearing Centre** **On: 12-15 July, 26-29 July & 2-3 August 2016**

Before: **Employment Judge Brown** **Members: Ms M Long, Mr L O'Callaghan**

Representation

Claimant: Mr R Lieper (Counsel)

Respondents: Mr P Goulding QC (Counsel)
Ms D Sen Gupta (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The First Respondent only is the correct Respondent to the Claimant's protected disclosure detriment claim.

(2) The First Respondent did not subject the Claimant to any detriments on the ground that the Claimant made any protected disclosure.

(3) The reason or principal reason for the Claimant's dismissal was conduct, not that the Claimant had made any alleged protected disclosure.

(4) The First Respondent dismissed the Claimant fairly.

(5) The Claimant's claims are dismissed.

REASONS

Preliminary

1 The Claimant brings complaints of protected disclosure detriment against the First and Second Respondent; and automatic unfair dismissal under *s103A Employment Rights Act 1996* for making a protected disclosure and ordinary unfair dismissal under *s98 Employment Rights Act 1996* against the First Respondent.

2 The parties agreed the issues to be determined by the Employment Tribunal. They were as follows:-

Correct Respondent

2.1 The First Respondent accepts that the Claimant may bring claims against it in relation to his alleged protected disclosures and his alleged unfair dismissal. As to the Second Respondent: is the Claimant entitled to bring protected disclosure detriment claims against the Second Respondent because:-

2.1.1 The Claimant was a worker within the meaning of *s230(3) ERA 1996*?

2.1.2 The Claimant was a worker within the extended meaning of *s43K ERA 1996*? Or

2.1.3 Pursuant to *s47B(1A)(b) ERA 1996* the Second Respondent was acting as agent for the First Respondent?

2.2 References to "Respondent" in the remainder of this List of Issues are to the First Respondent and, if applicable following determination of the correct Respondent(s), the Second Respondent.

Protected Disclosures

2.3 Did the Claimant make the alleged qualifying disclosures, whether considered in isolation or part of a series? In particular, in respect of each alleged qualifying disclosure:-

2.3.1 Did the Claimant disclose information?

2.3.2 Did the Claimant believe that the information disclosed tended to show the Respondent was failing or likely to fail to comply with its legal obligations under section 43B(1)(b) of the Employment Rights Act 1996 ("ERA")?

2.3.3 If so, was that belief reasonable?

2.3.4 Did the Claimant believe that he made the disclosure in the public interest (in respect of alleged qualifying disclosures made on or after 25 June 2013)?

2.3.5 If so, was that belief reasonable?

2.4 Were the alleged qualifying disclosures made in accordance with section 43C ERA 1996?

2.4.1 Did the Claimant make the disclosures in good faith (in respect of alleged qualifying disclosures made before 25 June 2013)?

2.4.2 Did the Claimant make the disclosures to his employer?

Detriments

2.5 Did the Respondent subject the Claimant to the following alleged detriments by any act, or any deliberate failure to act, on the ground that the Claimant made a protected disclosure:-

2.5.1 In October 2013, appointing/promoting the Claimant to the newly created role of Global Head of Voice Spot FX (which the Claimant contends was done in order to make him a "scapegoat" for FX systems and controls failings on the part of the Respondent)?

2.5.2 On 1 November 2013, suspending the Claimant?

2.5.3 On 6 February 2014, suspending making any decision about: (i) his entitlement to a 2013 discretionary incentive award and (ii) any deferred awards that were due to be released to the Claimant in March 2014?

2.5.4 On 12 February 2015, suspending making any decision about: (i) his entitlement to a 2014 discretionary incentive award (ii) any deferred awards that were due to be released to the Claimant in March 2015 and (iii) any increase in his fixed compensation in addition to continuing the suspension of any decisions in relation to the points at point 1.5.3 above?

2.5.5 Forcing the Claimant through an unfair disciplinary process?

2.5.6 On 8 May 2015 summarily dismissing the Claimant for conduct which did not amount to gross misconduct and, in any event, was:-

2.5.6.1 Impliedly acknowledged and condoned throughout the period of the Claimant's employment; and

2.5.6.2 Expressly acknowledged, encouraged and condoned, by compliance, legal and senior management at the Bank, between (but not limited to) March and July 2012?

Limitation

2.6 Were the complaints of detrimental treatment (each or all of them) presented before the end of the period of 3 months beginning with the date of the act or failure to act or where it is part of a series of similar acts or failures, the last of them (having regard to the ACAS Early Conciliation provisions in sections 207B ERA 1996)?

2.7 If not, can the Claimant show that it was not reasonably practicable to present the complaint before the end of that period of 3 months and that it was presented within such further period as the tribunal considers reasonable?

Remedies for detriments

2.8 If any of the Claimant's complaints of detrimental treatment are well founded, what, if any, compensation would be just and equitable in all the circumstances having regard to (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the Claimant's right (section 49(2) ERA 1996) and taking into account:-

2.8.1 Whether the Claimant has taken reasonable steps to mitigate his loss (section 49(4) ERA 1996)?

2.8.2 Whether the act, or failure to act, was to any extent caused or contributed to by any action of the Claimant? If so, by what proportion is it just and equitable to reduce the amount of compensation having regard to that finding (section 49(5) ERA 1996)?

2.8.3 Whether any compensation should be reduced (by up to 25%) because of any bad faith on the part of the Claimant (section 49(6A) ERA 1996?)?

2.8.4 Whether the Claimant is entitled to aggravated and/or stigma damages?

2.8.5 Whether the Claimant is entitled to damages for injury to feelings and/or injury to health?

Reason for dismissal

2.9 Was the reason (or, if more than one, the principal reason) for dismissal:-

2.9.1 A reason relating to the conduct of the Claimant (namely those reasons listed in the dismissal letter dated 8 May 2015)? Or

2.9.2 That the Claimant made the alleged protected disclosure(s)?

2.10 Was that reason potentially fair within the meaning of section 98(1) or (2) ERA?

Fairness of dismissal

2.11 If the reason or principal reason for dismissal was a fair one, was the dismissal fair within the meaning of section 98(4) ERA? In particular:-

2.11.1 Did the Respondent carry out a reasonable investigation prior to dismissing the Claimant?

2.11.2 At the time of the Claimant's dismissal did the Respondent have reasonable grounds to believe that the Claimant had committed the misconduct for which he was dismissed?

2.11.3 Did the Respondent have reasonable grounds for believing that the Claimant's conduct amounted to gross misconduct justifying summary dismissal without notice or payment in lieu of notice?

2.11.4 Was the decision by the Respondent to dismiss the Claimant for those reasons within the band of reasonable responses which a reasonable employer could adopt?

2.11.5 Did the Respondent follow a fair procedure for dismissing the Claimant?

2.12 If the Respondent did not follow a fair procedure in dismissing the Claimant:-

2.12.1 Would following a fair procedure have made a difference to the Respondent's decision to dismiss the Claimant? And

2.12.2 Did the Respondent fail to follow the applicable ACAS Code on dismissals?

Remedies for unfair dismissal

2.13 In the event that the Claimant's dismissal is found to be unfair, should the tribunal make an order for reinstatement or reengagement (sections 114-116 ERA 1996)? If so, on what terms?

2.14 What, if any, compensation would it be just and equitable to award the Claimant, taking into account:-

2.14.1 The loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the Respondent (section 123(1) ERA 1996)?

2.14.2 Whether the Claimant would have sustained loss (and, if so, to

what extent) if:-

2.14.2.1 He was not dismissed on the date of dismissal?

2.14.2.2 The Respondent had followed (as the Claimant contends it should have done) a different and fair procedure?

2.14.3 Whether the Claimant has taken reasonable steps to mitigate his loss (section 123(4) ERA 1996)?

2.14.4 Whether any conduct of the Claimant has been such that it would be just and equitable to reduce the amount of the basic award and/or compensatory award (section 122(2) ERA 1996 and/or section 123(6) ERA 1996)?

2.14.5 Whether any compensatory award should be increased (by up to 25%) because of any unreasonable failure by the Respondent to comply with the ACAS Code (section 207A TULR(C)A 1992)?

2.14.6 Whether any compensatory award should be reduced (by up to 25%) because of any bad faith on the part of the Claimant (section 123(6A) ERA 1996)?

2.14.7 If the Claimant is entitled to aggravated and/or stigma damages?

2.14.8 If the Claimant is entitled to damages for injury to feelings and/or injury to health?

The Claimant relied on protected disclosures set out in Further Particulars dated 1 February 2016. These were:

(1) In meetings with compliance and sales on 29 March 2012 in relation to a potential breach of client confidentiality, Mr Ashton orally disclosed to Mark Hope, FX desk level compliance ("Mr Hope"), senior sales managing directors Marcello Cavalcanti ("Mr Cavalcanti") and Simon Lomas ("Mr Lomas") and, he believes, Nick Howard, Global Head of Sales ("Mr Howard"), that interbank Chats were commonplace amongst the FX sales and trading teams, and that there was a lack of pre-existing Bank guidance on what was acceptable content for discussion on interbank Chats along with deficient Bank policies around confidential information. In particular, Mr Ashton disclosed that:

(a) What was then being put on interbank Chats, specifically regarding flow information from clients may cause breaches of Bank policy and obligations in the future;

(b) The lack of clarity from the Bank on what was confidential flow information and how this related to existing Bank policies and obligations;

(c) His focus was to analyse the then current FX trading practices on interbank Chats as against existing Bank policies and obligations to stop confidentiality breaches in the future; and

(d) Mark Clark may have engaged in behaviour prejudicial to the Bank's reputation by engaging in inappropriate discussions.

(2) On the telephone call with Mr Cartledge on 29 March 2012 referred to at paragraph 6.3(3) of Mr Ashton's original Grounds of Claim, Mr Ashton orally disclosed to Mr Cartledge the absence of any pre-existing guidance at the Bank on market colour/content and that the Bank's policies around confidential information and interbank Chats were inadequate, stating clearly that "We need to define some guidelines, as to what's right and wrong". Mr Ashton believes that Mr Cartledge reported this to senior management. In particular, Mr Ashton disclosed that:

(a) What was then being put on interbank Chats, specifically regarding flow information from clients, may cause breaches of Bank policy and obligations in the future;

(b) The lack of clarity from the Bank on what was confidential flow information and how this related to existing Bank policies and obligations;

(c) His focus was to analyse the then current FX trading practices on interbank Chats as against existing Bank policies and obligations to stop confidentiality breaches in the future;

(d) The then current Bank policies did not seem correct or adequate and a review of the then current practices was necessary to address breaches and policy gaps moving forward; and

(e) Mark Clark may have engaged in behaviour prejudicial to the Bank's reputation by engaging in inappropriate discussions.

(3) During a meeting on 5 April 2012, Mr Ashton made oral disclosures regarding the lack of pre-existing guidance from the Bank and the Bank's inadequate policies, and that he believed that this was likely to lead to breaches of the Bank's obligations going forward (for example, of confidentiality), to Mr Hope. Mr Ashton stated that although information exchange was seen by the Bank as an integral part of the FX business it was important that the Bank established acceptable parameters. In particular, Mr Ashton disclosed that:

(a) What was then being put on interbank Chats, specifically regarding confidential flow information from clients, may cause breaches of Bank policy and obligations in the future;

(b) The lack of clarity from the Bank on what was confidential flow information and how this related to existing Bank policies and obligations;

(c) His focus was to analyse the then current FX trading practices on interbank Chats as against existing Bank policies and obligations to stop confidentiality breaches in the future;

(d) The then current Bank policies did not seem correct or adequate and a review of the then current practices was necessary to address breaches and policy gaps moving forward.

Following this meeting, also on 5 April 2012, Mr Ashton believes that he repeated these disclosures orally to the London Voice Spot FX desk. Mr Ashton also sent an email on 5 April 2012 by which he informed the London Voice Spot FX desk of these oral disclosures and that he had initiated "an effort to help establish some guidelines and parameters" around "market colour and content going forward" (Mr Ashton's reference to "market colour" etc. being a reference to the more detailed contents he had disclosed orally).

(4) On 11 April 2012, Mr Ashton emailed Mr Bagguley confirming that he was "working on producing some guidelines for trading and sales commentary *so that we always operate within acceptable levels and avoid any issues*. I will keep you updated on the progress" [emphasis added]. Mr Ashton's email was in response to an email from Mr Bagguley, in which Mr Bagguley commented on the need to "raise the bar" in relation to market colour and confidential information, vindicating Mr Ashton's earlier disclosures relating to the lack of pre-existing guidance at the Bank on market colour/content and that the Bank's policies around confidential information about customer business, orders and order flow and interbank Chats were inadequate. By his email, Mr Ashton was referring to his prior disclosures that:

(a) What was then being put on interbank Chats, specifically regarding confidential flow information from clients, may cause breaches of Bank policy and obligations in the future;

(b) The lack of clarity from the Bank on what was confidential flow information and how this related to existing Bank policies and obligations; and

(c) His focus was to analyse the then current FX trading practices on interbank Chats as against existing policies and obligations to stop confidentiality breaches in the future.

(5) Mr Ashton worked on the market colour review from 5 April 2012 as well as the production of a new market colour policy with Mr Hope and Mr Colin Harrison, Mr Ashton's senior managers as well as other members of the compliance department (the names of which Mr Ashton cannot

recall), all of whom were therefore aware of Mr Ashton's disclosed concerns as set out elsewhere in these particulars.

(6) On 10 May 2012, the first Market Colour Workshop was held with both Sales and Trading. Attendees at the meeting included Mr Lomas, Mr Cavalcanti and Nico Dechosal, Head of London forwards ("Mr Dechosal") all of whom were made aware of Mr Ashton's disclosures orally during the workshop and subsequently in writing by an email sent by Mr Hope on 10 May 2012. In that email, Mr Hope repeated the substance of Mr Ashton's oral disclosures during the meeting, that "Interbank colour has the potential to give rise to further legal and compliance risks" and that the lack of policies and guidance was likely to lead to the Bank failing to comply with its obligations. In particular, Mr Ashton had disclosed that:

(a) Information regarding trade ideas, views on the market (strategies), future intentions, fixings, stop loss orders, customer orders and spreads were being discussed on both interbank and client Chats;

(b) The Bank needed to develop policies and procedures to ensure that FX spot traders were aware of what was and what was not acceptable, and that what was then being put on interbank Chats may cause breaches of Bank policy and obligations; and

(c) Interbank colour had the potential to give rise to further legal and compliance risks, and that the lack of Bank policies and guidance was likely to lead to the Bank failing to comply with its obligations.

(7) Mr Ashton suggested, and Mr Hope agreed, that a second workshop should be held, specifically for the FX trading team, which was held on 14 May 2012 (there may also have been further workshops). During the second workshop, Mr Ashton disclosed concerns that:

(a) Information regarding trade ideas, views on the market (strategies), future intentions, fixings, stop loss orders, customer orders and spreads were being discussed on both interbank Chats;

(b) The Bank needed to develop policies and procedures to ensure that FX spot traders were aware of what was and what was not acceptable, and that what was then being put on interbank Chats may cause breaches of Bank policy and obligations;

(c) Interbank Chats contain specific fixing references regarding information exchanged on fixes and trading intentions; and

(d) The Bank's policies were not clear or were insufficient, and that it was not clear whether there may be breaches (or had already been breaches) if this was not addressed.

It is clear that the workshops were attended by a variety of Bank employees from trading, sales and compliance, including Mr Colin

Harrison. During these meetings, Mr Ashton openly restated his concerns regarding the lack of pre-existing Bank guidance and the Bank's inadequate policies, and that he believed that this was likely to lead to breaches of the Bank's obligations, including confidentiality, to Mr Hope, Mr Colin Harrison and Mr Dechosal amongst others. It was also agreed at the meeting on 14 May 2012 that a separate discussion around fixing information was required due to the lack of pre-existing Bank guidance.

(8) On 26 June 2012, Mr Ashton emailed Mr Hope (copied to Mr Dechosal) regarding his continued concerns about the Bank's policies on fix orders stating "… we need a further discussion about fixes, we need to be very clear about this going forward". Mr Ashton also recalls (although he cannot recall the precise date) orally disclosing to Mr Hope that pre-existing Bank guidance in relation to fixes needed further clarification as to whether the current FX practices were consistent with the Bank's confidentiality obligations in relation to information being shared with other banks around the 'ECB' (European Central Bank) and 'WMR' (WM/Reuters) Fix. Mr Ashton also disclosed orally to Mr Hope that: he had already raised his concerns about fixing references regarding information exchanged on fixes and trading intentions via interbank Chats with Mr Hope, and also with Messrs Cartledge and Colin Harrison; that no action seemed to have been taken; that it was still unclear whether this was in breach of the Bank's policies or obligations (the implication being, based on the lack of action taken by the Bank, that it was not a breach); and that he still believed it needed further consideration.

(9) On 27 June 2012, Mr Ashton became aware that the Bank was the subject of an FCA Final Notice in respect of LIBOR, which increased his concerns that the Bank could be at risk of similar breaches with regulatory consequences in respect of FX.

(10) In the course of the telephone call on 28 June 2012 referred to at paragraph 6.3(7) of Mr Ashton's original Grounds of Claim, with compliance and with senior management at the Bank (Mr McGowan and Mr Cartledge), Mr Ashton made further disclosures about market colour to senior management at Barclays. He explained how FX fixes operated, and explained the conversations that took place around fixes, with a view to "netting" offsetting flows. Mr Ashton was given some re-assurance, in particular by Mr Cartledge, that discussion of fix orders was (i) known about and (ii) endorsed by the Bank. Mr Ashton believes notes of this call were taken by Mr Hope and circulated to Nick Howard and Mr Bagguley, repeating and further disseminating his disclosures. However, nothing was said about Bank policies being either amended or created to reflect this discussion, or any other guidance being provided by the Bank. Mr Ashton still believed it needed further consideration.

(11) Around 5 and 6 July 2012, Mr Ashton had further calls with Mr Hope in which he stated orally that he "wasn't comfortable with fixes colour" (or words to that effect), that is, he was not happy about the prevailing lack of

Bank guidance around fix discussions and the likelihood of this resulting in breaches of the Bank's obligations. Mr Ashton also believes that he reminded Mr Hope that he had raised these issues with him, and others, previously, without any action being taken, and that he still believed it needed further consideration.

(12) Mr Ashton believes that further calls with either Mr Cartledge and/or Mr Hope took place on (at least) 9 and 16 July 2012, in which he reiterated his concerns regarding "fixes colour". In particular, Mr Ashton recalls telling Mr Cartledge that he was "really uncomfortable" about, and "really concerned going forward", regarding aspects of fixes and market colour, and that this was likely to lead to breaches of the Bank's obligations and asked him to escalate his concerns to senior compliance and legal. Mr Cartledge's email dated 17 July 2012 acknowledged Mr Ashton's concerns in relation to (i) barrier stops; (ii) fixing orders and (iii) interbank Chats and that he had raised these with senior compliance and legal. In particular, Mr Ashton disclosed to Mr Cartledge on these calls that:

(a) He was concerned about market colour and content on interbank Chats specifically fixing, customer orders and confidentiality;

(b) This was likely to lead to breaches of the Bank's obligations and that Mr Ashton wanted it escalated to senior legal and compliance for their input on this process; and

(c) That he had already spoken to Mr Cartledge about his concerns about fixing content being exchanged on interbank Chats, but despite Mr Cartledge having told Mr Ashton that this practice was known about and endorsed by the Bank (see paragraph (10) above), Mr Ashton believed it was a global issue that needed a global response which would require the involvement of legal, compliance and management at the highest levels.

(13) On 17 July 2012 Mr Ashton met with Victoria Porter (a Business Manager for FX, "Ms Porter"), Mr Colin Harrison (by then, European head of Compliance) and Mr Hope and again orally disclosed his concerns about the lack of Bank guidance around fixes and market colour. In particular, Mr Ashton disclosed that:

(a) He was really concerned about market colour and content on interbank Chats specifically fixing, customer orders and confidentiality;

(b) This was likely to lead to breaches of the Bank's obligations and that Mr Ashton wanted it escalated to senior legal and compliance for their input on this process; and

(c) Trading staff may be engaged in other behaviour contrary to the Bank's clients' interests, such as when attempting to hedge their risk in relation to client fixing orders;

(d) He had already raised his concerns about fixing references regarding information exchanged on fixes and trading intentions via interbank Chats with Messrs Cartledge and McGowan, as well as with Messrs Hope and Colin Harrison; that no action seemed to have been taken; that it was still unclear whether this was in breach of the Bank's policies or obligations (the implication being, based on the lack of action taken by the Bank, that it was not a breach); and that he still believed it needed further consideration.

(14) On 19 July 2012, still not having had any answer from compliance, legal and senior management about Bank policy in respect of fix execution and discussions, Mr Ashton created a document, which has been referred to in the course of the Bank's investigation as "Benchmarks.Doc". On 19 July 2012, Mr Ashton emailed this document to Messrs Colin Harrison, Hope and copied to Mr Cartledge and Ms Porter. The document set out, in full and frank detail, how benchmarks were executed by FX traders and all the processes entailed at the Bank. Benchmarks.Doc was designed to assist in highlighting to compliance and legal:

(a) The possible breaches and future breaches of Bank policy and obligations, as well as the lack of Bank policy guidelines around fixing; and

(b) That trading staff may be engaged in other behaviour contrary to the Bank's clients' interests, such as when attempting to hedge their risk in relation to client fixing orders.

(15) On 24 July 2012 Mr Ashton met with legal and compliance officers at the Bank including Mr Alan Brewer, FX legal ("Mr Brewer"), Mr Hope and Mr Colin Harrison to discuss his benchmarks document. He recalls being chastised by an agitated Mr Brewer for sending this document by email (and therefore creating a permanent record of its creation, content and dissemination). However, no criticism was made of Mr Ashton's own conduct in relation to the practices set out in the document. Mr Brewer also stated during this meeting that interbank Chats could not be shutdown solely in the Bank's FX business in London as this would lead the Bank's regulators to ask why this had been done and specifically why this action had only been taken in relation to the FX business in London and not globally in the business as a whole. Mr Ashton believes he spoke to Mr Cartledge in the aftermath of this meeting with legal, to relay the adverse reaction to this document. In particular, at the meeting on 24 July 2012, Mr Ashton disclosed to senior legal and compliance:

(a) His Benchmark.Doc; and

(b) That information regarding trading ideas, views on the market (strategies) and future intentions, fixings, stop loss orders, spreads and customer orders were being shared on interbank Chats and

how this may breach the Bank's policy and obligations including confidentiality.

(16) In a telephone call with Mr Cartledge around 25 July 2012, after Mr Ashton's meeting with legal and compliance on 24 July 2012, Mr Ashton again raised his concerns, orally, that there were "real issues here" and the lack of Bank guidance and policies/procedures was likely to cause serious problems for the Bank in terms of its regulatory obligations. In particular, Mr Ashton disclosed:

(a) To senior management that, after hearing the Bank's legal team's view, he believed that there were real issues that could lead to legal, regulatory and compliance issues in relation to confidentiality, fixings and customer orders; and

(b) That this was a global issue that needed a global solution, which required extensive senior management, legal and compliance discussion to resolve.

(17) On 2 July 2013, at a meeting with the Bank's legal team and Karishma Grover (compliance, "Ms Grover"), Mr Ashton disclosed that he had been told by a Bank customer that they received detailed order book updates from their 'banks'. This could be a confidentiality problem for the Bank if it was also doing this. In a subsequent email exchange on 3 July 2013, Mr Ashton disclosed to Ms Grover that the Bank policy was to only disclose a range of order book values and not specific amounts.

(18) On 3 July 2013, following the meeting with the Bank's legal team and Ms Grover of compliance, Mr Ashton orally disclosed to Mr McGowan that the processes and procedures being followed by FX traders in relation to communications with other banks and customers could still be in breach of the Bank's obligations, particularly regarding confidentiality.

(19) On 5 July 2013, Mr Ashton met with compliance personnel Tony Ricci and Ms Grover to further discuss the disclosure that Mr Ashton had made in the 2 July 2013 meeting about clients receiving detailed order book updates. Mr Ashton explained that it was market practice that customers received updates in relation to customer FX order books, potentially in breach of confidentiality obligations. In particular, Mr Ashton disclosed that it was a regular occurrence for sales teams within the market to pass customer order book updates to valued clients.

(20) On or around 30-31 October 2013, Mr Ashton met individually in person with Mr Cavalcanti, Andrea Anselmetti, John Fullick ("Mr Fullick"), Ms Grover and Mr McGowan and disclosed orally to each of them that he Bank's policies and procedures regarding confidential information and the use of bank customer Chats was still deficient, as was the guidance received from the Bank's senior managers, compliance and legal in October 2012, and required further clarification.

(21) Between 21 October 2013 and 1 November 2013, Mr Ashton met with Mr McGowan, Mr Fullick, Chris Coleman, Joe Narita, Benjamin Bair and Mika Otorno and orally disclosed that the Bank's FX sales and traders in Tokyo were disclosing detailed information concerning the Bank's client order books to the Central Bank of Japan in breach of the Bank's obligations concerning confidential information. In particular, Mr Ashton disclosed that Tokyo trading and sales personnel were giving daily detailed order book updates to the Bank of Japan in breach of the Bank's obligations concerning confidentiality.

(22) On 25 and 26 March and 14 April 2014 Mr Ashton attended interviews with the Bank's lawyers, as part of the Bank's FX investigation, at which he repeated his disclosures.

(23) On 13 June 2014 Mr Ashton provided the Bank with his Compliance Chronology setting out the series of disclosures and efforts he had made, from March 2012, to bring to the Bank's attention the matters which were ultimately subject of the regulatory Notices, issued on 20 May 2015.

(24) Thus, from at least March 2012, Mr Ashton made protected disclosures about the absence of policies and guidance, relating to market colour and benchmark execution and discussions, and this the weakness of the Bank's systems and controls in this regard, which the Bank ultimately admitted amounted to a breach by the Bank of its regulatory obligations, specifically Principle 3 of the FCA's Principles for Business, for example in the FCA Final Notice of 20 May 2015.

(25) All of Mr Ashton's protected disclosures listed above were therefore made under section 43B(1)(b) of the ERA 1996, in that they tended to show that the Bank was failing or likely to fail to comply with its legal obligation, namely under Principle 3 of the Financial Conduct Authority's (previously the Financial Services Authority's) principles for business in that it was failing to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

(26) Additionally, Mr Ashton's protected disclosures listed at points (1), (2), (3), (5), (9), (11), (20), (21) and (22) also tended to show that the Bank was failing or likely to fail to comply with its legal obligation in relation to the duty of confidentiality it owed to its clients/customers.

3 Employment Tribunal heard evidence from the Claimant. For the Respondents it heard evidence from: Sonya Bonniface, Co-Head of Employee Relations for Barclays UK Investment Bank; Justin Bull, former Global Chief Operating Officer of Barclays Investment Bank and disciplinary hearing manager; Marcello Cavalcanti, Head of Foreign Exchange Banks Sales Europe; John Fullick, EMEA Head of Markets Compliance for Barclays UK Investment Bank; John Mahon, Co-Head of Barclays Non-Core and appeal hearing manager; and Adrian McGowan, former Global Head of FX trading at Barclays Investment Bank.

4 The Employment Tribunal read the witness statement of Mark Hope, former member of the Respondent's Compliance Team for Emerging Markets, Foreign Exchange and Commodities. Mr Hope had not signed his witness statement. The Employment Tribunal read a statement from his American Attorney, Antony Barkow of Jenner and Block LLP, stating that Mr Hope had approved the witness statement. The Employment Tribunal was told that Mr Hope had been asked by the American Department of Justice not to give evidence in this hearing to protect potential criminal proceedings and that Mr Hope considered that it was right to respect the Department of Justice's preference. In assessing Mr Hope's evidence, the Employment Tribunal took into account the fact that he had not attended to be cross-examined on it. It considered that less weight could be attached to his evidence, than evidence which had been tested in cross-examination.

5 There was an 18 volume bundle of documents, along with files marked "A" through to "F"; files A to C containing core documents, file D containing records of Bloomberg chats and file F containing privileged documents.

6 The Tribunal made a restricted reporting order, prohibiting the publication of the names of the Respondents' clients because it was necessary in the interest of justice to do so, to ensure that the Respondents were able to participate in the proceedings. Further, a very small part of the hearing was conducted in private because it related to a privileged investigation that had been carried out internally by the Respondents. Both orders were made pursuant to Rule 50 Employment Tribunal Rules of Procedure 2013.

7 Both parties made written and oral submissions at the conclusion of the evidence. The Tribunal reserved its decision and listed a provisional remedy hearing.

Findings of Fact

8 The Claimant was employed by Barclays Capital Services Ltd, the First Respondent, from 4 September 2006. He was first employed as a G10 Voice Spot FX Trader. In his particulars of employment, the Claimant was appointed as a Director "within Barclays Capital." Director was the second most senior level in Barclays. The particulars provided that, whilst the Claimant was employed by the First Respondent (described as "the Company" in the particulars of employment), he was expected to devote his full business time and attention to the performance of such duties as might be assigned to him by either the First or Second Respondents. It also provided that the Claimant might be asked to perform services for one or more of the company's affiliates, with the company and its affiliates being known as "the Barclays Group". (bundle 1, pgs.37 to 50):

9 His particulars of employment provided

> "<u>COMPLIANCE WITH POLICIES</u>
>
> You will be expected to acquaint yourself and to comply with Barclays Capital's policies…
>
> Whilst employed by the Company you are required to comply with all rules and

> regulations applicable to Barclays Capital's business or to you (including any rules relating to your role and any professional conduct rules). Any breach of these rules and regulations could lead to termination of your employment with the Company."

10 The contract provided that the First Respondent had the right to suspend the Claimant for such period and on such terms as it considered appropriate at any time and whether or not in connection with a disciplinary investigation. The contract also provided:

> "CONFIDENTIALITY
>
> Both during and after your employment, you have a personal responsibility to protect and maintain the confidentiality of information belonging or relating to the Company or any other member of the Barclays Group and its or their clients. Accordingly, you must not… except if such information is in the public domain (other than as a result of a breach of your obligations under this agreement), disclose to any person whatsoever or otherwise make use of any secret, proprietary or confidential information in whatever form which you have or may have acquired in the course of your employment concerning the business, affairs, finance, clients or trade connections of the Company or any other member of the Barclays Group or any of its or their suppliers, agents or clients and you must use your best endeavours to prevent the unauthorised publication or disclosure of any such confidential or secret information… Confidential information includes all information which would reasonably be regarded as confidential (including, but not limited to, client names, client contact details, client business, transaction details, business plans of the Company or any other member of the Barclays Group) or is otherwise marked as such…".

11 The Claimant became Co-Head of Barclays London G10 Voice Spot FX Desk, along with Matthew Gardiner, in May 2011. Thereafter, the Claimant was jointly responsible for supervision of traders on the Voice Spot FX Desk.

12 Mr Gardiner left Barclays, to join UBS, in June 2011. From that point, the Claimant was sole Head of Barclays London G10 Voice Spot FX Desk.

13 At the start of the Claimant's employment, the Claimant's annual salary had been £100,000 with a guaranteed bonus for 2006 of £262,500. By 2012, his fixed annual salary had increased to £200,000; his discretionary bonus was £669,000. His bonus depended, in part, on the profits he and his desk generated for Barclays.

14 Throughout his employment with the First Respondent the Claimant was an "approved person" and was subject to the Financial Conduct Authority's statements of principle and its code of practice. This required the Claimant to act with integrity, act with due skill care and diligence and observe proper standards of market conduct. His registration with the FCA recorded that he was authorised to undertake controlled functions on behalf of the Second Respondent (bundle 15, p5715).

15 The Non Investment Products Code was agreed by practitioners in markets, including the foreign exchange market, and applied at all relevant times to trading in

the foreign exchange markets (bundle 5, p.1745). Paragraph 15 of chapter 3 of the Codes for 2009 and 2011 provided:

> "Confidentiality is essential for the preservation of a reputable and efficient market place. Principals and brokers share equal responsibility for maintaining confidentiality… Principals or brokers should not, without explicit permission, disclose or discuss, or apply pressure on others to disclose or discuss, any information relating to specific deals which have been transacted, or are in the process of being arranged, except to or with the parties directly involved…"

16 During his employment with the First Respondent, the Claimant was subject to the requirements of the Bank's policies including its Global Code of Conduct, Global Electronic Communications Policy, Global Confidential Information and Chinese Walls Policy, Global Market Conduct Policy and Global Supervision Policy. These policies provided, amongst other things, the following:

> "**ANNEX 1: KEY PROVISIONS IN POLICIES**[1]
>
> **I. CODE OF CONDUCT (V.1.1, 30 OCTOBER 2009**
> **Para 1.0 (3/822)**
> "**1.0 INTRODUCTION**
> … This Code of Conduct (the "Code") summaries the policies and procedures that are relevant to all of the firm's employees and business activities globally. As an Investment Bank employee, you should be fully aware of the firm's expectations of you. You are required to read this Code and comply with its provisions.
>
> You should also conduct yourself in the spirit of the policies and procedures set out, ensuring that you maintain the highest standards of ethics and that you continuously aim to protect the firm's reputation. You should always consider whether a proposed course of action complies with all applicable laws and regulations and whether it could embarrass you, your colleagues or the firm before committing to take such action. To that end, you must avoid not only actual misconduct, but also any appearance of impropriety.
>
> Failure to comply with the firm's Compliance policies and procedures will constitute grounds for disciplinary action, which could potentially include dismissal and, where appropriate, referral to the relevant regulatory organisations. You may also be held personally liable for any improper or illegal acts committed during your employment. Such liability could subject you to civil or criminal penalties and regulatory sanction. All of the firm's Compliance policies and procedures are available on the Compliance intranet site, including regional and country-specific policies, where appropriate. You should familiarise yourself with these policies."
>
> **Para 3.3.3 (3/834)**
> "**3.3.4 Use of Electronic Media**
> You are required to conduct yourself in a professional manner reflecting the

Investment Bank's high ethical standards in all of your communications, whether external or internal and whether oral or written, including email, the internet/intranet, electronic bulletin boards, instant messaging and any other electronic systems provided by the firm. You should remember that every memorandum or email you send, every voicemail message you leave and every telephone call you make will be viewed by our stakeholders as a reflection of the core values, policies and ethics of the firm, its management and its employees. You are specifically reminded that:

- All email messages, whether internal or external, should be prepared with the same care and professionalism as letters, memoranda or other written communications;

- You must refrain from the use of inappropriate language in any email or voice message, including the transmission and re-transmission of mail containing offensive material;

- …"

Para 5.1, last 3 lines (3/838)
"Confidential information includes information concerning the Investment Bank as well as information received in confidence from clients or that the Investment Bank and its clients have agreed should be treated as confidential."

II. <u>GLOBAL CONFIDENTIAL INFORMATION & CHINESE WALLS POLICY (V.2.0, 4 NOVEMBER 2009)</u>

Para 2.1 (3/848-849)
"**2.1 Proper Handling and Use of Confidential Information**
The proper handling and use of confidential information, including material non public price sensitive information is a fundamental requirement of successfully operating in and meeting regulatory requirements and standards. This policy details the rules and procedures relating to confidential information and Chinese walls and provides guidance on the protection of confidential information.

Key concepts addressed in this policy include:

- *Confidential information:* This policy details the nature of information to be protected, including: (i) when information must be treated as confidential; (ii) when confidential information constitutes inside information; (iii) use of confidentiality, exclusivity and standstill agreements; and (iv) the circumstances under which information ceases to be confidential.

- …

- *Need to know*: There is an overriding principle that confidential information should only be passed when there is a legitimate need to know on the part of the recipient and the information transfer is in accordance with this policy. As a Barclays Capital employee, you should familiarise yourself with the contents of this policy and adhere to its requirements."

Para 2.2.1 (3/849)
"**2.2.1 Application to All Employees**
This policy applies to all employees, including temporary employees, consultants, contractors and non-permanent staff (collectively referred to as "employees and staff"), regardless of specific job responsibilities, department, or location."

Para 2.2.2 (3/849)
"**2.2.2 Supervisory Oversight Responsibility**
Barclays Capital's supervisors are reminded of their obligation to ensure that the employees and staff they supervise handle confidential information in accordance with applicable laws and regulations, as described in detail in the Global Supervision Policy."

Para 3.1 (3/851)
"**3.1 Confidential Information**
The requirements of this policy, as described below, apply to all information of a confidential nature. Confidential information includes information of a non public nature provided by a third party to Barclays Capital or that is the firm's own information."

Para 3.1.1 (3/851)
"**3.1.1 Information from Clients and Third Parties**
Barclays Capital may be deemed to be under a legal obligation of confidentiality concerning information provided to it by a third party irrespective of whether it entered into any agreement to that effect. Accordingly, employees are required to treat all information of a non public nature provided by a third party as confidential, and are required to abide by the terms of this policy with respect to all such information."

"**7.0 THE NEED TO KNOW PRINCIPLE**

The firm has a "need to know" principle with respect to the disclosure of confidential information and MNPI. Accordingly, representatives of Barclays Capital should never disclose confidential information or MNPI to any other employee/contingent worker or person unless such disclosure can be justified as being:

- In the interests of the client for whom or from whom such information has been obtained;
- Not a breach of any contractual agreements in place between the parties involved;
- In the interests of the proper functioning of Barclays Capital.

Before disclosing or discussing confidential information or MNPI with personnel outside of a Deal Team (as defined in the Global Deal Team and Insider Lists Policy), the following questions should be considered:

- Who needs to know the information in question?
- Why do they need to know?
- When do they need to know
- What procedures need to be followed before disclosing the information?

Employee/contingent workers should not assume, for example, that because they are located within a specific private side area that they can disclose confidential information or MNPI to others located in that area. Employees/contingent workers should also be particularly careful to avoid inadvertent disclosures. If there is an inadvertent disclosure, contact your regional Control Room immediately."

III. GLOBAL ELECTRONIC COMMUNICATIONS POLICY (V.2.0, 6 OCTOBER 2009)
Para 2.0 (3/787)
"**2.0 Definitions**
"**Electronic communication**" in this context means any form of communication of a written message, visual image or data file transmitted by electronic means or accessed using the firm's systems and also any use of web-browsing facilities, whether or not specific written messages are communicated.
…"

Para 3.0 (3/787-788)
"**3.0 Purpose**

The purpose of this policy is to ensure that you understand your obligations when using the firm's electronic communications systems and that during your use of the firm's electronic communications systems you do not:

- Disclose sensitive or confidential information to unauthorised parties;
- …
- Potentially, or actually, harm the reputation of the firm."

Para 5.0 (3/789)
"…
You should never use the firm's systems to deliberately access or send any information or materials of an illegal, malicious, discriminatory, offensive, obscene, pornographic, or otherwise abusive or threatening nature.
…"

Para 9.0 (3/790)
"…
Your electronic communications may be disclosed to third parties, such as regulators upon request, or when the firm is otherwise required to do so.

…"

Para 10.0 (3/790-791)
"**10.0 MISUSE OF ELECTRONIC COMMUNICATIONS SYSTEMS**
Any individual who acts outside his/her authority in accessing or using (including bypassing) any of the firm's electronic systems may in some jurisdictions be committing a criminal offence. The following examples of different types of misuse are for illustration purposes only and should not be considered exhaustive:
…

- Accessing/downloading, sending or forwarding anything that, in the firm's opinion, is considered inappropriate, offensive or defamatory material (e.g., pornographic, derogatory, discriminatory, sexually explicit material) or any other material including internet sites (and chat rooms) which could be offensive to others on the grounds of race, gender, sexual orientation, religion or religious belief, age or disability or that could otherwise reflect adversely on you, the firm or its customers;

- Sending material which could be considered offensive, abusive, harassing or bullying;

…

- Providing or using systems that knowingly allow electronic communications to be sent or received in such a way that they may adversely affect the reputation of the firm.

Failure to comply with this policy may result in disciplinary action up to and including dismissal."

IV. GLOBAL SUPERVISION POLICY (V.2.0, 1 APRIL 2009)
Executive summary (2/643)
"A supervisor is a person who manages and directs the work of others. The legal and regulatory standards for supervisors in the financial services business are high. A crucial part of your role as a supervisor is to make sure that the people you supervise know and follow applicable laws and regulations and the firm's policies, procedures and standards. As a supervisor, you should be always being conscious that you can be held responsible for your subordinates' actions, including breaches of policies and procedures.
…
The firm's policies contain much of what any supervisor needs to know. The key points to remember include:

- The firm's policy is to

    - observe and maintain the highest standards of integrity and professionalism;

    - observe the highest standards of market conduct; and

- act with due skill, care and diligence in conducting its affairs.

- As a supervisor, you must comply with these standards and make sure that your subordinates do so as well. You must take corrective action, including notifying the Compliance department, if a person you supervise fails to meet these standards.

…"

Key Principles and Good Practices for Effective Supervision (2/645)
"**Set an example:** The firm has selected you to represent it internally and externally. Your attitude towards Compliance and the firm's risk and control requirements and the manner you conduct yourself sends a message to your team. You are a role model."

External and internal dissemination of trade information (2/657)
"Protecting client confidentiality, particularly in respect of deal flow information, is essential to preserve a reputable and efficient market place and avoid disputes with clients.
Remind your team of the general rules for external dissemination:

- They should not, without explicit permission from the client, disclose or discuss (or apply pressure on others to disclose or discuss) any information relating to specific deals which have been transacted, or are in the process of being arranged; except to or with the parties directly involved, or where this is required by law or to comply with the requirements of a regulatory body. In addition, proprietary information on positions and trading strategies and any deal related hedges must also be kept strictly confidential

- In practice, this means that without explicit permission from their clients, they must not disclose to a third party the client name (directly or via a code name), deal size or price in respect of a completed or forthcoming transaction

- Reiterate to your team that they should generally only provide generic statements or market colour on deal flow without providing specific information on counterparties (e.g. remind them that they should only pass 'deal flow' information internally on a strict 'need to know' basis and subject to the restrictions in the Global Confidential Information and Chinese Walls Policy). All emails/attachments containing deal flow information should be marked as 'confidential' and for 'internal use only'"

V. GLOBAL EXTERNAL COMMUNICATIONS POLICY (V.1.1, 24 MARCH 2011)

Para 2.0 (4/1131)
"**2.0 SCOPE AND APPLICABILITY**
This policy covers all external communications between Investment Bank staff and external third parties (e.g., clients, potential clients, regulators, exchanges, the media and vendors). These communications may take any form, including,

but not limited to:

- Written communications, including all electronic communications (e.g., letters, e-mails, text messages and Bloomberg messages);

…"

Para 5.2 (4/1134)

"**5.2 Use of Language**

- Communications must be professional in tone and content.

…"

Para 5.13 (4/1138)

"**5.13 Confidential/Non public Information**

Public-side external communications must never disclose confidential information without the explicit approval from the Compliance department. Confidential information includes information of a non public nature provided by a third party to the Investment Bank or that is the firm's own proprietary information.

Please refer to the Global Confidential Information and Chinese Walls Policy and the Global Preventing Leaks of Confidential Information Policy for further information"."

17 The Claimant completed training on these policies (bundle 10, pgs.3735 to 3738). On an annual basis he completed an online self-certification course and attested, in the years 2007 to 2012, that he had read, understood and complied with the First Respondent's policies in the previous calendar year (bundle 1, pgs.141 to 151 and 307 to 312; bundle 2, pgs.584 to 591; bundle 3, pgs.869 to 893; bundle 4, pgs.1068 to 1095; bundle 6, pgs.2183 to 2197 and bundle 9, pgs.3061 to 3104).

18 The Foreign Exchange, or "FX", market is the market in which currencies are traded. Barclays' FX business facilitates foreign exchange transactions on behalf of clients who seek to hedge and trade currencies. Currencies are grouped into pairs, for example the Euro and the US$, to show the exchange rate between them. Spot trading involves currencies being bought and sold according to the currency price determined at the point of trade. In the Foreign Exchange market, a "fix" price is determined at set times in the trading day. The calculation time for the European Central Bank fix is 13:15 UK time ("the ECB fix"). Reuters provides a closing spot fix rate which is calculated at 16:00 UK time ("the 4pm fix" or "the close").

19 A client may place an order at a set price, or an order to trade upon a specific event (such as a stop loss order), or at the fix price, the FX benchmark rate determined at set times in the trading day. If an order is placed at the fix, the trader dealing with the order may:-

19.1 Execute in the market at the time of the fix.

19.2 Net off their position with another trader in the market prior to the fix (referred to as "matching").

19.3 Work with a broker to match his or her fixed position.

19.4 Pre-hedge his or her fixed position prior to the fix.

19.5 Warehouse his or her position until after the fix.

20 A trader may make a profit by pre-hedging the Bank's position. For example, if a client wishes to buy €100m against the US$ at the fix price, a trader may go into the market to try to buy Euros at a price he or she believes will be lower than the fix price.

21 A stop loss order is an order to buy or sell if the price of a certain currency falls or rises to a specified level. At this point, a designated volume of the currency is ordered to be sold or bought, to enable the customer to limit their loss. The triggering of a stop loss order is usually bad news for a client, because it means that the client has lost money.

22 If a Bank has, on all its client orders, a net amount of currency to sell, the trader refers to their position as being "left hand side". If the Bank has net orders to buy a certain amount of currency, the trader will refer to their position as "right hand side".

23 In the Voice FX business, clients interact with Barclays' sales people, who in turn pass orders to the trading desk. Sales people and traders are expected to provide information to clients, often referred to as "market colour". Traders and sales people accumulate "market colour" through a variety of sources including research, technical analysis, personal market interpretation, experience and "content" derived from the trading desk. Content includes flows and trends that the trader sees in the market.

24 Bloomberg chat rooms are online instant messaging forums. Chat room groups can be set up by an individual, who then invites others to join the group. The content of chats is recorded in electronic form. Barclays' traders had access to chats. The chats allowed bilateral, instant conversations to take place with clients, with other bank employees and traders. Other banks' traders also used Bloomberg chats, so that traders in different banks could speak to one another using the Bloomberg chat facility.

25 From at least 2010 Barclays Foreign Exchange traders typically participated in multiple chats during their working day.

26 There was a major dispute between the parties in this case about the nature of the information that it was appropriate for traders to share in chats, particularly with competitors. However, it was not in dispute that FX spot traders were permitted to be in chats with traders from competitor banks before 2012 and that they were permitted to share some information about their positions, including whether they were net buyers or sellers in the market, in order to establish whether there were any other traders with the opposite position, who could match their position.

27 The Claimant told the Employment Tribunal that, from the start of his employment, he was encouraged to be connected to the market and that this meant having friendly relationships with, and speaking to, peers at competitor banks and with customers, in order to obtain as much information as possible about the market.

28 When the Claimant was first employed by Barclays, his manager was Danny Wise, who was head of the London G10 Voice Spot FX Desk until May 2011. The Claimant told the Employment Tribunal that he was in internet chats with Danny Wise. He told the Tribunal that Danny Wise encouraged him to have direct contact with customers, to gain and share information, which could be passed on to other customers. In oral evidence the Claimant was asked about the nature of the chats in which he participated with Danny Wise. The Claimant said that he was in a chat called "the slags" chat with Danny Wise until April 2011. He said that Danny Wise was aware that the Claimant was sharing information with other traders; for example, if a trader was looking to net their position. When asked, in evidence, the Claimant said he could not give any specific examples of times when Mr Wise was aware that the Claimant was disclosing his net trading position to a competitor and his direction (left hand side or right hand side).

29 The Tribunal concludes, from the Claimant's evidence, that Mr Wise was aware that the Claimant was sharing information with other traders in relation to whether traders wanted to match positions, but that Mr Wise was not aware that the Claimant was disclosing the level of his net trading position, along with his direction, to competitors.

30 Tim Cartledge became the Claimant's line manager after Danny Wise left Barclays. The Claimant told the Tribunal that Tim Cartledge introduced "content" as a Barclays Voice Desk strategy, to add value with customers and increase revenue. The Claimant said that he was required, as part of his objectives, to have the best information in the market, gathered from inter-bank counter parties and customers. He told the Tribunal that it was widely acknowledged and accepted that chats provided a forum for exchanging this information and building relationships with other traders and clients.

31 In the Claimant's mid-year performance review 2012 (bundle 8, p.2657) the review stated:

> "Content is a huge part of what we do. Whether that's in chats, on the phone or in person. You have transformed our approach to content and made it a huge advantage for the firm."

In the manager's comment section the review recorded:

> "You are a superstar. Two years ago we set out a set of principles for the business which you believed in and drove hard.
>
> These were:
>
> (i) Be a content leader with sales and our clients
> (ii) Attract all the information you can from our clients and from our flow data
> (iii) Leverage this info in your risk taking
> (iv) Train the next generation of traders in the new style
> (v) Adopt new technology for liquidity and info
>
> And then the goals were to:

(i) Make budget
(ii) Adopt the new working methods that technology enables and the changing market requires
(iii) Drive the content that makes our FX business vital for clients to engage with."

32 In the Claimant's end of year appraisal for 2012, (bundle 9, p.3515) the Claimant's content objective was said to have been:

> "Keep pushing the content culture in the room, and ensure that the traders keep this at the forefront of all interaction. Work with sales to refine the chats that individual traders are on – focus on adding value."

That objective was noted to have been completed and exceeded.

33 The appraisals do not indicate that the Claimant's managers knew that the Claimant was obtaining content or information from competitors, or that the managers were encouraging him to gather content or information from competitors, rather than clients. The appraisals show that the appraising managers were encouraging the Claimant to glean information from clients and the bank's own data. The Tribunal concludes, however, that the Claimant's managers were not careful, in the appraisals, to understand how the Claimant was building content, or obtaining his profit and loss figures.

34 On 29 March 2012, very shortly after Barclays had executed a client's trade, details of the trade appeared on a Foreign Exchange website. The client complained about a breach of confidentiality, because the client had dealt with Barclays alone with regard to that trade. The complaint was referred to Barclays Compliance Department, which started an investigation. In that context, the Claimant had a conversation with Mr Cartledge, his manager, the same day (bundle 7, p.2490). The conversation was recorded automatically on the bank's systems.

35 The Claimant and Mr Cartledge spoke about trader to trader chats. Mr Cartledge raised the issue about whether Barclays should withdraw from trader to trader chats and queried:

> "… do we want to withdraw from talking to other traders at other banks, in which case we won't know what's going on…" (bundle 7, p.2501).

36 Mr Cartledge also talked about groups of traders exchanging information. He said that it was something Barclays needed to take a view on and said that: "We know that goes on". Mr Cartledge also remarked Barclays would not want to hire employees who were not "plugged into trader mumble".

37 The Claimant told him, "I think i-it's fine saying it, but you don't say names and stuff like that - .. 'cause I put on there we got a tricky twenty-five cable, it doesn't mean that, it doesn't tell you from customers.. maybe the amount is, is almost um, you know maybe I shouldn't have said the amount we do, we do deals all the time you know, .. That's not giving names or sectors or anything out…"

38 The Tribunal concludes, from this conversation, that Mr Cartledge did know that traders were exchanging information on chats and that this was seen as desirable by Barclays, in that the bank wanted traders to be aware of what was happening in the market. The Claimant gave Mr Cartledge information that the Claimant himself talked about trades. He said he would not mention names of clients or sectors. The Claimant was not saying that he considered that this breached any rules, he said, "..you know I think that's fine" and later said it was done all the time. The Claimant did not tell Mr Cartledge the precise level of information which was being exchanged by competitor traders in chats, or the frequency with which such information was exchanged between competitor traders during a single working day.

The Claimant's Chats

39 Later, from 2013 onwards, the bank conducted a privileged investigation into Foreign Exchange practices. The Claimant's chats were reviewed. The following are extracts from the Claimant's chats from 2008, which were material to the issues in this case.

40 On 7 September 2010, the Claimant was in a Bloomberg chat with James Witt from UBS. The Claimant said: "stops at 78 and 65". In saying this, he meant that he had stop loss orders at particular levels.

41 On 14 June 2011, the Claimant was in a chat with Niall O'Riordon at UBS and Frank Cahill at HSBC. Mr O'Riordon said: "i had stops for years but they got sick of my butchering". The Claimant said: "i happy with stops… in cable its a treat if u ave an aggregator its free shooting…" Frank Cahill said: "old chris 'the butcher' ashton" (bundle D, tab 3, p.1184).

42 On 26 June 2011, the Claimant was in a chat with Frank Cahill, a trader at HSBC. Mr Cahill said: "get lumpy cable at the fix ok". The Claimant said: "ta mate… 150 here". Mr Cahill said: "400 odd here". The Claimant later said: "170 here". The Claimant was disclosing the net amounts of his orders at the fix (bundle D, tab 4, pgs.1198 to 1199).

43 On 12 July 2011, the Claimant was in a chat with Jack Murray, a junior trader on the Spot desk who reported to the Claimant, and a competitor trader at JP Morgan. The Claimant said to Jack Murray:

> "What have u done apart from eat the last 3 hrs… fook all… by the way jack is it true that the sales guy cgt u rubbing matt in the toilet while whispering "dont forget me in zh" i can still perform if u let me come" (bundle D, tab 5, pgs.4150 to 4151).

44 On 9 August 2011, the Claimant was in a chat with Frank Cahill of HSBC, Paul Nash of RBS and Niall O'Riordon of UBS. The Claimant said: "so will be about lhs 60 quid". He said this 14 minutes before the fix time. The Claimant told the others in the chat room the net amount of his orders and his position (right hand side or left hand side).

45 On 4 October 2011 the Claimant was in a chat with Richard Usher, a trader at JP Morgan, in which the Claimant said:

> "lost ton eur at 80… whhhhoooopps… with no defence and u with stops as well i felt gd selling 100 at 55… haha… I sold 40 at 55 and rest at 50 and 47…"

The Claimant, in doing so, was telling Mr Usher the values of particular trades he had executed.

46 On 20 December 2011, the Claimant was invited by other traders already in a group chat to join their chat which was known by them as "The Cartel". Its members were Mr Rohan Ramchandani (CitiGroup); Richard Usher (JP Morgan) and Matt Gardiner (UBS).

47 The Claimant had completed a training session on competition law on 18 November 2011 (bundle 10, p.3736). The training materials for that session (bundle 5, pgs.1591 to 1645 and 1646 to 1665) included the following:

> "Many competition infringements occur due to arrangements that are not formal agreements, such as competitors exchanging information.
>
> Information exchange means firms find it easier to co-ordinate their behaviour and this can lead to price-fixing cartels.
>
> This information can be on:
> - Pricing, spreads, other costs or expenses
> - Sales levels, margins, commissions or rebates
> - General commercial strategy."

48 On 20 December 2011, the Claimant became involved with a chat in this group chat. Mr Usher said in the course of the chat: "u need to tell baggley if u hire sarge you lose out on the cartell gold". The Tribunal concludes that the Claimant was aware that the other participants in the chat were referring to the chat group as "the Cartel".

49 On 5 January 2012, the Claimant was in a chat with the Cartel members and said: "lose ton quid," meaning that he was a buyer of 100m sterling against the dollar (bundle D, tab 9, p.1935).

50 After the 4pm fix, Mr Gardiner at UBS asked: "scores gents?". Mr Ramchandani said: "+60k" the Claimant said: "+100… 3 days what u reckon pnl each day has been…"

51 There was a dispute between the parties as to what "scores gents?" meant. On the evidence of the chat itself, including the fact that, shortly after saying: "+100", the Claimant asked, "..what u reckon pnl each day has been?" the Tribunal concludes that "scores gents?" asked for the participants' profits or loss that day.

52 On 5 and 6 January 2012, the Claimant was another chat with other members of

the Cartel. The Claimant said:

> "big lhs ecb lads… triple… bigger now… lhs… monkey plus half a chimp… i have to give it a go… a gorilla less 2 monkeys…"

Mr Gardiner replied: "that yr amt romfy?" (Romfy was the Claimant's nickname). The Claimant replied "yes". Mr Gardiner said: "gwarn sahn". Mr Usher said: "sell 600 in last minute". The Claimant later said: "I saved 500 for last second… u wudnt have even known… didnt budge". During the course of this chat the Claimant was stating his trading position, that he was a seller (left hand side) of €300 (triple) at the European Central Bank fix and then €625 (monkey 500 plus half a chimp 125).

53 On 15 February 2012, during a further discussion in the Cartel the Claimant said:

> "get eur at mom ecb… deuce… actually 175 to be precise… some stops 35-30 now… eur… chimp minus ton now here… just ton here now but hopefully taking all the filth out for u matt… I getting chipped away at a load of bank filth for the fix…back to bully… fix… hopefully decks bit cleaner."

54 In doing this the Claimant was disclosing his net trading position. He was disclosing that his net position was reducing and therefore that he would not be trading significantly at the ECB fix.

55 On 21 February 2012, in another chat with the Cartel participants the Claimant said: "I get 47." Then later in the chat he said: "gave mine to drys at rbs so u shud be nice and clear to mangle". In this chat, the Claimant initially disclosed his trading position and then disclosed that he had netted his position, so that he would not be trading in the market.

56 On 30 April 2012, the Claimant was in a chat with Mr Mark Clark, one of his subordinates at Barclays, along with traders at four other banks. In the course of this chat Mr Clark said: "ye lhs abt a ton… haha.. ok i get abt 150 now" (bundle D, tab 14, p.4824).

57 The Claimant had not been active in the chat for about six minutes at the time Mr Clark made this comment and the Claimant did not subsequently take part in the chat.

58 On the evidence that the Tribunal has heard, the banks whose traders were members of the Cartel represented about 40 to 45% of the FX spot market.

Market Colour Review

59 Following the client incident on 29 March 2012, the Claimant telephoned his line manager Tim Cartledge, to inform him of it and the client complaint (bundle 7, p.2490). Client complaint was referred to Compliance. Mark Hope and his manager, Colin Harrison, conducted an investigation which revealed that Martyn Mead, Director of the UK bank's sales team, had provided information regarding the client's trade on a chat. Mr Mead had described the client with the word "supra," meaning "supranational,"

referring to a category of the bank's clients. The use of that term inadvertently had led to the client being identified, because there was only one supranational client of the bank at that time. Mark Clark, an FX trader reporting to the Claimant, also admitted making comments about that client in a chat room, again using the word "supra" to refer to the client.

60 The Claimant had a telephone call with Mark Hope the same day (bundle 7, p.2508) and had a brief discussion about Mr Hope reviewing the Claimant's own chats.

61 In his pleaded case, the Claimant said that he had orally disclosed to Mr Hope of Compliance and Messrs Calvacanti and Lomas, Senior Sales Managing Directors, and Mr Howard, Global Head of Sales, that interbank chats were common place and that there was a lack of Barclays guidance about their use. The Claimant did not refer to this in his witness statement and Mr Calvacanti told the Tribunal that he was in Madrid and not London on 29 March. The Tribunal concludes that this conversation did not happen.

62 However the Claimant did speak to Mr Cartledge and told Mr Cartledge that Mr Clark had put on the chats to other banks "supra selling cable" and that Mr Clark had given a rate and an amount and that the client had complained and wanted a full investigation. The Claimant also said that he himself used phrases such as: "we got a tricky 25 cable", saying that he mentioned in a chat room the amount of a cable customer order. The Claimant said that Mike Bagguley had talked about appropriate language previously, saying that he intended to work with Compliance on the subject, but that nothing had come of Mr Bagguley's comments (bundle 7, p.2500). Mr Cartledge said that they needed to talk about some policy. The Claimant said that their discussion about guidelines had been going on for a while (bundle 7, pgs.2503 to 2504).

63 There were a number of discussions around this time between managers and the Compliance Department about the fact that coded names for clients used in market colour could sometimes be deciphered by others in the market, so that client confidentiality was thereby breached. The discussions concerned the need for guidelines to be produced about language used in the client colour, in order to avoid such breaches.

64 The Claimant spoke to Mr Hope on 2 April 2012 by telephone. Mr Hope posed the question to the Claimant about what kind of language could be deciphered by the market. Mr Hope told the Claimant that Compliance had produced some draft guidelines at the request of Mr Bagguley and that Compliance needed the assistance of the Claimant and other traders, because they dealt in the market every day and knew the type of language that was being used (bundle 7, p.2521).

65 There was a meeting on 4 April 2012 between senior managers, including Mr Bagguley and Compliance officers, as a result of which it was decided that Compliance was to work with various managers, including Martyn Mead and the Claimant, to draft a set of guidelines covering the appropriate "dos and don'ts" when communicating market colour, who could be added to distribution lists and from whom it was appropriate to receive communications (bundle 7, p.2523).

66 Mr Hope emailed the Claimant on 5 April 2012, saying that Compliance was putting together workshops with managers, including traders, to discuss dos and don'ts of market colour. He asked the Claimant and the Claimant's traders to think about what they were saying in terms of coded market colour, why they were saying it and what the benefits were. Mr Hope said that the purpose of this was to allow traders to give market colour, but in a way which avoided situations like the breach of client confidentiality the previous week (bundle 7, p.2525).

67 The Claimant told the Tribunal that he disclosed to Mr Hope on 5 April 2012 that lack of policies and guidance at Barclays in relation to content and market colour could lead to further breaches of confidentiality. He said that the Claimant had specifically told Mr Hope what was being put on chats regarding potentially confidential information from customers.

68 In cross-examination it was put to the Claimant that he did not reveal that market colour was communicated to other traders at competitor banks. The Claimant said that the conversation with Mr Hope was about chats with other traders.

69 From a transcript of a telephone call later that day (p.2527) it seems that the Claimant referred to the meeting he had had with Mr Hope earlier that day. He said that he had talked to Mr Hope about Mr Clark putting on a chat, to other banks, information about the transaction in which client confidentiality was breached. The Claimant said that he had told Mr Clark off about it and that Mr Clark would not do such things again.

70 The Tribunal concludes that from this conversation the Claimant was not saying to Mr Hope that disclosure of information to other banks was going on more generally, or was likely to happen again. If this had been said during the earlier meeting, the Tribunal would have expected this to have been reflected in the later telephone call.

71 Insofar as the Claimant was discussing with Mr Hope the breach of confidentiality which had already occurred and the process for drawing up market colour guidelines, the Claimant was doing so in the context that Mr Hope and senior managers had already decided that such guidelines would be drawn up.

72 The Claimant emailed his team on 5 April about the market colour workshop proposed by Mr Hope. He cut and pasted the content of Mr Hope's email to him earlier that morning (bundle 7, p.2531).

73 On 10 April Mr Hope sent to Mike Bagguley a transcript of Mark Clark's chats to other banks, in which Mark Clark used the code name for the client and said that the client was selling a pony cable, meaning that the particular client was selling 25 million sterling for US$ (bundle 7, p.2532).

74 Mr Bagguley forwarded this transcript to Mr Cartledge and said:

> "1) Unacceptable reference to clients – non negotiable need to not do that.
>
> 2) Too much information to other banks – my view is we need to raise the bar on this, even if it disadvantages us.

> Please take compliance advice and action (1)…
>
> Happy to discuss your thoughts on a plan on (2)" (bundle 7, p.2532).

In answer Mr Cartledge said:

> "This is horrible, very disappointing, will read him the riot act for this. Interesting he reserves his choicest language for the chats without Chris in."

75 In early April Mr Hope had reviewed the Claimant's interbank chats between dates 1 and 31 March 2012. On 10 April Mr Hope sent samples of each interbank chats to Mr Bagguley and Mr Cartledge (bundle 7, p.2540 to 2556). He said that the total search returned about a million lines of communication and that the rooms contained harmless banter. Mr Hope said that he had seen nothing that he would deem wholly inappropriate in terms of banter or bad language. In the sample of chats referred to by Mr Hope the Claimant said things like: "stops 80-85 below here" on 21 March 2012 at 14:07; "stops 75 to 20 above" on 20 March 2012; and "just looked get 2 monkeys at the fix at 11.56" (bundle 7, pgs.2547 to 2548 and 2555). Mr Cartledge replied to Mr Hope saying: "Thanks Mark. Obviously a very different style here, pleased to see it has a much more professional and measured tone" (bundle 7, p.2562).

76 On 11 April 2012, the Claimant emailed Mr Bagguley, confirming that he was: "working on producing some guidelines for trading and sales commentary so that we always operate within acceptable levels and avoid any issues…" He also said that he had spoken to Mr Clark because Mr Clark's commentary was inappropriate and fell below the high standards that the Claimant set on the desk (bundle 7, p.2564).

77 The Claimant worked with Mr Hope and Mr Colin Harrison from Compliance at this time on producing market colour guidelines.

78 On 26 April 2012, Martyn Mead emailed Mr Hope and other managers with a list of terms used by various colleagues when discussing flow and providing market colour. He said:

> "The provision of market colour is to try and give clients more insight to what is moving the market and the client sector that maybe doing such trading…
>
> The reason we give market colour is to try to be more accurate than the opposition on market direction with generic but quality and value added information and if our ideas/ views are backed up by flow it makes us more of a go to institution, especially when we are calling markets correctly and flow is backing our ideas up" (bundle 7, p.2574).

He attached a list of code words for trading terms to be discussed.

79 On 29 April the Claimant emailed Mr Hope with his "thoughts on language for discussion". He specifically included language used: "to other banks". He suggested that phrases such as: "Get eur guy I like… Get eur smart guy gone with… get eur corp"

were are all not dangerous, but that phrase: "get eur supra" was dangerous because it was too descriptive. He said that there was a grey area, for example with "Selling eur here/my offers eur…" which he described as "dangerous had not actually happened". With regard to his order book he said that: "Offers 70-90 stops above 95-15" were ok as here no amounts involved but that "200 to go at 70-90 400 to buy 95-15" was more descriptive and "200 to go at 75 stop for 400 at 95" needed to be clarified. With regard to fixes he said that phrases such as: "Selling 500 at 10am fix" were dangerous as less likely people had matching for it but that selling 500 at 1.15 ECB or 4pm was a much bigger fix. He said: "unlikely to be insider – also can match" (bundle 7, p.2579). In this email, the Claimant was saying that the purpose of disclosing sale amounts at the fix was to secure matching, to net off with other traders.

80 The Tribunal finds that the Claimant was disclosing the type of language which was used by traders and saying that guidance decisions were needed on it. He had been asked by Mr Hope to consider what traders were saying in terms of market colour. This email was a result of that.

81 The first market colour workshop was held on 10 May 2012 (bundle 7, p.2582). A transcript of part of that meeting was available to the Tribunal. The meeting went through the list of coded terms which Mr Mead had set out for example: "asset manager", "hedge funds", "retail" and there was a discussion about whether these terms were sufficiently coded so as not to reveal the identity of the relevant client.

82 The Claimant joined as the meeting was discussing the use of the term: "Middle East" (p.2586). Mr Hope told him that the meeting had agreed that terms were permissible so long as there was no geography used, for example the location of the client. The Claimant said that it was not appropriate to mention the amount of a trade and that a trader could not say the rate, but could give a range (bundle 7, pgs.2591 and 2603). The Claimant said that a bank could say that they had bought: "a large amount". The Claimant said that the bank could build a picture adding colour without actually giving too much away (p.2604). The Claimant started talking about his list towards the end of the meeting (p.2616). He said: "Selling euro here I think because you are actually pre-empting a flow that hasn't happened… that's almost could be on the collusion bit I think…" (p. 2617). He also said: "I'm selling Euros here… that's almost me saying stop you can sell 'em and you'll make money on… so I would say that's definitely a no" (p. 2618).

83 The Tribunal finds that, in this conversation, the Claimant was saying that disclosing to other banks that the Respondent was selling Euros was unacceptable. He was also saying that disclosing that a trader had conducted a trade of a specific amount was wrong. He was saying that the guidelines should indicate that passing on this information was wrong.

84 However, the Tribunal does not accept the Claimant's evidence that he had said, during this market colour workshop, that information was being passed by traders at other banks regarding trade ideas, views on market strategies, future intentions, fixing stop loss orders, customers orders and spreads. The Tribunal finds that the Claimant was saying that traders could give market colour safely, without disclosing details of trades. He did disclose individual phrases used, but not the context in which they were being used. The ET finds that, when he did so, the Claimant was not clear

that these phrases all had been used, rather than some were hypothetical examples of phrases which should not be used. He was also not clear that particular phrases had frequently been used to communicate, to other traders, in competitor banks, details of client orders, including stop loss orders, before and during the time they were executed. In summary, the Tribunal finds that the Claimant was not being candid about the passing of information between banks in trader chats during this market colour workshop.

85 On 10 May 2012, Mr Hope sent an email to the attendees of the market colour workshop, setting out an overview of what had been discussed and agreed and asking for comments on anything he had overlooked. He listed the coded terms that had been agreed as being appropriate and said at the end, "Interbank market colour has the potential to give rise to further legal and compliance risks…". He said that a trading specific discussion had been arranged for the following Monday.

86 A further market colour workshop was then held on 14 May. The Claimant told the Tribunal that he had made clear in the meeting that information regarding stop loss orders, customer orders and spreads were being discussed on interbank chats and that the bank needed to develop procedures and policies about what was acceptable. He told the Tribunal that he had stated that interbank chats contained information exchanged on fixes and trading intentions and that the bank's policies were not sufficient. He said it was not clear whether traders may be in breach of them.

87 Mr Hope sent an email to the FX spot team arising out of this meeting and listing terms such as "get eur smart guy gone with and get eur guy I like". These terms were said to be acceptable. However, most of the terms referred to by the Claimant in his original list for discussion on 29 April were stated to be high risk including, "selling eur here" and "my offers eur" and "20 to go at 75 stop 4400 at 95". Mr Hope said that a separate discussion around fixing information was necessary. The Tribunal finds that, in this email, Mr Hope was warning FX traders that, if they were to use the phrases listed, they would be in danger of wrongdoing.

88 The Tribunal finds, from transcripts of phone calls and email evidence at this time, that the Claimant was participating in discussions about what was acceptable and what was not acceptable regarding terms to be used and information provided. It also finds that the Claimant had contended that many terms were not dangerous when, in fact, Mr Hope later advised that those terms were not permissible. The Tribunal does not find that the Claimant was saying, during the workshops, that traders were actually giving the details of customer orders at the fixes and stop loss orders to other banks on chat room conversations.

89 On 18 June 2012 Mr Hope produced a draft Market Colour Policy (bundle 8, p.2663). He sent it by email to John Gardiner, G10 Chief Operating Officer of FX and EM sales. Mr Hope said that the policy arose out of workshops and sessions with desk heads including the Claimant and that desk heads, including the Claimant, had provided active and constructive input. Mr Hope said that sessions had provided a good platform for attendees to address the coded terms and language that they employed and to reassess the risks associated with them. The policy said:

"This policy is intended to give practical guidance around the distribution <u>outside</u>

> the firm of market colour surrounding flow activity, and to help prevent inadvertent breaches of client confidentiality.
>
> The firm recognises that communication with our clients is a vital part of our business and that the provision of market colour around flow activity and stop levels is of particular importance…
>
> As a public-side GFX employee, you will come into possession of information regarding client orders and trading activity. You will also have possession of proprietary information relating to Barclays, including but not limited to:
>
> - The order Book
> - Trading Information
> - Positions.
>
> All such information is bound by the Global Confidential Information and Chinese Walls Policy.
>
> Employees are required to treat all information of a non-public nature provided by a third party as confidential, and to protect the firm's propriety information and treat it as confidential.
>
> Our duty of confidentiality means that without explicit permission from your client, you may not disclose the client name (directly or via a code name), deal size or price in respect of a completed, forthcoming or expected transaction."

90 The Claimant agreed, in cross-examination, that the duty of confidentiality referred to in the policy was a statement of existing policy as set out in the Respondent's Global Supervision Policy 2009.

91 The market colour policy gave practical guidance about the use of particular terms. It said that giving the level of a trade was not advisable but could be acceptable in some cases for example where the level was given as a range. It included the terms identified at a high risk in the FX trading specific market colour workshops and said that these were unacceptable language. The market colour policy said that geography specific terms were unacceptable.

92 Mr Hope sent the draft market colour policy to Tim Cartledge and Adrian McGowan, who had recently been appointed as Global Head of FX Options and Forwards and Regional Head of FX in Europe. Mr Hope said that the Claimant had provided active and constructive input into the policy.

93 On 25 June 2012, Mr Hope sent the draft policy to the Claimant (bundle 8, p.2682). The Claimant replied saying: "As I think we need a further discussion about fixes we need to be very clear about this going forward." Mr Hope agreed to talk to him about this.

94 The Claimant and Mr Hope had a telephone conversation on 26 June (bundle 8, p.2684). They talked about the draft policy and the terms listed as unacceptable. The Claimant raised the unacceptable term "Selling five hundred Euros at one fifteen or

four pm" and asked whether this meant that it was not permissible to talk about matching fixes off (bundle 8, p.2684). He said that it was a big issue. Mr Hope said that there could be further discussions about it. The Claimant said that he would say that he was getting €200 at the fix and that others would match (bundle 8, pgs.2684 to 2686).

95 Mr Hope said that the Respondent would need to have a specific section about the trader community. The Claimant said that if they could not talk about this then traders had big issues about what they currently did. He asked why it was not acceptable to say: "Get Euro at forty long term guy". Mr Hope said that it was a statement of the level that was the problem. Mr Hope asked the Claimant to send him an email about fixing colour (bundle 8, p.2690).

96 The Tribunal finds that the Claimant disclosed to Mr Hope in this conversation that traders were saying, in interbank chats, that they would be getting a certain amount of currency at a fix for the purposes of matching and he said that a policy or guidance was needed in relation to that. He was also saying, at this point, that he considered that this was acceptable and necessary practice.

97 In evidence, the Claimant agreed that, up until this time, his contribution to the market colour guidance had been welcomed. He said that, from this point on, however, he started to become a problem for the Respondent.

98 On 27 June 2012 Barclays settled an FCA Compliance action against it relating to the London Interbank Offered Rate (LIBOR). The bank's employees had allegedly sought to influence the LIBOR rate, including by co-ordinating with traders with other banks.

99 On 28 June 2012, there was a telephone call between the Claimant, Nicholas Dechosal (Head of FX Swaps for Europe), Mr Cartledge and Mr McGowan. The purpose of the call was to discuss the draft market colour policy. The Claimant told the others that information was being shared between banks about the level of orders at the fix, for example, that the Respondent would be getting 500 dollar Yen to match off. He also said that it would happen that the Respondent would say that it was getting 500 dollar Yen and other banks would say that they were getting dollar Yen too (bundle 8, p.2695). Mr Hope asked whether there was any danger in that (bundle 8, p.2697). The Claimant said that there was a possibility that there was danger because four of the biggest banks sharing information about amounts would mean that they had a better idea of the market. Mr Cartledge reiterated the benefits of netting off or matching amounts. Mr Hope asked if traders were comfortable with that exchange of information and the Claimant said that he was. Mr Cartledge then said that there was a problem with telling other banks, while selling something for a client, because a trader could "front run" the client in collaboration with other banks, but that it was reasonable to try to find an offsetting trade (bundle 8, p.2699). Mr Hope said that he would redraft the policy as a result (bundle 8, p.2700).

100 The Tribunal finds that the Claimant did tell the others involved in this telephone call that banks were exchanging information about orders around fixes, for the purpose of netting. He also said that sometimes all banks would exchange information that they all had orders the same way before the fix. He said that the guidelines had to be

amended to reflect this. He was happy with the way that Mr Hope was developing the policy. The Tribunal finds that, at this point, the Claimant was not suggesting that the bank practices were failing to comply with FCA guidelines. He said that traders were comfortable about exchanging that level of information.

101 However, on 5 July 2012, the Claimant had a further telephone discussion with Mr Hope. The Claimant again told Mr Hope that he shared information on interbank chats about orders at the fix, for the purposes of matching, but also that there were times when all the other banks sharing information said that their orders were the same way. The Claimant said that he was still worried about things like fixes and was double checking with Compliance (bundle 8, pgs. 2717 and 2725).

102 On 6 July 2012, the Claimant had a telephone call with Tim Cartledge. He reiterated that banks were sharing information about orders at the fix for matching and that sometimes all traders would have orders the same way. The Claimant said of this: "You've move the odds I guess… that's where it… is the worrying part" (bundle 8, p.2748). Mr Cartledge replied that communication with other banks should be for the purpose of finding offsetting trades (netting).

103 The Claimant told the Tribunal that there was a further call between him and Mr Hope and Mr Cartledge on 9 July 2012 and again on 16 July 2012. The Tribunal finds that it is likely that he reiterated that he was concerned that traders were exchanging information about orders at the fix.

104 On 17 July 2012, Mr Cartledge emailed Alan Brewer in the Respondent's legal department asking for Compliance guidance on issues, including:

- "Bank to bank chats (eg to competitors) for discussing market colour, should these be allowed at all in any asset class and if so what are the rules

- Best practice in handling fixing orders (eg client orders where the fill rate is based upon an externally benchmarked fix). Our activity in executing the order may move the market" (bundle 9, p3113).

Mr Cartledge also asked Compliance for opinions and to go through current practices on (i) barrier stops (ii) fixing orders (iii) bank to bank trader chats (bundle 9, p.3115).

105 Victoria Porter, Business Manager for Foreign Exchange, confirmed to Mr Cartledge that a meeting had been scheduled with the Claimant, amongst others, that day, to discuss these matters. Mr Cartledge had had a call with Compliance on 17 July and had been told that there were significant Competition law concerns about these issues. He said that it was a bank wide and industry wide matter for traders to talk to each other (bundle 9, p.3128).

106 After his meeting on 17 July, the Claimant telephoned Peter Little, a Spot Trader in Barclays, New York, at 4pm. He said that Mr Bagguley was now saying that Barclays had to withdraw from chat rooms. He said that information exchanged was seen as too much information. Mr Little said that this was nonsense and that he had relationships with people in the market he trusted. The Claimant said that Barclays

was seeing information sharing as collusion because there were four large banks sharing information making up 45% of the FX market (bundle 9, pgs 3155 to 3156).

107 The Claimant also had a telephone call with a unknown male on 18 July (bundle 9, p.3157). He said that information sharing at the fix had been used to match off orders. He also said:

> "..do you use it to provide you with an upper hand? Well I would say that's pretty much a given. Has it become standard market practice? I think it has." (bundle 9, p.3157).

The unknown male asked the Claimant:

> "Are you talking about people executing on fixes or people talking about em?" (them)

The unknown male said:

> "Oh no. Don't, don't get caught up in that Chris, I mean that genuinely. Wrong is wrong, doesn't matter how many people are doing it".

The Claimant said it had become market practice the norm. The unknown male said:

> "… it's not really a market practice it's it's just – a lot more people are doing it – that doesn't make it right."

The Claimant said:

> "I'm not in any way saying its right" (bundle 9, p.3159).

108 The Claimant produced a market colour benchmark document on 19 July 2012 (bundle 9, pgs. 3164 to 3167). This set out how benchmarks were executed by FX traders and set out the fact that traders shared information with other traders in other banks. At the conclusion of his document he set out the "cons" regarding the current practice and said:

> "Sharing information on benchmark flows between banks could be seen as contentious by sharing our potential positional risk to external trusted counterparties…
>
> Could these trader chats and information sharing compromise our service to customers?"

He said that a trader may see, either matching natural interest with others, including banks, via trader chats, or the amount increase with natural interest from broker voice, or electronic or other banks via trader chats, or see and share information from other banks, which is the same way, or opposite, for matching (bundle 9, pgs.3166 to 3167).

109 The Claimant attended a further meeting with Compliance and Victoria Porter on 19 July to discuss fixings and barriers (bundle 9, p3169). As a result of that meeting,

the Claimant told Peter Little that Compliance advice was that talking to other banks at the fixing was not permitted. He repeated this advice in another call to Peter Little on 24 July 2012. He said, "There's every chance that… all trader chats will be cut…" and that they were seen as anti-competitive (bundle 9, pgs.3181 to 3184).

110 On 24 July 2012, the Claimant had met with Legal and Compliance officers at Barclays, including Alan Brewer from the FX Legal department, Mr Hope and Mr Harrison. Mr Brewer chastised the Claimant for having sent his benchmark document by email. Mr Brewer stated his view that interbank chats could not be shut down solely in the bank's FX business in London, as the bank's Regulators would want to know why this action had only been taken in relation to FX business in London and not globally.

111 The next day on 25 July the Claimant had a telephone with Mr Cartledge (bundle 9, p.3188). The Claimant updated Mr Cartledge on the Claimant's discussions with Colin Harrison from Compliance. Mr Harrison's view was that trader chats should be stopped for FX at the bank globally and not just in London.

112 On 27 July, there was a telephone call between Tim Cartledge, Rick Sears, Colin Harrison, Mark Hope and Alan Brewer. Mr Harrison said that there had been a breach of confidentiality in April which had led to a general review of market colour given to clients and in the course of that there had been a lot of conversations with the Claimant. He said:

> "it became more and more obvious in conversations with Chris that where that market colour was communicated in chatrooms where only traders participated, we probably needed to analyse it in a different way than only thinking about client confidentiality issues…"

He said that Mr Bagguley had expressed increasing misgivings and nervousness about the use of chat rooms. He said that it had come to the point where the Claimant said he did not want to participate in chat rooms any more. Mr Sears responded that cutting traders off from talking to any other traders in the market sounded draconian. Mr Brewer replied that conversations with other traders were fine so long as they were generic and bland, but if they were sharing information which was not available for the market as a whole, that was uncomfortable. He said that the particular medium of chats generated that type of behaviour and left a very clear trail. Mr Brewer also said that traders sharing prices with each other had become normal and accepted practice, but it should not happen (bundle 9, p.3201).

113 Mr Hope explained that the market colour guidelines policy had tried to cover both bank client and trader to trader chats, but it had become more and more apparent that it was wrong to include trader to trader chats in it. Mr Brewer said that generic market colour being shared was fine:

> "but from what Chris said that's not what people are talking about on chatrooms. It's actual… information around pricing and what trades someone did or what order they'd received…".

Mr Brewer said that such information was of value and influenced the bank's behaviour

(bundle 9, p.3221). He also said that the whole market was doing the same thing. Mr Brewer said that if Barclays was not to shut down chats:

> "..this has got to go to some very senior people to take the view based on the fact that it is technically wrong… and do we want to continue doing it… based on the fact that we need it for business and… everyone's doing it" (bundle 9, p.3229).

114 The meeting agreed to have an ExCo meeting to discuss the matter. This took place by video conference on 31 July 2012. It was attended by Robert Bogucki, Adrian McGowan, Colin Harrison and Tim Cartledge. The meeting decided that interbank chats should be closed. The Claimant sought out Mr McGowan after the meeting and asked what had been decided. Mr McGowan told the Claimant that interbank chats should be stopped. No announcement was made at this point; it seems that no final decision had been made about the extension about the ban in chat rooms to other areas of the bank's business.

115 On 22 October 2012, Mr Bagguley emailed all FX traders, globally, at the bank, saying that Global FX had decided to close all participation in interbank trader chat rooms. He said that employees should cease participation in such chat rooms with immediate effect.

116 Barclays issued Global FX Market Colour Guidelines in December 2012 (bundle 9, p.3453). The Guidelines issued covered only communications with clients and not communications with competitors.

117 In December 2012 Barclays also issued "Competition Guidance on Exchanging Information with Competitors – Version for Sales/Structuring and Trading". It said: "Competition law… prohibits the exchange of commercially sensitive information between competitors, except in very limited circumstances." The Guidance instructed employees not to share commercially sensitive information with, or accept commercially sensitive information from, competitors. It also instructed employees not to use commercial negotiations with competitors solely as a way to gather commercially sensitive information. It said, "There must be a genuine intention to transact or potentially transact". The Guidance defined commercially sensitive information as including information about:

> ".. intended or potential or recent trades including information on pricing, volume, client identity or about client requests or orders and whether you intend to execute or the terms you intend to offer or have offered… or about your order book including details of your volume of orders limits etc…" (bundle 18, p.6796).

118 The Claimant was given an "exceptional" rating in his 2012 end of year appraisal by Mr Cartledge (bundle 9, p3520).

119 On about 11 June 2013, Bloomberg alleged that FX traders may have been attempting to manipulate rates at the fix.

120 On 2 July 2013, the Claimant attended a meeting with members of the Respondent's Legal team and Ms Grover of the Respondent's Compliance

Department. The Claimant told them that one of the Respondent's customers had told him that the customer had received detailed order book updates from their banks. The Claimant told the Tribunal that he had informed Legal and Compliance Department representatives that, if Barclays was doing this, it could be a breach of their duties of confidentiality.

121 The next day, 3 July, the Claimant had a discussion with Adrian McGowan. The Claimant raised the issue of provision of market colour to "customer", rather than "competitor", banks. He raised the issue of whether this could involve breaches of confidentiality, or could be anti-competitive. As a result, Mr McGowan had a meeting with FX management, Mr Brewer and Ms Bardell to ask for their guidance. Mr Brewer advised the Claimant about the legality of providing market colour in a telephone call on 10 July (bundle 10, p.3654)

122 On 5 July the Claimant met Tony Rici and Karishma Grove from the Respondent's Compliance Department, to discuss the issue of customers receiving detailed order book updates and explained that providing updates in relation to customer FX order books was potentially in breach of confidentiality guidelines.

123 In the summer of 2013, it was reported in the national press that the Financial Conduct Authority or "FCA" was commencing an investigation into the FX market. Barclays instructed external US and UK lawyers to conduct a privileged internal investigation into practices in its FX business during the period 2008 to 2013.

124 In October 2013, Regulatory and Enforcement authorities in the US and UK; the FCA, the Commodity Futures and Trading Commission or "CFTC", US Department of Justice, the Board of Governors of the Federal Reserve System and the New York Department of Financial Services, "the DFS," all commenced investigations into Barclays FX business.

125 In about August 2013, Mr Bagguley had told Mr McGowan that Mr Bagguley was taking on responsibility for more of Barclays products and, as a result, Mr McGowan would be appointed as Barclays Global Head of FX. Mr Cartledge would be appointed as Head of e-FICC (Electronic Trading Fixed Income Currencies and Commodities). Mr McGowan was to assume the non electronic part of Mr Bagguley's former FX role and Mr Cartledge was to move away from Voice FX Spot, to concentrate solely on electronic trading. Mr McGowan told Mr Cartledge that he would want a Global Head of FX Spot to support him, as Mr McGowan's experience was principally in FX Forwards and Options. He was clear that he required such support, stating this in an email to Mr Cartledge on 11 September 2013 (bundle 10, p.3672).

126 Messrs Bagguley and Cartledge told Mr McGowan that the Claimant had the skills and experience to perform the Global Head of FX Spot role and that the Claimant was ready for promotion from his current position. It was also agreed that the Claimant, in London, was best placed to be Global Head, because the London time zone overlapped with both the US time zone, where Jerry Urwin worked, and the Tokyo time zone, where Motomari Osawa was based.

127 On 11 September Mr Cartledge and Mr McGowan had an email discussion about the politics of the Claimant's appointment, as two of his colleagues, Jerry Urwin

and Motomari Osawa, were likely to be disappointed by it (bundle 10, pgs.3671 to 3674).

128 On 10 October 2013, Mr McGowan announced five new appointments within Barclays FX trading team, of which the Claimant was one. He said that the Claimant's team would work with a new e-FICC training group to ensure that Barclays' Voice and e Spot offering were aligned and consistent with regulatory requirements and expectations (bundle 10, pgs.3684 to 3685). At the time Mr McGowan promoted the Claimant to Global Head of FX, Mr McGowan did not know that the Claimant was likely to be suspended. The Employment Tribunal accepted Mr McGowan's evidence on this.

129 At the end of October 2013, the Claimant became aware that Barclays in Tokyo was sending its order book to the Bank of Japan. The Claimant told the Tribunal that he informed Barclays Compliance Department about this. In a telephone call with Jerry Urwin on 31 October that year, the Claimant told Mr Urwin about Barclays sending its detailed order book to the Bank of Japan. He said that he was going to sit down with Compliance and talk about this issue. Given that the Claimant told Mr Urwin that he was going to meet with Compliance, the Tribunal accepts his evidence that he had already raised the matter with Compliance by 31 October and had agreed to meet with Compliance to discuss the matter in more detail.

130 On 30 October 2013, the Claimant asked John Fullick of Barclays Compliance Department whether traders should participate in chats with customer banks as they were currently doing. The Claimant contended, at the Employment Tribunal, that he told Compliance that the bank's policies and procedures were still deficient and required further clarification.

131 From the Claimant's recorded conversations and emails at this time, however, it appears that the Claimant considered that it was permissible for traders to be involved in interbank chats with client banks. In a telephone call with Jerry Urwin on 31 October the Claimant said that he had been speaking with Compliance the previous day and had said, "… we are a content led model, these customers are customers.. we view as customers they're not in the top 20 of euro money. They're not competitors…" He then told Jerry Urwin that the Legal Department was of the opinion that banks needed to be treated separately from other customers. The Claimant said, ".. obviously this impacts the business…" (bundle 10, pgs.3703 to 3712).

132 On 31 October, the Claimant emailed Mr McGowan, Andrea Anselmetti and Marcello Cavalcanti, saying that a meeting was being arranged for that day to discuss the issue of chats with customer banks.

133 Mr Cavalcanti attended a meeting to discuss the matter with Mr Fullick on 5 November 2013. None of Mr Fullick, Mr McGowan or Mr Cavalcanti recalls attending a meeting with the Claimant about the subject on 31 October. The Tribunal concludes that no meeting took place on 31 October.

134 The privileged Barclays internal investigation reviewed chats that the Claimant had been involved in with other traders between 2008 and 2013. Eric Bommensath and Tom King, Co-Heads of Corporate and Investment Banking, took the decision to

suspend the Claimant. Pursuant to this decision, Clare Burtenshaw, Co-Head of Employee Relations, and Justin Bull, Global Chief Operating Officer of the Investment Bank, met the Claimant on 1 November 2013 and advised him that he was being suspended. His suspension was confirmed in writing on the same day. The letter said:

> "Further to our conversation today, I am writing to confirm that… you are suspended from your duties while Barclays investigates the potential manipulation of the FX rates by Barclays and/or other banks. Barclays has taken this decision following a review of various communications including between you and other banks, which suggests that you may not have complied with Barclays' policies and may have engaged in potential misconduct involving FX rates which therefore merit further investigation" (bundle 10, p.3725).

The Claimant was suspended along with 5 other FX traders.

135 Mr Bull told the Tribunal that he did not make the decision to suspend the Claimant, but that suspending employees in the context of the FX investigation was consistent with the approach taken by Barclays in relation to previous investigations of a similar magnitude. Mr Bull told the Tribunal that, when any Barclays employee was suspended prior to compensation awards and the vesting of deferred bonuses each year, a senior manager was asked to consider whether the award of any bonus, or vesting of deferred bonuses from previous years, should be suspended pending the outcome of the disciplinary investigation. This decision would be take again on an annual basis, at the time when awards and vesting was decided upon. He said that this practice was consistent with guidance issued by the Prudential Regulations Authority. At paragraph 16 the Guidance issued by the PRA states:

> "Firms should freeze the vesting of all deferred awards made to individuals undergoing internal or external investigation that could result in *ex-post* risk adjustment until such an investigation has concluded and the firm has made a decision and communicated it to the relevant employee(s)" (bundle 10, p.3682e).

136 Mr Bull wrote to the Claimant on 6 February 2014, telling him that the Bank's Board Remuneration Committee had decided that a decision on the Claimant's bonus for 2013 and any deferred awards should be suspended. Mr Bull said that the suspension decision was taken in relation to Barclays investigation into FX trading activities, was consistent with the Barclays Employee Handbook, the requirement of the UK's Prudential Regulation Authority and standard Barclays practice in similar circumstances (bundle 10, pgs. 3763 to 3764).

137 The Claimant participated in the internal privileged investigation, attending investigation interviews on 25 and 26 March and 11 April 2014. The Claimant received independent legal advice on the investigation from UK and US lawyers, funded by Barclays.

138 On 13 June 2014, the Claimant provided a document to the investigation entitled, "Compliance Chronology" (bundle 14, pgs.5015 to 5219). In this document he gave dates upon which he said he had sought clarity from Compliance in relation to fixes and had been involved in market colour discussions about interbank chats.

139 On 11 November 2014, the FCA published final notices making adverse findings and requiring the payment of financial penalties in relation to 5 banks: Citibank (bundle 15, p. 5449); HSBC (bundle 15, p.5490); JP Morgan (bundle 15, p.5531); RBS (bundle 15, p.5571 and UBS (bundle 15, p.5613).

140 Barclays was engaged in discussions and negotiations with its Regulators about the Regulators' proposed findings and financial penalties to be imposed on Barclays. Barclays was also regulated by the DFS, the New York Department of Financial Services. The Employment Tribunal accepted Mr Mahon's evidence that the reason Barclays was not given a final notice in November 2014 was that it had been unable to reach agreement with all its Regulators by that date.

141 The Tribunal finds that it would have been apparent to anyone who had studied the transcripts of the Claimant's Cartel chat rooms that adverse findings had been made by the FCA in relation to the Claimant's involvement in an alleged attempt by a trader at UBS to manipulate the ECB fix. The Claimant's words were quoted in the findings at paragraphs 4.39 to 4.40 of the UBS notice (bundle 15, pgs. 5630 to 5632).

142 The Claimant had not had any input into the FCA's investigations and findings, however. His evidence to the Employment Tribunal on this matter was that the trading he was referring to in the particular chat, when Barclays was reducing its net sell orders, was carried out entirely independently of him.

143 In December 2014, Barclays established a committee, chaired by Bob Hoyt, its Group General Council, and including Group Executive Committee members independent of the FX business, to oversee the bank's disciplinary proceedings in relation to employees in FX trading. The committee was called the FX Employee Review Committee (the FX ERC). The Tribunal accepted the Respondent's evidence that its role was to ensure a consistent approach to the review of FX practices across a number of countries. A similar committee had been established by Barclays in relation to the LIBOR investigation. The Tribunal finds that it was logical that Barclays would want to ensure a consistent approach across jurisdictions in relation to such a significant investigation.

144 On 5 January 2015, the FX ERC endorsed the appointment of Justin Bull and Harry Harrison, Co-Head of Barclays Non-Core, as disciplinary managers for the UK-based FX Trading Desk employees subject to disciplinary proceedings. Messrs Bull and Harrison both held the corporate title of Managing Director, the most senior level in the bank. Both had been senior managers in the Investment Bank and had considerable experience of working in a trading environment (bundle 16, p.5721).

145 Mr Bull told the Tribunal that he agreed to be a disciplinary manager only on the basis that a decision on the disciplinary outcome would be his and Mr Harrison's and not anyone else's. He told the Tribunal that, in relation to a previous LIBOR disciplinary hearing, Mr Bull had made a decision that an employee had not taken part in misconduct. Mr Bull's decision had been challenged by others at the bank, but Mr Bull had insisted that his outcome prevailed. The Tribunal accepted Mr Bull's evidence on this. He gave clear and forthright evidence which the Tribunal considered convincing and reliable.

146 On 9 January 2015, the FX ERC received legally privileged advice about employees, including the Claimant, and endorsed a recommendation that the Claimant be put through a disciplinary process (bundle 16, p.5724).

147 On 22 January 2015, Sonya Bonniface, Director of Human Resources, wrote to the Claimant, inviting him to attend a disciplinary hearing on 9 February. She said that the purpose of the hearing would be to consider whether disciplinary action should be taken against the Claimant in relation to the following allegations:-

147.1 You participated in interbank chat rooms in which you exchanged with traders at other banks: detailed non public information regarding trading positions strategies and future intentions; information regarding stop loss orders, spreads and customer orders.

147.2 You co-ordinated with traders at other financial institutions in attempting to influence through co-ordinated trading certain FX spot rates.

147.3 You were aware of and failed to act appropriately to address behaviour among FX traders in interbank chat rooms in which they may have exchanged with traders at other banks detailed non public information on the trader's trading positions, strategies and future intentions; who may have co-ordinated with traders at other financial institutions in attempting to influence, through co-ordinated trading, certain FX spot rates.

147.4 You failed to supervise team members such that team members participated in interbank chat rooms in which they may have exchanged with traders at other banks detailed non public information on the trader's trading positions, strategies and future intentions; may have co-ordinated with traders at other financial institutions in attempting to influence, through co-ordinated trading, certain FX spot rates.

147.5 You engaged in other behaviour potentially prejudicial to Barclays reputation (such as using derogatory language in relation to clients, swearing, or engaging in other inappropriate discussions).

147.6 You engaged in other behaviour potentially contrary to Barclays client interests (such as attempts to front run client orders, or trigger stop loss orders).

The letter said that the Claimant should be aware that, because of the serious nature of the allegations, dismissal was a possible outcome.

148 Ms Bonniface enclosed three lever arch files of documents including memoranda from the Claimant's interviews, numerous policies and regulatory rules and regulations, as well as transcripts of the Claimant's chats between 2008 and 2012. Five other FX traders were also subjected to disciplinary action.

149 On 26 January 2015 the Claimant's solicitors requested that the disciplinary hearing be moved to a date which would allow him to have properly studied the

documents provided (bundle 16, p.5738). On 2 February, the Claimant's solicitors asked the Respondent to confirm in what way the Respondent said the Claimant's participation in the relevant chats amounted to the categories of misconduct set out in the allegations against him.

150 On 10 February Ms Bonniface replied, attaching a schedule containing extracts from chats, with a description of the alleged misconduct exhibited in each (bundle 16, p.5749).

151 Further communication ensued between the Claimant's solicitors and Barclays' HR representatives. Barclays provided a further short schedule of two chats and alleged misconduct on 3 March 2015 (bundle 16, p.5916). Barclays also gave the Claimant further significant disclosure of documents around this time.

152 On 12 February 2015, Ms Bonniface informed the Claimant that, while he was under investigation and subject to any potential disciplinary process in relation FX trading activities, any decision in relation to his 2014 bonus and the vesting of deferred awards would be suspended. John Mahon had been asked to consider whether the compensation suspension should continue. He recommended that it should remain in place for all suspended employees, consistent with the Prudential Regulation Authority guidance.

153 In March 2015, Messrs Bull and Harrison were scheduling hearing dates for the suspended FX traders. On 12 March 2015, Mr Bull emailed, confirming various proposed dates and saying:

> "If this is all correct what is time line to get
>
> - our finding agreed
> - our findings through various governing bodies
> - communication of said findings to individuals…
> - what role, if any, do Harry or I have to play when these all appeal?" (bundle 16, p.5933).

154 Mr Bull told the Tribunal that his email was a reflection of his experience that employees who had any adverse finding made against them would appeal. He said that 3 disciplinary hearings had already been held in relation to 3 FX employees and that Mr Bull had formed the view that adverse findings would be made. He had also looked the papers for a fourth FX trader, not the Claimant, and had the view that there had been misconduct.

155 During the disciplinary procedure the Claimant requested that the Respondent disclose recordings of telephone calls between him and Mr Cartledge, Mr McGowan, Mr Bagguley, Mr Harrison, Mr Hope and Mr Brewer, amongst others. The disciplinary hearing was postponed on a number of occasions, including after the Respondent served further documents on the Claimant.

156 On 2 April 2015 Ms Bonniface sent to the Claimant's solicitor a further schedule of chats, for use at the disciplinary hearing. This schedule gave categories of misconduct, the provisions of policies relevant to them and the lines of relevant chats,

with times of the comments relied on. She said that this was representative sample, but other chats could be referred to (bundle 16, p.5969). The Claimant provided two witness statements for use at the hearing, along with a bundle of relevant documents.

157 Messrs Bull and Harrison conducted the disciplinary hearing on 13 April 2015 (bundle 17, p.6059). They asked the Claimant about the provisions of policies which applied to his work. The Claimant's solicitor asked to be taken to the policies to which Mr Bull was referring. Mr Bull replied, "Do we have until midnight… By the way we are going to end up having to read the whole file this afternoon which is fine by me…". The Tribunal finds that Mr Bull displayed impatience about what was a reasonable request.

158 At the disciplinary hearing the Claimant acknowledged the provisions of policies which applied to his work and the confidentiality provisions of his contract. He denied that he had breached the provisions of any policy, or the terms of his contract. He agreed that he had disclosed his trading positions to traders at competitor banks, but said that he had done so to try to net off with those holding opposite trading positions.

159 The Claimant was asked about specific chat conversations. In relation to his conversation with James Witt at UBS, when he talked about stop loss orders, the Claimant said that this was permissible in the context of market colour, the receipt and provision of which was expected by senior management. He said that stop losses were seen as "content" and acceptable at the time. Mr Harrison questioned the Claimant about whether giving a range for stop loss orders was acceptable, rather than a specific level. The Claimant said that Mr Hope had reviewed his chats for March 2012 and had said that there was no breach of policy. The Claimant said that it was not fair to say, now, that there was a possible breach of policy when his chats had previously been reviewed and cleared. Mr Bull said, "Well life's not fair," and that it was only a one month review. The Claimant replied that he had looked at the chats reviewed and the content was the same.

160 Mr Bull asked the Claimant about a chat with Messrs Usher, Ramchandani and Gardiner, when they all disclosed they had net sell orders and the Claimant was giving a commentary on how his net orders were decreasing. Mr Bull asked the Claimant if he had no intention of netting. The Claimant said that it was perfectly reasonable to try and find offsetting trades in the interbank market. Messrs Bull and Harrison asked the Claimant about his statement in the chat that the decks would be clearer for another trader. The Claimant replied that this referred to volatility in the market being reduced. He said that many of his comments, for example: "in cable… its free shooting" and "butchering stops" were banter.

161 Mr Bull also asked the Claimant about a comment made in a conversation with Mr Cahill at HSBC; "get lumpy cable at fix ok… 400 odd here". Mr Bull queried whether the Claimant was trying to net or match in circumstances that Mr Cahill had said that he had the same side. The Claimant said that it was not fair for Mr Bull and Mr Harrison to be making these points now when they were not brought up in 2012.

162 Mr Bull asked the Claimant about comments the Claimant had made to Jack Murray a junior trader on the FX desk. The Claimant said that these were bravado and slang.

163 The Claimant agreed that Mr Bull and Mr Harrison could send him further questions about chats after the disciplinary interview, which had lasted from 2pm to 4:45pm. Barclays sent the Claimant additional questions on 15 April 2015 (bundle 17, p.6261) and he responded on 24 April 2015 (bundle 17, p.6297).

164 The Claimant was asked questions about a chat on 6 January 2012 where he had "big lhs ecb lads… triple… bigger now…monkey plus half a chimp… i have to give it a go… a gorilla less 2 monkeys…" in relation to his LHS position before the ECB fix. He was asked whether he was exchanging information about this trading position and sharing information before the fix. The Claimant was also asked about an alleged failure to supervise Mr Clark in a chat on 30 April 2012 when Mr Clark had said: "ye lhs abt a ton… haha ok i get abt 150 now". The Claimant was asked whether Mr Clark was disclosing his net fix orders. The Claimant was asked about a chat on 15 January 2012 when Mr Gardiner said: "scores gents?" and the Claimant had responded +100. He was asked: "What were you disclosing?"

165 In his replies to the questions, the Claimant said that he could not remember what "scores gents?" referred to. He repeated that disclosing Barclays' fix position was appropriate with a view to "netting off". With regard to his supervision of Mr Clark, the Claimant said that his last interaction in that particular chat had been some minutes before and that it was unlikely that the Claimant had seen Mr Clark's comments.

166 The Claimant said that it was not fair for the bank to seek to measure the Claimant's conduct against the standards which did not exist at the relevant time. He said that acceptable parameters of market colour were only established later. He pointed to excellent appraisals in relation to his supervision and management of junior staff he had received at the relevant times.

167 After the disciplinary meeting, on 17 April 2015, the Claimant solicitors wrote to Barclays, saying that Mr Bull had continuously cut off the Claimant when the Claimant was trying to answer questions and had made inappropriate remarks such as, "Do we have until midnight," and, "Well life isn't fair!" (bundle 17, p6280).

168 On 28 April 2015, the FX ERC met. The notes of the meeting record that, on a legally privileged basis, Alison Miln provided the committee with written and verbal advice relating to individuals, including the Claimant. The notes of the meeting further record that Messrs Harrison and Mr Bull provided a summary of their recommendations for each individual and that the committee endorsed the recommendation that the Claimant should be dismissed without notice for gross misconduct (bundle 17, p6331).

169 At the Tribunal Mr Bull was cross-examined about when it was that he and Mr Harrison made their decision to dismiss the Claimant and when they made findings on the allegations against him. He was vague in evidence about whether he met with Mr Harrison to discuss the outcome, or whether they discussed it by telephone. He also could not remember which one of them had spoken at the FXERC. He told the Tribunal, however, that Mr Bull and Mr Harrison had made their decisions on the allegations and discussions over the weekend before the FXERC and had relayed their decision and justification for it to Human Resources immediately before the FXERC meeting.

170 The Employment Tribunal accepted Mr Bull's evidence that he and Mr Harrison made the decision over the weekend and went through their findings with Human Resources. They had conducted the disciplinary hearing and were, apart from Human Resources advisors, the only ones who were in a position to make a decision on the allegations having heard the evidence.

171 On 8 May 2015 Mr Harrison wrote to the Claimant, dismissing him without notice for gross misconduct (bundle 17, p.6337). The letter of dismissal was sent on the Second Respondent's headed notepaper. Mr Harrison repeated the allegations against the Claimant and set out his and Mr Bull's findings in relation to each.

172 With regard to allegation 1, Mr Harrison said that Mr Bull and he had reviewed Bloomberg chat records and found that the Claimant had disclosed specific information regarding his trading positions to traders at other banks. He said that the information went beyond market colour and included detailed information, which was not in the public domain. He said that they had also found that the Claimant had provided information regarding stop loss orders to traders at other banks. He said that the Claimant should have treated this information as confidential. In disclosing it to traders at other banks, the Claimant had breached the confidentiality obligations in his contract, the Respondent's Global Confidential Information and Chinese Walls Policy, its Global External Communications Policy and its Global Code of Conduct.

173 Mr Harrison said that he and Mr Bull had not upheld allegation 2 that the Claimant had attempted to co-ordinate with other traders who influenced FX spot rates. He said, nevertheless, that they noted that the information the Claimant had shared inappropriately with other banks was highly likely to have assisted others in attempting to influence the FX spot rates.

174 With regard to allegation 3, Mr Harrison said that Mr Bull and he had found that the Claimant was aware of, but did nothing to prevent, behaviours displayed by other members of the FX Spot Desk relating to sharing information of a non public nature. He said a review of chat rooms indicated that this information sharing took place between traders on a regular and consistent basis. Given the pervasive and frequent nature of the sharing, the Claimant ought to have been aware that traders could have used this information to co-ordinate trading to influence the FX Spot rates.

175 With regard to allegation 4, Mr Harrison said that he and Mr Bull had decided that the Claimant should have been actively monitoring the comments of his direct reports and that he had failed to address inappropriate comments made by more junior traders. They accepted, however, that on one occasion when Mr Clark made inappropriate comments, the Claimant was not actively participating in the chat at the time.

176 With regard to allegation 5, Mr Harrison said that the language used by the Claimant in chat rooms included references to a Cartel and sexual conduct. He said that they had found that the Claimant had used abbreviated swear words to circumvent the bank's monitoring systems. Mr Harrison said that the language used by the Claimant was inappropriate, offensive and defamatory and unprofessional and was in breach of the banks' Global Electronic Communications Policy, External Communications Policy and Code of Conduct.

177 With regard to allegation 6, Mr Harrison said that, having reviewed Bloomberg chat room conversations, on some occasions the Claimant had disclosed information regarding net orders in advance of a particular fix and or the nature of stop loss orders and, in doing so, had acted in a way which was potentially contrary to clients' interests. He said that that was a contravention of the bank's Code of Conduct.

178 Mr Harrison said that they had found that the Claimant had understood the requirements of policies and had had training on numerous compliance issues. He said that the Claimant had not made full disclosure of the extent of his own conduct, or of his colleagues, in chat rooms in 2012, when the market colour guidance was prepared. Mr Harrison said that the Claimant's behaviour in relation to each of the allegations was gross misconduct. This went to the Claimant's integrity, so that summary dismissal was the most appropriate sanction. Mr Harrison told the Claimant of his right to appeal.

179 On 20 May 2015, Barclays announced that it had reached a resolution with Regulatory authorities and had agreed to pay total penalties of $2.3 billion. The FCA Final Notice was issued against Barclays Bank plc, the Second Respondent (bundle 17, pgs.6382 to 6430). In the Final Notice, the FCA criticised Barclays' policies. At paragraph 4.32 of the notice it said:

> "While Barclays had policies in place regarding risks of the type described in this Notice, they were high level in nature and applied generally across a number of Barclays' business divisions."

180 The Notice said that policies were broad and not tailored to the FX business and that policies relating to confidential information, conflicts of interest and electronic communications were not sufficiently clear or specific in their application to the FX business. The Notice said that insufficient training on how policies should be applied to the FX business had been provided by Barclays, which increased the risk that misconduct would occur. The FCA Notice further found that guidelines introduced on exchange of information with competitors in October and December 2012 referred to the sharing of confidential information, but did not fully address the behaviours identified by the FCA.

181 The FCA decided, in its Notice, that traders had:

181.1 Attempted to manipulate FX fix rates in collusion with traders at other firms to the potential detriment of certain Barclays clients and market participants.

181.2 Had attempted to trigger client's stop loss orders to the detriment of clients and others in the market.

181.3 Shared confidential information inappropriately, including information about client orders.

182 The Claimant agreed in cross-examination that he was the trader responsible for many of the examples of misconduct found by the FCA.

183 The New York DFS Order against Barclays was also published on 20 May (bundle 17, pgs.6451 to 6477). The New York DFS Order noted that Barclays had already dismissed a number of employees involved including: "The Global Head of FX Spot Trading in London" - which was a reference to the Claimant. The Notice said that certain employees involved in the wrongful conduct had been suspended or placed on unpaid leave, but remained employed by the bank. The Order directed that the bank take all necessary steps to dismiss 4 named New York employees. Of employees who were suspended and under investigation by other authorities, the Order stated:

> "… the Department orders the Bank to take all steps necessary to terminate them as promptly as is consistent with its obligations to cooperate with those authorities."

184 The Claimant appealed against his dismissal by letter of 26 May 2015 (bundle 18, p.6499). He relied on three grounds of appeal:-

184.1 Regulatory bodies had found the bank's policies were not sufficiently clear or specific in their application to the FX business and it was unfair to dismiss the Claimant for alleged contraventions of such policies.

184.2 The bank had not dismissed the Claimant in 2012, despite having full notice of all the conduct which was now alleged to be misconduct. In disciplining the Claimant only after Regulatory investigations had been commenced, the bank had created standards of conduct which did not apply at the time.

184.3 The Claimant had been dismissed to appease an overseas Regulator; the New York DFS.

The appeal letter did not suggest that the dismissal letter was not sufficiently clear.

185 The FX ERC appointed John Mahon, Managing Director and Co-Head of Barclays Non-Core, and Francois Jourdain, Head of Compliance Barclays Investment Bank, to chair the appeal hearing. It was agreed that the appeal hearing would take place on 13 August 2015.

186 On 14 July, in advance of the appeal hearing, the Claimant asked that Barclays provide a list of areas likely to be covered at the appeal hearing, supporting evidence to be relied on at the appeal hearing and questions the appeal panel wanted to put to the Claimant (bundle 18, p.6547). On 4 August Barclays replied, providing areas for discussion at the appeal (bundle 18, p.6579).

187 The appeal took place on 13 August (bundle 18, p.6603). At the outset, Mr Mahon said that he and Mr Jourdain would listen to what the Claimant had to say and would pursue any necessary lines of enquiry before making a decision.

188 The Claimant said that his compliance chronology showed that he had always

spoken to senior management if he felt a policy was unclear. He said he could not agree that market colour should only ever be high level and generic without being given examples of high and low level information, but said that he had only ever shared generic, high level information in multi-party chat rooms.

189 The Claimant was asked about a chat in which he said, "..so will be about lhs 60 quid"; he was asked what he was trying to achieve by sharing this information. The Claimant said that he would offer this information and then match off. Mr Jourdain asked why the Claimant had disclosed the size of his order as an opening gambit. Mr Jourdain said that sharing such information could allow other traders to act to the Claimant's disadvantage. The Claimant said that that was how FX was conducted.

190 The Claimant said he had sought guidance on exactly this. Mr Mahon asked the Claimant about conversations in which he had been asked for his scores. The Claimant said he had already answered this question during an interview on 24 April 2014.

191 The Claimant referred to a review of chats undertaken by Mark Hope in March 2012, where nothing inappropriate was noted. Mr Mahon said that he did not understand how disclosing a stop loss order would be good for a client. The Claimant said that, at the time, stop loss orders had been considered market colour and permissible content and that Mr Mahon was using hindsight. He said that the understanding and use of content had grown over time, particularly with the emergence of e-commerce. The Claimant said he had been encouraged to increase his relationship with clients and was now being dismissed for it. The Claimant said he had been dismissed just two weeks before the FCA had released its final notice on 20 May.

192 On 11 December 2015, Mr Mahon and Mr Jourdain wrote to the Claimant, dismissing his appeal. The appeal rejection was sent on the Second Respondent's headed notepaper. Messrs Mahon and Jourdain said that they had made the decision, which was subject to oversight by the FX ERC, which oversaw the bank's actions in addressing employee conduct with the benefit of legal advice.

193 Messrs Mahon and Jourdain addressed the Claimant's grounds of appeal. With regard to the Claimant's contention that Regulatory bodies had found the bank's policies to have been insufficiently clear, Messrs Mahon and Jourdain said that it was clear from the wording of the policies that they contained broad, general principles, which were capable of being applied across the bank's business. There was no suggestion that they did not apply to the FX spot desk. They said that the Claimant had agreed that he was aware of and understood the policies and that his training record showed that he had been trained on them. They concluded that he was, therefore, aware of their content.

194 Messrs Mahon and Jourdain decided that, although the bank's policies were not specific to the FX business, that did not render them so inadequate as for the Claimant not to be able to understand how they should be applied to his role.

195 With regard to the Claimant's contention that it had been a requirement of Barclays to gather market colour, the appeal panel noted that the Claimant said he only shared generic and high level information in chat rooms. The appeal panel said that

the Claimant had explained that he had disclosed information, for example, "so will be about lhs 60 quid," to explore matching of trades. The appeal managers said that this was an example of the Claimant sharing specific information relating to trades in breach of policies. They did not accept that sharing of such detailed information was appropriate in the context of matching, or at all. Given what the Claimant had said about content, the appeal concluded that the Claimant knew that there was a prohibition on sharing information of this kind.

196 With regard to the question, "scores gents?" and the Claimant's reply, "+100," Messrs Jourdain and Harrison noted that the Claimant had said that it was clear that +100 did not refer to profit, from the contents of the chat. However, they concluded that, in the absence of specific evidence to the contrary, the Claimant was sharing information relating to this trade, most likely in relation to profit generated in a trade. They referred to the Claimant saying, "I sold 40 at 55 the rest at 50 and 47" and referred also to stop losses. They found that the Claimant was sharing specific information, including the fact that he had made a trade at a particular value and was disclosing stop losses placed by a client. Messrs Mahon and Jourdain concluded that it was reasonable for the disciplinary panel to conclude that the Claimant had breached Barclays' policies.

197 Regarding the Claimant's contention that Barclays' failure to take action in 2012, following a review of chats, made it unfair for them to take action later, the appeal managers said that, while there was a discussion in 2012 regarding the nature of information sharing, the Claimant had not fully shared with senior members of the business, its Legal and Compliance departments, the full nature and extent of conversations in multi-party chat rooms. Accordingly, they concluded that Barclays had not had an opportunity to fully appraise the Claimant's behaviour. While the Claimant had discussed the manner in which he was executing stop loss orders, the Claimant had not been clear about the level and frequency of information sharing. However, the managers concluded that, even if the Claimant had given a full picture of the Claimant's behaviour in 2012, this would not have absolved the Claimant from culpability for breaches of policy before the creation of Guidance in 2012.

198 With regard to the allegation the Claimant was being dismissed to appease the DFS, the appeal panel said that they had spoken to the disciplinary panel members about whether they had been instructed by the DFS, or anyone else at the bank, or another Regulator, to dismiss the Claimant. The disciplinary panel members had said that they were not involved in any negotiation with the Regulators and were not told by anyone that they were required to come to a decision to dismiss, or reach any particular outcome. Accordingly, the appeal managers said they were satisfied that the disciplinary procedure had not been a sham process.

199 Mr Mahon was a member of Barclays Regulatory Investigations and Oversight Committee (the RIOC). This was a standing body, intended to provide oversight, direction and supervision of significant regulatory investigations and remediation. As a member of the committee, Mr Mahon reviewed high level updates on the progress of the FX investigation and settlement negotiations with relevant Authorities. Mr Mahon agreed, in evidence to the Tribunal, that the RIOC was ultimately responsible for approving offers made in the course of negotiations. He was cross-examined about this. It was put to him that he was not impartial; that he and the bank both knew that

the only outcome for the disciplinary hearing was to comply with the orders of the DFS to dismiss relevant individuals. Mr Mahon said that the DFS could not compel the bank to dismiss employees, who still had the benefit of local employment law. He said that he would not have agreed to hear the appeal if he knew that the bank could not change its decision. Mr Mahon said that, if the bank reached a different decision to the relevant regulatory body and simply ignored the order of the regulatory body, then the body could withdraw the bank's licence. However, in his experience, what would ensue would be further negotiations between the bank and the Regulators. Mr Mahon said that he was a senior person at the bank and could not be influenced by anyone to do something he did not want to.

200 The FX ERC was informed of the outcome of the appeal on 24 November 2015. Neither Mr Jourdain nor Mr Mahon attended the meeting. The FX ERC accepted the outcome of the disciplinary appeal (bundle 18, p.6704).

201 Between the appeal hearing and the outcome letter being sent to the Claimant, Mr Mahon, or Mr Jourdain, or both, were away on business trips on 19 and 24 - 28 August, 3 - 11 September, 14 - 18 and 29 - 30 September, the 1, 2, 5, 6 and 8-9 October and 11 - 25 and 30 November, as well as the 1 to 4 December. They met together on 23 September and also met with Mr Bull and Mr Harrison that day. The Tribunal finds that both Mr Mahon and Mr Jourdain were very senior members of the bank and were very busy. The Tribunal accepted Ms Bonniface's evidence that they were assisted by her in drafting the outcome letter. The Tribunal concludes that they would have needed time to liaise with her to do this.

Relevant law

Protected Disclosures

202 A worker who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment. An employee who makes such a disclosure is also protected against being dismissed by his employer by reason of having made such a protected disclosure.

203 The meaning of "protected disclosure" is defined in *s43A ERA 1996*:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

204 "Qualifying disclosures" are defined by *s43B*. Before 25 June 2013, this provided:

"43B Disclosures qualifying for protection
In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure tends to show one or more of the following—
….
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…"

From 25 June 2013 a worker must also reasonably believe that the disclosure is being made in the public interest.

205 Before 25 June 2013, *s43G ERA 1996* provided that a qualifying disclosure was made in accordance with s43 if "..the worker makes a disclosure in good faith". That provision was repealed from 25 June 2013.

206 The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

Protection from Detriment

207 Protection from being subjected to a detriment is afforded by *s47B ERA 1996*, which provides:
"47B Protected disclosures
A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

208 A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may present a complaint to an Employment Tribunal under section 48. On such a complaint, it is for the employer to show the ground upon which any act, or deliberate failure to act, was done, *s48(2) ERA.*

209 The term 'detriment' has been explained by Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at 34:" .. [the] tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. ..An unjustified sense of grievance cannot amount to "detriment.""

210 "Worker" is defined by *s230(3) ERA* 1996 as, ".. an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contact that of a client or customer of any profession or business undertaking carried out by the individual..". "Employer" is defined by *s230(4) ERA* thus, "..the person by whom the employee or worker is (or, where the employment has ceased, was) employed."

211 "Worker" also has an extended meaning in relation to protection from detriment because of a protected disclosure, so that a wider category of workers is given protection from the actions of a wider category of employers. By *s43K ERA 1996,*

"**43K Extension of meaning of "worker" etc for Part IVA**

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them, …

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged, .."

212 In the context of *s43K(2)(a) ERA,* "substantially" means "in large part", not just "more than trivially", *Day v Lewisham and Greenwich NHS Trust* [2016] IRLR 415 at [40] –[41].

213 A worker may have two "employers," both of whom fulfil the statutory test in *s43K*, *McTigue v University Hospital Bristol NHS Foundation Trust* UKEAT/0345/15, 21 July 2016.

214 By *s47B(1A)(b) ERA 1996,* a worker has the right not to be subjected to any detriment by any act done by an agent of the worker's employer with the employer's authority on the ground that the worker has made a protected disclosure.

Protected Disclosure Detriment – Causation

215 In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

216 The burden of proof on the Respondent (*s48(2))* therefore requires the Respondent to show that the protected disclosure did not materially influence the Respondent's treatment of the whistleblower. The Court of Appeal indicated that, where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

217 The making of a protected disclosure cannot shield an employee from disciplinary action, including dismissal, which is taken for reasons other than the fact that the employee has made a protected disclosure, *Bolton School v Evans* [2007] ICR 641.

Unfair Dismissal

218 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

219 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*.

Automatically Unfair Dismissal

220 A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*:

"103A Protected disclosure
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

221 In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

Ordinary Unfair Dismissal

222 Conduct is a potentially fair reason for dismissal, *s98(2) ERA 1996.*.

223 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

224 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

225 Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

226 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

227 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR

439.

228 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

229 However, delay can render an otherwise fair dismissal unfair, per Elias LJ in *A v B* [2003] IRLR 405 at para 66.

230 The gravity of the charges and the seriousness of the consequences of the disciplinary proceedings for the employee will be relevant in considering what is expected of a reasonable investigation, *A v B* [2003] IRLR 405. In *Turner v East Midlands Trains Limited* [2013] IRLR 107 at paras 20 – 22, Elias LJ said, "..if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which will harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the scope and nature of the appropriate investigation….The test applied in *A v B* and *Roldan* is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences for the employee if they are proven, are particularly serious."

231 In *A v B* [2003] IRLR 405 Elias J said that, in certain circumstances, a delay in the conduct of the investigation might itself render an otherwise fair dismissal unfair. Where the consequence of the delay is that the employee is or might be prejudiced, for example because relevant statements have not been taken, or because delay has had an effect on fading memories, this will provide concerns about the investigative process.

232 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

Inconsistent Treatment of the Same Conduct

233 In *Sarkar* v *West London Health NHS Trust* [2010] IRLR 508, *CA,* the employer had initially taken the view that complaints about the Claimant's conduct from his colleagues could be dealt with under its 'fair blame policy', which was applicable to relatively low level misconduct and did not lead to dismissal. When that process broke down, the employer invoked its normal disciplinary procedure and later dismissed the Claimant. The Court of Appeal held that the ET had been entitled to take into account, when assessing whether the employer's decision to dismiss had been within the range of reasonable responses, the fact that the employer had previously viewed the Claimant's alleged misconduct as relatively minor and had acted inconsistently in later charging him with gross misconduct based on the same allegations.

234 However, in *Christou v London Borough of Haringey* [2013] EWCA Civ 178, [2013] IRLR 379, which arose out of the 'Baby P' case, two social workers involved in

Baby P's care had originally been disciplined under the Council's simplified disciplinary procedure and had been given a written warning for procedural failings, such as failing to make proper records of events. The simplified procedure was applicable for relatively minor breaches of conduct where the likely sanction was merely a verbal or written warning. Following the criminal trial, an investigation was undertaken to consider whether the original disciplinary action taken against the social workers had been sufficient. It found that the original disciplinary proceedings had been unsound and inadequate and identified five disciplinary charges against the social workers. Although no new facts were relied upon, the fresh charges were directed at alleged failings of substance, such as the poor exercise of professional judgment, rather than procedural complaints. A disciplinary panel upheld the charges and the social workers were summarily dismissed for gross misconduct.

235 The ET found the social workers had been fairly dismissed and, on appeal, the Court of Appeal held that the doctrines of res judicata and abuse of process were not applicable in relation to the two sets of disciplinary proceedings instituted by the employer. The CA held that the dismissals had not been unfair for having subjected the employees to double jeopardy.

236 The Court of Appeal said that the gravity of the fresh charges will be relevant to the question of whether it is fair to reopen proceedings, and the graver the charges the more likely it is that dismissal will be a reasonable sanction.

237 With regard to the doctrine of res judicata, the Court of Appeal held that the exercise of disciplinary power by an employer cannot be described as a form of adjudication. The employer is not determining legal rights in the same way as a court does. It said that the ET had found that the justification for the employer reopening the case lay in the fact that the allegations of misconduct had been very serious because they had involved a risk to a member of the public, and that new management were entitled to take a different view about the gravity of the conduct – that had been a proper and sufficient basis for the conclusion that the dismissals were fair, notwithstanding that the double jeopardy principle was infringed. In that case, the fact that the simplified procedure had been so far removed from any kind of adjudicative process reinforced the conclusion that the doctrine of res judicata was inapplicable.

Discussion and Decision

Correct Respondent to Protected Disclosure Detriment Allegations

238 The Employment Tribunal found that the Claimant's employment contract with the First Respondent made clear that the First Respondent was the employing entity. It also provided that the First Respondent could ask the Claimant to perform services for other entities within the Barclays Group (bundle 1, p.37 and 46).

239 The Claimant did not allege that the Second Respondent was, at any time, responsible for the payment of the Claimant's salary or benefits. The Tribunal found that there was no basis to imply a contract between the Claimant and the Second Respondent. There was a written contract between the Claimant and the First Respondent which contained the rights and obligations of the parties in respect of the work carried out by the Claimant. Given that the Claimant was required to perform

services for entities including the Second Respondent in his contract with the First Respondent, it was not necessary to imply a contract between the Claimant and the Second Respondent.

240 With regard to the extended meanings of "worker" and "employer" in *s43K Employment Rights Act 1996,* in order to be an employer within the meaning of that section, the Second Respondent would have to have been a person who substantially determined the terms upon which the Claimant was engaged, or in practice substantially did so; "substantially" meaning, "in large part" and not simply "more than trivially," *Day v Lewisham and Greenwich NHS Trust* [2016] IRLR 415 at paragraphs 40 to 41.

241 The Tribunal did not receive evidence from the Claimant that the terms upon which he worked were substantially determined by the Second Respondent. He gave little evidence on the matter and simply asserted it. In closing submissions, the Claimant contended that he was registered with the FCA to undertake a controlled function on behalf of the Second Respondent, the FCA's Final Notice was issued against the Second Respondent and that the Claimant's statement of particulars appointed him as a Director of the Second Respondent. The Claimant also pointed out that correspondence concerning the disciplinary process was sent using the Second Respondent's stationary. The Tribunal considered that none of these matters indicate, either on their own, or together, that the terms upon which the Claimant was engaged were, in fact, determined in large part by the Second Respondent, in practice or otherwise. They were just as consistent with the Claimant's terms being determined by the First Respondent and those terms requiring him to carry out functions for the Second Respondent. The Tribunal decided that, insofar as the Claimant may have done work for the Second Respondent, he did so under the terms of his contract with the First Respondent. The only evidence available to the Employment Tribunal was that those terms were determined in large part by the First Respondent and not by the Second Respondent.

242 Insofar as the Claimant contended that the Second Respondent subjected him to the relevant detriments, and was acting as agent of the First Respondent in doing so, the Tribunal did not hear evidence which suggested that it was the Second Respondent which did subject the Claimant to the relevant detriments.

Protected Disclosures

243 The Tribunal found that the Claimant did make protected disclosures to the First Respondent in July 2012, but not before then.

244 On 29 March 2012 the Claimant disclosed to Mr Cartledge information that the Claimant himself talked about customer trades in interbank chats. The Tribunal has found, however, that the Claimant did not say that he considered that this breached any rules, he said, "..you know I think that's fine" and later said it was done all the time. The Tribunal therefore found that the Claimant did not reasonably believe that the information tended to show that the First Respondent was failing or likely to fail to comply with any legal obligation to which it was subject.

245 In early April 2012 and, in particular, on 5 April 2012, the Claimant told Mr Hope

that he had told Mr Clark off about putting confidential information on a chat and that Mr Clark would not do such things again. The Tribunal concluded that the Claimant was not saying to Mr Hope that disclosure of information to other banks was going on more generally, or was likely to happen again. The Claimant did not disclose the information about Mr Clark's breach of confidentiality to Mr Hope, the information had been disclosed by Mr Clark and by a client complaint.

246 The Tribunal did not accept the Claimant's evidence that he had said, during the market colour workshop on 10 May 2012, that information was being passed by traders at other banks regarding trade ideas, views on market strategies, future intentions, fixing stop loss orders, customers' orders and spreads. The Tribunal found that the Claimant was saying that traders could give market colour safely, without disclosing details of trades. It found that the Claimant did not disclose information that the phrases under discussion had all had been used, rather than some were hypothetical examples of phrases which should not be used. The Claimant was participating in a discussion about what was and was not permissible, for the purposes of drafting a policy which would avoid future breaches of legal obligations. The ET found that in doing so, the Claimant did not disclose information which, in his reasonable belief, tended to show that anyone was likely to have breached, was breaching or was likely to breach legal obligations. The purpose of the discussion was to set rules to avoid any possible breach of legal obligation in the future.

247 The Tribunal has found that, in the second market colour workshop on 14 May 2012 and on other dates in May 2012, the Claimant was participating in discussions about what was acceptable regarding terms used by traders. It has found that the Claimant was not saying that traders were giving specific information on stop loss orders and customer orders to other banks on chat room conversations. He was therefore not disclosing information which he reasonably believed tended to show that legal obligations had been, were being, or were likely to be breached.

248 The Tribunal has found that, on 26 June 2012, the Claimant disclosed to Mr Hope that traders were saying, in interbank chats, that they would be getting a certain amount of currency at a fix, for the purposes of matching, and that a policy or guidance was needed in relation to that. The Tribunal has found that the Claimant was also saying, at this point, that he considered that this was acceptable and necessary practice. Accordingly, the Tribunal concluded that the Claimant was not disclosing information which he reasonably believed tended to show a (likely) breach of legal obligations. Similarly, on 28 June 2012, the Claimant disclosed to his superiors that banks were exchanging information about orders around fixes, for the purpose of netting, but said that traders were comfortable about exchanging this level of information.

249 However, on 5 July 2012 when the Claimant again told Mr Hope that he shared information on interbank chats about orders at the fix, for the purposes of matching, and that there were times when all the other banks sharing information said that their orders were the same way, the Claimant expressed "worries" about these behaviours and suggested that there could be problems with compliance with legal obligations (bundle 8, pgs. 2717 and 2725). On 6 July 2012, the Claimant reiterated to Tim Cartledge that banks were sharing information about orders at the fix for matching and that sometimes all traders would have orders the same way. The Claimant said of this:

"You've moved the odds I guess… that's where it… is the worrying part" (bundle 8, p.2748).

250 The Tribunal decided that, at this point, the Claimant was asserting that the practice could be breaching legal obligations. In further telephone calls between the Claimant, Mr Hope and Mr Cartledge on 9 and 16 July 2012, the Claimant reiterated that he was concerned that traders were exchanging information about orders at the fix and that this was anti competitive. He prepared a benchmarks document on 19 July 2012 which set out trader practices in relation to fixes and had discussions with legal and compliance officers about it on 19 and 24 July 2012. These discussions were in relation to his disclosures of information about trader behaviour at the fix, his stated concerns that this could breach legal obligations and the need for guidance on it.

251 On 27 July, during a telephone call, Mr Harrison told other senior employees that it had come to the point where the Claimant said he did not want to participate in chat rooms any more. During the telephone call, Mr Brewer and Mr Hope said that the facts regarding trader to trader chats had become more and more clear and that the Claimant had said that traders were not sharing generic market colour, but, "..actual information around pricing and what trades someone did or what order they'd received.." .

252 In July, the Claimant repeatedly disclosed the fact that traders were exchanging information about orders at the fix and raised concerns that this could be in breach of legal obligations and anti competitive. By 27 July the Claimant had told Mr Hope, Mr Brewer and Mr Harrison that traders were disclosing specific information about specific client orders in chats and that the Claimant was so concerned about the legal implications of this that he did not want to be involved in chats any longer. The Tribunal decided, therefore, that the Claimant did, in July 2012, disclose factual information which, in his reasonable belief, tended to show that traders had failed, were failing or were likely to fail to comply with legal obligations.

253 The Claimant did not act in bad faith in doing so. He did not disclose the full extent of traders' exchanges of information, but he did give sufficient information to enable Barclays senior employees to be aware that traders were exchanging information about customer orders with competitors and to take action to stop it.

254 Furthermore, the Tribunal found that, on 2 July 2013, the Claimant also disclosed to the First Respondent's legal team and compliance department that a customer had told him that the customer had received detailed order book updates from their banks. On 5 July he met with representatives of Barclays' Compliance Department, to discuss the issue of customers receiving detailed order book updates. He explained that providing updates in relation to customer FX order books was potentially in breach of confidentiality guidelines. The Tribunal found that he made a protected disclosure in doing so.

255 The Tribunal found that, in October 2013, the Claimant told Barclays' Compliance Department that Barclays was disclosing its order book to the Bank of Japan. He did so in the context of him raising concerns that this breached the bank's confidentiality obligations.

256 The Tribunal decided that the Claimant made these 2013 disclosures, believing that he was disclosing information in the public interest. The information regarding disclosure of the order book clearly concerned the actions of large, banking and public entities, whose actions could have wide public ramifications. Again, the Tribunal found that he made a qualifying disclosure to his employer, meaning that he made a protected disclosure in this regard.

257 However the Tribunal did not find that the Claimant made any protected disclosures with regard to the issue of disclosing information to client banks in October 2013. The Tribunal decided that it was clear, on the evidence, that the Claimant was not saying that there were compliance issues with regard to this, but, rather, was saying that the practice ought to continue.

Protected Disclosure Detriments

(i) The Claimant being promoted

258 The Tribunal accepted the Respondent's evidence that the Claimant was promoted as part of a general reorganisation of the FX business and for no other reason. The Tribunal rejected the Claimant's contention that his promotion was part of a plan to manoeuvre him into a position whereby he could be identified as the culprit in misconduct allegations concerning the FX desk. On 10 October 2013, Mr McGowan announced the reorganisation, making 5 new appointments within the Barclays FX trading team, of which the Claimant was one. The creation of the Global Head of FX reflected Mr McGowan's need for support in an area with which Mr McGowan was not familiar. This was recorded by Mr McGowan in an email on 11 September 2013 (bundle 10, p3672) and corroborated the Respondent's evidence. The Claimant's promotion was genuine and was a positive move for him, it was not a detriment.

259 In any event, Mr McGowan, who wanted a Global Head of FX to be appointed, did not know that the Claimant was likely to be suspended in relation to allegations of misconduct. His decision to promote the Claimant to the Global Head of FX position was due to the fact that the Claimant was ready for promotion and was located in London, which meant that his working hours overlapped both with New York and Tokyo, where other FX desks were based. The decision to promote the Claimant was in no way because of the Claimant's protected disclosures.

(ii) The Claimant's suspension

260 The Tribunal found that the reasons for the Claimant's suspension were as set out in the suspension letter dated 1 November 2013, which said, " …. you are suspended from your duties while Barclays investigates the potential manipulation of the FX rates by Barclays and/or other banks. Barclays has taken this decision following a review of various communications including between you and other banks, which suggests that you may not have complied with Barclays' policies and may have engaged in potential misconduct involving FX rates which therefore merit further investigation" (bundle 10, p.3725).

261 The Tribunal found that Barclays' privileged investigation had undertaken a review of the Claimant's chats and had identified potential misconduct of a serious

nature. The Claimant was suspended as a result.

262 The Tribunal accepted Mr Bull's evidence that suspension of employees was consistent with the approach taken by Barclays in relation to previous investigations of a similar magnitude.

263 The Claimant contrasted his suspension with the position of Mr Cartledge, who was not suspended. The Employment Tribunal was not told what the allegations were against Mr Cartledge and so was unable to draw any reliable comparison between the two men. In any event, the Claimant was suspended along with 5 other traders. It was not part of the Claimant's case that these FX employees also made protected disclosures, whereas Mr Cartledge did not. On the facts, the ET could not infer that the reason the Claimant was suspended and Mr Cartledge not suspended was the fact that the Claimant had made protected disclosures. Other FX employees were also suspended.

264 Moreover, there was no suggestion that the Respondent had taken any detrimental action against the Claimant since he made his first protected disclosures in June 2012.

265 The Tribunal was satisfied that, in the Claimant's case, the reason for his suspension at the time were the same reasons as led to the disciplinary process; that is, that an investigation had revealed potential misconduct which was so serious as to give rise to the risk of summary dismissal. The suspension followed quickly after the privileged investigation, but was a long time after the Claimant made his protected disclosures relevant to the same issues in July 2012. The Tribunal did not find there was any link between the Claimant's disclosure about the Bank of Japan and his suspension – no link was apparent from the facts at all.

(iii) The suspension of the Claimant's 2013 and 2013 bonuses

266 The Tribunal accepted the Respondent's evidence that suspension of bonuses, where individuals were subject to disciplinary investigation, was normal practice and consistent with guidelines. It accepted Mr Bull's evidence that, when any Barclays employee was suspended prior to compensation awards and the vesting of deferred bonuses each year, a senior manager would be asked to consider whether the bonus award or vesting should be suspended, pending the outcome of the disciplinary investigation. This decision would be taken again on an annual basis, at the time when awards and vesting was decided upon.

267 Paragraph 16 Prudential Regulations Authority Guidance states, "Firms should freeze the vesting of all deferred awards made to individuals undergoing internal or external investigation that could result in *ex-post* risk adjustment until such an investigation has concluded and the firm has made a decision and communicated it to the relevant employee(s)" (bundle 10, p.3682e).

268 The contemporaneous letters, explaining the decisions, stated that the decisions had been made in the context of the privileged investigations into misconduct.

269 Mr Bull's letter of 6 February 2014 told the Claimant that the decision regarding the Claimant's bonus for 2013 and any deferred awards had been suspended in light of Barclays investigation into FX trading activities and was consistent with the Barclays Employee Handbook, the requirement of the UK's Prudential Regulation Authority and standard Barclays practice in similar circumstances (bundle 10, pgs. 3763 to 3764).

270 By letter of 12 February 2015, Ms Bonniface informed the Claimant that, while he was under investigation and subject to any potential disciplinary process in relation FX trading activities, any decision in relation to his 2014 bonus and the vesting of deferred awards would be suspended.

271 The Tribunal found that these contemporaneous letters set out the true reasons for the suspension of the bonuses. The reasons were consistent with Guidance and past practice. The Respondent proved that the Claimant's protected disclosures were not any part of the reason the Claimant's bonuses were deferred.

(iv) Taking the Claimant through a disciplinary process

272 The Tribunal found that the instigation and pursuance of a disciplinary process against the Claimant was nothing to do with his protected disclosures.

273 The Claimant was promoted after he made his 2012 disclosures. That did not indicate that the Respondent harboured any negative animus towards the Claimant as a result of his original protected disclosures.

274 Again, the Tribunal found that the reason for the disciplinary process being pursued was the fact that Barclays' privileged internal investigation had revealed potential misconduct following a review of the Claimant's chats in the years 2008 - 2013. While the details of the privileged investigation were opaque, the Respondent having not waived privilege in relation to it, the Tribunal considered that it was clear that there was an investigation and that it revealed potential misconduct. Misconduct allegations were formulated as a result of the investigation and the Claimant was provided with the evidence uncovered by the investigation – he was provided with the relevant chats.

275 In any event the Claimant was not, as was described in the case of *Feccitt,* an innocent whistle-blower when the disciplinary process was commenced. He had participated in chats with traders at other banks in which he disclosed information, including detailed information about client orders and stop losses, which was potentially in breach of his duties of confidentiality and anticompetitive. The fact that he was disciplined along with 5 other FX traders indicates that it was his participation, along with those other traders, in the practice of disclosing client information in trader chats, which led to the disciplinary procedure.

(v) Unfair disciplinary process/ summarily dismissing the Claimant for matters which did not amount to gross misconduct

276 These are considered along with the Claimant's unfair dismissal complaint (which has a different burden of proof) below.

Unfair Dismissal
Reason for Dismissal

277 The Tribunal considered whether the Respondent had shown a potentially fair reason for dismissal. It reminded itself that, in order for the Claimant to have been automatically unfairly dismissed, the fact that he had made disclosures must have been the reason or principal reason for his dismissal.

278 The Tribunal found that the Respondent showed that the reason, or principal reason, for the Claimant's dismissal was the Respondent's genuine belief in the Claimant's misconduct. The reasons were set out in the letter of dismissal, where 5 findings of gross misconduct were made.

279 The allegations of gross misconduct had been put to the Claimant in writing when he was invited to the disciplinary hearing. They were explored during the disciplinary hearing and in subsequent questions sent to the Claimant. The Tribunal found that those allegations genuinely were the matters of inquiry for Messrs Harrison and Bull, the relevant decision makers. It was satisfied that the Claimant's protected disclosures were not in their minds when they decided to dismiss the Claimant.

Reasonable Evidence of Misconduct

280 The Tribunal considered whether the Respondent had reasonable evidence for the Claimant's misconduct when it came to the decision to dismiss. It considered, in turn, the evidence available to the Respondent in relation to each of the allegations it found to be proven against the Claimant.

<u>Allegation 1</u>

281 The Tribunal found that the Respondent had reasonable evidence, from the contents of the chats, that the Claimant disclosed specific information regarding his trading position to traders at other banks, and that the detailed nature of the information went beyond market colour and was detailed, non public, information.

282 The Respondent had evidence that the Claimant did this from a number of chats in which the Claimant gave details of the changes in his net orders for the fix. He did this, for example, in a "Cartel" chat on 15 February 2012, when he said, "get eur at mom ecb… deuce… actually 175 to be precise… some stops 35-30 now… eur… chimp minus ton now here… just ton here now but hopefully taking all the filth out for u matt… I getting chipped away at a load of bank filth for the fix…back to bully… fix… hopefully decks bit cleaner." Mr Bull specifically asked the Claimant about this chat during the disciplinary hearing.

283 The Claimant also disclosed specific information regarding his trading position in a "Cartel" chat on 6 January 2012, when he said, "big lhs ecb lads…triple..bigger now..lhs..monkey plus half a chimp..i have to give it a go..a gorilla less 2 monkeys..". The Claimant was also asked about this chat in further questions sent to him after the disciplinary hearing. The questions asked whether he was exchanging information about his trading position and sharing information before the fix.

284 From these chats, the Respondent had evidence that the Claimant had given his exact position, with specific orders, and his trading direction, to competitor banks. The Tribunal concluded that the Respondent had reasonable evidence that this information was not simply disclosed for the purposes of matching. The information went beyond what was required for matching. During the disciplinary hearing Mr Bull had queried whether the Claimant was trying to net or match his position on 26 June 2011 when Mr Cahill at HSBC said, "get lumpy cable at the fix ok.. 400 odd here". Mr Bull pointed out that Mr Cahill was saying that he was the same side as the Claimant.

285 The Tribunal found that the Respondent had reasonable evidence that the Claimant disclosed his stop loss orders. During the disciplinary hearing, Mr Harrison asked him about a conversation with James Witt at UBS on 7 September 2010 in which the Claimant said, "stops at 78 and 65". Mr Harrison put to the Claimant that giving a range for stop losses as acceptable as market colour, rather than giving a specific level.

286 Further, the Respondent had evidence that the Claimant knew of relevant policies regarding the non disclosure of information and had received training on them. The Claimant confirmed that he was aware of the policies which applied to him and the confidentiality provisions of his contract. Those documents included the description of confidential information. For example, the Claimant's contract stipulated, "Both during and after your employment, you have a personal responsibility to protect and maintain the confidentiality of information belonging or relating to the Company ….or .. clients. Accordingly, you must not… except if such information is in the public domain (other than as a result of a breach of your obligations under this agreement), disclose to any person whatsoever or otherwise make use of any secret, proprietary or confidential information … Confidential information includes all information which would reasonably be regarded as confidential (including, but not limited to, client names, client contact details, client business, transaction details, business plans of the Company or any other member of the Barclays Group) or is otherwise marked as such…".

287 Further, the 2009 Global Supervision Policy provided:

"**External and internal dissemination of trade information (2/657)**
Protecting client confidentiality, particularly in respect of deal flow information, is essential to preserve a reputable and efficient market place and avoid disputes with clients.
Remind your team of the general rules for external dissemination:
They should not, without explicit permission from the client, disclose or discuss (or apply pressure on others to disclose or discuss) any information relating to specific deals which have been transacted, or are in the process of being arranged; except to or with the parties directly involved, or where this is required by law or to comply with the requirements of a regulatory body. In addition, proprietary information on positions and trading strategies and any deal related hedges must also be kept strictly confidential."

288 The Respondent therefore had reasonable evidence that the Claimant had disclosed confidential information in breach of the policies and of his contract. It acted reasonably in concluding that the chats showed this, and in rejecting the Claimant's

explanations.

289 The Respondent did not uphold allegation 2 against the Claimant.

Allegations 3 and 4

290 With regard to allegations 3 and 4, the Tribunal found that the Respondent had reasonable evidence that the Claimant knew that other traders were widely sharing non public information on trading positions, strategies and future intentions and failed to supervise them and to address that behaviour.

291 Messrs Bull and Harrison had evidence that the Claimant had participated in chats with his junior employees, including Mr Clark. Messrs Bull and Harrison were conducting 5 disciplinary hearings in relation to sharing non public information in chats by 5 of the Claimant's FX subordinates. They had reasonable evidence, therefore, that the practice of sharing non public information was widespread on the FX desk.

292 Given the clear requirements of the Global Supervision Policy that the Claimant remind his team of the general rules for external dissemination, that they should not, " disclose or discuss … any information relating to specific deals which have been transacted, or are in the process of being arranged" ; but the Claimant's team were nevertheless disclosing such information, the Respondent had reasonable evidence that the Claimant had failed to carry out his supervisory role.

Allegation 5

293 On the basis of the Claimant's 21 July 2011 comment to Mr Murray alone, "by the way jack is it true that the sales guy cgt u rubbing matt in the toilet while whispering "dont forget me in zh" i can still perform if u let me come," the Respondent had reasonable evidence that the Claimant had engaged in discussions of a sexual nature which were inappropriate. The Claimant was a supervisor of a more junior colleague and was therefore responsible for the culture and practices within his team. His misconduct in this regard was reasonably seen as serious and potentially prejudicial to Barclays' reputation.

Allegation 6

294 The Tribunal found that Barclays had reasonable evidence that the Claimant was disclosing the value of client orders to other traders at other banks (see findings in relation to Allegation 1, above) and, therefore, had reasonable evidence that the Claimant was disclosing information which other banks could use to the detriment of the clients.

Reasonable Investigation

295 The Tribunal did not receive evidence about the precise nature of the privileged investigation into the chats. It is correct that there was a very significant delay between the Claimant's suspension and his dismissal. However, the content of the chats, which gave rise to the allegations of misconduct, was preserved. The Claimant was provided

with information, in the form of chats, during the investigation. Any risk of evidence being lost, or memories fading, was reduced. The Tribunal accepted that, in light of the breadth of the investigation, it was inevitable that there would be a lengthy investigatory and disciplinary process. The Tribunal found that delay did not make the investigation unreasonable.

296 The Claimant contended that Barclays acted unreasonably in relying on Mr Cartledge's evidence in coming to its decision to dismiss.

297 The Tribunal found that the Respondent acted reasonably in having the same hearing managers for each of the traders. It was within the broad band of reasonable responses for the Respondent to seek to ensure a consistent approach to the traders charged with the same or similar misconduct. Having the same managers responsible for all the disciplinary processes ensured that they obtained a rounded understanding of the situation and avoided duplicating investigations.

298 The Tribunal found that there was no evidence that Mr Cartledge's submissions to the disciplinary process led to any particular finding against the Claimant. The evidence relied on against the Claimant in the dismissal letter was the Claimant's own conduct and his own admissions. The Respondent therefore relied on what the Claimant said and did, rather than what Mr Cartledge said, during the disciplinary hearings, in coming to its conclusions. Accordingly, it did not act unfairly in taking Mr Cartledge's information, more broadly, into account.

299 The Claimant contended that the disciplinary hearing was unfair in that its outcome was a foregone conclusion. He relied on Mr Bull's question, in his email of 12 March 2015, bundle 16, p5933, about Mr Harrison and his role "when all these appeal". The Claimant also contended that Mr Bull's attitude during the disciplinary hearing indicated that the result was a foregone conclusion; for example his comments that life was "not fair" and that the disciplinary hearing would last until midnight.

300 The Claimant also contended that the Regulatory bodies' findings determined the outcome of the Claimant's disciplinary hearing and that the Respondent did not come to an independent decision.

301 However, the Employment Tribunal accepted Mr Bull's evidence that he had exonerated another employee in the context of a LIBOR investigation. Further, it was clear that Mr Bull and Mr Harrison put the relevant allegations to the Claimant in a detailed way, during the hearing and in written questions after the disciplinary hearing. The Tribunal found that Mr Bull and Mr Harrison gave the Claimant the opportunity to answer the allegations against him, before they made they decision. The Tribunal observed that Mr Bull should not have said that the hearing would last until midnight, or display irritation, but, otherwise, it found that he approached the disciplinary hearing conscientiously.

302 With regard to the 12 March 2015 email, in which Mr Bull said, "when all these appeal," the Tribunal accepted Mr Bull's evidence that he was referring, generally, to the employees appealing if any adverse finding was made against them. The Tribunal found that Mr Bull's comment was unfortunate, but it did not undermine the fact that Mr Bull and Mr Harrison discussed the allegations with the Claimant, listened to his

responses and came to a reasoned conclusion, having considered those responses.

303 With regard to the Regulators' Notices and Orders, the Tribunal acknowledged that the shadow of the regulatory bodies may well have been cast over the disciplinary and appeal hearings. However, while there was certainly a possibility that the disciplinary decisions could have been influenced by the knowledge of regulatory investigations and proposed findings, the Tribunal accepted Mr Bull and Mr Mahon's evidence that Mr Bull and Mr Harrison made their own decision. That decision happened to coincide with the decision of the Regulators but the Tribunal did not find that the decision of the Regulators dictated the decision to dismiss.

304 The Claimant contended that Mr Mahon was not independent, given his position on the RIOC, and should not have been involved in the appeal hearing. The Tribunal, however, accepted Mr Mahon's evidence that he was a very senior person in the bank and would not be dictated to by other people, or organisations. He made the appeal decision on the facts as he found them. The Tribunal accepted his evidence that, ultimately, if Barclays had decided the Claimant ought not to be dismissed, the bank would have entered into further negotiations with the Regulators about this.

305 The Tribunal was satisfied that the Regulators did not dictate the Claimant's dismissal and that the Respondent made its own decision that the Claimant was guilty of gross misconduct.

306 The Claimant contended that the outcome letter was insufficiently clear for the Claimant to know what were the findings against him. The Tribunal found that the outcome letter was unspecific, in that it did not detail the particular chats and evidence relied on. However, the Tribunal decided that the Claimant would have known why he had been dismissed, having read the whole of the letter. The Claimant was able to appeal against the decision in detail. The Claimant had also been supplied with detailed schedules of evidence to be relied on, in relation to each allegation, in advance of the disciplinary hearing. The outcome letter could be understood in the context of the allegations and evidence which had been provided to him.

307 With regard to the delay between the appeal hearing and the appeal outcome, the Tribunal found that this was explained by Mr Mahon and Mr Jourdain's absences. There was no evidence that the delay caused them to make any errors in their approach to the evidence, or their memories to fade in any way. There was no evidence that they were unable to come to a fair and reasoned conclusion due to the passage of time.

308 The Tribunal concluded that the Respondent dismissed the Claimant following a reasonable investigation.

Dismissal A Reasonable Sanction

309 Given that the Claimant's integrity, in breaching client confidentiality, had been impugned, it was reasonable for the bank to conclude that the Claimant's actions had destroyed or seriously damaged the relationship of trust and confidence between employer and employee.

310 Further, the Respondent acted reasonably in concluding that the Claimant was guilty of gross misconduct when, as Head of Barclays London G10 Voice Spot FX Desk since 2011, he had failed to supervise his subordinates so as to stop them from disclosing confidential information. It was within the broad band of reasonable responses for the Respondent to consider that the Claimant was guilty of gross misconduct when, as head of the London desk, he made comments of a sexual nature to his junior colleague.

311 The Claimant contended that this behaviour was not seen as misconduct at the time he did it and, in particular, that his behaviour had been reviewed in March 2012 and he had been reassured by Mr Hope that there was nothing impermissible in his chats. He also said that he had disclosed the nature of FX traders' information exchange during 2012 and that no disciplinary proceedings had been instituted against him, or any other trader, as a result.

312 *Sarkar* v *West London Health NHS Trust* [2010] IRLR 508, *CA,* and *Christou v London Borough of Haringey* [2013] EWCA Civ 178, [2013] IRLR 379 may provide support for the proposition that Tribunals can take into account, in determining whether the Respondent has acted reasonably in dismissing an employee, the fact that the employer previously viewed the relevant misconduct as minor.

313 In the present case, the Tribunal did not accept that the Respondent had been aware in 2012 of the exact nature of the Claimant's misconduct.

314 The Employment Tribunal found that the Claimant did not reveal, in 2012, that he had been giving detailed updates – in effect, running commentaries - on his trading position in chat rooms, for example, on 6 January 2012, when he said, "big lhs ecb lads…triple..bigger now..lhs..monkey plus half a chimp..i have to give it a go..a gorilla less 2 monkeys..". He did not disclose that such detailed running commentaries on his position went well beyond anything that was required for matching. He did not reveal that he was discussing profit and loss in chat rooms with other traders, for example, on 5 January 2012, in response to the question "scores gents?", the Claimant said: "+100… 3 days what u reckon pnl each day has been…". Accordingly, the Tribunal found that the Respondent had reasonable evidence that it had not been aware of the extent of the Claimant's information sharing in 2012 and therefore did not have adequate evidence upon which to decide whether the Claimant was guilty of the misconduct in allegation 1, at that time.

315 In any event, the Tribunal accepted the Respondent's submission that the Claimant's breaches of confidentiality were extremely serious in relation to banking practice. That being so, the Tribunal concluded that there was a proper and sufficient basis for the Respondent to institute disciplinary proceedings against the Claimant, even if no disciplinary action had been taken in 2012.

316 The Respondent acted reasonably in concluding that the Claimant was guilty of gross misconduct and that dismissal was a reasonable sanction.

Protected Disclosure Detriment and Summary Dismissal

317 On the facts, the Tribunal has found that the dismissal process was not unfair

and that the Claimant's conduct was gross misconduct, justifying summary dismissal. The Tribunal found that the Respondent's actions in this regard did not amount to detriments – they were fair and appropriate actions in light of the Claimant's conduct. In any event, they were not caused, to any extent, by the fact that the Claimant had made protected disclosures. They were caused entirely by the Claimant's conduct.

Employment Judge Brown

19 September 2016